



The Commissioner Has the Legal Authority to Protect California Consumers and the Economy Against Unfair and Discriminatory Practices in the Homeowners Insurance Marketplace

Many insurance companies are refusing to sell or renew policies in areas that the company considers prone to wildfire. The targeted areas and the conditions under which consumers are denied coverage vary widely from company to company and are based on secret “scores” that consumers do not understand and cannot challenge; complicating matters, each company has its own scoring system that may or may not be the product of historic data or a third-party model. Most insurance companies make eligibility decisions and/or charge premiums that do not reflect the substantial investments homeowners make in reducing the risk of wildfire to their homes and property, treating policyholders who actively mitigate their risks the same as policyholders who do not.

A. The Depublished AIA Case Does Not Bar the Commissioner from Exercising His Authority to Address Wildfire Eligibility/Underwriting Problems

The California Insurance Commissioner has an affirmative duty under state law—Insurance Code section 12921—to ensure that residential property insurance is marketed fairly and remains affordable and available to all residents of California. To meet that responsibility, the Commissioner is considering regulations aimed at making homeowners insurance more available and affordable by requiring insurance companies to reduce premiums when homeowners take actions to protect their homes and property against the growing incidence of climate-related wildfires, and by mandating greater transparency in the rate and premium setting process.

The insurance industry says the Commissioner has no legal authority to do so. This memo explains why the industry is wrong, and why those who are urging the Commissioner to embrace the industry’s narrow and self-serving view of his authority are undermining public confidence in the office.

In opposing regulations that address homeowners insurance underwriting, the insurers primarily rely on a *depublished* Court of Appeal decision that ordered the Department not to

enforce an emergency regulation regarding the use of past loss claims for adverse underwriting and rating determinations by homeowners insurers. In reaching this conclusion, the Court of Appeal stated: “[T]he Insurance Code does not give the Commissioner authority to regulate underwriting for homeowners insurance.” (*Am. Ins. Ass’n v. Garamendi* (“AIA”) (2005) 24 Cal.Rptr.3d 905, 918, ordered not published, Oct. 12, 2005.) However, the California Supreme Court, the final arbiter of California law, ordered that decision to be depublished—removed from the official volumes of decisions. As the insurance companies are well aware, a statement from a depublished appellate case cannot be relied on as precedential legal authority:

A depublished opinion “must not be cited or relied on by a court or a party in any other action.” (Cal. Rules of Court, rule 8.1115(a).) It is well-established that, under this rule, nonpublished opinions have no precedential value. (Citations omitted.)

Without precedential value, ***a depublished opinion is no longer part of the law and thus ceases to exist.***

(*Farmers Ins. Exch. v. Super. Ct.* (2013) 218 Cal.App.4th 96, 109, emphasis added.) While the decision may have collateral estoppel effect on the Commissioner and the Department, its binding effect is limited to the proposed regulation at issue in the AIA case. Its reasoning and holding does not bar the agency from exercising its authority to promulgate any and all regulations related to homeowners insurance and would not be binding in future litigation over a different regulation. (See *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 852 [for collateral estoppel doctrine to apply, the issues and facts to be determined in the second matter must be *identical* to those determined in the first judgment]; cf. *Los Angeles Police Protective League v. City of Los Angeles* (2002) 102 Cal.App.4th 85, 91 [“Collateral estoppel precludes a party from relitigating in a second proceeding the matters litigated and determined in a prior proceeding. The requirements for invoking collateral estoppel are the following: (1) the issue necessarily decided in the previous proceeding is identical to the one that is sought to be relitigated; (2) the previous proceeding terminated with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party to or in privity with a party in the previous proceeding. [Citation.]”].)

More fundamentally, the statement in the depublished *AIA* case is inconsistent with California Supreme Court opinions and in direct conflict with the California Insurance Code, as discussed below.

