Superior Court of California
County of Los Angeles

FILED
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County of Los Angeles

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David W. Slayton, Executive Officer/Clerk of Court
By: M. Mort, Deputy

CALIFORNIA FAIR PLAN ASSOCIATION,

Petitioner,

v.

RICARDO LARA, IN HIS OFFICIAL CAPACITY AS THE INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,

Respondent.

Case No. 21STCV38060

**RULING ON VERIFIED PETITION FOR WRIT OF MANDATE**

Dept. 82 (Hon. Curtis A. Kin)

Petitioner California FAIR Plan Association petitions for a writ of mandate directing respondent Ricardo Lara, in his official capacity as the Insurance Commissioner of the State of California, to vacate Amended Order 2021-2.

## I. Factual Background

### A. The California FAIR Plan

"In response to insurers' reluctance to write basic property insurance for homeowners who live in high risk or otherwise uninsurable areas, in 1968, the [California] Legislature enacted the 'Basic Property Insurance Inspection and Placement Plan' sections 10090 through 10100.2. The purposes of the statute are to (1) assure stability in the property insurance market, (2) assure the availability of basic property insurance as defined in the plan, (3) encourage the maximum use, in obtaining basic property insurance, of the normal insurance market, and (4) provide for the 'the equitable distribution among admitted insurers of the responsibility for insuring qualified property for which basic property insurance cannot be obtained through the normal insurance market by the establishment of a FAIR Plan (fair access to insurance requirements), an industry placement facility and a joint

reinsurance association.' (§ 10090.)"[1] (*St. Cyr v. California FAIR Plan Assn.* (2014) 223 Cal.App.4th 786, 792-793.)

"Under the statutory scheme, [petitioner] is an involuntary joint reinsurance association of all insurers authorized to 'write and engage[ ] in writing in [California], on a direct basis, basic property insurance or any component thereof in multiperil policies.' (§§ 10094, 10098.) [Petitioner] is the insurer of last resort, that is, [petitioner] is statutorily mandated to make available basic property insurance to any 'persons having an interest in real or tangible personal property who, after diligent effort ..., are unable to procure such insurance through normal channels from an admitted insurer.' (§ 10094.)" (*St. Cyr,* 223 Cal.App.4th at 793-794.)

"[Petitioner] is statutorily mandated to propose a plan of operation that provides, among other things, for the allocation of profits and losses arising from the FAIR Plan among the insurers, based upon the respective insurer's proportion of the California insurance market. (§ 10095.) In setting the rates for the FAIR Plan, the statute mandates that the rates 'shall not be excessive, inadequate, or unfairly discriminatory, and shall be actuarially sound so that premiums are adequate to cover expected losses, expenses and taxes, and shall reflect investment income of the plan. If the plan returns premiums to members annually, the rates shall not include any component relating to surplus enhancements.' (§ 10100.2)" (*St. Cyr,* 223 Cal.App.4th at 793-794.)

"The Commissioner is authorized to review and approve (or disapprove) [Petitioner's] plan of operation." (*St. Cyr,* 223 Cal.App.4th at 793-94.) "The commissioner may, at any time, withdraw tentative approval or the commissioner may, at any time after giving final approval, revoke that approval if the commissioner feels it is necessary to carry out the purposes of the chapter." (§ 10095(f).)

B. The Commissioner's 2019 Orders That Led to the 19STCP05434 Action

On November 14, 2019, the Commissioner issued Order No. 2019-2, which partially revoked certain aspects of the FAIR Plan's then-existing plan of operation and which required the FAIR Plan to submit a new revised plan of operation to effectuate various business operational changes to the FAIR Plan, including requiring the FAIR Plan to (1) sell HO-3 policies in California;[2] and (2) provide payment options to customers but without a charged fee to cover the cost incurred to

[1] Unless otherwise stated, all statutory references are to the California Insurance Code.

[2] An HO-3 policy is a homeowner's insurance policy. "HO-3" refers to the name of the standardized insurance form issued by the Insurance Services Office, Inc. (PA 72-73, 181.)

provide those options. (PA 182-84.) Order No. 2019-2 contained language explaining the need for the Commissioner to take action:

> WHEREAS, the Commissioner has determined that the coverages offered in the FAIR Plan's Division I dwelling fire and allied lines policies as required by the FAIR Plan's current Plan of Operation are insufficient to meet the growing demand for comprehensive homeowners' insurance in wildfire prone areas and other areas of the state where the voluntary market has and likely will continue to non-renew significant numbers of homeowners policies;
>
> . . .
>
> WHEREAS, the Commissioner feels it is necessary, in order to carry out the purposes of Chapter 9, to revoke his approval of the FAIR Plan's current Plan of Operation (Ed. 05/31/19) to the extent the current Plan of Operation is inconsistent with this Order . . . to respond to the unmet demand for homeowners insurance in the state[.]

(PA 181.)

On December 13, 2019, FAIR Plan filed a petition for writ of mandate in *California Fair Plan Association v. Lara*, case number 19STCP05434 ("19STCP05434 Action"), challenging Order No. 2019-2. (Petition ¶ 23.)

On December 19, 2019, the Commissioner issued Order No. 2019-3, in which the Commissioner promulgated his own revised plan of operation to be followed by FAIR Plan to effectuate the aforementioned business operational changes. (PA 188-91.)

