

*In the Supreme Court of the State of California*

**ASSOCIATION OF CALIFORNIA  
INSURANCE COMPANIES and  
PERSONAL INSURANCE  
FEDERATION OF CALIFORNIA,**

**Plaintiffs and Respondents,**

**v.**

**DAVE JONES, in his capacity as the  
Commissioner of the California  
Department of Insurance,**

**Defendant and Appellant.**

Case No. S226529

Court of Appeal, Second Appellate District, Case No. B248622  
Los Angeles County Superior Court, Case No. BC463124  
The Honorable Gregory W. Alarcon, Judge

**REPLY BRIEF ON THE MERITS**

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## INTRODUCTION AND SUMMARY OF ARGUMENT

Over the course of more than two decades, under the authority of the Unfair Insurance Practices Act (UIPA), Insurance Code, sections 790-790.15, the Legislature and the Insurance Commissioner have worked together to solve the longstanding problem of unintended underinsurance—where homeowners learn too late that their “replacement cost” policies are insufficient to replace their homes lost to wildfire.<sup>1</sup> The Legislature has, for example, mandated standard disclosures that, among other things, warn consumers of the risk of underinsurance. (§ 10102.) And the Commissioner, exercising his rulemaking authority to clarify what constitutes an untrue, deceptive, or misleading statement in this context, has required that replacement costs estimates include all costs commonly incurred in rebuilding, and reflect the actual and current costs to rebuild on the same parcel of property. (§§ 790.03, subd. (b); 790.10; Cal. Code Regs., tit. 10, § 2695.183 [replacement cost regulation].)

The rulemaking process worked exactly as the Legislature intended. As the court of appeal itself acknowledged, the Legislature contemplated that the Commissioner would fill in the details of the Legislature’s more general definitions ““for the benefit of the public without having to wait for the Legislature to act at a later date.”” (Opn. 28-29, quoting Assem. Com. on Finance and Insurance, summary of Assem. Bill No. 1353 (1971 Reg. Sess.) p. 1; OBM 6-7.) That is what the Commissioner did, requiring that replacement cost estimates be complete and reflect the real-world costs of rebuilding, ensuring that consumers can understand what they are being offered, spot potential errors and ask questions, compare estimates as

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<sup>1</sup> All statutory references are to the Insurance Code unless otherwise indicated. As used in this brief, “insurer” has the same meaning as “licensee” in section 2695.180, subdivision (b) of title 10 of the California Code of Regulations.

between insurers, and make informed coverage decisions. The court of appeal's contrary judgment, voiding the Commissioner's replacement cost estimate regulation, thus should be reversed.

In the main, respondents the Association of California Insurance Companies and the Personal Insurance Federation of California simply repeat the court of appeal's analysis. In so doing, they fail squarely to address the text of the relevant statutes, case law interpreting similar grants of rulemaking authority, the authoritative legislative history, and the purposes of the UIPA. Together these sources and authorities establish not only that the Commissioner in general has broad authority to fill out the Legislature's framework definitions, but that his exercise of authority in this specific instance—clarifying the Legislature's general definition of prohibited public statements as applied to replacement cost estimates—was squarely within his rulemaking power.

## **ARGUMENT**

### **I. SECTION 790.10 GRANTS THE COMMISSIONER BROAD AUTHORITY TO CLARIFY AND FILL IN THE DETAILS OF PROHIBITED ACTS DEFINED BY THE LEGISLATURE IN SECTION 790.03**

The Legislature established a statutory framework—the Unfair Insurance Practices Act, article 6.5 of the Insurance Code—under which the Legislature and the Commissioner together regulate the insurance industry to prevent “unfair methods of competition or unfair or deceptive acts or practices.” (See §§ 790, 790.2.) In section 790.03, the Legislature has defined “unfair methods of competition.” Some such acts and practices are fairly specifically defined, for example, holding oneself out as representing the California Health Benefit Exchange without a valid agreement with that entity. (§ 790.03, subd. (j).) Other prohibited acts and practices are more broadly drawn. Relevant here is the making of a public “statement” with

respect to insurance “which is untrue, deceptive, or misleading ....”  
(§ 790.03, subd. (b).)

Such a general prohibition may provide little guidance to the industry, and generally will not serve to change entrenched industry practices that prove to be misleading or confusing to consumers. Accordingly, the Legislature empowered the State’s insurance expert, the Insurance Commissioner, to fill in the details: “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.” (§ 790.10.)

As the Commissioner discussed at length, a plain reading of this language confers broad rulemaking authority, both under case precedent and by reference to the terms used in the California Administrative Procedure Act (APA). (OBM 20-27; see, e.g., Gov. Code, § 11352.600 [“regulation” defined as being of “general application” adopted to “implement, interpret, or make certain or specific the law enforced or administered by it”]; see also *Western States Petroleum Assn. v. Bd. of Equalization* (2013) 57 Cal.4th 401, 414; *Ford Dealers Assn. v. Dept. of Motor Vehicles* (1982) 32 Cal.3d 347.)