B. Proposition 103 Gives the Commissioner the Authority to Adopt Regulations to Require Insurance Companies to Provide Mitigation Discounts When Justified

In 1988, California voters fundamentally rewrote the insurance laws of this state. Rejecting an \$80 million campaign by the insurance industry that was designed to maintain the deregulated status quo that insurers had enjoyed for 40 years, the voters enacted Proposition 103. Finding that “[t]he existing laws inadequately protect consumers and allow insurance companies to charge excessive, unjustified and *arbitrary* rates,” (Historical and Statutory Notes, 42B West’s Ann. Ins. Code (2005 ed.) § 1861.01, p. 258, Proposition 103, Section 1 [“Findings”], emphasis added), the voters rejected the limited regulatory authority provided to the Commissioner and the public by the McBride-Grunsky Insurance Regulatory Act of 1947 (“McBride-Grunsky”). A key purpose of Proposition 103 “is to protect consumers from *arbitrary* insurance rates and practices . . . and to ensure that insurance is *fair*, available, and affordable for all Californians.” (*Id.* at 259, Proposition 103, Section 2 [“Purpose”], emphasis added.) Enforcement of the many reforms enacted by the Proposition 103 voters was entrusted to the elected Insurance Commissioner (Ins. Code § 12900) as supplemented by consumers acting as private attorneys general (Ins. Code § 1861.10(a); see also *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968.)

Section 1861.05(a), enacted by Proposition 103, is the centerpiece of the stringent regulation that the voters imposed upon the insurance industry. Combined with section 1861.01(c), section 1861.05(a) establishes the requirement that the Commissioner review and approve of applications for rate increases or decreases before they take effect. Section 1861.05(a) states:

No rate shall be approved or remain in effect which is excessive, inadequate, *unfairly discriminatory* or otherwise in violation of this chapter. In considering whether a rate is excessive, inadequate or unfairly discriminatory, no consideration shall be given to the degree of competition and the commissioner shall consider whether the rate mathematically reflects the insurance company’s investment income.

(Ins. Code § 1861.05, emphasis added.)

This provision applies to all forms of property-casualty insurance, including homeowners (Ins. Code § 1861.13). Thus, the Code itself regulates homeowners insurance, establishing legal standards that the voters expressly accorded the Commissioner the responsibility to enforce.

It has been noted that California’s Insurance Code does not contain a definition of “unfairly discriminatory.” (*King v. Meese* (1987) 43 Cal.3d 1217, 1222.) However, the plain language of section 1861.05(a) and the larger context of Proposition 103 within which section 1861.05(a) resides confirm that it forbids an insurer from treating applicants and insureds with similar risk in a dissimilar fashion. In the context of the insurance industry’s current disruptive behavior in the homeowners insurance marketplace—arbitrarily surcharging, cancelling, or non-renewing policyholders, neighborhoods, and communities throughout the state, *without considering efforts homeowners have undertaken to mitigate wildfire risk*—such practices are properly characterized as “unfairly discriminatory.”

The “excessive, inadequate and unfairly discriminatory” standard was widely adopted decades ago. As our Supreme Court has noted, the language “echoes similar language in the law of most states, as well as former section 1852 which it replaces.” (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 822; see also *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1257–1258.) However, as the Supreme Court has frequently observed, Proposition 103 altered the scope and application of the phrase as part of the voters’ comprehensive revision of the Insurance Code. Requiring a straightforward interpretation of the plain language of Proposition 103, the California Supreme Court has emphasized that “fairness” is one of Proposition 103’s explicit concerns. Citing Proposition 103’s purpose of “ensur[ing] that insurance is fair,” the Court stated: “[A]rticle 10 is not limited in scope to rate regulation. *It also addresses the underlying factors that may impermissibly affect rates charged by insurers and lead to insurance that is unfair, unavailable, and unaffordable.*” (*State Farm Mutual Auto. Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029 at 1041–1042, emphasis added.)

Other provisions of Proposition 103 confirm that the arbitrary classification of insureds in underwriting and rating without considering the reduction in risk due to property-level and community-level mitigation measures is “unfairly discriminatory.” Section 1861.03(a), enacted

by Proposition 103, references and incorporates the Unruh Civil Rights Act to establish that the use of the underwriting classifications forbidden under that law, such as race or gender, would constitute “unfair discrimination” for purposes of section 1861.05(a). And section 1861.02(a)(4) instructs that improper classification of insureds—motorists, in that statutory context—constitutes “unfair discrimination.”

