S S180126

IN THE SUPREME COURT OF CALIFORNIA

ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES et al.,

Plaintiffs and Appellants,

v.

STEVEN POIZNER, as Insurance Commissioner, etc., et al.,

Defendants and Respondents;

FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS,

Intervener and Respondent.

B208402

(Los Angeles County Super. Ct. No. BS109154)

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LATE DISTRICT, DIVISION ONE

PETITION FOR REVIEW

HORVITZ & LEVY LLP
DAVID M. AXELRAD (BAR NO. 75731)
MITCHELL C. TILNER (BAR NO. 93023)
15760 VENTURA BOULEVARD, 18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
(818) 995-0800 • FAX: (818) 995-3157
daxelrad@horvitzlevy.com
mtilner@horvitzlevy.com

BARGER & WOLEN LLP
ROBERT W. HOGEBOOM (BAR NO. 61525)
SUH CHOI (BAR NO. 217353)
MICHAEL A. S. NEWMAN (BAR NO. 205299)
633 WEST FIFTH STREET, 47TH FLOOR
LOS ANGELES, CALIFORNIA 90071-2043
(213) 680-2800 • FAX: (213) 614-7399
rhogeboom@bargerwolen.com
schoi@bargerwolen.com
mnewman@bargerwolen.com

ATTORNEYS FOR PLAINTIFFS AND APPELLANTS
THE ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES AND THE PERSONAL INSURANCE FEDERATION OF CALIFORNIA

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PETITION FOR REVIEW

ISSUES PRESENTED

This case involves the consumer participation and compensation provisions of the landmark insurance reform initiative Proposition 103, and the validity of regulations adopted by the Department of Insurance (Department) to implement those provisions. The provisions at issue, subdivisions (a) and (b) of Insurance Code section 1861.10, provide in full:

> (a) Any person may initiate or intervene in any proceeding permitted or established pursuant to this chapter [division 1, part 2, chapter 9 of the Insurance Code (chapter 9)], challenge any action of the

> [Insurance] commissioner under this article, and enforce any provision of this article.
>
> (b) The commissioner or a court shall award reasonable advocacy and witness fees and expenses to any person who demonstrates that (1) the person represents the interests of consumers, and, (2) that he or she has made a substantial contribution to the adoption of any order, regulation or decision by the commissioner or a court. Where such advocacy occurs in response to a rate application, the award shall be paid by the applicant.

(Ins. Code, § 1861.10, subds. (a), (b).)[1]

The issues presented are:

1. Should subdivisions (a) and (b) of section 1861.10 be construed together or separately? That is, must a person claiming advocacy and witness fees first show, under subdivision (a), that the fees were incurred in a "proceeding permitted or established pursuant to" chapter 9, or, as the Court of Appeal held, may the person recover fees merely by showing, under subdivision (b), that he or she represented consumers and made a substantial contribution to the outcome of *any* proceeding before a court or the commissioner?

2. Do the implementing regulations adopted by the Department unlawfully conflict with or expand the scope of section 1861.10 by empowering the commissioner to award advocacy and witness fees to a consumer representative who informally discusses an insurer's rate application with the insurer, when the

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[1] Unless otherwise indicated, all statutes discussed in this petition are in the Insurance Code.

commissioner has not ordered a public hearing on the application and the consumer representative has not intervened in a hearing?

3. When a court awards advocacy and witness fees to a consumer representative under section 1861.10, subdivision (b), in a case not covered by the second sentence of that subdivision, may the court require a *party* to pay the award or must it be paid out of the special account established by the Department and funded by insurers to cover the operating and administrative costs of Proposition 103?

INTRODUCTION: WHY REVIEW SHOULD BE GRANTED

The issues in this case go to the heart of the consumer participation and compensation provisions of Proposition 103. They implicate the interests of insurers and consumers alike throughout the state. Substantial sums are at stake.

Proposition 103 established a comprehensive statutory scheme to regulate insurance rates. The scheme requires insurers to apply to the commissioner and to obtain his approval before changing rates, and it provides for public hearings on rate applications. (See Ins. Code, §§ 1861.01, subd. (c), 1861.05, subds. (b), (c).) The scheme also permits consumer representatives to intervene in those hearings and to recover attorney fees when they substantially contribute to the outcome.

Specifically, section 1861.10, subdivision (a), allows any person to "initiate or intervene in any proceeding permitted or

established pursuant to" chapter 9, which governs "Rates and Rating and Other Organizations." (Ins. Code, § 1861.10, subd. (a).) Subdivision (b) authorizes any court or the commissioner to award "reasonable advocacy and witness fees and expenses" to any person who represents consumers and who makes a substantial contribution to any decision by a court or the commissioner. (*Id.*, § 1861.10, subd. (b).)

If subdivisions (a) and (b) are construed together, then a consumer representative may seek fees under subdivision (b) only if the fees were incurred in a proceeding permitted or established by chapter 9. On the other hand, if subdivisions (a) and (b) are construed separately, the consumer representative need only show, under subdivision (b), that it made a substantial contribution to any decision or order by a court or the commissioner, regardless of whether the proceeding was permitted or established by chapter 9.

In its published opinion, the Court of Appeal construed the subdivisions separately, treating subdivision (b) as an independent fee-shifting statute unrelated to subdivision (a). In the court's view, subdivisions (a) and (b) deal "with entirely different issues." (Typed opn., 17.) "The structure and language of section 1861.10 indicates that the issues of intervention in subdivision (a) and compensation in subdivision (b) are separate and independent." (*Ibid.*) Accordingly, the court rejected the proposition "that subdivision (a) limits or qualifies the two requirements for compensation set out in subdivision (b) of section 1861.10." (Typed opn., 18.)

The implications of the Court of Appeal's unorthodox interpretation—which none of the parties advocated—are

enormous. Fee awards under subdivision (b) are not discretionary. The statute *mandates* fee awards to consumer representatives who substantially contribute to an order by a court or the commissioner. The Court of Appeal's decision to uncouple subdivision (b) from subdivision (a) removes any limitation on the types of actions or proceedings in which fee awards will now be mandatory. Fee awards under subdivision (b) will no longer be limited to proceedings under chapter 9 involving insurance rates or rating organizations. Instead, fees will be recoverable under subdivision (b) in *any* court action and *any* proceeding before the commissioner in which a consumer representative substantially contributes to the outcome.

This is not—and should not be—the law. The purpose of section 1861.10 was to enable and encourage consumer representatives to participate in public hearings involving insurance rates and rating organizations by allowing those representatives to claim "advocacy and witness fees and expenses" incurred in those hearings. The purpose was *not* to fund consumer groups in all types of court actions or proceedings before the commissioner, even those having nothing to do with insurance rates and not arising under chapter 9.

The Court of Appeal's decision exposes insurers—and indeed all litigants—who find themselves opposing a consumer group to liability for the group's attorney fees. This dramatic judicial expansion of Proposition 103's consumer compensation provisions commands this court's attention.

If this court agrees with plaintiffs, the Association of California Insurance Companies and the Personal Insurance Federation of California, that long-settled principles of statutory interpretation require subdivisions (a) and (b) of section 1861.10 to be construed together, the question then becomes whether the Department unlawfully enlarged the scope of those subdivisions by adopting regulations that allow the commissioner to compensate consumer representatives who retain lawyers and experts to engage in what the Department calls an "informal negotiation process" (2 CT 310) and what Intervenor Foundation for Taxpayer and Consumer Rights (FTCR) calls an "informal discussion with the Department and the applicant" (1 CT 143), when the commissioner has not ordered a public hearing on the insurer's rate application. Proposition 103 establishes a procedure for public hearings, but it does not establish or even mention a procedure for informal, prehearing discussions on rate applications. FTCR has acknowledged that this prehearing discussion process is "not expressly set forth in the code" (3 CT 524) but has informally evolved over the years to "supplement[ ]" chapter 9 (3 CT 511). The Department describes it as a "practice to encourage resolution of rate challenges informally." (2 CT 309.)

Is an informal prehearing discussion—in which no official presides, no witnesses testify, no evidence is formally offered, no procedural rules apply, no public record is kept, no trier of fact participates, and no administrative ruling results—a "proceeding permitted or established pursuant to" chapter 9, within the meaning of section 1861.10, subdivision (a)? Is it "permitted"

simply because it is not expressly forbidden? Is it a "proceeding" at all? If the answer to any of these questions is no, the Department's regulations are contrary to statute and must fall.

The final issue is whether, in a case like this that does not involve a rate application and thus is not governed by the second sentence of section 1861.10, subdivision (b), the court has discretion to order a *party* to pay the consumer representative's fee award. Nothing in the statute expressly confers discretion on the court, and the Department has historically paid such awards from the special Proposition 103 account funded through fees charged to insurers. The second sentence of subdivision (b) should be read as the sole exception to this historical practice.

This court grants review when necessary to settle important questions of law. (Cal. Rules of Court, rule 8.500(b)(1).) The questions presented here are legal questions of statewide importance. The answers may profoundly affect the system of insurance rate regulation in California and the role consumer representatives play in that system. The answers may also affect the cost of insurance, because insurers are entitled to recoup through their rates any awards they are required to pay under section 1861.10, subdivision (b). (See Cal. Code Regs., tit. 10, § 2662.6, subd. (d).) Under the Court of Appeal's opinion, awards payable by insurers are sure to proliferate—precisely as the Department intended by adopting the regulations.

Plaintiffs urge the court to grant review and address these important questions.

STATEMENT OF THE CASE

A. The voters approve Proposition 103, which establishes a comprehensive statutory scheme governing insurer rate applications and consumer participation and compensation.

Proposition 103, approved by the voters in 1988, added article 10 (Ins. Code, §§ 1861.01-1861.14) to chapter 9. (*Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 851 (*Farmers*).) Article 10 is titled "Reduction and Control of Insurance Rates."

Proposition 103 forbids insurers from charging rates that are "excessive, inadequate, unfairly discriminatory or otherwise in violation of this chapter." (Ins. Code, § 1861.05, subd. (a).) The commissioner enforces this prohibition. (See *id.*, § 1861.01, subd. (c); *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1041.)

An insurer's rate may come before the commissioner for review in one of two ways.

First, any person aggrieved by an insurer's *existing* rate may file a complaint with the commissioner asking him to review the insurer's continuing use of that rate. (Ins. Code, § 1858, subd. (a); *Walker v. Allstate Indemnity Co.* (2000) 77 Cal.App.4th 750, 753 (*Walker*).)

Second, insurers themselves must apply to the commissioner for approval before *changing* any existing rate. (Ins. Code, §§ 1861.01, subd. (c), 1861.05, subd. (b).)

This case involves regulations that apply to the second of these two procedures for reviewing an insurer's rates.

When the commissioner receives an insurer's application to change an existing rate, he must notify the public. (Ins. Code, § 1861.05, subd. (c).) Any consumer or consumer representative may petition the commissioner to hold a public hearing on the rate application. (*Ibid.*; Cal. Code Regs., tit. 10, §§ 2646.4, subd. (a)(1), 2653.1, subd. (a).) The commissioner may, in his discretion, order a hearing on his own motion or in response to a consumer's petition for a hearing. (Ins. Code, § 1861.05, subd. (c).) If the commissioner denies a consumer's petition for a hearing, the consumer may seek judicial review of that decision. (Ins. Code, §§ 1858.6, 1861.09.)

