

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT**

**ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES AND
PERSONAL INSURANCE FEDERATION OF CALIFORNIA,**
Petitioners,

v.

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

and

**DAVE JONES IN HIS CAPACITY AS COMMISSIONER OF THE
CALIFORNIA DEPARTMENT OF INSURANCE,**
Real Party In Interest.

Appeal from the Los Angeles County Superior Court
Case Number BC463124
Honorable Gregory W. Alarcon, Superior Court Judge

**PETITIONERS' REPLY TO REAL PARTY IN INTEREST
DAVE JONES' PRELIMINARY OPPOSITION
TO PETITION FOR WRIT OF MANDATE**

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**ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES AND
PERSONAL INSURANCE FEDERATION OF CALIFORNIA**

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INTRODUCTION

In this Reply, Petitioners address the issue of whether they have an adequate remedy by proceeding to trial and appealing if the trial court enters an adverse judgment against them. An appeal is not adequate for the following reasons:

1. The regulation Petitioners are challenging infringes on their members' First Amendment rights and immediate relief is necessary.
2. Petitioners' members are subject to substantial penalties if they fail to comply fully with the burdensome dictates of the regulation.
3. Petitioners' members cannot avoid the harm imposed by the regulation.
4. This case presents only legal issues that can be resolved by a writ of mandate.

I. ARGUMENT

A. A Writ of Mandate Is Appropriate When First Amendment Rights Are Infringed.

Homeowner's insurance in California is replacement cost insurance. Insurance Code section 10102.¹ Hence, the insurance transaction between an insurance licensee (an agent, broker, or insurer) and an applicant for insurance or an insured involves, by necessity, a discussion of the replacement cost of the structure being insured. Despite this, the

¹ All statutory citations will be to the Insurance Code unless otherwise indicated.

Commissioner's regulation prohibits a licensee from making any statement or expressing any opinion about replacement cost estimates unless the estimate is calculated and communicated in accordance with the detailed provisions of the regulation. The regulation infringes on licensees' First Amendment rights to communicate freely with their customers.

In cases in which the trial court's denial of relief infringes on the First Amendment right to free speech, quick resolution by a petition for writ of mandate is appropriate. *Environmental Planning & Information Council v. Superior Court*, 36 Cal.3d 188, 190 (1984) (holding that "normally courts do not intervene at the pleading stage of a pending action" but it is warranted where there is the risk of "infringement upon Defendants' constitutional rights of free speech") (citing *Good Government Group of Seal Beach, Inc. v. Superior Court*, 22 Cal.3d 672, 685 (1978)); *see also Gonzalez v. Superior Court*, 180 Cal. App. 3d 1116, 1121 (1986).

B. Petitioners' Members Are Subject to Substantial Penalties Under the Regulation.

The regulation does much more than simply list a number of factors that must be considered in estimating replacement costs. The regulation requires a licensee to provide not just one estimated value, but to break out the estimate into four separate values - - an estimate for (1) the cost of labor, building materials and supplies; (2) overhead and profit; (3) cost of

demolition and debris removal; and (4) cost of permit and architects' plans. Cal. Code Regs. tit. 10, section 2695.183. In addition, the licensee has to include in any opinion expressed about replacement cost, a description of the foundation, frame, roof, siding, contour of the land, square footage, location, number of stories and wall heights, age of the structure, size and type of the garage, and the materials used in interior features and finishes, such as, heating and air conditioning systems, walls, flooring, ceiling, fireplaces, kitchen, and baths. *Id.* All of this is to be provided in writing. *Id.*

Accordingly, a licensee's omission or mischaracterization of a feature of the structure to be insured constitutes a violation of the regulation even if the "violation" has no affect on the replacement cost estimate. Each "violation" subjects the licensee to a penalty of \$5,000, or if willful, \$10,000 under Insurance Code section 790.035.

C. Petitioners' Members Cannot Avoid Injury Imposed By the Regulation.

As noted above, homeowner's insurance is replacement cost insurance. Hence, it is necessary for licensees to discuss replacement cost estimates with applicants and insureds during the insurance transaction. Moreover, section 791.10 requires insurers to communicate with applicants or insureds about replacement costs when the insurer makes an adverse underwriting decision, that is, declining coverage because the proposed

amount of insurance is too low or conditioning coverage on a higher amount of insurance. *See* section 791.02 defining adverse underwriting decisions. Accordingly, an insurer may not avoid the dictates of the regulation by ceasing all communications with applicants or insureds about replacement cost estimates.

D. This Case Presents Only Legal Issues For Resolution.

Petitioners' challenge to the regulation is based on three grounds: (1) the Commissioner lacks authority to adopt the regulation; (2) the regulation unlawfully regulates underwriting; and (3) the regulation infringes the First Amendment rights of insurance licensees. The Commissioner admits that he adopted the regulation.

This Court does not need any further proceeding in the trial court to address the legal issues presented by the Petition for Writ of Mandate.

II. CONCLUSION

Petitioners urge this Court to grant the Petition for Writ of Mandate ordering Respondent trial court to set aside its previous ruling and to grant Petitioners' Motion for Judgment on the Pleadings.

Date: _____

Respectfully submitted,

GENE LIVINGSTON
Attorney for Petitioners

CERTIFICATE OF WORD COUNT [Rule 8.204(c)]

I certify that the number of words in this Reply In Interest Dave Jones' Preliminary Opposition to Petition for Writ of Mandate, including footnotes, is 781 according to the word count of the Microsoft Office Word 2003 program used to prepare the brief.

DATED: _____

GREENBERG TRAURIG, LLP

By _____

Gene Livingston, Esq.
Attorney for Petitioners
Association of California
Insurance Companies and
Personal Insurance Federation
of California

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

I am employed in the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is **1201 K Street, Suite 1100, Sacramento, CA 95814.**

On April 5, 2012, I served **PETITIONERS' REPLY TO REAL PARTY IN INTEREST DAVE JONES' PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action by placing the true copy thereof, enclosed in a sealed envelope, postage prepaid, addressed as follows:

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- BY MAIL:** I am familiar with this firm's practice whereby the mail, after being placed in a designated area, is given fully prepaid postage and is then deposited with the U.S. Postal Service at Sacramento, California, after the close of the day's business.
- BY PERSONAL SERVICE:** I caused such envelope to be delivered by hand.
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(STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

(FEDERAL) I declare under penalty of perjury that the foregoing is true and correct, and that I am employed at the office of a member of the bar of this Court at whose direction the service was made.

Executed on April 5, 2012, at Sacramento, California.

LYNNE GOMES

SAC442,179,975