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IN THE
SUPREME COURT OF CALIFORNIA

SAMUEL HECKART,
individually and on behalf of a Class of those similarly situated,

Plaintiff and Appellant,

v.

A-1 SELF STORAGE, INC., *et al*

Defendants and Respondents,

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE
CASE NO. D066831

PETITION FOR REVIEW

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Service on the Office of the Attorney General and the District Attorney of the County of San Diego pursuant to Bus. & Prof. Code § 17209

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE(S)

STATE CASES

FEDERAL CASES

STATUTES

OTHER AUTHORITIES

To the Honorable Chief Justice and Honorable Associate Justices of the California Supreme Court:

Plaintiff-Appellant Samuel Heckart ("Plaintiff") respectfully petitions this Court for review of a published Opinion by the Court of Appeal, Fourth Appellate District, Division One. The Court of Appeal's Opinion, *Heckart v. A-1 Self Storage, Inc.* (Dec. 30, 2015, D066831) ____ Cal.Rptr.3d ____ [2015 WL 9582722] ("Opinion") affirms the Superior Court's order sustaining a demurrer to Plaintiff's First Amended Complaint ("Complaint") and dismissing Plaintiff's causes of action against Defendants Deans & Homer, A-1 Self Storage, Inc., Caster Properties, Inc., Caster Family Enterprises, Inc., and Caster Group L.P. ("Defendants"). A copy of the Opinion is attached to this Petition as Appendix A. Pursuant to California Rules of Court, Rule 8.500(b), Plaintiff asks the Court to grant review of the Opinion to secure uniformity of decision and settle the most foundational rules of insurance law in California.

I. ISSUES PRESENTED FOR REVIEW

1. If a self-storage facility's form storage rental agreements satisfy the elements of "insurance" under California Insurance Code ("Code") § 22 and satisfy all other elements of "insurance" under Code § 1758.75, are those storage rental agreements regulated "insurance" under the Code? (Yes)

2. Is "principal object" a necessary element of every "insurance" contract under the California Insurance Code? (No)

3. Is an informal Department of Insurance ("DOI") staff decision regarding alleged "insurance" entitled to judicial deference where there is no evidence that the DOI saw the contracts in question? (No)

II. INTRODUCTION

This case implicates the fundamental roles of California's legislative, executive and judicial branches of government. A long-established, judicially created test for identifying "insurance" in this State has come into direct conflict with more recently enacted provisions of the California Insurance Code ("Code"). The Courts of Appeal now disagree about when and how the judicial test should be applied. Two Courts of Appeal have gotten it right, but the Court of Appeal in this case got it very wrong. The published Opinion below ignores numerous, controlling statutory commands and also defers to an *ad hoc* Department of Insurance ("DOI") opinion letter that contradicts the Code's unambiguous text. This Court must intervene to restore harmony across the Courts of Appeal, the DOI and the California Legislature.

This case also implicates the integrity of consumer transactions occurring daily throughout California. Defendants here are a regional insurance company and owners of self-storage facilities providing storage units for personal property. For nearly a decade, the storage facilities have intentionally fleeced tens of thousands of consumers by pushing overpriced, ill-funded and illegal renters' insurance contracts on every customer who walks through their doors. The storage facilities' insurance contracts are the brainchild and very penmanship of the defendant insurance company, which has made an entire line of business out of teaching non-insurance companies how to violate the Code in California: and get away with it.

While Plaintiff's case focuses on a type of renters' insurance, the Opinion below has unavoidable and disastrous consequences for many different types of everyday consumer transactions, including (but not

limited to) renting a car, buying a cell phone, and buying a house. The Opinion below establishes—for the first time ever—that practically any insurance policy can be attached to a related consumer contract, and that policy ceases to be regulated "insurance" under the Code. Stated differently, non-insurance companies can now plug insurance policies word-for-word into their business contracts, inflate the premiums, deflate the coverage, delete the disclosures, and share the profits of a new world where anyone can sell sham insurance without consequence.

This Court must grant review to unravel conflicting legal standards and stem a rising tide of consumer abuse that the Legislature has wisely and expressly outlawed.

III. STATEMENT OF THE CASE

A. Legal Background

The California Insurance Code is "designed to protect the insured, or the public, from the insurer." (*California Physicians' Service v. Garrison* (1946) 28 Cal.2d 790, 810). The Code contains many vital consumer protection provisions. For example, it requires insurance companies to have adequate reserves available to pay their policyholders. (*E.g.*, § 690.).[1] The Code also requires insurance companies to make meaningful disclosures in their insurance contracts and prohibits misrepresentations in connection with selling insurance. (*E.g.*, §§ 330-361, 780-784.) The Code even establishes rules of professional conduct for insurance salespeople in

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[1] All citations to § or §§ herein refer to sections of the California Insurance Code.

order "to protect the public." (*E.g.*, § 1737.) In essence, the Code is a comprehensive statutory scheme that regulates all kinds of "insurance" businesses and contracts in California: for the benefit of the public.

But what is "insurance?" An inquiry into whether a particular contract is regulated as "insurance" begins with Code § 22. Section 22 defines "insurance" generally as "a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event." (§ 22.) This Court has long recognized that such a broad definition could be read to "engulf practically all contracts." (*Transportation Guarantee Co. v. Jellins* (1946) 29 Cal.2d 242, 249.) The Code, however, is not intended "to regulate all arrangements for assumption or distribution of risk." (*Ibid.*) It is only intended to regulate insurance contracts. To determine whether particular contracts are actually "insurance" policies subject to Code regulation, "each contract must be tested by its own terms as they are written . . . and as they are applied under the particular circumstances involved." (*Id.* at 248.)

For 70 years, California courts have used the "principal object test" to help shape (not supplant) this fact-dependent inquiry. (*See generally id.; Garrison*, 28 Cal.2d 790.) The principal object test reflects the settled proposition that not every contract containing elements of risk-shifting and risk distribution is regulated "insurance" under the Code. (*Truta v. Avis Rent A Car Sys. Inc.* (1987) 193 Cal.App.3d 802, 812-1.) Accordingly, even when a contract satisfies § 22's general definition of "insurance," courts inquire "whether [risk] or something else to which [risk] is related in the [contract] is [the contract's] principal object and purpose." (*Jellins*, *supra*, 29 Cal.2d at 249.)

But the Code's formulation of "insurance" is not exhausted by § 22; it identifies twenty-one specific "classes" of insurance, each with its own additional elements. (*See* §§ 100-124.5.) Those twenty-one classes include familiar things like life insurance, disability insurance, homeowners' insurance and car insurance. (*Ibid.*) The Code also defines specific types of "insurance" that are not expressly associated with any of the classes. (*See, e.g.,* § 12880 [defining "pet insurance"]; § 1758.69 subd.(e)(1) [defining "portable electronics insurance"]; § 1758.75 [defining storage renters' insurance].) Most of the Code's specific definitions of "insurance" do not suffer from the same overbreadth that plagues § 22. In fact, the Code specifically defines certain types of "insurance" as being "incidental" (not central) to non-insurance contracts. *E.g.,* § 1758.75 (storage renters' insurance); § 1753 (travel insurance); 1758.85 (personal effects insurance); § 1758.992 (credit insurance).) Can the principal object test render such specifically defined, "incidental" types of contracts non-insurance under the Code?

B. Defendants are allegedly distorting California "insurance" law for their own gain at the public's expense.

In 2004, the California Legislature enacted Division 1, Part 2, Chapter 5, Article 16.3 of the California Insurance Code ("Storage Insurance Act" or "Act"), §§1758.7, *et seq.* , "in reaction to perceived abuses by the self-storage industry." (¶53.)[2] The Storage Insurance Act

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[2] Citations to ¶__ or ¶¶__ refer to paragraph(s) of Plaintiff's First Amended Complaint ("FAC"), which is the operative complaint here.

prohibits storage facilities from selling storage insurance to their customers without a license from the California Department of Insurance. (§§ 1758.7 subd.(a)-(b), 1758.75 subd.(a).) In addition to licensing requirements, the Act requires storage facilities to comply with insurance-related disclosure requirements and employee training regimes, including ethics training. (§§ 1758.72, 1758.76.) The Act mandates that in selling storage insurance, a storage facility must work with a regulated insurance company that vouches for the facility's trustworthiness and competence to sell storage insurance. (§ 1758.71 subd.(a).) The Act further provides that a licensed storage facility can only sell storage insurance "on behalf of" an insurer "authorized to write those types of insurance policies" in California. (§§ 1758.7 subd.(b), 1758.75.)[3]

Plaintiff's Complaint alleges the following facts, which are presumed true here. (*Macias v. State of California* (1995) 10 Cal.4th 844, n.1 ["For purposes of review, the Court of Appeal . . . assumed the material facts in the complaint to be true. We shall likewise . . . ."].) Defendant Deans & Homer is an insurance company operating in California and across the western United States. (¶19.) Deans & Homer did not like the Storage Insurance Act of 2004 because it was not a profitable statute for their storage insurance business. (¶3.) So Deans & Homer decided to test the limits of California's "insurance" laws. (¶22-31.) Dean & Homer soon began pitching a new consumer "Protection Plan" to self-storage facilities throughout California. (*Ibid.*) Deans & Homer approached Defendant A-1 Storage, Inc. ("A-1") and persuaded A-1 to sell a new "Protection Plan," on

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[3] To "write" a policy means to act as the insurer on the policy.

