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March 11, 2010

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## VIA MESSENGER

The Honorable Ronald M. George, Chief Justice  
and the Associate Justices  
California Supreme Court  
350 McAllister Street  
San Francisco, CA 94102

*Association of California Insurance Companies and Personal  
Insurance Federation of California v. Poizner et al.*  
California Supreme Court Case No. S180126

Dear Chief Justice George and Associate Justices:

Pursuant to California Rule of Court 8.500(g), we submit this amicus curiae letter on behalf of the National Association of Mutual Insurance Companies ("NAMIC") and the Pacific Association of Domestic Insurance Companies ("PADIC") in support of the granting of the petition for review filed by appellants.

### Amici's Interests

Founded in 1895, NAMIC is a full-service national trade association serving the property/casualty insurance industry with more than 1,400 member companies that underwrite more than 40 percent of the property/casualty insurance premium in the United States. NAMIC has 106 members in California and estimates that those members underwrite approximately 23 percent of the property/casualty insurance premium in that state. NAMIC is involved nationally and in California on advocacy, public policy and member services issues.

PADIC is a nonprofit trade association representing about a dozen small to mid-sized property and casualty carriers domesticated in California. PADIC's members collect about \$730 million in premiums, pay approximately \$17 million in premium taxes and pay \$42 million in salaries and benefits to California residents. PADIC works with consumers, policyholders, media, regulators and legislators to improve consumer understanding of insurance issues and policies, keep costs and prices at a reasonable level and improve the competitive business environment.

NAMIC's and PADIC's members are interested in this matter because the questions raised affect the system of insurance regulation in California that governs their

The Honorable Ronald M. George, Chief Justice

and the Associate Justices

March 11, 2010

Page 2

activities and rates and therefore will profoundly affect those companies and their customers. Without a re-examination of the Court of Appeal decision, NAMIC and PADIC believe that the number of consumer advocacy interventions will increase with concomitant increases in advocacy and witness fees paid, and eventually insurance rates themselves will increase since all of the costs at issue are ultimately to be shouldered by ratepayers. NAMIC and PADIC also believe that the Court of Appeal decision should be examined to insure a proper and consistent interpretation of the insurance laws, particularly Proposition 103, and to give intended effect to those laws.

### **Review Should Be Granted**

As noted in the petition for review, this appeal examines the proper interpretation of portions of the Insurance Code enacted with passage of Proposition 103. In particular, the appeal examines (1) whether advocacy groups may recover fees for participating in proceedings not covered by the Insurance Code advocacy fee statute; (2) whether the Department of Insurance may properly adopt regulations empowering it to award fees when such power is inconsistent with the fee statute; and (3) whether a court may order a party to pay an award of advocacy fees in a case not involving a rate application or whether such fees should be paid out of the Proposition 103 fund. NAMIC and PADIC support granting the petition for review to address those issues for all of the reasons set forth in the petition for review.

In addition, NAMIC and PADIC write to insure that the Court is aware of the importance of the issues that would be addressed in review of the Court of Appeal's decision. In particular, NAMIC and PADIC urge the Court to consider the following, which relates to questions (1) and (2) set forth in the petition.

The decision, if allowed to stand, will have unintended and potentially disastrous consequences for the rate review process. The history of that process is set forth in the petition for review. In summary, prior to 2006, rate applications were submitted and reviewed by the Department of Insurance under Insurance Code § 1861.05(b). If the Commissioner granted a consumer group's request for a hearing regarding the rate application, the consumer group, if granted intervention in the hearing, would be eligible to recover reasonable advocacy and witness fees incurred for the hearing pursuant to California Insurance Code Section § 1861.10(b). Case law clearly established that consumer groups could not recover their fees unless they participated in the hearing process.

