

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO

**ASSOCIATION OF CALIFORNIA  
LIFE & HEALTH INSURANCE  
COMPANIES, a California not-for-  
profit corporation,**

**Petitioner and Plaintiff,**

**v.**

**CALIFORNIA DEPARTMENT OF  
INSURANCE, a public entity; STEVE  
POIZNER, in his official capacity as  
Commissioner of California Department  
of Insurance; and DOES 1-10,**

**Respondents and  
Defendants.**

**Case No. 34-2010-80000637-CU-WM-GDS**

**RULING ON SUBMITTED MATTER:  
GRANTING IN PART AND DENYING IN  
PART PETITIONER ASSOCIATION OF  
CALIFORNIA LIFE & HEALTH  
INSURANCE COMPANIES' PETITION  
FOR WRIT OF MANDATE AND/OR  
DECLARATORY RELIEF**

On August 16, 2010, Petitioner and Plaintiff Association of California Life & Health Insurance Companies filed a Petition for Writ of Mandate and/or Declaratory Relief ("Petition") alleging the Department abused its discretion in adopting various regulations related to postclaims underwriting. Petitioner seeks a peremptory writ of mandate pursuant to Civil Procedure Code § 1085 compelling Respondents and Defendants California Department of Insurance and Steve Poizner, Commissioner, to withdraw the regulations.<sup>1</sup>

Pursuant to the Court's December 9, 2010 Tentative Ruling, the parties appeared before

---

<sup>1</sup> Petitioner also asks the Court to declare the regulations void and invalid and seeks a permanent injunction precluding the Department from issuing and enforcing the regulations – claims that are essentially duplicative of its Petition

1 the Court on December 10, 2010, to address the merits of the Petition. The Court subsequently  
2 took the matter under submission. The Court, having heard oral argument, read and considered  
3 the written argument of all parties, and read and considered the documents and pleadings in the  
4 above-entitled action, now rules on the matter as follows:

5 **I. FACTUAL AND PROCEDURAL BACKGROUND**

6 On or about June 5, 2009, Respondent and Defendant California Department of Insurance  
7 (the "Department") initiated a rulemaking proceeding, Regulation File REG-2007-00054,  
8 intended to address proposed regulations adding a new article 11 to title 10, subchapter 2 of the  
9 California Code of Regulations, entitled "Standard for Health History Questionnaires in Health  
10 Insurance Applications, Pre-Issuance Medical Underwriting and Rescission of Health Insurance  
11 Policies," sections 2274.70-2274.78. (Petition at ¶ 20; Answer at ¶ 20.) The Department invited  
12 submission of written comments by July 20, 2009. (Petition at ¶ 22; Answer at ¶ 22.)

13 Petitioner is a California not-for-profit corporation comprised of 37 member life and  
14 health insurance companies in California. (Petition at ¶ 15.) Petitioner represents its constituent  
15 members with respect to legislative and regulatory issues affecting the health care and health  
16 insurance industries. It brings this action on behalf of its members. (Petition at ¶ 15.) Petitioner  
17 submitted written comments regarding the proposed regulations to the Department by the July 20,  
18 2009 deadline. The comments generally asserted that many of the proposed regulations  
19 conflicted with the Insurance Code and existing case law. (Petition at ¶ 23; Answer at ¶ 23 ) The  
20 Department responded to the comment letters and issued the Amended Text of Regulation on  
21 April 19, 2010. (Petition at ¶¶ 24, 25; Answer at ¶¶ 24, 25.)

22 On May 2, 2010, Petitioner submitted additional written comments regarding the  
23 Department's proposed regulations. (Petition at ¶ 26; Answer at ¶ 26.) The Department  
24 responded to Petitioner's comments without altering the proposed regulations (Petition at ¶ 27;  
25 Answer at ¶ 27.)

26 On July 19, 2010, the Office of Administrative Law approved the regulations and the  
27 regulations took effect on August 18, 2010. (Petition at ¶ 28; Answer at ¶ 28.)

28 Petitioner presents a number of challenges to Sections 2274.74, 2274.77, and 2274.78(c),

1 (d), (g), and (h) of Title 10 of the Code of Regulations (“CCR”). However, from the Court’s  
2 review of the challenged regulations and the parties’ written and oral arguments, it has become  
3 clear that the key issue is whether the Department has authority – either express or implied – to  
4 promulgate the challenged regulations.

