In the Matter of:
MERCURY INSURANCE COMPANY;
MERCURY CASUALTY COMPANY; and
CALIFORNIA AUTOMOBILE INSURANCE COMPANY,
Respondents.

OAH No.: N2006040185
CDI Case No.: NC03027545
INTERVENOR CONSUMER WATCHDOG'S OPPOSITION TO
RESPONDENTS' MOTION IN LIMINE
ALJ Assigned: Steven C. Owyang
Hearing Dates: March 16-20, 23-26, 30-31, and April 1-3, 2009
Pre-Hearing Conference: February 23, 2009
Hearing Location: Oakland
I. INTRODUCTION.

Respondents’ (hereafter “Mercury”) in limine motion is, at best, premature and, at worst, wholly speculative. Other than the “FRUB Report” materials – which are directly relevant to multiple issues in this proceeding – Mercury seeks broadly to exclude “all evidence” that is “beyond the scope” of the Amended Notice. (Mercury Motion in Limine (MIL) at 2.) Whatever Mercury intends by this obscure statement, Mercury’s motion should be denied for two basic reasons:

First, Mercury’s failure to describe the evidence it seeks to exclude – other than the FRUB Report – makes this motion fatally premature and speculative.

Second, the FRUB materials are readily admissible in this administrative proceeding where the “technical” rules of evidence do not apply under Government Code section 11513, which makes the Report’s admissibility all the more clear.

As shown below, all evidence that is relevant to prove that Mercury violated Insurance Code sections 1861.01(c) and 1861.05(a) and/or the amount of the penalties under section 1858.07 comes in. It cannot be excluded unless Mercury shows a valid statutory basis for doing so (i.e., the application of a specific privilege) or that the probative value of a specific piece of evidence is “substantially outweighed by the probability that its admission will necessitate undue consumption of time.” (See Govt. Code §§ 11513(c), (f).)

At base, the ALJ cannot decide admissibility of evidence in the abstract, as Mercury presents it — the “scope” of the pleading. To make out a justiciable in limine motion, Mercury must point to specific evidence it seeks to exclude. Mercury’s motion to exclude all evidence “outside the scope” simply begs the basic relevancy question and invites ongoing controversy throughout the hearing. The motion must, therefore, be denied.

II. ARGUMENT.

A. Mercury’s Speculative and Premature Motion Should be Denied

Mercury’s speculative motion should be denied outright. As California courts recognize, motions in limine are improper where, “events in the trial may change the context in which the evidence” is introduced. (See, e.g., Kelly v. New West Federal Savings (1996) 49 Cal. App. 4th 659,
Here, we do not even know what exact evidence Mercury will object to, much less, in what context it will be offered at trial.

Mercury’s motion is likewise premature. The only evidence that Mercury specifically identifies in its Motion in Limine is “the FRUB Report,” which covers all or some of the material that is the subject of Mercury’s Motion for a Protective Order seeking to prevent Consumer Watchdog from even seeing certain FRUB materials. Consumer Watchdog is unable to assess and respond to the relevancy of the unknown FRUB materials. Mercury’s motion should therefore be denied as to the withheld FRUB materials until such time as Consumer Watchdog can assess and respond to its relevancy.

**B. Mercury Fails to Recognize the Lenient Standard of Admission of Evidence in Administrative Proceedings.**

Throughout its motion in limine Mercury fails to acknowledge that, with limited exceptions, the “technical” rules of evidence that govern civil court proceedings do not apply in administrative proceedings. Instead, under Government Code section 11513, the rule is that: “[a]ny relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.” (Govt. Code § 11513(c).)

Indeed, all relevant evidence – unless its “probative value is substantially outweighed by the probability that its admission necessitates undue consumption of time” – is admissible. (Govt. Code § 11513(d).)

Therefore, Mercury’s repeated protestations that evidence should be excluded because it is “unproven”, “unadjudicated”, “undefended”, “prejudicial” or “confusing” (see, e.g., MIL at 6:22; 8:26), are without merit.

**C. The FRUB Materials Are Admissible Because They Are Relevant to Prove Mercury’s Knowledge, Notice, and Willfulness, and to Rebut Mercury’s Estoppel Defense.**

As an initial matter, it is unclear which specific FRUB materials Mercury wants to exclude. Mercury describes the FRUB Report as consisting of “approximately 150 pages of documents collected and created by FRUB in connection with an examination of Mercury’s underwriting practices from 1996 to 2004.” (MIL at 4:22-24.) As Consumer Watchdog understands it, there are essentially three
components to the FRUB materials produced by the Department to Mercury: a 2004 referral memorandum with exhibits; a 2000 Addendum to a FRUB Report, dated October 20, 2000; and the underlying FRUB Report, dated July 2, 1998. Mercury may be arguing that only the 2004 FRUB referral memorandum and materials should be excluded. Consumer Watchdog cannot tell. However, Consumer Watchdog believes, based on its general understanding of the type of documents at issue, that all of the FRUB materials are admissible.