Reference to other authorities confirms that the plain meaning of the “unfairly discriminatory” prohibition is to target the misclassification of risks. For example, the Actuarial Standards Board, Actuarial Standard of Practice (ASOP) No. 12, Section 3.2.1 states:

Rates within a risk classification system would be considered equitable if differences in rates reflect material differences in expected cost for risk characteristics. In the context of rates, the word fair is often used in place of the word equitable.

This general formulation can be found in cases discussing the cognate provisions of the pre-Proposition 103 Insurance Code. (See, e.g., *King v. Meese* (1987) 43 Cal.3d 1217, 1241–1242 (Broussard, concurring) [“One can argue that it is unfairly discriminatory to use classifications which result in charging good drivers in some areas much more than bad drivers in others [*sic*] parts of the state”].)

C. The Supreme Court Has Affirmed the Commissioner’s Broad Authority to Adopt Regulations to Enforce Proposition 103 and Other Provisions of the Insurance Code

Insurers have argued that the Commissioner’s authority over homeowners insurance does not extend to underwriting practices (either determining premiums or eligibility) because the statute does not refer to homeowner insurance rating factors, unlike the auto rating factor system and good driver discount policy provisions set forth in Section 1861.02.

Their argument has no support in the law.

The California Supreme Court has explicitly and emphatically affirmed on many occasions the Commissioner’s broad authority to adopt regulations to implement Proposition 103. In *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, the Court addressed the industry’s challenge to regulations promulgated by the Commissioner for the implementation of both the rate rollback provision (section 1861.01) and the prior approval process (section 1861.05), which apply to *all lines of insurance*, including homeowners. Responding to the

observation that Proposition 103 did not expressly authorize the Commissioner to promulgate such regulations, the Court stated:

It scarcely needs mention that the regulation of the insurance industry is squarely within the state’s police power. “What [has been] said about the police power—that it ‘extends to all the great public needs’ and may be utilized in aid of what the legislative judgment deems necessary to the public welfare, [citation]—is peculiarly apt when the business of insurance is involved—a business to which the government has long had a ‘special relation.’”

(*Id.* at 240, citation omitted.)

Such authority as the commissioner may have under the initiative to promulgate regulations of this sort is implied and not express.

(*Id.* at 273.)

In *20th Century*, the Court was simply confirming what it had stated in the context of the facial challenge to Proposition 103 five years previous—that the Commissioner has the authority he needs to implement and enforce the statutes:

[The Commissioner’s] powers are not limited to those expressly conferred by statute; “rather, ‘[i]t is well settled in this state that [administrative] officials may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as *may fairly be implied* from the statute granting the powers.’”

(*Calfarm Ins. Co. v. Deukmejian, supra*, 48 Cal.3d at 824, citation omitted.)

The Court explained that, under Proposition 103,

Much is necessarily left to the Insurance Commissioner, who has broad discretion to adopt rules and regulations as necessary to promote the public welfare. [Citations omitted] No provision bars the commissioner from consolidating cases or *issuing regulations of general applicability*. Thus, there is nothing here which prevents the commissioner from taking whatever steps are necessary to reduce the job to manageable size. It “is to be presumed that the [administrative agency] will exercise its power in conformity with the requirements of the Constitution; and if it does act unfairly, the fault lies with the [agency] and not the statute.”

(*Ibid.*, citations omitted, emphasis added.)

