SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

ROBERT KRUMME, on Behalf of the General Public, Plaintiff, v. MERCURY INSURANCE COMPANY; MERCURY CASUALTY COMPANY; CALIFORNIA AUTOMOBILE INSURANCE COMPANY, Defendants.	No. 313367 **FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER TRIAL**

The Court conducted trial of this case, sitting without a jury, beginning on July 15, 2002 and continuing through July 18, 2002. The Court has received, read, and considered all of the evidence, including testimony and exhibits, and all briefs and arguments of the parties. The Court finds the following facts and renders the following conclusions of law. If any of the following findings of fact is more properly considered a conclusion of law, it will be so considered, and any conclusion of law more properly considered as a finding of law shall be so considered. All citations to evidence are included solely for convenience, and all evidence in the record supporting the fact shall be considered in support of each cited fact, regardless of whether cited.

FINDINGS OF FACT

The Court finds the following facts:

1. Defendants Mercury Insurance Company, Mercury Casualty Company and California Automobile Insurance Company, are corporations admitted to write insurance in

California and are referred to collectively as "Mercury."

2. Mercury sells personal lines automobile insurance to California residents through independent insurance producers who can place insurance with more than one insurance company, acting as either agent or broker. (Trial testimony ("T.T.") 91: 7-13; 93:14-94:4; 119:18 – 123:12; Plaintiff's exhibits 7-12, 19, 21-23, 25, 27-31, 42, 46-61, 64-68.)

3. Mercury does not "direct write" personal lines automobile insurance by selling to the public through its own employees; nor does it sell through "captive" or "exclusive" agents (as does State Farm, for example). (T.T. 119:18-123:12; T.T. 156:24-28; Plaintiff's exhibits 7-12, 19, 21-23, 25, 27-31, 42, 46-61, 64-68.)

4. Mercury only sells its personal lines automobile insurance through California insurance agents and brokers who have entered into written producer contracts with Mercury. (T. T. 112:8-16; 113:23-114:14; Plaintiff's exhibits 2 and 5.)

5. Mercury currently has over 100 formally appointed insurance agents in California who sell Mercury's personal lines auto insurance for whom Mercury has filed "Action Notices" with the State Department of Insurance (SDI) pursuant to Insurance Code section 1704(a). (T.T. 98:14-99:2; 103:20-25; Plaintiff's exhibit 25.)

6. Mercury currently has between 750 and 800 "brokers" in California who sell Mercury's personal lines auto insurance whom Mercury has not appointed as insurance agents by filing "Action Notices" with the SDI pursuant to Insurance Code section 1704(a). (T.T. 98:14-99:2; Plaintiff's exhibit 25.)

7. Mercury wants to have and has cultivated stable, long-term relationships with its "brokers" as well as its agents. (T.T. 119:2-12.)

8. From Mercury's founding in 1962 until 1989, Mercury sold its personal lines auto insurance in California only through agents whom Mercury formally appointed and for whom it filed "Action Notices" with the SDI pursuant to Insurance Code section 1704(a). (T.T. 325:9-326:2; Plaintiff's exhibit 4.)

9. Each of Mercury's appointed agents has or had an "Agency Contract" in the form of Plaintiff's Exhibit 5, which provided among other things that the "[a]gent is authorized to

represent the above company for the classes of risks indicated below and receive commissions at the rate shown." (T.T. 299:2 – 304:23; Plaintiff's exhibit 5.)

10. Beginning in 1989, Mercury converted approximately 700 Mercury Casualty Company agents to "broker" status, none of whom objected, and terminated their former agents' section 1704(a) agency appointments. (T.T 327:1-328:23; Plaintiff's exhibits 15-18.)

11. In 1989, Mercury prepared a "Producers Contract" for use in its "brokerage relationships" by changing terms in its Agency Contract from "agency" and "agent" to either "producer" or "broker." Since 1989, Mercury's changes to the original "Producers Contract" form have been insubstantial or imposed greater burdens on brokers than on agents, such as the prohibition on sale of brokerage stock, with no such prohibition for agents seeking to sell their agency. (T.T. 181:3-21; 301:7-309:9; Plaintiff's exhibits 2-6.)

12. From 1989 to the present, Mercury's has required all brokers who sell Mercury personal lines auto insurance to have a "Producers Contract" with Mercury in the form of Plaintiff's exhibits 2, 3, and 4. All of these contracts have provided that "[t]he Producer is authorized to represent the Companies below for all classes of risks indicated and receive commissions at the rates shown, except for commission rates on certain classes of risks designated in the producers manual." (T.T. 299:2-304:23; Plaintiff's exhibits 2-4.)

