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MEASURE 1495:
2012 AUTOMOBILE INSURANCE DISCOUNT ACT

Initiative Statute

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XIII. EXECUTIVE SUMMARY

This initiative, named the “2012 Automobile Insurance Discount Act”, will allow insurance providers the ability to offer discounts to consumers based on proof of prior “continuous coverage” with any insurance provider. Proponents of this initiative emphasize its goal to increase consumer access to affordable automobile insurance by allowing drivers to keep their discounts while shopping for the lowest insurance price amongst competitors.¹ This measure will amend Proposition 103’s Insurance Code Section 1861.02, which established mandatory rating factors used in determining consumer insurance rates.² In decreasing order of importance, the factors are as follows: the insured’s driving record, the number of miles driven annually, the number of years of driving experience, and any other regulation adopted by the Insurance Commissioner.³

Current regulation allows “persistency” to be used as an optional rating factor in determining rates, premiums, and Good Driver discounts.⁴ However, persistency, which refers to a driver’s maintenance of continuous coverage, is limited in scope to a driver’s continuous coverage with the driver’s current insurance provider.⁵

A vote “yes” would amend Proposition 103, adding Section 1861.023 to the Insurance Code, allowing insurance providers to offer “continuous coverage” or persistency discounts to new customers who can demonstrate continuous coverage for the prior five years with any other insurance provider.⁶ The initiative allows for consumers to qualify for the continuous coverage discount if the lapse was: (1) not more than 90 days; (2) for no more than 18 months in the last five years due to loss of employment resulting from layoff or furlough; or (3) due to active military duty.⁷ Additionally, children residing with a parent may qualify for the discount based on their parent’s eligibility.⁸ Furthermore, consumers who cannot demonstrate continuous coverage over the past five years may still be awarded a discount, which will be proportional to the amount of time over the past five years that the driver did maintain coverage.⁹

A vote “no” will maintain current Insurance Code regulation, enacted by Proposition 103, allowing automobile insurance providers to offer “persistency” discounts to continuing consumers, but not to new consumers, as an optional rating factor.

¹ *2012 Automobile Insurance Discount Act*, <http://www.2012autoinsurancediscountact.com/faqs/> (last visited March 15, 2012).

² *Qualified Statewide Ballot Measures*, CALIFORNIA SECRETARY OF STATE, <http://www.sos.ca.gov/elections/ballot-measures/qualified-ballot-measures.htm> (last visited Feb. 20, 2012).

³ CAL. INS. CODE § 1861.02 (West 2005).

⁴ *Id.*

⁵ *Id.*

⁶ *Qualified Statewide Ballot Measures*, *supra* note 2.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

XIV. HISTORY AND CURRENT STATUS OF THE LAW

a. Proposition 103

In 1988, California voters passed Proposition 103, which enacted California Insurance Code Section 1861.02, with the express intention to protect consumers from arbitrary insurance rates and practices; to encourage a competitive insurance marketplace; and to ensure insurance is fair, available and affordable to all Californians.¹⁰ Proposition 103 imposed a substantial overhaul of property, casualty, and automobile insurance code provisions and relevant regulations.

Subsection (a) of Section 1861.02 provides that automobile insurance rates and premiums must be determined by the following factors in decreasing order of importance: (1) the insured's driving record; (2) the number of miles driven annually; (3) the number of years of driving experience; and (4) other factors the insurance commissioner may adopt by regulation.¹¹ There are currently sixteen optional rating factors that may be used to determine automobile insurance rates.¹²

Subsection (b) of Section 1861.02 provided for a "Good Driver Discount Policy" for applicants who met certain criteria.¹³ Subsection (c) of Section 1861.02 provided that "the absence of prior automobile insurance coverage, in and of itself, shall not be a criterion for determining eligibility for a Good Driver Discount, or generally for automobile rates, premiums, or insurability."¹⁴

Subsection (c) was enacted to combat the spiraling problem of uninsured motorists. Uninsured drivers, who are unable to afford car insurance, will face higher rates for being uninsured drivers, making it even less likely they will purchase insurance.¹⁵ Insurance Code 1861.02, as enacted by Proposition 103, remains the current statutory provision regarding the automobile insurance rating factors.

b. Quackenbush Regulation

In 1996, Insurance Commissioner Chuck Quackenbush adopted regulations to allow automobile insurance carriers to use "persistence" as an optional rating factor.¹⁶ Persistence refers to continued insurance coverage with a particular automobile insurance carrier.¹⁷ However, the Quackenbush regulation failed to define the scope of persistence as an optional rating factor, which resulted in various insurers interpreting the term differently.¹⁸ Some automobile insurers interpreted persistence to mean the number of years a customer has continued insurance coverage

¹⁰ See *State Farm Mutual Automobile Ins. v. Garamendi*, 32 Cal.4th 1029, 1041 (2004).

