



PIFC

PERSONAL INSURANCE FEDERATION OF CALIFORNIA



February 20, 2013

VIA HAND DELIVERY

Honorable Chief Justice and Associate Justices of the
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: **Response in Opposition to Request for Depublication of Opinion:**
*In re Insurance Installment Fee Cases*, 211 Cal. App. 4th 1395, 150 Cal. Rptr. 3d 6618 (2012)
Case No. D057138

Dear Honorable Justices:

Pursuant to Rule of Court 8.1125(b), I am submitting this letter on behalf of the Personal Insurance Federation of California (PIFC), Association of California Insurance Companies (ACIC), Association of California Life and Health Insurance Companies (ACLHIC), National

Association of Mutual Insurance Companies (NAMIC), and Pacific Association of Domestic Insurance Companies (PADIC). PIFC, ACIC, ACLHIC, NAMIC and PADIC respectfully ask that the Court deny the request to depublish the opinion of the Court of Appeal in *In re Insurance Installment Fee Cases*, 211 Cal. App. 4th 1395, 150 Cal. Rptr. 3d 618 (2012), made by the Consumer Attorneys of California ("CAOC"). Neither the limited portion of the Court of Appeal's analysis that is addressed by the letter submitted by CAOC, nor the other substantial portions of the Court of Appeal's opinion which CAOC has not addressed, should be depublished.

PIFC, ACIC, ACLHIC, NAMIC and PADIC together represent the vast majority of the insurance industry in California and nationwide:

PIFC is a trade organization existing to promote the interests of insurance companies doing business in California. Its membership is comprised of insurance companies that collectively underwrite the majority of personal lines auto and property insurance in California.

ACIC represents 363 property/casualty insurance companies doing business in California. ACIC members write $220.2 billion in premium in California insuring 36.3 percent of the property/casualty insurance sold in the state. ACIC members write 43.5 percent of personal auto insurance, 29.1 percent of homeowners insurance, 22.3 percent of commercial multi-peril business insurance and 40.4 percent of private workers compensation insurance. ACIC is the California voice of the Property Casualty Insurers Association of America (PCI), a national trade association which does business in California as ACIC. PCI is composed of more than 1,000 member companies, representing the broadest cross section of insurers of any national trade association. PCI members write nearly 40 percent of the property/casualty business in the United States.

ACLHIC is a California not-for-profit corporation, comprised of 36 member life and health insurance companies doing business 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's constituent insurance companies are subject to intensive regulation by the California Department of Insurance. ACLHIC represents its constituents with respect to, among other things, legislative and regulatory issues affecting the health care and health insurance industries.

NAMIC is the largest and most diverse property/casualty insurance trade association with 1,400 property/casualty insurance companies serving more than 135 million auto, home, and business policyholders writing more than $196 billion in premiums. NAMIC member companies have 50 percent of the automobile/homeowners market and 31 percent of the business insurance market.

PADIC member companies write approximately $1 billion in property and casualty premium almost exclusively in California. Because the vast majority of PADIC insurance business is written in California, insurance law, regulation and legislation have a much greater

impact on its members, and, more importantly, its policyholders, than companies who write insurance throughout the country. Approximately one half of the premium written by PADIC is in personal lines.

The issues addressed by the Court of Appeal in its decision, both as to the substantive issues raised by the plaintiffs' claims and as to the privacy concerns raised by pre-class certification discovery of policyholders' contact information and personal financial information, are of special concern to insurance industry groups and their member companies. In the first part of its opinion, the Court of Appeal addressed substantive issues regarding the lawfulness of installment payment plans made available by insurance companies to their policyholders. Depublication of the opinion would deprive not only the parties, but other policyholders, insurance companies and the public of a significant reasoned decision on important issues as to which answers are very much needed.