13. The primary advantage to a producer to having a "broker" agreement with Mercury rather than an agency agreement is the perceived ability to charge broker fees, and there is no advantage to an agency agreement over a "broker" agreement. (T.T. 335:11-23; Plaintiff's exhibits 2, 5-12, 40-43.)

14. Mercury has not formally appointed any "brokers" by filing "Action Notices" with the SDI pursuant to Insurance Code section 1704(a). (T.T. 310:16-19; Plaintiff's exhibits 7-12.)

15. Since at least July 1, 1996 to the present, Mercury "brokers" have had the same authority to bind coverage for Mercury's personal lines auto insurance as Mercury's agents, and their binding authority and procedures are identical to those of the Mercury "agents," with the one exception that for California Automobile Insurance Company, the producer must obtain electronic confirmation from Mercury before binding. (T.T. 103:15-19; 111:9-12; 111:17-

112:7; 308:27-309:9; 339:8-23; 340:5-342:20; 343:10-26; Plaintiff's exhibits 2, 5-7, 8-12, 17 (admission 9).)

16. Since at least July 1, 1996 to the present, both agents and "brokers" alike selling Mercury personal lines have had access to Mercury's complete underwriting guidelines. (Plaintiff's exhibit 17 (admission no. 7); Plaintiff's exhibits 7, 8.)

17. Since at least July 1, 1996 to the present, both agents and "brokers" alike selling Mercury personal lines have had access to Mercury's complete rating guidelines. (Plaintiff's exhibit 17 (admission no. 8); Plaintiff's exhibits 7, 8.)

18. Since at least July 1, 1996 to the present, Mercury "brokers" and agents alike have used and been required to abide by the same Mercury underwriting manuals when selling Mercury insurance. These documents are called "Agent/Broker" manuals and are provided to both agents and brokers alike. (T.T. 103:15-19; 111:9-12; 111:17-112:7; 339:8-23; Plaintiff's exhibits 7, 8.)

19. Since at least July 1, 1996 to the present, the Mercury "brokers" and "agents" have all been required to use blank Mercury application forms and to follow Mercury's application submission procedures to sell Mercury insurance. (T.T. 103:15-19; 111:9-12; 111:17-112:7; 339:8-23; Plaintiff's exhibits 7-12.)

20. Since at least July 1, 1996 to the present, Mercury agents and brokers all have had the same authority to issue financial responsibility certificates in Mercury's name, to issue endorsements to insurance policies, and to issue insurance identification cards, signifying that consumers are Mercury's insureds. (T.T. 111:9-12; Plaintiff's exhibits 7-12; 17 (admission 6).)

21. For Mercury, and for the personal lines insurance market in general, independent agents and independent brokers provide the same services to prospective insurance customers regardless of whether the customer ends up purchasing insurance from a company for which the producer is an appointed agent, or a company for whom the producer acts as a broker. Presently in this market there is no set of "broker services" that is more likely to be provided by a producer acting as an independent broker than by a producer acting as an independent agent. (T.T. 158:2-10; 160:25-169:18; 172:19-173:8; Plaintiff's exhibit 27-29.)

22. Mercury knowingly permits both its agents and its "brokers" to advertise to the public that they "represent" Mercury. (T.T. 108:8 – 110:20; 124:25 – 128:7; Plaintiff's exhibits 31, 61.)

23. Mercury authorizes its "brokers" to use Mercury's name and logo to the same extent as its agents, including displaying Mercury's name and logo on building signs and in offices and using Mercury's name and logo on business stationery and cards. (T.T. 110:12-13; Plaintiff's exhibits 23, 31, 61.)

24. Mercury allows agents and "brokers" alike to be placed on the "Agent Locator" page on Mercury's internet web site, and to participate in Mercury's direct mail campaigns. (T.T. 124:25-128:7; 348:5-354:1; Plaintiff's exhibits 31, 46-59, 61.)

25. Mercury exercises control over advertisements by "brokers" by requiring approva of any agent or "broker" advertising using the Mercury name or logo. In this approval process, Mercury reviews not only the form and placement of Mercury's name and logo but also the regulatory compliance and accuracy of the advertising copy. (T.T. 102:16-22; 311:6-28; 313:13-27; 324:14-28; Plaintiff's exhibits 2-5; 7, 8, 55, 59.)

