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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

CENTRAL CIVIL WEST

SAM DONABEDIAN, Individually, and on behalf of those similarly situated, Plaintiff, vs. MERCURY INSURANCE COMPANY, a Corporation; MERCURY CASUALTY COMPANY; CALIFORNIA AUTOMOBILE INSURANCE COMPANY; AMERICAN MERCURY INSURANCE COMPANY; MERCURY INSURANCE GROUP, an unknown entity, and DOES 5 through 100, inclusive, Defendants. THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS, Intervenor.	**Case No.: BC 249019** [Assigned to the Hon. Victoria G. Chaney, Dept. 324] **THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS' OPPOSITION TO JOINT MOTION FOR PRELIMINARY APPROVAL OF SECOND PROPOSED SETTLEMENT** Date: May 15, 2007 Time: 10:00 a.m. Dept: 324 Before: Hon. Victoria Chaney Complaint Filed: April 20, 2001 Trial Date: None set

TABLE OF CONTENTS

Statutes

Other Authorities

I. INTRODUCTION

On February 5, 2007, plaintiff Sam Donabedian and defendants (hereafter "Mercury") sought this Court's approval of a coupon settlement that they claimed was worth $65 million. In its objections to this settlement, the Foundation for Taxpayer and Consumer Rights ("FTCR") pointed out that the coupons constituting the monetary relief purportedly available to class members under the settlement amounted to little more than an elaborate marketing scheme for the Mercury defendants, that the benefits of the coupons were largely illusory and that the release of class member claims was overbroad. The only concrete monetary "relief" specified in the first coupon settlement was the $1,575,000 to be paid to plaintiff's counsel as attorneys' fees.

The Court, expressing discomfort with breadth of the release and the restrictions on the use of the coupons, rejected the first coupon settlement:

> THE COURT: All right. I'm not going to give approval for the preliminary certification of this class settlement for the reasons that I had previously stated.
>
> One, I think it's overbroad. I think that the release could be worded better. What this case has been about is persistency discounts. It has not been about good drivers and what was the other one? Of just rating factors.
>
> Number two, I am not comfortable with the way the settlement is currently structured. ***
>
> The situation which gives rise to the potential use of the coupon, I'm not happy with that. I'm not comfortable with that, I should say. So you can go back to the drawing board and try again, but I'm not approving it as it is.

(Reporter's Transcript of February 5, 2007 Proceedings at 35:9-36:1, FTCR Exh. 1.)

At a status conference on February 27, 2007, the Court directed the parties to pursue discovery on Mercury's principal affirmative defenses and set a briefing schedule to determine the validity of those defenses. The parties subsequently served document requests, a subpoena on the Department of Insurance, and noticed a few depositions. They did not, however, actually conduct *any* of the discovery. No documents were produced by Mercury or the Department of Insurance, no interrogatories were answered and no depositions were taken. Instead, the parties once again began to discuss settlement, once again chose to exclude FTCR from the discussions, and once again entered into a coupon settlement.

In many respects, the second coupon settlement fails to address the defects in the first coupon settlement rejected by this Court and is equally objectionable. Although the second coupon settlement narrows the scope of the release, its ostensible value has been slashed from $65 million to $45 million. Moreover, the monetary "relief" for class members still consists entirely of coupons for the purchase of Mercury's insurance. The extensive restrictions imposed on these coupons render their actual value suspect. As with the first settlement, the only guaranteed financial benefit from the second coupon settlement would be the payment of $1,575,000 in attorneys' fees to plaintiff's counsel. This is starkly illustrated in the comparison of the class relief in the two coupon settlements set forth below.