## 5 **II. DISCUSSION**

### 6 **A. Petitioner has standing to pursue its claims.**

7 The Department contends that Petitioner lacks standing to pursue its claims on two  
8 grounds. First, Petitioner, as an association of insurers, does not have standing to pursue its  
9 Government Code § 11350 declaratory relief claim because only its members (not Petitioner  
10 itself) are subject to the challenged regulations. (Opposition at 9:22-1012.) Second, Petitioner  
11 lacks the necessary beneficial interest to seek a petition for writ of mandate pursuant to Civil  
12 Procedure Code § 1085. (Opposition at 10:13-25.)

13 Petitioner has standing to pursue its declaratory relief claim. Government Code § 11350  
14 provides in pertinent part: “Any interested person may obtain a judicial declaration as to the  
15 validity of any regulation or order of repeal by bringing an action for declaratory relief in the  
16 superior court in accordance with the Code of Civil Procedure.” (Gov’t Code § 11350(a).)

17 The Department relies on the First Appellate District’s decision in *Associated Boat*  
18 *Industries v. Marshall*, (1951) 104 Cal.App.2d 21, for the proposition that “an incorporated trade  
19 association lacks standing to challenge the regulations where only the members of the association,  
20 and not the association itself, are subject to the regulations.” (Opposition at 10.2-5.) The  
21 Department goes on to note that “[s]ome courts have retreated from a strict application of  
22 *Marshall*” (Opposition at 10:6), but fails to note that the First Appellate District is one of those  
23 courts. In *Environmental Protection Information Center v Department of Forestry and Fire*  
24 *Protection*, (1996) 43 Cal.App.4th 1011, the First Appellate District stated:

25 Upon reflection, we agree with the *Residents* court and disapprove of our 1951  
26 decision in *Marshall*. In our view it simply no longer makes good sense to draw a  
27 hard and fast line between an organization, particularly a nonprofit one, and its  
28 members for purposes of analyzing whether that organization is an “interested  
person for purposes of Government Code section 11350. Accordingly, we now  
hold, consistent with the *Residents* court, that a party may be an “interested”  
person for purposes of Government Code section 11350 if either it or its members

1 is or may well be impacted by a challenged regulation.  
2 (*Environmental Protection Information Center, supra*, 43 Cal.App.4th at 1017-18.)

3 The Department's reliance on *Pacific Legal Foundation v Unemployment Insurance*  
4 *Appeals Board*, (1997) 74 Cal.App.3d 150, is misplaced. There, the Third Appellate District  
5 distinguished the *Associated Boat Industries* decision, stating that the First Appellate District  
6 addressed the issue of whether an "incorporated trade association, whose members are subject to  
7 the regulations attacked but which itself is not subject to those regulations," was an interested  
8 person. (*Pac. Legal Found, supra*, 74 Cal.App.3d at 156.) The Third Appellate District,  
9 however, addressed plaintiff Pacific Legal Foundation, an employer that "is or could be [itself]  
10 subject to" the regulation at issue. (*Ibid.*)

11 Petitioner also possesses the beneficial interest necessary to pursue its Civil Procedure  
12 Code § 1085 claim. Civil Procedure Code § 1086 requires a party seeking a peremptory writ of  
13 mandate to have a "beneficial interest" in the outcome of the writ proceeding "A beneficial  
14 interest means the petitioner has a special interest over and above the interest of the public at  
15 large." (*Cal. Ass'n of Health Servs at Home v State Dep't of Health Servs* (2007) 148  
16 Cal.App.4th 696, 706 (citation omitted).) "[A]n association has standing to bring suit on behalf  
17 of its members when: (a) its members would otherwise have standing to sue in their own right; (b)  
18 the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim  
19 asserted nor the relief requested requires the participation of individual members in the lawsuit."  
20 (*Driving School Ass'n of Cal v San Mateo High School Dist* (1992) 11 Cal.App.4th 1513, 1517  
21 (citation omitted).))

22 The Department does not contend that Petitioner's constituent members do not have  
23 standing to sue in their own right. (See Opposition at 10:1-5.) Based on Petitioner's allegations,  
24 the Court finds that Petitioner's members indeed have standing to sue in their own right. The  
25 Court concludes that the remaining requirements for associational standing are met. Accordingly,  
26 Petitioner has standing to pursue its Civil Procedure Code § 1085 claim.

27  
28 ///

1           **B.     Standard of Review.**

2           Government Code § 11342.2 provides: “Whenever by the express or implied terms of any  
3 statute a state agency has authority to adopt regulations to implement, interpret, make specific or  
4 otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless  
5 consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose  
6 of the statute.”

