B208402

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION ONE

THE ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES, et al.,
Plaintiffs and Appellants,

v.

STEVEN POIZNER, et al.,
Defendants and Respondents.

APPEAL FROM LOS ANGELES COUNTY SUPERIOR COURT, CASE NO. BS 109154
JAMES CHALFANT, JUDGE

APPELLANTS' REPLY BRIEF

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LEGAL ARGUMENT

I. THE AMENDED REGULATIONS ARE INVALID AND INEFFECTIVE.

A. The standard of review is de novo, and this court exercises its independent judgment.

Respondents are confused about the standard of review. On the one hand, they acknowledge that "[w]here, as here, a regulation is challenged on its face as not authorized by the governing statute, a question of law is presented that is subject to independent review by this Court." (Respondent's Brief (Department Brief) 12; see

Respondent's Brief of Intervenor The Foundation for Taxpayer and Consumer Rights (FTCR Brief) 16 [court independently determines whether "'regulations actually adopted . . . are consistent with Proposition 103—and with the law generally'"].)

On the other hand, the department suggests that its reading of the statutory scheme is entitled to "'great weight and respect'" (Department Brief 12) and that the court should simply determine whether the department "'reasonably interpreted the legislative mandate'" (Department Brief 13). FTCR likewise asserts that the commissioner's "interpretation of the Insurance Code" is entitled to "'considerable deference.'" (FTCR Brief 18.)

To dispel the confusion, the issue presented—whether the amended regulations are inconsistent with the governing statutes—is one of pure law. The proper standard of review is de novo, and the court exercises its independent judgment concerning the meaning of the governing statutes. No deference should be accorded either the department or the lower court. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11, fn. 4 ["A court does not . . . defer to an agency's view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature. The court, not the agency, has 'final responsibility for the interpretation of the law' under which the regulation was issued"]; *Aguiar v. Superior Court* (2009) 170 Cal.App.4th 313, 323 ["In deciding whether the regulation conflicts with its legislative mandate, the court does not defer to the agency's interpretation of the law under which the regulation issued, but rather exercises its own independent judgment"]; *Communities for a*

Better Environment v. California Resources Agency (2002) 103 Cal.App.4th 98, 108-109 [court "independently reviews the administrative regulation for consistency with controlling law. The question is whether the regulation alters or amends the governing statute or case law, or enlarges or impairs its scope. In short, the question is whether the regulation is within the scope of the authority conferred; if it is not, it is void. This is a question particularly suited for the judiciary as the final arbiter of the law, and does not invade the technical expertise of the agency" (footnotes omitted)]; *San Bernardino Valley Audubon Society v. City of Moreno Valley* (1996) 44 Cal.App.4th 593, 600 [on review of purely legal issue, appellate court "is free to ignore the decision of the trial court and to exercise independent judgment on the merits"].)

The department cites *County of Santa Cruz v. State Bd. of Forestry* (1998) 64 Cal.App.4th 826, 834, for the proposition that this court should simply decide whether the department has reasonably construed the statutory mandate. (Department Brief 13.) But that deferential standard applies only "'[w]here the intelligibility of the statutory language depends upon the employment of administrative expertise, which it is the purpose of a statutory scheme to invoke . . . .'" (*County of Santa Cruz*, at p. 835.) In contrast, "'[w]here the language of the governing statute is intelligible to judges their task is simply to apply it . . . ." (*Ibid.*)

The language of the statutes at issue here, Insurance Code sections 1861.05 and 1861.10,[1] was no doubt intelligible to the voters who enacted them, even though they had no "administrative expertise," so it should be intelligible to this court as well. Neither the department nor FTCR contends otherwise.

FTCR cites cases in which courts have accorded deference to interpretations of the Public Utilities Code by the Public Utilities Commission (PUC). (See FTCR Brief 17-18, 35-36 (citing *Southern California Edison Co. v. Peevey* (2003) 31 Cal.4th 781, 796 and *Southern California Edison Co. v. Public Utilities Com.* (2004) 117 Cal.App.4th 1039).) Those cases are inapposite. They trace their origin to a case in which the Supreme Court recognized and discussed certain legislative grants of authority unique to the PUC. (See *Southern Pac. Co. v. Public Utilities Com.* (1953) 41 Cal.2d 354, 362-363, 367 [discussing Pub. Util. Code §§ 730, 761, 762 and 763].)

