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No. S232322

IN THE SUPREME COURT OF CALIFORNIA

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

Plaintiff and Appellant,

v.

A-1 SELF STORAGE INC., et al.

Defendants and Respondents.

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

A-1 RESPONDENTS' ANSWER BRIEF ON THE MERITS

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Caster Group LP, Caster Properties, Inc., and Caster Family
Enterprises, Inc.

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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CERTIFICATE OF INTERESTED PARTIES

The identity of interested persons or entities who have an ownership interest of 10% or more in A-1 Self Storage, Inc., Caster Properties, Inc., Caster Family Enterprises, Inc., and Caster Group LP has not been publicly disclosed in this action and these individuals and entities wish to keep their identities undisclosed. The identities of these individuals and entities are not relevant to any material issues in this dispute and would impair their right of privacy. Public disclosure of private ownership information is inapplicable to the purpose and intent of Cal. Rule of Court 8.208. Hence, A-1 Self Storage, Inc., Caster Properties, Inc., Caster Family Enterprises, Inc., and Caster Group LP have previously filed an application to file a certificate of interested parties under seal.

There are no other interested entities or persons. (Cal. Rule of Court 8.208, subd. (e).)

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INTRODUCTION

Samuel Heckart and A-1 Self Storage agreed, as part of a self-storage lease, that A-1 would accept responsibility for the first $2,500 of certain types of damage to Heckart's stored property, but that Heckart would hold A-1 harmless for damages beyond $2,500. Heckart contends that this agreement subjects the lease to regulation as insurance. Neither the facts nor the law support extension of California's insurance regulatory regime to the parties' lease.

Under the principal object test – which California courts have applied for 70 years – the lease is not subject to regulation as insurance because the allocation of risk in the agreement (i) was secondary to the parties' principal object (a lease of self-storage space) and would not have existed but for the lease, (ii) was limited to risk inherent in their lease relationship, and (iii) furthered the legitimate goal of allocating a shared risk and avoiding disputes over liability for damage to stored property.

After 70 years, the Legislature has implicitly accepted the principal object test as controlling on the issue of whether a contract is subject to regulation as insurance. Where the Legislature has not acted to change a longstanding judicial rule, "it is up to the Legislature to change it if it is to be changed." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 178.) This Court should decline to replace a test the Legislature has accepted and on which citizens have relied to order their affairs.

Further, the Legislature has never acted to regulate leases like the one here as insurance, and the Department of Insurance (DOI) has twice opined that such leases are not subject to regulation as insurance. The courts should not, through judicial construction, extend California's stringent insurance regulatory regime to an agreement that neither the Legislature nor the DOI has seen fit to regulate as insurance.

The risk allocation agreement is fundamentally different from insurance. Unlike insurance – in which a party with no other relationship with the insured agrees to pay for losses that cannot possibly be its fault – the lease allocates a risk *shared* by the parties arising from their landlord-tenant relationship. Tenants can and do blame landlords when their personal property is damaged. The tenant may contend that a leaky roof caused water damage, that inadequate security led to theft, or that inoperative sprinklers permitted a fire loss. Many reported cases reflect such claims. Both parties have an interest in avoiding such liability disputes by agreeing in advance who will pay for damage.

The lease here allows the parties to avoid such disputes – in advance and without litigation – in one of two ways. Either:

> (i) the tenant agrees, via an exculpatory clause, to forego any argument that A-1 *was* responsible for damage to stored property and to carry insurance to cover possible damage, or
>
> (ii) for $10 more per month, A-1 agrees to forego any argument that it was *not* responsible and to pay up to $2,500 if tenant property is damaged while

stored in an A-1 facility, while waiving the tenant's obligation to carry insurance.

(CT 200 [¶ 4], 207 [¶ 33], 229-30.) Through one option or the other – the choice belongs to the tenant – the parties resolve in advance a potential dispute inherent in their relationship. In so doing, they advance California's public policy favoring settlement over litigation. Parties should be free to make such agreements without subjecting one party to regulation as an insurer.

This Court has recognized that "it was not the purpose of the insurance statutes to regulate all arrangements for assumption or distribution of risk." (*Transportation Guaranty Co. v. Jellins* (1946) 29 Cal.2d 242, 249.) To distinguish contracts subject to regulation as insurance from those that are not, *Jellins* and later cases have consistently applied the "principal object" test. Under that test, a contract is not subject to regulation as insurance – even if it contains elements that in isolation meet broad definitions of "insurance" – unless risk shifting and risk distribution is the parties' principal object. Here, there is no dispute that the parties' principal object was the lease of storage space. Both lower courts so found, and Heckart does not contend otherwise.

The principal object test protects consumers, businesses, and regulators. It ensures that contracts whose principal purpose is indemnity are regulated as insurance as intended by the Legislature, while not casting the regulatory net so wide as to interfere with parties' freedom to allocate risks incidental to non-

insurance transactions as they see fit. It ensures that the DOI's resources are focused where the Legislature considers they are most needed. Consumers' other interests remain protected by laws applicable to contracts generally, by California's robust consumer protection laws, and by laws specifically applicable to self-storage operators under the California Self-Service Storage Facilities Act (Bus. & Prof. Code, §§ 21700 *et seq.*).

Recognizing that he cannot win under the principal object test, Heckart's main argument is that Article 16.3 of Chapter 5 of the Insurance Code ("Article 16.3") supplants the principal object test and explicitly subjects the lease to regulation as insurance. This argument has no basis in the statutory text. Nothing in Article 16.3 even mentions risk allocation agreements in self-storage leases, much less subjects leases with such provisions to regulation as insurance.

Heckart's alternative argument – that public policy considerations make it wise to regulate the lease as insurance – is misplaced because the lease does not present the same kind or degree of consumer risks that justify imposing the extensive regulations of the Insurance Code. And in any event, if regulation of leases like the one here is desirable, that is a matter better left to the Legislature. (*Automotive Funding Group, Inc. v. Garamendi* (2003) 114 Cal.App.4th 846, 857.)

Finally, even if the principal object test were not dispositive, Heckart's complaint fails for several independent reasons, including that Heckart – who does not allege that he

suffered any injury – simply lacks standing to sue. (Part III, *post*.)

The Court should therefore affirm the judgment.

STATEMENT OF FACTS

In June 2012, Samuel Heckart (Heckart) rented a storage space at an A-1 Self Storage facility. (CT 199 at ¶ 2; 202-203 at ¶¶ 12-13.) Respondents Caster Properties, Inc., Caster Family Enterprises, Inc., and Caster Group LP are all alleged to have ownership or management interests in A-1. (CT 203 at ¶¶ 14-16.)

A. A-1 Offered Heckart Two Choices for Risk Allocation

With respect to the potential for damage to Heckart's belongings while stored on A-1's premises, A-1 offered Heckart two options detailed below.

1. Under the standard lease, an exculpatory clause puts all risk on the tenant

The standard (unmodified) lease includes (i) an exculpatory clause that prospectively releases A-1 from any liability for damage to the tenant's stored property (paragraph 11), and (ii) a requirement that the tenant carry property insurance covering any stored property (paragraph 12). (CT 207 at ¶ 33; 259 at ¶¶ 11-12.)

The insurance requirement is for the benefit of both parties – because it provides a third-party source of funds in the event of damage, reducing the need or incentive for the tenant to sue the landlord – and is authorized by statute. (*Liberty Mut. Fire Ins. Co. v. Auto Spring Supply Co.* (1976) 59 Cal.App.3d 860, 865 [requiring a tenant to obtain rental insurance is for the "implied benefit" of both the landlord and the tenant]; Ins. Code, § 1758.76, subd. (b)(1) ["the self-service storage facility's rental agreement may contain provisions requiring the renter to provide insurance on his or her property in the storage unit"].)

2. Under an optional lease addendum, A-1 agrees to accept responsibility up to $2,500

A-1 also offered Heckart, for an additional $10 rent per month, the option of a lease addendum under which, instead of disclaiming liability completely, A-1 agrees to accept the first $2,500 in financial responsibility for common types of damage to tenant property (*e.g.*, water, fire and theft losses), but only if the loss occurs while the property is stored at the A-1 facility. (CT 200 at ¶ 4; 229-30.)

A-1 offered this addendum – referred to as the Customer Goods Protection Plan (CGPP) – to Heckart in a writing that:

(i) reminded Heckart that the standard (unmodified) lease placed all risk of loss to stored property on him;

(ii) reminded Heckart that the standard (unmodified) lease required him to carry insurance covering his stored property; and

> (iii) offered a lease addendum under which, for "an additional payment of $10 monthly rent," A-1 would retain liability of up to $2,500 for property damage to stored property and would waive the requirement that Heckart insure his stored property. (CT 229-30.)

A-1 further explained that the lease addendum (if elected) would modify and form part of the standard lease: "This limited acceptance of liability is a modification to the waiver of liability in paragraph eleven (11) of the rental agreement that it forms a part of. It satisfies the insurance requirement stated in paragraph twelve (12)." (CT 229.)

B. Heckart "Inadvertently" Accepts the Optional Lease Addendum After Expressly Rejecting It

Heckart rejected the lease addendum by initialing the "reject" option on the written offer. (CT 202 at ¶ 12; 229.) By initialing, Heckart represented that he (i) carried the insurance required by the unmodified lease, and (ii) understood he had a 30-day grace period in which to provide proof of such insurance:

> No, I decline participation in the Customer Goods Protection Plan. I am currently covered by an insurance plan that covers my belongings in the storage facility. I understand that I need to provide the policy information in writing to the facility Owner within 30 days or I will automatically be enrolled in the Customer Goods Protection Plan until I do provide such information to the Owner.

(CT 229.)

