S232322

IN THE
SUPREME COURT OF CALIFORNIA

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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,

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

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APPELLANT'S OPENING BRIEF

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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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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 concerns a far-reaching and unprecedented judicial revision of the California Insurance Code. The California Insurance Code expressly prohibits a specific type of company from selling a specific type of contract without a State-issued license. Respondent A-1 Storage, Inc. ("A-1") is that specific type of company selling that specific type of contract without a State-issued license, yet the Court of Appeal held this to be lawful.

Respondents A-1, Caster Properties, Inc., Caster Family Enterprises, Inc. and Caster Group L.P. (collectively, "A-1 Respondents") are owners and operators of A-1 storage facilities located throughout California. A-1 has been renting out storage units to tens of thousands of consumers over the last decade for the temporary storage of their personal property. In connection with each rental contract, A-1 offers and sells storage "Protections Plans" promising payment of up to $2,500 to renters in the event of loss or damage to the renters' stored property. Under the Code,

Respondents' Protection Plans are expressly and specifically regulated as storage renters' "insurance" contracts that require a license to sell or carry in California.

According to the Court of Appeal's Opinion, however, there is no such thing as storage renters' "insurance" offered by a storage facility in connection with storage rental agreements. Indeed, if *any* company grafts standard form insurance policies into its related commercial or consumer contracts, those policies now cease to be "insurance" so long as the policies somehow depend on the non-insurance contracts. Under the Opinion, persons ordinarily subjected to regulation under the Code can now unilaterally exempt themselves from regulation by artfully structuring their transactions around the principal object test. For instance, veterinarian's insurance policies cease to be regulated "insurance" when offered as part of a pet purchase; burglary insurance policies cease to be "insurance" when written into contracts for security services; homeowners' insurance policies cease to be "insurance" when offered in connection with the sale of a house. All of this violates the Insurance Code from top to bottom.

In addition to violating the Code, the Court of Appeal's Opinion distorts 70 years of California jurisprudence by misapprehending a commonly employed doctrine of California "insurance" law: the principal object test. The principal object test has long served as one of several tools of Code interpretation. In determining whether certain risk-shifting contracts constitute "insurance" under the Code general definition, California courts, including this Court, have asked "whether [risk] or something else to which [risk] is related in the [contract] is [the contract's] principal object and purpose." (*Jellins v. Transportation Guarantee Co.* (1946) 29 Cal.2d 242, 249.) The Opinion relies upon this "principal object test" to hold that Respondents' storage insurance policies are not

"insurance" because they are merely tangential or "incidental" components of A-1's storage rental agreements. (*See generally Heckart v. A-1 Self Storage, Inc.* (Dec. 30, 2015, No. D066831) ____ Cal.Rptr.3d ____ [2015 WL 9582722] [hereinafter, "Opinion"].)

California courts have employed the principal object test to properly deem various contracts non-insurance even where certain risk-shifting agreements existed between contracting parties. But neither this Court nor any Court of Appeal has *ever* held the principal object test to be a standalone, dispositive test that decides every "insurance" case. In fact, this Court's most recent "insurance" decision says the exact opposite. *See Sweatman v. Dept. of Veterans Affairs* (2001) 25 Cal.4th 62, 73-74 (rejecting application of the principal object test to an incidental and tangential "spreading of risk within insurance concepts"). The Court of Appeal wrongly held the principal object test to be dispositive of this case—and every conceivable "insurance" inquiry—because it mistook the test for a rigid, standalone inquiry rather than the fact-specific, Code-dependent inquiry it has always been. In short, the principal object test has never really been a "test" at all. It has always been the principal object *factor*, one of several factors courts consider when deciding "insurance" cases. Unfortunately, the Opinion's dispositive principal object test obliterates huge portions of the Insurance Code and threatens to unleash a new species of abusive, unregulated insurance contracts throughout California.

Lacking any real statutory or even common law support for its holding, the Court of Appeal relied largely on a pair of informal Department of Insurance ("DOI") opinion letters ("Staff Letters"), in which a single DOI staff attorney twice declined to regulate Respondents' "Protection Plans" as storage insurance. The Staff Letters consist of a

combined eight sentences that decline to interpret or even mention the Insurance Code. Worse, the record reveals that the DOI did not even *see* Respondents' Protection Plan contracts before rendering its purported "insurance" decisions. The Staff Letters are without any legal or factual basis, and there is no constitutional justification for deferring to such unexplained administrative inaction, particularly in an "insurance" case like this one.

At bottom, every applicable statute supports Appellant's position, every applicable precedent supports Appellant's position, and the Department of Insurance has no position. Respondents' Protection Plans are clear cut, illegal storage renters' insurance policies under the Code, and the Opinion below must be reversed in its entirety.

III. STATEMENT OF THE CASE

A. Respondents are distorting California "insurance" law for their own gain at the expense of consumers.

In 2004, the California Legislature enacted Division 1, Part 2, Chapter 5, Article 16.3 of the Insurance Code, sections 1758.7, *et seq.* (the "Act" or "Article 16.3"). The Act prohibits self-service storage facilities (hereinafter "storage facilities") from selling storage renters' insurance to their customers without a license from the DOI. (§§ 1758.7 subd.(a)-(b), 1758.75 subd.(a).) In addition to licensing requirements, the Act requires storage facilities offering renters' insurance to comply with consumer disclosure requirements and employee training regimes. (§§ 1758.72, 1758.76.) The Act mandates that when selling storage insurance, a storage facility must employ ethical sales tactics and 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 provides that even a *licensed* storage facility can only sell renters' insurance

"on behalf of" an insurer "authorized to write those types of insurance policies" in California. (§§ 1758.7 subd.(b), 1758.75.)[1]

Plaintiff's First Amended Complaint ("FAC") alleges the following facts, which are presumed true here. (*Macias v. State of California* (1995) 10 Cal.4th 844, fn.1.) Respondent Deans & Homer is an insurance company operating in California and across the western United States. (C.T. 204, at ¶ 19.) At all relevant times, Deans & Homer has been writing and selling storage renters' insurance to consumers in California. (C.T. 201, at ¶ 7; 204, at ¶ 19; 209-11, ¶ 40.) Near the end of 2007, a Deans & Homer insurance agent approached A-1 and persuaded A-1 to start selling storage "Protection Plans," on A-1's own behalf, to all of A-1's storage renters in California. (C.T. 205, at ¶ 22.) These Protection Plan contracts are relatively simple. For $10 per month, A-1 promises each renter up to $2,500 in the event of certain types of loss or damage to their stored property. (*See generally* C.T. 229-30.)

The Deans & Homer agent told A-1 that if A-1 sold storage insurance policies for Deans & Homer, then those policies, and A-1 itself, would be subjected to unprofitable "insurance" regulations. (C.T. 205-06, at ¶¶23-27.) But the agent also told A-1 that if *A-1* became the carrier—as well as seller—of substantially the same storage insurance policies, then neither A-1 nor the policies would be regulated because the policies would no longer be "insurance" under the Code. (*Ibid.*) This is Deans & Homer's creative distortion of California insurance law: that when a standard form storage renters' insurance policy becomes part of a storage rental agreement, the policy ceases to be regulated "insurance" under the Code.

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[1] To "write" a policy means to serve as the insurer on the policy.

That view was and remains dead wrong, but A-1 accepted it anyway. (*Ibid.*) Consequently, for a decade, A-1 has been hard-selling all of its renters "Protection Plans" as addenda to A-1's rental agreements. (C.T. 207-09, at ¶¶ 32-37.) Each Protection Plan contract says it is "not a contract of insurance," yet it somehow "satisfies the insurance requirement stated in" A-1's rental agreements. (C.T. 229-30.) When a customer declines the Protection Plan, A-1 *automatically* enrolls them in it unless they provide A-1 with documentation of other insurance within 30 days. (C.T. 209, at ¶ 37.) Respondents' Protection Plans are nothing but repackaged versions of Deans & Homer's own storage insurance policies. (C.T. 189, at ¶ 3; 206, at ¶ 25-27; 208-09, at ¶ 31.) The only material difference between A-1's Protection Plan and Deans & Homer's regulated insurance is that "the Protection Plan offers less coverage and costs more than Deans & Homer's Customer Storage Insurance Policy." (C.T. 211, at ¶ 42.) In fact, A-1 does not maintain reserves adequate to pay "Protection Plan" claims. (C.T. 213, at ¶ 48.)