26. Mercury sources customer leads for agents and "brokers" alike through print, broadcast and direct mail advertising, the Mercury website, and Yellow Pages Advertising. (Plaintiff's exhibits 13-14, 21-22, 46-49, 54, 56-59.)

27. Mercury exercises control over its "brokers" and agents alike by disciplining them for failing to follow Mercury's rules and regulations, violating the law, and/or inadequate production by warning and suspending them, and in some cases exercises its power to terminate them. (T.T. 344:12-346:20; 385:1-8; Plaintiff's exhibit 15 (response nos. 11, 12, 14).)

28. Mercury considers itself liable for its "brokers'" conduct when the brokers act on Mercury's behalf. (T.T. 110:18-19.)

29. Mercury has marketing representatives who periodically visit, monitor and supervise both Mercury's agents and brokers on behalf of Mercury. The marketing representatives review the producers' production, compliance with Mercury's rules and regulations, the professionalism of their agencies, and their compliance with law. (T.T. 101:21-

102:14; 111:13-16; Plaintiff's exhibits 7, 8, 46-60.)

30. Mercury provides the same training to its agents and "brokers" alike. (T.T. 110:21-23.)

31. Mercury provides the same periodic bulletins and updates to its agents and "brokers" alike. (T.T. 110:24-111:8; Plaintiff's exhibit 55.)

32. Mercury secures volume commitments from its agents and "brokers" alike and terminates both for inadequate production. (T.T. 116:2-117:2; Plaintiff's exhibit 15 (Responses 11, 13).)

33. There are no differences between Mercury's agents and "brokers" regarding the application process to become a Mercury producer. (T.T. 118:26-119:1).

34. Mercury exercises control over the charging of broker fees by its appointed agents and will discipline them if discovered, but does not attempt to exercise the same control over "brokers." (T.T. 346:21-348:2.)

35. Mercury's cooperative advertising program originates sales leads for its agents and "brokers." This program consists of print and broadcast media as well as direct mail. (T.T. 103:15-19; 124:25-128:7; 348:5-354:1; Plaintiff's exhibits 13, 14, 46-61).

36. Mercury has written contracts with both its agents and brokers to govern their participation in Mercury's cooperative advertising programs. (Plaintiff's exhibits 13, 14, 46, 54.)

37. Mercury's print and direct mail cooperative advertising programs include comparisons of its insurance rates with those of other insurance companies. These rate comparison advertisements are published to the California public through print media. (T.T. 124:25-128:7; 348:5-349:26; Plaintiff's exhibits 21-23, 46 – 61.)

38. Mercury runs these print comparative rate advertisements in various newspapers approximately two to three times per month in each paper. Mercury often places these ads in newspapers with a large circulation such as the *Los Angeles Times* and the *San Diego Tribune* (T.T. 121:7-124:6; 348:12-349:20; 386:12-23.)

39. Mercury's comparative rate advertising programs typically include an "800" telephone number and invite the prospect to respond by telephoning the number. (T.T. 125:28-

126:14; 348:5-19; 353:17-19; Plaintiff's exhibit 22.)

40. Agents and brokers who participate in Mercury's comparison rate advertising are asked to sign agreements to refund or rebate broker fees collected on leads generated from the programs. (T.T. 351:4-353:10; Plaintiff's exhibits 13, 14, 54, 58.)

41. Mercury does not place in its rate comparison advertisements any statement that producers may add broker fees to the premiums shown in the rate comparisons. (T.T. 351:4-352:1; Plaintiff's exhibits 14, 17 (admission 14), 22, 54, 58.)

42. Mercury targets its print comparative rate advertising programs against its direct writer and captive agent insurance company competitors, including State Farm, Farmers, 21st Century, CSAA, Southern California Auto Club, and GEICO. (T.T. 349:28-350:4; Plaintiff's exhibit 22.)

43. Mercury is the only company listed in its comparative rate advertisements whose producers may charge a broker fee in addition to the premium because the direct writer and captive agent insurance company competitors do not use brokers. (T.T. 121:7-11; 349:28-350:4; Plaintiff's exhibit 22.)

44. Mercury employs comparative rate advertising to capture market share from direct writer insurance companies and captive agent insurance companies, where no broker fees are charged. (T.T. 119:25-123:11; Plaintiff's exhibits 14, 54, 58.)

45. The addition of a broker fee to a rate comparison may often have a material effect on the comparison by rendering the cost of Mercury insurance (including the broker fee) higher than the cost of the direct writer and captive agent companies included in the comparison ads. (T.T. 70:7-71:1; 350:7-24; 354:21-359:8.)

