Case No. B165389

IN THE COURT OF APPEAL
FOR THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

STEVEN POIRER,
Individually and on behalf of the general public
Plaintiff and Appellant;

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
A Corporation, and DOES 1 through 100, inclusive
Defendants and Respondents.

Appeal from the Superior Court of the State of California in and for the
County of Los Angeles, Case No. BC249205
(The Honorable Mortimer Wendell, Jr., Judge)

THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS' [PROPOSED] *AMICUS CURIAE* BRIEF

HARVEY ROSENFIELD, ESQ. (SBN 123082)
PAMELA M. PRESSLEY, ESQ. (SBN 180362)
LAWRENCE M. MARKEY, JR. (SBN 222684)
THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS
1750 Ocean Park Boulevard, Suite 200
Santa Monica, CA 90405
Tel. (310) 392-0522
Fax (310) 392-8874

RICHARD A. MARCANTONIO, ESQ. (SBN 139619)
PUBLIC ADVOCATES, INC.
131 Steuart Street, Suite 300
San Francisco, California 94105
Tel. (415) 431-7430
Fax (415) 431-1048

JAY ANGOFF, OF COUNSEL
ROGER BROWN AND ASSOCIATES
216 East McCarty Street
Jefferson City, MO 65101-3313
Tel. (573) 634-8501
Fax (573) 634-7679

Attorneys for Amicus Curiae

INTRODUCTION

State Farm lost this case at the ballot box fifteen years ago.

Proposition 103 was one of five insurance-related initiatives on the November 1988 ballot. Proposition 104, sponsored by State Farm, would have cancelled out each provision of Proposition 103. It was placed on the ballot to restore the statutory scheme that State Farm preferred in the event that both initiatives passed. Specifically, Proposition 104 would have reiterated that the Insurance Commissioner had "exclusive jurisdiction, subject to judicial review, to administer and enforce" its provisions. The voters defeated State Farm's measure by a three-to-one margin, and instead adopted Proposition 103.

Unlike State Farm's rival measure, Proposition 103 provides that "[a]ny person may initiate or intervene in any proceeding permitted" by Chapter 9 of the Insurance Code. (§ 1861.10(a).)[1] Proposition 103 amended Chapter 9 to expressly "permit" *judicial* proceedings; in particular, § 1861.03(a) permits suits under the Unfair Competition Law, Bus. & Prof. Code § 17200, et seq.) ("UCL").

Since the passage of Proposition 103, State Farm itself has invoked § 1861.10(a)'s authority in at least one judicial proceeding.

Today, however, State Farm attempts a complete about-face. Its entire argument in this appeal rests on the novel contention that § 1861.10(a) was not "intended to allow private individuals open access to the courts to enforce Chapter 9 statutes." (Respondent's Brief ("RB") at 38.)

---

[1] Unless otherwise noted, all citations are to sections of the Insurance Code. "Chapter 9" refers to Division I, Part 2, Chapter 9 of that Code. Proposition 103 is codified at Article 10 of Chapter 9.

State Farm makes this claim not only in the face of the voters' direct and unambiguous command and its own previous admissions in the electoral and judicial arenas, but also in the face of the unequivocal statement of the California Supreme Court in *Farmers Insurance Exchange v. Superior Court* (1992) 2 Cal.4th 377 ("*Farmers*"), affirming the authority Proposition 103 confers on the public to bring a UCL suit for a violation of Chapter 9. (*Id*. at 394.)

As State Farm has framed it, this is a straightforward case of statutory construction. And that is how *amicus* will address it**.** But what State Farm really challenges here is the wisdom of the voters in providing themselves with the authority to enforce substantive provisions of the reform law they were enacting, independent of the Insurance Commissioner's action or inaction.

Should State Farm prevail here, the consequences will be disastrous for consumers, as the Insurance Commissioner himself has recently emphasized in a brief addressing this very issue. A ruling accepting State Farm's reasoning would demolish the framework of legal accountability that stands as a paramount goal of Proposition 103. It would eliminate the right that the voters reserved to themselves to prevent violations of the Insurance Code, to remedy such violations through civil actions, and to obtain refunds of money they have improperly paid. Finally, it would severely undermine the integrity of the regulatory process administered by the Insurance Commissioner.

SUMMARY OF DISCUSSION

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*").) Finding that "the existing laws inadequately protect consumers," the voters

decisively rejected the forty-year-old statutory scheme that had relieved insurers of judicial accountability for their conduct.

Proposition 103 separately addresses *rates* and *premiums*. It requires *all* property-casualty insurers to obtain the Insurance Commissioner's approval for *rate* (i.e. revenue) changes. Additional requirements are imposed upon automobile insurers, who must obtain the Commissioner's approval for the "rating factors" they employ to determine an individual motorist's *premiums*.

This case concerns premiums, not rates. Poirer's complaint alleged that State Farm charges higher premiums to drivers who could not show proof of prior insurance. If true, this conduct violates § 1861.02, enacted by Proposition 103. Recognizing that the California Department of Insurance ("CDI") has insufficient resources to thoroughly review the filings made by each of the approximately eight hundred insurers doing business in California, or to monitor their compliance in the marketplace, Proposition 103, at § 1861.10(a), gave the public the unqualified private right to enforce both the provisions of the initiative and the state's civil rights and consumer protection statutes, which § 1861.03(a) expressly made applicable to insurers for the first time. Appellant Poirer filed suit under one of those statutes – the UCL.

The Superior Court never reached the question of whether State Farm was, indeed, violating Proposition 103. Rather, State Farm insisted that its conduct, whether lawful or not, was entirely insulated from civil suit. State Farm contended that two vestigial provisions of the pre-Proposition 103 statutory regime, §§ 1860.1 and 1860.2, grant the Insurance Commissioner "exclusive jurisdiction" over all challenges to an insurer's rates, premiums and practices. (RB 2.) Thus, according to State Farm, no violation of Chapter 9 can ***ever*** be challenged by an original civil action, and the injured public has no remedy. (RB 38.) The lower court

agreed, ruling, "Chapter Nine does not include a right to bring an original civil action such as this." (JA 887.)

Had Proposition 103 not passed, State Farm would be correct. The absence of judicial recourse and a bar against civil liability for violations of the Insurance Code were central features of the 1947 McBride-Grunsky Insurance Regulatory Act ("McBride-Grunsky") that Proposition 103 displaced. The voters, however, created an express, and expansive, private right of action in § 1861.10(a), which permits the public to commence, and intervene in, not only administrative proceedings, but civil actions, to enforce the provisions of Proposition 103. In doing so, § 1861.10(a) (together with § 1861.03(a)) put a definitive end to the "exclusive jurisdiction" regime on which State Farm relies.

In an effort to avoid the result the voters plainly intended, State Farm now argues that § 1861.10(a) *does not authorize civil actions after all*. According to State Farm, when the voters authorized "any person" to initiate or intervene in "any proceeding," they meant only "administrative proceedings," and when the electorate provided the public with new remedies in § 1861.03(a), it did not intend to allow the public to use those remedies to enforce the reforms it enacted at the very same time. (RB 37-39.)

State Farm further argues that the voters intended not only to *retain* the antitrust immunities the insurance companies enjoyed under pre-103 law, but also to *expand* them to apply to violations of the rules Proposition 103 imposed. (RB 26.)

This brief will first demonstrate that the plain language of Proposition 103 clearly and unequivocally created a private right of action (in §§ 1861.10(a) and 1861.03(a)), and explicitly authorizes a private UCL

suit for violations of Chapter 9.[2] The Supreme Court settled precisely this question over a decade ago in *Farmers*, and the Insurance Commissioner has confirmed this express statutory authority. Indeed, State Farm itself asserted § 1861.10(a) as the basis for its right to intervene in a 1997 Superior Court lawsuit, and is estopped from asserting the contrary, a-textual, position it has taken here. (Discussion, Section I.)

As for the vestigial provisions of McBride-Grunsky (§§ 1860.1 and 1860.2), Section II of the Discussion will show that, by their own terms, and construed in the context of the later-enacted provisions of Proposition 103, neither provision bars this suit nor immunizes State Farm. These provisions retain ***their traditional meaning in the Proposition 103 environment – though their scope has been greatly narrowed –*** and can be enforced without doing violence to Proposition 103's provisions. By contrast, State Farm's interpretation would place them in conflict with the voter's authorization of a private right of action.

Perhaps recognizing the far-fetched nature of its statutory-construction arguments, State Farm has retreated to a more modest, but equally flawed, argument on appeal. The company contends that the Insurance Commissioner *approved* State Farm's conduct and that this purported approval insulates it from UCL liability for its violation of § 1861.02(c). (RB 26-27.)

One court has expressed sympathy for insurers making a similar argument. In *Walker v. Allstate Indemnity Co.* (2000) 77 Cal.App.4th 750 ("*Walker*"), the First District Court of Appeal barred a suit seeking damages for excessive automobile insurance *rates* charged by State Farm

---

[2] For convenience, the four statutory provisions are reproduced together in Attachment 1.

and other insurers, on the ground that the rates had been approved by the Commissioner.

Amicus will demonstrate, in Discussion Section IIIA, that *Walker* was wrongly decided, and should not be followed by this Court. A different perception of what is fair cannot form the basis for supplying language that is not in the Insurance Code. Like the trial court and State Farm here, the First District in *Walker* misconstrued vestigial §§ 1860.1 and 1860.2, giving them precedence over the superseding provisions of the later-enacted Proposition 103. When the statutes are properly construed, one sees that the *Walker* decision defeats the voters' plain purpose, expressed in §§ 1861.10(a) and 1861.03(a), and conflicts with the California Supreme Court's decision in *Farmers*. The voters expressly mandated that insurers be subject to UCL enforcement for violations of Proposition 103, and made no distinction between whether such violations are approved by the regulatory agency or not. Proposition 103 precludes, rather than establishes, the application of the "filed rate doctrine" to insurance rates in California. This brief will show that the equitable powers of the courts, supplemented by the superior courts' ability to invoke the *Farmers* primary jurisdiction doctrine, are sufficient to protect the legitimate interests of insurers in the Proposition 103 environment, without denying consumers the opportunity to obtain judicial redress.