The California Supreme Court has reiterated this point on multiple occasions. For example, in 2004, the Court affirmed the authority of the Commissioner to promulgate regulations needed to ensure that the insurers’ premium setting practices “do not unfairly discriminate against poor and ethnic communities.” (*State Farm Mutual Auto. Ins. Co. v. Garamendi, supra*, 32 Cal.4th at 1039; see also *Ass’n of Cal. Ins. Cos. v. Jones* (“ACIC”) (2017)

2 Cal.5th 376, 392 [holding that Insurance Commissioner’s regulation covering replacement cost estimates for homeowners insurance was authorized by Unfair Insurance Practices Act, Ins. Code § 790 et seq. (UIPA)]; *PacifiCare Life & Health Ins. Co. v. Jones* (2018) 27 Cal.App.5th 391, 417 [finding “the Commissioner’s broad mandate to administer the UIPA provides him with authority to interpret [the] undefined terms in the context of the act.”]) In upholding the homeowners regulations at issue in *ACIC*, the Court recognized the well-established principle that “[w]here, as here, the Legislature uses open-ended language that implicates policy choices of the sort the agency is empowered to make, a court may find the Legislature delegated the task of interpreting or elaborating on the statutory text to the administrative agency.” (*ACIC, supra*, 2 Cal.5th at 393.)

D. By Enacting Specific Rules Governing *Auto* Insurance Premiums, the Voters Did Not Deprive the Commissioner of the Power to Regulate *Homeowners* Insurance Premiums

The fact that the voters did not enact a “rating factor” system for homeowners insurance while doing so for auto insurance is irrelevant. The California Court of Appeal rejected this insurance industry argument in a lawsuit the industry brought against Commissioner Poizner:

An administrative agency is not limited to the exact provisions of a statute in adopting regulations to enforce its mandate. ‘[T]he absence of any specific [statutory] provisions regarding the regulation of [an issue] does not mean that such a regulation exceeds statutory authority....’ [Citations.] The agency is authorized to ‘fill up the details’ of the statutory scheme. The absence of any specific provisions ... does not mean that regulations as to such issues exceed statutory authority, but only that the electorate did not itself choose to determine the issue and instead deferred to and relied upon the expertise of the Commissioner and the Department.

(*Ass’n of Cal. Ins. Cos. v. Poizner* (2009) 180 Cal.App.4th 1029, 1047, citations omitted.)

That is exactly the situation here. The voters chose to mandate a specific approach to the weighting of auto insurance rating factors but left it to the Insurance Commissioner to determine what measures would be necessary to regulate homeowners insurance. Nothing in Proposition 103 can be read to suggest otherwise.

Under California law, a regulation must meet only two requirements to be valid: it must be (1) “consistent and not in conflict with the statute” and (2) “reasonably necessary to effectuate

the purpose of the statute.” (Gov. Code § 11342.2; *Ass’n of Cal. Ins. Cos. v. Poizner, supra*, 180 Cal.App.4th at 1044.)

As numerous courts have found, the Commissioner’s authority to regulate underwriting rules and practices is grounded in numerous provisions of the Insurance Code and powers that may fairly be implied by the statutes. Section 1861.05(a) broadly authorizes the Commissioner to adopt regulations to ensure that rates are not “excessive, inadequate, unfairly discriminatory, or otherwise in violation of this Chapter.” This provision clearly contemplates that the Commissioner may disapprove a rate application submitted by a company that is violating *any provision* of Chapter 9 of the Insurance Code, and regulations promulgated thereto, including the vestigial McBride-Grunsky provisions, not just the provisions that govern excessive or inadequate rates.

An insurer’s underwriting rules are integrally related to rates. When determining *whether* to insure an applicant or the *amount* of premium to charge an individual insured’s premium, insurers typically consult internal manuals often referred to as “underwriting rules,” “underwriting guidelines,” or “eligibility guidelines.”¹ “Underwriting” has a dual meaning, which has been explained as follows:

“Underwriting” is a label commonly applied to the process, fundamental to the concept of insurance, of deciding which risks to insure and which to reject in order to spread losses over risks in an economically feasible way. (*Group Life & Health Ins. Co. v. Royal Drug Co.* (1979) 440 U.S. 205, 211–213, 99 S.Ct. 1067, 1073–1074, 59 L.Ed.2d 261; *Wilson v. Fair Employment & Housing Com.* (1996) 46 Cal.App.4th 1213, 1226, 54 Cal.Rptr.2d 419 (Bamattre Manoukian, J., dissenting); cf. also 1 Couch, Insurance (3d ed.1995) § 1.9, p. 116.)...[A]n underwriting rule is properly characterized as a rule followed or adopted by an insurer or a rating organization which either (1) limits the conditions under which a policy will be issued or (2) impacts the rates that will be charged for that policy.