Because a public hearing on a rate application is a "proceeding permitted or established pursuant to [chapter 9]," "[a]ny person may . . . intervene in" the hearing. (Ins. Code, § 1861.10, subd. (a).)

An administrative law judge presides. (Ins. Code, § 1861.08, subd. (a); *Fireman's Fund Ins. Companies v. Quackenbush* (1997) 52 Cal.App.4th 599, 606.) At the conclusion of the hearing, the judge renders a decision, which the commissioner may adopt, amend or reject based on the evidence reflected in the record developed before the judge. (Ins. Code, § 1861.08, subd. (c); Gov. Code, § 11425.50, subd. (c); *Walker, supra*, 77 Cal.App.4th at p. 756; *Fireman's Fund*, at p. 605.) Interested parties may seek judicial review of the

commissioner's decision by filing a petition for writ of administrative mandate. (Ins. Code, §§ 1858.6, 1861.09; *Walker*, at p. 756.)

In addition, any person is entitled to recover "reasonable advocacy and witness fees and expenses" by demonstrating that he or she "represents the interests of consumers, and, . . . has made a substantial contribution to the adoption of any order, regulation or decision by the commissioner or a court." (Ins. Code, § 1861.10, subd. (b).)

B. A court construes the Department's regulations to disallow compensation to a consumer group that did not intervene in a public hearing.

"To implement sections 1861.05 and 1861.10, the Department . . . promulgated regulations in 1995 . . . ." (Typed opn., 6.) Those regulations, which we refer to as the "former regulations," established procedures for consumers to intervene in a public hearing on an insurer's rate application and then to seek compensation for contributing to the commissioner's final decision on the application.[2]

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[2] All former regulations discussed in this brief may be found at 1 CT 23-38 and 2 CT 226-241. ("CT" refers to the four-volume clerk's transcript prepared for plaintiffs' June 6, 2008 appeal from the judgment. "CT (fees appeal)" refers to the one-volume clerk's transcript prepared for plaintiffs' September 5, 2008 appeal from the postjudgment attorney fee order.)

Under the former regulations, a consumer could not seek compensation under section 1861.10 unless he or she intervened in a public hearing on the application. The court so ruled in *American Healthcare Indemnity Co. v. Garamendi* (Super. Ct. L.A. County, 2005, No. BS094515) (*American Healthcare*). There, SCPIE Indemnity Company applied to the commissioner to approve a rate increase. FTCR filed a petition for a hearing on the application and a petition to intervene in the hearing. SCPIE ultimately withdrew its application. The commissioner then denied FTCR's request for a hearing, explaining that the request was moot in light of SCPIE's decision to withdraw its application. (2 CT 252.)

Though no hearing was held, FTCR requested compensation under section 1861.10, subdivision (b), for its "expenses relating to its objections to the rate application and filing its Petition for Hearing." (2 CT 252.) After initially denying the request, the commissioner reconsidered and granted the requested compensation. (*Ibid.*)

SCPIE petitioned the court for a writ of mandate invalidating the compensation award. The court granted the petition, ruling that the award was improper under both section 1861.10, subdivision (b), and the regulations then in effect. (2 CT 254-255.) The court reasoned:

> [FTCR] failed to establish the elements for an award of advocacy and witness fees and expenses pursuant to § 1861.10(b). The Commissioner never adopted any order, regulation, or decision on the merits with respect to Petitioners' rate increase applications. Given that there was no hearing granted and [FTCR] was not even a party to the proceeding as its Petition to Intervene

> was not granted, there was no, and could not be a, substantial contribution made by [FTCR]. [Citation.] The Commissioner abused his discretion by awarding advocacy and witness fees and expenses to [FTCR].

(2 CT 255.)

C. The Department responds by amending the regulations to allow compensation for consumer groups even absent a public hearing.

In response to the court's decision in *American Healthcare* (2 CT 309), then-Commissioner John Garamendi announced his intent to amend the governing regulations to allow consumers to seek "advocacy and witness fees" whenever they filed a petition for hearing on an insurer's rate application, even if the petition was denied and no hearing was held. The commissioner explained that, in his view, a consumer who requests a hearing should be entitled to seek compensation even when an insurer withdraws its rate application and thus eliminates the need for a hearing. (2 CT 222-223.)

Accordingly, in late 2006, as his term in office wound to a close, Commissioner Garamendi submitted to the Office of Administrative Law a series of regulatory amendments designed to authorize compensation for consumers starting from the time they file a petition for hearing on an insurer's rate application. (See 1 CT 152.) The amendments, which we refer to as the "amended regulations," took effect on January 28, 2007. (Cal. Regulatory Notice Register 2007, No. 2-Z (Jan. 12, 2007) pp. 47-48

<http://www.oal.ca.gov/res/docs/pdf/notice/2z-2007.pdf> [as of Feb. 4, 2010].)[3]

The commissioner accomplished his objective through the following specific amendments, among others:

- He amended California Code of Regulations, title 10, section 2661.1, subdivision (h), to define a new, prehearing "proceeding" called a "Rate Proceeding," which commences "upon the submission of a petition for hearing" or "upon notice of hearing." (2 CT 212; see 2 CT 244 [redlined].)

- He changed the title of California Code of Regulations, title 10, section 2661.3 from "Procedure for intervention in a *rate hearing*" (2 CT 231, emphasis added) to "Procedure for intervention in a *rate* or class plan *proceeding*" (2 CT 214, emphasis added; see 2 CT 246 [redlined]).

- He amended California Code of Regulations, title 10, section 2661.3, subdivision (a), to permit consumers to "intervene" in the newly defined prehearing "Rate Proceeding." (2 CT 214; see 2 CT 246 [redlined].)

- He amended California Code of Regulations, title 10, section 2661.1, subdivision (k), to state that a consumer could make a "substantial contribution," and thus qualify for compensation under section 1861.10, subdivision (b), even if the commissioner

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[3] All amended regulations discussed in this brief may be found at 1 CT 39-50 and 2 CT 210-221. Redlined versions of the regulations, detailing the January 2007 amendments, may be found at 1 CT 55-64 and 2 CT 242-251.

denied the consumer's petition for a hearing. (2 CT 213; see 2 CT 245 [redlined].)

In short, the amended regulations recognized a new, nonpublic, prehearing "rate proceeding," the beginning of which was marked by a petition for hearing. If otherwise qualified, the consumer had a right to "intervene" in this "rate proceeding" and then to seek compensation under section 1861.10, regardless of whether the commissioner ordered a public hearing on the rate application.

D. Plaintiffs file this action to invalidate the amended regulations. The trial court denies relief and enters judgment against plaintiffs.

In May 2007, plaintiffs filed in the superior court a combined petition for writ of mandate and complaint for declaratory and injunctive relief against the commissioner and the Department. (1 CT 6.) Plaintiffs sought to enjoin the commissioner from enforcing the amended regulations described above. (1 CT 6-7, 9, 11-12, 19.) Plaintiffs alleged that the amended regulations were invalid because they were inconsistent with, and in conflict with, sections 1861.05 and 1861.10. (1 CT 13, 17.)

FTCR, a consumer group, filed an application for leave to intervene in the action and a proposed complaint-in-intervention. (1 CT 102, 131.) Based on the parties' stipulation, the court granted FTCR's application and accepted for filing its complaint-in-intervention. (1 CT 177-178.) The complaint-in-intervention

alleged, in essence, that the challenged regulatory amendments were lawful and necessary and that plaintiffs therefore were not entitled to any relief. (1 CT 132-134, 149-150.)

The trial court heard argument and denied all relief to plaintiffs. (4 CT 699-705; 3/7/08 RT 19.) On April 2, 2008, the court entered judgment for defendants and FTCR, denying the petition for writ of mandate and ordering that plaintiffs take nothing under their complaint for declaratory and injunctive relief. (4 CT 706-707.)

E. The trial court awards advocacy fees to FTCR.

On June 9, 2008, FTCR filed a motion for attorney fees and expenses under section 1861.10, subdivision (b), and Code of Civil Procedure section 1021.5. (CT (fees appeal) 18-105.) Plaintiffs opposed the motion. (CT (fees appeal) 106-152.)

The trial court heard argument and entered an order awarding $121,848.16 in fees to FTCR under section 1861.10, subdivision (b).[4] (CT (fees appeal) 204-208.)

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[4] The court denied FTCR's alternative request for fees under Code of Civil Procedure section 1021.5, finding that FTCR's "financial stake" in defending and preserving the amended regulations was its "main concern." (7/25/08 RT 14; see 7/25/08 RT 19, 22; CT (fees appeal) 204-208.)

F. Plaintiffs appeal from the judgment and from the fee order.

Plaintiffs appealed from both the judgment (4 CT 719-720) and the postjudgment order awarding fees to FTCR (CT (fees appeal) 210-211). The Court of Appeal consolidated the two appeals.

On their appeal from the judgment, plaintiffs renewed their argument that the amended regulations were invalid because they conflicted with and expanded the scope of sections 1861.05 and 1861.10 by empowering the commissioner to compensate consumer representatives who do not intervene in a public hearing but who simply engage in informal discussions with insurers about their rate applications. (See AOB 25-31; see also ARB 5-17.)

On their appeal from the fee award, plaintiffs argued that nothing in section 1861.10, subdivision (b), authorized the court to require *plaintiffs* to pay advocacy fees awarded in a court action. Rather, the award should be paid from the account established by the Department and funded through fees paid by insurers to cover the administrative and operational costs of Proposition 103. (AOB 43-45; ARB 22-23.)

G. The Court of Appeal affirms both the judgment and the fee order.

In a published opinion, the Court of Appeal affirmed in full. The court rejected plaintiffs' challenge to the amended regulations on two grounds.

First, the court held "the issues of intervention in subdivision (a) [of section 1861.10] and compensation in subdivision (b) are separate and independent." (Typed opn., 17.) According to the court, the restrictions on consumer participation embodied in subdivision (a) do not apply to fee requests under subdivision (b). Rather, subdivision (b) independently authorizes fee awards to consumer representatives who substantially contribute to a judicial or administrative outcome. (Typed opn., 17-18.) Thus, the amended regulations properly empowered the commissioner to award fees to a consumer representative who participates in the informal prehearing "rate proceeding" defined by the amended regulations, whether or not chapter 9 permits or establishes that proceeding.

Second, the court held that chapter 9 *does* permit the informal prehearing "rate proceeding" (typed opn., 18-19), and thus the regulations allowing consumer groups to seek compensation for participating in that "proceeding" are consistent with section 1861.10 (typed opn., 21).

Turning to the fee award in this case, the Court of Appeal reiterated that subdivisions (a) and (b) of section 1861.10 are separate and independent. (Typed opn., 26.) Consequently, to

obtain fees, FTCR had only to show that it substantially contributed to the court's judgment in this case.