In 2006, the Insurance Commissioner propounded new regulations. The new regulations allowed consumer groups to participate in the rate application process earlier – before any hearing was ordered – by allowing consumer groups to participate in negotiating the disposition of the rate application. The regulations allowed consumer advocates to be involved in these negotiations even though there was no “proceeding” within the meaning of Insurance Code section 1861.10(a) for them to attend and even though the Commissioner had not granted any request to intervene. Because there was no “proceeding” – no hearing – the consumer groups would not, under the pre-2006 rules, be entitled to recover fees.

The Honorable Ronald M. George, Chief Justice

and the Associate Justices

March 11, 2010

Page 3

However, the new regulations also established that a “proceeding” begins as soon as a consumer group files a petition for hearing, which can be done immediately after the rate application filing. Under the new regulations, any negotiation regarding that application would be a “proceeding” and participating consumer advocates would be entitled to fees. This definition of “proceeding” finds no support in the statute, however. Section 1861.10(a) specifically refers to “proceedings permitted or established pursuant to this chapter” and the informal negotiations allowed by the new regulations are nowhere “permitted or established” by the Insurance Code. Indeed, the fees themselves are described as advocacy and witness fees – those fees incurred in a formal, adjudicatory hearing process, *not* private negotiations outside the hearing process and before that process has even begun. The Court of Appeal decision effectively overrules the statute, allowing the Insurance Commissioner to re-write it through the new regulations to include the application review and negotiations as a “proceeding,” as opposed to prior regulations which acknowledged that a “proceeding” was an adjudicatory process that commenced with the granting of a request for hearing and intervention.

The unintended consequence of the Court of Appeal’s decision – and the reason why the petition should be granted – is to encourage consumer advocates to become involved in the rate application review process at the beginning of the Department of Insurance’s review of the rate application and before the Commissioner makes any determination as to whether the application is controversial and should be examined at a hearing. Since the “proceeding” begins essentially at the filing of the application, consumer groups can intervene simply to establish their right to receive fees. This lengthens the process for everyone, driving up costs and ultimately rates. The Court of Appeal decision approving the Commissioner’s unauthorized new regulations radically changes the rate application process. It will result in significant and serious delays in rate approval, increased costs to insurers who must cover the consumer advocate’s unnecessary participation costs and circumvention of the Department’s role in reviewing rate applications. For these reasons and those expressed in the petition, NAMIC and PADIC urge the Court to grant review.

Sincerely,



Daniel K. Slaughter

1 CERTIFICATE OF SERVICE

2 I, Tina Clarence, declare:

3 I am a citizen of the United States and employed in San Francisco County, California. I  
4 am over the age of eighteen years and not a party to the within-entitled action. My business  
5 address is Transamerica Pyramid, 600 Montgomery Street, 14th Floor, San Francisco, California  
6 94111. On March 11, 2010, I served a copy of the within document(s):

7 MARCH 11, 2010 AMICUS CURIAE LETTER OF NATIONAL  
8 ASSOCIATION OF MUTUAL INSURANCE COMPANIES AND  
9 PACIFIC ASSOCIATION OF DOMESTIC INSURANCE  
COMPANIES

10  (BY MAIL) by placing the document(s) listed above in a sealed envelope with  
11 postage thereon fully prepaid, in the United States mail at San Francisco,  
California addressed as set forth below.

12 David M. Axelrad, Esq.  
13 Mitchell C. Tilner, Esq.  
14 Horvitz & Levy LLP  
15 15760 Ventura Blvd., 18th Fl.  
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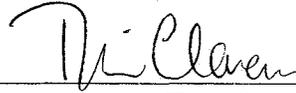
Clerk of the Court  
California Court of Appeal  
First Appellate District, Division Four  
350 McAllister Street  
San Francisco, CA 94102  
(Courtesy Copy)

24  
25  
26 I am readily familiar with the firm's practice of collection and processing correspondence  
27 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same  
28 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on

1 motion of the party served, service is presumed invalid if postal cancellation date or postage  
2 meter date is more than one day after date of deposit for mailing in affidavit.

3 I declare that I am employed in the office of a member of the bar of this court at whose  
4 direction the service was made.

5 Executed on March 11, 2010, at San Francisco, California.

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8 Tina Clarence

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