

Ships Passing in the Night: How California's Statutory Framework Directs Traffic Through the Maze of Jurisdictional Doctrines Concerning Insurance Rates

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Introduction

CALIFORNIA HAS ONE OF THE MOST RIGOROUS, active, and thorough insurance rate regulatory systems in the country. The current system—housed in Chapter 9, Division 1, Part 2 of the Insurance Code (“Chapter 9”)¹—represents a complete overhaul of the previous “open competition” system in existence since the 1947 enactment of the McBride/Grunsky Act. The 1988 voter initiative Proposition 103 replaced that system with “prior approval” rate regulation. Under Proposition 103, an insurer must apply for and obtain the insurance commissioner’s “prior approval” before charging a changed rate.² The standard for approval is that the proposed rate must not be “excessive, inadequate, unfairly discriminatory or otherwise in violation of [Chap-

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1. Chapter 9 has housed California’s rate regulatory system since 1947. Proposition 103 eviscerated most of Chapter 9 as it existed prior to 1988, and added Article 10. *See generally* CALIFORNIA BALLOT PAMPHLET FOR THE NOVEMBER 8TH GENERAL ELECTION (1988). The Article 10 statutes added by Proposition 103 are sections 1861.01–1861.14. Subsequent to Proposition 103’s adoption, the Legislature has from time to time amended Article 10, accounting for the additional statutes that appear in the Article today. *See* CAL. INS. CODE §§ 1861.15–1861.16 (West 2005).

2. CAL. INS. CODE § 1861.01(c) (West 2005).

ter 9].”³ This system of rate regulation is typical of “prior approval” laws in numerous states, but Proposition 103 included novel innovations, such as a mandatory “good driver” discount,⁴ rigid regulation of private passenger auto rating factors,⁵ and certain proscriptions on cancellation of private passenger auto policies.⁶ Proposition 103 also included provisions designed to encourage consumer participation in the rate review and rate hearing process, such as a provision for compensation and witness fees for participants.⁷

Despite this elaborate system and generous provision for consumer participation within it, plaintiffs’ class action attorneys and consumer groups insist that they may also assert rate actions against insurers in the courts. These court actions purport to enforce Proposition 103’s statutes, and typically challenge rates that have already been approved by the Insurance Commissioner. This Article explores the decades-long debate sparked by these rate cases: may the courts entertain original actions challenging rates and rate matters, or is the comprehensive regulatory system, established by Chapter 9 and vastly enhanced by Proposition 103, the exclusive mechanism for resolving rate issues?

The answer lies within the Chapter 9 statutes, and their correct, contextual interpretation. While Proposition 103 certainly wrought sweeping changes, it nonetheless *retained* the backbone of the McBride/Grunsky Act as the framework for the new rate regulatory system. This framework includes three statutes that make the Chapter 9 mechanism exclusive—sections 1860.1–1860.3 of the Insurance Code. The Chapter 9 mechanism creates a separate system that is predominantly “quasi-legislative”⁸ and relies upon decision makers with technical expertise on a technical subject matter, all subject to judicial review. The mechanism is consumer-friendly, it does not require an attorney, and it provides for compensation for advocacy regardless of whether the “advocate” is an attorney. It also includes independent

3. *Id.* § 1861.05(a).

4. *Id.* § 1861.02(b).

5. *Id.* § 1861.02(a).

6. *Id.* § 1861.03(c).

7. *Id.* § 1861.10 (fees and intervention); *id.* § 1861.04 (provision to consumers of rate comparisons); *id.* § 1861.05(b) (every insurer may request a hearing); *id.* § 1861.06 (public notice of rate filings); *id.* § 1861.07 (information provided to the commissioner is available for public inspection); *id.* § 1861.09 (judicial review, which allows judicial review of a denial of a request for hearing).

8. See *20th Century Ins. Co. v. Garamendi*, 878 P.2d 566, 602–03 (Cal. 2004).

judicial review once an administrative proceeding is concluded.⁹ The penalties that can be imposed for violations are severe.¹⁰ The system is comprehensive and exclusive, and does not provide for enforcement through class or other ordinary civil actions brought in a court.

The treatment of rate cases brought in California courts under Proposition 103 is confusing and inconsistent. Various forces contribute to the lack of clarity.

First, there is a fundamental misunderstanding about the enforcement of the regulatory system imposed by Proposition 103. Proposition 103, *inter alia*, requires regulatory approval of proposed rates, and the insurer has no choice but to charge the approved rate. The regulatory process allows consumer participation through administrative adjudication and judicial review—but does not include dual recourse in the form of private civil or class actions. As noted, there are statutes making this an exclusive mechanism.

Much confusion has arisen through a misperception that the key question is which of competing common law doctrines should be applied, rather than maintaining a focus on the statutory mandate. Initially, the appellate authority correctly construed the statutory system and held that the Chapter 9 statutes barred private actions. Specifically, in *Walker v. Allstate Indemnity Co.* (“*Walker*”),¹¹ the California Court of Appeal reviewed a challenge to various insurers’ allegedly “excessive” private passenger auto insurance rates as violating California’s Unfair Competition Law and various common law claims.¹² The court held that Chapter 9, as revamped by Proposition 103, does not permit enforcement through an ordinary civil action. A subsequent decision by a different California Court of Appeal creates substantial confusion regarding the scope of the Commissioner’s exclusive original jurisdiction over rates. In *Donabedian v. Mercury Insurance Co.* (“*Donabedian*”),¹³ the court ultimately held that in the demurrer context a court could not assume the pivotal fact of approval, but on the way to that holding discussed several possible constructions of the Chapter 9 statutes, and suggested that the common law “primary jurisdiction” doctrine was likely sufficient to address policy issues. Following *Donabedian*, two other appellate panels have speculated in *dicta*

9. CAL. INS. CODE §§ 1858–1858.7 (West 2005); *see also Garamendi*, 878 P.2d at 583–84, 599, 604.

10. *See CAL. INS. CODE §§ 1858.07, 1858.3, 1858.5, 1859.1, 1861.14 (West 2005).*

11. 92 Cal. Rptr. 2d 132 (Ct. App. 2000).

12. *Id.* at 133–38.

13. 11 Cal. Rptr. 3d 45 (Ct. App. 2004).

regarding the scope of the Commissioner's exclusive jurisdiction, each interpreting *Donabedian* differently.¹⁴ Adding to the confusion is a lurking 1992 decision by the California Supreme Court, *Farmers Insurance Exchange v. Superior Court*.¹⁵ In that opinion, the Court assessed the applicability of two competing common law doctrines—"exhaustion of administrative remedies" versus "primary jurisdiction"—but the opinion contains no analysis of the governing statutes. The Court did hold that the common law "primary jurisdiction" doctrine required that the case proceed before the Insurance Commissioner.¹⁶ But the absence of a statutory analysis has proved a conundrum to lower courts attempting to understand the opinion. The result of these authorities is that there is no clear direction concerning the scope of the Insurance Commissioner's statutory jurisdiction over rates and rate matters.

Secondly, the questions presented require a deep understanding of a complex and arguably archaic body of law outside the typical judicial fare. Resolution of these questions requires the correct interpretation of the law, an exercise unquestionably within the judicial prerogative.¹⁷ But the issues are outside the usual experience presented by most litigation, and the foreign nature of the subject matter makes it less instinctive and more confusing than the vast majority of questions presented in judicial proceedings. Courts' lack of familiarity with the subject matter enhances the likelihood that courts will defer to the regulator, a dicey proposition when the regulator has taken both sides on the question.¹⁸ The existence of complex and rarified issues has compounded the confusion in this area.

14. See *Farmers Ins. Exch. v. Superior Court*, 40 Cal. Rptr. 3d 653 (Ct. App. 2006) [hereinafter *Farmers 2006*]; *Fogel v. Farmers Group, Inc.*, 74 Cal. Rptr. 3d 61 (Ct. App. 2008).

15. *Farmers Ins. Exch. v. Superior Court*, 826 P.2d 730 (Cal. 1992) [hereinafter *Farmers 1992*]. Because there are two relevant decisions captioned "*Farmers v. Superior Court*," to avoid confusion this Article will refer to the 1992 California Supreme Court opinion as "*Farmers 1992*" and to the 2006 Court of Appeal opinion as "*Farmers 2006*".

16. *Farmers 1992*, 826 P.2d 730, 744–45 (Cal. 1992).

17. See, e.g., *Bodinson Mfg. v. Cal. Employment Comm'n*, 109 P.2d 935, 939 (Cal. 1941) ("The ultimate interpretation of a statute is an exercise of the judicial power.").

18. In *Walker v. Allstate Indem. Co.*, 92 Cal. Rptr. 2d 132 (Ct. App. 2000), the Commissioner submitted a brief at the trial court level arguing that the commissioner has exclusive jurisdiction over rate matters. Brief for the Respondant at 5, *Walker v. Allstate Indem. Co.*, 92 Cal. Rptr. 2d 132 (Ct. App. 2000) (No. A083865), 1999 WL 33657147. In *Donabedian*, the Department of Insurance submitted an amicus brief in support of the plaintiff/appellant, arguing that there should be an ability to bring a rate case in a court. Application of the Cal. Dep't of Ins. for Permission to File Amicus Curiae Brief at 11, *Donabedian v. Mercury Ins. Co.*, 11 Cal. Rptr. 3d 45 (Ct. App. 2004) (No. B159982), 2003 WL 23280980. Putting aside sheer politics, at times the Commissioner may be influenced by conditions emphasizing

This Article analyzes the language, purpose, and context of California's rate regulatory system to determine a reasonable construction of the Insurance Commissioner's exclusive original jurisdiction over rates. Part I provides an historical review of how rate issues have been dealt with by various courts. This Part first reviews basic historical insurance concepts in common law. It then reviews various provisions of the California Insurance Code that set the foundation for establishing the Commissioner's exclusive jurisdiction. Part II reviews the relevant case law. Though this Part attempts to sort through the various interpretations of Proposition 103, the case law is hopelessly muddled and often contradictory. Part III attempts to clarify the scope of the Commissioner's jurisdiction by suggesting a straightforward interpretation of the statutes at issue. This interpretation yields the following four conclusions regarding the Insurance Commissioner's exclusive jurisdiction:

First, the Insurance Commissioner *does* have exclusive original jurisdiction to determine whether rates are "excessive," "inadequate," "unfairly discriminatory," or "otherwise in violation of [Chapter 9]."¹⁹

Second, where a civil action presents a claim solely within the Insurance Commissioner's exclusive original jurisdiction, as described above, the civil action cannot be maintained. This would be the case, for example, where the claim is that rates are "excessive," or that an insurer violated a rate statute or regulation, or that there is a systemic fault in the approved rates (as opposed to a misapplication in a particular case).

Third, where a civil action presents a claim *a part of which* falls within the Insurance Commissioner's exclusive original jurisdiction, then the Commissioner has primary *and* exclusive jurisdiction over that issue. The Court must cede to the Commissioner's jurisdiction to decide that issue.²⁰ If the Commissioner's decision leaves a case to be decided, then the Court has jurisdiction to decide the remainder of

ing the need for uniform application of rate standards by an agency with the appropriate technical expertise, while at other times the lack of agency resources to adequately review each and every filing might prompt a different response.

19. CAL. INS. CODE § 1861.05(a) (West 2005).

20. While California case law refers to primary jurisdiction as "discretionary," the cases considering the doctrine in the rate context consistently hold that the court's jurisdiction could only be exercised one way under the circumstances presented. *Farmers* 1992, 826 P.2d at 732 ("We hold that prior resort to the administrative process is required in the circumstances of this case."); *Jonathan Neil & Assocs., Inc. v. Jones*, 94 P.3d 1055, 1065–66 (Cal. 2004) [hereinafter *Jonathan Neil*] (holding that trial court abused its discretion in not staying the case under the doctrine of primary jurisdiction, and that "the case for invoking the primary jurisdiction of the Insurance Commissioner is compelling").

the case. For example, in *Jonathan Neil & Associates, Inc. v. Jones* (“*Jonathan Neil*”),²¹ if the Commissioner determined that the insurer incorrectly calculated the rates and premiums charged to the insured, then the insured would be able to proceed with its civil action for breach of contract.

