Court of Appeal, Fourth Appellate District, Division Three
Kevin J. Lane, Clerk/Administrator
Electronically RECEIVED on 10/25/2017 at 5:58:34 PM

Court of Appeal, Fourth Appellate District, Division Three
Kevin J. Lane, Clerk/Administrator
Electronically FILED on 10/25/2017 by Denise Jackson, Deputy Clerk

No. G053914

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION 3**

PACIFICARE LIFE AND HEALTH INSURANCE COMPANY,

Plaintiff and Respondent

v.

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

Defendant and Appellant.

On appeal from the Superior Court for the County of Orange
Hon. Kim G. Dunning, Judge Presiding
Superior Court, Case No. 30-2014-00733375-CU-WM-CXC

AMICUS BRIEF OF THE AMERICAN COUNCIL OF LIFE INSURERS (ACLI), THE ASSOCIATION OF CALIFORNIA LIFE AND HEALTH INSURANCE COMPANIES (ACLHIC), THE INDEPENDENT INSURANCE AGENTS & BROKERS OF CALIFORNIA (IIABCAL), THE PERSONAL INSURANCE FEDERATION OF CALIFORNIA (PIFC), AND THE PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA (PCIAA) IN SUPPORT OF PLAINTIFF AND RESPONDENT

GREENBERG TRAURIG, LLP
Gene Livingston (SBN 44280)
livingstong@gtlaw.com
Bill Gausewitz (SBN 91524)
gausewitzb@gtlaw.com
1201 K Street, Suite 1100
Sacramento, CA 95814
Telephone: (916) 442-1111
Facsimile: (916) 448-1709

Attorneys for Amici Curiae
THE AMERICAN COUNCIL OF LIFE INSURERS (ACLI), THE ASSOCIATION OF CALIFORNIA LIFE AND HEALTH INSURANCE COMPANIES (ACLHIC), THE INDEPENDENT INSURANCE AGENTS & BROKERS OF CALIFORNIA (IIABCAL), THE PERSONAL INSURANCE FEDERATION OF CALIFORNIA (PIFC), AND THE PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA (PCIAA)

COURT OF APPEAL Fourth APPELLATE DISTRICT, DIVISION 3	COURT OF APPEAL CASE NUMBER: G053914
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 91524 NAME: William Gausewitz FIRM NAME: Greenberg Traurig STREET ADDRESS: 1201 K Street, Suite 1100 CITY: Sacramento STATE: CA ZIP CODE: 95814 TELEPHONE NO.: (916) 442-1111 FAX NO.: (916) 448-1709 E-MAIL ADDRESS: livingstong@gtlaw.com ATTORNEY FOR (*name*): Amici Curiae	SUPERIOR COURT CASE NUMBER: 30-2014-00733375-CU-WM-CXC
APPELLANT/ PETITIONER: Dave Jones, in his capacity as Insurance Commissioner of California RESPONDENT/ REAL PARTY IN INTEREST: PacifiCare Life and Health Insurance Company	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (*Check one*): [x] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Amici Curiae

2. a. [x] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest (*Explain*):
(1)		
(2)		
(3)		
(4)		
(5)		

[ ] Continued on attachment 2.

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 (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) 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).

Date: October 25, 2017

William Gausewitz
(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)

TABLE OF CONTENTS

I. APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF 6
II. INTEREST OF AMICI CURIAE 6
III. STATEMENT OF THE CASE 13
IV. STANDARD OF REVIEW..14

A. Courts Exercise Independent Judgment in Evaluating whether Regulations Are Consistent With Or Expand Upon the Scope of Underlying Law.................14
B. Interpretive Regulations Such As Those Invalidated by the Trial Court Are Given Limited Judicial Deference 15

V. SINGLE ACT DEFINITION..19

A. Regulation 2691.1(a) Is Not Consistent with Legislative Intent 19
B. The Commissioner's Interpretation of Section 790.03(h) is Inconsistent with the NAIC Model Act Adopted by the California Legislature 20
C. Subsequent Amendments to the NAIC Model Act Not Adopted in California Confirm that the 1972 Model Act Did Not Include Single Acts..........23
D. The Commissioner's Interpretation of Section 790.03(h) is Inconsistent with the Grammatical Construction of the Statute 23
E. The Commissioner's Regulatory Interpretations Invade the Province of the Legislature 24

1. The Supreme Court Expressly Rejected the Commissioner's Interpretation that a Single Act Can Constitute a Violation of Section 790.03(h)..25
2. The Enactment of Subsequent Legislation did not alter the scope of authority granted by section 790.03...26

F. The Enactment of Section 790.035 in 1989 Left Section 790.03 (h) Unchanged. 27
G. The Enactment of Section 12921.1 in 1990 Left Section 790.03(h) Unchanged. 29

VI. THE DEFINITION OF KNOWINGLY..31

A. By Defining "Knowingly" to Include Constructive Knowledge, Regulation Section 2695.2 (*l*) Improperly Expands the Scope of Section 790.03(h). 31

VII. THE DEFINITION OF WILLFUL...35

A. The Definition of "Willful" in Regulation 2695.2(y) Violates the Intent of the Legislature In Adopting Section 790.035. 35

VIII. CONCLUSION..37

TABLE OF AUTHORITIES

State Cases

Association of California Insurance Companies v. Jones
(2017) 2 Cal.5th 376 15

City of Alhambra v. County of Los Angeles
(2012) 55 Cal.4th 707 19

DaFonte v. Up–Right, Inc.
(1992) 2 Cal.4th 593, 7 Cal.Rptr.2d 238, 828 P.2d 140 32

Dyna–Med, Inc. v. Fair Employment & Housing Com.
(1987) 43 Cal.3d 1379 32

Green v. State of California
(2007) 42 Cal.4th 254 32

J. R. Norton Co. v. Agricultural Labor Relations Bd.
(1979) 26 Cal.3d 1 19

McLaughlin v. State Bd. of Educ.
(1999) 75 Cal.App.4th 196 27

Moradi-Shalal v. Fireman's Fund Insurance Cos.
(1988) 46 Cal.3d 287 25

PacifiCare Life And Health Insurance Company, v. Dave Jones
(No. G053914) 6

Peralta Community College Dist. v. Fair Employment & Housing Com.
(1990) 52 Cal.3d 40 31

Royal Globe Ins. Co. v. Superior Court,
23 Cal.3d 880 (1979) 20, 25

Western States Petroleum Assn. v. Board of Equalization
(2013) 57 Cal.4th 401 15

Yamaha Corp. of America v. State Bd. of Equalization
(1998) 19 Cal.4th 1 15

Zhang v. Superior Court
(2013) 57 Cal.4th 364 .... 25, 26

Statutes

Cal. Gov't. Code §11340 14

Cal. Gov't. Code § 11342.1 .... 14, 31, 33, 36, 37

Cal. Gov't. Code § 11342.2 .... 15, 31, 36, 37

Cal. Gov't. Code § 11353 14

Cal. Gov't. Code § 11425.60 18

Cal. Gov't. Code § 11517 17
Cal. Gov't. Code § 11580.23 33
Cal. Ins. Code § 703.1 33
Cal. Ins. Code § 754 33
Cal. Ins. Code § 781 33
Cal. Ins. Code § 790 14
Cal. Ins. Code § 790.03 .... 16, 20
Cal. Ins. Code § 790.03(b) 32, 33
Cal. Ins. Code § 790.03(h) 9, 14, 16, 18, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 36
Cal. Ins. Code § 790.15 14
Cal. Ins. Code § 790.035 .... 9, 14, 16, 26, 27, 28, 35, 36
Cal. Ins. Code § 923.5 11
Cal. Ins. Code § 997 11
Cal. Ins. Code § 12921 26
Cal. Ins. Code § 12921.1 .... 27, 29, 30, 31
Cal. Ins. Code § 12921.3 .... 29, 30
Cal. Ins. Code § 12921.3(a) 29
Cal. Ins. Code § 12921.15 13
Cal. Ins. Code § 12938 12

Other Authorities

Cal. Code Regs. tit.10, § 2644.10(e) 11
Cal. Code Regs. tit.10, § 2695.1(a) 14
Cal. Code Regs. tit.10, § 2695.2(l) 14, 32
Cal. Code Regs. tit.10, § 2695.2(y) 14

I. APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The American Council of Life Insurers (ACLI), the Association of California Life and Health Insurance Companies (ACLHIC), the Independent Insurance Agents & Brokers of California (IIABCal), the Personal Insurance Federation of California (PIFC), and the Property Casualty Insurers Association of America (PCIAA), apply for leave as amici curiae to file the following brief in *PacifiCare Life And Health Insurance Company, v. Dave Jones* (No. G053914).

