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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

DAVE JONES
in his capacity as commissioner of the California Department of Insurance

Defendant and Appellant

v.

ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES and PERSONAL INSURANCE FEDERATION OF CALIFORNIA

Plaintiffs and Respondents

After a Decision by the Court of Appeal
Second Appellate District, Division One, Case No. B248622

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This Court need not review the Court of Appeal decision. No other decision conflicts with it. It involves no question of law requiring settlement by this Court.

In fact, the Court of Appeal applied only well-settled legal principles, principles relating to the standard of review and rules of statutory construction applicable to judicial review of agency regulations. Here, the Court of Appeal applied those principles to conclude that the plain language of the Unfair Insurance Practices Act[1] demonstrates the Legislature's intent that the Commissioner's authority to add to the statutory list of unfair insurance acts or practices is limited to an explicit administrative process and not by regulation.[2]

The Commissioner states in his Petition for Review that this decision is important to him. Of course it is, it defines his authority. It is also important to Plaintiffs and Respondents and other members of the insurance industry. They have a decision confirming that the Commissioner is obligated to follow the explicit statutory process detailed in the UIPA if he

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[1] The UIPA is codified at Insurance Code sections 790 and following.

[2] The regulation involved in this case was adopted by Commissioner Poizner in 2010. It prohibits companies selling homeowner insurance from communicating estimates to homeowners of the cost to replace their homes unless the estimates are prepared and communicated in strict compliance with the detailed provisions of the regulation. Under the regulation, communicating an estimate not in compliance, no matter if it is totally accurate, is, as a matter of law, a misleading statement, and thus, an unfair insurance practice.

wants to expand the list of prohibited insurance business acts and practices. He cannot claim authority to "fill up the details of the statutory scheme" and expand the list by regulation.[3] Significantly, the decision deals with a very unique statutory provision that is only one of many articles in the voluminous Insurance Code, and it's importance is limited to that statute.

II. BACKGROUND

A. The Unfair Insurance Practices Act.

The UIPA, beginning with section 790[4], provides, "[t]he purpose of this article is to regulate trade practices in the business of insurance...by defining, or providing for the determination of all such practices in this State which constitute . . . unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." The provisions in this section stating that the purpose of the article to regulate insurance by "defining" unfair acts or practices is implemented in section 790.03 and by providing for the determination of such acts or practices is implemented in section 790.06.

Section 790.03 provides, "[t]he following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance." What follows are subdivisions (a) through (j),

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[3] He argues, regardless of what the statute says, he should have broad regulatory authority. Petition for Review, p. 9.

[4] All references to statutes are to the Insurance Code unless otherwise stated.

defining numerous unfair acts or practices, including one subdivision that contains 16 subparagraphs. The unfair acts or practices referenced in section 790 as those "defined" are those listed by the Legislature in section 790.03.

Section 790.06 sets out the process for the Commissioner to "determine" whether other acts or practices should be prohibited as unfair. It provides, "[w]henever the Commissioner shall have reason to believe that any person...is engaging...in any act or practice...not defined in Section 790.03, and that...the act or practices is unfair or deceptive...he or she may issue and serve upon that person an order to show cause...for the purpose of determining whether the alleged...acts or practices...should be declared to be unfair or deceptive within the meaning of this article."

In this case, the Commissioner expanded the list of acts or practices defined as unfair, but he did not do so pursuant to section 790.06 by issuing an order to show cause. Rather he did so by regulation, relying on section 790.10 for authority.[5]

The Court of Appeal reviewed the statutory language and concluded that the Commissioner's authority to add to the list of prohibited acts or practices existed under section 790.06 but not under section 790.10, which simply authorizes the Commissioner to administer the article, not define or

[5] Section 790.10 provides, "[t]he commissioner shall...promulgate reasonable rules and regulations...as are necessary to administer this article."

declare new acts. Accordingly, it affirmed the trial court's judgment invalidating the regulation.

B. The Regulation.

The regulation invalidated by the Court of Appeal decision is California Code of Regulations, Title 10, section 2695.183. It provides, "[n]o licensee shall communicate an estimate of replacement cost to an applicant or insured in connection with an application for or renewal of a homeowner's insurance policy that provides coverage on a replacement cost basis unless the requirements and standards set forth in subdivisions (a) through (e) below are met."

