No. S226529

IN THE SUPREME COURT OF CALIFORNIA

ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES AND PERSONAL INSURANCE FEDERATION OF CALIFORNIA,
Plaintiffs and Respondents,

v.

DAVE JONES IN HIS CAPACITY AS COMMISSIONER OF THE CALIFORNIA DEPARTMENT OF INSURANCE,

Defendant and Appellant.

SUPREME COURT
FILED

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After A Decision By The Court Of Appeal
Second Appellate District, Case No. B248622
Los Angeles County Superior Court Case No. BC463124
The Honorable Gregory W. Alarcon, Judge Presiding

ANSWER BRIEF ON THE MERITS

GREENBERG TRAURIG, LLP
GENE LIVINGSTON, SBN 44280,
LIVINGSTONG@GTLAW.COM
STEPHEN E. PAFFRATH, SBN 195932,
PAFFRATHS@GTLAW.COM
1201 "K" STREET, SUITE 100
SACRAMENTO, CALIFORNIA 95814
TELEPHONE: 916.442.1111

GIBSON, DUNN & CRUTCHER LLP
THEODORE J. BOUTROUS JR., SBN 132099,
TBOUTROUS@GIBSONDUNN.COM
JULIAN W. POON, SBN 219843,
JPOON@GIBSONDUNN.COM
VANESSA C. ADRIANCE, SBN 247464,
VADRIANCE@GIBSONDUNN.COM
333 SOUTH GRAND AVENUE
LOS ANGELES, CA 90071-3197
TELEPHONE: 213.229.7000

ATTORNEYS FOR PLAINTIFFS AND RESPONDENTS
ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES AND
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VADRIANCE@GIBSONDUNN.COM
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TELEPHONE: 213.229.7000

ATTORNEYS FOR PLAINTIFFS AND RESPONDENTS
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PERSONAL INSURANCE FEDERATION OF CALIFORNIA

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I. QUESTION PRESENTED

This Court granted review of the following question: "Did the Commissioner act within his statutory authority in promulgating regulations designed to prevent insurers from providing homeowners purchasing or renewing insurance policies with 'replacement cost' estimates that the Commissioner reasonably calculated would be incomplete and potentially misleading?"

The Court was also interested in "whether the Commissioner has the statutory authority to promulgate a regulation specifying that the communication of a replacement cost estimate which omits one or more of the components in subdivisions (a)-(e) of § 2695.183 of tit. 10 of the Cal. Code Regs. is a 'misleading' statement with respect to the business of insurance."[1]

II. INTRODUCTION

The Court of Appeal and the trial court both correctly held that the Commissioner's attempt to promulgate a regulation defining new unfair insurance practices exceeds the power granted to the Commissioner by the Legislature in the Unfair Insurance Practices Act (the "UIPA"). (Ins. Code, § 790 et seq.) Title 10, Section 2695.183 of the California Code of

---

[1] An Addendum excerpting the text of the relevant statutory and regulatory provisions is attached hereto.

Regulations (the "Replacement Cost Regulation"[2] or the "Regulation") seeks to impose detailed and cumbersome new content and format requirements on insurers in providing their insureds or prospective insureds with estimates of replacement costs for their homes. The effect of the Replacement Cost Regulation is to deem insurance practices unfair or deceptive, expanding the legislatively-prescribed list of unfair or deceptive acts or practices spelled out in the UIPA beyond the authority granted to the Commissioner by the UIPA. It also sidesteps the more limited, case-by-case process the Legislature specified in the UIPA for the Commissioner to address particular instances of allegedly unfair or deceptive practices not covered by the detailed and very specific list of "[p]rohibited acts" delineated by the Legislature. (Cal. Code Regs., tit. 10, § 2695.183.) There is simply no statutory authority for the Commissioner to do this.

To be valid, a regulation must be encompassed within the scope of authority conferred by the Legislature, consistent with the terms of the governing statute, and reasonably necessary. (Gov. Code §§ 11342.1 & 11342.2.) The challenged Regulation here is not valid: as the plain language of the UIPA makes clear, the Commissioner is not authorized to define new categories of unfair insurance practices or "[p]rohibited acts."

---

[2] The Commissioner has referred to § 2695.183 as the "Replacement Cost Regulation" in his Opening Brief on the Merits. (Opening Brief on the Merits ("OBM") at p. 2.)

The UIPA reserves the authority to "define" new unfair insurance practices to the Legislature. It only authorizes the Commissioner to "determine," with the concurrence of a superior court judge and on a case-by-case basis, whether particular instances of conduct alleged to be unfair should be treated as such for purposes of the UIPA. The statute does not authorize the Commissioner to unilaterally do so in an across-the-board quasi-legislative fashion that effectively adds new subdivisions and "[p]rohibited acts" to those set forth and defined by the Legislature in section 790.03. The Commissioner not only concedes, but trumpets, the fact that the Regulation does just that, claiming that "it is questionable whether the adjudicatory process could ever result in a set of required replacement cost estimate components that are as clear and comprehensive as provided in the [Regulation]." (OBM at pp. 35-36.) But the UIPA does not provide the authority for the Commissioner to take this action.

The Legislature not only prescribed a very detailed, specific list of unfair or deceptive practices and a method for the Commissioner to address additional instances of allegedly novel unfair or deceptive practices that might fall outside that list—in sections 790.03 and 790.06, respectively—but also clearly delineated the scope of the Commissioner's powers and authority in a manner that the Commissioner has exceeded by promulgating the Replacement Cost Regulation.

Moreover, the unlawfulness of the Commissioner's unwarranted attempt to expand the scope of his authority is also confirmed by the terms of section 790.10, which authorize the Commissioner only to "administer" the statute.

The Regulation is either pointless or an unlawful expansion of the Commissioner's power. If the Regulation does not constitute an expansion of, or addition to, the detailed list of unfair practices proscribed by the Legislature in section 790.03, then it would be pointless and unnecessary. Any unfair practices covered by section 790.03 can already be addressed by the Commissioner without need for the Regulation through enforcement proceedings authorized by section 790.05. And if the Regulation does define new categories of unfair or deceptive insurance practices, then it represents an improper attempt by the Commissioner to sidestep the method provided by the Legislature for addressing novel instances of allegedly unfair or deceptive practices not clearly covered by section 790.03's legislatively-prescribed list of "[p]rohibited acts"—namely, section 790.06's case-by-case order-to-show-cause proceedings before a superior court. The Commissioner's extra-statutory attempt to arrogate more powers than allowed by the Legislature should be disapproved by this Court, as it was by the courts below.

The well-established canon of avoidance of constitutional doubts also militates against the Commissioner's expansive reading of his

authority under the UIPA. Such a reading would raise serious constitutional doubts, including under the First Amendment to the United States Constitution and under article I, section 2 of the California Constitution, by both impermissibly restricting some speech and unconstitutionally compelling other speech.

Public policy considerations also do not support the Commissioner's attempted overreach. The Commissioner has claimed that the Replacement Cost Regulation was necessary to guard against underinsurance. Of the 40,000 claims that resulted from the 2007 wildfires, "the department received only 70 complaints related to underinsurance," amounting to complaints on only 0.175% of filed claims. (Administrative Record ("AR") 1254.) Assuming, arguendo, that all these complaints had merit, the statutory scheme already provides the Commissioner with the tools needed to address any perceived instances of unfair practices engaged in by insurance companies, again through sections 790.05 and 790.06 (among other provisions).

For these reasons, set forth more fully below, this Court should affirm the Court of Appeal's (and trial court's) judgment invalidating the Commissioner's challenged Replacement Cost Regulation as exceeding his authority under the UIPA.

III. FACTUAL AND PROCEDURAL HISTORY

A. The Statutory Scheme

The Unfair Insurance Practices Act ("UIPA") begins with section 790, which provides that "[t]he purpose of this article is to regulate trade practices in the business of insurance . . . by *defining*, or providing for the *determination of* all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." (Ins. Code § 790,[3] italics added.) Section 790 draws a distinction between unfair practices that are "defined" in the statute and particular instances of those that may be "determined" to be such (on a case-by-case basis).

Section 790.03 defines what constitute "unfair methods of competition or unfair or deceptive acts or practices" under the UIPA. It states that "[t]he following *are hereby defined* as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance," and provides a detailed, lengthy list of specific "[p]rohibited acts," many of which in turn have detailed sub-parts. (§ 790.03.) Section 790.03 contains subdivisions (a) through (j), several of which have their own numerous subparts. (See generally § 790.03; *see also id.* at subd. (h) [listing 16 separate subparts].)

---

[3] All references are to the Insurance Code unless indicated otherwise.

This detailed list includes specific prohibitions on failing to acknowledge and act reasonably promptly upon claims-related communications with insureds (§ 790.03, subd. (h)(2)), advising a claimant not to obtain the services of an attorney (*id.* at subd. (h)(14)), misleading a claimant as to the applicable statute of limitations (*id.* at subd. (h)(15)), and cancelling or refusing to renew a policy in violation of another section of the Insurance Code (*id.* at subd. (i)). By enacting such a meticulously detailed list, the Legislature made clear that in this particular statute, no need exists nor would it be appropriate for the Commissioner himself to add to or modify this legislatively-prescribed list in the quasi-legislative fashion he has with his Replacement Cost Regulation.

Subdivision (b) of section 790.03 defines as an unfair practice "Making or disseminating or causing to be made or disseminated before the public in this state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatsoever, any statement containing any assertion, representation, or statement with respect to the business of insurance or with respect to any person in the conduct of his or her insurance business, which is untrue, deceptive, or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue, deceptive, or misleading." (*Id.* at subd. (b).) It is this section on which the Commissioner relies in promulgating the Replacement Cost Regulation.

The UIPA also provides enforcement mechanisms to redress violations of section 790.03. It provides for civil penalties (§ 790.035), authorizes the Commissioner to "examine and investigate into the affairs of every person engaged in the business of insurance in the State in order to determine whether such person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice" (§ 790.04), and grants the Commissioner authority to initiate enforcement proceedings to remedy the commission of "[p]rohibited acts" under section 790.03 (§ 790.05).

Complementing section 790.03, section 790.06 provides a procedure, anticipated by section 790, for "determining," on a case-by-case basis and with the concurrence of a superior court judge, whether particular conduct constitutes an instance of a novel unfair or deceptive practice not covered by section 790.03's detailed list. Specifically, section 790.06 provides that:

> Whenever the commissioner shall have reason to believe that any person engaged in the business of insurance is engaging in this state in any method of competition or in any act or practice in the conduct of the business that is not defined in section 790.03, and that the method is unfair or that the act or practice is unfair or deceptive . . . he or she may issue and serve upon that person an order to show cause . . . for the purpose of *determining* whether the alleged methods, acts or practices or any of them should be declared to be unfair or deceptive within the meaning of this article.

(§ 790.06, subd. (a), italics added.)

This section provides the Commissioner with a mechanism to address any unfair practices that do not fall squarely within the detailed list of "[p]rohibited acts" proscribed by the Legislature in section 790.03 without creating an entirely new category of prohibited acts. The authority granted by section 790.06 is also clearly circumscribed by the language of that section, which limits the determination of unfair practices to acts that "should be declared to be unfair or deceptive *within the meaning of this article*." (*Ibid.*, italics added.)

