

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

DATE: 03/25/13			DEPT. 36
HONORABLE GREGORY W. ALARCON	JUDGE	C. MASON	DEPUTY CLERK
HONORABLE #4	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
P. MAPSTEAD, CA	Deputy Sheriff	NONE	Reporter

10:10 am	BC463124	Plaintiff	
	ASSOCIATION OF CALIFORNIA	Counsel	NO APPEARANCES
	VS	Defendant	
	DAVE JONES	Counsel	

**NATURE OF PROCEEDINGS:**

**RULING ON SUBMITTED MATTER**

The Court, having read and considered the proposed statements of decision and/or any oppositions filed and the Court's legal file in this matter, now makes the following orders:

The Court, having previously taken the matter under submission 02/04/13, now rules in accordance with the "Statement of Decision", consisting of 6 pages, filed this date and incorporated herein by reference to the Court file.

Pursuant to the Statement of Decision, plaintiff is ordered to submit a proposed judgment, consistent with the decision, within 10 days of the date of this order.

Plaintiff to give notice.

**CLERK'S CERTIFICATE OF MAILING**

I do hereby certify that I am not a party to the Cause herein, and that this date I served a copy of the above minute order and/or Court order reflected above upon each party/counsel named by depositing in the United States mail at the courthouse in Los Angeles, California, a copy of the original entered herein in a separate

<b>MINUTES ENTERED</b> 03/25/13 <b>COUNTY CLERK</b>
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MAR 25 2013

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES

John A. Clarke, Executive Officer/Clerk

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

Plaintiffs,

vs.

DAVE JONES, in his capacity as Commissioner  
of the California Department of Insurance,

Defendants.

Case No.: BC 463124

COMPLAINT FILED: June 8, 2011

**STATEMENT OF DECISION**

DEPARTMENT 36

TRIAL DATE: February 4, 2013

**I. INTRODUCTION**

This is a statement of decision following a court trial. In this action, Plaintiffs have moved for declaratory relief to seek judgment declaring a regulation, 10 CCR §2695.183, to be invalid. In 2010, the Commission of the Department of Insurance, Steve Poizner, adopted section 2695.183 of Title 10 of the California Code of Regulations.

This section imposes on homeowner insurers a specified method for estimating the replacement cost of a house, prohibiting an insurance licensee from communicating any estimate of replacement cost unless it is prepared and communicated in accordance with this regulation. Regulatory section 2695.183 allegedly severely limits communications by insurers to their insureds or applicants for insurance about the estimated cost of replacing insured's and

1 applicant's homes in the event of a total loss. The regulation bans all such communications  
2 unless the estimate of replacement cost is derived in accordance with the method provided by the  
3 regulation. Section 2695.183 became effective by its terms on June 27, 2011.

4 Defendant maintains it has the authority to adopt the regulation under Cal Ins Code §§  
5 790.03(b), 790.10, 1749.85, and 1749.7. 790.10 authorizes the Commissioner to adopt  
6 reasonable rules and regulations necessary to administer the Unfair Insurance Practices Art.

7 Cal Ins Code § 790.03(b) defines acts or practices that are unfair or deceptive: "The  
8 following are hereby defined as unfair methods of competition and unfair and deceptive acts or  
9 practices in the business of insurance...(b) Making or disseminating or causing to be made or  
10 disseminated before the public in this state, in any newspaper or other publication, or any  
11 advertising device, or by public outcry or proclamation, or in any other manner or means  
12 whatsoever, any statement containing any assertion, representation or statement with respect to  
13 the business of insurance or with respect to any person in the conduct of his or her insurance  
14 business, which is untrue, deceptive, or misleading, and which is known, or which by the  
15 exercise of reasonable care should be known, to be untrue, deceptive, or misleading."

17 Cal Ins Code § 1749.85(a) provides guidance for instruction/training for methods of  
18 estimating replacement costs, § 1749.85(b) prevents non-licensees from providing estimates of  
19 replacement costs, and § 1749.85(d) requires appraisers to use any standards for calculating  
20 estimates of replacement costs adopted by the Department of Insurance.

21 Cal Ins Code § 1749.7 provides the commissioner with authority to enact regulations  
22 under this article.  
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## 25 II. LEGAL STANDARD

1 Cal Gov Code § 11342.2 provides the general standard of review for determining the  
2 validity of administrative regulations. That section states that "[w]henever by the express or  
3 implied terms of any statute a state agency has authority to adopt regulations to implement,  
4 interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted  
5 is valid or effective unless [1] consistent and not in conflict with the statute and [2] reasonably  
6 necessary to effectuate the purpose of the statute."

