CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION THREE

No. B184610

SAFECO INSURANCE COMPANY OF AMERICA, et al.,

Petitioners,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

THE PROPOSITION 103 ENFORCEMENT PROJECT,

Real Party in Interest.

On Petition for Writ of Mandate from the Los Angeles Superior Court
The Honorable Anthony J. Mohr
Superior Court No. BC266219

RETURN TO PETITION FOR WRIT OF MANDATE

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TABLE OF CONTENTS

Page

Page

Page

TABLE OF AUTHORITIES

Page

CASES

Page

Page

Page

STATUTES, RULES AND REGULATIONS

Page

Page

SECONDARY AUTHORITIES

I. INTRODUCTION

The judiciary is accustomed to grappling with poorly written statutes, including voter initiatives, but occasionally they are written in plain and direct terms. In such instances, there is no interpreting for a court to do. The statutory text should be read to mean, simply, what it says. This is one of those times.

Real party in interest Proposition 103 Enforcement Project (Project) brought this action to challenge use by petitioners Safeco Insurance Company of America and First National Insurance Company of America (collectively Safeco) of unlawful "rating factors" when issuing insurance policies to consumers, in violation of Proposition 103's express provisions. From the litigation's outset in 2002, the complaint included a direct cause of action, under Proposition 103 itself, to remedy Safeco's violations. The question the writ petition raises is whether the following text (the relevant portions are highlighted) authorizes the private enforcement claim the Project has brought: "***Any person may*** initiate or intervene in any proceeding permitted or established pursuant to this chapter, challenge any action of the commissioner under this article, and ***enforce any provision of this article***." (Ins. Code, § 1861.10, subd. (a).)[1]

For several reasons, the answer is yes. The plain meaning unambiguously permits a direct cause of action. Indeed, despite spilling a lot of ink, Safeco fails to offer a plausible alternative reading of this text. The relevant case law is also against Safeco's position. In *Donabedian v. Mercury Insurance Co.* (2004) 116 Cal.App.4th 968 (*Donabedian*), this Court's colleagues in Division One rejected Safeco's strained reading of the same statute at issue here. In a futile effort to overcome the plain meaning and

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[1] All further statutory references are to the Insurance Code unless otherwise specified.

Donabedian, Safeco diverts the Court's attention to a skewed description of Proposition 103 and the broader insurance regulatory scheme in California. This greater context, however, only further supports the trial court's order. A "plain meaning" interpretation is faithful to familiar rules of construction, the regulatory scheme and voters' objectives when they enacted Proposition 103.

Resorting to heavy doses of melodrama, Safeco says the ruling below intrudes on the Insurance Commissioner's authority and will basically turn insurance regulation in California upside down. The repetitive parade of horribles is hyperbole. This case illustrates that there is no difficulty harmonizing consumer enforcement – more specifically, direct enforcement of Proposition 103 in the courts – with the Commissioner's regulatory role. Invoking the primary jurisdiction doctrine, the trial court here gave the Commissioner an opportunity to adjudicate the Project's allegations. But the Commissioner declined, concluding that the issues raised are best resolved through the civil justice system, not an administrative proceeding. Apart from the circumstances of this particular litigation, the Commissioner went on record in *Donabedian* in support of a private right of action under section 1861.10, subdivision (a). *Donabedian* noted the Commissioner's approval of direct consumer enforcement as an additional layer of protection for the public. As with other California consumer-protection statutes, private actions vindicating Proposition 103 play a critical role. Exactly as the voters intended, suits like this one complement public enforcement, rather than undermine it.

What is actually going on here is no riddle. Safeco's briefing avalanche is part of insurers' ongoing campaign in the judicial branch to abrogate Proposition 103's enforcement mechanisms. The unstated goal is to funnel all enforcement through the Commissioner and thereby curtail, if not eliminate, the democratic component of Proposition 103's enforcement scheme – independent consumer access to the courts to ensure compliance with the reforms. Insurers hope to restore the anachronistic regime before Proposition

103, when in practical effect they could do as they pleased. The voters, however, did not enact a toothless tiger. Any revamp of the law's enforcement provisions must be taken up with the electorate, not the judicial branch.

Consistent with *Donabedian*, this Court should hold that section 1861.10, subdivision (a) means what it says, and the Project's suit thus may go forward.[2]

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[2] With respect to the formalities, the Project demurs to the writ petition on the ground that it fails to state a claim upon which relief may be granted. (Cal. Rules of Court, rule 56(h)(1).) Because the Project disagrees with many of Safeco's legal and factual characterizations, the Project responds alternatively by verified answer, without admitting Safeco's characterizations. (*Ibid*.)

II. FACTUAL AND PROCEDURAL BACKGROUND

A. What this Case Is Really About: Safeco's Use of Unlawful "Rating Factors" to Calculate Motorists' Premiums, Not the Prior Approval of Safeco's "Rates"

Real party the Project is an undertaking of the Foundation for Taxpayer and Consumer Rights, a non-profit, public benefit corporation whose principal focus is ensuring implementation of Proposition 103. (1 Appendix in Support of Petition for Writ of Mandate [App.] 6.) To this end, the Project filed the current action against Safeco in January 2002. (1 App. 1.) The case is on review from the trial court's denial of Safeco's motion for judgment on the pleadings. (1 App. 54-55.) As such, the reviewing court "accepts as true the factual allegations" and "gives them a liberal construction" in the Project's favor. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515-516.)

Ignoring these settled rules, Safeco grounds its writ petition on an egregious mischaracterization of the complaint. The Project does not attack Safeco's "rates and rating plans previously filed with the California Department of Insurance and approved by the Insurance Commissioner." (Petn. 1.)[3] Here, and throughout its petition, Safeco seeks to obscure the fundamental difference between "rates" and "rating factors." As discussed in greater detail later, the two things bear only a phonetic resemblance. A "rate" is the total amount of premium an insurer is permitted to collect on a given line of insurance. Under Proposition 103, insurers must obtain the Commissioner's approval of the rates they propose to use during a given time period. Rates are a matter within the Commissioner's expertise. By contrast, "rating factors" are the considerations an insurer uses to allocate the total

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[3] The writ petition consists of two separately paginated parts and, accordingly, is cited as follows: (1) the introductory 16-page petition (Petn.); and (2) the 30-page Memorandum of Points and Authorities (Mem.).

premium (rate) among all insureds. Put colloquially, a rate is the insurer's "pie," and rating factors are the legally permissible utensils used to divide up the pie among the insureds who pay the premiums. The rating factors that may be used, in contrast to rates, do not particularly implicate the Commissioner's expertise. (See IV.C.2.a, *post* [further discussion of difference between rates and rating factors].)

To be clear – because Safeco persistently seeks to muddy the waters – this case concerns rating factors. Specifically, the project alleges that when issuing insurance policies, Safeco uses "the absence of prior automobile insurance coverage" and "the lack of continuous automobile insurance coverage" as "rating factor[s] to increase the amount of insurance premiums paid by California consumers." (1 App. 2, 5.) This flouts section 1861.02, which elaborates the rating factors that can, and cannot, be used when issuing insurance policies to consumers and determining eligibility for the Good Driver Discount. (1 App. 3-4.) Subdivision (c) of section 1861.02, part of Proposition 103 as originally passed by the voters, specifically bars insurers from using lack of prior insurance as a rating factor. (1 App. 4.) Likewise, the absence of continuous coverage is also not a permissible rating factor after Proposition 103. (1 App. 3.)

The nature of this suit is straightforward, then, but it is not what Safeco has described. Seeking to enforce a central provision of Proposition 103, the complaint challenges practices the Commissioner has never approved and that are expressly forbidden by statute.

Based on the above allegations, the Project brought a direct cause of action for violation of section 1861.02, and a separate cause of action for unlawful, fraudulent and unfair business practices in violation of the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.). (1 App. 8-10.) The complaint cites section 1861.10, the provision at issue here, as permitting the direct cause of action to enforce section 1861.02. (1 App. 2, 5.) The relief

sought includes an injunction to bar Safeco from engaging in the practices and a refund of overcharges policyholders have paid as a result. (1 App. 10-11.)

B. The Trial Court Invokes Primary Jurisdiction but, After Reviewing the Complaint's Allegations, the Insurance Commissioner Declines the Referral

The writ petition's false premise – that this action steps on the Insurance Commissioner's toes – is further undermined by a critical aspect of the procedural history that Safeco tries to sweep under the carpet.

Under *Farmers Insurance Exchange v. Superior Court* (1992) 2 Cal.4th 377 (*Farmers*), trial judges have discretion to invoke the primary jurisdiction doctrine if they conclude "'there is a paramount need for specialized agency fact-finding expertise'" on the issues presented. (*Id*. at p. 401.) This is no empty remedy for insurers, who almost always raise primary jurisdiction in an effort to slow or defeat litigation. When the trial court invokes the doctrine, the litigation is halted for a reasonable time while the case is referred to the agency for possible review. (*Ibid*.) This doctrine is one consideration of many here that undermine Safeco's parade of horribles. Primary jurisdiction guards against the purported judicial overreaching that Safeco claims will occur if section 1861.10, subdivision (a) is given its plain meaning. (*Id*. at p. 390.)