This case does not involve the PUC, and FTCR cites no comparable grants of authority to the department under the Insurance Code. Proposition 103 authorized the department to adopt regulations governing hearings on rate applications (see § 1861.055, subd. (a)), but the Legislature forbids the department (and other agencies) from adopting any regulation that is inconsistent or in conflict with a statute (Gov. Code, § 11342.2). As explained above, this court exercises its independent judgment, without deference to the department, in deciding whether the department has transgressed that legislative prohibition.

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1 Unless otherwise indicated, all further statutory citations in this brief refer to the Insurance Code.

B. The Department's unauthorized "practice" of encouraging prehearing "settlements" cannot justify the invalid regulations.

The department opens its argument by setting up two straw men. The department emphasizes the commissioner's general authority to promulgate regulations (Department Brief 14-15), a point not in dispute. The department also emphasizes the commissioner's "manifest" need to promulgate regulations governing the rate review process, given "the limited statutory guidance on the" subject. (Department Brief 15.) Again, no one disputes that the commissioner has the power to promulgate regulations governing the rate review process, so long as those regulations do not conflict with, or enlarge the scope of, the governing statute. (See AOB 8.) In other words, the commissioner's latitude in promulgating regulations is not unbounded; it has legal limits. Whether the amended regulations at issue transgress those limits is the central question before this court.

Respondents emphasize the department's practice of "encourag[ing] resolution of rate applications . . . before a hearing is noticed, to avoid lengthy formal hearings." (Department Brief 7; see Department Brief 18, 20-21.) Respondents explain that consumer groups "typically will hire experts, analyze rate applications and negotiate with insurers" during this "pre-hearing stage." (Department Brief 7, boldface omitted; see FTCR Brief 1-2, 8-9.) The regulations were amended to "authorize consumer groups to obtain advocacy fees for their work performed in a matter where their involvement in the rate review process did not extend beyond settlement negotiations." (Department Brief 2-3; see Department Brief 18-21.) The department contends that unless it can compensate these consumer groups, they will be less likely to participate in prehearing, informal resolution efforts. The result will be more formal hearings, with their attendant costs. (See Department Brief 8, 20-22 [prehearing resolutions obviate the need for "formal, costly hearing[s]" (p. 21) and "improve efficiency" (p. 22)].)

FTCR likewise builds its argument on the department's practice of encouraging prehearing "discussions among the parties." (FTCR Brief 20; see FTCR Brief 19-21.) In contrast to the department, which focuses on cost-savings, FTCR emphasizes that the department's practice promotes "full public participation in the rate-setting process." (FTCR Brief 21; see FTCR Brief 22-23, fn. 11, 34-37.)

Respondents proceed to interpret the statutory scheme to accommodate the department's historical practice. (See Department Brief 19-21; FTCR Brief 22-39.) But their approach is backwards. The department's practice must comport with *the statutes*, not vice-versa. And the statutes simply do not contemplate or permit prehearing "settlements" of rate applications; do not authorize the department to act, in effect, as a mediator between consumer groups and insurers; and do not authorize compensation for consumer groups that help to bring about "settlements" in the absence of a hearing on the rate application.

Nothing in Proposition 103 contemplates or permits off-the-record, prehearing "settlement" negotiations. A rate application is just that—an application. It is not a complaint, and it does not trigger an adversarial proceeding. There are no adverse parties, and there is nothing to "settle." (AOB 36-37.) The application is *deemed approved* unless the commissioner exercises his discretion to order a hearing and thereafter disapproves the application. (See AOB 12; *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 824 ["Increases of no more than 7 percent for personal lines, or 15 percent for commercial lines, are automatically granted without a hearing unless one is requested"].) So there is no occasion for "settlement negotiations" until after a hearing has been ordered. (See AOB 35-37.)

Proposition 103 prescribed the procedure to be followed by any consumer seeking to question or challenge a rate application. The procedure is spelled out in section 1861.05. A concerned consumer may request a hearing. Under section 1861.10, if the commissioner grants the request, the consumer may intervene in that hearing. At that point, a controversy is joined, the consumer presents witnesses and engages in advocacy, and the controversy is subject to settlement.