Fourth, where the civil action presents a question involving *application* of a rate (or rating rules) in a particular case, the Commissioner’s exclusive jurisdiction over rates is not presented. For example, if an insurer’s agent misapplied the rules in calculating rates for specific business, then the Insurance Commissioner’s jurisdiction is not implicated.²²

Even if adopted, the application of this basic set of guidelines for interpreting the scope of the Insurance Commissioner’s jurisdiction in rate matters will likely continue to present complex issues and challenges. Nevertheless, establishing such a basic set of rules would be an important first step in clarifying the respective roles of courts and the Commissioner in matters affecting insurance rates.

I. The Historical Framework Governing Rate Regulation

A. Common Law Concepts

For over a century, courts have recognized that the existence of specialized government agencies with specific technical expertise and oversight concerning the prices charged by regulated businesses creates unique issues of comity and jurisdiction as to cases involving rates. While the challenge addressed by this Article focuses on the correct construction of California’s statutes, an informed consideration of the scope of the Insurance Commissioner’s exclusive original jurisdiction over rates requires an understanding of several common law doctrines developed in related contexts. The established traditions reconciling the respective spheres of the courts and regulators form the backdrop for resolving this issue in California.

1. Filed Rate Doctrine

The “filed rate doctrine” is a creature of federal jurisprudence developed in the context of federal agency rate regulation. The essen-

21. 94 P.3d 1055 (Cal. 2004).

22. Note that there might be a threshold question as to whether the agent actually *correctly* applied the rules, with the real issue being whether the plaintiff has correctly interpreted the rules. This could require resort to the Commissioner to understand the rules. But if the matter involves purely a miscalculation, the Commissioner’s special expertise is not implicated. See, e.g., *Jonathan Neil*, 94 P.3d at 1063–65.

tial doctrine is that, where rates must by law be “filed” with an agency, the regulated entity cannot be sued in a civil action for charging the filed rate.²³ As the U.S. Supreme Court explained in one opinion: “The considerations underlying the doctrine . . . are preservation of the agency’s primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant.”²⁴ Further, a civil court may not *award relief* in an action that does not directly challenge the filed rate, where the relief would have the effect of retroactively adjusting the filed rate.²⁵ Federal decisions give the doctrine a fairly broad sweep.²⁶

Numerous jurisdictions have adopted the filed rate doctrine as applicable to insurance rates.²⁷ This is a logical conclusion, for numer-

23. See, e.g., AT&T v. Cent. Office Tel., Inc., 524 U.S. 214 (1998); Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 417, 422 (1986); Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156 (1922).

24. Ark. La. Gas Co. v. Hall, 453 U.S. 571, 577–78 (1981) (citation omitted).

25. See Day v. AT&T Corp., 74 Cal. Rptr. 2d 55, 60–65 (Ct. App. 1998) (claim alleging deceptive practices in the sale of phone cards where charges were based on any portion of minute used, and purchasers allegedly were deceived and believed that charges were distributed pro rata, was not barred by filed rate doctrine, but filed rate doctrine did bar any monetary relief which would have constituted a retroactive adjustment to the filed rates); but see Spielholz v. Superior Court, 104 Cal. Rptr. 2d 197, 204–06, 208 (Ct. App. 2001) (holding that filed rate doctrine applied only to bar claims specifically directed to the rate, and not to claims addressed to unrelated conduct where the remedy would retroactively change the rate).

26. See AT&T, 524 U.S. 214; Square D Co., 476 U.S. 409.

27. Alston v. Countrywide Fin. Corp., 585 F.3d 753, 765 (3d Cir. 2009) (filed rate doctrine did not apply to plaintiff’s claim that artificially inflated mortgage insurance rates were inflated reinsurance premiums constituting part of the expenses considered in the rate, and because plaintiff could not state a claim based on alleged inflation of filed rate, plaintiff lacked standing to bring a claim under the Real Estate Settlement Procedures Act); Winn v. Alamo Title Ins. Co., No. A-09-CA-214-SS, 2009 U.S. Dist. LEXIS 65889, at *28–29 (W.D. Tex. May 14, 2009) (filed rate doctrine barred claims that title insurers’ filed rates were inflated by improper conduct); Hooks v. Am. Med. Sec. Life Ins. Co., 2008 U.S. Dist. LEXIS 81451, at *19 (W.D.N.C. Aug. 19, 2008) (citing N.C. Steel, Inc. v. Nat’l Counsel on Compensation Ins., 496 S.E.2d 369, 374 (N.C. 1998) (filed rate doctrine barred claim based on alleged charging of unapproved renewal rates, where renewal rates adjusted original approved rates and “plaintiffs could not prove their claim without the rate set by the Commissioner being questioned”)); Rios v. State Farm Fire and Casualty Co., 469 F. Supp. 2d 727, 735, 739 (S.D. Iowa 2007) (filed rate doctrine barred claim where it would involve court in determining amount of the rate attributable to allegedly illusory endorsement and require court to “second guess” what rate the regulator would have allowed absent the allegedly illusory endorsement); McKenzie v. Progressive Auto Pro Ins. Co., 2007 U.S. Dist. LEXIS 26156 (M.D. Fla. Apr. 9, 2007); Freed v. N.H. Indem. Co., Inc., 2007 U.S. Dist. LEXIS 26158 (M.D. Fla. Apr. 9, 2007) (both dismissing action without prejudice under filed rate or primary jurisdiction doctrine, where plaintiffs alleged that rate differentials charged to policyholders paying in installments rather than paying up front were addi-

tional, hidden installment fees boosting actual installment fees above the statutorily permissible level); *Heaphy v. State Farm Mut. Auto. Ins. Co.*, 2006 U.S. Dist. LEXIS 24943, at *5 (W.D. Wash. Feb. 2, 2006) (“There is ample authority in this and other jurisdictions to the effect that the reasonableness of a rate cannot be challenged where that rate was required to be (and was) filed with a regulatory agency authorized to review it.”). In this case, the court held that the filed rate doctrine bars claims based on reasonableness of rate and alleged practices affecting rate); *Korte v. Allstate Ins. Co.*, 48 F. Supp. 2d 647 (E.D. Tex. 1999) (applying filed rate doctrine to bar “subsidy” claims); *Allen v. State Farm Fire and Casualty Co.*, 59 F. Supp. 2d 1217 (S.D. Ala. 1999) (filed rate doctrine applied to bar challenge to rates approved by Commissioner); *Mullen v. Allstate Ins. Co.*, 2009 Colo. App. LEXIS 1566 (Sept. 3, 2009) (a dispute whether a benefit is worth the premium paid for it is an insurance rate issue precluded from judicial consideration under the filed rate doctrine); *Horwitz v. Bankers Life & Cas. Co.*, 745 N.E.2d 591, 596 (Ill. App. Ct. 2001) (applying Colorado law and granting summary judgment in action based on rates filed with the Commissioner); *Anzinger v. Illinois State Med. Inter-Ins. Exch.*, 494 N.E.2d 655 (Ill. App. Ct. 1986) (because the regulator had exclusive original authority to initially determine the reasonableness and non-discriminatory nature of filed rates, there could be no implied right of action); *Amundson & Assocs. Art Studio v. Nat'l Council on Comp. Ins.*, 988 P.2d 1208 (Kan. Ct. App. 1999) (applying filed rate doctrine to preclude antitrust claims); *Commonwealth ex rel. Chandler v. Anthem Ins. Cos.*, 8 S.W.3d 48, 52 (Ky. Ct. App. 1999) (“Although the filed rate doctrine originated in the federal courts, it ‘has been held to apply equally to rates filed with state agencies by every court to have considered the question.’”) In this case, the court held that filed rate doctrine bars private civil actions, but not actions by the Attorney General seeking injunctive relief and civil penalties which would not affect rate.); *Schermer v. State Farm Fire & Casualty Co.*, 721 N.W.2d 307, 312–13 (Minn. 2006) (adopting filed rate doctrine and recognizing multiple rationales, including separation of powers, comity, legislative nature of ratemaking, technical expertise of regulator, and unforeseen consequences of potential court orders on entire rating plan and system; noting that “most states have adopted the filed rate doctrine, and many apply it to insurance regulation”); *Am. Bankers Ins. Co. v. Wells*, 819 So. 2d 1196, 1205 (Miss. 2001) (noting that “the acceptance of the [filed rate] doctrine’s basic applicability is near universal” and applying doctrine to bar aspect of claim challenging insurance rates and terms); *Richardson v. Standard Guar. Ins. Co.*, 853 A.2d 955, 963 (N.J. Super. Ct. App. Div. 2004) (“[W]e also reject plaintiff’s mistaken contention that the filed rate doctrine does not apply to the insurance industry not only because courts are not institutionally suited to regulate insurance premium and benefit rates, but also because of the extensive regulation of this industry. We, thus, align our decision with the considerable weight of authority from other jurisdictions that have applied the filed rate doctrine to ratemaking in the insurance industry.”); *City of N.Y. v. Aetna Cas. & Sur. Co.*, 693 N.Y.S.2d 139, 139 (N.Y. App. Div. 1999) (action by New York City and putative class alleging that auto insurance rates were excessive and unfairly discriminatory because they did not drop based on drop in auto theft rates was barred by filed rate doctrine); *Byan v. Prudential Ins. Co. of Am.*, 662 N.Y.S.2d 44, 44 (N.Y. App. Div. 1996) (court dismissed plaintiff’s “consumer fraud” action as barred by filed rate doctrine); *Minihane v. Weissman*, 640 N.Y.S.2d 102, 102 (N.Y. App. Div. 1996) (claiming that fraudulently obtained filed rate was barred by filed rate doctrine; doctrine exists “to ensure that rates charged are stable and non-discriminatory, bearing in mind that the regulatory agencies presumably are most familiar with the workings of the regulated industry and are in the best position, due to experience and investigative capacity, to establish the proper rates”); *N.C. Steel v. Nat'l Council on Comp. Ins.*, 496 S.E.2d 369, 372 (N.C. 1998) (holding that filed rate doctrine barred claim that rates were excessive because insurers withheld from Commissioner information about servicing fees charged in addition to the rate: “We believe this is a good example of why questions involving rates should be

ous reasons articulated in the opinions. Rate regulation is considered inherently legislative in character, because it involves determinations on matters of economic policy. In addition, regulators—not courts—have the technical expertise to evaluate rates. The regulator's jurisdiction in this regard should be respected as a matter of separation of powers and comity. Further, for active rate regulation to work effectively, it must be managed through the system created for that task. It cannot be fragmented throughout the court system with different trial courts making different determinations on the same rate issues. Moreover, to the extent there has been approval of the rate by the regulator, there are fairness issues around allowing private damage actions where the insurer was justified in relying upon the regulator's approval in charging the rate.