Deans & Homer not only drafted and provided A-1 with the Protection Plan contracts themselves, it also gave A-1 "Protection Plan" claim forms (read: "storage insurance" claim forms) and a series of procedures for executing this new "Protection Plan" line of business. (C.T. 206, at ¶¶ 26-27.) Deans & Homer then reinsured A-1—not storage renters—for some of the losses that A-1 might incur in paying Protection Plan claims. (C.T. 206-07, at ¶¶ 28-30.) Under this reinsurance agreement, A-1 grants Deans & Homer the continuing right to adjust and settle Protection Plan claims *directly with A-1's customers*. (C.T. 207, at ¶ 29.) Thus, claimants who suffer losses have no right to recover from the well-regulated, well-capitalized insurance company, yet the insurance company maintains the right to limit renters' recoveries *from A-1*. (*Ibid.*)

In sum, Deans & Homer:

(1) crossed out its own name from its storage renters' insurance policies and wrote in A-1's name as the insurer; (C.T. 207, at ¶ 31)

(2) increased the premiums and slashed the coverage on those policies; (C.T. 209-11, at ¶¶ 40-42)

(3) gave those insurance policies to unlicensed, unregulated A-1 to sell on A-1's own behalf; (C.T. 205-06, at ¶¶ 22-27) and

(4) secured its own profits by collecting reinsurance premiums from A-1 and maintaining substantial control over renters' "Protection Plan" claims, so as to limit its own liability to A-1 under the reinsurance agreement. (C.T. 206-07, at ¶¶ 28-31.)

As a result of all this, Plaintiff and the Class have overpaid for illegal, deceptive and inferior renters' insurance policies that had no business being on the market to begin with, much less as part of an auto-enrollment scheme. (C.T. 213, at ¶ 48.)

B. Procedural History

Plaintiff filed the FAC on April 14, 2014 after a limited opportunity for discovery. The FAC asserts causes of action 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. (C.T. 219-26, at ¶¶ 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 renters' "insurance" policies in violation of the Code. (C.T. 226-27) Plaintiff seeks to represent a multiyear Class of A-1's storage customers who have bought and continue to buy A-1's sham "Protections Plans" throughout California. (C.T. 216-17, at ¶ 56.)

In the Superior Court, Respondents demurred to the FAC, arguing

that their "Protection Plan" addenda could not be "insurance" policies under the principal object test. (C.T. 232-252.) The Superior Court applied the principal object test as dispositive and held that Respondents' Protection Plans were not storage renters' insurance because they were tangential to A-1's storage rental contracts. (*Heckart v. A-1 Self Storage, Inc.* (Super. Ct. San Diego County, 2014, No. 37-2013-00042315).)

Plaintiff appealed, arguing that Respondents' Protection Plans are obviously storage renters' "insurance" under Article 16.3 and that the principal object test must be reconciled with the Code's specific "insurance" definitions: especially those that are *necessarily* incidental to and dependent on some other transaction. Respondents, on the other hand, urged the Court of Appeal to apply their (distorted) principal object test as dispositive regardless of Article 16.3. The Court of Appeal applied Respondents' distorted, dispositive version of the principle object test to deem their Protection Plans *non-* insurance under the Code. (*See* Opinion at 9-10.) Purporting to rely on *Truta v. Avis Rent A Car Sys., Inc.* (1987) 193 Cal.App.3d 802, the Court of Appeal held that Respondents' Protection Plans were not storage renters' insurance because the primary purpose of the overall transaction between Appellant and A-1 was "the rental of storage space." (*Id.*) In addition, the Court of Appeal relied on two Staff Letters that Deans & Homer procured from the DOI in 2003 and 2008, respectively, in which the same DOI staff attorney twice declined to regulate Respondents' Protection Plan "program" as insurance. (Opinion at 12-13.) For these two reasons, the Court of Appeal held Respondents' Protection Plans to be mere risk-shifting contracts rather than storage renters' insurance within the meaning of Article 16.3. (*See generally* Opinion at 1-13.)

This Court granted Appellant's Petition for Review on March 16,

2016.

IV. RESPONDENTS' PROTECTION PLANS ARE STORAGE RENTERS' "INSURANCE" UNDER THE CODE.

A. The Code expressly regulates the precise contracts and parties in question.

As in any case involving statutory interpretation, this Court must "ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*California Teachers Ass'n v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632. [quoting *Dyna-Med, Inc. v. Fair Emp. & Housing Com.* (1987) 43 Cal.3d 1379, 1386].) Ascertaining the Legislature's probable intent "begin[s] with the statutory text." (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 215.) Specifically, in insurance cases, this Court "begin[s] with the plain language of the [Code], . . . viewing [the words] in their statutory context, because the language employed in the Legislature's enactment generally is the most reliable indicator of legislative intent." (*Fluor Corp. v. Superior Court* (2015) 61 Cal.4th 1175, 1198.) The Code's "plain meaning controls if there is no ambiguity in the statutory language." (*Ibid.*) "If, however, the statutory language may reasonably be given more than one interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute." (*Ibid.* [internal quotations omitted])

Here, the Code unambiguously identifies Respondents' Protection Plans as storage insurance, and every extrinsic aid of statutory interpretation bears this out.

1. *The Code unambiguously shows that Respondents' Protection Plans are regulated insurance.*

The Code 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.) Satisfaction of Section[2] 22 typically requires two contractual elements: shifting one party's risk of loss to another party, and distributing that risk among similarly situated persons. (*E.g., Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 725-26.) There is no dispute here that Respondents' Protection Plans satisfy both elements of Section 22.

In 2004, the Legislature enacted Assembly Bill 2520 to add Sections 1758.7, *et seq.* (the "Act" or "Article 16.3") to the California Insurance Code. Article 16.3 governs the circumstances under which storage facilities like A-1 may offer storage renters' insurance to their 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 subd.(a)-(b).)[3] Section 1758.75 then specifies the "types of insurance" that only 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.*

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[2] The word "Section" herein refers to the applicable section(s) of the California Insurance Code.

[3] All emphasis herein is added unless otherwise stated.

(§ 1758.75.) The Act further provides that:

> 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.)

The elements of Section 1758.75 storage "insurance" are therefore: (1) an "insurance" contract, (2) providing "coverage" against "hazards," (3) to storage "renters," (4) "for the loss of, or damage to, [renters'] tangible personal property," (5) while such property is "in storage or in transit during the rental period." (§ 1758.75.) Here, Respondents' Protection Plans:

(1) are *"insurance"* contracts "whereby [A-1] undertakes to indemnify [thousands of storage *'renters'*] against loss, damage or liability arising from [] contingent or unknown event[s]"; (§ 22; C.T. 209-12)

(2) promise renters cash *"coverage"* of up to $2,500 per renter in the event of potential *"hazards"* like fire, smoke, explosions, theft, vandalism, roof leaks, violent windstorms, or collapse of a self-storage building; (§ 1758.75; C.T. 229-30)

(3) provide coverage specifically for *"loss[es] of, or damage to, [renters'] tangible personal property"* caused by the above hazards; (*Ibid.*) and

(4) cover renters' property while such property is *"in storage . . . during the rental period."* (*Ibid.*)

Respondents' Protection Plans manifestly satisfy Section 22's general definition of "insurance" as well as Section 1758.75's specific definition of storage renters' "insurance," so they are regulated "insurance" under the Code. (*See* § 5 ["Unless the context otherwise requires, the general provisions of [§ 22] shall govern the construction of this code."].)

This case is that simple.

Moreover, storage facilities like A-1 are unambiguously included in Section 1758.74's prohibition against "any person" selling such "incidental" renters' insurance without an Article 16.3 license. (§§ 1758.74, 1758.75; *see also* § 19 ["'Person' means any person, association, organization, partnership, business trust, limited liability company, or corporation."].[4] And in case A-1 Respondents might (somehow) still wonder whether the Act or the Code applies to them, the Act practically singles them out for regulation. (§ 1758.7 ["No *self-service storage facility* . . . shall offer or sell . . . the types of insurance specified in Section 1758.75 in connection with and incidental to [storage] rental agreements . . . ."].)

There is no ambiguity whatsoever in these Code provisions as applied to Respondents' Protection Plans. They are so obviously storage renter's insurance that only a lawyer could find them to be anything else. (*Compare* § 1758.75 [defining storage renters' insurance], *with* C.T. 229-30 [form contract plainly satisfying the definition of storage renters' "insurance"].) Likewise, there is no ambiguity in the relevant Code provisions as applied to Respondents themselves. A-1 is both a "person" and a "self-service storage facility," so unlicensed A-1 cannot offer or sell storage insurance "incidental to, or in connection with," its storage rental agreements. (§§1758.7, 1758.74.) That is effectively the end of this case in this Court. (*See Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119-20 ["Where, as here, legislative intent is expressed in unambiguous terms, we must treat the statutory language as conclusive; 'no resort to extrinsic aids is necessary or proper.'"].)

