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CONFORMED COPY  
ORIGINAL FILED  
Superior Court of California  
County of Los Angeles

MAY 07 2013

John A. Clarke, Executive Officer/Clerk

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  
[PROPOSED] JUDGMENT  
  
DEPT: 36  
  
ACTION FILED: JUNE 8, 2011  
TRIAL DATE: FEBRUARY 4, 2013

BY FAX

1 The trial of this matter, an action for declaratory judgment, was held on February 4, 2013, in  
2 Department 36 of the above-entitled court before the Honorable Gregory Alarcon. Plaintiffs appeared  
3 by their counsel, Gene Livingston. Defendant appeared by his counsel, Lisa Chao, Deputy Attorney  
4 General.

5 In this matter, the parties provided the Record of the Rulemaking Proceeding, submitted written  
6 briefs, and made oral argument; they both requested a statement of decision and both submitted a  
7 proposed statement of decision; and, they submitted the matter for decision by this Court. The Court  
8 filed the attached written Statement of Decision on March 25, 2013.

9 IT IS ORDERED, ADJUDGED, AND DECREED THAT:

- 10 1. Plaintiffs' request for declaratory judgment against Defendant Dave Jones, in his capacity as  
11 Commissioner of the California Department of Insurance, is granted as set out more fully in the  
12 attached Statement of Decision.
- 13 2. Pursuant to Government Code section 11350, section 2695.183 of Title 10 of the California Code  
14 of Regulations is declared to be invalid, in that the Commissioner exceeded his authority by  
15 attempting to define additional acts or practices as unfair or deceptive by regulation, rather than  
16 by the procedure set out in Insurance Code section 790.06.
- 17 3. The Court, having concluded that the Commissioner lacks authority to adopt regulatory section  
18 2695.183, need not address Plaintiffs' remaining grounds for challenging the validity of the  
19 regulation.
- 20 4. Plaintiffs are to recover from Defendant their costs in pursuing this action.

21  
22 DATED: MAY 07 2013

**Gregory W. Alarcon**

\_\_\_\_\_  
The Honorable Gregory Alarcon  
Judge of the Superior Court

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County of Los Angeles

MAR 25 2013

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

John A. Clarke, Executive Officer/Clerk

ASSOCIATION OF CALIFORNIA  
INSURANCE COMPANIES and PERSONAL  
INSURANCE FEDERATION OF  
CALIFORNIA,

Plaintiffs,

vs.

DAVE JONES, in his capacity as Commissioner  
of the California Department of Insurance,

Defendants.

Case No.: BC 463124

COMPLAINT FILED: June 8, 2011

STATEMENT OF DECISION

DEPARTMENT 36

TRIAL DATE: February 4, 2013

I. INTRODUCTION

This is a statement of decision following a court trial. In this action, Plaintiffs have moved for declaratory relief to seek judgment declaring a regulation, 10 CCR §2695.183, to be invalid. In 2010, the Commission of the Department of Insurance, Steve Poizner, adopted section 2695.183 of Title 10 of the California Code of Regulations.

This section imposes on homeowner insurers a specified method for estimating the replacement cost of a house, prohibiting an insurance licensee from communicating any estimate of replacement cost unless it is prepared and communicated in accordance with this regulation. Regulatory section 2695.183 allegedly severely limits communications by insurers to their insureds or applicants for insurance about the estimated cost of replacing insured's and

1 applicant's homes in the event of a total loss. The regulation bans all such communications  
2 unless the estimate of replacement cost is derived in accordance with the method provided by the  
3 regulation. Section 2695.183 became effective by its terms on June 27, 2011.

4 Defendant maintains it has the authority to adopt the regulation under Cal Ins Code §§  
5 790.03(b), 790.10, 1749.85, and 1749.7. 790.10 authorizes the Commissioner to adopt  
6 reasonable rules and regulations necessary to administer the Unfair Insurance Practices Art.