The Commissioner’s broad authority to fill in the details of section 790.03, and in particular subdivision (b), prohibiting “untrue, deceptive, or misleading” public statements, is confirmed by the legislative history. (OBM 28-30.) In enacting section 790.10, the Legislature expressly noted that its purpose was to allow the Commissioner to act promptly through rulemaking to protect the public, and, in addition, that the Commissioner’s authority in this regard was limited only the requirements of the APA. (*Ibid.*; see also Appellant’s Motion for Judicial Notice (MJN), Ex. H, p. 33 [Assem. Com. on Finance and Insurance, summary of Assem. Bill No.

1353 (1971 Reg. Sess.); Ex. I, pp. 34-37 [Legislative Counsel Opinion of Assem. Bill No. 1353 (Jul. 14, 1971)].)

Further, the Legislature's subsequent actions do not call the Commissioner's rulemaking authority into question but instead confirm that the Legislature relies on the Commissioner and his expertise to fill in the details necessary to regulate a complex and constantly evolving industry. (OBM 30-32.) And the fact that the Legislature conferred other enforcement tools on the Commissioner, such as the ability to engage in case-by-case enforcement, cannot be read as a constraint on his rulemaking authority to fill in the details of legislatively-defined prohibited acts. (OBM 32-36.) The Legislature has entrusted the Commissioner to determine whether general rules or case-by-case enforcement, or some combination, will best protect the public and advance the purposes of the UIPA. (OBM 35-37.)

Respondents' arguments favoring a severely constrained view of the Commissioner's rulemaking authority fail to address these points and, ultimately, are at odds with the language, intent, and purpose of the UIPA.

**A. Under this Court's Precedent, Including *Ford Dealers*, the Commissioner's Reasonable View of His Rulemaking Authority Is Entitled to Respect**

Section 790.10 gives the Commissioner the authority to "promulgate reasonable rules and regulations ... as are necessary to administer [the UIPA]." This Court has interpreted analogous grants of authority to confer the power to "fill up the details" of a statutory scheme. (See, e.g., *Ford Dealers*, *supra*, 32 Cal.3d at p. 362; see also *Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1013-1014.)<sup>2</sup>

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<sup>2</sup> The court of appeal and respondents both assert that section 790.10 does not confer authority on the Commissioner to define new prohibited  
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As set out in the Commissioner’s brief, this Court’s decision in *Ford Dealers*, which involved a similar statutory scheme and grant of rulemaking authority, strongly supports that the Commissioner acted within his authority when he promulgated the replacement cost regulation. (See OBM 22-27.) In *Ford Dealers*, the Court examined a statutory scheme that generally prohibited misleading statements in the context of vehicle sales and gave the Department of Motor Vehicles authority to issue regulations to carry out those provisions. (OBM 22-24, discussing *Ford Dealers, supra*, 32 Cal.3d at pp. 362-373.) Under its statutory authority, the DMV issued regulations barring specific types of misleading statements. (*Ford Dealers, supra*, 32 Cal.3d at p. 354, 356.) Among other things, the DMV’s regulations prohibited dealers from providing statements to consumers that included itemized services charges for which the dealer had already been paid or would be reimbursed. (*Id.* at p. 362.) The Court in *Ford Dealers* upheld the regulations, concluding that “consumers confronted with an itemized charge for services performed on their automobile will assume that they are paying extra to purchase those specific services.” (*Id.* at p. 363.) “Where that is not in fact the case, because the dealer has already been paid for the services, the DMV could reasonably conclude that such an itemized charge is inherently misleading.” (*Ibid.*; see also *Moore, supra*, 2 Cal.4th at pp. 1013-1014 [holding that “Legislature delegated to the Board [of Accountancy] the authority to determine whether a title or designation not identified in the statute is likely to confuse or mislead the public”].) Similarly, here, section 790.03, subdivision (b) of the UIPA

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acts. (See Opn. 25; ABM 33-35.) The Commissioner in this case has not asserted he is defining a new prohibited act, but is instead acting on his authority to fill in the details of a prohibited act already defined by the Legislature.

broadly prohibits misleading statements regarding the business of insurance, and section 790.10 authorizes the Commissioner to administer the UIPA. As the Commissioner determined, section 790.10 reasonably encompasses the authority to determine that specific types of statements that fail to comport with consumer expectations and assumptions are inherently misleading. (See OMB 24-27.)

Recognizing its relevance to this case, respondents argue that *Ford Dealers* is “not controlling here” because—they assert—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.” (ABM 23; see also *ibid.*, citing *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11, fn. 4.) In the footnote cited by respondents, the Court in *Yamaha* clarified that, while courts give “great weight” to the construction of a statute by officials charged with its administration, “[t]he court, not the agency, has ‘final responsibility for the interpretation of the law’ under which the regulation was issued.” (*Yamaha*, at p. 11, fn. 4, quoting *Whitcomb Hotel, Inc. v. Cal. Emp. Com.* (1944) 24 Cal.2d 753, 757; see also OBM 18 and ABM 23 [both briefs quoting *Yamaha*, 19 Cal.4th at p. 11, fn. 4, for the proposition that the standard for reviewing whether a quasi-legislative rule is consistent with controlling law is “respectful nondeference”].)