A-1's own behalf to all of its storage renters in California. (*Ibid.*) Deans & Homer told A-1 that if A-1 sold storage insurance policies insured by Deans & Homer, then those policies (and A-1 itself) would be subjected to unfavorable "insurance" regulations. (*Ibid.*) However, Deans & Homer also told A-1 that if A-1 became the insurer—as well as the seller—of the same storage insurance policies, then neither A-1 nor the policies would be regulated because the policies would not be "insurance" under the Code. (*Ibid.*)

This is Deans & Homer's creative distortion of California insurance law: that when a standard storage insurance policy becomes part of a storage rental agreement, that policy ceases to be regulated "insurance" under the Code. This view was and remains wrong, but A-1 readily accepted it. *Id.* Consequently, for almost a decade, A-1 has been hard-selling all of its storage customers a toxic "Protection Plan," as an "addendum" to A-1's storage rental agreements. (¶¶22-48.) The Protection Plan is nothing but a repackaged version of Deans & Homer's own storage insurance policies. (¶¶3, 25-27, 31.) If customers reject the Protection Plan, A-1 automatically enrolls them in it anyway, unless they provide A-1 with documentation of other insurance within 30 days. ¶37. The material difference between A-1's Protection Plan and Deans & Homer's storage insurance policies is that "the Protection Plan offers less coverage and costs more than Deans & Homer's Customer Storage Insurance Policy." (¶42.) Worse, A-1 does not segregate customers' monthly Protection Plan premiums and does not maintain adequate reserves to pay "Protection Plan" claims. (¶48.)

Not only did Deans & Homer draft and provide A-1 with the abusive "Protection Plan" itself, Deans & Homer gave A-1 Protection Plan claim forms (read: "storage insurance claim forms") and a series of detailed procedures for implementing the Protection Plan. (¶¶26-27.) Of course, Deans & Homer is no charity for storage facilities. In exchange, Deans & Homer coinsured with A-1 (not storage customers) some of the losses incurred by A-1 in paying Protection Plan claims. (¶¶28-30.) Under Defendants' coinsurance contract, A-1 grants Deans & Homer the continuing right to adjust and settle "Protection Plan" claims directly with A-1's customers. (¶29.) So under Defendants' insurance scheme, A-1's customers have no recovery rights against the well-capitalized insurance company, but the well-capitalized insurance company maintains substantive rights against the customers. (*Ibid.)*

In sum, Dean's & Homer:

(1) crossed out its name from its storage insurance policies and wrote in A-1's name as the insurer; ¶31

(2) increased the premiums and slashed the coverage provided by those policies; (¶¶40-42)

(3) gave those insurance policies to unlicensed, unregulated A-1 to hard-sell on A-1's own behalf; (¶¶22-27) and

(4) secured its own profits by collecting coinsurance premiums from A-1 and maintaining substantial control over customers' "Protection Plan" claims. (¶¶28-31.)

As a result, Plaintiff and the Class have overpaid for inferior, illegal storage insurance policies under the Act. (¶48.)

C. Procedural History

Plaintiff filed the operative Complaint on April 14, 2014 after a limited opportunity for discovery. The FAC asserts causes of action against Defendants under California's Unfair Competition Law, BUS. & PROF. CODE §§ 17200, *et seq.*, the Consumer Legal Remedies Act, CIV. CODE §§ 1750, *et seq.*, and claims of negligent misrepresentation and civil conspiracy. (¶¶63-101.) The Complaint alleges the above facts and seeks damages, restitution, and declaratory and injunctive relief based on A-1's illegal sale of storage "insurance" policies in violation of the Act. (*Id.* at Prayer.) Plaintiff seeks to represent a multi-year Class of A-1's customers who have been and continue to be pushed into buying A-1's "Protections Plans" on a regular basis. (¶56.)

Defendants demurred to the Complaint, arguing that Defendants' "Protection Plan" cannot be "insurance" under § 22's principal object test. At the hearing on Defendants' demurrer, the trial court grappled with the meaning of "insurance" and expressed confusion about whether the principal object test should even apply in light of the Storage Insurance Act:

> THE COURT: It's a significant question. It's a big decision. *** And what's confusing and what creates a problem is the cases that seem to have two different ways of looking at it: the [principal object test], and then the determination is it insurance [under the Code] or not, which . . . don't necessary go together.

RT at 25. Ultimately, the Superior Court applied § 22's principal object test to hold that Defendants' "Protection Plan" was not storage insurance notwithstanding the Storage Insurance Act. (*Heckart v. A-1 Self Storage, Inc.* (Super. Ct. San Diego County, 2014, No. 37-2013-00042315).)

Plaintiff appealed, arguing that the Protection Plan is clearly "insurance" under the Act and that the principal object test must be reconciled with the Code's specific "insurance" definitions outside § 22. Defendants urged the Court to apply the principal object test as dispositive, notwithstanding the Act.

The Court of Appeal applied Defendants' dispositive version of the principle object test and held that the Protection Plan was not storage insurance because "the principal object" of A-1's storage rental agreement and Protection Plan "addendum" was "the rental of storage space." (Opinion at 9-10.) The Court of Appeal also deferred to a conclusory DOI opinion letter ("Staff Letter") without engaging in any deference analysis. (*Id.* at 12-13.) The Staff Letter did not address a single aspect or provision of the 2004 Storage Insurance Act. (*Ibid.*) In fact, there is no evidence in the record that the DOI ever saw Defendants' "Protection Plan" or reinsurance contracts. (*Id.* ["Deans & Homer requested an opinion from the DOI as to whether a program structured substantially similar to the Protection Plan constituted insurance."]) The Court of Appeal relied heavily on that Staff Letter in holding that Defendants' Protection Plan is not storage insurance. *Id.*

VI. THERE ARE NUMEROUS GROUNDS FOR REVIEW

The grounds for review of the Court of Appeal's Opinion are numerous and of paramount importance to this State.

First, the principal object test has been a key part of defining the outer bounds of "insurance" in California for the last 70 years. (*See generally Garrison*, 28 Cal.2d 790; *Jellins*, 29 Cal.2d 242.) But California courts and the DOI are now applying the principal object test in a manner

that contradicts and nullifies whole sections of the Code it purports to interpret. The Code says one thing, and the principal object test as interpreted by the Opinion below, now says the opposite. There is no reconciling the two.

Second, the Courts of Appeal now disagree about whether the principal object test applies at all to the Code's specifically defined classes of "insurance." (*Compare Truta, supra,* 193 Cal.App.3d 802 *and Wayne v. Staples Inc.* (2006) 135 Cal.App.4th 466, *with* Opinion.) Is the principal object test one of several fact-dependent tools for identifying the outer bounds of "insurance" under § 22, or is it a threshold inquiry that converts regulated types of "insurance" into non-"insurance" when appended to a non-insurance contract? The answer to this question will not only clarify California "insurance" law, but also guard the integrity of everyday economic transactions in California.

Third, courts should not defer to conclusory, *ad hoc* agency opinion letters without any deference analysis. This is particularly true where, as here, the DOI has made an *ad hoc* "insurance" determination without seeing the contracts in question. Moreover, because the applicable statute here is unambiguous and the DOI's Staff Letter contradicts the statute's plain text, deference is inappropriate. If the Opinion below is not reviewed, it encourages erroneous judicial deference across the landscape of California jurisprudence.

Fourth, while this case directly affects one type of "insurance" (storage renters' insurance) under the Code, similar statutory language is used throughout the Code to define many different types of "insurance." If the Opinion below is correct that storage insurance is not "insurance" when

offered by a storage facility, then marine insurance is not "insurance" when offered by a shipping company, apartment renters' insurance is not "insurance" when offered by landlords, and homeowners' insurance is not "insurance" when offered by homebuilders. None of these arrangements are subject to regulation under the Court of Appeal's Opinion. This means no reserves, no disclosure requirements, no ethical rules, and many other dangers. The potential for unchecked, abusive insurance schemes to be carried out against Californians is practically limitless, unless this Court grants review.