Finally, the Court of Appeal rejected plaintiffs' argument that the fee award, even if authorized, should be paid by the Department from the Proposition 103 special fund and not by plaintiffs. The court held that in cases not covered by the second sentence of section 1861.10, subdivision (b), the trial court may exercise discretion to require the "insurer" (and apparently insurer associations) to pay the fee award. (Typed opn., 27.) The court disagreed that fee awards are "administrative and operational costs" within the meaning of section 12979. (*Ibid.*)

LEGAL ARGUMENT

I. THIS COURT SHOULD EXAMINE THE COURT OF APPEAL'S UNORTHODOX INTERPRETATION OF SECTION 1861.10, WHICH EXPOSES ANY LITIGANT OPPOSING A CONSUMER GROUP TO LIABILITY FOR THE GROUP'S ADVOCACY FEES.

Statutes enacted by initiative measure are construed "under the same principles of construction applicable to statutes enacted by the Legislature." (*Farmers, supra*, 137 Cal.App.4th at p. 851.) The court's "task is to ascertain the intent of the electorate so as to effectuate the purpose of the law." (*Ibid.*) The court begins by examining "the statutory language, giving the words of the statute their ordinary and usual meaning and construing them in the

context of the statute as a whole and the overall statutory scheme," so that the scheme may be harmonized and retain its effectiveness. (*Ibid.*)

The court "'must also consider the *consequences* that will flow from a particular statutory interpretation'" and should prefer an interpretation that "'will result in wise policy rather than mischief or absurdity.'" (*Andersen v. Workers' Comp. Appeals Bd.* (2007) 149 Cal.App.4th 1369, 1375 (*Andersen*), emphasis added; see *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387 (*Dyna-Med*) ["Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation"].)

Statutory provisions relating to the same subject should be harmonized with each other to the extent possible. (*Dyna-Med, supra*, 43 Cal.3d at p. 1387; *State of California ex rel. Nee v. Unumprovident Corp.* (2006) 140 Cal.App.4th 442, 449-450.) One subdivision of a statute should be construed to limit another when doing so effectuates the Legislature's (or the voters') intent. (See, e.g., *People v. Wallace* (2009) 176 Cal.App.4th 1088, 1105 ["residing in California" limitation of former Penal Code section 290, subdivision (a)(1)(A), which required sex offender to register within five days after changing address, "*carries over* to the requirement [in former subdivision (a)(1)(D) of same statute] to update one's registration" within five days of birthday (emphasis added)].)

Here, the Court of Appeal held the limitations of section 1861.10, subdivision (a), did *not* carry over to fee claims under subdivision (b). The court explained that the two subdivisions

"deal[ ] with entirely different issues." (Typed opn., 17.) The court therefore "disagree[d] with the assertion that subdivision (a) limits or qualifies the two requirements for compensation set out in subdivision (b) of section 1861.10." (Typed opn., 18.)

The two subdivisions should have been harmonized. In tandem, they authorize consumers to participate in proceedings permitted or established by chapter 9 and then to seek compensation for the "advocacy and witness fees" incurred in the proceedings. The word "witness" in subdivision (b) signals that subdivision (b) must be limited to formal proceedings in which a witness can present evidence, i.e., proceedings permitted or established by chapter 9. Further, the second sentence of subdivision (b) refers to advocacy "in response to a rate application," which is one of the proceedings established by chapter 9.

The Court of Appeal's unorthodox interpretation—viewing subdivision (b) in isolation from subdivision (a)—portends serious adverse consequences, not only for insurers and their customers but for *any* litigant (plaintiffs here, for example, are not insurers) who opposes a consumer group in *any* court action or *any* proceeding before the commissioner. Under the Court of Appeal's reading of the statute, a consumer group may claim fees without demonstrating, under subdivision (a), that it incurred fees in a proceeding "permitted or established" under chapter 9. The group need only satisfy the two requirements set forth in subdivision (b): the group must demonstrate that it represents the interests of consumers and that it "made a substantial contribution to the

adoption of any order, regulation or decision by the commissioner or a court."

No longer is there any limitation on the nature of the proceeding in which a consumer group may recover advocacy fees from a court or from the commissioner. Because an award is mandatory, not discretionary, whenever the requirements of subdivision (b) are satisfied, the Court of Appeal's opinion means that consumer groups will be entitled to fees whenever they substantially contribute to the outcome of *any judicial proceeding or any proceeding before the commissioner*, whether or not the proceeding involves insurance rates or arises under chapter 9.

The voters who approved Proposition 103 were concerned with compensating consumer groups for participating in *public hearings on insurance rates*, not with compensating consumer groups in all manner of litigation. Proposition 103 was titled "Insurance Rates, Regulation, Commissioner. Initiative Statute." (3 CT 438.) The attorney general informed the voters that the proposition "[r]equires public hearing and approval by elected Insurance Commissioner for automobile, other property/casualty insurance rate changes." (3 CT 438.) The Legislative Analyst informed the voters that the proposition was concerned with "the laws that regulate insurance rates for certain types of insurance." (3 CT 438.) The proposition's stated purposes included "to protect consumers from arbitrary insurance rates and practices . . . ." (3 CT 439.) The proposition added article 10 (which included section 1861.10) to chapter 9. (3 CT 439.) Article 10 is titled "Reduction and Control of Insurance

Rates"; chapter 9 is titled "Rates and Rating and Other Organizations."

FTCR itself has construed section 1861.10 as an integral component of the rate approval process established in chapter 9, not as a freestanding fee-shifting statute: "*Taken together*, section 1861.05, et seq. and 1861.10 set forth a comprehensive statutory scheme to encourage effective and professional public participation in the implementation and enforcement of *the provisions of the Insurance Code enacted by Proposition 103 relating to the approval of rates*." (3 CT 494, emphases added.)

The Court of Appeal's contrary interpretation of section 1861.10, subdivision (b)—divorcing it from subdivision (a) of the same statute and from its context within chapter 9 and article 10—overlooks the voters' intent and will likely produce "'mischief or absurdity.'" (*Andersen*, *supra*, 149 Cal.App.4th at p. 1375) The Court of Appeal's novel interpretation merits this court's attention.

II. THIS COURT SHOULD DECIDE WHETHER THE AMENDED REGULATIONS CONFLICT WITH SECTION 1861.10 BY EMPOWERING THE COMMISSIONER TO COMPENSATE CONSUMER GROUPS ABSENT A PUBLIC HEARING.

A state agency may not adopt a regulation that conflicts with the authorizing statute or that enlarges the statute's scope. Such a regulation is invalid and ineffective. (Gov. Code, § 11342.2; see *Morris v. Williams* (1967) 67 Cal.2d 733, 748 ["Administrative

regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations"].)

If this court decides that subdivisions (a) and (b) of section 1861.10 should be construed together, the court should then decide whether the Department's amended regulations unlawfully enlarge the scope of section 1861.10 by empowering the commissioner to award "advocacy and witness fees" to consumer groups who informally negotiate with insurers, even when the commissioner has not ordered a hearing on the insurer's rate application and the consumer group has not intervened in any hearing.

The Court of Appeal held that the prehearing "rate proceeding," in which consumer groups and insurers informally discuss the insurer's rate application, "is a proceeding permitted by chapter 9." (Typed opn., 18.) This holding is difficult to square with the statutory scheme and language for numerous reasons.

1. *An informal prehearing discussion is not a "proceeding," nor is it recognized by chapter 9.* Section 1861.10 allows compensation to a consumer only after the consumer has initiated or intervened in a "proceeding" recognized by chapter 9. The amended regulations created a new "rate proceeding" that is not a "proceeding" at all. During informal discussions between consumer representatives and insurers, no official presides, no witnesses testify, no evidence is formally presented, no procedural rules apply, no trier of fact participates, no public record is kept, and no administrative decision is issued.

"Rate proceeding" is simply a label for the commissioner's internal review and processing of a rate application before any public hearing is ordered. Chapter 9 does not recognize or permit a consumer to initiate or intervene in the commissioner's review process for the purpose of, in FTCR's words, engaging in "informal discussion with the Department and the applicant." (1 CT 143.) Indeed, FTCR acknowledges that the prehearing "informal discussion" process is "not expressly set forth in the code" (3 CT 524) but has informally evolved over the years to "supplement[ ]" chapter 9 (3 CT 511). (See also 3 CT 525 [the "informal rate review process . . . occurs outside the context of the 'deemer' and 'hearing' provisions expressly set forth in section 1861.05"].)[5]

2. *The statutory compensation scheme was designed to promote consumer participation in* public *hearings, not private discussions.* Under chapter 9, any proceeding that a consumer can initiate or into which the consumer can intervene will be a public proceeding—either a court action or an administrative hearing. The amended regulations defeat this system of public scrutiny and oversight by establishing a new, prehearing "rate proceeding" into which consumer representatives are entitled to intervene and to advance arguments—off the record and outside the public's view.

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[5] Significantly, chapter 9 *does* provide for prehearing "informal conciliation" of consumer complaints challenging *existing* rates. (Ins. Code, §§ 1858.01, subds. (a)-(c), 1858.02, 1858.1) But chapter 9 contains no comparable provisions for prehearing "informal conciliation" with consumers when an insurer files an application to *change* rates, the subject of the amended regulations at issue here.

Chapter 9 does not authorize or contemplate a consumer response to a rate application except in a public hearing. Chapter 9 does not authorize or contemplate private, prehearing "advocacy" by a consumer representative (or anyone else) against a rate application.

3. *One cannot incur "advocacy and witness fees" in an informal prehearing discussion.* Section 1861.10 provides that a consumer representative may be compensated for "reasonable advocacy and witness fees and expenses." (Ins. Code, § 1861.10, subd. (b).) "A *witness* is a person whose declaration under oath is received *as evidence* for any purpose, whether such declaration be made on oral examination, or by deposition or affidavit." (Code Civ. Proc., § 1878, emphases added.) Unless and until the commissioner orders a hearing, there is no forum or proceeding in which a consumer can present evidence or witnesses, and therefore no possibility of incurring "witness fees."

Similarly, until the consumer intervenes in the hearing under section 1861.10, subdivision (a), there is no occasion for the consumer to engage in "advocacy" concerning the rate application. The statutes do not contemplate that the commissioner will entertain arguments or "advocacy" against a rate application except in a public hearing.

4. *An informal prehearing discussion does not produce any "order, regulation or decision."* Section 1861.10 allows compensation only if the consumer representative substantially contributes "to the adoption of any order, regulation or decision by the commissioner or a court." (Ins. Code, § 1861.10, subd. (b).) A

consumer representative who merely engages the insurer in an informal discussion during the "rate proceeding" as defined in the amended regulations, where no hearing is held, does not contribute to the adoption of any order, regulation or decision.