46. Mercury is aware of, and concerned about, misleading the public with its comparative rate print advertisements, when broker fees are added to the advertised premium at the point of sale. (T.T. 348:5-354:1; Plaintiff's exhibits 14, 54, 58.)

47. Mercury has not established any system to discover or monitor whether "brokers" who participate in cooperative rate advertising are indeed not charging such fees, and has no way of knowing whether such fees are being charged. (T.T. 353:11-354:1; 383:7-384:9.)

48. There are instances where a caller responding to an advertised Mercury 800-telephone number was told he would be charged a broker fee. (Plaintiff's exhibit 20 (exhibit 2 at p. 2).)

49. Mercury's submits its insurance rates and premiums to the California Department of Insurance ("SDI") for pre-marketing approval. (T.T. 408:13-18; Plaintiff's exhibits 11, 13, 14.)

50. Mercury does not submit the "broker fees" charged by charged by "brokers" who sell Mercury personal lines auto insurance to the SDI for approval as rates or premiums, and the SDI has not approved these fees under its rate approval authority. (T.T. 76:25-28; 335:27-336:5; Defendants' exhibit 14; Mercury Defendants' Pretrial Statement, 7:23-8:5 (¶4).)

51. It would be extremely difficult to ascertain the amount of compensation, which would afford adequate relief at law to members of the General Public for the ongoing violations, found above.

52. Equitable relief is necessary to prevent a multiplicity of lawsuits to redress ongoing violations of the violations found above.

53. A relatively small percentage of the total number of Mercury's "brokers" charge broker fees. (T.T. 69:21-27; 354: 10-12)

54. Mercury contends that the charging of broker fees is contrary to its financial interests. (69:1-3; 70:10-71:16; 354:25-355:10; 560:3-10; Mercury Defendants' Pretrial Statement, Undisputed Fact No. 35, 16:7-12.)

55. Mercury contends that prohibiting its "brokers" from charging broker fees for placing Mercury insurance would benefit Mercury and would not result in financial hardship for Mercury. (T.T. 70:10-71:16; 560:3-10, Mercury Defendants' Pretrial Statement, Undisputed Fact No. 35, 16:7-12.)

56. Mercury has exercised and exercises substantial control over its independent producers, most of whom are small businesses, in structuring and administering its relationships with them. (T.T. 99:3-102:22; 110:12-111:16; 113:23-115:11; 115:17-119:17; 313:13-315:4; 338:7-18; 344:7-345:25; 385:1-8.)

57. Mercury's producers have historically consented to changes in agent and broker status without objection. (T.T. 328:4-23; 329:8-330:17.)

CONCLUSIONS OF LAW

The Court concludes as follows:

1. The Insurance Code has defined the term "insurance agent" as "a person authorized by and on behalf of an insurer to transact all classes of insurance, except life insurance." (Insurance Code §1621; see also §31). The Insurance Code has defined the term "insurance broker" as "a person who, for compensation and on behalf of another person, transacts insurance other than life insurance with, but not on behalf of, an insurer." (Insurance Code §1623, see also §33). The leading case recognizing the legal distinction between these two entities is Marsh & McLennan v. City of Los Angeles (1976) 62 Cal.App.3d 108, where the court held that only insurance agents possess the authority to bind the insurer to coverage. Id., at 117-119. While the decision of Marsh & McLennan was decided before the enactment of Proposition 103 in 1988 and involved commercial insurance issues, the decision is relied upon by the State Department of Insurance (SDI) as the "current California case law" distinguishing the role of an "agent" and a "broker" in personal insurance lines. (PX 41, pp.19-20)[1] The views of the SDI are entitled to deference. (Trial Testimony [TT] 63:26—64:1; 547: 21-24).

2. From at least July 1, 1996 to date, the producers denominated as "brokers" pursuant to producers' contracts with Mercury Insurance Company, Mercury Casualty Company, and California Automobile Insurance Company have transacted insurance within the meaning of Insurance Code §35 on behalf of these insurance companies in placing personal lines automobile insurance with these companies. The relationship between these "brokers" and Mercury is

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[1] The defendant naturally challenges the Court's reliance on Marsh & McLennan as relevant authority in this legal analysis. The decision is not limited to an insurance industry existing in California before Proposition 103 was enacted. It continues to serve as the legal measure for the distinction between an agent and a broker even today, perhaps to the chagrin of the defendant. Loehr v. Great Republic Insurance Co. (1990) 226 Cal.App.3d 727, 734; Couch on Insurance §45:4 fn. 33 (3d. Edition 2003); California Practice Guide: Insurance Litigation (Rutter Group) ¶¶ 2.4, 2.8 (2001); Di Mungo & Glad, California Insurance Law Handbook §4.01 (2002).

functionally indistinguishable from the relationship between Mercury and its agents whom Mercury has formally appointed by filing Action Notices with the State Department of Insurance pursuant to Insurance Code §1704(a).