A. THE PRINCIPAL OBJECT TEST NOW CONFLICTS WITH THE CODE ITSELF

In 2004, the California Legislature enacted the Storage Insurance Act. §§ 1758.7, *et seq.* Article 16.3 of the Act governs the circumstances under which storage facilities can sell storage renters' insurance to its customers. (*Ibid.*) The Act first provides:

> No self-service storage facility . . . shall offer or sell insurance unless it has complied with the requirements of this article and has been issued a license . . . to offer or sell the *types of insurance* specified in Section 1758.75 *in connection with and incidental to* [storage] rental agreements . . . ."

(§§ 1758.7 (a)-(b) [emphasis added].) Section 1758.75 then specifies the "types of insurance" that a licensed storage facility may sell:

> A self-storage facility . . . licensed under this article may [sell storage insurance] for *an authorized insurer* only with respect to the following types of insurance and only in connection with, and incidental to, self-storage rental agreements: ¶(a) Insurance that provides *hazard insurance coverage to renters for the loss of, or damage to, tangible personal property in storage or in transit during the rental period.*

(§ 1758.75 [emphasis added].) The Act further provides:

> If *any person* sells insurance *in connection with, or incidental to*, self-service storage rental agreements . . . without obtaining the license required by this article, the commissioner may issue a cease and desist order . . . .

(§ 1758.74 [emphasis added].)

The elements of storage insurance under the Act are therefore: (1) "hazard insurance coverage," (2) for "renters," (3) "in connection with and incidental to" storage rental agreements; (4) "for the loss of, or damage to, tangible personal property," that is (5) "in storage or in transit," (6) "during the rental period." (*See* § 1758.75.) The Court of Appeal, however, did not apply a single fact about Defendants' Protection Plans to the elements of this newly defined "type of insurance" under the Code. (*See generally* Opinion.) If the Court of Appeal had done so, it would have found that:

(1) The Protection Plan promises *"coverage"* of up to $2,500 in cash per customer in the event of *"hazards"* like "fire, theft, vandalism, malicious mischief, rook lea[k], water damage, vandalism [again], or collapse of the building where the property is stored"; (§ 1758.75; Opinion at 3)

(2) The Protection Plan is made available *"to renters"* of A-1's storage spaces; (*ibid.*)

(3) The Protection Plan is an *"incidental"* addendum *"connected"* to all of A-1's storage rental agreements; (§ 1758.75; Opinion at 1-4)

(4) The Protection Plan's $2,500 in "coverage" promises to pay "renters" for the *"loss of, or damage to, tangible personal property"* resulting from the above "hazards," among others; (§ 1758.75; Opinion at 3)

(5) The Protection Plan's "coverage" applies to the "renters'" "tangible personal property" while such property is *"in storage"*; (*ibid.*) and

(6) The Protection Plan's "coverage" applies to losses of or damage to such property occurring *"during the rental period."* (*Ibid.*)[4]

Indeed, in addition to § 22's general "insurance" elements, Defendants' Protection Plan satisfies all six particularized elements of storage "insurance" under the Act.[5] Hence, the Protection Plan is "insurance." This case is truly that simple.

The single most important interpretive question in this case is this: *Why does an Article 16.3 license "only" allow storage facilities to sell "incidental" storage insurance policies written by "an authorized insurer?"* (§§ 1758.7 subd.(b), 1758.75.) There are only two possible answers to this question:

(a) the Legislature intended to require storage facilities to get a license and comply with the Code before selling "incidental" storage insurance policies that *are* backed by a well-regulated, well-capitalized insurance company, but intended that no licensing or compliance is required when storage facilities sell

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[4] There is no dispute that Defendants' "Protection Plans" also satisfy the baseline elements of "insurance," which are risk shifting and risk distribution. (*See Truta*, *supra*, 193 Cal.App.3d at 812; Opinion at 9-10 ["[W]e consider whether the Protection Plan's principal object was risk shifting and distribution."].)

[5] The Court of Appeal made no mention of this because it wrongly believed that "principal object" is a necessary element of every conceivable "insurance" policy under the Code. (*See generally* Opinion.)

the same "incidental" policies, under the same circumstances, *as an unregulated insurer*; or

(b) the Legislature intended that self-storage facilities not write such "incidental" "insurance" policies themselves unless they become "authorized insurers" under the Code.

(*Ibid.*)

The only serious answer is (b). Answer (b) is also the only answer that harmonizes the entire Act within itself and with the rest of the Code. (§ 1758.74 [prohibiting *"any person"* from selling "insurance in connection with, or incidental to, self-service storage rental agreements"]; *see also* § 680 ["An insurer shall not transact any class of insurance which is not authorized by its charter."]; § 700 ["A person shall not transact any class of insurance business in this state without first being admitted for that class. [A]dmission is secured by obtaining a certificate of authority from the [DOI] commissioner."]; § 717 ["Before granting a certificate of authority, the commissioner shall consider the qualifications of [an insurer] in respect to the following subjects (a) capital and surplus; (b) lawfulness and quality of investments; (c) financial stability; (d) reinsurance arrangements; (e) competency, character and integrity of management; (f) ownership and control of issued and outstanding shares . . . ; (g) whether claims under policies are promptly and fairly adjusted and are promptly and fully paid in accordance with law and the terms of the policies; (h) fairness and honesty of methods of doing business; . . . and (j) hazard to policy holders or creditors."].)[6]

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[6] Self-storage "insurance" as defined in § 1758.75 *necessarily* falls within one of the Code's twenty-one specific "classes" of insurance. (*See* § 120

The DOI has not evaluated A-1's capital structure or financial stability. (§§ 717 subd.(a), 717 subd.(c).) The DOI has not evaluated A-1's investments. (§ 717 subd.(b).) The DOI has not evaluated A-1's competency, character or integrity of management. (§ 717 subd.(e).) The DOI does not know who A-1's controlling shareholders are. (§ 717 subd.(f).) The DOI never evaluated whether A-1 properly adjusts or fully pays customer claims. (§ 717 subd.(g).) The DOI has not evaluated the fairness or honesty of A-1's business methods. (§ 717 subd.(h).) The DOI has not evaluated A-1 for any hazards that threaten "Protection Plan" policyholders or A-1's creditors. (§ 717 subd.(j).) This is why the Legislature does not want storage facilities writing "incidental" storage "insurance" policies: *with or without an Article 16.3 license to sell such policies for an "authorized insurer."* (§§ 1758.7 subd.(b), 1758.75.) A-1 is not qualified to act as an "incidental" insurer without any DOI oversight. (*Accord* § 1758.78 [prohibiting even licensed storage facilities from "[a]dvertis[ing], represent[ing], or otherwise portray[ing] [themselves] or [their] employees as licensed insurers"].)

Yet answer (a) above is the interpretation adopted by the Opinion below. (*See generally* Opinion.) But the Opinion's interpretation of the

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(*Footnote Continued*)

["*Miscellaneous* insurance includes . . . any insurance not included in any of the foregoing classes, *and which is the proper subject of insurance.*"]; Sen. Com. on Insurance, Analysis of Assem. Bill No. 2520 (2003-2004 Reg. Session) June 16, 2004, p. 2 [The purpose of Storage Insurance Act was to "create a new limited line of insurance category to regulate the offering for sale of insurance by self-service storage facilities in California."])

Act nullifies much of the Code (*e.g.*, §§ 680, 700, 717) and completely ignores § 1758.74, which provides that:

> If *any person* sells [storage] insurance *in connection with, or incidental to, [selling] self-service storage rental agreements* . . . without obtaining the license required by this article, the commissioner may issue a cease and desist order . . . .

But the Act is rendered superfluous if — as the Opinion held — storage facilities cannot possibly write "incidental" storage "insurance" because of the principal object test. (*But see Dyna-Med, Inc. v. Fair Employment & Hous. Com.* (1987) 43 Cal.3d 1379, 1387 ["[S]tatutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible."])

In addition, the Opinion conditions the definition of "insurance" entirely on the identity of the "insurer". The Opinion provides that if the "insurer" of the "incidental" contract is "authorized," then the contract *is* regulated "insurance," but if the unauthorized storage facility becomes the insurer of the same "incidental" contract, then that contract is *not* regulated "insurance." The Code's definition of "insurer," however, depends on the existence of "insurance." (*See* § 23 [defining "insurer"].) It follows that the meaning of "insurance" under the Code can never depend *solely* on the presence of an "insurer," as the Opinion implies. (*Accord* § 22 [definition of "insurance" depends on contractual terms, not the parties' identities].)