Mercury contends that “mere allegations” of wrongdoing included in the FRUB materials are inadmissible “unadjudicated contentions” that are irrelevant to these proceedings. The FRUB materials – which include official reports that were generated as the result of detailed investigations by department employees, reviewed by high level supervisors, and “officially filed” only after Mercury was provided an opportunity to clarify its position and advise the department whether the report contains any errors or omissions – are plainly the types of evidence “responsible persons are accustomed to rely on in the conduct of serious affairs,” and thus admissible here. (Govt. Code § 11513(c).)

Moreover, Consumer Watchdog is aware that, at least with respect to the FRUB Report from 1998 and the 2000 Addendum thereto, substantial portions of those documents discuss Mercury’s “Method of Doing Business” by permitting the undisclosed so-called “broker fees” that are at the heart of this case. This “mere allegation” is clearly relevant not only to whether Mercury’s conduct was knowing and willful – in order to determine the appropriate penalty for Mercury’s conduct – it is also directly relevant to the “estoppel defense” Mercury makes in its Motion for Summary Judgment or Adjudication. The Report and Addendum (and, presumably, some of the other FRUB materials), demonstrate that the Department considered Mercury’s broker fee practice to be impermissible.

Therefore, those FRUB materials will be admissible not only to show that Mercury violated the law, but to rebut Mercury’s estoppel claim that it relied on representations by the Department that its broker fee practices were legal.

Mercury’s argument that the FRUB materials are inadmissible because “many of the issues raised in the FRUB report were later resolved by way of settlement” (MIL 8:20) is inapposite. Probative evidence as to Mercury’s knowledge and willfulness does not become inadmissible simply because Mercury agreed to resolve some unknown number of unspecified issues identified by the Department in
the FRUB materials at some later date.\(^1\)

Mercury’s arguments that the unspecified FRUB materials contain “inadmissible hearsay” fare no better. That is because, as noted above, the FRUB materials may be introduced not for the truth of the matters asserted (i.e., that Mercury broke the law), but to demonstrate Mercury’s knowledge that the Department did not acquiesce in Mercury’s conduct and that Mercury willfully continued its practice nonetheless. Moreover, all or part of the FRUB materials may fall within any number of hearsay exemptions (e.g., party admission, official documents). Without knowing the exact contents of the specific FRUB materials Mercury objects to, Consumer Watch cannot demonstrate why such material may fall within a hearsay exemption.\(^2\) Finally, even if the FRUB materials are submitted for a hearsay purpose during the proceedings (that is, submitted to prove the truth of the matter asserted) and they do not fall within a hearsay exemption, the FRUB materials are still admissible in this administrative proceeding “for the purpose of supplementing or explaining other evidence.” (Govt Code § 11513.)

C. Evidence Is Freely Admissible to Prove Mercury’s Willfulness, Regardless of Whether it Relates to the Period Before, During or After the 1996-2003 Violation Period Covered by the Notice of Noncompliance.

Mercury’s arguments based on Evidence Code sections 1101 are likewise wide of the mark. Section 1101(a) prohibits the introduction of evidence of character or trait “when offered to prove his or her conduct on a specified occasion.” Section 1101(b) makes clear that section 1101(a) means what it

\(^1\) Not only is Mercury’s motion as to “previously settled matters” entirely hypothetical, as it does not identify any specific “matter,” it is also fanciful. Mercury states that it “is currently unaware of any fully adjudicated matter that could possibly be probative of any matter in dispute in this action or may be attempted to be offered into evidence against them in the instant hearing.” (MIL at 7:7-9.) Mercury’s statement overlooks the Findings of Fact and Conclusions of Law in Krumme v. Mercury, which Mercury attached as Exhibit 1 to its Request for Official Notice in Support of Motion for Summary Judgment or Adjudication. If, as Consumer Watchdog advocates in its opposition to Mercury’s summary judgment motion, the ALJ denies that motion, the Krumme Findings and Conclusions establish Mercury’s violations of the rate statutes and Mercury’s liability under section 1858.07 in this proceeding.

\(^2\) For this reason, Consumer Watchdog cannot respond to Mercury’s position that “the FRUB report” does not fall within the “official notice” hearsay exception because “the FRUB report” did not record an act at or near the time of the event. For example, if the specific document Mercury objects to is a report of a recently concluded investigation – that is a document created “at or near the time” of the conclusion of the investigation.
says; the exclusion applies only to proving that a party acted in a certain way on a given occasion, and not to proving state of mind:

Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident...) other than his or her disposition to commit such an act.