SUMMARY COMPARISON OF CLASS RELIEF IN SETTLEMENTS

	First Coupon Settlement	**Second Coupon Settlement**
Face Value of Coupons	$65	$45
Use of Coupon – Current Customers	Buy new insurance product from Mercury; cannot be applied to cost of renewal of existing policy.	Buy new insurance product from Mercury *or additional coverage*; cannot be applied to cost of renewal of existing policy.
Use of Coupon – Former Customers	Buy any new insurance product from Mercury.	Buy any new insurance product from Mercury.
Transferable	YES	NO (except to spouse, child, or parent).
Attorneys' Fees	$1,575,000	$1,575,000

The parties have not and cannot satisfy their burden of demonstrating that the second coupon settlement is fair, reasonable, or adequate. This is precisely the type of settlement that disillusions absent class members and undermines public confidence in the integrity of the class action process. It should not be preliminarily approved by this Court.

II. ARGUMENT

A. The Court Should Apply Heightened Scrutiny To The Second Coupon Settlement.

The settlement of a class action requires court approval. (*Dunk v. Ford Motor Co.*, (1996) 48 Cal.App.4th 1794, 1801; *Wershba v. Apple Computer, Inc.*, (2001) 91 Cal.App.4th 224, 240; *Malibu Outrigger Bd. of Governors v. Superior Court*, (1980) 103 Cal.App.3d 573, 578-79). In the class action context, courts have deviated from the usual practice of leaving settlement terms exclusively to the private parties involved, and require judicial approval of settlements, for "the protection of those class members … whose rights may not have been given due regard by the negotiating parties." (*See Dunk*, *supra*, 48 Cal.App.4th at 1801.) A court's independent evaluation of a proposed settlement is critical because at the settlement approval stage, the parties are not in an adversarial position; therefore, the court is the sole protector of the class against an inadequate settlement. (*See* 2 H. Newberg & A. Conte, *Newberg on Class Actions* § 11.42, FTCR Exhibit 2.) In its role of guardian of the rights of absent class members, the court functions as a fiduciary to the class. (*See 7-Eleven Owners for Fair Franchising v. Southland Corp.*, (2000) 85 Cal.App.4th 1135, 1151, FTCR Exhibit 3) ("As a 'fiduciary' of the absent class members, the trial court's duty was to have before it sufficient information to determine if the settlement was fair, adequate, and reasonable."); *see also Norman v. McKee*, (9th Cir. 1970) 431 F.2d 769, 774, *cert. denied*, (1971) 401 U.S. 912, FTCR Exhibit 4 (stating that the court's "responsibility [is] to act as a guardian of the absent parties")).

Protecting the due process rights of absent class members requires more than perfunctory reliance on presumptions of fairness. (*See In re General Motors Corp. Pick-up Truck Fuel Tank Litigation*, (3d Cir. 1995) 55 F.3d 768, 784, FTCR Exhibit 5). The trial court must "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished". (2 H. Newberg & A. Conte, *Newberg on Class Actions* § 11.41, FTCR Exhibit 2.) In evaluating proposed settlements, courts assess a number of factors, which are intended to identify defects in the settlement (*e.g.*, unfair terms or inadequate results) or the process that produced it (*e.g.*, inadequate representation). This assessment leads to an ultimate determination as to whether, in light of the totality of the circumstances, the settlement is fair, reasonable and adequate to the absent class members. (*Dunk*, *supra*, at 1801-02.) A court may consider a number of relevant factors in deciding whether to approve a settlement, but there is no rigid checklist, and the factors should be tailored to each case. *Ibid*. However, the court cannot approve a settlement unless it independently considers all of the relevant factors and determines that the settlement is "fair, reasonable and adequate to all concerned." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 245.) The parties seeking approval bear the burden of showing that the settlement is fair, reasonable and adequate. (*Oldham v. Cal. Capital Fund, Inc.* (2003) 109 Cal.App.4th 421, 434.) To make this determination, "the court must examine *whether the interests of the class are better served by the settlement than by further litigation*." (Herr, *Annotated Manual for Complex Litigation* (Fourth Edition, 2006) § 21.61, p. 413, FTCR Exhibit 6.)

