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October 3, 2012

Honorable Tani G. Cantil-Sakauye,
Chief Justice of California
Honorable Associate Justices of the
California Supreme Court
350 McAllister Street
San Francisco, California 94102

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Re: *Frances Harris, et al. v. Superior Court of Los Angeles County (Liberty Mutual Ins. Co., et al.); Case no. S205097*

Dear Honorable Chief Justice and Honorable Associate Justices:

Amici curiae American Insurance Association, Association of California Insurance Companies, Pacific Association of Domestic Insurance Companies, and Personal Insurance Federation of California, pursuant to Rule 8.500(g), California Rules of Court, respectfully submit this letter supporting a grant of review in the referenced matter. But *amici* believe a simple transfer order pursuant to Rule 8.528(d) would be an appropriate disposition.

The proper construction of the administrative exemption (Cal.Code Regs., tit. 8, § 11040) remains just as important for California, and the nation, as it was when the Court unanimously granted review on that issue in November 2007. (68 Cal.Rptr.3d 528; case no. S156555) While the ensuing opinion (53 Cal.4th 170) did much to settle the issue, the post-remand proceedings in the Court of Appeal reveal a gap this Court surely did not anticipate. The moderate disposition it adopted emboldened the respondent employees, Frances Harris *et al.*, to treat the opinion as tentative at best. Far from respecting it as controlling, they attacked it as "opaque," irrelevant, or simply wrong. And they persuaded a majority below to follow suit. While completely respectful in tone, the majority likewise felt free to revisit this Court's most prominent points. And courts and counsel in other cases may make the same mistake about this Court's intentions.

These *amici* believe there is a simple and appropriate solution. A grant-and-transfer order can easily clarify the Court's intentions, and ensure that the bench and bar will not again mistake this Court's moderate opinion of 2011 as a tentative opinion. A new plenary opinion is unnecessary. The Court should issue a grant-and-transfer order instructing the Court of Appeal to vacate the relevant trial court orders on the administrative exemption, and remand the case to the trial court with directions to apply this Court's 2011 opinion to the pertinent factual record in the first instance. There is no need for any broader appellate proceeding in between. The Court of Appeal will have ample opportunity to consider any appropriate challenges to the trial court's rulings.

INTERESTS OF *AMICI CURIAE*

Amici curiae, the American Insurance Association, the Association of California Insurance Companies, the Pacific Association of Domestic Insurance Companies and the Personal Insurance Federation of California are leading trade associations representing property and casualty insurers writing business in California, nationwide and globally. *Amici*'s members collectively underwrote the great majority of more than $55.8 billion in property and casualty premiums (including some $7.8 billion in workers' compensation premiums) written in California in 2011. *Amici*'s members, including companies based in California and virtually all other states, range in size from small companies to the largest insurers with global operations. On issues of importance to the property and casualty insurance industry and marketplace, *amici* advocate sound public policies on behalf of their members in legislative and regulatory forums at the state and federal levels and file *amicus curiae* briefs in significant cases before federal and state courts, including this Court.

DISCUSSION

1.

THIS COURT ISSUED A MODERATE OPINION, NOT A TENTATIVE OPINION

This Court did not grant review in 2007 to prepare a white paper on the administrative exemption. Its opinions are intended as controlling law, and they settle the governing principles even where, as here, the opinion does not then detail how the

principles apply to the particular record. That is why the opinions often lead to summary appellate dispositions. (*E.g., Melancon v. Walt Disney Productions* (1954) 127 Cal.App.2d 213, 215 ["the Supreme Court having ruled on the question by which ruling we are bound . . . a speedy determination of the appeal [is appropriate]. . . ."])

In this case, the body of the Court's opinion was far from tentative. It set forth the controlling law clearly and forcefully, pointing out in detail where and how the Court of Appeal had erred. But the Court elected to stop at that point. It concluded by "express[ing] no opinion on the strength of the parties' relative positions." (53 Cal.4th 190) Instead, it remanded with a broadly-worded direction to "review" the trial court's ruling by "applying the appropriate legal standards set out herein." (*Id.* at 191)

"Applying" does not mean "revisiting." The Court was moderate in its disposition, not tentative in its explication of the controlling law. As we now demonstrate, though, its directions were either misunderstood or disregarded.