On July 12, 2021, the Court (Hon. Mary H. Strobel) granted FAIR Plan's petition in the 19STCP05434 Action in part, finding that the Commissioner could not require FAIR Plan to offer an HO-3 policy. (PA 39.) However, in so doing, the Court disagreed with FAIR Plan's argument about the scope of the Commissioner's authority. The Court concluded that the Commissioner had authority to require FAIR Plan to offer some form of liability coverage, if there was a meaningful relationship, nexus, or connection between the insured property and the liability coverage. (PA 35-36.) Further, although concluding the Commissioner lacked authority to order FAIR Plan to provide an HO-3 policy, the Court did find that the Commissioner's order was not arbitrary, capricious, or lacking in evidentiary support. (PA 39-52.)

On August 19, 2021, the Court entered its judgment in the 19STCP05434 Action, granting in part and denying in part the writ petition. (PA 121-22.) As indicated in the judgment, the Court ordered a writ to be issued "directing the Commissioner to set aside those parts of [Order Nos. 2019-2 and 2019-3] that require the FAIR Plan to offer a comprehensive HO-3 Policy." (PA 122.)

C. Order No. 2021-2 That Led to this Writ Action

On September 17, 2021, the Commissioner issued Order No. 2021-2, which requires FAIR Plan to offer a "Homeowners' Policy" that "insures against, at a minimum, the following perils to the insured property not currently covered under the FAIR Plan's dwelling fire policy: accidental discharge or overflow of water or steam; premises liability; incidental workers' compensation; theft; falling objects; weight of ice, snow, or sleet; freezing; and loss of use, including coverage for additional living expenses and fair rental value." (PA 63-65.)

On October 14, 2021, petitioner filed the petition in this action.

D. Amended Order No. 2021-2

On November 19, 2021, the Commissioner issued Amended Order No. 2021-2 ("Amended Order"). (PA 176-77.) Amended Order No. 2021-2 included amendments to incorporate the Court's prior findings and conclusions from the 19STCP05434 Action and additional recitals:

> WHEREAS, the Commissioner expressly incorporates herein the findings and conclusions in the Court Order attached as Exhibit A and all evidence submitted or relied upon by the Commissioner in case No. 19STCP05434;
>
> . . .
>
> WHEREAS, requiring the FAIR Plan to expand its dwelling fire policy offerings to include the additional coverages ordered hereby is necessary to carry out the purposes of Chapter 9, because, among other things: (1) the availability of an expanded FAIR Plan homeowners policy addresses market deficiencies by making additional homeowners coverages more affordable and available in wildfire exposed areas in California; and (2) requiring FAIR Plan to provide an expanded policy will be more consistent with consumers' expectations, thereby increasing stability in the property insurance market.

(PA 177.) Amended Order No. 2021-2 also included language to clarify that incidental workers' compensation coverage was only required "to the extent that such coverage is with respect to [the insured] property." (PA 178.)

## II. Procedural History

On October 14, 2021, petitioner California FAIR Plan Association ("FAIR Plan") filed a petition for writ of mandate against respondent, Ricardo Lara, in his

official capacity as the Insurance Commissioner of the State of California ("Commissioner"), in this action.

On February 10, 2022, the Court denied FAIR Plan's motion for a preliminary injunction.

On July 21, 2023, petitioner filed its opening brief. On August 18, 2023, respondent filed an opposition. On September 1, 2023, petitioner filed a reply.

## III. Standard of Review

CCP § 1085(a) provides: "A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by that inferior tribunal, corporation, board, or person."

"There are two essential requirements to the issuance of a traditional writ of mandate: (1) a clear, present and usually ministerial duty on the part of the respondent, and (2) a clear, present and beneficial right on the part of the petitioner to the performance of that duty." (*California Assn. for Health Services at Home v. State Dept. of Health Services* (2007) 148 Cal.App.4th 696, 704.) "An action in ordinary mandamus is proper where...the claim is that an agency has failed to act as required by law." (*Id.* at 705.)

"When a party seeks review of an administrative decision pursuant to Code of Civil Procedure section 1085, judicial review is limited to examining the agency proceedings to ascertain whether the agency's action has been arbitrary, capricious or lacking entirely in evidentiary support, or whether the agency failed to follow the proper procedure and give notices required by law. And, where the case involves the interpretation of a statute or ordinance, our review of the trial court's decision is de novo." (*Ideal Boat & Camper Storage v. County of Alameda* (2012) 208 Cal.App.4th 301, 311, citing *Pomona Police Officers' Assn. v. City of Pomona* (1997) 58 Cal.App.4th 578, 584.) In independently reviewing legal questions, "[a]n administrative agency's interpretation does not bind judicial review but it is entitled to consideration and respect." (*Housing Partners I, Inc. v. Duncan* (2012) 206 Cal.App.4th 1335, 1343.)

An agency is presumed to have regularly performed its official duties. (Evid. Code § 664.) In a CCP § 1085 writ petition, the petitioner generally bears the burden of proof. (*California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1154.)

## IV. Analysis

### A. Commissioner's Authority to Issue Amended Order No. 2021-2

According to FAIR Plan, Amended Order No. 2021-2 violates the Commissioner's authority under Insurance Code § 10090, *et seq.* (Chapter 9 - Basic Property Insurance Inspection and Placement Plan) ("Act"), because it requires a homeowner's policy that provides premises liability coverage and incidental workers' compensation that pays for liabilities and not loss to property.

FAIR Plan raises issues of statutory construction. "The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] To determine legislative intent, we turn first to the words of the statute, giving them their usual and ordinary meaning. [Citations.] When the language of a statute is clear, we need go no further. However, when the language is susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340.)

