No. S226529

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES AND PERSONAL INSURANCE FEDERATION OF CALIFORNIA,
*Plaintiffs and Respondents,*

v.

DAVE JONES IN HIS CAPACITY AS COMMISSIONER OF THE CALIFORNIA DEPARTMENT OF INSURANCE,
*Defendant and Appellant.*

---

After a Decision By The Court of Appeal
Second Appellate District, Case No. B248622
Los Angeles County Superior Court Case No. BC463124
The Honorable Gregory W. Alarcon, Judge Presiding

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# ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES & PERSONAL INSURANCE FEDERATION OF CALIFORNIA'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

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## I. INTRODUCTION

In their amicus briefs, Consumers for Reliability and Safety, East Bay Community Law Center, Housing and Economic Rights Advocates, Public Counsel, and Public Good Law Center (collectively, "Consumers"), United Policyholders, and Professor Michael R. Asimow offer variations on the same tenuous arguments raised by the Commissioner in his merits briefs. These arguments do not warrant overturning the judgments of the Court of Appeal and the trial court invalidating the regulation challenged here, for the reasons given in the answer brief on the merits of Respondents Association of California Insurance Companies and Personal Insurance Federation of California ("Respondents" or "the Associations"), in this brief, and in the other amici briefs filed in this case.[1]

Professor Asimow, United Policyholders, and Consumers basically reprise the Commissioner's principal argument that the Commissioner shares "joint lawmaking" power with the Legislature "in the area of underinsurance" and that, by exercising his "broad, quasi-legislative ... authority," the Commissioner can supposedly "work together" with the Legislature to define what constitutes unfair or misleading practices under

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[1] (See, e.g., Brief of Amicus Curiae National Federation of Independent Business Small Business Legal Center, California Business Roundtable, and California Chamber of Commerce (collectively, "NFIB"); Brief of Amicus Curiae Pacific Association of Domestic Insurance Companies ("PADIC").)

the Unfair Insurance Practices Act ("UIPA"). (Opening Brief on the Merits ("OBM") at pp. 7-13, 30-31; Reply Brief on the Merits ("RBM") at pp. 1, 15; Ins. Code, § 790 et seq.)[2] But this notion runs counter to the plain language of the UIPA, in which the Legislature has specifically "define[d]" and spelled out—in 29 separate subdivisions and subparts—what constitutes an "unfair method[] of competition [or an] unfair and deceptive act[] or practice[] in the business of insurance" in California (§ 790.03), and has delegated to the Commissioner only the power to "determin[e]," on a case-by-case basis and with the concurrence of a superior-court judge, whether particular acts and practices not already "defined in Section 790.03" by the Legislature "should be declared to be unfair or deceptive within the meaning of this article" (§ 790.06). The Legislature has thus retained for itself lawmaking power in the area of underinsurance.

The amici supporting the Commissioner are also wrong in contending that the Legislature created a substantive "gap-filling mechanism" in section 790.10 to enable the Commissioner to quasi-legislatively define new kinds of "unfair and deceptive acts or practices" or "unfair methods of competition" not encompassed by section 790.03's 29 subdivisions and subparts. (Brief of Amicus Curiae United Policyholders at p. 21; Brief of Amicus Curiae Consumers at p. 1; RBM at

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[2] All references are to the Insurance Code unless indicated otherwise.

pp. 9, 12, 17.) Section 790.10 only authorizes the Commissioner to "administer" the UIPA. (§ 790.10; Answer Brief on the Merits ("ABM") at p. 33.)

This Court should thus affirm, notwithstanding the arguments of the amici supporting the Commissioner, because the Commissioner does not have the authority to quasi-legislatively expand upon the Legislature's already-detailed list of unfair and deceptive acts and practices specifically "defined" in section 790.03 of the UIPA, or to sidestep the case-by-case procedure the Legislature specified in section 790.06 of the UIPA for the Commissioner to "determine," with the approval of a superior-court judge, whether particular instances of allegedly unfair or deceptive acts or practices "should be declared to be" such. (§§ 790.03; 790.06.)

## II. ARGUMENT

### A. The Applicable Standard of Review Is "Respectful Non-Deference."

In *Yamaha Corp. of America v. State Board of Education*, this Court established the standard of review governing actions challenging an agency's interpretation of whether it "has been delegated the Legislature's lawmaking power." (*Yamaha Corp. of America v. State Bd. of Education* (1998) 19 Cal.4th 1, 10-11 ("*Yamaha*").) It is well-settled now that that standard is one of "respectful nondeference" to the agency's interpretation of the scope of its own authority. (*Id.* at p. 11, fn. 4.) Preserving the role

and "independent judgment" of courts when addressing "[t]he issue of statutory construction" makes sense not only as a matter of long-standing law, but also public policy. (*Western States Petroleum Assn. v. Bd. of Equalization* (2013) 57 Cal.4th 401, 415 ("*Western States*").) ""It is, emphatically, the province and duty of the judicial department, to say what the law is'" (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 469, quoting *Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137, 177), especially when agencies purport to construe the scope of their own powers to create "quasi-legislative rules [that] have the dignity of statutes." (*Yamaha*, 19 Cal.4th at p. 10.) To hold otherwise would leave the proverbial fox guarding the henhouse, and violate basic separation-of-powers and other constitutional principles. (See Brief of Amicus Curiae NFIB at p. 14, citing Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2097 (1990) ["[I]n Anglo-American law, those limited by law are generally not empowered to decide on the meaning of the limitation."].)

None of the amici supporting the Commissioner nor the Commissioner have provided any valid reason to depart from that standard now. Indeed, both the Commissioner and Professor Asimow *agree* that *Yamaha*'s standard of "respectful non-deference" provides the controlling standard, and that a reviewing court "has independent judgment power over

issues of statutory interpretation." (See Brief of Amicus Curiae Michael R. Asimow at p. 4; RBM at p. 7.)[3]

United Policyholders misstate the law in arguing that this Court may uphold the regulation challenged here—Title 10, Section 2695.183 of the California Code of Regulations ("Replacement Cost Regulation" or the "Regulation")—because the Commissioner "reasonably interpreted the legislative mandate." (Brief of Amicus Curiae United Policyholders at p. 21.) *County of Santa Cruz v. State Bd. of Forestry* (1998) 64 Cal.App.4th 826 ("*County of Santa Cruz*") does not support United Policyholders' contention. There, the Court of Appeal interpreted Government Code section 11342.2, which provides that "no regulation adopted is valid or effective unless *consistent with and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute*." (*Id.* at p. 834, italics added.) The court explained that its role was

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[3] The Commissioner concedes, as he must, that the "respectful nondeference" standard articulated in *Yamaha* applies in all cases challenging an agency's interpretation of the scope of its own authority. (See RBM at p. 7.) The "strong presumption of regularity" in *Ford Dealers Assn. v. Dept. of Motor Vehicles* (1982) 32 Cal.3d 347, 355 ("*Ford Dealers*") thus has no application here: to the extent it previously set forth the controlling standard of review (but see *Yamaha, supra*, 19 Cal.4th at p. 11, fn. 4 [noting that *Ford Dealers* may have "overstate[d] the level of deference"], it no longer does given this Court's subsequent decisions in *Yamaha* and *Western States.* (See *Yamaha*, 19 Cal.4th at pp. 10-11; *Western States*, 57 Cal.4th at pp. 415-416.)

to determine whether the agency "reasonably interpreted" its legislative mandate, but the court also recognized that "[w]here the language of the governing statute is intelligible to judges their task is simply to apply it." (*Id.* at p. 835.) That is precisely the case here: the plain language of the UIPA shows that the Legislature intended to itself define what constitutes "unfair and deceptive acts or practices in the business of insurance," and to provide the Commissioner with only a case-by-case adjudicative mechanism to "determine" whether any other acts or practices should also be deemed "unfair and deceptive." (§§ 790.03; 790.04; 790.06.) And regardless, this Court's decision in *Yamaha* obviously controls.