Plaintiffs have demonstrated that the provision in section 1861.10, subdivision (b), allowing consumer representatives to recover "advocacy and witness fees" cannot apply to prehearing "rate proceedings" because no advocacy or witnesses are involved. (See AOB 29.) The amended regulations improperly expand the scope of the statute by authorizing the commissioner to award "advocacy and witness fees" to consumers who "negotiate" with insurers before a hearing has been ordered. (See AOB 29-30.) The department offers no response. (See Department Brief 26-27.)

FTCR itself has acknowledged that the prehearing "informal discussion" process—the centerpiece of both respondents' positions on appeal—is not expressly set forth in the code but has informally evolved over the years to "supplement[ ]" chapter 9. (3 CT 511; see also 3 CT 525 [the "informal rate review process . . . occurs outside the context of the 'deemer' and 'hearing' provisions expressly set forth in section 1861.05"].)

Nor do the regulations contemplate or permit a prehearing "settlement." On the contrary, the regulations mandate that any settlement "shall be filed with *the administrative law judge* for proposed acceptance or rejection." (10 CCR § 2656.1, subd. (c), emphasis added.) The administrative law judge is the officer who presides over *the hearing*. (§ 1861.08, subd. (a).)

Put simply, the statutory scheme enacted by Proposition 103 does not contemplate prehearing "settlements," so it could not have contemplated consumer participation in, or compensation for, such "settlements."

The department claims to find support for its position in *State Farm Mutual Automobile Insurance Co. v. Garamendi* (2004) 32 Cal.4th 1029 (*State Farm*), a case plaintiffs addressed at some length in the opening brief (see AOB 37-39). As noted there, the *State Farm* court did not address the issue presented here or anything close to it. (See AOB 38-39.) The *State Farm* court held that Community Service Statements, which the commissioner by regulation requires certain insurers to submit, were subject to public disclosure under section 1861.07, notwithstanding one insurer's claim that the Community Service Statement contained trade secrets protected from disclosure under the Government Code.[2] (*State Farm,* at pp. 1043-1047.) *State Farm* had nothing to do with the rate application process. The court simply observed that its construction of section 1861.07 was "consistent with Proposition 103's goal of fostering consumer participation in the rate-setting process," by which the court meant the "public hearing process for reviewing insurance rate changes." (*State Farm,* at p. 1045; see AOB 37-38.)

The department suggests that the public disclosure requirements of section 1861.07, as construed in *State Farm,* must have been intended to allow consumers actively to oppose an insurer's rate application as soon as it has been filed, even if no public hearing is ordered. "Any other interpretation," the department argues, would be "absurd." (Department Brief 18.) Not so. There is nothing absurd about requiring disclosure so that consumers and their representatives can make an informed decision whether to request *a public hearing* on the rate application under section 1861.05. It hardly follows from the public disclosure provisions of section 1861.07 that consumers must be permitted to

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[2] Section 1861.07 states: "All information provided to the commissioner pursuant to this article shall be available for public inspection, and the provisions of Section 6254(d) of the Government Code and Section 1857.9 of the Insurance Code shall not apply thereto."

"negotiate" with insurers in an attempt to "settle" their rate applications short of a hearing.

C. Respondents fail to explain how consumers can "intervene" when there is no hearing and no adversary proceeding.

Citing authority for the principle that Proposition 103 should be liberally construed to promote its underlying purposes, the department argues that the phrase "any proceeding" in section 1861.10, subdivision (a), should be construed "to include consumer group participation in the entire rate review process," not just public hearings. (Department Brief 18.) This central argument runs through much of the department's brief. (See Department Brief 19-26.)

FTCR presents a similar argument (FTCR Brief 3, 22-27), urging that "the portion of the rate review and approval process that occurs after the filing of a petition for hearing and before any hearing notice is clearly a 'proceeding'" (FTCR Brief 26, fn. 12), which the commissioner had "'implied'" power to establish (FTCR Brief 39). In fact, FTCR goes further, asserting that the commissioner was "***required***" to allow consumers to participate in "the rate-setting process" (FTCR Brief 38), which FTCR understands to include prehearing review of a rate application.[3]

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[3] If, as FTCR contends, the commissioner is *required* to allow consumers to participate in prehearing review of rate applications,
(continued...)

But respondents never explain how their positions can be reconciled with the language in section 1861.10 that immediately precedes the words "any proceeding." The full sentence reads: "Any person may *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." (§ 1861.10, subd. (a), emphasis added.)