settled by the Insurance Commissioner and not by a jury. Whether the payment of the servicing carrier fees is a relevant factor which must be considered by the Commissioner in setting rates . . . is a technical question which requires considerable expertise to answer. It is best decided by the Commissioner, who has the expertise. It should not be decided by a court or jury, which does not have this expertise."); *Stutts v. Travelers Indem. Co.*, 682 S.E.2d 769, 772–73 (N.C. Ct. App. 2009) (where plaintiff could not prove breach of contract claim without rates set by commissioner being questioned, filed rate doctrine barred claim); *Lupton v. Blue Cross and Blue Shield of N.C.*, 533 S.E.2d 270, 273 (N.C. Ct. App. 2000) (filed rate doctrine barred suit alleging that insurers accumulated and maintained too great a "reserve" and misrepresented level to Commissioner); *Edge v. State Farm Mut. Auto. Ins. Co.*, 623 S.E.2d 387, 390–93 (S.C. 2005) (filed rate doctrine barred claim based on collecting "facility rate" in response to claim that rate was "illegal," as plaintiff's claims would require court to determine reasonable rate. The Court's stated reasons for adopting filed rate doctrine were (1) preserving agency's authority; (2) recognizing that agency had expertise whereas courts do not; (3) avoiding undermining regulatory scheme; and (4) avoiding piecemeal regulation through courts.); *Mid-Century Ins. Co. of Tex. v. Ademaj*, 243 S.W.3d 618, 625 (Tex. 2007) (acknowledging that Texas had adopted filed rate doctrine and applied it in the insurance context, but precluding the insurer from charging fee not included in the filed rate); *State ex rel. CitiFinancial, Inc. v. Madden*, 672 S.E.2d 365, 374 (W. Va. 2008) (holding that Insurance Commissioner has exclusive jurisdiction over reasonableness of rates; adoption of statutes creating claims based on consumer credit practices does not displace regulator's jurisdiction over credit insurance rates or create concurrent jurisdiction with respect to claims requiring determination of reasonableness of rate); *Prentice v. Title Ins. Co.*, 500 N.W.2d 658, 660 (Wis. 1993) (filed rate doctrine applied and barred price-fixing action against insurers). *Compare Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 393–94 (9th Cir. 1992) (applying Arizona law and holding that filed rate doctrine did not apply when there was no meaningful review of title insurance rates), *with McCray v. Fidelity Nat'l Title Ins. Co.*, 636 F. Supp. 2d 322, 329 (D. Del. 2009) ("Other than the Ninth Circuit in *Brown*, no other court has taken such a narrow view of the applicability of the filed rate doctrine" which held that application is dependent upon a judicial determination that rate review is "meaningful."). *See also* *Saunders v. Farmers Ins. Exch.*, 537 F.3d 961, 963 (8th Cir. 2008) (while court in previous opinion held that filed rate doctrine based on state regulation of insurance rates would not bar federal FEHA claim, in this opinion Court held that McCarran-Ferguson Act did bar federal FEHA claims challenging rates regulated by the state Insurance Commissioner).

2. Primary Jurisdiction

Primary jurisdiction is also a common law doctrine created by federal jurisprudence and, as originally conceived in the rate context, is closely related to the filed rate doctrine.²⁸ The original cases promulgating this doctrine involved civil actions that were expressly allowed by statute, but that turned on a rate question.²⁹ The action *in toto* was not barred, but whether the action had merit—and thus whether the plaintiff was allowed to seek redress in court—depended upon a rate question.

Primary jurisdiction applies where both the court and the regulator have concurrent jurisdiction over an action. In cases involving tariff or rate regulation, the court may have jurisdiction over the lawsuit, but the agency has jurisdiction over the subject matter of a core question—for example the reasonableness of the tariff or rate charged.³⁰ Jurisdiction over *the action* is proper in the court, but the *question*—in a case involving the agency's exclusive regulatory jurisdiction—has to be referred to the agency. Jurisdiction over the subject matter—versus jurisdiction over the case—does not directly overlap. The agency does not have jurisdiction to preside over a damages action, and the court does not have jurisdiction to decide such issues as whether the rate or tariff is “reasonable,” or the correct parameters for a tariff or rating classification.

For example, one U.S. Supreme Court case involved a question of whether the defendant had charged the correct tariff.³¹ The Court held that this question required resort to the agency that created the tariff schedule. Reciting the typical list of policy considerations—the

28. See, e.g., *Ark. La. Gas Co.*, 453 U.S. at 577–78 (identifying purpose of filed rate doctrine is to preserve agency's “primary jurisdiction over reasonableness of rates . . . ”); *McCray*, 636 F. Supp. 2d at 326–27 (citing *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), as the seminal filed rate case despite usually being considered a primary jurisdiction case).

29. See, e.g., *United States v. W. Pac. R.R. Co.*, 352 U.S. 59 (1956); *Tex. & Pac. Ry. Co.*, 204 U.S. 426. See also *Reiter v. Cooper*, 507 U.S. 258 (1993); *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976); *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296 (1963); *Hewitt-Robins Inc. v. E. Freight-Ways, Inc.*, 371 U.S. 84 (1962); *Pa. R.R. Co. v. United States*, 363 U.S. 202 (1960); *Far E. Conference v. United States*, 342 U.S. 570 (1952); *Gen. Am. Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422 (1940); *U.S. Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932); *W. & Atl. R.R. v. Ga. Public Service Comm'n*, 267 U.S. 493 (1925); *Great N. Ry. Co. v. Merchants' Elevator Co.*, 259 U.S. 285 (1922).

30. See, e.g., *W. Pac. R.R. Co.*, 352 U.S. at 63 (finding that questions regarding which was the correct tariff were in the “exclusive primary jurisdiction” of the Interstate Commerce Commission).

31. *Id.* at 63–65.

special expertise of the agency, the need for uniformity in application of a regulatory system, and a preference for deference to the agency charged with administering the regulatory system—the Court explained that only the agency that developed the tariff schedule could understand the specific details underlying the assignment of the different tariff levels. Since the economic policies and policymaking involved in those details are inherently legislative in nature, determination of which tariff applied fell within the “exclusive primary jurisdiction” of the regulator.³² Importantly, only the core question was referred to the agency for consideration—the rest of the case was stayed (not dismissed) pending the agency’s decision. If the agency decided that the defendant charged the correct tariff, then the court need only enter judgment for the defendant. But if the agency determined that an incorrect tariff was charged, then the plaintiff could continue with its civil action.

In other cases, the agency might not have *exclusive* jurisdiction over the subject matter, as when the court seeks the agency’s views regarding the correct construction of statutes administered or regulations adopted by the agency. In such a case, the agency’s technical expertise and familiarity with the problems and policies addressed by the statutes or regulations might be valuable or even essential to a proper construction of the statutes or regulations. But courts are the ultimate arbiters of “what the law is,”³³ and the interpretation of statutes and regulations is always within the judicial purview. In this circumstance, the agency’s and the courts’ jurisdiction over the subject matter is overlapping.³⁴

32. *Id.* at 63.

33. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

34. Most published primary jurisdiction opinions involve a determination of whether or not primary jurisdiction applies. There is little jurisprudence exploring what must happen as a practical matter if it does. This can be a complicated question. Among other things, it is well-settled that a party impacted by an agency’s interpretation and application of the law has a due process right to judicial review. To the extent an agency opinion involves such an exercise, rather than elucidation or application of technical matter or announcement of policy choices falling within the agency’s prerogative, a party would be entitled to judicial review of the agency’s legal opinion. Absent a specific developed structure for this review, a party must pursue review according to the existing channels for seeking review of an agency decision, which would generally require a petition for writ of mandate taken from the agency decision. See *Wise v. Pac. Gas & Elec. Co.*, 34 Cal. Rptr. 3d 222, 232–33 (Ct. App. 2005). This separate process would have to be pursued to culmination. A party could not risk res judicata or collateral estoppel by relying upon a challenge raised in the underlying civil action that gave rise to the primary jurisdiction proceeding. That would technically constitute a collateral attack on the result in the administrative proceeding, and would be barred. Cf. *Elkin v. Bell Tel. of Pa.*, 420 A.2d 371, 376–77 (Pa.

3. Exhaustion of Administrative Remedies

The doctrine of “exhaustion of administrative remedies” is yet another common law doctrine developed to provide a structure delineating the appropriate roles of coequal branches of government in an area where their authority coincides. The exhaustion doctrine is implicated in distinct situations in which a party seeks relief from a court, where there is an ongoing administrative proceeding or an existing administrative remedy.

First, “exhaustion” applies where the statutory system provides for administrative action. In most cases there is a right to judicial review of administrative action. The “exhaustion” doctrine controls the sequence and timing of that judicial review. All administrative remedies must be pursued to finality and “exhausted” before the applicant may seek judicial review of an agency decision. Thus, in this context, the “exhaustion” doctrine precludes judicial review of interlocutory orders in an administrative proceeding, and bars a petitioner with an administrative remedy from short-circuiting the administrative process and going directly to court.³⁵

Second, the doctrine applies where the statutory system contemplates an ordinary civil action as well as an administrative proceeding.³⁶ In this context, the doctrine precludes a plaintiff from pursuing a statutory cause of action for which the statutory scheme creates a non-exclusive administrative remedy until completing the prescribed administrative process. The plaintiff may, however, pursue other common law claims unless the statutory remedy is exclusive.³⁷ A typical situation is one where a putative plaintiff must file an agency claim and obtain a “right to sue” letter before filing an ordinary civil action.

1980) (the agency’s determination on the primary jurisdiction reference is binding on the court—subject to judicial review through normal channels—and the underlying case in which the court made the referral is a collateral proceeding). This procedural tangle would benefit from a legislative sorting, but has not yet achieved sufficient notice to warrant action.

35. *See, e.g.*, Abelleira v. Dist. Court of Appeal, 109 P.2d 942 (Cal. 1941) (petitioner sought review of administrative decision before exhausting *all* administrative remedies); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–52 (1938) (petitioner sought order to enjoin NLRB from holding a hearing).

36. *See generally* Stevenson v. Superior Court, 941 P.2d 1157, 1171–72 (Cal. 1997) (explaining that plaintiffs who base their employment discrimination claims directly on California’s Fair Employment and Housing Act must first exhaust administrative remedies, while plaintiffs alleging wrongful discharge in violation of public policy, a common law claim, need not exhaust administrative remedies); *see also* Rojo v. Kliger, 801 P.2d 373, 383–88 (Cal. 1990); Medix Ambulance Serv., Inc. v. Superior Court, 118 Cal. Rptr. 2d 249 (Ct. App. 2002).

37. *Rojo*, 801 P.2d at 387–88.

The civil action will be barred for failure to exhaust administrative remedies if the plaintiff attempts to file before obtaining the “right to sue” letter.

The two situations are analytically distinct in that, in the first, the only judicial proceeding contemplated is judicial review of the agency decision, while the second allows for an ordinary civil action. The commonality is that in each case the courts have applied the judicially developed rule that the courts will not intervene until the agency process has concluded.

4. “Defensive” Exhaustion

In *Styne v. Stevens* (“*Styne*”),³⁸ the California Supreme Court applied the doctrine of exhaustion of administrative remedies when the administrative remedy was implicated by the defendant’s affirmative defense, although not by the plaintiff’s complaint. The plaintiff contended that the doctrine did not apply, because its original complaint was properly filed as an ordinary civil action in a court. The California Supreme Court held that the exhaustion doctrine did apply, and that the plaintiff had to exhaust its remedies with respect to the defense raised by the defendant before it could proceed with its court action. The court held that the proper remedy was to *stay* the action to allow the parties to pursue the appropriate administrative proceeding to resolve the questions raised by the defense.³⁹

This holding significantly blurs the line between exhaustion of administrative remedies (as applied in this context) and primary jurisdiction. The presentation is unusual for either doctrine, but the more applicable doctrine would seem to be primary jurisdiction. Indeed, under a similar scenario, a year later in *Jonathan Neil* the California Supreme Court held that primary jurisdiction was the applicable doctrine. In *Jonathan Neil*, the case began as a collection action for premiums owed and not paid. The defendant cross-claimed for breach of contract/bad faith and alleged that the insurer overcharged for the insurance. The question of the appropriate charge had to be determined by analysis and application of certain insurance rate regulations. The Insurance Commissioner and Attorney General contended that the doctrine of exhaustion of administrative remedies applied. As noted above, the court held that the question of whether the correct rate was charged fell within the jurisdiction of the Insurance Commis-

38. 26 P.3d 343 (Cal. 2001).