The same holds true with *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98 ("*Communities for a Better Environment*"), also relied upon by United Policyholders. The Court of Appeal there emphasized that the question of "whether the regulation is within the scope of the authority conferred . . . is a question particularly suited for the judiciary as the final arbiter of the law, and does not invade the technical expertise of the agency." (*Id.* at pp. 108-109.) Once the court determines the agency acted within its scope of authority, the court can *then* consider the agency's potential technical expertise in assessing whether the regulation was "reasonably necessary" to effectuate the purpose of the statute. (*County of Santa Cruz*, *supra*, 64 Cal.App.4th at p. 835.) This two-step process does not (nor could it) modify the standard

of "respectful non-deference" articulated by this Court in *Yamaha*, and this Court need not reach this second prong and determine whether the Commissioner's technical expertise weighs in favor of deferring to his determination that the Regulation was "reasonably necessary." That is because here the Commissioner exceeded "the scope of the authority" conferred on him by the UIPA and thus cannot satisfy the first prong ("whether the regulation is within the scope of the authority conferred"). (*Communities for a Better Environment*, *supra*, 103 Cal.App.4th at p. 108.)

This Court's decision in *Moore v. California State Board of Accountancy* does not suggest otherwise. (*Moore v. Cal. State Bd. of Accountancy* (1992) 2 Cal.4th 999 ("*Moore*"); RBM at pp. 5, 11-12.) In *Moore*, which also predated *Yamaha*, the regulation at issue had been on the books for nearly half a century, without the Legislature having taken any steps to amend the governing statute or curtail the agency's interpretation of the scope of its own authority under it. (*Moore*, *supra*, 2 Cal.4th at p. 1017.) Although the Legislature had amended the statute at issue twice, the substantive provisions at issue in *Moore* had remained unchanged for 44 years. (*Ibid.*) This Court thus presumed that the Legislature was aware of the agency's longstanding interpretation of the Accountancy Act, and viewed it as being consistent with the Legislature's intent. (*Id.*, at pp. 1017-1018.) Here, in contrast, the Regulation was only promulgated fewer than five years ago, and there is no evidence the

Legislature has acquiesced in it. Moreover, the statute in *Moore* also had no case-by-case enforcement mechanism akin to section 790.06. *Moore* therefore does not warrant departing from this Court's duty to exercise its "independent judgment" and "test . . . executive acts" in "'say[ing] what the law is'" as to the scope of the Commissioner's authority under the UIPA. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 141, citing *Marbury v. Madison, supra,* 5 U.S. (1 Cranch) at pp. 175-178 [first two quotes]; *McClung v. Employment Development Dept., supra,* 34 Cal.4th at p. 469, quoting *Marbury v. Madison, supra,* 5 U.S. (1 Cranch) at p. 177 [third quote].)

Even assuming arguendo that sometimes deference to agency interpretations is warranted when those interpretations implicate an agency's particular technical expertise, any such deference would not be warranted here. The UIPA is not "technical, obscure," or particularly "complex," and even if some of its provisions might be characterized as "open-ended, or entwined with issues of fact, policy, and discretion," the Legislature has already resolved such issues in detail in section 790.03's 29 subdivisions and subparts and in subsequent legislative enactments. (*Western States, supra,* 57 Cal.4th at pp. 415-416; see also § 790.03; Respondents' Motion for Judicial Notice (Jan. 11, 2016), Decl. of S. Paffrath, Ex. C; ABM at pp. 6-10.) Consequently, the "respectful non-deference" called for in this case amounts to this Court's time-honored

"independent judgment" in construing the particular statutory scheme at issue here.

### B. The UIPA Does Not Confer Quasi-Legislative Authority on the Commissioner To Define What Constitutes an Unfair or Deceptive Act, Practice, or Method of Competition.

The plain language of the UIPA demonstrates, contrary to the assertions of the amici supporting the Commissioner, that the Legislature intended to and did exercise its prerogative to: (i) "define[]" what constitutes an "unfair method[] of competition" or "unfair and deceptive act[] or practice[] in the business of insurance" in California (§ 790.03), (ii) empower the Commissioner to enforce those legislative proscriptions (see, e.g., §§ 790.035, 790.04, 790.05, 790.07), and (iii) "determin[e]," through case-by-case adjudication and with the approval of a superior-court judge, whether particular instances of allegedly unfair or deceptive acts or practices should also "be declared to be unfair or deceptive within the meaning of this article" (§ 790.06, subd. (a)). (See ABM at pp. 25-43.)

The Legislature did not confer "joint lawmaking" authority on the Commissioner to also define and proscribe, through regulation, new kinds of allegedly unfair or deceptive practices. It did not authorize the Commissioner to promulgate a regulation that deems any kind of replacement cost estimate that does not conform with each and every one of the Regulation's detailed content and format requirements to be ipso facto

"unfair and deceptive." Reading the UIPA otherwise contravenes the plain text and structure of the statute and well-established canons of statutory interpretation, as well as this Court's precedents. (See ABM at pp. 35-43.)[4]

### 1. The Legislature Has Retained for Itself the Authority to "Define" Unfair and Deceptive Acts and Practices in the Business of Insurance.

Respondents do not dispute the general proposition that the Legislature has the power to grant adjudicative *and* rulemaking authority to an agency. (See Brief of Amicus Curiae Michael R. Asimow at pp. 1-3.) Asserting that general proposition, however, does little to resolve this case, because it also goes without saying that this same legislative power can establish parameters and limits on agency rulemaking, which is what the Legislature has done here. That is evident from actually analyzing the specific statutory regime before this Court, which Professor Asimow has failed to do in making his broad pronouncements, although he does

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[4] Indeed, the entire structure of the UIPA confirms that there are two—and only two—means for acts to be declared "unfair" or "deceptive." Over and over, the UIPA refers to acts that are either "defined" as unfair or deceptive right in section 790.03's 29 subparts and subdivisions, or "determined" to be unfair or deceptive on a case-by-case basis through section 790.06's adjudicative process. (See, e.g., § 790 [discussing the purpose of the law and referencing only two methods for declaring acts to be unfair or deceptive]; § 790.02 [prohibiting acts either "defined" or "determined" to be unfair or deceptive]; § 790.07 [authorizing the imposition of penalties for a person violating an order prohibiting an act "defined" in section 790.03 to be unfair or deceptive or "determined" to be such pursuant to section 790.06].)

acknowledge that the specifics of the UIPA statutory regime are "unusual." (*Id.* at p. 1.)

As for Professor Asimow's unsupported assertions that the "Legislature must specifically say so if it wants to limit the scope of rulemaking power" (*ibid.*) and that the Commissioner "has discretion to choose the most appropriate modality for declaring policy" (*id.* at p. 2), little need be said other than that they depart from long-standing separation-of-powers and other principles embodied in this Court's precedents, pursuant to which the Legislature prescribes by statute the scope of authority delegated to an administrative agency. (See *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1389 [holding that statute's plain language and legislative history did not show Legislature intended "sub silentio" to empower the agency to impose punitive damages, and "[a]n administrative agency cannot by its own regulations create a remedy which the Legislature has withheld"].)

In the UIPA, the Legislature has retained for itself the authority to "define" unfair or deceptive acts and practices in the business of insurance (§ 790.03), and has delegated to the Commissioner only the authority to enforce those legislative proscriptions (see, e.g., §§ 790.035, 790.04, 790.05, 790.07) and to "determin[e]," through case-by-case adjudication, whether particular instances of allegedly unfair or deceptive acts and practices should also be deemed to be such under the UIPA (§ 790.06).

(See *Gikas v. Zolin* (1993) 6 Cal.4th 841, 852 [reiterating that under canon of *expressio unius est exclusio alterius*, the Legislature's expression in a statute "necessarily means the exclusion of other things not expressed," and must be honored by courts in carrying out the Legislature's intent]; see also ABM at pp. 35-39.) That the Commissioner does not prefer this modality for achieving the Legislature's policy objectives does not permit him to enlarge the scope of his own authority and arrogate to himself "joint lawmaking" powers with the Legislature. (OBM at p. 30; see also ABM at pp. 30-31.) Otherwise, much of sections 790.03 and 790.06 would be rendered superfluous.

### 2. Section 790.10 Does Not Vest the Commissioner with Broad Authority To Regulate Substantively.

Consumers and United Policyholders next take up the Commissioner's flawed argument that section 790.10 is a substantive "gap filler" that provides the Commissioner with broad authority to define new unfair or deceptive acts and practices. (See RBM at pp. 9, 12, 17; Brief of Amicus Curiae Consumers at pp. 1, 13-17; Brief of Amicus Curiae United Policyholders at pp. 16, 21-22.) But, as Respondents have explained, the Legislature has already filled up those substantive gaps itself in the Insurance Code, both in section 790.03's 29 subparts and subdivisions, and in subsequent legislative enactments, such as sections 10101 and 10102. (ABM at pp. 26-29, 31-33.)

