S232322

IN THE
SUPREME COURT OF CALIFORNIA

SAMUEL HECKART,
Individually and on behalf of a Class of all 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

APPELLANT'S OPPOSITION TO DEANS & HOMER'S MOTION FOR JUDICIAL NOTICE

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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

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I. INTRODUCTION

The principal question posed by this appeal is novel, but not difficult to understand, 'are A-1's Protection Plans regulated insurance contracts?' Axiomatically, any answer must begin with the relevant language California Insurance Code.

In 2004, the California Legislature enacted Division 1, Part 2, Chapter 5, Article 16.3 of the Insurance Code, sections 1758.7, *et seq.* ("Article 16.3") which clarified that the following types of insurance were subject to regulation:

> A self-service storage facility or its franchisee... may act as a self-service storage agent for an authorized insurer only with respect to the following types of insurance and only in connection with, and incidental to, self-service 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.

(INS. CODE § 1758.75 subd. (a).) Appellant-Plaintiff Samuel Heckart argues that the import of the above language is clear and unambiguous. However no court has addressed the application of Article 16.3 until this case.

In the absence of clear precedent, Defendants-Appellees Deans & Homer and A-1 Storage, Inc. ("A-1") repeatedly and forcefully argued that the Supreme Court should defer, at least on some level, to the learned opinion of the California Department of Insurance ("DOI").[1] But the only

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[1] (*See* Answer Brief on the Merits by Deans & Homer, at pp. 16-17 ["As such, it is not only proper to consider the DOI's view of what is covered by the statute, it defies common sense to ignore the DOI's analysis."]; *see also* Answer Brief on the Merits by A-1, at pp. 31-32 ["To be sure, the DOI's opinions are not binding, but they are entitled to some deference, assist in

purported 'opinions' Deans & Homer offered to support its argument were two DOI Staff Letters of questionable meaning and provenance. The first Staff Letter was issued on August 29, 2003, approximately a year before Article 16.3 was enacted. The second Staff Letter, all of two sentences in length, was dated July 1, 2008—approximately three and half years after Article 16.3 went into effect. (*Compare* 2 CT 413 [January 2005 DOI notice of the change in law to all interested parties] *with* 2 CT 326, 328.) Heckart had challenged these Staff Letters at every opportunity. (Appellant's Opening Brief, at pp. 44-47.)

Neither of the Staff Letters opined on, or even mentioned, the statutes at issue in this case (or any section of the Insurance Code). (2 CT 326, 328, 311-12.) Deans & Homer and A-1, at best, attempt to attribute a legal position to the DOI based on their own self-serving interpretation of the DOI's prior vague statements. Therefore, it was unsurprising that this Court, *sua sponte*, invited the Insurance Commissioner to file an amicus curiae brief concerning the three issues presented, including whether "an informal DOI staff decision regarding alleged 'insurance' [is] entitled to judicial deference where there is no evidence that the DOI saw the contracts in question?" (*See* Amicus Curiae Brief of the Insurance Commissioner ["DOI ACB"], at p. 6; *see also* the Court's July 7, 2017 Letter to Dave Jones, Insurance Commissioner.) This invitation allowed the DOI, through its *elected* Commissioner, to pronounce the Department's *formal* legal opinion directly to this Court, with the benefit of the full record.[2]

(Footnote Continued)

statutory interpretation, and thus provide further support for the judgment."])

[2] Deans & Homer strangely portrays the Insurance Commissioner as "less-democratically accountable" than other elected officials. (Deans &

The DOI's Amicus Brief provides a clear synopsis of the relevant portions of the Insurance Code, including Article 16.3, and expressed the DOI's understanding of applicable case law. (*Id.*, at pp. 7-9, 13-27.) After examining the facts of this case, the DOI unequivocally concluded that A-1's Protection Plan is a contract for insurance that is subject to the DOI's regulation. (*See generally, id.*) The DOI further stated that the 2003 and 2008 Staff Letters provided to Deans & Homer were not legal 'opinion' letters, as they did not meet the statutory requirements of Insurance Code, section 12921.9 (DOI ACB, at pp. 7-9, 13-27) and were not the result of careful consideration by senior agency officials. (DOI ACB, at pp. 11-12, 18 n.3 [*citing Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal.4th 1].).