At Safeco's request, the trial court invoked primary jurisdiction in July 2002, six months after this case was filed. Concluding that the issues might benefit from the Insurance Commissioner's guidance, the court referred the matter to the Commissioner. (1 App. 63-66.) After considering the complaint's allegations for several months, however, the Department of Insurance sent the case back. The order explained: "The Commissioner declines to hold hearings on the matter because the factual questions presented by the litigation do not require any actuarial or rate making expertise, matters which the California Department of Insurance regularly handles, and matters in which the Commissioner is vested with unique authority. The particular

facts necessary to resolve the dispute will best be obtained through the discovery processes available to the Superior Court." (1 App. 68.)

Safeco treats the Commissioner's explanation as no more than a footnote in the proceedings below. (Petn. 9, fn. 3.) To the contrary, the Commissioner's order makes all the difference in light of Safeco's pitch to this Court. According to Safeco, the Project's direct enforcement of Proposition 103 somehow jeopardizes "rate certainty" in the California insurance market and even "creates a parallel system of judicial rate review." (Petn. 1, 4.) Although the Commissioner has a weighty interest in "rate certainty," he has examined the Project's allegations and has found nothing that warrants the expenditure of his administrative resources. Safeco's claim to represent the Commissioner's interests rings hollow.

C. Denying Safeco's Motion for Judgment on the Pleadings, the Trial Court Respects the Plain Meaning of Section 1861.10, Subdivision (a)

After the Insurance Commissioner rejected an administrative review, the trial court stayed the proceedings pending Division One's expected decision in *Donabedian*. (1 App. 134-136.) *Donabedian* was issued in March 2004, but the court continued the stay pending Division Eight's anticipated opinion in another appeal presenting related issues, *Poirer v. State Farm Mutual Automobile Insurance Company*. (1 App. 139-141.) After the *Poirer* panel issued an unpublished decision following *Donabedian* in October 2004, the litigation resumed.[4]

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[4] The Insurance Commissioner filed an amicus curiae brief in *Donabedian*, which may be found at 2003 WL 23280980. The Foundation for Taxpayer and Consumer Rights also filed amicus curiae briefs in those cases, which may be found at 2003 WL 23209749 (*Donabedian*) and 2004 WL 1284440 (*Poirer*), respectively.

In January 2005, Safeco moved for judgment on the pleadings on the UCL cause of action based on recently enacted Proposition 64. (1 App. 144.) The trial court eventually dismissed the UCL claim, a ruling that is not at issue here. (2 App. 361-365.) In connection with that motion, Safeco also sought dismissal of the direct cause of action. (1 App. 191-196.)

After ordering a new round of briefing (2 App. 366), the trial court rejected Safeco's effort to scuttle the direct cause of action. Safeco contends the court's order somehow grounds the existence of a direct action on the Commissioner's rejection of an administrative review. (Mem. 27-29.) This mischaracterizes, indeed trivializes, the court's ruling. The order first notes the plain language of section 1861.10, subdivision (a). As the court explained, irrespective of the UCL, "Proposition 103 appears to authorize the right to bring a direct action to enforce its provisions pursuant to Insurance Code section 1861.10(a)." (1 App. 57.) The order also relied on the recent opinion in *Donabedian*, where the same statute was addressed at length. (1 App. 57-59.) As shown below, the court's analysis is sound. Because Safeco's challenges to the order lack merit, the writ petition should be denied.[5]

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[5] The complaint avers that Safeco's business practices also violate section 1859, in addition to running afoul of section 1861.02. Section 1859 governs mandatory reporting to the Department of Insurance. (1 App. 4-5, 7-8.) To be clear, Safeco's alleged violation of section 1859 is not at issue in this writ proceeding. Section 1859 is not part of "this article" – Article 10 – that may be enforced through section 1861.10, subdivision (a). Safeco's section 1859 violation is best viewed as a predicate for the cause of action under the UCL, to the extent the UCL claim is ever revived in future proceedings. (1 App. 9.)

III. VERIFICATION

I, Kevin K. Green, am a partner with the law firm Lerach Coughlin Stoia Geller Rudman & Robbins LLP, counsel of record for the Project. I make this verification as the Project's counsel because I am more familiar with the relevant facts. The facts referred to in this return are true based on my review of the record in this case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this thirteenth day of October, 2005, at San Diego, California.

KEVIN K. GREEN

IV. DISCUSSION

A. The Plain Meaning of Section 1861.10, Subdivision (a), Authorizes a Direct Cause of Action to Enforce Proposition 103

1. The Statutory Text is Unambiguous

Again, the issue presented is whether section 1861.10, subdivision (a) authorizes the direct claim the Project has brought. Safeco's wordy writ petition, however, does everything except grapple with the statute's plain language. Statutory interpretation requires mental gymnastics only when the text is confusing or ambiguous. It is a refreshingly easy exercise when the statute speaks in direct terms. This is such a case.

Enacted in 1988, 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 (*Calfarm*).) Fed up with being gouged by the insurance industry, the voters stated expressly what they intended to accomplish: "The purpose of [Proposition 103] is to protect consumers from arbitrary insurance rates and practices, to encourage a competitive insurance marketplace, to provide for an accountable Insurance Commissioner, and to ensure that insurance is fair, available, and affordable for all Californians." (2 App. 562.) To achieve these goals, the electorate specified that Proposition 103 "shall be liberally construed and applied in order to fully promote its underlying purposes." (2 App. 569.) These tenets are not window dressing. They animate Proposition 103 jurisprudence to this day. (See *Foundation for Taxpayer & Consumer Rights v. Garamendi* (Sept. 27, 2005, B173987) ___ Cal.App.4th ___ [2005 Cal.App. Lexis 1512, at pp. *2-*3].) The broader context of insurance regulation in California, and how it was changed by Proposition 103, is discussed in greater detail below. As will appear, the larger context only supports the trial court's order.

More to the point, the single issue in this writ proceeding is actually a narrow one. Central to Proposition 103's framework is the role consumers reserved for themselves to enforce the reforms. To ensure compliance with Proposition 103, voters enacted a section titled "Consumer Participation." It consists of three independent clauses, separated by commas as follows: "Any person may initiate or intervene in any proceeding permitted or established pursuant to this chapter, challenge any action of the commissioner under this article, and enforce any provision of this article." (§ 1861.10, subd. (a).)

Each clause serves a different function. "Clause one" allows any person to "initiate or intervene in any proceeding permitted or established pursuant to this chapter," meaning Chapter 9 of this part of the Insurance Code. The proceedings available under clause one include civil actions under generally applicable laws (§ 1861.03, subd. (a)) and participation in administrative proceedings before the Commissioner. (See, e.g., §§ 1858, 1861.05.) "Clause two" allows any person to "challenge any action of the commissioner under this article," meaning Article 10 of Chapter 9. Proposition 103's provisions are found in Article 10.

But the voters did not stop there. They also enacted "clause three," at issue here. Truncated to its pertinent text, it reads: "Any person may . . . enforce any provision of this article." Because the first two clauses deal with enforcement of Proposition 103 through other avenues, the enforcement addressed in clause three can refer only to direct enforcement, in this instance in court. Indeed, a leading law dictionary defines "enforce" as "[t]o give force or effect to (a law, etc.); to compel obedience to." (Black's Law Dict. (7th ed. 1999) p. 549, col. 1; accord, Black's Law Dict. (5th ed. 1979) p. 474, col. 1 [same definition 20 years earlier].) Likewise, Webster's defines "enforce" as "compel obedience to: ***to enforce a law***." (Random House Webster's College Dictionary (2d ed. 1997) p. 432, col. 2.) As applied here, then, clause three

authorizes a private consumer action to enforce the substantive provisions of section 1861.02, which governs permissible rating factors. (1 App. 8-9.)

Safeco's writ petition founders on the most elementary rule of statutory interpretation. "'The plain language of the statute establishes what was intended by the Legislature.'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735, quoting *People v. Statum* (2002) 28 Cal.4th 682, 690.) As a result: "'Our first step in determining the Legislature's intent is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning.'" (*California Teachers Association v. Governing Board of Rialto Unified School District* (1997) 14 Cal.4th 627, 633, internal brackets omitted.) "'When the statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it.'" (*People v. Statum*, *supra*, 28 Cal.4th at pp. 689-690; see also *Donabedian*, *supra*, 116 Cal.App.4th at p. 976 [repeating all these tenets].) The "plain and commonsense meaning" of section 1861.10, subdivision (a) is that the Project's direct cause of action is permitted.