(*Smith v. State Farm Mut. Auto. Ins. Co.* (2001) 93 Cal.App.4th 700, 726.)

Pursuant to his authority under section 1861.10(b), the Commissioner presently requires these underwriting rules to be submitted with rate and class plan applications to the Department for inspection in order to ensure that an overall rate for homeowners or other line of insurance is

¹ Some insurers have been known to describe these rules as “marketing strategies.”

not unfairly discriminatory or otherwise in violation of Proposition 103 or other California laws. (See 10 CCR § 2648.4; 10 CCR § 2632.11(b).)

As the Department's General Counsel confirmed in his August 10, 2018 Legal Opinion:

Because underwriting rules determine the types of risks to be insured and the coverages to be offered, underwriting rules must be analyzed in connection with the rate review process to evaluate the reasonableness of a proposed rate in relation to the specific risks to be insured and coverages to be offered to determine whether such rates are excessive, inadequate or unfairly discriminatory. (Ins. Code §1861.05(a).)

(Opinion of the General Counsel of the California Department of Insurance, "Confidentiality of Underwriting Rules Filed with Rate Applications Pursuant to California Insurance Code section 1861.05(b)," Aug. 10, 2018, at 2.)

10 CCR section 2360.0 delineates the connection between "eligibility guidelines" and "rates." Subdivision (b) defines "Eligibility Guidelines" as "specific, objective factors, or categories of specific, objective factors, which are selected and/or defined by an insurer, and which have a *substantial relationship to an insured's loss exposure*." (10 CCR § 2360.0(b), emphasis added.) When an insurer performs a rate analysis, the overall rate level takes into account the aggregate projected expected losses across its relevant entire book of business. If those projected expected losses included in the rate calculation turn out to be lower than the actual losses that emerge, the insurance company's rate may not be adequate, and the insurance company may seek a rate increase under section 1861.05(a). Similarly, if the projected losses exceed the actual losses, a rate decrease may be warranted.

The aggregate projected expected losses included in a rate analysis is conceptionally the sum of the projected expected losses for each of the policyholders in the future rate period. If an insurance company institutes underwriting standards that impact the number, type, distribution, and coverage of policyholders in the future rate period, then that impacts the aggregate expected losses in the rate period. Underwriting standards that exclude or limit higher-risk policyholders or lower the coverage provided can result in a decrease in the projected expected losses. If that situation is not taken into account, it could result in an inflated value for the projected expected losses with the result being an excessive rate level on an overall level, as well as unfairly

discriminatory rates between groups of insureds used in the rate classification process. Therefore, in order to make a proper analysis of the overall rate needed for a future rate period, as well as for determining if rates are unfairly discriminatory, information regarding the underwriting standards and criteria, and how they have changed over time, is needed.

Actuarial standards issued by professional associations recognize the relationship between underwriting and rating and the need to take changes in underwriting into account in ratemaking. For example, ASOP No. 12, Section 1.2 states, “Risk classification can affect and be affected by many actuarial activities, such as the setting of rates, contributions, reserves, benefits, dividends, or experience refunds; the analysis or projection of quantitative or qualitative experience or results; *underwriting actions*; and developing assumptions, for example, for pension valuations or optional forms of benefits.” (Emphasis added.)

The Casualty Actuary Society Statement of Principles Regarding Property and Casualty Insurance Ratemaking states, “Operational Changes—Consideration should be given to operational changes such as changes in the *underwriting process*, claim handling, case reserving and marketing practices that affect the continuity of the experience.” And “[b]y interacting with professionals from various fields including *underwriting*, marketing, law, claims, and finance, the actuary has a key role in the ratemaking process.” (Emphasis added.)

The NAIC Property and Casualty Model Rating Law recognizes the relationship between underwriting and rating, and the commissioner’s authority to require the submission of underwriting guidelines as part of a rate filing. It defines “supplementary rating information” required to be submitted with a rate filing as including “any manual or plan of rates, classification, rating schedule, minimum premium, policy fee, rating rule, underwriting rule, and any other similar information needed to determine the applicable rate in effect or to be in effect.” (NAIC Model Laws, Regs., Guidelines & Other Resources, Prop. & Cas. Model Rating Law (Prior Approval Version, July 2009), at 1780-3.)

