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11 Attorneys for Intervenors  
12 Association of California Life and Health Insurance  
Companies, Personal Insurance Federation of California,  
13 Property Casualty Insurers Association of America,  
National Association of Mutual Insurance Companies,  
14 Pacific Association of Domestic Insurance Companies,  
American Council of Life Insurers, Independent Insurance  
15 Agents and Brokers of California, and National  
Association of Insurance and Financial Advisors –  
California

16 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
17 FOR THE COUNTY OF ORANGE  
18 CIVIL COMPLEX CENTER

19 PACIFICARE LIFE AND HEALTH  
20 INSURANCE COMPANY,

21 Petitioner and Plaintiff,  
22 v.

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

24 Respondent and Defendant.  
25

Case No. 30-2014-00733375-CU-WM-  
CXC  
26 Judge Kim G. Dunning

File No. UPA 2007-00004  
27 OAH No. 2009061395

**DECLARATION OF VANESSA O.  
WELLS IN SUPPORT OF MOTION  
FOR LEAVE TO INTERVENE**

1 I, Vanessa Wells, hereby declare:

2 1. I am an attorney licensed to practice in the State of California, a partner at  
3 the law firm of Hogan Lovells US LLP, and counsel for Intervenors, the Association of  
4 California Life and Health Insurance Companies, Personal Insurance Federation of  
5 California, Property Casualty Insurers Association of America, National Association of  
6 Mutual Insurance Companies, Pacific Association of Domestic Insurance Companies,  
7 American Council of Life Insurers, Independent Insurance Agents and Brokers of  
8 California, and National Association of Insurance and Financial Advisors – California  
9 (collectively, the “Intervenors”), in this action. I have personal knowledge of the facts  
10 stated in this declaration, and, if called as a witness, I could and would testify competently  
11 to those facts.

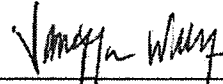
12 2. I was informed by PacifiCare’s counsel that the parties in this action  
13 intended to meet and confer regarding case management issues on October 16, 2014. I  
14 informed PacifiCare’s counsel, Steven Velkei, that the trade associations listed in  
15 paragraph 1, above, planned to file a motion for leave to intervene in this action. I  
16 provided a copy of the Intervenors’ proposed Complaint in Intervention for PacifiCare’s  
17 counsel to review. PacifiCare’s counsel stated that they agree to the intervention.

18 3. On October 15, 2014, I contacted Adam Cole, Deputy Commissioner and  
19 General Counsel for the California Department of Insurance, to inform him of the planned  
20 intervention. I spoke with Mr. Cole on two or three occasions thereafter about the issues  
21 in the case and the planned intervention. I provided Mr. Cole with a copy of the proposed  
22 Complaint in Intervention for the Department to review. On November 18, 2014, Mr.  
23 Cole informed me that the Commissioner would not stipulate to intervention, or file a  
24 statement of non-opposition. A true and correct copy of the e-mail I received from Mr.  
25 Cole is attached hereto as Exhibit A.

26 4. Attached hereto as Exhibit B is a true and correct copy of the proposed  
27 Complaint in Intervention that the intervenor trade associations plan to file in this action,  
28 upon grant of the instant motion. This proposed Complaint in Intervention is the same

1 draft submitted for review to counsel for the Commissioner and counsel for PacifiCare.

2 I declare under penalty of perjury under the laws of the State of California that the  
3 foregoing is true and correct and that this Declaration was executed on November 19,  
4 2014 at Menlo Park, California.



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Vanessa O. Wells

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# **EXHIBIT A**

## Wells, Vanessa

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**From:** Cole, Adam <Adam.Cole@insurance.ca.gov>  
**Sent:** Tuesday, November 18, 2014 10:34 AM  
**To:** Wells, Vanessa  
**Cc:** Campbell, Teresa; [lisa.chao@doj.ca.gov](mailto:lisa.chao@doj.ca.gov); Katz, Jamie  
**Subject:** RE: Complaint In Intervention DRAFT Circulation Copy.DOCX

Vanessa – We reviewed the draft complaint in intervention. The Department will not stipulate to the filing or submit a statement of non-opposition.

---

**From:** Wells, Vanessa [<mailto:vanessa.wells@hoganlovells.com>]  
**Sent:** Wednesday, November 05, 2014 3:09 PM  
**To:** Cole, Adam  
**Cc:** Campbell, Teresa; [lisa.chao@doj.ca.gov](mailto:lisa.chao@doj.ca.gov); Katz, Jamie  
**Subject:** Complaint In Intervention DRAFT Circulation Copy.DOCX

Adam: Attached is the Draft Complaint the Trades would file in PacifiCare. We believe it is final, but until actually filed it is subject to tweaking. Thank you for agreeing to review and consider a stipulation or statement of non-opposition.

Please let me know if you need further information. We plan to file the motion early next week. Regards, V.

### Vanessa Wells

Partner

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*Please consider the environment before printing this e-mail.*

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### About Hogan Lovells

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# **EXHIBIT B**

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11 Attorneys for Intervenors  
Association of California Life and Health Insurance  
12 Companies, American Council of Life Insurers, National  
Association of Mutual Insurance Companies, Pacific  
13 Association of Domestic Insurance Companies, Personal  
Insurance Federation of California, Property Casualty Insurers  
14 Association of America, Independent Insurance Agents and  
Brokers of California, and National Association of Insurance  
and Financial Advisors – California

15 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
16 FOR THE COUNTY OF ORANGE  
17 CIVIL COMPLEX CENTER

18 PACIFICARE LIFE AND HEALTH  
INSURANCE COMPANY,

19 Petitioner and Plaintiff,  
v.

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

22 Respondent and Defendant.

23 ASSOCIATION OF CALIFORNIA LIFE  
AND HEALTH INSURANCE COMPANIES,  
24 AMERICAN COUNCIL OF LIFE  
INSURERS, NATIONAL ASSOCIATION  
25 OF MUTUAL INSURANCE COMPANIES,  
PACIFIC ASSOCIATION OF DOMESTIC  
26 INSURANCE COMPANIES, PERSONAL  
INSURANCE FEDERATION OF  
27 CALIFORNIA, PROPERTY CASUALTY  
INSURERS ASSOCIATION OF AMERICA,  
28 INDEPENDENT INSURANCE AGENTS

Case No. 30-2014-00733375-CU-WM-CXC  
Judge Kim G. Dunning

File No. UPA 2007-00004  
OAH No. 2009061395

**VERIFIED COMPLAINT IN  
INTERVENTION**

1 AND BROKERS OF CALIFORNIA, AND  
2 NATIONAL ASSOCIATION OF  
3 INSURANCE AND FINANCIAL  
4 ADVISORS – CALIFORNIA , Intervenors.

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1 Association of Life and Health Insurance Companies (“ACLHIC”), American Council of  
2 Life Insurers (“ACLI”), National Association of Mutual Insurance Companies (“NAMIC”),  
3 Pacific Association of Domestic Insurance Companies (PADIC”), Personal Insurance Federation  
4 of California (“PIFC”), Property and Casualty Insurers Association of America (“PCIAA”),  
5 Independent Insurance Agents and Brokers of California (“IIAB-Cal”) and National Association  
6 of Insurance and Financial Advisors – California (“NAIFA-CA”) (collectively “Intervenors”)  
7 allege as follows:

8 **NATURE OF THE ACTION**

9 1. Through this Complaint, Intervenors seek to intervene in this action. PacifiCare Life and  
10 Health Insurance Company (“PacifiCare”) brought this action to obtain review of the Opinion  
11 dated June 9, 2014 issued and designated a “precedent decision” by Defendant and Respondent,  
12 Dave Jones, in his capacity as Insurance Commissioner of the State of California  
13 (“Commissioner”) in *In the Matter of the Order to Show Cause and Accusation Against*  
14 *PacifiCare Life and Health Insurance Company*, Case No. UPA 2007-00004, OAH No.  
15 2009061395 (the “Opinion”). Intervenors seek to intervene in order to represent the interests of  
16 their members affected by this precedential Opinion, and their members’ interests in the correct  
17 resolution of the important questions of law before the Court in this matter. The Court’s  
18 resolution of those questions of law will significantly impact every licensee of the California  
19 Department of Insurance doing business in this state and subject to regulation under the Unfair  
20 Insurance Practices Act (“UIPA”).