The Court of Appeal here declined to engage in any substantive Code interpretation at all. (*See generally* Opinion.) As a result, its Opinion contradicts the Code's plain text. The Opinion should be reviewed for this reason alone, among the others below.

B. THE OPINION BELOW CONFLICTS WITH TWO OTHER APPELLATE DISTRICTS ON THE MEANING AND APPLICABILITY OF THE PRINCIPAL OBJECT TEST

1. Under *Truta*, the "principal object test" is part of a fact-dependent rule for applying § 22 in isolation, not a threshold test for the Code's specific classes of "insurance."

Truta is the seminal case purportedly relied upon—but actually violated—by the Opinion below. (Opinion at 10.) In *Truta*, car rental company Avis charged its customers an extra fee on top of its car rental prices in exchange for a "collision damage waiver" ("Waiver" or "CDW"). (*Truta*, *supra*, 193 Cal.App.3d at 807-08.) Under the Waiver, Avis would not demand payment from customers if Avis's cars were damaged during the rentals. *Id.*[7] The plaintiff's claims rested on the allegation that the Waiver was an "insurance" policy under § 22. (*Ibid.*) The defendants argued the Waiver was not "insurance" in part because it was "an ancillary and incidental part of the car rental contract." (*Id.* at 809.)

Facing those facts *only* in the context of § 22, *Truta* properly turned to the principal object test to determine whether Avis's Waiver was "insurance." (*See id.* at 812-15.) "The question of whether an arrangement is one of insurance *may* turn, not on whether risk is involved or assumed, but on whether that or something else to which [risk] is related in the

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[7] The allegedly "insured" property in *Truta* thus belonged to the protection seller rather than the protection buyer: quite the opposite of a common insurance policy.

particular plan is [the plan's] principal object and purpose." (*Ibid.* [emphasis added].)[8] *Truta* established the following two-part analysis for identifying "insurance":

> (1) "To what extent, in each case, did the specific transactions or the general line of business at issue involve one or more of the evils at which the regulatory statutes were aimed?"; and
>
> (2) "were the elements of risk transference and risk distribution . . . a central and relatively important element of the transactions or instead merely incidental to other elements that gave the transactions their distinctive character?"

(Id. at 812-13 [quoting Keeton, INSURANCE LAW (1971) § 8.2(c), p. 552].)

Applying this two-part analysis, *Truta* held that Avis's Waiver was not an insurance policy, but instead a "tangential risk allocation" that "should not have the effect of converting the defendants . . . into insurers subject to statutory regulation." (*Id.* at 814.) Importantly, *Truta* explained: "Since [Avis] is not agreeing to pay anybody anything, but [was] simply agreeing not to hold the [customer] liable, there is no need for accumulating reserves." (*Id.* at 815.) Thus, two independent conclusions informed *Truta*'s holding: (1) Avis's Waiver was not the principal object of Avis's car rental agreement; and (2) the Waiver presented no identifiable "evils"

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[8](*But see* Opinion at 9 ["We *must* look to the 'principal object and purpose of the transaction' to determine whether it is a contract of insurance."] [*citing* 12 Appleman, INSURANCE LAW AND Practice (1981) § 7002, p. 14] (emphasis added).)

that the Code was designed to curb. (*See generally Truta, supra.*) Thus, the Waiver was not regulated "insurance."

Nowhere did *Truta* evaluate a contract like Defendants' Protection Plan, in which the alleged "insurer" promises to pay millions of dollars in cash to thousands of consumers if specific hazards materialize. Nowhere did *Truta* say that Avis could sell standard auto insurance policies drafted by Geico, but written by unregulated Avis as the insurer. Instead, *Truta* expressly warned against structuring such obvious, incidental "insurance" arrangements between rental car companies and customers. (*Id.* at 815 ["If the situation was such that [Avis] was agreeing to pay any moneys to third parties, this conclusion would be different."])

This case might be more like *Truta* if A-1 was promising not to hold storage renters liable for damage to A-1's storage facilities. Like *Truta*'s "collision damage waiver," such a "facility damage waiver" would have the protection seller waive payment from consumers, not promise to pay millions in cash to thousands of consumers, as A-1 has. The former situation demands no reserves because no default by the protection seller could occur to harm the protection buyer. (*See Garrison, supra*, 28 Cal.2d at 810-11 [holding that contracts were not "insurance" in part because "no default [could] exist" and "to require reserves would be a useless and uneconomic waste"].) The latter situation, however, requires reserves to protect policyholders from default. (*See Truta*, 193 Cal.App.3d at 815.)[9]

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[9] This Court subsequently adopted and applied *Truta*, but did not suggest—let alone hold—that title companies could write and sell title insurance incidental to conducting title searches. (*See generally Title Ins. Co. of Minnesota v. State Board of Equalization* (1992) 4 Cal.4th 715.)

2. *Wayne* holds that the principal object test is inapplicable where a specific class of "insurance" regulated by the Code is necessarily "incidental" to a primary transaction

In 2006, the Court of Appeal for the Second District decided *Wayne v. Staples Inc.* (135 Cal.App.4th 466). In *Wayne*, Staples retail stores were offering package-shipping services to their customers. (*Id.*, at 471-72.) On top of shipping prices, Staples was offering customers "declared value coverage" that protected against "the risk of loss or damage" to customers' goods while in transit. (*Ibid.*) This "declared value coverage" was actually an "inland marine insurance policy" written by a licensed insurance company, "National Union."[10] (*Ibid.*) The plaintiff's cause of action was based on Staples' unlicensed sale of "insurance" under the Code. *Id.* at 473. Staples argued that "the contracts between Staples and its shipping customers [were] not [insurance] . . . because the principal object or purpose of each agreement [was] to ship packages . . . ." (*Ibid.*)

The *Wayne* court disagreed. Upon reviewing *Truta*, *Wayne* explained that *Truta* does *not* say "the sale of insurance coverage as an incidental part of a more extensive transaction is not subject to regulation under the Insurance Code." (*Id.* at 476.) The *Wayne* court aptly reasoned:

> [W]hile it is true not all contracts allocating risk are insurance contracts subject to statutory regulation, all insurance contracts, even if sold as a secondary or

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[10] The Code specifically defines "marine insurance" as "insurance against any and all kinds of loss of or damage to . . . all goods, freights, cargoes, merchandise, effects, . . . and all other kinds of property . . . in connection with any and all risks or perils of navigation, transit, or transportation . . . ." (§ 103 subd.(a); *see also Wayne*, 135 Cal.App.4th at n.2.)

> incidental facet of a transaction with another, primary commercial purpose, are regulated by the Insurance Code and the Department of Insurance unless they fall within a specific regulatory exemption. Followed to its logical extreme, the contrary rule . . . would permit a car dealership to obtain commissions for the sale of automobile insurance or a real estate broker to sell homeowners insurance without being subject to regulation . . . because in each instance the sale of insurance was incidental to the purchase of a car or house.
>
> Use of the principal-object-and-purpose test to exempt a contract of inland marine insurance from statutory regulation is particularly inappropriate because this class of coverage, expressly regulated by the Insurance Code (*see* Ins. Code, §§ 100, subd. (3), 103), is intended to protect against loss or damage to goods in transit . . . . As a result, this insurance coverage will most often be offered, as it was in this case, in connection with, and incidental to, the customer's primary purpose of shipping his or her goods.

(*Id.* at 476-77.) Accordingly, *Wayne* held that Staples' "declared value coverage" was indeed "insurance" notwithstanding the principal object test interpreting § 22. (*Ibid.)*

In the Superior Court below, Defendants tried to distinguish *Wayne* by saying that Staples' "declared value coverage" was an "insurance" policy *solely* because a licensed insurance company was the "insurer."[11]

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[11] (*See* RT at 26 [Mr. Brooks for the A-1 Defendants: "Yeah. If A-1 was trying to offer a ***Deans & Homer*** insurance policy, they have to be licensed... Mr. Clifford for Deans & Homer: "If A-1 was doing what they were doing in the Staples case and was saying, Buy this policy of insurance[,] [a]nd they were having an insurance policy issued by ***National Union***, . . . then that's a different analysis."]; RT at 28 [Mr. Clifford for Deans & Homer: "Just so we're clear, [Plaintiff] is not insured through Deans & Homer. [Plaintiff] has [no] privity of contract with Deans &

That argument—implicitly adopted by the Opinion below—is circular and turns the entire Code upside down. (*See, e.g.*, Code § 23 [providing that the existence of an insurer depends on the existence of insurance, not the other way around]; Code § 22 [the Code's general definition of "insurance" depends on the characteristics of the contract, not the characteristics of the parties thereto].)