Finally, section 790.10 provides that "[t]he [C]ommissioner shall, from time to time as conditions warrant, after notice and public hearing, promulgate reasonable rules and regulations, and amendments and additions thereto, as are necessary to *administer* this article." (§ 790.10, italics added.)

The statute's terms and structure clearly delineate the bounds of the Commissioner's authority. The Legislature has reserved to itself the authority to define unfair or deceptive insurance practices. The Commissioner is not authorized to create, in quasi-legislative fashion, whole new categories of unfair or deceptive practices; only the Legislature may add to or modify section 790.03's highly specific and lengthy list of "[p]rohibited acts" in that manner. (Cal. Const., art. III, § 3 ["The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the

others except as permitted by this Constitution."].) While the Commissioner may investigate instances of novel practices not specifically enumerated in section 790.03 that he contends should also be considered unfair or deceptive, and while he also has the authority to seek relief from a superior court, on a case-by-case basis, under section 790.06, the Commissioner may not add to or modify section 790.03's legislatively-prescribed list of prohibited acts. The Commissioner is limited, in other words, to exercising only the authority that has been conferred on him to "administer" the UIPA.

B. The Regulation At Issue

The Replacement Cost Regulation, codified at California Code of Regulations, Title 10, section 2695.183, imposes on all providers of homeowners' insurance a single set of highly detailed content and format requirements for providing insureds and prospective insureds with estimates of the cost of replacing a house or other dwelling damaged by a natural disaster or other covered occurrence. The Regulation provides in relevant part: "No licensee shall communicate an estimate of replacement cost to an applicant or insured in connection with an application for or renewal of a homeowners' insurance policy that provides coverage on a replacement cost basis, unless the requirements and standards set forth in subdivisions (a) through (e) below are met." (Cal. Code Regs., tit. 10, § 2695.183.)

Subdivisions (a) through (e) of section 2695.183 set out the following "requirements and standards" for replacement cost estimates:

> (a) The estimate of replacement cost shall include the expenses that would reasonably be incurred to rebuild the insured structure(s) in its entirety, including at least the following:
>
> (1) Cost of labor, building materials and supplies;
> (2) Overhead and profit;
> (3) Cost of demolition and debris removal;
> (4) Cost of permits and architect's plans; and
> (5) Consideration of components and features of the insured structure, including at least the following:
>
> (A) Type of foundation;
> (B) Type of frame;
> (C) Roofing materials and type of roof;
> (D) Siding materials and type of siding;
> (E) Whether the structure is located on a slope;
> (F) The square footage of the living space;
> (G) Geographic location of property;
> (H) Number of stories and any nonstandard wall heights;
> (I) Materials used in, and generic types of, interior features and finishes, such as, where applicable, the type of heating and air conditioning system, walls, flooring, ceiling, fireplaces, kitchen and bath(s);
> (J) Age of the structure or the year it was built; and
> (K) Size and type of attached garage.

(*Id.* at subd. (a).)

Subdivisions (b) through (e) provide as follows:

> (b) The estimate of replacement cost shall be based on an estimate of the cost to rebuild or replace the structure taking into account the cost to reconstruct the single property being evaluated, as compared to the cost to build multiple, or tract, dwellings.

> (c) The estimate of replacement cost shall not be based upon the resale value of the land, or upon the amount or outstanding balance of any loan.
>
> (d) The estimate of replacement cost shall not include a deduction for physical depreciation.
>
> (e) The licensee shall no less frequently than annually take responsible steps to verify that the sources and methods used to generate the estimate of replacement cost are kept current to reflect changes in the costs of reconstruction and rebuilding, including changes in labor, building materials, and supplies, based upon the geographic location of the insured structure. The estimate of replacement cost shall be created using such reasonably current sources and methods.

(*Id.* at subds. (b)-(e).)

The Regulation continues in subdivision (g)(2)[4] and makes explicit that an estimate, to be acceptable, must be broken out in four parts:

> An estimate of replacement cost provided in connection with an application for or renewal of a homeowners' insurance policy that provides coverage on a replacement cost basis must itemize the projected cost for each element specified in paragraphs (a)(1) through (4), and shall identify the assumptions made for each of the components and features listed in paragraphs (a)(5), of this Section 2695.183.

(*Id.* at subd. (g).)

---

[4] Subdivision (f) of the Replacement Cost Regulation makes the provisions of the Regulation binding on all persons or entities licensed by the Commissioner to act as insurance agents, brokers, or solicitors. Subdivision (g)(1) requires that replacement cost estimates be provided to applicants. Subdivision (h) requires that if replacement cost estimates are updated or revised, copies must be provided to the applicant. Subdivision (i) requires licensees to maintain certain records relating to replacement costs. Subdivisions (k) through (q) address how the Replacement Cost Regulation should be construed. (See Addendum.)

Subdivision (j) purports to render any estimate calculated or communicated in any manner different than that specified by the Commissioner's very detailed Replacement Cost Regulation to be misleading as a matter of law (i.e., an unfair or deceptive insurance practice). It provides:

> To communicate an estimate of replacement value not comporting with subdivisions (a) through (e) of this Section 2695.183 to an applicant or insured in connection with an application for or renewal of a homeowners' insurance policy that provides coverage on a replacement cost basis constitutes making a statement with respect to the business of insurance which is misleading and which by the exercise of reasonable care should be known to be misleading, pursuant to Insurance Code section 790.03.

(*Id.* at subd. (j).)

Section 2695.183 repeatedly uses the phrase "estimate of replacement cost." That phrase is defined in section 2695.180(e) as follows:

> 'Estimate of replacement value' shall have the same meaning as 'estimate of replacement cost' and means any estimate, statement, calculation, approximation or opinion, whether expressed orally or in writing, regarding the projected replacement value of a particular structure or structures.

(*Id.* at subd. (e).)

The overall effect of the Replacement Cost Regulation is to create a long, detailed list of new purported unfair or deceptive insurance practices, none of which are enumerated in section 790.03. Subdivisions (a) though (e), even taken by themselves, thus create new standards, in quasi-

legislative fashion, governing the primary conduct of all licensees, including insurers, brokers, and agents (see Cal. Code Regs., tit. 10, §2695.180), in making replacement cost estimates, above and beyond the already specific and detailed list of standards and "[p]rohibited acts" prescribed by the Legislature in section 790.03. (Cal. Code Regs., tit. 10, § 2695.183, subds. (a)-(e).)

C. Procedural History

1. Rulemaking History

On April 2, 2010, the Commissioner gave notice of his proposal to adopt a series of regulations in response to complaints of underinsurance by homeowners following catastrophic wildfires. (AR 1101.) Included in the proposal was the original text of what would become the Regulation challenged here—section 2695.183, Standards for Estimates of Replacement Value. (AR 1077-1079.)

The Commissioner claimed that the Replacement Cost Regulation was necessary because in some instances homeowners had claimed that their insurance was inadequate to cover the cost of rebuilding their homes after a total loss caused by wildfires. The Commissioner supported this assertion by pointing to a scattering of unsubstantiated and unverified homeowner complaints. (AR 1081.)

Respondents—the Association of California Insurance Companies and the Personal Insurance Federation of California ("Respondents" or "the

Associations")—submitted comments to the Commissioner, highlighting the Commissioner's lack of authority to define new categories of unfair or deceptive insurance practices or to regulate homeowners' insurance in the manner that section 2695.183 purports to. (AR 1185-1196, 1204-1207.) Numerous other parties submitted comments as well. (AR 1165-1233.)

The Commissioner promulgated revised regulations, but did not make any changes addressing the Associations' concerns about the Commissioner's lack of authority to promulgate section 2695.183. (AR 1258-1262, 1269-1273.)

Respondents submitted additional comments to the revised regulation, again asserting that the Commissioner lacked authority to adopt the proposed regulations. (AR 1239-1247, 1253-1257.)

The Commissioner did not address the Associations' comments regarding his lack of authority in the final version of the Regulation (AR 12-15) and adopted it on November 16, 2010. (AR 5.) In adopting the Regulation, the Commissioner also prepared a Final Statement of Reasons in which he responded to comments submitted by interested parties, but again did not address comments regarding his lack of authority, except to cite sections 790.10 and 790.03. (AR 1388-1542.)

The Commissioner's Replacement Cost Regulation became effective on June 27, 2011. (AR 2.)

2. Procedural History Of This Litigation

The Associations filed a complaint for declaratory relief pursuant to Government Code section 11350 on June 8, 2011, challenging the validity of the Regulation on three grounds:

1. The Commissioner has exceeded his authority under the UIPA by purporting to define new categories of unfair or deceptive insurance practices extending beyond those specifically proscribed by the Legislature in section 790.03 of the Insurance Code;

2. The Regulation unlawfully restricts insurers' underwriting of homeowners insurance, which the Commissioner has no authority to regulate; and

3. The Regulation contravenes the First Amendment to the United States Constitution.

(Joint Appendix ("JA") 1-17.)

On March 25, 2013, the trial court issued its statement of decision granting the relief sought by the Associations. (JA 292-297.) The trial court held that "[p]ursuant to Government Code section 11350, the regulation section 2695.183 is invalid [in] that the Commissioner exceeded his authority by attempting to define additional acts or practices as unfair or deceptive by regulation rather than by the procedure set out in section 790.06." (JA 296.) The court reasoned that "[b]y characterizing all estimates of replacement costs as misleading (save the one provided by section 2695.183) Defendant in exercising its authority under Cal. Ins. Code § 790.10, expands the meaning of something 'known' or which 'should be

known' to be misleading beyond the parameters of Cal. Ins. Code § 790.03(b)." (JA 295.)

The court continued, explaining that "[t]he limits of the authority granted by §790.03 are underscored by Cal. Ins. Code § 790.06, which provides a special process by which the commissioner can determine how acts not listed in §790.03 can be defined as unfair or deceptive." "To follow Defendant's interpretation of §790.03(b) would be to obviate the need for §790.06, and statutes should be interpreted in such a way as to make them consistent with each other (citation omitted). Therefore, because §2695.183 improperly alters the scope of § 790.03(b), its adoption cannot be justified." (JA 295.)

The court concluded that the Regulation transcended the Commissioner's authority under the UIPA by adding to the already lengthy, detailed list of unfair practices and "[p]rohibited acts" specified by the Legislature in section 790.03. The court reasoned that the Commissioner may only address novel instances of alleged unfair practices not set forth in section 790.03 through section 790.06's case-by-case order-to-show-cause procedure before a superior court.

The Commissioner filed his notice of appeal on May 9, 2013. (JA 318-320.) On April 8, 2015, the Court of Appeal issued its thorough, well-reasoned published opinion affirming the trial court's decision that the Commissioner lacked authority to promulgate the Replacement Cost

Regulation. The Court of Appeal's decision correctly emphasized from the outset that courts need not defer to an administrative agency's interpretation of the scope of its own authority. (Opinion ("Opn.") at p. 18, citing *Western States Petroleum Assn. v. Bd. of Equalization* (2013) 57 Cal.4th 401, 415 ("*Western States Petroleum*"); *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 271; *Batt v. City and County of San Francisco* (2010) 184 Cal.App.4th 163, 170.) The court then explained that the plain language of the UIPA "reveals the Legislature's intent to set forth in the statute what unfair or deceptive trade practices are prohibited, and not delegate that function to the Commissioner." (*Id.* at p. 22.) Indeed, the express language of sections 790.02, 790.03, and 790.036 demonstrate that "the Legislature was deliberate in choosing what conduct to brand . . . as 'unfair and deceptive.'" (*Id.* at p. 23.) When read together with those provisions that delineate the Commissioner's powers (§§ 790.035-790.09), the court concluded that "the Legislature did not give the Commissioner power to define by regulation acts or conduct not otherwise deemed unfair or deceptive in the statute." (Opn. at p. 23.)

