SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ROGER HARRIS, DUANE BROWN, and BRIAN LINDSEY

Plaintiffs,

vs.

FARMERS INSURANCE EXCHANGE and MID CENTURY INSURANCE COMPANY,

Defendants.

Case Nos.: BC579498

[PROPOSED] ORDER SUSTAINING IN PART AND OVERRULING IN PART DEFENDANTS' DEMURRER TO PLAINTIFF'S FIRST AMENDED COMPLAINT

Hearing Date: January 25, 2016
Time: 11:00 a.m.
Dept.: 307

Plaintiffs Roger Harris, Duane Brown, and Brian Lindsey (collectively, "Plaintiffs") bring this putative class action against Defendants Farmers Insurance Exchange and its affiliate, Mid Century Insurance Company (collectively "Farmers" or Defendants") alleging that Defendants violated Ins. Code § 1861.02 and Cal. Code Regs., tit. 10 § 2632.5 by impermissibly calculating auto insurance premiums based on a policyholder's willingness to tolerate a price increase – a factor known as "elasticity of demand." Defendants demur that Plaintiffs' UCL causes of action (1) fall within the exclusive jurisdiction of the

California Department of Insurance and is barred by Ins. Code § 1860.1; (2) are barred by the "filed rate" doctrine; (3) are barred due to Plaintiffs' failure to exhaust administrative remedies; and (4) are barred by the "safe harbor" provisions of the UCL. Alternatively, Defendants argue that this case should be stayed under the "primary jurisdiction" doctrine pending proceedings before the Commissioner of Insurance (the "Commissioner").

The Court finds that Plaintiffs' UCL and unjust enrichment causes of action are not barred by Ins. Code § 1860.1 or the "filed rate" doctrine because Plaintiffs are not challenging a rate or rating factor approved by the Commissioner. However, the Court agrees that Plaintiffs fail to allege a viable cause of action for violation of Ins. Code § 1861.10. The Court also agrees that the doctrine of primary jurisdiction applies and that this matter should be stayed pending proceedings before the Commissioner.

Accordingly, the Court OVERRULES Defendants' demurrer as to Plaintiffs' UCL and unjust enrichment causes of action. The Court SUSTAINS WITHOUT LEAVE TO AMEND Defendants' demurrer as to Plaintiffs' cause of action for violation of Ins. Code § 1861.10. The Court STAYS this matter pending proceedings before the Commissioner.

## I. Introduction

### *A. Facts Alleged*

Auto insurance premiums in California are set pursuant to a two-step process. (FAC ¶ 26.) First, an insurer must calculate and obtain the Insurance Commissioner's approval of a "base rate," which is the same for each policyholder and represents the total annual premium that the insurer must charge in order to cover expenses and obtain a reasonable rate of return. (FAC ¶ 26; Ins. Code § 1861.05.) Second, an insurer must file a "class plan" disclosing the rating factors used to determine each policyholder's premium. (FAC ¶ 29.) Rating factors are defined as "any factor, including discounts, used by an insurer which

establishes or affects the rates, premiums, or charges assessed for a policy of automobile insurance." (FAC ¶ 28; Cal. Code Regs. ("CCR"), tit. 10, § 2632.2.)

The Insurance Code states that rates and premiums "shall" be determined by application of the following factors: "(1) The insured's driving safety record. (2) The number of miles he or she drives annually. (3) The number of years of driving experience the insured has had. (4) Those other factors that the commissioner may adopt by regulation and that have a substantial relationship to the risk of loss." (FAC ¶ 30; Ins. Code § 1861.02(a).) Code of Regulations, title 10, § 2632.5(d) sets forth additional rating factors approved by the Commissioner including the type of vehicle, vehicle performance capabilities, gender, marital status, and persistency. (FAC ¶ 31.)

The Commissioner has not approved "elasticity of demand" as a rating factor that insurers may consider in determining a policyholder's premium. (FAC ¶ 32; CCR, tit. 10, § 2632.5(d).) Nevertheless, Plaintiffs allege that Defendants use elasticity of demand as a rating factor and charge certain policyholders more if they are unlikely to seek insurance elsewhere in response to a price increase. (FAC ¶ 39.) Defendants did not disclose their use of elasticity of demand in their class plan. (FAC ¶ 40.) As a result, "Defendants' customers whose demand is inelastic . . . pay prices that are higher than they would have paid based on the risk they present, and higher than they would have paid in accordance with the class plan Defendants filed with the Department and that the Department approved." (FAC ¶ 39.)

Plaintiffs allege that named Plaintiffs and putative class members have suffered injury in fact and have lost money as a result of Defendants' unlawful business acts and practices. (FAC ¶ 80.)

