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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES and PERSONAL INSURANCE FEDERATION OF CALIFORNIA, Plaintiffs, v. DAVE JONES in his capacity as Commissioner of the California Department of Insurance, Defendant.	CASE NO. BC463124 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' COMPLAINT FOR DECLARATORY JUDGMENT** **DEPT: 36** **ACTION FILED: JUNE 8, 2011** **TRIAL DATE: JANUARY 30, 2013**

I. INTRODUCTION

Plaintiffs bring this action on behalf of their insurance company members that provide insurance to California homeowners. This action requests that the Court declare invalid a regulation that impermissibly creates a new unfair practice. The regulation dictates how insurers are to calculate and communicate estimates of replacement costs to insureds and applicants for insurance and predetermines that any communication that does not follow its dictates is misleading, regardless of whether such a communication, in fact, misleads anyone. The regulation is invalid because it was adopted in excess of the Commissioner's authority, it unlawfully restricts underwriting, and it infringes on the First Amendment rights of Plaintiffs' members.

Virtually every homeowner insurance policy authorized by statute to be sold in California is a "replacement cost" policy. Insurance Code section 10102.[1] Accordingly, a discussion between the homeowner buying insurance and the agent, broker, or insurer selling the policy concerning the estimated cost to replace the structure is inherent in the insurance transaction.

Despite the necessity for an insurance licensee (agent, broker, and insurer) to discuss the estimate of replacement cost with an insured or an applicant for insurance, the Commissioner of the Department of Insurance adopted section 2695.183 of Title 10 of the California Code of Regulations. That section prohibits any licensee from communicating in writing or orally any "estimate, statement, calculation, approximation or opinion" regarding the replacement cost of the structure being considered for insurance unless the licensee complies with the provisions of the regulation (Cal. Code Regs., Tit. 10, section 2695.180(c).) That is, the regulation prohibits all speech concerning an estimate of replacement cost unless the estimate is calculated and communicated in accordance with the methodology dictated. (Cal. Code. Regs., Tit. 10, section 2695.183.)

The regulation requires a licensee to provide not just one estimated value, but to break out the estimate into four separate values - - an estimate for (1) the cost of labor, building materials and supplies; (2) overhead and profit; (3) cost of demolition and debris removal; and (4) cost of permit and

[1] All statutory citations will be to the Insurance Code unless otherwise noted.

architects' plans. *Id.* In addition, the licensee has to include in any opinion expressed about replacement cost, a description of the foundation, frame, roof, siding, contour of the land, square footage, location, number of stories and wall heights, age of the structure, size and type of the garage, and the materials used in interior features and finishes, such as, heating and air conditioning systems, walls, flooring, ceiling, fireplaces, kitchen, and baths. *Id.* All of this is to be provided in writing. *Id.*

In other words, a licensee is rendered mute when the insured or applicant says, "I am thinking I should insure my house for $200,000. What do you think?" The regulation improperly predetermines that any response to this is an unfair claim practice unless the licensee first breaks out the total cost estimate to each of the four cost items and gathers all of the detailed information set out above.

Petitioners filed a complaint for declaratory judgment pursuant to Government Code section 11350 on June 8, 2011, challenging the validity of the regulation and now urge the court to enter judgment for them, invalidating the regulation. Plaintiffs set out three grounds, any one of which is sufficient for the Court to declare the regulation to be invalid.

1. The Commissioner exceeds his statutory authority by usurping the province of the legislature in defining a new unfair business practice. Dictating by regulation how insurance licensees are to calculate and communicate estimates of the cost to replace an applicant or insured's home or other structure, and predetermining that any communication which varies from the methodology dictated is misleading, constitutes a new definition of an unfair business practice, a function that the Legislature has reserved for itself.

2. The Commissioner, without any statutory authority, restricts underwriting by dictating how insurers are to determine the appropriate amount of insurance in deciding whether to accept a risk.

3. The Commissioner infringes the First Amendment rights of insurance licensees by banning all speech about estimates of replacement cost except estimates calculated and communicated as mandated by the regulation.

II. THE REGULATION

In 2010, the Commissioner adopted section 2695.183 to become effective on June 27, 2011. Section

2695.183 imposes on homeowner insurers a single, detailed method for estimating the replacement cost of a house. Section 2695.183 provides: "No licensee shall communicate an estimate of replacement cost to an applicant or insured in connection with an application for or renewal of a homeowners' insurance policy that provides coverage on a replacement cost basis, unless the requirements and standards set forth in subdivisions (a) through (e) below are met:". Cal. Code Regs., Tit. 10, section 2695.183.

Subdivision (a) of section 2695.183 provides as follows:

"(a) The estimate of replacement cost shall include the expenses that would reasonably be incurred to rebuild the insured structure(s) in its entirety, including at least the following:
(1) Cost of labor, building materials and supplies;
(2) Overhead and profit;
(3) Cost of demolition and debris removal;
(4) Cost of permits and architect's plans; and
(5) Consideration of components and features of the insured structure, including at least the following:
A) Type of foundation;
(B) Type of frame;
(C) Roofing materials and type of roof;
(D) Siding materials and type of siding;
(E) Whether the structure is located on a slope;
(F) The square footage of the living space;
(G) Geographic location of property;
(H) Number of stories and any nonstandard wall heights;
(I) Materials used in, and generic types of, interior features and finishes, such as, where applicable, the type of heating and air conditioning system, walls, flooring, ceiling, fireplaces, kitchen and bath(s);
(J) Age of the structure or the year it was built; and
(K) Size and type of attached garage."

Subdivisions (b) through (e) provide as follows:

"(b) The estimate of replacement cost shall be based on an estimate of the cost to rebuild or replace the structure taking into account the cost to reconstruct the single property being evaluated, as compared to the cost to build multiple, or tract, dwellings.

(c) The estimate of replacement cost shall not be based upon the resale value of the land, or upon the amount or outstanding balance of any loan.

(d) The estimate of replacement cost shall not include a deduction for physical depreciation.

(e) The licensee shall no less frequently than annually take responsible steps to verify that the sources and methods used to generate the estimate of replacement cost are kept current to reflect changes in the costs of reconstruction and rebuilding, including changes in labor, building materials, and supplies, based upon the geographic location of the insured structure. The estimate of replacement cost shall be created using such reasonably current sources and methods."