"*Whenever*" the Commissioner has "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," his recourse is through the case-by-case adjudicatory safety-valve procedure set forth in section 790.06. (§ 790.06, italics added.)

Consumers, United Policyholders, and Professor Asimow, echoing the Commissioner, argue otherwise, pointing to section 790.10 as the grant of authority that supposedly empowers the Commissioner to regulate substantively as to what does and does not constitute an "unfair method[] of competition" or "unfair and deceptive act[] or practice[]," notwithstanding section 790.03's detailed list and the other pillars of the UIPA enacted by the Legislature. But section 790.10 only authorizes the Commissioner to "promulgate," "from time to time as conditions warrant," "reasonable rules and regulations . . . as are necessary to *administer* this article." (§ 790.10, italics added.)[5]

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[5] Similarly, the Legislature has demonstrated elsewhere in the Insurance Code its intent to limit the Commissioner's rulemaking powers. For example, in section 1749.85, the Legislature specifically chose not to give the Commissioner authority to regulate the calculation and communication of replacement cost estimates by insurance licensees (such as the Associations' members), instead vesting the Commissioner with authority only to establish estimating standards for *appraisers*. (See § 1749.85, subd. (a).)

An administrative regulation must "be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law." (Gov. Code, § 11342.1.) A power to "administer" is thus not unbounded, as this Court has previously recognized in interpreting an agency's authority to "administer." In *Agnew v. State Board of Equalization* (1999) 21 Cal.4th 310, for example, this Court held that a legislative grant of power to the Board of Equalization to "make all rules necessary to *administer* and enforce the Sales and Use Tax Law" did not include the authority to enact even *procedural* rules requiring prepayment of interest as a precondition to assert an administrative claim. (*Id.* at pp. 321, 333-334, italics added.)

It follows a fortiori that here, the Commissioner may not use section 790.10 to *substantively* add to or modify what the Legislature has already specifically proscribed in section 790.03 and subsequently-enacted Insurance Code provisions. That is particularly so where here, the Legislature has also prescribed the means by which the Commissioner may "determin[e]" whether "methods, acts or practices" not specified in section 790.03 "should be declared to be unfair or deceptive within the meaning of this article"—through section 790.06's case-by-case adjudicative mechanism reviewed by a superior-court judge with power "to make and enter appropriate orders . . . necessary in [the court's] judgment to prevent injury to the public." (See, e.g., *Ciani v. San Diego Trust &*

*Savings Bank* (1991) 233 Cal.App.3d 1604, 1609 [explaining role of city, as "the delegated agency to administer local coastal permits," to process applications and issue demolition permits]; *City of San Marcos v. Cal. Highway Com.* (1976) 60 Cal.App.3d 383, 406 [noting that "resolution fixing a deadline for the receipt" of a valid application for funds, and the accompanying list of documents that must be included, are what "the Legislature entrusted to the department to administer"].)[6]

Even assuming arguendo the Legislature intended section 790.10 to confer on the Commissioner authority to promulgate more than just *procedural* provisions to administer the Legislature's detailed substantive proscriptions, the most any such authority could possibly extend to would be truly interstitial and circumscribed "reasonable rules and regulations" construing the actual acts and practices proscribed by the Legislature in the statute. Under this view, in other words, the most the Commissioner's authority under section 790.10 might encompass would include, for

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[6] Consumers misapprehend the point of Respondents' reliance on *Lopez v. Monterey County* (1999) 525 U.S. 266, 278-79, abrogated on other grounds by *Shelby County v. Holder* (2013) 133 S.Ct. 2612. (Brief of Amicus Curiae Consumers at p. 20.) Respondents rely on *Lopez* for the proposition that "administer" is generally understood to refer to "nondiscretionary" conduct. (ABM at pp. 29-30.) The Court in *Lopez* explained that "'administer' is consistently defined in purely nondiscretionary terms," but acknowledged that in the unique context of the Voting Rights Act, "administer" could also cover "nonlegislative, executive initiatives." (*Lopez v. Monterey County*, *supra*, 525 U.S. at pp. 278-279.)

example, specifying how many days constitutes "reasonably promptly" in subsection 790.03(h)(2)'s requirement that insurers "act reasonably promptly upon communications with respect to claims." (§ 790.03, subd. (h)(2).)

That said, the Commissioner's authority remains bounded by the UIPA itself, and in particular, sections 790.03 and 790.06. (Gov. Code, § 11342.2 ["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 and reasonably necessary to effectuate the purpose of the statute." (Italics added.)].)

The Regulation is demonstrably invalid because it goes well beyond even the interstitial role posited arguendo above. Sections (a) through (e) of the Regulation impose exacting requirements on what must be included in an insurance licensee's replacement cost estimate. By omitting any one element, or including another (regardless whether those elements apply under a particular set of circumstances), the licensee risks being deemed to have violated the UIPA's prohibition on unfair or deceptive conduct, with all the reputational and legal harms that entails. A licensee runs that very real risk, even when its conduct would not run afoul of the UIPA but for the Regulation.

Thus, contrary to the claims of the amici supporting the Commissioner and the Commissioner that the Regulation just requires a "complete" replacement cost estimate (see Brief of Amicus Curiae United Policyholders at pp. 22-26; Brief of Amicus Curiae Consumers at pp. 4, 6, 17; OBM at p. 30; RBM at p. 17), the Regulation "specifies, in great detail, the only type of estimate that will not be considered misleading." (Brief of Amicus Curiae PADIC at p. 4.) In so doing, the Regulation also makes new law. For example, before the Regulation was promulgated, California law did not prohibit the use of estimates that included a deduction for physical depreciation. (*Id.* at p. 5.) But now, if the Regulation is upheld, any such estimate would ipso facto become "misleading." (*Ibid.*; see also Cal. Code Regs., tit. 10, § 2695.183, subd. (d).)

The rest of the Regulation before this Court—subdivisions (f) through (q)—goes even further, leaving no doubt as to the Regulation's invalidity. Subsections (f) through (q), for example, mandate when and how a licensee must provide estimates of replacement cost coverage (see *id.* at subd. (g)(1)-(2); subd. (h)), the form and duration of document retention (*id.* at subd. (i)); the type of "training and written training materials" insurers must provide to broker-agents when they use "sources or tools" to create estimates (*id.* at subd. (k)); and the circumstances under which insurers "may communicate to an applicant or insured that an applicant or insured must purchase a minimum amount of insurance" (*id.* at subd. (p)).

By dictating intricate rules restricting licensees' business practices, the Regulation goes far beyond what the Legislature could arguably have authorized under section 790.10's limited grant of authority to "promulgate reasonable rules and regulations . . . as are necessary to administer this article," without rendering section 790.03 and other pillars of the UIPA surplusage. (See, e.g., *Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 611 "[C]ourts may not excise words from statutes. [Citation.] We assume each term has meaning and appears for a reason."].)[7]

The analogy Consumers draw to a federal food labeling regulation fails to overcome a critical reason why this Court should not overturn the lower courts' invalidation of the Regulation—even if the replacement cost estimate provided by an insurer is *entirely accurate,* the insurer could still

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[7] United Policyholders incorrectly characterize the Regulation as "modest" given that insurers could opt not to "communicate an estimate of a home's replacement value to a consumer at all." (Brief of Amicus United Policyholders at p. 5.) But even if that were actually feasible as a practical matter, United Policyholders' argument is belied by the terms of the Regulation itself, which impose additional requirements on insurers, even if they opt-out. For example, insurers are responsible for training broker-agents in the use of specific sources or tools for creating estimates of replacement cost and "prescrib[ing] complete written procedures to be followed by broker-agents when they use the sources or tools." The Regulation also imposes on the insurer responsibility for any noncompliance with the Regulation that results from the failure of the broker-agent's estimate to satisfy the requirements of subdivisions (a) through (e) of the Regulation. (Cal. Code Regs., tit. 10, § 2695.183, subd. (k).)