No party or counsel for a party authored, in whole or in part, the proposed brief. No party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than the amici curiae, their members, or their counsel has made a monetary contribution intended to fund the preparation or submission of the proposed brief.

II. INTEREST OF AMICI CURIAE

The five amici curiae are trade associations whose members are all either insurance companies, including companies possessing certificates of authority to transact insurance in California, or insurance agents and brokers licensed to transact insurance in California. The matter on appeal will determine the nature of the regulatory regime under which the amici curiae operate.

Amici curiae collectively represent the majority of California Department of Insurance (CDI) licensees. Their members write virtually every type of insurance sold in this state, including health, life, auto, homeowners, commercial general liability, commercial multi-peril, worker's compensation, and other lines of insurance necessary to enable California's economy to function. Some members are among the largest insurance companies writing policies in

California and the United States. Other members are relatively small and localized insurance companies. Still other members are life, health, and property/casualty agents and brokers. All of the amici's members licensed by the CDI are subject to the UIPA and the unlawful and unprecedented interpretation of the UIPA articulated by the Commissioner in the Opinion. These members – large and small, local and national, corporate and individual – are all entitled to a fair, lawful, and constitutional system of regulation.

(ACLI) is a national trade association with approximately 290 member companies operating in the United States and abroad. ACLI advocates in federal, state, and international forums for public policy that supports the industry marketplace and the 75 million American families that rely on life insurers' products for financial and retirement security. ACLI members offer life insurance, annuities, retirement plans, long-term care and disability income insurance, and reinsurance, representing 95 percent of industry assets in the United States. 235 ACLI member companies do business in California. 94 percent of all life and annuity payments in California are from ACLI member companies, and 91 percent of total life insurance coverage in California is provided by ACLI member companies. ACLI applies for leave to file as amicus curiae to represent its members who would be bound and adversely impacted by the Commissioner's regulatory interpretation.

ACLHIC is a California not-for-profit corporation, comprising 40 member life and health insurance companies in California. ACLHIC's members represent an industry that provides more than two trillion dollars of insurance coverage to Californians and has contributed more than $400 billion to California's economy. ACLHIC represents its constituent insurers with respect to, among other things, legislative and regulatory issues affecting the same line of annuity and life and disability insurance as does ACLI, and also represents health insurance.

ACLHIC applies for leave to file as amicus curiae to represent its members who would be bound and adversely impacted by the Commissioner's regulatory interpretation.

IIABCal is a trade association representing independent insurance agents and brokers in California who sell all lines and types of insurance, but whose business is concentrated in commercial and personal property/casualty lines of insurance. IIABCal applies for leave to file as amicus curiae to represent its members who would be bound and adversely impacted by the Commissioner's regulatory interpretation.

PCIAA is a diverse, property-casualty industry, nationwide trade association. PCIAA has nearly 1000 members, consisting of large and small companies in all 50 states, including California. PCIAA's members represent every form of ownership: stock; mutual; risk retention group (RRG); and reciprocal. PCIAA's members write $216 billion in annual premiums and represent 43% of the United States auto market, 29% of the homeowner's market, 34% of the commercial property and liability market, and 36% of the private workers compensation market. PCIAA does business in California as the Association of California Insurance Companies. PCIAA applies for leave to file as amicus curiae to represent its members who would be bound and adversely impacted by the Commissioner's regulatory interpretation.

PIFC is a California not-for-profit trade association representing six personal lines property/casualty insurers who collectively write the majority of the personal lines auto and homeowners insurance in California. PIFC applies for leave to file as amicus curiae to represent its members who would be bound and adversely impacted by the Commissioner's regulatory interpretation.

The Court is being asked to determine the legality of regulations adopted and implemented by the California Insurance Commissioner. These regulations govern not only the

parties to this litigation, but all insurers, and insurance agents and brokers, who participate in the insurance claims process in California. As such, all amici curiae have a substantial interest in the outcome of the appeal.

Insurance Code Section 790.03(h) provides that a violation occurs only if the insurer knowingly engaged in a pattern of unfair practices. Section 790.035 authorizes a penalty of $5,000 for a violation of Section 790.03, or $10,000 for a "willful" violation. The regulations interpreting these statutes, as enforced against PacifiCare, create a significant threat to amici's members.

The regulations 1) remove the statutory requirement for a pattern of violations from the statute and impose a penalty for a single act; 2) define "knowingly" to include implied or constructive knowledge, eliminating actual knowledge as a requirement; and 3) define "willful" as willingness to perform an act resulting in a violation, eliminating the requirement of intent to engage in an unfair practice.

For approximately 20 years following the 1992 adoption of the regulations, the Commissioner implemented them in a manner that did not provoke litigation. That changed with the *PacifiCare* case in which the Commissioner brought an adversarial administrative enforcement action and imposed penalties of more than $173,000,000 for willfully engaging in single acts, no matter how inadvertent. As stated above, amici represent a large majority of the United States insurance market, and the $173 million penalty in this case exceeds the largest penalty ever imposed on an amici member company by more than 10 times.

To illustrate how such interpretations could affect amici, a single computer glitch that affects 100,000 claims could be subject to a penalty of up to $10,000 for each individual claim under the Commissioner's regulatory interpretation and application. That approach, when

enforced in *PacifiCare* caused alarms to ring throughout the insurance industry. As enforced against Respondent, these regulations threaten the viability of all insurers doing business in California.

For example, auto insurers processed over 2,400,000 claims just for property damage in 2016. If a mistake was made on just 1% of those claims, auto insurers could be subject to penalties of up to $240,000,000. Insurers who write homeowner's insurance processed over 1,500,000 claims in 2016. A mistake in just 1% of those claims could expose them to penalties up to $150,000,000. Note that each claim involves several interactions between insurers and claimants, any one of which could result in an inadvertent or unavoidable violation.

Health insurers face even greater threats. The major health insurers cover nearly 1,700,000 lives in group and individual policies subject to regulation by the Department of Insurance. Most people covered by health insurance will make at least one medical or pharmaceutical claim during a year. People with chronic conditions will have dozens of claims. Each time a health care provider provides a service—an office visit, diagnosis, laboratory analysis, treatment, surgery, prescription, etc.— a claim is submitted. Health insurers process hundreds of thousands of claims each year. If a mistake were made on even an infinitesimal percentage of these claims, the penalties could easily reach 10 figures marketwide.
The penalty imposed on PacifiCare, which was not the largest health insurer by enrollment in the state, is evidence of this point.