Heckart alleges that, despite his rejection of the addendum, he "inadvertently" failed to act within the 30-day grace period

and thus was enrolled in the protection plan – precisely as the disclosure told him would happen. (CT 202 at ¶ 12.) The complaint is silent about the nature of Heckart's purported inadvertence.

C. Heckart Does Not Allege That A-1 Breached the Lease Addendum or That The Same Protection is Available Elsewhere for Less Money

Heckart does not allege that he ever made a claim under the lease addendum or that A-1 ever denied such a claim by any tenant. Heckart alleges that the lease addendum cost only $.34 per month more than a policy of renter's insurance sold by Deans & Homer that offered $3,000 of coverage, and he admits that the Deans & Homer policy was subject to a $100 deductible (whereas the lease addendum paid for losses from the first dollar). (CT 210.)

D. The Department of Insurance Twice Opined That The Lease Addendum Was Not Subject to Regulation as Insurance

Co-defendant Deans & Homer is an insurance underwriter and agent licensed to sell insurance. (CT 204 ¶ 19.) Deans & Homer sold insurance policies to A-1 covering it for any liabilities under the lease addendum in excess of $250,000 per year. (CT 206 ¶ 28.)

In 2003, Deans & Homer wrote to the DOI about a proposed risk allocation arrangement (which A-1 later adopted in

the form of the lease addendum) and asked the DOI opine whether it would be subject to regulation as insurance. (CT 267-271.) Deans & Homer provided a detailed and accurate description of the arrangement. (*Id.*; Slip Op., pp. 12-13 [finding the Deans & Homer's description of the arrangement to be accurate].) The DOI responded that the "proposed alternative lease provisions for a landlord to assume various risks associated with the leased property" would not be subject to regulation as insurance. (CT 273 ["We do not believe that such contracts between landlords and tenants are insurance contracts for purposes of statutory regulation"].)

Further, after the passage of Article 16.3 of Chapter 5 of the Insurance Code (the statutory regime upon which Heckart largely bases his lawsuit), Deans & Homer again asked the DOI to opine on the same question. The DOI again advised that it did not consider the lease addendum arrangement to be subject to regulation as insurance. (CT 275.)

STATEMENT OF THE CASE

Heckart sued A-1 on April 3, 2013 for alleged violations of California Civil Code §§ 1750 *et seq.* and California Business and Professions Code §§ 17200 *et seq.* (CT 2.) The trial court sustained A-1's demurrer with leave to amend on April 15, 2014. (CT 196.)

On April 18, 2014, Heckart filed a first amended complaint adding Deans & Homer as a defendant. (CT 198.) A-1 again

demurred (CT 232) and requested judicial notice of the DOI's responses to Deans & Homer's inquiries about whether the lease addendum would be considered "insurance" subject to regulation as such (CT 253, 273, 275). On September 4, 2014, the trial court granted judicial notice and again sustained A-1's demurrer – this time without leave to amend. (CT 475.)

The trial court entered final judgment in favor of all defendants on September 22, 2014. (CT 478-79.) The Court of Appeal affirmed on December 30, 2015.

ARGUMENT

I.

A TENANT'S ELECTION OF THE LEASE ADDENDUM DOES NOT TRANSFORM THE LEASE INTO INSURANCE

The judgment should be affirmed because the risk-allocation provisions in Heckart's self-storage lease – which were subsidiary to and reasonably advanced a non-insurance principal object – did not transform the lease into "insurance" subject to regulation as such under the Insurance Code.

A. The Agreement Is Not Properly Viewed as Shifting One Party's Risk of Loss to Another

The foundational premise of Heckart's argument is that the lease addendum meets a broad definition of "insurance" under Insurance Code section 22 and related case law. (Opening Brief 10.) "Case law has construed [section 22] as requiring two

elements: '(1) a risk of loss to which one party is subject and a shifting of that risk to another party; and (2) distribution of risk among similarly situated persons.'" (*Truta v. Avis Rent A Car Sys., Inc.* (1987) 193 Cal.App.3d 802, 812.)

Heckart assumes that the lease addendum satisfies these two elements but provides no supporting argument. In fact, because the lease addendum differs fundamentally from insurance, Heckart's assumption – and thus the foundational premise of his argument – is unsound.

1. The agreement does not shift risk, but rather allocates and caps a shared risk

In insurance, the insurer agrees to indemnify for losses that could not possibly be the insurer's fault. Risks that reside wholly with one party are transferred to another party who, but for the insurance contract, would not be exposed to any risk and who has no control over the risk. (*Allen v. Burnet Realty, LLC* (Minn. 2011) 801 N.W.2d 153, 159 ["in an insurance contract, the insurer will have no connection with or control over the losses sustained on the part of the insured"].) An insurance contract is therefore fairly said to shift the risk of loss.

In a self-storage lease, in contrast, the risk of loss to stored property is a shared risk common to *both* the landlord and the tenant because the law will, in many circumstances, hold the landlord liable for the loss. Many reported cases involve suits against self-storage landlords and other landlords for loss of a

tenant's personal property on various theories including negligence, breach of warranty, misrepresentation, and breach of contract. (See, e.g., *Gonzalez v. Personal Storage, Inc.* (1997) 56 Cal.App.4th 464, 471 [theft; self-storage landlord allowed access to unauthorized party]; *Pelletier v. Alameda Yacht Harbor* (1986) 188 Cal.App.3d 1551, 1553-54 [vandalism; marina landlord failed to provide adequate security]; *Cregg v. Ministor Ventures* (1983) 148 Cal.App.3d 1107, 1110 [theft; self-storage landlord failed to provide adequate security after representing that premises were secure]; *Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 913 [water damage; landlord failed to maintain premises]; *Evans v. Thomason* (1977) 72 Cal.App.3d 978, 981-82 [fire; apartment landlord failed to repair defective electric outlet]; *Golden v. Conway* (1976) 55 Cal.App.3d 948, 952-53 [fire; landlord failed to notify tenant of known dangerous condition and negligently hired unlicensed contractor]; *Poulsen v. Charlton* (1964) 224 Cal.App.2d 262, 264-66 [water damage; landlord negligently failed to prevent rain intrusion]; *Ewing v. Balan* (1959) 168 Cal.App.2d 619, 620 [fire; apartment landlord supplied defective water heater]; *George v. Bekins Van & Storage Co.* (1949) 33 Cal.2d 834, 838-39 [fire; warehouse operator negligently allowed smoking].)

The fact that A-1 controls the premises and thus faces risk from damage to tenant property distinguishes the risk allocation in the lease addendum from insurance risk "shifting." Rather than shifting the cost of a loss to a party that would otherwise

bear no risk, the lease allocates and caps a shared risk: either (i) $0 to A-1 and all the risk to the tenant, or (ii) the first $2,500 to A-1 and the balance to the tenant. Rather than shifting to A-1 a risk of loss that it would not otherwise face, the lease addendum restores to A-1 the risks of liability for damage that – but for the exculpatory clause – the tenant might blame on A-1, while capping that risk at $2,500.

The parties are, in effect, settling in advance the potential liability claims that the tenant (or the tenant's insurer, as subrogee) might bring against A-1 in the event of damage to stored property. As with any settlement, each party accepts less than his or her best day in court. The tenant foregoes the possibility that a jury would find A-1 negligent (or otherwise liable) and award damages above $2,500. A-1, conversely, foregoes the opportunity to argue that it was not negligent or to otherwise dispute its liability for the loss, and accepts the risk that it may end up paying for damage that a trier of fact would not find to be its fault. Unlike insurance risk shifting (shifting risk to an entity that would otherwise have none), both parties face some risk and, through an advance settlement, both give up something to mitigate the risk without litigation.

2. The agreement does not depend on risk distribution

The parties' risk allocation agreement here also differs from insurance because it does not depend on risk distribution. If many tenants elect the lease addendum, the arrangement may

resemble insurance (in that many persons pay a relatively small sum to protect against a larger risk). But the resemblance is superficial because distributing risk across a large pool of persons is not essential to the purpose or economic viability of the lease addendum arrangement.

In insurance, the distribution of risk across a large pool of insureds is fundamental to a viable business model:

> "It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it." 1 G. Couch, Cyclopedia of Insurance Law § 1:3 (2d ed. 1959).

Group Life & Health Ins. Co. v. Royal Drug Co. (1979) 440 U.S. 205, 211; *German Alliance Ins. Co. v. Lewis* (1914) 233 U.S. 389, 412 ["The effect of insurance – indeed, it has been said to be its fundamental object – is to distribute the loss over as wide an area as possible"].) Only by accepting a large number of risks can an insurer construct a viable business model. If an insurer agrees to insure just one risk, it is no more than a gambler.

The same is not true of the lease addendum. The addendum confers an economic benefit on A-1, no matter how many customers elect it, because it (i) caps A-1's risk of liability for tenant property damage at $2,500, and (ii) avoids the costs of liability disputes. Even if only one tenant elects the lease addendum, this trade off makes economic sense. Because the lease addendum does not depend on the law of large numbers to be economically rational for A-1, it is not a "risk distribution"

arrangement in the way that insurance is. Rather, it is bilateral risk mitigation.

B. Even if the Lease Addendum Constituted Risk Shifting and Risk Distribution, the Lease Is Not Subject to Regulation as Insurance

Even if the lease addendum involved risk shifting and risk distribution sufficient to meet the threshold definition of insurance under Insurance Code section 22, that still is not sufficient to subject the lease to *regulation* as insurance. Under 70 years of California law, an agreement is not subject to regulation as insurance – even if it contains elements of indemnity – if the indemnity provisions are subsidiary to a non-insurance principal object.

Here, the parties' risk allocation arrangement was not their principal object, but instead was secondary and reasonably related to a non-insurance principal object: a lease of storage space.