When interpreting a statute, the court must construe the statute, if possible, to achieve harmony among its parts. (*People v. Hull* (1991) 1 Cal.4th 266, 272; *Legacy Group v. City of Wasco* (2003) 106 Cal.App.4th 1305, 1313). "When the legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded." (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1118.) "When interpreting statutory language, we may neither insert language which has been omitted nor ignore language which has been inserted." (*See People v. National Auto. and Cas. Ins. Co.* (2002) 98 Cal.App.4th 277, 282.)

To the extent "purely legal issues involve the interpretation of a statute an administrative agency is responsible for enforcing, [the court] exercise[s] [its] independent judgment, 'taking into account and respecting the agency's interpretation of its meaning.'" (*Housing Partners I, Inc. v. Duncan* (2012) 206 Cal.App.4th 1335, 1343; *see also Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11.)

#### 1. General Overview of Property and Liability Insurance

Generally speaking, insurance policies include first-party coverage, third-party coverage, or both. "'First party' coverage is for losses suffered directly by the insured. 'Third party' coverage is for losses suffered by other persons for which the insured may be legally responsible." (Rutter, Cal. Prac. Guide, Insurance Litigation

§ 6:1.) "In some situations, both first and third party coverages are combined in a single policy (e.g., homeowners insurance)." (*Ibid.*)

First-party property insurance "is an agreement, a contract, in which the insurer agrees to indemnify the insured in the event that the insured property suffers a covered loss. Coverage, in turn, is commonly provided by reference to causation, e.g., 'loss caused by ...' certain enumerated perils. [¶ ] The term 'perils' in traditional property insurance parlance refers to fortuitous, active, physical forces such as lightning, wind, and explosion, which bring about the loss." (*Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395, 406.) "On the other hand, the right to coverage in the third-party liability insurance context draws on traditional tort concepts of fault, proximate cause and duty. This liability analysis differs substantially from the coverage analysis in the property insurance context, which draws on the relationship between perils that are either covered or excluded in the contract. In liability insurance, by insuring for personal liability, and agreeing to cover the insured for his own negligence, the insurer agrees to cover the insured for a broader spectrum of risks." (*Id.* at 407.)

2. Language of Section 10091(c)

The parties agree that the scope of the Commissioner's authority to require FAIR Plan to provide the policy ordered by the Amended Order depends largely on the definition of "basic property insurance" in the Act.

The purposes of Chapter 9 include: "(a) To assure stability in the property insurance market for property located in the State of California. [¶] (b) To assure the availability of *basic property insurance as defined by this chapter.* [¶] (c) To encourage maximum use, in obtaining *basic property insurance*, of the normal insurance market provided by admitted insurers and licensed surplus line brokers." (§ 10090(a-c), emphasis added.) Additionally, section 10095(f), concerning adoption of a Plan of Operation, provides that the Commissioner may "at any time after giving final approval, revoke that approval if the commissioner feels it is necessary to carry out the purposes of the chapter."

Under section 10094(a), FAIR Plan is required to sell "basic property insurance." Section 10091(c) defines "basic property insurance" as follows:

> ...*insurance against direct loss to real or tangible personal property* at a fixed location in those geographic or urban areas, as designated by the commissioner, from perils insured under the standard fire policy and extended coverage endorsement, from vandalism and malicious mischief, and includes *other insurance coverages as may be added with respect to that property by the industry placement facility with the approval of the commissioner or by the commissioner*, but shall not include insurance on automobile risks, commercial agricultural

commodities or livestock, or equipment used to cultivate or transport agricultural commodities or livestock.

(§ 10091(c), emphasis added.)[3]

FAIR Plan argues that premises liability and incidental workers' compensation insurance, coverage which the Commissioner ordered FAIR Plan to provide, are not "insurance against direct loss to real or tangible personal property." (§ 10091(c).) Further, argues FAIR Plan, premises liability and incidental workers' compensation insurance coverage are not encompassed within the provision for "other insurance coverages as may be added with respect to that property," because that phrase refers to insurance for the property, not liability. In this regard, FAIR Plan notes that property insurance is different from liability insurance, arguing that the Act contains 30 references to "property insurance" but not liability insurance because "[t]he entirety of the Act deals with basic property insurance." (OB at 13.)

FAIR Plan also argues that section 10091(c) limits the perils that may be included in "basic property insurance" under the Act to those covered under a standard fire policy (*i.e.*, fire and lightning), an "extended coverage endorsement" (*i.e.*, explosion, smoke, aircraft or vehicle, riot or civil commotion, volcanic eruption, and wind or hail), and vandalism or malicious mischief. (PA 538.) Neither premises liability nor workers compensation fall within this list of identified "perils." Presumably, FAIR Plan makes this argument regarding the perils limitation because the Amended Order inartfully lists premises liability and worker's compensation *coverage* as among the "perils" that are "not currently covered." (*See* OB at 15 [criticizing "internal errors" of the Order that refer to premises liability and workers' compensation "as 'perils' though such 'coverages' are not 'perils'"].)