Nothing in *Ford Dealers* suggests that the Court there abdicated its responsibility to make the final legal determination about the scope of the agency’s rulemaking authority. It is correct that the *Ford Dealers* Court stated that it would “defer to the agency’s expertise[,]” about whether the regulation was reasonably necessary to effectuate the purposes of the statute, so that it would not “superimpose its own policy judgment upon

the agency in the absence of an arbitrary and capricious decision.” (*Ford, supra*, 32 Cal.3d at p. 355.)<sup>3</sup> But the Court undertook its own examination of the statutory source of the DMV’s rulemaking authority. (See, e.g., *id.* at pp. 357-362, 362-363 [interpreting Veh. Code, § 11713].) The approach in *Ford Dealers* is thus fully consistent with *Yamaha*. (See *Yamaha, supra*, 19 Cal.4th at pp. 16-17.)

The Court’s more recent authorities confirm that while the courts retain the ultimate responsibility to construe statutes granting rulemaking authority, they accord appropriate “respect to the administrative construction.” (*American Coatings Assn., Inc. v. South Coast Air Quality Dist.* (2012) 54 Cal.4th 446, 461;<sup>4</sup> see also *Western States, supra*, 57 Cal.4th at p. 415 [“[i]n determining whether an agency has incorrectly interpreted the statute it purports to implement, a court gives weight to the agency’s construction”]; *Larkin v. W.C.A.B.* (2015) 62 Cal.4th 152, 158 [holding that adjudicatory determinations by expert agency charged with implementing statute entitled to “great weight”].)<sup>5</sup> In the particular context

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<sup>3</sup> The reasonable necessity of the regulation is not at issue in this appeal. (OBM 17-18; Opn. 18, fn. 8.)

<sup>4</sup> The Court in *American Coatings* observed that in reviewing quasi-legislative rulemaking, a court must be “satisfied that the rule in question lay within the lawmaking authority delegated by the Legislature[.]” (54 Cal.4th at p. 460.) Similarly, in reviewing an interpretive rule, the court must take “ultimate responsibility for the construction of the statute....” (*Id.* at p. 461 [quoting *Yamaha, supra*, 19 Cal.4th at p. 12].)

<sup>5</sup> Respondents contend that the Commissioner’s rulemaking authority should not be deemed “quasi-legislative.” (See ABM 25.) The Commissioner acknowledges that regulations do not always fall “neatly” into the category of being either quasi-legislative or interpretive, but may rest on a “continuum.” (*Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785, 799.) However characterized, the relevant question is, always, whether the rulemaking authority asserted is consistent with legislative intent. (*Ibid.*) As established in the Opening Brief and in this Reply, the  
(continued...)

of the Insurance Code, a court conducts an “independent examination” of the relevant statutes, but asks also “whether in enacting the specific rule” the Commissioner ‘reasonably interpreted the legislative mandate.’” (*State Farm Mut. Auto. Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1040, quoting *Fox v. San Francisco Residential Rent etc. Bd.* (1985) 169 Cal.App.3d 651, 656.)

Just as the DMV reasonably determined that a statute authorizing it “to adopt rules and regulations ‘as may be necessary to carry out’” the Vehicle Code conferred on it authority to issue regulations identifying specific classes of misleading statements (*Ford Dealers, supra*, 32 Cal.3d at pp. 354, 362-363), so too has the Commissioner reasonably determined that section 790.10 conferred on him ~~the~~ authority to issue regulations making clear that replacement cost estimates that are incomplete or do not reflect the actual and current costs of rebuilding are inherently misleading. This construction is entitled to appropriate respect and, as discussed in the Commissioner’s Opening Brief and below, is wholly consistent with the text of section 790.03 and legislative intent.

**B. This Court’s Decisions in *Ford Dealers* and *Moore* Support the View that the Commissioner Has Authority to Fill in the Details of What Constitutes an Untrue, Deceptive, or Misleading Statement**

Respondents make additional attempts to distinguish the Court’s decision in *Ford Dealers*—first on the ground that the Vehicle Code did not “provid[e] for a procedure for the agency to prosecute conduct not elsewhere defined in the Vehicle Code as false or misleading.” (ABM 24,

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Commissioner’s replacement cost regulation is consistent with the Legislature’s intent.

28.) They argue that, unlike the statute in *Ford Dealers*, the UIPA contains a provision, section 790.06, which gave the Commissioner authority to determine new, undefined, unlawful acts through individual adjudications. Respondents argue that, by giving the Commissioner this authority, the Legislature intended that the Commissioner would be limited to using this adjudicatory procedure to identify new unfair practices. (ABM 24-25.)

But the issue of whether the Commissioner must proceed under section 790.06 to identify previously undefined unfair practices is not before this Court because the replacement cost regulation is not determining a new, undefined unfair practice. Instead, section 790.03, subdivision (b) defines misleading statements as an unfair trade practice. The regulation is filling a gap by clarifying that incomplete replacement cost estimates are misleading under that section and subdivision. Therefore, section 790.06's procedures for determining a new unfair trade practice are irrelevant to the Commissioner's authority to issue the replacement cost regulation.