39. *Id.* at 354.

sitioner, and that the trial court had to apply the primary jurisdiction doctrine.

While this holding is logical, there is no clear distinction between *Jonathan Neil* and *Styne* that would explain the different selection. In *Jonathan Neil*, the court never mentions *Styne*. It is perhaps simply that one case is in the rate context, within which the primary jurisdiction doctrine was formed, and one case is not. It is perhaps that the regulatory defense in *Styne* was considered as an affirmative defense, with a potential separate life apart from the civil action. In any event, there appears no substantive ramification resulting from applying “defensive” exhaustion versus primary jurisdiction.

B. The Statutes

Section 1860.1 of the Insurance Code explicitly denies plaintiffs a civil cause of action for any “act done, action taken or agreement made pursuant to authority conferred” by this Chapter of the Insurance Code.⁴⁰ Section 1860.2 of the Insurance Code provides that the administration and enforcement of this Chapter of the Insurance Code is governed solely by the provisions therein. Further, it states that all exceptions, modifications, or interpretations of this authority are also delineated therein.⁴¹ Section 1860.3 of the Insurance Code lists these exceptions, modifications, and interpretations.⁴² These pro-

40. CAL. INS. CODE § 1860.1 (West 2005). This section states in full:

No act done, action taken or agreement made pursuant to the authority conferred by [Chapter 9 of Division 1 Part 2 of the Insurance Code] shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this state heretofore or hereafter enacted which does not specifically refer to insurance.

Id.

41. CAL. INS. CODE § 1860.2 (West 2005). This section states in full:

The administration and enforcement of [Chapter 9 of Division 1 Part 2 of the Insurance Code] shall be governed solely by the provisions of this chapter. Except as provided in this chapter, no other law relating to insurance and no other provisions in this code heretofore or hereafter enacted shall apply to or be construed as supplementing or modifying the provisions of this chapter unless such other law or other provision so provides and specifically refers to the sections of this chapter which it intends to supplement or modify.

Id.

42. CAL. INS. CODE § 1860.3 (West 2005). These are: sections 1–42 (the sections setting up the Insurance Code upon its adoption in 1935); sections 100–121 (classes of insurance); sections 620 and 621 (defining reinsurance); section 701 (Certificate of Authority: requirement that there be an adjudicatory hearing held under the provisions of the Administrative Procedures Act (“APA”) before the Commissioner can deny a certificate of authority or impose a monetary penalty); section 704 (requiring APA hearing before Commissioner can suspend certificate of authority and allowing suspension of certificate for

visions evince a clear intent to restrict the administrative/enforcement mechanism for rates and rating matters to the regulatory system.

The regulatory system is comprehensive and consumer-friendly, providing for both agency and consumer initiated enforcement. There is no hardship to the restriction, but certainly the language is restrictive and incompatible with the conclusion that it actually operates to permit various civil actions under other provisions, like the California business statutes. Yet, as discussed *infra* Part II, California courts have both condoned and condemned such actions in a series of inconsistent and contradictory interpretations of Proposition 103.

II. The Case Law

The confusion in construing sections 1860.1–1860.3 of the Insurance Code post-Proposition 103 stems from the inconsistent opinions in *Walker v. Allstate Indemnity, Co.*⁴³ and in *Donabedian v. Mercury Insurance Co.*⁴⁴ Two subsequent opinions—*Farmers v. Superior Court*⁴⁵ and *Fogel v. Farmers Group, Inc.*⁴⁶—add to the confusion with conflicting *dicta*. These decisions were preceded, however, by three influential opinions that laid the foundation for subsequent interpretations.

A. Early California Supreme Court Opinions

1. *Farmers Insurance Exchange v. Superior Court (“Farmers 1992”)*⁴⁷

The *Farmers 1992* action was filed by the Attorney General alleging violation of Proposition 103’s Good Driver Discount policy provisions, with related alleged violations of the rating standard. The court

certain identified transgressions); sections 730–737 (providing for field examinations); sections 12903 and 12904 (allowing Commissioner to employ actuaries and other staff and to purchase such reporting services and books as will aid in administering the chapter); section 12919 (making confidential communications to the Commissioner subject to the “official information” privilege set forth in CAL. EVID. CODE § 1040 (West 2009)); section 12921 (requiring the Commissioner to enforce the Insurance Code and governing settlements); section 12921.5 (authorizing the commissioner to meet with people either in person or through his designee in order to secure enforcement of the Insurance Code); sections 12924–12926 (investigative hearings, and requirement that Commissioner enforce the Insurance Code); sections 12928 and 12930 (providing for enforcement of penal provisions by certification to local District Attorney and trial as for any other penal provision); sections 12975–12977 (providing for funding of enforcement activities, collection of fines and penalties, refund of overpayments).

43. 92 Cal. Rptr. 2d 132 (Ct. App. 2000).

44. 11 Cal. Rptr. 3d 45 (Ct. App. 2004).

45. 40 Cal. Rptr. 3d 653 (Ct. App. 2006).

46. 74 Cal. Rptr. 3d 61 (Ct. App. 2008).

47. 826 P.2d 730 (Cal. 1992).

dismissed claims asserted directly under the Insurance Code statutes, but considered alleged violations of California's Unfair Competition Law ("UCL").⁴⁸ The court stated that its purpose in granting review was to decide whether it should apply the doctrine of "primary jurisdiction" and stay the suit pending action by the Commissioner.

The insurance company petitioners argued that the doctrine of "exhaustion of administrative remedies" applied and thus the UCL claims should first be considered by the Insurance Commissioner. The court held that the "exhaustion" doctrine did not apply to the UCL cause of action because a UCL cause of action is properly filed in a court, and not before the Insurance Commissioner. But, the court held, the "primary jurisdiction" doctrine did apply to the rate questions at the heart of the claim and that "prior resort to the administrative process is required in the circumstances of this case . . .".⁴⁹

The *Farmers 1992* opinion is of great significance in California law because it adopted the federal primary jurisdiction doctrine as part of California jurisprudence. But the opinion has created substantial confusion in later rate-based cases because it does not address the construction and application of sections 1860.1–1860.3 of the Insurance Code where the subject matter of a civil claim directly involves rates or rate issues.

Prior to *Farmers 1992*, the industry had referred to application of sections 1860.1–1860.3 of the Insurance Code as "exhaustion of administrative remedies." To some, the statutes created a specific, statutory "exhaustion" scheme, and earlier case law had swept application of the statutes under the "exhaustion of administrative remedies" rubric.⁵⁰ But this terminology is inaccurate. Under the doctrine of "exhaustion of administrative remedies," a plaintiff asserts a statutory cause of action for which there is an administrative remedy.⁵¹ That is not the same thing as a case where the plaintiff brings a civil action that does not itself provide for an administrative remedy, but the *subject matter* of that action falls within the jurisdiction of an agency. In *Farmers 1992*, the plaintiff alleged a violation of the UCL—a violation properly brought as a civil action and for which there is no administrative remedy.⁵² It was the *subject matter* of the claim that fell within the

48. CAL. BUS. & PROF. CODE §§ 17200–17209 (West 2008).

49. *Farmers 1992*, 826 P.2d at 732.

50. See *Karlin v. Zalta*, 201 Cal. Rptr. 379 (Ct. App. 1984), *disapproved in part* by Manufacturers Life Ins. Co. v. Superior Court, 895 P.2d 56 (Cal. 1995) (see discussion below). To note, the statutes more closely describe the filed rate doctrine.

51. See Part I.A.3 (discussing exhaustion of administrative remedies).

52. See CAL. BUS. & PROF. CODE §§ 17200–17209 (West 2008) (comprising the UCL).

Insurance Commissioner's jurisdiction. Thus, considered under common law doctrines rather than as a case controlled by statute, *Farmers 1992* presented a textbook case of primary jurisdiction.

In subsequent cases, plaintiffs regularly argue that *Farmers 1992* held that sections 1860.1–1860.3 of the Insurance Code do not create exclusive original jurisdiction, because the court declined to apply the exhaustion doctrine to the UCL claim. This argument misinterprets *Farmers 1992*. In fact, the court held that the primary jurisdiction doctrine applied, demonstrating recognition that the Commissioner *does* have exclusive original jurisdiction over the subject matter. The opinion simply fails to construe the statutes or offer any view on their applicability to the cause of action pleaded under the UCL. It would therefore be improper to read into the opinion any implicit holding—one way or the other—on the question.⁵³

2. *Manufacturers Life Insurance Co. v. Superior Court (“Manufacturers Life”)*⁵⁴

In *Manufacturers Life*, the plaintiff brokerage sued various life insurers and brokers for alleged boycott, price fixing, and other alleged violations of the Cartwright Act and the UCL. Although the action concerned life insurance and Chapter 9 rate regulation does not apply to life insurance, the opinion is important to understanding Chapter 9 and Proposition 103.

At the time *Manufacturers Life* was before the trial court, the general belief was that the industry enjoyed a general exemption from antitrust and other business unfair practices laws. The general belief was that the Insurance Code Unfair Insurance Practices Act (“UIPA”)⁵⁵ supplanted all other business regulatory laws as they ap-

53. See, e.g., *Walker v. Allstate Indem. Co.*, 92 Cal. Rptr. 2d 132, 138 (Ct. App. 2000). It should be noted that one of the Attorney General's principal arguments was that, as Attorney General, he had authority to sue under CAL. BUS. & PROF. CODE §§ 17200–17209 (West 2008) as to the same conduct regulated by a separate agency as to which there was a specific administrative remedy. The Court held that this argument had no bearing on the application of the primary jurisdiction doctrine. It might, however, make a difference in considering the application of CAL. INS. CODE §§ 1860.1–1860.3 (West 2005 & Supp. 2010) as to actions asserted by the Attorney General versus a private plaintiff. This would be consistent with authority holding that the filed rate doctrine does not bar an action by the Attorney General. *Commonwealth ex rel. Chandler v. Anthem Ins. Cos.*, 8 S.W.3d 48 (Ky. Ct. App. 1999) (noting filed rate action bars private action, but not action brought by Attorney General seeking remedies—injunctive relief and civil penalties—that would not alter rate).

54. 895 P.2d 56 (Cal. 1995).

55. CAL. INS. CODE §§ 790–790.10 (West 2005 & Supp. 2010).

plied to the insurance industry. This general belief is reflected in at least three published decisions, cited by the California Supreme Court in its opinion in *Manufacturers Life*.⁵⁶

The court in *Manufacturers Life* held that this widely held understanding was based on a misreading of its own earlier decision in *Chicago Title Ins. Co. v. Great Western Financial Corp* ("Chicago Title").⁵⁷ Contrary to certain appellate court interpretations, the court explained, the *Chicago Title* opinion never purported to find a broad, general exemption for the insurance industry from California's business regulatory laws.⁵⁸ Rather, the *Chicago Title* holding was confined to causes of action directed to rates, and based on the ground, specific to rates, that "rate regulation has traditionally commanded administrative expertise applied to controlled industries."⁵⁹ The court went on to further explain that specific Insurance Code statutes governing rate issues—not the UIPA—created the specific exemption carved out in *Chicago Title*, and that the "exemption" thus created was narrowly tailored to rate issues.⁶⁰

What does this life insurance decision have to do with construing a rate regulatory system that does not apply to life insurance? First, the opinion announced that there never was an "unfair exemption from the antitrust laws"⁶¹ and from other business regulatory laws for the insurance industry—that is, the exemption Proposition 103 removed never existed. The opinion also acknowledged that the specific statutes creating an area of exclusive original jurisdiction narrowly confined to rate issues *do* bar a civil action as to that subject matter.