¹¹ CAL. INS. CODE § 1861.02 (West 2005).

¹² See CAL. CODE REGS. tit. 10, §2632.5(d) (2012).

¹³ CAL. INS. CODE § 1861.02(b) (West 2005).

¹⁴ CAL. INS. CODE § 1861.02(c) (West 2005).

¹⁵ Vanessa Wells, *Ships Passing in the Night: How California's Statutory Framework Directs Traffic Through the Maze of Jurisdictional Doctrines and Concepts Concerning Insurance Rates*, 44 U.S.F. L. REV. 853, 875 (2010).

¹⁶ See CAL. CODE REGS. tit. 10, §2632.5(d)(11) (2012).

¹⁷ Wells, *supra* note 15, at 875.

¹⁸ *Id.*

with his or her current insurer.¹⁹ Others defined persistency more broadly to include “portable persistency”.²⁰ Portable persistency allows drivers to take their “persistency” with them—I.e., the applicant receives a discount based on years of coverage with any insurer.²¹

c. Low Regulation

In 2002, Insurance Commissioner Harry Low adopted a regulation to limit the scope of the persistency factor.²² Automobile insurance carriers may only consider the length of time the driver has been continuously insured with his or her current insurance provider, or an affiliate with that company, when using persistency as an optional rating factor.²³ The Low Regulation effectively banned the practice of offering portable persistency discounts to new customers.

d. SB 841

In 2003, the California Legislature sought to override the Low Regulation by amending Proposition 103.²⁴ The California Constitution permits the legislature to amend initiative statutes to ways: (1) by enacting a statute with voter approval, or (2) language of the initiative statute expressly permitting amendments without voter approval.²⁵ Proposition 103 specifically allows legislative amendments without voter approval when statutes are enacted to further the purpose of Proposition 103.²⁶ The Legislature passed SB 841 (hereinafter referred to as “Persistency Legislation”), which amended Proposition 103’s Insurance Code Section 1861.02 to allow insurers to give persistency discounts to drivers previously insured with any insurer.²⁷ Governor Grey Davis signed the Persistency Legislation into law on August 2, 2003.

Various actions were brought in California courts to challenge the constitutional validity of the Persistency Legislation.²⁸ Ultimately, in *Foundation for Taxpayer and Consumer Rights v. Garamendi* (hereinafter referred to as *FTCR v. Garamendi*),²⁹ the Persistency Legislation was held invalid because it did not further the purpose of the Proposition 103.

The ruling was based on two main points. First, the Persistency Legislation did not further the purpose of Proposition 103 because its grant of the portable persistency discount was in direct conflict of subsection (c), which prohibited the absence of prior automobile insurance coverage to

¹⁹ Samuel Sorich, *Auto Insurance Initiative Qualifies for November 2012 Ballot*, JDSUPRA (Jan. 23, 2012), available at <http://www.jdsupra.com/post/documentViewer.aspx?fid=d6215970-c54f-4438-b21a-39819d1bdfce#relateddocs>.

²⁰ *Id.*

²¹ Wells, *supra* note 15, at 876.

²² *Id.*

²³ See CAL. CODE REGS., tit. 10, §2632.5(d)(11) (2012).

²⁴ *Found. for Taxpayer and Consumer Rights v. Garamendi (FTCR v. Garamendi)*, 132 Cal. App. 4th 1354, 1361 (Ct. App. 2005).

²⁵ Cal. Const. art II, §10(c).

²⁶ Prop. 103, §8, subd. (b).

²⁷ Sorich, *supra* note 19.

²⁸ See *Donabedian v. Mercury Insurance Company*, 11 Cal. Rptr. 3d 45 (2004).

