

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT, DIVISION ONE

**ASSOCIATION OF CALIFORNIA INSURANCE  
COMPANIES and PERSONAL INSURANCE  
FEDERATION OF CALIFORNIA,**

**Petitioners,**

**v.**

**SUPERIOR COURT OF STATE OF  
CALIFORNIA, COUNTY OF LOS ANGELES,**

**Respondent,**

**DAVE JONES IN HIS CAPACITY AS  
COMMISSIONER OF THE CALIFORNIA  
DEPARTMENT OF INSURANCE,**

**Real Party in Interest.**

Case No. B239943

Los Angeles County Superior Court, Case No. BC463124  
The Honorable Gregory W. Alarcon, Judge

**PRELIMINARY OPPOSITION TO  
PETITION FOR WRIT OF MANDATE**

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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT – DIVISION ONE**

Case Name: *Association Of California Insurance Companies, et al. v. Superior Court*

Court of Appeal No.: B239943

**CERTIFICATE OF INTERESTED PARTIES OR ENTITIES OR PERSONS**  
(Cal. Rules of Court, Rule 8.208)

(Check One)

**INITIAL CERTIFICATE**

**SUPPLEMENTAL CERTIFICATE**

Please check the applicable box:

There are no interested entities or persons to list in this Certificate per California Rules of Court, rule 8.208(d).

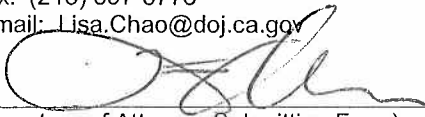
Interested entities or persons are listed below:

Full Name of Interested Entity or Party	Party <i>Check One</i>	Non-Party	Nature of Interest <i>(Explain)</i>
_____	[ ]	[ ]	_____
_____	[ ]	[ ]	_____
_____	[ ]	[ ]	_____
_____	[ ]	[ ]	_____
_____	[ ]	[ ]	_____
_____	[ ]	[ ]	_____

The undersigned certifies that the above listed persons or entities (corporations, partnerships, firms or any other association, but not including government entities or their agencies), have either (i) an ownership interest of 10 percent or more in the party if an entity; or (ii) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

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April 2, 2012

(Date)

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Dave Jones, Insurance Commissioner of the State of California (“Commissioner”), the real party in interest herein and the defendant below, submits this preliminary opposition to the Petition for Writ of Mandate (“Petition”) filed by Petitioners Association of California Insurance Companies and Personal Insurance Federation of California (collectively “Associations”), the plaintiffs below.

### INTRODUCTION

This case was brought by two insurance trade associations seeking to invalidate a regulation promulgated by the Commissioner to prevent misleading statements from being made to consumers regarding homeowners’ insurance policies. The Associations claim that section 2695.183 of Title 10 of the California Code of Regulations (“Regulation 2695.183”) is invalid because it is not authorized under Insurance Code section 790.03,<sup>1</sup> it improperly regulates underwriting of homeowners’ insurance, and it infringes the free speech rights of insurance companies. The Commissioner denies these contentions.

The trial court denied the Associations’ motion for judgment on the pleadings seeking a judgment declaring Regulation 2695.183 invalid. The Associations now ask this Court for an immediate review of the trial court’s denial of the motion for judgment on the pleadings.

The Petition should be summarily denied. The Associations have not established that their right to appeal after a final judgment is not an adequate remedy or that they will suffer any harm. The Court should not expedite the review of dispositive issues without the benefit of the complete rulemaking file and without first allowing the trial court to fully examine the issues based on a complete record.

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<sup>1</sup> Unless otherwise indicated, section references are to the Insurance Code.

## STATEMENT OF ADDITIONAL PERTINENT FACTS AND PROCEDURAL HISTORY

### I. REGULATION 2695.813

An insurer issuing homeowners' insurance policies in California may offer five different types of replacement cost coverage. (Ins. Code, § 10102.) Regulation 2695.813 provides that *if* an insurer decides to offer an "estimate replacement cost" to a customer, the estimate must be a complete estimate. The regulation sets forth the minimum standards necessary for an estimate to be a complete estimate. (Cal. Code Regs., tit. 10, § 2695.813, subds. (a)-(e).) The purpose of the regulation is to prevent misleading statements made to purchasers of homeowners' insurance regarding the amount of insurance coverage when an insurer communicates an estimate of replacement cost. In many cases, homeowners have discovered only after a total loss that replacement value estimates used by their insurers were too low or that certain items were not included in the estimate. (Record, Vol. 2, Tab 4, p. P-14.)<sup>2</sup> The regulation makes clear to consumers what is included in an estimate of replacement cost, so that they are not misled as to what they expect to be covered.

The regulation provides that an insurer's communication to a consumer of an estimate of replacement cost that does not include all the factors set forth in subdivisions (a) – (e) shall constitute a misleading statement. (§ 2695.183, subd. (j).)