The statute thus recognizes only two ways for a consumer to become involved in a proceeding under chapter 9. The consumer may either "initiate" or "intervene" in the proceeding.

Neither the department nor FTCR contends that a consumer can "initiate" a proceeding on a rate application. (See AOB 14.) The critical question, therefore, is what it means to "intervene" in a proceeding, and whether the commissioner's amended regulations improperly expand the scope of section 1861.10, subdivision (a), by allowing consumers to "intervene" in the commissioner's pre-hearing review of a rate application.

As plaintiffs have shown, the term "intervene" cannot apply to the commissioner's internal, prehearing review process. (AOB 14-17, 25-26.) "Intervene" means to make oneself a party to an ongoing action or proceeding between other persons. (AOB 14.) Unless and until the commissioner orders a hearing, there is no ongoing proceeding between other persons and thus nothing in which to "intervene."

(...continued)
then the provision of section 1861.05, subdivision (c), *requiring a hearing* on certain rate applications is superfluous.

The commissioner unlawfully expanded the scope of section 1861.10 by, in effect, stretching the meaning of "intervene" to allow consumers to inject themselves into the commissioner's internal, prehearing review process, which is not an ongoing proceeding between other persons.

D. Chapter 9 does not "permit" a prehearing "rate proceeding."

Citing section 1861.05, subdivision (c), the department argues that prehearing "rate proceedings" are "permitted" proceedings into which consumers may intervene under section 1861.10, subdivision (a). (Department Brief 23-24.) But the court will search the text of section 1861.05 in vain for any language mentioning—much less permitting—prehearing rate proceedings.

The department responds that section 1861.05, "[b]y its silence," permits prehearing rate proceedings. (Department Brief 25.) In the department's view, since section 1861.05 does not affirmatively *forbid* prehearing rate proceedings, it necessarily "permits" them. (Department Brief 26.)

Similarly, FTCR suggests that section 1861.05, subdivision (c), permits a prehearing rate proceeding because it "does not state that public participation is limited only to the hearing stage of the rate review process." (FTCR Brief 37, emphasis omitted.)

Respondents' arguments are flawed. The application review process established by section 1861.05 is *inconsistent* with the notion of a prehearing "rate proceeding." Section 1861.05 allows the commissioner to respond to an insurer's rate application in either of two ways: he can approve it or he can order a hearing. (See AOB 12.) These two options foreclose the third option respondents advocate, namely, allowing consumer representatives to "negotiate" and "settle" the rate application before any hearing has been ordered.

Respondents contend the amended regulations simply redefine the point in time when a rate proceeding begins, namely, when a consumer group submits a petition for hearing. (See Department Brief 20; FTCR Brief 23.) But section 1861.10, subdivision (a), does not allow intervention in proceedings established by the *commissioner*; it allows intervention in proceedings permitted or established by *chapter 9*. And chapter 9 does not permit or establish a prehearing "rate proceeding." We know this because the court in *Farmers Insurance Exchange v. Superior Court* (2006) 137 Cal.App.4th 842 (*Farmers*) inventoried all the proceedings that are "permitted" or "established" under chapter 9, and the court did *not* mention prehearing "rate proceedings." (*Farmers*, at p. 854.)

FTCR complains that plaintiffs "seek a system that would allow insurers to unilaterally advocate their interests to the Department and exclude consumer representatives from the process altogether." (FTCR Brief 4.) Nonsense. Plaintiffs seek only to enforce the statutory scheme. The scheme allows consumer representatives to ask the commissioner to order a hearing under section 1861.05 and allows them to seek to intervene in that hearing under section 1861.10, subdivision (a). Contrary to FTCR's exaggerated claim, no insurer can "exclude consumer representatives from the process altogether." (FTCR Brief 4.)

FTCR argues the reference in section 1861.10, subdivision (b), to consumer "'advocacy . . . in response to a rate application'" must mean that consumers may seek compensation for engaging in prehearing negotiations with insurers. (FTCR Brief 28-30.) But under the statutory scheme, the only vehicle by which a consumer can respond to a rate application is to request a hearing (see § 1861.05, subd. (c)) and then to intervene in the hearing (see § 1861.10, subd. (a)). The statutory scheme does not provide for prehearing "advocacy" by consumers.