1. California uses the "principal object" test to determine whether a contract is subject to regulation as insurance

There are risks incidental to many transactions and relationships. It is both prudent business and socially useful for the parties to anticipate and allocate these risks in advance and consensually, rather than fighting about liability when the risks come to pass.

The mere fact that the parties contract to allocate such risks does not, without more, subject the contract to the jurisdiction of the DOI. This Court has repeatedly recognized:

> [O]bviously it was not the purpose of the insurance statutes to regulate all arrangements for assumption or distribution of risk.

(*Transportation Guaranty Co. v. Jellins*, *supra*, 29 Cal.2d 242, 249; accord, *Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 726 ["[i]t is well established that "the mere fact that a contract contains . . . elements [of risk] shifting and distribution . . . does not necessarily mean that the agreement constitutes an insurance contract for purposes of statutory regulation"].)

Instead, for 70 years the California courts have applied the "principal object" test to determine whether a contract that includes elements of risk shifting and risk distribution is insurance for purposes of statutory regulation. Under this test, a contract is subject to regulation by the DOI *only if* risk shifting and risk distribution is the principal object and purpose of the transaction.

a. *Decisions of the California Supreme Court*

The principal object test was first articulated in *California Physicians' Service v. Garrison* (1946) 28 Cal.2d 790. There, this Court considered whether California Physicians' Service (CPS) was engaged in insurance by virtue of agreements under which (i) CPS pooled dues paid by its patient-members, and (ii) medical

providers agreed that, if they provided medical services to a member, they would look only to those pooled dues for payment. This Court held that CPS was not engaged in insurance for several reasons. One reason was that, by virtue of its agreements with the medical providers, CPS bore no risk of paying out more than it collected. (*Id.* at pp. 806-07.) But the "more compelling" reason was that the principal object of the agreements was medical service, not indemnity:

> There is another and more compelling reason for holding that the service is not engaged in the insurance business. Absence or presence of assumption of risk or peril is not the sole test to be applied in determining its status. The question, more broadly, is whether, looking at the plan of operation as a whole, 'service' rather than 'indemnity' is its principal object and purpose.

(*Id.* at p. 809.)

Later the same year, this Court again applied the principal object test in *Transportation Guaranty Co. v. Jellins, supra,* 29 Cal.2d 242. There, the Court considered a truck maintenance contract under which the contractor "agree[d] to make good any damage done to Owner's motor vehicle caused by collision, except the first $25.00 of each claim, which shall be paid by Owner." (*Id.* at p. 247.) The owner argued that this language (together with other contract language) established that the maintenance company assumed the risk of collision loss to the owner's trucks and, thus, created an illegal contract of insurance. (*Ibid.*)

This Court rejected the argument on two grounds. The first was that, on the judgment roll appeal, there was insufficient evidence to overturn the trial court's contrary interpretation of the contract. (*Id.* at pp. 244, 247-48.) Second, even assuming the contractor had assumed the risk of loss from collision, the Court explained that "a sound jurisprudence does not suggest the extension, by judicial construction, of the insurance laws to govern every contract involving an assumption of risk or indemnification of loss." (*Id.* at p. 248.)

Instead, a court must consider whether the parties' risk agreement is subordinate and related to some other principal object:

> "The fallacy is in looking only at the risk element, to the exclusion of all others present or their subordination to it. *The question turns, not on whether risk is involved or assumed, but on whether that or something else to which it is related in the particular plan is its principal object and purpose.*"

(*Id.* at p. 249, quoting *Jordan v. Group Health Assn.* (D.C. Cir. 1939) 107 F.2d 239, 245, italics supplied.) The Court then applied the principal object test and held that the contract provisions "seem to amply support the conclusion that, as stated in the contract itself, 'the *major part* of Contractor's service is the supplying of labor.' " (*Id.* at p. 252, italics supplied.)

This Court more recently applied the principal object test in *Title Ins. Co. v. State Bd. of Equalization, supra,* 4 Cal.4th 715. There, various title companies contracted with title insurers to perform services in connection with issuing title insurance

policies, including title searches. (*Id.* at p. 720.) The title companies further agreed that they, rather than the title insurer, would pay some of the title insurance claims. Under some contracts, the title companies agreed to pay claims without regard to fault, while under other contracts they agreed to pay only if the claim resulted from the title company's "negligence in searching title." (*Id.* at pp. 720-22.) The Board of Equalization argued that the title companies' assumption of risks that would otherwise fall on the title insurer constituted an "illegal contract of insurance." (*Id.* at p. 725.)

This Court disagreed. Citing the principal object test, the Court concluded that the indemnity obligations assumed by the title companies were secondary to the main purpose of the contracts, which was for the title company to perform a diligent title search and carry out other formalities associated with issuing the policies:

> The indemnification provisions are secondary to the main object and purpose of the underwriting agreements. In fact, the agreements to indemnify appear to be designed, at least in part, to give the underwritten title companies an incentive to perform their title search in a nonnegligent manner, as the title companies are in the best position to eliminate possible risk.

(*Title Ins. Co. v. State Bd. of Equalization*, *supra*, 4 Cal.4th at pp. 726-27.) The Court therefore concluded that "the title company is not involved in the illegal practice of insurance *even if an underwritten title company is deemed to have provided*

indemnification in connection with the main purpose of its contract with the title insurer." (*Id.* at p. 727, italics supplied.)

b. *Decisions of the Court of Appeal*

The Court of Appeal has likewise applied the principal object test to decide whether a contract is subject to regulation as insurance. In *Truta v. Avis Rent A Car System, Inc., supra,* 193 Cal.App.3d 802, the court considered a collision damage waiver option offered by a car rental company, under which the company waived the renter's liability for damage to the rental car. The court noted that "a persuasive argument can be made that the [collision damage waiver] transaction meets" the elements of insurance under Insurance Code section 22. (*Id.* at p. 812.) Still, the court concluded that the transaction was not subject to regulation as insurance because:

> The principal object and purpose of the transaction before us, the element which gives the transaction its distinctive character, is the rental of an automobile. . . . [The] tangential risk allocation provision should not have the effect of converting the defendants as contracting lessors into insurers subject to statutory regulation.

(*Id.* at p. 814.)

In *Automotive Funding Group, Inc. v. Garamendi, supra,* 114 Cal.App.4th 846, the court addressed a program offered by car finance lender under which borrowers had the option of either (i) insuring the car against damage and theft, or (ii) participating in the lender's Loss Damage Waiver ("LDW") program. Under

the LDW program, the lender agreed to cancel the borrower's debt in the event of a total loss to the car, and had the option to repair the car, at its own expense, in the event of damages less than a total loss. (*Id.* at p. 850.)

The DOI argued, inter alia, that the LDW should be considered insurance because it was mandatory. (*Id.* at p. 854.) The court rejected this argument, finding that the LDW was not mandatory but was offered as an alternative to insurance, and that:

> Offering an alternative to insurance does not mean that the alternative *is* insurance.

(*Id.*, italics in original.) The DOI also argued that the LDW included various insurance-like characteristics, including a deductible and the use of insurance adjusters to determine if a car had suffered a total loss. The court likewise rejected these factors as irrelevant, holding instead that the proper focus of inquiry was the parties' principal object:

> Instead, as the cases cited above make clear, the true focus is on the nature and terms of the LDW, and whether the risk-shifting accomplished by the LDW is the principal object and purpose of AFG's transactions.

(*Id.* at p. 855.) The Court concluded that the arrangement did not constitute insurance because "the primary objective of [the defendant's] transactions is to finance a used car purchase," and the LDW served the secondary objective of protecting the lender's security interest. (*Ibid.*)

c. *Decisions of other jurisdictions*

Other jurisdictions have also relied on the principal object test to decide whether an agreement constitutes insurance. (See, e.g., *Allen v. Burnet Realty, LLC* (Minn. App. 2010) 784 N.W.2d 84, 88-89, aff'd on other grounds 801 N.W.2d 153 [agreement to defend and settle claims against independent contractors]; *Castleberry v. Goldome Credit Corp.* (11th Cir. 2005) 418 F.3d 1267, 1272-73 [indemnity provision in sale agreement]; *Kinkaid v. John Morrell & Company* (N.D. Iowa 2004) 321 F.Supp.2d 1090, 1099-1100 [agreement to pay for livestock that die in transit]; *Boyle v. Orkin Exterminating Co.* (Fla. App. 1991) 578 So.2d 786, 787-88 [lifetime guarantee against termite damage]; *Rayos v. Chrysler Credit Corp.* (Tex. App. 1985) 683 S.W.2d 546, 548 [vehicle extended service plan]; *GAF Corp. v. County School Bd. of Washington County, Va.* (4th Cir. 1980) 629 F.2d 981, 983-84 [agreement by product supplier to indemnify for damages caused by third-party's negligence in installing the product]; *New Mexico Life Ins. Guaranty Ass'n v. Moore* (N.M. 1979) 93 N.M. 47, 50-51 [health care service plan]; *Huff v. St. Joseph's Mercy Hospital* (Iowa 1978) 261 N.W.2d 695, 700-01 [pre-paid obstetrical contracts]; *Korn v. Avis Rent-a-Car Sys., Inc.* (Pa. Com. Pl. 1977) 8 Pa. D. & C.3d 640, 646-47 [rental collision damage waiver]; *State ex rel. Londerholm v. Anderson* (1965) 195 Kan. 649, 663 [provision cancelling contract payments upon death of purchaser of cemetery lot]; *Jordan v. Group Health Ass'n*

(D.C. Cir. 1939) 107 F.2d 239, 248 [nonprofit organization providing medical services to members].)