*B.* *Procedural History*

On April 22, 2015, Plaintiffs filed their initial class action complaint against Defendants. On October 29, 2015, Plaintiffs filed the operative First Amended Complaint alleging the following causes of action:

1. Violation of Unfair Competition Law – Commission of Unlawful Business Act or Practice Cal. Bus. § Prof. Code § 17200 et seq.;
2. Violation of Unfair Competition Law – Commission of Unfair Business Act or Practice Cal. Bus. § Prof. Code § 17200 et seq.;
3. Violation of Unfair Competition Law – Commission of Fraudulent Business Act or Practice Cal. Bus. § Prof. Code § 17200 et seq.;
4. Unjust Enrichment;
5. Violation of Cal. Ins. Code § 1861.10.

Defendants demur to all causes of action. Plaintiffs oppose.

## II. Analysis: Demurrer

A demurrer for sufficiency tests whether the complaint states a cause of action. (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 747.) When considering demurrers, courts read the allegations liberally and in context. In a demurrer proceeding, the defects must be apparent on the face of the pleading or via proper judicial notice. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) "A demurrer tests the pleadings alone and not the evidence or other extrinsic matters. Therefore, it lies only where the defects appear on the face of the pleading or are judicially noticed (Cal. Code Civ. Proc., §§ 430.30, 430.70). The only issue involved in a demurrer hearing is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action." (*Hahn, supra*, 147 Cal.App.4th at 747.) "As a general rule in testing a pleading against a demurrer the facts alleged in the pleading are deemed to be true, however improbable they may be. [Citation.] The courts, however, will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially

noticed." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604 [176 Cal.Rptr. 824].)

*A. Plaintiffs' Causes of Action Are Not Barred by the Insurance Code Because Plaintiffs Are Not Challenging an Approved Rate*

Defendants argue that Ins. Code § 1860.1 bars Plaintiffs from challenging rates or rating factors approved by the Insurance Commissioner. Section 1860.1 states:

> No act done, action taken or agreement made pursuant to the authority conferred by [Chapter 9 of the Insurance Code] shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this State heretofore or hereafter enacted which does not specifically refer to insurance.

The following section (§ 1860.2) provides:

> The administration and enforcement of [Chapter 9] shall be governed solely by the provisions of this chapter. Except as provided in this chapter, no other law relating to insurance and no other provisions in this code heretofore or hereafter enacted shall apply to or be construed as supplementing or modifying the provisions of this chapter unless such other law or other provision expressly so provides and specifically refers to the sections of this chapter which it intends to supplement or modify.

Defendants contend that under these sections, any challenges to an approved rate must be brought under the administrative procedures set forth in Chapter 9 of the Insurance Code. Specifically, article 7 of Chapter 9 states:

> "Any person aggrieved by any rate charged, rating plan, rating system, or underwriting rule followed or adopted by an insurer or rating organization, may file a written complaint with the commissioner requesting that the commissioner review the manner in which the rate, plan, system, or rule has been applied with respect to the insurance afforded to that person. In addition, the aggrieved person may file a written request for a public hearing before the commissioner, specifying the grounds relied upon."

(Ins. Code, § 1858(a).) However, Ins. Code, § 1861.03, which is also under Chapter 9, expressly states:

> The business of insurance shall be subject to the laws of California applicable to any other business, including, but not limited to, the Unruh Civil Rights Act (Sections 51 to 53, inclusive, of the Civil Code), and the ***antitrust and unfair business practices laws*** (Parts 2 (commencing with Section 16600) and 3 (commencing with Section 17500) of Division 7 of the Business and Professions Code).

(Ins. Code, § 1861.03(a) [emphasis added].) As the court in *MacKay v. Superior Court* (2010) 188 Cal.App.4th 1427, 1442 [115 Cal.Rptr.3d 893, 904] recognized, section 1861.03 "which makes all of 'the laws of California applicable to any other business' applicable to '[t]he business of insurance,' appears to contradict Insurance Code sections 1860.1 and 1860.2, which limit ratemaking enforcement to the statutes set forth in the ratemaking chapter itself." The *MacKay* court reconciled this contradiction by finding that section 1860.1 "does not exempt all acts done 'pursuant to' the chapter—which is to say, all ratemaking acts—but instead exempts acts done 'pursuant to the authority conferred by this chapter.'" (*Id.* at 1443.) Because Chapter 9 "confers on the [Department of Insurance] the exclusive authority to approve insurance rating plans," the court concluded that "[a]n insurer charging a preapproved rate is . . . taking an action pursuant to the authority conferred by the chapter."

