

April 4, 2005

Hon. Ronald M. George, Chief Justice  
and Associate Justices  
California Supreme Court  
300 S. Spring St., 2nd Fl.  
Los Angeles, CA 90013

Re: *American Ins. Assn. vs. Garamendi*  
No. C 045 000 (127 Cal.App.4th 228)  
Request for Depublication (Rule 979(a))

Dear Chief Justice George and Associate Justices:

On behalf of United Policyholders, request is hereby made for depublication of the Opinion in No. C045000, *American Ins. Assn. vs. Garamendi*, filed February 28, 2005, and published at 127 Cal.App.4th 228.<sup>1</sup>

**A. UNITED POLICYHOLDERS' INTEREST**

UNITED POLICYHOLDERS (UP) was founded in 1991 as a non-profit organization dedicated to educating the public on insurance issues and consumer rights. It serves as a resource for insurance claimants, monitors legal and marketplace developments affecting policyholders and frequently is invited to participate and to testify at legislative and regulatory rate and policy proceedings. UP participated in the instant appellate proceedings as Amicus Curiae in support of Commissioner Garamendi.

**B. WHY DEPUBLICATION IS NECESSARY**

The amicus brief was based on a specific statute which established the Commissioner's authority to hold administrative hearings concerning complaints against

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<sup>1</sup>A copy of the Opinion is attached for the Court's convenience.

insurers – California *Ins. Code* §1858(a)<sup>2</sup>, part of the McBride-Grunsky Act. UP argued this law

constituted a legal basis for the Commissioner to regulate the underwriting of homeowner insurance. The Court of Appeal discussed – and rejected – UP’s position.

“Amicus Curiae contends that because section 1858 gives the Commissioner the power to determine if a complainant is aggrieved by an underwriting rule, it gives him implied power to adopt substantive underwriting regulations to carry out his duty. Section 1858, however, gives the Commissioner the power only to review “the manner” in which the underwriting rule has been applied. Nothing in the

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<sup>2</sup>**§1858. Complaint requesting review; hearing; denial; request for review to insurer or rating organization.**

(a) Any person aggrieved by any rate charged, rating plan, rating system, or *underwriting rule* followed or adopted by an insurer or rating organization, may file a written complaint with the commissioner requesting that the commissioner review the manner in which the rate, plan, system, or rule has been applied with respect to the insurance afforded to that person. In addition, the aggrieved person may file a written request for a public hearing before the commissioner, specifying the ground relied upon. (Italics added.)

provision allows the Commissioner to prohibit an underwriting rule that is fairly applied. The procedural protection offered by section 1858 does not grant the Commissioner a substantive power to regulate underwriting.” (127 Cal.App. 4<sup>th</sup> at 245.)

Yet the Opinion contradicts, without any reference or discussion, this Court's prior decision in *Farmers Ins. Exchange vs. Superior Court* (1992) 2 Cal.4th 377.<sup>3</sup> *Farmers* concerned an insurer's practice of refusing good driver discounts to eligible applicants, in violation of *Bus. & Prof. Code* §17200. This Court held that the Commissioner's administrative expertise would assist later judicial review if any unfairly discriminatory practices were found to exist. (*Id.* at 399-400.) Thus a court had the discretion to stay its proceedings (*Id.* at 394) and to require a complainant to first resort to the administrative procedure established by §1858 under the primary jurisdiction doctrine. (*Id.* at 401.)

In so holding *Farmers* provides a detailed explanation of the scope of relief §1858 **does** provide, along with its correlates in Article 7, Chapter 9, Part 2 of Division 1 of the *Ins. Code*. (*Id.* at 384-385.) Moreover, enforcement of §1858 matters is solely by the Commissioner under such Chapter 9 statutes. (*Id.* at 382, fn.1, citing

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<sup>3</sup>Several appellate decisions also support the proposition that §1858 authorizes substantive actions by the Commissioner: *Wilson vs. Fair Employment & Housing Com.* (1996) 46 Cal.App.4th 1213, 1221-1222: discriminatory underwriting decision or practice is within ambit of comprehensive scheme, including §1858, which is to be exclusively enforced pursuant to provisions of Chapter 9; *Wilkinson vs. Norcal Mutual Ins. Co.* (1979) 98 Cal.App.3d 307, 317: Section 1858 provides a remedy for any aggrieved person along with any public impact, including appropriate corrective action; *County of Los Angeles vs. Farmers Ins. Exch.* (1982) 132 Cal.App.3d 77, 85-87: Commissioner authorized by §1858 to hold hearings to correct discriminatory underwriting practices.