Numerous California cases confirm that underwriting rules affect rates and that the Commissioner has authority over those practices.

As noted previously, the California Supreme Court rebuffed an effort by State Farm to constrain the Commissioner’s authority through a miserly reading of the statute. The Court noted that Proposition 103 “addresses the *underlying factors that may impermissibly affect rates* charged by insurers and lead to insurance that is unfair, unavailable, and unaffordable.” (*State Farm Mut. Auto. Ins. Co. v. Garamendi, supra*, 32 Cal.4th at 1041–1042.)

In *Wilson v. Fair Employment and Housing* (1996) 46 Cal.App.4th 1213 (“*Wilson*”), the Court of Appeal addressed a claim of age discrimination in the sale of a liability insurance policy. The Court held that the Commissioner had the authority² “to decide issues presented by persons allegedly aggrieved by any ‘underwriting rule.’” (*Wilson, supra*, 46 Cal.App.4th at 1221.) Citing section 1861.05, the Court stated that the Commissioner “clearly possesses the expertise to evaluate and resolve issues regarding actuarial risks and allegedly discriminatory underwriting practices.” (*Id.* at 1222.)

A previous effort by Farmers to evade judicial accountability for illegal underwriting practices led to a California Supreme Court decision holding that unlawful underwriting practices violate the “unfairly discriminatory” prong of section 1861.05(a). In that case, *Farmers Ins. Exch. v. Super. Ct.* (1992) 2 Cal.4th 377, the Court addressed a suit brought by the Attorney General against Farmers for improper underwriting practices, including “unfairly discriminating in eligibility and rates for insurance for persons who qualify under the statutory criteria for a Good Driver Discount policy.” (*Id.* at 382.) The Court noted, “In order to decide whether petitioners have violated section 1861.05, it must be determined whether they employed an ‘unfairly discriminatory’ rate.” (*Id.* at 398.)

Similarly, the Second District Court of Appeal in *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968 discussed the regulatory process in detail, quoting with approval from an amicus brief filed by the Department of Insurance that explained that the Department examines underwriting practices as part of its review to determine whether an insurance company’s “rate” is “excessive, inadequate or unfairly discriminatory.” (*Id.* at 992.)

² The *Wilson* court mistakenly described this authority as “exclusive.” (See *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968.)

E. Vestigial Provisions of Pre-103 Laws, Incorporated in Proposition 103, Confirm the Commissioner’s Authority to Regulate Underwriting Practices

Further support for the Commissioner’s authority to regulate how insurers apply their underwriting rules lies within the remnants of the McBride-Grunsky Insurance Regulatory Act of 1947 that Proposition 103 retained within its new regulatory structure. The first clause of section 1861.10(a), added by Proposition 103, states that “[a]ny person may initiate or intervene in any proceeding permitted or established pursuant to this chapter.” “This Chapter” refers to Chapter 9 (of Part 2 of Division 1 of the Insurance Code), which includes both the remaining provisions of McBride-Grunsky (relevant here are sections 1857, et seq.) and Proposition 103.

Section 1858, et seq., contemplates administrative enforcement actions, initiated either by an aggrieved consumer (section 1858(a)), or by the Commissioner (section 1858.1), extended by and as a complement to the administrative and civil litigation rights established by the voters for “any person” through Section 1861.10(a). Section 1858(a) specifically includes “rating plan, rating system or *underwriting rule*” among the items that a consumer or the Commissioner may challenge. Section 1858.1 authorizes the Commissioner to issue a notice of non-compliance in response to a complaint under section 1858(a) and/or when he determines that an insurer has not complied “with the requirements and standards of this chapter,” which, again, includes Proposition 103. Thus, Proposition 103 contemplated that section 1858 proceedings—which are “permitted or established” by Chapter 9—would be available as an option for the enforcement of all of Proposition 103’s provisions, which are applicable to all property-casualty insurers, including homeowners.

