CASE NO. S157001

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PAULINE FAIRBANKS, *et al.*,
Plaintiffs/Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES
Respondent.

FARMERS NEW WORLD LIFE INSURANCE CO., *et al.*,
Defendants/Real Parties in Interest.

On Review of the Decision of the Court of Appeal,
Second Appellate District, Case No. B198538,
Denying a Petition for Writ of Mandate Challenging a Decision of the
Los Angeles Superior Court, Case No. BC305603.

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF CONSUMER WATCHDOG

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES:

Pursuant to Rule of Court 8.520(f) and 8.252(a), Consumer Watchdog respectfully requests permission to file the attached Amicus Curiae Brief in Support of Petitioners Pauline Fairbanks, et al. and the accompanying Motion for Judicial Notice. By order dated June 10, 2008, this Court granted Consumer Watchdog an extension of time, to this day, July 9, 2008, to serve and file, this application.[1]

STATEMENT OF INTEREST OF AMICUS CURIAE

Consumer Watchdog is a nationally recognized, California based, non-profit citizen education and advocacy organization. Founded in 1985, a core mission of the organization is to defend, enforce, and monitor the implementation of insurance reform Proposition 103 on behalf of the People of California before the courts and the California Department of Insurance.

Previously known as The Foundation for Taxpayer and Consumer Rights (the organization changed its name on April 25, 2008), the organization and/or its lawyers have appeared before this Court and the appellate courts in virtually every lawsuit concerning Proposition 103's constitutionality, scope, and application since the measure's passage in 1988.[2] The organization has also initiated, or intervened in, at least four

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[1] Consumer Watchdog filed and served an amicus curiae letter in support of the Petition for Review in this matter on October 26, 2007.

[2] For example, *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216; *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243; *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473; *Spanish Speaking Citizens' Foundation, et al. v. Low* (2000) 85 Cal.App.4th 1179; *Foundation for Taxpayer and Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354.

civil cases to enforce Proposition 103 against individual insurance companies as well as dozens of administrative proceedings before the California Department of Insurance.

The undersigned is the founder of Consumer Watchdog, and the author of Proposition 103.

The appeal in this case raises issues of enormous importance to California consumers and voters. The opinion of the Court of Appeal limits the legal remedies available to those who have been victimized by unlawful insurance practices; in substantial part the opinion is based upon "policy considerations" that are unsupported in the record and do not comport with the views of the agency whose jurisdiction the opinion ostensibly seeks to protect. Further, the opinion rests on an interpretation of this Court's decision in *Moradi-Shalal v. Fireman's Fund Insurance Cos.* (1988) 46 Cal.3d 287, that has previously been rejected by this Court.

Finally, and of particular concern to Consumer Watchdog, the opinion contains broad and unsupported policy statements that are not tethered to the issue in this case; these statements will lead to confusion that could taint unrelated cases involving Proposition 103 and other statutes.

HOW CONSUMER WATCHDOG WILL ASSIST THE COURT

As the leading non-profit organization representing the public interest on insurance and Proposition 103 matters in this state, Consumer Watchdog has extensive experience concerning several of the paramount issues raised by the decision of the Court of Appeal. We are familiar with the lower court's ruling and have closely reviewed the record below and the briefs of the parties in this case.

Because of the organization's historical role in insurance matters, it is able to provide a detailed discussion of both the precedents and the public policy discussed by the Court of Appeal.

Consumer Watchdog therefore believes it can provide this Court with a unique and valuable perspective, based on nearly twenty years of experience in Proposition 103 and insurance matters. Consumer Watchdog respectfully requests permission to file its amicus curiae brief and accompanying Motion for Judicial Notice.

Dated: July 9, 2008

Respectfully submitted,

Harvey Rosenfield
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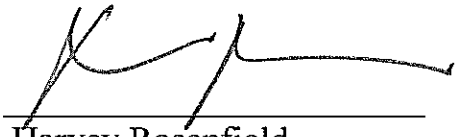
CONSUMER WATCHDOG

By: 
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AMICUS CURIAE BRIEF

INTRODUCTION & SUMMARY OF DISCUSSION

Consumer Watchdog submits this amicus curiae brief specifically to address the "policy considerations" that figure so prominently in the opinion below.[1]

According to the Court of Appeal, where two enforcement mechanisms operate concurrently – even where, as here, the challenged conduct would be considered unlawful under both – the private right of recourse to the judicial branch, with its far broader remedies and greater due process protections, must give way, based on "policy considerations," to a limited administrative proceeding before the Insurance Commissioner. So long as the Commissioner *could have* prosecuted insurer misconduct under the Unfair Insurance Practices Act (UIPA), there can be no private right of action to redress it under the Consumers Legal Remedies Act (CLRA).

This new, special judicial dispensation for insurance companies is necessary, according to the court below, because private lawsuits to enforce the CLRA against insurers would, in some unexplained way, be incompatible with the Insurance Commissioner's powers under the UIPA, and would "wreak havoc" upon this Court's decision in *Moradi-Shalal v. Fireman's Fund Insurance Cos.* (1988) 46 Cal.3d 287 (*Moradi-Shalal*).

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[1] Consumer Watchdog agrees with Petitioners that insurance is a "service" for purposes of the CLRA under generally applicable rules of statutory construction, for the reasons set forth in their Opening Brief.

The Court of Appeal's policy considerations are unfounded. This brief will show that:

1. The Department of Insurance and private parties have shared enforcement powers over property-casualty insurance companies for nearly 20 years pursuant to Proposition 103, and there has been no "havoc." While Proposition 103 is an entirely different statutory framework than the CLRA, experience under its parallel enforcement system, with its cumulative remedies, belies the concerns of the panel below. Indeed, we will show that the Insurance Commissioner – the official whose responsibilities are allegedly threatened by concurrent enforcement – has emphatically *embraced* private enforcement as a complement to his own authority.

2. *Moradi-Shalal* and related cases rejecting an *implied* private right of action under the UIPA have no bearing on this case. *Moradi-Shalal* addressed the question of whether a private right of action could be implied from the UIPA. It and the other cases that followed it hold that the UIPA can only be enforced by the Insurance Commissioner. These decisions offer no guidance about cases where there is an *explicit* private right of action established by statute. No principle of law sanctions the nullification of later-enacted statutes by an earlier enacted statute, regardless of how compelling a judicial panel believes the policy considerations are.