The regulation goes on to require not just one estimate, but four separate estimates for (1) cost of labor, building materials and supplies, (2) overhead and profit, (3) cost of demolition and debris removal, and (4) cost of permits and architect's plans. It also requires the estimate to contain a description of every feature of the home down to the flooring in each bathroom. It requires the four estimates and the description of every feature to be communicated in writing. The regulation requires insurers to update the method used to generate estimates at least annually.

Subdivision (j) of the regulation makes any communication of an estimate without complying fully with the detailed dictates of the regulation to be a violation of Insurance Code section 790.03, and thus an unfair practice. As a consequence, the Commissioner has amended section 790.03

by expanding the list of acts or practices that the Legislature defined as unfair.

C. The Court of Appeal Decision.

The Court of Appeal invalidated the regulation. It did so on the ground that the Legislature has specified the process for the Commissioner to address acts or practices not defined in section 790.03 that he nevertheless considers to be unfair through the order to show cause and administrative process spelled out in section 790.06. It is not by regulation; to do so by regulation would render section 790.06 meaningless and would be inconsistent with the Legislature's intent.

III. ARGUMENT

A. Review by this Court is Unnecessary.

Rule 8.500 of the California Rules of Court sets out two primary grounds for this Court to review a court of appeal decision, "to secure uniformity of decision or to settle an important question of law." The Commissioner asserts only the second ground as the basis for his petition. Certainly he cannot assert the first ground because no other decision conflicts with the Court of Appeal decision.

With respect to the second ground for review, the importance of the decision is limited to the fact that it resolves the conflict between the Commissioner and insurers concerning his authority to add to the list of acts or practices defined by the Legislature as unfair insurance practices in

section 790.03. In resolving that conflict, the Court of Appeal simply construed the UIPA by following well-settled legal principles enunciated by this Court in numerous cases over several decades. The decision raises no question of law that needs settling.

B. The Standard of Review and Rules of Statutory Construction Applied by the Court of Appeal are Well Settled.

The Court of Appeal quotes from this Court's decisions in *Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401 and *Twentieth Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216. It states that whether a regulation is in conflict with the statute it purports to implement or is outside the agency's statutory authority is a matter of statutory construction, "a question of law on which a court exercises independent judgment." Decision, p. 18.[6]

Citing *Credit Ins. General Agents Assn. v. Payne* (1976) 16 Cal.3rd 651 at 656, the Court of Appeal states the well-settled principle that, "[t]he Commissioner has only the authority conferred on him by the Legislature." Decision, p.21. The Court of Appeal states that it deduces "that authority from the language of the statute itself by applying familiar maxims of statutory construction." *Ibid.*

The Court of Appeal cites *Day v. City of Montana* (2001) 25 Cal.4th

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[6] References to the Court of Appeal decision will be cited as Decision, p.___.

268, 272 for the proposition that a court gives the statutory language its "plain meaning." "'Moreover, it is equally well-settled that fundamental rules of statutory construction require ascertainment of the legislative intent' so as to effectuate the purpose of the law [and] every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect." (*Kaiser Steel Corp. v. County of Solano* (1979) 90 Cal.App. 3rd 662, 667) *Ibid.*

Finally the Court of Appeal states, to "[t]he extent a statute addresses one subject but not another, we assume that choice was deliberate under the principle of *expressio unius est exclusio alterius*. The expression of some things in a statute necessarily means the exclusion of other things not expressed." (*Gikas v. Zolin* (1993) 6 Cal.4th 881, 852) *Ibid.*

C. Applying Well-Settled Principles of Law the Court of Appeal Concluded that the Regulation was Invalid.

The Court of Appeal examined the plain meaning of the UIPA. Section 790 provides that the purpose of the article is to regulate trade practices in the business of insurance "by defining, or providing for the determination of,...unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." Section 790.02 provides that no person shall engage in any act or practice "which is defined in this article as, or determined pursuant to this article to be," unfair or deceptive. The Legislature in these two sections makes explicit that it intends acts or

practices to be characterized as unfair or deceptive by two methods and only two methods, that is, those defined and those determined to be unfair or deceptive.