Taken together, these provisions establish a regulatory scheme in which “unfairly discriminatory” rates resulting from underwriting practices are closely regulated (Ins. Code § 1861.05) and subject to administrative complaints by consumers (Ins. Code § 1858(a)) and/or non-compliance proceedings (Ins. Code § 1858.1). The Commissioner is duty bound to require insurers’ full compliance with every provision of the Insurance Code. (Ins. Code § 12926.) Insurers’ argument that the Commissioner cannot regulate underwriting practices would subvert that coherent and comprehensive regulatory scheme. It would make little sense if the

Commissioner could bring section 1858 enforcement actions challenging underwriting rules and review them for compliance with Prop 103 in rate proceedings, but could not adopt regulations of general application to regulate those same practices.

Other provisions of McBride-Grunsky retained and strengthened by Proposition 103's strict system of prior approval and other provisions of the Insurance Code support the Commissioner's authority over underwriting rules:

- Insurance Code section 1857 requires the maintenance of records related to “rates, rating plans, rating systems [and] underwriting rules” such that the Commissioner may determine “every rate, rating plan, and rating system made or used” by an insurer complies with the requirements set forth in McBride-Grunsky and Proposition 103. Clearly, section 1857 provides the Commissioner with regulatory authority over underwriting rules. Section 1857(i) gives the Commissioner specific, express authority to promulgate regulations to make specific the requirements of section 1857 as those requirements relate to “underwriting rules.”
- Section 1857.9 authorizes the Commissioner to designate the contents of reports insurance companies must submit to the Commissioner. Section 1857.9(h) gives the Commissioner specific, express authority to promulgate regulations to implement that authority. There is no exception carved out for the reporting underwriting related data.

F. The Insurance Code Incorporates Additional Anti-Discrimination Protections that the Commissioner May Enforce Through Regulation

Insurance Code section 679.70 et seq. bars discriminatory practices in the homeowners insurance marketplace. Section 679.71 provides that an insurer may not refuse to accept an application for, issue, or cancel a policy of residential property insurance “under conditions less favorable” to the potential insured than to other comparable potential insureds. Further, the “conditions less favorable” include the imposition of higher rates or premiums.

G. California Courts Grant Broad Deference to the Commissioner's Interpretation of the Statutes He Regulates

The many judicial decisions over the last 30 years confirming the Commissioner's authority under Proposition 103 stand for an important principle: that the courts will defer to the

Commissioner’s view of the authority conferred upon him by the voters. With a few errant exceptions, such as the Court of Appeal in the depublished *AIA* case, most California courts do so—most recently the California Supreme Court, which in a March ruling in a case vigorously contested by the insurance industry emphasized the importance of deference to the Insurance Commissioner’s longstanding views on the laws he administers. (*Villanueva v. Fidelity Nat. Title Ins. Co.* (2021) 11 Cal.5th 104, 276 Cal.Rptr.3d 209, 212.)

In a previous challenge to the Commissioner’s authority to regulate homeowners insurance, the Supreme Court said:

The Regulation, like any agency action, comes to the court with a presumption of validity. [] The Association contends the Regulation falls outside the lawmaking authority delegated by the Legislature to the Commissioner, and conflicts with the UIPA. ... In exercising our ultimate responsibility to construe the statutory scheme, however, we “ ‘ accord[] great weight and respect” ’ ” to the administrative agency’s construction. []

How *much* weight to accord the agency’s construction depends on the context, a term encompassing both the nature of the statutory issue and characteristics of the agency. [] Among the factors bearing on the value of the administrative interpretation, two broad categories emerge: factors relating to the agency’s technical knowledge and expertise, which tend to suggest the agency has a comparative interpretive advantage over a court; and factors relating to the care with which the interpretation was promulgated, which tend to suggest the agency’s interpretation is likely to be correct. [] Bearing these factors in mind, we retain the ultimate responsibility to decide whether the Regulation falls within the Commissioner’s “ ‘ broad discretion to adopt rules and regulations as necessary to promote the public welfare.’ ”

(*ACIC, supra*, 2 Cal.5th 376, 390, citations omitted.)