The court rejected the Commissioner's argument that incomplete replacement cost estimates are encompassed by section 790.03, subdivision (b)'s reference to "untrue, deceptive, or misleading" statements by pointing out that, were that the case, there would be no need for the Regulation because section 790.05 already empowers the Commissioner to

assess penalties and issue cease-and-desist orders against licensees who give "lowball or incomplete estimate[s]." (*Id.* at pp. 24-25.) Likewise, section 790.06 offers a "multifaceted procedural process[]" that the Commissioner must comply with, including seeking a court order, before he may take actions to seek relief from any conduct not falling within the terms of section 790.03. (*Id.* at p. 25.) The court also emphasized that section 790.08 clarifies that the enforcement role of the Commissioner is tethered to acts and practices "'hereby declared to be unfair or deceptive,' to wit, defined or determined in the UIPA." (*Id.* at p. 26.)

The Court of Appeal then addressed the Commissioner's reliance on *Ford Dealers Assn. v. DMV* (1982) 32 Cal.3d 347 ("*Ford Dealers*"). (*Id.* at pp. 26-27.) It distinguished the statute at issue in *Ford Dealers* from the UIPA on the grounds that the UIPA provides a mechanism for the Commissioner to determine on a case-by-case basis and with the concurrence of a superior court judge whether particular instances of conduct alleged to be unfair or deceptive should be treated as such for purposes of the UIPA, while the statute in *Ford Dealers* had no such provision. The UIPA therefore provides a limited gap-filling mechanism that was not available in *Ford Dealers.* The Court of Appeal concluded that although "the Legislature could have delegated to the Commissioner the kind of broad authority conferred on the DMV in *Ford Dealers*; it did not do so in the UIPA." (Opn. at p. 27.)

Finally, the court relied on the lengthy history of the Legislature's detailed involvement in defining categories of "[p]rohibited acts" and unfair or deceptive insurance practices under section 790.03 (as well as other provisions of the Insurance Code) to provide further support for its conclusion that the Commissioner could not, "under the guise of 'filling in the details,'" do what the Legislature chose not to do. (*Id.* at p. 31.)

The Commissioner petitioned this Court for review on May 19, 2015. This Court granted review on July 15, 2015, directing the parties to "also" address "whether the Commissioner has the statutory authority to promulgate a regulation specifying that the communication of a replacement cost estimate which omits one or more of the components in § 2695.183(a)-(e) is a "misleading" statement with respect to the business of insurance." (*Assn. of Cal. Ins. Cos. v. Jones* (2015) 352 P.3d 390, 822-823.)

IV. STANDARD OF REVIEW

This Court has repeatedly reaffirmed the fundamental principle that an administrative agency may not adopt a regulation that exceeds the scope of, or is inconsistent with, the Legislature's grant of authority to the agency. (See, e.g., *Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785, 800; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11 ("*Yamaha*"); *Cal. Welfare Rights Organization v. Brian* (1974) 11 Cal.3d 237, 242.) "Administrative regulations that alter or amend the

statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations." (*Morris v. Williams* (1967) 67 Cal.2d 773,748; see also, e.g., *Preston v. State Bd. of Equalization* (2001) 25 Cal.4th 197, 219 ["[r]egulation [that] exceeds the scope of the Board's authority [] is invalid"]; *Assn. for Retarded Citizens of Cal. v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 391 ["Administrative action that is not authorized by, or is inconsistent with, acts of the Legislature is void."]; *Cooper v. Swoap* (1974) 11 Cal.3d 856, 864 ["It is axiomatic, of course, that administrative regulations promulgated under the aegis of a general statutory scheme are only valid insofar as they are authorized by and consistent with the controlling statutes."].)

This Court exercises its independent judgment when determining whether a regulation comes within the scope of the authority the Legislature has delegated to an administrative agency. (*Yamaha*, *supra*, 19 Cal.4th at p. 11, fn. 4.) "The court, not the agency, has 'final responsibility for the interpretation of the law' under which the regulation was issued." (*Ibid.*; see also *Western States Petroleum, supra,* 57 Cal.4th at p. 415 ["[T]he issue of statutory construction is a question of law on which a court exercises independent judgment."].) The applicable standard of review is, therefore, "respectful nondeference." (*Yamaha*, *supra*, 19 Cal. 4th at p. 11, fn. 4, citing *Environmental Protection Information Center v. Dept. of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1011, 1022.)

In determining whether a regulation lies within an agency's rulemaking authority, a court's "fundamental task is to ascertain the Legislature's intent so as to effectuate the purpose of the statute." (*Smith v. Super. Ct.* (2006) 39 Cal.4th 77, 83.) Courts look first to the statutory language to ascertain its usual and ordinary meaning. (*Ibid.*) "If there is no ambiguity," courts "presume the lawmakers meant what they said, and the plain meaning of the language governs." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.)

The rule articulated in *Yamaha* and *Western States Petroleum* is consistent with bedrock principles of separation of powers, pursuant to which this Court (and other courts) interpret statutes such as the UIPA, and declare what the law is. (See, e.g., *Bodinson Manufacturing Co. v. Cal. Employment Com.* (1941) 17 Cal.2d 321, 326 ["The ultimate interpretation of a statute is an exercise of the judicial power."]; *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 472 ["Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts."]; *Bixby v. Pierno* (1971) 4 Cal.3d 130, 141, citing *Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137, 175-178.) The power of statutory interpretation is conferred upon the courts by the California Constitution and, absent a contrary constitutional provision (none is on point here), may not be exercised by any other body. (*Bodinson Manufacturing Co. v. Cal. Employment Com.*, *supra*, 17 Cal. 2d at 326,

citations omitted; see also Cal. Const., art. VI, § 1.) It is thus the role of the Court to "ascertain the intent of the drafters so as to effectuate the purpose of the law." (*Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 268.)

Contrary to the Commissioner's view, *Ford Dealers* does not control here. *Ford Dealers* was decided prior to this Court's thorough and scholarly examination in *Yamaha* of the proper standard of review for assessing the legality of a challenged agency regulation. In *Ford Dealers*, the Court appeared to assume, without expressly deciding, that the regulations at issue in that case were adopted pursuant to a proper delegation of legislative authority. The Court thus applied a "strong presumption of regularity" to the regulation and afforded substantial deference to the agency's policy judgment in the absence of "an arbitrary and capricious decision." (*Ford Dealers*, *supra*, 32 Cal.3d at p. 355.) But, sixteen years later, in *Yamaha*, this Court held that its prior decisions, like *Ford Dealers*, "may overstate the level of deference" applicable to agency decisions. (*Yamaha*, *supra*, 19 Cal.4th at p. 11, fn. 4.)[5] In particular, the

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[5] In the intervening sixteen years, commentators have also criticized *Ford Dealers*'s formulation of the applicable standard of review: "[I]t might mean that the court must accept a reasonable agency interpretation with which it disagrees, in which case it would diverge from the mainstream doctrine." (Asimow, THE SCOPE OF JUDICIAL REVIEW OF DECISIONS OF CALIFORNIA ADMINISTRATIVE AGENCIES, 42 UCLA L. Rev. 1157 (1995), p. 1201; see also Asimow, Letter in Support of Commissioner's Petition for Review (June 11, 2015), at p. 3 [interpreting the Court's

Court cautioned that it "*does not . . . defer to an agency's view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature*." (*Ibid.*, italics added.) Indeed, the Commissioner appears to accept that this is the pertinent standard that governs here. (OBM at p. 18 ["The standard is . . . 'respectful nondeference.'"].) Thus, the Commissioner's reliance on *Ford Dealers* is inapt.

Ford Dealers is also readily distinguishable on its facts. The Vehicle Code provisions at issue in that case are entirely unlike the UIPA provisions on which the Commissioner relies here. Notably absent from the Vehicle Code was a section providing a procedure for the agency to prosecute conduct not elsewhere defined in the Vehicle Code as false or misleading. But here, of course, such a mechanism was specifically provided for by the Legislature in section 790.06 of the UIPA. That section creates a judicial procedure for addressing any conduct alleged to be "unfair or deceptive within the meaning of this article" but "that is not defined in Section 790.03." (§ 790.06.) Although the Department of Motor Vehicles may have needed to promulgate regulations to fill gaps left by the absence of an analogue in the Vehicle Code to section 790.06 of the UIPA, the

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Yamaha decision as providing that "the court should not abdicate its function of being the ultimate arbiter of statutes"].)

Commissioner has no authority to "fill up the details" he believes were omitted in section 790.03 because the Legislature has provided just such a gap-filler in section 790.06. The Legislature's decision to provide for the mechanism set forth in section 790.06 evinces its intent to define unfair insurance practices legislatively, rather than by delegating quasi-legislative authority to the Commissioner to do so. (OBM at p. 24.)[6]

V. ARGUMENT

A. The UIPA Does Not Confer The Type of Broad Quasi-Legislative Authority The Commissioner Has Claimed Here.

1. The Commissioner's Overbroad Assertion Of His Authority Under UIPA Conflicts With The Statutory Text And Structure.

The Commissioner's claim that the Legislature has granted him broad quasi-legislative authority to proscribe new categories of unfair or deceptive practices and prohibited acts is flatly contradicted by the plain language and structure of the statute itself, as well as its legislative

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[6] The Commissioner also points to similarities in the regulation promulgated by the DMV in *Ford Dealers* and section 2695.183. (OBM at p. 23.) But any similarities in the regulations are irrelevant—the question is the breadth of the authority granted by the delegating *statutes*—and the statute at issue in *Ford Dealers* provided for a far broader delegation of power than the UIPA does. In *Ford Dealers*, the director of the DMV was authorized to "adopt rules and regulations 'as may be necessary to carry out the provisions' of the Vehicle Code." (*Ford Dealers*, *supra*, 32 Cal.3d at p. 354.) The Court in *Ford Dealers* recognized this broad grant of power as a directive to "implement," rather than administer, the statute.

history. As an initial matter, the UIPA is not "a statute [that] identifies a complex problem (such as air pollution), sets forth a general goal . . . , and then broadly empowers an agency to study the problem and to adopt appropriate guidelines." (*Western States Petroleum*, *supra*, 57 Cal.4th at p. 436 (conc. & dis. opn. of (Kennard, J.); cf., e.g., *Am. Coatings Assn., Inc. v. South Coast Air Quality Dist.* (2012) 54 Cal.4th 446, 452 [concluding that because the Air Resources Boards had been "charged with developing the state implementation plan," the regulations adopted to do so were a valid exercise of the agency's delegated power].)