In section 790.03, the Legislature provides, "[t]he following are hereby defined as unfair . . . acts or practices in the business of insurance." In section 790.06, the Legislature sets out an explicit process for the Commissioner to determine an act or practice to be unfair or deceptive even though it is not defined as such in section 790.03

Over the years, the Legislature added to section 790.03 by defining additional acts or practices that were deemed to be unfair or deceptive. However, the structure of the UIPA did not change.

In fact, the structure of the UIPA was not changed twelve years after its initial enactment when the Legislature in 1971 added section 790.10, authorizing the Commissioner to adopt regulations when necessary to administer the article. Nothing in section 790.10 changed the explicit language of sections 790, 790.02, 790.03, and 790.06. The two processes to characterize acts or practices as unfair or deceptive remain as the core of the UIPA.

The Legislature reserved to itself the authority to define additional acts or practices as unfair or deceptive. It left to the Commissioner the authority to determine whether acts or practices not defined by the Legislature should be characterized as unfair or deceptive through the

process spelled out in section 790.06.

The Court of Appeal correctly concluded that to construe section 790.10 as authorizing the Commissioner to characterize additional acts or practices as unfair or deceptive would be inconsistent with the purpose stated in section 790 and the explicit prohibition contained in section 790.02 and would render section 790.06 meaningless. Decision, p. 25.

The Court of Appeal bolstered its conclusion by other provisions "in the UIPA actually denominating the Commissioner's powers. These focus on the Commissioner's power to enforce existing prohibitions in the UIPA (sections 790.035, 790.04, 790.05, 790.07, 790.08)." The Court of Appeal states that these provisions read with sections 790.03 and 790.06 demonstrate that the Legislature did not give the Commissioner power to define by regulation acts or conduct not otherwise deemed unfair or deceptive in the statute." Decision, p. 23

The Court of Appeal found further support in the legislative enactments that were made in response to claims of underinsurance following wildfires in the past. Decision, pp. 29-31. For example, the Legislature amended section 1729.85 in 2006 by authorizing the Insurance Commissioner to establish standards for the calculation of estimates of replacement value provided by real estate appraisers. While it could have, the Legislature did not authorize the Commissioner to impose such standards on insurance licensees. Decision, p. 29.

IV. CONCLUSION

The Court of Appeal concluded that the Commissioner was obligated to follow the specific statutory process to characterize additional acts or practices as unfair or deceptive. The principle that heads of agencies are bound by statutes enacted by the Legislature is well-settled. The Court of Appeal decision involves no question of law that needs to be settled by this Court. Accordingly, the Commissioner's Petition for Review should be denied.

DATED: June 5, 2015

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. Rule Ct. 8.204(1))

I certify that this brief contains 2,162 words as counted by the word counting function of the program used to generate this document, not including the tables of contents and authorities, the caption page, signature blocks, verification, certification of interested entities or persons, or this certification page.

DATED: June 5, 2015

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Assoc. of California Insurances Companies, et al. v. Dave Jones
Court of Appeal, Case No. B248622
Los Angeles County Superior Court, Case No. BC463124

CERTIFICATE OF SERVICE

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in this action. I am employed in the County of Sacramento, State of California and my business address is Greenberg Traurig, LLP, 1201 K Street, Suite 1100, Sacramento, CA 95814. On this day I caused to be served the following document(s):

ANSWER TO PETITION FOR REVIEW

☒ by placing ☐ the original ☒ a true copy into sealed envelopes addressed and served as follows:

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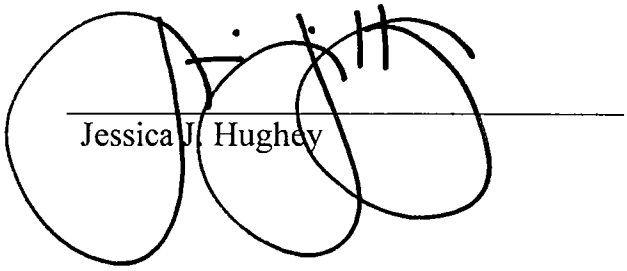
On June 5, 2015 I caused one electronic copy of the **ANSWER TO PETITION FOR REVIEW** in this case to be served on the California Supreme Court by sending the copy to the Supreme Court's electronic service address in addition to the original and 8 paper copies.

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

Executed on June 5, 2015, at Sacramento, California.



Jessica J. Hughey

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