21 2. Intervenors collectively represent the majority of California Department of Insurance  
22 (“CDI”) licensees. Their members write virtually every type of insurance sold in this state,  
23 including health, life, auto, homeowners, commercial general liability, commercial multi-peril  
24 and other lines of insurance necessary to enable California’s economy to function. Some  
25 members are among the largest insurance companies writing policies in California and the United  
26 States. Other members are relatively small and localized insurance companies. Still other  
27 members are life, health, and property/casualty agents and brokers. All of the Intervenors’  
28 members licensed by the CDI are subject to the UIPA, and the unlawful and unprecedented

1 interpretation of the UIPA articulated by the Commissioner in the Opinion. These members –  
2 large and small, local and national, corporate and individual – are all entitled to a fair, lawful, and  
3 constitutional system of regulation.

4 3. The Commissioner designated almost the entire 220 page Opinion as a “precedent  
5 decision”.<sup>1</sup> Government Code § 11425.60(b) allows an agency to designate as a “precedent  
6 decision” “a decision or part of a decision that contains a significant legal or policy determination  
7 of general application *that is likely to recur.*” (emphasis added) Every California licensee will  
8 therefore be bound by the new rules and interpretations of law announced in that Opinion. Every  
9 Administrative Law Judge and every CDI enforcement officer will be bound to apply the  
10 Opinion.

11 4. Intervenors seek to intervene in this action because it is their first and only opportunity to  
12 speak with respect to legal rules adopted or implemented in the decision. Those rules and  
13 interpretations, if allowed to stand, will have a profound impact on the entire California insurance  
14 industry and on California’s economy as a whole, not just the single licensee that was a party to  
15 the action below. Intervenors also seek leave to challenge the Commissioner’s attempt to use the  
16 “precedent decision” mechanism as a substitute for a hearing under California Insurance Code  
17 (“CIC”) § 790.06, and the rulemaking process, thus depriving the entire industry save one  
18 licensee of notice, the right to petition government, and the opportunity to be heard regarding  
19 binding rules adopted by an agency.

20 5. In addition to constituting an abuse of authority, the designation of the Opinion as a  
21 “precedent decision” is contradicted by the Opinion itself. The Opinion summarizes the case  
22 before the Commissioner as an “unprecedented litigation” having “no parallel” in Departmental  
23 enforcement of the UIPA. Yet, the Opinion itself creates the unprecedented rulings generating  
24 the unparalleled number of violations and amount of maximum penalties found by the  
25 Commissioner.

26 \_\_\_\_\_  
27 <sup>1</sup> The Opinion excluded from the designation specific holdings at p. 58, p. 69, pp. 84-85 and p. 119 in which the  
28 Commissioner reduced the number of “acts” for which he assessed a penalty in order to mitigate the penalty.  
That is, the only parts of the Opinion *not* made precedential are the parts that might possibly be useful in future  
cases to argue for a potential fair and constitutional application of cumulative penalties.

1 6. As set forth in the causes of action below, Intervenor challenge the Opinion's specific  
2 rulings of law that impact the industry generally, are incorrect, and outside the scope of the  
3 Commissioner's power – bounded by statute – to impose. Intervenor make eleven specific  
4 challenges, each stated in the form of (1) a *Bodinson* writ (*Bodinson Manufacturing Co. v.*  
5 *California Energy Comm'n*, 17 Cal. 2d 321 (1941)) and (2) a complaint for declaratory relief.

6 **PARTIES**

7 7. Intervenor ACLHIC is a California not-for-profit corporation, comprised of 37 member  
8 life and health insurance companies in California. ACLHIC's members represent an industry that  
9 provides more than two trillion dollars of insurance coverage to Californians and has contributed  
10 more than \$400 billion to California's economy. ACLHIC represents its constituent insurers with  
11 respect to, among other things, legislative and regulatory issues affecting the health care and  
12 health insurance industries. ACLHIC brings this action to represent its members who would be  
13 bound and adversely impacted by the Commissioner's rulings in the Opinion.

14 8. Intervenor ACLI is a Washington, D.C.-based trade association with approximately 300  
15 member companies operating in the United States and abroad. ACLI advocates in federal, state  
16 and international forums for public policy that supports the industry marketplace and the 75  
17 million American families that rely upon life insurers' products for financial and retirement  
18 security. ACLI members offer life insurance, annuities, retirement plans, long-term care and  
19 disability income insurance, and reinsurance, representing more than 90% of industry assets and  
20 premiums. ACLI brings this action to represent its members who would be bound and adversely  
21 impacted by the Commissioner's rulings in the Opinion.

22 9. Intervenor NAMIC is a nationwide association representing the interests of mutual  
23 insurers. A mutual insurance corporation is a specific organizational form without stockholders,  
24 and is managed for the benefit of policyholders. For almost 120 years, NAMIC has been serving  
25 the best interests of mutual insurance companies – large and small – across the country. NAMIC  
26 has approximately 1,400 property/casualty company members serving more than 135 million  
27 auto, home, and business policyholders. NAMIC members write 50% of the auto/homeowners  
28 insurance market in the United States. NAMIC brings this action to represent its members who

1 would be bound and adversely impacted by the Commissioner's rulings in the Opinion.

2 10. Intervenor PADIC is an organization of small to mid-sized California domestic property  
3 and casualty insurance companies. PADIC works with regulators, legislators, consumers and  
4 policyholders to improve understanding of insurance issues, to keep costs and prices at reasonable  
5 levels, to promote a healthy and competitive agency-based insurance marketplace, and to  
6 recognize the economic contributions made to California by domestic insurers. PADIC brings  
7 this action to represent its members who would be bound and adversely impacted by the  
8 Commissioner's rulings in the Opinion.

9 11. Intervenor PIFC is a California not-for-profit trade association representing seven  
10 personal lines property/casualty insurers who collectively write the majority of the personal lines  
11 auto and homeowners insurance in California. PIFC brings this action to represent its members  
12 who would be bound and adversely impacted by the Commissioner's rulings in the Opinion.

13 12. Intervenor PCIAA is a diverse, property-casualty industry, nationwide trade  
14 association. PCIAA has more than 1000 members, consisting of large and small companies in all  
15 50 states, including California. PCIAA's members represent every form of ownership: stock;  
16 mutual; risk retention group ("RRG"); and reciprocal. PCI's members write \$195 billion in  
17 annual premiums and represent 46% of the United States auto market, 32 % of the homeowner's  
18 market, 37% of the commercial property and liability market, and 41% of the private workers  
19 compensation market. PCIAA does business in California as the Association of California  
20 Insurance Companies, or "ACIC". PCIAA brings this action to represent its members who would  
21 be bound and adversely impacted by the Commissioner's rulings in the Opinion.

22 13. Intervenor IIAB-Cal is a trade association representing independent insurance agents and  
23 brokers in California who sell all lines and types of insurance, but whose business is concentrated  
24 in commercial and personal property/casualty lines of insurance. IIAB-Cal brings this action to  
25 represent its members who would be bound and adversely impacted by the Commissioner's  
26 rulings in the Opinion.

27 14. Intervenor NAIFA-CA is an association representing over 3,000 insurance professionals  
28 from all sectors of the industry, including life, health, property, casualty, and financial services.

1 NAIFA-CA brings this action to represent its members who would be bound and adversely  
2 impacted by the Commissioner's rulings in the Opinion.

3 15. Defendant Dave Jones currently occupies the office of Insurance Commissioner of the  
4 State of California and is sued herein solely in his capacity as Commissioner and not otherwise.  
5 The Commissioner regulates the business of insurance in California and is governed by the  
6 California Insurance Code, as well as by other applicable constitutional and statutory law.  
7 Pursuant to CIC § 12906, the California Department of Insurance ("CDI") is under the control of  
8 the Commissioner. The Commissioner issued the Opinion and designated it as a precedent  
9 decision.

10 16. Petitioner PacifiCare was the subject of the Opinion and the accompanying order to pay a  
11 fine of \$173.6 million. In this action, PacifiCare challenges the Opinion and order through a  
12 California Code of Civil Procedure ("CCP") 1094.5 "administrative" writ petition, and a  
13 complaint for declaratory relief.

#### 14 JURISDICTION AND VENUE

15 17. This is a Complaint in Intervention, filed in connection with a Petition for Writ of  
16 Mandate and Complaint for Declaratory Relief over which this Court has jurisdiction, and which  
17 is venued in this Court. Consequently, this Court has jurisdiction over this Complaint in  
18 Intervention, which is properly venued in the Court in which the original action was filed.