In *Allen v. Burnet Realty, LLC, supra,* 784 N.W.2d 84, for example, the court considered an agreement under which a licensed real estate broker, in exchange for a $450 annual charge, offered a legal assistance (LA) program under which it would defend and indemnify its independent contractor sales agents up to $1 million with respect to third-party claims related to matters within the scope of the parties' independent contractor relationship. (*Id.* at p. 86.) The court, noting that such third-party claims involved a shared risk because the broker was vicariously liable for the acts of its agents and exercised some control over the risk, held:

> In light of this relationship, the LA Program functions less as a traditional insurance program and more as an arrangement to share potential risk. The "principal purpose and object" of the [independent contractor agreement], of which the LA Program is a part, is to sell real estate. The LA Program operates to spread the risk of a "defective product," in this case, a dispute in the sales process, between the parties to the [independent contractor agreement]. Burnet, as a real estate broker, retains responsibility for the actions of an agent acting within the terms of the [independent contractor agreement]; by requiring adherence to its policies, Burnet exercises a degree of control over the risk of incurring losses. Thus we conclude the LA Program is not insurance or "indemnity for hire."

(*Id.* at p. 89.)

In *Castleberry v. Goldome Credit Corp., supra,* 418 F.3d 1267, the seller of a portfolio of loans agreed to defend and indemnify the buyer against any claim arising out of the origination of the loans within three years of the sale. (*Id.* at p. 1269.) The court applied the principal object test to hold that the indemnity provision did not constitute insurance:

> Moreover, although the loan portfolio sale agreement contains an indemnity provision, it is not primarily an indemnity contract. Rather, it is a sale contract with an indemnity clause covering the event that the instruments sold enmeshed the buyer in litigation. The indemnity clause functioned as an inducement to the buyer to enter into the sale transaction. When assumption of risk is only collateral to a contract that has a principal purpose other than risk shifting, the contract is not a contract of insurance

(*Id.* at pp. 1272-73.)

In *Boyle v. Orkin Exterminating Co., supra,* 578 So.2d 786, Orkin provided a lifetime guarantee against termite damage in exchange for an additional payment. The company promised both to re-treat the property if termites reappeared and also to replace any property damaged by termites. (*Id.* at p. 787.) The court observed:

> In the instant case the overall purpose of the guarantee was to add service to the "sale" of appellee's termite treatment program. Appellee was not in the business of providing guarantees but in providing pest control service.

(*Id.*) Citing the "principal object" standard and this Court's decision in *Transportation Guarantee Co. v. Jellins, supra,* 29

Cal.2d 242, the court concluded: "We think application of these principles supports the trial court's conclusion that Orkin's guarantee was no more than a warranty of its service both as to the product itself and the method of application." (*Id.* at p. 788.)

Similarly, in *Rayos v. Chrysler Credit Corp., supra,* 683 S.W.2d 546 at p. 548, the court – citing *Transportation Guarantee Co. v. Jellins, supra,* 29 Cal.2d 242 – applied the principal object test to conclude that a vehicle "protection plan" was not insurance. Rather, it was "more in the nature of a warranty to repair certain defects than an insurance policy which undertakes to pay a sum of money upon certain conditions." (*Ibid.*) Despite recognizing that warranties "may contain all the elements of an insurance contract," the court reasoned that warranties differ from insurance because they "provide protection against defects or failures in a product, where an insurance policy is issued to provide reimbursement or indemnity based on an accident or occurrence unrelated to any defect or failure in the product." (*Ibid.*)

In *GAF Corp. v. County School Bd. of Washington County, Va., supra,* 629 F.2d 981, a roofing product supplier agreed to repair damages caused by the faulty workmanship of third-party contractors who installed the products. (*Id.* at p. 982.) The court acknowledged that the agreement did "contain an 'insurance' component because the risk of damage from leaks caused by faulty workmanship was transferred to GAF." (*Id.* at p. 983.) Nevertheless, the court held that the agreement as a whole did

not constitute insurance because the risk transference was a "relatively unimportant element of the transaction and is incidental to the essential character of the guarantee, which is that of a warranty agreement accompanying the sale of goods." (*Id.* at pp. 983-84.)

2. *Application: the principal object of the contract was a lease, so the contract is not subject to regulation as insurance*

Because the Legislature has not acted in 70 years to replace the principal object test, it is the proper test to apply here. Where the Legislature has not acted to change a longstanding judicial rule, "it is up to the Legislature to change it if it is to be changed." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, *supra*, 20 Cal.4th at p. 178.) Applying the principal object test here, the agreement between Heckart and A-1 is not subject to regulation as insurance.

Most simply, the principal object of the transaction – the element which gives the transaction its "distinctive character" (*Truta v. Avis Rent A Car System, Inc.*, *supra*, 193 Cal.App.3d at p. 812) – plainly was leasing the storage unit. Self-storage is A-1's business, and storing his belongings is the reason Heckart contracted with A-1. But for their relationship as landlord and tenant, there would be no reason for A-1 to offer to Heckart – and no reason for Heckart to seek from A-1 – any sort of agreement about financial responsibility in the event of damage to stored property.

Moreover, the parties' risk allocation arrangement was subservient to, and reasonably furthered, their principal object of a storage lease. Instead of arguing after a loss about whether A-1's negligence caused or contributed to the damage, the parties can allocate financial responsibility for such risks *ahead of time*, thereby avoiding disputes and advancing their principal object: a problem-free lease. Not only does such an agreement further a non-insurance principal object, but it furthers California's public policy favoring settlement over litigation. (See, e.g., *Lehto v. Allstate Ins. Co.* (1995) 31 Cal.App.4th 60, 75 [noting "California's strong public policy in favor of settlement"].)

Indeed, this Court itself has identified risk shifting provisions in leases – specifically, "[t]he lessee who agrees to hold his lessor harmless for damage to property of, or injury to, third persons occurring on the premises [or] the lessor who agrees to keep the premises in repair" – as an example of a type of arrangement that should not be subject to regulation as insurance. (*Transportation Guarantee Co. v. Jellins*, *supra*, 29 Cal.2d at p. 248.)

It is also significant that the lease addendum is limited to the types of losses – fire, theft, water and wind damage, and building collapse – that can most plausibly be blamed on the landlord's negligence. (CT 210 [¶ 40].) Unlike Deans & Homer's storage insurance policy, the addendum does not extend to risks that can less plausibly be blamed on the landlord, including riots, landslides and earthquakes, sinkholes, and aircraft. (*Id.*) A-1 did

not undertake to pay for all types of loss, but only those most likely to result in liability disputes. The fact that the lease addendum is less broad than Deans & Homer's storage insurance policy and targets the losses most likely to generate liability disputes further demonstrates that the addendum serves the principal object of a dispute-free lease.

The fact that A-1 offers *alternative* ways of allocating risk further demonstrates that the lease itself – rather than the lease addendum – is the parties' principal object. (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 73-74 [the fact that an indemnity arrangement is optional supports conclusion that the parties' principal object is not indemnity].) Tenants can choose either the unmodified lease *or* the lease addendum. (CT 229-230, 258-259.) Heckart cannot plausibly argue that the lease addendum was the parties' principal object when it was optional, he intended to choose the standard lease, and he received the lease addendum only through his own alleged inadvertence. (CT 202 at ¶ 12.) The existence of alternatives demonstrates that the parties' principal object was not to shift risk to A-1, but rather simply to have *some* risk allocation agreement in furtherance of the mutual object of a dispute-free lease.

Further, like the agreements in *Title Ins. Co. v. State Bd. of Equalization, supra*, 4 Cal.4th 715, the lease addendum serves the parties' principal object by incentivizing A-1 – which is "in the best position to eliminate possible risk" (*id.* at p. 727) – to keep

its premises safe and secure. This is consistent with sound public policy to place the risk of loss on the party most able to minimize or avoid the loss. (See, e.g., *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 479-80; *State ex rel. Dept. of California Highway Patrol v. Superior Court* (2015) 60 Cal.4th 1002, 1015.)

The lease addendum is also analogous to the legal assistance agreement in *Allen v. Burnet Realty, LLC, supra,* 784 N.W.2d 84. Both agreements address a shared risk of loss over which the promising party has substantial control and that arises from the principal contractual relationship of the parties. Thus, like the legal assistance agreement in *Allen*, the lease addendum is subservient to that principal relationship.

Finally, the lease addendum serves a function similar to the indemnity promises in *Boyle v. Orkin Exterminating Co., supra,* 578 So.2d 786, and *Rayos v. Chrysler Credit Corp., supra,* 683 S.W.2d 546 at p. 548, which those courts held were more appropriately considered as warranties. (Part I(B)(2), *ante*.) A-1's business is the safe storage of customer goods. While the law permits A-1 to disclaim liability for damages to stored goods, it is appropriate and pro-consumer for A-1 to stand behind the quality of its facilities by accepting responsibility for damage. Agreeing to do so in advance is similar to the promise by Orkin that, if its termite treatment proved ineffective, it would pay to repair further termite damage. Such promises are subsidiary to the parties' principal object of providing and receiving high quality goods or services.

In short, under 70 years of authority, Heckart's burden was to allege facts showing that the principal object of the lease was indemnity, rather than a lease. He did not and cannot meet that burden here. Plainly, the parties' principal object was the lease of storage space, and the risk allocation provisions were subservient to and reasonably related to that object. Therefore, the trial court and Court of Appeal applied the correct test and properly held that the lease is not subject to regulation as insurance.

C. The DOI's Decision Not to Regulate Provides Further Support for the Judgment

The DOI reached the same conclusion. (CT 267-271, 273, 275.) In 2003, Deans & Homer provided the DOI with a detailed outline of the lease arrangement later adopted by A-1. (CT 267-271.) The DOI responded that the arrangement would *not* constitute insurance. (CT 273.) The DOI reiterated the same opinion in 2008, after the passage of Article 16.3 (the statutory regime upon which Heckart largely bases his lawsuit). (CT 275.)