It is in subdivision (g)(2) that the regulation makes explicit that an estimate, to be acceptable, has to be broken out as four estimates. It provides as follows: "An estimate of replacement cost provided in connection with an application for or renewal of a homeowners' insurance policy that provides coverage on a replacement cost basis must itemize the projected cost for each element specified in paragraphs (a)(1) through (4), and shall identify the assumptions made for each of the components and features listed in paragraphs (a)(5), of this Section 2695.183."

The effect of subdivision (j) is to render any estimate calculated or communicated differently than that required by the regulation to be misleading as a matter of law. In other words, such a communication is deemed to be an unfair business practice. It provides as follows: "To communicate an estimate of replacement value not comporting with subdivisions (a) through (e) of this Section 2695.183 to an applicant or insured in connection with an application for or renewal of a homeowners' insurance policy that provides coverage on a replacement cost basis constitutes making a statement with respect to the business of insurance which is misleading and which by the exercise of reasonable care should be known to be misleading, pursuant to Insurance Code section 790.03."

Subdivision (1) contains what, on the surface, appears to be an exception for estimates prepared for underwriting purposes, but, as will be demonstrated later, that exception is illusory. It provides as follows: "This Section 2695.183 applies to all communications by a licensee, verbal or written, with the sole exception of internal communications within an insurer, or confidential communications between an insurer and its contractor, that concern the insurer's underwriting decisions and that never come to the attention of an applicant or insured."

Subdivision (p) also appears to contain an exception to the requirements for underwriting purposes, but, again, as will be demonstrated in the section in the memorandum on underwriting, it, too, is illusory. It provides as follows: "For purposes of this subdivision (p), 'minimum amount of insurance' shall mean the lowest amount of insurance that an insurer requires to be purchased in order for the insurer to underwrite the coverage on a particular property, based upon an insurer's eligibility guidelines, underwriting practices and/or actuarial analysis. An insurer may communicate to an applicant or insured that an applicant or insured must purchase a minimum amount of insurance that

does not comport with subdivisions (a) through (e) of this Section 2695.183; however if the minimum amount of insurance that is communicated is based in whole or in part on an estimate of replacement value, the estimate of replacement value shall also be provided to the applicant or insured and shall comply with all applicable provisions of this article."

Section 2695.183 repeatedly uses the phrase "estimate of replacement cost." That phrase is defined in section 2695.180(e), adopted at the same time as section 2695.183 and reads as follows: "Estimate of replacement value" shall have the same meaning as 'estimate of replacement cost' and means any estimate, statement, calculation, approximation or opinion, whether expressed orally or in writing, regarding the projected replacement value of a particular structure or structures."

III. ARGUMENT

Judgment invalidating section 2695.183 should be granted. No material, disputed fact exists. The regulation is invalid as a matter of law because it was adopted without authority, it unlawfully restricts underwriting, and it violates insurance licensees' First Amendment rights. Any one of the three legal bases for challenging the regulation is sufficient for the court to enter judgment for Plaintiffs.

A. A Court Exercises Its Independent Judgment In Determining the Legal Validity of a Regulation and Must Invalidate An Unauthorized Or Inconsistent Regulation.

The California Administrative Procedure Act sets out in two sections the standards for determining whether the Commissioner has authority or not to adopt regulatory section 2695.183:

"* * * Each regulation adopted, to be effective, shall be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law." Government Code section 11342.1.

"Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute." Government Code section 11342.2.

The California Supreme Court has summarized the authority of a state agency as:

> [A]n executive agency created by statute has only as much rule-making power as is invested in it by statute [Citation omitted.] 'There is no agency discretion to promulgate a regulation

> which is inconsistent with the governing statute,' [Citation omitted.] 'The powers of public [agencies] are derived from the statutes which create them and define their functions.' [Citation omitted.] As we have explained, 'administrative action that is not authorized by, or is inconsistent with, acts of the legislature is void.' [Citation omitted.] And, as another court has announced, 'the rule-making authority of an agency is circumscribed by the substantive provisions of the law governing the agency...regulations that alter or amend the statute or enlarge or impair its scope are void.' [Citation omitted.]
> *Carmel Valley Fire Protection District v. State of California*, 25 Cal. 4th 287, 293 (2001).

As Justice Mosk quotes in his concurring opinion in *Yamaha Corp. of America v. State Board of Equalization*, 19 Cal. 4th 1, 16 (1998), 'The proper scope of the court's review is determined by the task before it.' (Emphasis in the original.) (Citation omitted.) The first duty is 'To determine whether the [agency] exercised [its] quasi-legislative authority within the bounds of the statutory mandate.' (Citation omitted.) 'Whatever the force of administrative construction ... *final responsibility for the interpretation of the law rests with the courts.*' (Emphasis in the original.) (Citations omitted.)

The California Supreme Court has clearly and often articulated the rule of law applicable to determine when an agency's regulation is invalid; that rule of law is applicable to this case. In *Retarded Citizens of California v. Department of Developmental Services*, 38 Cal. 3d 384, 390 (1985), the Court stated, "If, in interpreting the statute, the court determines that the administrative action under attack has, in effect, altered or amended the statute or enlarged or impaired its scope, it must be declared void.' In *Morris v. Williams*, 67 Cal. 2d 773, 748 (1967), the Court said, "Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations."

Other cases confirm the applicable rule of law. *See*, for example, *Preston v. State Board of Equalization*, 25 Cal. 4th 197, 219 (2001) ("regulation that exceeds the scope of the Board's authority is invalid"); *Woods v. Superior Court*, 28 Cal. 3d 668, 680 (1981) ("Repeatedly, we have held that administrative regulations which exceed the scope of the enabling statute are invalid and have no force or life."); *Cooper v. Swoap*, 11 Cal. 3d 856, 864 (1974) ("It is axiomatic, of course, that administrative regulations promulgated under the ageis of a general statutory scheme are only valid insofar as they are authorized by and consistent with the controlling statutes."); *California Welfare Rights Organization v. Brian*, 11 Cal. 3d 237, 242 (1974) ("It is well established that administrative regulations must conform to applicable legislative provisions, and that an administrative agency has no discretion to exceed the

authority conferred upon it by statute.").

As demonstrated below, section 2695.183, does in fact, alter, amend and enlarge the scope of the statute, and thus must be declared void.

B. The Commissioner Has No Authority Under Insurance Code Section 790.10 To Define New Acts As Unfair Business Practices.