#### 19 RIGHT TO INTERVENE AND STANDING

20 18. The Opinion at issue in this action, and the rulings of law set forth in the Opinion, purport  
21 to create rules binding upon Intervenors' members. Intervenors' members have not had notice or  
22 an opportunity to be heard regarding the rules established by the Opinion, which are now binding  
23 across the spectrum of licensees regulated by the Commissioner under the UIPA. Intervenors'  
24 members have a right to challenge the Commissioner's rulings of law that will be binding upon  
25 them, pursuant to a *Bodinson* writ (*Bodinson Manufacturing Co. v. California Energy Comm'n*,  
26 17 Cal. 2d 321 (1941)) and a complaint for declaratory relief (*Californians for Native Salmon and*  
27 *Steelhead Ass'n v. Department of Forestry*, 221 Cal. App. 3d 1419, 1429 (1990)). Intervenors  
28 could bring an action challenging the legal rulings contained in the Opinion as a standalone

1 action. That course, however, creates a risk of inconsistent judgments, and exposes Intervenors  
2 and their members to further risk of denial of the right to be heard regarding rules that will be  
3 binding upon them. The disposition of this action, consequently, may impair or impede  
4 Intervenors' ability to protect their members' interests in the matters at issue in this action.  
5 Further, Petitioner PacifiCare is a single licensee, and is not situated to represent the interests of  
6 the thousands of California licensees who are members of the Intervenors. Further, Intervenors'  
7 members unquestionably have a direct and immediate interest in the validity of the rules adopted  
8 by the Opinion.

9 19. Intervenors have standing to challenge the rules adopted by the Opinion because their  
10 members will or may well be impacted by those rules.

11 **GENERAL ALLEGATIONS**

12 20. The UIPA is a statutory Act conferring upon the Commissioner certain power to regulate  
13 licensees to ensure they deal fairly with consumers. It is similar to the Unfair Competition Law  
14 ("UCL") to the extent that it addresses unfair business practices. The UIPA, however, differs  
15 fundamentally from the UCL in both structure and application.

16 21. The UCL "borrows" from other statutes, using them to determine what constitutes a  
17 violation of Business and Professions Code § 17200. The UCL also includes a general category  
18 of "unfairness", which is not defined by statute but leaves it to the courts and common law to  
19 consider whether a challenged act or practice is unfair.

20 22. The UIPA, in contrast, includes a discrete list of specifically defined methods, acts or  
21 practices designated by the Legislature as "unfair." There is no "catch-all" category of otherwise  
22 unfair methods, acts or practices. The Act does not authorize either the Commissioner or the  
23 courts to simply add to the definitive list set forth in the Act. Nor does the UIPA "borrow" from  
24 other statutes by a blanket inclusion of "unlawful" acts as within its scope.

25 23. If the Commissioner believes that a method, act or practice outside the list delineated by  
26 the Legislature constitutes an "unfair" act or practice, the UIPA prescribes a process to address it.  
27 Specifically, CIC § 790.06 allows the Commissioner to convene a hearing (subject to the due  
28 process provisions of the Administrative Procedures Act) to consider whether the method, act or

1 practice not defined within the UIPA should be considered “unfair”. If the method, act or  
2 practice is not in the list delineated by the Legislature, the Commissioner cannot order penalties  
3 for a period prior to conclusion of the CIC § 790.06 hearing and a Court’s issuance of an  
4 injunction based on consideration of the hearing and its result.

5 24. The UCL does not adopt any level of scienter.

6 25. In contrast, CIC § 790.03(h) – the section of the UIPA at issue – requires that the listed  
7 “unfair claims settlement practices” must be “knowingly commit[ed] or perform[ed] with such  
8 frequency as to indicate a general business practice . . . .” Further, the penalty provision – CIC §  
9 790.035 – requires that conduct be “willful” in order to merit second tier punitive sanctions of  
10 twice the amount that can be awarded absent “willfulness.” Similarly, § 790.035 limits the  
11 Commissioner to a sanction of up to \$5000 when a series of the same error (such as leaving a  
12 notice off of a mailing sent to thousands of customers) is “inadvertent.”

13 26. In this complaint in intervention, Intervenors challenge those rulings in the Opinion that  
14 are outside the scope of the Commissioner’s statutory authority. Many of the challenged rulings  
15 erroneously treat the UIPA as if it were structured like the UCL. Others are specific to this  
16 administrative system. Intervenors make the following challenges to the Opinion:

17 (1) The Opinion erroneously holds that a violation of a separate regulatory statute  
18 contained elsewhere in the Insurance Code and not part of the UIPA constitutes a  
19 violation of the UIPA subject to UIPA penalties.

20 (2) The Opinion erroneously holds that a single act can violate CIC §§ 790.03(h)(1)-  
21 (h)(5).

22 (3) The Opinion erroneously equates an error, perhaps manifested numerous times  
23 because it affected a form sent to numerous customers, with a “business practice.”

24 (4) The Opinion erroneously holds that a practice can be “knowingly” committed without  
25 actual knowledge of facts violating the law. The Opinion cites 10 C.C.R. § 2695.2(l) as  
26 support for its interpretation. This regulation, which was adopted by the Commissioner, is  
27 likewise inconsistent with California law, and therefore invalid.

28 (5) The Opinion erroneously holds that, for purposes of assessing a higher penalty level

1 under CIC § 790.035, action can be “willful” if it is merely volitional. The Opinion cites  
2 10 C.C.R. § 2695.2(y) as support for its interpretation. This regulation, which was  
3 adopted by the Commissioner, is likewise inconsistent with California law, and therefore  
4 invalid.

5 (6) The Opinion erroneously interprets CIC § 790.03(h)(1) – which requires  
6 “misrepresentations” – to include within its scope mere failures to include within forms  
7 sent to customers specific legends or notices required by other Insurance Code statutes.

8 (7) The Opinion erroneously holds that a violation of a regulation – 10 C.C.R. § 2695.3 –  
9 directed to administration of the UIPA and not its substance constitutes a violation of the  
10 UIPA.

11 (8) The Opinion erroneously holds that providers are “claimants” within the meaning of  
12 CIC § 790.03(h)(1).

13 (9) The Commissioner improperly has used the device of designating the Opinion a  
14 “precedent decision” to avoid the legislative process as well as the process directed by the  
15 UIPA for adding to the specific list of methods, acts and practices contained within the  
16 UIPA, and as a substitute for a rulemaking proceeding in which all interested and affected  
17 parties have the opportunity to participate.

18 (10) The Opinion applies CIC § 790.035 such that the “per act” penalties awarded mount  
19 to an ultimate penalty wholly disproportionate to culpability, and creates a precedent for  
20 further unconstitutional misapplication of CIC § 790.035 to award excessive fines.

21 (11) The Opinion effectively adopts regulations setting a schedule of “baseline penalties”  
22 without statutory authority for that action.

### 23 CAUSES OF ACTION

#### 24 FIRST CAUSE OF ACTION FOR MANDATE – UNLAWFUL INCORPORATION OF

#### 25 OTHER STATUTORY PROVISIONS INTO THE UIPA

26 (Against the Commissioner by all Intervenors, pursuant to CCP §§ 1085, 1088.5)

27 27. Intervenors hereby incorporate by reference the allegations of paragraphs 1 – 26.

28 28. The UIPA contains a specific list of methods, acts and practices designated as “unfair.”



1 The Act does not make every regulatory infraction “unfair.” The Act identifies a finite list of  
2 methods, acts and practices determined by the Legislature as sufficiently serious to be designated  
3 as UIPA violations, to be stigmatized as “unfair,” and to carry the potential for civil penalties. In  
4 contrast to the UCL, the UIPA does not “borrow” from other statutes to determine what is a  
5 violation.

6 29. The Opinion holds – incorrectly – that the Commissioner may treat an alleged violation of  
7 a statute *outside the UIPA* as if it were a violation of the UIPA. For example, the Opinion holds  
8 that a violation of CIC § 10123.13(a) – requiring notice of provider appeal rights to be provided  
9 “on either the explanation of benefits or remittance advice” – constitutes a violation of the UIPA.  
10 Opinion p. 49. As another example, the Opinion holds that violations of CIC § 10169 – requiring  
11 a notice of an insured’s right to independent medical review to appear on several documents – are  
12 also violations of the UIPA. Opinion p. 59.

