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12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF LOS ANGELES

14 FLOYD MITCHELL, GRACIELA VIRGEN,
15 MARGARET CARMONA, and VIRGINIA
16 THOMPSON, individuals, on Behalf of
17 Themselves and All Others Similarly Situated,

18 Plaintiffs,

19 v.

20 ALLSTATE INSURANCE COMPANY, a
21 corporation, and DOES 1 through 100,
22 Inclusive

23 Defendants.

) Case No. BC 212492

)

) **NOTICE OF OBJECTIONS AND**
) **OBJECTIONS OF THE**
) **PROPOSITION 103 ENFORCMENT**
) **PROJECT TO SETTLEMENT**
) **AGREEMENT**

) Hearing Date: May 16, 2001

) Time: 8:30 a.m.

) Dept. No: 59

24 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

25 Please take notice that the Proposition 103 Enforcement Project hereby objects to the
26 proposed settlement agreement entered into by the parties on or about April 9, 2001. Appearing
27 by counsel at the hearing for preliminary approval of the proposed settlement on April 23, 2001,
28 the Proposition 103 Enforcement Project ("Prop 103 Project") requested and the court granted an
opportunity for objections to the proposed settlement to be filed by Prop 103 Project. The court
set a briefing schedule and hearing date for May 16, 2001. The court postponed entry of its
ruling granting preliminary approval of the parties' settlement pending the May 16 hearing. Prop

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103 Project's objections are based on the arguments set forth below, and upon such further argument and evidence as may be presented to this court.

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I. INTRODUCTION

This litigation seeks to end Allstate's practice of overcharging previously uninsured motorists, in violation of Insurance Code §1861.02(c), enacted by California voters through the 1998 ballot initiative known as Proposition 103. After extensive review of the parties' settlement agreement entered into on or about April 9, 2001 (hereinafter "Settlement Agreement"), and the proposed "Persistency Discount" rule, attached as Exhibit 2 thereto, the Proposition 103 Enforcement Project (hereinafter "Prop 103 Project"), objects to the Settlement Agreement on the grounds that:

1) the proposed rule continues to violate Cal. Ins. Code §1861.02(c) by imposing a higher automobile insurance premium on previously uninsured motorists, allowing Allstate to engage in the same unlawful conduct under another rubric; and

2) approval of the proposed rule by the California Department of Insurance (CDI) would violate prior writs issued by the San Francisco Superior Court mandating that the Commissioner not approve such rating factors in any insurance company's class plan.

By letter dated May 4, 2001, the Project has requested that the CDI act immediately to initiate a rulemaking proceeding that would determine whether the "Initially Persistent" discount proposed by Allstate and plaintiffs' counsel or any other rating factor that violates Ins. Code §1861.02(c) can be used by any company. Pending this rulemaking proceeding, the parties' settlement agreement should not be approved in its present form.

Prop 103 Project therefore respectfully requests that this court find, as a matter of law, that Section IIIB of the Settlement Agreement and the "Initially Persistent" rating rule as contained in Exhibit 2 of the Settlement Agreement violates §1861.02(c), deny approval of any settlement by the parties that contains such a rule, and direct the CDI to not approve any rating factor that violates §1861.02(c). In the alternative, the Project requests that the Court deny plaintiff's motion for preliminary approval of the Settlement Agreement pending the outcome of an administrative rulemaking proceeding by the CDI.

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II. BACKGROUND

A. The Proposition 103 Enforcement Project and Proposition 103.

The Proposition 103 Enforcement Project (“Prop 103 Project”) is a project of the non-profit Foundation for Taxpayer and Consumer Rights (FTCR). FTCR’s Prop 103 Project has been actively involved in the implementation of Proposition 103 and related insurance reform matters in numerous administrative and legal proceedings. Prop 103 Project’s attorneys and advocates challenge excessive rates and unjust industry practices; monitor the industry and issue reports, pursue reforms, and oppose anti-consumer legislation sponsored by the insurance lobby.