Walker must, at the very least, be distinguished, on three separate grounds. First, *Walker* does not apply to *unapproved* conduct. Nothing in the record demonstrates that the Commissioner did in fact approve the challenged conduct. Second, an administrative agency has no authority to approve the violation of a statute; such an agency action would be *ultra vires*. And third, *Walker* forbade a lawsuit seeking damages from insurers for charging excessive *rates.* Though State Farm has tried mightily to muddy the difference, this case is *not* about State Farm's *rates*, but rather

whether it is improperly applying conditions when determining an individual's *premium*. Discussion Section IIIB.

BACKGROUND

The changes wrought by Proposition 103, and the meaning of the vestigial provisions of prior law that Proposition 103 did not repeal, are at the heart of this case. We therefore begin with a history of the two relevant statutory regimes, the McBride-Grunsky Insurance Regulatory Act of 1947 and Proposition 103, which replaced it in 1988.

A. McBride-Grunsky Immunized Insurers and Denied Consumers the Right to Challenge Insurer Misconduct in the Courts.

McBride-Grunsky was the product of the insurance industry's determination to limit governmental regulation of its conduct.

The initial impetus was a series of judicial decisions subjecting insurers to the antitrust laws. (*See United States v. Underwriters Assn.* (1944) 322 U.S. 533.) The industry turned to Congress for relief, and it enacted the McCarran-Ferguson Act ("McCarran"), exempting insurers from federal antitrust law to the extent that state laws regulated insurance. (15 U.S.C. §§ 1011-1015.) At the behest of the insurance lobby, every state legislature proceeded to enact laws to meet the federal standard for exemption.[3]

---

[3] For a thorough history of McCarran, *see Smith v. Pacificare Behavioral Health of California* (2001) 93 Cal.App.4th 139, 149-152. *See also* Sidney L. Weinstock and John R. Maloney, *History and Development of Insurance Law in California*, West's Insurance Code Annotated LXVI (1971).

California's enactment, McBride-Grunsky,[4] explicitly authorized insurance companies, in setting rates, to engage in joint conduct which would otherwise have been a violation of antitrust laws.[5] 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).[6]

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 prohibited

---

[4] Exhibit A of the accompanying Motion for Judicial Notice ("MJN") sets forth the text of McBride-Grunsky Act as enacted and amended through the passage of Proposition 103. (Hereafter, "Exh." refers to exhibits attached to the MJN.)

[5] McBride-Grunsky's principal purpose was to "authorize cooperation between insurers in ratemaking and other related matters." (*See* former Cal. Ins. Code § 1853, added by Stats. 1947, c. 805, § 1, p. 1898, repealed by Proposition 103; *accord* MJN Exh. B [Letter from J.R. Maloney, Deputy Insurance Commissioner, on behalf of Wallace K. Downey, Insurance Commissioner, to Gov. Earl Warren, June 10, 1947, pp. 1-2].)

In setting rates, insurers relied on insurer-controlled "rating" organizations that collected loss data, projected that data into the future, and then disseminated proposed rates to insurers. Under McCarran, such activity could escape federal antitrust liability only if expressly authorized by state insurance law. (*See, e.g.,* Angoff, *Insurance Against Competition: How the McCarran-Ferguson Act Raises Prices and Profits in the Property/Casualty Insurance Industry* (1988) 5 Yale J. on Reg. 397.)

[6] All three former sections were added by Stats. 1947, c. 805, § 1, p. 1898-1899, and repealed by Proposition 103.

administrative regulation of insurers' rates and practices;[7] insurers were not required to *file* their rates or underwriting plans with the Insurance 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] Under the statutory scheme, insurers faced no regulatory accountability.

McBride-Grunsky also insulated insurers from judicial accountability. Sections 1858-1859.1 established an administrative complaint process that provided the Insurance Commissioner with "exclusive jurisdiction" over objections to an insurer's rates, premiums or 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 Insurance Commissioner, who could summarily deny a hearing in its sole discretion. Hearings could be held in secret.[11] Should a hearing substantiate misconduct, the Commissioner could provide prospective relief only. ***The Commissioner***

---

[7] Former §1850, added by Stats. 1947, c. 805, § 1, p. 1896, repealed by Proposition 103.

[8] *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 240 ("*20th Century*"). ("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 forms of insurance.'" (*Id.* at 240, *quoting King v. Meese* (1987) 43 Cal.3d 1217, 1221.)

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

[10] *See* §§ 1850, 1852(d), added by Stats. 1947, c. 805, § 1, p. 1897, repealed by Proposition 103.

[11] *See* § 735.5(c), which § 1860.3 applied to the McBride-Grunsky Act.

had no authority to order refunds, restitution or disgorgement.[12] Judicial review was available only by way of administrative mandamus under Code of Civil Procedure section 1094.5. (§ 1858.6.)

This miserly administrative process was rarely invoked and, according to state records, never resulted in a successful challenge to an insurer's rates.[13]

Finally, McBride-Grunsky erected an extraordinary shield from judicial oversight in the provisions whose residual scope after Proposition 103 is a core issue in this case: §§ 1860.1 and 1860.2.

Section 1860.1, in language that closely parallels McCarran,[14] reads:

> 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.

(§ 1860.1.)

---

[12] Sections 1858 – 1859.1 (amended 1977, 1979, 1984, 1987 and 1989). It was noted that the absence of such authority "puts a premium upon stalling and delay in the Commissioner's proceedings." (See MJN Exh. C [Letter from Harold B. Haas, Deputy Attorney General, California Dept. of Justice, to Gov. Earl Warren, June 11, 1947], p. 6.) These sections were amended in 1987 to enable a consumer to file a complaint directly with the Commissioner.

[13] An investigation "was unable to find a single formal determination made by the Department in the past 25 years that a rate is excessive." (Commission on California State Government Organization and Economy, *A Report on the Liability Insurance Crisis in the State of California*, July 1986, p. 29.)

[14] McCarran provides that no federal law shall "invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance unless such Act *specifically relates to the business of insurance.*" (15 U.S.C. §1012(b), emphasis added.)

The phrase "authority conferred by this chapter" had a very specific meaning: it referred to the statutory authority conferred on *insurance companies* to engage in concerted activities that, were they not expressly authorized by McBride-Grunsky, might violate the antitrust laws. This is confirmed by the legislative history of § 1860.1, including analyses by the Insurance Commissioner (MJN Exh. B), and the Attorney General (MJN Exh. C at 3, par. 5, and 13).

With § 1860.1 focused on anti-competitive conduct, its companion provision, § 1860.2, required that "[t]he administration and enforcement of this chapter shall be governed solely by the provisions of this chapter." At that time, Chapter 9 merely provided the administrative complaint process of §§ 1858-1859.1, which required that all challenges to insurers' rates, premiums and practices be brought only – "exclusively" – before the Commissioner. Thus, § 1860.2 foreclosed any judicial remedy except judicial review by means of administrative mandamus (§ 1858.6).

Collectively, these McBride-Grunsky provisions constructed a self-contained fortress within which insurers were impervious. The courts consistently applied them 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 § 1858, and because the challenged conduct was immunized.

Karlin v. Zalta (1984) 154 Cal.App.3d 953 ("*Karlin*"), is the oft-cited example from that era. 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 § 1852 of McBride-Grunsky and the Unfair Insurance Practices Act (UIPA) (§ 790, *et seq*.). The Court of Appeal ruled that § 1853 of McBride-Grunsky expressly sanctioned rate-setting collusion. (*Id*. at 970.) It also held that, to the extent that insurance rates were challenged, the

UIPA was completely preempted by §§ 1860.1 and 1860.2. (*Id*. at 969–975.) Finally, the court held that objections to insurance rates could only be raised in the form of an administrative complaint under § 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 986, fn. 23.)

B. Proposition 103 Replaced McBride-Grunsky with a Regulatory Framework that Holds Insurance Companies Accountable in the Courts.

During the liability insurance "crisis" of the 1980's,[15] the failure of the McBride-Grunsky regime became a matter of public outrage. Numerous highly critical reports determined that state law accorded the CDI too little authority to effectively address the crisis.[16] A legislative analysis published at the time concluded that, "[t]he McBride-Grunsky Act must be judged a failure."[17] Other inquiries faulted the Insurance Commissioner for failing to utilize even the limited authority it had.[18]

---

[15] *See, e.g., The Manufactured Crisis* (Aug. 1986) Consumer Rep. 51 p. 544.

[16] *See, e.g.,* Commission on California State Government Organization and Economy, *A Report on the Liability Insurance Crisis in the State of California* (Jul. 1986) pp. 24-30 (Commissioner's powers more limited than in other states, particularly over rates); National Insurance Consumer Organization, *Insurance in California: A 1986 Status Report for the Assembly* (Oct. 1986).

[17] MJN Exh. D (Sen. Claims and Corporations Com., Analysis of Assem. Bill 1687 (1987-1988 Reg. Sess.) July 15, 1987, p. 4 [analyzing legislation amending the McBride-Grunsky complaint process].) (Emphasis in original.)

[18] *See, e.g.,* Auditor General of California, *The Department of Insurance Needs to Further Improve and Increase Its Regulatory Efforts* (June, 1987);

In 1988, the voters replaced the discredited McBride-Grunsky system with a new statutory regime, Proposition 103, imposing substantive regulation upon insurers, and retaining for themselves the authority to enforce those requirements in the courts.

Proposition 103's findings clause stated that "the existing laws [McBride-Grunsky] inadequately protect consumers and allow insurance companies to charge excessive, unjustified and arbitrary rates."[19] To address that inadequacy, Proposition 103 ***explicitly repealed every provision of McBride-Grunsky that was inconsistent with the initiative statute.***[20] (Attachment 2 displays, in tabular form, the little that is left of McBride-Grunsky after Proposition 103.) A few sections of McBride-Grunsky were not expressly repealed because, as explained below (Discussion, Section II), these vestiges of the ruins of McBride-Grunsky were not inconsistent with the Insurance Code as modified by Proposition 103. However, these sections took on very limited functions in the expanded new edifice of Proposition 103.