Additionally, the Commissioner's authority to identify particular unfair practices through enforcement proceedings does not limit his authority to issue regulations. Instead, the fact that the Commissioner has enforcement authority supports the inference that the Commissioner also has the authority to clarify key terms by regulation. (*Moore, supra*, 2 Cal.4th at pp. 1013-1014 ["Inasmuch as enforcement of the provisions of the Accountancy Act ... is entrusted to the Board, it seems apparent that the Legislature delegated to the Board the authority to determine whether a title or designation not identified in the statute is likely to confuse or mislead the public."]; see also *Heckler v. Campbell* (1983) 461 U.S. 458, 476 ["The Court has recognized that even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its

rulemaking authority to determine issues that do not require case-by-case consideration.”].) As discussed in the Commissioner’s Opening Brief, courts recognize that where an agency is filling gaps in a complex statute through the formulation of policies with general applicability, the agency reasonably may choose to proceed by rulemaking. (See OBM 33-35 [discussing policy reasons for favoring rulemaking over adjudication when formulating rules of general application].) Thus, courts recognize that rulemaking and administrative adjudications complement each other, and “the choice between proceeding by general rule or by ad hoc adjudication ‘lies primarily in the informed discretion of the administrative agency.’” (*Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 413, quoting *Securities and Exchange Com. v. Chenery Corp.* (1947) 332 U.S. 194, 203.) Notably, respondents have not addressed these policy concerns or explained why they do not apply in the context of this case.

In a further attempt to distinguish *Ford Dealers*— in a footnote and without citation to authority—respondents argue that the grant of rulemaking authority to the DMV in *Ford Dealers* was fundamentally different because the statute conferring rulemaking authority on the DMV used the phrase “carry out” rather than “administer.” (ABM 25, fn. 6; see also *id.* 29-30 [reference to dictionary definition of “administer”].) Respondents also argue that this Court should read-in a limiting intent from the Legislature’s change from “implement” in an early draft of section 790.10 to “administer” in the final law. (ABM 29.)

Respondents fail to address the detailed discussion of the proper interpretation of “administer” set out in the Commissioner’s Opening Brief. (ABM 29-30.) As discussed, “administer” is a term of art in the APA, which the Legislature uses broadly to refer to an agency’s activities in carrying out a statute, which include implementing, interpreting, and making specific. (See OBM 20-21; see also Gov. Code § 11342.600

[Administrative Procedures Act defining a regulation as “every rule, regulation, order, or standard of general application ... adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure”].) The use of the term “administer” in section 790.10 thus is not is a limitation on agency authority; instead, it reflects the agency’s broad charge to carry out the legislative scheme and delegates to the Commissioner concomitant rulemaking authority.<sup>6</sup> (See *Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785, 799 [explaining that the grant of rulemaking authority in *Moore* (necessary for “administration”) provided broad authority to fill up the details of a statutory scheme as in *Ford Dealers*].)<sup>7</sup>

In any event, *Ford Dealers* is not an outdated anomaly, but reflects this Court’s continuing approach to interpreting language conferring rulemaking authority. In *Moore*, this Court considered the scope of the State Board of Accountancy’s authority to issue regulations to administer the Accountancy Act and found that it encompassed the authority to issue regulations that identify specific misleading terms. (*Moore, supra*, 2 Cal.4th 999, 1003.) Under the section 5058 of the Accountancy Act, it is unlawful for any unlicensed individuals to use the title “certified public

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<sup>6</sup> Even the dictionary definitions proffered by the respondents indicate that the term “administer” refers to an administrative agency’s general authority to carry out a statutory scheme. (See *Burton’s Legal Thesaurus* (4th ed. 2007) pp. 16 [“administer” is synonymous with “carry out,” “control,” and “direct”], 389 [synonyms for “manage” include “govern” and “regulate”].)

<sup>7</sup> Respondent’s “separation of powers” argument (see ABM 30-31) is simply a restatement of the rule that an agency’s powers are determined by statute and a court cannot expand an agency’s powers beyond that granted by the Legislature. The Commissioner here asks the Court simply to interpret and apply, not expand, the rulemaking powers set forth in section 790.10.

accountant,” “public accountant,” or “any other title or designation likely to be confused” with those terms. (*Id.* at p. 1004; see also Bus. & Prof. Code, §§ 5058, 5120.) The Board is charged with enforcing the Accountancy Act and given the authority to issue regulations “as may be reasonably necessary to *administer* the Accountancy Act.” (*Moore*, at p. 1010, italics added.) Under this rulemaking authority, the Board adopted a regulation prohibiting “the use of either the title ‘accountant’ or the description of the services offered as ‘accounting’ by an unlicensed person.” (*Id.* at p. 1004.) The plaintiffs challenged this regulation, arguing that the statute did not expressly prohibit the use of the terms “accountant” and “accounting,” and that the Board has expanded the scope of its statutory authority “by prohibiting *any* use of the terms ‘accounting’ or ‘accounting’ by unlicensed persons.” (*Ibid.*, italics added.)

The Court in *Moore* disagreed, concluding that the Board’s authority to issue regulations to administer the Accountancy Act included the authority to issue regulations identifying misleading titles. (*Moore, supra*, 2 Cal.4th at pp. 1013-1014.) And the Board’s authority to enforce the act through adjudication does not limit its ability to issue regulations specifying categories of misleading statements. (*Ibid.*) Instead, this enforcement authority supports the conclusion that the Board is authorized to interpret the key statutory terms.