3. Policy considerations weigh *in favor* of the application of CLRA to insurance. If recourse to "policy considerations" is necessary here as a matter of statutory construction, then Insurance Code section

1861.03(a),[2] enacted by the Proposition 103 voters twenty nine years after the passage of the UIPA, strongly supports the application of the CLRA to insurance. The subdivision directs that "[t]he business of insurance shall be subject to the laws of California applicable to any other business." (Insurance Code § 1861.03, sub (a).) The unambiguous purpose of this statute is to sweep away the insurance industry's exemption from the application of California's consumer protection laws, of which the CLRA is one.

Apart from their application here, the Court of Appeal's policy pronouncements are a matter of concern to Consumer Watchdog for another reason. Unless it is decisively rejected, the policy analysis proffered by the panel below will inevitably infect non-CLRA cases. That is because the Court of Appeal's conclusion – that parallel statutory enforcement mechanisms cannot be permitted – has no intrinsic tether to the CLRA. Put another way, the policy reasoning below would bar CLRA suits against insurance companies even if the CLRA explicitly stated that "insurance is a service." Indeed, insurers have advanced precisely the same policy argument to repeatedly challenge the right of consumers to bring lawsuits under the authority enacted by the voters as part of Proposition 103 nearly twenty years ago. There is no doubt that the insurance industry will seize upon any opportunity to make such arguments before the lower courts in the future. As the leading California public interest group representing California voters in Proposition 103 matters for the last two decades, Consumer Watchdog respectfully urges the Court to bear this context in mind.

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[2] All statutory designations are to the Insurance Code unless stated otherwise.

DISCUSSION

I. THE COURT OF APPEAL'S POLICY CONCERNS ARE UNFOUNDED.

The issue in this matter is whether insurance is a service for purposes of lawsuits brought under the CLRA.

But that is not the question the panel below asked and then answered in its opinion. Instead, the Court postulated a *conflict* between the CLRA and the UIPA:

> We here consider whether the generally-applicable provisions of the CLRA override the insurance-specific provisions of the UIPA, and provide for a private right of action where the UIPA provides only for administrative enforcement.

(*Fairbanks v. Superior Court* (2007) 154 Cal.App.4th 435, 447 (Farmers New World Life Insurance Co. et al., Real Parties in Interest) (*Fairbanks*).)

Long established principles of statutory construction direct that courts focus first on the plain text and ordinary meaning of the statutes, thus avoiding, if possible, resort to legislative intent or inquiry into the policy behind the enactments. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798; *Day v. City of Fontana* (2001) 25 Cal.4th 268, 272; see also *Maricela C. v. Superior Court* (1998) 66 Cal.App.4th 1138, 1144.)

Framing the issue as a question of conflicting statutes led the court to make short work of examining the plain text of the statutes, however, and the opinion quickly turns to a discussion of "policy considerations." (*Fairbanks*, *supra*, 154 Cal.App.4th at 446.) The court below predicts dire consequences if the ostensible conflict between the statutes is not resolved in favor of the UIPA and against the CLRA:

> In a practical sense, allowing for a CLRA remedy for insurance fraud would wreak havoc on the established code and decades of case history.

(*Ibid.*)

It is obvious that the court perceives a threat from a system under which the insurance market is policed through both administrative enforcement of the insurance laws under UIPA and civil enforcement under the CLRA. The nature of that threat is far from obvious, however.

The court is clearly *not* concerned that dual enforcement authority would lead to conflicting results. To the contrary, it emphasizes that both the UIPA and the CLRA could be utilized to challenge conduct that is unlawful *under both statutes*:

> [I]f insurance were considered a "service" under the CLRA, many of the unfair and deceptive practices prohibited by the UIPA would *also* constitute "proscribed practices" under the CLRA.

(*Ibid.*, emphasis in original.)

Nor does the court below express any concern about the fact that consumers are presently able to invoke traditional common law rights and remedies against practices that are also "proscribed practices" under the UIPA. Apparently the court's fears are directed only to statutory mechanisms under which groups of injured persons may join together to seek justice through the class action device made accessible by the CLRA.

While the panel below never explains why alternative administrative and civil enforcement mechanisms are of such grave concern, nor offers any support for its prognostication of "havoc," the panel clearly believes that the best policy would be to entrust the

Insurance Commissioner with the exclusive authority to address unlawful conduct by insurance companies.

Once upon a time, that view was broadly reflected in California's insurance laws. But the laws have changed. Experience under Proposition 103, enacted by the voters in 1988, provides a basis for assessing the Court of Appeal's fears concerning alternative statutory enforcement mechanisms and cumulative remedies.

A. Prior to Proposition 103, the Insurance Commissioner Had "Exclusive Jurisdiction" Over Challenges to Insurance Company Acts and Practices.

Under the McBride-Grunsky Regulatory Act of 1947 (McBride Act), the property-casualty insurance industry was insulated from accountability in the courts through a combination of the "exhaustion" doctrine and various statutory immunities that precluded application of the antitrust and consumer protection laws to the industry's rates and practices.

In the context of Proposition 103 litigation, this Court has frequently discussed the McBride Act regime. The McBride Act was enacted for the purpose of providing insurers antitrust immunity for rate-fixing practices that would otherwise be collusive. (See *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1257-1258; *State Compensation Insurance Fund v. Superior Court* (2001) 24 Cal.4th 930, 939; *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 281; *20th Century Ins. Co. v. Garamendi, supra*, 8 Cal.4th 216, 240, *quoting King v. Meese* (1987) 43 Cal.3d 1217, 1221.)

The McBride Act framework effectively precluded private lawsuits under the Unfair Competition Law (Bus. & Prof. Code § 17200

et seq. [UCL]) and other state laws.[3] "[U]nder the McBride Act, the commissioner had *exclusive jurisdiction* to adjudicate complaints...." (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 981, emphasis added.)[4]

B. Proposition 103 Established a Dual Enforcement System and Eliminated the Commissioner's Exclusive Jurisdiction over Violations of the Insurance Code.

In 1988, California voters enacted precisely the kind of alternative administrative and civil enforcement system that the Court of Appeal below rejects on policy grounds. Proposition 103 made "numerous fundamental changes in the regulation of automobile and other types of insurance." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 812.) The measure enacted a stringent system of regulation governing the rates, premiums and underwriting practices of the industry. Though the Insurance Commissioner was entrusted with the responsibility to implement and enforce the law, the voters were not content to leave the Commissioner with sole authority to do so. They eliminated the

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[3] See *Karlin v. Zalta* (1984) 154 Cal.App.3d 953, for a sweeping but typical application of the McBride Act immunities.