2. Safeco's Proposed Reading Makes No Sense and Hinges, Literally, on Rewriting the Statute

In contrast to the Project's straightforward approach, Safeco largely eschews a textual inquiry. Although the writ petition is long and redundant, the statute is barely quoted at all. Safeco's avoidance extends to attacking statutes that are not even at issue here. (See, e.g., Mem. 9 ["Neither section 1861.09 nor section 1858.6 authorizes the creation of a civil cause of action."].) This is because Safeco has no alternative interpretation of section 1861.10 – the provision actually at issue – that makes any sense.

A statute is ambiguous, of course, only "if it is capable of two constructions, both of which are reasonable." (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 776.) When Safeco gets around to analyzing subdivision (a), the interpretation proposed is absurd.

According to Safeco, the three clauses in subdivision (a) are not grammatically independent of each other. Rather, "the second and third clauses deal with the extent of the substantive rights that can be enforced under the first clause." (Mem. 4.) Hence, under Safeco's gloss, "any person . . . may enforce any provision of this article" not in court, but only in the administrative and other proceedings referred to in the first clause. (*Ibid*.) The first clause, says Safeco, imposes a "clear limitation" on the second and third clauses. (Mem. 5.)

"Limitation" is a charitable label. Safeco's interpretation conveniently reads clause three out of the statute. If Safeco is correct – clause three authorizes only what is already authorized under clause one – then voters enacted meaningless surplusage. Safeco's interpretation violates the cardinal rule that all words in a statute must be given meaning. When fleshing out statutory text, courts "avoid[] an interpretation which renders any of its language surplusage." (*City of Huntington Beach v. Board of Administration of the Public Employees' Retirement System* (1992) 4 Cal.4th 462, 468.) The statute is just not written the way Safeco describes. Again, this is how it reads, with numbers inserted this time to separate the clauses: "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, subd. (a).) Safeco's reading disregards the legislative command that "where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." (Code Civ. Proc., § 1858.)

In a predictable attempt to turn the tables, Safeco declares that it is the Project that prefers a different statute and thus is urging "judicial activism." (Mem. 29.) Safeco's interpretation is so barren, however, that the writ petition actually rewrites the text of Proposition 103 to advance the interpretation Safeco prefers. In its supporting memorandum, Safeco alters the language to

make it appear that clause three is subordinate to, rather than independent of, clause one. Says Safeco: "The second and third clauses, '***to*** challenge any action of the commissioner' and '***to*** enforce and provision of this article' identify those substantive claims that may be pursued under those procedures [mentioned in clause one]." (Mem. 4, emphasis added.) Hence, Safeco wants the statute to read: "Any person may initiate or intervene in any proceeding permitted or established pursuant to this chapter ***to*** challenge any action of the commissioner under this article and ***to*** enforce any provision of this article."

If this is what the statute actually said, then Safeco might have a point. But this is not the text the electorate approved 17 years ago. The preposition "to" does not appear where Safeco has inserted it. And, here, inserting one word is not innocuous. The alteration fundamentally changes the interplay between the three clauses, which, again, serve different functions in the scheme of consumer enforcement.

Safeco's unorthodox approach to statutory construction goes beyond creative advocacy. This is a litigant expressly rewriting a statute to support a particular position. Courts, of course, do not engage in that exercise. Our Supreme Court has cautioned: "[W]e are mindful of this court's limited role in the process of interpreting enactments from the political branches of our state government. In interpreting statutes, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law . . . ." (*California Teachers Association v. Governing Board of Rialto Unified School District*, *supra*, 14 Cal.4th at p. 632.) Even if the "actual words" here were ambiguous on a direct action, Proposition 103's requirement of liberal construction would dictate that the statute be construed in the Project's favor to allow the suit. (2 App. 569.) Perhaps unsurprisingly, Safeco fails to mention this requirement – a bedrock of Proposition 103 jurisprudence – anywhere in its petition.

Safeco's campaign in the judicial branch to curtail Proposition 103 is also an end-run around the authority to approve amendments that the voters reserved solely to themselves. Correctly anticipating that insurance companies' opposition to Proposition 103 would not end on election day, the electorate mandated that "[t]he provisions of this act shall not be amended by the Legislature except to further its purposes . . . or by a statute that becomes effective only when approved by the electorate." (2 App. 569.) Courts have taken this command seriously and struck down statutes that disregard it. (See, e.g., *Foundation for Taxpayer & Consumer Rights v. Garamendi*, *supra*, 2005 Cal.App. Lexis 1512 [invalidating legislative enactment because it ran afoul of this provision]; *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473 [same].) Safeco can hardly achieve indirectly, through strained judicial interpretation, what the Legislature itself is forbidden from doing directly.

Indeed, this writ petition simply reflects the insurance industry's continuous assault on Proposition 103 that began right after it became law. Although the Supreme Court largely upheld the voters' reforms in *Calfarm* in 1989, the high court correctly observed that this was just the beginning. Proposition 103 may never "find rest" from litigation. (*20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 246.) Insurers such as Safeco, however, are ultimately presenting their grievance in the wrong forum. Safeco's undisguised preference for a less protective statute must be taken up at the ballot box: "'[T]he judicial role in a democratic society is fundamentally to interpret laws, not to write them. The latter power belongs primarily to the people and the political branches of government . . . .'" (*California Teachers Association v. Governing Board of Rialto Unified School District*, *supra*, 14 Cal.4th at p. 633, ellipses in original.)

B. As the Trial Court Recognized, Case Law Affirms the Existence of a Direct Action to Enforce Proposition 103

1. This District's Recent Decision in *Donabedian* Is on Point

As the record reflects, Division One's recent *Donabedian* opinion was a central focus of the proceedings below. The trial court was correct to take guidance from that decision.

Safeco argues: "*Donabedian* held only that a UCL cause of action premised on violations of Proposition 103 was originally cognizable in the courts." (Petn. 2, emphasis and fn. omitted.) This is a wooden reading of *Donabedian*. Division One's rationale and extensive statutory analysis also apply to direct claims under clause three of section 1861.10, subdivision (a).

The *Donabedian* complaint closely resembled the Project's complaint here. Seeking enforcement of section 1861.02, the plaintiff alleged that "Mercury violated the UCL by using the absence of prior insurance, in and of itself, as a criterion in determining eligibility for the Good Driver Discount, generally for automobile premiums and insurability, and in applying a persistency discount." (*Donabedian*, *supra*, 116 Cal.App.4th at p. 974.) Reversing the dismissal below, the court held that the case could proceed.

The *Donabedian* panel discussed the multiple ways that Proposition 103 is enforced by the public. The court gave section 1861.10, subdivision (a) the common-sense interpretation that the Project has urged all along in the present case. Respecting the statute's express text, the panel distinguished a direct claim from a UCL action:

> [A]s stated, Proposition 103 entitles qualified applicants to receive a Good Driver Discount (§§ 1861.02, subd. (b), 1861.025); it prohibits insurers from using the lack of prior insurance, in and of itself, as a criterion in determining eligibility for the Good Driver Discount, or generally for automobile rates, premiums, and insurability (§ 1861.02, subd. (c)); it authorizes consumers to enforce that prohibition (§

> 1861.10, subd. (a)); ***and*** it subjects the insurance industry to the laws – including the UCL – that are applicable to other types of businesses (§ 1861.03, subd. (a)).

(*Id*. at p. 982, emphasis added.)

The *Donabedian* panel soundly rejected Mercury's argument that "plaintiff's sole means of redress was to file a complaint with the Insurance Commissioner pursuant to the formal administrative process." (*Id*. at p. 987.) "We conclude that the commissioner does not have exclusive jurisdiction, nor does this case involve ratemaking." (*Id*. at p. 983.) Reiterating the above explanation, the panel reasoned:

> Proposition 103 prohibits insurers from using the absence of prior insurance as a rating criterion (§ 1861.02, subd. (c)) and subjects insurers to the UCL (§ 1861.03, subd. (a)). The Proposition further provides: 'Any person may initiate or intervene in any proceeding permitted or established pursuant to . . . chapter [9].' (§ 1861.10, subd. (a).) The formal administrative process is found in chapter 9. 'Any person may **[*also*]** . . . enforce any provision of . . . article [10 of chapter 9].' (§ 1861.10, subd. (a).)"

(*Id*. at p. 987, emphasis added and brackets in original.) The "also" amplifies the point that has come to matter here. The three clauses in subdivision (a) are grammatically independent. Under clause one and section 1861.03, consumers may bring a UCL action but, apart from this, they may bring a direct action under clause three to "enforce any provision" of Article 10.

This reading of subdivision (a) is further supported by the Insurance Commissioner's position in *Donabedian* as amicus curiae. The Commissioner's comments about UCL claims, quoted directly from his brief, apply with equal force to direct claims: "'In enacting Proposition 103, the voters vested the power to enforce the Insurance Code in the public as well as the Commissioner. As the plain text of Insurance Code sections 1861.03 and 1861.10 make[s] clear, Proposition 103 established a private right of action for [its] enforcement . . . [.]'" (*Id*. at p. 982, brackets and ellipsis in original.)