Below, Heckart did not object to the request for judicial notice of the DOI's opinion letters, did not challenge that grant of judicial notice in his appeal, and did not address DOI's opinion letters until his reply brief in the Court of Appeal. Further, the main argument raised in his reply brief – that Deans & Homer procured the DOI opinion letter by misleadingly describing the proposed lease arrangement – was rejected by the Court of

Appeal, which found that Deans & Homer accurately described the proposed arrangement to the DOI. (Reply Brief, pp. 28-33; Slip Op., pp. 12-13.) Heckart does not resurrect that argument here.

Instead, he now argues that the Court of Appeal erred in giving *any* deference to the DOI's repeated opinions. To be sure, the DOI's opinions are not binding, but they are entitled to some deference, assist in statutory interpretation, and thus provide further support for the judgment.

"[C]ourts often recognize the propriety of assigning great weight to administrative interpretations of law either by reference to an explicit or implicit delegation of power by the Legislature to an administrative agency [citations], or by noting the agency's specialization and expertise in interpreting the statutes it is charged with administering [citations]." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 22 (Mosk, J., concurring); see also *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984) 467 U.S. 837, 844 ["considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations."]; *Morris v. Williams* (1967) 67 Cal.2d 733, 748 [while not binding on the courts, "construction of a statute by officials charged with its administration, including their interpretation of the authority vested in them to implement and carry out its provisions, is entitled to great weight"].)

In addition to considerations of the DOI's experience and expertise, considerations of industry reliance further counsel deference to agency interpretations:

> But there is a third reason for paying special heed to an administrative interpretation: the reality that the administrative agency - by virtue of the necessity of performing its administrative functions - creates a body of de facto law in the interstices of statutory law, which is relied on by the business community and the general public to order their affairs and, after a sufficient passage of time, is presumptively accepted by the Legislature.

(*Yamaha Corp. of America v. State Bd. of Equalization*, *supra*, 19 Cal.4th at p 22 [Mosk, J., concurring].) Accordingly, judicial deference is particularly appropriate where an agency's interpretation is longstanding. (*Id.*) "When an administrative interpretation is of long standing and has remained uniform, it is likely that numerous transactions have been entered into in reliance thereon, and it could be invalidated only at the cost of major readjustments and extensive litigation." (*Whitcomb Hotel, Inc. v. Cal. Emp. Com.* (1944) 24 Cal.2d 753, 757; accord, *Mason v. Retirement Bd. of City & Cty. of San Francisco* (2003) 111 Cal.App.4th 1221, 1228.)

The DOI's 2003 and 2008 opinion letters are entitled to some deference for both the foregoing reasons. First, the DOI is well-positioned, by virtue of its delegated role as enforcer of the Legislature's insurance mandates, to understand both the intended scope and practical limits of its jurisdiction under the Insurance Code. Second, Deans & Homer's request to the DOI

made clear that self-storage operators would rely on the opinion to order their affairs (CT 267, 271), so the DOI's opinions were offered not casually but with the knowledge that industry would rely on it. Moreover, thirteen years have passed without the DOI altering its position or taking any action, thus deepening and further justifying industry reliance. The DOI's repeated, longstanding, and unrevoked disclaimer of regulatory authority over the precise contractual arrangements at issue here provides a further reason to affirm.

D. If any Special Regulation Is Required, That Decision Should Be Left to the Legislature

Even if the Court considers the issue not adequately answered by the principal object test as bolstered by the DOI's opinions, prudence and precedent dictate that any extension of the Insurance Code to self-storage leases be decided by the Legislature.

The regulations imposed by the Insurance Code is extensive and sometimes onerous. Courts should be hesitant to impose such regulation by judicial construction, where the Legislature's intent to regulate is not clear. (*Transportation Guaranty Co. v. Jellins, supra*, 29 Cal.2d 242 [noting that extension by judicial construction is contrary to "sound jurisprudence"].) For this reason, the *Automotive Funding Group* court acknowledged that, even though it was concerned that "unscrupulous" lenders could abuse the loss damage waiver

provision, it was up to the Legislature whether to regulate such arrangements as insurance:

> [T]he mere possibility of such harm does not somehow transmute the [loss damage waiver] into an insurance policy. . . . Whether more consumer protections are needed, or whether the activities of lenders such as AFG should also be regulated by the Department [of Insurance], are matters for the Legislature, not for us.

(*Automotive Funding Grp., Inc. v. Garamendi*, *supra*, 114 Cal.App.4th at p. 857).

Indeed, the Legislature has the power to bring contracts within the ambit of the Insurance Code regardless of the principal object test, and it has done so where it has perceived a need for regulation. (See Ins. Code, §§ 116, 116.5, 116.6, 12800 *et seq.* [subjecting certain types of automobile-related warranties and vehicle service contracts to regulation under the Insurance Code].) Further, the Legislature has the power to, and has, specifically regulated self-storage operators under the California Self-Service Storage Facilities Act. (Bus. & Prof. Code, §§ 21700 *et seq.*) That act establishes rules concerning liens, evictions, and certain contract terms, but is silent concerning risk allocation provisions. Indeed, the act expressly provides that it "shall not be construed to impair or affect the right of the parties to create additional rights, duties, and obligations in and by virtue of the rental agreement . . ." (Bus. & Prof. Code, § 21713.) The fact that the Legislature has not acted to regulate the lease provisions at issue here, even though they have been in use for years, suggests

that the Legislature has not seen a need for greater regulation than already imposed by California's general consumer protection laws. The Legislature's inaction further weighs against judicial extension of the Insurance Code to the agreement here.

In addition, this Court has recognized that the law affords parties great freedom to allocate risks and make indemnity promises for claims "arising out of their relationship":

> Parties to a contract, including a construction contract, may define therein their duties toward one another in the event of a third party claim against one or both *arising out of their relationship*. Terms of this kind may require one party to indemnify the other, under specified circumstances, for moneys paid or expenses incurred by the latter as a result of such claims. [Citation.] . . .
>
> As befits the contractual nature of such arrangements, but subject to public policy and established rules of contract interpretation, *the parties have great freedom to allocate such responsibilities as they see fit*. [Citation.]

(*Crawford v. Weather Shield Mfg. Inc.* (2008) 44 Cal.4th 541, 551, italics supplied.) Here as well, the lease addendum is limited to risks arising out of the parties' landlord-tenant relationship. The same principle of freedom of contract counsels against extension of Insurance Code regulation to self-storage leases by judicial construction, rather than by Legislative act.

This is especially true where, as here, Heckart cannot point to any abuses by A-1 or by any other self-storage operator that offers a similar lease arrangement. (*Automotive Funding Grp., Inc. v. Garamendi, supra,* 114 Cal. App. 4th at p. 857 [noting

there was no indication that the defendant had engaged in the potential abusive conduct suggested by the DOI].) Heckart does not allege that A-1 or any other self-storage operator has ever wrongfully refused to pay for damaged property, been financially unable to do so, or otherwise neglected or abused its rights and obligations under a risk allocation agreement like the lease addendum. The absence of any allegation of such abuses is a further reason the courts should refrain from extending the Insurance Code to the self-storage leases by means of judicial construction.

In short, California possesses a robust collection of consumer protection laws, including Business & Professions Code section 17200 *et seq.*, as well as laws specifically regulating self-storage operators. If the Legislature determines that these laws are insufficient to protect consumers with respect to self-storage leases, the Legislature can enact legislation appropriately tailored to the perceived need.

E. The Rule of Lenity Supports the Same Conclusion

One final consideration – the rule of lenity – supports the same result. The rule of lenity, which applies to the interpretation of statutes to which criminal penalties attach, requires the court to interpret the statute as favorably to the defendant as the circumstances reasonably permit. (*Walsh v. Dept. Alcoholic Bev. Control* (1963) 59 Cal.2d 757, 764-65.) The rule applies even in a civil action, as long as the underlying

statute on which the civil action is based carries criminal penalties. (*Id.* at p. 765 ["the foregoing principles apply even when the underlying action is civil in nature"]; accord, *Tos v. Mayfair Packing Co.* (1984) 160 Cal.App.3d 67, 80.) The rule is rooted in constitutional due process and ex post facto protections. (*People v. Davis* (1994) 7 Cal.4th 797, 811.)

Here, the unlicensed sale of insurance is a criminal offense. (Ins. Code, §§ 700, 1633.) Accordingly, if there is reasonable doubt as to the correct application of the Insurance Code in this case – and there is not, for the reasons above – the rule of lenity applies and provides a further ground to affirm the judgment.

II.

HECKART'S CONTRARY ARGUMENTS SHOULD BE REJECTED

Heckart does not contend that he can win if the principal object test supplies the correct rule of decision. Instead, he stakes his appeal on the Court disregarding the principal object test based on certain statutory and public policy arguments. For the reasons below, none of these arguments has merit.

A. Nothing in the Insurance Code Addresses Whether The Lease Addendum is Insurance

1. Article 16.3 does not address self-storage leases

Heckart's principal argument is that the Court can ignore the principal object test because Article 16.3 (entitled "Self-Storage Agents") of Chapter 5 of the Insurance Code supposedly establishes that his lease is subject to regulation as insurance. (Opening Brief, pp. 9-26; Ins. Code, §1757.8 *et seq.*)

Article 16.3 is part of Chapter 5 of the Insurance Code, entitled "Production Agencies," commencing at Insurance Code section 1621. The chapter is concerned not with what constitutes insurance, but with who is entitled to sell insurance. For example, the chapter defines "insurance agent" (§ 1621), sets agent licensing requirements (§§ 1631 *et seq.*), and establishes disciplinary mechanisms (§§ 1737 *et seq.*). Pertinent here, the chapter also defines several types of limited purpose agents who are subject to less extensive regulation, including travel insurance agents, cargo shippers' agents, and self-service storage agents. (Ins. Code, § 1752 *et seq.*)

Heckart's reliance on Article 16.3 of Chapter 5 is misplaced because, as the Court of Appeal found, it "puts the cart before the horse." (Slip Op., p. 11.) "The requirements of Article 16.3 of the Insurance Code only apply *if* the Protection Plan is insurance." (*Id.*, italics supplied.) But nothing in Article 16.3 answers the question of whether or when the inclusion of risk allocation

provisions in a self-storage lease subjects the lease to regulation as insurance.