The voters imposed reforms in five broad categories:

• Immediate rate reductions (§ 1861.01).

• Regulation of rates (§§ 1861.05-1861.09).

• Regulation of automobile premium-setting practices (§ 1861.02; *see also* § 1861.03(c));

Consumers Union, *Bark But No Bite: Toothless Regulation by the Department of Insurance Has Left California Consumers Unprotected* (July, 1987.)

[19] MJN Exh. E sets forth the text of Proposition 103 as enacted by the voters on November 8, 1988.

[20] MJN Exh. E, Section 7 ["Repeal of Existing Law"]. Exhibit A displays these repealed provisions as redlined.

• Elimination of barriers to competition in the marketplace (§ 1861.03(b); *see also* §§ 1861.04, 1861.12); and,

• Public participation and insurer accountability (§§ 1861.03(a), 1861.10(a)).

The last three reforms are at issue here. We now summarize them.

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

Proposition 103 distinguished between "rates" and "premiums," mandating separate procedures for the regulation of insurance rates and the premium-setting practices employed by insurers. The sharp distinction between the two – which State Farm 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, etc.). Under § 1861.05, et seq., Proposition 103 requires insurers to submit proposed rates for *all lines* of property-casualty insurance (*see* § 1861.13) to the Commissioner for prior approval. In submitting such 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 (§ 1861.05(a)) that rates be neither "excessive" nor "inadequate."[21]

This case is not about rates.

---

[21] To justify a rate as reasonable, an insurer must, *inter alia*, estimate its current losses, project future losses and investment income, and determine a reasonable rate of return. (Cal. Code Regs., tit. 10, § 2644.1, et seq.; *see also Calfarm*, *supra*, 48 Cal.3d 805; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216; *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473.)

Under requirements *applicable only to automobile insurance*, an insurer must also obtain approval for the method by which it allocates its total revenue requirement (rate) among its policyholders, i.e., how much *premium* it can collect from each insured motorist. The criteria that an insurer uses to establish a motorist's premium are known as "rating factors."[22]

Section 1861.02 sets forth the special rules governing the use of automobile rating factors. Section 1861.02(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 adopted by the Commissioner 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. (Cal. Code Regs., tit. 10, §§ 2632.5, 2632.7 and 2632.8.)

Each insurer must obtain the Commissioner's approval of its "class plan,"[23] through a process entirely separate from that governing rate applications.[24]

---

[22] The distinction between rates and premiums was discussed in *Spanish Speaking Citizens' Foundation v. Low* (2000) 85 Cal.App.4th 1179, 1186; *see also Karlin v. Zalta*, *supra*, 154 Cal.App.3d 953, 970, fn. 12 (pre-103 case).

[23] "Class plans" are the filings insurers submit to the Commissioner that disclose which of the authorized rating factors the insurer proposes to use, their weight and other required information. (Cal. Code Regs., tit. 10, § 2632.3.)

[24] Contrary to State Farm (JA 27), the procedures governing approval of automobile class plans (§ 1861.02(d) and Cal. Code Regs., tit. 10, § 2632.1, et seq.) are completely separate and distinct from those governing property-

Proposition 103 specifically bars one – and only 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*, *supra*, 43 Cal. 3d 1217, 1225.)[25] To promote their purpose of making insurance "available and affordable to all" (MJN Exh. E [Prop. 103], § 2 [Purpose]), the 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(c), emphasis added.)

The "absence of prior insurance" may not be utilized either as a rating factor or to determine "insurability," i.e. eligibility for a policy. State Farm's "eligibility guideline" (JA 62) is *not* an approved rating factor; Poirer challenged it as a violation of § 1861.02(c).

2. Proposition 103 Repealed the Insurance Industry's Immunity from the Antitrust Laws, Replacing it with Narrow Exceptions.

To effectuate its goal of increasing competition in the marketplace, Proposition 103 eliminated the insurance industry's exemption from the antitrust laws: it repealed the McBride-Grunsky era provisions that

---

casualty *rate* applications, including auto 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. The only link between the two is that §1861.02(a)(4) declares that failure to abide by its premium-setting requirements would render an insurer's *rates* "unfairly discriminatory" for purposes of § 1861.05(a).

[25] The Court noted that insurers in some parts of the State "often impose[d] so many restrictions (e.g., no prior insurance precludes application) that . . . insurance… [was] inaccessible." (*Id*. at 1239.)

explicitly authorized joint conduct that would otherwise violate the antitrust laws: former §§ 1853, 1853.6 and 1853.7. It also repealed McBride-Grunsky statutes that authorized the creation of "rating organizations":[26] former §§ 1854 – 1854.5. Finally, it expressly made California's antitrust law – the Cartwright Act – applicable to the industry through § 1861.03(a).

After Proposition 103, Chapter 9 authorizes very little anti-competitive conduct. Section 1861.03(b), however, created a narrow "safe harbor" provision for certain activities between two or more insurers:

> Nothing in this section shall be construed to prohibit (1) any agreement to collect, compile and disseminate historical data on paid claims or reserves for reported claims, provided such data is contemporaneously transmitted to the commissioner, or (2) participation in any joint arrangement established by statute or the commissioner to assure availability of insurance.

Additionally, Proposition 103 did not repeal several provisions of McBride-Grunsky that permit other joint activities, such as § 1853.5 (concerted action among insurers with common ownership or management); § 1853.8 (agreements to apportion risks); § 1855 (operation of advisory organizations); § 1856 (joint underwriting and reinsurance).

Thus, § 1860.1, which immunizes acts taken by insurers "pursuant to the authority conferred by [Chapter 9]," *still serves its traditional purpose* by providing *some* immunity for certain joint conduct. The basic *meaning* of that section remains unchanged; however, the *scope* of the immunity it confers has contracted.

---

[26] *See supra* footnote 5.

3. Proposition 103 Created a Broad Private Right of Action to Permit 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 shield erected by its predecessor, McBride-Grunsky, could not be more vivid.

Throughout Proposition 103, the voters manifested in plain terms its intent to retain an active role in ensuring the proper implementation and enforcement of the provisions of Proposition 103. The measure requires notice, disclosure, and the opportunity for public participation in the matters governed by the measure. (*See, e.g.,* § 1861.05, et seq.) It also made the Insurance Commissioner an elected official, accountable directly to the voters. (§ 12900.)

While under Proposition 103, "much is necessarily left to the Commissioner,"[27] the voters chose not to leave *everything* to the Commissioner. Thus, they established in § 1861.10(a) an independent check upon the conduct of insurance companies (as well as the Commissioner):

> 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(a), clause numbers in brackets added.)

Section 1861.10(a) confers on members of the public an *unqualified* right to seek administrative *or* judicial redress against any insurer as well as

---

[27] *Calfarm*, *supra*, 48 Cal.3d 805, 824.

against the Commissioner. In particular, anyone may "initiate . . . any proceeding" that Chapter 9 "permit[s] or establishe[s]"; and anyone may "enforce any provision of" Proposition 103.[28]

Under McBride-Grunsky, before Proposition 103, Chapter 9 did not "permit[] or establish[]" any proceeding other than the often-futile grievance proceeding allowed by § 1858, et seq. But a key section of Proposition 103 changed that decisively. Section 1861.03(a) states:

> The business of insurance shall be subject to the laws of California applicable to any other business, including, but not limited to, the Unruh Civil Rights Act (Civil Code Sections 51 through 53), and the antitrust and unfair business practices laws (Parts 2 and 3, commencing with section 16600 of Division 7, of the Business and Professions Code).

Sections 1861.10(a) and 1861.03(a) of Proposition 103 changed the landscape of Chapter 9, directly affecting the scope (but *not the meaning*) of the two vestigial provisions on which State Farm rests its case. The concerted activities immunized by § 1860.1 are now sharply limited by Chapter 9. And no longer does § 1860.2 have the effect of prohibiting private enforcement actions in the courts. While it remains the case that "[t]he administration and enforcement of this chapter [are] governed solely by the provisions of this chapter," the provisions of this chapter – Chapter 9 – now include § 1861.03(a), which subjects the insurance industry to all state-law remedies, without exception, and § 1861.10(a), which allows any person to enforce those remedies.

The Commissioner's formerly "exclusive jurisdiction" under § 1858 now gives way to the alternative remedies provided by §§ 1861.03(a) and 1861.10(a). Consumers now can elect to employ the less costly, less complicated administrative process for the resolution of minor individual

---

[28] No court has methodically reviewed subdivision (a)'s three clauses.

grievances, or they can choose the more powerful judicial forum when desirable – the latter without any requirement of exhausting administrative remedies. (*Farmers, supra*, 2 Cal.4th 377, 394.)

In sharp contrast to McBride-Grunsky, the voters made insurers subject to UCL enforcement for violations of Proposition 103, without regard to action taken by the Commissioner, making no distinction between "approved" and "unapproved" conduct. UCL liability incentivizes carriers to ensure their own compliance with the mandates of the law and allows private attorneys general to ensure that illegal charges would be enjoined and overcharges repaid to policyholders.

The voters' decision to establish a private right of action in place of McBride-Grunsky's impoverished scheme recognized six practical realities:

• Proposition 103 imposes many obligations and responsibilities upon both insurance companies and the Commissioner, in contrast to McBride-Grunsky, which imposed none.

• Budgetary and staffing considerations necessarily limit the ability of CDI's staff to ensure that each insurance company's filings comply with applicable laws and regulations.[29]

---

[29] The CDI oversees roughly 800 property-casualty insurance companies with $38 billion in premium volume in 2001 (National Association of Insurance Commissioners, *2000 Insurance Department Resources Report* (2001) pp. 33, 40-41). To regulate this market, CDI in 2000 had only four actuaries on staff (*id*. at 5), and 27 market conduct examiners (*id*. at 6). CDI's 140 complaint analysts contended with over 30,000 complaints and 422,000 inquiries in 2000 (*Id*. at 57). Between 1991 and 2001, the CDI brought a total of 159 enforcement actions. (See http://www.insurance.ca.gov/Consumer-Alert/Insurer.htm, visited May 27, 2002.) Finally, the CDI has contended with budget deficiencies. (Liedtke, *Need to Cut Insurance Agency Challenged*, Contra Costa Times, Aug. 14, 1996, p. 1C.)