Another excerpt from the Commissioner's brief leaves no doubt on the viability of direct actions under section 1861.10: "'Thus, in 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.'" (*Id*. at p. 983, brackets in original.) A direct action under clause three of section 1861.10, subdivision (a) is just another type of private-attorney-general claim, no different in relevant effect than a UCL claim.

The Commissioner's interpretation of the Insurance Code "'should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language'" – certainly not the case here. (*Southern California Edison Co. v. Peevey* (2003) 31 Cal.4th 781, 796; see also *City of Huntington Beach v. Board of Administration of the Public Employees' Retirement System*, *supra*, 4 Cal.4th at p. 470, fn. 7; *Spanish Speaking Citizens' Foundation v. Low* (2000) 85 Cal.App.4th 1179, 1214-1215.) Moreover, as one court stated recently: "The fact that the Commissioner does not view the trial court as having poached into the Commissioner's statutory domain is clearly significant, and we defer to his interpretation of his authority. [Citations.]" (*Krumme v. Mercury Ins. Co.* (2004) 123 Cal.App.4th 924, 937 (*Krumme*).)

In sum, *Donabedian*'s analysis confirms the "plain meaning" interpretation of section 1861.10, subdivision (a). As in that case involving the UCL, the same statute provides "the necessary procedure and substance to permit the present suit." (116 Cal.App.4th at p. 977.)

Safeco nonetheless contends that if this Court agrees with the Project, the decision will usher in a brave new world of (apparently overzealous) private enforcement. To quote just a few of the overwrought assertions, Safeco declares that a direct action "threatens to turn the prior approval rate process on its head" and purportedly will have "enormous ramifications for insurers doing business in California." (Petn 4; Mem. 1.) These are scarecrow

arguments. In light of the right to bring a UCL claim to enforce Proposition 103, a significant role for consumer enforcement in the courts already exists. This cannot be a sea change because we are already there.

In fact, we have been there since Proposition 103 was passed in 1988. Numerous authorities, both statutory and judicial, confirm the right to enforce the voters' reforms through the UCL. Safeco does not dispute this right because the law on the point, in addition to *Donabedian*, is overwhelming. (See §§ 1861.03, subd. (a); 1861.10, subd. (a); *Farmers*, *supra*, 2 Cal.4th at pp. 394-395; *State Farm Mutual Automobile Insurance Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1041; *Krumme*, *supra*, 123 Cal.App.4th at p. 937 [following *Donabedian*].) Through its "unlawful prong" (Bus. & Prof. Code, § 17200), the UCL "borrows violations of other laws," such as Proposition 103, "and treats them as unlawful practices that the [UCL] makes independently actionable. [Citations.]" (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180, internal quotation marks omitted.) The specific statutory provision at issue here, governing direct claims, has been dormant by comparison, but was also part of Proposition 103 as originally enacted.

The rationale of *Donabedian* is again apt:

> In sum, as Mercury would have it, a violation of Proposition 103 would always fall within the exclusive jurisdiction of the Insurance Commissioner and would never give rise to a civil action in the first instance. But that interpretation is contrary to the Proposition's plain language . . . . It would make little sense if Proposition 103 – which subjects insurers to the UCL – were interpreted to preclude a civil action alleging a violation of that very Proposition.

(116 Cal.App.4th at p. 991.) It is hardly a leap to conclude that voters, who approved multiple modes of enforcement, intended to provide a direct action to ensure compliance with Proposition 103.

2. Safeco's Cited Decisions Are Not to the Contrary

Downplaying *Donabedian*, Safeco proclaims that "California courts have consistently rejected any effort to create a civil cause of action under Proposition 103." (Mem. 10.) This assertion, however, does not meet the lofty advance billing. Safeco relies on just two cases. Neither calls the trial court's order into question.

First, Safeco clings to a footnote of dicta in *Farmers*. (Mem. 13-14.) This may be a seminal decision, but not on the statutory provision at issue here. As framed by the Supreme Court, the question there was "whether this judicial action should be stayed under the doctrine of 'primary jurisdiction' pending administrative action by the [Insurance] Commissioner." (*Farmers*, *supra*, 2 Cal.4th at p. 381.) The trial court dismissed a direct claim the Attorney General brought against Farmers for violation of Proposition 103, but upheld a UCL claim. (*Id*. at pp. 381-383.) Farmers then sought writ review of the latter ruling. (*Id*. at p. 383.) In passing, while reciting the procedural history, the high court remarked that the trial court's ruling on the direct claim "appears correct," even though the issue was neither raised nor briefed. (*Id*. at p. 382, fn. 1.) As the court stated: "The People do not contest this ruling." (*Id*. at p. 382.)

The *Farmers* footnote, then, is obiter dictum in its purest form. The Supreme Court's own precedents make clear 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.) In particular, the high court has been distinctly unimpressed with "footnote dicta," even from its own opinions. The court said in one such case: "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. [Citations.]" (*Trope v. Katz* (1995) 11 Cal.4th 274, 284, internal quotation marks omitted.) Stated more concisely: "Dictum has no force as precedent." (*People v. Linwood* (2003) 105 Cal.App.4th 59, 69.)

Although the writ petition seeks to present *Farmers* as dispositive, Safeco's counsel was more candid at oral argument in superior court. As Safeco stated then, whether section 1860.10, subdivision (a) allows a direct claim "was not before them" – the Supreme Court – and what little was said "is dicta." (2 App. 520.) The trial court observed that "dicta" actually may be a generous description. The sparse comments were merely tossed into the procedural history, by way of explaining "'how we got here.'" (*Ibid*.) In all events, even if the *Farmers* footnote were an authoritative statement of law, it does not address where the specific statutory provision at issue here – section 1861.10, subdivision (a) – fits into the mix.[6]

Likewise, Safeco's attempt to extend the First District's decision in *Walker v. Allstate Indemnity Co.* (2000) 77 Cal.App.4th 750 (*Walker*) to the current circumstances is misguided. (Mem. 14-15.) Once more, Safeco seeks to blur the distinction between rates and rating factors, and approved and unapproved conduct. In *Walker*, the plaintiff sought to challenge rates, not rating factors, and, even more striking, the rates had been approved by the Commissioner years before. "The causes of action were each bottomed on the insurers' charging approved rates alleged nevertheless to be 'excessive' within the meaning of section 1861.05, subdivision (a)." (77 Cal.App.4th at p. 753, footnote omitted.) In relevant part, that statute provides: "No rate shall be approved or remain in effect which is excessive, inadequate, unfairly

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[6] Even more of a stretch is Safeco's attempt to get mileage out of *Calfarm*, *supra*, 48 Cal.3d 805. (Mem. 24-25.) Suffice to say that whether a direct action is permitted under clause three of subdivision (a) also was not presented in that case – in dicta or otherwise.

discriminatory or otherwise in violation of this chapter." The court declined to entertain a challenge second-guessing the Commissioner's imprimatur on the defendants' rates, and tossed the suit on that basis. But this result portends nothing for this action. *Walker* does not address challenges to unapproved or illegal conduct by an insurer, in express violation of Proposition 103. Again, the Project's direct claim is based on violation of section 1861.02's rules governing permissible rating factors – not approved rates. (1 App. 8-9.)

The *Donabedian* court, faced with allegations that are substantively interchangeable with the Project's here, soundly concluded that "*Walker* is inapposite." (116 Cal.App.4th at p. 991.) *Donabedian*'s explanation could have been written for the present case:

> Here, plaintiff alleges that Mercury violated a specific prohibition of Proposition 103: An insurer may not use the absence of prior insurance, in and of itself, as a criterion in determining eligibility for the Good Driver Discount, generally for automobile premiums and insurability, or in applying a persistency discount (§ 1861.02, subd. (c)). In contrast, the challenge in *Walker* rested on amorphous concepts such as "industry trends," "rates of return earned by individual insurers," and "generic factors." [Citation.] *Walker* involved a challenge to approved rates. [Citation.] This case does not. [Citation.]

(*Id*. at pp. 991-992.)

C. The Direct Action Is Faithful to the Broader Regulatory Scheme and Proposition 103's Purposes

Lacking any colorable argument on the statutory text, Safeco obsesses on the broader framework of insurance regulation in California. Even if a textual inquiry could be so easily brushed aside, there is nothing in the regulatory framework barring a direct action.