The Commissioner argues that he needs the regulations to protect consumers. He ignores, however, that the imposition of large penalties ultimately harms consumers and that he possesses other enforcement mechanisms.

Large penalties can negatively impact consumers in two ways. First, the law precludes an insurer from recouping fines and penalties by increasing rates[1]. As a result, when insurers pay fines and penalties, they must pay from their reserves, reducing the resources held in reserve. The Insurance Code limits the amount of insurance an insurer can write based upon the amount in the insurer's reserve[2]. The reserve requirements are conservative to ensure that insurers always have sufficient funds to pay claims.

When reserves are reduced, insurers' capacity to write additional insurance, that is, cover more people and their potential losses, is also reduced. As a consequence, insurance becomes less available. In addition, insurers need adequate reserves to develop and make available to consumers new insurance products. Reduced reserves will likely mean fewer or no new products.

Second, the threat of large penalties will cause insurers to seek ways to avoid having them imposed. There will be economic incentives is to spend significantly higher amounts for personnel, consultants, and technical equipment to achieve near perfection to avoid the fines and penalties. Those amounts are included in the calculation of insurance rates that consumers pay. Consumers for whom price is critical are forced to drop their insurance because of rate increases. Experience demonstrates that every price point increase results in a portion of consumers going bare, that is, without insurance.

The Commissioner's regulatory interpretation will harm consumers. It will make insurance harder to find, result in the loss of new products, increase rates, and cause some consumers to drop their insurance.

---

[1] Title 10, CCR section 2644.10(e) precludes payments made as fines and penalties to be included as expenses in calculating rates.

[2] See, e.g. Sections 923.5, 997

Further when the Commissioner asserts he needs these regulations to protect consumers and to assure that insurers follow the law, he ignores the many other mechanisms at his disposal to exert enormous authority over insurers.

The Commissioner is authorized to examine insurers[3] for compliance with law and does so regularly through market conduct examinations. The Department is authorized to, and does, look at all aspects of how an insurer conducts its business, including how it handles claims.

These examinations can result in a stipulation whereby insurers agree to pay fines, change procedures and operations, pay restitution to consumers, and submit follow-up compliance reports. Market conduct examinations require substantial time and resources from both insurers and the Department of Insurance. Insurers must absorb these internal costs, plus reimburse the Department for their costs. The Department prepares a final examination report that makes findings about the business by the insurer. Market conduct examination reports are made public[4] for all consumers to access and consider in their insurance purchases.

The complaint process discussed in a later portion of this brief is another consumer protection mechanism. Anyone, unhappy about any aspect of their relationship with anyone in the business of insurance, can submit a complaint to the Department of Insurance. Complaints can include the sales experience, policy provisions, or claims resolution.

The Department has a large unit that receives and investigates complaints. If examiners in that unit determine that the insurer failed to follow the law the complaint is deemed justified. Justified complaints can impact insurers in their applications for rate adjustments. In addition,

---

[3] Section 730, Section 12938

[4] Market Conduct Examination Reports may be searched from https://publishing.insurance.ca.gov/search/default.aspx

the Commissioner publishes[5] periodically the complaint history for each insurer. That publicity impacts an insurer's competitive standing with prospective buyers.

The Commissioner also releases report cards on health insurers based on data insurers are obligated to submit to the Department. These report cards reveal comparative information beyond how claims are handled to include the responsiveness of healthcare providers in the insurer's provider network. Consumers and particularly group buyers use these report cards to decide whether to buy coverage from a particular insurer or not.

The Commissioner heavily regulates all aspects of the insurance business[6]. That control provides the Commissioner with a powerful "bully pulpit." Insurers, agents, and brokers respond when the Commissioner suggests a change in operations or practices. The Commissioner has a full arsenal of enforcement tools to achieve compliance by insurers with the laws.

The Commissioner has created a circumstance in which insurers and insurance producers face dramatically new cost structures, which if allowed to stand will impose significantly increased insurance costs on consumers. Amici therefore have a compelling interest, both for themselves and for the consumers that they serve, in the outcome of this matter.

The proposed brief is offered in support of the Plaintiff and Respondent, PacifiCare Life and Health Insurance Company.

III. STATEMENT OF THE CASE

The facts of this appeal have been stated fully in the briefs of the parties. In brief summary, the Insurance Commissioner has adopted regulations to interpret the insurance claims

---

[5] Section 12921.15

[6] Additional discussion of the Commissioner's other consumer protection powers may be found in Respondent's Brief, pp. 44-45.

handling law found in section 790.03(h) of the California Insurance Code. The trial court ruled that three of these regulations[7] are invalid.

These three regulations define terms employed in section 790.03(h) and section 790.035[8]. The trial court invalidated these three definitions for violating the requirements of the California Administrative Procedure Act (APA)[9].

Regulation section 2695.1(a) establishes the rule that knowingly committing any act listed in section 790.03(h) on a single occasion constitutes a violation of the California Unfair Insurance Practices Act[10]. Regulation 2695.2(*l*) defines the term "knowingly committed" to include acts committed with implied or constructive knowledge. Regulation 2695.2(y) defines "willful" as it is used in section 790.035 to imply only a willingness to commit an act and specifies that an act may be done willfully even if it is done with no intent to violate the law, injure another, or obtain an advantage.

The trial court concluded that these regulations were not consistent with and had the effect of expanding the scope of the authorizing legislation in violation of the APA. Amici urge this Court to sustain the trial court's ruling.

IV. STANDARD OF REVIEW

A. Courts Exercise Independent Judgment in Evaluating whether Regulations Are Consistent With Or Expand Upon the Scope of Underlying Law.

The APA provides that "[e]ach regulation adopted, to be effective, shall be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law"[11]. The APA further requires that "[w]henever by the express or implied terms of any

---

[7] Title 10, Cal. Code Regs., sections 2695.1(a), 2695.2(*l*), and 2695.2(y). Unless stated otherwise, any section identified as "regulation section" refers to Title 10 of the California Code of Regulations.
[8] Unless stated otherwise, all references to "section" refer to that section of the California Insurance Code.
[9] California Government Code sections 11340 to 11353.
[10] Sections 790 – 790.15.
[11] California Government Code, § 11342.1.

statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute"[12].

In reviewing whether a regulation satisfies these legal requirements, the Court exercises independent judgment (*Association of California Insurance Companies v. Jones* (2017) 2 Cal.5th 376, 390.) "[W]hen an implementing regulation is challenged on the ground that it is 'in conflict with the statute' (Gov.Code, § 11342.2) or does not 'lay within the lawmaking authority delegated by the Legislature' (citation omitted), the issue of statutory construction is a question of law on which a court exercises independent judgment" (*Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401, 415).

B. Interpretive Regulations Such As Those Invalidated by the Trial Court Are Given Limited Judicial Deference

Regulations are broadly distinguished as either quasi-legislative or interpretive[13]. The three regulations invalidated by the trial court all define terms used in statute and thus represent the Commissioner's view of the statute's legal meaning and effect. These regulations are interpretive. As such, the Commissioner's interpretation is entitled to limited judicial deference[14] depending upon the situation[15].

---

[12] California Government Code § 11342.2.

[13] "It is a 'black letter' proposition that there are two categories of administrative rules and that the distinction between them derives from their different sources and ultimately from the constitutional doctrine of the separation of powers. One kind — quasi-legislative rules — represents an authentic form of substantive lawmaking: Within its jurisdiction, the agency has been delegated the Legislature's lawmaking power. . . . It is the other class of administrative rules, those interpreting a statute, that is at issue in this case. Unlike quasi-legislative rules, an agency's interpretation does not implicate the exercise of a delegated lawmaking power; instead, it represents the agency's view of the statute's legal meaning and effect, questions lying within the constitutional domain of the courts." *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10–11

[14] "Because an interpretation is an agency's legal opinion, however 'expert,' rather than the exercise of a delegated legislative power to make law, it commands a commensurably lesser degree of judicial deference." *Yamaha, supra,* 19 Cal.4th 1, at 11.