3. *Quelimane Co. v. Stewart Title Guaranty Company* ("Quelimane")⁶²

In *Quelimane*, the plaintiffs alleged antitrust and UCL claims based on an alleged conspiracy to refuse to issue title insurance in relation to property acquired by means of a tax sale.⁶³ Defendants de-

56. This understanding is reflected in at least three published decisions—cited by the court in *Manufacturers Life*, 895 P.2d at 58, and in Proposition 103. See *Liberty Transport, Inc. v. Harry W. Gorst Co.*, 280 Cal. Rptr. 159 (Ct. App. 1991); *Karlin v. Zalta*, 201 Cal. Rptr. 379 (Ct. App. 1984); *Greenberg v. Equitable Life Assur. Society*, 110 Cal. Rptr. 470, 474 n.2 (Ct. App. 1973).

57. 444 P.2d 481 (Cal. 1968).

58. *Manufacturers Life*, 895 P.2d at 62.

59. *Id.* (citing *Chicago Title*, 444 P.2d at 492).

60. *Id.* at 64.

61. *Rebuttal to Argument Against Proposition 103*, in CALIFORNIA BALLOT PAMPHLET FOR THE NOVEMBER 8TH GENERAL ELECTION, at 101 (1988).

62. 960 P.2d 513 (Cal. 1998).

63. *Id.* at 517.

murred on the grounds that applicable Insurance Code statutes precluded a civil action, and the trial and appellate courts agreed.⁶⁴

The California Supreme Court reversed. The court agreed that the statutes at issue (two Insurance Code sections structured similarly to sections 1860.1–1860.2)⁶⁵ would bar a cause of action grounded on title insurance companies' activities related to "rate setting."⁶⁶ The defendants argued that the sections at issue constituted "the exclusive regulation of the conduct of escrow and title transactions by entities engaged in the business of title insurance" and, therefore, its preclusive effect was not confined to rating matters.⁶⁷ The court held that the legislative history of this provision showed that the Legislature intended by this language only to preclude attempts at regulation by local law enforcement agencies, and not to make the prohibition on civil actions broader than the issue of rates.⁶⁸

Because it construed statutes substantially similar to sections 1860.1–1860.3 of the Insurance Code, the *Quelimane* opinion is helpful in clarifying that this type of statute *does* have the restrictive effect of precluding civil actions concerning the subject matter impacted by the statutes. But this is perhaps half the inquiry. This model of statute specifies *by reference* the matters as to which civil actions are restricted. The restriction will change with the reference: exactly what civil actions are precluded depends upon the subject matter specified in the reference.

B. Opinions Interpreting Insurance Code Sections 1860.1–1860.3

Two published opinions consider and rule upon the interpretation of Insurance Code sections 1860.1–1860.3 when used in "rate" civil actions: *Walker v. Allstate Indemnity Co.*⁶⁹ and *Donabedian v. Mercury Insurance Co.*⁷⁰ The insurer-defendants made the same arguments in both cases and the plaintiffs made the same arguments in both cases (although the facts were more obscured in the second case than the first). In the first case the Insurance Commissioner appeared on the side of the defendants at the trial court level and filed no briefs at the appellate level. In the second case, the "Department of Insur-

64. *Id.* at 518–19.

65. *Id.* at 523. The statutes at issue in *Quelimane* were CAL. INS. CODE §§ 12414.26 and 12414.29 (West 2005).

66. *Quelimane*, 960 P.2d at 516, 523–24.

67. *Id.* at 523–24.

68. *Id.*

69. 92 Cal. Rptr. 2d 132 (Ct. App. 2000).

70. 11 Cal. Rptr. 3d 45 (Ct. App. 2004).

ance”⁷¹ filed a brief as *amicus curiae* on the side of the plaintiffs. The First Appellate District Division 2 heard and decided the first case, and the Second Appellate District Division 1 heard and decided the second case.⁷² The two opinions are very different. Some consider them irreconcilable.

In addition to *Walker* and *Donabedian*, there are two other appellate opinions *Farmers Insurance Exchange v. Superior Court* (“*Farmers 2006*”)⁷³ and *Fogel v. Farmers Group, Inc.*⁷⁴ which further complicate the interpretation of the rate regulation statutes. To the extent relevant, these cases are also discussed *infra*.

1. *Walker v. Allstate Indemnity Co.*⁷⁵

Walker was originally asserted against numerous insurers writing auto insurance in the State of California, and against the Insurance Commissioner. The complaint alleged that the insurer defendants violated the UCL by charging “excessive” rates in violation of the Proposition 103 statutes generally and section 1861.05(a) of the Insurance Code specifically.⁷⁶ The complaint also alleged that the Commissioner violated the law by approving the applied for excessive rates.⁷⁷ The trial court sustained all demurrers based on its understanding that sections 1860.1–1860.2 of the Insurance Code provided for an exclusive administrative hearing process to review excessive rate claims.⁷⁸

71. *Id.* at 46. The identity of *amicus curiae* in the *Donabedian* case was a curiosity. The Insurance Commissioner, not the “Department of Insurance,” is the insurance regulator in the State of California. The Department exists to fulfill the regulatory function, but officially, the authority rests with the Commissioner. Typically, all legal pleadings and briefs are filed by the “Insurance Commissioner.” In this case, the briefs were filed by the “California Department of Insurance” acting through staff counsel, rather than the Insurance Commissioner acting through the Attorney General. *Id.* The reason for this oddity was never disclosed.

72. An interesting bit of trivia is that each of the courts issuing the *Walker* and *Donabedian* opinions have links to the predecessor influential cases. *Manufacturers Life* reviewed and quoted at length from the intermediate appellate court opinion in that case. *Manufacturers Life Ins. Co. v. Superior Court*, 895 P.2d 56 *passim* (Cal. 1995). The intermediate appellate court was the First Appellate District Division 2, which is the Division that issued the *Walker* opinion five years later. *Manufacturers Life Ins. Co. v. Superior Court*, 33 Cal. Rptr. 2d 424 (Ct. App. 1994); *Walker*, 92 Cal. Rptr. 2d 132. Justice Mallano—the author of the *Donabedian* opinion—was, approximately thirteen years previously, the trial court judge in *Farmers 1992*. *Donabedian*, 11 Cal. Rptr. 3d 45; *Farmers 1992*, 826 P.2d 730 (Cal. 1992).

73. 40 Cal. Rptr. 3d 653 (Ct. App. 2006).

74. 74 Cal. Rptr. 3d 61 (Ct. App. 2008).

75. 92 Cal. Rptr. 2d 132 (Ct. App. 2000).

76. *Id.* at 133.

77. *Id.*

78. *Id.*

On appeal, plaintiffs argued that certain statutes adopted as part of Proposition 103 rendered sections 1860.1–1860.2 of no force or effect. Plaintiffs argued that section 1861.03(a) of the Insurance Code—which makes the business of insurance subject to California’s business regulatory laws applicable to all businesses—created additional remedies for rate statute violations in the form of civil actions under the UCL and, presumably, all of the other statutes referenced in that section (the state antitrust laws, the state Unfair Competition Act, the Unruh Anti-Discrimination Act, and every other statute applicable to business generally).⁷⁹ Plaintiffs argued further that section 1861.10(a) of the Insurance Code—allowing “[a]ny person” to “initiate or intervene in any proceeding permitted or established pursuant to this chapter, challenge any action of the commissioner under this article, and enforce any provision of this article”—empowered plaintiffs to bring civil actions over rate matters.⁸⁰ Plaintiffs also argued that *Farmers 1992* supported their position.⁸¹

The court acknowledged that “Proposition 103 wrought many changes” to California’s rate regulation laws, including adding the prior approval system and providing for public access and consumer participation.⁸² Taking into account the changes “wrought” by Proposition 103, the court held that “an insurer’s action in collecting premiums consistent with an approved rate is certainly done pursuant to the authority conferred on the commissioner by the amended McBride Act,” and is therefore within the purview of section 1860.1 post-Proposition 103.⁸³ Additionally, the court explained the following:

If section 1860.1 has any meaning whatsoever (which under the accepted rules of statutory construction it must), the section must bar claims based upon an insurer’s charging a rate that has been approved by the commissioner pursuant to the amended McBride Act. The statutory scheme enacted by the voters in Proposition 103 compels this result. Under this scheme, the *commissioner* is charged with setting rates after an extensive hearing process in which consumers and interested parties are encouraged to participate. . . . When this process has run its course, the insurers must charge the approved rate and cannot be held civilly liable for so doing. [] A consumer or an interested party is, however, provided the opportunity to petition the commissioner to review the continued use of

79. *Id.* at 134, 135–36.

80. *Id.* at 134, 137.

81. *Id.* at 138.

82. *Id.* at 136, 134.

83. *Id.* at 136.

any approved rate, i.e. obtain prospective, not retrospective, relief.⁸⁴

Notably, moving beyond the preclusive effect of section 1860.1, the court held that charging an approved rate cannot be considered “illegal,” “unfair,” or “tortious”—in effect, the approval creates a safe harbor.⁸⁵

The court rejected plaintiffs’ arguments based on Insurance Code sections 1861.03(a) and 1861.10(a), stating:

There is nothing in either statute, or even the two considered together, to support appellants’ implicit position that they may challenge a final order of the commissioner in a manner not prescribed by the amended McBride Act and after the time to do so has clearly passed. Appellants’ argument seems an obvious attempt to avoid consumer participation provisions of Proposition 103 that appellants deem burdensome or impractical and thus frustrate the power granted to the commissioner by the voters to set insurance rates after soliciting both insurer and consumer input into his decision. To read sections 1861.03 and 1861.10 as appellants urge would result in an unnecessary conflict between these statutes and section 1860.1, which embodies the finality of the commissioner’s ratemaking decision. Put another way, to accept appellants’ argument would require violation of well-accepted principles of statutory construction.⁸⁶

The court went on to note that its holding that section 1860.1 barred a civil action challenging approved rates was supported by the California Supreme Court’s holdings in *Quelimane* and *Manufacturers Life*, as discussed *supra* Part II.A.⁸⁷

Finally, the court addressed plaintiffs’ argument that the *Farmers* 1992 decision establishes that the Commissioner does not have exclusive jurisdiction over UCL claims challenging rates.⁸⁸ The court acknowledged a superficial appeal to plaintiffs’ argument.⁸⁹ But, the court agreed with Allstate that the *Farmers* 1992 opinion simply does not address application of the statutes to the UCL claims.⁹⁰ The court noted that the California Supreme Court’s subsequent opinions in *Quelimane* and *Manufacturers Life* establish that, in the high court’s view, this form of statute *does* bar a civil action asserted through a cause of action cognizable in a court, but addressed to a subject mat-

84. *Id.* (citations omitted).

85. *Id.*

86. *Id.* at 137–38 (citations omitted).

87. *Id.*

88. See *supra* Part II.A.1 (discussing *Farmers* 1992).

89. *Walker*, 92 Cal. Rptr. 2d at 138.

90. *Id.*

ter placed in the jurisdiction of the Commissioner.⁹¹ This would argue against the superficial reading of *Farmers* 1992 as holding *sub silentio* that sections 1860.1 and 1860.2 only preclude a direct civil action and not an action brought through some other vehicle such as the UCL. The court also distinguished the *Farmers* 1992 case on the facts, as the *Farmers* 1992 case did not involve approved rates. “In the end,” the court held, “*Farmers* is inapposite.”⁹²

2. *Donabedian v. Mercury Insurance Co.*⁹³

This case was part of a group of cases, with a history. To understand the case, it is helpful to know the history.