Needless to say, the DOI's Amicus Brief was not well received by Deans & Homer. The DOI's clear representation that it does not, *and has never*, adopted the Respondents' asserted interpretation of the "principle object" test, section 1758.75, and California jurisprudence more generally was condemn as arbitrary and dithering. To support this argument, Deans & Homer requested that the Court take judicial notice of two additional sets of documents which purportedly establish that the DOI previously greenlighted its Protection Plan scheme. The proffered documents related to the DOI's "Approval of Application" of the *insurance rates charged* for the *Storage Operator's Contract Liability Policy* (or "Rate Approval[s]").

(Footnote Continued)

Homer's Answer to the DOI's Amicus Brief ["Answer Brief"] at p. 25.) But, like the governor and members of the legislature, the Honorable Commissioner Jones's mandate flows from his popular election. (INS. CODE § 12900, subd. (a).) The same cannot be said about the author of the DOI Staff Letters on which Deans & Homer relies.

(*See generally* Deans & Homer's Motion for Judicial Notice ["MJN"].)

Racing to reinforce its increasingly untenable position, Deans & Homer failed to take the most basic steps to adequately establish the admissibility of the Rate Approvals and related document. But even were proper steps taken to substantiate the *bona fides* of these documents, Deans & Homer cannot escape the fact that the Rate Approvals are irrelevant to the question at bar.

Deans & Homer's Storage Operator's Contract Liability Policy is a contract that reinsured A-1—not storage renters—for certain loses that A-1 might incur in paying Protection Plan claims. (1 CT 206-07, at ¶¶ 28-30.) Deans & Homer leaves unexplained how the DOI's approval of the insurance rates for the Storage Operator's Contract Liability Policy functions as a tacit approval of A-1's Protection Plan.[3] The Rate Approvals deal solely with Respondents' reinsurance agreement and do not mention the actual terms of the Protection Plan. Nor do the proffered documents support Deans & Homer's newfound and irreconcilable argument: the DOI's legal opinion is entitled unquestioned deference, so long as the DOI does not agree with arguments forwarded by Appellant.

II. ARGUMENT

A. Deans & Homer's Request for Judicial Notice is Untimely

Objection: The Rate Approvals are untimely.

Deans & Homer submits the DOI's Rate Approvals, and related documents, for judicial notice for the first time before this Court. The

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[3] Indeed, the DOI even warned Deans & Homer, during the rate approval process, that storage facility must be licensed to sell insurance in California. (Declaration of Scott Lancaster in support of MJN, at p. MJN 12.)

subject documents are not a part of the Clerk's Transcript, have not been previously produced to Appellant, and were not presented to the courts below. The first opportunity that Appellant has had to address Deans & Homer's new 'evidence' is through these objections.

"It has long been the general rule and understanding that 'an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.'" (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.) This is also true when the Court is reviewing an order sustaining a demurrer. (*Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325, *as modified* (Jan. 18, 1996).) "The rule promotes the orderly settling of factual questions and disputes in the trial court, provides a meaningful record for review, and serves to avoid prolonged delays on appeal." (*In re Zeth S., supra.*) As a consequence, "[a]n appellate court may properly decline to take judicial notice under Evidence Code sections 452 and 459 of a matter which should have been presented to the trial court for its consideration in the first instance." (*Brosterhous*, *supra*, at 325–26.)

Deans & Homer attempts to explain away its belated submission by asserting that the DOI's Rate Approvals for the Storage Operator's Contract Liability Policies were not before the trial court, or the court of appeal, because their relevance became apparent only when the DOI affirmatively asserted that 2003 and 2008 Staff Letters were not authoritative. (MJN, at pp. 2-3.) The arguments underpinning the DOI's Amicus Brief are not novel. Heckart advanced similar arguments that the 2003 and 2008 staff letters were not entitled to deference before this Court and the courts

below.[4] Furthermore, these DOI's Rate Approvals date back to 2003 and 2014. The suggestion that Deans & Homer would not present evidence that the DOI 'approved' the Protection Plans, until the last minute, strains reason.