In contrast to such capacious statutory schemes, the Legislature has set forth a very detailed and specific list of practices and "[p]rohibited acts" in the UIPA that it has defined as unfair or deceptive. (See § 790.03.) The Legislature also has not enacted any language empowering the Commissioner to make new law. (See generally § 790 et. seq.; compare, e.g., *Am. Coatings Assn., Inc. v. South Coast Air Quality Dist.*, *supra*, 54 Cal.4th at p. 452 ["Under California law . . . [California Air Quality Management Districts] are required to 'adopt and enforce rules and regulations to achieve and maintain the state and federal ambient air quality standards in all areas affected by emission sources under their jurisdiction, and shall enforce all applicable provisions of state and federal law.' [Health & Saf. Code,] § 40001, subd. (a)."]; *Western States Petroleum*, *supra*, 57 Cal.4th at p. 414 ["Government Code section 15606, subdivision

(c) authorizes the Board to '[p]rescribe rules and regulations to govern local boards of equalization when equalizing, and assessors when assessing....'"]; *Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1150 [" Subdivision (h) of section 12276.5 provides in pertinent part: 'The Attorney General shall promulgate a list that specifies all firearms designated as assault weapons in Section 12276 or declared to be assault weapons pursuant to this section.'"] with section 790.10 ["The commissioner shall, from time to time as conditions warrant, after notice and public hearing, promulgate reasonable rules and regulations, and amendments and additions thereto, as are necessary to administer this article."].)

The UIPA thus constitutes a classic "self-executing" statutory scheme that does not require agency action to spell out what particular acts are prohibited—the Legislature has already done so, in section 790.03 and its many subparts and subdivisions. (See *Western States Petroleum, supra,* 57 Cal.4th at p. 436 (conc. & dis. opn. of Kennard, J.); see also Opn. at pp. 27-28 [contrasting the Regulation and UIPA with other statutory schemes granting "broad discretion" to agencies, and citing *Credit Ins. Gen. Agents Assn. v. Payne* (1976) 16 Cal.3d 651, 656].) The UIPA is "fully self-executing and enforceable irrespective of the [Commissioner's] rules interpreting how it should be applied in specific situations." (*Western*

States Petroleum, *supra*, 57 Cal.4th at p. 436 (conc. & dis. opn. of Kennard, J.).)

In addition, when it adopted the UIPA, the Legislature actually provided a mechanism for the Commissioner to redress particular instances of novel practices the Commissioner contends are unfair or deceptive but that fall outside the ambit of section 790.03's detailed list. That mechanism, of course, is section 790.06's case-by-case order-to-show-cause procedure before a superior court—one that does not empower the Commissioner to exercise quasi-legislative authority.

This reading of the UIPA is confirmed by its legislative history. For example, the enrolled bill report provided to the Governor by the Department of Finance includes a description of the anticipated fiscal effect—specifically, "One time $1,500 hearing costs"[7] for promulgating regulations to administer the UIPA. (Appellant's Request for Judicial Notice ("Appellant's RJN") Exh. A.) Given how low this figure is, and the fact that it refers to "one time" costs, it appears clear that all the Legislature anticipated was limited post-enactment activity by the Department of Insurance, and that the Legislature did not expect that the Commissioner

[7] This would be approximately $4,300 in today's dollars, according to the United States Department of Labor's online inflation calculator, available at http://www.bls.gov/data/inflation_calculator.htm.

would engage in quasi-legislative lawmaking of the sort represented by the Replacement Cost Regulation.

The limited scope of the Commissioner's authority under the UIPA is also confirmed by at least one other important and telling portion of the legislative history. The bill, when introduced, provided that the Commissioner had authority to adopt regulations to "implement" the UIPA. On July 9, 1971, AB 1353 was amended, replacing the word "implement" with "administer." (See Plaintiffs and Respondents' Motion for Judicial Notice ("RJN") Exh. B [July 9, 1971 Version of AB 1353].) That change further demonstrates that the Legislature recognized that: (1) it had fully defined, in a self-executing way, the particular acts and practices that it deemed unfair or deceptive in its detailed and specific list in section 790.03, with a limited, case-by-case, gap-filling mechanism for novel instances of allegedly unfair or deceptive practices in section 790.06's order-to-show-cause procedure, and (2) the Commissioner may only "administer" the UIPA.

Giving authority to the Commissioner to "administer" the UIPA provides a limited delegation of authority. "Administering" confers authority only "[t]o have charge of; manage." (See Appellant's RJN Exh. D [American Heritage Dict. (2d college ed. 1982) p. 79]; see also Black's Law Dictionary (10th ed. 2014) [defining "administer" as "[t]o provide or arrange (something) officially as part of one's job"]; *Lopez v. Monterey*

County (1999) 525 U.S. 266, 266 [the term "'administer' is consistently defined in purely nondiscretionary terms"].)

The overreach by the Commissioner embodied in the Replacement Cost Regulation also violates well-established principles of separation of powers, because it transgresses the boundaries set by the Legislature in adopting the UIPA. (See *Laisne v. State Bd. of Optometry* (1942) 19 Cal.2d 831, 835 ["When one department or an agency thereof exercises the complete power that has been by the Constitution expressly limited to another, then such action violates the implied mandate of the Constitution."]; see also *Carmel Valley Fire Protection Dist. v. State of Cal.* (2001) 25 Cal.4th 287, 297 [reaffirming that "the primary purpose of the separation-of-powers doctrine is to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government." (Citations omitted.)].) Under these circumstances courts have "not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch." (*Carmel Valley Fire Protection Dist. v. State of Cal.*, *supra*, 25 Cal.4th at p. 297, citations omitted.)

Although the legislative branch of government "properly may delegate some quasi-legislative or rulemaking authority to administrative agencies," the head of "an executive agency created by statute[] has only as

much rulemaking power as is invested in [him or her] by statute." (*Id.* at p. 299, citations omitted.) Underlying these principles is "the belief that the Legislature as the most representative organ of government should settle insofar as possible controverted issues of policy" and "must determine crucial issues whenever it has the time, information and competence to deal with them." (*Clean Air Constituency v. Cal. State Air Resources Bd.* (1974) 11 Cal.3d 801, 817.)

In the years since the passage of the UIPA, the Legislature has further confirmed its intention to retain and continue to exercise its authority to define (in the statute itself) what acts and practices the Legislature itself deems unfair or deceptive, and thus prohibited. The year after section 790.10 was adopted, for example, the Legislature added subdivision (h) to section 790.03 forbidding fourteen specific "unfair claims settlement practices." (Stats. 1972, ch. 725, § 1, p. 1314.) In 1975, it added two more paragraphs enumerating specific unfair claims settlement practices under subdivision (h). (Stats. 1975, ch. 790, § 1, p. 1812.) In 1978, it added the second and third paragraphs under subdivision (f) mandating that subdivision (f) be interpreted to require differentials based upon the sex of the insured and carving out a limited exception thereto. (Stats. 1978, ch. 186, § 1, p. 416.) And in 1983, it added the fourth paragraph under subdivision (f) stating that, notwithstanding subdivision (f), sex-based differentials in rates or dividends or benefits are

not required for certain categories of policies. (Stats. 1983, ch. 1261, § 1, eff. Sept. 30, 1983.)

In 1992, following the Oakland Hills wildfire the previous year, the Legislature enacted section 10101 et seq. These provisions were updated in 2010 to specifically address some of the causes of underinsurance, such as insureds failing to notify insurers about improvements to their homes and the effect of inflation on the cost of home repairs. Sections 10101 and 10102 required insurers to deliver to insureds a copy of the California Residential Property Insurance disclosure statement. (§§ 10101-10102.) That statement described for insureds the types of insurance policies, including actual cash value coverage, replacement cost coverage, extended replacement cost coverage, and guaranteed replacement cost coverage. It also described building code upgrade coverage and urged insureds to read their policies carefully. (§ 10102.) Section 10102 contains a section titled "The Residential Dwelling Coverage Limit," which informed insureds that coverage should be high enough to rebuild a home if it is *completely* destroyed. After conducting hearings that covered the underinsurance phenomenon, the Legislature responded not by giving the Commissioner free rein to engage in quasi-legislative rulemaking, but by requiring additional disclosures and keeping responsibility for determining coverage

limits on insureds rather than shifting that responsibility to insurers as the Commissioner seeks to do.[8]

In this case, the Legislature's intent is clear—the Commissioner may only "administer" the UIPA, and may only utilize the more limited, non-legislative procedures the Legislature has specified for the Commissioner to redress the lengthy and highly specific list of prohibited acts proscribed by the Legislature, as well as novel instances of unenumerated practices the Commissioner views as unfair or deceptive. By attempting to arrogate the power and long-closely-guarded legislative prerogative to define what constitute unfair or deceptive insurance practices under the UIPA, the Commissioner has transgressed what the plain text and structure of this particular statute permits.

2. Sections 790.03(b) And 790.10 Do Not Confer Authority On The Commissioner To Define New Categories Of Unfair Or Deceptive Insurance Practices.

The purpose of the UIPA "is to regulate trade practices in the business of insurance . . . by *defining*, or *providing for the determination* of, all such practices in this State which constitute unfair methods of

[8] The Legislature also emphasized that underinsurance stemmed from cost factors, and in particular, construction costs that exceeded the insurance coverage provided. It did not (unlike the Commissioner) place responsibility for this situation on insurers, nor did it find that underinsurance was the result of an "unfair" or "deceptive" practice.

competition or unfair or deceptive acts or practices, and by prohibiting the trade practices so *defined* or *determined*." (§ 790, italics added.)

In section 790.03 of the UIPA, the Legislature explicitly defined the acts or practices it considers to be unfair or deceptive. Section 790.03 is extremely detailed, containing subdivisions (a) through (j) (many of those with their own detailed subparts) delineating the specific conduct that constitutes "unfair methods of competition and unfair and deceptive acts" under the UIPA. (§ 790.03.) Absent from the statute, however, is any mechanism for the Commissioner to add to or modify this finely-reticulated and legislatively-prescribed list, or to otherwise define, in quasi-legislative fashion, new categories of unfair or deceptive acts beyond those set forth in section 790.03. The Legislature has reserved that power for itself and, over the years, has continued to exercise that closely-guarded prerogative itself.

Had the Legislature intended to create a third mechanism for regulating unfair practices by permitting the Commissioner to create regulations like the ones at issue here, it almost certainly would have harmonized the entire statutory structure and made conforming changes in the other sections of the UIPA. For example, section 790.02 of the UIPA prohibits persons from engaging in trade practices that are "defined in this article as, or determined pursuant to this article to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance." This section makes no reference to practices that the

Commissioner has designated to be unfair or deceptive through regulation. (See § 790.02.) Likewise, the penalties and enforcement provisions of the UIPA do not contain any suggestion that unfair or deceptive practices could be defined through regulations promulgated by the Commissioner. (See §§ 790.035, 790.05.) Nor does any other section of the UIPA make such a reference. (See generally § 790 et. seq.) A statute and its terms must be read in pari materia with the terms associated with it. The Court should therefore construe section 790.03 in a way that is harmonious with the entire UIPA, and does not create new unfair practices that do not fit with the rest of the statutory structure. (See *Yates v. U.S.* (2015) 135 S.Ct. 1074, 1085 (plur. opn. of Ginsburg, J.) [concluding that the phrase "tangible object" in the Sarbanes-Oxley Act cannot be understood to refer to a fish—even if a fish is a "tangible object"—because the term must be read in light of the statutory context]; see also *Grafton Partners L.P. v. Super. Ct.* (2005) 36 Cal.4th 944, 960 ["[T]he meaning of a word may be ascertained by reference to the meaning of other terms which the Legislature has associated with it in the statute[.]"].)