In *MacKay*, the court held that plaintiffs were precluded from bringing a civil action challenging defendant's use of accident verification as a rating factor because "accident verification was, in fact, a rating factor approved by the DOI." (*Id.* at 1437.) However, the court clarified that "if the underlying conduct challenged was not the charging of an approved rate, but the *application* of an unapproved underwriting guideline, Insurance Code section 1860.1 would not be applicable." (*Id.* at 1450.) In other words, an insurer could "file with the [DOI] a rate filing and class plan that [satisfies] all of the ratemaking components of the regulations," but still violate the Insurance Code in applying that approved rate. (*Ibid.*) This is precisely what Plaintiffs allege happened in this case.

Plaintiffs allege that Defendants filed a rate filing and class plan meeting all the requirements in the regulations. However, Plaintiffs allege that in applying the approved rate, Defendants improperly took into consideration elasticity of demand as a rating factor. The parties agree that elasticity of demand was not one of the rating factors submitted to the DOI as part of Defendants' class plan, which means that Plaintiffs are not challenging a rate or rating factors approved by the Commissioner. Thus, under *MacKay*, Plaintiffs' causes of action are not barred by Ins. Code § 1860.1 because Plaintiffs are not challenging an "action [taken] pursuant to the authority conferred by the chapter." (See *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 992 [11 Cal.Rptr.3d 45, 62] [overruling trial court's order granting defendant's demurrer to plaintiff's UCL cause of action because plaintiff was not challenging an approved rate, but instead challenging defendant's use of "lack of prior insurance" to determine insurability without the Commissioner's approval].)

*B. Plaintiffs' Claims are Not Barred Under the "Filed Rate" Doctrine*

Defendants next argue that Plaintiffs' claims are also barred under the "filed rate" doctrine. The filed rate doctrine "derives from the requirement contained in the Federal Communications Act that common carriers . . . file with the Federal Communications Commission (FCC) and keep open for public inspection 'all charges [and the] classifications, practices, and regulations affecting such charges.'" (*Day v. AT & T Corp.* (1998) 63 Cal.App.4th 325, 328-29 [74 Cal.Rptr.2d 55].) "[T]he doctrine presumes the consumer's knowledge of all lawful rates and bars consumer suits for damages arising out of claims involving those rates, on the premise that a consumer who pays the filed rate has suffered no injury and incurred no damage." (*Ibid.*) In *MacKay*, the Court found that "[n]umerous state courts have applied the filed rate doctrine to approved insurance rates." (*MacKay, supra*, 188 Cal.App.4th at 1448-49.)

In this case, even assuming the filed rate doctrine applies, Plaintiffs' claims are not barred. As discussed above, Plaintiffs are not challenging the rate or rating factors filed with the Department of Insurance. Instead, Plaintiffs allege that Defendants used inelasticity of demand as a rating factor without the Department's approval and as a result charged a rate higher than the approved rate.

*C. Plaintiffs Allege Facts Sufficient to State a Cause of Action for Unjust Enrichment*

Defendants contend that Plaintiffs' unjust enrichment cause of action fails because it is being used as a means to plead around explicit bars to other causes of action. (Dem. p. 14.) "The elements of an unjust enrichment claim are the 'receipt of a benefit and [the] unjust retention of the benefit at the expense of another.'" (*Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1593 [80 Cal.Rptr.3d 316, 323].) The Court finds that Plaintiffs have sufficiently alleged a cause of action for unjust enrichment by alleging that Defendants "unjustly collected higher auto insurance payments from thousands of insureds than they were entitled to by using elasticity of demand as a rating factor."

Defendants' citation to *Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583 [80 Cal.Rptr.3d 316] is inapposite. In *Peterson*, plaintiffs alleged that defendants were unjustly enriched by selling insurance and receiving insurance premiums without a license to sell such insurance. (*Id.* at 1586.) The appellate court affirmed the trial court's ruling sustaining defendant's demurrer to plaintiffs' causes of action for violation of the UCL and unjust enrichment, in part, because plaintiffs failed to allege an actual injury. (*Id.* at 1592, 1594.) The court also held that plaintiffs could not "circumvent the law and public policy reflected in [the UCL]" by "pursu[ing] their claim under the label "unjust enrichment." (*Id.* at 1595.)

Here, by contrast, Plaintiffs have alleged injury in fact and have stated a cause of action under the UCL. Accordingly, the Court finds that Plaintiffs have also stated a cause of action for unjust enrichment.

*D. Plaintiffs Fail to Allege a Cause of Action for Violation of Ins. Code § 1861.10*

Defendants demur to Plaintiffs' cause of action for violation of Ins. Code § 1861.10 on the grounds that that section of the Insurance Code does not create a private right of action. The Court agrees. Ins. Code § 1861.10(a) states:

> (a) Any person may initiate or intervene in any proceeding permitted or established pursuant to this chapter, challenge any action of the commissioner under this article, and enforce any provision of this article.