The Court of Appeal disagreed, stating that regulations not challenged by plaintiffs allow the commissioner to issue a decision based on a *settlement* between a consumer representative and an insurer, without ordering a formal hearing. (Typed opn., 21; see typed opn., 24 [referring to "the resolution of a rate application without a public hearing, as, for example, by way of a settlement"].) The court overlooked that any proposed settlement of a rate application must "be filed with the *administrative law judge* for proposed acceptance or rejection." (Cal. Code Regs., tit. 10, § 2656.1, subd. (c), emphasis added.) The administrative law judge is the officer appointed to preside over *the hearing*. (Ins. Code, § 1861.08, subd. (a).) Thus, the regulations do not contemplate a decision based on a settlement *before* a hearing has been ordered and an administrative law judge has been appointed. Once a hearing has been ordered and the consumer representative has intervened, the representative may negotiate a settlement with the insurer and submit it to the administrative law judge for approval, thereby sparing the Department and the parties from the cost and delay involved in convening a formal hearing. What the consumer representative may *not* do under the statutory scheme, however, is to seek compensation for lawyers and experts retained to negotiate a settlement with an insurer *before* any hearing has been ordered.

III. THIS COURT SHOULD DECIDE WHETHER A COURT MAY REQUIRE A PARTY TO PAY FEE AWARDS IN CASES NOT COVERED BY THE SECOND SENTENCE OF SECTION 1861.10, SUBDIVISION (B).

On appeal, plaintiffs contended that even if section 1861.10 authorized the fee award to FTCR in this court action, the Department, not plaintiffs, should be required to pay it. Plaintiffs pointed to the second sentence of section 1861.10, subdivision (b), which specifically requires the applicant insurer to pay any award of fees incurred responding to a rate application. Plaintiffs argued that fee awards in *other* cases, such as this, should be paid by the Department from the special fund established pursuant to section 12979, which requires the commissioner to "'establish a schedule of filing fees to be paid by insurers to cover *any administrative or operational costs* arising from the provisions of" Proposition 103. (Ins. Code, § 12979; see AOB 43-45.)

The Court of Appeal disagreed. Citing no authority, it held that in circumstances not covered by the second sentence of subdivision (b), "whether the award is payable by the insurer is discretionary." (Typed opn., 27.) The court ruled that a fee award to an intervenor is not an "administrative or operational cost[ ]" under section 12979. (*Ibid.*)

No language in section 1861.10 grants the court discretion to require a party to pay an intervenor's fee award. The second sentence of subdivision (b) defines the cases in which a party may be required to pay such an award. By default, in other cases such

as this, the Department should be required to pay the award from the special fund established to cover the costs of administering Proposition 103.

Indeed, according to the Department's website, in proceedings not involving insurer rate applications, the *Department* has historically paid the fees awarded to intervenors. (See Cal. Department of Insurance, *Consumers: Informational Report on the CDI Intervenor Program*, <http://www.insurance.ca.gov/0250-insurers/0300-insurers/0200-bulletins/prop-103-recoup/report-on-intervenor-program.cfm> [as of Feb. 8, 2010].)

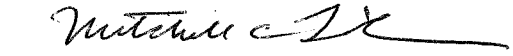
CONCLUSION

This court should grant plaintiffs' petition for review and address the important legal issues this case presents.

February 8, 2010

HORVITZ & LEVY LLP
DAVID M. AXELRAD
MITCHELL C. TILNER

BARGER & WOLEN LLP
ROBERT W. HOGEBOOM
SUH CHOI
MICHAEL A. S. NEWMAN

By: 
Mitchell C. Tilner

Attorneys for Plaintiffs and Appellants
THE ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES and THE PERSONAL INSURANCE FEDERATION OF CALIFORNIA

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this petition consists of 7,012 words as counted by the Microsoft Word version 2007 word processing program used to generate the petition.

Dated: February 8, 2010

Mitchell C. Tilner

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES et al.,

Plaintiffs and Appellants,

v.

STEVEN POIZNER, as Insurance Commissioner, etc., et al.,

Defendants and Respondents;

FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS,

Intervener and Respondent.

B208402

(Los Angeles County Super. Ct. No. BS109154)

APPEALS from a judgment and an order of the Superior Court of Los Angeles County. James C. Chalfant, Judge. Affirmed.

Horvitz & Levy, David M. Axelrad, Mitchell C. Tilner; Barger & Wolen, Robert W. Hogeboom, Suh Choi and Michael A. S. Newman for Plaintiffs and Appellants.

Edmund G. Brown, Jr., Attorney General, W. Dean Freeman and Felix E. Leatherwood, Supervising Deputy Attorneys General, Diane Spencer Shaw and Christine Zarifian, Deputy Attorneys General, for Defendants and Respondents.

Consumer Watchdog, Harvey Rosenfield, Pamela M. Pressley, Todd M. Foreman; Public Advocates, Inc., and Richard A. Marcantonio for Intervener and Respondent.

In 1988, the voters of California enacted an initiative measure designated on the ballot as Proposition 103. Proposition 103 required approval of insurance rate increases by the Insurance Commissioner of the State of California (Commissioner), provided for consumer participation in the administrative rate-setting process, and permitted the recovery of advocacy and witness fees and expenses (together referred to as compensation) under certain circumstances. This lawsuit involves the validity of the 2006 amendments to regulations permitting consumer interest interveners to obtain compensation for participation in the administrative rate-setting process where an order or decision is issued by the Commissioner on an insurer's rate-setting application *without a formal rate hearing*, where, for example, the matter was resolved by a settlement among the parties.

Plaintiffs, The Association of California Insurance Companies, The Personal Insurance Federation of California, The American Insurance Association, and The Pacific Association of Domestic Insurance Companies (Insurance Companies), filed a petition for a peremptory writ of mandate and complaint for declaratory and injunctive relief, claiming that because the amended regulations permit an award of compensation without a formal rate hearing, the regulations conflict with Insurance Code sections 1861.05 and 1861.10. (Unspecified statutory references are to the Insurance Code.) The trial court rendered a judgment upholding the validity of the regulations and denying the Insurance Companies' petition and requests for declaratory and injunctive relief. The trial court also issued an order awarding compensation to Intervener, The Foundation for Taxpayer and Consumer Rights (FTCR). Insurance Companies appealed from the judgment and the order awarding compensation.

As explained below, we affirm the judgment because the regulations are consistent with the governing statutes and reasonably necessary to effectuate the purposes of those statutes. We also affirm the trial court's award of compensation to FTCR because the trial court was authorized to award such compensation under section 1861.10, subdivision (b).

I

BACKGROUND

A. Statutory and Regulatory Framework

"In 1988, voters passed Proposition 103, which 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 . . . .) 'Formerly, the so-called "open competition" system of regulation had obtained, under which "rates [were] set by insurers without prior or subsequent approval by the Insurance Commissioner . . . ."' (*20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 240 . . . .) Proposition 103 altered this system by adding to the Insurance Code article 10 — 'entitled "Reduction and Control of Insurance Rates." ([Ins. Code,] §§ 1861.01–1861.14.)' [Citation.]" (*State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1035 (*State Farm*).) Article 10 (now comprised of sections 1861.01 through 1861.16) was added to division 1, part 2, chapter 9 of the Insurance Code (hereinafter chapter 9). Chapter 9 is now comprised of sections 1850.4 through 1861.16 of the Insurance Code. "This new article required, among other things, approval by the . . . Commissioner . . . for all insurance rate increases [citation], and 'provide[d] for consumer participation in the administrative ratesetting process' (*Walker v. Allstate Indemnity Co.* (2000) 77 Cal.App.4th 750, 753)." (*State Farm*, *supra*, 32 Cal.4th at p. 1035, fn. omitted.)

Before Proposition 103, ratemaking and rate regulation for various classes of insurance were governed by the McBride-Grunsky Insurance Regulatory Act of 1947 as amended (McBride Act), set forth in chapter 9 of the Insurance Code. (*Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 680 (*Economic Empowerment Foundation*).) "An administrative procedure to enforce the laws regulating insurance rates predated Proposition 103 and still exists. Section 1858, subdivision (a) states that any person aggrieved by a rate charged, rating plan, rating system, or underwriting rule may file a complaint with the Commissioner and request a public hearing. The Commissioner must review and investigate the matter and may conduct a public hearing. (§§ 1858, subd. (c), 1858.01, subds. (a) & (b), 1858.1, 1858.2.)

If the Commissioner finds that a violation has occurred, the Commissioner must issue an order prohibiting the misconduct and may order other corrective action. (§ 1858.3.) Any finding or determination by the Commissioner under chapter 9 is subject to judicial review under the independent judgment standard, including a decision not to conduct a hearing. (§§ 1858.6, 1861.09.) Any failure to comply with a final order by the Commissioner gives rise to a monetary penalty, and the Commissioner may bring an action in the superior court to enforce collection. (§ 1859.1.) The [foregoing] provisions . . . all predated Proposition 103." (*Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 853 (*Farmers Ins.*).)

The laws regulating insurance rates before Proposition 103 "were widely viewed as ineffective" and public dissatisfaction with such laws was the "primary impetus for Proposition 103." (*Farmers Ins.*, *supra*, 137 Cal.App.4th at p. 852.) "The stated purpose of [Proposition 103] was 'to protect consumers from arbitrary insurance rates and practices, to encourage a competitive insurance marketplace, to provide for an accountable Insurance Commissioner, and to ensure that insurance is fair, available, and affordable for all Californians.' (Stats. 1988, p. A-276, § 2.)" (*Id.* at p. 851.)

Accordingly, the uncodified findings and declaration of Proposition 103 stated that ""insurance reform is necessary. First, property-casualty insurance rates shall be immediately rolled back to what they were on November 8, 1987 . . . . Second, automobile insurance rates shall be determined primarily by a driver's safety record and mileage driven. Third, insurance rates shall be maintained at fair levels by requiring insurers to justify all future increases. . . . Insurance companies shall pay a fee to cover the costs of administering these new laws so that this reform will cost taxpayers nothing.' (Stats. 1988, p. A-276, § 1.)" (*Farmers Ins.*, *supra*, 137 Cal.App.4th at pp. 852–853.)

Under Proposition 103, an insurer "which desires to change any rate shall file a complete rate application with the commissioner. . . . The applicant shall have the burden of proving that the requested rate change is justified and meets the requirements of this article [article 10 of chapter 9]." (§ 1861.05, subd. (b).) Thus, after November 8, 1989, "Proposition 103 institutes a permanent regulatory regime comprising the 'prior

approval' system, under which, in the words of Insurance Code section 1861.05, subdivision (a), the Insurance Commissioner must approve a rate applied for by an insurer before its use . . . ." (*20th Century Ins. Co. v. Garamendi*, *supra*, 8 Cal.4th at p. 243 (*20th Century*).) The Commissioner must notify the public of the insurer's application for a rate change. (§ 1861.05, subd. (c).) The application is deemed to be approved 60 days after public notice unless "(1) a consumer or his or her representative requests a hearing within forty-five days of public notice and the commissioner grants the hearing, or determines not to grant the hearing and issues written findings in support of that decision, or (2) the commissioner on his or her own motion determines to hold a hearing, or (3) the proposed rate adjustment exceeds 7% of the then applicable rate for personal lines or 15% for commercial lines, in which case the commissioner must hold a hearing upon a timely request." (§ 1861.05, subd. (c).)[1]

The provisions of the Insurance Code enacted by Proposition 103 and which are key to this appeal are subdivisions (a) and (b) of section 1861.10, which provide:

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[1] Section 1861.05 provides in pertinent part: "(a) No rate shall be approved or remain in effect which is excessive, inadequate, unfairly discriminatory or otherwise in violation of this chapter. . . . [¶] (b) Every insurer which desires to change any rate shall file a complete rate application with the commissioner. . . . The applicant shall have the burden of proving that the requested rate change is justified and meets the requirements of this article. [¶] (c) The commissioner shall notify the public of any application by an insurer for a rate change. The application shall be deemed approved sixty days after public notice unless (1) a consumer or his or her representative requests a hearing within forty-five days of public notice and the commissioner grants the hearing, or determines not to grant the hearing and issues written findings in support of that decision, or (2) the commissioner on his or her own motion determines to hold a hearing, or (3) the proposed rate adjustment exceeds 7% of the then applicable rate for personal lines or 15% for commercial lines, in which case the commissioner must hold a hearing upon a timely request. In any event, a rate change application shall be deemed approved 180 days after the rate application is received by the commissioner (A) unless that application has been disapproved by a final order of the commissioner subsequent to a hearing, or (B) extraordinary circumstances exist. . . ."