be deemed to have violated the UIPA if the Regulation is upheld. That demonstrates that the Regulation goes too far and conflicts with the UIPA itself. (See Gov. Code, § 11342.2 ["[N]o regulation adopted is valid or effective unless consistent and not in conflict with the statute."].) Moreover, the nutritional-labeling regulation Consumers rely on is readily distinguishable as it was promulgated pursuant to a broad delegation of authority to the Secretary of Health and Human Services to establish specific standards for food labeling.[8]

Consumers also rely to no avail on *Spray, Gould & Bowers v. Associated Internat. Ins. Co.* (1999) 71 Cal.App.4th 1260 ("*Spray*"). (See Brief of Amicus Curiae Consumers at pp. 22, 25-26.) *Spray* is wholly inapt, because there the defendant did not challenge whether the Commissioner had the authority to promulgate the challenged regulation. (See *Spray*, 71 Cal.App.4th at p. 1269, fn. 8 ["AIIC does not contend that

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[8] (See, e.g., Nutrition Labeling & Education Act, 21 U.S.C. § 343, subd. (i) ["To the extent that compliance . . . is impracticable, or results in deception or unfair competition, exemptions shall be established by regulations promulgated by the Secretary."]; *id.* at subd. (q)(2)(A) ["If the Secretary determines that a nutrient other than a nutrient required by subparagraph (1)(C), (1)(D), or (1)(E) should be included in the label or labeling of food subject to subparagraph (1) for purposes of providing information regarding the nutritional value of such food that will assist consumers in maintaining healthy dietary practices, *the Secretary may by regulation require that information relating to such additional nutrient be included in the label or labeling of such food.*" (Italics added.)].)

the regulations have been other than duly promulgated."].) The court thus did not reach the issue presented in this case, and "'an opinion is not authority,'" of course, "'for a proposition not therein considered.'" (*Elisa B. v. Super. Ct.* (2005) 37 Cal.4th 108, 118, quoting *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.)

*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805 ("*Calfarm*") is similarly wide of the mark and does not support the Commissioner's arrogating "broad powers" to "quasi-legislatively" engage in "joint lawmaking" with the Legislature. (Brief of Amicus Curiae Consumers at pp. 8, 21; OBM at pp. 30-31.) The statutory scheme at issue in *Calfarm* (see sections 1861.01, et seq., governing the reduction and control of insurance rates) differs markedly from the UIPA: it does not include, for example, a detailed list of unfair practices akin to section 790.03, or a provision like section 790.06 to address, on a case-by-case basis, additional allegedly unfair acts. (See §§ 1801 et seq.)

Furthermore, in *Calfarm*, this Court stated that no provision of that statute "bars the commissioner from . . . issuing regulations of general applicability." (*Calfarm*, *supra*, 48 Cal.3d at p. 824.) Here, however, the Legislature has set forth in the UIPA a detailed and exacting list of prohibitions for the Commissioner to enforce (see § 790.03), as well as a specific case-by-case procedure for the Commissioner to use in addressing

particular instances of acts or practices not covered in the legislatively prescribed list (see § 790.06).

United Policyholders also misstate the administrative record in claiming that Respondents "participated in the drafting process that led to issuance of the regulation, got almost everything they asked for, and signaled general assent." (Brief of Amicus Curiae United Policyholders at p. 7.) The truth of the matter, as the record makes amply clear, is that in pushing through the Regulation, the Commissioner simply ignored Respondents' repeated protests that the Commissioner exceeded his authority in attempting to "impos[e] new duties and liabilities on the insurer" (AR 1118) by "creat[ing] an entirely new definition for commonly used terms" (*id.* at p. 1240), "expand[ing] the list of unfair business practices" (*ibid.*), and "set[ting] out totally new standards and restrictions on communication" (*id.* at p. 1241).

Last, United Policyholders' quasi-fiduciary-duty argument does not support upholding the Regulation. (Brief of Amicus Curiae United Policyholders at pp. 17-20.) Even assuming arguendo insurers owe insureds a quasi-fiduciary duty of candor, the Regulation goes too far. The UIPA already requires that estimates cannot be "untrue, deceptive, or misleading" (§ 790.03, subd. (b)), so if that were all the Regulation proscribes, it would be superfluous. It is clear though that the Regulation goes much further, and impermissibly so. Ignoring the fact that estimates

are necessarily nothing more (or less) than reasonable forecasts made at any given time based on a specific set of facts, rather than guarantees of a specific cost or outcome, the Regulation demands much more by adding detailed content and format requirements for any kind of replacement cost estimate, and imposing records-management and training obligations on insurers. (See ABM at pp. 39-42.)

### C. This Court Need Not Look to the Legislative History of the Unfair Trade Practices Model Act.

This Court need not and should not look to the legislative history of the Unfair Trade Practices Model Act ("Model Act") invoked by Consumers but never adopted wholesale by the California Legislature. (Brief of Amicus Curiae Consumers at pp. 11-17.) Indeed, there is no need to resort to any legislative history whatsoever, given the plain meaning and structure of the UIPA. (See, e.g., *Day v. Fontana* (2001) 25 Cal.4th 268, 272 ["If there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs."]; ABM at pp. 22, 25-27.) But even if there is any need to look to legislative history here, this Court should look only to the legislative history of *California's* own UIPA.

The legislative history of California's UIPA further shows that the Legislature intended that the Commissioner use only section 790.06's case-by-case adjudicatory procedure to address particular instances of novel

practices falling outside the ambit of section 790.03's 29 subparts and subdivisions. (See ABM at pp. 28-29.)[9] As recently as 2000, the Legislature passed Senate Bill 1500, designed to strengthen section 790.06's adjudicatory process. SB 1500 required the Commissioner to, among other things, "specify [in his order] the reason why the method of competition is alleged to be unfair or the act or practice is alleged to be unfair or deceptive." (Respondents' Motion for Judicial Notice, Decl. of S. Paffrath, Ex. C, at p. 2.) The Bill Analysis for SB 1500 explained that "the bill addresses the authority of the Insurance Commissioner when the Commissioner has reason to believe an unfair or deceptive practice has occurred that is not one specifically defined in Insurance Code Section 790.03." (*Id.* at p. 1.) The enactment of SB 1500 demonstrates that the Legislature, 29 years after the adoption of section 790.10, still intends

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[9] Both the Commissioner and amici incorrectly suggest that invalidating the Regulation would limit the Commissioner to retrospectively punishing past misconduct. (See Brief of Amicus Curiae Professor Asimow at p. 2; RBM at pp. 4-5.) But as PADIC has shown in its amicus brief, section 790.06 has proven to be a powerful tool for the Commissioner to also prospectively deter perceived insurer overreach. (See Brief of Amicus Curiae PADIC at pp. 7-9.) For example, in 1993, the Commissioner utilized the 790.06 adjudicative procedure to prohibit four of the largest life insurers in California from refusing to do business with agents who rebated commissions. (*Id.* at p. 8; see also Motion for Judicial Notice of Amicus PADIC, Ex. 1 (*In the Matter of Prudential Insurance Co. of Am., et al.* (1994) Decision After Order to Show Cause Pursuant to Insurance Code Section 790.06 , OAH Nos. L-60175, etc.).)

for section 790.06 to be the means by which the Commissioner can determine whether acts or practices not included in section 790.03 should be deemed unfair or deceptive under the UIPA.[10]

Even if the legislative history of the Model Act were relevant to construing California's UIPA (it is not), our Legislature deliberately departed from the Model Act in a significant way. California elected to *retain* the "omnibus provision" of the original Model Act, codified in our UIPA at section 790.06, even though the NAIC rejected it. (See

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[10] Both Consumers and the Commissioner challenge Respondents' interpretation of the legislative history for AB 1353 as "unsupported." (Brief of Amicus Consumers at pp. 15-16; see also RBM at p. 14.) Specifically, the Commissioner disputes Respondents' reliance on an enrolled bill report for AB 1353, citing *In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1218, fn. 3, for the proposition that enrolled bill reports "are not given great weight." (RBM at p. 14.) But in doing so, the Commissioner omits the rest of the cited footnote, which states in relevant part:

> In *Elsner v. Uveges* (2004) 34 Cal.4th 915, 934, footnote 19, we rejected the argument that enrolled bill reports are irrelevant to discerning legislative intent because they are prepared after the Legislature's passage of the bill. As we stated: '[W]e have routinely found enrolled bill reports, prepared by a responsible agency contemporaneous with passage and before signing, instructive on matters of legislative intent.'