3. This notice requirement pursuant to §1704(a) is significant. The section applies to "every applicant" who is an agent for insurer dealing in life, fire and casualty, or travel insurance with a particular insurer. It is the prerequisite for the "agent" to act for a particular insurer and remains in effect if a date for cancellation is stated in the notice or there is a subsequent filing for termination. The filing of notice under §1704(a) is within the realm of Mercury's responsibility as an insurer. See testimony of Bruce Norman, T.T. 388:2-9; 105: 3-22; 387: 11-15. Mercury acknowledges it has a legal duty to file such notices in this regard. (P.E. 44). This requirement is designed to protect insureds that rely on the "agent's" relationship with the Insurer so that the Insurer is bound by the acts of those identified in the §1704(a) notice. Ins. Code §1731; Loehr v. Great Republic Ins. Co. (1990) 226 Cal.App.3d 727, 732-733.

4. Because these "brokers" have transacted, and do transact, insurance on behalf of Mercury, they cannot be considered "insurance brokers" for licensing purposes within the meaning of Insurance Code §1623 and are instead "insurance agents" within the meaning of Insurance Code §1621.

5. The substance of the activities and relationships between Mercury and its "brokers" is controlling, and not the name "broker" that the parties to the producers' contracts have used to describe their relationship. Carlton v. St. Paul Mercury Ins. Co. (1994) 30 Cal.App.4th 1450, 1457; Maloney v. Rhode Island Ins. Co. (1953) 115 Cal.App.2d 238§. "The law respects form less than substance." (Civil Code § 3528.)

6. The Court specifically rejects Mercury's contention that under current law, a "producer" may be both "agent" and "broker" under existing licensing law in California, the equivalent of a dual agent. Rather, dual agency for licensing purposes is permitted only in a very limited context, the authority to collect premiums and deliver policies. See Insurance Code §1732; Maloney v. Rhode Island Ins. Co. (1953) 115 Cal.App.2d 238, 244-245 (Peters J.) The purpose of this safe harbor is to maintain the broker-agent distinction while at the same time

protecting insureds. It is not a device to confuse the established legal distinction between a "broker" and an "agent" so clearly announced in §1621 and §1623 of the Insurance Code. Any other contention that the "dual agency" notion is a tacit override of the restrictions legislatively created by §1621 and §1623 must be discounted in light of the clear mandate articulated in these legal standards. Indeed, the record in this case establishes the Department of Insurance has operated on the generally principal that §§ 31 and 33, and §§1631 and 1632 have continuing application to insurance agents and brokers generally. (See PX 20, Tab 5, pp. 2-3; PX 33, pp. 16-17; and PX 38). [2] The record also indicates that the Department has considered the application of these same principals in its Notice of Noncompliance and letter from Elizabeth Mohr, Senior Staff Counsel of the Department of Insurance, dated January 21, 2000, to the very defendants in this case. (DX 9).[3] From at least July 1, 1996 to date, the "brokers" have transacted insurance on behalf of Mercury outside the limited scope permitted by Insurance Code section 1732.

7. Plaintiff has rebutted the presumption under Insurance Code §1623 that the "brokers" are brokers for licensing purposes by virtue of their designation as such in the applications for insurance submitted to Mercury. Plaintiff has shown that the "brokers" have in fact acted since July 1, 1996 as "insurance agents" on behalf of Mercury within the meaning of Insurance Code §1621 and continue to so act.

