

CALIFORNIANS SAY GOODBYE TO A PORTION OF PROPOSITION 103

By Brian Kabateck and Lina Melidonian

The recent California appellate court decision in *Amber McKay, et al. v. Sup. Ct. of the State of CA, County of LA*, will have a significant impact on consumers as the boundaries of Proposition 103, which safeguard insureds from the imposition of unfair insurance premiums, seem to now be critically jeopardized. 115 Cal.Rptr.3d 893 (2010)

In 1988, California voters passed Proposition 103, which primarily focused on practices that allowed insurance companies to overcharge California consumers with unfair rate hikes. Although insurance companies spent over \$80 million in their efforts to defeat the measure, California consumers triumphed. Since its enactment, Proposition 103 has forced insurance companies to refund more than \$1.2 billion to Californians, and has served as a prophylactic measure by preventing automobile insurance rate increases worth billions.

Proposition 103 entitles qualified applicants to receive a Good Driver Discount. It prohibits insurers from using the lack of prior insurance to determine eligibility for the discount, or for automobile rates, premiums, and insurability. It authorizes consumers to enforce that prohibition and it subjects the insurance industry to laws, such as California's unfair competition law, that are applicable to other types of California businesses.

In enacting Proposition 103, Californians vested the power to enforce the Insurance Code in the public as well as the Insurance Commissioner. In fact, Proposition 103 established a private right of action for its enforcement.

The plaintiffs in *MacKay* brought the class action against 21st Century for violations of California's unfair-competition law under Business & Professions Code Section 17200. The allegations resulted from the defendant's practice of utilizing certain rating factors such as considering the absence of prior automobile insurance, which is referred to as "persistency," and accident verification as a factor for setting its insurance premiums. This rating practice is expressly prohibited under Proposition 103. Defendant's primary defense was that it is immune from liability under the unfair-competition law pursuant to *Walker v. Allstate* because its premium rating plans were approved by the Department of Insurance. (2000) 77 Cal.App.4th 750. The trial court agreed and determined that an unfair competition challenge to any illegal practices cannot be brought where rating plans have been already approved by the Department of Insurance. The plaintiffs appealed.

The legal issue the appellate court faced was "whether the approval of a rating factor by the [Department of Insurance] precludes a civil action against the insurer challenging the use of that rating factor."

In a unanimous decision penned by Justice H. Walter Croskey, the court held "that the statutory provisions for an administrative process...are the exclusive means of challenging an approved rate." That, according to the court, precluded an unfair-competition law action. As such, the court ordered the trial court to enter judgment for 21st Century. The court ruled on

two key points. First, it held that the accident verification procedure used by 21st Century, which subjected insureds to higher rates because of lack of prior insurance, was an approved rating factor and that an insurance rate approved by the Department of Insurance may only be challenged administratively.

By holding that there can be no unfair competition challenge regarding illegal practices pertaining to rating plans so long as someone within the Department of Insurance approves an insurance carrier's rating plan, the decision significantly undermines the purpose of Proposition 103. It is also contrary to established California law and will only serve to encourage insurance companies to circumvent the proposition. Indeed, the decision will pave a path for insurance companies to freely evade the rate hike restrictions they are subject to by having the approvals for the rating plans go through the Department of Insurance, rather than be subject to private actions. Most importantly, MacKay forces California consumers to rely on administrative agencies, such as the Department of Insurance, as the only avenue available for disputing any illegal insurance rate hikes. In effect, MacKay will deny California consumers recourse from our civil justice system when dealing with insurance rate hike issues.

Yet, California Insurance Code Section 1861.03 makes Proposition 103 violations subject to the provisions of the unfair-competition law. Moreover, the state Supreme Court in *Farmers Insurance Exchange v. Superior Court* held that an insured could bring an unfair competition action to challenge an insurer's violation of Proposition 103. (1992) 2 Cal.4th 377. The *Farmers* decision is consistent with the intent of the proposition, which holds insurers accountable for violations by private right of action.

Likewise in *Donabedian v. Mercury Ins. Co.* the Court of Appeal held that Proposition 103 permits a person to maintain a civil action under the unfair-competition law when the complaint alleges that an insurer has used an applicant's absence of prior insurance in determining premiums, a discount for good driving, or insurability. (2004) 116 Cal.App.4th 968. The court reasoned that the plain language of Proposition 103 and its legislative history compel such a conclusion, as "[i]t would make little sense if Proposition 103 - which subjects insurers to the UCL - were interpreted to preclude a civil action alleging a violation of that very Proposition."

Despite the express language of the insurance code, *MacKay* demonstrates that the Department of Insurance's approval of potential illegal rate plans fully immunizes insurance companies. The decision shifts the onus from lawmakers and courts to administrative agencies such as the Department of Insurance.

By affirming the dismissal of the plaintiffs' claim, the court has robbed California consumers from the main device they had to ensure that insurers do not arbitrarily impose premium rate hikes that are otherwise prohibited by the California Insurance Code. Furthermore, any deterrent the unfair-competition law may have had to these unlawful business practices has been significantly undermined.

While *Walker*, which 21st Century heavily relied on, held that approved rates could not hereafter be civilly challenged, *Farmers* and *Donabedian* arguably created confusion on this issue as they concluded otherwise. Although *MacKay* may now resolve any existing confusion in declaring that approved rates and rating factors cannot be civilly challenged, it unfortunately does so at a significant price to California consumers.