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*Ins. Code* § 1860.2.)<sup>4</sup>

*Farmers* also concludes that the doctrine of exhaustion of administrative remedies can be applied whenever proceedings under §1858 will lie.

“Pursuant to the Insurance Code, the People's claims under that code are exclusively the province of the Insurance Commissioner. (§1860.2 [“The ... enforcement of this chapter shall be governed solely by the provisions of this chapter.”]; §1858 et seq. [setting out procedures for administrative determination of rate and rate-making issues].) Judicial review is of course available to challenge those administrative determinations (see §§ 1858.6, 1861.09), but such review may be obtained only after the available administrative procedures have been invoked and exhausted. (See post, pp. 392, 393, fn. 11.)” (*Farmers, supra*, 2 Cal.4th at 382, fn. 1, approving *County of Los Angeles vs. Farmers Ins. Exchange, supra*, 132 Cal.App.3d at 85-87.)

Moreover, §1858 is available to all complainants, including an insured, a law enforcement agency or the Commissioner himself. (*Farmers, supra*, 2 Cal.4th at 384, fn. 2, and at 401, fn. 20.)

An unfair underwriting rule is still unfair even if fairly applied. The Opinion errs in holding that §1858 is **only** a procedural statute and affords no substantive authority to the Commissioner. No substantive rate/rating/underwriting regulation can ever occur if §1858 only authorizes procedural actions by the Commissioner. Nor can any such substantive defects be reviewed by a court under *Ins. Code* §1858.6, the statute having been judicially rewritten.<sup>5</sup>

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<sup>4</sup> Accord, *Donabedian vs. Mercury Ins.* (2004) 116 Cal.App.4th 968, 977-978, 984-985; *Wilson vs. Fair Employment & Housing Com.*, *supra*, 46 Cal.App.4th at 1221-1222.)

<sup>5</sup>The Opinion also conflicts with *20<sup>th</sup> Century Ins. Co. vs. Garamendi* (1994) 8 Cal.4th 216: “[Section 1858.6] applies the independent-judgment-on-the-evidence standard of review to various

UP submits §1858 does far more than provide a procedural path for aggrieved persons to seek administrative relief against an insurer whose conduct is improper. In practice, the Opinion deprives the Commissioner of an integral function of his office. The result will be a constricted Commissioner, whose authority is now limited to holding hearings concerning the uniform application of substantively flawed rates, rules or procedures.

### C. CONCLUSION

In today's litigation climate, does the judiciary really want to require all rating and underwriting disputes to be handled by the courts? Judicial review of an administrative ruling is a far cry from managing a new lawsuit. What use is the primary jurisdiction doctrine if the Commissioner doesn't have any? Budget restraints on our Courts have squeezed the judiciary to almost the breaking point, and it makes little sense to restrict an existing and functioning administrative system to procedural inspections.

If the Opinion remains published law, parties will always have to resort to the courts to obtain redress against unlawful rates and underwriting practices. Having gone to that trouble, is there any doubt insureds will join claims for bad faith and punitive damages? Any procedural improprieties will now be subsumed in such civil damage suits. And are the prior substantive administrative decisions rendered in §1858 hearings still valid?

It is better law and better public policy to reinforce the system the Legislature established. This Court decided that in *Farmers*, giving courts the discretion to require the Commissioner to do his job when appropriate. It is thus requested that the Opinion be depublished.

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decisions of the Insurance Commissioner on the rates of individual insurers and **related matters** – specifically, ‘any rate charged, rating plan, rating system **or** underwriting rule followed or adopted by [any] insurer or rating organization.’” (*Id.* at 273, emphasis added.) The discussion of the McBride-Grunsky Act, including §1858.6, (at pp. 273-275) supports the substantive scope of § 1858.

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Respectfully submitted,

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