[4] In brief, sections 1858 through 1859.1 established an administrative complaint process under which 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 his sole discretion. Should a hearing substantiate misconduct, the Commissioner could provide prospective relief only. The Commissioner had no authority to order refunds, restitution or disgorgement. Judicial review was available only by way of Code of Civil Procedure § 1094.5. These sections were amended just prior to the introduction of Proposition 103 to enable a consumer to file a complaint directly with the Commissioner. (See also *King v. Meese* (1987) 43 Cal.3d 1217, 1240-1241.)

industry's broad immunities and established the right of individual citizens to challenge, in court, violations of Proposition 103:

> In enacting Proposition 103, the voters vested the power to enforce the Insurance Code in the public as well as the Commissioner. As the plain text of Insurance Code sections 1861.03 and 1861.10 make[s] clear, Proposition 103 established a private right of action for [its] enforcement....

(*Donabedian, supra*, 116 Cal.App.4th at 982 [quoting the amicus brief of the Insurance Commissioner].)

This Court first recognized the right to sue an insurer under Proposition 103 in *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377 (*Farmers*), which established the primary jurisdiction doctrine. Rejecting Farmers' argument that a UCL suit challenging its unlawful premium-setting practices had to be brought first before the Commissioner, the Court explained that Proposition 103 provides "'*alternative*' or '*cumulative*' administrative and civil remedies." (*Id.* at 393-394, emphasis added.) This dual enforcement was later confirmed in a meticulous statutory analysis by the Court of Appeal in *Donabedian, supra,* 116 Cal.App.4th 968.

To be sure, Proposition 103 differs from the CLRA. Proposition 103 explicitly establishes a dual civil and administrative enforcement system. Sections 1861.03(a) and 1861.10(a) expressly authorize consumers to bring civil actions against insurance companies for violations of its provisions. The CLRA does not establish, or even advert to, administrative proceedings. However, for purposes of assessing the policy considerations that the Court of Appeal articulated – particularly the threat of "havoc" posed by the availability of cumulative or alternative remedies – the experience under Proposition 103 is highly

instructive. For nearly twenty years, a parallel system of enforcement – administrative and private – has governed the insurance industry's rates and practices. Consumers have been authorized to sue insurance companies under the UCL, the Cartwright Act, the Unruh Act and other state laws, and there is no evidence of havoc.

C. The Insurance Commissioner Has Continuously Embraced Private Enforcement of the Insurance Code As Essential to Fulfilling Its Statutory Responsibilities under Proposition 103.

According to the court below, the Insurance Commissioner should be vested with the exclusive authority to police the entire insurance marketplace in California, under a statute – the UIPA – whose remedies are negligible compared to those available under the statute it is to displace, the CLRA.

This ruling is premised on policy considerations that stand in sharp contrast to the actual views of the Insurance Commissioner – the official whose responsibilities are allegedly threatened by the dual system of civil and administrative enforcement. The Commissioner has repeatedly and emphatically embraced private enforcement as a crucial component in the enforcement of the state's insurance laws.

At the outset, it is important to note that none of the cases in which the Commissioner has presented his views on private enforcement involve the CLRA (at least to Consumer Watchdog's knowledge). Rather, the context was civil litigation in which insurance company defendants had been sued and argued that the suits were barred, notwithstanding Proposition 103's authority. Again, however, for purposes of assessing the Court of Appeal's "policy considerations," the Commissioner's carefully considered views of private enforcement are equally relevant here.

The Insurance Commissioner first expressed support for private enforcement in a December 18, 1991 amicus letter to this Court from the General Counsel of the California Department of Insurance (CDI) in the *Farmers* case. The Commissioner's letter is discussed in *Farmers, supra,* 2 Cal.4th at 400, fn. 19, and is attached as Exhibit A to Consumer Watchdog's Motion for Judicial Notice (MJN). The Commissioner wrote:

> "[T]he Commissioner *welcomes the assistance* of law enforcement officials and individuals acting as private attorneys general in seeking compliance with various provisions of the Insurance Code. Indeed, it is the Commissioner's view that Proposition 103 amended the Insurance Code precisely to encourage such actions by law enforcement officials and consumers. (See Ins. Code § 1861.03, subd. (a).)
>
> In the Commissioner's view, the drafters of Proposition 103 understood that the *Department, even under an elected Insurance commissioner, could not reasonably be expected to respond to all allegations of violations of its newly enacted reforms.* For that reason, the initiative specifically made the business of insurance subject to Business and Professions Code section 17200 et seq. (Ins. Code § 1861.03.) In this manner, those organizations or individuals who have sufficient resources to pursue an unfair business practices lawsuit involving insurance rating practices or other claims would be able to do so, without having to rely solely upon the Department to investigate and prosecute their claims.
>
> [T]he Commissioner perceives that *little disruption to the Department's ongoing enforcement efforts is likely to result* from other parties' pursuit of independent actions under the Business and Professions Code. Far from interfering with the Department's efforts, the independent authority created by Business and Professions Code section 17200 et seq., serves as a *valuable complement* to the Commissioner's own authority in this area.

(MJN, Exh. A [Commissioner's Amicus Letter in Farmers], pp. 1-2, emphasis added.)

In 1996, the Insurance Commissioner again addressed concurrent enforcement, this time in the context of this Court's consideration of arguments that parallel almost exactly the policy considerations adopted by the panel below. In *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, the insurance company defendants asserted that the UIPA superseded the Cartwright Act and the UCL so as to bar prosecution of an antitrust claim against an insurance company. As this Court related:

> The Insurance Commissioner, whose office proposed inclusion of section 790.09 in the UIPA to *ensure that existing remedies would be preserved*, continues to take the position that the *Legislature did not intend, by adoption of the UIPA, to supersede the Cartwright Act or any other state laws.* Appearing as amicus curiae in support of plaintiff, the commissioner expresses his belief that *regulatory enforcement by his office is complementary to the Cartwright Act and the UCA* [Unfair Competition Law]. Both the commissioner and the California District Attorneys Association, which also appears as amicus curiae, express the belief that the public interest is served by vigorous enforcement of all three statutes. The California District Attorneys Association asserts that actions under the UCA have become the principal law enforcement instrument of prosecutors in the areas of consumer protection and unfair competition, with more than 200 such actions being prosecuted annually. The UCA is also the basis for prosecutions brought to supplement provisions of the Health & Safety Code and the Labor Code to remedy public health and sanitation and public safety violations, and its use to supplement other provisions of law has been upheld repeatedly.

(*Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 275, fn. 8.) This Court concluded that the Legislature did not

"grant[] the insurance industry a general exemption from state antitrust and unfair business practices statutes. Rather, the Legislature intended that rights and remedies available under those statutes were to be *cumulative* to the powers the Legislature granted to the Insurance Commissioner...." (*Id.* at 263, emphasis added.) As noted *infra* at pages 19-23, that decision is on point here and disposes of the "policy considerations" adopted by the panel below in this case.