The Court is unconvinced that FAIR Plan's reading of section 10091(c) must necessarily prevail. That section defines "basic property insurance" as both "insurance against direct loss to real or tangible personal property . . . *and* . . . other insurance coverages as may be added with respect to that property." (§ 10091(c), emphasis added.) The latter is a catchall provision that allows the Commissioner to

[3] Prior to July 23, 2021, the definition of "basic property insurance" was "insurance against direct loss to real or tangible personal property at a fixed location in those geographic or urban areas designated by the commissioner, from perils insured under the standard fire policy and extended coverage endorsement and vandalism and malicious mischief and such other insurance coverages as may be added with respect to such property by the industry placement facility with the approval of the commissioner or by the commissioner, but shall not include insurance on automobile or farm risks." (Former § 10091(c).) With respect to the issues presented in the instant petition, there is no substantive difference between the prior and current versions of the statute.

determine, in his broad discretion, whether FAIR Plan should provide "other insurance coverages" that have some connection to the property. Thus, although section 10091(c) might contain a limitation on "perils," the Legislature used a different word, "coverages," when stating what the Commissioner may order FAIR Plan to provide as basic property insurance. The only stated limitation on such "coverages" is that they be "with respect to [the] property." (§ 10091(c).) Arguably, then, the catchall provision allows for liability insurance so long as it is "with respect to the property." The Court recognizes, however, that the catchall provision might also arguably be read, as FAIR Plan suggests, to limit "other insurance coverages" to coverages only for loss "with respect to" the property itself.

Because section 10091(c) is ambiguous with respect to the Commissioner's authority to require FAIR Plan to include liability coverages, the Court considers various extrinsic aids to resolve that ambiguity.

3. Administrative Construction

The parties disagree on the amount of deference, if any, the Court should give to the Commissioner's interpretation of section 10091(c). The California Supreme Court has explained, as follows, the circumstances in which judicial deference to an agency's interpretation may be warranted:

> When an agency is not exercising a discretionary rulemaking power but merely construing a controlling statute, "'[t]he appropriate mode of review ... is one in which the judiciary, although taking ultimate responsibility for the construction of the statute, accords great weight and respect to the administrative construction.'" How much weight to accord an agency's construction is "situational," and greater weight may be appropriate when an agency has a "'comparative interpretive advantage over the courts,'" as when "'the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion.'" Moreover, a court may find that "the Legislature has delegated the task of interpreting or elaborating on a statute to an administrative agency," for example, when the Legislature "employs open-ended statutory language that an agency is authorized to apply or 'when an issue of interpretation is heavily freighted with policy choices which the agency is empowered to make.'".... In other words, the delegation of legislative authority to an administrative agency sometimes "includes the power to elaborate the meaning of key statutory terms." Nevertheless, the proper interpretation of a statute is ultimately the court's responsibility.

(*American Coatings,* 54 Cal.4th at 461-62, citations omitted.)

Additionally, "consistent administrative construction of a statute, especially when it originates with an agency that is charged with putting the statutory machinery into effect, is accorded great weight.'" (*Ste. Marie v. Riverside County Regional Park & Open-Space Dist.* (2009) 46 Cal.4th 282, 292-93.) "Significant factors to consider include whether the administrative interpretation has been formally adopted by the agency or is instead in the form of an advice letter from a single staff member, and whether the interpretation is long-standing and has been consistently maintained." (*Ibid.*) Moreover, giving great weight to an agency's interpretation is particularly appropriate "where the Legislature and other interested parties have long acquiesced in the interpretation." (*Thornton v. Carlson* (1992) 4 Cal.App.4th 1249, 1257.) "Under these circumstances, the administrative practice will be upheld 'unless it is clearly erroneous or unauthorized.'" (*Ibid.*)

The parties discuss the following statements and actions of the California Department of Insurance ("CDI" or "Department"), post-passage of the Act, to support their respective interpretations of the definition of "basic property insurance."

a. 1972 Reports

Petitioner contends that the CDI "made clear in its 1972 report [to the California legislature] that 'basic property insurance' does not include all the coverages offered under a comprehensive homeowners insurance policy." (PA 315.) Petitioner cites to CDI's October 31, 1972, Report to the California Legislature regarding the Availability, Adequacy, and the Cost of Property Insurance in High Risk Areas. This report stated in part:

> The FAIR Plan has been criticized for not making many of the coverages that could be purchased in the normal market available to its insureds. The most notable deficiency is the lack of the homeowners type package policy for personal risks and the lack of business interruption and other time element coverages for commercial risks. In both of these cases, the justification of the lack of broader coverage is embodied in the narrow scope of legislative intent at the time the FAIR Plan was created. It is clear from the Federal legislation, which in turn mandated the State law, that the intent of Congress was to require the availability of only such insurance as would facilitate financing of construction and rebuilding programs and private investment in inner city areas. In general, the required coverage of lending institutions financial real or personal property investment in inner city areas can be satisfied by the coverages offered by the California FAIR Plan Association.

(PA 334.)

This statement by CDI provides some evidence that CDI interpreted the Act more narrowly in the early 1970s. However, the 1972 Report to the Legislature did not provide a definitive or comprehensive interpretation of the statutory question presented here, which is whether the Commissioner has the authority under California law to order FAIR Plan to provide additional coverages if the Commissioner determines such additional coverages are necessary to carry out the purposes of the Act. (§ 10095(f); § 10090.) The Department's statements to the Legislature cited above focused on the intent of Congress in adopting the federal legislation. The federal legislation imposed minimum thresholds that states had to meet in adopting state legislation.