Section 1861.02(c) of the Insurance Code bars an insurer from using the absence of prior insurance “in and of itself” as a criterion for determining eligibility for the California Good Driver Discount policy “or generally for automobile rates, premiums, or insurability.”⁹⁴ The object of this provision is to attempt to address the spiraling problem of uninsured motorists: drivers drive without insurance because auto insurance is too expensive relative to the driver’s income, and because the driver has driven without insurance that driver is a higher risk and the insurance becomes even more expensive, making it even less likely that the driver will purchase insurance. It is not so much the individuals driving without insurance that are the intended beneficiaries of this provision. The insurance they are required by law to carry is liability insurance for the benefit of accident victims. Section 1861.02(c) is intended to add practical support, so that drivers will be able to comply with the law and purchase insurance, and accident victims will not go uncompensated because there is no insurance.

Insurers have always been permitted to include “persistency” as a rating factor.⁹⁵ “Persistency” is the opposite of “lapse,” and refers to continued insurance with a particular carrier.⁹⁶ Statistical data shows that drivers who have stayed with the same insurer for many years—drivers with a higher “persistency”—cost less to insure. When this data is included in formulating rates, drivers may receive substantial discounts for “persistency.”

91. *Id.*

92. *Id.* at 139.

93. 11 Cal. Rptr. 3d 45 (Ct. App. 2004).

94. CAL. INS. CODE § 1861.02(c) (West 2005).

95. See, e.g., CAL. CODE REGS. tit. 10, § 2632.5(d)(11) (1989).

96. See Spanish Speaking Citizens’ Found., Inc. v. Low, 103 Cal. Rptr. 2d 75, 80–81 (Ct. App. 2000).

Mercury is an aggressive, growing insurer attempting to take market share from large established insurers. The “persistency” discount is an obstacle. Mercury devised the “portable persistency” discount in order to compete for large insurers’ established business. “Portable persistency” allows policyholders to take “persistency” with them—i.e., the applicant receives a discount based on years insured with any insurer. Several other insurers also adopted a “portable persistency” rating factor—indeed, some may well have determined that offering such a discount was necessary to compete with Mercury.

The problem with “portable persistency” is that if the insurer is charging certain applicants less because they were previously insured with any carrier, by definition those who were not insured by any carrier are being charged more. This brings the “portable persistency” rating factor into conflict with the directive of Insurance Code section 1861.02(c) that an insurer cannot utilize the “absence of prior insurance” in rating. To address this conflict, Mercury promoted a bill to amend section 1861.02(c) that would allow the “portable persistency” discount.⁹⁷ The bill passed and the amendments were added.⁹⁸

While one might have thought that Proposition 103 advocates would have supported an attempt to compete on price, the opposite occurred. The Foundation for Taxpayer and Consumer Rights (“FTCR”—one of the entities founded by consumer rights advocate Harvey Rosenfield, the principal author of Proposition 103)—brought an action challenging the amendment as an unconstitutional amendment to Proposition 103.⁹⁹ The court agreed, and the amendment was held unconstitutional.¹⁰⁰

In the interim, numerous actions were filed against various insurers charging violation of Insurance Code section 1861.02(c).¹⁰¹

97. *Donabedian*, 11 Cal. Rptr. 3d at 59–62; Found. for Taxpayer & Consumer Rights v. Garamendi, 34 Cal. Rptr. 3d 354, 360 (Ct. App. 2005) (discussing Mercury’s intervention in support of Senate Bill 841).

98. *Garamendi*, 34 Cal. Rptr. 3d at 360–61.

99. *See id.* at 354.

100. *Id.* at 361–63.

101. Most of the actions charged that insurers were using a “portable persistency” factor in violation of section 1861.02(c) of the Insurance Code. *See, e.g., Donabedian*, 11 Cal. Rptr. 3d at 53–55. Where the insurer did not use a “portable persistency” rating factor, plaintiff’s counsel attempted to manufacture a violation of section 1861.02(c) by arguing that the insurer’s requirement that an applicant have some form of independent verification to support a claim to be accident free constituted a violation of section 1861.02(c) of the Insurance Code. Opening Brief of Appellant at 3–4, *Donabedian v. Mercury Ins. Co.*, 11 Cal. Rptr. 3d 45 (Ct. App. 2004) (No. B159982), 2003 WL 23153523. Insurers pointed out that they could not just take an applicant’s word for it that he or she had, for example, a six year accident free record. Opening Brief of Respondent at 41–43, *Donabedian v. Mercury*

Donabedian was one such action, and the first to go to the Court of Appeal.

In *Donabedian*, the superior court (Judge Carolyn Kuhl) sustained Mercury's demurrer without leave to amend on the grounds that its portable persistency rating factor was part of the rates approved by the Commissioner, and, under *Walker*, a civil action challenging the approved rate was barred.¹⁰² The Court of Appeal reversed.¹⁰³

Ultimately, the court reversed on the ground that the action was decided on demurrer at the pleading stage, and a fact critical to the trial court order—approval by the Commissioner of the rating factor as it was applied by Mercury—could not be discerned from the complaint.¹⁰⁴ The parties and *amici* disputed the meaning of materials submitted for judicial notice, and the court declined to resolve these disputes at the pleading stage.¹⁰⁵ Before announcing this narrow holding, however, the opinion postulates at least three different constructions of Insurance Code sections 1860.1–1060.3. Each is inconsistent with the others. Two would create a direct conflict with the *Walker* opinion, although the court denied that its decision conflicted with *Walker*.

The first postulated construction reads section 1861.03(a) of the Insurance Code as incorporating the statutes referenced therein—all California laws regulating business—into the Insurance Code as “proceedings” for the administration and enforcement of the rate statutes. Thus, despite the fact that the plain language of sections 1860.1 and 1860.2 *limits* the administration and enforcement of the rate statutes to the administrative hearing mechanisms provided for in Chapter 9, section 1861.03(a) would be read to allow essentially any civil action under any business regulatory statute as a means of policing the rate statutes. This interpretation would create a “dual” system of enforcement consisting of civil actions in the courts in addition to a traditional but expanded administrative system.

The second rationale, in contrast, gives sections 1860.1 and 1860.2 a rigidly restrictive reading. According to this theory, sections 1860.1 and 1860.2 do not have an updated application post-Proposi-

Ins. Co., 11 Cal. Rptr. 3d 45 (Ct. App. 2004) (No. B159982), 2003 WL 23280979. Plaintiff's counsel argued that there would be no way of verifying an accident free record without prior insurance, and that the accident record verification requirement must therefore be a ruse to establish a rate based on the absence of prior insurance. *Id.* at 41.

102. *Donabedian*, 11 Cal. Rptr. 3d at 47.

103. *Id.*

104. *Id.* at 63–64.

105. *Id.*

tion 103. They have only the scope they had prior to the statutory adoption and repeals wrought by Proposition 103. They apply to the few preserved sections of the McBride/Grunsky Act not repealed by Proposition 103 that allow certain concerted activity.¹⁰⁶

For this rationale, the court relied heavily on *State Compensation Insurance Fund v. Superior Court* (“*Schaefer Ambulance*”).¹⁰⁷ In *Schaefer Ambulance*, the California Supreme Court considered a statute similar to section 1860.1—Insurance Code section 11758—set forth in the workers’ compensation section of the Insurance Code. The Court noted the similarity between section 11758 and section 1860.1. The California Supreme Court acknowledged that the impact of section 11758 was to create exclusive original jurisdiction before the Insurance Commissioner over the area covered by section 11758. The next question was: what was covered by section 11758? To answer that question, the court relied in part on the legislative history of the original McBride/Grunsky Act, because of the similarity of section 11758 to section 1860.1 and because the legislative history of section 11758 suggested an intent to apply something similar to the McBride/Grunsky Act to workers’ compensation insurance. The court concluded that the area covered by section 11758 extended only to concerted activity concerning ratemaking. Ignoring the complete overhaul to the McBride/Grunsky Act accomplished by Proposition 103 some forty years after this legislative history, which radically altered the area covered by section 1860.1 (and section 1860.2), the *Donabedian* court appeared to read the California Supreme Court’s reliance on the legislative history of the McBride/Grunsky Act as conclusively establishing that section 1860.1 applied only to the limited concerted activity authorized by sections 1853.5, 1853.8, and 1855–1855.5.

Finally, the court’s discussion of the *Walker* holding suggests a distinction between cases involving the “rate” itself, in contrast to “application of the rate.”¹⁰⁸ In this part of the discussion the court quoted at length from the Department of Insurance *amicus* brief, which argued that the class plan and rating factors were not part of the rate, but rather constitute the application of the rate.¹⁰⁹ Because, assertedly, the use of rating factors constitutes application of the rate, that is not part of what is approved or regulated by the rate regulation statutes.¹¹⁰ The

106. See *id.* at 61 (citing CAL. INS. CODE §§ 1853.5, 1853.8, 1855–1855.5 (West 2005)).

107. 103 Cal. Rptr. 2d 662 (Ct. App. 2001).

108. *Donabedian*, 11 Cal. Rptr. 3d at 61–62.

109. *Id.* at 62–63.

110. *Id.* at 62–64.

court found *Walker*—which involved the rate itself—to be “inapposite.”¹¹¹

As an overall gloss, the *Donabedian* court also found—in contrast to the *Walker* court’s view on the same question—that *Farmers* 1992 implicitly held that sections 1860.1 and 1860.2 of the Insurance Code do not preclude a civil action asserted under the UCL for violation of the rate statutes.¹¹²

The different theories articulated in *Donabedian* are inconsistent with each other. Theory 1 states that all of the laws identified by section 1861.03(a) become part of the internal rate regulation enforcement mechanism. Theory 2 says that sections 1860.1 and 1860.2 simply carve out a small area of immunity for concerted activity under a few pre-Proposition 103 statutes. Under theory 1, approved rates and alleged violations of the rate statutes fall within the ambit of sections 1860.1 and 1860.2. Under theory 2, they do not. Under theory 1, the antitrust laws would apply to concerted activity under the pre-Proposition 103 statutes through section 1860.1 and 1860.2, because the antitrust laws are included in section 1861.03(a). Under theory 2, the antitrust laws do not apply to the specified concerted activity. Thus, theory 1 and theory 2 cannot both be correct, and the inconsistencies point up the flaws in both theories.

Additionally, under either theory 1 or theory 2, the claims in *Walker* would go forward. Under theory 1, the *Walker* plaintiffs could bring a UCL action to challenge approved rates as excessive, because a UCL action is a permissible mechanism under section 1860.1 for challenging approved rates. Under theory 2, the *Walker* claims would not fall within the narrow ambit given to sections 1860.1 and 1860.2.

Theory 3 is that a civil action lies to challenge “application of the rates,” but not the rates *per se*. This may be a correct statement of law, but is not reconcilable with theories 1 and 2. Under each of those theories, this is a *non sequitur*. As noted, under either theory 1 or theory 2, a pure rate claim could proceed, so it does not matter if the subject matter concerns the rates *per se* or only application of the rates.

Further, while it may be a correct statement of law that the “application” of the rate does not implicate the Commissioner’s jurisdiction, it is also a correct statement of *fact* that the “application” of the rate—rather than the rate itself—is at issue. *Donabedian* is fairly unique in that respect. There, the complaint alleged that the plaintiff did not

111. *Id.* at 62.

112. *Id.* at 56–58.

challenge the rates as approved, but their application. Further—and more importantly—the description provided of the persistency rating factor in the class plan documents was unclear, and could have been understood by the Department as describing traditional persistency.¹¹³ Consequently, without more, the issue could have been with the manner of application, rather than with the rates as approved. But, the rating or class plan itself—which translates the overall premium the insurer is allowed to charge statewide into the actual rates which will be charged to insureds—is absolutely an integral part of the rate and absolutely part of what is approved by the Commissioner.