In construing a statute "to ascertain the Legislature's intent so as to effectuate the purpose of the law," the Court is guided by well-established canons of statutory construction, such as *expressio unius est exclusio alterius*. (*In re J.W.* (2002) 29 Cal.4th 210, 209, citation omitted.) Where, as here, a statute addresses one subject but not another, that choice to omit

certain subjects should be seen as a deliberate act by the Legislature, and one that should be honored by courts in carrying out the Legislature's intent. (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852.) *Expressio unius* is based on the "common-sense premise that when people say one thing, they do not mean something else." (2A Sutherland Statutory Construction (7th ed. 2008) Statutory Interpretation, § 47:23; see also *Gikas v. Zolin*, *supra*, 6 Cal.4th at p. 852 ["The expression of some things in a statute necessarily means the exclusion of other things not expressed."].)

"[W]here exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed." (*Mutual Life Ins. Co. v. City of Los Angeles* (1990) 50 Cal.3d 402, 410, citing *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195; see also *People v. Johnson* (1988) 47 Cal.3d 576, 593 ["[U]nder the doctrine of *expressio unius est exclusio alterius* we must infer that the listing of terms and conditions is complete, and that there are no additional requirements which bind petitioner.[]" (Citation omitted.)].) The maxim "should be applied 'where appropriate and necessary to the just enforcement of the provisions of a statute.'" (*Estate of Banerjee* (1978) 21 Cal.3d 527, 539, citing *Blevins v. Mullally* (1913) 22 Cal.App. 519, 529.) Thus, the Legislature's decision to specify, at length and in detail, particular acts as being unfair or deceptive (and thus "prohibited") should be read as precluding the addition or creation of *additional* categories of unfair, deceptive, or otherwise

prohibited acts or practices by anyone other than the Legislature itself. This approach is only further confirmed by the history of amendments to section 790.03 and the passage and amendments to sections 10101 et seq. discussed in Section V.A.1, *ante*. These amendments to the UIPA and the Insurance Code further demonstrate that the Legislature has always intended to reserve to itself the task of defining what practices it considers to be unfair or deceptive under the UIPA, and to not delegate that task to the Commissioner. (Cf. *WSS Industrial Construction, Inc. v. Great West Contractors, Inc.* (2008) 162 Cal.App.4th 581, 589 [noting, in confirming the intent of the Legislature, that over time a "trend" had emerged in changes to a statute].) The omission of a particular practice from the UIPA should be regarded as the result of a conscious choice by the Legislature.

The Commissioner argues that sections 790.10 and 790.03 confer such authority on him, claiming that section 790.10 "delegates quasi-legislative rulemaking authority to the Commissioner to issue substantive rules of general applicability." (OBM at p. 20.)

But the Commissioner's claim that he "has the power to promulgate all reasonable rules and regulations, of whatever type and purpose, that the Commissioner determines are necessary to carry out his responsibility to 'administer' the Unfair Insurance Practices Act" (*id.* at pp. 20-21) is wholly inconsistent with the UIPA's text and structure, which clearly reserve to the Legislature the power to define unfair or deceptive practices, while

delegating to the Commissioner only the power to "determine," on a case-by-case basis and with the concurrence of a superior court judge under section 790.06, whether particular instances of novel practices the Commissioner contends are unfair or deceptive should be treated as such under the UIPA.

The Commissioner's argument that section 790.03(b) includes within it the very practices covered by the Replacement Cost Regulation also proves too much. This broad reading would cover something that on its face would not be deemed as "unfair," "deceptive," or "misleading," but for the Regulation. But if the Regulation does not define new categories of unfair or deceptive insurance practices—specifically, anything that does not conform to all of the Replacement Cost Regulation's detailed content and format requirements—then there should be no need for the Regulation. That is because, under that reading of the Regulation, whatever the Regulation covers should already be covered by section 790.03. The Commissioner would therefore already be able, without the Regulation, to redress the very practices targeted by the Regulation through the enforcement and other mechanisms prescribed by the Legislature in section 790.05 and other provisions of the UIPA.

The Commissioner not only concedes, but trumpets, the fact that the Regulation goes beyond what the UIPA would otherwise permit him to do, claiming that "it is questionable whether the adjudicatory process could

ever result in a set of required replacement cost estimate components that are as clear and comprehensive as provided in the [Regulation]." (OBM at pp. 35-36.) It is therefore indisputable that the Replacement Cost Regulation proscribes *additional* acts or practices that the Commissioner contends are unfair or deceptive—again, simply because they depart in some way from the Regulation's many detailed content and format requirements—and that go beyond what the Legislature has proscribed in section 790.03 (or other provisions of the UIPA), and that the Commissioner has therefore exceeded his authority under the UIPA. (See Section V.A.1, *ante*.) The only provision the Legislature has authorized for the Commissioner to "fill up the gaps" in terms of any novel instances of unenumerated practices the Commissioner contends are unfair or deceptive is, again, the far more limited, case-by-case and with-the-concurrence-of-a-superior-court-judge procedure set forth in section 790.06.

The Commissioner also attempts to characterize the Replacement Cost Regulation as nothing more than a requirement that an estimate should be complete. (OBM at p. 35.) But this argument also proves too much and cannot withstand scrutiny. The UIPA already requires that estimates be truthful, not deceptive, and not misleading (see § 790.03, subd. (a)), so if that were all the Regulation proscribes, it would, again, be superfluous. The idea that certain types of estimates are necessarily misleading is also contradicted by the indisputable fact that estimates are necessarily nothing

more (or less) than reasonable approximations based on a specific set of facts. They are not—and cannot be—guarantees of a specific cost or outcome, and the necessary components of a particular estimate and the best way to communicate that estimate are necessarily contingent upon the specific circumstances surrounding it.

In reality, the Replacement Cost Regulation goes much further than requiring complete estimates. It creates, in quasi-legislative fashion, new categories of "misleading" practices—again, anything that does not conform to all of the Commissioner's many detailed content and format requirements—that (but for the Regulation) would not, in many instances, be "misleading" (or "deceptive" or "unfair") at all. What might constitute a "misleading" estimate or a truthful one will necessarily be different, depending on the facts and circumstances of a particular scenario. In other words, the Regulation *deems* particular estimates to be misleading, independent of the particular facts and circumstances surrounding the estimate in question. Indeed, the Commissioner himself concedes that an estimate that does not comply with the Regulation may not be misleading, instead characterizing such an estimate as merely "potentially" misleading in his own framing of the Question Presented. This exceeds the Commissioner's powers: the UIPA simply does not confer on the Commissioner the power to deem a practice misleading through regulation. And the Commissioner's admission that the Regulation brings within its

sweep not only misleading estimates but also those that are "potentially" misleading is nothing less than an admission that he has gone beyond the UIPA's grant of authority.

The Regulation contains a long list of requirements for replacement cost estimates, including those found in subdivisions (a) through (e), the omission of any one of which would violate the Regulation even though such an omission may or may not result in a misleading estimate. For example, subpart (a)(5)(J) requires estimates to consider the age of the structure or the year it was built. But this may have no bearing on the cost to replace the structure with a new one in the face of a natural disaster. Subdivision (e) requires verification and updating of replacement cost estimates annually—even if costs have not changed at all, or have decreased. Thus, if, for example, an insurer issues a replacement cost estimate and construction costs decrease the following year, an insurer might be at risk of being in violation of subdivision (e) of the Regulation, even though the estimate provided a dollar amount higher than required to cover reconstruction.

The ultimate effect of the Regulation is to dictate how insurers may communicate with insureds and potential insureds, and to deem certain communications misleading, without consideration for the facts and circumstances surrounding a particular replacement cost estimate, and without regard to whether or not the estimate is accurate. An insurer could

provide an estimate that is perfectly reasonable—even accurate to the penny—but if it does not spell out the specific items listed in subsections (a) through (e) of the Replacement Cost Regulation, that estimate would be deemed to be misleading under the Regulation. The UIPA does not delegate to the Commissioner the ability to regulate insurers' communications with their customers in this way, and decide that perfectly accurate communications are "misleading."

Insurers must be able to engage in dialogue with their customers without fear of violating the manifold details of the Regulation. The dialogues between insurers and insurance purchasers are inevitably dictated by the particular facts of each situation, and a particular estimate is not necessarily misleading just because it may omit one of the items delineated in subsections (a) through (e) of the Regulation. For example, a communication between an insurer and a prospective purchaser might focus on a particular portion of a replacement cost estimate, and not discuss the other items detailed in the Regulation. Such a conversation would violate the Regulation, even though it would not necessarily be misleading and would not necessarily violate the UIPA.

The remainder of the Regulation creates a variety of procedural hurdles to overcome, which, again, are hardly essential to ensuring that a replacement-cost estimate is not misleading. For example, the Regulation requires that insurance licensees calculate and communicate estimates in

lockstep with the Regulation's many detailed content and format requirements, break out estimates into four separate components, characterize the many factors that may impact cost, and specify everything in writing. (See Cal. Code Regs., tit. 10, § 2695.183.) These requirements indisputably go well beyond anything that section 790.03 could possibly be read to require.

The Commissioner's promulgation of his Replacement Cost Regulation also cannot be considered "administering" within the meaning of 790.10. (See Section V.A.1, *ante*.)

3. Section 790.06 Provides A Limited, Case-By-Case Mechanism To Determine Whether Novel Instances Of Unenumerated Practices The Commissioner Views As Unfair Or Deceptive Should Be Treated As Such Under The UIPA.

The Legislature created a separate method for the Commissioner to "determine" whether novel instances of acts or practices not covered by section 790.03 should be treated as unfair or deceptive, and remedied as such, under the UIPA. In section 790.06, the Legislature provided that:

> Whenever the commissioner shall have reason to believe that any person engaged in the business of insurance is engaging in this state in any method of competition or in any act or practice in the conduct of the business that is not *defined* in Section 790.03, and that the method is unfair or that the act or practice is unfair or deceptive and that a proceeding by him or her in respect thereto would be in the interest of the public, he or she may issue and serve upon that person an order to show cause . . . for the purpose of *determining* whether the alleged methods, acts or practices or any of them should be declared to be unfair or deceptive within the meaning of this article.

(§ 790.06, subd. (a), italics added.)

If the Commissioner believes an insurance licensee is engaging in a novel instance of an unfair or deceptive act or practice not defined as such in section 790.03, the Commissioner may issue an order to show cause under section 790.06, so that a court may ultimately determine whether the challenged conduct should be "determined" to be unfair or deceptive for purposes of the UIPA. If the Commissioner insists that the challenged conduct should be deemed unfair or deceptive for purposes of the UIPA, then the Commissioner must issue a written report explaining why. (See *id.* at subd. (b).)

If the report charges a violation and the challenged conduct has not been discontinued, the Commissioner, through the Attorney General, may petition a court to enjoin the licensee from continuing to engage in that conduct. (See *ibid.*) Evidence in addition to the record taken before the Commissioner may be considered by the court. The Commissioner may modify the findings as a result of the additional evidence. (*Id.* at subd. (c).) If the court finds that the challenged conduct is unfair or deceptive, the court may issue an order enjoining the licensee from continuing to engage in it. (See *id.* at subd. (d).)

Section 790.07 then provides for penalties to be imposed on any person who "has violated a cease and desist order issued pursuant to Section 790.05 or a court order issued pursuant to Section 790.06."