More recently, the Commissioner has submitted *three* appellate briefs as amicus curiae again emphatically embracing private litigation as a crucial complement to the Department's enforcement of the state's insurance laws.

Each of these cases involved a civil lawsuit challenging the violation of provisions of Proposition 103 by insurance carriers. The Commissioner submitted a brief in *Donabedian*, *supra*, 116 Cal.App.4th 968; it is attached as Exhibit B to Consumer Watchdog's Motion for Judicial Notice.[5] The second case was *Poirer v. State Farm Mutual Automobile Insurance Company* (unpublished) (1 App. 139-141) (B165389), 2004 WL 2325837.[6] The third case in which the Commissioner filed an amicus brief was a consolidated writ proceeding: *Farmers Insurance Exchange v. Superior Court* (Douglas Ryan, Real Party in Interest) and *Safeco Insurance Co. of America v. Superior Court* (Proposition 103 Enforcement Project, Real Party in Interest) (2006) 137

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[5] The Commissioner's brief in *Donabedian* may also be found at 2003 WL 23280980.

[6] The Commissioner's brief in *Poirer* is not available online.

Cal.App.4th 842, review den. June 14, 2006 ("*Farmers/Safeco*"[7]). The Commissioner's brief in that case is attached as Exhibit C to Consumer Watchdog's Motion for Judicial Notice.[8]

In each case, the insurers had urged the courts to overturn the private right of action established by Proposition 103.[9]

After confirming in each amicus brief that Proposition 103 eliminated the Commissioner's exclusive jurisdiction in favor of a system of dual enforcement of the laws, the Commissioner discussed the importance of private enforcement in very practical terms.

The Commissioner emphasized that the CDI had limited resources and expertise. For example, in his brief in *Donabedian*, the Commissioner stated:

> The Department goes to great lengths to review the class plan applications that it receives [pursuant to Insurance Code section 1861.02(a)]. However, this is no small feat. From January of 2002 to December of 2002, the Department reviewed 217 class plans, some of which may contain hundreds of pages. During this same time period, the Department received and reviewed a total of 6,739 rate increase/decrease filings, generally [pursuant to Insurance Code section 1861.05 (a)]. In order to conduct the class plan review, the Department employs a total of 29 rate analysts and actuaries. The Department employs a total of 46 analysts to review the other prior approval filings

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[7] The Proposition 103 Enforcement Project is a project of Consumer Watchdog.

[8] The Commissioner's brief in *Farmers/Safeco* may also be found at 2005 WL 3487115.

[9] Consumer Watchdog filed amicus briefs in *Donabedian* and *Poirer*. The briefs were filed under Consumer Watchdog's former name, The Foundation for Taxpayer and Consumer Rights, and may be found at 2003 WL 23209749 (*Donabedian*) and 2004 WL 1284440 (*Poirer*), respectively.

> received, literally, on a daily basis. While each of these analysts and actuaries are familiar with the Insurance Code, they typically do not have the benefit of legal training. Moreover, private attorneys general often have access to resources that the Department does not. Like all administrative agencies, the Department *must balance its statutory responsibilities with the available resources when exercising its discretion to deploy its prosecutorial authority.*
>
> The Department does conduct some enforcement actions against carriers.... 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 Code is revealed.

(MJN, Exh. B [Commissioner's Brief in *Donabedian*], p. 19, emphasis added.)

The Commissioner has also noted that the private enforcement confers an additional benefit in a regulatory regime in which the actors are well aware of the limits of the agency's resources: it "provide[s] a deterrent to misconduct." (MJN, Exh. C [Commissioner's Brief in *Farmers/Safeco*], p. 29.)

In each of these cases, the insurance industry defendants and their *amici* argued strenuously that the concurrent enforcement system established by Proposition 103 would undermine the Commissioner's regulatory authority, echoing in nearly identical language the policy concerns raised by the Court of Appeal in this case. As the Commissioner noted:

> Much of Petitioners' papers are devoted to an *unfounded fear* that the direct private right of action in section 1861.10 will substantially disrupt the administrative prior approval

> process set forth in Article 10 [Proposition 103]. Petitioners portray *dire consequences* for the Commissioner and the courts should the third clause of section 1861.10(a) be construed according to its plain language.

(MJN, Exh. C [Commissioner's Brief in *Farmers/Safeco*], p. 26, emphasis added.) The Commissioner unambiguously dismissed this argument:

> To the extent that Petitioners suggest that they are acting in the interests of the Commissioner or the regulatory process when they argue that section 1861.10(a) would produce dire consequences if properly construed, *they need have no fear. Nothing in the panoply of accountability provisions in Proposition 103, including the private right of action generally and the right to directly enforce provisions of Proposition 103 in particular, in any way interferes with or threatens the Commissioner's ability to carry out his duties and responsibilities to the public and to the industry.*

(*Id.* at 28, emphasis added.)

Indeed, in sharp contrast to the views of the panel below, the Commissioner foresaw deleterious consequences were the court to conclude that his authority was exclusive. He warned of "potentially disastrous results" should private enforcement be barred. (MJN, Exh. B [Commissioner's Brief in *Donabedian*], p. 18.) "If such litigation is dismissed by courts..., suffice it to say that much insurer conduct which violates the law will unnecessarily persevere." (*Id.* at 19.)

Again, we must acknowledge that Proposition 103 is not the CLRA. But there is nothing in the record in this proceeding (or, for that matter, in any proceeding in California that we are aware of) that

supports the suggestion that alternative or cumulative remedies would undermine the functions or authority of the Department of Insurance.[10]

During the nearly twenty years that Proposition 103 has been on the books, California courts have adjudicated private lawsuits, invoking the Department's special expertise under the *Farmers* primary jurisdiction doctrine when necessary to protect judicial efficiency and consistency. In the absence of any evidence to support the predicted "havoc," the Commissioner's assessment of the benefits of a cumulative or dual enforcement system, albeit in the context of Proposition 103, is extremely relevant to any policy inquiry that might be necessary here. The "policy considerations" the Court of Appeal articulated in this case are diametrically the opposite of those set forth by the agency whose jurisdiction it purported to be protecting.[11]

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[10] That is not to say that the insurers have not routinely threatened "havoc" at the prospect of accountability in the civil courts. As this Court has witnessed on many occasions since Proposition 103 was enacted, the threat of financial catastrophe has been a recurrent theme in every one of the many lawsuits insurance companies have brought to challenge Proposition 103 and the regulations promulgated thereunder. (See, e.g., *Fireman's Fund Ins. Co. v. Garamendi* (1992) 790 F.Supp. 938; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216; *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243; *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029.) There is evidence that such posturing, when not confined to legal briefs, has been a deliberate strategy of insurance companies undertaken to influence this Court's actions. (Reich, *Van De Kamp Says Insurance Firms Engaged in Collusion*, Los Angeles Times (January 3, 1991), p. A3 [reporting on an investigation by the California Attorney General which concluded that insurance firms had organized an economic boycott in order to influence this Court to issue a stay in *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805].)