It is more likely that Deans & Homer did not previously believe these documents relevant, and is now offering this 'evidence' to the Court as a last act of desperation. Yet, desperation is not a valid reason for not presenting 'relevant' evidence in a timely manner.

B. Documents Ancillary to DOI's 2003 And 2014 Rate Approvals are not Properly Subject to Judicial Notice

Objection: Documents provided by private businesses and email correspondence with a government agency are not "official acts." (EVID. CODE § 452, subd. (c).)

Deans & Homer requests that this Court take judicial notice of the DOI's 2003 and 2014 Rate Approvals, as well as private correspondence and other documents related thereto. (MJN at p. 1.) Judicial notice is not proper simply because a document was provided to, or originated from, a governmental agency. The Court may only take notice of evidence reflecting "official acts" of the DOI. (EVID. CODE § 450 ["Judicial notice may not be taken of any matter unless authorized or required by law."]; EVID. CODE § 452, subd. (c) [The Court has discretion to take notice of "[o]fficial acts of the legislative, executive, and judicial departments... of any state of the United States."].) Equally, a matter is subject to judicial notice only if it is reasonably beyond dispute. (*Post v. Prati* (1979) 90 Cal.App.3d 626, 633.) The majority of the documents that Deans & Homer

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[4] Deans & Homer actually complains that the DOI "essentially (with a few exceptions) adopts Heckart's argument." (*See* Answer Brief at p. 1.)

seeks to have judicially noticed do not meet these basic requirements.

For instance, Deans & Homer submits a number of documents that the QBE Insurance Corporation (not a party to this case) purportedly provided to the DOI when soliciting the 2003 and 2014 Rate Approvals (*See* Lancaster Decl., Ex. A, at pp. MJN 1-10, 13 & Ex. B at pp. MJN 19-20) and email correspondence between QBE Insurance Corporation and the DOI (*See id.*, Ex. A at pp. MJN 11-12). But, documents drafted by insurance carriers are not 'official acts' of the government. Nor are email communications with the DOI's staff. (*See Allegretti & Co. v. Cty. of Imperial* (2006) 138 Cal.App.4th 1261, 1275 n.7 ["We deny County's request for judicial notice of letters from California's Chief Deputy Attorney General for Legal Affairs and the Chair of the California State Water Resources Control Board. County does not provide explanation why these letters written by governmental employees constitute "official acts" in contrast to mere correspondence."].) Judicial notice of such ancillary documents is improper.

C. The Proffered Documents do not Represent Admissible Evidence

Objection: Documents lack proper foundation (EVID. CODE §§ 1400-1401); hearsay (EVID. CODE § 1200).

Evidence should not be accepted by the Court because it is provided by a party to a dispute. Instead, the burden is on the party requesting judicial notice to first establish that it has provided the Court with sufficient, reliable and trustworthy information. (*People v. Maxwell* (1978) 78 Cal.App.3d 124, 130.)

Deans & Homer offers a number of documents that were purportedly drafted by Perr & Knight Inc. for a third-party, QBE Insurance Corporation. (*See* Lancaster Decl., Ex. A at p. MJN 1 [The filing was being submitted by

Perr & Knight Inc. "[o]n behalf of QBE Insurance Corporation."].) Thus, it was the QBE Insurance Corporation that provided these documents to the DOI. (*See id.* at pp. MJN 1-10.) To support its request for judicial notice, Deans & Homer offers the declaration of its own Compliance Officer, Scott Lancaster. (*See* Lancaster Decl.) But nothing in the Record infers that Mr. Lancaster had personal knowledge of the circumstances related to interactions between QBE Insurance Corporation, Perr & Knight Inc., and/or the DOI. None of the documents provided in Mr. Lancaster's declaration originated from or were addressed to Mr. Lancaster specifically, or Deans & Homer generally. (*Id.*, at ¶ 3 [Mr. Lancaster attests that he "directed" the approval efforts for Deans & Homer, but provides no other details of his involvement.]) Mr. Lancaster does nothing to authenticate these documents except to append them to his declaration. (*See* EVID. CODE § 702, subd. (a) [Lay witnesses are allowed to testify only about matters within their personal knowledge.]; *Claudio v. Regents of Univ. of California* (2005) 134 Cal.App.4th 224, 244, *as modified on denial of reh'g* (Dec. 13, 2005) [A declaration of an individual without firsthand knowledge of a document is not proper authentication.].)