FTCR perceives unfairness in a system under which the commissioner is allowed "to receive additional data and documents from the rate applicant in support of a rate application during the pre-hearing rate review stage of the proceeding, but is not allowed to 'entertain evidence or arguments against a rate application except in a public hearing.'" (FTCR Brief 30, emphasis omitted.) Proposition 103 places the burden on the applicant insurer to demonstrate that the requested rate does not violate the statutory prohibition against rates that are "excessive, inadequate, unfairly discriminatory or otherwise in violation of this chapter." (§ 1861.05, subd. (a).) Naturally, to meet its burden, the applicant must present "data and documents" and must respond to the commissioner's requests for information. The consumer has no burden to prove anything. If the commissioner has any doubts whether the requested rate conforms to the statutory requirements, he may order a hearing, at which "data and documents" from all parties may be considered.

The only reason a consumer group would submit "data and documents" in advance of a hearing would be to *oppose* the rate application. But under the statutory scheme, the commissioner cannot disapprove a rate application unless he first holds a hearing, and he must base his disapproval on the evidence produced in the hearing.[4] (AOB 12-13.) It follows that the only legitimate purposes of prehearing "evidence" in opposition to a rate application are to persuade the commissioner to order a hearing or to persuade the insurer to withdraw its application. If the commissioner orders a hearing, the consumer group may seek leave to intervene and may later seek compensation. If the commissioner does not order a hearing or if the insurer withdraws its application, the prehearing "evidence" has not contributed to any order or decision on the application and thus, under section 1861.10, subdivision (b), cannot justify compensation. (See AOB 24, fn. 13 [commissioner abandoned proposed regulation that would have required insurer to obtain order before withdrawing rate application].)

Whatever the consumer group might accomplish informally without a hearing, it is not something for which the statute authorizes compensation, and the commissioner cannot confer that authorization on himself by regulation.

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4 FTCR disagrees, asserting that the commissioner can "approve or disapprove a proposed rate when no hearing is held." (FTCR Brief 29, fn. 13, emphasis omitted.) But FTCR cites no authority that the commissioner can disapprove a rate application absent a hearing, and FTCR cites no supporting examples.

E. The differing treatment of intervenor compensation under the Public Utilities Code and the Insurance Code buttresses *plaintiffs'* position.

The department claims to find support for its position by analogy to the intervenor compensation provisions of the Public Utilities Code. (See Department Brief 27-29.) But a comparison of those provisions to the provisions in Proposition 103 buttresses *plaintiffs'* position.

First, the Public Utilities Code allows compensation for costs of "*participation* or intervention in any proceeding of the commission." (Pub. Util. Code, § 1801, emphasis added.) In contrast, to qualify for compensation under section 1861.10, the consumer must either "initiate or intervene" in a proceeding. (§ 1861.10, subd. (a).) "Participation" alone is not sufficient.

Second, the Public Utilities Code expressly authorizes compensation to intervenors who substantially contribute to any "alternative dispute resolution procedures in lieu of formal proceedings as may be sponsored or endorsed by the commission . . . ." (Pub. Util. Code, § 1802, subd. (f) [defining proceeding].) Proposition 103 contains no comparable provision authorizing the department to sponsor or endorse "alternative dispute resolution" procedures or authorizing compensation for consumers who participate in such procedures relating to an insurer's rate application.

Significantly, chapter 9, of which Proposition 103 is a part, *does* provide for prehearing "informal conciliation" of consumer complaints challenging *existing* rates. (§§ 1858.01, subds. (a)-(c), 1858.02, 1858.1.) But chapter 9 contains no provisions for prehearing "informal conciliation" or "alternative dispute resolution procedures" when an insurer files an application to *change* rates. In other words, no statute authorizes consumers to "negotiate" with insurers or to "settle" rate applications absent a hearing.

Third, the Public Utilities Code allows compensation to intervenors in specified proceedings and "other *formal* proceeding[s]" of the PUC. (Pub. Util. Code, § 1802, subd. (f), emphasis added; see *id.*, § 1801.3, subd. (a) [Legislature intends that compensation provisions "apply to all *formal* proceedings of the commission" (emphasis added)].) The Public Utilities Code does not allow compensation for consumers who negotiate with public utilities outside of a formally sponsored alternative dispute resolution procedure or other formal proceeding. The commissioner's amended regulations, in contrast, purport to allow compensation to consumers who participate in informal, prehearing negotiations, an activity not recognized by any statute. (See AOB 26-27 & fn. 14; 3 CT 511.)