7           The traditional two-pronged analysis governing a court’s review of an administrative  
8 regulation is well known. “First, the court asks whether the [agency] exercised [its] quasi-  
9 legislative authority within the bounds of the statutory mandate.” (*Mineral Ass’ns Coalition v*  
10 *State Mining and Geology Board* (2006) 138 Cal.App.4th 574, 582 (internal quotations and  
11 citation omitted).) Under this first prong, the Court “independently reviews the administrative  
12 regulation for consistency with controlling law.” (*Communities for a Better Environment v Cal*  
13 *Res Agency* (2002) 103 Cal.App.4th 98, 109 (citation omitted); *State Farm Mutual Auto Ins Co*  
14 *v Garamendi* (2004) 32 Cal.4th 1029, 1040 (citation omitted).) Regulations that alter or amend  
15 the governing statute or case law or enlarges or impairs its scope are void. (*Communities, supra*,  
16 103 Cal.App.4th at 108 (citation omitted); *Mineral Ass’ns Coalition, supra*, 138 Cal App.4th at  
17 582 (citation omitted).)

18           “[T]he second prong of this standard, reasonable necessity, generally does implicate the  
19 agency’s expertise; therefore, it receives a much more deferential standard of review. The  
20 question [here] is whether the agency’s action was arbitrary, capricious, or without reasonable or  
21 rationale basis.” (*Communities, supra*, 103 Cal.App.4th at 109 (citation omitted) )

22           Here, however, resolution of most of the issues before the Court rests on a more  
23 fundamental question, assumed in the express language of Government Code § 11342.2: Does the  
24 Department have the authority, either express or implied, to adopt the regulations at issue?

25           “‘It is well settled in this state that [administrative] officials may exercise such additional  
26 powers as are necessary for the due and efficient administration of powers expressly granted by  
27  
28

1 statute, or as *may fairly be implied* from the statute granting the powers.”<sup>2</sup> (*CalFarm Ins. Co* ,  
2 *supra*, 48 Cal.3d at 824-25 (internal quotations and citation omitted); *In re J G*. (2008) 159  
3 Cal.App.4th 1056, 1066 (“To be valid, administrative action must be within the scope of authority  
4 conferred by the enabling statutes”) (citation omitted).) “[C]ourts usually give great weight to the  
5 interpretation of an enabling statute by officials charged with its administration, including their  
6 interpretation of the authority vested in them to implement and carry out its provisions. [Citation.]  
7 But regardless of the force of administrative construction, final responsibility for interpretation of  
8 the law rests with courts. If the court determines that a challenged administrative action was not  
9 authorized by or is inconsistent with acts of the Legislature, that action is void.” (*In re J G* ,  
10 *supra*, at 1066-67 (citation omitted).) The Court must therefore utilize its independent judgment  
11 to evaluate the claimed source of the Department’s rulemaking authority in order to determine  
12 whether the Department in fact has the power to adopt the challenged regulations. (See *County of*  
13 *Santa Cruz v State Bd of Forestry* (1998) 64 Cal. App 4th 826, 834 (citation omitted) )

14 Whether the Legislature expressly delegated quasi-legislative powers to an administrative  
15 agency should be readily apparent from the language of a statute. Whether an administrative  
16 agency has the implied power to engage in rulemaking involves a more complicated analysis. The  
17 doctrine of implied powers ““is not without limitations. It cannot be invoked where the grant of  
18 express powers clearly precludes the exercise of others, or where the claimed power is  
19 incompatible with, or outside the scope of, the express power. For a power to be justified under  
20 the doctrine, it must be essential to the declared objects and purposes of the enabling act-not  
21 simply convenient, but indispensable. Any reasonable doubt concerning the existence of the  
22 power is to be resolved against the agency.”” (*Addison v Dept of Motor Vehicles* (1977) 69  
23 Cal.App.3d 486, 498 (citing 1 Cal.Jur.3d, Administrative Law, § 39, pp. 257-58).)

24  
25 ///

26 \_\_\_\_\_  
27 <sup>2</sup> Courts have repeatedly held that the commissioner “has broad discretion to adopt rules and regulations as necessary  
28 to promote the public welfare ” (*Id* at 824, *State Farm, supra*, 32 Cal 4th at 1040 (citation omitted) ) However, the  
commissioner’s discretion to adopt necessary rules and regulations must still stem from the Legislature’s delegation –  
either express or implied – of quasi-legislative power to engage in administrative rulemaking.