²⁹ *FTCR v. Garamendi*, 132 Cal. App. 4th at 1354.

be used in and of itself as a criterion for determining insurance discount eligibility.³⁰ Second, the Persistency Legislation did not further the purpose of Proposition 103 because it violated subsection (e), which grants the Insurance Commissioner the exclusive power to adopt regulation imposing optional rating factors.³¹ The Court of Appeals holding in *FTCR v. Garamendi* preserved the 2002 Low Regulation's limited scope of persistency as an optional rating factor.³²

e. Proposition 17

In the June 2010 statewide primary election, Proposition 17 was a failed attempt to override Proposition 103. If Proposition 17 had passed, automobile insurance companies would be permitted to offer portable persistency discounts to new customers who demonstrated continuous, or continuous auto insurance coverage with a lapse of no more than 90 days, in the previous five years.³³ Voters defeated the initiative 52% to 48%.³⁴ The language of Proposition 17 granting the use of continuous coverage, or portable persistency, is the same as the 2012 Automobile Insurance Discount Act. However, proponents of the Act are welcoming it as a new and improved version of Proposition 17 drafted to address Proposition 17's shortcomings.³⁵ Unlike the Act, Proposition 17 did not offer exemptions for men and women currently on active duty in the military or for drivers who have not maintained continuous coverage due to loss of employment or furlough.³⁶

XV. PROPOSED CHANGE TO EXISTING LAW

The 2012 Automobile Insurance Discount Act would amend Proposition 103, by enacting a new Insurance Code section, to allow an insurance provider to offer a "continuous coverage" discount on automobile insurance policies to insurance customers if they have continuously followed the mandatory insurance law.³⁷ Continuous coverage is defined as uninterrupted automobile insurance coverage.³⁸ Consumers with a lapse in coverage would still be eligible for this discount if the lapse was: (1) not more than 90 days in the past five years for any reason; (2) for no more than 18 months in the last five years due to loss of employment resulting from layoff or furlough; or (3) due to active military duty.³⁹ Additionally, children residing with a parent may qualify for the discount based on either parent's eligibility.⁴⁰

³⁰ *Id.* at 1358.

³¹ *Id.*; See CAL. INS. CODE § 1861.02 (West 2005).

³² *Id.*

³³ *Qualified Statewide Ballot Measures, supra* note 2.

³⁴ June 8, 2010, *Primary Elections-Statement of Vote*, CALIFORNIA SECRETARY OF STATE, <http://www.sos.ca.gov/elections/sov/2010-primary/ssov/ballot-measures-summary.pdf> (last visited March 15, 2012).

³⁵ *2012 Automobile Insurance Discount Act, supra* note 1.

³⁶ *Id.*

³⁷ *Qualified Statewide Ballot Measures, supra* note 2.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

Insurance providers may offer discounts on a proportional basis to consumers who are unable to demonstrate a history continuous coverage over the prior five years.⁴¹ The proportional discount will be determined by the number of whole years in the immediate preceding five years for which the customer was insured.⁴² For example, if a customer is able to demonstrate that he or she had coverage for the previous three of the five years, the customer will receive 60 percent of the total continuous coverage discount.⁴³

Projected Proportional Discounts Based on Number of Year Insured Within Last Five Year

	Base	Minimum (1 year)	Medium (3 years)	Maximum (5 years)
Discounts	\$1,200.00	\$1,104.00	\$912.00	\$720.00

IV. IMPACT OF THE PROPOSED INITIATIVE

a. Impact on Individuals

If the proposed initiative passes, drivers who have maintained automobile insurance may seek short term discounts on their policies. The discount would not require a consumer to be loyal to one particular automobile insurance company, but merely maintain insurance coverage with any automobile insurance provider continually for the prior five years. The legislation does not affect lapses due to active military service.⁴⁴ It also allows lapses up to 90 days in the previous five years and lapses up to 18 months due to loss of employment resulting from layoff or furlough.⁴⁵ First time drivers and drivers with lapses not recognized as exceptions in their auto insurance history will likely be subject to higher premiums in California. In Texas and Florida, where similar propositions have passed, those with lapses in insurance coverage pay roughly 50% more than their counterparts.⁴⁶ However, the proposed initiative does allow consumers who are unable to demonstrate continuous coverage to be granted a proportional discount.⁴⁷ The discount will be proportioned to number of whole years in the previous five years that the consumer maintained coverage.⁴⁸

b. Impact on the State

This initiative could result in an increase in the total value of automobile insurance premiums earned by insurance companies in California. Currently, automobile insurance is one of the major

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Ballot Propositions*, LEGISLATIVE ANALYST'S OFFICE (July 27, 2011), <http://www.lao.ca.gov/ballot/2011/110461.aspx>

⁴⁴ *Qualified Statewide Ballot Measures*, *supra* note 2.