13 30. The Commissioner’s interpretation of the UIPA – as allowing him to leverage an alleged  
14 violation of a statute outside the UIPA into a violation of the UIPA subject to the UIPA penalty  
15 provisions – is wrong as a matter of law.

16 31. The Commissioner’s interpretation of the UIPA as allowing a violation of a separate  
17 statute to be treated as a violation of the UIPA therefore constitutes an abuse of discretion and an  
18 abuse of the Commissioner’s statutory authority, subject to a writ of mandate issued by the Court  
19 compelling the Commissioner to correct that abuse of discretion.

20 **SECOND CAUSE OF ACTION FOR DECLARATORY RELIEF – UNLAWFUL**  
21 **INCORPORATION OF OTHER STATUTORY PROVISIONS INTO THE UIPA**

22 (Against the Commissioner by all Intervenors pursuant to CCP § 1060)

23 32. Intervenors hereby incorporate by reference the allegations of paragraphs 1 – 31.

24 33. A controversy has arisen between the Commissioner on the one hand and the Intervenors  
25 and their members on the other, regarding the scope of the UIPA.

26 34. As expressed in the Opinion, the Commissioner takes the position that the UIPA can  
27 “borrow” from other Insurance Code statutes such that a violation of an Insurance Code statute  
28 not included in the UIPA can constitute the basis for a UIPA violation.

1 35. Intervenor disagree, and assert that only a violation of the specific methods, acts and  
2 practices identified in the UIPA can be considered a violation of the UIPA, absent the special  
3 hearing provided for in CIC § 790.06. Intervenor also specifically contend that violation of a  
4 separate statute is subject to whatever consequence the Legislature attached to that violation, and  
5 is not subject to UIPA penalties.

6 36. Intervenor's members are subject to regulation by the Commissioner in accordance with  
7 the Commissioner's interpretations of the UIPA. Without relief from this Court, Intervenor's  
8 members will be subjected to an unlawful interpretation of the UIPA, which would allow the  
9 Commissioner to exact punitive fines for acts and practices not defined as "unfair" by the UIPA.  
10 This risk is especially high due to the Commissioner's designation of the Opinion as a "precedent  
11 decision".

12 37. Wherefore, Intervenor pray for a declaration of the correct interpretation of the UIPA as  
13 excluding anything outside its expressly identified methods, acts and practices as a basis for  
14 liability, absent invocation of the special hearing provided for by CIC § 790.06.

15 **THIRD CAUSE OF ACTION FOR MANDATE – ALTERING THE SCOPE OF**  
16 **CIC § 790.03(h)(1) - (h)(5) BY HOLDING THAT A SINGLE ACT IS SUFFICIENT**

17 (Against the Commissioner by all Intervenor pursuant to CCP §§ 1085, 1088.5)

18 38. Intervenor hereby incorporate by reference the allegation of paragraphs 1-37.

19 39. CIC § 790.03 is the principal statute defining "unfair methods of competition and unfair  
20 and deceptive acts or practices in the business of insurance." In this case, the only predicate for  
21 the charges against PacifiCare was CIC §§ 790.03(h)(1)-(h)(5). Opinion p. 17. Subsection (h), as  
22 relevant to this case, defines as a UIPA violation:

23 Knowingly committing or performing with such frequency as to indicate a general  
24 business practice any of the following unfair claims settlement practices:

25 (1) Misrepresenting to claimants pertinent facts or insurance policy  
26 provisions relating to any coverages at issue.

27 (2) Failing to acknowledge and act reasonably promptly upon  
28 communications with respect to claims arising under insurance policies.

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- (3) Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies.
- (4) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss requirements have been completed and submitted by the insured.
- (5) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.

40. Each of these subsections, by its terms, defines a “practice”, not a single “act.” One aspect of the language selected by the Legislature confirming that these subsections define a “practice”, not a single “act”, is the use of the plural. Holding the Commissioner to his own rule of construction set forth in the Opinion, the use of the plural connotes a “practice”, not a single “act.” *See* Opinion p. 13. While the Opinion argues that other subsections of CIC § 790.03(h) could be violated by a single act, that question is not at issue, because PacifiCare was not charged with violations of other subdivisions of CIC § 790.03(h).

41. While the Commissioner’s conclusion that a single act can constitute a violation of subdivisions of CIC §§ 790.03(h) other than (1)-(5) would be considered *dicta* in a court opinion, it is not clear what the impact of that conclusion will be in a “precedent decision”. On information and belief, the Commissioner intends to assert that conclusion as legally binding in pending and future matters.

42. The Commissioner’s conclusion that a single act can constitute a violation of CIC §§ 790.03(h)(1)-(h)(5) is incorrect as a matter of law and subjects licensees to liability and penalties outside of the liability and penalties actually created by statute.

43. The Commissioner’s conclusion therefore constitutes an abuse of discretion and an abuse of the Commissioner’s statutory authority subject to writ of mandate issued by this Court, compelling the Commissioner to correct that abuse of discretion.

1                    **FOURTH CAUSE OF ACTION FOR DECLARATORY RELIEF – ALTERING**  
2                    **CIC § 790.03(h)(1) - (h)(5) BY HOLDING THAT A SINGLE ACT IS SUFFICIENT**

3                    (Against the Commissioner by all Intervenors pursuant to CCP § 1060)

4                    44. Intervenors hereby incorporate by reference the allegations of paragraphs 1 – 43.

5                    45. A controversy has arisen between the Commissioner on the one hand and Intervenors and  
6                    their members on the other regarding the correct interpretation of CIC §§ 790.03(h)(1) – (h)(5) as  
7                    to whether a single act can constitute a violation of these subdivisions.

8                    46. The Commissioner contends that a single act can constitute a violation of CIC §§  
9                    790.03(h)(1) – (h)(5). On information and belief, the Commissioner further contends that his  
10                    precedent decision establishes that a single act can constitute a violation of each and every  
11                    subdivision of CIC § 790.03(h), even though it is an adjudicatory opinion in which no violation of  
12                    subdivisions other than (h)(1) – (h)(5) were presented.

13                    47. Intervenors contend that a single act cannot constitute a violation of CIC §§ 790.03(h)(1)-  
14                    (h)(5) by the terms of those subdivisions. Intervenors further contend that the Commissioner  
15                    cannot determine in an adjudicatory decision whether a single act can be a violation as to other  
16                    subdivisions not implicated in the case. Intervenors further contend that the Commissioner’s  
17                    precedent decision cannot be held to address whether a single act can be a violation as to other  
18                    subdivisions not implicated in the case.

19                    48. Intervenors’ members are subject to regulation by the Commissioner in accordance with  
20                    the Commissioner’s interpretations of the UIPA. Without relief from this Court, Intervenors’  
21                    members will be subjected to an incorrect interpretation, which will make a single act a violation  
22                    of CIC § 790.03(h)(1)-(h)(5) contrary to the terms of the statute. Further, on information and  
23                    belief, Intervenors’ members will be subject to a precedent decision beyond the scope of the case  
24                    adjudicated in reaching the precedent decision.

25                    49. Wherefore, Intervenors pray for a declaration of the correct interpretation of CIC §  
26                    790.03(h)(1) – (h)(5). Intervenors further pray for a declaration that the Commissioner’s  
27                    precedent decision cannot extend beyond CIC § 790.03(h)(1)-(h)(5) to suggest that there can be a  
28                    violation of other provisions of CIC § 790.03(h) not at issue in the case.

**FIFTH CAUSE OF ACTION FOR WRIT OF MANDATE –**  
**AN ERROR IS NOT A “BUSINESS PRACTICE”**

(Against the Commissioner by all Intervenors pursuant to CCP §§ 1085, 1088.5)

50. Intervenors hereby incorporate by reference the allegations of paragraphs 1-49.

51. As set forth above, engaging in a practice identified within the 16 subparts of CIC § 790.03(h) can be a violation of the UIPA if it is performed “with *such frequency* as to indicate a general business practice.” (emphasis added). A critical issue in applying this provision is distinguishing errors – which are not business practices – from a general business practice. The issue arises in part because in the context of insurance a single error may be manifested multiple times – for example, when a single error is made in a mailing sent to thousands of individuals. The UIPA does not purport to brand as “unfair” such an error.