Subdivision (d) of section 1861.05 addresses the issue of extraordinary circumstances. It is not pertinent to this appeal, so we do not set out its provisions.

"(a) Any person may initiate or intervene in any proceeding permitted or established pursuant to this chapter [chapter 9], challenge any action of the commissioner under this article [article 10], and enforce any provision of this article. [¶] (b) The commissioner or a court shall award reasonable advocacy and witness fees and expenses to any person who demonstrates that (1) the person represents the interests of consumers, and, (2) that he or she has made a substantial contribution to the adoption of any order, regulation or decision by the commissioner or a court. Where such advocacy occurs in response to a rate application, the award shall be paid by the applicant."

As noted by the court in *Calfarm Ins. Co. v. Deukmejian*, *supra*, 48 Cal.3d 805 (*Calfarm*), Proposition 103 "does not establish a detailed method of processing and deciding rate applications. It contains a few provisions relating to public notice and participation (i.e., §§ 1861.05, subd. (c), 1861.06, 1861.07 & 1861.10)[,[2]] but hearings are generally held in accordance with provisions of the Administrative Procedure Act. (See § 1861.08, which provides generally that '[h]earings shall be conducted pursuant to Sections 11500 through 11528 of the Government Code.') 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.]" (*Calfarm*, at p. 824; see also *20th Century*, *supra*, 8 Cal.4th at p. 280 [Proposition 103 impliedly authorizes Commissioner to formulate regulations adopted in quasi-legislative proceedings].)

B. The 1995 Regulations

To implement sections 1861.05 and 1861.10, the Department of Insurance (Department) promulgated regulations in 1995, in subchapter 4.9 of chapter 5 of title 10 of the California Code of Regulations. The regulations set up procedures for persons to

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[2] Section 1861.06 provides, "Public notice required by this article shall be made through distribution to the news media and to any member of the public who requests placement on a mailing list for that purpose." Section 1861.07 provides, "All information provided to the commissioner pursuant to this article shall be available for public inspection, and the provisions of Section 6254(d) of the Government Code and Section 1857.9 of the Insurance Code shall not apply thereto."

intervene or participate in proceedings on rate applications and other proceedings subject to chapter 9. (Cal. Code Regs., tit. 10, former §§ 2661.2, 2661.3 & 2661.4.) (If a 1995 regulation in title 10 of the California Code of Regulations was later amended, the 1995 version of the regulation is referred to as a "former regulation." The current version of a regulation is referred to as "regulation.")

A person wishing to intervene and become a party to a rate hearing was required to file a petition to intervene; if the petitioner intended to seek compensation in the proceeding, the petition was required to contain an itemized estimated budget for the participation. (Former reg. 2661.3, subds. (a) & (c).) "Interveners wishing to recover fees must first file a request for a finding of eligibility to seek compensation, which establishes that the intervener represents the interests of consumers. (Cal. Code Regs., tit. 10, [former regs.] 2662.2, 2662.3, subd. (a).) Those found eligible to seek compensation must then file a request for an award of compensation, which details the intervener's services and expenditures, and describes the intervener's 'substantial contribution' to the proceeding. (Cal. Code Regs., tit. 10, [former reg.] 2662.2, subd. (a).)" (*Economic Empowerment Foundation, supra*, 57 Cal.App.4th at p. 681.) "Compensation may be reduced to the extent that the intervener's substantial contribution 'duplicates' that of another party to the proceeding. (Cal. Code Regs., tit. 10, [former reg.] 2662.5, subd. (b).)" (*Id.* at p. 681.)

Regulation 2661.1, subdivision (b) defines "compensation" as "payment for all or part of advocacy fees, witness fees, and other expenses of participation and intervention in any rate hearing or proceeding other than a rate hearing." Former regulation 2662.1 stated that "[t]he purpose of this Article [article 14, titled 'Intervenor's and Participant's Fees and Expenses'] is to establish procedures for awarding advocacy fees, witness fees and other expenses to intervenors and participants in proceedings, including proceedings other than rate hearings, before the Insurance Commissioner in accordance with Section 1861.10(b) of the Insurance Code."

Former regulation 2651.1, subdivision (h) defined "proceeding" as "any action conducted pursuant to Article 10 of Chapter 9 of Part 2 of Division 1 of the California

Insurance Code, entitled 'Reduction and Control of Insurance Rates.'" Former regulation 2661.1, subdivision (e) provided, "'Proceeding' . . . includes those proceedings set forth in Insurance Code Section 1861.10(a)." A "proceeding other than a rate hearing" was defined in former regulation 2661.1, subdivision (f) as "any proceeding, including those described in subdivision (e) above, conducted pursuant to Chapter 9 of Part 2 of Division 1 of the Insurance Code which is not a rate hearing as defined in this section." A "[r]ate hearing" included "any proceeding conducted pursuant to Insurance Code section . . . 1861.05." (Former reg. 2661.1, subd. (h).)

C. The 2006 Regulations

In September 2006, the Commissioner issued a Notice of Proposed Action and Notice of Public Hearing to amend the regulations "governing the prior approval process, including regulations governing consumer participation. The proposed regulations will modify those regulations contained in Subchapter 4.9 (Rules of Practice and Procedure for Rate Proceedings) in order to clarify that consumers who participate in the approval process after having filed a petition for hearing may seek an award of reasonable advocacy fees. [¶] For example, [former regulations] 2651.1 and 2661.1 contain definitions. The Department proposes to amend these definitions to clarify that a 'proceeding' is established upon submission of a petition for a hearing by a consumer. . . . [¶] . . . In addition, the Department proposes to amend [regulation] 2662.3(a)(3) to expand the list of the types of documents that a consumer may use to prove that it has made a substantial contribution to the adoption of any order, regulation, or decision by the Commissioner." (Cal. Reg. Notice Register 2006, No. 38-Z, p. 1374.)

Regulation 2662.3, subdivision (b)(3) permits an intervener or participant to show a substantial contribution with documents including but not limited to "stipulations or settlement agreements regarding the outcome or material issues in the proceeding, and decision or order by the Department or Commissioner concerning a petition for hearing or rate or class plan application issued without a formal hearing."

A more detailed Initial Statement of Reasons stated that the Commissioner "proposes to adopt and amend regulations to change the definitions related to

'proceedings' and to establish an application withdrawal procedure following the filing of a petition for a hearing, so as to ensure that consumer representatives are eligible to seek compensation when they make a substantial contribution to any 'order, regulation, or decision by the commissioner' prior to a formal hearing being granted or denied. The balance of the proposed amendments conform various provisions of existing regulations regarding compensation to intervenors in such proceedings to those changes." (Cal. Dept. of Insurance, file No. RH06092874, Initial Statement of Reasons (Sept. 22, 2006) p. 4.)

The Initial Statement of Reasons explained the necessity for the amendments: "It has been the Department's practice to encourage consumer representatives and applicants to resolve rate challenges informally so as to avoid engaging in lengthy formal hearings that benefit no one. Often during negotiations, insurers seek to withdraw their rate applications. In some instances, applicants have withdrawn their applications after a petition for a hearing has been filed and after the petitioner has expended substantial time and effort advocating its position through its advocates and experts. In these instances, the result of the informal process has been either no rate change, or a substantial alteration in the rate ultimately approved by the Commissioner. Such results benefit the public without the necessity of conducting a formal hearing. [¶] In several of these instances, either the challenge was settled by the parties or the case was dismissed as moot when the applicant chose to withdraw rather than proceed with its application and potentially be subject to a hearing. After extensive and careful consideration, the Commissioner determined that the petitioner made a 'substantial contribution' to his decision concerning the rate applications even though no hearing was held. Recently, several insurers have objected to the Commissioner's authority to award compensation to petitioners who make a substantial contribution in these circumstances. . . . [¶] . . . [¶] [A] superior court recently ruled that the Commissioner was not authorized to award a petitioner a fee award. . . . [T]he Commissioner believes that the intervenor regulations should be amended to reflect the fact that once a petition for hearing has been filed, a proceeding has been established and that an insurer may not withdraw its rate application

without approval of the Commissioner. Consumer representatives who make a substantial contribution to the outcome of that proceeding are entitled to compensation for their work, even if the proceeding concludes without a hearing." (Cal. Dept. of Insurance, file No. RH06092874, Initial Statement of Reasons, *supra*, p. 2.)

The superior court decision to which the Commissioner referred was an October 2005 ruling in *American Healthcare Indemnity Company v. Garamendi* (Super. Ct. L.A. County, No. BS094515) (*American Healthcare*). In *American Healthcare*, the trial court granted the insurers' petition for a writ of mandate seeking to vacate the Commissioner's award of compensation to FTCR. There, FTCR had filed petitions for a hearing and for intervention but the insurers withdrew their rate applications before any hearing on their applications, and no hearing was granted. The trial court determined that because FTCR's petition to intervene was not granted, FTCR was not a party to the proceeding and "there was no, and could not be, a substantial contribution made by [FTCR]," and the Commissioner therefore abused his discretion in awarding compensation to FTCR.

It was the Commissioner's view that section 1861.10, subdivision (b) "plainly mandates that 'any person' who 'represents the interests of consumers' and who 'made a substantial contribution to the adoption of any order, regulation, or decision by the commissioner' is entitled to an award of compensation for reasonable advocacy fees and expenses. An insurer's attempt to withdraw its application in order to avoid paying compensation defeats the purpose of the statutes. . . . [¶] . . . [¶] In summary, the Commissioner believes that, as the voters intended, the scrutiny of consumer representatives is an important tool to ensure that applicants comply with the statutory and regulatory prohibition on 'excessive, inadequate, and unfairly discriminatory' rates, or rates that otherwise violate the law, and that if consumer representatives are denied the ability to seek compensation when they make a substantial contribution in pre-hearing proceedings, such scrutiny would be discouraged and curtailed. [¶] Such a result contravenes the public policy underlying section 1861.10 and analogous intervenor compensation statutes of encouraging consumer participation in administrative and court

proceedings, and thereby aiding regulators and courts in their decisions. [Citations.]" (Cal. Dept. of Insurance, file No. RH06092874, Initial Statement of Reasons, *supra*, p. 3.)