• Similar constraints limit CDI's ability to effectively police insurers' conduct in the marketplace. Private enforcement thus provides a necessary deterrent function.[30]

• CDI lacks administrative authority to order restitutionary relief.

• Independent enforcement would be necessary in the event that the Commissioner failed or declined to protect consumers' rights.

• The judicial branch is uniquely independent from the economic influence that might be brought to bear upon the Commissioner.

DISCUSSION

I.

UCL Suits Challenging an Insurer's Violation of Chapter 9 are Expressly Authorized By Proposition 103.

The principal issue in this case is the meaning of § 1861.10(a). Coupled with § 1861.03(a), it affords Poirer the right to bring this UCL action. This private right of action has never been seriously disputed, either before the California Supreme Court definitively resolved the question in *Farmers,* or since.

State Farm now asserts that in fact Proposition 103 does not create a private right of action for violations of Chapter 9, but rather, only specifies "who" may bring administrative challenges to insurers conduct. (RB at 37-39.) That contention is utterly without merit. (*See* Section A.) State Farm further urges this Court to ignore the Supreme Court's dispositive decision

---

[30] Mank, *Is There a Private Right of Action under EPA's Title VI Regulations? The Need to Empower Environmental Justice Plaintiffs* (1999) 24 Colum. J. Envtl. L. 1, 48-49 (private rights of action have been highly instrumental in "protecting individual rights because of the limitations…of administrative enforcement mechanisms").

in *Farmers*, on the supposed ground that the Court was not construing statutes but just common law. That peculiar analysis is equally unavailing. (Section B). The Commissioner's interpretation (Section C), the legislative history (Section D) and State Farm's own positions at the ballot box (Section E) and in another court (Section F) confirm that § 1861.10(a) authorizes this UCL suit.

Once this Court affirms that § 1861.10(a) authorizes a UCL suit, State Farm's "jurisdictional" defense is at an end, regardless of how the Court interprets the vestigial McBride-Grunsky immunity sections that State Farm claims control this case, as will be explained in Part II, below.

A. The Plain Language of Proposition 103 Creates A Private Right of Action for Violation of Chapter 9; State Farm's Contrary Interpretation Violates Every Rule of Statutory Construction.

At the outset, it is important to bear in mind that Proposition 103 is an *initiative* statute adopted by the voters pursuant to their reserved legislative powers. (Cal. Const., art. IV, § 1.) As this Court has noted:

> [I]t is "'the duty of the courts to jealously guard [the people's initiative and referendum power]'…'[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right [to local initiative or referendum] be not improperly annulled.'" [citation]

(*Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal. App. 4th 1473, 1485-1486 (citation omitted)).

Proposition 103 itself offers further guidance as to its interpretation: it provides that the initiative should be "liberally construed" to promote its underlying purposes. (Proposition 103, Stats. 1988, § 8.)

Review of the three clauses in § 1861.10(a) reveals a carefully crafted unqualified private right of action.

Clause [1] specifies that "any person" may "initiate or intervene in any proceeding permitted or established pursuant to this *chapter* [Chapter 9]." (Emphasis added.)

Chapter 9 includes both Proposition 103 and the remains of the McBride-Grunsky Act; therefore, "proceeding[s] permitted or established" by the Chapter include both administrative proceedings *and* civil lawsuits.

The administrative proceedings include the § 1858 administrative complaint process created by McBride-Grunsky; the regulatory proceedings established by § 1861.02 (auto premiums) and § 1861.05, et seq. (property-casualty rates); and agency rulemaking proceedings.

Chapter 9 also includes civil actions made applicable by § 1861.03.

Clause [2] allows "any person" to "challenge any action of the commissioner under this *article* [Article 10, i.e., Proposition 103]." (Emphasis added.)

Clause [3] of § 1861.10(a) specifies that "any person" may "enforce any provision of this *article* [Article 10, i.e., Proposition 103]." (Emphasis added.) Clause 3 creates a private right to go directly to court to enforce the provisions of the insurance code added by Proposition 103.

Section 1861.10(a)'s meaning is plain, and governs. (*Torres v. Automobile Club of So. California* (1997) 15 Cal. 4th 771, 777.)

State Farm's efforts to wriggle out of the statute's plain meaning and emphatic breadth do not succeed. The company asserts that the language "any person may enforce" the provisions of Article 10 refers only to "*who*" may enforce those provisions, not "*the means*" or "*how*" they may be enforced. (RB 37-38.) According to State Farm, it is the vestigial McBride-Grunsky immunity statutes, §§ 1860.1 and 1860.2, which dictate "how" the provisions are to be enforced. State Farm's conclusion is "'any person' may enforce Proposition 103 statutes only through the Chapter 9 mechanism"

(RB 38), which, it assures the Court, "includes a full arsenal of available remedies." (RB 9.)

These are, of course, the formerly "exclusive" administrative remedies that the voters so clearly rejected. Notably absent from that "arsenal" was the ability of an aggrieved consumer to go to court to obtain relief – particularly *restitution* – against an insurer's violation of the law. If participation in administrative proceedings is all that the voters meant, they need not have included § 1861.10(a). Under McBride, "any person" already had the right to pursue administrative remedies. (§ 1858(a).)

In effect, State Farm asks this Court to *revert the Insurance Code to its McBride-Grunsky state*, when Chapter 9 did not "permit[] or establish[]" any proceeding other than the often-futile grievance proceeding allowed by § 1858, et seq.

State Farm does not provide a scintilla of support for its "who" not "how" analysis, nor for its contention that the "proceedings" "permitted or established" by the Chapter refers only to administrative proceedings. The statute does not say, "any ***administrative*** proceeding." It says "***any***" proceeding.

Moreover, State Farm's interpretation of § 1861.10(a) renders § 1861.03(a) surplusage. According to State Farm, the voters made the UCL applicable to insurers by § 1861.03(a), but did not intend to allow themselves to utilize its remedies to challenge violations of Proposition 103. This is a patent absurdity. The voters' will cannot be denied with so facile an argument.

As explained *supra*, it was extreme dissatisfaction with the McBride-Grunsky regime, under which insurers could not be held accountable by either regulators or the courts, which led the voters to enact Proposition 103. Indeed, Proposition 103's chief goal was to make the insurers accountable for their rates and practices directly to the public

through a variety of measures: regulation, public disclosure, an elected commissioner, and the right to enforce their newly enacted reforms directly. State Farm's construction is that the voters, by enacting §1861.10(a), simply re-enacted the "existing law" that they expressly concluded had failed. Such a construction flies in the face of the findings and purposes of the measure, and must be rejected. (*Sanford v. Garamendi* (1991) 233 Cal.App.3d 1109, 1119.)

B. The California Supreme Court's Decision in *Farmers* Affirms the Right to Bring UCL Challenges for Violations of Proposition 103.

In accord with the plain language of the statute, the public's right to enforce Proposition 103 by bringing a UCL action under § 1861.10(a) has been unequivocally affirmed by the California Supreme Court's decision in *Farmers*.

In *Farmers*, the Attorney General, acting under the authority of §§ 1861.03(a) and 1861.10(a), filed suit against an insurer, alleging numerous violations of Proposition 103, including violations of § 1861.02(c). (*Farmers*, *supra* 2 Cal.4th at 381-382.)[31]

Farmers argued that the vestigial McBride-Grunsky immunities barred suit under the UCL. Like State Farm, Farmers framed its defense as a question of the Commissioner's "exclusive jurisdiction." (*Id.* at 394.) In rejecting that argument, the Supreme Court looked to §§ 1861.10(a) and 1861.03(a). Proposition 103, the Court explained, provides "'alternative' or 'cumulative' administrative *and civil* remedies." (*Id.* at 393-394, emphasis added.)

---

[31] The People also alleged that Farmers' *rates* were "unfairly discriminatory" under § 1861.05.

And § 1861.03(a), the Court affirmed, "provides that the insurance industry is subject to, inter alia, Business and Professions Code § 17200, et seq." (*Id*. at 394.) That means that insurers are unconditionally subject to suit in the courts:

> [S]ection 1861.03 does not condition a suit under Business and Professions Code section 17200 on prior resort to the administrative process under the Insurance Code.

(*Farmers, supra*, 2 Cal.4th at 394).

The *Farmers* Court endorsed the discretionary "primary jurisdiction" doctrine, under which courts may *temporarily abstain* from deciding certain matters in order to avail themselves of the technical "expertise presumably possessed by the Insurance Commissioner." (*Id*. at 398.) Primary jurisdiction, it underscored, "applies where a claim is ***originally cognizable in the courts***." (*Id*. at 390, italics in original, emphasis added.) Thus, the Court emphatically distinguished the "primary jurisdiction" doctrine from the McBride-era doctrine of "exclusive jurisdiction," which State Farm champions. When that doctrine governed, before Proposition 103, challenges to an insurer's rates, premiums or practices could only be brought by "exhaustion" of the administrative remedies provided by the § 1858 complaint process. The Court explained: "Exhaustion applies where an agency alone has *exclusive jurisdiction over a case*; primary jurisdiction where both a court and an agency have the legal capacity to deal with the matter." (*Id*. at 390-391, quoting Schwartz, Administrative Law (1984) § 8.23, p. 485, emphasis added.)

State Farm, unable to prevail in this appeal without showing that Proposition 103 provides no private right of action, argues that this Court need not follow *Farmers*. State Farm says that the Supreme Court in *Farmers* addressed only "common law" questions of exhaustion, exclusive jurisdiction and primary jurisdiction, where a claim "was not on its face

asserted pursuant to a regulatory statute" (*ibid*.) and where "there are no statutes controlling the issue of the allocation of authority over the subject matter as between the courts and an agency." (RB 44.)