II. THE ATTORNEY FEE AWARD SHOULD BE REVERSED OR MODIFIED.

Plaintiffs have demonstrated that the trial court erred by awarding attorney fees to FTCR under section 1861.10, subdivision (b). This court action is not "permitted or established" by chapter 9 (§ 1861.10, subd. (a)), so section 1861.10 does not apply. (AOB 41-

43.) Plaintiffs have also demonstrated that if a fee award was proper, the department—not plaintiffs—should be responsible for paying it. (AOB 43-45.)

The department does not disagree; it does not respond at all to either of plaintiffs' arguments.

FTCR does respond to plaintiffs' arguments, but the responses are uniformly unsound.

First, FTCR misstates the standard of review, asserting that the trial court's fee award must be upheld "[a]bsent a showing of an abuse of discretion." (FTCR Brief 40.) In support, FTCR cites *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 578 (*Graham*) (FTCR Brief 40), but *Graham* is off point. The Supreme Court there reviewed a fee award under Code of Civil Procedure section 1021.5, the "private attorney general" statute. Fee awards under section 1021.5 are reviewed for abuse of discretion. (*Graham*, at p. 578.)

Here, the trial court *declined* to award fees under section 1021.5. (See AOB 6-7.) Instead, the court based the award solely on section 1861.10, which applies only to proceedings that are "permitted or established" by chapter 9. (§ 1861.10, subd. (a); see AOB 41-42.) The issue on appeal is whether this action for a writ of mandate and for declaratory and injunctive relief was "permitted or established" by chapter 9. That is a question of pure law that this court reviews de novo. (*Carpenter v. Jack In The Box Corp.* (2007) 151 Cal.App.4th 454, 460 ["the determination of whether the trial court had the statutory authority to make such an award [of attorney fees] is a question of law that we review de novo"]; *Leamon* *v. Krajkiewcz* (2003) 107 Cal.App.4th 424, 431 ["An appellate court reviews a determination of the legal basis for an award of attorney fees independently as a question of law"].)

Next, FTCR emphasizes its claimed "substantial contribution" to the lower court's decision. (See FTCR Brief 40-42.) FTCR's emphasis is misdirected. Unless the present court action was "permitted or established" by chapter 9, the fee award must fall—whether or not FTCR contributed to the trial court's decision.

FTCR asserts that any court action challenging a regulation adopted to implement a provision of Proposition 103 "is necessarily a proceeding that is 'established' and is certainly 'permitted' pursuant to section 1861.10." (FTCR Brief 42.) FTCR cites no authority and provides no explanation to support its assertion. The argument is unsound. FTCR does not and cannot point to any provision in chapter 9 that "necessarily" establishes or permits this court action challenging the lawfulness of the amended regulations. Rather, as plaintiffs have shown, the authority for this court action stems from the Code of Civil Procedure and the Government Code, which were the authorities plaintiffs cited in bringing the action. (See AOB 41-42.) Plaintiffs did not allege jurisdiction or seek relief under any provision of chapter 9.

FTCR contends it "invoked section 1861.10(a) as a basis for intervention in this court proceeding." (FTCR Brief 42-43.) FTCR's point is unclear. The trial court never ruled that section 1861.10 authorized FTCR to intervene; it did not need to reach the issue because the parties *stipulated* that FTCR could intervene. (See 1 CT 177-178.) Plaintiffs expressly reserved their right to argue that section 1861.10 did *not* authorize intervention. (See 1 CT 125-126 [¶¶ 5, 8].)

FTCR cites seven cases that supposedly show "FTCR and other consumer groups have successfully intervened under [section 1861.10] in numerous other court actions seeking to challenge or uphold the Commissioner's regulations adopted pursuant to Proposition 103 or to challenge illegal amendments to the initiative statute that failed to further its purposes." (FTCR Brief 43 & fn. 20.) But none of the cited cases held or discussed whether section 1861.10 permits a consumer group to intervene in such court actions. In fact, the courts in the cited cases did not identify the statutory bases for the interventions.

In any event, the statutory basis for FTCR's intervention is irrelevant. The determinative question for purposes of evaluating the lawfulness of the fee award is whether chapter 9 "permitted or established" *plaintiffs' action*. As plaintiffs have explained, it did not. (See AOB 41-43.)