The courts and commentators have noted several "red flags" in proposed settlements which trigger the need for particular judicial vigilance to protect the rights of absent class members. The court should apply heightened scrutiny where (1) the parties reach a settlement prior to an adversary class certification motion (*Wershba*, *supra*, 91 Cal.App.4th at 240; *see id.*, § 21.612, p. 416; *see also Amchem Prods., Inc. v. Windsor* (1997) 521 U.S. 591, 620-21, FTCR Exhibit 7 [holding that the rights of absent class members "demand undiluted, even heightened, attention in the settlement context"]); (2) the settlement provides "class members illusory nonmonetary benefits, such as discount coupons for more of defendants' product" (Herr, *supra*, § 21.61, p. 414); (3) the settlement was reached before discovery, where "it may be more difficult to assess the strengths and weaknesses of the parties' claims and defenses…and to consider how class members will actually benefit from the proposed settlement" (Herr, *supra*, § 21.612, p. 416); (4) the settlement is one where "defendants have incentives to restrict payment of claims because they may reclaim residual funds" (*Id.*, § 21.62, p. 420).

All of these red flags are present here. Under the circumstances, the Court should apply heightened scrutiny to the second coupon settlement.

B. The Court Should Refuse To Approve The Second Coupon Settlement Because It Sharply Reduces The Relief Ostensibly Being Provided To Class Members.

Without any acknowledgement or even the slightest explanation, the second coupon settlement slashes the benefits purportedly available to class members from $65 million to $45 million. The reduction results from a decrease in the face value of the coupons from $65 to $45. This amounts to a 30% decrease in the monetary benefits ostensibly being provided to class members under the second coupon settlement.

Inexplicably, the parties contend that it is reasonable for the class to accept $20 million less today than was reasonable just three months ago. The dramatic reduction in the face value of the benefits available to absent class members underscores the inadequacy of the second coupon settlement. It also belies plaintiff's contention that this settlement "provides additional benefits to the class…" (Plaintiff's Mem. In Support of Joint Motion at 6:22-23.) The Court should refuse to approve it.

C. The Court Should Refuse To Approve The Second Coupon Settlement Because The Coupons Are Of Dubious Value.

The parties contend that the second coupon settlement is worth $45 million. However, this valuation is predicated on the assumption that all of the coupons will be used by all class members (*i.e.*, a 100% redemption rate). This assumption is patently absurd and, notably, the parties have failed to submit any declarations attesting to likely redemption rates. Even a cursory review of the settlement terms reveals that the severe restrictions on the use of the coupons renders their value largely illusory.

As a threshold matter, the coupons lack any intrinsic value. The coupons are merely a marketing device for Mercury. They cannot be redeemed for cash; unlike the first settlement, they are not freely transferable and cannot be bought or sold in any market; and they cannot be used to purchase products from multiple vendors. Instead, the coupons may *only* be used to purchase insurance from Mercury.

The courts have refused to approve similar settlements providing coupons to class members that amount to "little more than a sales promotion" for the defendant. (*In Re General Motors Corp. Pick-Up Fuel Tank Products Liability Litigation*, *supra*, at 818-819.) Here, this inherent defect in the coupons is compounded by the extensive restrictions on their use applicable to both former and current policyholders.

1. <u>Former Policyholders</u>

Under the settlement, a former policyholder may utilize the $45 coupon to purchase a new insurance policy from Mercury. However, the coupon will only have value to those former policyholders who would save at least $45 by purchasing a policy from Mercury instead of purchasing a policy from another insurance company.

Moreover, to realize any value from the coupon, the class member would have to enter into a new business relationship with Mercury even though the class member may have chosen not to do business with Mercury in the past. Even where the economic incentive to use the coupon exists and the class member is willing to do business with Mercury, the class member would have to satisfy all of the applicable underwriting requirements to obtain a new insurance policy from Mercury and realize any real benefit from the coupon. The former policyholder must present the coupon to his or her agent or broker, apply for new insurance with Mercury, *and* be accepted by Mercury to utilize the coupon.[1] Unless all of these things occur, the class member will not derive *any* value whatsoever from the coupon. She will receive only a worthless piece of paper in exchange for the release of her claims.