For working purposes, *Donabedian* and *Walker* can be reconciled on the grounds that *Donabedian* was decided on demurrer, and it could not be discerned from submitted materials whether the portable persistency rating factor was part of the approved rate. The complaint alleged that it was not part of the approved rate, but merely the “application of” the rate. *Walker*, on the other hand, involved the rate itself, and pursuing the claims would involve the court in technical rate matters assigned to the Commissioner’s exclusive jurisdiction. The arguments showcased in both *Walker* and *Donabedian*, however, cannot be reconciled. At some point, the conflict must be resolved.

3. Other Appellate Views: *Farmers Insurance Exchange v. Superior Court (“Farmers 2006”)*¹¹⁴ and *Fogel v. Farmers Group, Inc.* (“*Fogel*”)¹¹⁵

Two opinions following *Donabedian* discuss *Donabedian*, although the cases themselves address other issues. The opinions are relevant to the debate because they add to the general confusion.

Farmers 2006 considered whether there could be a private civil action in a court brought directly under the Proposition 103 statutes. The court held there was not.¹¹⁶ After expressly finding that “*Donabedian* . . . is not on point,”¹¹⁷ the court went on to discuss *Donabedian*, reading the opinion in accordance with theory 1 (dual system) described in the *Donabedian* opinion.¹¹⁸

113. *Id.* at 63.

114. 40 Cal. Rptr. 3d 653 (Ct. App. 2006).

115. 74 Cal. Rptr. 3d 61 (Ct. App. 2008).

116. See *Farmers 2006*, 40 Cal. Rptr. 3d at 660.

117. *Id.* at 663.

118. *Id.*

In *Fogel*, the plaintiff challenged the Attorney In Fact (“AIF”) fee charged by the insurer/reciprocal exchange as excessive.¹¹⁹ The contractual arrangement stated that the insurer/reciprocal exchange would collect the AIF fee from the premium paid by the insured subscribers.¹²⁰ The defendant argued that the AIF fee was bound up with the approved rate, such that the rate approval should preclude a civil challenge to the AIF fee. The Court of Appeal viewed the AIF fee as akin to a third party vendor expense, holding that the approval of the rate does not extend to cover expenses collected out of premium funds.¹²¹ Given this perspective, the rate approval did not equate to approval of the AIF fee, the amount of which was not directly considered in or specifically made a part of the approval. The court expressly did not reach the question of the correct construction of sections 1860.1–1860.3. Interestingly, the theory advanced in *Fogel* by *amicus curiae* FTCR (the same entity appearing as *amicus curiae* in *Donabedian*)¹²² was *Donabedian* theory 2 (limited historical reading of sections 1860.1–1860.3), in contrast to the *Farmers 2006* apparent understanding of *Donabedian* as articulating theory 1 (dual system of rate regulation).¹²³ While the court in *Fogel* declined to state a construction, the court did state that it did not agree that *Schaefer Ambulance* mandated adoption of the limited historical construction of sections 1860.1–1860.2.¹²⁴ The court emphasized that in *Schaefer Ambulance* the California Supreme Court had expressly chosen to distinguish—not disapprove—*Walker*.

III. Resolving the Problem: A Considered Statutory Construction

The statutory system created by Proposition 103 gives the Insurance Commissioner exclusive original jurisdiction over the narrow area of pricing regulation unique to insurance. Business regulatory statutes (applicable to businesses generally) apply to insurance companies in the same way they do to other businesses. There is no general immunity for the insurance industry from business regulatory laws. But for pricing—an area of regulation unique to insurance and

119. *Fogel*, 74 Cal. Rptr. 3d at 65.

120. *Id.* at 69.

121. *Id.* at 72–73.

122. Compare *Donabedian v. Mercury Ins. Co.*, 11 Cal. Rptr. 3d 45, 46 (Ct. App. 2004) (identifying Foundation for Taxpayer and Consumer Rights), with *Fogel*, 74 Cal. Rptr. 3d at 65 (same).

123. *Fogel*, 74 Cal. Rptr. 3d at 72.

124. *Id.*; see *supra* text accompanying note 107 (discussing *Schaefer Ambulance*).

not applicable to California businesses generally—the self-contained enforcement system is comprehensive and exclusive, and does not include civil actions.

Proposition 103 was intended to—and did—radically change insurance rate regulation in California. Before the adoption of Proposition 103, insurers were not subject to any regulation before charging a self-selected price. The pricing standard was articulated similarly to the current standard—rates could not be “excessive, inadequate, or unfairly discriminatory”—but rates were presumptively not excessive if the market was judged to be competitive.¹²⁵ An “aggrieved person” could make an administrative complaint to the Department regarding existing rates, and the Insurance Code provided for administrative hearings.¹²⁶ Consumer groups, however, viewed this as a non-existent remedy given the presumption that rates in a competitive market could not be excessive.¹²⁷ Adding to their distrust of the administrative remedy, consumer groups also felt that insurance commissioners were biased because they were appointed and because most came from the insurance industry (since no one else understood or wanted the position).¹²⁸

Proposition 103 brought change. It brought regulation through review and prior approval rather than reliance on market mechanisms. It brought an elected insurance commissioner “accountable” to the electorate. It brought numerous provisions enabling consumer participation in the regulatory process, protecting consumers from arbitrary action by the commissioner, and compensating consumers for their participation. As part of this system, it brought consumers the autonomy to seek judicial review in the courts if the Commissioner refused to grant a hearing.¹²⁹ But, contrary to the arguments of plaintiff’s attorneys, it did not provide for a “dual system” of rate regulation overlaying civil actions with the comprehensive administrative system.

125. See CAL. INS. CODE § 1852(a) (West 2005) (repealed by Proposition 103).

126. CAL. INS. CODE §§ 1858–1858.7 (West 2005).

127. See Harvey Rosenfield, *Revolting the Insurance Crisis: The Voter Revolt Initiative*, DAILY J. REPORT, July 15, 1988, at 5 (“The Voter Revolt initiative requires the Commissioner to ignore the number of other companies in the marketplace in determining whether a rate is excessive. Today, the Department of Insurance refuses to consider rates excessive if there is ‘competition’ in the marketplace. The insurers and the Department of Insurance have always agreed that competition exists (even though state law virtually precludes a real free market) simply by noting that many insurance companies operate in California.”).

128. *Id.* (“Presently, the Insurance Commissioner is a political appointee with no accountability to the public. It is no surprise then, that the Department of Insurance has historically exhibited a pro-industry bias.”).

129. CAL. INS. CODE § 1861.09 (West 2005).

As discussed *infra*: (1) the statutory language of sections 1860.1–1860.3, in the context in which it appears, limits available remedies in matters involving rates; (2) Proposition 103 does end the perceived general exemption for the insurance industry from California business laws, but does not set up those general laws as a remedy for violation of rate-specific statutes; (3) Proposition 103 adds consumer-friendly provisions for participation in rate regulation proceedings, but does not create a “dual system” of rate regulation; and (4) in the context in which they now appear, sections 1860.1–1860.3 can be read as codifying a form of the “filed rate doctrine,” accepted across the country as appropriately adjusting the jurisdiction of the regulator and the courts.

A. The Statutory Language *Limits Available Remedies in Matters Involving Rates*

In repealing most of the previously existing rate regulation statutes, Proposition 103 left sections 1860.1–1860.3 of the Insurance Code in place. These statutes, as written, purport to *strictly limit* remedies for both violations of the rate regulation statutes and for claims concerning actions taken under these statutes (such as charging a rate approved by the Commissioner).

The language selected is significant. Section 1860.1 of the Insurance Code explicitly denies plaintiffs a civil cause of action for any “act done, action taken or agreement made pursuant to authority conferred” by Chapter 9.¹³⁰ Section 1860.2 of the Insurance Code provides that the administration and enforcement of Chapter 9 is governed solely by the provisions therein. Further, it states that all exceptions, modifications, or interpretations of this limitation are also delineated therein.¹³¹ These provisions evince a clear intent to restrict

130. CAL. INS. CODE § 1860.1 (West 2005). This section states in full:

No act done, action taken or agreement made pursuant to the authority conferred by [Chapter 9] shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this State heretofore or hereafter enacted which does not specifically refer to insurance.

Id.

131. CAL. INS. CODE § 1860.2 (West 2005). This section states in full:

The administration and enforcement of [Chapter 9] shall be governed solely by the provisions of this chapter. Except as provided in this chapter, no other law relating to insurance and no other provisions in this code heretofore or hereafter enacted shall apply to or be construed as supplementing or modifying the provisions of this chapter unless such other law or other provision so provides and specifically refers to the sections of this chapter which it intends to supplement or modify.

the administrative/enforcement mechanism for rates and rating matters to the regulatory system.

These statutes cannot have been preserved by accident given the broad sweep of the repeal. More to the point, the restrictive language of these statutes cannot be reconciled with the suggestion that their actual effect is to throw wide the door to permit civil actions under every business regulatory statute on the books. The plain intent and effect of these statutes is to *restrict* remedies for alleged violation of the rate statutes.

B. Insurance Code Section 1861.03(a) Subjects the Insurance Industry to California's Business Laws, and Ends the Perceived General Exemption for the Industry—But Not in the Narrow Context of Rate Regulation

Section 1861.03(a) of the Insurance Code is cited by “dual system” advocates as the statute that incorporates essentially all of California law into the Insurance Code. Yet, its plain language cannot fairly be read to support this construction.

Section 1861.03(a) states: “The business of insurance shall be subject to the laws of California applicable to any other business, including, but not limited to, the Unruh Civil Rights Act . . . and the antitrust and unfair business practices laws . . . ”¹³² Under section 1861.03(a), an insurance company can be sued under the antitrust laws, the Unruh Act, or any other general business statute just like “any other business.” But “any other business” is not subject to rate regulation. Making insurers subject to the general business statutes applicable to “any other business” is wholly different from incorporating those general business laws into a chapter devoted to insurance-specific rate regulation as specific remedies for violation of rate statutes. Section 1861.03(a) does the former, not the latter.

California has from time to time adopted statutes that *do* specifically incorporate the UCL as a remedy for violation of a statutory scheme. This form of statute directly states that purpose.¹³³ In con-

Id.

132. CAL. INS. CODE § 1861.03 (West 2005).

133. See, e.g., *id.* § 12693.81 (West 2005) (“It shall constitute unfair competition for purposes of Chapter 5 (commencing with Section 17200) of Part 2 of Division 7 of the Business and Professions Code for an insurer, an insurance agent or broker, or an administrator” to make statements or take action to induce an individual employee to separate from the employer’s group health coverage in reliance on the Healthy Families Program.); CAL. INS. CODE § 12725.5 (West 2005) (same as section 12693.81, but concerning the Cali-

trast to the language of these statutes, the language of section 1861.03(a) does not state that a specific violation of Chapter 9 can be enforced through the UCL statutes. It states, rather, that the “business of insurance” should be treated like any other California business, and be subject to all of California’s business regulatory statutes.¹³⁴ That is completely different.