The opinion by the Court of Appeal also contains a number of significant rulings on privacy issues, including the ruling challenged by CAOC. Those rulings provide precedents that are important to policyholders and insurers. In class action insurance litigation, simply revealing the identify of a policyholder who is a potential class member will very often reveal information about the policyholder's insurance transactions. In this case, for example, the class was defined to include policyholders who paid their premiums on an installment plan. Identification of a policyholder as a potential member of the class in itself revealed personal financial information. In other insurance litigation, identification of policyholders may reveal what sort of claims or claim a policyholder may have made or what sort of insurance he or she has purchased. Furthermore, class action plaintiffs routinely request discovery of claims files and other matters that policyholders generally consider private and confidential. Thus, PIFC, ACIC, ACLHIC, NAMIC, PADIC and their members have a strong interest in seeking to protect the privacy rights of insurance policyholders and a strong interest in the precedential value of the decision in this case of the Court of Appeal.

## I. As an Initial Matter, This Court Should Not Depublish the Substantial Portions of the Court of Appeal's Opinion Which Are Not the Subject of CAOC's Request and Are Not Addressed by CAOC in its Letter

In its opinion, the Court of Appeal affirmed the trial court's dismissal of the plaintiffs' fourth amended complaint without leave to amend, and, on defendant State Farm's appeal, reversed the trial court's post-judgment order imposing on State Farm the cost of providing notice to putative class members whose contact information and installment fee payment information had been requested in discovery by the plaintiffs. In its letter, CAOC asks this Court to depublish the entire opinion of the Court of Appeal. CAOC, however, has objected only to a limited part of Section III of the Court's analysis of the issue of which party should bear the cost of notice to the putative class members. CAOC has provided no reason to depublish the rulings of the Court of Appeal on the merits of the plaintiffs' claims or on other issues bearing on the cost of notice.

The Court of Appeal's rulings on these issues should remain published and citable as precedent. In particular, the Court's holding that State Farm's insurance installment fees were lawful resolves the industry-wide uncertainty that followed the Court of Appeal's decision in *Troyk v. Farmers Group, Inc.*, 171 Cal. App. 4th 1305, 90 Cal. Rptr.3d 589 (2009). *Troyk* held that a monthly "installment fee" charged for a one-month term policy constituted premium and that the fee was unlawful. In *Insurance Installment Fee Cases*, the Court of Appeal made clear that its reasoning and analysis in *Troyk* does not apply to monthly installment fees paid for a six-month term policy, and that such installment fees are not a payment of premium, but are consideration for a benefit separate from the insurance coverage, paid for under an agreement separate from the policy. *See Ins. Installment Fee*, 211 Cal. App. 4th at 1406-07, 150 Cal. Rptr. 3d at 626. The Court of Appeal held that such "true" installment fees did not need to be stated on the policy's declaration page or approved by the Insurance Commissioner as premium and did not violate the relevant California regulations regarding premium. The Court also held that State Farm's installment payment plan did not breach the terms of the policy and did not violate any prong of the UCL.

As the Court of Appeal found, installment payment plans provide the benefit to an insured of being able to pay premiums on a monthly basis instead of in "large lump-sum payments." *Ins. Installment Fee*, 211 Cal. App. 4th at 1419, 150 Cal. Rptr. 3d at 636. The existence of a precedent that such payment plans are lawful provides assurance that such plans will continue to be offered to consumers and gives guidance to insurance companies that offer such plans. Thus, the significance of the opinion transcends the case at hand and benefits both consumers and insurance companies by clarifying the applicable law and allowing a beneficial practice to continue. It is in the public interest that the Court of Appeal's reasoned analysis of the contract and regulatory issues presented by the plaintiffs' claims should remain as published precedent.

Likewise, CAOC does not challenge the Court of Appeal's analysis of and rulings on many issues raised by the trial court's order imposing on State Farm the costs incurred in providing notice to putative class members before releasing their contact information and personal financial details to plaintiffs. In addition to the challenged ruling (1) that the putative class members in this case were entitled to notice and opportunity to object before release of their contact information, the Court of Appeal held (2) that notice to policyholders and an opportunity to object unquestionably was constitutionally required for plaintiffs' requested discovery of the policyholders' installment payment history information; (3) that the notice procedure was required by the court's order; (4) that the costs of the notice procedure were significant special attendant costs beyond those typically involved in responding to routine discovery and were necessary to the conduct of the litigation because the notice procedure was required by law and court order; and (5) that the trial court abused its discretion in not awarding reasonable costs for the notice procedure to State Farm.