While several sections are listed as authority for the regulation (Cal. Code Reg., Tit. 10, section 2695.183.), only two, sections 790.10 and 1749.85, are cited as authority in the responses to Plaintiffs' comments questioning the Commissioner's authority. (Responses to Comments, Final Statement of Reasons, Record, pp. 1591, 1592, 1611, 1616.) The Commissioner's reliance on section 790.10 is misplaced. It only gives the Commissioner authority to administer this article, not to define new acts as unfair business practices. The Legislature has reserved to itself the exclusive authority to define new acts as unfair business practices.

Section 790.10 is part of the Unfair Insurance Practices Act ("UIPA"). That section provides that, "The commissioner shall, from time to time as conditions warrant, after notice and public hearing, promulgate reasonable rules and regulations, and amendments and additions thereto, as are necessary to **administer** this article." (Emphasis added.)

The UIPA begins with section 790. That section provides, "The purpose of this article is to regulate trade practices in the business of insurance . . . by defining, or providing for the determination of all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." It is important to note that section 790 refers to unfair acts or practices as "defined" or "determined."

Section 790.03 provides, "The following are hereby **defined** as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance." (Emphasis added.) Hence, the unfair acts or practices referred to in section 790 as those "defined" are those acts and practices defined by the Legislature in section 790.03.

What then was intended by the provision in section 790 referring to unfair acts or practices to be "determined?" The answer to that question is found in section 790.06. "Whenever the commissioner

shall have reason to believe that any person engaged in the business of insurance is engaging in this state in any method of competition or in any act or practice in the conduct of the business that is not defined in section 790.03, and that the method is unfair or that the act or practice is unfair or deceptive . . he or she may issue and serve upon that person an order to show cause . . . for the purpose of **determining** whether the alleged methods, acts or practices or any of them should be declared to be unfair or deceptive within the meaning of this article."[2] (Emphasis added.)

Hence, the structure of the statutory authority is clear. The Legislature has reserved to itself the authority to define unfair business practices. The Commissioner's authority is limited to determining unfair practices but only if he does so in accordance with section 790.06. The Commissioner cannot define new unfair practices; that role is exclusively retained by the Legislature. The Commissioner cannot determine new unfair practices by regulation; he can do so only pursuant to section 790.06.

The Commissioner has not, nor does he claim to have, adhered to the procedure set out in section 790.06 to determine an act not defined in section 790.03 to be unfair. Rather, he proceeded by regulation to define the act of communicating about estimates of replacement costs to be an unfair act or practice, ostensibly to administer subdivision (b), section 790.03.

The Legislature, in subdivision (b), section 790.03, defines as an unfair act or practice the making of any statement with respect to the business of insurance "which is untrue, deceptive, or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue, deceptive or misleading." While Section 790.10 authorizes the Commissioner to adopt regulations necessary to administer the UIPA, it certainly does not authorize him to alter, amend, or expand the UIPA by defining new unfair business acts and practices. But that is what he has done.

The Commissioner, by adopting the regulation, has predetermined that any communication that varies from the proscribed method is misleading, without having the benefit of reviewing any such communication. The regulation provides that it is an unfair business practice for a licensee to make any

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[2] Section 790.06 provides for a hearing to be held on the basis of the order to show cause, that the hearing is to be conducted in accordance with the quasi-adjudicatory portions of the Administrative Procedure Act, and the commissioner is to issue a written report after the hearing.

statement to an insured or applicant about a replacement cost estimate unless the estimate is calculated and communicated in strict compliance with every requirement in the regulation, even where nothing about the statement is untrue, deceptive, or misleading. A statement about an estimate of replacement cost that is truthful and appropriate is defined to be an unfair business practice by the regulation unless it is calculated and communicated in compliance with the dictates of the regulation. A statement about a replacement cost estimate that is truthful and appropriate cannot violate section 790.03(b), a statute prohibiting untrue, deceptive, and misleading statements. However, it is made an unfair business practice by virtue of the regulation. In fact, the Commissioner admits as much when he states in his responses to comments that the text to section 2695.183(j) was amended to make explicit that communicating an estimate of replacement cost without full compliance with the regulation is deemed to be an unfair business practice. (Responses to Comments, Final Statement of Reasons, Record, pp. 1574, 1590-91.) Hence, the Commissioner has defined a new act as an unfair business practice to be added to those already defined in section 790.03.

The details of the regulation further demonstrate that the Commissioner has gone well beyond administering the provision in section 790.03(b) that prohibits making a statement that is untrue, deceptive, or misleading, defined by the Legislature as an unfair business practice, and is attempting to define unfair business practices himself. The regulation requires any communication about an estimate of replacement cost, even the expression of an opinion, to be communicated in writing. To communicate orally without providing a written estimate is defined to be an unfair business practice, although nothing about the communicated estimate is untrue, deceptive, or misleading.

The regulation requires four separate detailed estimates. An estimate for (1) cost of labor, building materials and supplies, (2) overhead and profit, (3) cost of demolition of debris removal, and (4) cost of permits and architects' plans. (Cal. Code Regs., Tit. 10, section 2695.183.) An estimate that simply totals the cost of those four items and is provided as a single number is defined by the regulation to be an unfair business practice, although nothing about the total estimate is untrue, deceptive, or misleading. A communication that combines, for example, overhead and profit with the cost of labor, building materials and supplies, resulting in three separate estimates, is defined to be an unfair business practice

by the regulation, although nothing about the three estimates is unfair, deceptive, or misleading,

The regulation also requires a communication about an estimate of replacement cost to include in the written estimate a description of the foundation, frame, roof, siding, contour of the land, square footage, location, number of stories and wall heights, age of the structure, size and type of garage, and the materials used in interior features and finishes, such as, heating and air conditioning systems, walls, flooring, ceiling, fireplaces, kitchen, and baths. (Cal. Code Regs., Tit. 10, section 2695.183.) Failure, for example, to correctly identify the flooring in a bathroom would render the communication about the estimate to be an unfair business practice, even if it had no impact on the estimated cost.

The Commissioner defines any communication about an estimate of replacement cost, where the estimate was not calculated or communicated in strict compliance with the regulation, to be an unfair business practice, even if the estimate is accurate and appropriate and there is nothing about the communicated estimate that is unfair, deceptive, or misleading. At the same time, he concedes that the regulation does not necessarily produce accurate estimates: "The regulations do not require of replacement value estimates any particular degree of accuracy." This, and other articulations of the same message are found repeatedly in the Responses to Comments, Final Statement of Reasons. (*See*, for example, Record, pp. 1593, 1623, 1628, 1730.) The effect of the regulation is that an inaccurate and potentially misleading estimate prepared and communicated in accordance with the regulation is deemed to be lawful, but an accurate estimate calculated and communicated differently than what is required in the regulation is deemed to be unlawful.