"The plain language of this clause provides no independent authority for a proceeding not otherwise authorized by chapter 9, but creates broad standing in a proceeding 'permitted or established pursuant to' chapter 9." (*Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 854 [40 Cal.Rptr.3d 653, 661].) In other words, under section 1861.10(a), an insured may initiate an administrative procedure pursuant to section 1858(a) or file suit under the UCL or another business law pursuant to section 1861.03(a). However, section 1861.10(a) "does not create a private right of action based on a violation of section 1861.02." (*Id.* at 854.)

Accordingly, Plaintiffs' cause of action under section 1861.10(a) fails as a matter of law.[1]

[1] The Court notes that Plaintiffs do not raise any arguments opposing Defendants' demurrer to this cause of action.

*E. The Court Exercises its Discretion to Stay this Case in Deference to Proceeding Before the Commissioner Under the Doctrine of "Primary Jurisdiction"*

Defendants contend that Plaintiffs' claims fail because Plaintiffs failed to exhaust their administrative remedies. In the alternative, Defendants argue that, under the doctrine of "Primary Jurisdiction," Plaintiffs' claims should be stayed pending proceedings before the Commissioner. In *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 390 [6 Cal.Rptr.2d 487, 495-96, 826 P.2d 730, 738-39] ("*Farmers*"), our Supreme Court, quoting the U.S. Supreme Court's decision in *U.S. v. Western Pac. R. Co.* (1956) 352 U.S. 59 [77 S.Ct. 161, 1 L.Ed.2d 126], explained the relationship between the doctrines of exhaustion and primary jurisdiction:

> " '*Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone;* judicial interference is withheld until the administrative process has run its course. '*Primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts,* and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views."

(*Id.* at 738-739.) In *Farmers*, the Supreme Court applied this definition and held that a UCL claim alleging a violation of the Insurance Code is "originally cognizable in the courts" and thus "triggers application of the primary jurisdiction doctrine" rather than exhaustion of remedies. (*Id.* at 391.) In that case, the People, through the Attorney General, filed suit alleging that various insurers violated the UCL by "(i) refusing to offer and sell a Good Driver Discount policy to any person who meets the standards of section 1861.025; (ii) refusing to charge persons who qualify for the Good Driver Discount policy a rate "at least

20% below the rate the insured would otherwise have been charged for the same coverage"; (iii) unlawfully using the absence of insurance as a criterion for determining eligibility for a Good Driver Discount policy . . . ; and (iv) "unfairly discriminating in eligibility and rates for insurance for persons who qualify under the statutory criteria for a Good Driver Discount policy." (*Id.* at 381-382.)

In view of the allegations in the People's complaint, the *Farmers* court found "good reason to require that th[e] [Insurance Code's] administrative procedures be invoked." (*Id.* at 396.) The court noted that "questions involving insurance ratemaking pose issues for which specialized agency fact-finding and expertise is needed in order to both resolve complex factual questions and provide a record for subsequent judicial review." (*Id.* at 397.) Moreover, requiring courts "to rule on such matters without benefit of the views of the agency charged with regulating the insurance industry" creates a "risk of inconsistent application of the regulatory statutes." (*Id.* at 398.)

Plaintiffs respond that deferring this matter to the Commission is unnecessary because the question of whether Defendants employed elasticity of demand as a rating factor is a straightforward question that can be answered without the Commissioner's expertise. The Court is not convinced. Defendants contend that they did not use elasticity of a demand as a rating factor. Thus, evaluating Plaintiffs' claims would necessarily involve a technical analysis of the rating factors and formulas used by Defendants in order to determine whether or not elasticity of demand was taken into account. In such a situation, as recognized by the *Farmers* court, "it seems clear that the Insurance Commissioner, rather than a court, is best suited initially to determine whether his or her own regulations pertaining to compliance have been faithfully adhered to by an insurer." (*Farmers*, *supra*, 2 Cal.4th at 399.)

## III. Conclusion

For the foregoing reasons, the Court SUSTAINS WITHOUT LEAVE TO AMEND Defendants' demurrer to Plaintiffs' cause of action for violation of Ins. Code § 1861.10. The Court OVERRULES Defendants' demurrer to Plaintiffs' remaining causes of action. In addition, applying the doctrine of "primary jurisdiction," the Court STAYS this matter pending proceedings before the Commissioner of Insurance.

Dated: JAN 25 2016

AMY D. HOGUE, JUDGE

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JUDGE OF THE SUPERIOR COURT