S267746

No. 20-55099

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALLIED PREMIER INSURANCE,

Plaintiff-Appellee

vs.

UNITED FINANCIAL CASUALTY COMPANY,

Defendant-Appellant

Appeal from the United States District Court for the Central District of California, No. 5:18–cv–00088-JGB-KKX,
The Honorable Jesus G. Bernal

APPELLANT'S REPLY BRIEF

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INTRODUCTION

CAL. VEH. CODE § 34630(b) states that a commercial trucker's "certificate of insurance" shall not be canceled on less than 30 days' notice from the insurer to the DMV. The statute says nothing about the cancellation requirements for a trucker's insurance policy.[1]

Allied does not claim the statute's language is ambiguous. Instead, the thrust of Allied's brief is that the Court should ignore the language of the governing statute and look only to the language in three DMV forms called for by 13 CAL. CODE REGS. § 220.06—the MCP 65 certificate of insurance, the MCP 67 motor carrier endorsement, and the MCP 66 notice of cancellation. Allied argues the agency's form language controls the cancellation process for United Financial's insurance policy and its MCP 65 certificate, and that because the certificate was not canceled before the accident in this case, the policy remained in force despite having lapsed months earlier.

[1] That process is governed by a separate statute, CAL. INS. CODE § 677.2.

Allied's sleight-of-hand depends on persuading this Court that the policy and the certificate are the same thing. (Red 7.) But courts do not interpret statutes by conflating different terms, and forms and regulations do not prevail over statutes. An administrative agency has no discretion to issue or enforce a regulation or policy that alters, takes away from, or adds to a governing statute. *Association for Retarded Citizens v. Department of Developmental Services*, 38 Cal.3d 384, 391 (1985). CAL. VEH. CODE § 34630(b) states that it applies only to cancellation of a trucker's MCP 65 "certificate of insurance." Thus, even if the DMV form language could be interpreted as Allied suggests, it is unenforceable because it attempts to add to the statute an unauthorized requirement that a trucker's insurance policy cannot go out of force without 30 days' notice to the DMV. Allied has no answer for this point.

Allied's additional arguments concerning the risk of circuity of action and the lack of a judgment against the commercial trucker, Mr. Porras, in the underlying wrongful death lawsuit are also without merit for the reasons explained below.

ARGUMENT

I. CAL. VEH. CODE § 34630(b) IMPOSES A 30-DAY DMV NOTICE REQUIREMENT ONLY ON CANCELLATION OF AN MCP 65 CERTIFICATE OF INSURANCE. THE DMV FORMS MAY NOT ADD AN UNAUTHORZED 30-DAY NOTICE REQUIREMENT FOR CANCELLATION, LAPSE, OR RECISSION OF A TRUCKER'S INSURANCE POLICY.

In the opening brief (Blue 17–21), United Financial explained that the Legislature distinguished insurance policies from certificates of insurance in CAL. VEH. CODE § 34630 and the surrounding statutory scheme. Allied responds that regulators have since conflated those terms through various forms they have promulgated. (Red 7–8, 13–14.) Allied's approach is misguided—it ignores the proper relationship between statutes and regulations, and unnecessarily sets up a conflict between two branches of government.

"Administrative action that is not authorized by, or is inconsistent with, acts of the Legislature is void." *Association for Retarded Citizens*, 38 Cal.3d at 391. The rule applies to written regulations and agency policy. "A ministerial officer may not … under the guise of a rule or regulation vary or enlarge the terms of a legislative enactment …." *Agnew v. State Board of Equalization*,

21 Cal.4th 310, 321 (1999), citing *First Industrial Loan Co. v. Daugherty*, 26 Cal.2d 545, 550 (1945); *California Trout, Inc. v. State Water Resources Control Bd.*, 207 Cal.App.3d 585, 607 (1989), citing *Witcomb Hotel, Inc. v. Cal. Emp. Com.*, 24 Cal.2d 753, 757 (1944) ("An administrative officer may not make a rule or regulation that alters or enlarges the terms of a legislative enactment.")

This rule applies regardless of subject matter or the motives of the administrative agency. In *Cinquegrani v. Department of Motor Vehicles*, 163 Cal.App.4th 741 (2008), for example, the California Court of Appeal determined that the DMV could not suspend a person's *drivers'* license for operating a *boat* while intoxicated, because the Legislature had crafted different penalties for that conduct. The boaters in the case had prior convictions for driving under the influence. The DMV suspended their drivers' licenses after they were convicted for boating under the influence. Under the governing statute, the penalties for a boating under the influence conviction were fines, imprisonment, successful completion of an alcohol or drug education, training, or treatment program, and mandatory completion

of a boating safety course. *Id.* at 746. The statute said nothing about suspension of driving privileges. *Id.* at 747–748.