Appellant's concerns regarding the authenticity of these documents are not academic. Several of the documents submitted are incomplete. For example, the Sample Policy Declaration submitted by Deans & Homer ends mid-paragraph without any apparent explanation. (Lancaster Decl., Ex. A, at p. MJN 10.) Furthermore, there may be other private submissions (such as additional communications between the relevant parties) not provided to the Court which would offer important context under which the Rate Approvals were granted. The Court should not accept such procedurally improper, facially incomplete, documents for judicial notice based on nothing but blind faith.

Hearsay limitations also precludes the granting of judicial notice. (*N. Beverly Park Homeowners Ass'n v. Bisno* (2007) 147 Cal.App.4th 762, 778 *citing* 1 Witkin, Cal. Evidence (4th ed. 2000) Judicial Notice, § 25, p. 119.) Each 'out-of-court' statement is being submitted by Deans & Homer for the truth of the matters asserted therein, *e.g.* that the DOI approved the Storage Operator's Contract Liability Policy (and the Protection Plan). (EVID. CODE § 1200, subd. (a).) To the extent that the documents reference or incorporate other 'out-of-court' statements, such statements represent yet another level of hearsay. (EVID. CODE § 1201.)

Deans & Homer, as proponent of the evidence submitted, carries the burden of establishing its admissibility under an exception to the hearsay rule. (*People v. Blacksher* (2011) 52 Cal.4th 769, 820.) Deans & Homer has done nothing to dissuade the Court that the proffered documents represent inadmissible hearsay. The evidence proffered by Deans & Homer is simply not admissible under the applicable evidentiary standards.

D. The Proffered Documents are Irrelevant

Objection: Irrelevant (EVID. CODE § 350), slight probative value outweighed by undue consumption of time (EVID. CODE § 352).

Evidence to be judicially noticed, regardless of the grounds on which the request for judicial notice is based, must first satisfy the threshold test of relevance. (*People v. Rowland* (1992) 4 Cal.4th 238, 281 n. 6 ["[I]t is reasonable to hold that judicial notice, which is a substitute for formal proof of a matter by evidence, cannot be taken of any matter that is irrelevant...."] [*citing* 12 Jefferson, CAL. EVIDENCE BENCHBOOK (2d ed. 1982) Judicial Notice, § 47.1, p. 1749.].)

In this case, Deans & Homer advances a singular rationale for the admission of its eleventh-hour submission: the Rate Approvals further indicate that the DOI had previously evaluated and approved the terms of

the Protection Plan. (MJN, at pp. 2-3.) Thus, Deans & Homer suggests that the 2003 and 2014 Rate Approvals, in conjunction with the 2003 and 2008 Staff Letters, somehow embodies the DOI's prior "consistent and longstanding view" on the statutes at issue and deserve *more deference* than the DOI's Amicus Brief.[5] (MJN, at pp. 2-3; Answer Brief, at pp. 8-9.) In contrast, Deans & Homer paints the DOI's Amicus Brief as an outlier, an interpretative vacillation, which violates the Respondents' due process rights. (MJN, at p. 3; Answer Brief, at pp. 8-9, 24-26.) In reality, the factual relevance of the Rate Approvals are largely feigned and legal importance of these documents is completely misplaced.

First, even a facial review of the 2003 and 2014 Rate Approvals confirm these documents are of no consequence. The gravamen of this appeal is a correct understanding of Article 16.3 and its application to the facts of this case. The proffered evidence aids neither of these tasks because the 2003 and 2014 Rate Approvals do nothing to alter the Court's analysis of the Protection Plans or the underlying statutory regime.