This statute seeks to accomplish the purpose of Proposition 103 to remove the perceived “unfair exemption” for the insurance industry from the antitrust laws and other business regulatory statutes. That is what the statute says it does, that is what the Ballot Pamphlet for the November 1988 Election says it does,¹³⁵ and that is what Proposition 103 author, Harvey Rosenfield, said this statute would do in a July 15, 1988 article explaining Proposition 103 to the electorate. Rosenfield wrote:

Competition is the key to lower prices for insurance consumers. Currently, insurance companies are exempted by law from the consumer protection statutes which are applicable to any other business in California. These exemptions have artificially blocked competition in the insurance marketplace for most consumers, permitting companies to essentially fix prices among themselves, and resulted in higher rates. The Voter Revolt initiative [i.e., Proposition 103] repeals these unjust exemptions, and adds other pro-competition reforms

The Voter Revolt initiative completely repeals the insurance industry’s exemption from the antitrust laws, and makes California’s other consumer protection laws applicable to insurers for the first time.¹³⁶

fornia Major Risk Medical Insurance Program); CAL. CIV. CODE § 1797.86 (West 2009) (“[A]ny violation of this chapter constitutes unfair competition under Section 17200 of the Business and Professions Code, grounds for rescission under Section 1689 of this Code, and an unfair method of competition or deceptive practice under Section 1770 of this Code.”); CAL. BUS. & PROF. CODE § 17364 (West 2008) (“Every failure to comply with any provision of this chapter constitutes unfair competition and shall be enforced under Chapter 5 (commencing with section 17200).”).

134. CAL. INS. CODE § 1861.03(a) (West 2005).

135. The *Analysis by the Legislative Analyst* in the Ballot Pamphlet repeated the perception that “insurance companies are not subject to the state’s antitrust laws,” and told voters that “[t]he measure makes insurance companies subject to the state’s antitrust laws.” *Analysis by the Legislative Analyst, in CALIFORNIA BALLOT PAMPHLET FOR THE NOVEMBER 8TH GENERAL ELECTION*, at 98, 140 (1988); see also *Argument in Favor of Proposition 103, in CALIFORNIA BALLOT PAMPHLET FOR THE NOVEMBER 8TH GENERAL ELECTION*, at 100 (1988) (“Proposition 103 will also end the insurers’ exemption from the anti-monopoly laws”); *Rebuttal to Argument Against Proposition 103, in CALIFORNIA BALLOT PAMPHLET FOR THE NOVEMBER 8TH GENERAL ELECTION*, at 101 (1988) (“[Proposition] 103 eliminates the insurance industry’s unfair exemption from the antitrust laws.”).

136. Rosenfield, *supra* note 127, at 3.

As described in connection with the discussion of the *Manufacturers Life* case, *supra*, it was indeed the general perception that there existed a broad insurance industry exemption from the antitrust and other general business statutes. The Ballot Pamphlet and the Rosenfield article (to the extent it describes the history of the times)¹³⁷ establish that section 1861.03(a) was intended to eliminate that perceived broad exemption.

From the judicial perspective, there are two conceptual impediments to a correct understanding of section 1861.03(a). First, contrary to pre-Proposition 103 belief, the business of insurance was *always* subject to California's general business laws.¹³⁸ With the passage of time since the California Supreme Court's 1995 ruling in *Manufacturers Life* to that effect, there remains little awareness of the perceived need for reform, in 1988, to make the insurance industry subject to California's general business laws. Without understanding that history, it would not be readily apparent why a statute would be necessary to make insurers subject to laws already applicable to them—thus inhibiting a comprehensive understanding of the statute.

Second, section 1861.03(a) is placed within a chapter in the Insurance Code that is primarily directed to rate regulation. This creates the illusion that section 1861.03(a) is related to the rate regulatory mechanism. But there is no such relation. Section 1861.03(a) was adopted by voter initiative. As has been frequently noted, voter initiative statutes lack the careful craftsmanship that results from the iterative legislative process.¹³⁹ None of section 1861.03's subsections have to do with rates.¹⁴⁰ The California Supreme Court recognized this,

137. In *Farmers 2006*, Harvey Rosenfield and his organization, Foundation for Taxpayer and Consumer Rights, attempted to use his article as "legislative history" of Proposition 103. The court properly held that the article could not be used for that purpose. *Farmers 2006*, 40 Cal. Rptr. 3d 653, 664 (Ct. App. 2006). But an article can be used to establish the "history of the times" for the purpose of showing the context within which the legislation was enacted.

138. See *supra* Part II.A.2. (discussing *Manufacturers Life* v. Superior Court, 895 P.2d 56, 64 (Cal. 1995)).

139. See, e.g., Richard B. Collins & Dale Oesterle, *Governing By Initiative—Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. COLO. L. REV. 47, 76–78 (1995); Elizabeth Garrett, *Perspective on Direct Democracy—Who Directs Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 18–22, 24–27, 31–36 (1997); Matthew L. Spitzer, *Perspective on Direct Democracy—Evaluating Direct Democracy: A Response*, 4 U. CHI. L. SCH. ROUNDTABLE 37, 44–45 (1997) (all explaining that voter initiatives tend to be poorly drafted).

140. CAL. INS. CODE § 1861.03 (West 2005) (For example, subsection (a) makes the business of insurance subject to antitrust and other business regulatory laws; subsection (b) states exceptions to subsection (a) for specific insurance arrangements and practices going well beyond rates (e.g., multiple insurance entities participating in underwriting a single

observing that Article 10 of Chapter 9 (adopted by Proposition 103) “is not limited in scope to rate regulation.”¹⁴¹ Rather, “[t]hrough Insurance Code section 1861.03, subdivision (a), the article also subjects the business of insurance to laws prohibiting discriminatory and unfair business practices.”¹⁴²

Section 1861.03(a) was intended to—and to the extent necessary does—“end” the insurance industry’s broad exemption from the anti-trust and other general business laws. But it does not function to incorporate those laws into Chapter 9 as a remedy for alleged rating violations.

C. Insurance Code Section 1861.10(a) Adds Consumer-Friendly Provisions for Participation in Rate Regulation Proceedings, but Does Not Create a “Dual System” of Rate Regulation

Insurance Code section 1861.10(a) provides a mechanism for “[a]ny person [to] initiate or intervene in any proceeding permitted or established pursuant to this chapter, challenge any action of the commissioner under this article, and enforce any provision of this article.”¹⁴³

“Dual system” advocates argue that their “dual system” argument is supported by section 1861.10(a), read with section 1861.03(a).¹⁴⁴ In pairing the two, advocates argue that section 1861.03(a) lists all “permitted” actions in which “[a]ny person” is empowered to “initiate or intervene” as per section 1861.10(a).¹⁴⁵ They conclude that section 1861.10(a) makes civil actions asserted under the California business laws identified in section 1861.03(a) a means of enforcing the provisions of Chapter 9.

This initiative statute cannot bear so fine a parsing. Throughout, the initiative evinces a cautious drafting style, employing bolstering language with a “belt and suspenders” effect. Thus, for example, section 1861.02(a) refers to determining “rates *and* premiums” based on the mandatory rating factors and mandatory “weighting,” although it would not realistically be possible to determine one but not the other

risk); and subsection (c) limits an insurer’s right to cancel or non-renew an auto policy.). Section 1861.03(a) does not, on its face, have to do with rate regulation and its placement within Article 10 does not change its meaning. *Id.*

141. State Farm Mut. Auto. Ins. Co. v. Garamendi, 88 P.3d 71, 77 (Cal. 2004).

142. *Id.*

143. CAL. INS. CODE § 1861.10(a) (West 2005).

144. See *supra* Part III.B.

145. CAL. INS. CODE § 1861.10(a) (West 2005).

according to the statutory strictures. Section 1861.07 of the Insurance Code provides that “[a]ll information provided to the commissioner pursuant to this article shall be available for public inspection,” and then goes on to stipulate that two statutes that would otherwise protect such information from disclosure do not apply.¹⁴⁶ In *State Farm v. Garamendi*, the California Supreme Court held that the second clause in section 1861.07 does nothing more than reinforce the first.¹⁴⁷ The lesson taught by this holding is that placing undue weight on the inclusion of multiple supporting words and phrases and relying on the usual presumption that each has a separate meaning can misdirect the interpretation of an initiative statute.

Be that as it may, section 1861.10(a) does not, in any case, change section 1861.03(a) into a statute about “proceedings” rather than a statute about the substantive law. Several of the Chapter 9 statutes do focus on procedure.¹⁴⁸ Section 1861.03(a) does not bear the same hallmarks¹⁴⁹ and does not “permit” or “establish” a proceeding for enforcing the rate regulation statutes. As discussed, section 1861.03(a) makes the business of insurance subject to numerous *substantive* business regulatory laws. In most cases, each separate statutory scheme includes provision for a civil action as part of the enforcement mechanism for that statutory scheme. But it is a stretch to read section 1861.03(a) as adopting the civil action enforcement of these business regulatory laws as a way to enforce the different statutory rate scheme. This consequence—like the entire “dual system” theory—is far beyond any announced purpose of Proposition 103, and irreconcilable with the limiting language of Insurance Code sections 1860.1 and 1860.2.¹⁵⁰

146. *Id.* § 1861.07.

147. *Garamendi*, 88 P.3d at 78–80.

148. Section 1861.05 sets forth the rate review process, and includes a right to petition for hearing. Subsection (c) provides for discretionary and mandatory hearings in different circumstances. Section 1861.08 sets the parameters for administrative hearings. Section 1861.09, in and of itself and through referencing section 1858.6, allows mandate proceedings (as described in the Government Code and Code of Civil Procedure) in the courts. All of these statutes—and the section 1858 series pre-dating Proposition 103—are procedural, and all are comprehended in the section 1861.10(a) reference. Section 1861.05(c), section 1861.08, and preexisting sections 1858–1858.3 could be described as “establishing” proceedings within the Department for enforcing the Chapter 9 provisions. Section 1861.09 and its referenced section 1858.6 could be described as “permitting” judicial proceedings under other, Government Code and Code of Civil Procedure statutes. *See CAL. INS. CODE §§ 1861.05–1861.08* (West 2005 & Supp. 2010).

149. *See supra* note 148.

150. *See supra* Part III.A.

Finally, from the 30,000 foot view, the contorted construction given to sections 1861.03(a) and 1861.10(a) in order to support the dual system argument simply make no sense. If an initiative statute were intended to create a judicial challenge to rates as an overlay to the administrative process, it would do so directly and expressly. Voters could not be expected to follow the tortured construction used to support the dual system argument, and there would be no reason not to include a simple, understandable provision allowing a private right of action in a court. The fact that provision does not exist strongly evinces the lack of any intent to include it.

D. Proposition 103 Codifies a Form of Filed Rate Doctrine, Aligning California's Insurance Rate Regulatory System with the Rest of the Country

The filed rate doctrine has been adopted by virtually every jurisdiction to consider its application to insurance rates. California could elect to be the only state to reject the principles underlying that doctrine, but there is nothing in the statutes or in Proposition 103 suggesting that intent. The statutes themselves read as a codification of a filed rate doctrine. Rejecting the uniformly adopted filed rate doctrine and instead adopting a “dual system” of rate regulation would itself constitute a major initiative that would certainly have been called out in the initiative statute and the Ballot Pamphlet. It was not. Rather, Proposition 103 retained the codified “filed rate doctrine” set forth in sections 1860.1–1860.3 of the Insurance Code, and introduced prior approval rate regulation requiring review and approval by the Commissioner. That system should be acknowledged and allowed to work, and the “dual system” argument rejected.

Conclusion

Sections 1860.1–1860.3 of the Insurance Code, by their terms, articulate a specific statutory “filed rate doctrine” applicable to insurance rate matters in California. The statutory language cannot be reconciled with the notion that, through these statutes, California has elected to depart from the uniform, nationwide jurisprudence and reject the concept of the regulator’s exclusive original jurisdiction over regulated rates. Thus, California courts should, consistently with the language of the statutes and the uniform tradition in the context of regulated rates, recognize the Insurance Commissioner’s exclusive original jurisdiction over rates.

This step is a beginning—not an end. There remain difficult case-by-case problems regarding whether and to what extent a particular case presents rate matters falling within the Commissioner's jurisdiction. But recognizing the Commissioner's statutory exclusive original jurisdiction would be an important beginning to developing a rational balance between litigation—which belongs in the courts—and rate regulation—which belongs with the regulator.