Decision Stands: Proposition 103 Approved Insurance Rates Cannot be Attacked in a Civil Action

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California Supreme Court Rejects Requests to Depublish *MacKay*

by **Kent R. Keller**

On October 6, 2010, Division Three of the Second Appellate District issued a landmark decision in *MacKay v. Superior Court*, 188 Cal. App. 4th 1427 (2010), declaring that approved insurance rates subject to Proposition 103 cannot thereafter be collaterally attacked in a civil action.

In brief, *MacKay* was a certified Unfair Competition Law (UCL) class action involving more than 500,000 class members who contended that 21st Century Insurance Company had used two illegal "rating factors" in developing automobile insurance premiums. The two factors had been included in rate and class plan filings approved on multiple occasions by the Insurance Commissioner.

The issue, as the Court explained, was:

whether the approval of a rating factor by the DOI [Department of Insurance] precludes a civil action against the insurer challenging the use of that rating factor." *MacKay*, supra at 1434.

In a detailed opinion, authored by Justice H. Walter Croskey, the Court concluded that approval did preclude a collateral attack in a civil action.

This decision is of critical importance to insurers and consumers subject to rate approval pursuant to Proposition 103.

Prior to *MacKay*, it was not clear whether approval precluded civil actions. As a result, many insurers were sued, virtually always in class actions, by parties challenging approved rates on one basis or another.

The result was that, while insurers were required to obtain rate approval before putting a rate into effect and once approval was obtained could had to use the approved rate, they did so at the peril of a class action lawsuit.

Whether such lawsuits benefited insureds or simply increased premiums in the future is a continuing debate. What, however, was clear was that such actions often produced large attorneys' fees awards.

Given the value of these class actions to the plaintiffs' bar, it was not surprising that requests to depublish *MacKay* were numerous.

In addition to a request from counsel for the plaintiffs in *MacKay*, requests were filed by Consumer Watchdog, the City and County of San Francisco, the Consumer Attorneys of California, Public Advocates, the Mexican American Legal Defense & Education Fund, the

Southern Christian Leadership Conference of Greater Los Angeles, United Policyholders, the California State Insurance Commissioner, and others.

Indeed, by a letter dated January 10, 2011, new Commissioner Dave Jones advised the California Supreme Court that he, like his predecessor, supported depublication.

Despite this tsunami of support for depublication, on January 12, 2011 the Supreme Court denied all requests and declared the case closed.

While the reasons for denying or granting depublication are never certain, we have to believe that the Supreme Court recognized the correctness of Justice Crokey's decision. As a result of the Supreme Court's action, *MacKay* remains valid and precedential authority.

21st Century Insurance Company was represented in this case by Kent R. Keller, Steven H. Weinstein, Marina M. Karvelas and Peter Sindhuphak of Barger & Wolen.