(*Ibid.*, emphasis added; see also *ibid.* [explaining that contemporaneous constructions of new legislation are entitled to great weight, and enrolled bill reports are such contemporaneous constructions].)

Attachment A.)[11] Thus, the NAIC went in a direction California *could have gone, but elected not to go*—the NAIC did not prescribe a case-by-case adjudicative mechanism by which commissioners could determine that particular instances of additional non-specified acts should be characterized as unfair or deceptive. Ultimately, to the extent the NAIC Model Act legislative history is even relevant, it actually *supports* affirmance here.

### D. There Is No Need for This Court To Look To the Law of Other States in Analyzing California's UIPA.

Consumers ask this Court to take guidance from Wyoming and Oklahoma in interpreting the language of California's UIPA. (See Brief of Amicus Curiae Consumers at pp. 24-27.) But again, there is no need to look to different statutory or legal regimes, particularly non-California ones, when, as here, the text and structure of California's UIPA are clear, and insofar as they are not, looking to California legislative history should suffice. (See, e.g., *Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co.* (2010) 50 Cal.4th 913, 931 ["We see no reason to turn to other [state] courts' decisions when our own statutory scheme is clear."].)

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[11] Insofar as the Court is inclined to consider (it need not) Consumers' history of the NAIC proceedings attached to their brief as Appendices A-M, Respondents respectfully request that the Court grant the same consideration to the history of the NAIC's decision to reject the "omnibus" provision codified in California's UIPA as section 790.06, attached hereto.

Last, Consumers cite no authority (and there does not appear to be any) for the proposition that the Commissioner should be afforded "broad discretion" under the UIPA given that no private right of action exists to enforce the UIPA. (Brief of Amicus Curiae Consumers at p. 29.)[12]

## III. CONCLUSION

Professor Asimow, United Policyholders, and Consumers are wrong that the Commissioner has "broad discretionary authority" to quasi-legislatively define and proscribe, through regulation, new "unfair methods of competition and unfair and deceptive acts or practices in the business of insurance" not specified by the Legislature. (§ 790.03.) The Commissioner does not have co-equal, "joint lawmaking" powers with the Legislature. (OBM at p. 30.) Rather, the Legislature has expressly and consistently reserved for itself the power to define what constitute "unfair methods of competition and unfair and deceptive acts or practices in the business of insurance." (§ 790.03.) This follows from the plain language of the UIPA and subsequently-enacted provisions of the Insurance Code.

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[12] There are, of course, numerous statutes that do not give rise to a private right of action. Yet Consumers cite no case, nor does there appear to be any, suggesting that agencies administering such schemes should therefore have broader discretion to exercise quasi-legislative powers or exceed the bounds of their legislatively-prescribed powers. And insofar as the Legislature intended to create some kind of safety valve where a private right of action could have gone, it has done so—and gone no further—in the UIPA's existing provisions, such as section 790.035's civil-penalty enforcement procedure.

Overturning the lower courts' correct invalidation of the Regulation, as the Commissioner and his amici contend for, would turn long-standing separation-of-powers, statutory interpretation, and other principles on their head. This Court should reject the Commissioner's attempt to run roughshod over the Legislature's carefully-constructed statutory scheme, and should uphold the lower courts' invalidation of the Commissioner's Replacement Cost Regulation as exceeding the scope of the Commissioner's authority under the UIPA.

Dated: May 19, 2016

Respectfully submitted,

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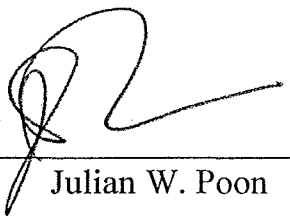
## CERTIFICATION OF WORD COUNT

Pursuant to Rule 8.204(c)(1), California Rules of Court, the undersigned hereby certifies that this Consolidated Answer to Amicus Curiae Briefs contains 6,370 words, excluding the tables and this certificate, according to the word count generated by the computer program used to produce this document.

Dated: May 19, 2016



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# Attachment


Proceedings of the National Association of Insurance Commissioners, 1971, Volume II

Annual Meeting, New York, New York

June 14, 1971

- June 18, 1971

1971-2 NAIC Proc. 341

**LENGTH:** 18098 words

**TITLE:** LAWS, LEGISLATION & REGULATION (B) COMMITTEE; Unfair Trade Practices (B8) Subcommittee

NOTE: Formulas may not appear exactly as they do in the printed version of the Proceedings.

[*341] The B8 Subcommittee to review the model Unfair Trade Practices Act met in the Imperial B Ballroom, the Americana Hotel, New York City at 10:00 a.m., June 16, 1971.

The Chairman declared a quorum present and called the meeting to order. Agenda Item 1 concerned a review by Co-Chairman Durkin of the principal purposes and objectives of the Subcommittee.

Agenda Item 2, report of the Industry Advisory Committee, was presented by Robert S. Seiler. The report of the Industry Advisory Committee was received by the Subcommittee and a copy is attached. A partial dissent was presented by William Pugh, a copy of which is attached. There was no discussion of the report from the floor. The Michigan proposal, a copy of which is attached, was presented and briefly discussed. No action was taken and the Subcommittee went into executive session.

During the executive session there was considerable discussion of the Industry Advisory Committee's report. After discussion a motion was made and seconded that the Industry Advisory Committee be requested to provide the B8 Subcommittee with recommended and proposed language on or before September 1, 1971 dealing with the following subjects as respects the Model Unfair Trade Practice Act:

1. Specific language dealing with the four additional defined practices which would constitute an unfair trade practice: (a) favored agent or insurer-coercion of debtors; (b) use of insurance as an inducement, to purchase goods and services; (c) interlocking boards of directors; and (d) claims practices - unreasonable delay or refusal. These are the items recommended by the Industry [*342] Advisory Committee.

2. Specific language giving the various state insurance departments the authority to promulgate, subject to individual state statutes and requirements, rules and regulations as proposed in the Industry Advisory Committee's report.

3. Specific language which would define as an unfair trade practice the failure of an insurer to assemble all of the complaints received by the company, or its representatives, in one place to facilitate periodic review by insurance department examiners. This proposed language should include a requirement that information by maintained indicating the number of complaints received by classification of coverage; the nature of these complaints; the number rejected; and the length of time it took the insurer to act on such complaints.

4.Specific language amending the penalty section to include a monetary penalty for violations of the Act. There should also be authority to issue a cease and desist order to prevent further violations of these same practices or acts.

5. Continue to review and present to the B8 Subcommittee specific recommendations dealing with a more prompt and efficient enforcement procedure.

6. Continue to review the question of class actions and all matters relating thereto and present commendations in this area as well as proposed language in the event this item is included in the model act.

7. Specific language dealing with refusal to insure risks solely because of age, residence, race, color, creed, marital status, ancestry, lawful occupation or solely because the insured will not agree to place collateral business with a particular insurer, if such practices are performed with such frequency as to constitute a general business practice.

A task force of this Subcommittee will be appointed whose activities will be parallel to and in conjunction with the Industry Advisory Committee. In addition, this Subcommittee will consider the above items and any other related matters in greater depth.

There being no further business, the motion was made to adjourn at 12:20 p.m.

Hon W. Fletcher Bell, Co-Chairman, Kansas; Hon. John A. Durkin, Co-Chairman, New Hampshire; Hon. Richards D. Barger, California; Hon. J. [*343] Richard Barnes, Colorado; Hon. Johnnie L. Caldwell, Georgia; Hon. James Baylor, Chicago; Hon. Russell E. Van Hooser, Michigan; Hon. Robert L. Clifford, New Jersey; Hon. Benjamin R. Schenck, New York; Hon. Herbert S. Denenberg, Pennsylvania; Hon. Clay Cotton, Texas.