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[4] The Court of Appeal did not even mention § 1758.74 in its decision. (*See generally* Opinion.)

Nonetheless, a thorough examination of the whole Act and the whole Code only canonizes the obvious. Respondents' Protection Plans are regulated storage "insurance" policies under the Act and under the Code as a whole.

2. *Every "extrinsic aid" of statutory interpretation demonstrates that Respondents' Protection Plans are regulated insurance contracts.*

Despite the extreme narrowness and clarity of Article 16.3's "insurance" definition and prohibitions, the Court of Appeal believed that Respondents' Protection Plans could not be storage renters' insurance *solely* because A-1, rather than Deans & Homer or some other third party, was the alleged "insurer" of these contracts. (*See generally* Opinion at 1-12.)[5] In other words, had A-1 done nothing but replace its own name in the Protection Plans with Deans & Homer's name as the Protection Plan obligor, no one—not even the Court of Appeal—could deny that these exact same contracts would be "incidental" storage renters' "insurance" offered in violation of the Act. (*See generally* C.T. 229-30; §§1758.7, *et seq.*) But according to the Opinion below, replacing Deans & Homer's name with A-1's name as the "insurer" in a standard form insurance policy—and changing nothing else—somehow renders the policy *non*-insurance under the Code. (*See generally* Opinion at 1-12.; §§ 1758.7, *et*

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[5] Respondents' counsel have adopted—as they must—this same erroneous position since the outset of this case. (*See* RT at 26 [Mr. Brooks for A-1: "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 [*Wayne v. Staples Inc.* (2006) 135 Cal.App.4th 466] and was saying, ['b]uy this policy of insurance[,'] [a]nd they were having an insurance policy issued by [an insurance company], . . . then that's a different analysis."].)

seq.)

Nothing in or about the Act or the Code even arguably supports this proposition. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (1977) 70 Cal.App.3d 599, 606 ["It is a fundamental principle of law that, in determining rights and obligations, substance prevails over form."].) Instead, everything about the Act and the Code demands the opposite result.

a. The Act's express purposes show that Respondents' Protection Plans are storage renters' insurance.

When determining the Legislature's intent in Article 16.3, this Court should assign "significance . . . to every word, phrase, sentence and part" of the Act. (*Select Base Materials, Inc. v. Bd. of Equalization* (1959) 51 Cal.2d 640, 645; *see also Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476.["We must presume that the Legislature intended every word, phrase, and provision in a statute to have meaning and to perform a useful function."] (internal quotations omitted).) Indeed, this Court "do[es] not presume that the Legislature performs idle acts, nor [does it] construe statutory provisions so as to render them superfluous." (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22.)

Perhaps the clearest indicator of legislative intent in Article 16.3 is the fact that an Article 16.3 license "only" allows storage facilities to sell "incidental" renters' insurance *written by "an authorized insurer."* (§§ 1758.7 subd.(b), 1758.75.) Behind this limitation are two potential, mutually exclusive intentions: (1) to require storage facilities to get a license and comply with the Code before selling "incidental" renters' insurance backed by a regulated insurer, but at the same time, *not* to require licensing or Code compliance when storage facilities sell the exact same

"incidental" policies *written by the unregulated facilities themselves* (this makes no sense); or (2) to prohibit storage facilities—with or without an Article 16.3 license—from *writing* "incidental" renters' insurance unless they properly become "insurer[s] authorized to write those types of insurance policies in this state" (this makes plenty of sense). (§ 1758.7(b); *accord* § 150 ["Any person capable of making a contract may be an insurer, *subject to the restrictions imposed by this code.*"].)

Respondents, in their relentless creativity, might proffer a third intent behind Article 16.3's "authorized insurer" limitation: merely to prohibit licensed storage facilities from selling renters' insurance written by unauthorized *third parties*. There are two independent reasons why this could not have been the exclusive intent behind Article 16.3's "authorized insurer" limitation. First, this third possible—indeed, likely—intent does not *by itself* eliminate the absurd nature or effect of the first, countersense intent described above. Second, this third intent—if exclusive—would have the Legislature conditioning the question of "insurance" *solely* on the identity of the alleged "insurer": such that § 1758.75 contracts are not "incidental" storage insurance when a storage facility is the renters' counterparty, but *are* incidental storage insurance when some other person (insurance company or not) is the renters' counterparty. Unfortunately for Respondents, that view is antithetical to the structure and function of the entire Insurance Code.

As for the Code's structure, the existence of an "insurer" depends *entirely* on the existence of "insurance," not the other way around. (*See* § 23 ["The person who undertakes to indemnify another *by insurance* is the insurer, and the person indemnified is the insured."]; § 22 ["Insurance is a contract where by *one* undertakes to indemnify *another* against loss, damage, or liability arising from a contingent or unknown event."]; *accord*

§ 150 ["Any person capable of making a contract may be an insurer, subject to the restrictions imposed by this code."].)[6] Accordingly, a given contract—by its terms and circumstances—is either insurance or it is not. The same contract cannot be "insurance" when one person is the insurer, and *non*-insurance when someone else becomes the insurer (and nothing else changes at all). (*Id.*) No California court has *ever* adopted such a Code-defying, downright dangerous position until this case: and for good reason.

The primary function of the Code is to "to protect the insured, or the public, from the insurer." (*California Physicians' Service v. Garrison* (1946) 28 Cal.2d 790, 810].)). The Code does this by preventing unauthorized persons—whoever they are—from transacting "insurance," regardless of whether the contracts themselves happen to comply with the Code. (*E.g.*, § 700(b) ["The unlawful transaction of insurance business in this state in willful violation of the requirement for a certificate of authority is a public offense . . . ."].) The Code also protects the public by regulating the sale and terms of "insurance" *contracts*, regardless of whether the "insurer" happens to be authorized. (*See generally* Insurance Code Division 1, Part 1, Chapters 3-5 [regulating the negotiation and terms of "insurance" contracts].) Here, if Respondents and their "Protection Plan" addenda — plain-vanilla renters' insurance policies — can evade the entire Code just

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[6] The same goes for insurance agents, the existence of which depends entirely on the existence of an "insurance" contract. (*See* § 1621 ["An insurance agent is a person who transacts *insurance* . . . ."].) This is why the Act specifically and narrowly defines a new "type of insurance" that the newly licensed "self-service storage agents" may sell. (§§ 1758.7(a)-(b); 1758.75.) *There can be no limited "agent" of an "insurer" unless there is first an "insurance" contract.*

by changing the insurer's identity from a third party to a storage facility, the express purposes of the Act and the Code are eviscerated. No storage facility would *ever* have to become licensed to sell incidental renters' insurance, because they could unilaterally deregulate all such policies—and themselves—by not just selling, but also *performing* those insurance contracts without regulatory oversight. (*But see Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 788 ["It is fundamental that legislation should be construed so as to harmonize its various elements without doing violence to its language or spirit."].)

Where, as here, the Code expressly prohibits a specific type of company from selling a specific type of contract without regulation, it most certainly prohibits such a company from *selling and performing* that contract without regulation. (*Id.*) This is common sense. When the Code defines particularized "insurance" contracts that are "incidental" by nature, it makes no sense whatsoever to use the principal object test as a blanket bar against regulation, based only on the identity of the alleged "insurer." But that is exactly what the Opinion below does, and Respondents know it. (*See generally* Opinion at 1-12; §§ 1758.7 *et seq.*) Respondents' and the Court of Appeals' position is nothing short of antagonistic to Article 16.3's (and the rest of the Code's) express and implied intentions.

Detailed examination of the Code outside Article 16.3 only further clarifies the reality that A-1 may not sell—much less sell *and carry*—Section 1758.75 "insurance" without regulation.

b. <u>The Code's statutory scheme shows that Respondents' Protection Plans are regulated "insurance" contracts.</u>

One of the Court of Appeal's primary reservations against stating the obvious (that Respondents' "Protection Plans" are clear cut storage renters'

insurance policies) was its aversion to subjecting *non*-insurance companies to the Code just because their business contracts shift and distribute risk amongst private parties.[7] But the Court of Appeal need only have looked to the Code itself to quell its fears of overregulation, because broad-sweeping regulation of all risk-shifting is *not* what the Code purports to establish: not even by its literal terms. (*See Stafford v. Realty Bond Service Corp.* (1952) 39 Cal.2d 797, 805 ["[E]very 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."].)

Indeed, contrary to what the Court of Appeal seemed to think, no certificate of authority from the Insurance Commissioner is required to transact pure Section 22 "insurance" in California: *even when the Code is read literally*. In other words, the mere fact that a company's business contracts satisfy Section 22's general "insurance" definition does *not* mean that the company has to follow the Code or obtain an insurer's certificate to lawfully conduct its business. Instead, "[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 procuring a certificate of authority from the commissioner." (§ 700; *see also* § 680 ["An insurer shall not transact any *class* of insurance which is not authorized by its charter."].)