Wayne cannot be reconciled with the Opinion here because, like § 1758.75's specific definition of storage "insurance," § 103's specific definition of "marine insurance" reuses the word "insurance." (§§ 103, 1758.75, subd.(a).) Moreover, just as inland marine insurance is "incidental" by nature, storage insurance is "incidental" by definition. (*Wayne*, *supra*, 135 Cal.App.4th at 477; §§ 1758.7, 1758.74, 1758.75.) Yet unlike the Opinion below, *Wayne* held that the principal object test was not even applicable, much less dispositive. (*Wayne*, *supra*, 135 Cal.App.4th at 476-77.) Here, the Court of Appeal should have found *Wayne*, and not *Truta*, to be "on point and persuasive." Opinion at 10. Instead, the Opinion ignored *Wayne* and created a clear conflict regarding whether and how the principal object test applies to specific definitions of "insurance" outside § 22.[12]

3. The Opinion below conflicts with both *Truta* and *Wayne*.

(*Footnote Continued*)

Homer. Deans & Homer made no representations to [Plaintiff]. There's no relationship whatsoever. And that's why . . . ."].)

[12] The Opinion declines to distinguish or even cite *Wayne* despite the fact that Plaintiff relied heavily on *Wayne* on appeal.

Truta established the principal object test as half of a two-part, fact-specific inquiry for identifying alleged "insurance" contracts under the general definition of insurance provided by § 22. (*Truta*, *supra*, 193 Cal.App.3d at 812-13.) While the Opinion below purports to "find *Truta* on point and persuasive," it ignores the other half of *Truta*'s "insurance" analysis. Opinion at 10. Nowhere does the Opinion analyze whether Defendants' alleged "Protection Plan" and reinsurance agreement "involve one or more of the evils at which the [Code was] aimed." (*Compare* Opinion, *with Truta*, *supra*, 193 Cal.App.3d at 812-13.)

Had the Court of Appeal done so, it would have seen that the Legislature does not want storage facilities selling "incidental" storage insurance for "an authorized insurer" without regulation. (*See* Part IV.A., *infra*.) Clearly then, the Legislature does not want storage facilities selling the same "incidental" storage insurance on their own account without regulation. (*Ibid.*) The Code fundamentally aims to ensure that all "insurers" (incidental or not) are willing and able to pay policyholder claims as needed. (*Ibid.*) A-1's Protection Plan policyholders have no such assurance and thus face a sharply increased default risk that the Code exists to prevent. (*See Id.*; *Garrison*, *supra*, 28 Cal.2d 790; *Truta*, *supra*, 193 Cal.App.3d at 815.) In fact, the Code makes it a crime for authorized insurers like Deans & Homer to reinsure unauthorized insurers like A-1 for purposes of skirting the Code. (§ 803(a) ["No admitted insurer shall assume or reinsure the liabilities of a nonadmitted insurer . . . for the purpose of circumventing the rate and form provisions of this code . . . ."]; § 804 ["Any insurer willfully violating any provision of this article is guilty of a misdemeanor . . . ."].) Yet that is what allegedly occurred here. (¶¶1,

25-30.) Defendants' storage insurance scheme thus presents the precise "evils" that the Act specifically—and the Code generally—aim to prevent. But the Opinion here treats the principal object test as dispositive and does not analyze any potential "evils" at all. (Opinion at 9.) The Opinion therefore violates *Truta.*

As for *Wayne*, it rightly held that the principal object test is not applicable—much less dispositive—when a contract contains a particular type of regulated "insurance." (*Wayne*, *supra*, 135 Cal.App.4th at 476-77.) The Opinion below relies on the principal object test (not the Code) only because the Code's specific definition of storage insurance reuses the word "insurance." (Opinion at 11-12.) But so does the Code's definition of "marine insurance," and the *Wayne* court rightly disregarded the principal object test anyway. (*Id.* at 476-77, n.2; § 103.) The Opinion below therefore contradicts *Wayne* on the most foundational rules for identifying "insurance" in California.

This Court should decide which Court(s) of Appeal properly understood the principal object test's relationship to the Code's specific definitions of insurance: the First District in *Truta* and the Second District in *Wayne*, or the Fourth District here.

C. *AD HOC* DOI OPINION LETTERS ARE NOT ENTITLED TO JUDICIAL DEFERENCE, PARTICULARLY WHERE THE DOI HAS NOT SEEN THE CONTRACTS IN QUESTION

1. The DOI's *ad hoc* Staff Letter is informal and conclusory, and thus not entitled to deference.

"[T]he binding power of an agency's interpretation of a statute or regulation is contextual: [i]ts power to persuade is both circumstantial and

dependent on the presence or absence of factors that support the merit of the interpretation." (*Yamaha Corp. of Am. v. State Bd. Of Equalization* (1998) 19 Cal.4th 1, 13.) Ultimately, "it is the duty of this court ... to state the true meaning of the statute finally and conclusively, even though this requires the overthrow of an earlier erroneous administrative construction." (*Bodinson Mfg. Co. v. California Employment Comm'n* (1941) 17 Cal.2d 321, 326.) "[M]inisterial and informal [agency] actions do not merit [judicial] deference." (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 575-76.)

The DOI's 2008 Staff Letter here presents the height of informality because it is a one-off, conclusory letter addressed to a single private party: Deans & Homer. (Opinion at 12-13.)[13] It concluded that Deans & Homer's description of the "Protection Plan" and reinsurance agreement would not constitute "insurance." (*Id.*) The Staff Letter does not mention, much less interpret, the Storage Insurance Act. *Id.* The Staff Letter did not provide any "administrative [Code] construction" whatsoever. (*Ibid.*) In fact, nothing would prevent the DOI from promulgating a formal rule or writing a new "opinion letter" that reaches the opposite conclusion tomorrow. The DOI's Staff Letter is not even binding on the DOI itself. Thus, the Court of Appeal erred in affording Defendants' Staff Letter "considerable deference."[14] (*Id.*)

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[13] The DOI's 2003 opinion letter to Deans & Homer is irrelevant because it predates the Storage Insurance Act of 2004. (*See* Opinion at 12.)

[14] While the Opinion below relies on the federal Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984) 467 U.S. 837 to justify its "considerable deference" to a DOI Staff Letter, it

2. There is no evidence that the DOI has even seen the alleged "insurance" contracts, so deference is wholly inappropriate.

To determine whether particular contracts are "insurance" subject to Code regulation, "each contract must be tested by its own terms as they are written . . . and as they are applied under the particular circumstances involved." (*Jellins*, *supra*, 29 Cal.2d at 248.) Here, there is no evidence in the record that the DOI even saw the contracts at issue. (*See* Opinion at 12-13.) The record shows that Defendant Deans & Homer simply communicated with the DOI about "a program structured substantially similar to the Protection Plan." (*Id.* at 12.) That loose "program" description eventually begat Defendants' actual Protection Plan and reinsurance contracts. (*Ibid.*) If California courts cannot determine whether contracts are "insurance" without testing them "by their own terms as they are written," how can California courts defer to a DOI "insurance" decision without evidence that the DOI has seen the contracts in question? (*Jellins*, *supra,* 29 Cal.2d at 248.) They cannot. (*Cf. Ibid.*) The DOI's *ad hoc*, conclusory Staff Letter was not only informal and unauthoritative, it was also substantially ignorant of the pertinent facts.

(*Footnote Continued*)

declines to mention the federal Supreme Court's later decision in *United States v. Mead Corp.* (2001) 121 S.Ct. 2164, which makes clear that *ad hoc* agency statements like the Staff Letter are not entitled to deference because they lack "the force of law." (*See* Opinion at 13 [relying on *Chevron* without mentioning *Mead*].) Furthermore, *Chevron* itself holds that even an agency's authoritative interpretation is not entitled to deference when the statute is unambiguous or the interpretation is unreasonable; both are true here. (*See* Part, IV.A., *supra.*)

Therefore, the Opinion erred in deferring to the Staff Letter without evidence that the DOI evaluated the contracts in question. (*See Yamaha Corp. of Am.*, 19 Cal.4th at 13 ["An interpretation of a statute contained in a regulation . . . is more deserving of deference than [one] contained in an advice letter prepared by a single staff member."].)

D. THE OPINION MISCONSTRUES THE ENTIRE CODE AND INVITES FRAUDULENT INSURANCE SCHEMES TO PERVADE CALIFORNIA'S ECONOMY BY ADOPTING THE "LOGICAL EXTREME" THAT *WAYNE* EXPRESSLY REJECTED.