52. Industry understanding and the general practice employed by regulators distinguishes between error and inadequate business practices. Without such historical industry understanding, CIC § 790.03(h) becomes a vague statute that can be given different meanings by a regulator as applied to different licensees.

53. In the Opinion, the Commissioner interpreted CIC § 790.03(h)’s requirement of “frequency” to mean “over and over again” (Opinion p. 17). But “over and over again” does not mean “frequency”, without a denominator. An event occurring 1,000 times – which might be considered “over and over again” – may be frequent or infrequent, depending upon the denominator. If the denominator is 2000, then the event occurred 50% of the time, which is with high frequency. If the denominator is 20,000, the event occurred 5% of the time, a low frequency.

54. The Commissioner altered the scope of the UIPA in labeling a single error manifested multiple times as a “business practice.” The Commissioner also altered the scope of the UIPA by interpreting CIC § 790.03(h)’s “frequency” requirement to mean an event occurring multiple times, without regard to the rate at which the event occurred. The Opinion alters the law and allows error to be branded an unfair business practice, even when the error, in the context of the entire claims universe examined by the CDI, complies with industry norms. This interpretation

1 creates an elusive standard that invites arbitrary enforcement.

2 55. The Commissioner's interpretation of CIC § 790.03(h) set forth in the Opinion is contrary  
3 to statutory law.

4 56. The Commissioner's interpretation of CIC § 790.03(h) therefore constitutes an abuse of  
5 discretion and an abuse of the Commissioner's statutory authority, subject to a writ of mandate  
6 issued by this Court compelling the Commissioner to correct that abuse of discretion.

7 **SIXTH CAUSE OF ACTION FOR DECLARATORY RELIEF –**

8 **AN ERROR IS NOT A BUSINESS PRACTICE**

9 (Against the Commissioner by all Intervenors pursuant to CCP § 1060)

10 57. Intervenors incorporate by reference the allegations set forth in paragraphs 1-56.

11 58. A controversy has arisen between the Commission on the one hand and Intervenors and  
12 their members on the other concerning the correct interpretation of CIC § 790.03(h).

13 59. The Commissioner asserts that engaging in a practice "with such frequency as to indicate  
14 a general business practice" means engaging in the practice "over and over again", without regard  
15 to frequency.

16 60. As explained in the Fifth Cause of Action, Intervenors and their members assert that that  
17 statute requires "frequency", which cannot be established without reference to the relevant  
18 universe. Intervenors and their members further assert that the Commissioner's interpretation  
19 creates a vague standard capable of arbitrary application and enforcement.

20 61. Intervenors' members are subject to regulation by the Commissioner in accordance with  
21 the Commissioner's interpretations of the regulations. Without relief from this Court,  
22 Intervenors' members will be subjected to an incorrect interpretation, which allows errors to be  
23 treated as unfair "general business practice[s]".

24 62. Wherefore, Intervenors pray for a declaration of the correct interpretation of CIC §  
25 790.03(h).

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1 SEVENTH CAUSE OF ACTION FOR MANDATE –

2 INTERPRETATION OF “KNOWINGLY”

3 (Against the Commissioner by all Intervenors pursuant to CCP §§ 1085, 1088.5)

4 63. Intervenors hereby incorporate by reference the allegations of paragraphs 1-62.

5 64. As set forth above, CIC § 790.03(h) makes it a violation to engage in the practices listed  
6 in subparts (1) through (16) when conduct is “knowingly” performed. Adverbs such as  
7 “knowingly” – or “recklessly” or “negligently” – are used by the Legislature to denote levels of  
8 conduct intended to be affected by a given statute.

9 65. Under California law, where the Legislature has expressed in a statute that conduct must  
10 be “knowingly” performed, there must be actual knowledge.

11 66. In the Opinion, the Commissioner disregards California law on the level of scienter  
12 required when the Legislature has decreed that conduct must be “knowingly” performed for there  
13 to be a violation. The Commissioner holds that, as there is a regulation that defines “knowingly”  
14 for purposes of CIC § 790.03(h), the regulation controls. Opinion p. 15. But, the Commissioner  
15 adopted the regulation. The regulation is invalid if it is inconsistent with the statute that required  
16 that conduct be “knowingly” performed, as that term is understood under California law.

17 67. The Opinion’s interpretation of “knowingly” is inconsistent with California law. The  
18 Opinion holds that action allegedly contrary to any provision in the entire body of California  
19 insurance law is “knowingly” committed. This interpretation is contrary to the requirement that  
20 an actor must have actual knowledge to “knowingly” act.

21 68. The regulation – 10 C.C.R. § 2695.2(l) – is invalid because it is inconsistent with the  
22 command of the statute, as the terms of the statute are defined by California law.

23 69. The Commissioner’s interpretation of CIC § 790.03(h) therefore constitutes an abuse of  
24 discretion and an abuse of the Commissioner’s statutory authority, subject to a writ of mandate  
25 issued by this Court compelling the Commissioner to correct that abuse of discretion.

26 70. The Commissioner’s adoption of 10 C.C.R. § 2695.2(l) therefore constitutes an abuse of  
27 discretion and an abuse of the Commissioner’s statutory authority, subject to a writ of mandate  
28 issued by this Court prohibiting the Commissioner from enforcing this invalid regulation.





1 NINTH CAUSE OF ACTION FOR MANDATE –

2 INTERPRETATION OF “WILLFUL”

3 (Against the Commissioner by all Intervenors pursuant to CCP §§ 1085, 1088.5)

4 78. Intervenors hereby incorporate by reference the allegations of paragraphs 1-77.

5 79. Penalties for violation of the UIPA are assessed under CIC § 790.035. That section  
6 provides for a “per act” penalty of up to \$5000, rising to a “per act” penalty of up to \$10,000  
7 when the conduct is “willful”. The statute also allows the Commissioner discretion to determine  
8 what constitutes an “act”, with the limitation that “when the issuance, amendment, or servicing of  
9 a policy or endorsement is inadvertent, all of those acts shall be a single act for the purpose of this  
10 section.”

11 80. In the Opinion, the Commissioner adopted the definition of “willful” set forth in a  
12 regulation he adopted: 10 C.C.R. § 2695.2(y). Opinion p. 22. That definition, in turn, is cribbed  
13 from a jury instruction describing what is “willful” under Penal Code § 7. It states that “willful”  
14 means ““simply a purpose or willingness to commit the act, or make the omission referred to in  
15 the California Insurance Code or this subchapter. It does not require any intent to violate law, or  
16 to injure another, or acquire any advantage.”” Opinion p. 22.

17 81. Under California law, when the term “willful” is used in a statute in which civil penalties  
18 are imposed, particularly where the statute establishes a two-tier system imposing different  
19 penalty levels for willful and nonwillful violations, this definition is incorrect. In such a case,  
20 willfulness does not equate to mere volition, as it does in the Commissioner’s definition. To the  
21 contrary, for example, the conduct cannot be willful if it is in accordance with a good faith belief  
22 that the facts imposing the statutory obligation were not present. Thus, if a licensee has a good  
23 faith belief that its conduct comports with the law, it is not acting willfully for purposes of CIC §  
24 790.035, although the licensee may be acting volitionally.

25 82. The Opinion’s interpretation of the term “willful” is inconsistent with California law.

26 83. The regulation – 10 C.C.R. § 2695.2(y) – is invalid because it is inconsistent with the  
27 command of the statute, as the terms of the statute are defined by California law.

28 84. The Commissioner’s interpretation of CIC § 790.035 therefore constitutes an abuse of

1 discretion and an abuse of the Commissioner's statutory authority, subject to a writ of mandate  
2 issued by this Court compelling the Commissioner to correct that abuse of discretion.

3 85. The Commissioner's adoption of 10 C.C.R. § 2695.2(y) therefore constitutes an abuse of  
4 discretion and an abuse of the Commissioner's statutory authority, subject to a writ of mandate  
5 issued by this Court prohibiting the Commissioner from enforcing this invalid regulation.

6 **TENTH CAUSE OF ACTION FOR DECLARATORY RELIEF –**

7 **INTERPRETATION OF "WILLFUL"**

8 (Against the Commissioner by all Intervenors pursuant to CCP § 1060)

9 86. Intervenors hereby incorporate by reference the allegations of paragraphs 1-85.

10 87. A controversy has arisen between the Commissioner on the one hand and Intervenors and  
11 their members on the other regarding the proper interpretation of the term "willful" as it is used in  
12 CIC § 790.035.