[15] Amici agree with the Respondent's detailed discussion of standard of review, Respondent's Brief pp. 21-24.

Insurance Code section 790.03 lists the acts that are prohibited as unfair business practices by the Unfair Insurance Practices Act (UIPA). Subdivision (h) begins "knowingly committing or performing with such frequency as to indicate a general business practice any of the following unfair settlement practices:."

Subdivision (h) was adopted in 1972. For over twenty years after the Legislature added subdivision (h) to the UIPA, the Commissioner interpreted the statute such that both the adverb "knowingly" and the prepositional phrase "with such frequency as to indicate a general business practice" modified both verbs "committing" and "performing."

In 1992 the Commissioner reinterpreted the statute in Regulation 2695.1(a). That regulation reads, "Section 790.03(h) of the California Insurance Code enumerates sixteen claims settlement practices that, when either knowingly committed on a single occasion, or performed with such frequency as to indicate a general business practice, are considered to be unfair claims settlement practices and are, thus, prohibited by this section of the California Insurance Code."

At the same time, twenty years after the enactment of subdivision (h), the Commissioner adopted Regulation 2695.2(l). That regulation reads, "'Knowingly committed' means performed with actual, implied or constructive knowledge, including, but not limited to, that which is implied by operation of law." The Commissioner's interpretation drove actual knowledge right out of the statute.

Insurance Code section 790.035 provides that a person who engages in an act or practice defined in section 790.03 is liable for a fine not to exceed $5,000, or if the act or practice was willful, a civil penalty not to exceed $10,000. The Commissioner adopted Regulation 2695.2(y) interpreting this statute. Regulation 2695.2(y) reads, "'Willful' or 'Willfully' when applied to the intent with which an act is done or omitted means simply a purpose or willingness to commit

the act, or make the omission referred to in the California Insurance Code or this subchapter. It does not require any intent to violate law, or to injure another, or to acquire any advantage."

The Commissioner, ignoring that his interpretations of the statute are entitled to little, if any, judicial deference, argues for almost total deference, in part, because the regulations have been in place for the 25 years since their adoption in 1992. The regulations were on the books, but at no time in their first 20 plus years were they the subject of an administrative adjudication. Not until the *PacifiCare* case and the contemporaneous *Globe Life, et al*[16] case (also known as the *Torchmark* case).

Torchmark contested an Accusation filed by the Department that threatened significant penalties. Torchmark filed a Motion to Strike factual allegations based upon the Commissioner's regulatory interpretations. The Administrative Law judge granted the Motion and invalidated the same regulations that are the subject of the matter before this Court.

The ruling by the ALJ was pursuant to a pre-hearing motion and not subject to rejection or modification by the Commissioner pursuant to Government Code section 11517. The Commissioner's only procedural avenue to contest the ALJ's decision was to petition a court for review. Instead, he did nothing more in the *Torchmark* case for approximately two years, until after his decision in *PacifiCare*.

Hearings in the *PacifiCare* case lasted nearly four years and involved 225 days of actual hearing. Following the hearing the Administrative Law Judge issued a proposed decision recommending a penalty of $11.5 million. The regulations which are the subject of this appeal were applied by the ALJ as written to support the recommended penalty The Commissioner rejected the ALJ's proposed decision, pursuant to Section 11517 of the Government Code, and

[16] Department of Insurance Case # UPA-2008-00017; Office of Administrative Hearing # 2011090887.

issued a contrary decision which imposed a penalty of $173,600,000, an increase of over 15 times beyond the amount recommended by the ALJ.

The Commissioner also designated the *PacifiCare* decision as a precedential decision pursuant to Section 11425.60 of the Government Code. This designation means that the agency considers the case to be one that "contains a significant legal or policy determination of general application that is likely to recur."

After designating the *PacifiCare* decision to be precedential, the Commissioner attempted to revive the proceeding in *Torchmark* which had no action for two years with the goal of circumventing the ruling of the ALJ in that case. The Commissioner asserted that the *PacifiCare* precedent governed the *Torchmark* adjudication and invalidated the earlier decision by the *Torchmark* ALJ. In effect, the Commissioner used the oxymoronic concept of a retroactive precedent, by applying rules and standards adopted years later to the earlier actions of the Torchmark companies.

The significance of this history of *Torchmark* and *PacifiCare* is twofold. First, it demonstrates that the Commissioner has recently undertaken a historically unprecedented campaign to expand enforcement of Section 790.03(h) and its associated regulations, thus increasing the concern of amici and prompting this brief. Second, it proves that there has been a recent and fundamental change in the Commissioner's enforcement of Section 790.03(h). The Commissioner argues[17] that the longevity of the regulations demonstrates their validity and contradicts concerns of Respondent and amici that they are invalid. Precisely the opposite is true.

The Commissioner urges this Court to consider the regulations favorably because they have been on the books for 25 years. The fact of the matter is that no Commissioner during these

[17] Appellant's Opening Brief, p. 30; Appellant's Reply Brief, p. 14.

25 years has applied the regulations in any manner similar to the application in *PacifiCare* and *Torchmark*. The regulations may have been on the books but the application has caused the current challenge to their validity. The Commissioner has enforced these regulations through unprecedented adversarial administrative adjudication and has ordered the imposition of unprecedented penalties. The longevity of regulations on the books is irrelevant in the face of the Commissioner's recent change in the enforcement of the regulations.

The Commissioner argues that the Court should allow the regulations to survive, that they are part of the fabric of insurance regulation. The change in enforcement reflected in the *Torchmark* and *PacifiCare* cases demonstrates that these are not part of the longstanding regulatory regime. The recent change in enforcement of these regulations leads to the conclusion that they are entitled to little, if any, deference, and the trial court's ruling that they are invalid should be affirmed.

V. SINGLE ACT DEFINITION

A. Regulation 2691.1(a) Is Not Consistent with Legislative Intent

"The objective of statutory construction is to determine the intent of the enacting body so that the law may receive the interpretation that best effectuates that intent." *City of Alhambra v. County of Los Angeles* (2012) 55 Cal.4th 707, 718–19.

"It is fundamental in statutory construction that courts should ascertain the intent of the Legislature so as to effectuate the purpose of the law. Thus, when administrative rules or regulations "alter or amend the statute or enlarge or impair its scope, they are void and courts not only may, but it is their obligation to strike down such regulations." *J. R. Norton Co. v. Agricultural Labor Relations Bd.* (1979) 26 Cal.3d 1, 29.

B. The Commissioner's Interpretation of Section 790.03(h) is Inconsistent with the NAIC Model Act Adopted by the California Legislature

The California Legislature, in 1972, added unfair claims settlement practices, subdivision (h), to the list of unfair business practices set out in Insurance Code section 790.03. In doing so, the Legislature based its addition on the National Association of Insurance Commissioners' (NAIC) Model Unfair Claims Settlement Practices Act. The Model Act provided, "Committing or performing with such frequency as to indicate a general business practice any of the following" claims practices.