It seems clear from the cited report that CDI believed in 1972 that additional coverages were not necessary to carry out the purposes of the Act. It also seems clear that CDI's position has changed since the 1972 report, particularly when considering "business liability" coverage, which is now provided in the BOP, discussed *infra*. (*See* AR 375-376.) Given the development of CDI's position over time, this Court affords less weight to its views in a 1972 report than to the Commissioner's current interpretation of the Act.

b. <u>CDI's Approval of the BOP</u>

Since 1994, FAIR Plan has offered a Businessowners policy ("BOP"). (AP 364-367, 298, 368-409.) The BOP includes a businessowners standard property coverage form. Covered causes of loss under this property form include fire, lightning, explosion, windstorm or hail, smoke, aircraft or vehicles, riot or civil commotion, vandalism, sprinkler leakage, sinkhole collapse, volcanic action, and transportation. (AR 368-409.) Additional coverages include actual loss of business income from a suspension in operations caused by direct physical loss of or damage to property at the premises. (AP 375-376.)

As relevant to this writ petition, the BOP also includes a businessowners liability coverage form that provides coverage for "business liability." (AP 391-409.) The form defines business liability as "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury,' 'property damage,' 'personal injury' or 'advertising injury' to which this insurance applies, but only if such 'personal injury' or 'advertising injury' arises out of the ownership, maintenance or use of the premises ... and operations necessary or incidental to those premises, or arises out of the project shown in the Declarations ...." (AP 391.) Coverage for liability for bodily or advertising injury, or for medical expenses arising from bodily injury, applies if the occurrence, offense, or accident takes place in the "coverage territory," which is defined to include the United States of America, Puerto Rico, Canada, and in some cases elsewhere in the world. (*See* AP 393-394; *see also* AP 405-406 [definition of "Coverage Territory"].)

CDI's statements and actions in 1992-1994 relating to its approval of the BOP, as well as FAIR Plan's acquiescence to that expanded coverage, are relevant to the deference owed to the Commissioner in this writ action. While the BOP is not the same as the expanded policy at issue in the instant petition, the BOP notably includes a form of liability coverage and materially expanded the property insurance coverage previously offered by FAIR Plan.

Minutes of a meeting for FAIR Plan's Governing Committee, dated May 20, 1992, reflect that, following the Los Angeles riots in 1992, CDI expressed its concern over the availability of suitable business insurance in the inner-city areas. FAIR Plan learned that CDI was in discussions with the Legislature to extend coverages offered by the FAIR Plan. FAIR Plan's then General Manager asserted "that a better way to handle this would be for the Department and the FAIR Plan to enter into discussions to solve perceived problems, rather than deal through the legislature." (AP 341-342.) The Department and FAIR Plan met on May 12, 1992 to discuss the availability of insurance for businesses in the riot torn areas of Los Angeles. At that time, the Department indicated its interest that the FAIR Plan offer businessowners insurance providing (1) replacement cost coverage, (2) business interruption, (3) general liability, and (4) a premium plan. (AP 342.) FAIR Plan's then General Manager "informed the Governing Committee that the section relative to the FAIR Plan in the Insurance Code appeared to be broad as far as the powers of [the Commissioner] were concerned, and requested Mr. Wolf, the FAIR Plan counsel, to give his opinion as to what power the Commissioner held." (AP 342.)

Wolf responded in a March 12, 1993 letter, stating that, "without any new legislation, the FAIR Plan may, with the Commissioner's approval, add the business owners package policy to the coverages it offers, so long as the FAIR Plan does not offer any insurance on automobile or farm risks." (AR 1609.) Wolf reasoned, *inter alia*, that "in enacting the FAIR Plan legislation, the Legislature appears to have recognized that 'basic property insurance' could be expanded to include liability insurance ... by finding it necessary to exclude from that definition insurance on automobile risks, almost all of which constitutes liability insurance...." (AR 1611.) The May 20, 1992, minutes also state that Wolf opined at the meeting that comprehensive general liability "would probably necessitate action by the legislature to include this in the FAIR Plan." (AP 342.)

The May 20, 1992, minutes reflect that FAIR Plan's Governing Committee, *i.e.* not CDI or the Commissioner, concluded that "[general] liability coverage was readily available in the voluntary market" and that "[general] liability insurance was entirely outside the scope of the Association." (AP 343.) The Committee also concluded that the FAIR Plan could offer business interruptions coverage. (AR 342-343.) The Governing Committee decided that general liability coverages would be "made through a [voluntary] market assistance program ["MAP"], and that this be communicated to the Department of Insurance." (AP 343.)

For reasons not directly relevant here, FAIR Plan's Governing Committee subsequently reconsidered setting up a MAP, and determined that some liability coverage, particularly related to businesses, could be included in a FAIR Plan policy. At a meeting held February 25, 1993, Wolf again gave his opinion "that the legislation setting up the California FAIR Plan can reasonably be construed to allow liability . . . coverages to be included," including premises liability. (AP 347.) In explaining this opinion, he specifically "indicated the legislation states that basic property insurance *also* include '. . . other insurance coverages as may be added with respect to such property . . . with the approval of the Commissioner." (AP 347, emphasis added.) Indeed, Wolf specifically stated he was "confident" that such statutory language was "broad enough to add" the contemplated liability coverages without the necessity of approaching the legislature. (AP 347.) On the heels of that, FAIR Plan's Governing Committee approved development of a businessowners package policy. (AP 347-48.)

In crafting the BOP, FAIR Plan relied upon an ISO form and made various changes to the form. As relevant here, an endorsement was added to limit the liability coverages on the form to those premises, operations, and projects specifically designated by the insured. (AP 350-354, 358.) According to FAIR Plan's minutes from May 1993, CDI's liaison with FAIR Plan, Richard Roth, "requested a review of the liability coverages to ensure that the coverage given is narrowed to premises related coverage" and asserted that this would "ensure that the liability coverage would comply to that permitted to the current FAIR Plan legislation." (AP 358.)