Furthermore, Mercury could attempt to charge a higher premium to offset the discount purportedly received by the former policyholders it accepts. Nothing in the second coupon settlement would restrict Mercury's ability to seek a rate increase in the future. Similar considerations led the court in *Buchet v. ITT Financial Corp.* (D. Minn. 1994) 845 F.Supp. 684, amended 858 F.Supp. 994, FTCR Exhibit 8, to reject a settlement.

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[1] However, the settlement does not preclude Mercury from claiming the class member no longer satisfies underwriting criteria.

2. Current Policyholders

The use of the coupons by current policyholders is also severely restricted. As a threshold matter, the current policyholder would be forced to spend more money through the purchase of additional Mercury auto insurance coverage or a new insurance product in order to use the coupon. Moreover, it is highly likely that the price of additional coverage will substantially exceed $45. In other words, the current policyholder would have to incur an additional expense – perhaps well in excess of $45 – to reap any real benefit from the coupon. Unless the class member has a desire to purchase additional insurance and is willing to purchase that insurance from Mercury, the class member will not realize any economic benefit from the coupon. For such class members, the second coupon settlement would be worthless.

3. Restrictions on Transferability

The limitations on the use of the coupons are further exacerbated by the restrictions on their transferability. The parties have agreed to severely restrict the transferability of the coupons in the second coupon settlement. Under the settlement, the coupons may be transferred only once. More important, they may only be transferred to a class member's spouse, child, or parent.[2] In view of these restrictions, the development of any secondary market for the coupons would be impossible and their economic value quite limited.

4. Inadequate Documentation of Coupon Redemption Rate and Value

There is growing concern among courts, policy makers, and the public that class action settlements involving coupons are improper, and they are now disfavored under federal law. (*See* 28 U.S.C.A. § 1712.) There are two key factors which this Court should consider in determining the adequacy of the second coupon settlement, and on which the parties have provided absolutely *no information*. They are: (1) the likelihood the coupons will be redeemed (*see*, *e.g. Buchet*, *supra*, at 684, 684-86, [rejecting coupon settlement after

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[2] Such a "transfer" to one of these immediate family members would presumably be possible only if they are not already on the same policy.

reviewing redemption rate in a previous case involving the same defendant])[3] and (2) their actual value if redeemed (*id.* at 693 [rejecting the argument of proponents that the court need only look to face value of scrip certificates stating that "the true value of the certificates to the class depends on when the certificates will be used, how they will be used, and who will be using them"].)[4] Courts have criticized and rejected coupon settlements as inadequate and unfair, citing to the low redemption rates and value to defendants as inducements to purchase their own products, among other reasons. (*See Dunk v. Ford Motor Co.*, *supra*, 48 Cal.App.4th 1794, 1805 [stating that "questions arise as to the value of a settlement where…the coupon relates to a 'big ticket item,' is not transferable, represents only a tiny percentage of the purchase price, and is valuable to the defendant as an inducement to promptly purchase the defendant's product"].)

The parties' complete unwillingness to address these issues in their papers is telling. They apparently recognize that the value of the coupons is minimal or non-existent.

Coupon redemption rates generally average in the single digits. (*See*, *e.g.*, Tharin, J. and Blockovich, B., *Coupons and the Class Action Fairness Act,* 18 Geo. Journal of Legal Ethics 1443, 1445 (Fall 2005), FTCR Exhibit 10 [redemption rates of one to three percent]; Judge Thomas A. Dickerson, *Consumer Class Actions and Coupon Settlements: Are Consumers Being Shortchanged?* ADVANCING THE CONSUMER INTEREST (Sept. 2000), p. 6, FTCR Exhibit 11, [redemption rates of two to six percent]). Here, because the

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[3] Because of this potential for low redemption rates in coupon settlements, The National Association of Consumer Advocates (NACA), a well-respected national non-profit organization, has recommended in its guidelines for the settlement of consumer class actions that

> [a] settlement involving certificates should require a minimum level of redemption by the class members within a reasonable period of time.
>
> . . .
>
> [c]lass counsel and defendants should submit to the court and all counsel of record detailed information about redemption rates and coupon transfers during the entire life of the coupon. By doing so, a public record will be made of what works and what does not work in non-cash settlement cases.