The California Legislature inserted the word "knowingly" in front of the phrase "committing or performing." "Knowingly" was inserted, as the Insurance Commissioner argued to the Supreme Court in 1979, because "some allowance ought to be made for innocent violations in this area."[18]

For more than two decades, the Insurance Department interpreted the phrase, "committing or performing" to be modified by both the adverb "knowingly" and the prepositional phrase, "with such frequency as to indicate a general business practice." Then in 1992, after the Supreme Court's decision in *Moradi-Shalal,* the Department adopted a regulation reinterpreting subdivision (h) to create two types of violations. An insurer could violate the subdivision if it either "knowingly committed," any of the listed acts or "performed with such frequency as to indicate a general business practice" any of the listed acts.

The effect of the reinterpretation was to authorize the Department to penalize an insurer for committing a listed act on only one occasion if it was knowingly done. The reinterpretation struck the modifier "with such frequency as to indicate a general business practice" from

[18] See PacifiCare's MJN, Exhibit A, pp. 27-28, the California Department of Insurance's Amicus Brief in *Royal Globe*, pp. 5-6.

application to an act or practice "committed" by an insurer, and provided that this modifier only applied to an act "performed" by an insurer.

The Commissioner justifies the reinterpretation of the statute on the ground that "the legal and regulatory environment are not static and both have changed..." He goes on to argue that his "rulemaking authority is broad enough to change with evolving regulatory expectations, and the language of section 790.03(h) is capacious enough to accommodate his regulatory interpretation." Appellant's Reply Brief, pp. 24, 25.

The Commissioner's attempt to justify his interpretation ignores the reality that the statutory language has not changed; it has remained static. It is irrelevant whether the person who serves as Insurance Commissioner has changed. It is irrelevant whether the current Commissioner desires greater power to act based upon his view of today's conditions.

The Commissioner's authority to adopt regulations is limited to the scope of the statute, and the scope is defined by the Legislature's intent at the time the statute was enacted. It doesn't matter whether a creative Department employee can fashion a strained interpretation of the statute 20 years after the statute was enacted. What is relevant is what the Legislature intended.

What did the Legislature intend in 1972? It intended to codify the NAIC Model Act in California.

Even a cursory review of the NAIC language refutes the argument that the Legislature intended to create two types of violations when it codified the Model Act in California. The NAIC language is "Committing or performing with such frequency as to indicate a general business practice any of the following" acts. It is patently illogical to parse the NAIC language to mean that an insurer violates the law if it is either "committing" any of the listed acts or "performing with such frequency as to indicate a general business practice" any of the listed acts.

Such an interpretation renders the second phrase totally unnecessary; the word "committing" swallows up the second phrase because, with no modifiers, "committing" encompasses all possibilities. Any act, whether or not it indicates a general business practice, would be an act that was committed. Thus, interpreting the NAIC Model Act to consider the business practice limitation to apply only to acts performed, but not to acts committed, is nonsensical. It nullifies the second phrase, "performing with such frequency as to indicate a general business practice".

Nothing in the NAIC comments related to this language and included in the Commissioner's Motion for Judicial Notice supports the interpretation that the NAIC proposed a meaningless phrase as part of its Model Act. The plain meaning and only logical interpretation of the NAIC language is that the prepositional phrase "with such frequency as to indicate a general business practice" modifies both verbs, committing and performing.

The California Legislature inserting "knowingly" in front of both verbs to prevent the imposition of penalties for innocent violations does not change the structure of the sentence, nor does it provide evidence of a different legislative intent. The Legislature understood and intended at the time it enacted Section 790.03(h) that "committing or performing" were both modified by the phrase "with such frequency as to indicate a general business practice," just as the NAIC intended.

Similarly, the Legislature intended to modify both verbs when it added "knowingly." It is illogical to believe that it intended to modify only the first verb, committing. The desire to allow for innocent violations applies equally to those acts and practices that will be either committed or performed.

C. Subsequent Amendments to the NAIC Model Act Not Adopted in California Confirm that the 1972 Model Act Did Not Include Single Acts

The Commissioner argues that the NAIC Model Act authorizes the imposition of penalties for single-act violations. Years after the Legislature adopted the NAIC Model Act in California, the NAIC amended the Model Act to cover single acts.[19] Importantly, California never amended section 790.03 (h) to expand it to include single acts.

Two points should be emphasized about the current version of the Model Act. First, where the NAIC, the organization of all state insurance regulators, addressed the issue of imposing sanctions for single act violations, it authorized sanctions for single act violations only under much more egregious circumstances than that provided by the Commissioner's regulations. The NAIC Model Act provides that a single act violation occurs only if it "is committed flagrantly and in conscious disregard of" the statute or regulations. That is a significantly more rigorous standard than "knowingly," and far higher than the constructive knowledge standard of Regulation 2695.1. Second, the amendment of the Model Act to address single-act violations, subsequent to California's enactment of section 790.03(h) in 1972, confirms the NAIC's recognition that the original Model Act provision dealing with settlement practices did not contemplate that single acts would constitute violations giving rise to sanctions.

Despite amendments to the NAIC Model Act, California left its law unchanged. The only viable conclusion is that, just as the California Legislature had no intention to, and did not, include single acts in 1972, it has chosen to continue that policy today.

D. The Commissioner's Interpretation of Section 790.03(h) is Inconsistent with the Grammatical Construction of the Statute

Had the NAIC intended to codify two forms of violations as the Commissioner asserts, it would have signaled that intent by punctuation. This would have been done by inserting a

[19] The current NAIC Model Act is available at http://www.naic.org/store/free/MDL-900.pdf

comma after "committing" and after "business practice" so the NAIC language would read, "committing, or performing with such frequency as to indicate a general business practice, any of the following." Again the first phrase "committing" any of the following acts would render the second phrase "performing with such frequency" any of the following acts meaningless, but, at least, the commas would indicate the intent to do that.

Of course, the NAIC did not insert the commas, nor did the California Legislature. The omission of these commas demonstrates that neither the NAIC or Legislature intended to separate "committing" and "performing" into two separate types of violations.

PacifiCare argues in its Respondent's Brief that when the Legislature has intended to create separate categories it has used commas. (Respondent's Brief, p. 35) In reply, the Commissioner dismisses the role of a comma. (Appellant's Reply Brief, p. 22) Perhaps, the best retort to the Commissioner's argument is set out by Scalia and Garner, two well-known experts on interpreting statutes. In their book, Reading Law: The Interpretation of Legal Texts, they say, "No intelligent construction of a text can ignore punctuation." (Scalia and Garner, Reading Law, p. 161)

E. The Commissioner's Regulatory Interpretations Invade the Province of the Legislature

Regulation 2691.1(a), separating "committing" and "performing" into two types of violations, is inconsistent with the NAIC Model Law. It is inconsistent with the grammatical meaning of the statute. It is inconsistent with all indicia of the Legislature's intent. The Commissioner's only remaining point is to argue that the environment has changed.

If the "legal and regulatory environment" has changed as the Commissioner asserts, he should petition the Legislature to amend the statutory law. Nothing authorizes him to take it upon himself to make such a significant amendment to the statute in the guise of a regulation.

1. The Supreme Court Expressly Rejected the Commissioner's Interpretation that a Single Act Can Constitute a Violation of Section 790.03(h)

PacifiCare has fully set out in its Respondent's Brief that the Supreme Court rejected the Commissioner's single-act interpretation of section 790.03(h). The Supreme Court has addressed that subdivision in the *Royal Globe*[20], *Moradi-Shahal*[21], and *Zhang*[22] decisions. Amici endorse PacifiCare's argument.

The Commissioner attempts to avoid this clear Supreme Court resolution of the single-act issue by saying that "[t]he question of single-act liability was not before the Court in *Moradi-Shalal*" but that "the only question before the Court was whether section 790.03(h) can be enforced by private parties." Contrary to the Commissioner's assertion, the Supreme Court carefully evaluated the statute and characterized it as authorizing administrative sanctions only when a pattern of actions was revealed[23].