2.
THE RESPONDENT-EMPLOYEES UNABASHEDLY ATTACKED THIS COURT'S OPINION

In the post-remand proceedings this Court granted them, the respondent-employees Frances Harris, *et al.* ("the employees") unabashedly attacked the Court's opinion. Their supplemental respondents' brief, filed on or about February 29, 2012, featured the following contentions about this Court's opinion:

- This Court repeatedly criticized the Court of Appeal's analysis of the administrative exemption. But on remand, the employees said this Court's views "do not suggest negative inferences." (Supp.Resp.Br. at 4)
- This Court held that the *Bell* cases (*Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805, etc.) were no substitute for the "detailed guidance" provided by subsequent regulations. (53 Cal.4th 187) But on remand, the employees said the *Bell* cases "remain good law" (Supp.Resp.Br. at 1) and should be followed here.
- The employees dismissed this Court's analysis of the *Bell* cases as "opaque" in significant part. (Supp.Resp.Br. at 22)

• This Court relied significantly on *Miller v. Farmers Ins. Exchange* (9th Cir. 2007) 481 F.3d 1119), citing its holding that claims adjusters qualify for the administrative exemption. (53 Cal.4th 189) But on remand, the employees said the "citation to *Miller*, and its impact . . .may be overstated by the California Supreme Court." (Supp.Resp.Br. at 16)

• This Court stated that *Miller* had undermined the persuasiveness of *Bratt v. County of Los Angeles* (9th Cir. 1990) 912 F.2d 1066. (53 Cal. 4th 189) But on remand, the employees touted *Bratt* and like cases as "distill[ing] the essence of the administrative requirement at issue here." (Supp.Resp.Br. at 17)

• This Court cited a number of other federal cases agreeing with *Miller* and called them "instructive." (53 Cal.3d 189, n. 8) But the employees dismissed them as a "half-dozen" or "handful" of decisions pertinent only to "future" disputes — not this one — because they are "of different stripes," "unhelpful," or "do not merit discussion." (Supp.Resp.Br. at 26-28; original emphasis)

• Finally, this Court found little value in several administrative opinion letters cited by the employees, preferring to rely on the controlling regulations themselves. (53 Cal.4th 190) But on remand, the employees said these letters "matter" and "confirm that the claims adjusters before this Court . . . do not perform administrative work." (Supp.Resp.Br. at 19)

3.
THE COURT OF APPEAL MAJORITY TREATED THIS COURT'S OPINION AS NONBINDING

The Court of Appeal majority did not repeat the employees' outright attack on this Court's opinion. But their advocacy succeeded nonetheless. It effectively neutralized the usual force of a Supreme Court opinion. As the following examples illustrate, the majority below repeatedly failed to treat this Court's views as controlling:

• This Court's central holding was that new and detailed regulations fully control the administrative exemption, sharply reducing the need for judicial interpretation as illustrated by the *Bell* cases. But the Court of Appeal majority opened its discussion of the "directly related" test by stating that it "obviously stands in need of interpretation." (144 Cal.Rptr.3d 297)

• This Court said all pertinent regulations must be read together. Indeed, it criticized the Court of Appeal majority's reliance on a "gloss" on one provision (53 Cal.4th

188), namely, that the administrative exemption requires work "at the level of" policy or general operations. But the Court of Appeal majority relied on the same gloss again. (*E.g.*, "[n]one of that work, or the similar work of the other class members, is carried out at the level of management policy or general operations. Rather, it is all part of the day-to-day operation. . . .")

• To clarify further, this Court singled out subdivision (b) of the controlling federal regulations, and particularly its reference to "'servicing' a business as, for example, advising the management, planning, negotiating, [and] representing the company. . . ." But according to the Court of Appeal majority, it was only the petitioner-employers who "rel[ied] heavily" on that language. (144 Cal.Rptr.3d 299) This Court had merely "called attention to [its] potential significance. . . ." (*Id.* at 300)

• As noted above, this Court relied significantly on *Miller v. Farmers Ins. Exchange, supra,* 481 F.3d 1119, citing its holding that claims adjusters qualified for the administrative exemption "under more recent applicable federal regulations." (53 Cal.4th 189) But the Court of Appeal majority completely ignored the *Miller* case.