1           **C.     The Petition is granted in part and denied in part.**

2                   **1.     Section 2274.74 is invalid.**

3           Petitioner contends the Department exceeded its authority in promulgating Section  
4 2274.74, “Standard for Avoiding Prohibited Postclaims Underwriting.” Section 2274(a) provides:

5           In order to complete medical underwriting prior to issuing a policy, the insurer  
6 shall obtain the necessary information to evaluate eligibility for coverage in  
7 accordance with the insurer’s medical underwriting guidelines and determine the  
8 appropriate rate for the policy offered. The insurer shall obtain health history  
9 information about an applicant necessary to complete medical underwriting from  
10 at least one source of such information, if available, other than self-reported  
11 information provided by the applicant. The insurer must engage in the activities  
12 specified in Paragraphs (1) through (7) of this Subdivision (a) to the degree  
13 necessary to assure that it has obtained the health history information in the detail  
14 needed for complete and consistent application of its medical underwriting  
15 guidelines and rating plan.

16           Section 2274.74(a) then goes on to define “medical underwriting” as including, but not  
17 limited to, seven enumerated activities. “In order to resolve all reasonable questions arising from  
18 written information submitted on an application prior to issuing a policy, the insurer shall obtain  
19 and use any necessary additional information external to the health insurance application to  
20 resolve inconsistencies or conflicts in the application ” (10 CCR § 2274(b).) Section 2274.74(b)  
21 then outlines the activities that must be conducted in order to resolve all reasonable questions.  
22 (10 CCR § 2274.74(b).)

23           If an insurer fails to fully comply with the above-outlined provisions, “the insurer is  
24 prohibited from rescinding, canceling, limiting a policy or certificate, or increasing the rate  
25 charged, subsequent to receiving: (1) a request for authorization of service or verification of  
26 eligibility for benefits; (2) notice of a claim; (3) a claim or a request for a change in coverage; or  
27 (4) any other communication that puts the insurer on notice of a claim.” (10 CCR § 2274.74(c).)

28           The Department fails to address the authority for the promulgation of Section 2274.74 in  
its Opposition. During oral argument, however, the Department contended that Insurance Code  
§§ 790.10 and 12921 authorized the Department to adopt Section 2274.74.<sup>3</sup> The Court disagrees.

<sup>3</sup> Section 2274 74 also identifies the following authorities in support of its adoption Insurance Code §§ 10291 5 and 12926; *CalFarm Ins Co v Deukmejian* (1989) 48 Cal.3d 805, and *20th Century Ins Co v Garamendi* (1994) 8 Cal 4th 216 in support of its adoption of Section 2274 74 The Department failed to address these purported authorities in either its Opposition or during oral argument The Department’s failure to rebut Petitioner’s arguments constitutes a waiver of any argument the Department may have that these authorities authorize it to adopt the

1 The Department's argument regarding Insurance Code § 790.10 fails for several reasons.  
2 First, Insurance Code § 790.10, which is contained in Article 6.5 of Chapter 1 of Part 2 of  
3 Division 1 of the Insurance Code expressly authorizes the commissioner to, "from time to time as  
4 conditions warrant, after notice and public hearing, promulgate reasonable rules and regulations,  
5 and amendments and additions thereto, as are necessary to *administer this article.*" (Emphasis  
6 added.) Postclaims underwriting, however, is governed by a separate article outside the reach of  
7 Insurance Code § 790.10 – Article 6 of Chapter 4 of Part 2 of Division 2 of the Insurance Code

8 Second, Insurance Code § 790.03 defines "unfair methods of competition and unfair and  
9 deceptive acts or practices in the business of insurance" to include nine categories of actions,  
10 none of which include postclaims underwriting and rescission based thereon. (Ins. Code §  
11 790.03(a)-(i).) "Few cases have provided a more appropriate occasion to apply the maxim  
12 *expressio unius exclusio alterius est*, under which the enumeration of things to which a statute  
13 applies is presumed to exclude things not mentioned." (*O'Grady v Super Ct* (2006) 139 Cal  
14 App. 4th 1423, 1443; *In re J. W.* (2002) 29 Cal. 4th 200, 209 ("The other principle, commonly  
15 known under the Latin name of *expressio unius est exclusio alterius*, is that the expression of one  
16 thing in a statute ordinarily implies the exclusion of other things").)