This is, respectfully, nonsense.

Farmers was manifestly a case of *statutory* construction, in which the issue was whether the McBride-Grunsky era *statutory* doctrines of exhaustion and exclusive jurisdiction applied, or whether a UCL action could be brought under *statutes* enacted by Proposition 103. The Court noted that the UCL complaint "allege[d] violations of specific statutory eligibility rules" (*Farmers, supra, 2 Cal. 4th* at 398), including violation of § 1861.02(c).

In their briefs, the insurer relied upon the McBride-Grunsky era cases applying §§ 1860.1 and 1860.2, such as *Karlin* and *County of Los Angeles*, to argue that the Commissioner had exclusive jurisdiction over challenges to violations of Chapter 9. And just like State Farm here, Farmers argued that "the California Insurance Code provides the Commissioner with a *full framework* by which to remedy complaints arising out of insurance rating or underwriting practices." (MJN Exh. F [Petition for Review, filed February 8, 1991, *Farmers Insurance Exchange v. Superior Court* (1992) 2 Cal.4th 377, (No. S016912)], p. 14, emphasis added.) (*Compare* State Farm's RB at 9-10: administrative process offers "full arsenal" and "complete" system.)

Moreover, contrary to State Farm's assertion, the McBride-Grunsky statutory provisions at issue here were referenced throughout the case. Farmers asserted § 1860.2 as a defense to the suit. That provision was explicitly addressed by the trial court, in the unpublished decision of the Court of Appeal, by amici, and, briefly, by the Supreme Court itself. The Court suggested, in dicta in a footnote, that §1860.2 "appear[ed]" to preclude suit with regard to the *first* cause of action, which directly alleged

violations of §§ 1861.02 and 1861.05. (*Id*. at 382, fn.1.) The question for decision, however, was whether the *second* cause of action, which asserted the very same statutory violations, not directly but as predicate unfair practices under the UCL, was properly asserted. The Court held that it was. Here, §1860.2 was no bar.

If the Supreme Court had believed that Proposition 103 did not authorize a UCL action, it would have reversed the Superior Court and the Court of Appeal, both of which recognized that Proposition 103 authorized UCL actions for violations of Chapter 9. Instead, the Court affirmed.

C. The Insurance Commissioner Confirms The Existence and Importance of the Private Right of Action, and His View is Entitled to Deference.

The Courts properly have the final responsibility when it comes to the interpretation of statutes; however the Insurance Commissioner's interpretation of the statutes he administers has been accorded significant deference. (*Spanish Speaking Citizens' Foundation v. Low*, *supra,* 85 Cal.App.4th at 1213-1216). The Supreme Court recently stated that an administrative agency's interpretation of its statutes "should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language." (*Southern California Edison Co. v. Peevey* (2003) 31 Cal.4th 781, 796, quoting *Greyhound Lines, Inc. v. Public Utilities Com.* (1968) 68 Cal.2d 406, 410-411.)

In a detailed analysis of Proposition 103, the Insurance Commissioner has stated unambiguously that, "Proposition 103 established a private right of action for the enforcement of Division 1, Part 2, Chapter 9, of the Insurance Code." (MJN Exh. G [Amicus Curiae Brief of the California Department of Insurance, filed December 30, 2003, *Donabedian v. Mercury Insurance Company*, Ct. App., Second Dist., Div. One, (No. B159982)], p. 11.)

D. The Legislative History Shows that the Voters Intended to Establish a Private Right of Action.

The Supreme Court has looked to the ballot pamphlet and contemporaneous materials to construe Proposition 103. (*Amwest Surety Insurance Co. v. Wilson* (1995) 11 Cal.4th 1243, 1256.) This legislative history shows that at the time the initiative was proposed and enacted the public's ability to hold insurers accountable was considered of great importance.

Proposition 103's accountability provisions were considered so important to its overall purposes that they were highlighted in the "Argument in Favor of Proposition 103" published in the ballot pamphlet: "[Proposition 103] specifies that a permanent, independent consumer watchdog system will champion the interests of insurance consumers." (JA 570.) The insurance industry's opposing argument tried to turn this legal accountability into a political liability, saying, "PROP 103 would add time, expense and lots of lawyers[.]" (JA 571.)

Absent some indication of a conflict between the electorate's intent and the intent of the initiative's drafter, evidence of the drafter's intent is also an appropriate tool for use in statutory interpretation. (*Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 536.) The Los Angeles Daily Journal published a detailed analysis of Proposition 103, prepared by the proponent, as a special report on July 15, 1988. Such contemporary media accounts are useful to show how the language of the proposal was likely understood by its enactors. (*See*, *e.g.*, *Harrot v. County of Kings* (2001) 25 Cal.4th 1138, 1164, fn. 5 (dis. opn. of George, C.J.).) The analysis states:

> [Proposition 103] provides individual consumers with the *absolute right* to go to the Department of Insurance *or the*

courts should insurance companies fail to comply with their responsibilities. (Emphasis added).

(MJN Exh. H [Rosenfield, *Another Perspective on the Automobile Insurance Crisis, 'Revolting the Insurance Crisis*,' Daily Journal Report (July 15, 1988)], p. 67.)

E. State Farm Sponsored a Ballot Measure to Restore the Insurance Commissioner's "Exclusive Jurisdiction," But It Was Defeated by the Voters, as Were Other Weaker Public Accountability Measures.

Various interests that opposed Proposition 103 sponsored four of their own competing initiatives in 1988. Each of those proposals was rejected. Review of these measures is useful to determine the voters' understanding of Proposition 103; moreover, the voters' rejection of these measures emphasizes the voters' intent to enact the provisions that prevailed. (*Taxpayers v. Fair Political Practices Comm'n*. (1990) 51 Cal.3d 744, 769 ["When competing initiatives are on the ballot, it is possible, if not probable, that many of the votes in favor of each measure were cast by the voters who cast votes against the alternative proposition."].)

Especially informative here is the proposition sponsored by State Farm, submitted to state authorities in response to Proposition 103. Proposition 104 was written so as to cancel out, provision for provision, each portion of Proposition 103 in the event both passed and State Farm's initiative received more votes,[32] as the Official Ballot Summary prepared

[32] Cal. Const., art. II, § 10, subd. (b). Two years later, the California Supreme Court terminated provision-by-provision initiative conflict analysis in *Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission* (1990) 51 Cal.3d 744.

by the Attorney General[33] and the Official Analysis by the Legislative Analyst[34] each noted.

State Farm's proposition sought *in two different sections* to restore the Commissioner's exclusive jurisdiction. Proposed § 12018(f) of Proposition 104 stated:

> The Commissioner of Insurance shall have *exclusive jurisdiction*, subject to judicial review, to administer and enforce this Section…. If the Commissioner finds, after appropriate hearings, that any insurer has failed to comply with this Section, he or she may order such insurer to adopt rates in compliance with this Section and to provide an appropriate remedy for any charges in excess of those permitted by this Section.

(JA 619, emphasis added.)

Moreover, Proposition 104 would have enacted a *new* § 1852(e), stating:

> The commissioner shall have exclusive jurisdiction to enforce this section, subject to judicial review.

(JA 622.)

Plainly, State Farm sought to preserve the "exclusive jurisdiction" doctrine; just as plainly, it believed that Proposition 103's passage would eliminate that doctrine by creating a private right of action in court.[35]

Proposition 104 was overwhelmingly defeated by a 25% to 75% vote of the electorate.[36]

---

[33] Proposition 104 "[c]ancels Propositions 100, 101, 103" (JA 572 [Ballot Pamp., supra, Official Title and Summary of Prop. 104], p. 102.)

[34] (JA 615 ["Reenactment of Insurance-Related Provisions"].)

[35] Proposition 104 also would have cancelled the intervenor compensation provisions contained in § 1861.10(b). (JA 620 [Proposed § 12924.5].)

[36] Proposition 104 results reported at http://holmes.uchastings.edu/ (visited February 21, 2004).

A third ballot measure, Proposition 100, also addressed public accountability, but only authorized participation in administrative proceedings. (*See* Ballot Pamp., *supra*, text of Prop. 100, p. 130 [§ 13601(a)], (JA 600); *Id.*, p. 132 [§ 1852.6], (JA 602).) The voters defeated this weaker measure by a 41% to 59% vote.[37]

The voters' decisive rejection of these conflicting measures is powerful evidence of their intention to enact each provision of Proposition 103, of which they are deemed aware. (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 252.) State Farm's argument here is nothing more than an effort to win from the courts what the company lost at the ballot box in 1988.

F. State Farm Itself Invoked § 1861.10(a) to Participate in a Civil Action, and State Farm Should Be Estopped from Denying its Application Here.

Finally, in at least one prior court proceeding, *State Farm itself has acknowledged and availed itself of the very statutory right it denies exists here.* In 1997, State Farm sought to intervene in an original lawsuit brought by *amicus* FTCR and others, challenging the validity of regulations promulgated pursuant to § 1861.02 of Proposition 103 – the same section whose violation is at issue here. In State Farm's motion, attached as MJN Exh. I, State Farm argued: "Supporting State Farm's right to intervene here is an express statute, Insurance Code §1861.10(a)." (*Id*. at 12.) State Farm then wrote:

> Chapter 9 of Part 1 Division 2 of the Insurance Code governs property/casualty rates and rating practices, and Article 10 contains the provisions adopted by Proposition 103, including Insurance Code § 1861.02(a). This action is itself one

---

[37] Proposition 100 results reported at http://holmes.uchastings.edu/ (visited February 21, 2004).

> brought under § 1861.10(a), "challeng[ing] … action of the commissioner under [Article 10]." [Footnote]. There is no question but this action is one to which § 1861.10(a) applies, and in which State Farm can intervene.

(*Id*. at 12.)