7 Cal Ins Code § 790.03(b) defines acts or practices that are unfair or deceptive: "The  
8 following are hereby defined as unfair methods of competition and unfair and deceptive acts or  
9 practices in the business of insurance...(b) Making or disseminating or causing to be made or  
10 disseminated before the public in this state, in any newspaper or other publication, or any  
11 advertising device, or by public outcry or proclamation, or in any other manner or means  
12 whatsoever, any statement containing any assertion, representation or statement with respect to  
13 the business of insurance or with respect to any person in the conduct of his or her insurance  
14 business, which is untrue, deceptive, or misleading, and which is known, or which by the  
15 exercise of reasonable care should be known, to be untrue, deceptive, or misleading."

17 Cal Ins Code § 1749.85(a) provides guidance for instruction/training for methods of  
18 estimating replacement costs, § 1749.85(b) prevents non-licensees from providing estimates of  
19 replacement costs, and § 1749.85(d) requires appraisers to use any standards for calculating  
20 estimates of replacement costs adopted by the Department of Insurance.

21 Cal Ins Code § 1749.7 provides the commissioner with authority to enact regulations  
22 under this article.  
23  
24

25 **II. LEGAL STANDARD**

1 Cal Gov Code § 11342.2 provides the general standard of review for determining the  
2 validity of administrative regulations. That section states that "[w]henver by the express or  
3 implied terms of any statute a state agency has authority to adopt regulations to implement,  
4 interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted  
5 is valid or effective unless [1] consistent and not in conflict with the statute and [2] reasonably  
6 necessary to effectuate the purpose of the statute."  
7

8 Under the first prong, the judiciary independently reviews the administrative regulation  
9 for consistency with controlling law. *Communities for a Better Environment v. California*  
10 *Resources Agency* (2002) 103 Cal. App. 4th 98, 108. The question is whether the regulation  
11 alters or amends the governing statute or case law, or enlarges or impairs its scope. *Id.* The  
12 question is whether the regulation is within the scope of the authority conferred. If it is not, it is  
13 void. *Id.* Under the second prong, the question is whether the agency's action was arbitrary,  
14 capricious, or without reasonable or rational basis. *Id.*

15 **III. DISCUSSION**

16 The court finds that Defendant did not have the authority to adopt 10 CCR §2695.183  
17 under Cal Ins Code § 790.03(b). Section 790.03(b) defines unfair competition as any  
18 communications to insureds which are "untrue, deceptive, or misleading, and which [are] known,  
19 or which by the exercise of reasonable care should be known, to be untrue, deceptive, or  
20 misleading."  
21

22 Defendant argues that 10 CCR §2695.183 simply interprets Cal Ins Code § 790.03(b) by  
23 "identifying one particular variety of misleading statement which licensees know or should know  
24 is misleading: to describe as a replacement cost estimate an estimate that fails to consider all of  
25 the elements which no one dispute may in fact need to be paid for in the event of a total loss."

1 [Opp., p. 10]. Defendant appears to imply it has the regulatory authority under §790.03(b) to  
2 define anything not previously defined as “untrue, deceptive, or misleading” in the name of the  
3 public good. (Defendant’s Proposed Statement of Decision at page 5.)

4 “Estimates” of replacement costs are inherently inaccurate, but not misleading. They are  
5 only misleading if one claims or implies they’re accurate. By characterizing all estimates of  
6 replacement costs as misleading (save the one provided by 10 CCR §2695.183), Defendant, in  
7 exercising its authority under Cal Ins Code §790.10, expands the meaning of something “known”  
8 or which “should be known” to be misleading beyond the parameters of §790.03(b).  
9

10 The language of §790.03(b) does not grant Defendant the authority to penalize acts not  
11 known or cannot be determined through reasonable care to be misleading. The limits of the  
12 authority granted by §790.03 are underscored by Cal Ins Code § 790.06 which provides a special  
13 process which the commissioner can determine how acts not listed in §790.03 can be defined as  
14 unfair or deceptive.