These are recurring issues, and the Court of Appeal's reasoned analysis provides needed guidance to the trial courts and to litigants. CAOC has not requested or offered reasons for the depublication of the portions of the opinion addressing issues two to five listed above.

Accordingly, even if this Court determines that the challenged portion of the Court of Appeal's opinion be depublished (and as discussed below, it should not do so), the remainder of the Court's opinion, including both its decision that the plaintiffs' claims in this case lacked merit and its decision on other issues raised by State Farm's appeal on the cost of notice, should remain published.

## II. This Court Should Not Depublish the Portion of the Court of Appeal's Opinion that Holds that the Putative Class Members in this Case Were Entitled to Notice and Opportunity to Object Before Release of Their Identifying Information to Plaintiffs

CAOC urges depublication on the ground that the opinion of the Court of Appeal in this case is contrary to *Pioneer Electronics (USA), Inc. v. Superior Court*, 40 Cal. 4th 360, 150 P.3d 198, 53 Cal. Rptr. 3d 513 (2007). In fact, in its opinion, the Court of Appeal properly looked to *Pioneer Electronics* for guidance regarding the issue of whether the putative class members in this case (State Farm policyholders who paid policy premiums on an installment plan) were entitled to notice and an opportunity to object before release of their identifying information to plaintiffs' counsel.

In contending that there is a conflict between the two opinions, CAOC mistakes the issue addressed by this Court in *Pioneer Electronics*. In *Pioneer Electronics*, this Court addressed the issue of whether the privacy interests of the putative class members required additional protection (notice and affirmative consent to disclosure) *beyond* the notice and an opportunity to object provided by the trial court. This Court held that under the circumstances affirmative consent was not required. *See Ins. Installment Fee*, 211 Cal. App. 4th at 1427, 150 Cal. Rptr. 3d at 643 (quoting *Pioneer Electronics*, 40 Cal. 4th at 372, 150 P.3d at 205, 53 Cal. Rptr. 3d at 522). It is true, as CAOC asserts, that in *Pioneer Electronics* this Court "did not hold that such a notice and opportunity to opt out was required in every putative class action case in which contact information is sought." (CAOC letter at 3). This Court did not opine one way or the other on that issue in *Pioneer Electronics* because that was not the issue before it. Thus, the conclusion of the Court of Appeal on an issue that was not decided or presented in *Pioneer Electronics* did not and could not conflict with this Court's opinion in *Pioneer Electronics*.

In *Insurance Installment Fees*, the Court of Appeal held specifically that the notice and opt-out procedure prescribed by Judge Peterson before release of the putative class members' identifying information was "necessary to protect the policyholders' privacy rights under the California Constitution." 211 Cal. App. 4th at 1426, 150 Cal. Rptr. 3d at 642; *see also id.* at 1429, 150 Cal. Rptr.3d at 645 (concluding "that the privacy notice State Farm sent to its policyholders was required by the California Constitution"). The Court of Appeal also indicated its view that this requirement was generally applicable in class actions, stating in a footnote that "the discovery of identifying information for potential class members in a putative class action

requires notice to the potential class members and an opportunity to object to disclosure." *Id.* at 1428 n.23, 150 Cal. Rptr. 3d at 633 n.23.[1]

In reaching these conclusions, the Court of Appeal looked to *Pioneer Electronics* for guidance and concluded that this Court's reasoning and language in *Pioneer Electronics* implicitly supported the conclusion that if notice and opportunity to opt out had not been provided in that case, a serious invasion of privacy would have occurred. As the Court of Appeal noted, this Court repeatedly referred to the opt-out protection that was afforded to the putative class members in *Pioneer Electronics:*

- The trial court properly "permitted disclosure of contact information regarding Pioneer's complaining customers *unless, following proper notice to them, they registered a written objection.* These customers had no reasonable expectation of any greater degree of privacy, and no serious invasion of their privacy interests would be threatened by requiring them affirmatively to object to disclosure." *Pioneer Electronics*, 40 Cal. 4th at 374-75, 150 P3d at 207, 53 Cal. Rptr. 3d at 524 (emphasis added).