FIRST REPORT OF THE INDUSTRY ADVISORY COMMITTEE TO THE NAIC B-5 SUBCOMMITTEE TO REVIEW THE MODEL UNFAIR TRADE PRACTICES ACT, JUNE 16, 1971

I. The Industry Advisory Committee's Assignment.

The Industry Advisory Committee held its initial meeting, at the request of the NAIC, at the Zone V meeting in Santa Fe, New Mexico on April 26. Immediately following that meeting we met with the B-8 Subcommittee for the purpose of reviewing the subject generally and for a discussion of the scope and direction of the Industry Advisory Committee's activities. As a result of that meeting Commissioner Durkin, as co-chairman of the Subcommittee, on May 14th distributed a letter setting forth various items which the Industry Advisory Committee was to consider. Those items fall into the following categories:

A. Addition of "Defined" Unfair Trade Practices. There was considerable interest among the Subcommittee members as to the possibility of adding additional specific examples of unfair trade practices to Section 4 of the Model Act. Section 4 now covers misrepresentations and false advertising of policy contracts; false information and advertising generally; defamation; boycott, coercion and intimidation; false financial statements; stock operations and advisory board contracts; unfair discrimination in life insurance, annuities and health insurance; and rebates. A number of specific suggestions were given to the Advisory Committee for its consideration.

B. Streamlining Administrative Procedures. Some question was raised as to whether the Model Act had enough "teeth" in it. As currently drafted, (Section 5 to 8 and 11 the Act relies chiefly upon a cease and desist order, following a hearing, as the means of remedying a "defined" unfair trade practice. It is only after a cease and desist order has been violated that the Commissioner may impose a monetary penalty upon a licensee. In addition, there was sentiment among the Commissioners to the effect that the method of determining the controlling non-defined unfair trade practices was too cumbersome. Under Section 9 of the Model Act, a Commissioner has the authority to review specific trade practices used by a licensee to determine if such practices are unfair. This requires a notice and hearing involving the specific licensee. The Commissioner makes his determination but has no power to order the licensee to desist from such practices. He is required (under Section 10) to resort to the courts for the issuance of an injunction in order to enforce his findings.

C. Power to Issue Regulations. The Model Act does not confer any authority upon the Commissioner to promulgate regulations. Some commissioners thought the Act could be made more effective if some authority was added in this area. One suggestion for consideration was to give the Commissioner the power by regulation to add new specific acts to the unfair trade practices [*344] enumerated in Section 4.

D. Consumer Class Actions. As a result of the various federal proposals to create consumer class actions for damages produced by the commission of unfair trade practices, some of which proposals would include insurance services, the Advisory Committee was asked to be ready to discuss this subject. The proposals in this area include: 1) unlimited class action rights; 2) a right to a class action triggered only by a finding by the Commissioner that an unfair

trade practice has been committed; and 3) empower the Commissioner to sue on behalf of injured members of a class for damages sustained.

E. "Group Insurance" and "Credit Insurance". The Subcommittee also requested that we be prepared to discuss the subject of "group insurance". Presumably, "group" auto and property insurance, and "credit insurance". A number of state laws now prohibit, as an unfair trade practice, the fictitious grouping of property, casualty or surety risks for rating purposes. No specific items were directed to us for consideration in this area.

F. New Hampshire Bill Revising Unfair Trade Practices Act. Commissioner Durkin distributed, for discussion purposes and not as a committee draft, a proposed revision of the New Hampshire Unfair Trade Practices Act, which incorporates, in substance, most of the revisions to the Model Act which were suggested by the various members of the Subcommittee. This proposal has since been introduced in the New Hampshire legislature.

The Industry Advisory Committee met on June 3rd in Chicago to consider these items, and others, and as a result of that meeting is prepared to offer a number of recommendations for revision of the present Model Act. However, we are not prepared at this time to present specific language to incorporate such recommendations into the Model Act.

In the performance of its assignment the Industry Advisory Committee reviewed the history of the NAIC Model Act, compared the Model Act to the Federal Trade Commission Act and also researched the laws of all 50 states to identify and substantive departures from the Model Act. It may be useful for the record to reflect the results of this research before getting to the specific comments and recommendations we wish to offer with respect to the Model Act.

II. History and Purpose NAIC Model Unfair Trade Practices Act.

In response to the anactment of the McCarran Act in 1945 the NAIC, assisted by an all-industry committee, developed a "Model Act relating to Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance." The All-Industry Committee Draft of January 24, 1947 was approved as a Model Act by the NAIC at its Annual Meeting in June 1947.

The purpose of the Model Unfair Trade Practices Act, as stated therein, is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress), by defining, or providing for the determination of all such practices which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

We direct your attention to pages 145 et seq. of the 1959 Proceedings of the NAIC, Vol. I, for a good discussion of the Model Act in the context of the McCarran Act. The Model Act is also treated in the following portions of the NAIC Proceedings:

[*345] 1947 Proc. Pages 383-410

1959 Proc. Vol I, Pages 145-147

1960 Proc. Vol II, Pages 509-515

1961 Proc. Vol I, Pages 309-316

III. Comparison of Model Act with Federal Trade Commission Act.

The NAIC Model Act is patterned very closely after the Federal Trade Commission Act (15 U.S.C.A. Sec. 45) and much of the language was lifted bodily from the federal law. The Model Act, with its broad prohibition against unfair or deceptive acts or practices parallels the FTC Act, but unlike the federal law, it enumerates certain defined acts or practices peculiar to the business of insurance. Since any such enumeration could not cover every conceivable situation, the Model Act contains an omnibus provision (Section 9) virtually identical with a provision of the FTC Act.

In addition, both acts contain similar enforcement provisions. The persons charged with enforcement of the acts are given the authority to examine and investigate, conduct hearings, and issue cease and desist orders, which are subject to judicial review. Even the penalty provisions of the two acts are identical.

IV. Enactment of the NAIC Model Act and Subsequent Expansion.

All fifty states have enacted unfair trade practice statutes, most of which contain provisions identical or substantially similar to the Model Act. The State of Oregon and the District of Columbia have not enacted the Model Act,

however, the statutes which have been enacted in those two jurisdictions contain a series of provisions prohibiting all of the unfair methods of competition and deceptive acts included in the Model Act, and provide the Insurance Commissioner with the necessary powers of enforcement.

Although a number of states omitted Section 9, the omnibus provision, from the Model Act when originally enacted, the great majority of states now include in their statutes a similar provision which gives the Insurance Commissioner the authority to file charges against any insurer or any person when he has reason to believe that such insurer or person is engaging in an unfair practice which is not specifically defined in the statute. After holding a hearing and making appropriate findings, the Commissioner may request the attorney general of his state to bring an action to enjoin the continuation of such unfair act or practice or unfair method of competition.

A large number of states have broadened the coverage of the Model Act by specifically prohibiting other activities which are declared to be unfair trade practices; for example, interlocking directorates, dealing in premiums, fraudulent statements in applications, favored broker arrangements, offering insurance as to inducement to purchase commodities, and unreasonable delay or refusal to pay claims as a general business practice.

V. Recommendation on Suggested Revision of the Model Act.

A. Addition of Defined Unfair Trade Practices. In considering what additional "defined" unfair [*346] trade practices might be incorporated into the Model Act, the Industry Advisory Committee had to determine what are "trade practices" for the purpose of the Act. The phrase "trade practices" is very broad. Under the FTC Act it encompasses all business activity involving the consumer and all activities between competitors, other than those activities which are covered by the balance of the anti-trust laws. In the insurance context, almost all activities, except purely internal administrative activities, could be called "trade practices". However, much of our activity in these areas is already regulated by other laws. Therefore, in order to determine what prohibitions might be appropriate under the Model Act, we decided to recommend against the inclusion in the Model Act those practices which, in the general scheme of statutory enactments, are usually found in other portions of the insurance laws. For example, a suggestion relating to unfair discrimination in fire and casualty rates should appear in the rating laws rather than in the unfair trade practices statute. Similarly, acts which do not directly involve the consumer or a competitor, such as administrative procedures, should not be included in the Model Act. The Model Act should not become the repository for specific acts which the commissioners can reach through existing law. If a particular state is missing authority in a given area, which area is generally covered by laws in other states, we ought not broaden the Model Act in such situations.

The Industry Advisory Committee, pursuant to the charge of the B-8 Subcommittee, undertook a study of the various state statutes for specific examples of provisions which define unfair acts and practices in addition to those set forth in the Model Act. Recent comprehensive revisions of insurance codes have failed to disclose any consistent pattern which would provide guidance for making a recommendation for extensive revision of the provisions of the Model Act. The Committee carefully considered the following eleven practices which have appeared as additional enumerated unfair practices in a number of statutes. The Committee's recommendation follows the discussion of each separate act or practice.