The Court of Appeal relied on the principal object test and ignored the Storage Insurance Act for one reason only: the Act's narrow definition of storage "insurance" reuses the word "insurance." (Opinion at 11-12.) As it turns out, most of the Code's specific definitions of "insurance" incorporate the word "insurance" as well. (*See, e.g.*, §§ 101, 103, 105(b) , 106(a) , 107, 109-115, 118-119.)[15] The Opinion below thus assumes that all specifically defined types of "insurance" under the Code invite application of the principal object test *as a threshold inquiry*. (*Cf.* Opinion at 11-12.) In this way, the Opinion assumes that the Code contains a *fatal, circular flaw*, that requires satisfaction of the principal object test as a *necessary element* of every "insurance" contract. But in doing so, the Opinion failed to construe the Code as a harmonious whole, and rendered

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[15] (*See also* § 12880(d) [pet insurance]; § 1758.992 [credit insurance]; § 1758.85 [personal effects insurance in connection with car rentals].)

the Act's specific definition of storage insurance as surplusage. (*See Garcia v. McCutchen* (1997) 16 Cal.4th 469, 477.)

Section 22 is intentionally overbroad because the Legislature never intended it to be applied in isolation. The Code never regulates "insurance" solely as defined by § 22, but as twenty-one specifically defined "*classes* of insurance," each with their own defining features. (§§ 680, 700.) Accordingly, the Code contains general sections, applicable to the business of insurance as a whole, and sections which only govern specific classes or types of insurance. (*See Fluor Corp. v. Superior Court* (2015) 61 Cal.4th 1175, 1194-96.) The specifically defined insurance classes *exhaust* all possible forms of regulated "insurance" under the Code. (*See* § 120 ["*Miscellaneous* insurance includes . . . any insurance not included in any of the foregoing classes, *and which is the proper subject of insurance.*"])

While § 22 provides the necessary elements of risk shifting and pooling of risk, these elements are insufficient to create regulated "insurance" for a "miscellaneous" contract, unless it is "the proper subject of insurance." (§ 120.) This is where the principal object test has its proper application. For many other specific definitions of insurance, such as self-storage insurance in this case, the additional defining elements are provided by the Code itself. This is why *Wayne* correctly held that the principal object test is inapplicable when there is a specific Code definition for a specific type of "insurance": *especially* where that type of insurance is "incidental" by its very nature. (*Wayne*, 135 Cal.App.4th at 476-77; *see also California Bank v. Schlesinger* (1958) 159 Cal.App.2d Supp. 854, 864 [when a common-law decision conflicts with a statute, the statute takes precedence].) It is also why *Truta* was correct in holding that a collision

damage waiver required application of the principal object test to determine whether it was "the proper subject of insurance." (*Accord* § 120.)

The Opinion below must be reversed because it held that the principal object test is a *necessary* element of *every* regulated insurance contract even though the Code specifically provides otherwise. (*E.g.*, § 1785.75 ["insurance [] in connection with, or incidental to, self-service storage rental agreements... ."]) The Opinion ignored the rule of statutory construction that if "a general and particular provision are inconsistent, the latter is paramount to the former." (CIV. PROC. CODE § 1859.) This fatal flaw reveals why the Opinion below held that Defendants' Protection Plan is not regulated "insurance" even though it satisfies the risk-shifting and pooling elements of § 22 and satisfies every particularized element of storage "insurance" under § 1758.75.

If the Court declines review, California will be rapidly ambushed by a swarm of new, legalized "insurance" schemes that will damage many individuals and businesses across diverse sections of California's economy. PetSmart can sell abusive mutations of "pet insurance" in connection with the sale of a pet. Staples can resume selling abusive mutations of marine insurance *as an insurer*. (*But see Wayne*, *supra*, 135 Cal.App.4th 466.) Unregulated homebuilders can sell homeowners' insurance. Unregulated employers can offer incidental disability insurance. The potential insurance schemes that can now evade the Code in this State are practically endless. Indeed, now that the principal object test can be used to exempt almost *anything* from regulation as "insurance," it is open season on Californians. The party has already started for Defendants, and it should end today.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that the Supreme Court of California review the Court of Appeal's Opinion in this case.

Respectfully submitted,

Dated: February 8, 2016

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CERTIFICATE OF WORD COUNT (Rule 8.204)

I, William R. Restis, counsel for appellant, certify pursuant to the California Rules of Court, that the word count for this document is 7,991 words, excluding the tables, this certificate, and any attachment permitted under rule 8.204(c). This document was prepared in Word, and this is the word count generated by the program for this document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed, at San Diego, California, on February 8, 2016.

Dated: February 8, 2016

FINKELSTEIN & KRINSK LLP
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Counsel for Plaintiff and Appellant
Samuel Heckart

Appendix A

Filed 12/30/15

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SAMUEL HECKART, Plaintiff and Appellant, v. A-1 SELF STORAGE, INC. et al., Defendants and Respondents.	D066831 (Super. Ct. No. 37-2013-00042315-CU-BT-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, John Meyer, Judge. Affirmed.

Finkelstein & Krinsk and William R. Restis, for Plaintiff and Appellant.

Sheppard Mullin Richter & Hampton and John T. Brooks, for Defendants and Respondents for A-1 Self-Storage, Caster Group, Caster Properties, Inc. and Caster Family Enterprises, Inc.

Wilson, Elser, Moskowitz, Edelman & Dicker, John R. Clifford and David J. Aveni, for Defendant and Respondent Deans & Homer.

In this case, we conclude an addendum to a storage unit rental agreement, which modified the agreement's allocation of liability for damage or loss to stored property, was not "insurance" subject to regulation under Article 16.3 of the Insurance Code concerning

self-service storage agents. Rather, the addendum was dependent on the rental agreement whose principal object was the rental of storage space. Thus, the storage facility that offered the addendum did not engage in the unlicensed sale of insurance.

Samuel Heckart brought this action against A-1 Self Storage, Inc. (A-1), Caster Properties, Inc., Caster Family Enterprises, Inc., Caster Group LP (Caster Group), and Deans & Homer (together, Defendants) for violations of the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq. (the UCL)), violations of the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq. (the CLRA)), negligent misrepresentation, and civil conspiracy. Heckart alleged A-1's sale of a Customer Goods Protection Plan (the Protection Plan) in connection with its rental of storage space constituted unlicensed sale of insurance. The trial court sustained Defendants' demurrer to Heckart's first amended complaint without leave to amend, concluding the Protection Plan was not insurance. Heckart appeals, contending his allegations are sufficient to state the asserted causes of action because the Protection Plan is insurance that must comply with the Insurance Code. We find his arguments unavailing and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A-1 operates storage facilities in California. Caster Properties, Inc., Caster Family Enterprises, Inc., and Caster Group have ownership, operation or management interests in A-1.

In June 2012, Heckart rented a storage unit from A-1. He signed A-1's standard rental agreement (the Rental Agreement), which set out the basic terms of the rental. The Rental Agreement provided:

> "11. INDEMNITY: Tenant(s) does hereby Indemnify and hold harmless Landlord from any loss by reason of injury or damage to person or property, from whatever cause, all or in part connected with the condition or use of the premises. . . .
>
> "12. INSURANCE: Tenant, at Tenant's expense, shall maintain a policy of fire, extended coverage endorsement, burglary, vandalism and malicious mischief insurance for the actual cash value of stored property. Insurance on Tenant's property is a material condition of this agreement and is for the benefit of both Tenant and Landlord. Failure to carry the required Insurance is a breach of this agreement and Tenant assumes all risk of loss to store property that would be covered by such Insurance.
>
> "[¶] . . . [¶]
>
> "19. CUSTOMER GOODS PROTECTION PLAN: If Tenant(s) elects to participate in [the Protection Plan], those provisions in this rental agreement concerning landlord's liability which are modified by [the Protection Plan] are considered never to have been in effect."

The Protection Plan reiterated terms of the Rental Agreement, including that the tenant assumed the sole risk of loss or damage to stored property, A-1 was not liable for loss or damage to stored property, and the tenant must insure his or her stored property. The Protection Plan stated, however, that for an additional payment of $10 per month, A-1 would retain liability for loss of or damage to the tenant's stored property up to $2,500 for losses caused by fire, explosion, smoke, theft, vandalism, malicious mischief, roof leaf, water damage, vandalism, or collapse of the building where the property was stored. The Protection Plan went on to state that, if elected, "[t]his limited acceptance of liability is a modification to the waiver of liability in paragraph eleven (11) of the rental agreement that it forms a part of. It satisfies the insurance requirement stated in paragraph twelve (12)."