(National Ass'n of Consumer Advocates, Standards and Guidelines for Litigating and Settling Consumer Class Actions ["NACA Guidelines"], § 2C, 176 F.R.D. 383 (1998) [a copy of the NACA Guidelines is FTCR Exhibit 9]).

[4] As the NACA guidelines point out, "for most of the class, redemption may not be an option, because they are unwilling or unable to make a future purchase. Thus, the class members are not equally compensated -- some get more, others get less." (NACA Guidelines, § 2B, *supra*, 176 F.R.D. 383.)

coupons are subject to highly restrictive conditions, the rate will be quite low. Indeed, it is probable that redemption rates will be less than two percent.

Thus, it is evident that the coupons will provide only miniscule benefits to a small fraction of the class. The parties cite *Dunk*, *supra*, in support of their motion. However, the court in *Dunk* emphasized the importance of several elements that are missing here: first, there had been "extensive discovery" through which counsel could gauge the strength of their case (*id*. at 1802), a fundamental issue here, as discussed below in greater detail. Second, class certification had been adversarial (*id*. at 1803). Moreover, *Dunk* was a mass tort (product liability) case, and the court opined that "due regard should be given to what is otherwise a private consensual agreement between the parties." (*Id*. at 1801.) This, by contrast, is a case brought under the Unfair Competition Law, which protects both consumers and competition – including other insurance companies that have the right to expect a level playing field – and is therefore imbued with concern for the broader public interest. (*See Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949.)

In sum, the parties have simply not met their burden of demonstrating the fairness, adequacy and reasonableness of the second coupon settlement.

D. The Court Should Refuse To Approve The Second Coupon Settlement Because It Does Not Specify The Content Of The Coupons Or The Details Of Their Distribution.

The parties are asking this Court to approve a settlement in which the entire relief to class members consists of coupons. However, the second coupon settlement agreement does not contain any details on the precise nature or content of the coupons or the proposed manner of their distribution. These are critical issues that the Court must assess in considering the reasonableness of the settlement.

It is obvious that the size, presentation and text of the coupons will have a significant impact on how they are understood and utilized by class members. Similarly, the form of distribution will dramatically impact the utilization rate for the coupons. Thus, the ultimate value of the coupons rests upon details that the parties have failed to consider or address.

The second coupon settlement does not contain any requirements relating to the form of the coupons, that the coupons be mailed first class or that the coupons be accompanied by a cover letter explaining their purpose or the terms on their usage. Unless such reasonable requirements are explicitly defined in the settlement, there is a great risk that the coupons will be viewed and treated as "junk" mail by class members, and be promptly discarded. This is particularly true here because the coupons will not be distributed with the class notice.

Under the circumstances, the Court cannot conclude that the settlement is fair, reasonable, and adequate.

E. The Court Should Refuse To Approve The Second Coupon Settlement Because The Plaintiff Has Not Conducted The Discovery Necessary To Determine The Size Of The Class Or The Amount Of The Overcharges.

The parties have once again failed to substantiate in any way their estimate of the size of the class ("over one million" policyholders between April 20,1997 and December 5, 2005- Plaintiff's Mem., p. 11) or the amount of the overcharges experienced by the class ("in excess of $65 million" [Plaintiff's Memo. In Support of Joint Motion [To Approve First Settlement], p. 6]). There has been no discovery on this (or any other) substantive issue – a red flag that triggers greater judicial scrutiny. There is no indication that an actuary or others with the necessary expertise have independently confirmed these data points. Indeed, based upon a regulatory filing made by Mercury on November 16, 2005 at the order of the Insurance Commissioner, FTCR has calculated that the unlawful surcharge to Mercury policyholders for the first nine months of 2005 *alone* was more than $35 million. (*See* FTCR Exhibit 12 [Filing Memorandum and Persistency Removal Dislocation Exhibit, filed November 16, 2005].) Mercury's filing calls into question the undocumented estimate of $65 million for the entire eight year class period.