FTCR notes that section 1861.10, subdivision (b), authorizes both the commissioner and the court to render a fee award. (FTCR Brief 43.) Again, FTCR's point is obscure. The statute certainly allows the court to award fees, but only in an action that is "permitted or established" by chapter 9. Section 1861.10, subdivision (b) does not authorize the court to award fees in an action such as this, which finds its authority in the Code of Civil Procedure and the Government Code.

In *Farmers, supra,* 137 Cal.App.4th 842, the court enumerated all the judicial proceedings that chapter 9 either permits or establishes. (*Id.* at 854, citing §§ 1858.6, 1859.1, 1861.03, subd. (a), 1861.09.) Absent from the court's enumeration was any judicial proceeding to challenge the lawfulness of a regulation. FTCR nevertheless argues that, "by analogy," chapter 9 must also permit or establish "any court proceeding to review a regulation adopted by the Commissioner." (FTCR Brief 44.) The analogy fails. *Farmers* holds that, for purposes of section 1861.10, subdivision (a), the judicial proceedings that chapter 9 permits or establishes are those that are specifically mentioned in chapter 9, and chapter 9 does not mention a judicial challenge to a regulation. To conclude that chapter 9 also permits or authorizes other judicial proceedings "by analogy" or by implication would be to read into chapter 9 provisions that it does not contain and thus improperly expand the scope of the chapter beyond what its plain language will bear.

FTCR contends that "[c]ourts have routinely awarded intervenors reasonable attorneys' fees and expenses under section 1861.10(b) in proceedings brought either to challenge or uphold regulations adopted by the Commissioner pursuant to Proposition 103." (FTCR Brief 44.) FTCR fails to show that any of the trial courts considered the question whether the regulatory challenges were permitted or established by chapter 9. Further, the fact that *trial* courts in other cases have improperly awarded fees hardly constitutes a persuasive reason for this appellate court to uphold an improper award in this case.

FTCR also contends that its fee award should stand even if this court reverses the judgment. FTCR claims it substantially contributed to the trial court's decision, so it is entitled to fees regardless of how that decision fares on appeal. (See FTCR Brief 41-42.) FTCR's contention is unsound for two reasons. First, it wrongly assumes chapter 9 "permitted or established" this action. Since, as we have shown, chapter 9 did not permit or establish this action, FTCR's supposed contribution is irrelevant.

Second, "[r]eversal of the judgment dictates that the attorney fee awards . . . also be reversed." (*Spanish Speaking Citizens' Foundation, Inc. v. Low* (2000) 85 Cal.App.4th 1179, 1240.) Reversal of the judgment here would demonstrate that FTCR's "contribution" to the decision below had no value but merely lead the trial court into error. To allow FTCR to collect fees for its contribution to a legally erroneous decision would be absurd.

Finally, with respect to whether the department or plaintiffs should be responsible for paying the fee award if it is upheld, FTCR acknowledges that section 1861.10, subdivision (b), "does not specify who shall be required to pay the fee award in proceedings other than rate proceedings." (FTCR Brief 45.) FTCR argues "the decision is committed to the discretion of the Commissioner or to the court, as applicable." (*Ibid.*) But FTCR does not acknowledge section 12979, under which the department is required "to cover any administrative or operational costs arising from the provisions of" Proposition 103 through filing fees paid by insurers generally.

Section 1861.10, subdivision (b), is a provision of Proposition 103. If the fee award here is proper under section 1861.10, subdivision (b), then it falls within the scope of section 12979 and should be covered by the department in the first instance. Significantly, the department does not disagree.

CONCLUSION

For the foregoing reasons and those discussed in plaintiffs' opening brief, the judgment should be reversed with directions that the trial court grant the relief plaintiffs requested in their combined complaint and petition for writ of mandate.

The attorney fee award to FTCR should also be reversed or, at least, modified to clarify that plaintiffs are not responsible for paying it.

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 5,297 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: July 16, 2009

Mitchell C. Tilner

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On July 16, 2009, I served true copies of the following document(s) described as **APPELLANT'S REPLY BRIEF** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

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

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

Executed on July 16, 2009 at Encino, California.

Robin Steiner

Robin Steiner

SERVICE LIST

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

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