The introductory portion of Safeco's memorandum hits on the two core objections Safeco makes to a direct action. These objections are then trotted out in various costumes, ad nauseam, throughout the 30-page memorandum. First, Safeco argues that applying the statute's plain meaning will interfere

with the Commissioner's review of rates. Second, "full consumer participation" purportedly exists already, so a direct action is unnecessary. (Mem. 1-4.) These objections fail to withstand scrutiny. Particularly in light of the primary jurisdiction doctrine, the direct action poses no practical threat to rate regulation. Even if Safeco thinks consumer remedies are an embarrassment of riches without a direct action, the voters have spoken and they disagreed. Private consumer enforcement is, in fact, an expressly contemplated component of the regulatory scheme enacted by Proposition 103.

1. The Prior McBride-Grunsky Framework Immunized Insurers and Denied Consumers the Right to Challenge Insurer Misconduct in the Courts

Understanding the scheme adopted by Proposition 103 requires some understanding of the scheme it replaced, the McBride-Grunsky Insurance Regulatory Act of 1947 (McBride-Grunsky). McBride-Grunsky was the product of the insurance industry's determination to limit governmental regulation of its conduct. The initial impetus for the statute was a decision subjecting insurers to the antitrust laws. (*United States v. South-Eastern Underwriters Assn.* (1944) 322 U.S. 533.) Dissatisfied with this result, the industry turned to Congress for relief. Congress promptly enacted the McCarran-Ferguson Act (McCarran), exempting insurers from federal antitrust law to the extent that state laws regulated insurance. (See 15 U.S.C. §§ 1011-1015.) Every state legislature then enacted laws to meet the federal standard for exemption. (See *Smith v. Pacificare Behavioral Health of California* (2001) 93 Cal.App.4th 139, 152-154 [discussing McCarran's history].)

California's enactment, McBride-Grunsky, explicitly authorized insurance companies, in setting rates, to engage in joint conduct that would otherwise have violated antitrust laws. This included authority for

"[c]oncerted action" (former § 1853), "[a]greements to adhere to rates" (former § 1853.6), and the "[e]xchange of information and experience data" (former § 1853.7).[7]

But McBride-Grunsky reached beyond the antitrust exemption to erect a statutory framework under which the property-casualty insurance industry was virtually exempt from oversight by the executive or judicial branches. The "regulation" it provided, while sufficient to exempt insurers under McCarran, was otherwise illusory. McBride-Grunsky affirmatively prohibited administrative regulation of insurers' rates and practices. Insurers were not required to file their rates or underwriting plans with the Commissioner.[8] Even if a rate was excessive, the Commissioner was prohibited from taking any action so long as there was "competition" in the marketplace.[9] Insurers similarly were accorded carte-blanche in the setting of premiums.[10] As several courts have noted, California was an "'open rate'" state in which insurers in practical effect could set whatever rates they desired. (See *Donabedian*, *supra*, 116 Cal.App.4th at p. 981.)

Under the prior statutory scheme, then, insurers faced no regulatory accountability. As our Supreme Court has stated: "Under [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

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[7] All three former sections were added by Stats. 1947, c. 805, § 1, pp. 1898-1899, and repealed by Proposition 103. (2 App. 566.)

[8] Former § 1850, added by Stats. 1947, c. 805, § 1, p. 1896, repealed by Proposition 103. (2 App. 566.)

[9] Former § 1852, added by Stats. 1947, c. 805, § 1, p. 1897, repealed by Proposition 103. (2 App. 566.)

[10] Former §§ 1850 and 1852, subd. (d), added by Stats. 1947, c. 805, § 1, p. 1897, repealed by Proposition 103. (2 App. 566.)

forms of insurance.'" (*20th Century Ins. Co. v. Garamendi*, *supra*, 8 Cal.4th at p. 240.)

McBride-Grunsky also insulated insurers from judicial accountability. Sections 1858-1859.1 of the prior regime established an administrative complaint process that gave the Insurance Commissioner exclusive jurisdiction over objections to an insurer's rates, premiums and practices. Under that process, 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 Commissioner, who could summarily deny a hearing in its sole discretion. Should a hearing substantiate misconduct, the Commissioner could provide prospective relief only. The Commissioner had no authority to order monetary relief, whether refunds, restitution or disgorgement. (See §§ 1858-1859.1 (amended 1977, 1979, 1984, 1987 and 1989).) Judicial review was available only by way of administrative mandamus under Code of Civil Procedure section 1094.5. (See former § 1858.6.) This miserly administrative process was rarely invoked and, to the Project's knowledge, never resulted in a successful challenge to an insurance company's rates.

Finally, McBride-Grunsky contained two vestigial provisions that the electorate left on the books when it enacted Proposition 103. Section 1860.1 gave insurers a legislative blessing to engage in certain forms of concerted activity that might otherwise violate the antitrust laws. Section 1860.2 directed that McBride-Grunsky could be enforced only through its own provisions, not through other laws. Before Proposition 103, the enforcement regime was virtually non-existent. Chapter 9 merely provided the administrative complaint process of sections 1858-1859.1. As noted, those sections required that all challenges to insurers' rates, premiums and practices be brought only before the Commissioner. Thus, section 1860.2's impact was to foreclose any judicial remedy except judicial review by means of

administrative mandamus (section 1858.6). Because sections 1860.1 and 1860.2 have been misunderstood and misapplied by some contemporary courts, these sections are addressed in more detail later after explaining the impact of Proposition 103 on the regulatory scheme. (See Part IV.C.2.c, *post*.)

Collectively, all these McBride-Grunsky provisions constituted a regime in which insurers won and consumers lost. As *Donabedian* summarized: "In short, under the McBride Act, the commissioner had exclusive jurisdiction to adjudicate complaints about insurance rates but had practically no authority to regulate them effectively." (116 Cal.App.4th at p. 981.)

Indeed, the courts consistently applied McBride-Grunsky 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 section 1858, and because the challenged conduct was immunized. The decision in *Karlin v. Zalta* (1984) 154 Cal.App.3d 953 is illustrative. There, a consumer brought suit, alleging a conspiracy among insurers and others to fix prices for medical malpractice insurance at excessive levels during the "malpractice crisis" of the 1970s, in violation of section 1852 of McBride-Grunsky and the Unfair Insurance Practices Act (UIPA) (§ 790 et seq.). The Court of Appeal ruled that section 1853 of McBride-Grunsky expressly sanctioned rate-setting collusion. (*Karlin v. Zalta*, *supra*, 154 Cal.App.3d at p. 970.) It also held that, to the extent that insurance rates were challenged, relief under the UIPA was foreclosed by sections 1860.1 and 1860.2. (*Id*. at pp. 968-979.) Finally, the court held that objections to insurance rates could be raised only in the form of an administrative complaint under section 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 p. 986, fn. 23.)

2. Proposition 103 Replaced McBride-Grunsky with a Regulatory Framework that Holds Insurance Companies Accountable

When the Legislature failed to remedy the one-sided unfairness of McBride-Grunsky, voters scrapped most of it in favor of a new regulatory regime. Proposition 103 imposed genuine regulation upon insurers. As a safeguard, moreover, voters retained for themselves the power to enforce their reforms in the courts.

Proposition 103's findings clause stated that "[t]he existing laws [McBride-Grunsky] inadequately protect consumers and allow insurance companies to charge excessive, unjustified and arbitrary rates." (2 App. 562.) To address that inadequacy, Proposition 103 explicitly repealed every provision of McBride-Grunsky that was inconsistent with the initiative statute. (2 App. 566-569.) A few sections of McBride-Grunsky were not expressly repealed because, as explained below, these vestiges were consistent with the Insurance Code as modified by Proposition 103.

The voters imposed reforms in five broad categories: (1) immediate rate reductions (§ 1861.01); (2) rate regulation (§§ 1861.05-1861.09); (3) eliminating barriers to competition in the marketplace (§ 1861.03, subd. (a); see also §§ 1861.04, 1861.12); (4) regulation of automobile premium-setting practices (§ 1861.02; see also § 1861.03, subd. (c)); and (5) public participation and insurer accountability (§§ 1861.03, subd. (a);1861.10, subd. (a)). The last two reforms are at issue here. Their provisions are summarized below.

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

Proposition 103 distinguished between "rates" and "rating factors" and mandated separate procedures for regulating them. The sharp distinction between the two – which Safeco has attempted to blur – 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 and so on). Proposition 103 requires insurers to submit proposed rates for all lines of property-casualty insurance to the Commissioner for prior approval. (§§ 1861.05, 1861.13.) In submitting rate applications, insurers must comply with a highly technical formula to ensure that the proposed rates are within a range of reasonableness bounded by the statutory requirement that rates be neither "excessive" nor "inadequate." (§ 1861.05(a).) To justify a rate as reasonable, an insurer must, among other things, estimate its current losses, project future losses and investment income, and determine a reasonable rate of return. (See Cal. Code Regs., tit. 10, § 2644.1 et seq.; *Calfarm*, *supra*, 48 Cal.3d 805; *20th Century Ins. Co. v. Garamendi*, *supra*, 8 Cal.4th 216.)