The form Protection Plan required the tenant to either initial to accept or decline participation in the plan. Heckart declined participation by initialing that option, which provided: "No, I decline participation in the . . . Protection Plan. I am currently covered by an insurance plan that covers my belongings in the storage facility. I understand that I need to provide the policy information in writing to the facility Owner within 30 days or I will automatically be enrolled in the . . . Protection Plan until I do provide such information to the Owner." Heckart "inadvertently" purchased the Protection Plan and was enrolled in it, presumably because he failed to provide proof of insurance within 30 days.

Deans & Homer is an insurance underwriter, agent and broker licensed to sell insurance by the California Department of Insurance (DOI). Deans & Homer provided A-1 with the template for the Protection Plan agreement and forms, policies, and procedures needed to implement the Protection Plan. It also sold A-1 a Storage Operator's Contract Liability Policy (Storage Liability Policy) that covered A-1's Protection Plan losses. For a premium of $0.74 per month for each Protection Plan participant, Deans & Homer assumed liability for all of A-1's Protection Plan losses over $250,000 per year. Deans & Homer also retained the right to adjust Protection Plan claims directly with plan participants.

In April 2013, Heckart, on behalf of himself and other similarly situated California residents, sued A-1 and Caster Group for violations of the UCL and CLRA. He alleged A-1 and Caster Group engaged in unfair, unlawful and deceptive sale of unlicensed

insurance in conjunction with the rental of storage units. A-1 and Caster Group demurred to the complaint. The trial court sustained the demurrer with leave to amend.

Heckart amended his complaint, adding Deans & Homer and the other Caster entities as defendants. He alleged causes of action for violations of the UCL and CLRA, negligent misrepresentation, and civil conspiracy. Heckart's allegations were premised on the notion that A-1's Protection Plan was an unlicensed and illegal insurance policy. Heckart alleged the Protection Plan's automatic enrollment after 30 days if the tenant did not provide proof of insurance was deceptive to a reasonable consumer, causing class members to be "enrolled in an illegal insurance plan that is not properly disclosed as such, is sold in an illegal and misleading manner, and costs more but provides less coverage than other self-storage insurance," including a policy offered by Deans & Homer.

Defendants demurred to Heckart's amended complaint, arguing it failed because the Protection Plan did not transform the Rental Agreement into insurance. Rather, the Protection Plan was tangential to the principal object of the transaction between Heckart and A-1, which was rental of storage space. The trial court sustained the demurrer without leave to amend, concluding the principal object of the transaction between Heckart and A-1 was rental of a storage unit, not the sale of insurance. Thus, each cause of action failed because the Protection Plan was not a contract of insurance.

In conjunction with the order sustaining Defendants' demurrer to the amended complaint, the trial court granted Defendants' request for judicial notice of multiple documents, including a letter from Deans & Homer to the DOI and two letters from the

DOI to Deans & Homer. Deans & Homer's letter to the DOI requested an opinion on whether a program structured like the Protection Plan would be subject to regulation as insurance. The DOI's 2003 response letter opined that the DOI "did not believe that such contracts between landlords and tenants are insurance contracts for purposes of statutory regulation. The primary purpose of the contract is rental of the premises. The parties appear to be allocating the risk by contractual agreement. For an additional amount of rent, the risk of damage for a particular risk shifts from the lessee to the lessor." In a 2008 letter, the DOI confirmed the opinion it expressed in its 2003 letter.

DISCUSSION

I. *General Legal Principles*

A. Insurance Principles

"Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event." (Ins. Code, § 22; undesignated statutory references are to this code.) "Thus, insurance necessarily involves two elements: (1) a risk of loss to which one party is subject and a shifting of that risk to another party; and (2) distribution of risk among similarly situated persons." (*Metropolitan Life Ins. Co. v. State Bd. of Equalization* (1982) 32 Cal.3d 649, 654 (*Metropolitan Life*).) However, "the mere fact that a contract contains these two elements does not necessarily mean that the agreement constitutes an insurance contract for purposes of statutory regulation. [¶] 'A statute designed to regulate the business of insurance . . . is not intended to apply to all organizations having some element of risk assumption or distribution in their operations. The question of whether an arrangement is

one of insurance may turn, not on whether a risk is involved or assumed, but on whether that or something else to which it is related in the particular plan is its principal object and purpose." (*Truta v. Avis Rent A Car System, Inc.* (1987) 193 Cal.App.3d 802, 812 (*Truta*).)

In 2004, California added Article 16.3 to the Insurance Code, which regulates self-service storage agents. (Added by Stats. 2004, ch. 428 (A.B. 2520), § 3.) Under that statutory scheme, "[n]o self-service storage facility, or franchisee of a self-storage facility, shall offer or sell insurance unless it has complied with the requirements of [Article 16.3] and has been issued a license by the commissioner as provided in [that] article." (§ 1758.7, subd. (a).) Licensed self storage facilities or their franchisees may offer or sell "hazard insurance coverage to renters for the loss of, or damage to, tangible property in storage or in transit during the rental period" "in connection with, and incidental to, self-service storage rental agreements." (§§ 1758.7, subd. (b), 1758.75, subd. (d).)

The licensee must provide prospective renters with written materials that summarize the material terms and conditions of coverage, describe the process of filing a claim, disclose information on price, benefits, exclusions, conditions, or other limitations, and provide specified information about the licensee and the availability of the DOI's consumer hotline. (§ 1758.76, subd. (a).) Additionally, the self-service storage agent must disclose that the purchase by the renter of insurance is not required to rent storage space, that the insurance policies offered by the self-service storage agent may duplicate the renter's homeowner's insurance or other coverage, and the self-storage facility is not

qualified or authorized to evaluate the renter's existing coverage. (§ 1758.76, subd. (b).) The insurance offered or sold by a self-storage facility must be "provided under an individual, a group, or a master policy issued to the self-service storage agent by an insurer authorized to write [that] type[] of insurance." (§ 1758.76, subd. (d).) The Insurance Code does not prevent a storage facility from including a provision in its rental agreement "requiring the renter to provide insurance on his or her property in the storage unit." (§ 1758.76, subd. (b)(1).)

B. Standard of Review

" ' "On appeal from an order of dismissal after an order sustaining a demurrer, our standard of review is de novo, i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law." ' " (*Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 650.) "A judgment of dismissal after a demurrer has been sustained without leave to amend will be affirmed if proper on any grounds stated in the demurrer, whether or not the court acted on that ground." (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324.) In reviewing the complaint, "we must assume the truth of all facts properly pleaded by the plaintiffs, as well as those that are judicially noticeable." (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814.)

"To the extent issues of statutory interpretation are raised, we apply the rules of statutory construction and exercise our independent judgment as to whether the complaint states a cause of action. [Citation.] Our first task in construing a statute is to ascertain the Legislature's intent in order to carry out the purpose of the law. If the statutory

language is clear and unambiguous, no judicial construction is required. If the statute is ambiguous, the words must be construed in context in light of the statutory purpose." (*Doe v. Doe 1* (2012) 208 Cal.App.4th 1185, 1188-1189.)

II. *Analysis*

A. The Protection Plan Is Not Insurance

Heckart argues the trial court erred in ruling the Protection Plan is not insurance subject to regulation under the Insurance Code. Based on the premise that the Protection Plan is insurance, Heckart contends he properly stated causes of action for violation of the UCL, negligent misrepresentation, and civil conspiracy. We reject Heckart's arguments.

In general, insurance requires shifting one party's risk of loss to another party and distributing that risk among similarly situated persons. (*Metropolitan Life, supra*, 32 Cal.3d at p. 654.) However, not all contracts satisfying these two elements constitute insurance. We must look to the "principal object and purpose of the transaction" to determine whether it is a contract of insurance. (*Truta, supra*, 193 Cal.App.3d at p. 814.) Thus, we consider whether the Protection Plan's principal object was risk shifting and distribution.

In *Truta*, the class plaintiffs challenged a provision in a standard car rental contract providing that for a fee, the rental company would agree to bear the cost of any damage to the vehicle. (*Truta, supra*, 193 Cal.App.3d at p. 807.) Plaintiffs argued that this provision converted the transaction into one of insurance and thus the defendants were required to comply with insurance statutes. (*Id.* at pp. 807-808, 812.) Rejecting this

argument, the *Truta* court reasoned that the "principal object and purpose of the transaction" and "the element which gives the transaction its distinctive character" was the rental of an automobile, and not this incidental benefit offered to consumers. (*Id.* at p. 814.)

We find *Truta* on point and persuasive. The Protection Plan in this case was an addendum to and dependent upon the Rental Agreement. Without the Rental Agreement, the Protection Plan would not exist and would have no purpose. Thus, we must look at the Rental Agreement and Protection Plan as a whole. Looking at the entire transaction between the parties, the principal object or "distinctive character" was the rental of storage space.