1. Favored Agent or Insurer - Coercion of Debtor: Such provisions prohibit any requirement that insurance be purchased or renewed through any particular agent, broker in insurer as a condition to furnishing any person, any loan, credit property or service or the use of other acts of coercion; it would not prevent the exercise upon a reasonable basis of any right to approve or disapprove the insurer selected by such person. Over half of the states have enacted some such provisions, but unfortunately much of the statutory language is ambiguously drafted. It is important to recognize that legislation is needed that would be directed at lending institutions in order to effectively prohibit such practices. The Industry Advisory Committee recommends that provisions of this type be included in the Model Act as an additional defined unfair practice. In the alternative such a provision could be adopted as a supplement to the Model Act, rather than as an additional defined practice. In making this recommendation the Committee recognizes that the jurisdiction of the Commissioner would, of necessity, be extended over non-licensees for the purpose of enforcement. This may present conflicts with other state laws.It also raises the legal question of the ability of the Commissioner to act against federally chartered institutions such as banks and savings and loans.

2. Use of Insurance as an Inducement to Purchase Goods and Services: Such provisions have been enacted in an inconsistent manner and are in addition to the existing prohibitions against rebates. While in most cases the rebate prohibitions and the rating laws may prohibit such activities, the Industry Advisory Committee nonetheless recommends that a provision be included in the Model Act to define some such practices as unfair and that the statutory language clearly provide a prohibition against the use of insurance as an inducement to purchase goods and services. In

these situations it will be necessary to exclude any services performed by an insurer [*347] insurance) covering a fictitious group of persons or risks, at a preferred rate or on any form other than as offered to persons not in such group and to the public generally would be prohibited, unless approved by the commissioner. The Industry Advisory Committee recognizes the controversial nature of this area of insurance regulation. It is the consensus of the Committee that such statutory provisions should not be made a part of the Model Unfair Trade Practices Act and that it would be more appropriate to refer this subject to another committee of the NAIC which is concerned with the rating laws. In addition, this subject should be considered by an Industry Advisory Committee composed solely of persons active in the fire and casualty field.

9. Political contribution prohibited: Such a provision directed at prohibiting an insurer from aiding any political party or organization or any candidate for political office is not considered by the Industry Advisory Committee to be an appropriate subject to be included in the Model Unfair Trade Practices Act. Any problems in this area are common to all types of business corporations and not just insurers, and should be considered in that context. Many states already have statutes covering this subject. The Hatch Act, at the federal level, prohibits contributions or political compaigns for federal office. The Committee sees no need for action by the NAIC in this area.

10. Deceptive use of insurer name: At least 41 states have already enacted specific legislation prohibiting the deceptive or misleading use of names by an insurer. In addition approximately 20 states hae retaliatory laws that are broad enough to confer jurisdiction over this problem, and to plug any deficiencies in their statutes. Then, too, Section 9 of the Model Act (the omnibus section) may be useful for this purpose. It is the opinion of the Industry Advisory Committee that an additional provision of this type should not be included in the Model Unfair Trade Practices Act because of the unnecessary duplication that would result.

11. Prohibition of relationship with a mortuary or funeral establishment: Any problems which might arise in this area of insurance regulation appear to be local in nature, and it is the opinion of the Industry Advisory Committee that any legislation on this subject should be handled on a state-by-state basis and not as a part of the Model Unfair Trade Practices Act.

It should be noted that the Industry Advisory Committee strongly recommends against adopting provisions under the Model Act which are already subject to statutory and regulatory control. Such a practice can easily produce conflicting requirements and can also serve to extend prohibitions far beyond what is reasonably necessary to control the problems.

The letter of May 14, 1971 from Commissioner Durkin, Co-chairman of the B-8 Subcommittee, requested the Industry Advisory Committee to consider including seven additional practices in Section 4 of the Model Act. The Industry Advisory Committee gave careful consideration to each item and its recommendations are set forth immediately following the language quoted from the May 14 letter.

1. "Failure of an insurer to maintain a separate organization within the home office (maybe with the company), headed by a responsible officer, to process and respond adequately to policyholder complaints."

2. "Failure of an insurer to record and assemble all records of policyholder complaints in a central location to facilitate periodic review by insurance departments"

[*348] 3. "Failure of an insurer to record, maintain and produce, when requested by appropriate authority, a summary of all complaints, by appropriate classification, received, the nature of such complaints, the number remedied and the length of time required by the insurer to reach their conclusion."

4. "Failure of an insurer to provide within this state reasonable means whereby any person aggrieved by the application of such insurer's rating system, claims practices, sales practices or underwriting procedures may be heard, in person or by his authorized representative, on his written request to review the manner in which such procedures were applied in connection with insurance afforded or tendered to him."

The first four provisions would define as an unfair practice the failure of an insurer to maintain reasonable complaint handling procedures. The Industry Advisory Committee agrees that all insurers should maintain an efficient administrative procedure for handling policyholders' complaints. However, this subject area should be considered by the regulatory authorities more appropriately in connection with an insurer's procedure for handling claims. The examination process involves an extensive review of companies' practices in this area and additional legislation, especially in the Model Act, is considered to be unnecessary. In addition, it is extremely difficult to draft any specific requirement in this area that could possibly apply reasonably to the varying types of companies operating in the insurance business

today. For example, some companies operate regionally and it would be expensive to collect all complaints in one place. Also, small companies may not be able to afford separate departments for this purpose, as the suggestion contemplates. The fourth provision goes beyond claim practices and applies to sales, underwriting and rating. The Committee believes that insurers now deal adequately with the public in these areas. The suggestion implies that you must have people present in each state for this purpose. That would have considerable impact on mail order companies, for example. It disregards that fact that through the communications media the country is small indeed. The rating laws generally cover this area insofar as rate questions are concerned. In the underwriting area, the Fair Credit Reporting Act will be of great assistance in solving problems. Finally, we do not believe that it is appropriate to cover this matter in the Model Act. The Committee believes that the regulators have sufficient authority presently to solve any problems that may arise with particular insurers.

5. "Failure of an insurer to establish a reasonable procedure for disclosure to its board of directors or trustees of any material interest or affiliation on the part of any of its officers, directors, trustees, or responsible employees which might be in conflict with the official duties of such person."

Regulatory tools are already available to assure the establishment of a procedure for disclosure of conflicts of interest. In addition to the interrogatory in the Annual Statement, the Examination Manual directs examiners to make a review of the procedures for such disclosure. It is the recommendation of the Industry Advisory Committee that such a provision not be included in the Model Act, in view of the fact that there are other regulatory tools presently available.

6. "Refusal to insure risks solely because of age, residence, race, color, creed, national origin, marital status, ancestry, lawful occupation, or solely because of location of the risk or solely because the insured will not agree to place collateral business with a particular insurer, if such practices are performed with such frequency as to constitute a general business practice."

[*349] A pattern of law has been developing on a state-by-state basis to prohibit some of the discriminatory practices referred to and legitimate arguments exist against the type of restrictions that would otherwise be imposed upon insurance underwriting and sales practices. This is an extremely broad prohibition and reaches deeply into the legitimate marketing and underwriting practices of companies. The Industry Advisory Committee agrees that insurers should not refuse to insure because of race, color, and creed. As a practical matter, the Committee sees no need to broaden the Model Act as to race, etc. since many states have handled the problem by regulation.

As to the other factors, the Committee recommends against the inclusion of such prohibitions in the Model Act. As written the suggested prohibition would apply to all lines of insurance. Consider the impact on a fire company which would be required to insure dwellings near munitions plants because "location" would no longer be a valid group for refusal to insure. At least it could be so argued. Specialty companies, such as those who insure only teachers would not be able to restrict their marketing approaches because of occupation. In the auto field companies would be required to issue coverages singly that they now package for good reason, such as collision and comprehensive. If there are serious problems in this area then they ought to be considered individually with respect to each line of insurance and in light of the realities of the market place and not in the context of the Model Act.

7. "Reducing coverage during the policy term without the consent of the insured."

It was the consensus of the Industry Advisory Committee that there is no need for inclusion of this provision in the Model Act, since both the insurance contract and other statutes already prohibit unilateral modification of coverage during a policy term.