Both Insurance Companies and FTCR submitted written comments concerning the proposed amendments to the regulations. On November 3, 2006, FTCR petitioned the Commissioner to participate in the rulemaking proceeding for the purpose of representing the interests of consumers. FTCR's estimated advocacy fees and expenses of participation in the rulemaking proceeding were $36,025. On December 4, 2006, the Commissioner granted FTCR's petition and found that FTCR was eligible to seek compensation in Department proceedings for a term of two years, beginning July 14, 2006.

On November 6, 2006, the Department held a public hearing on the proposed amendments to the regulations regarding compensation to interveners. A representative of Insurance Companies spoke in opposition to the proposed amendments, and a representative of FTCR spoke in favor of them.

On November 13, 2006, the Commissioner submitted the amendments and the record of the rulemaking proceeding to the Office of Administrative Law, which approved the amendments and filed them with the Secretary of State. The amendments became effective on January 28, 2007. The Commissioner originally submitted the adoption of a new regulation (proposed regulation 2653.6) to the Office of Administrative Law that would have precluded an insurer from withdrawing a rate or class plan application after a petition for hearing had been filed unless the Commissioner approved of the withdrawal of the application. Before January 12, 2007, the Commissioner withdrew this proposed regulation and it never became effective. (Cal. Reg. Notice Register 2007, No. 2-Z, p. 48.)

Regulation 2651.1, subdivision (h) defines "proceeding" to mean "any action conducted pursuant to Article 10 of Chapter 9 of Part 2 of Division 1 of the California Insurance Code, entitled 'Reduction and Control of Insurance Rates,' including a rate proceeding established upon the submission of a petition for hearing pursuant to California Insurance Code section 1861.05 and section 2653.1 of this subchapter."

A "rate proceeding" is defined as "any proceeding conducted pursuant to Insurance Code sections 1861.01 and 1861.05. For purposes of section 1861.05, a 'rate proceeding' is established upon the submission of a petition for hearing in accordance with section 2653.1 of this subchapter, or if no petition for hearing is filed, upon notice of the hearing." (Reg. 2661.1, subd. (h).)

A "rate hearing" is defined as "a hearing noticed by the Commissioner on his own motion or in response to a petition for hearing pursuant to Insurance Code section 1861.05, which is conducted pursuant to the applicable procedural requirements of Insurance Code section 1861.08, and subchapters 4.8 and 4.9 of this chapter." (Reg. 2661.1, subd. (i).)

"'Substantial Contribution' means that the intervenor substantially contributed, as a whole, to a decision, order, regulation, or other action of the Commissioner by presenting relevant issues, evidence, or arguments which were separate and distinct from those emphasized by the Department of Insurance staff or any other party, such that the intervenor's participation resulted in more relevant, credible, and non-frivolous information being available for the Commissioner to make his or her decision than would have been available to a Commissioner had the intervenor not participated. A substantial contribution may be demonstrated without a regard to whether a petition for hearing is granted or denied." (Reg. 2661.1, subd. (k).)

Subdivisions (a) and (e) of regulation 2661.3 were amended to permit a person who petitions for a hearing to combine in one pleading a petition to intervene with a petition for a hearing. Regulation 2661.3, subdivision (g) deals with the requirements for granting a petition to intervene and a petition for a hearing.

Regulation 2662.1 sets out the purpose of article 14 (regs. 2662.1 through 2662.8), to wit: "to establish procedures for awarding advocacy fees, witness fees and other expenses to petitioners, intervenors and participants in proceedings, including proceedings other than rate proceedings, before the Insurance Commissioner in accordance with Section 1861.10(b) of the Insurance Code."

Regulation 2662.3, subdivision (a) was amended to add "petitioner" to the list of those entitled to request an award of compensation (the others being interveners and participants). Regulation 2662.3, subdivision (b)(3) and regulation 2662.5, subdivision (a)(1) expanded the evidence that can be used to establish a substantial contribution.

D. Trial Court Proceeding

In May 2007, Insurance Companies filed a verified petition for a peremptory writ of mandate and a complaint for declaratory and injunctive relief, seeking to invalidate regulations 2651.1, subdivision (h); 2661.1, subdivisions (h), (i), and (k); 2661.3, subdivisions (a), (e), and (g); 2662.1; 2662.3, subdivisions (a) and (b)(3); and 2662.5, subdivision (a)(1). Insurance Companies maintained that the foregoing regulations were inconsistent with sections 1861.10 and 1861.05 in that the statutes permitted compensation awards to interveners only for participation in a formal "rate hearing" and not for participation in any other part of the administrative rate-setting process.

Commissioner Poizner and the Department filed opposition to the petition for a peremptory writ and complaint. FTCR was permitted to intervene in the action and filed a complaint in intervention and opposition to the petition and complaint. All parties also filed requests for judicial notice. After a hearing, the trial court rejected Insurance Companies' petition and complaint, concluding that Insurance Companies "failed to demonstrate that the Amended Regulations are inconsistent and in conflict with section 1861.10, and not reasonably necessary to effectuate the purpose thereof." Insurance Companies appealed from the judgment.

FTCR filed a motion for an award of compensation for reasonable attorney fees and expenses incurred in the superior court action, pursuant to section 1861.10, subdivision (b). Insurance Companies opposed the motion on several grounds, arguing, among other things, that such fees were not permitted under section 1861.10 because the action was not one "permitted or established" under chapter 9 of the Insurance Code and all of the work done by FTCR was duplicative of the work by Poizner and the Department. After a hearing, the court awarded FTCR $121,848.16 pursuant to section 1861.10, subdivision (b). Insurance Companies appealed from the order.

II

DISCUSSION

A. Governing Law and Standard of Review

"Government Code section 11342.2 provides the general standard of review for determining the validity of administrative regulations. That section states that '[w]henever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless [1] consistent and not in conflict with the statute and [2] reasonably necessary to effectuate the purpose of the statute.'" (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 108, fn. omitted (*Communities*).)

Insurance Companies do *not* challenge the trial court's finding that they "failed to demonstrate that the Amended Regulations are . . . not reasonably necessary to effectuate the purpose [of Proposition 103]." Accordingly, on this appeal we need not address the reasonable necessity requirement, but only the consistency requirement of the standard set out in Government Code section 11342.2.

The standard of consistency in Government Code section 11342.2 means "being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." (Gov. Code, § 11349, subd. (d).)

With respect to the consistency requirement, "the judiciary independently reviews the administrative regulation for consistency with controlling law. The question is whether the regulation alters or amends the governing statute or case law, or enlarges or impairs its scope. In short, the question is whether the regulation is within the scope of the authority conferred; if it is not, it is void. This is a question particularly suited for the judiciary as the final arbiter of the law, and does not invade the technical expertise of the agency." (*Communities*, *supra*, 103 Cal.App.4th at pp. 108–109, fns. omitted.) "By contrast, the second prong of this standard, reasonable necessity, generally does implicate the agency's expertise . . . ." (*Id.* at p. 109; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11 (*Yamaha*).)

Proposition 103, in section 1861.09, requires that "[j]udicial review shall be in accordance with Section 1858.6." Section 1858.6 states in pertinent part: "Any finding, determination, rule, ruling or order made by the commissioner under this chapter shall be subject to review by the courts of the State and proceedings on review shall be in accordance with the provisions of the Code of Civil Procedure. In such proceedings on review, the court is authorized and directed to exercise its independent judgment on the evidence and unless the weight of the evidence supports the findings, determination, rule, ruling or order of the commissioner, the same shall be annulled."

"The independent judgment standard requires the trial court to accord a strong presumption of correctness to the Commissioner's findings, and the burden of proof rests on the party challenging those findings, but ultimately the trial court is free to reweigh the evidence and substitute its own findings. [Citation.] On appeal, we apply the substantial evidence test to the trial court's factual findings, but review legal determinations independently." (*State Farm Mutual Automobile Ins. Co. v. Quackenbush* (1999) 77 Cal.App.4th 65, 71.)

"In deciding whether the regulation conflicts with its legislative mandate, the court does not defer to the agency's interpretation of the law under which the regulation issued, but rather exercises its own independent judgment. (See *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 110[5], fn. 7 ['[w]hile the [agency's] construction of a statute is entitled to consideration and respect, it is not binding and it is ultimately for the judiciary to interpret this statute']; *Yamaha*, [*supra*, 19 Cal.4th] at p. 11, fn. 4 ['[t]he court, not the agency, has "final responsibility for the interpretation of the law" under which the regulation was issued']; see also *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 11 ['"[a]dministrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations"'].)" (*Aguiar v. Superior Court* (2009) 170 Cal.App.4th 313, 323.) "Courts must, in short, independently judge the text of the statute, taking into account and respecting the agency's interpretation of its meaning, of course, whether embodied in a formal rule or less formal representation. Where the

meaning and legal effect of a statute is the issue, an agency's interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth." (*Yamaha, supra*, 19 Cal.4th at pp. 7–8.)

"The general principles that govern interpretation of a statute enacted by the Legislature apply also to an initiative measure enacted by the voters. [Citation.] Thus, our primary task here is to ascertain the intent of the electorate [citation] so as to effectuate that intent [citation]." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 978–979.) "Usually, there is no need to construe a provision's words when they are clear and unambiguous and thus not reasonably susceptible of more than one meaning." (*Id.* at p. 979.)

We "'must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose.' [Citation.] At the same time, 'we do not consider . . . statutory language in isolation.' [Citation.] Instead, we 'examine the entire substance of the statute in order to determine the scope and purpose of the provision, construing its words in context and harmonizing its various parts.' [Citation.] Moreover, we '"read every statute 'with reference to the entire scheme of law of which it is a part so that the whole may be harmonized and retain effectiveness.'"' [Citations.]" (*State Farm, supra*, 32 Cal.4th at p. 1043.)

B. Analysis of Consistency Requirement

Insurance Companies contend that the 2006 amendments to the intervener regulations are invalid because the amendments conflict with and enlarge the scope of sections 1861.05 and 1861.10. Insurance Companies maintain that the foregoing statutes allow consumers to obtain compensation in connection with *public hearings* on rate applications, and not in connection with other parts of the administrative rate-setting process where no public rate hearing is ordered by the Commissioner. Insurance Companies' reasoning can be summarized as follows: An informal "prehearing" proceeding involving a rate application is not a proceeding "permitted or established"

pursuant to chapter 9 of part 2 of division 1 of the Insurance Code (that is, sections 1850.4 through 1861.16), and there is no right to intervene in that "prehearing" proceeding and thus no right to compensation.

The logical corollary of Insurance Companies' argument, as acknowledged in their opening brief, is the assertion that Proposition 103 does not afford or contemplate consumer participation in *every aspect* of the administrative rate-setting process, but only in the *public rate hearing*.

As explained below, we conclude that the amended regulations allow compensation for participation in the rate-setting process beginning with the submission of a petition for a hearing or the Commissioner's notice of a rate hearing, even if there is no public rate hearing. We further determine that the amended regulations are consistent with Proposition 103 and valid.