17 Nothing in the language or structure of Insurance Code § 790.03 indicates that the list of  
18 actions is anything but exclusive. The statute does not contain language commonly found in other  
19 statutes setting forth a list of included or excluded items, such as "including, but not limited to "  
20 The Legislature could have easily included postclaims underwriting within the definition of unfair  
21 methods of competition or unfair or deceptive acts or practices had it intended Insurance Code §  
22 790.03 to cover this practice. (See *O'Grady, supra*, 139 Cal.App.4th at 1444 (citation omitted).)

23 Most importantly, however, is the fact that the Legislative intent articulated in Article 6 5  
24 supports the conclusion that the Legislature reserved for itself, and only itself, the right to  
25 categorically define unfair methods of competition and unfair and deceptive acts or practices <sup>4</sup>

---

26 challenged regulations (*Cal Dept of Corrections v State Personnel Bd* (2004) 121 Cal App 4th 1601, 1619  
27 (citation omitted) )

28 <sup>4</sup> Insurance Code § 790.06 outlines the procedures to be followed "whenever the commissioner shall have reason to  
believe that any person engaged in the business of insurance is engaging in this state in any method of competition or

1 Article 6.5 applies to all persons engaged in the business of insurance (Ins. Code §  
2 790.01) and prohibits such persons from engaging in “any trade practice *which is defined in this*  
3 *article as, or determined pursuant to this article to be*, an unfair method of competition or an  
4 unfair or deceptive act or practice in the business of insurance.” (Ins. Code § 790.02 (emphasis  
5 added).) The express purpose of Article 6.5 “is to regulate trade practices in the business of  
6 insurance . . . *by defining, or providing for the determination of*, all such practices in this State  
7 which constitute unfair methods of competition or unfair or deceptive acts or practices and by  
8 prohibiting the trade practices so defined or determined.” (Ins. Code § 790 (emphasis added).)

9 During oral argument, the Department argued that postclaims underwriting resulting in  
10 rescission constitutes an unfair settlement practice, which is defined by Insurance Code §  
11 790.03(h). Insurance Code § 790.03(h) expressly defines an “unfair claims settlement practice”  
12 as including 16 specific types of actions.<sup>5</sup> (Ins. Code § 790.03(h)(1)-(16).) Again, the

---

13 in any act or practice in the conduct of the business that is not defined in Section 790.03 ” The Department does  
14 not cite to Insurance Code § 790 06 as the authority for promulgating Section 2274 74 and did not address this  
15 provision in either its Opposition or during oral argument Upon independent review of Insurance Code § 790 06, the  
16 Court is unconvinced that it provides authority for the Department to promulgate the challenged regulation In  
17 contrast to Insurance Code § 790 03, which generally precludes broad categories of unfair practices, Insurance Code  
18 § 790 06 allows the commissioner to identify a specific unfair practice committed by an identifiable insurer, in which  
19 case the commissioner may serve that insurer with an order to show cause and notice of hearing to address the  
20 alleged unfair practice. It also is undisputed that the outlined procedure has not been followed in this instance

21 <sup>5</sup> These include (1) Misrepresenting to claimants pertinent facts or insurance policy provisions relating to any  
22 coverage at issue; (2) Failing to acknowledge and act reasonably promptly upon communications with respect to  
23 claims arising under insurance policies, (3) Failing to adopt and implement reasonable standard for the prompt  
24 investigation and processing of claims arising under insurance policies, (4) Failing to affirm or deny coverage of  
25 claims within a reasonable time after proof of loss requirements have been completed and submitted by the insured,  
26 (5) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has  
27 become reasonably clear, (6) Compelling insureds to initiate litigation to recover amounts due under an insurance  
28 policy by offering substantially less than the amounts ultimately recovered in actions brought by the insureds, when  
the insureds have made claims for amounts reasonably similar to the amounts ultimately recovered, (7) Attempting to  
settle a claim by an insured for less than the amount to which a reasonable person would have believed he or she was  
entitled by reference to written or printed advertising material accompanying or made part of an application, (8)  
Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or  
consent of, the insured, his or her representative, agent, or broker, (9) Failing, after payment of a claim, to inform  
insureds or beneficiaries, upon request by them, of the coverage under which payment has been made, (10) Making  
known to insureds or claimants a practice of the insurer of appealing from arbitration awards in favor of insureds or  
claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in  
arbitration; (11) Delaying the investigation or payment of claims by requiring an insured claimant, or the physician of  
either, to submit a preliminary claim report, and then requiring the subsequent submission of formal proof of loss  
forms, both of which submissions contain substantially the same information, (12) Failing to settle claims promptly,  
where liability has become apparent, under one portion of the insurance policy coverage in order to influence  
settlements under other portions of the insurance policy coverage, (13) Failing to provide promptly a reasonable  
explanation of the basis relied on in the insurance policy, in relation to the facts or applicable law, for the denial of a  
claim or for the offer of a compromise settlement, (14) Directly advising a claimant not to obtain the services of an

1 Legislature could have easily defined unfair settlement practices to include postclaims  
2 underwriting had it intended Insurance Code § 790.03(h) to cover this practice.