The Legislature knows how subject a contract meeting a certain description to regulation under the Insurance Code. It has done so, for example, with respect to specifically-defined automobile warranty contracts, fuel additive contracts, and vehicle service contracts. (Ins. Code, §§ 116, 116.5, 116.6, 12800 *et seq.*) Article 16.3 attempts nothing of the sort.

Rather, the text of Article 16.3 shows that the Legislature's only intent was to create a limited class of insurance agents who (i) would be licensed to sell only one type of insurance policy, and (ii) would be subject to correspondingly limited licensing and training requirements. Specifically, Article 16.3 created "self-service storage agents" whose authority is narrowly limited to selling hazard insurance policies covering property in storage, issued by an authorized insurer, and sold "in connection with, and incidental to" a self-service storage lease. (Ins. Code, § 1758.7, subd. (b) and § 1758.75.)

Article 16.3 does not attempt to define what contracts constitute insurance, and it certainly does not address whether or when risk allocation options in self-storage leases could be considered insurance. Indeed, the problem Article 16.3 was enacted to address had nothing to do with uncertainty about *what* contracts should be regulated as insurance. Rather, consistent with the placement of Article 16.3 in the "Production Agencies" chapter, the problem concerned *who* could properly sell

self-storage insurance policies, a type of insurance contract that had existed in the marketplace "for more than 20 years." (CT 264.) Self-storage operators had been selling such policies on behalf of admitted insurers, but without being licensed as an insurance agent. The DOI, however, had begun taking the position that an agent's license was required. (Senate Comm. on Ins. Report on A.B. 2520, June 16, 2004 [http://www.leginfo.ca.gov/pub/03-04/bill/asm/ ab_2501-2550/ab_2520_cfa_20040616 _081436 _ sen_comm.html].)

Assembly Bill 2520 – offered by the self-storage industry in response to the DOI's position that an agent's license was required (*id.*) – was a compromise that permitted self-storage companies to obtain licensure without having to meet the rigorous requirements applicable to other types of insurance agents, including bond obligations (§§ 1662 *et seq.*) and prelicensing and continuing education requirements (§§ 1749 *et seq.*).

Creating this new class of insurance agents with limited rights and limited licensing requirements was the sole subject of Article 16.3. Unlike Insurance Code sections 116, 116.5, 116.6, and 12800 *et seq.*, nothing in Article 16.3 purports to define what contracts qualify as insurance. Nothing in Article 16.3 even mentions risk allocation provisions in self-storage leases, much less mandates that such provisions subject a lease subject to regulation as insurance. And nothing in Article 16.3 suggests a

rejection of the principal object test as the controlling test for what contracts are subject to regulation as insurance.

2. The division of insurance into classes does not define what is insurance

Heckart also argues that the Insurance Code's division of insurance into classes somehow demonstrates Legislative intent to regulate the lease addendum as insurance. (Opening Brief, pp. 17-23.) This argument is also misplaced. The purpose of dividing insurance into classes is not to define what contracts constitute insurance in the first place. Rather, the class divisions exist because the Insurance Code regulates different categories of insurance differently, as specified in Division 2 of the Insurance Code, entitled "Classes of Insurance." (See, e.g., Ins. Code, § 1880 et seq. [rules applicable only to fire and marine insurance]; § 10110 et seq. [same, for life and disability insurance]; § 11550 et seq. [same, for liability, worker's compensation, and common carrier liability insurance].)

For example, the Insurance Code provides that "[f]ire insurance includes: (a) "Insurance against loss by fire, lightning, windstorm, tornado, or earthquake." (Ins. Code, § 102.) This language would be fatally circular if it purported to define what is insurance. But the definition is effective in its sole purpose: identifying which insurance contracts are subject to the special rules of Insurance Code sections 1880 *et seq.*, which apply only to fire and marine insurance.

Heckart is also wrong to argue that the division of insurance into classes prevents Insurance Code section 22 from sweeping too broadly. (Opening Brief, p. 18.) The classes of insurance include "miscellaneous insurance," which is defined as "any insurance not included in the foregoing classes, and which is the proper subject of insurance." (Ins. Code, § 120.) Because this catch-all category exists, the Insurance Code's class definitions do nothing to limit which contracts are subject to regulation as insurance. Indeed, as shown above, the Courts developed the principal object test precisely because nothing in the Insurance Code itself ensures that insurance regulation is not, contrary to Legislative intent, extended to all contracts having some element of indemnity.

3. The fact that the lease addendum is an alternative to insurance does not make it insurance

The fact that A-1 accepts the lease addendum as an alternative to the tenant carrying insurance does not make the addendum insurance. "Offering an alternative to insurance does not mean that the alternative is insurance." (*Automotive Funding Grp., Inc. v. Garamendi, supra*, 114 Cal.App.4th at p. 854.)

Nor is it relevant that the lease addendum addresses many of the same types of loss (such as fire, roof leaks, and building collapse) as an insurance policy would. That is hardly a surprise, since neither agreement would be of much use to anyone if it did not address risks likely to arise. Further, as noted above, the

lease addendum is narrower than a typical insurance policy because it is limited to the types of damage most plausibly blamed on the landlord. (Part I(B)(2), *ante*.)

4. *Heckart's public policy arguments do not support judicial extension of regulation*

In support of his statutory argument, Heckart also argues that the Court should consider whether the parties' risk allocation agreement "presents evils at which the insurance code is aimed." (Opening Brief, pp. 23-26.) Relatedly, he argues that public policy considerations – including the possibility that unscrupulous persons will seek to evade regulation of contracts that are properly subject to regulation – support regulating the lease as insurance. (Opening Brief, p. 26.)

As a preliminary matter, invoking the "evils" at which the Insurance Code is addressed or invoking general public policy principles provides no help in interpreting Article 16.3. Resorting to extrinsic aids to statutory construction is improper where a statute is clear on its face. (*Solberg v. Superior Court* (1977) 19 Cal.3d 182, 198 ["When statutory language is thus clear and unambiguous there is no need for construction, and courts should not indulge in it."].) On its face, Article 16.3 makes no attempt to subject risk allocation provisions in self-storage leases to regulation as insurance. If public policy supports regulating leases like the one here as insurance or otherwise, the

Legislature can act accordingly. (*Automotive Funding Grp., Inc. v. Garamendi, supra*, 114 Cal.App.4th at p. 857).

Further, Heckart's "evils" arguments are largely circular. Heckart argues that if A-1 is not subject to regulation as an insurer, then the DOI will not have the authority to regulate A-1's finances and investments, ensure the integrity of its management, police its interactions with customers, or supervise the training of its employees. (Opening Brief, pp. 23-26.) But the same is true of every non-insurance company. That is not an argument for subjecting non-insurers to the jurisdiction of the DOI.

Heckart's argument about the need for adequate financial reserves – to ensure A-1's performance of its contractual obligations – is misplaced for a similar reason. (Opening Brief, p. 25.) Many companies assume long-term obligations the performance of which depends on continued solvency. For example, product manufacturers assume warranty obligations; retailers issue gift cards that, by law, cannot expire (Civ. Code §1749.5, subd. (a)); health clubs sell lifetime memberships; parties enter futures contracts or long-term supply contracts; employers offer multi-year employment contracts; subcontractors make defense and indemnity promises to general contractors. But the mere fact that continued solvency is important to a company's ability to perform a contractual obligation does not subject a company to regulation as an insurer.

Heckart's argument regarding financial reserves is inapt for a further but related reason. Without some risk allocation agreement, self-storage operators are potentially liable to every tenant for the *full value* of the tenant's stored property if damaged due to the landlord's fault. Despite this large and uncapped potential liability to tenants, the Legislature has not seen fit to regulate the solvency of self-storage operators. Where (as here) a self-storage operator has contracted to cap its per-tenant risk at $2,500, there is even less reason to do so.

Further, the Insurance Code regulates so rigorously that its purview is properly reserved for a narrow class of companies. (See, e.g., Ins. Code, §§ 700 *et seq.* [requiring filing of financial statements and reports before admittance]; 739 *et seq.* [requiring annual filing of risk-based capital reports, and authorizing the Insurance Commissioner to take control of insurance companies if assets are insufficient]; 759 *et seq.* [establishing consumer protections in connection with sale of insurance products]; 790 *et seq.* [regulating settlement of claims]; 900 *et seq.* [requiring annual and quarterly filing of financial statements]; 980 *et seq.* [solvency requirements]; 1100 *et seq.* [regulating amount and location of moneys and securities owned]; 1170 *et seq.* [regulating securities and loan investments]; 1185 *et seq.* [requiring report of material acquisitions and dispositions of assets]; 1190 *et seq.* [regulating excess fund investments]; 1215 *et seq.* [regulating mergers and acquisitions]; 1240 *et seq.* [regulating foreign investments]; 1861.02 *et seq.* [establishing rate regulation].)

Such intensive regulation makes sense where (i) a company's sole or primary source of revenue is premiums, (ii) the dominant expense is the payment of claims, and (iii) solvency depends on careful balance of premium income, investment returns, and statistically-predicted claim expense. But it makes little or no sense for companies that do not share these characteristics, including A-1. Heckart cannot allege that A-1's revenues or expenses related to the lease addendum are a significant portion of its business.