(§ 790.07.) That section, like other provisions of the UIPA, recognizes two methods by which acts or practices may be declared to be unfair or deceptive—(i) defined by the Legislature in section 790.03, and (ii) determined by the Commissioner and a court, on a case-by-case basis, to be unfair or deceptive pursuant to section 790.06.

Section 790.06's legislatively-prescribed, limited, case-by-case procedure permitting the Commissioner to "determine" if a practice is unfair or deceptive contains important checks and balances and specific safeguards mandated by the Legislature. The insurer, for example, has an opportunity in these case-by-case administrative adjudicatory proceedings to offer evidence to demonstrate that, under the particular facts and circumstances of any given case, the challenged conduct could not have resulted in any reasonable insured (or prospective insured) being misled. (See § 790.06, subd. (a).) The insurer can also opt to voluntarily discontinue the challenged conduct, without any penalties being imposed. (See *id.* at subd. (b).) And even if the insurer does not voluntarily disclose, the insurer is not subject to any injunctive relief unless and until a court first finds that the Commissioner's findings are supported by the weight of the evidence. (See *ibid.*)

Section 790.06 is also the sole "gap-filling" procedure or mechanism authorized by the Legislature in the UIPA. (See Section V.A.1, *ante*.) Under section 790.06, the Commissioner may initiate judicial proceedings

if the Commissioner has "reason to believe that any person engaged in the business of insurance is engaging in this state in any method of competition or in any act or practice in the conduct of the business that is not defined in Section 790.03, and that the method is unfair or that the act or practice is unfair or deceptive and that a proceeding by him or her in respect thereto would be in the interest of the public." (§ 790.06, subd. (a).) By doing so, the Legislature made clear that it did not intend to, and did not, delegate the kind of sweeping, quasi-legislative power the Commissioner has arrogated here, through regulations such as its Replacement Cost Regulation, which contravene the plain terms and structure of the statute.

The legislative history of section 790.06 only serves to confirm that the Legislature never intended to give the Commissioner unfettered authority to create new unfair practices but rather intended section 790.06 to be the sole method for identifying and curbing practices that did not fall within the sweep of 790.03, yet are within the meaning of the statute. The Bill Analysis prepared for the Senate Insurance Committee in support of SB 1500, which strengthened the section 790.06 process in the year 2000, makes this clear. It states that "[p]resent law defines a set of unfair methods of competition and unfair deceptive acts or practices in the business of insurance. (Section 790.03 of the Insurance Code)." It then goes on to explain the purpose of SB 1500: "This bill addresses the authority of the Insurance Commissioner when the Commissioner has

reason to believe an unfair or deceptive practice has occurred that is not one specifically defined in Insurance Code section 790.03. In that instance, the Commissioner may issue an order to show cause upon a person . . . ." (RJN Ex. C [Bill Analysis, Senate Committee on Insurance (April 26, 2000)].) The Bill Analysis therefore confirms that the Legislature did not intend the Commissioner to address perceived new unfair practices through regulation but rather expected him or her to use the mechanism provided by section 790.06 to do so.

The section 790.06 mechanism is unique and renders wholly inapt the cases relied on by the Commissioner dealing with Proposition 103, life and disability insurance laws, or Vehicle Code provisions considered by the Court in *Ford Dealers*. The Court of Appeal agreed that the UIPA is different from other statutory schemes when it concluded that the cases relied upon by the Commissioner, including *Ford Dealers*, *Payne*, and *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, were not instructive because they involved different kinds of insurance, administrative proceedings, or statutes. (See Opn. at pp. 20, 24-28.) None of those cases involve the kind of statutory structure at issue here, with prohibited acts defined by the Legislature in a very detailed, lengthy statutory list (§ 790.03), coupled with a limited, case-by-case "gap-filling" procedure to deal with particular instances of novel practices not covered by that legislatively-proscribed list of prohibited acts (§ 790.06).

B. The Canon Of Avoidance Of Constitutional Doubts Also Favors Affirmance.

The well-established canon of avoidance of constitutional doubts also militates against adopting the Commissioner's breathtaking interpretation of his purportedly quasi-legislative authority under the statute. The United States Supreme Court has long held that the dissemination of "truthful information about entirely lawful activity" could not constitutionally be prohibited absent extraordinary circumstances. (*Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.* (1976) 425 U.S. 748, 773; see also *Sorrell v. IMS Health, Inc.* (2011) 131 S.Ct. 2653, 2670-2671 "[T]he 'fear that people would make bad decisions if given truthful information' cannot justify content-based burdens on speech." (Citing *Thompson v. Western States Medical Center* (2002) 535 U.S. 357, 358-359.)]; *44 Liquormart, Inc. v. R.I.* (1996) 517 U.S. 484, 503 ["The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. That teaching applies equally to state attempts to deprive consumers of accurate information about their chosen products . . ."]; see also *Beeman v. Anthem Prescription Management, LLC* (2013) 58 Cal.4th 329, 353 [emphasizing the importance of the "free flow of commercial information," citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, *supra*, 425 U.S. at 765].)

But this is precisely what the Commissioner has attempted to do here by promulgating his Replacement Cost Regulation. The Regulation limits truthful communications between insurers and insureds. For example, if a contractor submitted an estimate for services to rebuild a home, which included every detail down to the finishes, all of which were true, the estimate could nonetheless be deemed "misleading" under the Regulation if it failed to itemize its components. The same would be true for an entirely truthful oral estimate, as the Regulation requires that all estimates be in writing. The Regulation thus unduly restrains how insurers share information that may be entirely truthful with insureds and potential insureds.

Nor may the government compel speech—even factual speech. The First Amendment protects "the decision of both what to say and what not to say." (*Riley v. Nat. Federation of Blind of N.C., Inc.* (1988) 487 U.S. 781, 797-798 [concluding that factual statements in state-mandated fundraising disclosures unduly burdened protected speech].) Here, the Regulation compels insurers to estimate replacement cost according to a rigid formula, in all circumstances, to the exclusion of informative, fact-based disclosures appropriate to the applicant or insured's particular circumstances. Specifically, the Regulation requires insurance providers to make certain specific communications to potential insureds regarding replacement cost estimates, and dictates the form and timing of those communications. At

the same time, the Regulation bans other communications between insurers and their clients that do not satisfy the specific details of the Regulation. The Regulation thus chills open, honest communications between insurers and insurance purchasers as insurers risk violating the Regulation if they fail to check off all of the many boxes mandated by the Regulation in their communications with insurance purchasers, whether or not those many requirements apply under a particular set of circumstances.

The Commissioner contends that the Regulation is necessary to protect consumers. (OBM at pp. 1-2.) But, by prohibiting truthful speech to insureds, the Regulation goes far beyond typical consumer protection and disclosure laws. As the U.S. Supreme Court has recognized, the regulation of truthful speech is more likely to hinder public debate on issues of important public policy than it is to protect consumers from harm:

> It is the State's interest in protecting consumers from 'commercial harms' that provides 'the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.' Yet *bans that target truthful, nonmisleading commercial messages rarely protect consumers from such harms*. Instead, such bans often serve only to obscure an 'underlying governmental policy' that could be implemented without regulating speech. In this way, these *commercial speech bans not only hinder consumer choice, but also impede debate over central issues of public policy*.

(*44 Liquormart, Inc. v. R.I.*, *supra*, 517 U.S. at pp. 502-03, italics added & citations omitted.) For this reason, the Court has held that "a State's paternalistic assumption that the public will use truthful, nonmisleading

commercial information unwisely cannot justify a decision to suppress it." (*Id.* at p. 497; see also *Sorrell v. IMS Health Inc.*, *supra*, 131 S. Ct. at p. 2671 ["The State may not burden the speech of others in order to tilt public debate in a preferred direction."].) By dictating what may and may not be said to applicants and insureds about replacement costs and the precise manner in which those statements may be made to applicants and insureds, the Commissioner has enacted precisely the type of "unwarranted governmental regulation" on speech against which the First Amendment was designed to protect. (*Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.* (1980) 447 U.S. 557, 561; cf. *id.* at p. 564 [emphasizing that the government's power to regulate commercial speech that is "neither misleading nor related to unlawful activity" is sharply circumscribed]; *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, *supra*, 487 U.S. at p. 801 ["Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." (Citing *NAACP v. Button* (1963) 371 U.S. 415, 438)].)

The Court need not definitively resolve whether the Regulation is (at least as applied in some circumstances) unconstitutional though, because it can and should simply construe the statute to avoid these serious constitutional doubts. This Court, after all, "construe[s] statutes, when reasonable, to avoid difficult constitutional questions." (*In re Smith* (2008)

42 Cal.4th 1251, 1269, citing *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1105; see also *Clark v. Martinez* (2005) 543 U.S. 371, 380-381 ["[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail."].) Applying this well-established canon of statutory interpretation provides additional support for affirming the lower courts' well-considered invalidation of the Commissioner's Replacement Cost Regulation.

C. Public Policy Considerations Also Do Not Support The Commissioner's Attempted Overreach Here.

Finally, public policy considerations also do not support the Commissioner's unlawful attempted power grab here. The Commissioner attempts to rely on the emotional tug of a handful of consumer complaints to support his assertion of quasi-legislative powers, notwithstanding the specifically defined terms of the particular statute at issue. (AR 1103.) But even assuming that these complaints are well-founded, they still do not provide any support for allowing the Commissioner to promulgate his Replacement Cost Regulation.

First, as the Commissioner stated in his November 2009 press release, "the department received only 70 complaints related to underinsurance stemming from the nearly 40,000 claims" that resulted from the 2007 wildfires. (AR 1254.) Indeed, at another point in the

Administrative Record, the Commissioner stated that there were even *fewer* complaints, claiming only that there were "more than fifty" such files. (AR 1430.) In other words, even according to the Commissioner, only 0.175% of claimants have lodged complaints of underinsurance. (See *ibid.*)

Second, if these complaints (or others) are well-founded and should be redressed under the UIPA, then the Commissioner already has the legislatively-prescribed tools to do so under the statute, including section 790.05's enforcement proceedings and section 790.06's case-by-case order-to-show-cause proceedings. Utilizing these more limited, measured, and case-specific procedures specified by the Legislature would be feasible, particularly given the small number of complaints (50-70, in the wake of the 2007 wildfires) the Commissioner has been able to point to here. The record here contains no evidence regarding how the Commissioner addressed or attempted to address these complaints. There is no evidence in the record showing that attempts by the Commissioner to address these complaints were hampered by the absence of a Replacement Cost Estimate Regulation, or that the Regulation would solve the problem presented by these complaints.

Consequently, the Commissioner's attempt to exceed the scope of authority the Legislature has conferred on him, under the plain terms and structure of the particular statute at issue (the UIPA), also finds no support

in any of the public policy considerations to which the Commissioner has alluded.

VI. CONCLUSION

The Legislature has reserved for itself, and closely guarded and exercised over the years, the power to define what constitute unfair or deceptive insurance practices under the UIPA, spelling out specifically and in considerable detail, in section 790.03, what acts and practices it considers unfair or deceptive, and thus prohibited under the UIPA. The Legislature also carved out a limited case-by-case procedure to allow the Commissioner, with the concurrence of a superior court judge, to deal with particular instances of novel practices not enumerated in section 790.03 yet within the meaning of the statute and considered to be unfair or deceptive by the Commissioner.