The Court does not have to peek beyond the date on the first Rate Approval to determine its irrelevance. The 2003 Rate Approval predates the effective date of Article 16.3 and cannot possibly be evidenced as the DOI's interpretation of this 2004 amendment to the Insurance Code. (Lancaster Decl., Ex. A, at p. MJN 14.) Additionally, the 2014 Rate Approval was a largely *pro forma* request to revise the DOI's previous 2003 rate application and does not discuss the subsequent enactment of

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[5] The DOI's Amicus Brief marks the first time that the DOI either addressed the proper interpretation of Article 16.3 or had a full understanding of the material facts of this case. To suggest that the prior Staff Letters and Rate Approvals represents the clear and consistent evidence of the DOI's application of Article 16.3 to the Protection Plan defies common sense.

Article 16.3. (Lancaster Decl., Ex. A, at pp. MJN 15-20.) This perfunctory rate review does not evidence an agency's "careful consideration" of a novel legal issue. (*Yamaha*, 19 Cal.4th at 12-13.)[6]

Deans & Homer also misstates the Rate Approvals' legal significance. Proposition 103, passed by California voters in 1988, requires the DOI's 'prior approval' before insurance companies can implement insurance rates or make changes thereto. (*MacKay v. Superior Court* (2010) 188 Cal.App.4th 1427, 1440-41, *as modified* (Oct. 22, 2010); *see also* INS. CODE § 1861.01, subd. (c) ["[I]nsurance rates subject to this chapter must be approved by the commissioner prior to their use."].) But the DOI's authority to approve insurance rates was narrow. The rate approval process was never designed to permit the DOI to immunize select insurers from violations of non-ratemaking sections of the Insurance Code or California's consumer protection statutes. (*See MacKay*, *supra*, at 1449-50; *see also* INS. CODE § 1861.03, subd. (a).)

In light of the DOI's limited authority, both the 2003 and 2014 Rate Approvals properly disclosed that they only serve as authorization of the *rates* associated with the Storage Operator's Contract Liability Policies, and should not to be read as a broader endorsement of the legality of Deans & Homer's Protection Plan program:

> *If any portion of the application or related documentation conflicts with California law, that portion is specifically not approved.* Policy forms and underwriting guidelines included in this filing *were reviewed only insofar as they relate to rates contained in this filing* or currently on file with the California

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[6] Despite Deans & Homer's argument to the contrary, the DOI's staff letters and Rate Approvals were not 'approvals' or 'interpretations' sought *contemporaneously* with the enactment of section 1758.75. (Answer Brief, at p. 9.) Section 1758.75 was enacted in late 2004 and was first effective in January 1, 2005.

> Department of Insurance. *This approval does not constitute an approval of underwriting guidelines nor the specific language, coverages, terms, covenants and conditions contained in any forms, or the forms themselves. The Commissioner may at any time take any action allowed by law if he determines that any underwriting guidelines, forms or procedures for application of rates, or any other portions of the application conflict with any applicable laws or regulations.*

(Lancaster Decl., Ex. B, at p. 18 [emphasis added]; *see also id.*, Ex. A, at p. 14.)[7] Thus, the 2003 and 2014 Rate Approvals have no bearing on this case.

Second, Deans & Homer's due process arguments are without merit. Deans & Homer constructs a due process violation by advocating for an extension of the prohibitions of the *Ex Post Facto* clause of the United States Constitution to non-binding administrative acts. (*See* MJN at p. 3; *see also* Answer Brief at p. 25 ["The Due Process Clause of the United States Constitution prevents the courts from achieving, through a legal interpretation both unexpected and indefensible by reference to the law previously expressed, that which the legislative branch may not achieve under the Ex Post Facto Clause."].) Consequently, Deans & Homer argues that the 2003 and 2014 Rate Approvals represent "settled expectations" that may not be altered by the DOI's subsequently filed Amicus Brief. (*Ibid.*)[8]

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[7] The DOI's Rate Approvals further disclosed that "[n]othing in this letter shall constitute approval of any other application, whether incorporated by reference, or filed prior or subsequent to the application set forth above." (Lancaster Decl., Ex. B, at p. 18 [emphasis added]; *see also id.*, Ex. A, at p. 14.) For this reason, even if information regarding the Protection Plans was provided during the rate approval process, DOI made it clear the 2003 and 2014 Rate Approvals were not approvals of these separate, yet related, contracts.