The Rental Agreement allocated the risk of property damage and loss to the tenant. Tenants were free to choose that option. Alternatively, for an additional fee of $10 per month, tenants could choose to enter into the Protection Plan, which allocated risk to A-1. If the tenant chose to participate in the Protection Plan, it modified paragraphs 11 and 12 of the Rental Agreement, which concerned indemnity and the tenant's obligation to maintain insurance on his or her stored property. Just as the parties were free to contract to allocate risk to the tenant, they were also free to allocate risk to A-1. Allowing parties to shift the risk of property damage does not turn an agreement, whose primary objective is storage rental into insurance.

Additionally, we note that contrary to Heckart's argument, the Storage Liability Policy between A-1 and Deans & Homer does not suggest the Protection Plan is insurance. Heckart contends A-1 collected unlawful commissions from Deans & Homer

because A-1 charged tenants $10 per month and paid Deans & Homer $0.74 per Protection Plan participant, which amounted to A-1 earning over $8 million in "commissions" from Deans & Homer during the class period. Nothing in the Protection Plan or Storage Liability Policy indicates that Deans & Homer paid A-1 commissions. Rather, the Storage Liability Policy was an insurance policy that A-1 purchased from Deans & Homer to cover the losses it would have to pay participants under the Protection Plan. A-1 was not required to purchase the Storage Liability Policy from Deans & Homer as a condition of offering tenants the Protection Plan option to the Rental Agreement. Instead, A-1 was free to accept responsibility for loss or damage to the property of Protection Plan participants. The Storage Liability Policy simply provided a way for A-1 to limit its exposure.

Heckart further argues A-1 violated the Insurance Code in regard to training its employees (§ 1758.72) and providing tenants with written disclosures about filing claims, duplication of coverage, employees' abilities to evaluate a tenant's existing coverage, and that purchase of the Protection Plan was not required to rent storage space (§ 1758.76). Heckart's argument fails because it puts the cart before the horse. The requirements of Article 16.3 of the Insurance Code only apply if the Protection Plan is insurance. This is clear from the statutory language. For example, section 1758.7 provides that a self-service storage facility shall not "*offer or sell insurance* unless it has complied with the requirements of [Article 16.3]." (§ 1758.7, subd. (a), italics added.) Similarly, a self storage facility "*shall not sell insurance* pursuant to [Article 16.3]" unless it provides required written materials and disclosures. (§ 1758.76, italics added.) Thus, the

requirements of Article 16.3 only come into play if the self storage facility is selling insurance.

"We also give deference to the [DOI's] interpretation of the Insurance Code." (*Truta, supra*, 193 Cal.App.3d at p. 814.) Deans & Homer requested an opinion from the DOI as to whether a program structured substantially similar to the Protection Plan constituted insurance. In 2003, the DOI opined that such programs were not insurance for purposes of statutory regulation because the primary purpose of the contract was real property rental. In 2008, which was after the enactment of Article 16.3 of the Insurance Code, the DOI confirmed its 2003 opinion.

Heckart claims the DOI's opinion is not entitled to deference because Deans & Homer did not accurately describe the Protection Plan program to the DOI. First, he claims Deans & Homer failed to disclose that self-storage facilities would pay claims. Contrary to Heckart's argument, Deans & Homer's letter makes clear that the property owner "would retain or assume liability for various types of risks" and "[a]ny commitment to retain risk made to the tenant would be made by the owner only." Based on this language, Deans & Homer disclosed that property owners, such as storage facilities, would pay claims to tenants.

Heckart also argues Deans & Homer failed to disclose a "pass through of risk" under the Storage Liability Policy between Deans & Homer and A-1. However, Deans & Homer accurately disclosed to the DOI that the program "would not be a transaction between the tenant and any insurer or even a pass through of risk from the tenant to the insurer." We do not find anything misleading in this representation. As we previously

discussed, the Storage Liability Policy was simply an insurance policy that A-1 purchased to cover its potential losses and was not required as a condition of offering tenants the option to enroll in the Protection Plan. Moreover, Deans & Homer disclosed to the DOI that property owners had the option of purchasing coverage from Deans & Homer.

It is clear from the DOI's opinion letters that it does not believe that the Insurance Code regulates programs such as the Protection Plan. "We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." (*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984) 467 U.S. 837, 844, fn. omitted.) Based on our analysis of the Protection Plan and statutory scheme upon which Heckart relies, we see no reason to depart from the DOI's opinion in that regard.

Based on the foregoing, we conclude the Protection Plan is not insurance subject to regulation under the Insurance Code.

B. Heckart's Claims

1. UCL, Negligent Misrepresentation, and Civil Conspiracy

Heckart's UCL, negligent misrepresentation, and civil conspiracy causes of action were all premised on his allegation that the Protection Plan is insurance. Specifically, his UCL claim alleged Defendants' sale of unlicensed and illegal insurance and failure to comply with the Insurance Code constituted unfair and unlawful business practices within the meaning of the UCL. Similarly, in his negligent misrepresentation cause of

action, Heckart alleged Defendants misrepresented that the Protection Plan is not a contract of insurance. Lastly, in his civil conspiracy claim, Heckart alleged Defendants conspired to sell the Protection Plan in a manner calculated to avoid regulation under the Insurance Code.

Because the UCL, negligent misrepresentation, and civil conspiracy causes of action are all dependant on the allegation that the Protection Plan is insurance and we have concluded it is not, the trial court properly sustained Defendants' demurrer as to those causes of action.

2. CLRA

In his first amended complaint, Heckart alleged Defendants violated the CLRA by failing to represent the Protection Plan is insurance, representing that purchase of the Protection Plan is required, and imposing an unconscionable contract on class members by requiring enrollment in an illegal insurance policy. On appeal, Heckart recognizes that the CLRA does not apply to insurance contracts, but argues his CLRA cause of action should survive because the CLRA applies to misrepresentations about the Protection Plan contained in the Rental Agreement. We reject Heckart's argument.

The CLRA prohibits unfair or deceptive acts that "result[ ] in the sale or lease of goods or services to any consumer . . . ." (Civ. Code, § 1770.) The CLRA defines "[s]ervices" as "work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods." (Civ. Code, § 1761, subd. (b).) Insurance does not constitute a "service" for purposes of the CLRA. (*Fairbanks v. Superior Court* (2009) 46 Cal.4th 56, 62-63 (*Fairbanks*).) The CLRA must

"be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection." (Civ. Code, § 1760.)

In order to prove his CLRA cause of action as he framed it in his first amended complaint, Heckart would need to establish that the Protection Plan was insurance. Even if he could prove that, which he cannot, a transaction involving the sale of insurance is exempt from the CLRA. (*Fairbanks, supra*, 46 Cal.4th at pp. 62-63.) Recognizing this hurdle, Heckart contends the CLRA applies to the Rental Agreement because storage rental is a "service" within the meaning of the CLRA.

The CLRA applies to the "sale or lease of goods or services." (Civ. Code, § 1770.) In this case, the Rental Agreement was for the lease of real property, which is not a "good" or "service." (See *McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1465-1467, 1488 [the CLRA does not apply to a transaction resulting in the sale of real property].) Heckart contends the Rental Agreement is for "services" because it "requires A-1 to provide both security and availability services." The fact that A-1 agreed to provide "security and availability" services was ancillary to the main purpose of the Rental Agreement, which was lease of storage space, and does not transform the agreement into one for the sale or lease of "services" within the meaning of the CLRA.

Based on the foregoing, Heckart failed to allege facts sufficient to properly state a CLRA claim.

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

McINTYRE, J.

WE CONCUR:

NARES, Acting P. J.

McDONALD, J.

I, KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, do hereby certify that this preceding and annexed is a true and correct copy of the original on file in my office.

WITNESS, my hand and the Seal of the Court this December 30, 2015

KEVIN J. LANE, CLERK

By Jonathan Newton Deputy Clerk

Heckart v. A-1 Self Storage, Inc. et. al.; Supreme Court Case No.: S_____
Court of Appeals Case No. D066831;
San Diego County Superior Court Case No.: 37-2013-00042315-CU-BT-CTL

PROOF OF SERVICE

I, the undersigned, declare that I am over the age of eighteen (18) years and not a party to the within action. I am employed in the County of San Diego, State of California. My business address is 550 W. C Street, Suite 1760, San Diego, California 92101.

I served the following document(s) on February 8, 2016:

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On the person(s) listed below:

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By the following means:

☒ **VIA U.S. MAIL**: I enclosed the documents in a sealed envelope or package addressed to the person(s) at the addressees) listed above. I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is place for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court, at whose direction the within service was made.

Executed: February 8, 2016, at San Diego, California.

Rebecka Garcia