8. The Court construes Insurance Code §1704(a) to require each insurance company who wishes to transact insurance in California to file Action Notices with the California State Department of Insurance for all "fire and casualty broker-agent" licensees who act in the capacity

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[2] As PX 38, a letter by Tim Hart of the Department dated April 5, 2000, points out, the Department of Insurance opposed AB 2639 because it would "blur the legal distinction between agent and broker" that existed in the law and hence become "anti-consumer." In a letter dated November 6, 1997, Jon Tomashoff, legal counsel for the Department of Insurance, wrote "In certain cases, an *agency* relationship may exist in fact, but not in name. Such a *de facto* agency might occur where the insurer, either intentionally or negligently, has failed to file an *action notice* for one, some or all of its producers, yet treats those producers---and the producers themselves act---as agents." (emphasis in original) (PX 33, p.16)

[3] In her letter accompanying the Notice of Noncompliance to Mercury CEO George Joseph Elizabeth Mohr of the Department alleges the practices of Mercury producers suggests they are operating as "de facto" agents of Mercury. (DX 9).

as an "insurance agent" on the company's behalf within the meaning of Insurance Code section 1621. This construction is the most consistent with the language of Section 1704(a), and with the statute's purpose, which is to ensure that each such insurance company publicly identifies the broker-agent licensees acting on its behalf as a public acknowledgment of the company's liability for the errors and omissions of the licensee. By its operative language, §1704(a) merges the role of "broker-agent" only in the limited arena of "fire and casualty." The Legislature expressly left untouched the broader statutory distinctions and regulatory effect of §1621 and §1623 in other forms of insurance policies when it amended §1704(a).

9. The consolidation of the broker-agent license in 1990 and the subsequent amendments to Insurance Code sections 1625 and 1625.5 did not abolish the requirement that insurance companies file Action Notices pursuant to section 1704(a) for all Fire and Casualty licensees acting as an agent on behalf of an insurance company. Specifically, the only change to the Insurance Code generated by the 1990 amendment to §1625 that is significant to this case is the Legislature combined what was formerly separate licenses for the Fire and Casualty agent and broker into one Fire and Casualty broker-agent license. This combination was adopted by the Legislature because it believed the customer for such policies could tell if he was dealing with an agent or broker based on whether the producer possessed the authority to bind the insurer to coverage with the customer. If the producer did possess authority to bind, the customer knew the producer was acting in his capacity as an agent. (Plaintiff Exhibit 43). This strongly suggests the Legislature was otherwise concerned with maintaining the agent-broker distinction, not canceling it.

10. The additional enactment of §1625.5 only created a sub-license to the Fire and Casualty broker-agent license called a "Personal-Lines" License.

11. The 1996 amendment of Insurance Code section 769 was not intended to abolish the requirement of Insurance Code section 1704(a) that insurance companies file Action Notices for all broker-agent licensees who are acting in the capacity of an insurance agent.

12. From January 1, 1996 to date, Mercury has violated and continues to violate the letter, policy, and spirit of section 1704(a) by not filing Action Notices for "brokers" selling

Mercury personal lines auto insurance because the "brokers" were and are acting in the capacity of insurance agents on Mercury's behalf within the meaning of Insurance Code section 1621.

13. "Insurance agents" within the meaning of Insurance Code section 1621 have been and are legally prohibited from charging "broker fees" for the placement of personal lines auto insurance. "Broker fees" may only be charged by broker-agent licensees who act in the capacity of an insurance broker within the meaning of Insurance Code section 1623 in transacting insurance with respect to the insurer with which the coverage is placed. (Defendant' exhibit 1; 10 C.C.R. § 2189.3.)

14. From at least July 1, 1996 to date, "brokers" have charged and continue to charge "broker fees" to consumers on the sale of Mercury personal lines auto insurance. (10 C.C.R. 2189.2(a).)

15. In charging these broker fees, the brokers were acting and act in the course and scope of their agency in transacting insurance as "insurance agents" on behalf of Mercury. (Icasiano v. Allstate Ins. Co. (N.D. Cal. 2000) 103 F.Supp.2d 1183, 1190; Lippert v. Bailey (1966) 241 Cal.App.2d 376.)

16. The charging of these "broker fees" violated and still violates the letter and spirit of the broker fee regulations, 10 C.C.R. sections 2189.1 et seq., and of the common law as interpreted by the SDI under Bulletin 80-6. (Defendants' exhibit 1; 2.) To lawfully charge a broker fee, the broker-agent licensee must be acting in the capacity of an insurance broker within the meaning of section 1623 in transacting insurance with respect to the insurer with whom the coverage is placed. (Defendants' exhibit 1, 2; 10 C.C.R. § 2189.3.) Here, the "brokers" were acting and do act in the capacity of an insurance agent on behalf of Mercury when transacting Mercury insurance, and therefore not in the capacity of an insurance broker. (Ins. Code § 1623.) The filing of an action notice under section 1704(a) establishes that the broker-agent licensee is acting in the capacity of an insurance agent in placing insurance with the insurer by whom the notice is filed, and therefore not in the capacity of an insurance broker. (Ins. Code § 1731.) "That which ought to have been done is to be regarded as done, in favor of him to whom, and against whom, performance is due." (Civil Code § 3529.) Here, Mercury should have filed

action notices for its "brokers." Its failure to do so violated and violates the spirit and policy of the common law of agency (Defendants' exhibit 1, 2), and of 10 C.C.R. § 2189.3.