[8] Deans & Homer cites *Perry v. Sindermann* for the contention that administrative policies and rules can give rise to a property right. ((1972)

This strained argument falls wide of the mark. It is difficult to imagine how the DOI's Amicus Brief involves the evils which the *Ex Post Facto* clause, or more generalized prohibitions against retroactive rulemaking, are directed. The Amicus Brief does not retroactively prohibit business practices that were previously 'approved' as legal. Absent an express delegation of authority from the legislature, the DOI cannot create or amend the law. (*Ass'n of California Ins. Companies v. Jones* (2017) 2 Cal.5th 376, 390.) Nor is the DOI responsible for interpreting a statute for the purposes of resolving a civil lawsuit, as that responsibility is reserved for the courts. (*See Bodinson Mfg. Co. v. California Employment Comm'n* (1941) 17 Cal.2d 321, 326-27 *citing* CAL. CONST., art. VI, sec. 1.) Instead, the DOI generally decides when and how it enforces the Insurance Code on behalf of the State.[9]

(Footnote Continued)

408 U.S. 593, 602-603.) "The foregoing principle is, however, subject to the unquestioned exception that no such rules, understandings or circumstances can contravene the intent of the legislature regarding the [related] entitlements." (*Carducci v. Regan* (D.C. Cir. 1983) 714 F.2d 171, 177, *citing Bollow v. Federal Reserve Bank* (9th Cir. 1981) 650 F.2d 1093, 1099, *cert. denied*, 455 U.S. 948 (1982).) The DOI cannot create a property right to sell insurance by administrative fiat if such contracts are made illegal by Article 16.3.

[9] While Deans & Homer boasts that it sought the DOI's approval "on four separate occasions, and received the Department of Insurance's approval in each instance," none of these instances accurately represent the DOI's pre-approval of the Protection Plan. (MJN, at p. 3.) The DOI is without authority to 'approve' insurance offerings beyond ratemaking. Even a letter signed by the Insurance Commissioner himself does not have binding regulatory effect. (INS. CODE § 12921.9, subd. (b).) At best, a staff letters represent a decision of the DOI not to exercise its enforcement powers, and not an interpretation of a statute. (*Ass'n of California Ins. Companies,* 2 Cal.5th at 401 [The fact that "the Commissioner also possesses authority to enforce the statute through case-by-case adjudication merely underscores that sometimes agencies must make considered judgments about how they will implement a statute."].) Nevertheless, DOI can provide its opinion to a court for its consideration. (*Yamaha*, 19

This case, however, does not involve the DOI's discretion to enforce the law or the Agency's regulatory power more generally. This case involves the determination of a private dispute; Appellant has invoked the jurisdiction of this Court to adjudicate his consumer action.[10] The Court should not abdicate its responsibility because the DOI submitted its opinion, at the Court's invitation, even assuming that a DOI employee had once adopted a contrary position based on no salient facts or law. To hold otherwise prevents judicial or administrative review of any pseudo-executive decision once made. (*C.f. Carducci*, 714 F.2d at 177 ["Any other rule would deprive the people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe."].)

Stated differently, Deans & Homer is not granted civil immunity because it sought the DOI's approval of its insurance rates in 2014 for a tangentially related insurance policy (or lobbied a single DOI employee for a two sentence letter in 2008). (*See* 2 CT 431.) This is especially true here, where the Rate Approvals expressly disclaimed that "[t]he Commissioner may at any time take any action allowed by law if he determines that any underwriting guidelines, forms or procedures for application of rates, or any

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(Footnote Continued)

Cal.4th at p. 12 ["[T]he judiciary, although taking ultimate responsibility for the construction of the statute, accords great weight and respect to the administrative construction."].)