In order to address the failure of insurers to service particular communities, principally in predominantly low-income, urban areas, Proposition 103 sought to diminish the importance of geography and place primary emphasis on driving record and individual driving habits. *See* Cal. Ins. Code § 1861.02(a). Mandating the use of new rating factors, however, does not address the practical reality that the availability of insurance agents and brokers is extremely circumscribed in some communities.¹ To ensure that qualified drivers can obtain insurance regardless of where they live, Proposition 103 further specifies that any good driver, as defined in the initiative, has the right to purchase an auto insurance policy from the insurer of his or her choice. *See* Cal. Ins. Code § 1861.02(b)(1). The absence of prior insurance coverage cannot disqualify an otherwise good driver from obtaining the good driver discount, *nor can it be used by insurers as a criterion in and of itself for rates or premiums generally.* *See* Cal. Ins. Code §1861.02(b)(3)(C) and (c). It is this last-mentioned provision of Proposition 103, §1861.02(c), that plaintiffs in this class action lawsuit seek to enforce.

¹ *See* Khalid Al-Faris, California Dep’t Of Insurance, Selling And Servicing Levels Of Private Passenger Auto Liability In Urban Cities (1993).

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B. Writs Issued by Superior Court Prohibit Commissioner from Approving Class Plans that Violate §1861.02(c).

In 1996, FTCR and other consumer groups challenged other insurance companies' violations of §1861.02(c). *See Proposition 103 Enforcement Project v. Quackenbush* (Super. Ct. S.F. County, 1997, No. 982646) and *Consumers Union and Southern Christian Leadership Conference v. Quackenbush* (Super. Ct. S.F. County, 1997, No. 982181). Those actions evolved from Commissioner Quackenbush's denials of requests for hearings by Prop 103 Project to challenge Safeco Insurance Company of Illinois's ("Safeco's") Class Plan (PA-96-0070-00) and by Consumers Union and Southern Christian Leadership Conference to challenge the Class Plan of the Interinsurance Exchange of the Automobile Club. The approved class plans implemented rules allowing a surcharge on drivers who could not verify compliance with the state's financial responsibility law. The San Francisco Superior Court issued writs in both lawsuits against Commissioner Quackenbush on February 10, 1997, which prohibit the Commissioner from approving the use of any rating factor requiring proof of compliance with the mandatory insurance laws (prior insurance coverage). *See* Peremptory Writs of Mandate in Case Nos. 982181 and 982646 attached hereto as Exhibit A.

C. Administrative Challenges by Consumer Groups to Allstate's Rule 39 "Non-Verifiable Accident Record Surcharge".

In 1997, FTCR's Proposition 103 Enforcement Project and other groups initiated administrative proceedings before the California Department of Insurance on the Class Plan Applications of State Farm, Farmers, and Allstate. (File Nos. PA-97-0077-00, PA-97-0079-00, and PA-97-0078-00.) Those proceedings were bifurcated into two phases. Phase I sought to determine whether the companies were in compliance with Ins. Code § 1861.02(a)'s requirement that premiums be based primarily on factors related to driving history as implemented through Quackenbush's factor weighting regulations. After the Department upheld insurers' interpretation of the law and regulations, consumer groups petitioned for a writ of mandate in Alameda County Superior Court challenging the Quackenbush factor weighting regulations. That issue has recently completed its course through the courts, ending in a denial of review by

1 the California Supreme Court in *Spanish Speaking Citizens Foundation, et al. v. Quackenbush*
2 (2000) 85 Cal.App.4th 1179, review den. March 28, 2001, leaving in place the Court of Appeal's
3 decision upholding the Quackenbush automobile insurance factor weighting regulations.

4 Phase II of those proceedings was to determine, among other issues, the validity of
5 Allstate's Rule 39, the "non-verifiable accident driving record surcharge." In determining
6 Incident Surcharge Rating and Good Driver Discount Eligibility, Allstate's Rule 39 operates to
7 impose a "non-verifiable accident record" surcharge on all new applicants who cannot show
8 acceptable written verification of their accident record for the prior three years. Overall, drivers
9 who cannot show acceptable verification would end up paying approximately 50-60% more than
10 those who can show acceptable verification. Acceptable verification must be:

- 11 • A letter of experience from the driver's current/prior insurance carrier(s);
- 12 • A renewal offer from the driver's current insurance carrier; or
- 13 • BOTH OF THE FOLLOWING:
 - 14 ○ The driver's signed certification; and
 - 15 ○ An acceptable form of written verification of an accident record for the most
16 recent 18 months from a disinterested third party, including but not limited to:
 - 17 ■ A letter from the driver's employer (applies to driver who has been driving
18 company car for the past 18 months)
 - 19 ■ A letter from the driver's commanding officer in the military (listing
20 driving accident history for previous 18 months or stating driver had not
21 been driving a vehicle for the last 18 months)
 - 22 ■ A letter from the driver's Peace Corps supervisor, U.S. Foreign Service or
23 similar organization (listing driving accident history for previous 18
24 months or stating driver had not been driving a vehicle for the last 18
25 months)

- 1 ▪ A letter from the current insurance carrier of the driver's parents stating
2 the driver was a rated driver on the parents' policy for the last 18 months
3 that lists the driver's accident history for the most recent 18 months.