As should be plain by now, this case is not about rates. Under requirements that apply only to automobile insurance, an insurer must also allocate its total revenue requirement (rate) among its policyholders – that is, determine how much premium it can collect from each insured motorist. The criteria an insurer uses to establish a motorist's premium are known as "rating factors." The distinction between rates on the one hand, and rating factors and premiums on the other, is discussed in some of the cases. (See, e.g., *Donabedian*, *supra*, 116 Cal.App.4th at pp. 992-993; *Spanish Speaking Citizens' Foundation v. Low*, *supra*, 85 Cal.App.4th at pp. 1186-1187.)

The statutory provision invoked by the Project here sets forth the special rules governing use of automobile-insurance rating factors. Section 1861.02, subdivision (a) requires that "premiums for an automobile insurance policy . . . shall be determined" principally by three specified rating factors (known as "mandatory" factors, subd. (a)(1)-(3)) 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" (subd. (a)(4)). Regulations set forth the optional rating factors an insurer may use, and address the "weighting" of these factors for purposes of determining a person's premium. (See Cal. Code Regs., tit. 10, §§ 2632.5, 2632.7 and 2632.8.)

As noted at the outset of this brief, Proposition 103 specifically bars 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* (1987) 43 Cal.3d 1217, 1225.) "Discriminatory treatment of the uninsured was therefore of major significance prior to the passage of Proposition 103." (*Foundation for Taxpayer & Consumer Rights v. Garamendi*, *supra*, 2005 Cal.App. Lexis 1512, at p. *5, fn. 3.) To promote their purpose of making insurance "available, and affordable for all" (2 App. 562), California 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, subd. (c).)

With regard to the rating factors, all insurance companies must submit a "class plan" to the Commissioner. Class plans disclose which of the authorized rating factors the insurer proposes to use, their weight and other required information. (See Cal. Code Regs., tit. 10, § 2632.3.) The procedures governing approval of automobile class plans (Cal. Code Regs., tit.

10, § 2632.1 et seq.) are completely separate from those governing property-casualty rate applications, including automobile insurance rates (§ 1861.05 et seq.; Cal. Code Regs., tit. 10, § 2646.1 et seq.). Insurers may apply for rate changes without applying for class plan changes, and vice versa.

Here, the complaint alleges that Safeco uses two rating factors (no prior insurance and lack of continuous coverage) not disclosed to the Commissioner at all, much less approved by him. (1 App. 2-4, 8-9.) Stated another way, the Project is not challenging what Safeco filed and got approved; rather, the Project challenges what Safeco did not file and did not get approved. These allegations, of course, are taken as true at this stage. (*Gerawan Farming, Inc. v. Lyons*, *supra*, 24 Cal.4th at pp. 515-516.) Contrary to what Safeco has suggested, the Commissioner's approval of its class plan does not immunize Safeco from suit for, as here, using unapproved rating factors that are specifically prohibited by statute. (See *Donabedian*, *supra*, 116 Cal.App.4th at pp. 992-993.)

The above backdrop places the current suit in context. Although painting with a broad "rate" brush, Safeco does not really dispute, because it cannot, that this case involves unapproved conduct and practices the voters expressly prohibited – not approved rates. Indeed, this is confirmed by the Commissioner's decision to decline the trial court's referral under the primary jurisdiction doctrine. The Project's allegations, as he concluded, did not require regulatory review. (1 App. 67-69.)

In a footnote, Safeco appears to acknowledge that this case involves "allegedly unapproved rating factors." (Mem. 1, fn. 1.) "However," Safeco continues, "once you create a private right to sue under the statute, you cannot limit that right by arguing it[] exists only in situations where the complaint raises concerns about unapproved rates or rating factors. . . . [T]he new private right of action would apply to all fact patterns that raise Proposition 103 violations." (*Ibid*.) There is nothing "new" about Proposition 103's

private right of action, including the direct enforcement the Project seeks here. As shown above, consumers' right to "enforce any provision of this article" (§ 1861.10, subd. (a)) has been on the books since 1988, and the viability of UCL enforcement actions was reconfirmed recently in *Donabedian*.

In any event, Safeco's claimed concerns are unfounded. Safeco ignores the safeguard role of primary jurisdiction in managing litigation that addresses issues within the Commissioner's authority. (See *Farmers*, *supra*, 2 Cal.4th 377.) Primary jurisdiction more than suffices to protect the legitimate interests of insurers and the Commissioner in the Proposition 103 environment, without denying consumers the enforcement role they reserved for themselves.

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

As a comprehensive scheme for controlling insurance rates and premiums, Proposition 103 places paramount emphasis on the accountability of both insurers and the Insurance Commissioner to the public. The contrast between the public accountability mandated by Proposition 103 and the comprehensive shield erected by its predecessor, McBride-Grunsky, could not be more vivid.

Contrary to Safeco's distorted portrayal, throughout Proposition 103 the voters manifested in plain terms their intent to assume an active role in ensuring the initiative's proper implementation and enforcement. For example, the measure requires notice, disclosure and the opportunity for public participation in the matters governed by the measure. (See, e.g., § 1861.05.) It also made the Insurance Commissioner an elected official, accountable directly to the voters. (§ 12900.)

Safeco nonetheless contends that there is no "consumer benefit" from a direct action to enforce Proposition 103. (Mem. 3.) The public, says Safeco,

already has "ample administrative and judicial remedies." (Mem. 8.) Safeco's partisan assessment of what remedies are "ample" is of no concern here. "What is relevant is what the statutes say . . . ." (*Krumme*, *supra*, 123 Cal.App.4th at p. 945.) While "much is necessarily left to the Commissioner" under Proposition 103 (*Calfarm*, *supra*, 48 Cal.3d at p. 824), the voters chose not to leave everything to the Commissioner.

The voters have made their policy choice and the statute is explicit. In section 1861.10, subdivision (a), the electorate established an independent citizen check on the conduct of insurance companies (as well as the Commissioner): "Any person may initiate or intervene in any proceeding permitted or established pursuant to this chapter, challenge any action of the commissioner under this article, and enforce any provision of this article." Subdivision (b) of this section confirms that voters contemplated a right to direct relief through the courts: "The commissioner or a court shall award reasonable advocacy and witness fees and expenses to any person who demonstrates that (1) the person represents the interests of consumers, and, (2) that he or she has made a substantial contribution to the adoption of any order, regulation or decision by the commissioner or a court."

Under McBride-Grunsky, before Proposition 103, Chapter 9 did not "permit[] or establish[]" any proceeding (§ 1861.10, subd. (a)) other than the often-futile grievance proceeding allowed by section 1858 et seq. But Proposition 103 changed that decisively. Section 1861.03, subdivision (a) makes various state laws applicable for the first time to the insurance industry: "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 (Sections 51 through 53, inclusive of the Civil Code), and the antitrust and unfair business practices laws Parts 2 (commencing with Section 16600) and 3 (commencing with Section 17500 of the Business and Professions Code)."

With the industry's historic immunity largely lifted by section 1861.03, the right to sue is affirmatively conferred elsewhere by section 1861.10, subdivision (a). It authorizes and encourages consumers to pursue private enforcement, either directly (through clause three, as here) or by invoking the newly applicable state laws (through clause one). Thus, working in tandem, sections 1861.03 and 1861.10 of Proposition 103 fundamentally changed the remedial landscape of Chapter 9. The Commissioner's formerly exclusive jurisdiction under section 1858 now gives way to alternative and concurrent avenues of enforcement. Consumers can now employ the administrative process for the resolution of individual grievances or they can choose the more powerful judicial forum.

Straining for some basis to overturn the trial court, Safeco argues that a direct action is foreclosed by sections 1861.09 and 1858.6, which deal with mandamus review of the Commissioner's administrative proceedings. (Mem. 8-9.) The notion that the existence of mandamus review (of administrative proceedings) necessarily forbids a direct action (in the courts) makes no logical sense. Indeed, Safeco's argument is circular because it assumes the answer to the question – whether Proposition's 103 scheme allows a direct action. That question is answered by section 1861.10, subdivision (a). Nothing in sections 1861.09 and 1858.6 speaks to whether a direct action may be brought, much less forecloses it.

The voters' decision to establish private consumer enforcement in place of McBride-Grunsky's impoverished scheme recognized several practical realities. Proposition 103 imposes many obligations and responsibilities on both insurance companies and the Commissioner, in contrast to McBride-Grunsky, which imposed virtually none. Budgetary and staffing considerations necessarily limit the ability of the Commissioner's staff to ensure that each insurance company's filings comply with applicable laws and regulations. Similar constraints limit the Commissioner's ability to police

insurers' marketplace conduct effectively. Private enforcement thus serves a necessary deterrent function. Also, independent enforcement would be necessary if the Commissioner failed to act.