The Commissioner attempts to characterize the regulation as simply a definition of replacement costs. (Responses to Comments, Final Statement of Reasons, Record, pp. 1569, 1576, 1587.) First, the regulation on its face rebuts that assertion. The regulation is very elaborate. Nowhere does it state that it is merely a definition. Further, the term "estimate of replacement cost" is defined in another section of the regulation as "any estimate, statement, calculation, proximation, or opinion, whether expressed orally or in writing, regarding the projected replacement value of a particular structure or structures." (Cal. Code Regs., Tit. 10, section 2695.180(e).)

Second, one would expect a regulatory definition to be of a term found in the statute being

implemented, interpreted, or made specific. The Commissioner asserts that he is implementing, interpreting, or making specific subdivision (b), section 790.03. (Cal. Code Regs., Tit. 10, section 2695.183.) Yet, nowhere in that subdivision, or in any other provision of the UIPA, are the terms "replacement cost," "replacement value," "estimate of replacement cost" found.

Finally, the Commissioner asserts that, the regulation will end any ambiguity about the meaning of "replacement value" and "estimate of replacement value" and what components are included in making such an estimate. (Responses to Comments, Final Statement of Reasons, Record, p. 1587.) In that same response, he also admits that, "the regulation will provide licensees and their customers the opportunity to more easily do business in California because a term used previously without definition in the homeowner insurance business will now be more clearly defined and **consistent among insurers**." (Emphasis added.)

These statements demonstrate that the Commissioner is going beyond administering section 790.03(b) that prohibits untrue, deceptive, or misleading statements. He insists that every insurer calculate and communicate estimates of replacement cost in a singular way. The estimates don't have to be accurate; they just have to be consistent among insurers. Nothing in section 790.03 prohibits statements that lack consistency among insurers. To achieve that, the Commissioner seeks to define, by regulation and in violation of the specific provisions of sections 790, 790.03, and 790.06, new acts as unfair business practices.

The truth of the matter is that the Commissioner is compelling insurance licensees to include information that he considers to be desirable in all communications concerning estimates of replacement costs, so those communications are "consistent among insurers." He defines any failure to include all of that information in any communication about an estimate of replacement cost to be an unfair business practice. (Cal. Code Regs., Tit. 10, section 2695.183.) This he cannot do by regulation. He can **determine** a new unfair business practice, but only in accordance with the procedures set out in section 790.06. Yet without complying with section 790.06, the Commissioner is attempting to add other acts or practices to those that have been defined by the Legislature to be unfair.

The effect of the Commissioner adopting regulatory section 2695.183 is to render section 790.06

surplusage; the Commissioner simply reads that section right out of the Code. That, of course, violates a fundamental rule of statutory construction. "It is a maxim of statutory construction that 'Courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage.'" *Reno v. Baird,* 18 Cal. App. 4th 640, 658 (1998) (*quoting Arnett v. Dal Cielo,* 14 Cal. 4th 4, 22 (1996)).

Plaintiffs' Complaint for Declaratory Judgment requires this Court to construe the meaning of sections 790.03, 790.06, and 790.10. The fundamental rule of statutory construction is to look at the plain meaning of the statute. "We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend." *Coalition of Concerned Communities, Inc. v. City of Los Angeles,* 34 Cal. 4th 733, 737 (2004). In construing a provision, 'we presume the Legislature meant what it said' and the plain meaning governs." *Smith v. Workers' Compensation Appeals Board*, 46 Cal. 4th 272, 277 (2009) (*quoting People v. Snook*, 16 Cal. 4th 1210, 1215 (1997)).

Here, the statutory provisions are clear and explicit. Section 790 states that the purpose of the UIPA is to regulate insurers' trade practices by **defining** or providing for the **determination** of unfair business practices. The Legislature explicitly defined unfair business practices in section 790.03; that section begins, "The following are hereby defined" as unfair business practices. Then, in section 790.06, the Legislature provided for the **determination** of additional acts that constitute unfair business practices. That section authorizes the Commissioner to add acts of unfair business practices in accordance with the procedures set out in the section. Little could be clearer than the explicit provisions of these three sections.

Section 790.10 provides that the Commissioner may adopt regulations as are necessary to **administer** the UIPA. Nothing in the term "administer" could be construed to be explicit authorization for the Commissioner to define additional acts as unfair business practices by regulation. Also, one

must conclude that the Legislature did not implicitly authorize the Commissioner to define additional acts as unfair business practices. Rather, the Legislature provided for the determination of additional acts in section 790.06.

Another fundamental rule of statutory construction is that the expression of one thing excludes the other. "Under the maxim of statutory construction, *expressio unius est exclusion alterius*, if exemptions are specified in a statute, we may not imply additional exemptions unless there is a clear legislative intent to the contrary." *Sierra Club v. State Board of Forestry*, 7 Cal. 4th 1215, 1230 (1994).)); *accord Gikas v. Zolin*, 6 Cal. 4th 841, 852 (1993) (" *Expressio unius est exclusion alterius.* The expression of some things in a statute necessarily means the exclusion of other things not expressed.") Hence, the Legislature, by expressly authorizing the Commissioner to determine additional unfair business practices pursuant to the procedures set out in section 790.06, excludes the implication that the Commissioner can do the same thing by regulation pursuant to section 790.10.

C. Recent Decisions Confirm That the Commissioner May Not Define By Regulation New Acts As Unfair Business Practices.

To assist the Court, Plaintiffs submit for its consideration two recent decisions. Though neither decision is precedential nor binding on this Court, each is instructive on the interpretation of the regulation and statutory provisions at issue in this case. The first decision is from the Superior Court in Sacramento County, California, and the second is from an administrative law judge acting as a hearing officer for the Department of Insurance. In both instances, the judicial officers analyzed issues nearly identical to those before the Court in this case -- regulations having the effect of defining new acts as unfair business practices. In each case, the judge invalidated regulations adopted by the Commissioner without authority. In each case, the Commissioner pointed to section 790.10 as the source of his authority.