Under the Code, there are twenty-one (21) discrete, specifically

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[7] *See* Opinion at 6 ["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."] [quoting *Truta*, 193 Cal.App.3d at 812]; Opinion at 10 ["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 . . . into insurance."].

defined "classes" of insurance, each with its own unique definition and characteristics. (*See generally* §§ 100-120.) These twenty-one classes are—by the Code's plain terms—exhaustive of all regulated "insurance" in California. (*Id.*; *see also* § 100 ["Insurance in this state is *divided into* the following classes: . . . ."].) Thus, even if a company's commercial or consumer contracts shift and distribute some risk—thus satisfying Section 22—the company need not subject itself to DOI scrutiny unless its contracts *also* fall within one of the Code's specific insurance "classes."

Respondents repeatedly argued below (and again in their Answer to Appellant's Petition for review) that Article 16.3 did not create a new "class" of insurance under the Code. They are technically correct as far as that statement goes. (*See* § 100 [not listing storage renters' insurance as a "class"]; § 1758.75 [defining a new "type" of insurance rather than a new "class"].) But that statement is no help to Respondents' case. The problem for Respondents is that the new "type of insurance" referenced throughout Article 16.3 necessarily constitutes one of the Code's *preexisting* "classes" of insurance: if nothing else, "Miscellaneous insurance." (*See* § 120 ["Miscellaneous insurance includes . . . any insurance not included in any of the foregoing classes, *and which is a proper subject of insurance.*"].)

There can be no doubt that Section 1758.75 storage insurance—if not within any other class—is in the "Miscellaneous" class because the Code: (1) narrowly defines storage renters' insurance and calls it a "type of insurance"; (2) expressly regulates the offering and sale of storage renters' insurance by storage facilities; and (3) not only assumes, *but expressly provides* that there are "insurer[s] authorized to write those types of insurance policies in this state." (*See* §§ 1758.7, 1758.75, 1758.791(e).) Accordingly, Section 1758.75 storage insurance is necessarily "Miscellaneous insurance" (if nothing else) because it is a "proper subject

of insurance." (§ 120.) And no one—storage facility, insurance company, car dealership or horse breeder—can lawfully transact that "class" of insurance without a certificate of authority from the Commissioner. (§§ 680, 700; *see also* § 150 ["Any person capable of making a contract may be an insurer, *subject to the restrictions imposed by this code*."].)

Section 120's "Miscellaneous insurance" definition is not only instructive on the illegality of Respondents' Protection Plans, it is relevant to prove a broader, more important point of legislative intent throughout the whole Code: that being, *the Legislature always recognized that Section 22 was overbroad as a standard for "insurance" regulation.* (*See* § 120 ["Miscellaneous insurance includes . . . any insurance not included in any of the foregoing classes, *and which is a proper subject of insurance.*"].) This is why in all instances, for every single class, the Code itself requires something more—often a great deal more—than the satisfaction of Section 22 to trigger "insurance" regulation.

In most cases, the Code establishes that "something more" with painstaking specificity via the Code's discrete class definitions. Some class definitions limit "insurance" regulation through the enumeration of specific risks.[8] Other class definitions limit insurance regulation by enumerating particularized types of insured property.[9] Still other classes limit regulation

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[8] *E.g.*, § 102(a) [fire insurance includes "insurance against loss by fire, lightning, windstorm, tornado, or earthquake"]; § 111 [boiler and machinery insurance includes "insurance against loss . . . from explosion of, or accident to, boilers, tanks, pipes, pressure vessels, engines, . . ."]; § 112(a) [burglary insurance includes "insurance against burglary or theft or both"].

[9] *E.g.*, §§ 103(c) [marine insurance includes "insurance against any and all kinds of loss of or damage to: ¶(c) Precious stones, jewels, jewelry, gold, silver or other precious metals"]; 102(c), 112(c) [fire insurance and

by enumerating specific kinds of insured (but never *insuring*) parties.[10] Nowhere does the Code purport to establish "principal object" or "primary purpose" as the indispensable "something more" that must attend every Section 22 contract before regulation can be triggered.

Quite the opposite: some class definitions—much like § 1758.75's storage "insurance" definition—expressly limit regulation *through the insurance contract's relationship to some other primary transaction.* (*E.g.*, § 104 ["Title insurance means insuring, guaranteeing or indemnifying owners of real or personal property . . . against loss or damage suffered by reason of: . . . ¶(c) [i]ncorrectness of *searches relating to the title* to real or personal property."]; § 105 ["Surety insurance includes . . . ¶(b) [i]nsurance against loss resulting from the forgery or alteration of *any instrument* of any kind or character or of any signature thereon."]; *see also* § 1758.75 [defining storage renters' "insurance" contracts in relation to storage rental agreements]; § 1758.74(b) [recognizing that storage renters' "insurance" may be sold "*in connection with, or incidental to*, self-service storage rental agreements"].)

Most of the Code's class definitions employ various combinations and conjunctions of the above limitations. (*See generally* §§ 100-120.) So

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(Footnote Continued)

burglary insurance include "[i]nsurance by means of an all-risk policy . . . against any and all kinds of loss of or damage to, or loss of use of, personal property other than merchandise"].

[10] *E.g.*, § 118 ["Aircraft insurance includes insurance of aircraft owners, users, dealers or others having insurable interests [in aircraft]"]; § 104 ["Title insurance means insuring, guaranteeing or indemnifying owners of real or personal property or the holders of liens or encumbrances thereon or others interested therein . . . ."].

while Section 22—read in isolation—might threaten to "engulf practically all contracts," the Code itself never did. (*Transportation Guarantee Co. v. Jellins* (1946) 29 Cal.2d 242, 249.) Contrary to the Court of Appeal's view, Section 22's breadth was no legislative accident that courts must correct across the whole Code using the same "principal object" tool in every instance; Section 22 was never intended as the standard or gatekeeper of all "insurance" regulation. Instead, Section 22 was always a well-considered building block of overall Code construction, *never* to be read in isolation and certainly not to be modified in every instance. (*See* § 5 ["Unless the context otherwise requires, the general provisions of [§ 22] *shall* govern the construction of this code."]; § 37 ["Provisions of this code relating to a particular class of insurance or a particular type of insurer *prevail* over provisions relating to insurance in general or insurers in general."].)

Where the Legislature saw a special need for judicial or administrative assistance in delineating "insurance" contracts for regulation, it overtly requested that assistance. (*See, e.g.,* § 120 [assuming that not all Section 22 insurance is "a proper subject of insurance," and thus not all Section 22 insurance is subject to regulation as "Miscellaneous insurance"].) The Legislature requested no help in defining storage renters' "insurance" under Section 1758.75 because it needed none. The Act's formulation of storage renters' insurance is so narrow, so easily understood, and so readily applicable to this case (or any other case) that it requires no Code-supplanting "test" to inform its plain meaning.

Respondents' Protection Plans are expressly regulated, "incidental" insurance contracts under the Act and under the Code as a whole. Not only does Section 1758.75 define a specific "type of insurance" contract under the Code, it also constitutes a specific "class" of insurance under the Code.

If A-1 wants to lawfully transact storage renters' insurance on its own behalf, then A-1 needs to obtain a certificate of authority: just like any other insurer. (§ 150 ["Any person capable of making a contract may be an insurer, *subject to the restrictions imposed by this code.*"].) If A-1 wants to transact storage insurance on behalf of "an authorized insurer," then A-1 needs to get an Article 16.3 license like every other storage facility. (§§ 1758.7, *et seq.*; C.T. 413)[11]

c. Respondents' Protection Plan scheme presents the precise "evils" that the Code generally, and the Act specifically, exist to regulate.

In evaluating the extent to which Respondents' Protection Plan scheme presents evils at which the Insurance Code is aimed, this Court might begin by looking at the requirements for becoming "an authorized

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[11] In general, the particular class(es) into which storage renters' insurance contracts fall may vary according to the particular terms of each contract. The Code specifically contemplates that a particular type of insurance contract might fall into one or more regulated classes under different circumstances. (*See* § 121 ["Except as otherwise stated, the enumeration in this chapter of the kinds of insurance in a particular class *does not limit any such kind to any one of such particular classes, inasmuch as the classification of similar insurance may vary with the subject matter.*"].) In this case, Respondents' Protection Plans might be in Section 102's "fire insurance" class rather than Section 120's Miscellaneous class, because they expressly provide coverage against "loss by fire." (*See* § 102(a).) Respondents' Protection Plans might also be "burglary insurance" under Section 112 because they expressly provide coverage for "loss[es] by . . . theft." (*See* § 112(a).) But for purposes of this case, it makes no difference *which* class Respondents' Protection Plans fall under because the point is this: every Section 1758.75 storage insurance contract either constitutes Miscellaneous insurance *or* some other preexisting class of regulated insurance, because "incidental" storage insurance is "a proper subject of insurance" under the Code. (§ 120; *see generally* §§ 1758.7, *et seq.*)

insurer" in California. (§ 1758.75.) Section 717 provides:

> 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.