The DMV argued that public safety concerns justified its ability to limit driving privileges of individuals with boating under the influence convictions. The court disagreed. The court, while sensitive to the public interest of punishing drunk boat operators, held the answer to the problem was new legislation, not DMV administrative policy that attempted to add penalties to the enabling statute. *Id.* at 750. The court stated:

> The DMV's misinterpretation of a statute does not provide a legal basis for an otherwise unauthorized punishment. "Administrative action that is not authorized by, or is inconsistent with, acts of the Legislature is void," which is true of actions that alter, amend, enlarge or impair a statute.
>
> (*Id.* at 750–751, citing *Association for Retarded Citizens*, 38 Cal.3d at 391.)

In *Terhune v. Superior Court*, 65 Cal.App.4th 864 (1998), the California Court of Appeal reached a similar conclusion with respect to a Board of Prison Terms regulation governing parole of convicted criminals. The regulation stated parole could be revoked where an inmate suffered from a mental disorder which, among other things,

made him a danger to himself or others when psychiatric treatment could not be obtained in the community. *Id.* at 868. An inmate's parole was revoked twice under the regulation, even though he had served a determinate prison term and his initial parole release date had passed. Despite the public safety concern, the court held that because several statutes (all governing the release of potentially sexually violent predators) did not allow parole to be revoked based on the reported need for psychiatric treatment after an inmate served a determinate prison term, the agency exceeded its statutory authority in revoking the inmate's parole. *Id.* at 881. The court stated: "No matter how altruistic its motives, an administrative agency has no discretion to promulgate a regulation that is inconsistent with the governing statutes." *Id.* at 873.

Allied makes a similar mistake here. It construes regulations and forms in a manner that presupposes the DMV intended to—and could—alter statutory language. But because the DMV regulations and forms are susceptible to an interpretation that is consistent with the statutory language, it is unreasonable to engage in a construction that sets up a conflict and renders the regulatory action invalid. See

Valenzuela Gallardo v. Lynch, 818 F.3d 808, 816 (9th Cir. 2016) (where construction of statute would raise constitutional concern, court should construe statute to avoid such problem unless construction is plainly contrary to intent of legislature); *People v. Garcia*, 2 Cal.5th 792, 804 (2017) (same).

Specifically, Allied argues the language in United Financial's MCP 65 (e.g., Porras "is covered by an insurance policy"), MCP 67 (e.g., the endorsement "is made a part of all policies insuring" Porras), and MCP 66 (e.g., insurer gives notice that the "policy, including applicable endorsements and certifications," is hereby canceled) forms means United Financial certified that its insurance policy, despite lapsing months earlier, was still in force at the time of the accident because the MCP 65 certificate was never canceled.[2] If the forms were interpreted as Allied urges,[3] it would improperly add to CAL. VEH.

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[2] United Financial had no option to use different form language. The DMV requires these forms for commercial truckers to maintain their operating authority. 13 CAL. CODE. REGS § 220.06.

[3] Allied reads these phrases in isolation, without reference to other language in the forms. Allied even claims the MCP 67, because it is endorsed to the insurance contract, is the policy. (Red 4.) Both the MCP 65 certificate and the MCP 67 endorsement, however, stated the endorsement's purpose was to conform the United Financial insurance

CODE § 34630(b) an unauthorized requirement that a trucker's insurance policy cannot go out of force (by lapse, cancellation, or otherwise) on less than 30 days' notice to the DMV. The statute states the notice requirement applies *only* to the "certificate of insurance."[4]

The form language also contradicts the DMV regulation that mandates use of the forms. The regulation states the certificate of insurance described by CAL. VEH. CODE § 34630(b) is the MCP 65 form and that the MCP 66 form must be used to provide notice of cancellation of the "Certificate of Insurance, required under Vehicle Code section 34630(b) …." 13 CAL. CODE REGS. § 220.06(a)(1) and (c). Like the enabling statute, the regulation says nothing about

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policy to the requirements of the Motor Carriers of Property Permit Act, CAL. VEH. CODE § 34600 et seq. (2 ER 91–92.) One of the requirements was that the 30-day DMV cancellation rule applies only to the "certificate of insurance," not the insurance policy. CAL. VEH. CODE § 34630(b). The endorsement added that, with the exception of the statutorily-imposed requirements, the terms and conditions of the insurance policy as between United Financial and Porras remained unchanged. (2 ER 92.)

[4] Allied repeatedly refers to United Financial's attempt to cancel the insurance policy. (Red 5–6, 8.) United Financial did not cancel the policy; it lapsed because Porras did not renew it when he purchased insurance from Allied. (2 ER 83.)

cancellation of the insurance policy, so the form should not be read to support an interpretation of the law that is not found in the statute.

Allied argues strict compliance with the forms is required to ensure public safety and to enhance the DMV's ability to confirm a commercial trucker's financial responsibility. But such concerns, even if valid, do not justify the improper administrative overreach that would result if the forms are interpreted as Allied urges. The true purpose of the 30-day notice of cancellation requirement for the MCP 65 certificate of insurance is expressed right in the enabling statute, CAL. VEH. CODE § 34630: the certificate obligates the insurer to pay for a trucker's liability, even if coverage under the insurance policy is unavailable. The 30-day cancellation requirement ensures the public has at least a one-month safety net in the event the trucker's policy is terminated (e.g., lapse, cancellation, rescission), he does not purchase replacement coverage within 30 days, and he meanwhile causes an accident while operating his equipment.

Here, Porras purchased replacement coverage with Allied, which went into effect immediately after he let his United Financial policy lapse. Allied's policy provided coverage of $1 million, well above the

$750,000 minimum required. The 30-day safety net provided by the statute, therefore, was unnecessary. If Allied's position were accepted (i.e., a trucker's insurance policy is subject to the same 30-day cancellation requirement as the MCP 65 certificate of insurance), the result would not be the 30-day safety net, but 30 days of duplicate insurance coverage for the trucker or a subsequent insurer (like Allied) from which to seek contribution, even if the first insurer filed the MCP 66 cancellation form *immediately* after its policy went out of force.

II. PERTINENT LEGISLATIVE HISTORY CONFIRMS THE PROPRIETY OF UNITED FINANCIAL'S POSITION.

United Financial's opening brief collected legislative history demonstrating that, as it considered proposed additions and subtractions to key statutes over time, the Legislature settled on the approach advocated by United Financial here. (Blue 22-26.) Allied offers no substantive response.

Instead, Allied argues the Court should not consider the drafting history of CAL. VEH. CODE § 34630 et seq. because it was not part of the record in the district court. (Red 17–18.) That response makes no sense, because legislative history is not part of a record in a litigated

case—that history is simply persuasive authority for a court to consider in interpreting a statute. See Kenneth Culp Davis, JUDICIAL NOTICE, 55 Colum. L. Rev. 945, 952 (1955) (explaining that court may "resort to legislative facts, whether or not those facts have been developed on the record"); see also *Owino v. Holder*, 771 F.3d 527, 535, n. 4 (9th Cir. 2014) (appellate court took judicial notice of materials from regulatory file as legislative facts because relevant to interpretation of statute at issue in case).

Allied cites cases involving an appellate court's refusal to take judicial notice of "adjudicative facts" under FED. R. EVID. 201(c). (Red 17.) But United Financial is asking this Court to consider "legislative facts," which are not subject to these requirements. *See* FED. R. EVID. 201(a) ("This rule governs judicial notice of an adjudicative fact only, not a legislative fact.") Judicial access to "legislative facts" is not subject to "any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level." FED. R. EVID. 201(a), advisory note to 1972 amendments.

Thus, United Financial's legal point stands unrebutted. If the Court looks beyond the plain meaning of "certificate of insurance" in CAL. VEH. CODE § 34630 et seq., it should consider the statute's drafting history because it is relevant to the interpretation of the statute as enacted. As noted in United Financial's opening brief, the California Legislature initially considered applying the statute's cancellation provisions to a trucker's insurance policy (i.e., the precise argument Allied advances here), but then rejected that approach and limited the cancellation language to the MCP 65 certificate. (Blue 22–24.) This is powerful evidence the Legislature, when using the words "certificate of insurance," meant only the MCP 65 certificate, not the certificate and the insurance policy.[5]

[5] Allied states the website citations on page 23 of United Financial's opening brief do not work as hyperlinks. The citations were not intended as hyperlinks. The citations were provided so the reader could enter the citation into a browser and pull up the referenced legislative material.

III. REAL, NOT HYPOTHETICAL, CIRCUITY OF ACTION WILL RESULT IF ALLIED IS PERMITTED RELIEF BASED SOLELY ON UNITED FINANCIAL'S MCP 65 CERTIFICATE AND MCP 67 ENDORSEMENT.

United Financial's MCP 65 certificate of insurance and MCP 67 endorsement were issued for the benefit of injured third parties who might assert a claim based on Porras' commercial trucking activities. They were not issued to support a second, separate action by one liability insurer (Allied) against another (United Financial), which would in turn generate a reimbursement claim against the insured—with the coverage obligation landing back at Allied's feet.

The MCP 65 certificate was filed with the DMV to certify Porras' financial responsibility and the MCP 67 endorsement was issued to Porras to conform his policy to the requirements of CAL. VEH. CODE § 34630 et seq. The endorsement made clear that, except as specified in the endorsement (i.e., provisions required by the statute), all other terms and conditions in the policy between United Financial and Porras remained unchanged. (2 ER 92.) The endorsement provided United Financial with an express reimbursement right against Porras in the event United Financial is required to pay money because of the

statutorily-imposed requirements. (2 ER 92.) If the Court allows Allied to collect against United Financial, it would trigger United Financial's reimbursement right and result in a futile circuity of action. *Transport Indem. Co. v. American Fid. & Cas. Co.*, 4 Cal.App.3d 950, 958 (1970).

Allied claims this risk is purely hypothetical because United Financial has not shown it has pursued other policyholders under the MCP 67 reimbursement language and it is unknown whether Porras would then look to Allied for coverage or Allied would again seek subrogation and contribution like it has done here. (Red 19–20.) The doctrine, however, does not require proof that the future events will in fact occur. The very nature of the doctrine is based on *potential* circuity of action based on the relationship between the parties. In *Transport Indem.*, the court did not require proof that the non-covering insurer would actually seek subrogation and indemnity from the covering insurer; the risk of same was enough based on the relationship of the parties and the legal issues involved. *Id.* at 9.

The same is true here. To be sure, United Financial's right to pursue Porras for reimbursement has not yet arisen, but that is

because it has not paid money as a result of the accident. But if it is required to satisfy the judgment here, there is no dispute the MCP 67 endorsement provides United Financial with an express reimbursement right. The relationship of the parties (consecutive insurers of the same trucker), the insurance contracts involved (similar commercial auto policies), and Allied's conduct to date (it provided coverage for the loss and pursued subrogation and contribution) shows that circuity of action is a real risk.

IV. ALLIED IS NOT ENTITLED TO RELIEF UNDER UNITED FINANCIAL'S MCP 65 CERTIFICATE AND MCP 67 ENDORSEMENT BECAUSE PORRAS DID NOT SUFFER A JUDGMENT.

Allied does not dispute that "liability imposed by law" and "legal liability," as used in United Financial's MCP 67 endorsement and MCP 65 certificate of insurance, conditions coverage on the existence of a judgment against Porras. Allied argues that California's "failure to settle" law (i.e., insurer must accept reasonable settlement demand within policy limits to prevent exposure of insured's assets to judgment in excess of limits) nonetheless excuses the judgment requirement because Allied, as an insurer with a policy undisputedly in force at the

time of the accident, was required to accept the wrongful death claimants' policy limit demand. (Red 20–21.)

Allied's argument is based on case law involving insurance policies, not MCP certificates and MCP 67 endorsements. Where an insurer defends a policyholder in a liability case pursuant to the terms of a policy, it has a duty to pay reasonable settlement demands within a policy limit for reasons that have nothing to do with these motor carrier-related documents. Among other things, under an insurance policy, an insurer has the right to control settlement and defense of a case, and thereby has an interest in effecting settlement for less than its policy limits. *Hamilton v. Maryland Cas. Co.*, 27 Cal.4th 718, 726 (2002); *Meritt v. Reserve Ins. Co.*, 34 Cal.App.3d 858, 870 (1973).

United Financial's MCP 65 certificate and MCP 67 endorsement are not insurance policies. Unlike insurance contracts, they do not require the insurer to defend a liability case; in fact, the endorsement expressly excludes "any costs of defense or other expense that the policy provides." (2 ER 92.) Further, an insurer's failure to pay prior to judgment under an MCP 65 certificate and MCP 67 endorsement does not create exposure to the policyholder for personal liability; the

policyholder already faces personal liability because the insurer has an express reimbursement right under the MCP 67 endorsement.

Allied chose to settle the wrongful death lawsuit against Porras because Allied's insurance policy provided actual coverage and, according to Allied, the settlement demand by the wrongful death claimants was reasonable. The same was not true for United Financial. Even if Allied were not involved (i.e., if Porras had let his United Financial policy lapse and neglected to purchase new insurance before the accident), United Financial's only potential exposure would have been under the MCP 65 certificate and MCP 67 endorsement. United Financial would not have had a duty to defend Porras against the wrongful death claims and would not have had a duty to pay until such time as there was a judgment (i.e., liability, not just potential liability) against him.

V. CERTIFICATION TO THE CALIFORNIA SUPREME COURT IS UNNECESSARY.

Allied suggests the Court certify to the California Supreme Court the issue of the meaning of "certificate of insurance" in CAL. VEH. CODE § 34630 et seq. (Red 18–19.) Certification is unnecessary. The

straightforward statutory interpretation issues in this case are based on established California rules of statutory construction.

CONCLUSION

For these reasons and those in the opening brief, the Court should reverse the district court's judgment and order the court to enter judgment for United Financial.

October 22, 2020

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