Since the Board was also authorized to seek an injunction against the use of such terms, its authority to “adopt, repeal, or amend such regulations as may be reasonably necessary and expedient for the ... administration of [the Accountancy Act]” (§ 5010) includes the power to identify by regulation those terms which it finds are “likely to be confused with ‘certified public accountant’ or ‘public accountant,’” the use of which may be enjoined under the broad prohibition of section 5058. To conclude otherwise would contravene the intent and purpose behind the statute.

(*Id.* at p. 1014; see also *Ramirez, supra*, 20 Cal.4th at p. 799 [approving, post-*Yamaha*, the Court’s reasoning in *Moore*].)

As with the Accountancy Act reviewed in *Moore*, the UIPA prohibits specific unfair practices, but also broadly prohibits *any* misleading statement regarding the business of insurance. And, as in *Moore*, the Commissioner is authorized to enforce the statutory scheme through individual adjudications and to issue any regulations necessary for the administration of that scheme. Consistent with both *Ford Dealers* and *Moore*, this grant of regulatory authority necessarily includes the authority to fill in the gaps in the UIPA by identifying categories of statements that are inherently misleading. (*Moore, supra*, 2 Cal.4th at pp. 1013-1014; *Ford Dealers, supra*, 32 Cal.3d at pp. 362-363.) That is precisely what the Commissioner did in promulgating the replacement cost regulation.<sup>8</sup>

**C. Respondents’ Argument that the Unfair Insurance Practices Act In Some Respects Might Be “Self-Executing” is Irrelevant to the Question of the Scope of the Commissioner’s Rulemaking Authority**

Respondents rely on the dissent in *Western States Petroleum Assn.* for the proposition that the UIPA is self-executing, implying that this somehow limits the Commissioner’s ability to issue regulations. (ABM 27, citing *Western States, supra* 57 Cal.4th at p. 436 (conc. & dis. opn. of Kennard, J.)) A self-executing statute is simply a statute that does not require implementing regulations to be effective. (*American Nurses Assn. v.*

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<sup>8</sup> Respondents compare section 790.10 with grants of regulatory authority in other statutory schemes, claiming that the differences between these delegations of authority indicate that the grant of authority in section 790.10 is narrow. (ABM 26-27.) Such differences are not surprising given the broad range of administrative agencies and the varying duties assigned to them. *Ford Dealers* and *Moore* are instructive on the particular type of rulemaking at issue in this case, and support the Commissioner’s view of his authority.

*Torlakson* (2013) 57 Cal.4th 570, 580.) The fact that a statute is self-executing, however, does not mean that the administering agency is precluded from issuing regulations. (Cf. *Plaza Hollister Ltd. Partnership v. County of San Benito* (1999) 72 Cal.App.4th 1, 28 [discussing self-executing constitutional provisions].) Regardless of whether the UIPA is self-executing in some respects, the Legislature has expressly authorized the Commissioner to issue regulations, and this express grant controls.

**D. Respondents' Attempts to Counter the Clear Legislative History Supporting the Commissioner's Rulemaking Authority Are Without Merit**

The legislative history also supports a broad interpretation of the Commissioner's authority. As discussed in the Commissioner's Opening Brief, the legislative history reflects that, in enacting section 790.10, the Legislature intended to "give[] the Insurance Commissioner the authority to promulgate rules and regulations so that if the need therefor arises, he can, without delay, promulgate necessary rules making such practices definite and specific for the benefit to the public without having to wait for the Legislature to act at a later date." (OBM 29, quoting MJN, Ex. H, p. 33 [Assem. Com. on Finance and Insurance, summary of Assem. Bill No. 1353 (1971) Reg. Sess.], emphasis added[.]) As the court below acknowledged, this statement of legislative purpose supports the conclusion that section 790.10 authorizes the Commissioner to issue the replacement cost regulation. (Opn. 29.)

Respondents do not even mention this bill analysis. Instead, they point to an enrolled bill report that states that the fiscal effect of adding section 790.10 to the UIPA is "[o]ne time \$1,500 costs." (ABM 28; Respondents' Motion for Judicial Notice, Ex. A, [Cal. Dept. of Finance, Enrolled Bill Rep. on Assem. Bill No. 1353 (1971 Reg. Sess.) prepared for Governor Reagan (Oct. 8, 1971)].) Respondents argue that the Legislature

must have anticipated very limited regulatory activity, given the low estimated costs. (ABM 28.) Because enrolled bill reports are not prepared by the Legislature, however, they are not given great weight and cannot be used to contradict the plain language of a statute or the analysis of a legislative committee. (*In re Conservatorship of Whitley* (2010) 50 Cal.4th 1218, fn. 3.) The enrolled bill report thus cannot be read to limit the Commissioner rulemaking activity to a one-time, \$1,500 hearing because section 790.10 expressly provides that the Commissioner “shall promulgate reasonable rules and regulations” “from time to time as conditions warrant...” (§ 790.10.) An enrolled bill report “cannot be used to alter the substance of legislation[.]” (*Whitley, supra*, 50 Cal.4th at p. 1218, fn. 3.)