17. Mercury is vicariously liable under the UCL for these past and ongoing violations of the broker fee regulations and the common law by its "broker" agents. The "brokers" charged and charge these "broker fees" in the course and scope of transacting insurance on behalf of Mercury, and therefore in the capacity of insurance agents within the meaning of section 1621 on behalf of Mercury. (Chern v. Bank of America (1976) 15 Cal.3d 866; (People v. Superior Court (Jayhill) (1973) 9 Cal.3d 283; General Nutrition Corp. 2000 FTC LEXIS 36, 44; (Southwest Sunsites, Inc. (1985) 105 FTC 37, 355-356, 1980 FTC LEXIS 86, *aff'd* (9th Cir. 1986) 785 F.2d 1431.) "He who can and does not forbid that which is done on his behalf, is deemed to have bidden it." (Civil Code § 3519.)

18. From at least July 1, 1996, Mercury has engaged and continues to engage in false advertising in violation of Business & Professions Code sections 17200 and 17500 by advertising rate comparisons without disclosing that broker fees may be added in addition to the premium advertised. These advertisements were and are likely to deceive consumers because undisclosed broker fees that materially affect the cost of the insurance and adversely affect the comparison of Mercury's rates with those of the quoted competitors may be added at the time the consumer purchases Mercury insurance. (Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 211; Day v. AT&T Corp. (1998) 63 Cal.App.4th 325, 331-332.)

19. Mercury's affirmative defense that plaintiff's claims are subject to the exclusive jurisdiction of the State Department of Insurance is without merit. (Insurance Code §§ 1860.1, 1860.2.) None of plaintiff's claims challenges any rate or premium which Mercury submitted to or obtained approval from the State Department of Insurance or seeks to enforce any provision of Insurance Code section 1861.1 et seq. (Compare Walker v. Allstate Indemnity Co. (2000) 77 Cal.App.4th 750,.) Accordingly, exclusive jurisdiction is not a defense. (Quelimane Co., Inc. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 45-46.); Spielhotz v. Superior Court (2001) 86 Cal.App.4th 1366, 1375.) Indeed, Walker recognized the continuing application of the Unfair

Competition Law as to insurers except in the area of ratemaking. Walker at 77 Cal.App.4th 758-759.

20. The pleadings of plaintiff do not challenge any premium or rate defendant submitted to the Department of Insurance. It does not seek enforcement of any provisions of Insurance Code §§ 1861.1 *et.seq.* Yet, defendant contends this Court lacks jurisdiction to proceed and that the Insurance Commissioner has primary jurisdiction over plaintiff's contentions. Central to this issue is the case of Farmers Insurance Exchange v. Superior Court (1992) 2 Cal.4th 377. This involved a specific challenge to the rates under Insurance Code §§ 1861.02 and 1861.05 and also incorporated these sections into a violation of Business & Professions Code § 17200, the applicable statute in this case. Essentially, the majority in Farmers found the Insurance Commissioner had primary jurisdiction over both causes of action because each theory focused on the particular rate provisions of §§ 1861.02 and 1861.05. However, on the issue of primary jurisdiction, the Court noted the limits, not the exclusivity, of the doctrine. "Thus, there is nothing from which we can conclude that the Legislature intended to preclude a court presented with a suit under the Unfair Practices Act from exercising discretion under the primary jurisdiction doctrine, in situations in which the practice challenged is one over which an administrative agency may also exercise jurisdiction." Id. at 395. See also id. at 394. The test is what is alleged in the plaintiff's complaint. Id. at 397-398.

21. A review of plaintiff's Third Amended Complaint discloses the allegations under § 17200 focus on the relationship Mercury producers have with the defendant. It alleges that the defendant has fostered this relationship without complying with § 1704 of the Insurance Code. As a result, Mercury is engaging in unfair, unlawful, and fraudulent business practices. The contentions found to be true by this Court, are not anchored in rates as opposed to relationships that generate the violation of Business and Professions Code § 17200.