The fairness, adequacy, and reasonableness of the proposed settlement cannot be properly assessed by the Court (and members of the class) until the necessary information is provided – for the public record – and has been reviewed by a qualified expert.

F. The Court Should Refuse To Approve The Second Coupon Settlement Because It Does Not Guarantee Any Minimum Payment to the Class.

Under the second coupon settlement, Mercury will retain the value of any unredeemed coupons. There is no provision requiring Mercury to continue to issue coupons until a minimum number are redeemed, or to specify a *cy pres* award to a charitable organization if the total amount of redeemed vouchers falls short of a specified minimum.

Given the combination of a likely low redemption rate and no requirement for the next best use of the funds, it is clear that the principle beneficiary of this settlement would be Mercury. Courts have rejected such settlements. (*See*, *e.g.*, *Sylvester v. Cigna Corp.* (D. Me. 2005) 369 F.Supp.2d 34, 53, FTCR Exhibit 13, [finding that a claims rate of less than 20% combined with a clause permitting the unclaimed funds to revert to defendant "work[ed] in concert to produce a settlement that is unfair, inadequate and unreasonable and that in practice yields comparably little for the Class"]; *Buchet*, *supra*, at 696, as amended 858 F.Supp. 944 [finding settlement unreasonable due to low claims rate and "the lack of any form of guaranteed minimum value"]).

G. The Court Should Refuse To Approve The Second Coupon Settlement Because The Class Notice Is Inadequate.

As drafted by the parties and presented to the Court, the class notice does not advise absent class members of their right to object to the fees requested by plaintiff's counsel. It should include a statement explicitly informing class members that they are entitled to do so. The settlement provides handsome monetary compensation to attorneys who achieved comparatively little benefit for their clients and class members must be adequately informed of their right to contest that fee.

The class notice is also defective in that it states that the $1,575,000 in fees sought by plaintiff's counsel "reflects the benefit Class Counsel conferred on the Class." (Class Notice ¶5b.) There is absolutely no evidence to support this assertion and it is plainly inaccurate. Indeed, the fee requested by class counsel will, in all probability, dwarf any "benefit" conferred on class members.

H. The Class Is Likely to Do Better if this Case Goes to Trial Than Under the Second Coupon Settlement.

There are many serious flaws in the second coupon settlement, as FTCR has demonstrated. *They all proceed, however, from a fundamentally incorrect premise: that Mercury secured regulatory approval for its practice, and that its conduct, though illegal, is thereby immunized from liability.*

Mercury has been asserting this defense for years. In amicus briefs before the Court of Appeal, both FTCR and the Department of Insurance (CDI) disputed Mercury's factual and legal arguments on this point. Plaintiff Donabedian himself solidly rebutted Mercury's legal arguments in his February 2005 Motion for Judgment on the Pleadings.

At the February 27, 2007 status conference, the Court set a schedule for the parties to conduct the discovery related to the factual basis for Mercury's principal defenses. Unfortunately, plaintiff failed to complete any of this discovery on any of the critical issues. Instead, plaintiff elected to negotiate a settlement without engaging in any serious discovery. This fact alone strongly militates in favor of rejecting the second coupon settlement. (*Dunk, supra*, at 1802; *Herr, supra,* at 419; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235.)

Unarmed and unprepared, plaintiff negotiated a settlement that assumes Mercury's defenses are credible. They are not.

First, Mercury's practice was not approved. Pursuant to section 2632.1, et seq. of title 10 of the California Code of Regulations, Mercury is required to submit a "class plan," which contains the list of automobile rating factors Mercury proposed to utilize. As FTCR pointed out in its amicus brief before the Court of Appeal, and the *Donabedian* court confirmed, the official "checklist" filed by Mercury did not disclose to either the Commissioner or the public that Mercury had unilaterally redefined "persistency" so as to penalize the previously uninsured.