3 Moreover, the language of Section 2274.74 indicates the Department's clear intent to  
4 prohibit outright the rescission, cancellation, or limiting of a policy or the increasing of rates if an  
5 insurer fails to complete medical underwriting and answer all reasonable questions. (10 CCR §  
6 2274.74(c).) An insurer, therefore, is in violation of Section 2274.74 if it engages in postclaims  
7 underwriting one time, even if that is the one and only time an insurer engages in such conduct.  
8 This scheme is incompatible with Insurance Code § 790.03(h), which provides that an insurer  
9 engages in an unfair settlement practice when that insurer knowingly commits or performs  
10 various activities "with such frequency as to indicate a general business practice" of engaging in  
11 unfair settlement practices.

12 The Department also contended that Insurance Code § 12921(a) provided the Department  
13 with implied authority to adopt Section 2274.74.<sup>6</sup> Insurance Code § 12921(a) requires the  
14 commissioner to "perform all duties imposed upon him or her by the provisions of this code and  
15 other laws regulating the business of insurance in this state, and shall enforce the execution of  
16 those provisions and laws." The Court is unconvinced that this particular provision impliedly  
17 authorize the Department's adoption of Section 2274.74. Insurance Code § 12921(a) has  
18 consistently been recognized by courts as requiring the commissioner to enforce existing laws  
19 regulating the insurance industry, which include duly enacted statutes and duly promulgated  
20 administrative regulations. (See *Employees Serv Ass'n v. Grady* (1966) 243 Cal.App 2d 817,  
21 823; *Franklin Life Ins Co. v. State Bd Of Equal.* (1965) 63 Cal.2d 222, 228-29.) The Department  
22 has not cited, and the Court has been unable to locate, any authorities supporting the Department's  
23 authority to promulgate regulations pursuant to this statute.

24 That the Department does not have broad-based authority to enact regulations pursuant to

---

25 attorney; (15) Misleading a claimant as to the applicable statute of limitations; and (16) Delaying the payment or  
26 provision of hospital, medical, or surgical benefits for services provided with respect to acquired immune deficiency  
27 syndrome or AIDS-related complex for more than 60 days after the insurance has received a claim for those benefits,  
where the delay in claim payment is for the purpose of investigating whether the condition preexisted coverage

28 <sup>6</sup> The Department did not argue that Insurance Code § 12921(b), which relates to the commissioner's powers in an  
administrative enforcement action, authorized the adoption of Section 2274.74

1 Insurance Code §12921(a) is supported by the specific delegation of quasi-legislative power that  
2 exists throughout the Insurance Code – a delegation absent from Insurance Code § 12921(a). As  
3 discussed in detail above, Insurance Code §790.10 expressly authorizes the commissioner to  
4 promulgate regulations governing unfair insurance practices. Most important here, however, is  
5 the language of Insurance Code § 12921(c), which specifically provides authority for the  
6 promulgation of regulations for document filing:

7         Notwithstanding any other provision of law, the commissioner may accept  
8         documents submitted for filing or approval, process transactions, and maintain  
9         records in electronic form or as paper documents, and may adopt regulations to  
       further this subdivision.

10         This stands in stark contrast to the absence of such language in Insurance Code  
11         § 12921(a). The express delegation of quasi-legislative power by the Legislature to the  
12         commissioner in Insurance Code § 12921(c) is clear, rendering the absence of such a delegation  
13         in Insurance Code §12921(a) both conspicuous and meaningful.

14         The Department also cites Insurance Code § 10384 as an authority for the adoption of  
15         Section 2274.74. Although not specifically addressed by the Department in its Opposition, the  
16         Court addresses this purported authority in light of the parties' significant discussion of this  
17         particular statute in both their pleadings and during oral argument.