Here, the DOI has not evaluated A-1's capital structure or financial stability. (§§ 717(a) & (c).) The DOI has not evaluated A-1's investments. (§ 717(b).) The DOI has not evaluated A-1's competency, character or integrity of management. (§ 717(e).) The DOI does not know who A-1's controlling shareholders are. (§ 717(f).) The DOI has not evaluated whether A-1 properly adjusts or fully pays customer claims. (§ 717(g).)[12] The DOI has not evaluated the fairness or honesty of A-1's business methods. (§ 717(h).) The DOI has not evaluated A-1 for any hazards that threaten "Protection Plan" policyholders or A-1's creditors. (§ 717(j).) All of this shows why the Legislature does not want unauthorized storage facilities *writing* incidental renters' insurance policies *with or without an Article 16.3 license*. (§§ 1758.7 subd.(b), 1758.75, 1758.791(e) .) A-1 is completely unqualified to act as a renters' insurance company in California,

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[12] For the Court's information, A-1 does not. (*See, e.g.,* C.T. 119-20 [A-1 emailing Deans & Homer for advice on how to avoid paying legitimate claims, and Deans & Homer replying, "you don't want to spell out the exact [claims procedures] you will follow because then you will be bound by them," and further stating, "I am a bit concerned again that you are trying to make yourself into an insurance operation."].)

regardless of whether it has been vetted to *sell* insurance for an authorized insurer. (*Cf.* § 1758.78 [prohibiting even licensed storage facilities from "[a]dvertis[ing], represent[ing], or otherwise portray[ing] [themselves] or [their] employees as licensed insurers"].)

Furthermore, the Code is specifically aimed at ensuring that insurers—incidental or not—have adequate capital levels and reserves to support their policyholders' claims. (*See, e.g.,* §§ 739, *et seq.* [providing for extensive regulation of insurers' "risk-based capital" levels]; § 923.5 ["Each insurer transacting business in this state shall at all times maintain reserves . . . . The reserves shall be computed in accordance with regulations made from time to time by the commissioner."].) In this case, Respondents' Protection Plans are precisely the type of contracts that demand capital oversight and reserve accumulation, because A-1 has assumed tens of millions of dollars in contingent cash obligations to thousands of consumers statewide. (C.T. 213 [alleging $9 million in Protection Plan *revenues* during the five-year Class Period, which computes to tens of millions of dollars in contingent obligations at any given time during the Class Period].) A-1, however, does *not* maintain reserves sufficient to support renters' Protection Plan claims. (*Ibid.*) This lack of reserves contributes to precisely the type of increased default risk that the Code exists to mitigate. (*Ibid.*; *see also Garrison*, 28 Cal.2d at 810-11; *Title Ins. Co.*, 4 Cal.4th at 725 [relying on the fact that the well-regulated "insurer remains liable to the insured and must pay the full amount of claims"]).

As for Article 16.3, it specifically seeks to ensure that storage facilities selling incidental renters' coverage have employees who are knowledgeable about renters' insurance and properly trained to employ ethical sales practices (§ 1758.72.) A-1, however does not train its

employees to use ethical sales practices, nor does it properly educate its employees on insurance-related issues. (C.T. 212.) The Act also requires storage facilities to disclose that any coverage offered may be duplicative of insurance that the renter already has. (§ 1758.76(b)(2).) A-1, however, systematically coaxes its renters into buying Protection Plans *even when the renters already have their own coverage through a regulated insurance company.* (C.T. 208.)

Furthermore, the Act requires a licensed storage facility to disclose to its renters that they need not purchase storage insurance from the facility at all. (§ 1758.76(b)(2).) Yet A-1's Protection Plan operations are intentionally designed to nudge even the most reluctant renters into becoming policyholders through over-the-counter sales pressure and even automatic enrollment. (C.T. 208-09.) In sum, most of what A-1 has been doing to sell and provide storage renters' insurance is the exact opposite of what the Legislature intended when it enacted Article 16.3.

d. Public policy would be ill-served by allowing goods and services providers to transplant unregulated insurance policies into everyday consumer contracts.

If Respondents' "Protection Plans" are not regulated storage renters' "insurance" policies under the Code, then there can *never* be such a thing as "incidental" insurance in California. In other words, there will be no such thing as a regulated insurance policy incorporated into a related non-insurance contract between two parties. If that is the case, California—more than any other State—will be rapidly ambushed by bad actors pushing legalized "insurance" schemes that will harm consumers and businesses across diverse economic sectors.

For instance, pet stores could peddle abusive, unregulated mutations of veterinarian's insurance in connection with pet sales. (*But see* §§ 12880,

et seq. [specifically regulating "pet insurance"]) Retailers shipping goods could coerce their customers into buying overpriced, unsavory versions of marine insurance to boost revenue. (*But see Wayne v. Staples, Inc.* (2006) 135 Cal.App.4th 466, 476-77 [holding the opposite].) Homebuilders or even realtors could provide abusive homeowners' insurance to buyers in connection with every housing sale. (*But see ibid.*; *Sweatman v. Dept. of Veterans Affairs* (2001) 25 Cal.4th 62, 73-74. [rejecting application of the principal object test to certain "home protection plans," and finding a tangential "spreading of risk within insurance concepts"].) Under the Court of Appeal's Opinion, the list of potential insurance schemes that could pervade this State's economy is practically endless. Fortunately, we have an Insurance Code to combat all of that.

But if the principal object test can be used to exempt almost *anything* from regulation as "insurance," then it is officially open season on Californians. This Court should send a clear message not only to Respondents and the lower courts, but also to opportunistic observers who may currently view California as a breeding ground for free-wheeling, predatory insurance operations. The message is this: the insurance laws of this State are dictated by the Code, not by some readily circumvented judicial "test" lacking any design or mechanism for consumer protection.[13]

B. All prior "insurance" decisions by this Court and the Court of Appeals show that the principal object test was never even dispositive under § 22, much less under particularized Code provisions like Article 16.3.

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[13] The Code is so abundantly clear here that Article 16.3's legislative history is unnecessary to this Court's decision (*Fluor Corp.* 61 Cal.4th at 1198), but if the Court chooses to look at it, the Court will only find further support for Appellant's position.

In deciding that Respondents' Protection Plans are not storage insurance under Sections 1758.7 *et seq.*, the Court of Appeal relied entirely on its view of the "principal object test" as a standalone, dispositive test for deciding every conceivable "insurance" inquiry. (*See* Opinion at 9 ["We *must* look to the 'principal object and purpose of the transaction' to determine whether [Respondents' Protection Plan] is a contract of insurance."]; *id.* at 11-12 [arguing that Article 16.3 "insurance" cannot exist unless the principal object test is satisfied].) This is erroneous not only as a matter of statutory interpretation, but also as a matter of California precedent. A thorough review of all relevant appellate precedent shows that the "principal object test" has never been the indispensable, dispositive gatekeeper of Section 22 "insurance," let alone of *specific* Code provisions that define *specific* types of regulated "insurance."

1. *Neither California Physicians' Service v. Garrison nor Transportation Guarantee Co. v. Jellins held or even suggested that the principal object test is dispositive of every "insurance" inquiry.*

This Court first touched on the principal object test in 1946, in a case involving a charitable group of doctors. (*California Physicians' Service v. Garrison* (1946) 28 Cal.2d 790.) The doctors collectively agreed to provide medical care to indigent people in exchange for, essentially, whatever people could afford to pay. (*Id.*, at 805.) In *Garrison*, the principal object test was one of *several* factors that guided this Court's "insurance" inquiry. Other pivotal factors included: (1) whether the alleged insurer actually assumed any risk (*id.*, at 804-05); (2) whether there was good reason to require the alleged insurer to maintain reserves (*Ibid.*); (3) that "there [was] no more impelling need than that of adequate medical care on a voluntary, low-cost basis for persons of small income" (*Id.* at 809); and (4) that *"the Legislature . . . necessarily intended that [the alleged*

insurer] be exempt from regulation by the Insurance Commissioner." (*Id.* at 810.) It is difficult to imagine how this Court's reasoning in *Garrison* supports the Opinion below when: (1) A-1 assumes concrete, Code-specific risks to consumers' personal property; (2) A-1 is a financially unregulated entity assuming enormous contingent cash obligations to thousands of consumers; (3) there is no "impelling need" for universal storage insurance (*Id.* at 809); and (4) the Legislature "necessarily intended" that storage facilities like A-1 *not* "be exempt from regulation by the Insurance Commissioner." (*Id.* at 810; §§ 1758.7, *et seq.*) How *Garrison* supports dispositive application of the principal object test to this case—or any other case for that matter—is beyond even the wildest legal imagination.