And, even if it is properly considered, the enrolled bill report in fact supports the Commissioner’s interpretation. The report contains two findings: 1) “The insurance code sections which define unfair trade practices, which includes misleading advertising, are rather broad and subject to considerable interpretation;” and 2) “This bill authorizes the Insurance Commissioner to promulgate reasonable rules and regulations necessary to administer the provisions of the existing law.” (Respondents’ Motion for Judicial Notice, Ex. A..) Read together, these findings support the view that the Commissioner’s rulemaking authority was designed, ~~at least in part,~~ to address the breadth of the UIPA’s definitions of unfair trade practices and to enable the Commissioner to issues regulations making these categories more specific.

**E. The Legislature’s Subsequent Actions Confirm That the Commissioner Has Broad Authority to Fill In the Regulatory Details**

Since enacting section 790.10, the Legislature has added new categories of prohibited acts to the UIPA and has enacted new statutes relating to replacement cost estimates. But none of these amendments has

limited the Commissioner's express authority to issue regulations as necessary to administer the UIPA. Instead, as discussed in the Commissioner's Opening Brief, the Legislature and the Commissioner have worked together to address the problem of incomplete replacement cost estimates as the UIPA intends. (OBM 11-13.)

In response, respondents point to instances where the Legislature has more specifically defined some types of unfair practices (see, e.g., ABM 31-32, discussing § 790.03, subds. (f)(3), (f)(4), and (h)), and where it has legislated in the area of replacement cost estimates (see, e.g., ABM 32, citing to §§ 10101-10102). Respondents then argue that the canon of *expressio unius est exclusio alterius* precludes rulemaking to fill out the details of section 790.03, subdivision (b). (ABM 35-37.) Their strained reading of the UIPA should be rejected.

The *expressio unius* canon of statutory construction applies where there is be "some reason to conclude an omission is the product of intentional design." (*Howard Jarvis Taxpayers Assn. v. Padilla* (2016) 62 Cal.4th 486, 514.) "The canon 'is generally applied to a specific statute, which contains a listing of items to which the statute applies' and may not have any application to 'an entire code.'" (*Ibid.*, quoting *In re Sabrina H.* (2007) 149 Cal.App.4th 1403, 1411.) The canon's requirements are not met here for several reasons.

First, the definition in section 790.03, subdivision (b) is purposefully broad and general. Rather than limiting its reach to specific types of misrepresentations, subdivision (b) prohibits "any statement containing any assertion, representation, or statement with respect to the business of insurance ... 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." (§ 790.03, subd. (b).) The fact that the Legislature subsequently added specified categories of misleading

statements to the UIPA does not undermine subdivision (b)'s broad prohibition. (See *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 249 [courts give meaning to every word of a statute if possible, and avoid constructions making any word surplusage].) And the Legislature's actions do not suggest that it desired to exclude the Commissioner from any role in clarifying and filling in the details of section 790.03, subdivision (b) in areas that the Legislature has not spoken to. Instead, when the Legislature employs open-ended language and authorizes the agency to issue regulations, the delegation of rulemaking authority includes the power to fill the gaps by elaborating on the meaning of key statutory terms. (*American Coatings Assn.*, *supra*, 54 Cal.4th at pp. 461-462.)

Second, there is no basis to conclude that the Legislature intended that only the general prohibition of section 790.03, subdivision (b) would apply, except where it might enact more specific legislation. To the contrary, the legislative history reflects that the Legislature intended that the Commissioner would clarify and make definite by regulation specific classes of statements that would fall under the legislatively-defined prohibition. (MJN, Ex. H, p. 33 [Assem. Com. on Finance and Insurance, summary of Assem. Bill No. 1353 (1971) Reg. Sess.], noting that the purpose of section 790.10 was to authorize the Commissioner to issue regulations to make UIPA's unfair practices "definite and specific"].) Thus, the only logical inference is that the Legislature did not intend to limit the range of misrepresentations that are prohibited by the UIPA to those expressly set out in the statute. Instead, it intended "to defer to . . . the expertise" of the Commissioner to fill in the regulatory gaps by determining that certain classes of misleading statements are inherently misleading. (*Ford Dealers*, *supra*, 32 Cal.3d at pp. 355, 362-363.)

Finally, the fact that the Legislature has passed legislation regarding replacement cost estimates in other portions of the Insurance Code (see

ABM 31-33) does not suggest that it has reserved to itself the sole power to regulate in this area under a *expressio unius* theory. (See ABM 34.) Courts have declined to apply “this statutory construction tool to an entire code.” (*In re Sabrina H.*, *supra*, 149 Cal.App.4th at p. 1411; *Howard Jarvis Taxpayers Assn.*, *supra*, 62 Cal.4th at p. 514.) Because the UIPA and these newer provisions regarding replacement cost “are widely separated, both in where they are codified and as to how and when they were adopted,” there is no basis to infer that the Legislature intentionally omitted misleading replacement cost estimates from the UIPA. (See *Howard Jarvis Taxpayers Assn.*, at pp. 514-515 [rejecting application of *expressio unius* inference in context of ballot measure seeking advisory opinion].) Instead, these enactments simply reflect that the Legislature shares the Commissioner’s concern regarding the risks associated with unintended underinsurance. When the Legislature wishes to check or guide the Commissioner’s exercise of his rulemaking authority under section 790.10, it does so directly. (OBM 29-30 [discussing § 790.034, in which Legislature provided guidance on content of Fair Claims Settlement Practices Regulations].) Here, as noted, the Legislature and the Commissioner have worked together to address the complicated problem of underinsurance. (OBM 7-12, 30.) The Legislature’s recognition of the seriousness of this problem provides no basis for limiting the Commissioner’s rulemaking authority.

