

[New Restitution Remedy Proposed for Insurers and Licensees in California](#)

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On March 1, 2011, [California State Senator Noreen Evans](#) introduced Senate Bill 361 as [spot bill](#) legislation. The legislation was at the request of California [Insurance Commissioner Dave Jones](#) who seeks to enable consumers to obtain their out-of-pocket costs associated with claimed wrongful conduct by insurers or other licensees, which would include producers.

As explained in [Senator Evans' press release](#), the bill grants explicit authority to the [California Department of Insurance](#) (CDI) to “order restitution as part of an administrative enforcement action.”

Because the legislation is a spot bill, the next version of the bill will provide the details discussed in the press release. Senator Evans' office also issued an [SB 631 Fact Sheet](#) that provides further information on the proposed legislation.

The press release and fact sheet acknowledge that the CDI presently does not have the authority to order insurers or other licensees to restore out-of-pocket expenses or money wrongfully obtained.

The fact sheet provides examples of the types of monetary losses that are sought to be dealt with by SB 631:

1. health insurance rescissions for out-of-pocket costs for medical treatment that the CDI alleges should be covered under the policy;
2. the charging of a premium that is higher than allowed; and,
3. the effect of the recent court decision in [MacKay v. Superior Court](#). *MacKay* held that consumers cannot sue an insurer directly for rating activities that were subject to the CDI's approval in the rate application process.

The effect of this bill would likely result in the CDI initiating administrative actions based on consumer complaints as well as market conduct rating and underwriting and claims examinations for the primary purpose of ordering restitution to consumers.

The press release advises that SB 631 would allow insurers to challenge the CDI's determination in court, and it also states that the bill would preserve the ability of consumers to sue their insurer in court over the claimed wrongful conduct.

Perhaps just as important, the legislation allows the CDI to seek reimbursement for all of its costs in bringing the enforcement action. Currently, the CDI has no authority to seek reimbursement for the costs it incurs in administrative actions.

Proponents of SB 631 may face an uphill battle with the aspect of this legislation that amends [Proposition 103](#)'s penalties relating to rating and underwriting matters.

It is our preliminary analysis that Proposition 103 and California Insurance Code (CIC) [§ 1861.14](#) specify that violations of Article 10 "Reduction and Control of Insurance Rates" are subject to the penalties set forth in CIC §§ 1859.1 and 1858.07 (*i.e.*, \$5,000 for each act and \$10,000 if willful).

Because this legislation would have the effect of amending CIC § 1861.14 to provide restitution, it would require a two-thirds vote of the legislature.

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