4 The Rule 39 surcharge applies only to new business. If the surcharge is applied, it will be
5 applied for 36 months from the date the policy is issued. While Motor Vehicle Records can be
6 used to verify violations, Motor Vehicle Records are not an acceptable form of written
7 verification of an accident record for purposes of Rule 39.

8 In raising this issue in its administrative petition for hearing on the class plans, the
9 Proposition 103 Enforcement Project argued, as plaintiffs have in this case, that Rule 39 violated
10 §1861.02(c) by using the absence of prior insurance as a basis to charge previously uninsured
11 motorists higher premiums. A hearing on Phase II has yet to be noticed by the Department.

12 **D. The Mitchell Proceedings.**

13 In the interim, the present private litigation was instituted to challenge Allstate's Rule 39.
14 Plaintiffs in this class action, *Mitchell et al. v. Allstate*, LASC Case No. BC 212492, filed on
15 June 24, 1999 alleged that the defendant's Rule 39 violates §1861.02(c); plaintiffs sought
16 damages and injunctive relief.

17 By mutual agreement of the parties, the litigation was stayed pending a hearing and
18 decision by the CDI on the question of whether Rule 39 violates the statute in the concurrently
19 filed administrative complaint (*In the Matter of the Complaint of Mitchell et al. v. Allstate*, IH-
20 00-0097-91), under the putative authority of the primary jurisdiction doctrine set forth in
21 *Farmers v. Superior Court* (1992) 2 Cal.4th 477. The CDI held an informal hearing on March
22 14, 2000. The CDI did not notify the parties in Phase II of the prior Class Plan challenges of that
23 fact. The parties to IH-00-0097-91 filed post-hearing briefs and comments with the CDI in April
24 and May 2000.

25 At some date, unknown to Prop 103 Project, the parties informed the CDI that they
26 intended to settle the class action litigation, and the CDI agreed to withhold issuance of its
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1 decision on the matter and allow parties instead to proceed with submitting their settlement
2 agreement to the court for approval.

3 FTCR subsequently learned through plaintiffs counsel that the parties entered into a
4 settlement agreement on or about April 9, 2001 which would:

5 1. Require Allstate to discontinue the use of its Rule 39 surcharge – an action which is
6 superfluous as noted below given the Department’s emergency regulation.

7 2. Permit Allstate to utilize a new so-called “Initially Persistent” Discount rule.

8 Allstate’s proposed “Initially Persistent” Discount would require motorists applying
9 for an insurance policy with Allstate to provide proof of insurance with a single
10 carrier for the previous 12 months in order to receive an approximately 11% discount.

11 Acceptable proof of prior “persistency” for purposes of receiving Allstate’s
12 discounted premium include:

- 13 • A letter of experience;
- 14 • Automobile insurance identification cards;
- 15 • Automobile insurance declarations pages; or
- 16 • Automobile insurance renewal offers.

17 3. In lieu of damages, require Allstate to issue “coupons” to those drivers who were
18 improperly surcharged under Rule 39; the coupons provide discounts for future
19 purchases of Allstate insurance products.

20 **E. Department of Insurance Issues Emergency Regulation that Would Invalidate**
21 **Rule 39.**

22 On April 9, 2001, the Department issued a notice of a proposed emergency regulation
23 (File No. ER-41) that would prohibit insurance companies from requiring proof of insurance to
24 verify driving history, effectively nullifying Allstate’s Rule 39. (A copy of the Notice of
25 Proposed Emergency Action, File No. ER-41, is attached hereto as Exhibit B.) The emergency
26 regulation has yet to be submitted to the Office of Administrative Law. Whether this would
27 moot out the administrative proceedings in Phase II of the 1997 class plan challenges referenced
28 above and in *In the Matter of the Complaint of Mitchell et al. v. Allstate*, IH-00-0097-91 is

1 unclear. The question of relief to policyholders who were surcharged under Rule 39, at the very
2 least remains outstanding and should be determined by the Department.