• Instead of following *Miller*, finally, the majority openly announced it was following a contrary and much earlier decision, *Martin v. Cooper Elec. Supply Co.* (3d Cir.1991) 940 F.2d 896. *Martin* predated by many years the regulations this Court deemed controlling, and presumably for that reason the Court did not even mention *Martin*. But the employees' supplemental brief below had cited it twice.

4.
A GRANT-AND-TRANSFER ORDER IS AN APPROPRIATE DISPOSITION

This Court's broad dispositional power stems not only from precedent and the Rules of Court, but also from Section 43 of the Code of Civil Procedure. The latter authorizes, among other things, orders by this Court "direct[ing] . . . further proceedings to be had." And the only limitation contained in § 43 pertains to orders granting a new trial, in which event the Court must "pass upon and determine all the questions of law involved in the case. . . ." The statute imposes no similar limitation, or any other, on the Court's power to "direct . . . further proceedings to be had."

In short, the statute plainly authorizes the disposition these *amici* are suggesting: an order granting review, transferring the cause to the Court of Appeal, and instructing that court to vacate the trial court's orders on the administrative exemption, and to remand that issue to the trial court with instructions to apply this Court's 2011 opinion to the relevant record.

A transfer for such proceedings is also authorized by Rule of Court 8.528(d). It broadly provides that the Court, "[a]fter granting review, . . . may transfer the cause to a Court of Appeal without decision but with instructions to conduct such proceedings as the Supreme Court orders." The employees might protest that the only "proceedings" this Court may order under the Rule must involve a determination of the merits of the case, a minimum amount of briefing or argument by counsel, or a minimum amount of work by the Court of Appeal itself. But no language in the Rule supports such a narrow (and wooden) reading. And even if such a reading were possible, Code Civ. Proc. § 43 independently confers on this Court an unrestricted power to order any "further proceedings" it may deem appropriate.

It only remains to point out that a grant-and-transfer order is a perfectly appropriate means to clarify or enforce this Court's prior opinion. We could find no discussion of the power in California cases, but the United States Supreme Court has frequently examined its analogous power and broadly agrees on its use in a situation like this. *Lawrence v. Chater* (1996) 516 U.S. 163, 166, explained that the "GVR order" — grant, vacate and remand — "has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices. We have GVR'd in light of a wide range of developments, including our own decisions. . . .") And in a very recent case, *Cavazos v. Smith* (2011) — U.S. — [132 S.Ct. 2, 181 L.Ed.2d 311, 80 U.S.L.W.], a 6-to-3 majority ordered a similar *per curiam* disposition because the "decision below cannot be allowed to stand." (132 S.Ct. 7) The high court had previously "call[ed] the panel's attention to this Court's [controlling] opinions" but "the panel persisted in its course . . . without seriously confronting the significance of the cases called to its attention." (*Id.*)

CONCLUSION

For all the foregoing reasons, *amici* respectfully request the Court to grant review in this matter followed by a transfer order pursuant to Rule of Court 8.528(d). The Court should instruct the Court of Appeal to vacate the relevant trial court orders on the administrative exemption, and remand the cause to the trial court with directions to apply this Court's 2011 opinion to the pertinent factual record in the first instance.

DATED: October 3, 2012

Respectfully submitted,

BIEN & SUMMERS

By:

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PROOF OF SERVICE

The undersigned declares:

I am over the age of 18 years and not a party to this cause. I caused to be served --

AMICUS CURIAE LETTER OF AMERICAN INSURANCE ASSOCIATION, ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES, PACIFIC ASSOCIATION OF DOMESTIC INSURANCE COMPANIES, AND PERSONAL INSURANCE FEDERATION OF CALIFORNIA

by enclosing true copies of same in envelopes with proper postage prepaid and addressed to –

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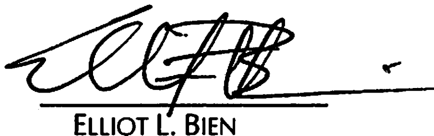
and placing same for delivery by the United States Postal Service in my usual manner on the date stated below.

The foregoing is true and correct. Executed under penalty of perjury at San Rafael, California, on October 3, 2012.



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