13 88. The Commissioner asserts that the term "willful" as used in CIC § 790.035 requires  
14 merely volition.

15 89. Intervenors and their members assert that the term "willful" as it is used in CIC § 790.035  
16 excludes conduct where the licensee had a good faith belief that its conduct comported with the  
17 law.

18 90. Intervenors' members are subject to regulation by the Commissioner in accordance with  
19 the Commissioner's interpretation of the UIPA. Without relief from this Court, Intervenors'  
20 members will be subjected to an incorrect interpretation, allowing assessment of punitive fines for  
21 conduct which is merely volitional.

22 91. The Commissioner adopted a regulation – 10 C.C.R. § 2695.2(y) – memorializing his  
23 incorrect interpretation of the UIPA. Without relief from this Court, Intervenors' members will  
24 be subject to an invalid regulation.

25 92. Wherefore, Intervenors pray for a declaration of the correct interpretation of CIC §  
26 790.035, and a declaration that 10 C.C.R. § 2695.2(y) is invalid.

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1 subsection of this particular statute, there must be a misrepresentation, i.e., a false statement of  
2 fact.

3 102. Intervenors' members are subject to regulation by the Commissioner in accordance with  
4 the Commissioner's interpretation of CIC § 790.03(h)(1). Without relief from this Court,  
5 Intervenors' members will be subjected to an incorrect interpretation, which allows findings of  
6 UIPA violations and issuance of fines.

7 103. Wherefore, Intervenors pray for a declaration of the correct interpretation of CIC §  
8 790.03(h)(1).

9 **THIRTEENTH CAUSE OF ACTION FOR MANDATE –**

10 **10 C.C.R. § 2695.3 DOES NOT CREATE A VIOLATION OF THE UIPA**

11 (Against the Commissioner by all Intervenors pursuant to CCP § 1085, 1088.5)

12 104. Intervenors hereby incorporate by reference the allegations of paragraphs 1-103.

13 105. 10 C.C.R. § 2695.3 provides for examinations of licensees by the California Department  
14 of Insurance ("CDI") and describes steps licensees must take to assist in examinations, such as  
15 maintaining claims data, and file maintenance.

16 106. 10 C.C.R. § 2695.3 does not purport to elaborate upon any substantive provision of the  
17 UIPA, nor does it correspond to any provision within the UIPA stating a violation.

18 107. In the Opinion, however, the Commissioner treats a violation of 10 C.C.R. § 2695.3 as a  
19 violation of the UIPA. *See, e.g.,* Opinion pp. 31, 36.

20 108. Treating a violation of 10 C.C.R. § 2695.3 as a violation of the UIPA unlawfully expands  
21 the scope of the statute.

22 109. The Commissioner's holding that a violation of 10 C.C.R. § 2695.3 constitutes a violation  
23 of the UIPA therefore constitutes an abuse of discretion and an abuse of the Commissioner's  
24 statutory authority, subject to a writ of mandate issued by this Court compelling the  
25 Commissioner to correct that abuse of discretion.

1                   **FOURTEENTH CAUSE OF ACTION FOR DECLARATORY RELIEF –**  
2                   **10 C.C.R. § 2695.3 DOES NOT CREATE A VIOLATION OF THE UIPA**

3                   (Against the Commissioner by all Intervenors pursuant to CCP § 1060)

4 110. Intervenors hereby incorporate by reference the allegations of paragraphs 1-109.

5 111. A controversy has arisen between the Commissioner on the one hand and Intervenors and  
6 their members on the other regarding the scope of the UIPA.

7 112. The Commissioner asserts that a violation of the examination and recordkeeping  
8 regulation – 10 C.C.R. § 2695.3 – constitutes a violation of the UIPA.

9 113. Intervenors and their members assert that 10 C.C.R. § 2695.3 establishes procedures for  
10 CDI examinations, including required recordkeeping to facilitate CDI examinations. Section  
11 2695.3 does not create a new violation of the UIPA, nor can it, as it does not correspond to any of  
12 the violations statutorily declared by the UIPA.

13 114. Intervenors' members are subject to regulation by the Commissioner in accordance with  
14 the Commissioner's interpretation of the UIPA. Without relief from this Court, Intervenors'  
15 members are subject to being charged with violation of the UIPA if the Commissioner finds any  
16 failure to maintain records as required by § 2695.3's requirements for examinations.

17 115. Wherefore, Intervenors pray for a declaration that 10 C.C.R does not expand the scope of  
18 the UIPA, and a licensee cannot be held to violate the UIPA for a violation of § 2695.3.

19                   **FIFTEENTH CAUSE OF ACTION FOR MANDATE –**  
20                   **A PROVIDER IS NOT A "CLAIMANT"**

21                   (Against the Commissioner by Intervenor ACLHIC pursuant to CCP §§ 1085, 1088.5)

22 116. Intervenor ACLHIC hereby incorporates by reference the allegations of paragraphs 1-115.

23 117. In the Opinion, the Commissioner construes the term "claimants" as used in CIC §  
24 790.03(h)(1) to include healthcare providers who provided services to insureds. Opinion p. 17.  
25 The Opinion relies upon 10 C.C.R. §§ 2695.2(a), (c) and (f) in reaching this conclusion. Section  
26 2695.2 provides definitions "as used in these regulations". Subpart (a) defines a "beneficiary" to  
27 include, for purposes of life and disability claims, "the party or parties entitled to receive the  
28 proceeds or benefits occurring under the policy in lieu of the insured". Subpart (c), as pertinent

1 here, defines “[c]laimant” as a “first or third party claimant as defined in these regulations”.  
2 Subpart (f) defines a first party claimant as “any person asserting a right under an insurance  
3 policy as a named insured, other insured, or beneficiary *under the terms of that insurance policy*  
4 . . . .” (emphasis added). The Opinion concludes that, since the definition of “first party claimant”  
5 uses the word “beneficiary” and a “beneficiary” (according to the Opinion) includes a provider  
6 who has rendered services to an insured, a provider counts as a claimant for purposes of CIC §  
7 790.03(h)(1).

8 118. The definition of “first party claimant”, however, does not say “beneficiary”. It says  
9 “beneficiary under the terms of that insurance policy”. To be a first party claimant, and thus a  
10 claimant, a person must be a “beneficiary under the terms of the policy”. If a provider is not a  
11 “beneficiary under the terms of the policy”, the provider is not a claimant. Typically, providers  
12 obtain assignments from insureds that permit them to obtain payment directly from an insurer.  
13 Absent that assignment, providers typically have no rights under the terms of a policy itself.  
14 Providers therefore are not “beneficiari[ies] under the terms of th[e] policy”.

15 119. The Opinion impermissibly expands the scope of the UIPA by purporting to include  
16 providers within the definition of claimants under CIC § 790.03(h)(1).

17 120. The Commissioner’s interpretation of “claimants” to include providers therefore  
18 constitutes an abuse of discretion and an abuse of the Commissioner’s statutory authority, subject  
19 to a writ of mandate issued by this Court compelling the Commissioner to correct that abuse of  
20 discretion.

21 **SIXTEENTH CAUSE OF ACTION FOR DECLARATORY RELIEF –**

22 **A PROVIDER IS NOT A “CLAIMANT”**

23 (Against the Insurance Commissioner by Intervenor ACLHIC pursuant to CCP § 1060)

24 121. Intervenor ACLHIC hereby incorporates by reference the allegations of paragraphs 1-120.

25 122. A controversy has arisen between the Commissioner on the one hand and ACLHIC and its  
26 members on the other regarding the class of persons included within the term “claimants” in CIC  
27 § 790.03(h)(1).

28 123. The Commissioner asserts that the term “claimants” includes healthcare providers who

1 have provided services to insureds.

2 124. ACLHIC and its members assert that providers are not claimants, and that the class of  
3 persons intended to be included within the term “claimants” does not include providers who can  
4 only seek reimbursement through an assignment from a true claimant.

5 125. ACLHIC’s members are subject to regulation by the Commissioner in accordance with  
6 the Commissioner’s interpretation of the UIPA. Without relief from this Court, ACLHIC’s  
7 members will be subjected to an incorrect interpretation which expands the scope of the UIPA.

8 126. Wherefore, ACLHIC prays for a declaration that providers are not “claimants” within the  
9 meaning of CIC § 790.03(h)(1).