Mercury has claimed that members of the Commissioner's staff "suggested" and "encouraged" Mercury to apply its redefinition of persistency. (Defendants' Mem. of Points and Authorities in Support of Joint Motion, pp. 2-3.) Before the Court of Appeal, Mercury provided documents it characterized as orders from the CDI. However, FTCR closely examined these documents, and submitted information, including additional CDI documents, which demonstrate that these documents were drafts, as the Court of Appeal noted. (*See Donabedian* at 993-994.)

Second, there is no "safe harbor" in either the statutes or case law for violation of an express statutory prohibition of Proposition 103. To find a "safe harbor," *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Company* (1999) 20 Cal.App.4th 163 requires that a statute specifically provide one. *Donabedian* confirmed that provisions of the Insurance Code do not address, much less immunize, the conduct challenged here. In *Krumme v. Mercury Ins. Co*. (2004) 123 Cal.App.4th 924, the Court of Appeal eviscerated Mercury's argument that informal and private statements or actions by CDI personnel could constitute a "safe harbor"; *Krumme* states that even "administrative regulations are insufficient to create a safe harbor from UCL liability." (*Id.* at 940, fn. 5, and 946.) An administrative agency simply does not have the authority to *approve* an action that violates a state law; such an approval would be *ultra vires*. (*See*, *e.g.*, *Assoc. for Retarded Citizens v. Dept. of Development Svcs.* (1985) 38 Cal.3d 384, 391; *AICCO v. Insurance Company of North America* (2001) 90 Cal.App.4th 579.)

As for the administrative estoppel argument put forward on behalf of Mercury, that doctrine only bars an agency from contradicting itself. (*See* 11 Witkin, Summary of California Law (9th Edition, 1990) Equity, § 182, p. 864; § 177, pp. 858-859.) *It does not apply to bar the claims of innocent third parties, such as the class.* (*Id*. at § 177, p. 859.) Even if the court were to apply it to the class, Mercury bears the burden of showing that the CDI had actual knowledge of Mercury's unlawful practice, issued its approval of Mercury's practice with the intent to induce Mercury to commit the unlawful practice, and that Mercury had no knowledge that the practice was unlawful. (*Ibid*.) Mercury has offered no evidence to meet its burden, and the appellate record here strongly suggests it cannot. But even if Mercury did, "there can be no estoppel where it would defeat operation of a policy protecting the public" (*id*. at §183, p. 864) or where the action was beyond the agency's power (*id*. at §184, p. 866). Both conditions apply here.

Indeed, in the recent case of *Feduniak v. California Coastal Com'n*., the Court of Appeal discussed the doctrine of administrative estoppel in detail. That opinion makes clear that Mercury cannot prevail on its estoppel argument here. (*Feduniak v. California Coastal Com'n.* (2007) 148 Cal.App.4th 1346).

III. CONCLUSION

FTCR understands litigation risk and would not object to a reasonable settlement involving compromise by the class in order to resolve this case. But real harm has been done here. A statute has been flouted. The victims of Mercury's practice are out of pocket real money. After six years of continuous litigation, Mercury has failed in its efforts to defeat this suit. Yet this settlement would give Mercury the victory that has eluded it in the courts.

While the proposed release has been narrowed, the defects in the second coupon settlement remain numerous and profound. The use of coupons to extinguish the claims of thousands of class members is neither good for the class nor for public policy. The parties have not met the high burden of justifying their use. The actual value of the second coupon settlement to the class is likely to be, at best, a miniscule fraction of the parties' own unsubstantiated estimate of the overcharges. To the extent the coupons are redeemed, the conditions of their use transform the class relief here into a marketing bonanza for Mercury. And any relief not utilized remains in the coffers of the company, a further windfall.

For all of these reasons, the second coupon settlement is not fair, adequate and reasonable, and should be rejected.

Dated: May 2, 2007

FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS

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