⁴⁵ *Id.*

⁴⁶ Jamie Court, Op-Ed., *A Bad 'Discount' on Car Insurance*, *L.A. TIMES*, Sept. 21, 2011, <http://articles.latimes.com/2011/sep/21/opinion/la-oe-court-mercury-20110921>.

⁴⁷ *Qualified Statewide Ballot Measures*, *supra* note 2.

⁴⁸ *Id.*

types of insurance purchased by California residents. It accounted for approximately \$21 billion (19 percent) of all premiums collected by California insurers in 2010.⁴⁹ If the initiative passes and insurance premiums rise, the state would receive more in tax revenues as a result. For example, the state's taxes on \$30 billion of insurance company income would be greater than the state's taxes on \$21 billion. However, the provision of continuous coverage discounts could reduce premium tax revenues received by the state. It would depend on whether the automobile insurance companies earn enough from the surcharges for the drivers who have lapses in coverage to offset the discounts offered to the insured drivers who have continuous coverage. Also, it would depend upon the extent to which insurance companies choose to offer such discounts to their customers, and the size of the discounts provided.⁵⁰

The net impact on state premium tax revenue from this measure may not be significant. This is because overall premiums are predominately determined by other factors—such as driver safety, the number of miles driven, and years of driving experience—which are unaffected by the measure.⁵¹

V. POLICY CONSIDERATIONS

a. Proponent's Arguments

California drivers who have complied with State law in maintaining insurance coverage may be rewarded with a discount from their insurance carrier, regardless of the quantity of insurance carriers in a driver's history. The discount will incentivize California drivers to keep continuous automobile insurance coverage. The initiative's primary supporters are American Agents Alliance and George Joseph, chairman of insurance company Mercury General Corporation.⁵² Supporters of the initiative are comprised of automobile insurance companies and Quotes.com.⁵³ Quotes.com is a website that allows users to obtain competitive rate on automobile insurance. Most recently, both Democratic Party Leaders and Republican Party Leaders have endorsed the initiative.⁵⁴ Both parties have released statements of support emphasizing that this is not a party issue, but rather a question of fairness.⁵⁵

The proponents focus on three major points. First, the proponents show that consumers will receive a discount that they were not previously eligible to receive. As regulations currently proscribe, automobile insurance providers are required to assess premiums, and discounts based on three primary rating factors: safety of their driving records, the amount of miles the driven on

⁴⁹ *Ballot Propositions*, *supra* note 43.

⁵⁰ *Id.*

⁵¹ Sorich, *supra* note 19.

⁵² Court, *supra* note 46.

⁵³ *Votes Are In: 2012 Automobile Insurance Discount Act Qualifies*, YAHOO! FINANCE (February 7, 2012), <http://finance.yahoo.com/news/votes-2012-automobile-insurance-discount-100000199.html>.

⁵⁴ Press Release, PR Newswire, Democratic Leader Supports 2012 Automobile Insurance Discount Act Two Days After Official Support From California Republican Party (Feb. 28, 2012), http://www.bizjournals.com/prnewswire/press_releases/2012/02/28/SF61401.

⁵⁵ *Id.*

an annual basis, and the number of years they had been driving⁵⁶. This initiative will proscribe a fourth element: proof of continuous coverage with any prior insurance provider. There are other factors that insurance companies may choose to use when assessing discounts, but they are optional.⁵⁷

Proponents also focus their arguments on the ability of California's insured drivers to have the flexibility to switch automobile insurance carriers and still qualify for a continuous coverage discount. Currently, an insurance company can offer a discount to its customers for their loyalty to the particular automobile insurance company. The automobile insurance companies are forbidden, however, to offer a loyalty discount to new customers⁵⁸. Proponents have likened this discount to giving the consumer a portable loyalty discount, allowing one to switch between carriers and still maintain the discount.⁵⁹

Lastly, the proponents feature the inclusivity of the measure of classes of people who may be inadvertently and negatively affected by the new legislation. The measure will not apply to a lapse in insurance coverage due to active military service. Similarly, continuous coverage will be deemed to exist if there is a lapse in coverage of up to 18 months due to loss of employment resulting from layoff or furlough, and a lapse up to 90 days in the previous five years.⁶⁰

b. Opponent's Arguments

There is no defining group or organization yet formed in opposition to this initiative, likely given the infancy of the initiative, which will appear on the November ballot. However, various consumer watchdog groups and other consumer advocate groups have released early projections indicating the potential harm of this initiative, if passed.

