Venue Fight for Insurance Disputes Pits Activists, Regulator Against Insurers
At Issue Is Ruling That Keeps Rate Challenges Out Of Court

By Ciaran McEvoy

LOS ANGELES - Battle lines are being drawn between consumer activists and the California Department of Insurance on one side and the insurance industry on the other concerning a state appellate court decision whose opponents say immunizes insurers for using illegal underwriting criteria to determine rates.

On Friday, the Insurance Department in a four-page letter urged the state Supreme Court to depublish a unanimous October decision authored by 2nd District Court of Appeal Justice H. Walter Croskey. The lower court ruled that a class of consumers who alleged they were charged higher insurance rates because of the company's use of underwriting criteria must seek recourse with the Insurance Department rather than sue the insurer in court.

MacKay v. Superior Court, B220469

The case stems from an insurance policyholder who alleged 21st Century Insurance used the person's lack of a prior insurance policy in setting rates. The plaintiff asked the Insurance Department to investigate, but sued after the department took no punitive measures against the insurer.

The lawsuit settled after the Court of Appeal heard oral arguments, but the parties agreed the court could issue a decision.

Critics of the ruling argue it undermines Proposition 103, a voter-approved 1988 ballot initiative that brought major reforms to California insurance regulation. Prop. 103's passage rolled back insurance rates and, according to its proponents, gave consumers the right to go to court to challenge insurance companies' rate-setting practices.

Critics of the ruling argue it undermines Proposition 103, a voter-approved 1988 ballot initiative that brought major reforms to California insurance regulation.

The Insurance Department's letter, written by general counsel Adam M. Cole, called Croskey's ruling "inconsistent" with prior insurance law.

"For nearly 20 years the Commissioner has advised this court and the Courts of Appeal that consumers have a right to go directly to court to assert violations of Proposition 103," Cole wrote.

Cole also asked the Supreme Court to review the ruling, should it reject calls to depublish the decision, which would have the effect of erasing it from the legal books.
The letter has drawn praise from consumer attorneys. "[Insurance Commissioner Steve] Poizner, a Republican, did not automatically side with the insurance industry," said Drew Pomerance of Roxborough Pomerance Nye & Adreani, who represented the plaintiffs in MacKay. "Instead, he did the right thing and followed the law, and my hat's off to him."

Ioannis Kazanis, an Insurance Department spokesman, declined to comment on the matter.

Samuel Sorich, president of the Association of California Insurance Companies - an insurance industry lobbying group, called Cole's letter inaccurate. "We believe that Justice Croskey, who is probably the preeminent insurance scholar on the appellate courts, is correct," Sorich said, adding that Croskey's ruling was consistent with insurance laws in "every other state that has looked at this issue."

Sorich said his organization plans to file its own letter urging the state Supreme Court to let the lower court's ruling stand.

Harvey J. Rosenfield of the nonprofit consumer advocate Consumer Watchdog and author of Proposition 103, called Croskey's ruling "a huge error that will lead to tremendous abuse," and effectively immunizes insurance companies for setting illegal and discriminatory rates.

He praised the Insurance Department's decision to back de-publication and called the MacKay decision part of the insurance industry's desire to take insurance disputes out of the courts.

"The Department of Insurance can penalize the company, but it can't give people their money back," Rosenfield said.

RELATED ARTICLES

A 'Get Out Of Jail Free' Card For the Insurance Industry
November 16, 2010
The conclusion to a two-part series on Proposition 103 and the regulation of insurance companies. By Harvey Rosenfield of Consumer Watchdog.

Consumer Lawyers Fighting Against Legal Tide
March 2, 2009
San Francisco-based attorney James C. Sturdevant worries that class action lawsuits could be severely restricted if the California Supreme Court upholds a lower court ruling requiring all members of a class prove they’d been harmed to have standing in such a lawsuit.