15 To follow Defendant’s interpretation of §790.03(b) would be to obviate the need for  
16 §790.06, and statutes should be interpreted in such a way as to make them consistent with each  
17 other. *Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal. 3d 288, 298, See Defendant’s  
18 Proposed Statement of Decision at pages 5 to 6.). Therefore, because 10 CCR §2695.183  
19 improperly alters the scope of Cal Ins Code §790.03(b), its adoption cannot be justified.  
20

21 Defendant did not have the authority to adopt 10 CCR §2695.183 under Cal Ins Code §  
22 1749.85. Cal Ins Code § 1749.85(a) does not contemplate the adoption of an unfair business  
23 practice regulation like 10 CCR §2695.183, for it merely concerns the prelicensing curriculum  
24 for brokers, agents, etc. The remaining cited sections of Cal Ins Code § 1749.85 are likewise  
25 inapplicable as (b) precludes *non-licensees* from providing estimates of replacement value and

1 (d) concerns the adoption of standards for estimates of replacement value for *appraisers*, not  
2 *licensees*.

3 Defendant argues that even without specific statutory authority, it possess a general  
4 power to adopt regulations as necessary to promote the public welfare, citing *Calfarm Ins. Co. v.*  
5 *Deukmejian*, 48 Cal.3d 805, 824 (1989). (Defendant's Proposed Statement of Decision at 5-6).  
6 Defendant overstates the dicta in *Calfarm Ins. Co.*, for the court only mentions this authority in  
7 the context of a void statutory scheme that requires the agency to fill in the blanks. *See id.* This  
8 limited context is further underscored by the *Calfarm Ins. Co.* Court citing to *Credit Ins. General*  
9 *Agents Asso. v. Payne* (1976) 16 Cal. 3d 651, 656 which cautions that "promoting the public  
10 welfare" does not mean "vary[ing] or enlarge[ing] the terms of an enabling statute" or "issu[ing]  
11 regulations which conflict with this or any other statute." In this case, the statutory scheme  
12 provided by §§790.03 and 790 clearly delineate what procedures the commissioner must go  
13 through in order to adopt regulations concerning deceptive acts.  
14

#### 15 16 **IV. CONCLUSION**

17 Plaintiffs request for declaratory relief against Defendant Dave Jones, in his capacity as  
18 Commissioner of the California Department of Insurance, is granted. Pursuant to Government  
19 Code section 11350, the regulation section 2695.183 is invalid and that the Commissioner  
20 exceeded his authority by attempting to define additional acts or practices as unfair or deceptive  
21 by regulation rather than by the procedure set out in section 790.06. Having concluded that the  
22 Commissioner lacks this authority, the Court need not address Plaintiffs' remaining grounds for  
23 challenging the validity of the regulation. Plaintiff is to file a proposed judgment, consistent  
24 with this statement of decision, within 10 days of this ruling.  
25

1 DATED:

MAR 25 2013

2  
3 **Gregory W. Alarcon**

4 \_\_\_\_\_  
5 HON. GREGORY ALARCON  
6 JUDGE OF THE SUPERIOR COURT  
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1 *Association of California Insurance Companies, et al. v. Dave Jones*  
2 Los Angeles County Superior Court Case No. BC463124

3 **DECLARATION OF SERVICE**

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

8 **[PROPOSED] JUDGMENT**

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

10 Lisa Chao	Attorney for Defendant
11 Deputy Attorney General	DAVE JONES, California Insurance
12 Office of the Attorney General	Commissioner
13 300 South Spring Street, Suite 1702	
14 Los Angeles, CA 90013	
15 Telephone: (213)897-2488	
16 Facsimile: (213) 897-5775	

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

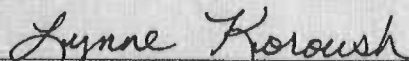
20  **BY PERSONAL SERVICE:** I caused such envelope to be delivered by hand.

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

23  **BY FACSIMILE:** I caused such document(s) to be transmitted by facsimile transmission from  
24 (916) 448-1709 to the person(s) and facsimile transmission number(s) shown above. The  
25 facsimile transmission was reported as complete without error and a transmission report was  
26 properly issued by the transmitting facsimile machine. A true and correct copy of the  
27 transmission report will be attached to this proof of service after facsimile service is completed.

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

Executed on April 3, 2013, at Sacramento, California.

  
LYNNE KOROUSH