By promulgating his Replacement Cost Regulation, the Commissioner has attempted to run roughshod over this carefully constructed and circumscribed statutory scheme, in order to arrogate quasi-legislative powers the Legislature has not conferred on him in the UIPA.

The Court of Appeal and the trial court both correctly held that the Commissioner's Replacement Cost Regulation exceeded the scope of the Commissioner's authority under the UIPA, and thus invalidated the Regulation. This Court should reach the same conclusion and affirm.

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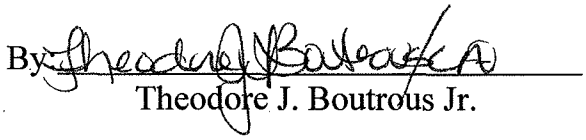
Respectfully submitted,

GREENBERG TRAURIG, LLP
GENE LIVINGSTON, SBN 44280
STEPHEN E. PAFFRATH, SBN 195932

GIBSON, DUNN & CRUTCHER LLP
THEODORE J. BOUTROUS JR., SBN 132099
JULIAN W. POON, SBN 219843
VANESSA C. ADRIANCE, SBN 247464

By: 
Theodore J. Boutrous Jr.

Attorneys for Plaintiffs-Respondents
ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES and PERSONAL INSURANCE FEDERATION OF CALIFORNIA

CERTIFICATION OF WORD COUNT

Pursuant to Rule 8.204(c)(1), California Rules of Court, the undersigned hereby certifies that this Answer Brief on the Merits contains 12,958 words, excluding the tables and this certificate, according to the word count generated by the computer program used to produce this document.

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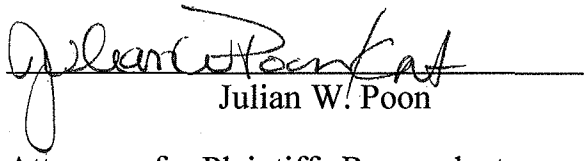

Julian W. Poon

Attorneys for Plaintiffs-Respondents
ASSOCIATION OF CALIFORNIA
INSURANCE COMPANIES and
PERSONAL INSURANCE
FEDERATION OF CALIFORNIA

ADDENDUM

Insurance Code Section 790

The purpose of this article is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, Seventy-ninth Congress),[9] by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

Insurance Code Section 790.02

No person shall engage in this State in any trade practice which is defined in this article as, or determined pursuant to this article to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

Insurance Code Section 790.03

The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance.

(a) Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular, or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon, or making any false or misleading statement as to the dividends or share of surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any company for the purpose of inducing or tending to induce the policyholder to lapse, forfeit, or surrender his or her insurance.

(b) Making or disseminating or causing to be made or disseminated before the public in this state, in any newspaper or other publication, or any

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[9] 15 U.S.C. § 1011 et seq.

advertising device, or by public outcry or proclamation, or in any other manner or means whatsoever, any statement containing any assertion, representation, or statement with respect to the business of insurance or with respect to any person in the conduct of his or her insurance business, which is untrue, deceptive, or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue, deceptive, or misleading.

(c) Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion, or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.

(d) Filing with any supervisory or other public official, or making, publishing, disseminating, circulating, or delivering to any person, or placing before the public, or causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public any false statement of financial condition of an insurer with intent to deceive.

(e) Making any false entry in any book, report, or statement of any insurer with intent to deceive any agent or examiner lawfully appointed to examine into its condition or into any of its affairs, or any public official to whom the insurer is required by law to report, or who has authority by law to examine into its condition or into any of its affairs, or, with like intent, willfully omitting to make a true entry of any material fact pertaining to the business of the insurer in any book, report, or statement of the insurer.

(f)(1) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contract.

(2) This subdivision shall be interpreted, for any contract of ordinary life insurance or individual life annuity applied for and issued on or after January 1, 1981, to require differentials based upon the sex of the individual insured or annuitant in the rates or dividends or benefits, or any combination thereof. This requirement is satisfied if those differentials are substantially supported by valid pertinent data segregated by sex, including, but not limited to, mortality data segregated by sex.

(3) However, for any contract of ordinary life insurance or individual life annuity applied for and issued on or after January 1, 1981, but before the compliance date, in lieu of those differentials based on data segregated by sex, rates, or dividends or benefits, or any combination thereof, for ordinary life insurance or individual life annuity on a female life may be calculated as follows: (A) according to an age not less than three years nor more than six years younger than the actual age of the female insured or female annuitant, in the case of a contract of ordinary life insurance with a face value greater than five thousand dollars ($5,000) or a contract of individual life annuity; and (B) according to an age not more than six years younger than the actual age of the female insured, in the case of a contract of ordinary life insurance with a face value of five thousand dollars ($5,000) or less. "Compliance date" as used in this paragraph shall mean the date or dates established as the operative date or dates by future amendments to this code directing and authorizing life insurers to use a mortality table containing mortality data segregated by sex for the calculation of adjusted premiums and present values for nonforfeiture benefits and valuation reserves as specified in Sections 10163.1 and 10489.2 or successor sections.

(4) Notwithstanding the provisions of this subdivision, sex-based differentials in rates or dividends or benefits, or any combination thereof, shall not be required for (A) any contract of life insurance or life annuity issued pursuant to arrangements which may be considered terms, conditions, or privileges of employment as these terms are used in Title VII of the Civil Rights Act of 1964 (Public Law 88-352), as amended, and (B) tax sheltered annuities for employees of public schools or of tax-exempt organizations described in Section 501(c)(3) of the Internal Revenue Code.[10]

(g) Making or disseminating, or causing to be made or disseminated, before the public in this state, in any newspaper or other publication, or any other advertising device, or by public outcry or proclamation, or in any other manner or means whatever, whether directly or by implication, any statement that a named insurer, or named insurers, are members of the California Insurance Guarantee Association, or insured against insolvency as defined in Section 119.5. This subdivision shall not be interpreted to prohibit any activity of the California Insurance Guarantee Association or the commissioner authorized, directly or by implication, by Article 14.2 (commencing with Section 1063).

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[10] Internal Revenue Code sections are in Title 26 of the U.S.C.

(h) Knowingly committing or performing with such frequency as to indicate a general business practice any of the following unfair claims settlement practices:

(1) Misrepresenting to claimants pertinent facts or insurance policy provisions relating to any coverages at issue.

(2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.

(3) Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies.

(4) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss requirements have been completed and submitted by the insured.

(5) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.

(6) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by the insureds, when the insureds have made claims for amounts reasonably similar to the amounts ultimately recovered.

(7) Attempting to settle a claim by an insured for less than the amount to which a reasonable person would have believed he or she was entitled by reference to written or printed advertising material accompanying or made part of an application.

(8) Attempting to settle claims on the basis of an application that was altered without notice to, or knowledge or consent of, the insured, his or her representative, agent, or broker.

(9) Failing, after payment of a claim, to inform insureds or beneficiaries, upon request by them, of the coverage under which payment has been made.

(10) Making known to insureds or claimants a practice of the insurer of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.

(11) Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either, to submit a preliminary claim report, and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information.

(12) Failing to settle claims promptly, where liability has become apparent, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

(13) Failing to provide promptly a reasonable explanation of the basis relied on in the insurance policy, in relation to the facts or applicable law, for the denial of a claim or for the offer of a compromise settlement.

(14) Directly advising a claimant not to obtain the services of an attorney.

(15) Misleading a claimant as to the applicable statute of limitations.

(16) Delaying the payment or provision of hospital, medical, or surgical benefits for services provided with respect to acquired immune deficiency syndrome or AIDS-related complex for more than 60 days after the insurer has received a claim for those benefits, where the delay in claim payment is for the purpose of investigating whether the condition preexisted the coverage. However, this 60-day period shall not include any time during which the insurer is awaiting a response for relevant medical information from a health care provider.

(i) Canceling or refusing to renew a policy in violation of Section 676.10.

(j) Holding oneself out as representing, constituting, or otherwise providing services on behalf of the California Health Benefit Exchange established pursuant to Section 100500 of the Government Code without a valid agreement with the California Health Benefit Exchange to engage in those activities.

Insurance Code Section 790.035

(a) Any person who engages in any unfair method of competition or any unfair or deceptive act or practice defined in Section 790.03 is liable to the state for a civil penalty to be fixed by the commissioner, not to exceed five thousand dollars ($5,000) for each act, or, if the act or practice was willful, a civil penalty not to exceed ten thousand dollars ($10,000) for each act. The commissioner shall have the discretion to establish what constitutes an

act. However, when the issuance, amendment, or servicing of a policy or endorsement is inadvertent, all of those acts shall be a single act for the purpose of this section.

(b) The penalty imposed by this section shall be imposed by and determined by the commissioner as provided by Section 790.05. The penalty imposed by this section is appealable by means of any remedy provided by Section 12940 or by Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

Insurance Code Section 790.04

The commissioner shall have power to examine and investigate into the affairs of every person engaged in the business of insurance in the State in order to determine whether such person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice prohibited by Section 790.03 or determined pursuant to this article to be an unfair method of competition or an unfair or deceptive practice in the business of insurance. Such investigation may be conducted pursuant to Article 2 (commencing at Section 11180) of Chapter 2, Part 1, Division 3, Title 2 of the Government Code.

Insurance Code Section 790.05

Whenever the commissioner shall have reason to believe that a person has been engaged or is engaging in this state in any unfair method of competition or any unfair or deceptive act or practice defined in Section 790.03, and that a proceeding by the commissioner in respect thereto would be to the interest of the public, he or she shall issue and serve upon that person an order to show cause containing a statement of the charges in that respect, a statement of that person's potential liability under Section 790.035, and a notice of a hearing thereon to be held at a time and place fixed therein, which shall not be less than 30 days after the service thereof, for the purpose of determining whether the commissioner should issue an order to that person to, pay the penalty imposed by Section 790.035, and to cease and desist those methods, acts, or practices or any of them.

If the charges or any of them are found to be justified the commissioner shall issue and cause to be served upon that person an order requiring that person to pay the penalty imposed by Section 790.035 and to cease and desist from engaging in those methods, acts, or practices found to be unfair or deceptive.

The hearing shall be conducted in accordance with the Administrative Procedure Act, Chapter 5 (commencing at Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, except that the hearings may be conducted by an administrative law judge in the administrative law bureau when the proceedings involve a common question of law or fact with another proceeding arising under other Insurance Code sections that may be conducted by administrative law bureau administrative law judges. The commissioner and the appointed administrative law judge shall have all the powers granted under the Administrative Procedure Act.

The person shall be entitled to have the proceedings and the order reviewed by means of any remedy provided by Section 12940 of this code or by the Administrative Procedure Act.

Insurance Code Section 790.06

(a) Whenever the commissioner shall have reason to believe that any person engaged in the business of insurance is engaging in this state in any method of competition or in any act or practice in the conduct of the business that is not defined in Section 790.03, and that the method is unfair or that the act or practice is unfair or deceptive and that a proceeding by him or her in respect thereto would be in the interest of the public, he or she may issue and serve upon that person an order to show cause containing a statement of the methods, acts or practices alleged to be unfair or deceptive and a notice of hearing thereon to be held at a time and place fixed therein, which shall not be less than 30 days after the service thereof, for the purpose of determining whether the alleged methods, acts or practices or any of them should be declared to be unfair or deceptive within the meaning of this article. The order shall specify the reason why the method of competition is alleged to be unfair or the act or practice is alleged to be unfair or deceptive.