[11] The views of the Insurance Commissioner, consistent since 1991, were well known to the panel below: it was the same Division of the Second

II. MORADI-SHALAL AND RELATED CASES REJECTING AN *IMPLIED* PRIVATE RIGHT OF ACTION UNDER THE UIPA HAVE NO BEARING ON THIS CASE.

The Court of Appeal determined that the availability of alternative remedies under the CLRA and the UIPA would conflict with this Court's seminal decision in *Moradi-Shalal* and the related cases that followed it. The opinion states:

> [I]nterpreting the CLRA to apply to insurance would, in effect, swallow the UIPA whole by allowing a private right of action where the courts have explicitly held that a private right of action under that statute was never intended. [Footnote citation to *Moradi-Shalal* and other cases.]

(*Fairbanks*, *supra*, 154 Cal.App.4th at 447.)

The import of this interpretation of *Moradi-Shalal* is profound: so long as the Insurance Commissioner *could have* investigated the conduct alleged here through an administrative action under UIPA, there can be no private right of action to redress the conduct under the CLRA. This is

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Appellate District that decided *Farmers/Safeco*, *supra*, 137 Cal.App.4th 842. The Department's brief in that proceeding ought to have reassured it that parallel civil and administrative enforcement systems would advance, rather than hinder, the agency's mission. The *Farmers/Safeco* court refused to acknowledge that Proposition 103 provides for a direct action under its provisions. However, it left intact and confirmed the conclusion of this Court in *Farmers* and of the Court of Appeal in *Donabedian* that Proposition 103 confers authority to enforce those same provisions through a UCL action. (*Farmers/Safeco*, *supra*, 137 Cal.App.4th 842, 853, fn. 8 ["'[A]ny person' may initiate or intervene in any proceeding 'permitted or established' pursuant to Chapter 9. As we have already described, such proceedings are limited to ... direct legal actions authorized by section 1861.03, subdivision (a)...."].)

true, as the court below states, even if the conduct is unlawful under *both* UIPA and the CLRA. (*Ibid.*)

The panel not only misreads *Moradi-Shalal*, but expands its scope far beyond the explicit limitations this Court set in that decision and in subsequent cases rejecting the argument adopted by the court below.

A. In *Moradi-Shalal*, This Court Applied Statutory Construction Principles to Determine Whether A Private Right of Action Can Be *Implied* From A Statute.

In *Moradi-Shalal*, the plaintiffs sued under the UIPA. That statute was *silent* on the subject of whether they could do so. To answer whether the UIPA authorized a direct action by private plaintiffs, this Court turned to the rules of statutory construction. After a lengthy examination of the legislative history, the Court concluded that the Legislature had intended that only the Insurance Commissioner could enforce its provisions. (*Moradi-Shalal*, *supra*, 46 Cal.3d at 300.) This Court held, therefore, that a private right of action to enforce the UIPA could not be *implied* from that statute.

As this Court later found it necessary to emphasize, "'*Moradi-Shalal* marks a return to the fundamental principal'" that a statute "'is to be applied according to its terms.'" (*Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 279.)

A number of cases, some cited by the court below, have followed *Moradi-Shalal* because the issue was whether a private right of action to enforce the statute directly could be *implied* from the UIPA or from another statute that was also *silent* on the matter. (See, e.g., *Zephyr Park v. Superior Court* (1989) 213 Cal.App.3d 833, 837 [no implied first party private right of action under section 790.03]; *Vikco Insurance Services, Inc. v. Ohio Indemnity Co.* (1999) 70 Cal.App.4th 55, 62

["Specifically, there is no reference whatsoever to a private right of action, or any other language stating that an individual insurance agent or independent insurance agency may bring a lawsuit to enforce [section 1769]"]; *Crusader Insurance Co. v. Scottsdale Insurance Co.* (1997) 54 Cal.App.4th 121, 124 [section 1763 does not impliedly authorize a private right of action].)

Other cases have refused to allow the UIPA to be invoked as a predicate unlawful act for purposes of a UCL suit. (See, e.g., *Maler v. Superior Court* (1990) 220 Cal.App.3d 1592, 1598-1599 [the UIPA may not be invoked as a predicate for an action under the UCL, which was made applicable to the insurance industry by Proposition 103, sections 1861.03, subd. (a) and 1861.10, subd. (a)].)

Neither *Moradi-Shalal* nor any of the follow-on cases are apposite. Here, the parties did not sue under, or even invoke, the UIPA. Rather, they sued under the CLRA, which *expressly* provides a private right of action to enforce its own provisions. Yet the court below stated that because the UIPA *also* bars some of the same conduct, only the Commissioner, not the courts, may address it.

B. *Manufacturers Life* Rejected the Construction of *Moradi-Shalal* and the UIPA Adopted by the Court Below.

This Court directly addressed and rejected the reasoning of the court below in *Manufacturers Life,* where it confirmed that the UIPA did not override a suit under the UCL and the Cartwright Act (Bus. & Prof. Code §§ 16720-16770), and emphasized that *Moradi-Shalal* did not say otherwise. (*Manufacturers Life*, *supra*, 10 Cal.4th at 284.)

In *Manufacturers Life*, an insurance agency alleged that several defendant insurance companies had conspired to boycott the plaintiff's

agency and to prevent the plaintiff's clients from obtaining certain information about settlement annuities. (*Id.* at 264.) The complaint alleged, among other causes of action, a claim of unfair business practices in violation of the UCL, predicated on violations of the Cartwright Act, Business and Professions Code § 16720, et seq. (*Id.* at 263-64.)

The insurance company defendants in *Manufacturers Life* made precisely the argument that was adopted by the court below in this case. As this Court described it:

> [Defendants] claim that permitting a UCA [UCL] action for an unfair insurance practice that is prohibited by the UIPA would 'seriously compromise' this court's holding in *Moradi-Shalal* [citation] that there is no private cause of action for violations of section 790.03 even if the conduct also constitutes a violation of the Cartwright Act."