**II. THE COMMISSIONER ACTED WITHIN HIS AUTHORITY IN DETERMINING THAT COST ESTIMATES THAT ARE INCOMPLETE, OR THAT DO NOT REFLECT ACTUAL AND CURRENT COSTS TO REBUILD, ARE MISLEADING**

If Court agrees that the Commissioner has authority to fill up the details of what constitutes an untrue, deceptive, or misleading statement, defined by the Legislature in section 790.03, subdivision (b)—which the

Commissioner believes is well established—then the only remaining question is whether Commissioner’s replacement cost regulation simply provides a specific example a type of prohibited statement. It does.

As discussed in the Commissioner’s Opening Brief, the replacement cost regulations grew out of a widespread underinsurance problem revealed by a series of catastrophic wildfires. (OBM 7-11; see OBM 26, citing MJN, Ex. D, p. 16 [Sen. Banking, Finance and Insurance Com., Bill Analysis of Sen. Bill No. 2 (2006-2007 Reg. Sess.) as amended Mar. 29, 2005].) The Commissioner received numerous complaints from homeowners whose homes had been destroyed, and who learned too late that their replacement cost insurance would not in fact cover the cost to replace their homes. (OBM 9-10; see also, e.g., RF II:432, 346, 460, 481, 484.) The Commissioner’s investigation showed that consumers were being misled into underinsuring their homes by industry practices. (OBM 27, citing RF I:79-80, 124, 169, 217, II:351-352, 432; III:583, 789, 826, IV:1030 [summary of the Commissioner’s market conduct examinations].) For example, some in the industry used estimation software offering consumers “quick quotes” that failed to account for all of the relevant characteristics of the property. (MJN, Ex. D, p. 16 at pp. 16-17; RF IV:1029.) In some instances, estimates were based on considerations, such as the resale value of the land, that were unconnected to rebuilding a substantially similar structure at the same location. (Cite to record.) And, further, insurers’ estimation software was sometimes out of date, leading to out-of-date and understated replacement cost estimates. (Cite to record.)

The replacement cost regulation was designed to protect homeowners from being misled into unintended underinsurance. Accordingly, the regulation provides that replacement cost estimates that: fail to include certain enumerated expenses typically incurred in rebuilding (Cal. Code Regs., tit. 10, § 2695.183, subd. (a)); do not reflect actual costs to rebuild a

substantially similar structure on the same parcel (*id.* at subd. (b)-(d)); or are out-of-date (*id.* at subd. (e)), are untrue, deceptive, or misleading and therefore prohibited under section 790.03, subdivision (b) (Cal. Code Regs., tit. 10, § 2695.183, subd. (j)).<sup>9</sup>

**A. The replacement cost regulation merely requires that estimates match consumer expectations**

Respondents summarily assert that the replacement cost regulation “would cover something that on its face would not be deemed as ‘unfair,’ deceptive,’ or ‘misleading[.]’” (ABM 38, 41.) Respondents’ examples focus on individual, hypothetical circumstances where a replacement cost estimate that does not comply with subdivisions (a)-(e) of the regulation might—through happenstance—still result in coverage adequate to pay the costs required for a complete rebuild. (ABM 41.) For example, they posit (without citation) the possibility that an insurer’s failure to keep its replacement cost methods current might result in a total replacement cost estimate that is *higher* than required, if construction costs have declined in the interim. (*Ibid.*)

This argument incorrectly assumes that whether or not a replacement cost estimate is misleading is judged only by the bottom-line estimate of coverage. That some small number of replacement cost estimates made in violation of subdivisions (a)-(e) of the regulation might not cause underinsurance in a particular instance does not change the fact that such estimates are misleading in their component details. Such deficiencies

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<sup>9</sup> See OBM 13-15. The regulation contains additional requirements concerning replacement cost estimates. (See, e.g., Cal. Code Regs., tit. 10, § 2695.183, subds. (g)(2) [itemized estimate]; (i) [recordkeeping].) Only the violation of the requirements in (a)-(e), however, are deemed to be misleading. (See *id.*, subd. (j).) Respondents’ complaints about requirements in the regulation’s other subdivisions are not relevant to this appeal. (See, e.g., ABM 42-43.)

deprive homeowners of the ability to understand the coverage purchased, ask questions, and compare policies and prices as between insurers. (See *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 951 [misleading statements include statements that, although true, have a “capacity, likelihood or tendency to deceive or confuse the public”]). Further, they are unfair to other insurers that provide complete, current information about the replacement cost coverage they offer.