In both *Royal Globe* and *Moradi-Shalal* the Supreme Court considered the application of 790.03(h) at length in a regulatory context. The *Royal Globe* decision acknowledged that "repetition of prohibited acts is relevant to the duty of the insurance commissioner" (*Royal Globe*, *supra,* at 891), but was not required in a third-party bad faith cause of action[24]. *Moradi-Shalal* ruled that, in eliminating private third-party actions, the means for Section 790.03(h) enforcement is "limited to providing administrative sanctions by the Insurance Commissioner, *once an investigation revealed such a pattern.*" (*Moradi-Shalal, supra,* at 303 (emphasis added)). In both *Royal Globe* and *Moradi-Shalal* the Supreme Court recognized that

---

[20] *Royal Globe Ins. Co. v. Superior Court*, 23 Cal.3d 880 (1979)
[21] *Moradi-Shalal v. Fireman's Fund Insurance Cos.* (1988) 46 Cal.3d 287
[22] *Zhang v. Superior Court* (2013) 57 Cal.4th 364
[23] Amici concur with the discussion of this issue in Respondent's Brief at pp. 30-31.
[24] "[W]hile repetition of prohibited acts is relevant to the duty of the insurance commissioner to issue a cease and desist order, to an aggrieved private litigant who can demonstrate that the insurer acted deliberately, the frequency of the insurer's misconduct and its application to others is irrelevant." *Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal.3d 880, 891.

administrative enforcement of Section 790.03(h) required the regulator to find a pattern of violations[25].

Notwithstanding the Commissioner's assertion that the single-act issue was not before the Court in *Royal Globe* and *Moradi-Shalal*, it was. In fact, it was fundamental to the Court in *Moradi-Shalal* to overturning the *Royal Globe* decision. Moreover, in *Zhang*, the Supreme Court confirmed its holding that penalties can be imposed only for "practices that amount to a pattern of misconduct." (57 Cal.4th at p. 380, fn. 8) Regulation 2695.1 specifically conflicts with the Supreme Court decisions and is invalid.

2. The Enactment of Subsequent Legislation did not alter the scope of authority granted by section 790.03.

The Commissioner argues at length[26] that the enactment of Section 790.035 and Section 12921 altered the scope of regulatory authority conferred upon the Department of Insurance pursuant to Section 790.03. This argument is inconsistent with law, since it argues that the intent of the legislature that enacted a statute is altered by the enactment by a later legislature of other legislation that did not amend the statute under review. The argument also fails because the legislative history of Section 790.035 demonstrates that the legislature which enacted Section 790.035 understood Section 790.03 to require a pattern of acts to demonstrate a violation.

Section 790.035 was added to the Insurance Code by Chapter 725, Statutes of 1989. Section 12921 was added to the Insurance Code by Chapter 1375, Statutes of 1990. Neither of these enactments amended Section 790.03, and thus they cannot reflect an intention of the Legislature to amend the legal impact of Section 790.03. These changes in law cannot possibly

[25] The Supreme Court reasserted this interpretation of law in 2013, saying that in *Moradi-Shalal* the Court had "approved the reasoning of Justice Richardson's *Royal Globe* dissent, holding that the UIPA contemplates only administrative sanctions for practices amounting to a pattern of misconduct." *Yanting Zhang v. Superior Court* (2013) 57 Cal.4th 364, 380 (emphasis added).
[26] Appellant's Reply Brief, pages 27-29.

illuminate the legislative intent of the 1972 Legislature that enacted Section 790.03 nearly two decades earlier.

The Commissioner's argument amounts to suggesting that the 1989 enactment of Section 790.035, and the 1990 enactment of Section 12921.1 both amounted to implied amendments of Section 790.03(h). Implied amendments are disfavored. "We are mindful that the principle of amendment or exception by implication is to be employed frugally, and only where the later-enacted statute creates such a conflict with existing law that there is no rational basis for harmonizing the two statutes, such as where they are 'irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation....' (citation)" *McLaughlin v. State Bd. of Educ.* (1999) 75 Cal.App.4th 196, 222–23.

Since the two statutes clearly are not "so inconsistent that they cannot have concurrent operation", it is an improper interpretation to conclude that enactment of Section 12921.1 resulted in an implied amendment, necessary to harmonize the two statutes. The statutes are in perfect harmony without finding an implied amendment.

The Commissioner's effort to suggest that the enactment of legislation nearly 20 years after the enactment of Section 790.03(h) is without merit and should be rejected by the Court.

F. The Enactment of Section 790.035 in 1989 Left Section 790.03 (h) Unchanged.

The Commissioner argues that Section 790.035 was intended to allow the Commissioner to impose fines for single act violations of Section 790.03 (h). He repeats his argument that the singular form of "act" is used six times in section 790.035. The Commissioner fails to acknowledge that the operative opening sentence specifies that the statute applies to "any person who engages in . . . any unfair or deceptive act *or practice*". If, as the Commissioner argues, Section 790.035 had the effect of authorizing sanctions for single-act violations of the practices

listed in Section 790.03(h), there would be no point to specifying that it applies to a person who engages in a "practice."

The most logical interpretation is that the Legislature, in 1989, used the phrase "act or practice" to fit grammatically with the various ways in which unfair conduct is defined in section 790.03. Some definitions relate to acts, others, and specifically subdivision (h), require a practice or a pattern of misconduct.

Section 790.035 authorizes the Commissioner to impose a fine for any act that is a violation of Section 790.03. This does not modify what is required by law to constitute an act in violation of Section 790.03. In simple terms, Section 790.035 says that each time an insurer violates Section 790.03 it may be fined. It does not, however, change what constitutes a violation of Section 790.03. If a violation of Section 790.03(h) required a showing of a pattern before Section 790.035 was enacted, that requirement did not change because Section 790.035 was enacted.

Furthermore, as Respondent has highlighted, the legislative history of Section 790.035 demonstrates that the Legislature understood that a violation of Section 790.03(h) required a showing of a pattern of wrongful conduct.[27] When the Legislature enacted Section 790.035, it did so based upon an understanding that it provided fines if an insurer was found to be committing a pattern of prohibited actions. Far from indicating that the enactment of Section 790.035 somehow changes the scope of regulatory authority of Section 790.03, the legislative history demonstrates that the Legislature enacted Section 790.035 with the opposite understanding – that it would authorize fines for claims practice violations only when an insurer was found to have been committing a pattern of certain undesirable, specified practices in settling claims.

[27] Respondent's Brief, pp. 39-40

G. The Enactment of Section 12921.1 in 1990 Left Section 790.03(h) Unchanged.

Section 12921.1 requires the Commissioner to establish a program to accept inquiries from members of the public, and to investigate their complaints and take appropriate action, "concerning the handling of insurance claims (Section 12921.3[28]). The scope of Section 12921.1 expressly extends beyond the scope of Section 790.03(h) since the statute specifically includes "complaints and inquiries . . . concerning . . . violations of Article 10 (commencing with Section 1861) of Chapter 9 of Part 2 of Division 1" (Section 12921.3(a)).

The Commissioner employs an argument that, since Section 12921.1 allows the Department to investigate and take action on individual complaints about claims handling, Section 790.03(h) must be interpreted to allow penalties for single-act violations as an act of "harmonizing[29]" the two sections.

There is no legal basis for such an inference. The 1990 Legislature did not amend Section 790.03(h) to create an enforcement mechanism for single act violations. Rather it established the Section 12921.1 complaint program as an essentially unrelated means for the Commissioner to address consumer complaints of any nature.