(*Id.* at 268.) This Court rejected the argument because, it noted, the right to prosecute a UCL action is expressly authorized by the statute, distinguishing it from *Moradi-Shalal*, where the issue was whether such a right could be *implied* from the UIPA:

> As the Court of Appeal here recognized, however, a cause of action for unfair competition based on conduct made unlawful by the Cartwright Act is not an "implied" cause of action which *Moradi-Shalal* held could not be found in the UIPA. There is no attempt to use the UCA to confer private standing to enforce a provision of the UIPA.

(*Id.* at 284.)

Manufacturers Life observes that no reading of the UIPA supports the conclusion that it exempts insurance companies from the application of other state laws:

> This conclusion [rejecting *Moradi-Shalal's* application] does not compromise the rule of *Moradi-Shalal* in any way. The court concluded there that the Legislature did not

> intend to create new causes of action when it described unlawful insurance business practices in section 790.03, and therefore that section did not create a private cause of action under the UIPA. The court did not hold that by identifying practices that are unlawful in the insurance industry, practices that violate the Cartwright Act, the Legislature intended to bar Cartwright Act causes of action based on those practices. Nothing in the UIPA would support such a conclusion. The UIPA nowhere reflects legislative intent to repeal the Cartwright Act insofar as it applies to the insurance industry....

(*Ibid.*)

Of significant importance to the Court was the UCL's explicit statutory directive that its rights are cumulative to other laws. (*Id.* at 284 ["[T]he Legislature has clearly stated its intent that the remedies and penalties under the UCA are cumulative to other remedies and penalties"].) Business and Professions Code section 17205 states:

> Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state.

The CLRA contains a nearly identical declaration:

> The provisions of this title are *not exclusive*. The remedies provided herein for violation of any section of this title or for conduct proscribed by any section of this title shall be *in addition to* any other procedures or remedies for any violation or conduct provided for in any other law.

(Civ. Code § 1752.)

Manufacturers' Life also notes that the UIPA itself disclaims any intent to preempt civil litigation, such as suits under the CLRA. It reads:

> No order to cease and desist issued under this article directed to any person or subsequent administrative or judicial proceeding to enforce the same shall in any way relieve or absolve such person from any administrative

> action against the license or certificate of such person, civil liability or criminal penalty under the laws of this State arising out of the methods, acts or practices found unfair or deceptive.

(Ins. Code § 790.09.)

The Court concludes that "[t]hat part of section 790.09 which preserves civil and criminal liability would be meaningless if defendants' proposed construction of the section were accepted." (*Manufacturers' Life*, *supra*, 10 Cal.4th at 274.) Exactly the same statutory analysis applies here.

Nevertheless, the opinion below attempts to distinguish *Manufacturers Life* on chronological grounds, noting that the Cartwright Act preceded the UIPA, while the CLRA postdated the UIPA. It states: "[S]ince the UIPA *predates* the CLRA, it cannot be said that we are here reading the UIPA to silently destroy a *pre-existing* cause of action under the CLRA." (*Fairbanks*, *supra*, 154 Cal.App.4th at 447.) In fact, what the court below is doing is much worse than that. It is holding that the UIPA should be construed to *impliedly* supersede the later enactment of the CLRA. No principle of statutory construction so holds.

As noted previously, the Court of Appeal framed the issue in a way that presumed a conflict between the UIPA and the CLRA. As this Court instructed in *Manufacturers Life,* courts typically look for ways to avoid finding conflicts between statutes, harmonizing them if possible. (*Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 274 ["Well-established canons of statutory construction preclude a construction which renders a part of a statute meaningless or inoperative.... [W]here there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

Pursuant to this mandate we must give significance to every part of a statute to achieve the legislative purpose [citations omitted]"].)

The two statutes are so manifestly different in their procedures and remedies that they would have to be considered complementary, even absent the express disavowal of section 790.09. The UIPA, all parties here agree, is an administrative enforcement tool that can only be employed by the Insurance Commissioner; the Administrative Procedure Act (Gov. Code § 11500, et seq.), which largely governs the CDI's administrative proceedings, provides far more limited protections than do courts of law; and the UIPA has the highly limited set of remedies suited to an administrative agency. (See Ins. Code § 790.04 et seq.) By contrast, the CLRA provides rights and remedies – particularly the ability to proceed on a class basis – that are unique to the judicial branch. The CLRA provides for actual and statutory damages (Civ. Code § 1780(a)(1)); restitution (Civ. Code § 1780(a)(3)); punitive damages (Civ. Code § 1780(a)(4)); "any other relief which the court deems proper" (Civ. Code § 1780(a)(5)); and special civil penalties for seniors or the disabled (Civ. Code § 1780(b)).

Tellingly, the opinion below seizes upon the different remedies in the UIPA and the CLRA in support of its ruling. It observes that the plaintiffs in *Manufacturers Life* were seeking only equitable relief, while here, under the CLRA, damages are available. (*Fairbanks, supra,* 154 Cal.App.4th at 447, fn. 10.) The Court of Appeal's unexplained antipathy toward that stronger remedy leads it to conclude that the distinction weighs against the application of the CLRA. However, this Court found that consideration an important distinction *in favor of* private enforcement in *Manufacturers Life*:

> The Insurance Commissioner has no power to initiate a criminal proceeding against, or an action to impose civil liability on, a person who engages in unfair trade practices. The authority of the commissioner is limited to enjoining future unlawful conduct and suspending or revoking a license or certificate.

(*Manufacturers' Life, supra*, 10 Cal.4th at 273-274.)

In any case, even if the court below was correct, and the UIPA and the CLRA are incompatible, the rules of statutory construction would require the court to hold that the CLRA impliedly repealed any conflicting provisions of the UIPA. When two statutes are inconsistent and incompatible, the general presumption against implied repeals is overcome and the *later statute prevails*. (*People v. Bustamante* (1997) 57 Cal.App.4th 693, 700-701; see also *Burlington Northern and Santa Fe Railway Co v. Public Utilities Commission* (2003) 112 Cal.App.4th 881, 890.)

Unsurprisingly, the insurance industry has refused to acquiesce to this Court's unambiguous rulings on the scope of *Moradi-Shalal.* A few years after *Manufacturers Life*, the Court was required to address a "question [that] might appear to have been answered in *Manufacturers Life*" – whether title insurance companies could be sued under the UCL. (*Quelimane Company, Inc. v. Stewart Title Guaranty Company* (1998) 19 Cal.4th 26, 43.) The trial court sustained a demurrer as to all causes of action, and the Court of Appeal affirmed. The Court reversed, referring back to its decision in *Manufacturers Life.* It held that because the underlying predicate for the UCL cause of action was not an alleged violation of the UIPA, the claim was proper and *Moradi-Shalal* was not a bar. (*Id.* at 43-44.)