On July 2, 1993, FAIR Plan announced that a 2/3 majority of the insurance company members approved a plan to expand the FAIR Plan to offer a BOP. (AP 364.) On March 7, 1994, the CDI issued a letter approving the BOP program and related amended plan of operation. (AP 364-67.)

The Commissioner asserts that its interpretation of section 10091(c) "has consistently maintained a decades-long interpretation of Subdivision (c) as authorizing the sort of premises liability found in the BOP and required by the Order." (Opp. at 14, fn. 4.) The administrative history relating to the BOP supports giving deference to the Commissioner in his current interpretation of the Act. Since at least 1994, CDI has interpreted the Act to authorize the Commissioner to require FAIR Plan to provide liability coverage related to business operations on the insured premises. The longstanding liability coverage in the BOP conflicts with FAIR Plan's current narrow interpretation of "basic property insurance" to be limited to direct loss to property or to the bare minimum insurance necessary to obtain a mortgage. It is significant that both FAIR Plan and the California Legislature have acquiesced, for more than 25 years, to the Commissioner's interpretation of the Act to grant him authority to require FAIR Plan, through approval of the Plan of Operation, to provide liability coverage in the BOP. (*See Thornton*, 4 Cal.App.4th at 1257 [weight should be given to agency's interpretation "where the Legislature and other interested parties have long acquiesced in the interpretation"]; *Save Our Heritage*

*Org. v. City of San Diego* (2018) 28 Cal.App.5th 656, 668 ["The Legislature is presumed to be aware of a long-standing administrative practice .... If the Legislature, as here, makes no substantial modifications to the [statute], there is a strong indication that the administrative practice [is] consistent with the legislative intent"].)

While the evidence shows that the Department has not had a consistent interpretation of the Act since its original adoption, the evidence does support a finding that, since at least the early 1990s, the Department has interpreted the Act to authorize the Commissioner to require FAIR Plan to provide at least some forms of liability insurance. That interpretation, to which FAIR Plan has acquiesced and the Legislature has not modified, is entitled to substantial deference. (*Ste. Marie,* 46 Cal.4th at 292-93.) At least with respect to the authority of the Commissioner to require property-related liability coverage, the Commissioner's current interpretation is generally consistent with the Commissioner's prior approval of liability coverage in the BOP.

4. Whether Premises Liability and Workers' compensation Coverage Are "With Respect To" Property

Having found that section 10091(c) generally may authorize the Commissioner to require property-related liability coverage, the Court next considers specifically whether coverage per the Amended Order for (1) premises liability and (2) "incidental worker's compensation to the extent that such coverage is with respect to such property" qualify as "other insurance coverages as may be added with respect to" the insured property under section 10091(c).

Citing *Hartford Casualty Ins. Co. v. Travelers Indemnity Co.* (2003) 110 Cal.App.4th 710, the Commissioner maintains that "with respect to" is a phrase that "merely indicates some relationship" between two things and is synonymous with "in relation to." (*Hartford,* 110 Cal.App.4th at 719.) In *Hartford*, the Court of Appeal was called on to interpret an insurance policy providing coverage to an additional insured "'but only with respect to' the [insured's] work or operations or facilities owned or used by [the insured]." The *Hartford* court concluded that the phrase did not require a showing of direct liability caused by the insured. (*Id.* at 716.) The Court of Appeal concluded that the policy language required no more than a "minimal causal connection or incidental relationship between the liability and the [insured]'s presence as a tenant" in the leased premises upon which the incident occurred. (*Id.* at 720.)

In *Hartford,* the policy required an event to be "with respect to" the insured's "work or operations or facilities owned or used by" the insured, a fairly expansive list. In that context, the court decided that the "with respect to" language required only a minimal causal connection between the incident giving rise to liability and the insured's tenancy in a building. The language of Section 10091(c) differs as it only

authorizes the Commissioner to add coverages "with respect to such property," not an expansive list of qualifiers. *Hartford* thus provides limited guidance as to the legal interpretation of the phrase "with respect to" in section 10091.

Even under a broad interpretation of the statute, section 10091 only authorizes the Commissioner to add insurance coverages "with respect to" the insured property. The Court interprets this language to require some relationship, nexus, or connection between the property and the liability coverage. The Commissioner's interpretation of section 10091 to allow addition of property-related liability coverages is consistent with the Commissioner's prior approval of liability coverage in the BOP and the Legislature's and FAIR Plan's acquiescence to that interpretation. By contrast, FAIR Plan's interpretation of section 10091 to exclude all property-related liability coverage conflicts with the BOP.

Concerning premises liability coverage, a premises liability qualification requires a "causal connection" between the injury and "ownership, maintenance, or use" of the insured property. (Rutter, Cal. Prac. Guide, Insurance Litigation, § 7:2194.1, citing *Kramer v. State Farm Fire & Cas. Co.* (1999) 76 Cal.App.4th 332, 340 ["[C]onstruing residential coverage to apply to any tortious conduct occurring on the premises would in effect render nugatory the language specifically limiting coverage to injury arising out of the 'ownership, maintenance, or use' of the property. Conduct having no causal connection to the premises...would be covered merely because it occurred onsite"].) The Amended Order, however, does not state explicitly that the premises liability coverage must arise out of the ownership, maintenance, or use of the insured property. By contrast, BOP's "Business Liability" coverage contains explicit language limiting coverage to damage or injury that "arises out of the ownership, maintenance or use of the premises shown in the Declarations and operations necessary or incidental to those premises, or arises out of the project shown in the Declarations." (AP 391.) Arguably, the Amended Order's lack of any such explicit limiting language leaves open the possibility that FAIR Plan must provide coverage for any tort that happens to occur on the premises/insured property, irrespective of whether the damage or injury is connected to the ownership, maintenance, or use of the property.