10 **SEVENTEENTH CAUSE OF ACTION FOR MANDATE –**  
11 **IMPROPER USE OF “PRECEDENT DECISION”**

12 (Against the Commissioner by all Intervenors pursuant to CCP §§ 1085, 1088.5)

13 127. Intervenors hereby incorporate by reference the allegations of paragraphs 1 – 126.

14 128. As described throughout this Complaint, the Opinion adds new practices not listed in the  
15 UIPA as additional unfair practices chargeable under the UIPA. The Commissioner also adopts  
16 various new rules, such as defining a “general business practice” by deleting the reference to  
17 “frequency”, and allowing errors to be transformed into culpable business practices. The  
18 Commissioner made these new rules, unlawfully expanding the scope of CIC § 790.03 applicable  
19 to all licensees, by designating the Opinion a “precedent decision”.

20 129. The Commissioner is authorized to designate “precedent decisions” under Government  
21 Code § 11425.60. The Commissioner cannot, however, substitute that device for the legislative  
22 process, or for the methodology prescribed by the UIPA for adding to the list of methods, acts and  
23 practices that can be considered to violate the UIPA – a hearing under CIC § 790.06. Nor can the  
24 Commissioner substitute that device for a statutory rulemaking proceeding, when he is adopting  
25 rules with industry-wide impact. Such a substitution would deprive industry licensees of their  
26 right to petition government, and their due process right to be heard before rules are adopted that  
27 directly impact the rights of industry licensees generally.

28 130. Without limitation, the Opinion purports to adopt “baseline penalties” for each category of

1 conduct considered. *See, e.g.* Opinion pp. 40, 48, 56, 68, 83, 94, 106, 118, 126, 132, 141, 149,  
2 156, 162, 171, 177, 182, 190, and 197. After setting the “baseline penalty” with respect to each  
3 category, the Opinion then discusses various factors pertaining to mitigation or enhancement of  
4 the penalty, but only with reference to the “baseline penalty.” The Commissioner cannot adopt a  
5 schedule of “baseline penalties” applicable industry-wide in the context of a single licensee’s  
6 adjudicatory hearing, by designating the Opinion a precedent decision. This tactic deprives  
7 industry licensees of their right to petition government, and their due process right to be heard  
8 before rules are adopted that directly impact the rights of industry licensees generally.

9 131. The Commissioner’s use of the “precedent decision” designation, in this case, violates the  
10 UIPA, and violates Intervenors’ members’ constitutional rights.

11 132. The Commissioner’s use of the “precedent decision” designation, in this case, circumvents  
12 Administrative Procedures Act requirements for adopting regulations, the rules adopted in the  
13 “precedent decision” constitute underground regulations and are not enforceable.

14 133. The Commissioner’s use of the “precedent decision” designation, in this case, therefore  
15 constitutes an abuse of discretion and an abuse of the Commissioner’s statutory authority, subject  
16 to a writ of mandate issued by this Court prohibiting the Commissioner from applying the rules  
17 adopted in the Opinion as industry-wide rules.

18 **EIGHTEENTH CAUSE OF ACTION FOR DECLARATORY RELIEF –**  
19 **IMPROPER USE OF “PRECEDENT DECISION”**

20 (Against the Commissioner by all Intervenors pursuant to CCP § 1060)

21 134. Intervenors hereby incorporate by reference the allegations of paragraphs 1- 133.

22 135. A controversy has arisen between the Commissioner on the one hand and Intervenors and  
23 their members on the other, concerning the Commissioner’s use of the “precedent decision”  
24 device.

25 136. The Commissioner asserts that he can use the ability to designate a decision a “precedent”,  
26 pursuant to Government Code § 11425.60(b), to expand the scope of the UIPA and adopt new  
27 rules, as he has done in the Opinion. The various ways in which the Opinion expands the scope  
28 of the UIPA and adopts new rules are described throughout this Complaint in Intervention.



1 137. Intervenors and their members assert that, while Government Code § 11425.60(b) allows  
2 the Commissioner to designate a precedent decision, there is no authority to use this device in lieu  
3 of the CIC § 790.06 hearing expressly devised by the Legislature as the sole means for adding to  
4 the list of practices considered unfair methods, acts and practices under the UIPA. Nor is there  
5 authority for circumventing licensee rights to petition government and to due process in the  
6 course of adopting rules for general application. Nor can the authority to designate a precedent  
7 decision be used to circumvent Administrative Procedures Act rulemaking requirements, when  
8 the Commissioner is adopting a rule of general application.

9 138. Intervenors' members are subject to regulation by the Commissioner in accordance with  
10 the Commissioner's interpretation of the UIPA. Without relief from this Court, Intervenors'  
11 members will be subject to an unlawfully expanded version of the UIPA.

12 139. Wherefore, Intervenors pray for a declaration that the Commissioner cannot use the device  
13 of the "precedent decision" to avoid the procedure set forth in CIC § 790.06, or to create rules of  
14 general application without notice to affected persons and an opportunity to be heard. Intervenors  
15 further pray for a declaration that the underground regulations adopted through the precedent  
16 decision are invalid, and without force or effect.

17 **NINETEENTH CAUSE OF ACTION FOR MANDATE –**

18 **UNCONSTITUTIONAL APPLICATION OF CIC § 790.035 TO ALLOW**  
19 **CUMULATIVE PENALTIES DISPROPORTIONATE TO CULPABILITY**

20 (Against the Commissioner by all Intervenors pursuant to CCP § 1085, 1088.5)

21 140. Intervenors hereby incorporate by reference the allegations of paragraphs 1-139.

22 141. CIC § 790.035 creates a penalty mechanism relying primarily on "per act" penalties. The  
23 Commissioner is entrusted with significant discretion in assessing penalties. The penalty amounts  
24 are expressed as "not to exceed" \$5,000 per act for nonwillful conduct and "not to exceed"  
25 \$10,000 per act for willful conduct. A primary reason the Commissioner is afforded discretion –  
26 both with respect to the per act amount, and in determining what counts as an "act" (with the  
27 limitation that when conduct is "inadvertent" the entire manifestation is deemed a single "act") –  
28 is to avoid rendering the statute unconstitutional as inherently imposing excessive fines and

1 violating the due process rights of licensees. The Commissioner, thus, has the responsibility to  
2 administer the statute in such a way that cumulative per act penalties do not result in an ultimate  
3 result disproportionate to the culpability of the conduct at issue and a violation of the due process  
4 clause.

5 142. On information and belief, the penalty of \$173.6 million assessed against PacifiCare in the  
6 Order accompanying the Opinion is disproportionate to the culpability of the conduct at issue.  
7 The disproportionate effect results from the Commissioner's improper application of the "per act"  
8 formula set forth in the statute.

9 143. The only aspects of the Opinion not designated as a "precedent decision" are the portions  
10 where the Commissioner did apply a mitigating discretion by limiting the number of acts which  
11 were counted as violations. By not designating these portions of the Opinion as a precedent  
12 decision but designating the entire remainder of the Opinion as a precedent, the Commissioner  
13 creates a precedent authorizing the use of the statute's "per act" penalty structure to achieve an  
14 unconstitutionally excessive fine in violation of the due process provisions of state and federal  
15 constitutions.

16 144. The Commissioner's use of the "per act" penalty structure, and selective designation of  
17 the Opinion as a precedent decision but for the portions providing for mitigation of the  
18 cumulative penalty produced by the per act structure, creates a precedent for excessive fines. The  
19 Commissioner's decisions creating this mechanism constitute an abuse of discretion and an abuse  
20 of the Commissioner's statutory authority, subject to a writ of mandate issued by this Court  
21 prohibiting the Commissioner from issuing penalties based upon that interpretation of CIC §  
22 790.035.

23 **TWENTIETH CAUSE OF ACTION FOR DECLARATORY RELIEF –**  
24 **UNCONSTITUTIONAL APPLICATION OF CIC § 790.035 TO ALLOW**  
25 **CUMULATIVE PENALTIES DISPROPORTIONATE TO CULPABILITY**

26 (Against the Commissioner by all Intervenors pursuant to CCP § 1060)

27 145. Intervenors hereby incorporate by reference the allegations of paragraphs 1-144.

28 146. A controversy has arisen between the Commissioner on the one hand and Intervenors and

1 their members on the other regarding the constitutional validity of the Commissioner's  
2 implementation of the penalty structure in CIC § 790.035, as explained in the Nineteenth Cause  
3 of Action, supra.