- The concern expressed by the Court of Appeal that the notice letters to be sent to Pioneer's complaining customers might never be delivered and read was "misplaced, *assuming the notice clearly and conspicuously explains how each customer might register an objection to disclosure*." *Id.* at 373, 150 P.3d at 206, 53 Cal. Rptr. 3d at 524 (emphasis added).

- "[T]he order in this case imposed important limitations, *requiring written notice of the proposed disclosure to all complaining Pioneer customers, giving them the opportunity to object to the release of their own personal identifying information*." *Id.* (emphasis added).

- "The limited disclosure to plaintiff of mere contact information regarding possible class action members would not appear to unduly interfere with either form of privacy, *given that the affected persons readily may submit objections if they choose.*" *Id.* at 372, 150 P.3d at 205, 53 Cal. Rptr. 3d at 522 (emphasis added).

- The letter authorized by the trial court "'d[id] allow anyone who d[id] not wish to be bothered to say so, and they will not be contacted.'" *Id.* at 372, 150 P.3d at 205, 53 Cal. Rptr. 3d at 521 (quoting trial court order).

[1] The Court of Appeal also held that the opt-in notice procedures ordered by the trial court were constitutionally necessary before information about the payment histories of the putative class members could be given to the plaintiffs' attorneys. *See* 211 Cal. App. 4th at 1428-29, 150 Cal. Rptr. 3d at 644-45. CAOC has not asserted that that holding conflicts with *Pioneer Electronics* or is in any way incorrect.

Thus, as the Court of Appeal stated, the "language from *Pioneer*" (i.e., this Court's repeated emphasis on the opportunity to object afforded to the putative class members in that case) "supports the proposition that even as to generally discoverable identifying information for potential class members in a putative class action, *some* form of notice and opportunity to object to disclosure to a third party is required to protect the potential class members' privacy rights under the California Constitution." 211 Cal. App. 4th at 1427, 150 Cal. Rptr. 3d at 643. The assertion by CAOC that the just quoted statement by the Court of Appeal "misstates the holding of *Pioneer Electronics*" and that the Court of Appeal "misstates" this Court's holding in *Pioneer Electronics* anywhere in its opinion is wrong. In looking to the "language from Pioneer," the Court of Appeal is not stating the Court's holding in *Pioneer Electronics*, but using the Court's language and analysis as a guide in deciding the issue presented in this case.

The proposition that some form of notice and opportunity to object was required for the putative class members in *Insurance Installment Fees* is further supported by this Court's analysis of the specific privacy interests at stake in *Pioneer Electronics*. The potential class members at issue had already contacted Pioneer and "freely offered" their contact information to Pioneer "for the purpose, presumably, of allowing further communication regarding their complaints." *Pioneer Electronics*, 40 Cal. 4th at 367, 150 P.3d at 201, 53 Cal. Rptr. 3d at 517; *see also id.* at 372, 150 P.3d at 205, 53 Cal. Rptr. 3d at 521 (the Pioneer customers whose identifying information was sought had "already voluntarily disclosed their identifying information to [Pioneer] in the hope of obtaining some form of relief"); *id.* at 374, 150 P.3d at 206, 53 Cal. Rptr. 3d at 523 (the proposed disclosure would merely "releas[e] the same contact information they already divulged long ago"). In short, it is hard to imagine a group of putative class members with lesser privacy interests at stake than the putative class members in *Pioneer Electronics*. If, as this Court strongly indicated, the putative class members in *Pioneer Electronics* were entitled to notice and an opportunity to object before release of their contact information, it is difficult to envisage circumstances in which putative class members would **not** be entitled **at least** to such protection. Indeed, in many cases, even the provision of mere contact information, by identifying a person as a putative class member, may reveal private personal or financial information – as in the *Insurance Installment Fee* case, where identifying a person as a putative class member identified the person as having paid for his or her insurance with installment payments. In the circumstances, the conclusion of the Court of Appeal that opt-out notice was required before release of the identities of potential class members is in the mainstream of California jurisprudence on this issue.