The only provision in Proposition 103 addressing the issue of compensation ("advocacy and witness fees and expenses") is in subdivision (b) of section 1861.10. (See *ante*, pp. 5–6.) Subdivision (b) sets out two requirements for an award of compensation: (1) representation of consumer interests and (2) substantial contribution to the adoption of an order, regulation, or decision by the Commissioner or a court. Subdivision (a) of section 1861.10 deals with entirely different issues, including the initiation of, or intervention in, certain proceedings. The structure and language of section 1861.10 indicates that the issues of intervention in subdivision (a) and compensation in subdivision (b) are separate and independent. Accordingly, the only *statutory requirements* for compensation are set out in subdivision (b) of section 1861.10. (The regulations, however, limit compensation to "petitioners, intervenors, and participants in proceedings . . . ." (Reg. 2662.1; see also regs. 2662.3, subd. (a), 2662.5.)) Subdivision (b) does not expressly or by implication require that the order, regulation, or decision of the Commissioner be adopted only after a public hearing, or only after any specific procedure.

"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.]" (*Ford Dealers Assn. v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, 362.) The agency is authorized to "'"'"fill up the details'"'" of the statutory scheme. (*Mineral Associations Coalition v. State Mining & Geology Bd.* (2006) 138 Cal.App.4th 574, 589.) The absence of any specific provisions regarding the proceedings in which compensation is authorized 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. (See *Credit Ins. Gen. Agents Assn. v. Payne* (1976) 16 Cal.3d 651, 656 (*Credit Ins.*) ["Courts have long recognized that the Legislature may elect to defer to and rely upon the expertise of administrative agencies."].)

According to Insurance Companies, the amended regulations exceed statutory authority because consideration of section 1861.10, subdivision (b) in conjunction with other provisions of Proposition 103 and chapter 9 reveals that the statutes limit compensation only to rate hearings. We disagree.

The first two provisions of Proposition 103 that Insurance Companies attempt to read together are subdivisions (a) and (b) of section 1861.10. Insurance Companies maintain that subdivision (a) of section 1861.10 limits and qualifies subdivision (b) so as to permit compensation only in conjunction with a *rate hearing* because only a rate hearing is a "proceeding permitted or established pursuant to [chapter 9]" within the meaning of subdivision (a).

As stated, we disagree with the assertion that subdivision (a) limits or qualifies the two requirements for compensation set out in subdivision (b) of section 1861.10. But assuming for purposes of argument that subdivision (a) adds a third statutory requirement for an award of compensation — that is, that compensation must be for initiation of or intervention in any proceeding permitted or established pursuant to chapter 9 — we conclude that a "rate proceeding" is a proceeding permitted by chapter 9.

Proposition 103 specifically refers to only several parts of the administrative rate review process: Section 1861.05, subdivision (b) provides that an insurer which desires to change any rate shall file a rate application with the Commissioner; section 1861.05, subdivision (c) addresses the issue of when an application is deemed to be approved and refers to rate change application hearings; section 1861.08 deals with the law governing hearings, the Commissioner's adoption of a decision, and discovery; section 1861.09 addresses the issue of judicial review; and section 1861.10, subdivision (a) refers to consumer intervention. The foregoing procedures can be considered as "established" by Proposition 103.

But not all details of the administrative rate review process are "established" by the statutes. As noted in *Calfarm*, *supra*, 48 Cal.3d at page 824, Proposition 103 does not provide a detailed method of processing and deciding rate change applications. Many procedures and details were necessarily left to regulations and rules to be promulgated by the Commissioner. In point, subdivision (a) of section 1861.10 refers broadly to "any proceeding *permitted* or established pursuant to [chapter 9]." (Italics added.)

Proposition 103 contemplates or permits public participation and intervention in the rate review process. Proceedings arising out of an insurer's rate change application, and which entail public participation and intervention in the rate review process, are procedures "permitted" and "established" by chapter 9. The "rate proceeding" commences with the submission of a petition for a hearing or with a notice of a hearing. (Reg. 2661.1, subd. (h).) The "rate proceeding" thus constitutes a proceeding "permitted" pursuant to chapter 9 and falls within the ambit of section 1861.10, subdivision (a). Consequently, the amended regulations pertaining to rate proceedings are consistent with the latter statutory provision.

Citing language in *Farmers Ins.*, *supra*, 137 Cal.App.4th 842, Insurance Companies maintain that the only proceeding to review an application for a rate increase "permitted" by chapter 9 is the public rate hearing because only a *rate hearing* (and not a "*rate proceeding*") is specifically addressed in chapter 9 (in sections 1861.05 and 1861.08). *Farmers Ins.* provides no support for Insurance Companies. *Farmers Ins.* held

that section 1861.10, subdivision (a) did not create a private right of action for insureds wishing to sue insurers for violation of the good driver discount provisions of section 1861.02. (*Farmers Ins., supra*, 137 Cal.App.4th at p. 847.) *Farmers Ins.* did not deal with any issues pertaining to the regulations or compensation under subdivision (b) of section 1861.10.

Without citation to any authority, Insurance Companies characterize a "rate proceeding" as not an administrative proceeding, but "simply a label for the Commissioner's internal nonpublic review of a rate application before any hearing has been ordered." Contrary to Insurance Companies' claim, the rate proceeding as defined in regulation 2662.1, subdivision (h) commences with the submission of a petition for hearing or with a notice of hearing. The petition and notice are pleadings (reg. 2651.1, subd. (g)) and part of the public record (reg. 2652.9). Although regulation 2662.1, subdivision (h) specifies the beginning but not the end of the rate proceeding, the regulatory scheme contemplates that the rate proceeding culminates in an order or decision by the Commissioner on the insurer's rate application. The rate proceeding is thus part of the public rate-setting process.

Also part of the rate-setting process is the "rate hearing." (Reg. 2661.1, subd. (i).) A rate hearing may in some cases constitute a part of the "rate proceeding," but a rate hearing is not necessary in all instances for the adoption of an order or decision by the Commissioner. For example, regulations *not challenged by Insurance Companies* specifically address the issue of stipulations and settlements. An administrative law judge may accept a stipulation or settlement if the agreement is in the public interest and is "fair, adequate, and reasonable." (See reg. 2656.2, subd. (a).) Regulation 2656.1, subdivision (a) provides: "Parties may stipulate to the resolution of an issue of fact or the applicability of a provision of law material to a proceeding, or may agree to settlement on a mutually acceptable outcome to a proceeding, with or without resolving material issues." Stipulations and settlements must be filed with the administrative law judge for proposed acceptance or rejection. "When a stipulation or settlement is filed with the administrative law judge, it shall also be served on all parties. If a stipulation dispositive

of the case or a settlement is proposed prior to the taking of any testimony, the parties supporting the stipulation or settlement shall file and serve supporting declarations indicating the reasons that the settlement or stipulation is fundamentally fair, adequate, reasonable and in the interests of justice." (Reg. 2656.1, subd. (c).)

The administrative law judge must reject a proposed stipulation or settlement whenever "the stipulation or settlement is not in the public interest and is not, taken as a whole, fundamentally fair, adequate, and reasonable." (Reg. 2656.2, subd. (a).) "The terms of a stipulation or settlement adopted by the administrative law judge shall be included in any proposed decision provided to the Commissioner." (Reg. 2656.3, subd. (b).)

The regulations thus permit the Commissioner to adopt an order or decision on a rate change application based on an approved settlement and without holding a formal rate hearing. Accordingly, an intervener in such a proceeding is entitled to seek compensation under the amended regulations. The amended regulations fill in the details not specifically addressed by Proposition 103 but nevertheless fall within the scope of statutory authority.

Other provisions which Insurance Companies claim support their proposition that awards of compensation are limited to expenses incurred in rate hearings are sections 1861.05, subdivision (c) (see *ante*, fn. 1) and 1861.08.[3] Their argument is as follows: Section 1861.05, subdivision (c) permits a rate application to be "deemed approved" under certain circumstances unless (1) a consumer requests and is granted a hearing,

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[3] Section 1861.08 provides in pertinent part: "Hearings shall be conducted pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, except that: [¶] (a) Hearings shall be conducted by administrative law judges . . . . [¶] (b) Hearings are commenced by a filing of a notice in lieu of Sections 11503 and 11504. [¶] (c) The commissioner shall adopt, amend, or reject a decision only under Section 11518.5 and subdivisions (b), (c), and (e) of Section 11517 and solely on the basis of the record as provided in Section 11425.50 of the Government Code. [¶] . . . [¶] (e) Discovery shall be liberally construed and disputes determined by the administrative law judge as provided in Section 11507.7 of the Government Code."

(2) the Commissioner determines to hold a hearing, or (3) the proposed rate adjustment exceeds specified amounts, in which case the Commissioner must hold a hearing upon timely request. Insurance Companies reason the foregoing language indicates that the *only* way to *disapprove* a rate application is by way of a public rate hearing conducted pursuant to section 1861.08, which is required for the "adoption of any order, regulation or decision by the commissioner." (§ 1861.10, subd. (b).) Insurance Companies conclude that "the statutory scheme does not contemplate that the commissioner will entertain evidence or arguments against a rate application except in a *public* hearing," that "unless and until the commissioner orders a hearing, the only statutory role for a consumer in response to a rate application is to petition for a hearing," and that until the Commissioner orders a hearing on a rate application, there is no proceeding in which to intervene. If there is no proceeding in which to intervene, there is no forum in which to incur "advocacy and witness fees and expenses" under section 1861.10, subdivision (b).

The fallacy in Insurance Companies' argument is that section 1861.05, subdivision (c) sets out the circumstances under which a rate change application may be deemed to be approved without a rate hearing. It does not address the proceedings that may occur after the Commissioner determines to hold a hearing or after an intervener submits a petition to intervene or a petition for a hearing. Section 1861.05 does not address the issue of the resolution of a rate change application by way of a stipulation or settlement. And neither section 1861.05 nor 1861.08 expressly or by implication *limits* public participation to the *rate hearing* stage of the rate review process.

Subdivision (e) of section 1861.08 contemplates an intervener's participation in discovery, a prehearing stage of the rate review process. (See *ante*, fn. 3.) And Insurance Companies do not challenge regulation 2655.1, subdivision (a), which permits an intervener to request discovery concurrently with the filing of its initial pleading.[4]

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[4] Under regulation 2651.1, subdivision (g), pleading means "any petition, notice of hearing, notice of defense, answer, motion, request, response, brief, or other formal document filed with the Administrative Hearing Bureau pursuant to this subchapter."

Accordingly, Proposition 103 and regulations not challenged by Insurance Companies expressly provide for consumer participation in other aspects of the rate review process in addition to participation in a rate hearing.

To read sections 1861.08 and 1861.05 as limiting public participation to rate hearings is contrary to the uncodified provision of Proposition 103, stating that "'[t]his act shall be liberally construed and applied in order to fully promote its underlying purposes.' (Stats. 1988, p. A-290, § 8.)" (*Farmers Ins., supra,* 137 Cal.App.4th at p. 852.) Such a construction is also contrary to the goal of fostering consumer participation in the administrative rate-setting process, one of the purposes of Proposition 103. (*State Farm Mutual Automobile Ins. Co. v. Garamendi, supra,* 32 Cal.4th at p. 1035.)