Opponents' primary criticism is that this initiative serves as a pretext for singling out California drivers who have no prior history of insurance or lapses that are not excused by the initiative's exceptions⁶¹. It is projected that these consumers will be forced to pay higher premiums and rates, with fewer discounts, to compensate for deep discounts given to consumers who qualify for the continuous coverage discount⁶². Although maintaining automobile insurance is mandatory, opponents fear that these premiums and rate hikes will result in new customers deciding to take

⁵⁶ *Ballot Propositions*, *supra* note 43.

⁵⁷ *Votes Are In: 2012 Automobile Insurance Discount Act Qualifies*, *supra* note 53.

⁵⁸ *Id.*

⁵⁹ Nanette Miranda, *Car Insurance Discount Act Could Give Break in Prices*, *NEWS10* (January 19, 2012), <http://www.news10.net/news/article/174134/2/Car-insurance-discount-act-could-give-break-in-prices>.

⁶⁰ *Ballot Propositions*, *supra* note 43.

⁶¹ Court, *supra* note 46.

⁶² Laurie Bennett, *Billionaire George Joseph Pushes California Ballot Prop – Again*, CONSUMER WATCHDOG (February 10, 2012), <http://www.consumerwatchdog.org/story/billionaire-george-joseph-pushes-california-ballot-prop-again>.

the risk of driving without insurance, if surcharges end up being at the same rate in other states where similar initiatives have passed.⁶³

Furthermore, opposition is skeptical of the initiative because George Joseph, of Mercury Insurance Company, and American Agents Alliance, primarily support it. Opponents of the initiative suspect foul play, stating that Joseph, individually, contributed more than \$8 million in support of the initiative, while trying to cover up his connection to Mercury.⁶⁴ Also, American Agents Alliance, the official group that is supporting this initiative, is alleged to be nothing more than a collection of top Mercury executives, and was created merely for the purpose of concealing the true identity of the proponents, Mercury Insurance Company.⁶⁵

This may make one wonder: what does Mercury stands to gain from the passage of this initiative? Mercury may charge increased premiums to those who have lapses in insurance coverage for periods greater than eighteen months. Mercury would be able to apply this surcharge to existing customers who have had a lapse in coverage for periods greater than eighteen months within the last five years. Mercury stands to benefit more than other insurance companies because of their unique position in the automobile insurance industry. Mercury is an aggressive, growing insurer attempting to take market share from large established insurers by undercutting the competition.⁶⁶ Despite its growing size, Mercury still targets and attracts customers that typically are more interested in bottom-line cost than coverage and customer service.⁶⁷ Therefore, when compared to large insurance carriers, Mercury has more customers who would be eligible for the surcharge. And, when compared to small insurance companies, Mercury has the resources to leverage against the smaller companies.

Finally, the opposition points out that the discount will only be short-lived, and the California drivers who will receive the discount will actually be subject to rate increases shortly thereafter. The opposition declares that there is no legislation that would prevent insurance companies from raising the rates, even for those who are eligible for the discount. One opponent claims the surcharges could be upwards of 40% of the current rates (see Figure 2).⁶⁸

Figure 2
Projected Surcharges (Minimum 40%)

	Base	Low	Mid	High
Surcharges	\$1,200.00	\$1,680.00	\$1,800.00	\$1,860.00

⁶³ Court, *supra* note 46.

⁶⁴ *Id.*

⁶⁵ Bennett, *supra* note 62.

⁶⁶ Wells, *supra* note 15, at 876.

⁶⁷ Bennett, *supra* note 62.

⁶⁸ *Id.*

I. CONCLUSION

If approved, the 2012 Automobile Insurance Discount Act will authorize insurance providers to offer discounts to California drivers who have maintained continuous automobile insurance for more than five years. The initiative, on its face, will benefit a majority of California's drivers by providing those with a discount who have maintained continuous coverage, regardless of the insurance carrier. However, new drivers and drivers who have lapsed their coverage for reasons not permitted by the initiative will be ineligible for this type of discount and will likely be subject to higher rates and premiums as first-time purchasers.

If denied, automobile insurance companies and California drivers would see no change from current policies. Automobile insurance companies would still be able to offer discounts to loyal customers who maintained continuous coverage with their current provider, but will be unable to provide continuous coverage discounts to new customers to incentivize switching from one car insurance carrier to another.