CAOC also claims that *Insurance Installment Fee* is contrary to decisions of other Courts of Appeal. However, CAOC cites only **one** case, *Crab Addison, Inc. v. Superior Court*, 169 Cal. App. 4th 958, 87 Cal. Rptr. 3d 400 (2008), where a Court of Appeal held that some form of notice and an opportunity to object or to consent was not necessary. (CAOC letter at 4.) Moreover, in its *amicus curiae* brief to this Court in *Pioneer Electronics*, CAOC itself acknowledged that providing notice and an opportunity to object was "routine[]" and "correct," stating that "where only one party had access to [percipient witnesses' or proposed class members'] identifying information, courts *routinely* order that party to disclose the information to the other side *after providing notice and an opportunity to object to the individuals in question*."

Amicus Curiae Br. of Consumer Attorneys of California in Support of Real Party in Interest Patrick Olmstead, *Pioneer Electronics*, 40 Cal. 4th 360, 150 P.3d 198, 53 Cal. Rptr. 3d 513 (No S133794), 2006 WL 951488, at *1 (emphasis added). CAOC also termed notice and an opportunity to object "the correct 'opt-out' approach." *Id.* at *19 (asserting that the trial court in *Pioneer Electronics* "utilize[d] the correct 'opt-out' approach").

Furthermore, the Court of Appeal did not ignore the discretionary nature of the determination as to whether the privacy rights at stake in a particular case warrant protection and, if so, what protection. Indeed, in its opinion the Court of Appeal sets out in detail the "'analytical framework'" established by this Court in *Pioneer Electronics* for "'assessing claims of invasion of privacy under the state Constitution.'" *Ins. Installment Fee*, 211 Cal. App. 4th at 1420, 150 Cal. Rptr. 3d at 637 (quoting *Pioneer Electronics*, 40 Cal. 4th at 370, 150 P.3d at 204, 53 Cal. Rptr. 3d at 520). The Court of Appeal also sets forth and analyzes in detail the balancing of interests undertaken by Judge Peterson in the trial court. *See* 2011 Cal. App. 4th at 1420-22, 150 Cal. Rptr. 3d at 637-39. This analysis forms the basis for the Court of Appeal's own analysis as to the competing interests in this case, with reference to this Court's discussion of the interests at stake in *Pioneer Electronics. See* 211 Cal. App.4th at 1426-27. The notion urged by CAOC that *Pioneer Electronics* does not support both the specific conclusion that the proposed class members in this case and that putative class members generally have a privacy interest in their identifying information that requires notice and an opportunity to object to release of that information (and possibly other measures as well) is incorrect.

In short, CAOC's reasons for urging depublication are not well taken. The Court of Appeal's opinion does not conflict with *Pioneer Electronics*, as CAOC asserts. Rather, the opinion is a reasoned decision that carefully analyzes this Court's language in *Pioneer Electronics*, and its conclusion flows from this Court's opinion in *Pioneer Electronics*. Contrary to CAOC's assertion (CAOC letter at 2), the opinion is not subject to "misuse as precedent." CAOC has presented no reason that would support banishing the Court of Appeal's opinion from the ranks of citable precedent.

## Conclusion

For all of these reasons, the Court is respectfully asked to deny the CAOC's request to depublish the opinion of the Court of Appeal in *In re Insurance Installment Fee Cases*, 211 Cal. App. 4th 1395, 150 Cal. Rptr. 3d 618 (2012).

Respectfully submitted,

Kara Cross
General Counsel
Personal Insurance Federation of California
(submitted on behalf of PIFC, ACIC, ACLHIC, NAMIC and PADIC)

cc: See attached Proof of Service