Mercury acknowledges this limitation, arguing that, “It is not easy - if not impossible - to conceive of a situation where evidence that prior civil wrongs by Mercury could be used to establish that Mercury planned, prepared, or had the opportunity to violate Sections 790.03 (a)-(b) and 1861.05(a).” (MII at 9:24-26.) Mercury misconceives what the FRUB materials and other evidence of Mercury’s pre-July 1996 and post-April 2003 conduct will be offered to prove. It will not be offered to prove violations of sections 1861.01(c) and 1861.05(a); it will be offered to prove Mercury’s willfulness in committing these violations.

In this noncompliance action, the Department seeks to impose penalties under Insurance Code section 1858.07(a). “Any person who uses any rate, rating plan, or rating system in violation of this chapter is liable to the state for a civil penalty not to exceed five thousand dollars ($5,000) for each act, or, if the act or practice was willful, a civil penalty not to exceed ten thousand dollars ($10,000) for each act....” (Emphasis added.)

There is scarcely a triable issue — Consumer Watchdog submits there is none — that Mercury used an illegal rate and is subject to penalty under section 1858.07(a). As Consumer Watchdog’s opposition to Mercury’s Motion for Summary Judgment makes clear, Mercury is collaterally estopped to contest the findings in Krumme v. Mercury. The Superior Court found that during the period 1996 to 2003, Mercury harbored a system of de facto agents who systematically charged illegal fees. (It is a misnomer to call these “broker fees” because these producers were agents, not brokers.) As Consumer Watchdog also establishes in its summary judgment opposition, illegal agent fees constitute part of the rate, and therefore violate the pre-market rate approval requirements of section 1861.01(c) and the antidiscrimination ban of section 1861.05(a).

There is no reason to “bifurcate” liability. Collateral estoppel moots all triable issues as to Mercury’s violations. Insofar as the Department’s illegal rate claim is concerned, the sole triable issue is
the amount of the penalty.

The key evidence in aggravation of the penalty amount is the proof that Mercury’s violations were not innocent or inadvertent, but willful. Consumer Watchdog stands ready to make that proof at trial. Because the Department has alleged willful violations, the question of Mercury’s willfulness falls squarely within the “scope of the pleading.” (First Amended Notice of Noncompliance ¶¶ 3-5.) This proof extends to Mercury’s conduct and practices before, during, and after the 1996-2003 violation period. As the following discussion will establish, the controlling regulation does not confine proof of willfulness to the 1996-2003 violation period. The regulation expressly invites proof of prior knowledge and continuing disregard, both of which are present in this case.

The Department’s Regulations for Enforcement Actions and Penalties state that “In determining that an enforcement action should be pursued and in selecting the appropriate amount of the penalty from the applicable range of penalty amounts that could be assessed, the Department shall consider … (d) The knowledge or willfulness of the non-compliant act.

(1) Violations that may be considered willful or knowingly committed include but are not limited to the following:

(A) When the insurer is aware at the time of the act that it is violating the law;

(B) When the insurer reasonably should have known of the act’s unlawfulness when the non-compliant act occurred;

(C) When the insurer has promulgated express policies or procedures that are in noncompliance with the law;

(D) When the insurer has failed to adopt, communicate and implement reasonable standards for consistent, compliant activity; or

(E) When the insurer has failed to take effective remedial measures when a violation was identified or discovered.”

(10 C.C.R. § 2591.3(d)(1) (emphasis added).)

The regulatory willfulness standard renders prior acts and practices relevant to prove Mercury’s knowing or reckless disregard of the violations at the time it was committing them. The scope of this action therefore includes proof that even before the 1996-2003 period, Mercury knew that it had a sham
system, that its “brokers” were really agents, and that it was violating the rate law. (Section 2591.3(d)(1)(A).)

Section 2591.3(d)(1)(C) also brings within the scope of this action proof that Mercury’s policies and procedures — which were longstanding and ingrained well before the inception of the 1996-2003 time period — were illegal.

The regulation also authorizes proof of willfulness post-dating the 1996-2003 time period. Subsection (E) allows proof of Mercury’s failure to cure the violations until long after the Department identified them to Mercury, they were established through trial in Krumme v. Mercury, and an injunction against them rendered. Thus, Mercury’s stubborn maintenance of the illegal agency system long after the 2003 injunction was rendered is compelling evidence that its violations were willful and that a higher penalty should be imposed.

III. CONCLUSION.

For all of the above reasons, Mercury’s motion should be denied.

DATED: February 20, 2009

Respectfully submitted,

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I, Ann Williams, state:

I am a citizen of the United States. My business address is 639 Front Street, Fourth Floor, San Francisco, CA 94111. I am employed in the City and County of San Francisco where this mailing occurs. I am over the age of eighteen years and not a party to this action. On the date set forth below, I served the foregoing documents described as:

INTERVENOR CONSUMER WATCHDOG’S OPPOSITION TO RESPONDENTS’ MOTION IN LIMINE

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on February 20, 2009, at San Francisco, California.

Ann Williams

[Signature]