Most of the lower courts have gotten the message, however. In *AICCO, Inc. v. Insurance Company of North America* (2001) 90

Cal.App.4th 579, the plaintiff challenged the defendant insurance company's attempt to shed liability for an entire group of policies by restructuring itself and transferring the policies to a new entity, without obtaining the consent of the policyholders. (*Id.* at 584.) The complaint alleged, *inter alia,* a UCL cause of action predicated on an alleged violation of Civil Code section 1457 (which provides that an obligation may not be transferred without the consent of the party entitled to its benefit). The insurance company argued that *Moradi-Shalal* barred the action, which the Court of Appeal flatly rejected.

> Even if we were to assume that some of the conduct alleged in the complaint comes within the scope of the acts prohibited by the UIPA, it *also* potentially violates Civil Code section 1457. As in *Manufacturers Life, supra,* 10 Cal.4th 257, we conclude the complaint is not barred because the acts that form the basis for the violations of Civil Code section 1457, might also violate the UIPA.

(*AICCO, Inc. v. Insurance Company of North America, supra*, 90 Cal.App.4th at 597, emphasis added.)

The decision of the Court of Appeal here stands as an anomaly among these cases.[12]

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[12] In only one other case that Consumer Watchdog is aware of has a court invoked *Moradi-Shalal* to bar a UCL action, and the case can be distinguished (or should be overruled). In *Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061, the plaintiff was a third party that had a security interest in a vehicle for which the owner had failed to maintain premiums and which was subsequently damaged in an accident. The plaintiff brought a UCL action against the insurer challenging its cancellation and other practices. The Court of Appeal there held that the trial court properly sustained a demurrer, in part on the ground that *Moradi-Shalal* barred a challenge to conduct because the insurer's practices "are the type of activities covered by the UIPA." (*Id.* at 1071.) The court distinguished – unpersuasively –

C. *Moradi-Shalal* Did Not Establish a Special Presumption Against Private Rights of Action.

In addition to expanding the scope of *Moradi-Shalal*, the decision of the court below imposed a novel rule of statutory construction that applies only to cases involving the insurance and, perhaps, other regulated industries: where a statute such as the CLRA creates a private right of action, that right will nevertheless not be applied to the industry unless the statute expressly says so. The opinion states:

> [A]llowing a private right of action under the CLRA would, in effect, undermine the holding in *Moradi-Shalal* and allow a private right of action for UIPA violations. This private right of action would be based *not* on any express grant of the right in clear, understandable, unmistakable terms, but on a conclusion that, although the CLRA was *silent* on the matter of insurance, it was intended to create a private right of action for insurance practices already regulated elsewhere.

(*Fairbanks*, *supra*, 154 Cal.App.4th at 446-447, emphasis in original.) Farmers leaps on this bandwagon, arguing:

> It is ... irrational to suppose that the Legislature intended to create a private right of action under the CLRA for those unfair and deceptive insurance practices already prohibited by the UIPA, without saying it was doing so.

(Answer Brief at 36.)

Manufacturers Life and *Quelimane Company, Inc. v. Stewart Title Guaranty Company*, *supra*, 19 Cal.4th 26, but it also stated that the demurrer was properly granted because the complaint did not correctly tether its allegations of "unfair" practices under the UCL to a legislative policy as required by *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163. (*Textron Financial Corp. v. National Union Fire Ins. Co.*, *supra*, 118 Cal.App.4th at 1071-1073.)

Nothing in *Moradi-Shalal* suggests that it introduced a new judicial hostility to private rights of action when the defendants happen to be insurance companies. Rather, as this Court has repeatedly stressed, "'*Moradi-Shalal* marks a return to the fundamental principal'" that a statute "'is to be applied according to its terms.'" (*Manufacturers Life*, *supra*, 10 Cal.4th at 279.) No principle of statutory construction supports the Court of Appeal's rule placing the burden on the Legislature to "expressly" name the insurance industry (or any other regulated industry) in "clear, understandable, unmistakable terms" if it wishes laws of general applicability to apply to it. "The Supreme Court . . . has never prescribed any 'magic words' the Legislature or the electorate must use to make their purposes explicit." (*In re Mehdizadeh* (2004) 105 Cal.App.4th 995, 1004.)

Applying basic principles of statutory construction, this Court has consistently refused to bar private enforcement absent an express statutory directive. In *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, the Court clearly delineated the terms under which a particular *practice* may not be challenged under the UCL:

> Courts may not simply impose their own notions of the day as to what is fair or unfair. Specific legislation may limit the judiciary's power to declare conduct unfair. If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination. When specific legislation provides a "safe harbor," plaintiffs may not use the general unfair competition law to assault that harbor.

(*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 182.) Such an exemption

must be stated explicitly, however, and cannot be "implied" merely because there is no affirmative authority in the statute:

> We thus conclude that a plaintiff may not bring an action under the unfair competition law if some other provision bars it. *That other provision must actually bar it, however, and not merely fail to allow it.*

(*Id.* at 184, emphasis added.)

The opinion below turns this rule on its head: when it comes to the insurance industry (not just a particular practice), a "plaintiff may not bring an action under the unfair competition law" if "some other provision" of law "fail[s] to allow it."

This is not the first time the panel below has attempted to apply *Moradi-Shalal* in such a fashion. It adopted exactly the same analysis two years ago in *Farmers/Safeco*, *supra*, 137 Cal.App.4th 842, noted *supra* at page 16, footnote 11. In that consolidated proceeding, Consumer Watchdog was a pre-Proposition 64 plaintiff in a suit against Safeco. The issue was whether Proposition 103, section 1861.10 subd. (a), authorizes individuals to directly "enforce" provisions of the measure in court. The superior court, relying on this Court's statutory analysis in *Farmers* and that of the Court of Appeal in *Donabedian*, concluded it did. The decision of the Court of Appeal, authored by the same panel as here, reversed. It cited *Moradi-Shalal* as support for a previously unrecognized rule of statutory construction governing the private right of action in matters involving industries that are also subject to administrative oversight:

> Particularly when regulatory statutes provide a comprehensive scheme for enforcement by an administrative agency, the courts ordinarily conclude that the Legislature intended the administrative remedy to be exclusive unless the statutory language or legislative

history clearly indicates an intent to create a private right of action."

(*Farmers/Safeco*, *supra*, 137 Cal.App.4th 842, 850.)

The point of *Moradi-Shalal* is an elementary one – to respect the plain language of statutes. This bedrock principle is flouted by the judicial fabrication of a presumption that bars the application of the CLRA to insurance unless the legislative branch inserts a special affirmative reference to that industry.

This novel application of *Moradi-Shalal* has already done significant damage. Consumer Watchdog respectfully urges this Court to definitively reject it.