3 **F. Court Grants Leave for Prop 103 Project to File Objections to Settlement**
4 **Agreement.**

5 By appearance of its attorneys on April 23, 2001 at the hearing on preliminary approval
6 of the settlement agreement in the present litigation, the Proposition 103 Enforcement Project
7 requested and the court granted it leave to file objections to the settlement. The court then set a
8 briefing schedule for Prop 103 Project to file its objections and for the parties to reply and set a
9 hearing date for April 16, 2001.

10 **III. ARGUMENT**

11 In determining whether to approve a class action settlement, courts have broad discretion
12 to determine whether the settlement is “fair, reasonable and adequate to all concerned.” *See*
13 *Dunk v. Ford Motor Company* (1996) 48 Cal.App.4th 1794, 1801. Because of the instant
14 Settlement Agreement’s discriminatory impact not only on members of the class, but on the
15 broader 20-25%¹ of drivers who are currently uninsured due to the unavailability and
16 unaffordability of automobile insurance, because the proposed “Initially Persistent” rating rule
17 violates §1861.02(c), and because approval of the proposed rule by the CDI would violate prior
18 writs issued by the San Francisco Superior Court, this court should exercise its discretion to find
19 that the Settlement Agreement is indeed unfair, unreasonable, and inadequate to all concerned.
20 *See id.*

21
22 **A. Allstate’s Proposed “Initially Persistent” Discount Violates Ins. Code §1861.02(c).**

23 Proposition 103, Ins. Code §1861.02(c), specifies that:

24 the absence of prior automobile insurance coverage, in and
25 of itself, shall not be a criterion for determining eligibility

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28 ¹ California Department of Insurance, *1998 Commissioner’s Report on Underserved Communities*
available on CDI’s Web site at <http://www.insurance.ca.gov/docs/FS-Studies.htm>.

1 for a Good Driver Discount policy, or generally for
2 automobile rates, premiums or insurability.

3 Allstate's proposed "Persistency Discount" would create different rating schedules for
4 "Initially Persistent" Drivers and for "Non-Persistent" Drivers. See Exhibit 2 to Settlement
5 Agreement at p 1-2 (Section IA1, "Rating of Initially Persistent, New Business Rating" and
6 Section IB1, "Rating of Non-Persistent, New Business Rating"). A driver applying for a new
7 policy with Allstate will be classified as "Initially Persistent" and given a discount
8 (approximately 11%) if he or she "has maintained continuous automobile insurance coverage
9 with a single insurance company or single insurance group for at least the one year period
10 immediately prior to the new business effective date" of the Allstate policy if acceptable
11 documentation is shown, including, but not limited to:

- 12 • A letter of experience;
- 13 • Automobile identification cards;
- 14 • Automobile insurance declarations pages; or
- 15 • Automobile insurance renewal offers.

16 Drivers classified as "Non-Persistent", those who could not show proof of persistency
17 with one carrier for the past twelve months, would not be eligible for any discount for at least
18 one year from the effective date of the new policy.

19 There is no denying that all people who apply for insurance with Allstate who did not
20 have insurance at any time in the previous 12 months would be excluded from receiving the
21 "Initially Persistent" discount. Under Allstate's Rule 39, all previously uninsured drivers would
22 have had a surcharge applied to their premium. Under the proposed new rule, all previously
23 uninsured drivers will likewise be charged higher rates solely because they did not have prior
24 insurance – they will not be eligible for an approximately 11% discount that previously insured
25 motorists will receive. Thus, two consumers – otherwise identical – would be charged different
26 rates solely because one had prior insurance and one did not. While the proposed new rule may
27 narrow the gap somewhat in terms of how much more previously uninsured motorists will pay
28 than other drivers, that does not save the new rule from violating §1861.02(c). A "discount" for

1 previously insured obviously carries the same penalty as a “surcharge” for the previously
2 uninsured. The fact remains that consumers will be charged a higher rate solely because they did
3 not have prior insurance. That is exactly the result that §1861.02(c) prohibits.

4 Plaintiffs and Allstate may argue that §1861.02(c) is not violated by the proposed new
5 rule because people without prior insurance are not the only ones who are penalized. Those new
6 policyholders who had insurance in the last 12 months, but were not consistently with the same
7 carrier for those 12 months, would also not be entitled to the discount. Since a small group of
8 people (those who patronized more than one company in the last twelve months) are penalized
9 along with the entire group of previously uninsured applicants who would not receive the
10 discount, plaintiffs and Allstate will argue that it is not the lack of prior insurance “in and of
11 itself” that is the criterion on which the discount is based.