[10] Plaintiff has a protected right to have his case heard by the Court, and not predetermined by a DOI staff attorney. (*C.f. Guardianship of Sullivan* (1904) 143 Cal. 462, 467 [The law has long been settled that in a civil action "[a] party litigant is entitled to a decision upon the facts of his case from the judge who hears the evidence, where the matter is tried without a jury, and from the jury that hears the evidence, where it is tried with a jury. He cannot be compelled to accept a decision upon the facts from another... ."].)

other portions of the application conflict with any applicable laws or regulations." (Lancaster Decl., Ex. B, at p. 18; *see also Id.*, Ex. A, at p. 14.) Employees of the DOI are not above reproach. (*See* INS. CODE § 12940; *C.f. Baer v. Associated Life Ins. Co.* (1988) 202 Cal.App.3d 117, 123 ["[W]e remind Associated that the deputy commissioner is offering his opinion of what the law means. With all due respect to his authority, it does not encompass interpretation of law."].)

Nor is a decision of this Court analogous to harm inherently engendered in retroactive administrative or legislative rule-making to warrant application of the *Ex Post Facto* clause. Existing statutes, such as Article 16.3, provide Deans & Homer with constitutionally adequate notice of proscribed conduct. (*Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 536; 1 CT 216-17 [Appellant's case only involves transactions occurring after Article 16.3 was enacted.].) The Court's role in construing existing law is limited to declaring the proper application of law to a given dispute; the Court does not amend the regulatory or statutory framework each time it renders a decision. (*See Rogers v. Tennessee* (2001) 532 U.S. 451, 460-61.) Accordingly, judicial decisions interpreting statutes are presumed to apply retrospectively. (*Pineda, supra*, at 536 [*citing Grafton Partners L.P. v. Superior Court* (2005) 36 Cal.4th 944, 967].) This is true even when this Court's opinion may contradict previous precedent. (*Grafton Partners L.P., supra*, at 967.)

The Rate Approvals, and related documents, are simply irrelevant to the limited legal question at hand. Even assuming limited probative value attaches to these documents, the resulting value is overwhelmingly outweighed by the undue consumption of time. (EVID. CODE § 352.) The parties have fully briefed this case. Numerous amicus briefs have been submitted, as well as the parties' respective responses thereto. The

submission of such factually and legally impotent 'evidence' at this juncture may trigger an additional round of briefing to allow Appellant and third-parties, such as the DOI, an adequate opportunity to address the Rate Approvals and related legal arguments. Regardless, even with such opportunity, Appellant would be prejudiced by the denial of the opportunity to conduct probative discovery that would have been afforded had these documents been presented in the trial court. Instead of needlessly opening this, the issues before this Court are best decided on examination upon existing record.

III. CONCLUSION

By its terms, judicial notice under section 452 is discretionary. For the reasons stated herein, Appellant requests that the Court deny Deans & Homer's Motion for Judicial Notice.

Respectfully submitted,

Dated: October 18, 2017

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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 October 18, 2017:

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Attorneys for Amicus Curiae, Dave Jones, Insurance Commissioner of the State of California

By the following means:

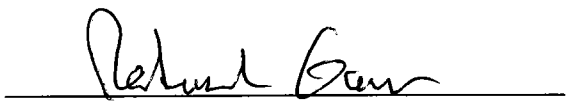
☐ **VIA U.S. MAIL**: I enclosed the documents in a sealed envelope or package addressed to the person(s) at the addressees) listed above. I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and 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.

☒ **VIA OVERNIGHT DELIVERY**: I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the person(s) at the address listed above. I placed the envelope or package for collection and overnight delivery to an office or a regularly utilized drop box of the overnight delivery carrier. (Supreme Court Only)

☐ **VIA ELECTRONIC TRANSMISSION**: Based on a court order or agreement of the parties to accept electronic service, I caused the documents to be sent to the person(s) at the electronic service addressees listed above.

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: October 18, 2017 at San Diego, California.



Rebecka Garcia