Lower courts are following the Supreme Court’s lead. Quoting from *ACIC*, the Court of Appeal in 2019 upheld an historic fine against Mercury Insurance Company for overcharging consumers in violation of Prop 103:

In reviewing whether an agency has properly interpreted a statute, although we make the final determination of its construction, we give “ ‘ great weight and respect to the administrative construction.” ’ ” (*Association of California Ins. Companies v. Jones* (2017) 2 Cal.5th 376, 397, 212 Cal.Rptr.3d 395, 386 P.3d 1188 (*Assn.*)). In determining how much weight we give to the agency’s interpretation we consider “factors relating to the agency’s technical knowledge and expertise, which tend to suggest the agency has a comparative interpretive advantage over a court[,] and factors relating to the care with which the interpretation was

promulgated, which tend to suggest the agency’s interpretation is likely to be correct.” (*Id.* at p. 390, 212 Cal.Rptr.3d 395, 386 P.3d 1188.) We also give deference to the Commissioner’s rulings and bulletins (defining agent fees/broker fees) because, although not controlling on us, they “ ‘do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.’ ” (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 14, 78 Cal.Rptr.2d 1, 960 P.2d 1031 (*Yamaha*)). This is especially true when the agency here has “technical knowledge and expertise” (*Assn.*, at p. 390, 212 Cal.Rptr.3d 395, 386 P.3d 1188) and has “thoroughly considered the issue and reached a reasonable conclusion in harmony with the [statute], long-standing administrative construction, and public policy considerations” (*Ohio Casualty Ins. Co. v. Garamendi* (2006) 137 Cal.App.4th 64, 79, 39 Cal.Rptr.3d 758).

(*Mercury Ins. Co. v. Lara* (2019) 35 Cal.App.5th 82, 100.)

Just last month, in a tentative decision rejecting yet another industry challenge to the Commissioner’s authority over homeowners insurance, the Los Angeles Superior Court relied on the Supreme Court’s decisions to give significant deference to the Commissioner’s decision to address destabilizing insurer practices in the homeowner insurance marketplace by ordering the FAIR Plan to expand its coverage.

When an agency is not exercising a discretionary rulemaking power but merely construing a controlling statute, “ [t]he appropriate mode of review ... is one in which the judiciary, although taking ultimate responsibility for the construction of the statute, accords great weight and respect to the administrative construction.” How much weight to accord an agency’s construction is “situational,” and greater weight may be appropriate when an agency has a “ ‘comparative interpretive advantage over the courts,’ ” as when “ ‘the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion.’ ” Moreover, a court may find that “the Legislature has *delegated* the task of interpreting or elaborating on a statute to an administrative agency,” for example, when the Legislature “employs open-ended statutory language that an agency is authorized to apply or ‘when an issue of interpretation is heavily freighted with policy choices which the agency is empowered to make.’ ” ...In other words, the delegation of legislative authority to an administrative agency sometimes “includes the power to elaborate the meaning of key statutory terms.” (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 800, 85 Cal.Rptr.2d 844, 978 P.2d 2.)

(Tentative Decision on Petition for Writ of Mandate, *Cal. Fair Plan Ass’n v. Lara*, No.

19STCP05434 (Los Angeles Super. Ct., Apr. 27, 2021), at 17, citing *Am. Coatings Ass’n v. South Coast Air Quality Mgmt. Dist.* (2012) 54 Cal.4th 446, 461-462.)

Conclusion

The Insurance Commissioner has the legal authority to require insurance companies to set rates and premiums that reflect a homeowner's risk of loss and to prevent insurance companies from arbitrarily withdrawing from neighborhoods and communities across the state. Contrary to the insurers' arguments, there is no requirement that an enabling statute expressly authorizes the Commissioner to promulgate regulations needed to enforce the laws. So long as the Commissioner has the authority to prevent unfair rate discrimination and to regulate the underlying factors that may lead to insurance that is unfair, unavailable, and unaffordable, he is empowered to issue the regulations needed to do so.