In *Association of California Life & Health Insurance Companies v. California Department of Insurance*, Case No. 34-2010-80000637 (2010), an insurance trade association challenged the adoption of regulations relating to postclaims underwriting. (A copy of the Ruling is attached with the Request for Judicial Notice.) The regulations sought to impose on health insurers an obligation to determine the

accuracy and completeness of the health information provided by applicants for health insurance before issuing policies, rather than rescinding the policies and denying claims based on applicants' providing false or incomplete information in their applications.

The Court concluded that section 790.10 provided no authority to the Commissioner. The Court noted that section 790.10 authorizes the Commissioner to adopt regulations to administer this article. Postclaims underwriting is governed by a separate article, and section 790.03 defines unfair methods of competition and unfair and deceptive acts or practices in the business of insurance in "nine categories of actions, none of which include postclaims underwriting and rescission based thereon." (*ACLHIC v. DOI* Ruling, p. 8.)

The Court continued by saying, "Nothing in the language or structure of Insurance Code § 790.03 indicates that the list of actions is anything but exclusive. The statute does not contain language commonly found in other statutes setting forth a list of included or excluded items, such as 'including, but not limited to'. The Legislature could have easily included postclaims underwriting within the definition of unfair methods of competition or unfair or deceptive acts or practices had it intended Insurance Code § 790.03 to cover this practice. (Citation omitted .)

"Most importantly, however, is the fact that the legislative intent articulated in Article 6.5 supports the conclusion that the Legislature reserved for itself, and only itself, the right to categorically define unfair methods of competition and unfair and deceptive acts or practices." *Id.* At this point, the Court included in a footnote that Insurance Code section 790.06 outlines the procedures to be followed whenever the Commissioner shall have reason to believe that any person engaged in the business of insurance is engaging in this state in any method of competition or in any act or practice in the conduct of the business that is not defined in section 790.03. (*Ibid,* pp.8-9.)[3]

The Court also rejected the Commissioner's argument that the postclaims underwriting regulation is encompassed within section 790.03(h), which defines unfair claims settlement practices.

[3] Despite the trial court's ruling that the Commissioner lacks authority to expand the defined acts of unfair practices by regulation, he did not appeal the decision.

There, the Court noted that the Legislature set out 16 specific types of action and could easily have included postclaims underwriting had it intended for that section to cover that practice.

The second matter, an Accusation filed by the Department against Globe Life & Accident Insurance Company, and other insurers, involved alleged violations of regulations adopted by the Commissioner to administer section 790.03(h), a subdivision containing a list of 16 unfair settlement practices. The Administrative Law Judge's ruling is set out in the Order on Demurrers and Motions to Strike and Dismiss. (A copy of the Order is attached to the Request for Judicial Notice.) In evaluating the Fair Settlement Practices Regulations adopted by the Department, the Administrative Law Judge concluded as follows:

> ". . . the Fair Settlement Practices Regulations impermissibly seek to establish new standards an duties constituting unfair methods of competition and unfair and deceptive acts or practices in the business of insurance within the meaning of Insurance Code section 790.03, subdivision (h), and then seek to penalize respondents for failure to meet the standards, all in derogation of the precedent process required by Insurance Code section 790.06. Thus, under the specific circumstances extant in the manner in which the Fair Settlement Practices Regulations are sought to be applied by the Department in this consolidated OSC, the Regulations are unenforceable." (Order, para. 26, p. 8.)

Throughout the Order, the ALJ repeatedly states that the Legislature reserved to itself exclusive authority to define acts of unfair business practices, that the Commissioner has no authority under section 790.10 to define further acts as unfair business practices, and that the process for the Commissioner to add new acts as unfair business practices is the procedure set out in section 790.06. (Order, para. 86, p. 25; para. 89, pp. 26-27; para. 92, p. 28; para. 96, p. 29; para. 98, pp. 30-31; para. 99, p. 31; and, para. 113, p. 31.)

Paragraph 98 of the Ruling contains a representative statement of the ALJ's conclusions:

> "Applying the principle of *expressio unius est exclusion alterius*, the Legislature's expressed intention to make exclusive the list of unfair methods of competition and unfair and deceptive acts or practices in the business of insurance set forth in section 790.03, any additional purportedly unlawful settlement practice is necessarily prohibited, unless the process set forth in Section 790.06 is followed, or the Legislature adds it itself. In so doing, the Legislature both fully occupied this field and thus preempted the Department from using the process of adopting "interpretative" regulations as an alternative to following the section 790.06 process."

As the Superior Court ruling and the ALJ's order demonstrate, when the issue of the Commissioner's authority to define additional acts as unfair business practices has arisen previously, the

respective judicial officers have concluded that the Commissioner does not have the authority to define new unfair practices by regulation. The Commissioner's authority, if he seeks to determine acts not defined in section 790.03 as unfair, is to follow the procedure set out in section 790.06. On the basis of the same statutory analysis, Plaintiffs urge this Court to reach the same conclusion and invalidate regulatory section 2695.183.

D. The Commissioner Has No Authority Under Insurance Code Section 1749.85 to Restrict Licensees' Communications About Replacement Costs.

As noted above, the Commissioner relies on a second provision of law, section 1749.85, as authority to adopt regulatory section 2695.183. (Responses to Comments, Final Statement of Reasons, Record, pp. 1591, 1592, 1611, and 1616.) The inapplicability of that section to authorize the Commissioner to dictate how insurance licensees are to communicate with insureds and applicants about replacement cost estimates is clear from a review of the section.

Section 1749.85 is in an article entitled "Pre-licensing and Continuing Education." In fact, subdivision (a) of that section refers to a curriculum committee making recommendations to the Commissioner about training for insurance producers and authorizes the Commissioner to approve courses. Subdivision (b) authorizes only "insurer underwriter or actuary or other person identified by the insurer, or a licensed property broker-agent, casualty broker-agent, personal lines broker-agent, contractor, or architect to estimate replacement value of a structure or explain various levels of coverage under a homeowners' insurance policy."

The Legislature adopted an amendment, adding subdivisions (c) and (d). Subdivision (c) provides that this section should not be construed to preclude licensed appraisers, contractors, and architects from estimating replacement value of a structure." Subdivision (d) provides that "If the Department of Insurance, by adopting a regulation, establishes standards for the calculation of estimates of replacement value of a structure by **appraisers**, then on and after the effective date of the regulation a real estate appraiser's estimate of replacement value shall be calculated in accordance with the regulation." (Emphasis added.)

Real estate appraisers are licensed by another agency and are not ordinarily subject to

Department of Insurance regulations. Accordingly, the Legislature had to provide specifically that in this one instance, they may be subject to a regulation adopted by the Department of Insurance.