In its quest to evade the plain language of Proposition 103, Safeco invites the Court's attention to the ballot materials. (Petn. 20-24.) These do not come into play, however, unless the statute at issue is ambiguous. (*People v. Farell* (2002) 28 Cal.4th 381, 394.) Ours is not. Nonetheless, even if section 1861.10, subdivision (a) were ambiguous, the ballot materials stated that Proposition 103's reforms "enable consumers to permanently unite to fight against insurance abuse." (2 App. 563.) Voters were also advised that Proposition 103 would create "a permanent, independent consumer watchdog system" that "will champion the interests of insurance consumers." (*Ibid*.)

In the 1988 election, moreover, voters handily rejected several competing insurance-related initiatives, including Proposition 104. Had Proposition 104 received more votes, it would have nullified each provision of Proposition 103 and expressly retained the prior exclusive jurisdiction regime. (See generally http://library.uchastings.edu/ballot_pdf/1988g.pdf [collecting 1988 initiative materials; last visited Oct. 11, 2005].) This fuller context hardly suggests an intent, when adopting Proposition 103, to leave all enforcement of the reforms to the Commissioner as Safeco claims. To the contrary, it shows a strong intent to enact the measure that prevailed. (See *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n* (1990) 51 Cal.3d 744, 769.)

c. Vestigial Sections 1860.1 and 1860.2 Do Not Undermine a Direct Action to Enforce Proposition 103

Although the argument is halfhearted, Safeco suggests this Court should follow *Walker*'s analysis and, in particular, the First District's application of sections 1860.1 and 1860.2 there to dismiss the suit. (Mem. 14-15.) As already explained, *Walker* is distinguishable on its facts as involving a

challenge to approved rates rather than, as here, unapproved and unlawful rating factors. Apart from this difference, *Walker* misapplied 1860.1 and 1860.2 and, accordingly, its analysis is not persuasive.

By their very text, these statutes do not bar private consumer enforcement of Proposition 103 under section 1861.10, subdivision (a). Section 1860.1 provides:

> 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.

The key words for the present purposes are "other law." Section 1860.1 might apply here if the Project's basis for suit were a statute outside Chapter 9. But that is not our case. Just as in *Donabedian*, the code sections that "authorize this action are not 'other law' – they are part of the same chapter as section 1860.1." (116 Cal.App.4th at p. 977.)

The same distinction applies to the second vestigial statute, section 1860.2. It provides:

> The administration and enforcement of this chapter shall be governed solely by the provisions of this chapter. 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 to or be construed as supplementing or modifying the provisions of this chapter unless such other law or other provision expressly so provides and specifically refers to the sections of this chapter which it intends to supplement or modify."

In fewer words, Chapter 9's various strictures may generally be enforced only through the proceedings specified in the chapter, not through "other law." This does not impede this litigation because the Project seeks relief under section 1861.10, subdivision (a) – part of Chapter 9 – rather than through "other law." As *Donabedian* stated: "Once again, the statutory sections that permit this suit are part of the same chapter as section 1860.2 and

are not 'other law.'" [Citation.] (116 Cal.App.4th at p. 978.) Hence, section 1860.2 is no shoal either.

The *Walker* court misread sections 1860.1 and 1860.2 in another fundamental respect. In addition to disregarding the "other law" limitation, the First District gave these provisions a much broader substantive sweep than they have historically been accorded. They immunize only certain types of concerted activity between two or more insurers. They do not apply to cases like this one (and, for that matter, *Donabedian*) involving the conduct of only one insurance company.

Again, *Walker* was a litigation assault against numerous insurers, seeking to challenge rates the Commissioner had already approved. (77 Cal.App.4th at p. 753.) The suit did not involve, in any way, joint conduct or actions taken in concert by the insurers. Yet the court held that section 1860.1 barred the suit, because that section purportedly "[e]mbodies the finality of the commissioner's ratemaking decisions." (*Id*. at p. 758.) "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." (*Id*. at p. 756.)

This conclusion disregards section 1860.1's limited scope of immunity, particularly after Proposition 103. Contrary to what the *Walker* court assumed, section 1860.1 is not shorthand for the "finality of the Commissioner's ratemaking decisions." (*Id*. at p. 758.) *Walker*'s interpretive gloss transforms this provision from one immunizing only certain types of joint conduct by insurers into one also immunizing an insurer's unilateral conduct.

Walker made this quantum leap by failing to examine the origins of sections 1860.1 and 1860.2. Their limited immunity has always extended only to concerted activity. As one appellate decision observes: "The preamble to

the McBride Act describes it as an act 'granting certain immunities under other laws which do not specifically refer to insurance.'" (*Karlin v. Zalta*, *supra*, 154 Cal.App.3d at p. 968.) Sections 1860.1 and 1860.2 worked together to immunize insurers against Cartwright Act or other antitrust liability to allow concerted action by insurers with regard to ratemaking. (*Id*. at p. 969.)

Shortly after *Walker*, the proper scope of section 1860.1 arose in *State Compensation Insurance Fund v. Superior Court* (2001) 24 Cal.4th 930 (*SCIF*). There, our Supreme Court applied section 11758, which governs workers' compensation insurers and is textually identical to section 1860.1. The similarity led the high court to draw on the legislative history and purposes of McBride-Grunsky to flesh out the meaning of section 11758. (*Id*. at pp. 938-940.) Summing up, the court concluded: "Interpreting section 11758 to only apply to concerted activity otherwise barred by the antitrust laws, and not to the individual misconduct of an insurer regarding its insured, is also supported by section 11758's legislative history." (*Id*. at p. 938.) The court quoted a letter from then-Commissioner Quackenbush distinguishing between joint and unilateral conduct: "'The purpose of Insurance Code section 11758 is to immunize insurers and rating organizations from anti-trust laws so that they can act in concert to make rates. . . . The plain language of Insurance Code Section 11758 does not immunize an insurer from misconduct in reporting data to the rating organization.'" (*Id*. at p. 940, brackets deleted.)

Even more recently, *Donabedian* further illustrates the limited role for sections 1860.1 and 1860.2 in the regulatory scheme after Proposition 103. Drawing on *SCIF*, Division One observed that these statutes "were enacted to permit concerted action among insurers in setting rates. Like the statutory scheme in [*SCIF*], these two provisions of the McBride Act were adopted to immunize insurers from antitrust laws. [Citations.]" (*Donabedian*, *supra*, 116 Cal.App.4th at p. 990.) These sections still have meaning but, contrary to the

Walker court's analysis, they must be kept in their proper place. As Division One stated: "Of course, this is not to say that sections 1860.1 and 1860.2 no longer serve any purpose. For example, insurers are still permitted to engage in some concerted and joint activity under provisions of McBride-Grunsky that Proposition 103 did not repeal. (See, e.g., §§ 1853.5 [related insurers may act in concert in setting rates], 1853.8 [insurers may enter into agreements to equitably apportion casualty insurance afforded applicants], 1855-1855.5 [members and subscribers of advisory organization may use policy forms, bond forms, and manuals of that organization].)" (*Id*. at pp. 990-991.)

Like the complaint in *Donabedian*, the Project's complaint focuses on the insurer's non-compliance with section 1861.02's "rating factor" strictures. In other words, this case, like *Donabedian*, concerns the actions of one insurer. (Compare *id*. at p. 974 with 1 App. 1-11.) In light of this similarity, the following passage from *Donabedian* also fits the circumstances here: "Like the claim in [*SCIF*], plaintiff's claim challenges the unilateral conduct of a single insurer, does not involve concerted action, and has no antitrust implications." (116 Cal.App.4th at p. 990.) Contrary to what Safeco seeks to imply, then, sections 1860.1 and 1860.2 do not impact a case like this one involving an insurer's unilateral conduct.

Although often discussed in tandem with section 1860.1, strictly speaking, section 1860.2 does not even deal with particular immunities from suit. Again, it provides: "The administration and enforcement of [Chapter 9] shall be governed solely by the provisions of this chapter." Article 10, which contains the various sections of Proposition 103, is part of Chapter 9. Thus, section 1860.2 simply raises the question of the enforcement avenues available after Proposition 103. Before the initiative, California consumers had virtually no recourse but their enforcement options, precisely as they intended, are much vaster now. Article 10 provides a wealth of recourse, including section 1861.10, subdivision (a) – the statute at issue in this writ proceeding.

Donabedian confirms this common-sense application of section 1860.2, once more employing prose that could have been written for our case. Discussing section 1860.2, Division One noted that the enforcement avenues under Proposition 103 "include the formal administrative process (§§ 1858-1858.7) and the 'enforce[ment]' by '[a]ny person' of certain provisions (§ 1861.10, subd. (a)), including the statutory ban on using the absence of prior insurance as a rating criterion (§ 1861.02, subd. (c))." (*Donabedian*, *supra*, 116 Cal.App.4th at p. 985.)

This brings the analysis full circle to the issue before this Court – whether the Project's direct action is authorized by the voters' command that "[a]ny person may . . . enforce any provision of this article." (§ 1861.10, subd. (a).) For the reasons already explained, the answer is yes.