Also in 1946, this Court addressed a pair of truck maintenance contracts under which the alleged insurer, a truck maintenance business, had agreed to purchase—not write—"insurance" for certain trucks that were the subject of its maintenance contracts. (*See generally Transportation Guarantee Co. v. Jellins* (1946) 29 Cal.2d 242.) In *Jellins*, the defendant truck owner had breached its maintenance contracts with the plaintiff truck repair company, and in *post hoc* defense of his breach, the truck owner argued that the maintenance contracts were void because they constituted illegal "insurance." (*Ibid.* at 244.) The trial court had already entered judgment against the breaching defendant, finding that the maintenance contracts did not contain "insurance." (*Ibid.*) This Court applied a standard of review that "construe[d] all ambiguities in the contracts against the defendant and in favor of plaintiff": thus, in favor of a non-insurance finding. (*Ibid.* at 245; *see also ibid.* at 246 ["If [the contractual] language does not *necessarily* require the conclusion that plaintiff was operating *as an insurer* within the contemplation of [the Code,] then the judgment of the trial court must be upheld."].)

It is worth highlighting that the *Jellins* Court was not even clear on what the terms of these truck maintenance contracts actually meant. (*See id.* at 245 [stating that the alleged "insuring clauses" in the contracts were "seemingly [] inconsistent with other provisions thereof"]; *id.* at 248 ["The agreement by plaintiff to 'insure said motor vehicle for Owner in an authorized insurance company selected by Contractor as follows,' . . . is not on its face an unlawful undertaking as an incident of the maintenance contract; *it at least admits of an interpretation inconsistent with the theory of defendant that plaintiff himself was to act as the insurer.*"]; *id.* at 253 ["Even if we assume (we do not so decide) that plaintiff's obligation to make repairs was unlimited . . . , that obligation would not necessarily void the contract [as illegal insurance]. [Plaintiff's] obligation and right to make [repairs] would be entirely compatible with the carrying of insurance *with an authorized carrier* to cover the cost of such repairs when the same were necessitated by some casualty such as collision or fire or flood."].)

This Court did articulate and rely—in part—on the principal object test to decide that those maintenance contracts were not "insurance" under the Code. Specifically, citing *Garrison*, the Court reasoned that "obviously it was not the purpose of the insurance statutes to regulate all arrangements for assumption or distribution of risk. That view would cause them to engulf practically all contracts, particularly condition sales and contingent service agreements." (*Ibid.* at 249.) Importantly, however—and unlike here—there were no "insurance statutes" in *Jellins* expressly prohibiting "truck maintenance companies" from offering or selling "incidental" insurance policies in connection with their truck maintenance contracts. (*Ibid.* at 249.) This Court was thus left to interpret only the Code's *general* "insurance" definition in relation to these contracts, and accordingly concluded that "the controlling object of each contract [was] service, not

insurance." (*Ibid.*) But that was not the end of this Court's "insurance" inquiry, even under Section 22.

The Court ultimately relied on the trial court's factual finding that "it [was] not true that . . . plaintiff agreed to *carry as an insurer* any collision or other insurance on either of [the] motor vehicles" in question. (*Ibid.*, at 254.) The Court held this finding to be "determinative of this appeal" regardless of "other considerations." (*Ibid.*) In so holding, the Court made clear that the defendants' "insurance" arguments "might have [had] merit" if only the case had been in a different procedural posture. (*Ibid.*) In other words, the Court in no way held or even suggested that an unregulated truck maintenance company could carry standard auto insurance policies so long as it did so in conjunction with repairing trucks. The Court suggested the exact opposite of this throughout its *Jellins* opinion. (*E.g., ibid.* at 248, 253.)

And nowhere did the *Jellins* Court suggest—much less decide—that "principal object" is necessary to the creation or identification of every insurance contract. On the contrary, the Court declared loud and clear that in every "insurance" inquiry, "each contract must be tested by its own terms as they are written, as they are understood by the parties, and as they are applied under the particular circumstances involved." (*Ibid.* at 248.) There is no hard-and-fast formula for deciding every "insurance" case: not under Section 22, and certainly not across every specific insurance definition that the Code has to offer. (*Ibid.*) Fairly read, *Jellins* offers zero support for the Court of Appeal's Opinion.

2. *Neither Truta v. Avis Rent A Car Sys., Inc. nor Automotive Funding Grp., Inc. v. Garamendi held or even suggested the principal object test to be dispositive of every "insurance" case.*

Truta v. Avis Rent A Car Sys., Inc. (1987) 193 Cal.App.3d 802 is the

seminal case purportedly relied upon—but actually violated—by the Court of Appeal in this case. (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 its customers if Avis's cars were damaged during the rental period. (*Ibid.*)[14] The plaintiff's claims rested on the allegation that the Waiver was an "insurance" policy under Section 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 Section 22, *Truta* properly turned to the principal object test to determine whether Avis's Waiver was regulated "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 particular plan is [the plan's] principal object and purpose." (*Ibid.* [emphasis added].)[15] *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?";[16] and

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[14] 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.

[15](*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).)

[16] In other words, "apply the Code to the facts of each case."

(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, Code-dependent 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.) Two independent conclusions thus 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" 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* tens of millions of dollars to thousands of consumers if certain risks materialize. Nowhere did *Truta* say that Avis could sell standard auto insurance policies drafted by Geico, but written by unregulated Avis into car rental contracts with Avis as the insurer. Instead, *Truta* expressly warned against structuring such obvious, incidental "insurance" arrangements. (*Id.* at 815 ["If the situation was such that [Avis] was agreeing to pay any moneys to third parties, this conclusion would be different."].)

Appellant's case might be more like *Truta* if A-1 was promising not to hold renters liable for damage to A-1's 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, obviously requires reserves to protect policyholders from default. (*See Truta*, 193 Cal.App.3d at 815.)

Moreover, *Truta* established the principal object test as half of a two-part, fact-specific, Code-dependent inquiry for identifying alleged "insurance" contracts. (*Truta*, *supra*, 193 Cal.App.3d at 812-13.) The first part of *Truta*'s inquiry—which examines the "line of business at issue" and the "evils at which the regulatory statutes were aimed"—reflects a proper reverence for the Code itself and also reflects the reality that the same company might have distinct "lines of business" within the same overall operation. Even under Section 22, *Truta* did not hold or suggest that the principal object test should decide every "insurance" case by itself. And had the *Truta* court faced specific, on-point Code provisions like Article 16.3, the *Truta* court manifestly would have considered the "evils" at which those specific "regulatory statutes" were aimed, irrespective of the principal object test. (*Id.* at 812-13.)

Like *Truta*, *Automotive Funding Grp., Inc. v. Garamendi* (2003) 114 Cal.App.4th 846 held that "[w]hether or not a risk-shifting arrangement is insurance [actually] turns on *two factors*," not one dispositive test. (*Compare id.* at 851-52, *and Truta*, 193 Cal.App.3d at 812-13 [both establishing two factors], *with* Opinion at 9 [establishing one dispositive test].) As in *Truta*, *Garamendi*'s alleged insurer offered mere waivers to

consumers, rather than promising to *compensate* consumers for losses to personal property:

> If the car is totaled, [alleged insurer] AFG *simply cancels the debt*. If not, then AFG has the option of repairing the car at its expense. *Nowhere does AFG promise to make repairs*: it merely states that if a car is repairable, [then] "any such repairs shall be at [AFG's] approval and expense." According to the stipulated facts, *AFG "may choose" to make repairs and has total control and discretion over whether a vehicle is repaired or a total loss*. In short, *AFG promises to do nothing* except bear the risk of loss due to theft or physical damage, with the right to make repairs at its expense *if it chooses*.