Section 1749.85 is significant to this matter for two reasons. First, the Legislature authorized the Department of Insurance to establish estimating standards for appraisers, but did not include in that grant of authority the imposition of standards on insurance licensees. Rather, subdivision (b) raises the inference that the Legislature views licensees and those involved in the business of insurance to be capable of estimating replacement costs without regulatory constraints. It does so by exempting licensees from the ban imposed on others to estimate replacement costs.

Second, subdivision (b) also accepts that contractors and architects are competent to estimate replacement costs without regulatory constraints. Subdivision (c) confirms this by providing specifically that the prohibition in subdivision (b) does not apply to appraisers, contractors, and architects. However, subdivision (d) then conditions estimates prepared by appraisers to those conducted in accordance with regulations adopted by the Department of Insurance. These provisions demonstrate the Legislature's intent that estimates prepared by contractors and architects, as well as insurance licensees, can be made outside of any standards established by the Department of Insurance. By expressly subjecting appraisers to regulation by the Commissioner in a section that deals with architects, contractors, and insurance licensees, the Legislature evidences its intent that the Commissioner's authority is limited. Once again, the rule of statutory construction that the expression of one thing excludes others is applicable. *Sierra Club v. State Board of Forestry*, 7 Cal. 4th 1215, 1230 (1994).)); *accord Gikas v. Zolin*, 6 Cal. 4th 841, 852 (1993). The Commissioner has no more authority to regulate the calculation and communication of replacement cost estimates by insurance licensees than he does by architects and contractors.

Section 1749.85 authorizes the Commissioner to adopt standards for calculating replacement cost estimates prepared by appraisers, but appraisers only. The section demonstrates the Legislature's intent to leave insurance licensees, contractors, and architects free of standards that may be imposed by the Commissioner.

In adopting regulatory section 2695.183, the Commissioner has exceeded the scope of his

authority and acted inconsistently with the provisions of the UIPA and section 1749.85. On this ground alone, the Court should declare the regulation invalid and grant judgment for Plaintiff.

E. The Regulation Unlawfully Restricts Underwriting.

In *Smith v. State Farm,* 93 Cal.App.4th 700, 726 (2001), the Court of Appeal for the 2nd District said "Underwriting is a label commonly applied to the process, fundamental to the concept of insurance, of deciding which risks to insure and which to reject in order to spread losses over risks in an economically feasible way. [Citations omitted.] Given such understanding . . . it seems to us that an underwriting rule is properly characterized as a rule followed by or adopted by an insurer or a rating organization which either (1) *limits* the conditions under which a policy will be issued or (2) *impacts* the rates that will be charged for that policy."

The Commissioner asserts that that regulatory section 2695.183 does not impact underwriting (Responses to Comments, Final Statement of Reasons, Record, pp. 1569, 1594, and 1595.). Specifically, he points to subdivisions (l) and (p) of that section as the basis for his assertion. (Record, pp. 1594 and 1595.) At first glance, those subdivisions give the appearance that calculating and communicating estimates of replace cost for underwriting purposes is exempt from the mandatory provisions of the regulation. However, a closer look at the actual language in those subdivisions and the specific statutory requirements that impose on insurers the obligation to calculate and communicate replacement cost to insureds and applicants demonstrates that the regulation directly impacts underwriting.

Subdivision (l) provides that the regulatory section "applies to all communications by a licensee, verbal or written, with the sole exception of internal communications within an insurer, or confidential communications, between an insurer and its contractor, that concern that insurer's underwriting decisions and that never come to the attention of an applicant or insured."

Inherent in subdivision (l), is the recognition that insurers prepare estimates for replacement cost to make underwriting decisions. These decisions may be to decline the risk, to accept the risk provided the coverage amount is changed, or to accept the risk without conditions. Subdivision (l) exempts the insurers' estimates of replacement cost from the requirement of regulatory section 2695.183 provided a

communication about the estimate "never comes to the attention of an applicant or insured."

The truth of the matter is that communications about insurer's underwriting decisions do come to the attention of applicants and insureds, and particularly so with respect to adverse underwriting decisions. Insurance Code section 791.10 deals with adverse underwriting decisions such as declinations, cancellations, or non-renewals. In the event of an adverse underwriting decision, that statutory section requires either the insurer or its agent to provide the applicant or insured with "the specific reason or reasons for the adverse underwriting decision."

When an insurer notifies an insured or applicant that it declines to accept a risk or non-renews an existing policy, on the ground that the coverage proposed by the applicant or insured is too low or too high, it is, in effect, communicating information about an estimate of replacement cost. After all, the definition of "estimate of replacement cost" means any statement or opinion regarding the projected replacement value of a structure. Hence, a communication that a risk is declined or non-renewed because the proposed coverage amount was too low or too high is a statement or opinion regarding the projected replacement value and falls within the ambit of this regulation.

Similarly, an underwriting decision that the risk will be accepted only if the coverage amount is increased is also an adverse underwriting decision covered by Insurance Code 791.10. It results in the applicant or insured having to pay a higher premium. (*See* Insurance Code section 791.02(a)(1), including within the definition of an adverse underwriting decisions charging a higher rate on the basis of information that differs from that furnished by the insured or applicant.) When an insurer concludes that the coverage proposed by the insured or applicant is too low, that is information that differs from the information provided by the insured or applicant, and the cost of the insurance will be higher based on the insurer's estimate of the replacement cost. Subdivision (l), while appearing to exempt underwriting decisions, fails to do so because Insurance Code section 791.10 requires licensees to communicate the reasons when an adverse underwriting decision is made.

Subdivision (p) provides as follows: "For purposes of this subdivision (p), 'minimum amount of insurance' shall mean the lowest amount of insurance that an insurer requires to be purchased in order for the insurer to underwrite the coverage on a particular property, based upon an insurer's eligibility

guidelines, underwriting practices and/or actuarial analysis. An insurer may communicate to an applicant or insured that an applicant or insured must purchase a minimum amount of insurance that does not comport with subdivisions (a) through (e) of this Section 2695.183; however, if the minimum amount of insurance that is communicated is based in whole or in part on an estimate of replacement value, the estimate of replacement value shall also be provided to the applicant or insured and shall comply with all applicable provisions of this article."

Once again, subdivision (p) appears to create an exemption for communications about an insurer's "minimum amount of insurance." The subdivision allows the minimum amount of insurance to be communicated to an applicant or insured as long as the amount is not "based wholly or in part on an estimate of replacement value." If it is based on an estimate of replacement value, the estimate shall comply with the provisions of the regulation.