However, it is apparent that the term "premises liability," standing alone, is used within the insurance industry to connote coverage for an "insured's legal liability for bodily injury or property damages arising out of the ownership, maintenance or use of the insured premises." (*Cf.* PA 743 [Premises Liability Endorsement defining "Premises Liability" coverage].) Understood as such, which is consistent with the Commissioner's interpretation of section 10091(c) requiring a limitation of coverage to ownership, maintenance, or use of the insured premises in connection with BOP's business liability, the Court finds the Commissioner may require FAIR Plan to provide coverage for premises liability within the meaning of section 10091(c).

Concerning "incidental worker's compensation to the extent that such coverage is with respect to such property," "[w]orkers' compensation insurance covers injuries suffered in the course of employment 'without regard to negligence' by the employer or the employee." (AR 1710; Lab. Code § 3600(a).) FAIR Plan contends that the Commissioner's limitation is nonsensical because workers' compensation covers liability for injuries and is not coverage "with respect to" property. However, the Commissioner expressly incorporated the findings and conclusions of the Court in the 19STCP05434 Action, which contained the same interpretation of the meaning of "with respect to such property" discussed above. (PA 35, 177.) Accordingly, the limitation of workers' compensation in the Amended Order is read to require some relationship, nexus, or connection between the property and the liability coverage. With that understanding, the Court finds the Commissioner is authorized to compel FAIR Plan to provide such coverage.

B. Whether Amended Order No. 2021-2 is Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support

"Mandamus may issue to correct the exercise of discretionary legislative power, but only if the action taken is so palpably unreasonable and arbitrary as to show an abuse of discretion as a matter of law. This is a highly deferential test." (*Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255, 1264-65.)

"In ordinary mandamus proceedings courts exercise very limited review 'out of deference to the separation of powers between the Legislature and the judiciary, to the legislative delegation of administrative authority to the agency, and to the presumed expertise of the agency within its scope of authority.' The court may not weigh the evidence adduced before the administrative agency or substitute its judgment for that of the agency, for to do so would frustrate legislative mandate. An agency acting in a quasi-legislative capacity is not required by law to make findings indicating the reasons for its action, and the court does not concern itself with the wisdom underlying the agency's action any more than it would were the challenge to a state or federal legislative enactment." (*Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 230, citations omitted.)

"A court will uphold the agency action unless the action is arbitrary, capricious, or lacking in evidentiary support. A court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." (*Shapell Industries,* 1 Cal.App.4th at 232.)

This abuse of discretion standard is a "rational basis" test. (*County of Los Angeles Department of Public Health v. Superior Court* (2021) 61 Cal.App.5th 478, 761.) The quasi-legislative decision "must have a real and substantial relation to the object sought to be obtained." (*Ibid.*)

In justifying the issuance of the Amended Order, the Commissioner provides:

> WHEREAS, requiring the FAIR Plan to expand its dwelling fire policy offerings to include the additional coverages ordered hereby is necessary to carry out the purposes of Chapter 9, because, among other things: (1) the availability of an expanded FAIR Plan homeowners policy addresses market deficiencies by making additional homeowners coverages more affordable and available in wildfire exposed areas in California; and (2) requiring FAIR Plan to provide an expanded policy will be more consistent with consumers' expectations, thereby increasing stability in the property insurance market.

(PA 178.)

FAIR Plan argues that the Commissioner failed to consider all relevant factors, as purportedly evidenced by describing premises liability and workers' compensation as perils instead of coverages and not including the justification for expanding the dwelling fire policy in the initial version of Order No. 2021-2. (*Compare* PA 176-78 [Amended Order] *with* PA 5-6 [initial order].) With respect to the former ground, while premises liability and workers' compensation are coverages and not perils (*see Garvey*, 48 Cal.3d at 406 [describing perils as "fortuitous, active, physical forces"]), the error in description is not probative of whether the order to provide an expanded policy is arbitrary, capricious, or unsupported. With respect to the latter ground, FAIR Plan does not cite any authority indicating that delayed justification of the issuance of an order necessarily means that the order had no evidentiary support.

FAIR Plan also argues that the Commissioner cannot rely on findings and reasoning based on California customers' demand for an HO-3 policy, as the insurance coverage that the Commissioner seeks to compel FAIR Plan to provide is not an HO-3 policy.

As stated above, the Amended Order incorporated the findings and conclusions of the Court in the 19STCP05434 Action. (PA 177.)

In the Court's prior ruling, the Court set forth evidence demonstrating an increase in the number of California homeowners who had their homeowners' policies non-renewed in the voluntary markets because of wildfire risks. (PA 43.) As a result, the issuance of FAIR Plan policies has increased. (PA 43.) Further, the Court found: "Because the vast majority of California homeowners hold homeowners' policies, a reasonable inference can be made that homeowners generally prefer such policies and may have switched to Petitioner's Dwelling Policy at increasing rates in fire-prone areas because of the unavailability or prohibitive expense of homeowners' policies." (PA 44.)