D. Safeco's Various Diversionary Arguments Miss the Mark

In its desperate effort to evade the plain meaning of the statute, Safeco tosses out a few red herrings. These arguments received a light focus, at most, in Safeco's papers in superior court, and properly so. Even if not waived, Safeco's miscellaneous contentions lack merit.

1. Case Law on Implied Rights of Action Is Inapposite Because Proposition 103 Speaks Expressly on the Issue

Safeco contends that no private right of action should be implied here. (Mem. 16-17.) In substance, this rehashes Safeco's flawed argument that the text does not permit a direct action. Because the text is explicit, this case does not involve judicial creation of a right of action. Contrary to Safeco's description, *Moradi-Shalal v. Fireman's Fund Insurance Cos.* (1988) 46 Cal.3d 287 (*Moradi-Shalal*) did not herald a new judicial hostility to private rights of action under statutes. Rather, as this Court has noted, "*Moradi-Shalal*, as correctly understood, '"marks a return to the fundamental principal"'" that a statute '"'"is to be applied according to its terms."'"' (*State*

Farm Fire & Casualty Co. v. Superior Court (1996) 45 Cal.App.4th 1093, 1107, quoting *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 279.)

There is nothing in Safeco's cited decisions, moreover, remotely undermining the "plain meaning" interpretation of section 1861.10, subdivision (a). In contrast to the Insurance Code sections at issue in Safeco's cases, the statute here was enacted as part of a comprehensive new framework empowering consumers to hold insurers accountable. To achieve this goal, voters expressly reserved for themselves the power to "enforce" the reforms. Nothing like this was present in Safeco's authorities. (Compare § 1861.10, subd. (a) with *Moradi-Shalal*, *supra*, 46 Cal.3d at p. 292 and fn. 2 [holding that section 790.03 did not create right to sue]; *Vikco Insurance Services, Inc. v. Ohio Indemnity Co.* (1999) 70 Cal.App.4th 55, 62 [same for section 769]; *Crusader Insurance Co. v. Scottsdale Insurance Co.* (1997) 54 Cal.App.4th 121, 124 [same for section 1763].)

In fact, the logic of these cases actually supports the Project's reading of section 1861.10, subdivision (a). Explaining why section 769 did not create a right to sue, the court reasoned: "Specifically, there is no reference whatsoever to a private right of action, or any other language stating that an individual insurance agent or independent insurance agency may bring a lawsuit to ***enforce the statute***." (*Vikco Insurance Services, Inc. v. Ohio Indemnity Co.*, *supra*, 70 Cal.App.4th at p. 62, emphasis added.) Thus, under *Vikco*'s own analysis, the statute here is sufficiently clear on what the voters intended. Likewise, this is not an instance where "enforcement of a regulatory statute" is entrusted "solely to an administrator." (*Crusader Insurance Co. v. Scottsdale Insurance Co.*, *supra*, 54 Cal.App.4th at p. 134.) Proposition 103 did away with exclusive jurisdiction, placing coextensive enforcement power in the hands of the Commissioner and the public. This, of course, is ultimately why Safeco's writ petition cannot succeed.

2. The Voters Need Not Use Magic Words to Create a Right to Sue

Safeco next contends that section 1861.10, subdivision (a) does not permit a direct action because it fails to use specific language that Safeco believes is significant. (Mem. 17-18.) "In fact," Safeco observes, "the word 'sue' or the phrase 'file a civil action' appear nowhere in this statute." (Mem. 17.)

Safeco cites no relevant authority for a formalistic "magic words" requirement and the law is actually to the contrary. The Legislature and the electorate are not required to use talismanic language when enacting statutes. As Division Seven stated recently in construing an initiative: "The Supreme Court . . . has never prescribed any 'magic words' the Legislature or the electorate must use to make their purposes explicit." (*In re Mehdizadeh* (2004) 105 Cal.App.4th 995, 1004.) Even indulging Safeco's exercise, it is easy to locate statutes that afford a direct action without using words such as "sue" or "civil action." (See, e.g., *Goerhing v. Chapman University* (2004) 121 Cal.App.4th 353, 374-379.) This is faithful to the legislative command that, when construing statutes, courts should "ascertain and declare what is in terms or ***in substance*** contained therein." (Code Civ. Proc., § 1858, emphasis added.) Safeco's "magic words" argument also fails.

3. The Trial Court Has Power to Fashion Various Remedies

Finally, Safeco grumbles that section 1861.10, subdivision (a) "lacks the typical remedies available in civil suits." (Mem. 18.) Having failed to specify remedies, the argument goes, voters cannot have intended to create a private right of action.

Safeco's logic is again flawed. The absence of enumerated remedies does not mean there is no cause of action. "Under fundamental legal principles, a statute may not be construed as creating a right without a remedy." (*Bermite Powder Co. v. Franchise Tax Board* (1952) 38 Cal.2d 700,

703, citing Civ. Code, § 3523.) "Where a legal wrong has been committed it is the duty of the court to grant appropriate relief." (*Taylor v. S&M Lamp Co.* (1961) 190 Cal.App.2d 700, 712.)

If liability is established, there is no question that the superior court has power to fashion an appropriate remedy. Our Supreme Court rejected Safeco's position nearly a century ago in *Paxton v. Paxton* (1907) 150 Cal. 667. There, it was similarly argued that "the complaint does not state a cause of action, and the court had no jurisdiction to entertain it" because the statute at issue "does not provide any procedure or machinery for enforcing its provisions, and no special procedure is prescribed elsewhere." (*Id*. at p. 670.) The high court disagreed, explaining that "where the right is given by statute without any prescribed remedy, it may be enforced by any appropriate method recognized by the general law of procedure." (*Ibid*.) The opinion continues: "This principle is crystallized in section 1428 of the Civil Code, which provides that 'an obligation arising from operation of law may be enforced in the manner provided by law, or by civil action, or proceeding.'" (*Ibid*.)

Section 1428 is still part of the Civil Code and continues to animate case law. Citing this provision, the Supreme Court stated more recently: "Legislative silence on the subject of remedies does not, however, bar the instant suit; the absence of a particular remedy is not the same as the absence of a cause of action." (*San Lorenzo Education Association v. Wilson* (1982) 32 Cal.3d 841, 847.) Indeed, "[w]here a right is given by statute it may be enforced by any appropriate method, legal or equitable." (*Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist.* (1976) 65 Cal.App.3d 121, 131, citing *Paxton v. Paxton*, *supra*, 150 Cal. at pp. 670-671; see also Code Civ. Proc., § 187.)

Under "the general law of procedure" (*Paxton v. Paxton*, *supra*, 150 Cal. at p. 670), courts are authorized to issue injunctions. (See Code Civ. Proc., § 526, subd. (a).) Hence, for example, if the Project proves that Safeco

violated section 1861.02, the relief could include an injunction to prevent future violations. In addition, or alternatively, Safeco could be ordered to review its records, calculate the amount of overpayment owed to consumers and refund them what they are owed. (See 6 B.E. Witkin, California Procedure (4th ed. 1997) Provisional Remedies, § 282, p. 224 [discussing mandatory injunctions].) Or this amount could be awarded as restitution within the superior court's inherent authority. As this Court has recognized: "Trial courts have broad equitable power to fashion any appropriate remedies. [Citation.]" (*Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1552; accord, *Crain v. Electronic Memories & Magnetics Corp.* (1975) 50 Cal.App.3d 509, 524.)

Safeco's preoccupation with remedies is premature. This litigation, on review here from a grant of judgment on the pleadings, has not even entered the evidentiary stage. A proper remedy, tied to the facts and violations actually proved, is a discretionary matter for the trial judge down the road. It is enough for now that, contrary to Safeco's assumption, various remedies are possible. Rather than enumerating specific remedies in Proposition 103 itself, the voters, as they were entitled to do, simply left the whole subject to "the general law of procedure." (*Paxton v. Paxton*, *supra*, 150 Cal. at p. 670.)

V. CONCLUSION

For the reasons given, Safeco's writ petition should be denied. This Court should hold that the Insurance Code provision at issue here means what it says: "Any person . . . may enforce any provision of this article."

(§ 1861.10, subd. (a).) If Safeco prefers the statute to be written differently, the matter must be taken up with the voters.

DATED: October 13, 2005

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RULE 14 CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that **RETURN TO PETITION FOR WRIT OF MANDATE** uses a proportionately spaced Times New Roman 13-point typeface, and that the text of this brief comprises 12,728 words according to the word count provided by Microsoft Word word-processing software.

DATED: October 13, 2005

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DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 West Broadway, Suite 1900, San Diego, California 92101.

2. That on October 13, 2005, declarant served the **RETURN TO PETITION FOR WRIT OF MANDATE** by depositing a true copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this thirteenth day of October, 2005, at San Diego, California.

_____

Terree DeVries