Insurance Code section 10102 sets out the coverages that insurers may offer:

- guaranteed replacement cost with full code upgrades
- guaranteed replacement cost with limited or no code upgrades
- limited replacement cost with extended coverage, that is, a percentage amount over the policy limits
- limited replacement cost up to the policy limits with no extended coverage
- actual cash value that pays the fair market value of the dwelling, or the cost to repair, to rebuild, or to replace the dwelling.

Those coverages, without any significant exception, are all predicated on replacement cost. Therefore, an insurer cannot sell insurance that covers the replacement cost of a structure and establish a "minimum amount of insurance" based on anything other than an estimate of replacement cost.

The Commissioner does not claim authority to regulate underwriting. Rather, as noted above, he asserts the regulation does not impact insurers' ability to underwrite. (Record, pp. 1569, 1594, and 1595.) Nevertheless, in an effort to answer any question that may arise about the Commissioner's authority to regulate the underwriting of homeowners insurance, the issue is briefly addressed below.

While Proposition 103 conferred authority on the Commissioner to regulate rates for

homeowner's insurance, it conferred no authority to regulate underwriting for homeowner's insurance. Insurance Code section 1861.01 et seq. Proposition 103 also affected the underwriting of auto insurance. It mandated that insurers cover all "good drivers." Insurance Code section 1861.02 and 1861.025. However, Proposition 103 added no provision limiting homeowners' insurers' underwriting discretion.

Other provisions of the Insurance Code impose certain limitations on insurers' rights to cancel a policy, to non-renew, or to decline coverage. See, for example, sections 675 (an insurer may not refuse to renew a policy solely on the grounds of a pending claim), 676 (after a policy has been in effect for 60 days, it can be canceled only for nonpayment of premium, conviction of a crime that increases the hazard insured against, or discovery of fraud), 676.9 (no insurer may refuse to accept, renew, or cancel, restrict, or terminate because the applicant or insured is a victim of domestic violence), 676.10 (no insurer shall cancel or refuse to renew solely because a hate crime was committed against the insured or applicant), and 791.12 (no insurer may base an adverse underwriting decision on a previous adverse underwriting decision or on an inquiry about coverage under a homeowner's insurance policy).

While the regulation may not dictate an insurer's underwriting decision whether to accept a particular risk, however, that decision is inextricably joined with an insured or applicant's choice about how much insurance to buy, that is, the coverage amount. The coverage amount cannot be separated from the decision to write homeowner's insurance, because homeowner's insurance is predicated on replacing the structure or providing the equivalent of the replacement cost.

Homeowner's insurance differs from auto, health, and life. As long as a driver purchases the minimum amount of auto insurance required by law, the amount is irrelevant from an underwriting perspective. With respect to health insurance, buyers have numerous options -- what services are covered and what exemptions exist. Similarly, the amount of life insurance a person chooses to buy is the insured or applicant's choice. The amount does not implicate generally the underwriting decision of whether to cover the risk or not.

The amount of homeowners' insurance is an essential part of the underwriting decision. The risk accepted is to pay the cost of replacing the structure. Hence, an insurer can undertake that risk only if a

homeowner purchases a coverage amount commensurate with that risk. The restrictions that the regulation imposes on insurers in calculating and communicating an estimate of replacement cost directly burdens the underwriting decision about whether to accept a risk, and, if so, at what amount. The Commissioner has unlawfully restricted homeowner insurers underwriting, and, on this ground alone, the Court should declare regulatory section 2695.183 invalid and grant judgment for Plaintiffs.

F. The Regulation Infringes on Insurance Licensees' First Amendment Rights.

In its landmark decision, *Central Hudson Gas & Elec. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), the United States Supreme Court established standards to determine the validity of restrictions imposed on commercial speech by state agencies. The Court noted, "The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. *Virginia Pharmacy Board*, 425 U.S., at 761-762. Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. In applying the First Amendment to this area, we have rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech." *Central Hudson*, 447 U.S. at 561-562.

The Court, in *Central Hudson*, also stated that, "The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the State interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." *Id.* at 564[4].

Expanding on the two criteria, the Court said, "Under the first criterion, the Court has declined to

[4] "Under a commercial speech inquiry, it is the State's burden to justify its content-based law as consistent with the First Amendment." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011) (citing *Thompson v. Western States Medical Center*, 535 U.S. 357, 373 (2002)).

uphold regulations that only indirectly advance the State interest involved." *Id.* Continuing, the Court said, "The second criterion recognizes that the First Amendment mandates that speech restrictions be 'narrowly drawn.' The regulatory technique may extend only as far as the interest it serves . . . nor can it completely suppress information when narrower restrictions on expression would serve its interest as well." *Id.* at 565. The Court summarized its previous discussion with respect to the two criteria by saying, "we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.* at 566.

The regulation ostensibly was adopted to prevent untrue, deceptive or misleading statements about replacement cost estimates, that articulates the Commissioner's interest. Accordingly, the first inquiry is whether the regulation is designed to directly advance that governmental interest.

Repeatedly, the Commissioner admitted in his Responses to Comments, Final Statement of Reasons that the regulation does not require any estimate of replacement cost calculated and communicated in accordance with the regulation to be accurate. (Record, pp. 1593, 1623, 1628, and 1630.) A regulation that results in inaccurate estimates of replacement costs no more advances the Commissioner's asserted interest than does the advertising ban advance the interest of Arizona to protect the quality of attorney work in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Accordingly, the regulation fails the first criterion of *Central Hudson.*

The regulation also fails the second criterion of the *Central Hudson* test. *Central Hudson*, 447 U.S. at 565. The regulation is not "narrowly drawn" as it is more extensive than is necessary to serve the governmental interest. *Id.*

As noted previously, the regulation prohibits licensees from communicating with any insured or applicant about estimates of replacement cost unless the estimate is calculated and communicated in strict compliance with the regulation. Courts have invalidated regulations that restrict speech by prohibiting all communications other than that compelled by the state agency. *See*, for example, *ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc.*, 138 Cal.App. 4th 1307 (2006).