The purpose of consumer protection laws such as the UIPA is to protect the public against “the probability or likelihood as well as the actuality of deception.” (See *Ford Dealers, supra*, 32 Cal.3d at p. 363, quoting *Chern v. Bank of America* (1976) 15 Cal.3d 866, 876.) A statement is misleading where “consumers are likely to assume something”—here, that replacement cost estimates include all expenses typically incurred in rebuilding, and that they reflect actual and current costs—“that is in fact not true.” (See *Ford Dealers, supra*, 32 Cal.3d at p. 363-364; see also *Compton v. Countrywide Financial Corp.* (9th Cir. 2014) 761 F.3d 1046, 1053 [noting that the inquiry whether an omission is likely to mislead consumers is objective].) The Commissioner’s replacement cost regulation does no more than ensure that replacement cost estimates are constructed to match consumer expectations, and thus are not misleading.

**B. The Court should reject respondents’ belated attempt to argue that there was no serious underinsurance problem necessitating the regulation**

Respondents attempt to diminish the significance of the underinsurance problem that precipitated the replacement cost regulation, asserting that the Commissioner received only 70 complaints. (ABM at 52-53, citing RF V:1254, VI:1430.) To the extent that respondents’ contention is that the regulation was not reasonably necessary, it may be quickly rejected. At trial and before the court of appeal, respondents “disclaimed

any attack on the [replacement cost r]egulation on the basis of lack of necessity.” (Opn. 18, fn. 8.) They should not be allowed to make a necessity argument for the first time before this Court. And, in any event, the Commissioner reasonably concluded that the underinsurance problem was significant and widespread, based on these representative complaints and other evidence. (See, e.g., RF IV:1059 [United Policyholder survey reflecting that more than 75 percent of those responding to the survey were underinsured by an average amount of \$240,000, but only 18 percent of those respondents complained to the Commissioner about underinsurance]; OBM 7-12 [discussing legislative action to address underinsurance]; MJN, Exs. A through F, pp. 1-30 [legislative analyses identifying confusion over replacement cost estimates as factor contributing to underinsurance]; RF VI:1430 [describing evidence supporting Commissioner decision to issue the replacement cost regulation].) The replacement cost regulation constitutes the Commissioner’s reasonable, industry-wide response to a serious and widespread problem.

### **III. RESPONDENTS’ FREE SPEECH ARGUMENT IS NOT PROPERLY BEFORE THIS COURT AND LACKS MERIT**

Respondents purport to invoke the canon of constitutional avoidance, arguing that this Court should construe section 790.10 to preclude the Commissioner’s authority to issue the replacement cost regulation, so that the Court may avoid “resolv[ing] whether the [r]egulation is (at least as applied in some circumstances) unconstitutional” under the First Amendment. (ABM 51.)

This argument is fundamentally flawed in at least two respects. First, respondents have not pursued or preserved the issue of the regulation’s constitutionality, so there is no constitutional determination to be avoided. Neither the trial court nor the court of appeal addressed this issue, and the issue was not raised by the Commissioner in his petition for review, or by

respondents in their answer. (Cal. Rules of Court, rule 8.516(a)(1); see also *Quesada v. Herb Thyme Farms, Inc.* (2015) 62 Cal.4th 298, 324 [declining to address issue not previously addressed by lower courts].)<sup>10</sup>

Second, the avoidance canon is not a mechanism for striking down a regulation in its entirety and on its face, but rather is an interpretative tool that applies when courts are faced with two plausible interpretations of a statute, one of which raises serious constitutional doubts. (*People v. Gutierrez* (2014) 58 Cal. 4th 1354, 1373.) In those circumstances, courts will adopt the construction that “will render [the statute] valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable.” (*Ibid.*, quoting *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 548.) Here, there is no question that section 790.10 is valid, regardless of the interpretation this Court adopts. As such, the cannon of constitutional doubts cannot be used to strike down a regulation respondents find objectionable in the guise of interpreting its authorizing statute. (See *United States v. Apel* (2014) \_\_\_ U.S. \_\_\_, 134 S.Ct. 1144, 1153 [courts “do not ‘interpret’ statutes by gerrymandering them with a list of exceptions that happen to describe a party’s case”].)

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<sup>10</sup> There is, in any event, no merit to respondents’ free speech claim. By requiring the disclosure of complete and accurate factual information regarding replacement cost estimates, the regulation “furthers, rather than hinders, the First Amendment goal of discovery of truth and contributes to the efficiency of the ‘marketplace of ideas.’” (*Beeman v. Anthem Prescription Management, LLC* (2013) 58 Cal.4th 329, 357.) Requirements of this type are subject to rational basis review and are constitutional so long as they bear “‘a rational relationship to a conceivable legitimate state purpose.’” (*Id.* at p. 364, quoting *California Grocers Assn. v. City of Los Angeles* (2011) 52 Cal.4th 177, 209; see also *Zauderer v. Office of Disciplinary Counsel* (1985) 471 U.S. 626, 651.) There can be no reasonable dispute that the replacement cost regulation meets this standard.

## CONCLUSION

The Commissioner respectfully requests that the Court reverse the court of appeal's judgment, uphold the replacement cost regulation, and remand this matter for entry of judgment in favor of the Commissioner.

Dated: March 11, 2016

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the attached **REPLY BRIEF ON THE MERITS** uses a  
13 point Times New Roman font and contains \_\_\_\_\_ words.

Dated: March 11, 2016

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