(*Garamendi*, 114 Cal.App.4th at 856.) Tellingly, the *Garamendi* defendants conceded that their incidental waivers "would be insurance if [they had] obligated AFG to make repairs." (*Id.*, at fn. 7.) The Court of Appeal itself noted that its holding "applie[d] only as to [that] action" and "ha[d] no bearing on any actions" where the alleged insurer actually promised to make payments or repairs for customers. (*Ibid.*)

Why did *Garamendi* expressly contemplate an "insurance" finding—under the same "incidental" facts—if only the alleged insurer had promised to pay for repairs? Simple: the *Garamendi* court—unlike the Court of Appeal here—understood the principal object test as one of "two factors," not as a myopic, dispositive gatekeeper of all "insurance" regulation. (*Id.*, at 851-52.) So long as *Garamendi*'s waiver was merely a "debt cancellation program," there was no need for the alleged insurer to maintain "sufficient reserves to meet its obligations." (*Id.*, at 856; *accord California Physicians' Service v. Garrison* (1946) 28 Cal.2d 790 [reasoning that insurance regulation was unnecessary because "no default [could] exist" and the alleged insurer "assumed [no] definite obligations"].)

Moreover, like *Truta*, *Garamendi* analyzed its alleged insurance

contracts only under Section 22's general definition, not a particularized "insurance" definition like the one in Section 1758.75. Properly read, *Truta* and *Garamendi* support Appellant's position here, not Respondents'. (*Accord Sweatman*, 25 Cal. 4th at 73-74 [rejecting the Court of Appeal's reliance on *Truta*'s principal object test].)

3. *Title Ins. Co. v. State Bd. Of Equalization did not hold or suggest that the principal object test is dispositive of every "insurance" inquiry.*

This Court once applied *Truta*'s principal object test in a tax case, without emphasizing the "evils" component of *Truta*'s two-part insurance inquiry. (*See generally Title Ins. Co. v. State Bd. Of Equalization* (1992) 4 Cal.4th 715.) In *Title Ins. Co.*, real property owners were purchasing regulated title insurance policies backed by authorized insurers. (*Id.* at 720.) The insurance companies, in turn, contracted with "title companies" to conduct the related title searches and issue the title insurance policies to property owners *on behalf of the authorized title insurers*. (*Ibid.*) The Court explained that "the preliminary title search[es] [were] designed to . . . identify[] any possible clouds on the title and exclude[e] them from the coverage of the policy." (*Ibid.*) As part of fulfilling this responsibility to the insurers, the title companies agreed to indemnify the insurers for losses they might incur (i.e., claims they might have to pay because of bad title searches. (*Id.* at 720.)

Importantly, the question in *Title Ins. Co.* was not whether the title insurance policies constituted "title insurance" under Code § 104 (they plainly did). (*Ibid.*) Nor was the question whether the title companies were authorized to carry section 104 title insurance in California (they were not). (*Id.* at 725.) Instead, the only "insurance"-related question was whether the contracts between the title companies and title insurers constituted

insurance *under Section 22* by virtue of the title companies' assumption of contingent obligations.

This Court first observed that the contracts between title companies and insurers did not "appear to distribute the risk of liability for claims among similarly situated persons." (*Id.* at 726.) For this reason alone, the contracts were not "insurance" under section 22. (*Id.* at 725-26 [explaining that Section § 22 insurance encompasses elements of risk shifting and "distribution of risk among similarly situated persons"].)[17] Despite this dispositive finding, the Court also stated—consistent with the Code itself—that not every agreement that shifts and distributes risk constitutes "an insurance contract for purposes of statutory regulation." (*Ibid.* at 726.) The Court went on to apply the principal object test and find the contracts to be non-insurance because the "main function" of those contracts was to "perform a title search" and "carry out the formalities involved in the issuance of a [lawful] title insurance policy." (*Ibid.*)

A rigorous analysis of *Title Ins. Co.* in relation to this case shows why *Title Ins. Co.* offers no support for the Opinion below. First, the Court was applying the principal object test *only under Section 22*, to contracts that did not even distribute risk. (*Ibid.*) The Court did not hold or even suggest that the principal object test must supplant every *specific* "insurance" definition under the entire Code. (*Ibid.*) In fact, the Court had no occasion to even *ask* whether the alleged insurance contracts might be "title insurance" under § 104, because § 104's "title insurance" definition is limited to contracts indemnifying *property owners*, not contracts indemnifying title insurers. (§ 104 ["Title insurance means insuring,

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[17] The Court could have ended its "insurance" analysis right there. (*Id.*)

guaranteeing, or indemnifying *owners of real or personal property* or the holders of liens or encumbrances [on the property] or others interested [in the property] . . . .].)

Second, while the Court declined to highlight the "evils" and "line of business" component of *Truta*'s two-part insurance inquiry, it specifically reasoned that "the [regulated title] insurer remains liable to the insured and must pay the full amount of claims [even] if the underwritten title company fails to perform in accordance with its obligation" to the title insurer. (*Title Ins. Co.*, 4 Cal.4th at 725.) Thus, the contracts at issue created no meaningful default risk because the well-capitalized insurance companies stood ready, willing and able to meet—and accountable for meeting—their obligations to property owners as claims arose. (*Ibid.*; *see also Garrison*, 28 Cal.2d at 804-05.)

Third, *Title Ins. Co.* correctly articulated the long-standing and *exclusive* point behind California's principal object test: that risk shifting and distribution are not *sufficient* to constitute regulated "insurance" under the Code. (*Title Ins. Co.*, 4 Cal.4th at 726.)[18] But that does not mean—and this Court did *not* say—that such insufficiency makes "principal object" or "primary purpose" a *necessary* element of every conceivable "insurance" arrangement. (*See generally id.*) This is basic logic. The principal object test always and only recognized that not every rectangle (contract that satisfies Section 22) is a square (regulated "insurance"). (*See id.*; *Garrison*, 28 Cal.2d at 809; *Jellins* 29 Cal.2d at 248-49; *Truta*, 193 Cal.App.3d at 812; *Garamendi*, 114 Cal.App.4th at 851-52.) This does *not* mean that when a clear cut square (regulated insurance policy) is drawn inside some

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[18] The Code itself always recognized this. (*See* Part IV.A.2.b, *ante*.)

other shape (a related transaction in goods, services or real property), the square ceases to be a square. Such nonsense has no foundation in the Code and no place in California jurisprudence. And the Court has already acknowledged this.

4. *Sweatman v. Dept. of Veterans Affairs shows that the principal object test does not determine the outcome of every "insurance" case.*

In *Sweatman v. Dept. of Veterans Affairs*, this Court reviewed a program administered by the California Department of Veterans Affairs ("VA"), under which the VA purchases homes and resells them to eligible veterans. (25 Cal.4th 64-65.) The veterans pay the VA for their homes on favorable installment terms. (*Ibid.*) In connection with each home purchase, the VA requires each veteran to apply for what would (normally) obviously be life and disability insurance, to ensure that the VA is properly reimbursed for its home purchases if the veterans become unable to pay. (*Ibid.*) These life and disability insurance policies between veterans and the VA were accordingly called "home protection plans." (*Ibid.*)

The Court of Appeal in *Sweatman*—like the Court of Appeal in this case—relied on *Truta*'s principal object test to determine that these "home protection plans" were not insurance because they were incidental to purchasing homes. (*Id.* at 67.) This Court, while technically affirming, went out of its way to reprimand the Court of Appeal for relying on *Truta*'s principal object test. (*Id.* at 73-74.) Specifically, although these home protections plans were merely incidental and tangential to veterans' home purchases, *they were nevertheless "a spreading of risk within insurance concepts."* (*Id.*) The only reason these home protection plans were *not* "insurance" subject to the Code was because the Military and Veterans Code—and the Insurance Code itself—specifically said so. (*Id.* at 70, 72,

74.)

This Court thus made two things abundantly clear in *Sweatman*: (1) neither *Truta* nor the principal object test supplants the Code or any other California statute; and (2) tangential or incidental coverage may still constitute "insurance" as a matter of common law. (*Id.* at 70-74.) At least one Court of Appeal received these messages loud and clear.

5. *Wayne v. Staples, Inc. rightly held that the principal object test is inapplicable to specifically defined "insurance" contracts that are "incidental" by their nature.*

In *Wayne v. Staples, Inc.*, Staples retail stores were offering package-shipping services to their customers. (135 Cal.App.4th 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. (*Id.*) This "declared value coverage" was actually an "inland marine insurance policy" written by a licensed insurance company called National Union.[19] (*Id.*) The plaintiff's cause of action was based on Staples' unlicensed sale of insurance under the Code. *Id.* at 473. Staples, however, 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* properly explained what *Truta* did *not* say: namely, that "the sale of insurance

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[19] 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(a).)

coverage as an incidental part of a more extensive transaction is not subject to regulation under the Insurance Code." (*Id.* at 476.) *Wayne* aptly reasoned as follows:

> [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 incidental facet of a transaction with another, primary commercial purpose, are regulated by the Insurance Code[20] 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 clear cut inland marine insurance notwithstanding the principal object test. (*Ibid.*) *Wayne* was rightly decided because it elected to interpret the Code rather than extend California precedent in a manner that contradicts the Code. (*See Palos Verdes Faculty Assn. v. Palos Verdes Peninsula*

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[20] In other words, a square is a square.