III. POLICY CONSIDERATIONS WEIGH *IN FAVOR OF* THE APPLICATION OF THE CLRA TO INSURANCE.

As noted *supra*, Consumer Watchdog agrees with the statutory analysis of the Petitioners, which demonstrates that the CLRA applies to insurance without any need to reference public policy issues.

However, if recourse to "policy considerations" is necessary here as a matter of statutory construction, then this Court ought to consider an explicit directive of the voters that directly addresses the question of which laws apply to the insurance industry.

Before the Court of Appeal, the parties did not raise, and the Court of Appeal did not mention, Insurance Code section 1861.03(a), enacted by the Proposition 103 voters in 1988.

As discussed above at pages 7-8, this is one of two provisions of Proposition 103 that swept away pre-Proposition immunities and

established a private right of action to enforce the measure's provisions. Subdivision (a) of section 1861.03 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).

(Emphasis added.)

The Proposition 103 voters unmistakably stated their dissatisfaction with the statutory framework in place when they went to the polls in November, 1988. In the Findings contained in the preamble to Proposition 103, they determined that "the existing laws inadequately protect consumers...." (See *Calfarm*, *supra*, 48 Cal.3d at 812-813.)

To address the flaws in the prior statutory scheme, the voters directed that the insurance industry would be subject to California's consumer protection laws, and repealed and modified provisions of the McBride Act accordingly.

Farmers' tries to negate the breadth of this provision by claiming the voters merely intended to "remove the then existing *antitrust* exemption." (Answer Brief, p. 38, emphasis in original). However, by its plain language, the scope of this provision goes far beyond the Cartwright Act, as this Court's decision in *Farmers, supra*, and the *Donabedian* decision, *supra*, confirm. The word "laws" is plural, and the phrase "including, but not limited to" makes it plain that the enumerated statutes are only examples of the laws that are to be applicable to the insurance industry.

The CLRA is certainly one of "the laws of California applicable to any other business." The CLRA contains only two exemptions: for

certain transactions involving real property, and for the news media. (See Civ. Code §§ 1754-1755.) No such exemption may be found for insurance. It is not necessary to argue that Proposition 103 would override such an exemption if it existed. All that needs to be said here is that *if* the CLRA is ambiguous with respect to its application to insurance, the directive of section 1861.03(a), and the policy considerations that led the voters to enact it twenty-nine years after the passage of the UIPA, strongly support the application of the CLRA to insurance.

CONCLUSION

The Court of Appeal's invocation of "havoc" is worth a closer look. It's not the marketplace, the insurance industry, or even consumers that the court below said it feared for. At least on its face, the opinion says it's the Insurance Code and case law that the court is worried about. "[A]llowing for a CLRA remedy for insurance fraud would wreak havoc on the *established code* and *decades of case history*," it says.

This is a startling statement. To suggest that the application of the CLRA to the insurance industry would somehow "wreak havoc" upon the Insurance Code is to disrespect and preempt the court's obligation to determine what the Code actually says. In turn, "[d]ecades of case history" have no independent vitality apart from the statutes that were interpreted. A court's task is not to "weigh the economic or social wisdom or general propriety" of legislation (*Legislature of the State of California v. Eu* (1991) 54 Cal.3d 492, 514 [citing *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Education* (1978) 22 Cal.3d 208, 219]), but simply to discover, and defer to, the policy choices made by

the legislative branch and enforce those policies. "Courts have nothing to do with the wisdom of laws or regulations....[U]nder the doctrine of separation of powers neither the trial nor appellate courts are authorized to 'review' legislative determinations." (*Santa Monica Beach v. Superior Court* (1999) 19 Cal.4th 952, 962, quoting *Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 461-462.)

In 1987, this Court rejected a challenge to the state's mandatory automobile insurance law and the practices of insurance companies that sold the required insurance. (See *King v. Meese* (1987) 43 Cal.3d 1217.) The Court instructed the petitioners there to take their case to the Legislature. "[W]e cannot look behind the enacted framework to replace the Legislature's social judgment with our own." (*Id.* at 1235.)

If the insurance industry is to be granted an exemption from the CLRA, it cannot be based on unsupported "policy considerations" or a creative expansion of case law. Such an exemption must come from the legislative branch, in the form of a statute, not from a court, no matter how thoughtful or learned it might be in insurance matters.

The decision below should be reversed.

Dated: July 9, 2008

CONSUMER WATCHDOG
Harvey Rosenfield
Pamela Pressley
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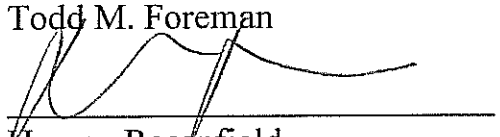
BY: 
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RULE 8.52(c)(1) CERTIFICATE OF COMPLIANCE

I, Harvey Rosenfield, certify that the text of the foregoing AMICUS CURIAE BRIEF OF CONSUMER WATCHDOG is proportionately spaced, has a minimum 13.5 point typeface, and contains 8,962 words as counted by the word-processing program used to generate the document.

Dated: July 9, 2008

CONSUMER WATCHDOG
Harvey Rosenfield
Pamela Pressley
Todd M. Foreman

BY: _____
Harvey Rosenfield

Attorneys for Amicus Curiae
CONSUMER WATCHDOG

PROOF OF SERVICE

State of California, City of Santa Monica, County of Los Angeles

I am employed in the City of Santa Monica and County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 1750 Ocean Park Blvd., Suite #200, Santa Monica, California 90405, and I am employed in the city and county where this service is occurring.

On July 9, 2008, I caused service of true and correct copies of the document entitled

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF CONSUMER WATCHDOG

PROOF OF SERVICE

upon the persons named in the attached service list, in the following manner:

1. If marked FAX SERVICE, by facsimile transmission this date to the FAX number stated to the person(s) named.

2. If marked EMAIL, by electronic mail transmission this date to the email address stated.

3. If marked U.S. MAIL or OVERNIGHT or HAND DELIVERED, by placing this date for collection for regular or overnight mailing true copies of the within document in sealed envelopes, addressed to each of the persons so listed.

I am readily familiar with the regular practice of collection and processing of correspondence for mailing of U.S. Mail and for sending of Overnight mail. If mailed by U.S. Mail, these envelopes would be deposited this day in the ordinary course of business with the U.S. Postal Service. If mailed Overnight, these envelopes would be deposited this day in a box or other facility regularly maintained by the express service carrier, or delivered this day to an authorized courier or driver authorized by the express service carrier to receive documents, in the ordinary course of business, fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 9, 2008, at Santa Monica, California.

Carmen Aguado

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