In the 19STCP05434 Action, FAIR Plan argued that any difference in coverage between the standard dwelling fire policy and an HO-3 policy could be covered with a Difference in Conditions ("DIC") policy. (PA 14.) The Court stated:

> As summarized above, Respondent cites undisputed evidence that DIC policies are expensive on a relative basis compared to HO-3 policies. Indeed, Petitioner's own evidence suggests that DIC policies are often purchased from surplus lines carriers. Bacarti estimated that a DIC policy would only be about 10 percent less than the HO-3 policy. (AR 1550.) Since the consumer must also purchase Petitioner's Dwelling Policy to replace the non-renewed HO-3 policy, paying 90 percent of the cost of the HO-3 policy solely for the DIC policy could result in a substantial increase in the yearly premium to obtain a true replacement. (See e.g. AR 672 [showing average Dwelling Policy premium of $1,147].) Irwin testified to consumer complaints about the "significant change of cost from the prior insurance policy to the combination of the FAIR Plan with a DIC policy." (AR 1496.) As an example, Irwin cited a hypothetical policy increase of $1,200 to $3,000, more than doubling of the cost. (Ibid.) While Petitioner's actuary states that "there is no reason to believe that a FAIR Plan HO-3 [policy] would cost less than the" combination of a DIC policy and the FAIR Plan Dwelling Policy (AR 664), she cites no detailed analysis or evidence in support. There is also evidence to the contrary, including Allen's testimony about additional underwriting, marketing, and risk management expenses of DIC writers. (AR 704-705.) Based on the cited evidence, Respondent could rationally conclude that a combined FAIR Plan HO-3 policy would be substantially less expensive than the DIC-Dwelling Policy combination and similar in cost to the non-renewed HO-3 policies; that Order 2 could help address market deficiencies by making HO-3 policies available in fire-prone areas; and that Order 2 would thereby carry out the purposes of the Act. (See Ibid; AR 7; § 10090.)
>
> As summarized above, Respondent also submits evidence of consumer complaints about confusion caused by DIC policies, which exclude the standard fire policy, and about unintended gaps in coverage. When considered with the cost and availability issue discussed above, Respondent could rationally conclude from such complaints that ordering Petitioner to provide a HO-3 policy was necessary to carry out the purposes of the Act. (AR 748-752.)

(PA 50-51.) Petitioner does not challenge or dispute the Court's summary of such evidence.

Although the insurance coverage here is less comprehensive than the HO-3 policy that was challenged in the 19STCP05434 Action, the evidence that supported the coverage in that action similarly supports the coverage in this action. Wildfire risks persist, as admitted by FAIR Plan. (AR 1839 [FAIR Plan's brief in support of preliminary injunction stating that California wildfires "are now an apparent reality for Californians"].) Therefore, there is no reason to believe that the rate of nonrenewal of homeowners policies has decreased. Thus, there is a rational basis for the Commissioner to find a continuing need to make expanded homeowners policies more available in wildfire-exposed areas. (PA 177.)

FAIR Plan also argues that there is no evidentiary support for the Commissioner's assertion that the policy envisioned in the Amended Order will make additional homeowners coverages more affordable and available in areas affected by wildfires and increase stability in the property insurance market. (PA 177.) FAIR Plan correctly identifies that "affordability" is not an express goal of the Act. Nonetheless, the Court previously found the relevance of affordability in connection with meeting other goals of the Act. (PA 49 ["The Commissioner could rationally conclude that the stability of the property insurance market, and also the availability of insurance from a practical perspective, materially depend on the cost of insurance available to consumers. If an insurance policy is prohibitively expensive, it may be effectively unavailable"].) Even though the expanded policy at issue in the instant proceeding is not a full HO-3 policy, the prohibitive cost of DIC policies and confusion about what DIC policies cover supports the Commissioner's desire to have an expanded policy as an option for homeowners, in furtherance of the goal of assuring stability in the property insurance market. (*See* § 10090(a).)

FAIR Plan also argues that requiring it to offer coverages that are already available in the market does not promote the goals of the Act and will cause confusion for homeowners who are seeking all the coverage offered under an HO-3 policy.

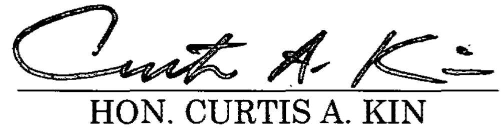
The Commissioner provides evidence that the plan required by Amended Order No. 2021-2 is as close to a comprehensive HO-3 policy as permitted under the Court's prior decision in the 19STCP05434 Action. (AR 2049 at ¶ 10.) There was an increase in insurer-initiated nonrenewals following the wildfires of 2017 and 2018, and, while nonrenewals were lower in 2020 than 2019, they remained higher than in years prior to 2019. (AR 1875 at ¶ 11.) Fair Plan's market growth in 2020 has been concentrated in areas with higher fire risk (*Id.*). While FAIR Plan disagrees on the efficacy of the Amended Order in achieving the goals of the Act, Fair Plan's position is insufficient for the Court to find the Commissioner's contrary conclusion is arbitrary or irrational. The Commissioner could reasonably conclude that the expanded policy at issue would address market deficiencies, especially in wildfire exposed areas, and that coverage would be more in line with consumers' expectations, thereby increasing stability in the market.

With respect to any claims that the expanded policy may confuse consumers who are seeking an HO-3 policy, the Court does not substitute its judgment for that of the Commissioner. (*County of Los Angeles,* 214 Cal.App.4th at 654.)

## V. Conclusion

For the foregoing reasons, the petition is DENIED. Pursuant to Local Rule 3.231(n), respondent Ricardo Lara, in his official capacity as the Insurance Commissioner of the State of California, shall prepare, serve, and ultimately file a proposed judgment.

Date: November 27, 2023



HON. CURTIS A. KIN