Section 12921.1 has no direct relationship at all to Section 790.03(h). Section 12921.1 requires the Commissioner to establish a program to accept and investigate consumer complaints. The Commissioner argues that such complaints may involve violations of Section 790.03(h) and that, therefore, the two statutes must be viewed as a single law, the Legislative intent of Section 12921.1 being inferred into Section 790.03(h).

Further, the plain language of the statute does not support the Commissioner's inference. Section 12921.1 does not refer to Section 790.03(h). By its own terms it is far broader than

---

[28] Section 12921.3 defines the nature of the complaints accepted pursuant to Section 12921.1.
[29] Appellant's Reply Brief, p. 29

dealing with claims alone. It requires the Commissioner to "establish a program . . . to investigate complaints and respond to inquiries received pursuant to Section 12921.3". The bill which enacted Section 12921.1 was SB 2569 (Rosenthal, 1990)[30]. SB 2569 also amended Section 12921.3. One of the amendments to Section 12921.3 enacted by SB 2596 was to specify that the complaint program would accept complaints relating to "violations of Article 10 (commencing with Section 1861) of Chapter 9 of Part 2 of Division 1". This Article deals not with claims but with rating of insurance. It is entirely unrelated to Section 790.03.

The bill by which the 1990 Legislature enacted Section 12921.1 expanded the pre-existing complaint program to specify that it covered complaints about insurance rating. If there is any logical inference, it is that SB 2596 intended to expand the Commissioner's complaint program to other subjects which were not previously specified.

The fact that the Legislature did not intend the enactment of section 12921.1 to expand the Commissioner's enforcement authority is supported by the enacting bill itself. SB 2569 contained uncodified Section 6 which said "It is the intent of the Legislature that for purposes of this act, the word 'prosecute' shall not be deemed to expand the Insurance Commissioner's existing authority to bring enforcement actions against insurers." Within the text of the bill itself is an explicit statement of legislative intent that, when it enacted this law, the Legislature considered whether creation of the complaint process expanded the Commissioner's authority to bring enforcement actions, and that it did not intend such an expansion. The Commissioner's argument that enactment of Section 12921.1 reflects legislative intent that Section 790.03(h) should be interpreted to permit enforcement actions for single act violations is refuted by the statement of legislative intent included in the very bill that enacted the law.

---

[30] Appellant's Motion for Judicial Notice, Exhibit C.

It is also well-established that the "declaration of a later Legislature is of little weight in determining the relevant intent of the Legislature that enacted the law". *Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 52. The *Peralta* court was evaluating whether the failure of a subsequent legislature to amend a statute had any value in interpreting the underlying statute, and concluded that it did not. How much less value is there than in the enactment of an entirely different law in 1990, with respect to discovering the intent of the Legislature in 1972 in enacting law.

The bill that enacted Section 12921.1 did not amend Section 790.03(h)[31]. There is no basis at all for saying that the 1990 enactment of Section 12921.1 altered, in any way at all, the scope of authority the Legislature granted to the Commissioner in 1972 by enacting Section 790.03(h).

VI. THE DEFINITION OF KNOWINGLY

A. By Defining "Knowingly" to Include Constructive Knowledge, Regulation Section 2695.2 (*l*) Improperly Expands the Scope of Section 790.03(h).

Section 790.03(h) requires that acts violating its prohibitions must be done "knowingly". Regulation section 2695.2(*l*) defines "knowingly committed" to mean "performed with actual, implied or constructive knowledge, including, but not limited to, that which is implied by operation of law. The trial court invalidated this regulation.

The question before the Court is whether the term "knowingly" as interpreted by the Commissioner is a proper interpretation of the law, or whether it wrongfully expands upon the scope of and is inconsistent with the underlying statute in violation of sections 11342.1 and 11342.2 of the California Government Code.

---

[31] In fact, Section 790.03 was not amended at all between 1989 and 2001.

Under settled canons of statutory construction, in construing a statute courts ascertain the Legislature's intent in order to effectuate the law's purpose (*Dyna–Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386.) The initial step in this analysis is to look at the statute's words and give them "their usual and ordinary meaning." (*DaFonte v. Up–Right, Inc.* (1992) 2 Cal.4th 593, 601, 7 Cal.Rptr.2d 238, 828 P.2d 140.) "The statute's plain meaning controls the court's interpretation unless its words are ambiguous." (*Green v. State of California* (2007) 42 Cal.4th 254, 260.

The plain meaning of "knowing" is "1. Possessing knowledge, intelligence, or understanding; 2. . . .; 3. Deliberate; *knowing complicity in the plot*[32]". The essential element of these definitions is that each reflects that a "knowing" act must be an act done with some actual awareness that the act is being performed.

For purpose of this analysis, the Court is not required to determine precisely what level of awareness is required by the statute. The definition adopted by the Commissioner in regulation 2695.2(*l*) permits a finding of violation with no actual awareness and is therefore inconsistent with, and expands the scope of, Section 790.03(h).

Constructive knowledge is "[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person." (Black's Law Dict. (9th ed. 2009). This legal concept is most commonly phrased in statute with some variant of the formulation that an act is done by a person who "knew or should have known" a relevant fact.

When the Legislature intends to establish a constructive knowledge standard, it has no difficulty doing so. For example, Section 790.03(b) prohibits publications which are "known, or which by the exercise of reasonable care should be known" to be misleading. In the same Insurance Code section in which the Legislature required that a violation of subdivision (h) be

---

[32] The American Heritage Dictionary, *supra*,

done "knowingly" it provides a standard of constructive knowledge supports finding a violation of the prohibition against providing misleading statements. The Legislature is clearly able to specify a constructive knowledge standard when it intends to. For the Commissioner to insert a constructive knowledge standard into the statute by regulation expands the scope of the statute in violation of Section 11342.1 of the Government Code.

Section 790.03(b) is far from the only Insurance Code section in which the Legislature has proven competent to create a constructive knowledge standard without the need for the Commissioner's regulation. Section 703.1 prohibits making certain statements that are "known, or that by the exercise of reasonable care should be known, to be untrue, deceptive, or misleading." Section 754 prohibits referral fees "for which the person knows or should have known" will be reimbursed by an insurer. Section 781 prohibits a person from making a statement that is "known, or should have been known" to be a specific type of misrepresentation. Section 11580.23 requires that an insured notify an insurer of an uninsured motorist claim "within a reasonable time after the insured knew or should have known of the uninsured status of the motorist."

That is only the California Insurance Code. A WestLaw search of the California Civil Code reveals 60 statutes employing the phrase "should have known." A similar search of the California Penal Code reveals 105 occurrences of the phrase.

Had the Legislature intended "knowingly" to include implied or constructive knowledge, it captured these concepts in the phrase "performed with such frequency as to indicate a general business practice". It would have had no need to add "knowingly" unless it intended for it to refer to actual knowledge. The addition of the word to the language of the NAIC Model and its inclusion in Section 790.03(h) demonstrates intent to require actual knowledge. A standard of

implied or constructive knowledge is not substantively different from the unmodified NAIC Model Act standard.

When the California Legislature intends to create constructive knowledge as the standard by which an action shall be judged, it knows how to do so. By the Commissioner's interpretation the phrase "or should have known" is effectively inserted into the statute by regulatory dictate.

Defending his interpretation, the Commissioner improperly conflates "implied knowledge" and "imputed knowledge"[33]. Respondent acknowledges that the actual knowledge of its employees and agents is imputed to the insurer. The Commissioner seizes on this and asserts that PacifiCare has accepted the "implied" knowledge portion of his invalid definition of "knowingly." That is neither a fair or accurate description of Respondent's Brief.