Thus, in order to participate in that civil action, State Farm read the plain language of § 1861.10(a) in just the same way as the voters and the Supreme Court in *Farmers* did. Directly contradicting its argument here – that § 1861.10(a) only authorizes initiation of, or intervention in, *administrative* proceedings – State Farm explicitly acknowledged the application of § 1861.10(a) to permit a *civil proceeding* in Superior Court. State Farm is plainly estopped to make its contradictory argument here. (7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, §§ 283, 284A, p. 823.)

****

State Farm's strategy is obvious. It asks this Court to emasculate the voter-adopted provisions §§ 1861.10(a) and 1861.03(a), so as to avoid any conflict with the vestigial McBride-Grunsky statutes. The preceding discussion has shown that State Farm's interpretation of those provisions must fail.

In any case, as *amicus* will next demonstrate, when the McBride-Grunsky sections are properly construed, they do not conflict with the Proposition 103 provision.

II. Vestigial Sections 1860.1 and 1860.2 Neither Bar Private Lawsuits Nor Immunize Insurers.

State Farm's argument on §§ 1860.1 and 1860.2 comes down to this: the passage of Proposition 103 not only expanded the *scope* of the immunity conferred by those provisions, but radically altered their *meaning* as well. State Farm offers no basis for such a revision of the two statutes

and no law to support such a rule of construction. When properly construed on their own terms, McBride-Grunsky's §§ 1860.1 and 1860.2 retain clear, but limited, meaning under Proposition 103. They provide neither the immunity nor the jurisdictional bar asserted by State Farm. (*See* Sections A and B, below.)

Indeed, those vestigial provisions must, and easily can, be interpreted so as not to conflict with the voters' purpose in adopting §§ 1861.03(a) and 1861.10(a). If State Farm were correct that there is a "conflict" between the older and newer statutes that must be "harmonized," however, then the rules of statutory construction would require that the 1947 statutes be considered repealed *pro tanto* by implication. (*See* Section C.) The cases cited by State Farm do not support its argument. (*See* Section D.)

A. By Its Own Terms, § 1860.1 Does Not Apply to Immunize State Farm's Conduct.

To avail itself of § 1860.1, an insurer must meet two conditions:

1. Its "act," "action" or "agreement" must be "taken or . . . made pursuant to the authority conferred by this chapter" – a chapter which no longer includes the broad immunities of former §§ 1853, 1853.6 and 1853.7, but rather a far more limited set of immunities.
2. The "law[s] of this State" from which the insurer seeks immunity from liability are only those "which do[] not specifically refer to insurance."

State Farm can surmount neither of these hurdles.

1. Chapter 9 does not "confer authority" on State Farm to use an underwriting rule that Proposition 103 expressly prohibits.

State Farm contends that any conduct, lawful or unlawful, is immunized under § 1860.1, because its "class plan" was approved by the

Commissioner. State Farm asserts that its "action" (of charging an allegedly illegal premium) was "taken… pursuant to the authority conferred by this chapter" *upon* State Farm *by* the Commissioner. (RB at 33.)

For this analysis of the statute, State Farm relies upon one case – the First District's decision in *Walker, supra*, 77 Cal.App.4th 750. (RB at 26.) That court concluded that:

> Whatever else the amended McBride Act does, it definitely confers authority *upon the commissioner to approve rates*.

(*Walker, supra*, 77 Cal.App.4th 750, 756, emphasis added.)

Failing to properly parse the statute's grammar and syntax, the *Walker* court misread § 1860.1. It simply cannot be construed to "authorize" illegal rates, much less practices, even if purportedly approved by the CDI.

(In Part III, below, we explain further why *Walker* is wrongly decided and why, in any event, it is readily distinguishable.)

As enacted in 1947, § 1860.1 immunized only certain *joint* activities of two or more insurers, as did its McCarran counterpart. It did not provide immunity from other laws, nor did it apply to conduct by one insurer acting alone. (*See* Background, pp. 16-17 and footnote 5, above; *accord Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 282.) Proposition 103 did not expand that immunity; to the contrary, it restricted it sharply. Moreover, McBride-Grunsky never authorized the Commissioner to approve rates (indeed, it specifically forbade such regulation). Only Proposition 103 provides such authority.

State Farm grudgingly acknowledges the plain meaning and application of § 1860.1 under McBride-Grunsky. (RB at 25.) However, it contends that the passage of Proposition 103 "altered the scope of § 1860.1's preclusive effect." (RB at 26.) Now, according to State Farm,

§ 1860.1 is no longer limited to the concerted conduct of *multiple* insurers, but extends as well to an *individual* insurer's unlawful practices. (*Ibid*.) Nowhere in Proposition 103 is there any evidence that the voters intended to expand the statutes passed by legislators in 1947, much less negate their own enactment of §§ 1861.03(a) and 1861.10(a) – quite the contrary.

But State Farm's argument would do more than just greatly "alter[] the *scope* of § 1860.1"; it would mandate a radical change in its *meaning*. State Farm's argument is that, after the passage of Proposition 103, an antitrust immunity that formerly attached to the concerted conduct of multiple insurers now attaches to an individual insurer's violation of the Proposition's consumer protections. We are unable to locate a principle of statutory construction that would sanction such a sweeping transformation of the plain meaning of forty-year old statutory language.

Indeed, State Farm's construction collapses into nonsense upon close inspection. Section 1860.1 confers *immunity upon insurers* for certain *acts of insurers* – specifically, those which they take jointly "pursuant to the authority conferred by this chapter." Any logical reading must conclude that the immunity flows to *the same parties* who engage in the authorized act.

State Farm's reading hopelessly violates the grammar and logic of the statute, as well as its history. First, the insurer argues that the ***"act done" refers to the Commissioner's approval*** of State Farm's class plan. (RB 26.) If so, the immunity would flow to the Commissioner – not to the insurer – an absurd result never intended by the 1947 Legislature.

This reading is absurd not only because § 1860.1 confers immunity on insurers, not on the Commissioner, but also because it confers immunity on insurers who act *jointly*, not on an insurer's unilateral wrongdoing. Not surprisingly, State Farm's analysis is unable to account for the phrase

"agreement made" in the statute. Neither the Commissioner, nor State Farm, can make an agreement with itself.

State Farm offers yet another reading of the statute. It contends that the Commissioner approves its class plan "pursuant to the authority conferred by" Chapter 9, and the insurer is obligated to use the class plan so-approved. Now it suggests that the ***"act done" is the insurer's action of "collecting premiums."*** (RB 27.) However, this too is a grammatical impossibility. The authority of a specific company to "collect" a premium comes only from the Commissioner when he approves a class plan ; it is not "conferred by" the statutory provisions in chapter 9.

The table below compares the uniformity of the traditional reading of § 1860.1 with the syntactical and grammatical chaos of each of State Farm's conflicting interpretations.

	"Act done, action taken or agreement made"	**"Authority conferred by this chapter" (Code sections)**	**Whom chapter "confer[s]" authority upon**	**Who would get the immunity**
McBride-Grunsky	Joint conduct	1853, 1853.6, 1853.7	Insurers	Insurers
Prop. 103	Joint conduct	1861.03(b), 1853.5, 1853.8, 1856	Insurers	Insurers
State Farm #1	Approval of rates, premiums (even if unlawful)	1861.02, 1861.05	Commissioner	Commissioner
State Farm #2	Collecting premiums (even if unlawful)	(none; rate/premium approval comes from Commissioner)	(no statutory authority is conferred on insurers)	(no statutory immunity is conferred on insurers)

To support State Farm (or *Walker's*) interpretation of § 1860.1, it would have to read:

"pursuant to the authority conferred by the chapter *upon the commissioner and by the commissioner upon an insurer*."

But § 1860.1 doesn't say that.

The California Supreme Court decisively rejected State Farm's construction of § 1860.1 in a case concerning an *identical* provision in the workers' compensation law. In *State Compensation Insurance Fund v. Superior Court* (2001) 24 Cal.4th 930 ("SCIF"), the insurer argued that its conduct was immune from suit under § 11758 of the workers compensation law, a virtually identical twin of § 1860.1. (*Id.* at 939-940.) The insurer's theory was that its reporting of allegedly-incorrect data was an "act done" pursuant to the article in which section 11758 is found. The Supreme Court rejected that construction, stating that the statute:

> refers to an "act done, action taken or agreement made *pursuant to the authority* conferred by this article ...." It does not refer to an "act done, action taken or agreement made pursuant to this article."

(*Id.* at 936, emphasis in original.)[38] The Court went on to explain that the phrase "the authority conferred by this chapter" refers to "cooperation between insurers." (*Id.* at 936.)

Finally, State Farm's construction ignores the continuing meaning of § 1860.1 as an antitrust immunity statute under Proposition 103. As noted previously, Proposition 103 provides a very narrow "safe harbor" for certain joint conduct (§ 1861.03(b)), and did not repeal several provisions of McBride-Grunsky that authorized joint activities. Thus, the voters

---

[38] Having ruled that the very interpretation of the statute made by *Walker* was incorrect, the Court also distinguished *Walker* in dicta, on the ground that it applied to challenges to approved *rates*. (*Id*. at 942.) That same distinction can be made here. *See* Section IIIB, below.

retained § 1860.1 as part of Chapter 9 because it *still provides some immunity* for insurers' joint actions, as it did under McBride-Grunsky. Now, however, the scope of that immunity is sharply limited. (Deprived of this analysis, the *Walker* court was unable to glean "any meaning whatsoever" from § 1860.1 and thus relied on its own faulty construction. (*Walker, supra*, 77 Cal.App.4th at 756.))

In summary, State Farm's conduct is not protected by § 1860.1 because the act for which State Farm seeks immunity from liability is not any form of concerted activity. Rather, State Farm seeks immunity for its unilateral violation of § 1861.02(c). Nothing in Chapter 9 – neither in the remnants of McBride-Grunsky nor in Proposition 103 – confers on an insurer the "authority" to base premiums on the prior-insurance status of a driver. To the contrary, Proposition 103, in § 1861.02(c), expressly *prohibits* an insurer from so doing.