In a related argument, Insurance Companies assert that by allowing compensation for intervention in proceedings other than a formal public hearing pursuant to section 1861.08, the amended regulations "defeat [Proposition 103's] system of public scrutiny and oversight by establishing a new, prehearing 'proceeding' into which consumer representatives are entitled to intervene and to advance arguments — off the record and outside the public's view."

But in rate proceedings, intervention can only occur after an insurer files a rate change application, which is open to public inspection (reg. 2652.9); public notice must be given of the rate change application (reg. 2648.2, subd. (f)); a petition for hearing must be served on insurers and is available for public inspection (reg. 2653.1, subds. (c) & (d)); the petition for hearing, any response, any answer, and the Commissioner's decision to grant or deny a hearing are part of the record of the proceeding (reg. 2653.5); and proposed stipulations and settlements must be served on all parties, filed with the administrative law judge, and included in the administrative law judge's proposed decision provided to the Commissioner (regs. 2656.1, subd. (c), 2656.3, subd. (b)). Given the regulatory scheme, which is "on the record" and open to public scrutiny, Insurance Companies have failed to establish the backroom scenario they imagine could occur.

Insurance Companies also contend that settlement or resolution of a rate application without a public rate hearing is not permitted by Proposition 103 because it does not expressly provide for such proceedings, in contrast to sections 1858.01 and 1858.02, provisions in chapter 9 enacted before Proposition 103. Sections 1858.01 and 1858.02 set out procedures governing complaints filed by a person aggrieved by, among other things, an insurance rate charged to that person. Section 1858.02, subdivision (a) provides: "The commissioner may seek resolution of a complaint by informal conciliation at any time and may require the complainant and insurer or rating organization to meet and confer for the purposes of resolving the matter complained of by informal conciliation. The commissioner may decline to find probable cause for a complaint and may deny a request for a public hearing if the complainant refuses to enter into informal conciliation at the commissioner's request. Likewise, the commissioner may find probable cause for a complaint and may act to hold a public hearing, whether or not a request for a public hearing accompanied the complaint, if the insurer or rating organization refuses to enter into informal conciliation at the commissioner's request."

As noted, the absence of specific statutory provisions in Proposition 103 relating to the resolution of a rate application without a public hearing, as, for example, by way of a settlement, does not mean that regulations permitting such resolution exceed statutory authority, but only that the electorate deferred to and relied upon the expertise of the Commissioner as to such matters. (*Credit Ins.*, *supra*, 16 Cal.3d at p. 656.) "Under this standard of review, even though an enabling statute authorizes only '. . . such reasonable rules and regulations as may be *necessary* . . .' [citation] a court should seek not to determine whether the challenged regulation is strictly 'necessary.' Instead, it must ascertain whether the agency reasonably interpreted its power in deciding that the regulation was necessary to accomplish the purpose of the statute. Stated another way, the court's role is limited to determining whether the regulation is 'reasonably designed to aid a statutory objective.' [Citations.]" (*Id.* at p. 657.) Thus, even if another regulation would better meet the statutory objectives, a regulation is valid unless it is unreasonable in light of discernible statutory objectives. (*Id.* at p. 658.)

The burden of demonstrating the regulations' invalidity under the foregoing standard is on Insurance Companies (*Credit Ins.*, *supra*, 16 Cal.3d at p. 657), and they have not shown that the regulations were not reasonably designed to aid a statutory objective. Accordingly, we cannot conclude that the regulations exceed statutory authority.

Based on language in *Economic Empowerment Foundation*, *supra*, 57 Cal.App.4th at page 689, Insurance Companies maintain that the amended regulations impermissibly allow compensation where there is no order or decision on the merits, such as when an insurer withdraws its application before a hearing. But *Economic Empowerment Foundation* did not deal with the amended regulations or with the issue of compensation when an application is withdrawn before a hearing. The case does not assist Insurance Companies' facial challenge to the amended regulations. Rather, *Economic Empowerment Foundation* addressed the issue of whether, under section 1861.10, the trial court or the Commissioner had jurisdiction to award compensation to interveners for fees and expenses incurred in representing the interests of consumers in proceedings on insurers' rate increase applications. The court held that "the Commissioner has exclusive original jurisdiction over fees in proceedings, like the rate proceeding herein, which are commenced in the Department for a determination by the Commissioner on the merits." (*Economic Empowerment Foundation*, *supra*, 57 Cal.App.4th at p. 690.) The court, on the other hand, "would have sole jurisdiction over fees in any case in which it renders the final order or decision. As a practical matter, this would mean that fees must be sought in the forum in which the case or proceeding originated." (*Id.* at p. 689, fn. omitted.)

The petition for a peremptory writ of mandate mounted a facial challenge to the validity of the amended regulations, not a challenge to the amended regulations as applied to a specific award of compensation. Insurance Companies do not cite to any regulation which permits the award of compensation without the adoption of an order, regulation, or decision by the Commissioner or the court. Even if Insurance Companies could posit a scenario where compensation might be improper, their facial challenge would not succeed because the amended regulations can be interpreted consistently with

the governing statutes. "A facial challenge is '"the most difficult challenge to mount successfully, since the challenger must establish that *no set of circumstances exists under which the [law] would be valid.*"' [Citation.] The moving party must show that the challenged statutes or regulations '"'inevitably pose a present total and fatal conflict'"' with applicable prohibitions. [Citation.]" (*T.H. v. San Diego Unified School Dist.* (2004) 122 Cal.App.4th 1267, 1281.)

Based on the foregoing, we conclude that Insurance Companies have failed to establish that the amended regulations are inconsistent with the governing statutes and the trial court properly rendered a judgment denying Insurance Companies' petition for a peremptory writ of mandate.

C. Award of Compensation to FTCR

Although the order awarding compensation to FTCR is silent as to whether the compensation must be paid by Insurance Companies or the Department, all parties interpret the award to be payable by Insurance Companies, as the losing parties. We also so interpret the order.

Insurance Companies maintain (1) that the award of compensation to FTCR by the trial court should be reversed because the trial court proceeding was not one "permitted or established" by chapter 9 within the meaning of section 1861.10, subdivision (a), or (2) that the award should be modified to provide that Insurance Companies are not responsible for paying it.

For the reasons set out above in part B., we disagree with Insurance Companies' assertion that subdivision (a) of section 1861.10 provides a limitation or qualification to the provisions of subdivision (b). Assuming for purposes of argument that an award of compensation is limited to expenses incurred in those proceedings "permitted or established" pursuant to chapter 9, judicial review of a regulation is such a proceeding. Section 1858.6 affords for judicial review of a "rule," meaning a regulation, and section 1861.09 affords for judicial review and refers to section 1858.6. Accordingly, the instant petition for a peremptory writ of mandate, seeking judicial review of the amended regulations, is a proceeding permitted and established pursuant to chapter 9.

Insurance Companies argue that because their petition for a peremptory writ of mandate "did not allege jurisdiction or seek relief under any provision of chapter 9," their trial court action was brought under provisions of the Government Code and the Code of Civil Procedure. Notwithstanding Insurance Companies' failure to cite or rely upon chapter 9, chapter 9 contains the provisions authorizing their trial court action; the Government Code and the Code of Civil Procedure set out the rules of procedure for that action.

Insurance Companies do not persuade us that even if the award stands, the Department, and not they, should pay it. Their position is not supported by the last sentence of subdivision (b) of section 1861.10, stating that "[w]here such advocacy occurs in response to a rate application, the award shall be paid by the applicant." That sentence means that where the conditions for compensation are met *in response to a rate application*, the award must be paid by the insurer. But in all other circumstances, whether the award is payable by the insurer is discretionary. A judicial review arising out of a rulemaking proceeding presents such other circumstance, so an award against the insurer is in the discretion of the trial court. Insurance Companies make no further argument that imposing liability on them for FTCR's award constituted an abuse of discretion.

Citing section 12979, Insurance Companies assert that the award should be paid by the Department because the Department can recoup administrative and operational costs from insurers through assessing filing fees against insurers.[5] But section 12979 deals only with administrative and operational costs of the Department, not awards of compensation for expenses of interveners such as FTCR. As Insurance Companies fail to provide any authority that the statute is intended to shift liability for compensation from insurers to the Department, their assertion is without merit.

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[5] Section 12979 provides: "Notwithstanding the provisions of Section 12978, the commissioner shall establish a schedule of filing fees to be paid by insurers to cover any administrative or operational costs arising from the provisions of Article 10 (commencing with Section 1861.01) of Chapter 9 of Part 2 of Division 1."

Accordingly, we conclude that Insurance Companies fail to persuade us that the trial court erred in awarding FTCR compensation payable by Insurance Companies.

DISPOSITION

The judgment and the order are affirmed. All respondents are entitled to their costs on appeal from appellants.

CERTIFIED FOR PUBLICATION.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

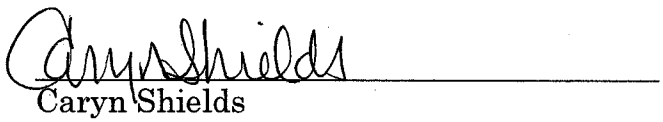
On February 8, 2010, I served true copies of the following document(s) described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on February 8, 2010 at Encino, California.



Caryn Shields

SERVICE LIST

The Association of California Insurance Companies, et al. v. Steven Poizner, et al.
Case No. B208402

Mark P. Richelson (SBN 58121) Christine Zarifian (SBN 212810) Deputy Attorneys General Office of the Attorney General 300 South Spring Street, Room 1702 Los Angeles, CA 90013 (213) 897-2479	Attorneys for Defendants and Respondents Steve Poizner; Insurance Commissioner of the State of California; California Department of Insurance
Harvey J. Rosenfield (SBN 123082) Pamela M. Pressley (SBN 180362) Foundation for Taxpayer & Consumer Rights 1750 Ocean Park Blvd., Suite 200 Santa Monica, CA 90405-4902 (310) 392-0522	Attorneys for Intervener and Respondent The Foundation for Taxpayer and Consumer Rights
Richard A. Marcantonio (SBN 139619) Public Advocates, Inc. 131 Steuart Street, Suite 300 San Francisco, California 94105 (415) 431-7430	Attorneys for Intervener and Respondent The Foundation for Taxpayer and Consumer Rights
Robert W. Hogeboom (SBN 61525) Suh Choi (SBN 217353) Barger & Wolen 633 West Fifth Street, 47th Floor Los Angeles, CA 90071 (213) 680-2800	Attorneys for Plaintiffs and Appellants The Association of California Insurance Companies; The Personal Insurance Federation of California; The American Insurance Association
Honorable James C. Chalfant Los Angeles Superior Court 111 North Hill Street, Dept. 85 Los Angeles, CA 90012	[Case No. BS109154]

Clerk of the Court
California Court of Appeal
Second District, Division One
300 South Spring Street
2nd Floor, North Tower
Los Angeles, California 90013-1213

[Case No. B208402]