22. Because this case involves, essentially, unfair practices by the defendant that affect competitors and consumers generally, it is a matter that can be handled by a court without initially deferring to the Insurance Commissioner. As Justice Powell noted in a case analyzing primary jurisdiction vis-à-vis the Civil Aeronautics Board, "the action brought by petitioner does

not turn on a determination of the reasonableness of the challenged practice, a determination that could be facilitated by an informed evaluation of the economics or technology of a regulated industry. The standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case." Nader v. Allegheny Airlines Inc. (1976) 426 U.S. 290, 305-306. See also Cundiff v. G.T.E. California Inc. (2002) 101 Cal.App.4th 1395, 1406-1407.

23. It is also significant that the Insurance Commissioner previously initiated some administrative review of defendant's relationship with its "producers." At best there is a dispute of viewpoints among the parties why Commissioner Quackenbush aborted the Department's Noncompliance inquiry. There appears no need to suspend the judicial process to have the Department revisit the matter. No effort was made to refer this matter to the Commissioner before the trial and no need for the technical expertise of the Department has been demonstrated. See Cundiff, supra., 101 Cal.App.4th at 1409-1411; State Farm Fire & Cas. Co. v. Superior Court (1996) 45 Cal.App.4th 1093, 1112 (disapproved on other grounds in Cal-Tech Communications Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 187); Tenderloin Housing Clinic v. Astoria Hotel Inc. (2000) 83 Cal.App.4th 139, 142-143. Further delay in judicial resolution of the issues in plaintiff's complaint, especially after this trial and briefing schedule, is not needed.

24. It is immaterial to Mercury's liability in this case that it did not actually receive the "broker fees." Under section 17200, the test of liability is whether Mercury engaged in unlawful, unfair or fraudulent business practices. (Bus. & Prof. Code § 17200.) Mercury need not directly benefit in order to be held liable under this statute. Nevertheless, there is evidence in the record that even though Mercury did not directly receive the fees, Mercury perceives some business advantage and therefore a benefit in the charging of "broker fees" by its "broker" agents. (Plaintiff's exhibit 20 (contesting SDI's Draft Notice of Non-compliance); Plaintiff's exhibit 34 (sponsorship of bill to amend Insurance Code section 1623 to legalize broker fees); Plaintiff's exhibit 42 (organization of "broker" agents to oppose broker fee regulation) T.T. 356:4-359:18.)

Further, Mercury is deemed by operation of law to have constructively received the "broker fees." (Lippert v. Bailey (1966) 241 Cal.App.2d 376; Good v. Prudential Insurance Company of America (N.D. Calif. 1998) 5 F.Supp.2d 804, 807-08.) The issue of constructive as opposed to actual receipt is more appropriately addressed to the remedial aspect of the case.

25. Mercury's argument that the Legislature's consolidation of the "broker-agent" license in 1990 by amending Insurance Code section 1625 abrogated the distinction between "broker and agent" in personal lines insurance is without merit. Section 1704(a) and the broker fee regulations continue to depend on distinctions between the "capacities" of an agent vis a vis broker, which are in turn defined by sections 1621 and 1623. These distinctions continue to be viable and necessary for determining the insurers' vicarious liability for producer errors and omissions and the legality of broker fee charges. Neither Insurance Code sections 769, 1625, nor 1625.5 bear on these issues, and neither section 1861.02(b) nor any of the other provisions of Proposition 103 changed this aspect of the insurance licensing law.

26. The Court adopts these findings of fact and conclusions of law, after full consideration of the respective arguments advanced by each of the parties, including amicus curiae. This decision of the Court is made after considering the appropriate burden of proof that the plaintiff has, after reviewing all relevant exhibits, and considering the legal authorities in this matter.

Dated: April 11, 2003

Robert L Dondero

Judge of the Superior Court

ROBERT L. DONDERO

SUPERIOR COURT OF CALIFORNIA
County of San Francisco

ROBERT KRUMME, ET. AL.

Plaintiff(s)

vs.

MERCURY INSURANCE COMPANY, ET..AL.

Defendant(s)

Case Number: 313367

CERTIFICATE OF MAILING
(CCP 1013a (4))

I, MARILYN L. FLORES, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On APRIL 11, 2003 I served the attached FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER TRIAL by placing a copy thereof in a sealed envelope, addressed as follows:

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and, I then placed the sealed envelopes in the outgoing mail at 400 McAllister Street, San Francisco, CA. 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practices.

Dated: APRIL 11, 2003

GORDON PARK-LI, Clerk

By: _____

MARILYN L. FLORES, Deputy Clerk