2. Section 1861.03(a), which references the UCL, "specifically refer[s] to insurance."

State Farm also fails to meet the second requirement of § 1860.1. If a law "specifically refer[s] to insurance," § 1860.1 is no bar to suit or liability.

The law that imposes the liability that State Farm seeks to escape here is Proposition 103, a law that specifically refers to nothing but insurance. "All of the provisions of Proposition 103 relate generally to the cost of insurance or the regulation thereof...." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 842.) One of those provisions in particular, § 1861.03(a), expressly incorporates by reference the provisions of, *inter alia*, the UCL. Section 1861.03(a) provides that "[t]he business of *insurance* shall be subject to the laws of California applicable to any other business, including…unfair business practices laws...." (§ 1861.03,

emphasis added.) Because § 1861.03(a) specifically refers to insurance within the meaning of § 1860.1, UCL cases can be brought against insurers.

State Farm seems to acknowledge that Proposition 103 made the UCL applicable ("this action does not 'constitute a violation of' any law that does not refer to insurance – including the UCL..." (RB 33), and it opines that "there are and will continue to be hundreds of cases that include UCL claims filed against insurance companies each year." (RB 36.) Under State Farm's interpretation of §§ 1860.1 and 1860.2, however, *none of those suits could be brought for violations of the very law that made the UCL applicable: Proposition 103*.[39] State Farm would orphan § 1861.03(a).

B. By Its Own Terms, § 1860.2 Does Not Apply To Immunize State Farm's Conduct.

The inapplicability of § 1860.2 to Poirer's lawsuit is just as clear as that of § 1860.1. Section 1860.2 specifies which laws apply in the "enforcement" of the provisions of Chapter 9. Its first sentence reads:

> The administration and enforcement of this chapter [Chapter 9] shall be governed solely by the provisions of this chapter.

Accordingly, if the provision that authorizes Poirer's enforcement action is found in Chapter 9, then the first sentence of this section is by itself dispositive. That is, in fact, the case. Poirer's suit against State Farm is based on the express authority of Chapter 9: § 1861.10(a) authorizes "any person" to "enforce any provision of" Proposition 103, and Section 1861.03(a) explicitly authorizes enforcement *under the UCL*.

The second sentence of § 1860.2 addresses the applicability of statutes that are *not included* in Chapter 9:

---

[39] The voters were not required to reenact the UCL within the Insurance Code.

> *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…. (Emphasis added.)

This sentence forbids the application of other laws, with one critical exception: "[e]xcept as provided in this chapter." Again, the answer is simple: Proposition 103's provisions are within the chapter. Put another way, Chapter 9 *provides* for its private enforcement through the UCL.

On this point, State Farm has no answer, other than to obstinately repeat that "Chapter 9… does not include a right to bring a UCL action, or any other original civil action." (RB at 23.) To the contrary, that right is clear (*see* Section I, above), and is fatal to State Farm's argument.

C. State Farm's Interpretation of §§ 1860.1 and 1860.2 Would Place Them in Conflict With Proposition 103, and Result in Their Repeal by Implication.

To determine the vestigial meaning of the two McBride-Grunsky statutes the voters left in place upon enacting Proposition 103, the correct course is the one *amicus* has followed here: first, attend to the plain meaning of the initiative's provisions, and then determine what role remains for those unrepealed McBride provisions. State Farm takes the opposite approach and, not surprisingly, bestows a scope and meaning on the vestigial provisions that conflicts with Proposition 103. As we have shown, the vestigial provisions, when properly construed, are internally consistent and harmonious with the new structure the voters erected in Proposition 103.

State Farm's interpretation of the McBride-Grunsky provisions, on the other hand, results in an irreconcilable conflict between them and the plain language of the later-enacted provisions of Proposition 103. That construction is not only illogical, but defies the rules of statutory construction, particularly those that safeguard the will of the voters. The voters did not *sub silentio* preserve McBride-Grunsky's immunities and

prohibition on private actions at the same time that they expressly repealed those immunities, applied state laws, and authorized private actions.

If, however, the Court were to accept State Farm's interpretation of the 1947 statutes, the proper result under California law would be to hold the McBride-Grunsky provisions repealed, to that extent, by implication. (*Burlington Northern and Santa Fe Railway Co v. Public Utilities Commission* (2003) 112 Cal.App.4th 881; *accord People v. Bustamante* (1997) 57 Cal.App.4th 693, 700-701.) That such repeals are disfavored (as State Farm acknowledges) is simply another reason to reject State Farm's interpretation of §§ 1860.1 and 1860.2.[40]

D. No Other Case Law Supports State Farm's Interpretation of the Four Statutes At Issue Here.

Seeking to escape the plain language of the statute and the *Farmers* decision, State Farm falls back on two cases that address statutes governing lines of insurance *that do not come within Proposition 103*: *Quelimane Co. v. Stewart Title Guaranty Co*. (1998) 19 Cal.4th 26 (title insurance) and *SCIF, supra*, 24 Cal. 4th 930 (workers' compensation). Each case construes a provision modeled on vestigial § 1860.1. State Farm cites neither case for any proposition contained therein; indeed, both cases *upheld* a right to sue under the UCL. Rather, State Farm believes that in each case, the UCL suit *would have been barred* had the action fallen within the scope of the immunity. (RB 28-29.)

These cases suit State Farm's legal strategy perfectly, because they arise in statutory schemes like the one that governed automobile insurance

---

[40] Contrary to State Farm (RB 37), that Proposition 103 did not repeal §§ 1860.1 and 1860.2 while it repealed other provisions of McBride-Grunsky cannot be construed to mean that it intended those provisions to override the newly-enacted provisions of Proposition 103. (*See Burlington Northern, supra,* 112 Cal.App.4th at 890.)

before the voters enacted Proposition 103. While both title insurance and workers compensation insurance include an analog to McBride's antitrust immunity for concerted action, neither includes any provision analogous to the key voter-adopted statutes here: §§ 1861.03(a) and 1861.10(a). For this very reason, *Quelimane* and *SCIF* are of no more help to State Farm than would be a pre-103 case like *Karlin, supra*.

III.

Walker's Erroneous Construction of §§ 1860.1 and 1860.2 Should Not Be Followed, Much Less Extended, By This Court.

To summarize the analysis so far: Part I demonstrated that §§ 1861.10(a) and 1861.03(a) bestow a broad right of private action for violations of Chapter 9. State Farm's construction, denying that right, ignores the plain language of those provisions.

Part II showed that State Farm's interpretation of the vestigial McBride-Grunsky provisions, §§ 1860.1 and 1860.2, is equally flawed. Sections 1860.1 and 1860.2 retain their traditional meaning under Proposition 103, but their scope has been greatly narrowed. Thus, they in no way conflict with the Proposition 103 provisions.

All that State Farm is left to rely on is the First District's decision in *Walker*.

In *Walker*, plaintiffs filed a class-action lawsuit against 78 insurance companies, as well as then-Commissioner Chuck Quackenbush, challenging as "excessive" auto insurance ***rates*** that had been approved by the Commissioner over the preceding three years. The plaintiffs demanded disgorgement and punitive damages. The insurers demurred, arguing that §§ 1860.1 and 1860.2 immunized them from suit for damages based on their use of approved rates. The First District agreed. (*Id*. at 754.)

Walker was wrongly decided, as Section A will show, and this Court should not accept its faulty reasoning. Even if this Court believes that *Walker* was correct on its facts, however, it should decline to extend it to the very different circumstances alleged here. *Walker* can, and must, be distinguished. (*See* Section B.)

A. *Walker* Erroneously Permitted the Vestigial McBride-Grunsky Statutes to Nullify Proposition 103's Provisions, in Violation of Controlling Supreme Court Precedent.

The decision in *Walker* is demonstrably erroneous for four reasons:

1. The *Walker* court construed § 1860.1 incorrectly.

As discussed in Section II(A) above, *Walker* failed to properly analyze § 1860.1. (*Walker* said nothing about § 1860.2 other than to reference it jointly with § 1860.1). The grammar and syntax of the subdivision simply do not permit a reading under which the commissioner is "authorized" by Chapter 9 to "authorize" an insurer's violation of law.

2. The First District failed to follow the California Supreme Court's decision in *Farmers,* which controls.

The *Walker* court tried to distinguish *Farmers*, stating:

> [T]he *Farmers* court did not consider whether an Unfair Business Practices Act claim *arising in an exclusively rate-making context* could be brought in the superior court in light of the immunity provided in Insurance Code sections 1860.1 and 1860.2.
>
> (*Walker*, *supra*, 77 Cal.App.4th 750, 759, emphasis added.)[41]

The court misread *Farmers*. *Farmers* expressly rejected the contention that court challenges to rates were barred. (*Farmers*, *supra*, 2 Cal.4th at 387, fn.

---

[41] It is worth noting that even *Walker* seems to acknowledge what State Farm here denies: that UCL cases *can* be brought to enforce Chapter 9, as long as they do not involve "exclusively rate making" issues. (*Ibid.)*

7.) The Supreme Court repeatedly noted that the issue it was addressing was whether a challenge to an insurer's *rate* as "unfairly discriminatory" under § 1861.05 was one that could be brought before a court. (*Farmers, supra,* 2 Cal. 4th at 382, 385, 398, and 399.) It held it could.

3. The *Walker* court misapplied other precedents.

The *Walker* court cited *Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305 and *Karlin v. Zalta* (1984) 154 Cal.App.3d 953, for the proposition that the Insurance Commissioner has "exclusive jurisdiction" over ratemaking. (*Walker*, *supra*, 77 Cal.App.4th 750, 755.) But these pre-Proposition 103 cases construing the McBride-Grunsky Act are irrelevant to questions of the application of Proposition 103.

Walker also mischaracterized two other cases, *Quelimane Co. v. Stewart Title Guaranty Co*. (1998) 19 Cal.4th 26, and *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, as recognizing statutory exceptions to the viability of UCL cases against insurers after Proposition 103 "for rate-making decisions." (*Id.* at 759.) For the same reason that pre-103 cases do not answer the question before this Court, neither do cases construing portions of the insurance code to which Proposition 103's unique provisions do not apply.