The U.S. Supreme Court dealt with a situation nearly identical to the instant case in *In re RMJ*, 455 U.S. 191 (1982). In that case, the Missouri Supreme Court disciplined a lawyer for using words in

an advertisement that differed from the specific words that a bar rule permitted. *In re RMJ*, 455 U.S. at 194-196. The rule permitted a lawyer to include in an advertisement ten categories of information; name, address and telephone number, areas of practice, date and place of birth, schools attended, foreign language ability, office hours, fee for an initial consultation, availability of the schedule of fees, credit arrangements, and the fixed fee to be charged for certain specific routine legal services. *Id.* The rule also listed ten routine services which might be advertised. *Id.*

With respect to the areas of practice, the Missouri rule provided three general areas; general civil practice, general criminal practice, or general civil and criminal practice. *Id.* The rule provided that if one of those general practice areas was included in the advertisement, the lawyer could not use any one of 23 specific areas. *Id.* at 195. The specific areas included administrative law, bankruptcy, family law, labor law, tort law, and workers compensation law. *Id.* The rule required the areas of practice to be expressed in the precise words included in the rule. *Id.*

The lawyer, subject to discipline imposed by the Missouri Supreme Court, included in his advertisement that he was admitted to practice in both Missouri and Illinois, a category of information not permitted under the rule. *Id.* at 196-198. He also stated that he practiced real estate law rather than property law, personal injury rather than tort law, and he included eight areas in the advertisement that are not listed in any manner by the rule. *Id.* The Court invalidated the rule and reversed the decision of the Missouri Supreme Court. *Id.* at 206-207.

In determining whether the regulation is not more extensive than necessary to serve a compelling state interest, courts have expressed preference for disclaimers rather than restrictions on speech. *Id.* at 203. For example, the Supreme Court in the case of *In re RMJ* stated "the Court in *Bates* suggested that the remedy in the first instance is not necessarily a prohibition, but preferably a requirement of disclaimer as an explanation." 455 U.S. at 203.

In addition, the D.C. Circuit Court of Appeal concluded in *Pearson v. Shalala*, 164 F. 3d 650 (D.C. Cir. 1999), a case very similar to the instant case, that disclaimers, rather than outright bans, are a more reasonable fit. There the court held that the Commissioner of the Food and Drug Administration could not prohibit all claims about food supplements except those approved by the FDA in doing so, the

court stated:

> In *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), the Supreme Court addressed an argument similar to the one the government advances. The State Bar had disciplined several attorneys who advertised their fees for certain legal services in violation of the Bar's rule, and sought to justify the rule on the ground that such advertising is inherently misleading "because advertising by attorneys will highlight irrelevant factors and fail to show the relevant factor of skill." *Id.* at 372, 97 S.Ct. 2691. The Court observed that the Bar's concern was "not without merit," but refused to credit the notion that "the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information." Id. at 374-75, 97 S.Ct. 2691. Accordingly, the Court held that the "incomplete" attorney advertising was not inherently misleading and that "the preferred remedy is more disclosure, rather than less." Id. at 376, 97 S.Ct. 2691. In more recent cases, the Court has reaffirmed this principle, repeatedly pointing to disclaimers as constitutionally preferable to outright suppression. See *Peel*, 496 U.S. at 110, 110 S.Ct. 2281; RMJ, 455 U.S. at 206 n. 20, 102 S.Ct. 929; *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466, 478, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988).

Pearson, 164 F.3d at 657.

The *In re RMJ* and *Pearson* analysis is applicable to regulatory section 2695.183. Section 2695.183 bans all communications by insurers, whether made directly or indirectly through agents and brokers, except those authorized by the Commissioner. If any communication about estimates of replacement cost is potentially misleading, the solution is disclaimers and not prohibitions.

A variety of disclaimers could address any concerns about potentially misleading communications surrounding replacement cost. A disclaimer could remind insureds and applicants that it's their responsibility to select a coverage amount[5], the amounts to be paid in case of a total loss. Similarly, a disclaimer could emphasize that an estimate provided by an insurer is only an estimate, it is not a guarantee of what the actual cost may be in the future.

The regulation fails the two critical prongs of *Central Hudson,* that is, the regulation does not

[5] It is up to the homeowner to determine how much insurance to buy, that is, to set the policy limits. *Everett v. State Farm*, 162 Cal.App.4th 649 (2008).

directly advance the governmental interest asserted, and it is more extensive than is necessary to serve that interest. Because of its failure to meet those tests, the regulation is invalid, and, on that ground alone, this Court should declare regulatory section 2695.183 invalid and grant judgment for Plaintiffs.

IV. CONCLUSION

The only issues presented to this court for resolution are legal ones. Plaintiffs are entitled to judgment if any one of the legal challenges to the regulation is upheld. All three of the challenges are substantial and should be sustained under the law. Nothing in the UIPA authorizes the Commissioner to adopt the regulation. The regulation unlawfully restricts insurers' underwriting decisions, and the regulation infringes on insurance licensees' First Amendment rights in communicating with insureds and applicants about estimates of replacement cost.

Plaintiffs urge this Court to declare regulatory section 2695.183 invalid and enter judgment for them.

DATED: December 14, 2012

GREENBERG TRAURIG, LLP

By: _____
GENE LIVINGSTON
Attorneys for Plaintiffs Association of California Insurance Companies and Personal Insurance Federation of California

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DECLARATION OF SERVICE

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in this action. I am employed in the County of Sacramento, State of California and my business address is Greenberg Traurig, LLP, 1201 K Street, Suite 1100, Sacramento, CA 95814. On this day I caused to be served the following document(s):

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' COMPLAINT FOR DECLARATORY JUDGMENT

☒ by placing ☐ the original ☒ a true copy into sealed envelopes addressed and served as follows:

Lisa Chao
Deputy Attorney General
Office of the Attorney General
300 South Spring Street, Suite 1702
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Telephone: (213)897-2488
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Attorney for Defendant
DAVE JONES, California Insurance Commissioner

☐ **BY MAIL**: I am familiar with this firm's practice whereby the mail, after being placed in a designated area, is given fully prepaid postage and is then deposited with the U.S. Postal Service at Sacramento, California, after the close of the day's business.

☐ **BY PERSONAL SERVICE**: I caused such envelope to be delivered by hand.

☐ **BY OVERNIGHT COURIER**: I caused such envelope to be placed for collection and delivery in accordance with standard overnight delivery procedures for delivery the next business day.

☒ **BY ELECTRONIC SERVICE**: I caused such document(s) to be transmitted by electronic mail delivery to the following e-mail address: lisa.chao@doj.ca.gov.

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

Executed on December 14, 2012 at Sacramento, California.

Lynne Koroush
LYNNE KOROUSH