Despite the similarity of the terms, they are fundamentally different. Implied knowledge refers to knowledge not actually possessed but implied by circumstances or operation of law. The person involved does not have the knowledge in fact, but the law is going to operate on the legal fiction that she or he has the knowledge.

Imputed knowledge is an entirely different legal doctrine under which the knowledge actually possessed by one person is deemed by law to be possessed by another person. The important difference between imputed knowledge and implied knowledge is with respect to the reality of the knowledge. Actual knowledge of agents and employees is properly imputed to principals and employers. However, the source of this imputed knowledge cannot be "knowledge" that is implied by operation of law.

---

[33] Appellant's Reply Brief, p. 30 "the inclusion of 'implied' knowledge expresses the accepted principle that an employee's knowledge is—by law—properly imputed to the company"

The Legislature enacted a statute which did not employ constructive knowledge as the basis of a violation. The Commissioner adopted a regulation under which constructive knowledge would be the basis for a violation. The regulation therefore illegally alters and enlarges the scope of the statute. Regulation 2695.2(*l*) was properly invalidated by the trial court.

VII. THE DEFINITION OF WILLFUL

A. The Definition of "Willful" in Regulation 2695.2(y) Violates the Intent of the Legislature In Adopting Section 790.035.

Section 790.035 provides that a violation of Section 790.03 is punishable by a civil penalty of $5,000 for each violation of Section 790.03, or of $10,000 if the violation is "willful." Regulation 2695.2(y) provides that "willful means simply a purpose or willingness to commit the act, or make the omission referred to in the California Insurance Code or this subchapter. It does not require any intent to violate law, or to injure another, or to acquire any advantage."

Once again the Commissioner has adopted an interpretation of the statute which does not employ the usual meaning of a word, and thus failed to adopt a regulation that is consistent with Legislative intent. The clear intention of the statute, which imposes a more severe penalty for willful violations than are imposed for violations that are not willful, is that a violation is considered to be objectively worse if it is willful than if it is not.

The dictionary definition of "willful" is "deliberate" or "intentional". Section 790.035 establishes a lower penalty for unfair or deceptive acts or practices that are not willful, and an enhanced penalty "if the [unfair or deceptive] act or practice was willful." Regulation 2695.2(y), by eliminating any character of intentional wrongdoing from the enforcement of the statute, reverses this structure and creates a rule under which in almost all violations of the statute being considered willful. As a practical matter, unless the act is done involuntarily or under obvious

duress, any performance or commission of one of the Section 790.03(h) acts is going to be presumed to have been done "with a purpose or willingness to commit the act." Under this definition, a violation that was unambiguously legally negligent will be deemed to have been willful.

If there are facts which suggest that an act was performed or committed with no "purpose or willingness to commit the act", those facts are going to be offered by the insurer that is subject to the enforcement action, rather than by the examiner. Thus the regulation takes the clear statutory structure, under which a violation is presumed to be subject to a maximum $5,000 unless it is shown to be "willful", and converted the structure into a presumption that a violation is subject to a $10,000 fine unless facts indicate that the act was performed or committed with purpose or willingness. Instead of willfulness becoming the basis for an enhanced penalty, lack of willfulness becomes, in effect, an affirmative defense. This is inconsistent with the statute and, by expanding the cases in which the maximum penalty is authorized, it is an interpretation that improperly expands the scope of the statute.

The Legislature clearly enacted a statute designed to provide an enhanced penalty for insurers who set out to commit a violation willfully. Regulation 2695.2(y) interpreted this as a structure in which every violation is presumed to be subject to the enhanced penalty unless it can be demonstrated that the insurer lacked any "purpose or willingness to commit the act." The regulation, by greatly expanding upon the universe of actions which are subject to being penalized as "willful" violations, is inconsistent with and enlarges the scope of Section 790.035, and therefore violates sections 11342.1 and 11342.2 of the Government Code. The regulation was properly invalidated by the trial Court.

VIII. CONCLUSION

The trial court was correct in invalidating the regulations here challenged. Each of the three regulations invalidated by the trial court are based upon faulty interpretations of the statutes administered by the Commissioner. The effect of these faulty interpretations is that the regulations exceed the scope of authority conferred by their authorizing statutes, in violation of Section 11342.1 of the California Government Code. Each of the regulations is inconsistent with the underlying statutes, in violation of Section 11342.2 of the Government Code.

The trial court action invalidating the regulations was correct. Amici respectfully urge this Court to affirm the trial court's action.

DATED: October 25, 2017

GREENBERG TRAURIG LLP

By
BILL GAUSEWITZ

Attorneys for Amici Curiae
THE AMERICAN COUNCIL OF LIFE INSURERS, THE ASSOCIATION OF CALIFORNIA LIFE AND HEALTH INSURANCE COMPANIES, THE INDEPENDENT INSURANCE AGENTS & BROKERS OF CALIFORNIA, THE PERSONAL INSURANCE FEDERATION OF CALIFORNIA, AND THE PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA

CERTIFICATE OF WORD COUNT

The text of this Amicus Brief consists of 9,399 words as counted by the Microsoft Word version used to generate this Brief.

Respectfully submitted,

Dated: October 25, 2017

GREENBERG TRAURIG, LLP

By

BILL GAUSEWITZ
Attorneys for Amici Curiae
The American Council of Life Insurers, The Association of California Life and Health Insurance Companies, The Independent Insurance Agents & Brokers of California, The Personal Insurance Federation of California, and The Property Casualty Insurers Association of America

PROOF OF SERVICE

Case Name: Pacificare v. Jones, Ins. Commissioner (DOI)
No.: G053914

I declare:

I am employed by Greenberg Traurig LLP, at which 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 Greenberg Traurig LLP, for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at Greenberg Traurig LLP is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On October 25, 2017, I electronically served the attached **AMICUS BRIEF OF THE AMERICAN COUNCIL OF LIFE INSURERS (ACLI), THE ASSOCIATION OF CALIFORNIA LIFE AND HEALTH INSURANCE COMPANIES (ACLHIC), THE INDEPENDENT INSURANCE AGENTS & BROKERS OF CALIFORNIA (IIABCAL), THE PERSONAL INSURANCE FEDERATION OF CALIFORNIA (PIFC), AND THE PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA (PCIAA) IN SUPPORT OF PLAINTIFF AND RESPONDENT** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on October 25, 2017, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at Greenberg Traurig at 1201 K Street, Suite 1100, Sacramento, CA 95814, addressed as follows:

Lisa W. Chao Supervising Deputy Attorney General Laura E. Robbins Deputy Attorney General Attorney General's Office 300 S. Spring Street, Suite 1702 Los Angeles, CA 90013-1230 Lisa.chao@doj.ca.gov Laura.robbins@doj.ca.gov	Attorneys for Insurance Commissioner Dave Jones

Steven Velkei Felix Woo Dentons US LLP 601 South Figueroa Street, Suite 2500 Los Angeles, CA 90017-5704 Steven.velkei@dentons.com felix.woo@dentons.com	Attorneys for PacifiCare Life and Health Insurance Company
Honorable Kim G. Dunning Superior Court of California County of Orange Civil Complex Center/Dept. CX 104 751 W. Santa Ana Blvd. Santa Ana, CA 92701 ***(Via U.S. Mail)***	
Daniel M. Kolkey, Esq. Kahn A. Scolnick, Esq. Joseph Gorman, Esq. Gibson, Dunn & Crutcher, LLP 555 Mission Street, Suite 3100 San Francisco, CA 94105	Attorneys for PacifiCare Life and Health Insurance Company

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 October 25, 2017, at Sacramento, California.

Declarant

Marlene Celis