18         Insurance Code § 10384 provides: "No insurer issuing or providing any policy of  
19         disability insurance covering hospital, medical, or surgical expenses shall engage in the practice  
20         of postclaims underwriting. For purposes of this section, "postclaims underwriting" means the  
21         rescinding, canceling, or limiting of a policy or certificate due to the insurer's failure to complete  
22         medical underwriting and resolve all reasonable questions arising from written information  
23         submitted on or with an application before issuing the policy or certificate " It is clear from the  
24         language of Insurance Code § 10384 that the Legislature did not expressly delegate to the  
25         Department the authority to promulgate regulations related to postclaims underwriting.

26         It is also evident that Insurance Code § 10384 fails to provide the Department with the  
27         implied authority to adopt regulations related to postclaims underwriting. Nothing in the language  
28         of Insurance Code § 10384 relates to the Department. Insurance Code § 10384 is a clear

1 prohibition on the ability of an insurer to engage in postclaims underwriting. Any argument by  
2 the Department that it has implied authority pursuant to Insurance Code § 10384 to adopt Section  
3 2274.74 is negated by the passage of Assembly Bill 658, which was chaptered on September 20,  
4 2010. Effective January 1, 2011, Insurance Code § 10273.7 allows the commissioner, on or  
5 before July 1, 2011, to “issue guidance regarding compliance with this section and Sections  
6 10713, 10273.4, 10273.6, 10384.17, and 10384, or any regulations promulgated under those  
7 provisions. The guidance shall not be subject to the Administrative Procedure Act. The guidance  
8 shall only be effective through December 31, 2013, or until the commissioner adopts and effects  
9 regulations pursuant to the Administrative Procedure Act, whichever occurs first.” (Ins Code §  
10 10273.7(g).)

11 Thus, while the Department will arguably have the authority to promulgate regulations  
12 related to postclaims underwriting and rescission based thereon as of January 1, 2011, it is evident  
13 that the Department did not have this authority at the time Section 2274.74 was adopted.

14 **2. Section 2274.77 is invalid.**

15 Petitioner also challenges Section 2274.77, as being promulgated in excess of the  
16 Department’s jurisdiction and authority. Section 2274.77 requires an insurer, at the time of  
17 issuance and delivery of a policy, to return a complete copy of the application attached to the  
18 policy to the insurer for review. (Section 2274.77(a).) An insurer is precluded from using the  
19 information on an application “as the basis for rescission or cancellation of the policy unless the  
20 application was attached to or endorsed on the policy at the time the policy was delivered to the  
21 insured.” (Section 2274.77(c).) “Attached to or endorsed on the policy” is defined as requiring  
22 “that a complete copy of the applicant’s application for health insurance coverage was included in  
23 the same mailing, or other delivery mechanism used, at the same time that the health insurance  
24 policy was delivered.” (Section 2274.74(d).)

25 For the same reasons articulated by the Court with regard to Section 2274.74, the Court  
26 finds that Section 2274.77 is also invalid.

27 **3. Section 2274.78 is valid.**

28 Petitioner also contends that the Department lacked the authority to adopt various timing

1 requirements encapsulated in Section 2274.78(c), (d), (g), and (h). Section 2274.78 is the only  
2 regulation for which the Department addresses the authority for the regulation's adoption in its  
3 Opposition. (Opposition at Section VII.) The Department contends that "Insurance Code section  
4 790.03, which proscribes unfair claims investigations, and section 790.10, which grants broad  
5 rulemaking authority to implement section 790.03", support the adoption of the challenged  
6 portions of Section 2274.78. The Court agrees.

7 Section 2274.78, "Post-Contract Issuance Rescission or Cancellation Investigations,"  
8 "applies only to claims investigations intended to produce facts or other information that could be  
9 used as the basis for an evaluation by the insurer of whether to rescind or cancel the policy where  
10 the insurer has either received a claim from a claimant . . . or a notice of a claim . . ." (10 CCR  
11 § 2274.78(a).) Section 2274.78 goes on to impose various timelines related to an insurer's claims  
12 investigation where "an insurer receives medical or health history information about an insured  
13 after having issued health insurance coverage to the insured and such information reasonably  
14 raises a question of whether the insured misrepresented or omitted material information prior to  
15 the issuance of the policy . . ." (10 CCR § 2274.78(c) ) For example, an insurer must  
16 commence any review or investigation within 15 calendar days of receipt of such information (10  
17 CCR § 2274.78(c)); notify the insured of the investigation or review within seven days after the  
18 decision to investigate or review is made (10 CCR § 2274.78(d)); complete the investigation or  
19 review within 90 calendar days after delivery of written notice (10 CCR § 2274.78(g)); and notify  
20 the insured of the results of its investigation within seven calendar days of the conclusion of its  
21 investigation (10 CCR § 2274.78(h)).