12 This argument is no more than a linguistic subterfuge in order to avoid the clear meaning
13 of §1861.02(c). There is no doubt that Allstate’s Rule 39 surcharge operated to charge all
14 previously uninsured motorists more for their auto insurance premiums solely because they could
15 not show proof of prior insurance. The only question is whether the change in *language* in
16 Allstate’s newly proposed rule cures that defect. As illustrated above, it does not do so.

17
18 **B. Approval of the Proposed “Initially Persistent” Discount Would Violate A Prior
Writ of Mandate.**

19 This Court must not approve the settlement of the parties when two previously-issued
20 superior court writs bar the Insurance Commissioner from approving rating factors that require
21 proof of compliance with the state’s financial responsibility law as proposed by the parties here.
22 Here, Allstate is requiring proof of prior insurance (i.e., proof of compliance with the financial
23 responsibility law) in order for new applicants to be eligible for its “Initially Persistent” discount.
24 Approval by the Commissioner of Allstate’s rule, therefore, would violate the prior writs issued
25 in 1997 by the San Francisco Superior Court in *Proposition 103 Enforcement Project v. Chuck*
26 *Quackenbush*, Case No. 982646 and *Consumers Union and Southern Christian Leadership*
27 *Conference v. Quackenbush*, Case No. 982181 which command the Commissioner “not to
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1 approve financial responsibility compliance rating factors in determining rates and premiums for
2 automobile insurance coverage absent [the Commissioner's] adoption of such factors by
3 regulation in accordance with Insurance Code §1861.02(a)(4)" and "to notify all California
4 private passenger automobile insurers that the use of a financial responsibility compliance factor
5 will not be permissible." See Peremptory Writs of Mandate attached hereto as Exhibit A.

6 Allstate will likely argue that its proposed rule is a rating factor that has been adopted by
7 regulation because "persistence" is one of the factors enumerated in Cal. Code Regs. §2632.5.
8 Just because Allstate is calling its newly proposed rule a "Persistence Discount," however, does
9 not mean that it is the same "persistence" factor that is allowed under, but nowhere defined in,
10 the regulations adopted by former Insurance Commissioner Quackenbush.¹ Regardless of the
11 label, the proposed rule acts to surcharge previously uninsured motorists and cannot be approved
12 by the Commissioner when it has the result of requiring compliance with California's financial
13 responsibility law. See *id.*

14 IV. CONCLUSION

15 For all of the foregoing reasons, Prop 103 Project respectfully requests that this court
16 find, as a matter of law, that the parties' proposed rule violates §1861.02(c), deny approval of the
17 class action settlement agreement and direct the Insurance Commissioner not to approve any
18 rating factor that requires the proof of no prior insurance in violation of §1861.02(c). In the
19 alternative, Prop 103 Project requests that the court deny preliminary approval of the settlement
20 and stay any further proceedings on this matter until such time as the California Department of
21 Insurance has taken the following actions:

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24 ¹ Under the Administrative Procedures Act, any standards of general application that the
25 Department uses to define "persistence" in the class plan approval process are themselves
26 required to be adopted by regulation. See Cal. Gov't. Code §11340.5. ("No state agency shall
27 issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction,
28 order, standard of general application, or other rule, . . . unless the guideline, criterion, bulletin,
manual, instruction, order, standard of general application, or other rule, has been adopted as a
regulation and filed with the Secretary of State" pursuant to the APA.)

- 1 1. Completed a rulemaking proceeding to determine the appropriateness of any
2 surcharges/discounts for “initial persistency” in light of §1861.02(c)’s prohibition against
3 using the absence of prior insurance as a rating factor;
4 2. Issued its rulings on the *Mitchell v. Allstate* proceeding, IH-00-0097, and Phase II of the
5 administrative proceedings initiated by consumer groups in 1997 (File Nos. PA-97-0077-00,
6 PA-97-0079-00, and PA-97-0078-00) to determine the appropriate relief owed to
7 policyholders forced to pay Allstate’s Rule 39 surcharge.

8
9 Dated: May 8, 2001

PROPOSITION 103 ENFORCEMENT
PROJECT, a project of the Foundation for
Taxpayer and Consumer Rights
Harvey Rosenfield
Pamela Pressley

13 BY: _____
14 Pamela Pressley
15 Attorneys for the PROPOSITION 103
16 ENFORCEMENT PROJECT