Regulation 2695.813 does not, contrary to the Associations' contention, impose an obligation on an insurer to estimate replacement cost or to communicate an estimate of replacement cost to consumers. (§ 2695.813, subd. (g)(1).) It also does not mandate any particular amount of

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<sup>2</sup> Citations to the "Record" will be to the Record filed by the Associations in support of the Petition.

coverage, does not prohibit an insured from obtaining his or her own estimate of replacement cost, does not prevent an insurer and its customer from negotiating coverage different from an estimate of replacement cost communicated under the regulation, or otherwise limit communications between an insurer and consumers. The regulation in pertinent part provides:

(m) No provision of this article shall be constructed as requiring a licensee to estimate replacement cost or to set or recommend a policy limit to an applicant or insured. No provision of this article shall be constructed as requiring a licensee to advise the applicant or insured as to the sufficiency of an estimate of replacement cost.

(n) No provision of this article shall limit or preclude a licensee from providing and explaining the California Residential Property Insurance Disclosure, as cited in Insurance Code section 10102, explaining the various forms of replacement cost coverage available to an applicant or insured, or explaining how replacement cost basis policies operate to pay claims.

(o) No provision of this article shall limit or preclude an applicant or insured from obtaining his or her own estimate of replacement cost from an entity permitted to make such an estimate by Insurance Code section 1749.85.

(p) For purposes of subdivision (p), “minimum amount of insurance” shall mean the lowest amount of insurance an insurer requires to be purchased in order for the insurer to underwrite the coverage on a particular property, based upon an insurer’s eligibility guidelines, underwriting practices and/or actuarial analysis. An insurer may communicate to an

applicant or insured and shall comply with all applicable provisions of this article. Nothing in this article shall limit or preclude an insurer from agreeing to provide coverage for a policy limit that is greater than or less than an estimate of replacement cost provided pursuant to this article.

The Commissioner promulgated Regulation 2695.813 pursuant to his authority under sections 790.03 and 790.10, as supported by sections 1749.7 and 1749.85.

## **II. THE TRIAL COURT'S DENIAL OF THE ASSOCIATIONS' MOTION FOR JUDGMENT ON PLEADINGS**

On June 8, 2011, the Associations filed a Verified Complaint for Declaratory Relief pursuant to Government Code section 11350. (Record, Vol. 1, Tab 1, pp. 1-17; Petition, p. 2.) On July 7, 2011, the Commissioner filed an Answer to the complaint. (Record, Vol. 1, Tab 2, pp. 18-23.) In his Answer, the Commissioner denied all allegations concerning the invalidity of Regulation 2695.183. (*Ibid.*)

On December 5, 2011, the Associations filed a motion for judgment on the pleadings pursuant to Code of Civil Procedure section 438 seeking a judgment declaring Regulation 2695.183 invalid. (Record, Vol. 1, Tabs 3-4, pp. 24-46.) The Associations contended that the Commissioner had no authority to adopt the regulation in question and that the regulation improperly restricts underwriting and infringes on an insurer's free speech rights. (Record, Vol. 1, Tab 4, pp. 34-41.) In support of their motion, the Associations submitted a select portion of the rulemaking file, but not the complete rulemaking file. (Record, Vol. 2.)

The Commissioner opposed the motion. (Record, Vol. 1, Tab 6, pp. 49-76.) The Commissioner contended that a motion for judgment on the pleadings was not an appropriate method for the determination of the issues in this case. The Associations were not entitled to judgment under Code of



Civil Procedure section 438 because the Commissioner's answer controverted allegations of the complaint and presented defenses. (*Id.*, at pp. 57-58.) The Commissioner noted that the Associations failed to provide the trial court with the entire rulemaking file or even make references to the select portions of the file it did submit. (*Id.*, at p. 58.) The Commissioner also argued that he had authority to promulgate the regulation under sections 790.03 and 790.10, which proscribe deceptive and misleading practices and grant the Commissioner rulemaking authority, as well as sections 1749.7 and 1749.85, which allow the Commissioner to adopt standards for estimating replacement values by real estate appraisers. (*Id.*, at pp. 62-64.) Further, the regulation does not restrict underwriting because it does not require in any way prescribe the risks an insurer must insure and at what cost. (*Id.*, at pp. 65-67.) Finally, the regulation does not violate insurers' first amendment rights. (*Id.*, at pp. 68-72.)

On January 24, 2012, the trial court held the hearing on the Associations' motion. Following oral argument, on January 26, 2012, the trial court denied the motion "based on the reasoning contained in defendant's opposition papers." (Record, Vol. 1, Tab 8, p. 93.)

**THE PETITION SHOULD BE SUMMARILY DENIED BECAUSE THE ASSOCIATIONS HAVE NOT ESTABLISHED THE ABSENCE OF AN ADEQUATE REMEDY.**

A writ of mandate will not issue to review interim rulings of a trial court unless there is no plain, speedy and adequate remedy. (*San Diego Gas & Elec. Co. v. Superior Court* (1996) 13 Cal.4th 893, 912-913; Code Civ. Proc., § 1086.) The right to appeal from a final judgment is ordinarily presumed to be an adequate remedy precluding the issuance of a writ. (*San Diego Gas & Elec.*, *supra*, 13 Cal.4th at pp. 912-913.) The petitioner has the burden to show that the remedy of appeal is inadequate. (*Phelan v. Superior Court* (1950) 35 Cal.2d 363, 370.)

The Associations have not met their burden here. There is no reason the Associations could not or should not proceed to judgment in the court below and allow the trial court to decide all the issues in the first instance based on a full record. The denial of the motion does not preclude the Associations from renewing their legal arguments. The matter can also quickly proceed to judgment. An action for declaratory relief such as the one brought by the Association is entitled to statutory priority in setting a trial date pursuant to Code of Civil Procedure section 1062.3. Thus, there is no reason the case could not be expeditiously and properly resolved in the trial court before any review by this Court. If the Associations suffer an adverse judgment below, they can then appeal from that final judgment.

Significantly, the Commissioner agrees that the validity of Regulation 2695.813 is of important public interest. However, it is because of the importance of this issue to the public at large that the Court should not rush to judgment through extraordinary writ without having the issues being fully litigated in the court below and without the benefit of a complete record. The Court in *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273, noted the benefits of review by appeal rather than extraordinary writ as follows:

The Court of Appeal is generally in a far better position to review a question when called upon to do so in an appeal instead of by way of a writ petition. When review takes place by way of appeal, the court has a more complete record, more time for deliberation and, therefore, more insight into the significance of the issues.

In this case, it is premature for this Court to review the validity of the regulation as requested in the Petition. The Associations contend they are seeking declaratory relief pursuant to Government Code section 11350, which allows the court to consider the rulemaking file. Yet, the

Associations presented neither the trial court nor this Court with the entire rulemaking file necessary for either court to review the validity of the regulation at issue. (Gov. Code, § 11350, subd. (d)(1).)

Finally, Regulation 2695.183 is intended to prevent insurers from making misleading statements to their customers. The Associations and their members will not suffer harm by having to comply with the regulation while the matter is litigated in the trial court. At no time during the rulemaking process or proceedings before the trial court, and nowhere in this Petition, did the Associations contend that the requirements of subdivisions (a) through (e) of Regulation 2695.183 are not proper factors to be used in calculating estimates of replacement cost or that they deviate from the factors insurers currently use to prepare estimates. Nor do they present any evidence that communicating the estimates to their customers in the manner required under the regulation greatly increases their costs of doing business. They simply do not want to disclose the components of their estimates to customers.

Therefore, the Associations have not shown that they are entitled to extraordinary relief.

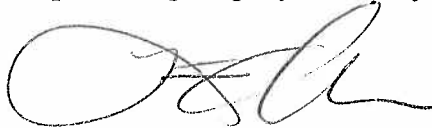
**CONCLUSION**

For the foregoing reasons, the Commissioner respectfully requests that the Petition be summarily denied.

Dated: April 2, 2012

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I certify that the attached Preliminary Opposition to Petition for Writ of Mandate uses a 13 point Times New Roman font and contains 1922 words.

Dated: April 2, 2012

KAMALA D. HARRIS  
Attorney General of California

A handwritten signature in black ink, appearing to read 'LW Chao', written in a cursive style.

LISA W. CHAO  
Deputy Attorney General

*Attorneys for Real Party in Interest  
Dave Jones, Insurance Commissioner of  
the State of California*

**DECLARATION OF SERVICE BY U.S. MAIL and OVERNIGHT DELIVERY**

Case Name: **ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES and  
PERSONAL INSURANCE FEDERATION OF CALIFORNIA v. DAVE  
JONES in his capacity as Commissioner of the California Department of  
Insurance**

No.: **BC463124**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On April 2, 2012, I served the attached **PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Honorable Gregory W. Alarcon  
Judge of the Superior Court  
Los Angeles County Superior Court  
111 North Hill Street  
Department 36  
Los Angeles, California 90012-3117  
*(Respondent)*

In addition, I placed a true copy thereof enclosed in a sealed envelope, delivery fees provided for, to be delivered via overnight service by FederalEx Corporate Services, Inc., at Los Angeles, California, addressed as follows:

Gene Livingston, Esq.  
Greenberg Traurig, LLP  
1201 "K" Street, Suite 1100  
Sacramento, California 95814-3938  
*(Attorneys for Petitioners Association of California Insurance Companies  
and Personal Insurance Federation of California)*

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 2, 2012, at Los Angeles, California.

Kathi Palacios  
\_\_\_\_\_  
Declarant

  
\_\_\_\_\_  
Signature