Unified Sch. Dist. (1978) 21 Cal.3d 650, 660-61 [even when previous decisional authority conflicts with the explicit language of a statute, it is the statute that controls].) Consistent with both *Truta* and *Garamendi*, *Wayne* crystallized the fact that the principal object test has never been a standalone gatekeeper of the entire California Insurance Code, until now.

C. The Court of Appeal erred in holding that Respondents' "Protection Plans" are not storage renters' insurance under the Code.

1. *The Opinion upends the Code along with decades of California precedent by looking only to the principal object test and nothing else.*

Neither this Court nor any California Court of Appeal has held that satisfaction of the principal object test is a necessary element of every "insurance" contract. *See* Part IV.B, *ante*. The Opinion below, however, held exactly that. (*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]; Opinion at 11-12 [determining that Respondents' Protection Plans could not be insurance under Article 16.3 unless they first satisfied the principal object test].) This is erroneous for multiple reasons.

For starters, Code Section 37 states: "Provisions of this code relating to a particular class of insurance or a particular type of insurer *prevail* over provisions relating to insurance in general or insurers in general." (§ 37.) Here, the principal object test has always been a tool for limiting the (entirely intentional) breadth of Section 22's *general* definition of insurance. Conversely, Section 1758.75 defines a very *specific* type of insurance. By deciding that Section 1758.75 cannot be satisfied unless the principal object test is satisfied, the Court of Appeal caused the Code's general provisions to prevail over the Code's specific provisions in

violation of Section 37. It also ignored Section 5's admonition that Section 22—not the principal object test—"shall govern the construction of this code." (§ 5.)

As a direct result, the Opinion compounded error upon error by not even *attempting* to interpret Article 16.3 outside of the singular word "insurance." But California courts should not be "reading statutory provisions as isolated fragments." (*Poole v. Orange County Fire Authority* (2015) 61 Cal.4th 1378, 1393 (Cuéllar, J., concurring).) Instead, a court's "task is to consider the words of the text as part of a larger statutory project, so [it] can better discern not only ambiguity but whether ambiguity exists in the first place." (*Ibid.*) Had the Court of Appeal employed this wisdom, it would have recognized that there is no ambiguity at all in Article 16.3 as applied to Respondents' Protection Plans. (Part IV.A.1., *ante*.) It would have recognized that Article 16.3 prohibits "any person," (*expressly including storage facilities*) from "sell[ing] insurance in connection with, or incidental to, self-service storage rental agreements" without a license. (*Ibid.*) It would have recognized that the Code requires more—not less—of a person seeking to *carry* insurance obligations as an insurer than it does of a person seeking merely to *sell* insurance "on behalf of an authorized insurer." (Part IV.A.2., *ante*.) The Court of Appeal might have noticed that—by definition and for good reason—the Code *never* allows for the question of "insurance" to turn solely on an "insurer's" identity. (*Ibid.*) It might have noticed that the Code repeatedly defines specific kinds of "insurance" in relation to some other primary contract. (*Ibid.*) It might have noticed that Section 22's breadth was no legislative accident because the Code—by its own terms—only regulates specific *classes* of insurance in the first place. (*Ibid.*) And importantly, it would have noticed that Respondents' Protection Plan and reinsurance scheme presents most if not

all of the "evils" that the Code generally—and the Act specifically—exist to prohibit. (*Ibid.*; *see also* § 803 [prohibiting authorized insurers like Deans & Homer from reinsuring unauthorized insurers like A-1 "for the purpose of circumventing the rate and form provisions of this code"].)

Instead, the Court of Appeal disregarded every single word of the California Insurance Code outside of the word "insurance," and then misread or ignored every applicable judicial precedent. Unfortunately, the error did not end there.

2. *The Opinion erred in deferring to an informal, uninformed and conclusory DOI Staff Letter without any indication that the DOI had seen the contracts in question.*

As a general matter, "the 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.)

In this case, the DOI's 2003 and 2008 Staff Letters are devoid of formality because they are one-off, conclusory no-action letters addressed to a single private party by a single DOI lawyer. (C.T. 273, 275; Opinion at 12-13.) The DOI's 2003 Staff Letter cited three isolated pages of *Truta* without so much as a parenthetical explanation: no Code provisions, no explanation of the agency's decision-making procedures, and no defensible

legal rationale whatsoever. (C.T. 273) This casual agency musing also predated the Legislature's 2004 enactment of Article 16.3, so far from being authoritative, the 2003 Staff Letter is practically irrelevant here. (*Ibid.*)

Moreover, when it comes to "insurance" determinations specifically, "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.) Deans & Homer, however, sought the DOI's 2003 Staff Letter *not* by sending the DOI the pertinent contracts, but by sending the DOI a carefully crafted letter from its attorney describing "a program structured substantially similar to the Protection Plan" and reinsurance regime. (Opinion at 12; C.T. 267-271) The DOI responded with a six-sentence letter speculating that the contracts it had not seen would not be "insurance contracts for purposes of statutory regulation." (C.T. 273.) If California courts cannot determine whether contracts are "insurance" without testing them "by their own terms as they are written," how can California courts properly defer to a DOI "insurance" decision without knowing whether the DOI has even seen the contracts in question? (*Jellins, supra,* 29 Cal.2d at 248.) They cannot.

As for the 2008 Staff Letter, Deans & Homer's attorney apparently thought it prudent to "communicate[] again with . . . the DOI" in 2008 regarding Respondents' Protection Plan and reinsurance regime. (C.T. 331-32)[21] Whatever "communicated again with" means, the DOI ultimately

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[21] It is unclear why it took Deans & Homer—a regulated insurance company writing storage insurance throughout California—nearly *four years* after the Article 16.3's enactment to revisit the legality of its storage Protection Plan scheme with the DOI. Perhaps the Court can think of a good faith reason for this delay, but Appellant cannot.

responded to that mystery communication with a *two-sentence* Staff Letter, which merely readopted the six-sentence Staff Letter from 2003. (C.T. 275) There is no information in the record about how Deans & Homer's lawyer "communicated with" the DOI, what he told the DOI, or what documents he sent to the DOI in support of Deans & Homer's renewed request for a no-action letter. Once again, there is no indication that Deans & Homer's lawyer actually sent the DOI these Protection Plan contracts for evaluation.

In fact, there is no indication in the record that the DOI's staff attorney *was even aware of Article 16.3 when he signed the 2008 Staff Letter*. One would hope he was, but there is no evidence to support this conclusion other than the fact that he was a DOI staff attorney. The 2008 Staff Letter does not even mention—let alone interpret—Article 16.3 or any other statute, so this Court is left to speculate as to what statutes (if any) the DOI even considered before rendering its purported opinion. (*Ibid.*) And thanks to the Code's sheer volume and complexity, it is not unheard of for legal practitioners and authorities to render insurance-related opinions without awareness of every controlling Code provision. (*See Fluor*, 61 Cal.4th at 1221-24 [overruling this Court's common law decision in *Henkel Corp. v. Hartford Accident & Indemnity Co.* (2003) 29 Cal.4th 934 because it conflicted with Code § 520, which the *Henkel* parties had failed to bring to the Court's attention].)

For all of these reasons, the DOI's off-the-cuff and uninformed Staff Letters are entitled to zero judicial deference in this State. The Staff Letters exhibit not one factual indicator of reliability, not one legal iota of interpretive authority. They contradict the Code. They deface California

precedent. They are lobbied-for folly, not law.[22]

V. CONCLUSION

For all of the foregoing reasons, this Court must reverse the Court of Appeal's Opinion in its entirety.

Respectfully submitted,

Dated: May 16, 2016

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[22] While the Opinion 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 the DOI's Staff Letters, it declines to mention the federal Supreme Court's subsequent decision in United States v. Mead Corp. (2001) 533 U.S. 218, which made clear that *ad hoc* agency statements like the Staff Letters are not entitled to Chevron deference because they lack "the force of law." (*Ibid.* at 229-233. But 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 if the statute is unambiguous or the agency's interpretation is unreasonable; both are true here. (See *Chevron*, 467 U.S. at 842-43; Part, IV.A., ante.)

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I, David J. Harris, Jr., counsel for Appellant, certify pursuant to the California Rules of Court, that the word count for this document is 13,736 words, excluding the tables, this certificate, and any attachment permitted under rule 8.204(c). This document was prepared in Microsoft Word, and this is the word count generated by the program for this document.

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Executed, at San Diego, California, on May 16, 2016.

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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.

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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: May 16, 2016, at San Diego, California.

Rebecka Garcia