7 Under the first prong, the judiciary independently reviews the administrative regulation  
8 for consistency with controlling law. *Communities for a Better Environment v. California*  
9 *Resources Agency* (2002) 103 Cal. App. 4th 98, 108. The question is whether the regulation  
10 alters or amends the governing statute or case law, or enlarges or impairs its scope. *Id.* The  
11 question is whether the regulation is within the scope of the authority conferred. If it is not, it is  
12 void. *Id.* Under the second prong, the question is whether the agency's action was arbitrary,  
13 capricious, or without reasonable or rational basis. *Id.*

### 15 III. DISCUSSION

16 The court finds that Defendant did not have the authority to adopt 10 CCR §2695.183  
17 under Cal Ins Code § 790.03(b). Section 790.03(b) defines unfair competition as any  
18 communications to insureds which are "untrue, deceptive, or misleading, and which [are] known,  
19 or which by the exercise of reasonable care should be known, to be untrue, deceptive, or  
20 misleading."

21 Defendant argues that 10 CCR §2695.183 simply interprets Cal Ins Code § 790.03(b) by  
22 "identifying one particular variety of misleading statement which licensees know or should know  
23 is misleading: to describe as a replacement cost estimate an estimate that fails to consider all of  
24 the elements which no one dispute may in fact need to be paid for in the event of a total loss."  
25

1 [Opp., p. 10]. Defendant appears to imply it has the regulatory authority under §790.03(b) to  
2 define anything not previously defined as “untrue, deceptive, or misleading” in the name of the  
3 public good. (Defendant’s Proposed Statement of Decision at page 5.)

4 “Estimates” of replacement costs are inherently inaccurate, but not misleading. They are  
5 only misleading if one claims or implies they’re accurate. By characterizing all estimates of  
6 replacement costs as misleading (save the one provided by 10 CCR §2695.183), Defendant, in  
7 exercising its authority under Cal Ins Code §790.10, expands the meaning of something “known”  
8 or which “should be known” to be misleading beyond the parameters of §790.03(b).

9  
10 The language of §790.03(b) does not grant Defendant the authority to penalize acts not  
11 known or cannot be determined through reasonable care to be misleading. The limits of the  
12 authority granted by §790.03 are underscored by Cal Ins Code § 790.06 which provides a special  
13 process which the commissioner can determine how acts not listed in §790.03 can be defined as  
14 unfair or deceptive.

15 To follow Defendant’s interpretation of §790.03(b) would be to obviate the need for  
16 §790.06, and statutes should be interpreted in such a way as to make them consistent with each  
17 other. *Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal. 3d 288, 298, See Defendant’s  
18 Proposed Statement of Decision at pages 5 to 6.). Therefore, because 10 CCR §2695.183  
19 improperly alters the scope of Cal Ins Code §790.03(b), its adoption cannot be justified.

20  
21 Defendant did not have the authority to adopt 10 CCR §2695.183 under Cal Ins Code §  
22 1749.85. Cal Ins Code § 1749.85(a) does not contemplate the adoption of an unfair business  
23 practice regulation like 10 CCR §2695.183, for it merely concerns the prelicensing curriculum  
24 for brokers, agents, etc. The remaining cited sections of Cal Ins Code § 1749.85 are likewise  
25 inapplicable as (b) precludes *non-licensees* from providing estimates of replacement value and

1 (d) concerns the adoption of standards for estimates of replacement value for *appraisers*, not  
2 *licensees*.

3 Defendant argues that even without specific statutory authority, it possess a general  
4 power to adopt regulations as necessary to promote the public welfare, citing *Calfarm Ins. Co. v.*  
5 *Deukmejian*, 48 Cal.3d 805, 824 (1989). (Defendant's Proposed Statement of Decision at 5-6).  
6 Defendant overstates the dicta in *Calfarm Ins. Co.*, for the court only mentions this authority in  
7 the context of a void statutory scheme that requires the agency to fill in the blanks. *See id.* This  
8 limited context is further underscored by the *Calfarm Ins. Co.* Court citing to *Credit Ins. General*  
9 *Agents Asso. v. Payne* (1976) 16 Cal. 3d 651, 656 which cautions that "promoting the public  
10 welfare" does not mean "vary[ing] or enlarge[ing] the terms of an enabling statute" or "issu[ing]  
11 regulations which conflict with this or any other statute." In this case, the statutory scheme  
12 provided by §§790.03 and 790 clearly delineate what procedures the commissioner must go  
13 through in order to adopt regulations concerning deceptive acts.  
14

#### 16 IV. CONCLUSION

17 Plaintiffs request for declaratory relief against Defendant Dave Jones, in his capacity as  
18 Commissioner of the California Department of Insurance, is granted. Pursuant to Government  
19 Code section 11350, the regulation section 2695.183 is invalid and that the Commissioner  
20 exceeded his authority by attempting to define additional acts or practices as unfair or deceptive  
21 by regulation rather than by the procedure set out in section 790.06. Having concluded that the  
22 Commissioner lacks this authority, the Court need not address Plaintiffs' remaining grounds for  
23 challenging the validity of the regulation. Plaintiff is to file a proposed judgment, consistent  
24 with this statement of decision, within 10 days of this ruling.  
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1 DATED:

MAR 25 2013

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**Gregory W. Alarcon**

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HON. GREGORY ALARCON  
JUDGE OF THE SUPERIOR COURT

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