4. *Walker* Improperly Attempted To Establish A "Filed-Rate Doctrine" With Respect To Insurance Rates.

As discussed previously at Background, p. 14, revenue needs of insurance companies are estimated within a range bounded by the "excessive/inadequate" standards. (§ 1861.05.) There is no uniquely "correct" rate. Because the reasonableness of a rate is a mixed question of

law and fact,[42] requiring expertise and judgment, courts are reluctant to substitute their judgment for those of rate regulators. Some federal courts have therefore imposed the "filed-rate doctrine" to immunize from private challenge rates previously approved as not excessive by an administrative agency. (*See, e.g., Wegoland Ltd. v. Nynex Corp* (2003) 27 F.3d 17, 19.)

The *Walker* court imposed the equivalent of the "filed-rate doctrine" (while disavowing that it was doing so). (*Walker*, supra, 77 Cal.App.4th 750, 757, fn. 4.) But the statutes *Walker* cited do not supply authority for a filed-rate doctrine. Indeed, it is inconsistent with the Proposition 103 statutory scheme approved by the voters, as the Attorney General of California has recognized. In a detailed statutory analysis, the Attorney General concluded that, "the filed rate doctrine does not apply to insurance rates in California."[43]

The insurers will vehemently argue that it is unfair that they be subject to liability once they are able to win the agency's "approval." But the voters had a different view of "fairness," and made remedies such as restitution and disgorgement expressly available should an insurer violate the requirements of Chapter 9.

The voters' decision recognized the limits of the regulatory scheme they were enacting. CDI's resources cannot possibly provide the depth and breadth of regulation that the reasoning of the *Walker* court assumed was in place. When each of the eight hundred property-casualty insurers doing business in California wish to change its rates, it must submit an application to the CDI for approval – *for each line of insurance*. Most of these filings receive a cursory review, and the vast majority of applications are

---

[42] *See, e.g.*, *Interstate Commerce Commission v. Union Pacific Railroad Co.* (1912) 222 U.S. 541, 547.

[43] State of California, Department of Justice, *Antitrust Guidelines for the Insurance Industry*, March 1990, p. 22, fn. 44.

automatically "deemed approved" after sixty days.[44] Such mechanical actions cannot be equated to formal agency rulemaking proceedings, or adjudicatory proceedings on rate applications (which have occurred less than a handful of times in the last five years), for which courts would accord greater deference. (*See Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 13; s*ee also* this Court's analysis in *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 607-609.) Indeed, contrary to the apparent assumption of the *Walker* court, 77 Cal.App.4th at 756, ***none of the challenged rates had ever been subject to a hearing.***

As the Commissioner has explained (MJN Exh. G at 12-14), it is impossible for the CDI to catch every mistake, omission or violation of the law.[45] (*Id*. at 19-22.) A rule that immunizes anything that can get past the necessarily limited review provided by the CDI would lead to exactly the abuses Proposition 103 intended to prevent. Instead, the voters imposed potential liability upon insurers, without regard to the actions of the agency, in order to place the burden upon insurers to make sure they are always in compliance with the law.

The interests of insurers are also protected under the framework adopted by the electorate. Courts can apply equitable principles – such as the doctrine of equitable estoppel – to bar or limit restitution if necessary to prevent an unjust result. (*See, e.g., Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 179-180.) Moreover, the primary jurisdiction doctrine articulated by *Farmers* enables superior courts to

---

[44] Ins. Code § 1861.05(c), as amended by Stats. 1992, c. 1257, 1 and Stats. 1993, c. 646, § 1.

[45] It is equally unrealistic to expect that private efforts will provide such scrutiny.

obtain the agency's views on challenges to previously-approved rates.[46] It is highly unlikely that an insurance commissioner would overturn a previous finding of "reasonableness" absent circumstances strongly militating in favor of relief – and even then, under *Farmers*, the superior court would have the last say.

B. *Walker* Does Not Apply To This Case, And The Trial Court Erred In Expanding It To Immunize State Farm's Conduct From Court Challenge.

Although *Walker* is erroneous, this Court need not disavow it in order to conclude that it is inapplicable here.

1. Walker does not apply to unapproved conduct.

Walker repeatedly emphasizes that its holding is based on the fact that the rates being challenged were *approved*. *(Walker*, *supra*, 77 Cal.App.4th at 753, 756, 757, 759). Thus, even if § § 1860.1 and 1860.2 somehow immunized approved conduct, *Walker* does not support the proposition that these sections immunize *unapproved conduct*.

While Poirer's complaint does not negate State Farm's assertion that the Commissioner had approved State Farm's *class plan*, no evidence in the record before this Court demonstrates that State Farm's alleged violation of § 1861.02(c) was *disclosed to, understood by, or knowingly approved* by the Commissioner. An insurance company cannot bootstrap the Commissioner's approval of its "class plan" to immunize, under *Walker*, that which is *not* approved. The Commissioner has noted the "potentially disastrous" impact of a rule immunizing improprieties buried in a class

---

[46] In establishing the "primary jurisdiction" doctrine, the Supreme Court reviewed cases from other jurisdictions applying the "filed rate doctrine." (*Farmers*, *supra*, 2 Cal.4th 377, 386-387.) Thus the Court was well aware of the doctrine, but apparently recognized that it would not be compatible with Proposition 103.

plan. (MJN Exh. G at 18.) Such a "catch-me-if-you-can" rule would provide insurers with an incentive to deceive the Commissioner, undermining the integrity of the regulatory process the voters instituted. (*See Stevens v. Superior Court* (1999) 75 Cal.App.4th 594.)

Finally, as a matter of law and common sense, the approval of a filing by the Commissioner cannot be held to immunize conduct in the marketplace that does not comply with the filing.[47]

2. Violations of a state statutory proscription *cannot be approved.*

Appellant's complaint charges State Farm with violating an *explicit statutory proscription*, § 1861.02(c). *Walker's* theory of immunity based on approval of the "reasonableness" of rates, even if correct, cannot immunize a practice that is prohibited by statute. An administrative agency simply does not have the authority to ***approve*** an action that violates a state law; such an approval would be *ultra vires*. (*See, e.g., Assoc. for Retarded Citizens v. Dept. of Development Svcs.* (1985) 38 Cal.3d 384, 391; *AICCO v. Insurance Company of North America* (2001) 90 Cal.App.4th 579.)

Holding otherwise would authorize the Commissioner to ignore both governing statutes and its own regulations.

3. Because a guideline is not a "rate," *Walker* does not apply, *whether or not it was approved.*

The *Walker* court described the matter before it as an "*exclusively rate-making*" case. (*Walker*, *supra*, at 759, emphasis added.) Here the challenge is to the use of an *underwriting guideline* to determine an individual's ***premiums***.

---

[47] As the CDI approval letters state, "Only the changes specifically requested in the application set forth above are approved." (*See, e.g.,* JA 458.)

Determining whether a revenue request (i.e., a rate) is *reasonable* requires the expertise and judgment of the Commissioner, as noted previously. By contrast, whether a carrier is employing a premium-setting criterion that violates a statute is the kind of question of law that courts adjudicate every day.

The Commissioner has taken the position that he does not approve underwriting guidelines, which are submitted as part of their class plans. (See MJN Exh. G, at 20, fn. 9.) Moreover, many insurers, including possibly State Farm, submit their underwriting guidelines in confidence, and thus they are not subjected to the public scrutiny mandated by Proposition 103. Therefore, such guidelines cannot be subject to *Walker's* rule.

CONCLUSION

That Proposition 103 authorizes a private right of action under the UCL has never before been seriously questioned by the insurance industry. Now, that has changed. State Farm is one of several insurers facing UCL actions brought for overcharging policyholders in violation of Proposition 103, illegal practices which began during the avowedly laissez-faire tenure of Commissioner Quackenbush.

It was precisely to be able to protect themselves against insurance rip-offs that the voters passed Proposition 103, ordered rollbacks, mandated an open process of rate and premium regulation, repealed barriers to competition, created the office of elected commissioner and – if all those safeguards somehow failed – authorized themselves to take matters into their own hands by acting as private attorneys general in order to employ judicial remedies that would stop unlawful conduct and return illicit gains.

State Farm asks the judicial branch to restore what it lost at the ballot box on November 8, 1988.

FTCR can well imagine the portents of doom that insurers will raise lest their request be denied. They have made the same predictions in many judicial proceedings. And with few exceptions, the courts have not been deterred from implementing the law exactly as the voters wrote it.

Rather than accept State Farm's unprincipled, logic-defying and often-inconsistent analysis of the four statutes, this Court need only recognize that the voters knew what they were doing, and acted rationally and consistently with the overall purpose of the initiative by creating a private right of action and leaving in place the McBride-Grunsky provisions as they did. The framework of accountability – including civil liability – constructed by the voters represents a careful, deliberate and clear balancing of the interests of consumers and insurers.

State Farm may lament the voters' decision to subject insurers to civil liability – including restitution – for violations of Proposition 103; but the company lost that battle fifteen years ago. State Farm might believe that § 1861.02(c) is bad public policy. (RB 48.) The voters believed otherwise.

State Farm has come to the wrong branch of government for relief. As another court construing Proposition 103 put it: "The remedy … is not in interpretation but in amendment or repeal." (*Sanford*, *supra*, 233 Cal.App.3d 1109, 1125.) Indeed, State Farm agrees with *amicus* on this point: "the determination of whether there should be an action for monetary relief concerns issues of complex economic policy entrusted to the legislative branch of government." (RB 48.) Utilizing another right they have reserved for themselves – the initiative process – the voters made that very determination fifteen years ago. *Amicus* FTCR respectfully urges this Court to honor it.

//

//

Dated: March 1, 2004

THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS
Harvey Rosenfield
Pamela Pressley
Lawrence Markey

PUBLIC ADVOCATES, INC.
Richard Marcantonio

ROGER BROWN AND ASSOCIATES
Jay Angoff, Of Counsel

BY: _____
Harvey Rosenfield
Attorneys for *Amicus Curiae*
THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS