Consumer Watchdog v. the Commissioner, et al., 25STCP01367

~~Tentative~~ decision on demurrer: mostly sustained

Respondents Ricardo the Commissioner, in his official capacity as Insurance Commissioner of California ("Commissioner"), and the California Department of Insurance ("Department") demur to the Petition filed by Petitioner Consumer Watchdog.

The court has read and considered the moving papers, opposition, and reply, and renders the following tentative decision.

A. Statement of the Case

1. The Petition

On April 14, 2025, Petitioner Consumer Watchdog filed the verified Petition against Respondents Commissioner and the Department alleging three mandamus/declaratory relief causes of action for violation of the Administrative Procedure Act (Government ("Govt.") Code §11340 *et seq.*) ("APA") and the Insurance Code. The Petition alleges in pertinent part as follows.

a. The Stipulations

Following destructive wildfires in 2017 and 2018, insurance industry groups sought to reduce insurers' financial exposure from the FAIR Plan. Pet., ¶26. In 2023, the Department and insurers sought to make several changes, including the authorization of pass-throughs, through legislative action. Pet., ¶26. In February of 2024, a bill was introduced to the legislature which would have authorized FAIR Plan members to recover the costs of FAIR Plan assessments by imposing surcharges on policyholders. Pet., ¶26. These efforts were unsuccessful. Pet., ¶26.

Not having achieved their objectives in the legislature, insurers sought to achieve them through the Commissioner. Pet., ¶27. On July 25, 2024, the Commissioner and FAIR Plan entered into Stipulation and Order No. 2024-1 without prior public notice. Pet., ¶27. This stipulation recited the Commissioner's determination to allow FAIR Plan member insurers to shift the cost of assessments to policyholders but did not effectuate the pass-throughs. Pet., ¶27.

On August 27, 2024, the Commissioner and FAIR Plan entered into Stipulation and Order No. 2024-2 repeating the rationale of the earlier stipulation and order and attaching a newly adopted Plan of Operations. This new plan did not address pass-throughs for FAIR Plan assessments. Pet., ¶28.

b. The Bulletins

On September 3, 2024, the Commissioner issued Bulletin 2024-8 establishing three scenarios under which insurers may recover the cost of FAIR Plan assessments from policyholders: (1) if the FAIR Plan levies assessments of up to $1 billion on insurers writing residential policies or commercial policies or combined total of $2 billion on insurers writing both residential and commercial policies, member insurers may seek approval to recoup up to 50% of costs; (2) if assessments exceed $1 billion on insurers of residential or commercial property policies or exceed $2 billion for insurers writing both policy types combined, member insurers may seek approval to recoup 100% of assessment costs; (3) if the FAIR Plan levies any amount of assessment on insurers

writing High Value Commercial Property Policies, member insurers may seek approval to recoup 100% of assessment cuts. Pet., ¶29. The Bulletin did not explain how these approval requests would be reviewed. Pet., ¶29.

On February 11, 2025, following the wildfires in January of 2025, the Commissioner issued Bulletin 2025-4 in connection with approving a $1 billion assessment. Pet., ¶30. This Bulletin expanded on Bulletin 2024-08 by providing procedural requirements for insurance companies to submit pass-through requests and detailing what these insurers must provide with the request. Pet., ¶30. The Department also released a document called "Recoupment of FAIR Plan Assessment by Admitted Insurers" which gave further guidance for insurers. Pet., ¶30

Neither of the Bulletins was submitted for public discussion, comment, or review nor submitted to the Office of Administrative Law ("OAL") for review and approval, and the Department asserted no exemption from the APA. Pet., ¶31.

c. <u>The Bulletins, the FAIR Plan Statutes, and the APA</u>

The Bulletins do not regulate or impact the FAIR Plan, nor modify how, when, or to what extent the FAIR Plan may assess member insurers. Pet., ¶32. The Bulletins regulate the interactions between member insurers and their policyholders. Pet., ¶32. While the Department characterizes the Bulletins as protecting consumers from bearing the full costs of assessments, no prior rules enabled member insurers to pass costs to policyholders. Pet., ¶33.

The Department contends the Bulletins clarify existing law and regulation. Pet., ¶34. However, the Bulletins allow insurers to pass assessment costs through to policyholders, an action not contemplated by the FAIR Plan statutory framework. Pet., ¶34. The Bulletins constituted new rulemaking and significantly altered the nature of the FAIR Plan. Pet., ¶34.

Under the APA, a regulation includes "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern procedure." Govt. Code §11342.600. Pet., ¶35. The Bulletins qualify as regulations because they explicitly establish procedures for recoupment of FAIR Plan assessment costs from policyholders. Pet., ¶36. The FAIR Plan statutes and the Plan of Operations do not authorize or contemplate pass-throughs. Pet., ¶36. The Bulletins constitute substantive and procedural rulemaking requiring compliance with the APA process. Pet., ¶36.

The APA requires notice of proposed regulatory action, opportunity for public comment, publication of documentation justifying and explaining the regulations including informative digests and initial and final statements of reasons, and review and approval of proposed regulations by the OAL. Pet., ¶37. The Bulletins did not meet any of these criteria. Pet., ¶37. The Bulletins do not qualify for exemption from APA requirements, and the Department did not assert any such exemption. Pet., ¶38.

Regulations cannot alter or amend the governing statute or case law. Pet., ¶39. The FAIR Plan statutes only allow the Department to implement regulations related to incentives for insurers to offer insurance in high-risk areas. Pet., ¶40. The Department has no other authority with which to justify creating the regulation, and the Department has not made regulation outside this limited scope in almost 60 years. Pet., ¶40. The Department's authority is limited to oversight and approval of the Plan of Operations and general supervision of the FAIR Plan and does not extend to individual member insurers and their relationships with their policyholders.

Pet., ¶¶ 41-42.

The Bulletins are invalid because they unlawfully amend and enlarge the scope of the FAIR Plan statutes by creating a new mechanism for member insurers to transfer assessment costs to policyholders. Pet., ¶43. While the Department analogizes to the California Insurance Guarantee Association ("CIGA"), California Life and Health Insurance Guarantee Association ("CLHIGA"), and California Earthquake Authority ("CEA"), those frameworks have specific statutory authorization for pass-through charges, and the FAIR Plan does not. Pet., ¶44.

The FAIR Plan statutory framework requires that member insurers proportionally divide any costs or losses from the FAIR Plan. Pet., ¶45. The Bulletins allow insurers to pass FAIR Plan assessment costs onto policyholders in a non-proportional manner, violating the requirement that member insurers distribute costs proportionally. Pet., ¶¶ 46-47. The Bulletins further state the Department has discretion to determine how much of an insurer's assessment costs can be passed through. Pet., ¶48. This again violates the requirement for proportional distribution of the costs and exceeds the scope of the Department's authority. Pet., ¶48.

Allowing member insurers to retain all FAIR Plan profits while being permitted to pass costs through to policyholders is inequitable, especially since the FAIR Plan uses the potential for assessments of its members as a justification for purchasing lower amounts of reinsurance then comparable insurance facilities. Pet., ¶¶ 49-50.

The Bulletins also incentivize insurers to pass risk to the FAIR Plan wherever possible, which is inconsistent with legislative policy aims and the stated goals of the Commissioner. Pet., ¶51.

To be valid, a regulation must be reasonably necessary to effectuate the purpose of the underlying statute. Pet., ¶52. Regulations adopted pursuant to implied powers must meet a higher standard of reasonableness than those adopted to express authority. Pet., ¶52. The Bulletins ostensibly protect the stability of the property insurance market and availability of property insurance. Pet., ¶53. However, the FAIR Plan is statutorily required to offer basic property insurance to qualifying Californians, so further regulation is unnecessary. Pet., ¶53.

d. The Prayer

Petitioner Consumer Watchdog seeks a peremptory writ of mandate commanding the Department to refrain from implementing or enforcing the Bulletins or otherwise allowing FAIR Plan member insurers to pass assessment costs to their policyholders. Pet. at 36. Petitioner seeks declarations that the Bulletins are invalid regulation and not authorized by the FAIR Plan statutes. Pet. at 36. Petitioner Watchdog seeks an injunction prohibiting the Department from allowing FAIR Plan member insurers to directly pass-through assessment costs to policyholders and compelling the Department to facilitate the return of any assessment costs unlawfully collected from policyholders. Pet. at 36. Finally, Petitioner seeks costs of suit, reasonable attorney fees, and such other, different, or further relief as the court may deem just and proper. Pet. at 36.

2. Course of Proceedings

Proofs of service on file dated May 7, 2025 show that Respondents were served with the Petition by email per their consent.

B. Demurrers

Demurrers are permitted in administrative mandate proceedings. CCP §§1108, 1109. A demurrer tests the legal sufficiency of the pleading alone and will be sustained where the pleading is defective on its face.

Where pleadings are defective, a party may raise the defect by way of a demurrer or motion to strike or by motion for judgment on the pleadings. CCP §430.30(a); Coyne v. Krempels, (1950) The party against whom a complaint or cross-complaint has been filed may object by demurrer or answer to the pleading. CCP §430.10. A demurrer is timely filed within the 30-day period after service of the complaint. CCP §430.40; Skrbina v. Fleming Companies, (1996) 45 Cal.App.4th 1353, 1364.

A demurrer may be asserted on any one or more of the following grounds: (a) The court has no jurisdiction of the subject of the cause of action alleged in the pleading; (b) The person who filed the pleading does not have legal capacity to sue; (c) There is another action pending between the same parties on the same cause of action; (d) There is a defect or misjoinder of parties; (e) The pleading does not state facts sufficient to constitute a cause of action; (f) The pleading is uncertain ("uncertain" includes ambiguous and unintelligible); (g) In an action founded upon a contract, it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct; (h) No certificate was filed as required by CCP section 411.35 or (i) by CCP section 411.36. CCP §430.10. Accordingly, a demurrer tests the sufficiency of a pleading, and the grounds for a demurrer must appear on the face of the pleading or from judicially noticeable matters. CCP §430.30(a); Blank v. Kirwan, (1985) 39 Cal.3d 311, 318. The face of the pleading includes attachments and incorporations by reference (Frantz v. Blackwell, (1987) 189 Cal.App.3d 91, 94); it does not include inadmissible hearsay. Day v. Sharp, (1975) 50 Cal.App.3d 904, 914.

The sole issue on demurrer for failure to state a cause of action is whether the facts pleaded, if true, would entitle the plaintiff to relief. Garcetti v. Superior Court, (1996) 49 Cal.App.4th 1533, 1547; Limandri v. Judkins, (1997) 52 Cal.App.4th 326, 339. The question of plaintiff's ability to prove the allegations of the complaint or the possible difficulty in making such proof does not concern the reviewing court. Quelimane Co. v. Stewart Title Guaranty Co., (1998) 19 Cal.4th 26, 47. The ultimate facts alleged in the complaint must be deemed true, as well as all facts that may be implied or inferred from those expressly alleged. Marshall v. Gibson, Dunn & Crutcher, (1995) 37 Cal.App.4th 1397, 1403. Nevertheless, this rule does not apply to allegations expressing mere conclusions of law, or allegations contradicted by the exhibits to the complaint or by matters of which judicial notice may be taken. Vance v. Villa Park Mobilehome Estates, (1995) 36 Cal.App.4th 698, 709.

For all demurrers filed after January 1, 2016, the demurring party must meet and confer in person or by telephone with the party who filed the pleading for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer. CCP §430.41(a). As part of the meet and confer process, the demurring party must identify all of the specific causes of action that it believes are subject to demurrer and provide legal support for the claimed deficiencies. CCP §430.41(a)(1). The party who filed the pleading must in turn provide legal support for its position that the pleading is legally sufficient or, in the alternative, how the complaint, cross-complaint, or answer could be amended to cure any legal insufficiency. Id. The demurring party is responsible for filing and serving a declaration that the meet and confer requirement has been met. CCP §430.41(a)(3).

If a demurrer is sustained, the court may grant leave to amend the pleading upon any terms as may be just and shall fix the time within which the amendment or amended pleading shall be filed. CCP §472a(c). In response to a demurrer and prior to the case being at issue, a complaint or cross-complaint shall not be amended more than three times, absent an offer to the trial court as to such additional facts to be pleaded that there is a reasonable possibility the defect can be cured to state a cause of action. CCP §430.41(e)(1).

C. Governing Law[1]

1. Prop 103

Prior to Prop 103, ratemaking and rate regulation for various classes of insurance were governed by the McBride–Grunsky Insurance Regulatory Act of 1947, as amended ("McBride Act"), set forth in chapter 9.[2] Economic Empowerment Foundation v. Quackenbush, (1997) 57 Cal.App.4th 677, 680. Chapter 9 of the McBride Act is now comprised of sections 1850.4 through 1861.16. Association of California Ins. Cos. v. Poizner, ("Poizner") (2009) 180 Cal.App.4th 1029, 1035.

In 1988, voters passed Proposition 103 ("Prop 103"), which made fundamental changes in the regulation of automobile and other types of insurance. Poizner, *supra,* 180 Cal.App.4th at 1035. Formerly, the "open competition" system of regulation existed whereby rates were set by insurers without prior approval by the Insurance Commissioner. Id. Prop 103 altered this system by adding article 10 (Reduction and Control of Insurance Rates) to the Insurance Code (§1861.01-1861.16). Id. This new article requires, *inter alia*, approval by the Commissioner for all insurance rate increases and provides for consumer participation in the rate setting process. Id.

Prop 103 preserved and enhanced a comprehensive administrative scheme regulating insurance rates." Farmers Ins. Exchange v. Superior Court, ("Farmers") (2006) 137 Cal.App.4th 842, 853, 855. Key changes effected by Prop 103 are that it "required, among other things, approval by the Commissioner for all insurance rate increases, and 'provided for consumer participation in the administrative ratesetting process.'" Poizner, *supra*, 180 Cal.App.4th at 1035 (citation omitted). Prop 103 enhanced the preexisting administrative procedures by extending standing from 'any person aggrieved' (§1858(a)) to 'any person' (§1861.10(a)) and requiring more exacting review of insurance rates and approval of rates by the Commissioner. Farmers, *supra*, 137 Cal.App.4th at 853.

Prop 103 contemplates or permits public participation and intervention in the rate review process. Id. at 1049. Section 1861.10(a) provides that any person may initiate or intervene in any proceeding permitted or established pursuant to chapter 9. This provision encompasses not only a proceeding concerning an application to increase rates, but any proceeding permitted or established pursuant to chapter 9. Farmers, *supra*, 137 Cal.App.4th at 854. Chapter 9 includes proceedings under section 1858 to review rates charged, rating plans, rating systems, or underwriting rules. Id. In addition, proceedings arising out of an insurer's rate change

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[1] All further statutory references are to the Insurance Code unless otherwise stated.

[2] The McBride Act covers the classes of insurance at issue in this case, which fall under the umbrella of "casualty insurance". It excludes only the categories of insurance listed in section 1851, which are not at issue. §§ 1850.4, 1851.

application, and which entail public participation and intervention in the rate review process, are procedures permitted and established by chapter 9. Poizner, *supra*, 180 Cal.App.4th at 1049.

Under section 1861.05, the Commissioner must notify the public of the insurer's application for a rate change. §1861.05(c). The application is deemed to be approved 60 days after public notice unless (1) a consumer or his or her representative requests a hearing within 45 days of public notice and the Commissioner grants the hearing, or determines not to grant the hearing and issues written findings in support of that decision, or (2) the Commissioner on his or her own motion determines to hold a hearing, or (3) the proposed rate adjustment exceeds 7% of the then applicable rate for personal lines or 15% for commercial lines, in which case the Commissioner must hold a hearing upon a timely request. §1861.05(c). Poizner, *supra*, 180 Cal.App.4th at 1037.

"Proposition 103 does not establish a detailed method of processing and deciding rate applications. It contains a few provisions relating to public notice and participation ... but hearings are generally held in accordance with provisions of the Administrative Procedure Act." Id. at 1038. "Much is necessarily left to the Insurance Commissioner, who has broad discretion to adopt rules and regulations as necessary to promote the public welfare." Ibid.

To implement Prop 103, the Commissioner has adopted certain regulations found in subchapters 4.8 and 4.9 of chapter 5 of title 10 of the California Code of Regulations ("CCR"). *See* Poizner, *supra*, 180 Cal.App.4th at 1038-40. The regulations define a "rate proceeding" as "any proceeding conducted pursuant to Insurance Code Sections 1861.01 and 1861.05". 10 CCR §2661.1(h). A rate proceeding constitutes a proceeding permitted pursuant to chapter 9 and falls within the ambit of section 1861.10(a). Poizner, *supra*, 180 Cal.App.4th at 1049.

2. The FAIR Plan Statutes

The Legislature created FAIR Plan in 1968 (§10090 *et seq.*) (the "FAIR Plan statutes"), as an involuntary association of "insurers licensed to write and engaged in writing basic property insurance within this state to assist persons in securing basic property insurance and to formulate and administer a program for the equitable apportionment among insurers of basic property insurance." §10091(a). It is a source for fire and other coverages for Californians unable to obtain such coverages from the normal market. §10094(a). The FAIR Plan statutes provide for mandatory membership by admitted California insurers writing the coverages FAIR Plan offers, and for apportionment among them of FAIR Plan's writings, expenses, profits, and losses. §§ 10094(a), 10095(a), (c). The FAIR Plan statutes also permit FAIR Plan, with the Commissioner's approval, to assess its members in amounts sufficient for its operation. §10094(c).

D. Analysis[3]

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[3] Respondents have complied with their meet and confer obligations under CCP section 430.41(a)(3). Keith Decl., ¶¶ 2-3.

Petitioner Consumer Watchdog requests judicial notice of the following exhibits: (a) the Casualty Actuarial Society's "Statement of Principles Regarding Property and Casualty Insurance Ratemaking" (RJN Ex. A); (b) the Department's current "Prior Approval Rate Application Filing Instructions" (RJN Ex. B); (c) rulemaking documents promulgated by the Department concerning the "Mitigation in Rating Plans" regulation promulgated in 2022, the "Amendments to Procedural

Respondents demur to all three causes of action in the Petition, which challenge Bulletins 2024-8 and 2025-4 issued by the Commissioner.

In September 2024, the Commissioner issued Bulletin 2024-8, which sets forth three pass-through scenarios under which insurers may seek to impose surcharges on their policyholders to recover the cost of FAIR Plan assessments. Pet., ¶29.

On February 11 2025, the Commissioner issued Bulletin 2025-4, which states that it provides updated guidance about the procedure through which the FAIR Plan's member insurers may request the Commissioner's prior approval under Prop 103 to seek recoupment from their policyholders of assessment amounts paid to the FAIR Plan. Pet., ¶30.

1. The First Cause of Action

The Petition's first cause of action alleges that the Commissioner violated the APA by issuing the Bulletins without the rulemaking safeguards required.

Respondents argue that the challenged Bulletins recognize the increased risk of wildfires and that FAIR Plan, if threatened with insolvency, may levy an assessment on its member issuers with the Commissioner's prior approval. Pet., Ex. A, p. 2; Ex. B, pp. 1-2. The Bulletins state that the Commissioner will consider rate applications by FAIR Plan's members under Prop 103 to recoup a portion of the FAIR Plan assessment paid by the insurer by imposing a temporary supplemental fee ("TSF", "pass-through", or "surcharge")[4] on new and renewed policies issued by the insurers themselves. The Bulletins also provide instructions regarding the content of the rate applications and the procedures surrounding them. Dem. at 7.

The Bulletins do not authorize a FAIR Plan request for assessment approval, but rather they provide the procedure through which FAIR Plan's member insurers may request the Commissioner's prior approval under Prop 103 to seek recoupment from their policyholders of any FAIR Plan assessments. Pet. Ex. A, p. 2; Ex. B, p.2. The Bulletins specify that such applications by insurers are "subject to the Insurance Commissioner's prior review and approval under Prop. 103 and must be submitted according to the Department's instructions for rule-change

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Regulations for Rate Cases" regulations promulgated in 2002, and the "Intervenor Regulations" regulation promulgated in 2006 (RJN Ex. C.); (d) rulemaking documents promulgated by the Department concerning the "Complete Rate Application" regulations promulgated in 2024, the "Catastrophe Modeling and Ratemaking" regulations promulgated in 2024, and the "Net Cost of Reinsurance" regulations promulgated in 2024 (RJN Ex. D); (e) legislation proposed by the Department in August of 2023 proposing to amend the FAIR Plant to permit pass-through charges (RJN Ex. E); (f) legislation proposed by Assemblyman David Alvarez in 2024 to amend the FAIR Plan statutes to allow pass-through charges (RJN Ex. F); (g) Stipulation and Order Nos. 2024-1 and 2024-2, including the current Plan of Operations (RJN Ex. G).

The requests for RJN Exs. A, E. and F are denied. Ex. A is not an official act or a fact not reasonably subject to dispute. *See* Evid. Code §452(c), (h). The proposed legislation (RJN Exs. E and F) is not authenticated legislative history. *See* Evid. Code §452(b). The remaining requests are granted. Evid. Code §452(b), (c).

[4] The court will generally use the term "pass-through" as that is the term used by Petitioner."

applications in effect at the time the application is made." Pet., Ex. A, p. 3, ¶4; Ex. B, p. 3, ¶4. Dem. at 7.

a. Prop 103 Must Be Broadly Construed to Be Within the APA Exception

Govt. Code section 11340.9(g) provides an exception to the APA rulemaking requirements for "[a] regulation that establishes or fixes rates, prices, or tariffs." The Commissioner's regulations under Prop 103 have been held to fall within this exception. The California Supreme Court case of 20th Century Ins. Co. v. Garamendi, ("20th Century") (1994) 8 Cal.4th 216, involved the regulations adopted by the Commissioner following Prop 103's initial passage to implement the new statutory rate-regulation regime. The Commissioner submitted the rate regulations (in various forms) to the OAL, which "has the authority to review and either approve or disapprove certain regulations". The OAL disapproved the regulations. Id. at 248. While regulations are generally subject to OAL review as a condition of validity, the Commissioner took the position that the rate regulations come within the rate-setting exception and fall outside OAL review. Id. The Supreme Court agreed, holding that "[t]he rate regulations—both generally and specifically as to rollbacks[5] -- come within the rate-setting exception. Id. at 270.

Respondents argue that the first cause of action does not state a claim because the Bulletins on their face concern rule-change applications submitted to the Commissioner by FAIR Plan member insurers under Prop 103. Pet., Ex. A, p. 1 ("This Bulletin provides notice of the procedure through which the FAIR Plan's member insurers may request the Insurance Commissioner's prior approval under Proposition 103 to seek recoupment from their policyholders of any FAIR Plan assessments ..."); Pet., Ex. A, p. 2 (same); Pet., Ex. B, p. 1 ("This Bulletin provides UPDATED guidance regarding the procedure through which the FAIR Plan's member insurers may request the Insurance Commissioner's prior approval under Proposition 103 to seek recoupment from their policyholders of any FAIR Plan assessments ..."); Pet., Ex. B, p. 2 ("This Bulletin provides updated guidance about the procedure through which the FAIR Plan's member insurers may request my prior approval under Prop. 103 to seek recoupment from their policyholders of assessment amounts paid to the FAIR Plan"); Pet., Ex. A, p. 2 ("Any FAIR Plan member insurer that has paid an assessment levied by the FAIR Plan may submit a rule-change application requesting the Insurance Commissioner's prior approval, pursuant to Prop. 103 and in accordance with the Insurance Commissioner's rate filing instructions ...,"); Pet., Ex. B, p. 2 ("Any FAIR Plan member insurer that has paid an assessment levied by the FAIR Plan may submit a rule-change application requesting the Insurance Commissioner's prior approval, pursuant to Prop. 103, to collect temporary supplemental fees to recoup a portion of its FAIR Plan assessment as follows ..."); Pet., Ex. A, p. 3; Ex. B, p. 3 ("applications ... are subject to the Insurance Commissioner's prior review and approval under Prop. 103 and must be submitted according to the Department's instructions for rule-change applications in effect at the time the application is made". (emphasis added for all quotes). Because the Commissioner's regulations under Prop 103 come within an exception to the APA, the Bulletins do as well. Dem. at 7, n. 3, 8-9.

Petitioner describes the Bulletins as an attempt to launder the Bulletins' pass-throughs,

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[5] "Rollbacks" refers to section 18601.01(a)-(b), which established a temporary regulatory regime of rate reduction and freeze evidently designed to allow the setting up of a permanent regulatory regime to follow. Id. at 243. Dem. at 8, n. 4.

which are substantive Fair Plan issues, through Prop 103's procedures. The Bulletins are focused on issues under the FAIR Plan statutes, not Prop 103. Directing FAIR Plan member insurers to upload pass-through requests through the Prop 103 application process does not make the pass-throughs substantively authorized by Prop 103. If it were otherwise, the Commissioner could evade the APA whenever he pleases simply by using Prop 103 filing mechanisms. That kind of regulatory laundering is not permitted under the law. Opp. at 9.

The pass-throughs are triggered solely by FAIR Plan assessments and justified exclusively by FAIR Plan policy goals. The Bulletins were issued to effectuate recitals stated in the stipulations and orders executed between the Commissioner and FAIR Plan, neither of which contained any reference to Prop 103. RJN, Ex. G. Both Bulletins declare that the pass-throughs are intended to "modernize" and "strengthen" the FAIR Plan while providing financial stability and solvency protections, thereby invoking the first two statutory purposes of the FAIR Plan Act as justification. §10090(a), (b). The Bulletins require each insurer's consumer notice to echo those same FAIR Plan purposes. Opp. at 9-10.

Conversely, neither Bulletin claims to advance Prop 103. The Bulletins use the Prop 103 application process only as a clerical vehicle. Whatever "broad discretion" the Commissioner enjoys under Prop 103 does not extend to imposing fees on policyholders "to ensure the FAIR Plan's long-term financial resiliency." Pet., Ex. B, p. 5. In short, Respondents are trying to "hide the [non-APA-exempted] substance ... behind [an APA-exempted] form." *See* Bravo Vending v. City of Rancho Mirage, ("Bravo Vending") (1993) 16 Cal.App.4th 383, 405. Opp. at 10.[6]

Petitioner argues that Govt. Code section 11340.9(g)'s ratemaking exception does not apply to the Bulletins because the pass-throughs are not, by any reasonable definition, a "rate, price, or tariff." The Bulletins expressly segregate the pass-throughs from premium and loss calculations -- *i.e.*, "ratemaking." Having disclaimed any ratemaking function, the Commissioner cannot now shelter behind the ratemaking exemption to justify their noncompliance with the APA. Opp. at 4.

In 20th Century, the Supreme Court adopted a simple working definition of an insurance rate: "a rate is the price or premium that an insurer charges its insureds for insurance." 8 Cal.4th at 240 (analyzing Prop 103). But by the Bulletins' own terms, the pass-throughs are not premiums. Bulletin 2025-4 states: "Any amount recouped by a member insurer through temporary supplemental fees on policyholders shall not be considered premium." Pet., Ex. B, p. 5 (emphasis added). If the money collected by a pass-through is not premium, a pass-through cannot be a rate. *See, e.g.*, 10 CCR §2643.3 (excessive-or-inadequate test rests on "earned premiums"). Opp. at 12.

Nor are the pass-throughs losses. Bulletin 2025-4 states that a pass-through filing must be "revenue neutral" and "shall not include proposals or amendments to existing rates or rules." Pet., Ex. B, p. 4. Bulletin 2025-4 further provides: "Any amount recouped by an insurer through temporary supplemental fees on policyholders shall not be considered losses for the purpose of

[6] That the pass-throughs substantively concern the FAIR Plan statutes is further established by comparison to the Bulletins' reference to "similar [] other existing California insurance safety net mechanisms": CIGA, CLHIGA, and the CEA. The pass-throughs contemplated by those programs are expressly provided for within the statutory schemes for those programs. Pet., ¶ 44. No comparable provisions exist in the FAIR Plan statutes. Opp. at 12.

any subsequent rate change application." Pet., Ex. B, p. 5 (emphasis added). Along with premiums, historical losses are one of the key inputs in ratemaking. 20th Century, *supra*, 8 Cal.4th at 249 ("The rate regulations generally require insurance premiums and losses to be accounted for on an accrual basis, as 'premiums earned' and 'losses incurred.' ... 'Direct ratemaking' measures the insurer's operations at the 'retail' level, counting all premiums the insurer receives from its policyholders and all losses paid to them"). Opp. at 12.

The pass-throughs further do not meet the qualitative definition of a rate provided in 20th Century—the pass-throughs are not part of what "an insurer charges its insureds for insurance." No part of a FAIR Plan member insurers' policyholders' insurance coverage is paid for by the pass-throughs. Nor did any such policyholders purchase their insurance conditioned on the payment of pass-throughs. Rather, the pass-throughs are after-the-fact fees unilaterally imposed on policyholders by the Commissioner that serve as reinsurance for the FAIR Plan's member insurers; the only "benefit" to the consumer is avoiding cancellation for non-payment. Opp. at 12.

Taken together, the Bulletins' exclusion of pass-throughs from premium and losses entirely excludes pass-throughs from the ratemaking process established under Prop 103. Pursuant to the Bulletins, insurers may not file a rate-change application, must label the submission a rule-change application, and may not alter any existing rates or rules. Yet, Respondents claim this is sufficient for the Bulletins to be exempt as "fixing or establishing rates, prices, or tariffs." Opp. at 13-14.

Respondents correctly reply (Reply at 3-4) that Petitioner construes Prop 103 too narrowly. Govt. Code section 11340.9(g)'s exception to the APA rulemaking requirements is for "[a] regulation that establishes or fixes rates, prices, or tariffs." (emphasis added). The exception is in the disjunctive -- rates, prices, or tariffs -- reflecting that it is sufficient that a regulation concerns a non-rate charge that affects the price of insurance -- *i.e.*, something that modifies the amount the insured would pay based on the applicable rate.

Petitioner's argument ignores that the exception covers prices and tariffs as well as rates. 20th Century holds that "a rate is the price or premium that an insurer charges its insureds for insurance." 8 Cal.4th at 240 (emphasis added). The Bulletins do not themselves authorize any rate or pass-through but rather inform insurers how to file rate applications seeking a pass-through. If approved, the pass-through is clearly part of the price the insurers will charge their insureds for the benefit of obtaining, renewing, or (as alleged) keeping their insurance policies.[7]

Respondents rely on State Compensation Ins. Fund v. McConnell, etc., Industrial Indem. Co., Intervener, (1956) 46 Cal.2d 330, as illustrative. In that case, the Commissioner issued a ruling that sought "to modify existing minimum workmen's compensation premium rates by putting into effect two new rating plans, one of them called the 'Premium Discount Plan.'" Id. at

[7] Respondents suggest that the pass-throughs may also qualify as a tariff. Although the term may not be common in insurance, in Public Utilities Commission proceedings a tariff is "a schedule 'showing all rates, tolls, rentals, charges, and classifications ... together with all rules, contracts, privileges, and facilities which in any manner affect or relate to rates, tolls, rentals, classifications, or service.'" Southern California Edison Co. v. City of Victorville, (2013) 217 Cal.App.4th 218, 226. By analogy, the pass-throughs clearly would be a "charge" and the Bulletins are a "rule... which in any manner affect or relate to rates" to be charged by FAIR Plan's members. Ibid. Reply at 4. The court need not address this alternative.

337-38. The Premium Discount Plan "provid[ed] for a graduated discount from the premium produced by the manual rate". Id. at 339. The court held that "[t]he discount from the manual rate becomes in effect a modifying factor in the rate-making process." Id. at 339. The court rejected an argument that the ruling "was never validly promulgated by the commissioner," relying on the exception for "regulations establishing or fixing rates, prices or tariffs" and concluding that the Premium Discount Plan was a "regulation[] fixing and establishing insurance premium rates within the meaning of this exception." Id. at 343. Respondents conclude that no different conclusion is warranted here. Reply at 4-5.

Petitioner responds that not all regulations issued under Prop 103 are inherently subject to the ratemaking exemption. While it is true that the regulations at issue in 20th Century were found to fall within the ratemaking exception, that does not mean that all regulations issued under the authority of Prop 103 are inherently subject to the exception.[8] The claim that all regulations issued under Prop 103 are exempt from APA compliance can be dismissed through a simple hypothetical. If the Commissioner sought to issue a regulation requiring insurers to give their policyholders written notice of the process by which complaints about rates can be raised before the Department, such a regulation would clearly be issued under Prop 103 but would not be subject to the ratemaking exemption. Providing written notice of a complaint process is not "establishing or fixing rates, prices, or tariffs." The inquiry into whether the exemption applies is not cut off simply because a regulation is issued under Prop 103. Opp. at 15.

Perhaps not, but Petitioner acknowledges that two non-insurance cases have construed the APA exception more broadly than mere regulations establishing or fixing actual rates, holding that the exception applies to any "essential" or "integral" aspect of the ratemaking process. Winzler & Kelly v. Department of Industrial Relations, (1981) 121 Cal.App.3d 120, 128 (wage law coverage determination); Vector Resources, Inc. v. Baker, (2015) 237 Cal.App.4th 46, 56–57 (wage rates). Petitioner concedes that 20th Century appears to follow the same logic by assessing whether the rate regulations analyzed were "necessary and proper for the implementation of Proposition 103." 8 Cal.4th at 272. Opp. at 13, n. 4.

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[8] Petitioner argues that a recent example is the 2022 "Mitigation in Rating Plans" regulation (10 CCR §2644.9), which was unquestionably issued under Prop 103 authority, yet the Department properly followed the full APA rulemaking process. RJN Ex. C. There is no apparent reason why this regulation, which also required insurers to submit rule-change applications without rate impact for review and approval, was not subject to the ratemaking exemption, but the Bulletins would be. Other Prop 103 rules likewise went through the APA's notice-and-comment process and were not claimed to be subject to the ratemaking exemption—*e.g.,* the "Amendments to Procedural Regulations for Rate Cases" (File No. RH02020999) and the "Intervenor Regulations" (File No. RH06092874). RJN Ex. C. Opp. at 15.

Respondents correctly reply that the fact that the Commissioner has on other occasions followed the APA rulemaking procedures in promulgating regulations under Prop 103 has no bearing on the issues. In 20th Century, the Commissioner several times submitted the rate regulations to the OAL, doing so voluntarily to provide maximum opportunity for public participation, and in the hope of avoiding any litigation that might accompany his reliance on the ratesetting exception. 8 Cal.4th at 248. The court did not hold that the Commissioner's submissions to OAL required him to comply with the APA. Reply at 7-8.

Although Petitioner argues that the Bulletins are not an essential or integral part of the ratemaking process because a pass-through is neither essential nor integral (Opp. at 13), the logic of 20th Century suggests that regulations establishing the administrative process for ratemaking are covered by the exception just like regulations establishing substantive ratemaking rules. Both are an integral part of the ratemaking process. *Cf.* Ins. Co. v. Deukmejian, (1989) 48 Cal.3d 805, 824 ("[Prop 103] does not establish a detailed method of processing and deciding rate applications ... Much is necessarily left to the Insurance Commissioner, who has broad discretion to adopt rules and regulations as necessary to promote the public welfare.").

In sum, Prop 103 must be broadly construed to include the Commissioner's rules and regulations establishing the ratemaking administrative process within Govt. Code section 11340.9(g)'s exception to the APA rulemaking requirements.

b. The Bulletins Are a Form of Rate Application Under Prop 103

Petitioner argues that Respondents are factually wrong that "the Bulletins [] reflect on their face that they concern rate applications to the Commissioner by FAIR Plan member insurers *under Proposition 103.*" Dem. at 7 (first emphasis added, second emphasis in original). The Bulletins tell insurers to file rule-change applications, a filing type the Department's Prior Approval Instructions describe as applying to "all filings without rate impact." RJN, Ex. B, p. 5 (emphasis added). Neither Bulletin directs insurers to file a rate application. Opp. at 13.

The different standards of review for rule-change and rate-change applications underscore the wrongness of applying the APA ratemaking exemption. Rate-change applications must be reviewed for compliance with section 1861.05's "excessive/inadequate" rate standard. *See* 10 CCR §2641.3 (purpose of the review of rates subchapter is to establish the process and policies to determine whether proposed rates are excessive or inadequate). If the pass-throughs were considered rates, then insurers would have to file complete rate applications for them where amounts recouped would be directly factored into the excessive/inadequate determination. Yet, the excessive/inadequate standard is not referenced in either Bulletin. Additionally, if the rate-change application including pass-throughs resulted in a rate increase of over 7%, then consumer intervenors would have the right to require a public hearing be held on the application. §1861.05(c). By excluding the pass-throughs from being considered "premium" or "losses" and directing insurers to file rule-change applications, Respondents avoid those requirements. Opp. at 13-14.

Policy considerations reinforce the APA's statutory text. The APA exists to ensure transparency, an opportunity for "meaningful public participation in the adoption of administrative regulations by state agencies," and to provide a "record assuring effective judicial review." Voss v. Superior Court, (1996) 46 Cal.App.4th 900, 908; Malaga County Water District v. Central Valley Regional Water Quality Control Board, (2020) 58 Cal.App.5th 418, 442.) Its protections are especially important when considering rules that enable the transfer of potentially billions of dollars from the pocketbooks of consumers to corporations. The lack of clarity over the authority or legal status of the Bulletins is exactly what the APA exists to prevent. Because the pass-throughs are not insurance rates, the Bulletins are subject to the APA. Opp. at 16.

Petitioner concludes that, had the Department duly issued a regulation, the APA would have required notice, public comment, and OAL review to test the rule's legality under the FAIR Plan statutes (which it would not have passed). Had the Bulletins required pass-throughs to be

applied for through complete rate applications, then all of Prop 103's rate review provisions would have applied to ensure the pass-throughs were justified under the excessive-inadequate standard. By failing to follow APA procedures and constructing the pass-throughs to be applied for as rule-changes without rate impact, Respondents seek to duck both regimes. Opp. at 14.

Petitioner is wrong that the Bulletins do not require rate applications under Prop 103 because they direct insurers to file rule-change applications. As reflected in the Rate Instructions, a rule-change application is merely a type of rate application under Prop 103. "Every insurer wishing to introduce new, or change existing, rules, rates or forms ... must complete a Prior Approval Rate Application", among other documents. RJN Ex. B, p. 4 (emphasis added). "These instructions apply only to applications for new program, rate, coverage form, rule, transferred program and program withdrawal filings for prior approval (Proposition 103) lines of business ...". Id. (emphasis added). "Insurers must submit a completed Application for all new programs and changes to existing rates, forms and rules (rating and eligibility).". RJN Ex. B, p. 5 (emphasis added). Reply at 6, n. 5.

Petitioner's argument that rule-change and rate-change applications have different standards of review and that rule-change applications give Respondents broader discretion ignores that Respondents require extensive rate-related information for rule-change applications, and expressly state that they will review rule-change applications for potential rate impact and they may require a rule-change applicant to instead file a complete rate-change application. RJN Ex. B, p. 4 ("With every Application, insurers must submit a complete rate manual which contains all current rates, rating factors and rating rules including any changes in rates, rating factors and/or rating rules ..."); Ex. B, p. 5 ("For all filings without rate impact, insurers must submit a rule or form filing. An Application with full rate support may subsequently be required at the discretion of the Department."); Ex. B, pp. 5-6 ("If an insurer maintains that there is no rate impact resulting from proposed changes to rating manual or eligibility guidelines, the insurer is required to submit the proposed changes as part of a rule or form filing ... in order for the Department to review the proposed changes for possible rate impact. The Department retains discretion to require the insurer to file a complete rate application in support of the proposed changes.").

Moreover, it is not inconsistent under Prop 103 for a rule change application to be a more streamlined procedure than a complete rate change application. There are no barriers to efficient decision making in Prop 103. "Much is necessarily left to the Insurance Commissioner, who has broad discretion to adopt rules and regulations as necessary to promote the public welfare" and "there is nothing [in Prop 103] which prevents the commissioner from taking whatever steps are necessary to reduce the job to manageable size." 20th Century, *supra*, 8 Cal.4th at 245 (citation omitted).

Petitioner also ignores the procedural safeguards inherent in the rule-change application process. The Bulletins instruct insurers to file a certain type of rate application, which must then be reviewed by the Department, with all the procedural safeguards of any rate application under Prop 103. Among other administrative remedies available under Prop 103, Petitioner or other consumer representatives can initiate or intervene in both: (1) a rule change application proceeding, as a form of rate application proceeding; and (2) a proceeding under section 1858 to challenge "any rate charged, rating plan, rating system, or underwriting rule." §1861.10(a). Petitioner then could argue against imposition of a particular pass-through as an excessive rate.

Under the broad construction of Prop 103, the Bulletins are within Govt. Code section

11340.9(g)'s exception to the APA rulemaking requirements as a form of rate application. The demurrer to the first cause of action is sustained.

2. The Second Cause of Action

The Petition's second cause of action alleges that the Commissioner lacked the authority to permit pass-throughs under the FAIR Plan statutes.

Respondents argue that the second cause of action does not state a claim because, as the Bulletins' content reflects, they were issued under Prop 103, not the FAIR Plan statutes. This is corroborated by the Petition's allegations that the Bulletins "directly regulate the FAIR Plan's member insurers" and not FAIR Plan, "do not directly affect the FAIR Plan in any way," "purport to regulate conduct solely as between Respondent and the FAIR Plan's member insurers," and "come into play only after the FAIR Plan decides to assess its member insurers, and are effectuated without any involvement by the FAIR Plan itself." Pet., ¶¶ 70-71. Dem. at 9; Reply at 8.

Respondents argue that that the Commissioner has broad authority to issue regulations under Prop 103. *See e.g.*, 20th Century, *supra*, 8 Cal.4th at 280-81; Calfarm Ins. Co. v. Deukmejian, (1989) 48 Cal.3d 805, 824 ("[Prop 103] does not establish a detailed method of processing and deciding rate applications ... Much is necessarily left to the Insurance Commissioner, who has broad discretion to adopt rules and regulations as necessary to promote the public welfare."); State Farm Mutual Automobile Ins. Co. v. Garamendi, (2004) 32 Cal.4th 1029, 1041-42 (Prop 103 "gives the Commissioner broad authority over insurance rates" and upholding the Commissioner's authority to adopt challenged regulation). Because the Bulletins were issued within the scope of the Commissioner's authority under Prop 103, it is irrelevant whether, as Petitioner alleges, they fell outside the scope of his authority under the FAIR Plan statutes. Dem. at 9.

Petitioner argues that the key question is not whether the Bulletins utilize Prop 103 procedures, but whether allowing pass-throughs lies within the Commissioner's statutory authority. Substance, not form, governs. Civil Code §3528; *see also* Bravo Vending, *supra,* 16 Cal.App.4th at 405 (local agencies should not be allowed to frustrate state law's intent to preempt by passing carefully drafted ordinances which hide the preempted substance of a regulation behind a non-preempted form). Because the Commissioner's authority to issue regulations under Prop 103 is implied, the scope of such authority should be narrowly construed. *See* California Chamber of Commerce v. State Air Resources Bd., (2017) 10 Cal.App.5th 604, 620. Opp. at 9.

According to Petitioner, Respondents ignore substance in favor of label when they argue that the Bulletins fall within the Commissioner's authority under Prop 103 because they direct FAIR Plan member insurers to apply for pass-throughs using established Prop 103 processes for filing rate-change applications. The Bulletins implement the FAIR Plan statutes, do not engage substantively interpret or implement Prop 103, and create a surcharge foreign to Prop 103. Respondents do not identify any provision of Prop 103 that grants the Commissioner such unilateral authority. Nothing in the Bulletins—or in any contemporaneous statement—claims Prop 103 as substantive authority for the pass-throughs, as opposed to the Prop 103 application process simply being the filing mechanism for pass-through applications. The Commissioner cannot do whatever he wants just by claiming he is acting pursuant to Prop 103. The Commissioner therefore acted *ultra vires.* Opp. at 5, 10-11.

Petitioners add that the two Prop 103 provisions cited by the Bulletins —sections

1861.02(c) and 1861.05(b)—provide no authority for the pass-throughs. Section 1861.02(c) concerns only to automobile coverage. Section 1861.05(b) governs the "complete rate application" an insurer must submit when "desir[ing] to change any rate". Yet, the Bulletins expressly instruct insurers not to file rate-change applications, do not subject the pass-throughs to the "excessive/inadequate" analysis required for rates by section 1861.05(a), and exclude the pass-throughs from being considered in future ratemaking. Pet., Ex. A, p. 2; Ex. B, p. 2. Opp. at 11.

Respondents argue that whether allowing pass-throughs lies within the Commissioner's statutory authority is a ratemaking question that falls under Prop 103, not the FAIR Plan statutes. In support of this conclusion, Respondents pose a hypothetical: If the Commissioner permitted a FAIR Plan member to pass an expense through to insureds that was not a FAIR Plan assessment, would that implicate the Commissioner's authority under the FAIR Plan statutes? Obviously not. Rather, it would implicate "the Commissioner['s] broad authority over insurance rates" under Prop 103. *See* State Farm Mutual Automobile Ins. Co. v. Garamendi, (2004) 32 Cal.4th 1029, 1041-42. Similarly, if the Bulletins directed insurers to seek to recoup the FAIR Plan assessment through complete rate change applications instead of a pass-through fee, would Petitioner still deny that they implicate such broad authority? That seems unlikely. Reply at 8-9.

The court concludes that Petitioner's argument rests on its incorrect conclusion that rule change applications are not a type of rate application under Prop 103, a conclusion belied by the Prior Approval Rate Application Filing Instructions. RJN Ex. B.

Petitioner makes various arguments that the Bulletins' findings and reasoning for the pass-throughs all pertain to the FAIR Plan statutes and not Prop 103. However, "[a]n administrative body making a quasi-legislative decision" reviewable by ordinary mandamus "is not generally required to either make findings or explain how the evidence supports its decision." American Chemistry Council v. Office of Environmental Health Hazard Assessment, (2020) 51 Cal.App.5th 918, 926.

The Commissioner had authority under Prop 103 for the pass-throughs in the Bulletins.

3. The Third Cause of Action

The Petition's third cause of action alleges that the pass-throughs conflict with, and therefore violate, the FAIR Plan statutes.

Respondents contend that the third cause of action does not state a claim because the Petition (and its exhibits) reflect on their face that Petitioner has failed to exhaust all available administrative remedies. As referred to above, section 1861.10(a) permits "any person" to "initiate or intervene in any proceeding permitted or established pursuant to" Prop 103 or the McBride Act. Permitted or established proceedings include all rate proceedings under section 1861.05, as well as proceedings under section 1858 challenging any rate charged, rating plan, rating system, or underwriting rule. Farmers, *supra*, 137 Cal.App.4th at 854; Poizner, *supra*, 180 Cal.App.4th at 1049. Dem. at 9-10.

The availability of such administrative remedies under sections 1861.05 and 1858 has been held to impose an exhaustion requirement that must be satisfied before any person may seek judicial relief concerning matters within the ambit of those sections. Farmers Ins. Exchange v. Superior Court, (1992) 2 Cal.4th 377, 381-82, n. 1 (demurrer to claim of violations of Prop 103 was properly sustained for failure to exhaust administrative remedies available under the Insurance Code); Karlin v. Zalta, (1984) 154 Cal.App.3d 953, 979–87 (affirming dismissal of claims alleging

conspiracy to fix medical malpractice insurance premium rates at excessive levels because McBride Act regulates all activities involving casualty insurance ratemaking and plaintiff failed to exhaust administrative remedies). Dem. at 10.

Petitioner responds that there are no required administrative remedies before challenging the Commissioner's unlawful regulations. As a general matter, "courts may rely upon mandamus under Code of Civil Procedure section 1085 to review the validity of a quasi-legislative action" and if "an administrative agency has exceeded its authority in the exercise of its quasi-legislative powers, a court may issue a writ of mandate." Clean Air Constituency v. California State Air Resources Bd., (1974) 11 Cal.3d 801, 809. Respondents' exhaustion defense collapses on the text of the statutes they invoke. Section 1861.05 establishes no administrative remedies at all, and section 1858 applies only to complaints about "any rate charged, rating plan, rating system, or underwriting rule followed or adopted by an insurer or rating organization." (emphasis added). Section 1858 has nothing to do with legal challenges to the Commissioner's regulations. Each of the three cases cited by Respondents was a challenge against insurance company practices or actions, not the Commissioner's regulations. *Cf.* 20th Century, *supra*, 8 Cal.4th at 216 (challenge to Commissioner's regulations); Association of California Ins. Companies v. Jones, (2017) 2 Cal.5th 376 (same); Association of California Ins. Cos. v. Poizner, (2009) 180 Cal.App.4th 1029 (same). Opp. at 16-17.

Indeed, to the extent the pass-throughs are analyzed as implementing Prop 103, section 1858.6 expressly provides for judicial review of "[a]ny ... rule ... made by the commissioner under this chapter." The Legislature thus expected courts to resolve challenges aimed at the Commissioner's regulatory power rather than at an insurer's conduct, even where the rules concern ratemaking (as in 20th Century, *supra*, 8 Cal.4th 216). Opp. at 17.

To the extent Respondents' argument is that Petitioner should try to intervene in one of the Fair Plan member's pass-through applications, such intervention is not a legal prerequisite to suit, nor would it have served any purpose. The Petition does not contest the arithmetic or methodology of a particular insurer's pass-through; it attacks the legality of the pass-through scheme itself. The court is the proper arbiter of the legal questions at the heart of this case. Poizner, *supra*, 180 Cal.App.4th at 1045 (whether an agency is authorized to issue a regulation "is a question particularly suited for the judiciary as the final arbiter of the law, and does not invade the technical expertise of the agency"). Thus, no administrative remedy was necessary to exhaust before this action was filed. Opp. at 17.

Respondents reply that Petitioner mischaracterizes both their argument and the statutory scheme. Petitioner ignores both the administrative proceedings expressly provided for by section 1861.05, and also Respondents' explicit reliance on section 1861.10, which permits any person to initiate or intervene in any proceeding permitted or established pursuant to the McBride Act, including Prop 103, challenge any action of the Commissioner under Prop 103, and enforce any provision of Prop 103. §1861.10(a). Reply at 10-11.

Petitioner then misidentifies Respondents' cases on this point in arguing that section 1858 has nothing to do with legal challenges to the Commissioner's regulations" and that this is confirmed by Respondents' three cases. It is true that Respondents' cases involved challenges to insurers' practices or actions, but only two involved section 1858 (Karlin v. Zalta, *supra,* 154 Cal.App.3d at 953; County of Los Angeles v. Farmers Ins. Exchange, *supra,* 132 Cal.App.3d at 77), while the third involved Prop 103 itself (Farmers Ins. Exchange v. Superior Court, *supra,* 2

Cal.4th at 377). Whatever the proper scope of section 1858, section 1861.10(a) plainly provides administrative machinery to challenge the Commissioner's regulations, like the Bulletins by permitting any person to challenge any action of the commissioner under Prop 103. "[W]hen administrative machinery exists ... the courts will not act until such administrative procedures are fully utilized and exhausted," and this "rule is applicable whether the petitioner is seeking ordinary mandamus or administrative mandamus." FlightSafety Intern., Inc. v. Los Angeles County Assessment Appeals Bd., (2023) 96 Cal.App.5th 712, 718. Reply at 11.

Petitioner's other argument, that "Section 1858.6 expressly provides for judicial review of" the Commissioner's rules under the McBride Act, has been rejected. "Judicial review is of course available to challenge [the Commissioner's] administrative determinations (see §§ 1858.6, 1861.09), but such review may be obtained only after the available administrative procedures have been invoked and exhausted." Farmers, *supra*, 2 Cal.4th at 382, n. 1. Reply at 11, n. 11.

Petitioner is correct. Section 1858.6 expressly provides for judicial review of the Commissioner's rules under the McBride Act, including Prop 103. Respondents are wrong that such review requires administrative exhaustion. In Farmers, the California Supreme Court only held that the People's claim against an insurer, prosecuted by the Attorney General, required exhaustion. 2 Cal.4th at 382, n. 1. It did not hold that a challenge to the Commissioner's regulation or rule requires exhaustion. Nor would such a rule make sense. It would be heroic for the Commissioner to hold that his own rule or regulation violated the law.

Nor do sections 1861.05 and 1861.10 so require. Section 1861.05 concerns rate approval and section 1861.10 permits any person to initiate or intervene in any proceeding permitted or established pursuant to the McBride Act, including Prop 103, challenge any action of the Commissioner under Prop 103, and enforce any provision of Prop 103. §1861.10(a). It provides authority for Petitioner to challenge the Commissioner's actions under Prop 103 by initiating or intervening in a proceeding, but it does not say whether the proceeding must be administrative or judicial review. Petitioner may challenge the Bulletins' pass-throughs as in conflict with, and violation of, the FAIR Plan statutes without exhausting any administrative remedy.

E. Conclusion

The demurrer is sustained without leave to amend for the first and second causes of action and overruled for the third cause of action. Respondents have 30 days to answer only.