United Policyholders

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November 16, 2010

SUPREME COURT
FILED

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Frederick K. Ohlrich Clerk

Deputy

Via Hand Delivery

The Honorable Chief Justice Ronald M. George
and the Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: Request to depublish the Court of Appeal Opinion in Nos. B220469, MacKay v. Superior Court of Los Angeles (21st Century Insurance)

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

We respectfully ask this Court to order depublication of the Opinion in Nos. B220469 and B223772, MacKay v. Superior Court of Los Angeles, filed October 6, 2010 (and modified on October 20 and 22, 2010), and published at 188 Cal.App.4th 1427, 115 Cal.Rptr.3d 893 (2010).

1. The MacKay opinion undermines the essential complementary function of civil lawsuits to the law enforcement activities performed by the California Department of Insurance.

While the Department is a competent and professional agency, its actions are limited by finite staffing, political forces and a budget that has shrunk in recent years.[1] By providing insurers with blanket immunity for any illegal act disclosed or implied in any of the thousands of filings they make each year with the Department of Insurance, the MacKay opinion leaves insured California businesses and individuals dangerously unprotected. The opinion goes so far as to extend that immunity to matters merely discussed with a staff person at the Department.

[1] "In January 2009, CDI's state operations budget was $135.9 million. Since then, Commissioner Poizner has reduced the state operations budget by nearly 15 percent, or $19.3 million, to $116.6 million". (California Department Of Insurance, "Department Of Insurance Blog" Blog, www.insurance.ca.gov, 11/16/09)

2. It is settled law in this context that silence by the regulator does not equate to approval.

"The absence of a finding on an issue that was not before the Department cannot be construed as an approval of that conduct or an interpretation of any statute the Department is charged with enforcing". (*Stevens v. API Ins. Services, Inc.* (1999) 75 Cal.App.4th 594, 608).

3. By its own admission, the Department of Insurance does not and cannot comb through every detail in the 7,000 filings insurers make annually as the MacKay opinion *de facto* assumes.

United Policyholders has great respect for the work and efficacy of the Department of Insurance and works closely with the Department on a regular basis. It is not, therefore, a critique of the Department to acknowledge that the agency simply does not have the resources to identify every illegal program and potentially illegal program that is contained with the myriad filings submitted and approved by the Department every day.

Between class plan and rate applications, the Department reviews approximately 7,000 filings each year.[2] There are also hundreds of form filings, data submissions and other documents provided for review and often approval. Each of those filings can include hundreds of pages and sometimes thousands. Yet the California Department of Insurance has a total of 67 rate analysts and 16 actuaries responsible for reviewing all of its property, casualty, life and health insurance filings.[3] That leaves, at best, about 100 filings annually to be handled by each rate analyst and 430 filings to be scrutinized by each actuary. Even the most aggressive of regulatory regimes will not ferret out every fraud.

Indeed, as the Department explained in its *Amicus Curiae* brief in *Donabedian v. Mercury*:

> In all candor, however, the Department simply lacks sufficient resources to pursue every allegation where an approved rate or rating factor appears reasonable on its face when approved by the Department, but through the independent investigation and resources expended by a private attorney general, a violation of the Insurance

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[2] Brief *amicus curiae* of the California Department of Insurance in *Sam Donabedian v. Mercury Ins. Co.* in the Court of Appeal for the State of California, Second Appellate District, Division One, Case No. B159982 at page 19.

[3] *2009 Insurance Department Resources Report*, National Association of Insurance Commissioners, p. 7.

Code is revealed. If such litigation is dismissed by courts under the exhaustion of remedies doctrine, on the grounds that the issue concerns a pure question of "rates," suffice it to say that much insurer conduct which violates the law will unnecessarily persevere. *CDI amicus brief in Sam Donabedian v. Mercury Ins. Co.* in the Court of Appeal for the State of California, Second Appellate District, Division One, Case No. B159982 at page 19.

This honest admission by a regulator should not be ignored by the Court. The *MacKay* opinion invites insurers to exploit the limited resources of the agency, and overworked Department analysts – many of whom have no legal training – to avoid accountability for discrimination, unfair pricing, or other illegal practices. Under Proposition 103, insured businesses and individuals in California have an unqualified right to use our legal system to challenge practices such as those that were exposed in the Mackay record.[4]

Under *Mackay*, the Department will have no choice but to assume that buried in every filing, or contained in the emails exchanged between staff and insurer regarding the filing, is an illegal act. Because *Mackay* immunizes everything that could be conceived to have been "approved" with each filing, the Department will not be able to approve any filing that has not been reviewed, page by page, by an analyst, actuary and a lawyer. Without such a review, the Department would potentially be exposing consumers to any number of fraudulent activities. Under Prop 103, as it is written, such immobilizing requirements are unnecessary because if a violation appears, the public can hold the insurer accountable, even if it could convince or outwit a regulator.

With *Mackay*, the efficiency of having a public backstop is removed and regulatory staff will be mired in each filing, even if many or most are completely lawful. This extra time required on each filing will make it impossible for the Department to meet its statutory deadlines and filings will be approved without any review. But still, as they would be deemed approved, insurers will be immune for any illegal act submitted in a filing that was never even reviewed.

4. United Policyholders' interest in this matter relates to our ongoing work with the CDI and our position as Chair of the CDI Consumer Advisory Task Force.

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[4] As the record shows, 21st Century acknowledged that its definition of the persistency rating factor was unacceptable to the Department and withdrew it in May 1997, but then a few months later the company slipped into a four page memo a note that it intended to continue to use an unlawful definition of persistency. This memo should have been submitted as a class plan filing; instead it was improperly submitted in a rate filing.

United Policyholders was founded in 1991. It is a non-profit organization dedicated to educating the public on insurance issues and consumer rights. The organization is tax-exempt under Internal Revenue Code §501(c) (3). United Policyholders is funded by donations and grants from individuals, businesses, and foundations. United Policyholders coordinates with the California Department of Insurance on an ongoing basis on numerous claim and regulatory matters that directly impact consumers. Executive Director is the Chair of the CDI Consumer Advisory Task Force.

United Policyholders serves as a resource for insurance claimants and actively monitors legal and marketplace developments affecting the interests of policyholders. United Policyholders receives frequent invitations to testify at legislative and other public hearings and to participate in regulatory proceedings on rate and policy issues.

United Policyholders has been granted leave to file *amicus curiae* briefs on behalf of policyholders in more than one hundred cases throughout the United States involving insurance principles that are likely to affect large segments of the public and business community. United Policyholders' *amicus* brief was cited in the United States Supreme Court's opinion in *Humana v. Forsyth* (1999) 525 U.S. 299 and its arguments were adopted by this Court in *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815.

Respectfully submitted,

Amy Bach, Esq.
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for United Policyholders

PROOF OF SERVICE BY MAIL

Case Name: Mackay v. 21st Century Insurance
Court of Appeal Case No.: B220469
Superior Court Case No.: BC297438

I declare that I am employed in the County of San Francisco, California. I am over the age of 18 years and am not a party to the within cause; my business address is 222 Columbus Ave., San Francisco, CA. 94133. On November 16, 2010, I served the enclosed

Letter Requesting Depublication to Hon. Ronald M. George and Associate Justices

on the parties listed below by placing copies thereof in sealed envelopes with adequate postage for first class delivery and depositing each with the U.S. Postal Service. Under California Rule of Court 8.1125(a) (5), copies of this letter were mailed to the following:

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