4 147. The Commissioner asserts discretion to order a "per act" penalty which ultimately results  
5 in a fine disproportionate to the culpability of the conduct. The Commissioner has designating  
6 the Opinion as a "precedent decision", *expressly excluding* those rulings whereby he mitigated  
7 the ultimate fine by reducing the number of acts penalized, expressly to self-authorize issuance of  
8 excessive fines.

9 148. Intervenors and their members assert that the constitution and California case law require  
10 careful oversight of "per act" penalty structures to ensure that the cumulative penalties produced  
11 through that mechanism are not disproportionate to the culpability of the conduct at issue.  
12 Intervenors further assert that the Commissioner's precedent decision authorizes disproportionate,  
13 excessive fines in violation of constitutional limits.

14 149. Intervenors' members are subject to regulation by the Commissioner in accordance with  
15 the Commissioner's interpretation of the UIPA. Without relief from this Court, Intervenors'  
16 members will be subjected to a mechanistic application of CIC § 790.035 likely to produce  
17 excessive fines disproportionate to culpability.

18 150. Wherefore, Intervenors pray for a declaration limiting the Commissioner to a  
19 constitutionally acceptable application of CIC § 790.035.

20 **TWENTY-FIRST CAUSE OF ACTION FOR MANDATE –**

21 **UNAUTHORIZED "BASELINE PENALTIES"**

22 (Against the Commissioner by all Intervenors pursuant to CCP §§ 1085, 1088.5)

23 151. Intervenors hereby incorporate by reference the allegations of paragraphs 1-150.

24 152. The UIPA provides for penalties in CIC § 790.035, as described above.

25 153. The UIPA provides for penalties only as to the methods, acts and practices specified in the  
26 UIPA. The UIPA does not permit the penalties set forth in CIC § 790.035 to be imposed for  
27 infractions of other Insurance Code statutes. The UIPA does not permit the penalties set forth in  
28 CIC § 790.035 to be imposed as to conduct not specified in the UIPA. If the Commissioner

1 commences a proceeding to consider whether additional conduct not described in the UIPA  
2 should be considered “unfair”, the Commissioner cannot impose a penalty for conduct occurring  
3 prior to conclusion of that proceeding, it’s affirmation by a court, and issuance of an injunction by  
4 a court.

5 154. The Opinion purports to adopt “baseline penalties” for each category of conduct  
6 considered. *See, e.g.* Opinion pp. 40, 48, 56, 68, 83, 94, 106, 118, 126, 132, 141, 149, 156, 162,  
7 171, 177, 182, 190, and 197.

8 155. The “baseline penalties” the Opinion purports to adopt are not authorized by CIC §  
9 790.035.

10 156. The Opinion purports to adopt “baseline penalties” applicable to conduct not covered by  
11 the UIPA, although such conduct might in some cases constitute an infraction of other Insurance  
12 Code statutes.

13 157. The Commissioner lacks statutory authority to adopt the “baseline penalties” articulated in  
14 the Opinion. Adoption of these “baseline penalties” therefore constitutes an abuse of discretion  
15 and an abuse of the Commissioner’s statutory authority, subject to a writ of mandate issued by  
16 this Court compelling the Commissioner to correct the abuse, and precluding the Commissioner  
17 from imposing the “baseline penalties”.

18 **TWENTY-SECOND CAUSE OF ACTION FOR DECLARATORY RELIEF –**  
19 **UNAUTHORIZED “BASELINE PENALTIES”**

20 (Against the Commissioner by all Intervenors pursuant to CCP § 1060)

21 158. Intervenors hereby incorporate by reference the allegations of paragraphs 1-157.

22 159. A controversy has arisen between the Commissioner on the one hand and Intervenors and  
23 their members on the other concerning the schedule of “baseline penalties” the Opinion purports  
24 to adopt, as further alleged above.

25 160. The Commissioner asserts that he has the authority to adopt the schedule of “baseline  
26 penalties” set forth in the Opinion.

27 161. Intervenors and their members assert that the Commissioner lacks statutory authority to  
28 adopt the schedule of “baseline penalties” set forth in the Opinion.

1 162. Intervenors' members are subject to regulation by the Commissioner in accordance with  
2 the Commissioner's interpretation of the UIPA, including the Opinion. Without relief from this  
3 Court, Intervenors' members will be subjected to penalties not authorized by the UIPA or the  
4 Insurance Code, but improperly adopted by the Commissioner through the precedent Opinion.

5 163. Wherefore, Intervenors seek a judicial declaration from this Court that the "baseline  
6 penalties" the Opinion purports to adopt are invalid.

7 **PRAYER FOR RELIEF**

8 WHEREFORE, Intervenors pray for the following relief:

9 As to the First, Third, Fifth, Seventh, Ninth, Eleventh, Thirteenth, Fifteenth, Seventeenth,  
10 Nineteenth and Twenty-First Causes of Action, that this Court issue its writ of mandate  
11 compelling the Commissioner to act in accordance with constitutional, statutory and decisional  
12 law, and prohibiting the Commissioner from enforcing the Opinion or regulations 10 C.C.R. §§  
13 2695.2(l) and (y) as inconsistent with law and an abuse of discretion;

14 As to the Second, Fourth, Sixth, Eighth, Tenth, Twelfth, Fourteenth, Sixteenth,  
15 Eighteenth, Twentieth and Twenty-Second Causes of Action, that this Court issue a Declaratory  
16 Judgment as requested in the identified Causes of Action;

17 For attorney's fees and costs incurred herein; and

18 For such other and further relief as Intervenors may request or this Court may determine is  
19 appropriate.

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Dated: November \_\_, 2014

HOGAN LOVELLS US LLP

By: \_\_\_\_\_  
Vanessa Wells  
Michael Maddigan  
Attorneys for Intervenors  
Association of California Life and Health  
Insurance Companies, American Council  
of Life Insurers, National Association of  
Mutual Insurance Companies, Pacific  
Association of Domestic Insurance  
Companies, Personal Insurance Federation  
of California, Property Casualty Insurers  
Association of America, Independent  
Insurance Agents and Brokers of  
California, and National Association of  
Insurance and Financial Advisors –  
California

1 **PROOF OF SERVICE**

2 I, Carmela Barrera, declare:

3 I am a citizen of the United States and employed in Los Angeles County, California. I am  
4 over the age of eighteen years and not a party to the within-entitled action. My business address  
5 is 1999 Avenue of the Stars, Suite 1400, Los Angeles, California 90067. On November 21,  
6 2014, I served a copy of the within document(s):

7 **DECLARATION OF VANESSA O. WELLS IN SUPPORT OF  
8 MOTION FOR LEAVE TO INTERVENE**

- 9  by transmitting via facsimile the document(s) listed above to the fax number(s) set  
10 forth below on this date before 5:00 p.m.
- 11  by placing the document(s) listed above in a sealed envelope with postage thereon  
12 fully prepaid, the United States mail at Los Angeles, California addressed as set  
13 forth below.
- 14  by placing the document(s) listed above in a sealed Federal Express envelope and  
15 affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal  
16 Express agent for delivery.
- 17  by personally delivering the document(s) listed above to the person(s) at the  
18 address(es) set forth below.
- 19  by transmitting via e-mail or electronic transmission the document(s) listed above  
20 to the person(s) at the e-mail address(es) set forth below.

17 Daniel M. Kolkey  
18 Gibson, Dunn & Crutcher, LLP  
19 555 Mission Street, Suite 3000  
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*Attorneys for Respondent and Defendant  
Dave Jones, in his Capacity as Insurance  
Commissioner of the State of California*

24 Adam M. Cole  
25 Teresa Campbell  
26 California Department of Insurance  
27 45 Fremont Street, Suite 2300  
28 San Francisco, CA 94105

*Respondent and Defendant  
Dave Jones, in his Capacity as Insurance  
Commissioner of the State of California*

27 I am readily familiar with the firm's practice of collection and processing correspondence  
28 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same

1 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on  
2 motion of the party served, service is presumed invalid if postal cancellation date or postage  
3 meter date is more than one day after date of deposit for mailing in affidavit.

4 I declare under penalty of perjury under the laws of the State of California that the above  
5 is true and correct.

6 Executed on November 21, 2014, at Los Angeles, California.

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8 \_\_\_\_\_  
9 Carmela Barrera

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