The hearings provided by this section shall be conducted in accordance with the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code), except that the hearings may be conducted by an administrative law judge in the administrative law bureau when the proceedings involve a common question of law or fact with another proceeding arising under other Insurance Code sections that may be conducted by administrative law bureau administrative law judges. The commissioner and the appointed administrative law judge shall have all the powers granted under the Administrative Procedure Act. If the alleged methods, acts, or practices or any of them are found to be unfair or deceptive within the meaning of this

article the commissioner shall issue and service upon that person his or her written report so declaring.

(b) If the report charges a violation of this article and if the method of competition, act or practice has not been discontinued, the commissioner may, through the Attorney General of this state, at any time after 30 days after the service of the report cause a petition to be filed in the superior court of this state within the county wherein the person resides or has his or her principal place of business, to enjoin and restrain the person from engaging in the method, act or practice. The court shall have jurisdiction of the proceeding and shall have power to make and enter appropriate orders in connection therewith and to issue any writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public pendente lite.

(c) A transcript of the proceedings before the commissioner, including all evidence taken and the report and findings shall be filed with the petition. If either party shall apply to the court for leave to adduce additional evidence and shall show, to the satisfaction of the court, that the additional evidence is material and there were reasonable grounds for the failure to adduce the evidence in the proceeding before the commissioner, the court may order the additional evidence to be taken before the commissioner and to be adduced upon the hearing in the manner and upon the terms and conditions as to the court may seem proper. The commissioner may modify his or her findings of fact or make new findings by reason of the additional evidence so taken, and shall file modified or new findings with the return of the additional evidence.

(d) If the court finds that the method of competition complained of is unfair or that the act or practice complained of is unfair or deceptive, that the proceeding by the commissioner with respect thereto is to the interest of the public and that the findings of the commissioner are supported by the weight

Insurance Code Section 790.10

The commissioner shall, from time to time as conditions warrant, after notice and public hearing, promulgate reasonable rules and regulations, and amendments and additions thereto, as are necessary to administer this article.

California Code of Regulations section 2695.183

No licensee shall communicate an estimate of replacement cost to an applicant or insured in connection with an application for or renewal of a homeowners' insurance policy that provides coverage on a replacement cost basis, unless the requirements and standards set forth in subdivisions (a) through (e) below are met:

(a) The estimate of replacement cost shall include the expenses that would reasonably be incurred to rebuild the insured structure(s) in its entirety, including at least the following:

(1) Cost of labor, building materials and supplies;

(2) Overhead and profit;

(3) Cost of demolition and debris removal;

(4) Cost of permits and architect's plans; and

(5) Consideration of components and features of the insured structure, including at least the following:

(A) Type of foundation;

(B) Type of frame;

(C) Roofing materials and type of roof;

(D) Siding materials and type of siding;

(E) Whether the structure is located on a slope;

(F) The square footage of the living space;

(G) Geographic location of property;

(H) Number of stories and any nonstandard wall heights;

(I) Materials used in, and generic types of, interior features and finishes, such as, where applicable, the type of heating and air conditioning system, walls, flooring, ceiling, fireplaces, kitchen, and bath(s);

(J) Age of the structure or the year it was built; and

(K) Size and type of attached garage.

(b) The estimate of replacement cost shall be based on an estimate of the cost to rebuild or replace the structure taking into account the cost to reconstruct the single property being evaluated, as compared to the cost to build multiple, or tract, dwellings.

(c) The estimate of replacement cost shall not be based upon the resale value of the land, or upon the amount or outstanding balance of any loan.

(d) The estimate of replacement cost shall not include a deduction for physical depreciation.

(e) The licensee shall no less frequently than annually take reasonable steps to verify that the sources and methods used to generate the estimate of replacement cost are kept current to reflect changes in the costs of reconstruction and rebuilding, including changes in labor, building materials, and supplies, based upon the geographic location of the insured structure. The estimate of replacement cost shall be created using such reasonably current sources and methods.

(f) Except as provided in subdivision (k) of this Section 2695.183, the provisions of this article are binding upon licensees, notwithstanding the fact that information, data or statistical methods used or relied upon by a licensee to estimate replacement cost may be obtained through a third party source. Any and all information received by the Department pursuant to this article shall be accorded the degree of confidential treatment required by section 735.5 of the Insurance Code or Chapter 2 of Part 1 of Division 3 of Title 2 of the Government Code, commencing at section 11180.

(g)(1) If a licensee communicates an estimate of replacement cost to an applicant or insured in connection with an application for or renewal of a homeowners' insurance policy that provides coverage on a replacement cost basis, the licensee must provide a copy of the estimate of replacement cost to the applicant or insured at the time the estimate is communicated. However, in the event the estimate of replacement cost is communicated by a licensee to an applicant to whom the licensee determines an insurance policy shall not be issued, then the licensee is not required pursuant to the preceding sentence to provide a copy of the estimate of replacement cost. In the event the estimate of replacement cost is communicated by telephone to an insured, the copy of the estimate shall be mailed to the insured no later than three business days after the time of the telephone conversation. In the event the estimate of replacement cost is communicated by telephone

to an applicant, the copy of the estimate shall be mailed to the applicant no later than three business days after the applicant agrees to purchase the coverage.

(2) An estimate of replacement cost provided in connection with an application for or renewal of a homeowners' insurance policy that provides coverage on a replacement cost basis must itemize the projected cost for each element specified in paragraphs (a)(1) through (a)(4), and shall identify the assumptions made for each of the components and features listed in paragraph (a)(5), of this Section 2695.183.

(h) If an estimate of replacement cost is updated or revised by, or on behalf of, the licensee and the revised estimate of replacement cost is communicated to the applicant or insured in connection with an application for or renewal of a homeowners' insurance policy that provides coverage on a replacement cost basis, the licensee shall provide a copy of the revised or updated estimate of replacement cost to the applicant as provided in paragraph (g)(1) of this Section 2695.183, or to the insured simultaneously with the renewal offer, as the case may be. This subdivision (h) shall not apply when the update or revision to the estimate of replacement cost or the policy limit results solely from the application of an inflationary provision in a policy or an inflation factor. This subdivision (h) shall not obligate a licensee to recalculate an estimate of replacement cost on an annual basis.

(i) Licensees shall maintain (1) a record of the information supplied by the applicant or insured that is used by the licensee to generate the estimate of replacement cost, and (2) a copy of any estimate of replacement cost supplied to the applicant or insured pursuant to paragraph (g)(1), or subdivision (h), of this Section 2695.183. If a policy is issued, these records and copies shall be maintained for the entire term of the insurance policy or the duration of coverage, whichever terminates later in time, and for five years thereafter. However, if the estimate of replacement cost is provided to an applicant to whom an insurance policy is never issued, the records and copies referred to in the first sentence of this subdivision (i) shall be maintained for the period of time the licensee ordinarily maintains applicant files in the normal course of business, provided that such period of time shall be at least sufficient to ensure that the licensee is able to comply with the provisions of this subdivision in the event the policy is issued to the applicant.

(j) To communicate an estimate of replacement value not comporting with subdivisions (a) through (e) of this Section 2695.183 to an applicant or insured in connection with an application for or renewal of a homeowners'

insurance policy that provides coverage on a replacement cost basis constitutes making a statement with respect to the business of insurance which is misleading and which by the exercise of reasonable care should be known to be misleading, pursuant to Insurance Code section 790.03.

(k) When an insurer identifies one or more specific sources or tools that a broker-agent must use to create an estimate of replacement cost,

(1) the insurer shall prescribe complete written procedures to be followed by broker-agents when they use the sources or tools,

(2) the insurer shall provide the broker-agent with the training and written training materials necessary to properly utilize the sources or tools according to the insurer's prescribed procedures, and

(3) the insurer, and not the broker-agent, shall be responsible for any noncompliance with this Section 2695.183 that results from the failure of the estimate to satisfy the requirements of subdivisions (a) through (e), unless that noncompliance results from failure by the broker-agent to follow the insurer's prescribed written procedures when using the source or tool.

(l) This Section 2695.183 applies to all communications by a licensee, verbal or written, with the sole exception of internal communications within an insurer, or confidential communications between an insurer and its contractor, that concern the insurer's underwriting decisions and that never come to the attention of an applicant or insured.

(m) No provision of this article shall be construed as requiring a licensee to estimate replacement cost or to set or recommend a policy limit to an applicant or insured. No provision of this article shall be construed as requiring a licensee to advise the applicant or insured as to the sufficiency of an estimate of replacement cost.

(n) No provision of this article shall limit or preclude a licensee from providing and explaining the California Residential Property Insurance Disclosure, as cited in Insurance Code section 10102, explaining the various forms of replacement cost coverage available to an applicant or insured, or explaining how replacement cost basis policies operate to pay claims.

(o) No provision of this article shall limit or preclude an applicant or insured from obtaining his or her own estimate of replacement cost from an

entity permitted to make such an estimate by Insurance Code section 1749.85.

(p) For purposes of this subdivision (p), "minimum amount of insurance" shall mean the lowest amount of insurance that an insurer requires to be purchased in order for the insurer to underwrite the coverage on a particular property, based upon an insurer's eligibility guidelines, underwriting practices and/or actuarial analysis. An insurer may communicate to an applicant or insured that an applicant or insured must purchase a minimum amount of insurance that does not comport with subdivisions (a) through (e) of this Section 2695.183; however, if the minimum amount of insurance that is communicated is based in whole or in part on an estimate of replacement value, the estimate of replacement value shall also be provided to the applicant or insured and shall comply with all applicable provisions of this article. Nothing in this article shall limit or preclude an insurer from agreeing to provide coverage for a policy limit that is greater than or less than an estimate of replacement cost provided pursuant to this article.

(q) This article shall apply only to estimates of replacement value that are prepared, communicated or used by a licensee on or after June 27, 2011.

* * *

CERTIFICATE OF SERVICE

I, Carol J. Aranda, declare as follows:

I am employed in the County of San Francisco, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 555 Mission Street, Suite 3000, San Francisco, California 94105, in said County and State. On January 11, 2016, I served the within:

ANSWER BRIEF ON THE MERITS

to each of the persons named below at the address(es) shown, in the manner described.

SEE ATTACHED SERVICE LIST

☑ **BY MAIL**: I placed a true copy in a sealed envelope addressed as indicated on the attached service list for collection and mailing at my business location, on the date mentioned above, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service in a sealed envelope with postage fully prepaid. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained in the proof of service.

I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document(s), and all copies made from same, were printed on recycled paper, and that this certificate was executed on January 11, 2016 at San Francisco, California.

Carol Aranda

Service List

Kamala D. Harris
Edward C. DuMont
Paul D. Gifford
Janill L. Richards
Linda Berg Gándara
Diane S. Shaw
Stephen Lew
Lisa W. Chao
300 S. Spring Street, Suite 1702
Los Angeles, CA 90013

Attorneys for Defendant/Appellant Dave Jones, in his capacity as the Insurance Commissioner of the State of California

Clerk of the Court of Appeal
Second Appellate District, Division One
300 South Spring Street, 2nd Floor
Los Angeles, CA 90013

Clerk of the Los Angeles County
Superior Court
Hon. Gregory W. Alarcon
Department 36
Stanley Mosk Courthouse
111 North Hill Street
Los Angeles, CA 90012