To the contrary, Heckart alleges that A-1 operates over 42 self-storage facilities in California occupying over 3.4 million square feet of space, but that its annual payments to tenants under the lease addendum are only $25,000. (CT 203, 213 [¶¶ 17, 49-51].) In the context of the admitted size of A-1's business, this figure is insignificant. Further, many of the payments to tenants are likely for damages that A-1 might owe in any event, under the general law of landlord negligence, for failing to maintain reasonably secure premises. Heckart thus cannot plausibly argue that consumer protection demands that A-1's business be subjected to the deep financial regulation the Legislature has specified for companies like Allstate and State Farm. (See *People ex rel. Roddis v. Community Mutual Association* (1968) 68 Cal.2d 677, 683 [health plan that combined direct service and insurance indemnity models not subject to regulation as insurer absent proof that providing indemnity constituted a "significant financial proportion of the business"].)

The limited nature of the risk allocated by the lease addendum further militates against the extensive financial regulation under the Insurance Code. The agreement is limited to $2,500 and to stored personal property – which by its nature is less likely to be as crucial to a customer's well-being than (for example) people's homes, cars, or health. Further, while the protections of the Insurance Code are motivated, in substantial part, by the need to protect innocent third parties (*Barrera v. State Farm Mut. Auto. Ins. Co.* (1969) 71 Cal.2d 659, 669-680; *Abbott v. Interinsurance Exch. of Auto. Club of S. Cal.* (1968) 260 Cal.App.2d 528, 532), the agreement here implicates no interests of third parties. For all these reasons, the consequences of default are relatively modest, and so the need for extensive financial regulation is correspondingly low.

Also, Heckart's speculation about potential abuses is unsupported by any allegations of actual abuses. California has employed the principal object test for 70 years without suffering from schemes to evade regulation of contracts that should be regulated as insurance. The principal object test inherently tends to prevent such evasion because only agreements in which the parties' risk allocation agreements legitimately serve a primary, non-insurance object will not be subject to regulation as insurance. In any event, if abuses ever did emerge, they can best be dealt with by specific legislation tailored to the perceived abuse rather than by jettisoning a test that time has proven to be workable and fair.

Finally, Heckart's examples of potential areas of abuse – like pet retailers building veterinary insurance into pet sales, or realtors packing homeowner's insurance into home sales (Opening Brief, p. 26) – are poor parallels. A-1 and Heckart's agreement lasted only while they remained landlord and tenant, and was limited to risks of property damage that could plausibly be blamed on A-1 and over which A-1 had substantial control. Retailers and realtors, in contrast, do not have a similar ongoing relationship with a customer generating plausible claims against them for post-sale damage to property. Promises unrelated to risks inherent in an ongoing relationship – like a pet seller promising to pay veterinary bills if Fido breaks a leg – are unlikely to pass muster under the principal object test. But if the vendor makes promises reasonably addressing risks inherent in the relationship and over which the vendor has some control – like a shipper agreeing to pay up to a certain sum for damage to goods in its possession – the agreement is reasonably related to a non-insurance principal object. The latter is what A-1 and Heckart did here.

B. Heckart's Discussion of Case Law Fails to Show that the Principal Object Test is Not Controlling

Heckart next argues that, even if his Article 16.3 argument fails, the principal object test has never been "dispositive" and is just one factor to consider. (Opening Brief, pp. 28-41.) Heckart's attempt to relegate the parties' principal object to a mere factor is misplaced. While the courts have sometimes alluded to

additional considerations to support a finding, no case has found a contract to be subject to regulation as insurance where the principal object was not indemnity.

Heckart attempts to distinguish several of the principal object cases on the ground that they did not involve a statutory regime like Article 16.3, or that the contracts did not implicate a need for reserves. Article 16.3 is irrelevant because it reflects no Legislative intent to regulate leases like the one here, and reserve considerations are misplaced for numerous reasons already discussed. (See Parts II(A)(1) and (4), *ante*.)

Heckart's other attempted distinctions also fail to show that the principal object test is not dispositive. For example, while Heckart correctly notes (Opening Brief, p. 28) that *California Physicians' Service* mentioned the lack of financial risk in reaching its decision, he fails to acknowledge that the Court held that the "more compelling" reason for its decision was that the principal object of the agreements was the provision of medical services, not indemnity. (*California Physicians' Service v. Garrison, supra*, 28 Cal.2d at p. 809.)

Likewise, while *Transportation Guarantee Co.* noted several independent grounds to affirm – including the dispute noted by Heckart as to whether the contract included *any* promise to transfer risk – the Court found the principal object test dispositive even assuming that contract included a promise to pay for collision damage. (*Transportation Guarantee Co. v. Jellins, supra*, 29 Cal.2d at p. 248.) Indeed, the Court rejected

the notion that the outcome depends on whether risk is assumed: " 'The question turns, *not on whether risk is involved or assumed*, but on whether that or something else to which it is related in the particular plan is its principal object and purpose.' " (*Id.* at p. 249, italics added, quoting *Jordan v. Group Health Ass'n*, *supra*, 107 F.2d at p. 245.)

Heckart's characterization of *Truta v. Avis Rent A Car System, Inc.*, *supra*, 193 Cal.App.3d 802 is likewise misplaced. *Truta* did not, as Heckart argues, establish a "two-part analysis for identifying 'insurance.' " (Opening Brief, p. 32.) The supposed two-part test is not the case's holding, but rather was quoted from a treatise in the court's initial review of authorities. (*Truta v. Avis Rent A Car System, Inc.*, *supra*, 193 Cal.App.3d at pp. 812-813.) But when the Court reached its own analysis, the parties' principal object – and not any discussion of a second factor – was the *only* consideration mentioned:

> The principal object and purpose of the transaction before us, the element which gives the transaction its distinctive character, is the rental of an automobile. Peripheral to that primary object is an option, available to the lessee for additional consideration, to reallocate the risk of loss (up to the sum of $1,000) to the lessor in the event the vehicle sustains damage during the rental term. Thus, as in *Jellins*, after reviewing the entire contract we are satisfied that this tangential risk allocation provision should not have the effect of converting the defendants as contracting lessors into insurers subject to statutory regulation.

(*Id.* at 814.)

Further, Heckart attributes to the *Truta* court statements it did not make. In particular, the observations about reserves and about Avis not promising to pay third parties (cited by Heckart at page 33 of his brief) were not made by the court, but rather by the DOI. Moreover, while the court acknowledged deference to the DOI's *conclusion* – further supporting the propriety of such deference here – it did not adopt the DOI's *reasoning*. To the contrary, the court noted that it was not "determining whether we agree with the Department of Insurance's memorandum." (*Id.* at pp. 811-812.) Finally, even assuming that an agreement to pay a *third-party* would have transformed the *Truta* agreement into insurance as the DOI there reasoned, the lease addendum includes no agreement to pay for damages to third parties.

Heckart also inaccurately characterizes *Automotive Funding Group, Inc. v. Garamendi, supra*, 114 Cal.App.4th 846. Heckart erroneously states that the court "contemplated" the arrangement would constitute insurance if the defendant had obligated itself to pay for repairs, as opposed to retaining the discretion to repair. (Opening Brief, p. 35.) In fact, the court expressly stated that it was not "deciding that issue." (*Id.* at p. 856 n. 7.) The court emphasized that the "true focus" is on whether risk-shifting is the parties' principal object. (*Id.* at p. 855.)

Heckart's attempted distinction of *Title Ins. Co. v. State Bd. of Equalization, supra*, 4 Cal.4th 715, is likewise misplaced

because it relies on his flawed arguments under Article 16.3 and concerning reserves. Moreover, as even Heckart concedes, this Court predicated its holding specifically on the principal object test, further establishing that test as dispositive. (*Id.* at p. 726 ["Based on this [principal object] analysis, we conclude that the underwriting agreements are not illegal contracts of insurance."].)

Heckart's analysis of *Sweatman v. Department of Veterans Affairs, supra*, 25 Cal.4th 62, is also flawed. *Sweatman* never applied the principal object test. Rather, it found the test irrelevant because regulation of the contract at issue was expressly vested by statute in the Department of Veterans Affairs, to the exclusion of the DOI. (*Id.* at p. 74.)

Further, while *Sweatman* touched briefly on principal object considerations, its discussion in that regard favors A-1. In particular, this Court found *Truta* did not support the Court of Appeal's opinion because – unlike the mandatory and separate disability coverage in *Sweatman* – the collision damage waiver in *Truta* (i) was optional, and (ii) was incorporated in the rental agreement itself and available by "merely checking off a box on the rental contract." (*Id.* at pp. 73-74.) Here, like *Truta* and unlike *Sweatman*, the lease addendum was optional, was integral to the lease itself, and was available simply by checking a box on the lease application. Thus, *Sweatman's* discussion strengthens the analogy between the agreement here and the agreement in *Truta* and weakens the analogy to the agreement in *Sweatman*.

Finally, Heckart's reliance on *Wayne v. Staples, Inc.*, 135 Cal.App.4th 466 (2006) is misplaced. *Wayne* did not reject the principal object test. Rather, it simply found that there was no need to apply the test because there was no question that what the retailer was selling – an actual insurance policy issued by an actual insurance company – was insurance. (*Id.* at pp. 471-72.) But the court expressly re-affirmed that the principal object test controls when there *is* a dispute about whether a given contract does or does not constitute insurance. (*Id.* at pp. 476-77.)

In sum, the consistent holding of 70 years of California cases is that a contract is not subject to regulation as insurance unless indemnity is the principal object of the contract. Because indemnity was not the principal object here, and because the Legislature has never acted to subject leases like Heckart's to regulation as insurance, the judgment should be affirmed.

III.

THERE ARE INDEPENDENT GROUNDS TO AFFIRM

In addition to the principal object test, there are two independent grounds to affirm.

A. Heckart Lacks UCL Standing

Even assuming that the lease addendum were subject to regulation as insurance, Heckart's suit fails because he does not allege the "loss of money or property" essential to standing under Business and Professions Code section 17204 (the unfair

competition law or UCL). "A litigant's standing to sue is a threshold issue to be resolved before the matter can be reached on the merits. [Citation.]" (*Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 1000.) The burden to establish standing rests on the plaintiff, even at the pleading stage. (*Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1589.)

California courts have twice addressed UCL claims challenging the unlicensed sale of insurance and held that the plaintiff lacked standing to sue. They did so because an unlicensed insurance contract is still an enforceable contract, not a void contract. Despite the licensure violation, the purchasers received exactly the protection promised and thus had not "lost money or property" as required for UCL standing under Business and Professions Code section 17204. (See *Medina v. Safe-Guard Products* (2008) 164 Cal.App.4th 105, 112, 114; *Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1586.)

The same is true here: even assuming an insurance licensing violation by A-1, Heckart does not allege that the lease addendum was unenforceable or that A-1 ever failed to honor its obligations under the lease addendum. Accordingly, just as in *Medina* and *Peterson*, Heckart got what he paid for and suffered no injury.

Nor can Heckart manufacture UCL standing by complaining that the lease addendum was allegedly $0.34 per month more expensive than the alternative of purchasing a self-

storage insurance policy offered by Deans & Homer, which would have cost $9.66 per month, provided $3,000 in coverage, but which would have been subject to a $100 deductible. (CT 201 at ¶ 40.)

To establish UCL standing based on a defendant's price being too high, a plaintiff needs to show two things. First, the *same* product must be available for less elsewhere. (*Peterson v. Cellco Partnership, supra,* 164 Cal.App.4th at p. 1591 [no economic injury because the plaintiffs did "not allege they could have bought the *same* insurance for a lower price either directly from the insurer or from an authorized agent"][italics supplied]; *Bower v. AT&T Mobility, LLC* (2011) 196 Cal.App.4th 1545, 1555 [plaintiff failed to allege economic injury because she did not allege she could have bought the same phone package more cheaply elsewhere].) Second, the plaintiff must also allege a *causal connection* between paying the allegedly higher price and some improper conduct by the defendant. (*Daro v. Superior Court* (2007) 151 Cal.App.4th 1079, 1098.)

Here, Heckart alleges neither. Because the lease addendum has no deductible while the Deans & Homer insurance policy imposes a $100 deductible (CT 210 [¶ 40]), the lease addendum pays *more* than the Deans & Homer policy for all losses up to $2,599.99. And on small losses, the lease addendum is dramatically more valuable. For example, on a $200 loss, the lease addendum pays 100% more than the Deans & Homer

policy. Thus, Heckart fails to allege that he could have purchased the same protection for less.

Further, even if Heckart had alleged some equivalent but cheaper way to secure $2,500 in protection, A-1 did nothing to stop Heckart from choosing that alternative. Indeed, Heckart admits that he intended to reject the lease addendum and checked the corresponding box, promised that he would provide proof of insurance, but then "inadvertently" failed to do so. (CT 201 at ¶ 7; CT 202 at ¶ 12.) If Heckart inadvertently failed to do what he promised, he has no one to blame but himself. There is no causal connection between A-1's alleged misconduct (*i.e.*, not being licensed as an insurer) and Heckart's failure to provide the proof of insurance required to avoid the lease addendum.

Because Heckart both got what he paid for and cannot in any event blame A-1 for his inadvertent failure to provide proof of insurance, he suffered no loss of money or property caused by A-1. Because Heckart lacks the threshold element of UCL standing, his claim cannot be considered on the merits and must be dismissed even assuming he had meritorious arguments that A-1 is subject to regulation as an insurer.[1]

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[1] Although Heckart also alleged several non-UCL causes of action, he does not on review argue error with respect to the dismissal of those causes of action. In any event, those causes of action fail for the reasons briefed below, even assuming arguendo that the lease were subject to regulation as insurance.

B. A-1 is Not An Insurer Under the *Roddis* Test Either

In a materially different circumstance, this Court held that a test other than the principal object test was appropriate to determine whether an entity was subject to regulation as an insurer. (*People ex rel. Roddis v. Community Mutual Association, supra*, 68 Cal.2d 677.) The alternative *Roddis* test is not applicable here, for the reasons below. But even if it were, A-1 is not an insurer under this test either – thus providing a second independent ground to affirm.

Roddis is inapplicable because it did not involve a contract in which a minor component of indemnity supported a non-insurance principal object. Rather, it involved a health care service plan (CMA) that simultaneously used both non-indemnity and indemnity arrangements to achieve the principal object of the contract (namely, protecting members against unexpected health care costs). The Court reasoned that, even assuming that CMA served a majority of its members through a non-indemnity arrangement, a "substantial minority" of members might rely on CMA for indemnity. To protect the members that CMA served through indemnity, the Court held that CMA would have to be classified as an insurer if "indemnity is a significant financial proportion" of its business. (*People ex rel. Roddis v. Community Mutual Association, supra*, 68 Cal.2d at p. 683.)

Roddis thus adopted its alternative "significant financial proportion" test because with respect to some of its members, CMA functioned entirely as an insurer – thus necessitating a

stricter test to ensure that such members were adequately protected. That situation does not exist here. A-1 does not provide *just* indemnity to some tenants and *just* storage to other tenants. Instead, it contracts with every tenant for the same thing – storage – and a small element of arguable "indemnity" exists in subordination to that object. The principal object test, rather than the *Roddis* test, is thus appropriate here.

But even assuming arguendo that the *Roddis* test applied, Heckart's complaint admits that any alleged indemnity payments are not a "significant financial proportion" of A-1's business. Heckart admits that A-1 operates over 42 self-storage facilities in California occupying over 3.4 million square feet of space, but that its annual payments to tenants under the lease addendum are only approximately $25,000. (CT 203, 213 [¶¶ 17, 49-51.] Supposed "indemnity" payments on the order of only $25,000 are plainly insignificant in relation to the admitted size of A-1's business.

Further, at least a portion those payments cannot properly be considered "indemnity" because A-1 is paying sums that it might otherwise owe under the law of landlord negligence. Even if *some* of A-1's payments under the lease addendum are for losses that could not possibly be blamed on A-1 – and which thus might be more properly considered to be "indemnity" – that subset is necessarily even less significant as a proportion of A-1's business.

Accordingly, even assuming arguendo that *Roddis* provided the correct rule of decision, the judgment should be affirmed because A-1 clearly is not an insurer under the *Roddis* test.

CONCLUSION

The Court should affirm because (i) under the controlling principal object test, the lease addendum is not subject to regulation as insurance, and (ii) the Legislature has never expressed any intent to subject leases like A-1's to regulation as insurance. Further, the DOI has disclaimed any interest in regulating the lease addendum arrangement, and this determination is entitled to deference both because of the DOI's expertise and because A-1 and others have relied on the DOI's written opinions.

Finally, Heckart's arguments based on public policy exaggerate the risks inherent in the lease addendum and prove too much in any event, since the same policy considerations apply to many contracts that are not regulated as insurance. If the lease does present risks to consumers requiring more regulation than provided by California's general consumer protection laws and by the California Self-Service Storage Facility Act (Bus. & Prof. Code, § 21700 *et seq.*), the decision of whether and how much to regulate should be made by the Legislature, not by judicial extension of the rigorous requirements of the Insurance Code.

Dated: July 15, 2016

Respectfully submitted,

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By

JOHN T. BROOKS

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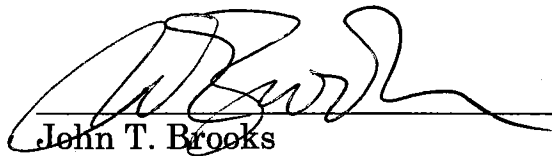
CERTIFICATE OF COMPLIANCE

I, John T. Brooks, appellate counsel to A-1 Self Storage, Inc., Caster Properties, Inc., Caster Family Enterprises, Inc., and Caster Group LP, certify that the foregoing brief is prepared in proportionally spaced Century Schoolbook 13 point type and, based on the word count of the word processing system used to prepare the brief, the brief is 13,952 words long.



John T. Brooks

PROOF OF SERVICE

Samuel Heckart v.A-1 Self Storage Inc., et al.
Supreme Court of California, Case No. S232322
Court of Appeal, Fourth Appellate District, Division One, Case No. D066831
San Diego Superior Court, Case No. 37-2013-00042315-CU-BT-CTL

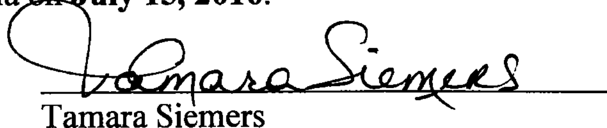
I, Tamara Siemers, declare as follows: I am employed with the law firm of Sheppard Mullin Richter & Hampton LLP, whose address is 501 West Broadway, 19th Floor, San Diego, California 92101. I am over the age of eighteen years, and am not a party to this action. On **July 15, 2016,** I served the foregoing document described as:

A-1 RESPONDENTS' ANSWER BRIEF ON THE MERITS

[X] **U. S. MAIL:** I placed a copy in a separate envelope, with postage fully prepaid, for each addressee named below for collection and mailing on the below indicated day following the ordinary business practices at Sheppard Mullin Richter & Hampton LLP. I certify I am familiar with the ordinary business practices of my place of employment with regard to collection for mailing with the United States Postal Service. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit or mailing affidavit.

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

Executed at San Diego, California on **July 15, 2016.**



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