22 Insurance Code § 790.10 expressly authorizes the commissioner to "promulgate  
23 reasonable rules and regulations, and amendments and additions thereto, as are necessary to  
24 administer this article." Section 2274.78 falls squarely within the Department's power to regulate  
25 unfair practices, including those defined by Insurance Code §§ 790.03(g)(2), (3), (4), and/or (5).

- 26 (2) Failing to acknowledge and act reasonably promptly upon communications with  
27 respect to claims arising under insurance policies.
- 28 (3) Failing to adopt and implement reasonable standard for the prompt investigation  
and processing of claims arising under insurance policies.

- 1
- 2 (4) Failing to affirm or deny coverage of claims within a reasonable time after proof  
of loss requirements have been completed and submitted by the insured.
- 3 (5) Not attempting in good faith to effectuate prompt, fair, and equitable settlements  
4 of claims in which liability has become reasonably clear.

5 These statutory subsections all require an insurer to act “reasonably promptly” or within a  
6 “reasonable time” within receipt of a claim. Section 2274.78 in no way conflicts with Insurance  
7 Code § 790.03 by defining the precise timeframes within which an insurer must act with respect  
8 to a cancellation investigation conducted after receipt of a claim by an insurer. In outlining  
9 precise timeframes within which an insurer must conduct a cancellation investigation, the  
10 Department in no way alters or amends the scope of Insurance Code §§ 790.03(g)(2), (3), (4),  
11 and/or (5), which all require an insurer to act “reasonably promptly” or within a “reasonable  
12 time” in communicating with insureds regarding claims, investigating and processing claims, and  
13 effectuating settlements of claims.

14 In contrast to Section 2274.74 and 2274.78, Section 2274.78 does not purport to define a  
15 new unfair practice. Instead, Section 2274.78 establishes reasonable timeframes within which an  
16 insurer must conduct a cancellation investigation after submission of a claim. The Court cannot  
17 conclude that the Department acted arbitrarily, capriciously, or without reasonable or rationale  
18 basis in adopting Section 2274.78.

19 **III. DISPOSITION**

20 The petition for a peremptory writ of administrative mandamus is GRANTED in part and  
21 DENIED in part.<sup>7</sup> A judgment shall issue in favor of Petitioner, and against Respondents,  
22 granting the petition for writ of mandamus. A peremptory writ shall issue from this Court to  
23 Respondents, commanding Respondents to withdraw Sections 2274.74 and 2274.77 in  
24 accordance with the Court’s ruling and to take any other action enjoined on them by law. The  
25 writ shall further command Respondents to make and file a return within 60 days after issuance of  
26 the writ, setting forth what it has done to comply with the writ. The Court reserves jurisdiction in

27 \_\_\_\_\_  
28 <sup>7</sup> Respondents’ Request for Judicial Notice is DENIED on the basis the attached documents are irrelevant (*Gbur v  
Cohen* (1979) 93 Cal App 3d 296, 301 )

1 this action until there has been full compliance with the writ.

2 In accordance with Local Rule 9.16, Petitioner is directed to prepare a formal order and  
3 judgment, incorporating this Court's ruling as an exhibit, and a peremptory writ of mandamus;  
4 submit them to opposing counsel for approval as to form in accordance with Rule of Court  
5 3.1312(a); and thereafter submit them to the Court for signature and entry of judgment in  
6 accordance with Rule of Court 3.1312(b).

7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

DATED: December 30, 2010



**MICHAEL KENNY**

Judge MICHAEL P. KENNY  
Superior Court of California,  
County of Sacramento

**CERTIFICATE OF SERVICE BY MAILING**  
**(C.C.P. Sec. 1013a(4))**

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above-entitled **RULING ON SUBMITTED MATTER** in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at 720 9<sup>th</sup> Street, Sacramento, California.

Gregory N. Pimstone  
Manatt, Phelps & Phillips, LLP  
11355 West Olympic Blvd  
Los Angeles, CA 9004-1614

John M. Leblanc  
Barger & Wolen LLP  
633 W. 5<sup>th</sup> Street, 47<sup>th</sup> Floor  
Los Angeles, CA 90071-2043


Edmund G. Brown, Jr.  
Attorney General of California  
Deputy Attorney General  
1300 I street, Suite 125  
Po.O. Box 944255  
Sacramento, CA 94244-2550

Superior Court of California,  
County of Sacramento

Dated: December 30, 2010

By:

~~SEE~~

  
Deputy Clerk