B. Revision of Precedures Under Model Act.

1. "Define" acts - Section 4. The Industry Advisory Committee considered the suggestion to include a provision to permit the imposition of administration penalties, in addition to the providing authorizing cease and desist orders. In view of the fact that the Committee is recommending the enumeration of additional acts and practices which are defined to be unfair or deceptive, it is the opinion of the Industry Advisory Committee that the need for a provision to impose a mandatory fine or penalty is greatly lessened. Furthermore, the present remedial provisions in the Model Act are virtually identical to the provisions of the FTC Act which does not grant authority to impose penalties on persons who have engaged in an unfair or deceptive practice. The only penalties for such violation provided in the FTC Act are civil penalties recoverable in the envent that a cease and desist order is violated, similar to Section 11 of the Model Act. The Supreme Court of the United States has held on numerous occasions that Federal Trade Commission proceedings are neither compensatory nor punitive in character, but are strictly corrective and preventative measures taken in the interest of the general public, FTC vs. GRATZ 253 U.S. 421 (1920); GIMBEL BROS vs. FTC, 116 F2d 578 (2dCir, 1941). In

FTC vs. Ruberoid Co., 343 U.S. 470 (1951), the court said "orders of the Federal Trade Commission are not intended to damages for past acts, but to prevent illegal practices in the future."

If the Model Act is to continue to parallel the FTC Act, there would appear to be little reason, in view of the legislative history and established judicial precent, for adding penalty provisions to the Model Act for engaging in an unfair or deceptive practice. However, if it is necessary to go farther than the FTC Act, it is the consensus of the Industry Advisory Committee [*350] that any penalty provision to be added to the Model Act should be as an alternative to the cease and desist order provision and not in lieu thereof. It should provide the Commissioner with authority to impose a fine, not to exceed a specified amount, for a violation of a defined unfair trade practice, following a hearing and other appropriate due process safeguards.

It should be noted that many of the "defined" practices in the Model Act, and regulation issued thereunder (such as the A & S Advertising Rules) require interpretation. Honest men can differ in their interpretation of the law and rules in light of specific facts. The administrative penalty ought not be used as a revenue measure or to correct innocent errors. Nor should it be used to set examples for other insurers.

2. Omnibus provision - Section 9. With respect to the statutory procedure relating to undefined unfair practices, it is the recommendation of the Industry Advisory Committee that the Model Act be revised to remove the provision which requires the commissioner to act through the attorney general in order to obtain an injunction against further violstion of a practice found to be unfair or deceptive. In lieu thereof it is recommended that a provision be included which would permit the insurance commissioner to issue a cease and desist order following the notice and hearing presently provided for on the condition that a stay of such order would go into effect pending an appeal and would remain in effect until judicial review had been completed.

The Committee intends to investigate other consumer practices laws to see if other procedures can be adapted to the Model Act.

C. Authority to Issue Regulations. The recommended expansion of the defined acts lessens the necessity for this power However, the Industry Advisory Committee recommends the addition of a provision to the Model Act authorizing the commissioner to issue regulations which would identify specific acts or practices considered to be a violation of the defined acts and practices enumerated in the statute.It is recommended that such provision include an admonition that such regulation shall not extend or enlarge upon the statutory provisions. In addition, it is recommended that a requirement for mandatory notice and hearing prior to the issuance of such regulations be included.

D. Consumer Class Actions. The Industry Advisory Committee strongly recommends against the inclusion in the Model Act of any provision for consumer class action suits for damages resulting from violation of the Act, whether accompanied or not by a "trigger" mechanism, that is a finding by the commissioner that the Act has been violated. Such a provision is unnecessary and undesirable for the following reasons:

1. The common law in all states recognizes the principle of representative actions, so the consumer is not without remedy in this area;

2. There is less reason for such legislation as applied to a heavily regulated industry such as insurance (characterized by Commissioner Durkin in his testimony on S.984, S.1222 and S.1378 as "pervasive" regulation):

3. The regulator already has the practical power to accomplish on behalf of the consumer what consumer less actions are designed to accomplish. This is evident from the testimony of Commissioner Barger in connection with Senate Bill 3201 in August 1970 (1970 NAIC Proceedings pages 135-144) and from Commissioner Durkin's testimony on S. 984, S. 1222 and S. 1378 in April, 1971;

[*351] 4. Insurers will never be able to rely on the decision of the regulator. If policyholders are able to challenge the decision of the Commissioner through the use of the class action, the whole regulatory mechanism will be subverted. A number of class actions have been filed challenging medical pay offsets in uninsured motorists coverage -- forms approved by the insurance department;

5. Consumer class actions will result in "judicial" regulation of the insurance business;

6. The class action principle has been abused in practice. The principal beneficiaries have been the attorneys. There is much criticism of the federal rules because of the basic inequities in this area.

7. The types of class actions being experienced today have industry-wide implications - not restricted to isolated acts by one insurer. There is an obvious impact on loss experience, market capacity, and perhaps solvency of insurers;

8. Class actions tend to encourage champerty, maintenance and the impropriety of attorneys stirring up litigation;

9. Many of the laws regulating the business are not completely clear, particularly in terms of new practices, etc. As a result, an insurer would not be able to safely rely on the opinion of counsel nor perhaps even the decision of the regulator because of the fear of a class action. This will unduly inhibit the industry in developing new forms and procedures;

10. The costs of defense of class action suits are prohibitive. Litigation minded persons can shop forums until the defendant bows to the yolk of defense costs and agrees to a settlement;

The Industry Advisory Committee is well aware of the Congressional activity in this area. We support the NAIC's action in seeking to exclude insurance services from the ambit of the current legislative proposals. Commissioners Barger and Durkin, in their testimony before the U.S. Senate Committees considering consumer class actions, gave a number of examples of how the state regulatory process protects the consumer and how the commissioners assist the public in areas covered by the class action suits. These same examples not only support the system of state regulation but also stand for the proposition that the insurance consumer has no real need for this additional legislation. As applied to the insurance industry, the Industry Advisory Committee endorses the statement of Simon H. Rifkind, Esq., a former federal judge, in testifying on S. 3201 (Hearings before the Senate Judiciary Committee on Consumer Protection Act of 1970, p. 382):

"Finally, the most important question, . . . is whether class actions are the best or even an appropriate means to protect consumers from unfair or deceptive practices. Law suits are most effective when an individual or a discrete group of individuals is seriously harmed by another person's conduct. When the injurious conduct instead causes widespread, extremely diffuse harm inflicting relatively small individual wounds on many, many people or the population generally, the conduct is normally best regulated by a government.

Difficulties encountered with the administrative approach should not lead us to fly willy-nilly to regulation by private class action that would be wasteful at best and more [*352] likely chaotic in its consequences."

Even without additional special causes of action being created for the consumer, class action law suits against insurers are becoming numerous and troublesome, to say nothing of the expense.

Similar objections lie to any suggestion that the commissioner be entitled to bring class actions for damages arising out of the violation of the Model Act. Such power would change the role of the commissioner from that of a regulator to a collection agency. It will produce conflict between commissioners where there are differences of opinion as to whether the Act has been violated and will engender great public and political pressure upon the commissioners, particularly where a neighboring department has utilized its power in this area. Such conflict will destrop comity between the states, resulting ultimately in federal regulation. The best solution for the consumer is effective regulation.

E. "Group Insurance" and Credit Insurance.

The Industry Advisory Committee has already recommended in its comments on "fictitious group" laws applicable to the fire any casualty fields, that this subject is not appropriate for consideration under the Model Act and recommended study of the subject by another committee of the NAIC and another Industry Advisory Committee.

Similarly, the Committee recommends that the subject of credit insurance not be considered as within the scope of the Model Act. The NAIC, through specially appointed subcommittees, has been working in this very complex field for many years. A Model Act and numerous resolutions have been developed. Any activity in this area by the B-8 Subcommittee and this Industry Advisory Committee would be duplicative at best and certainly confusing. In addition, this Industry Advisory Committee is probably not representative of the companies writing credit insurance.

F. Bill Revising the New Hampshire Unfair Trade Practices Act.

The Industry Advisory Committee considered the bill which Commissioner Durkin submitted for discussion purposes. As Commissioner Durkin has indicated, this bill contains the substance of most of the items which the Advisory Committee was asked to consider. Our previous recommendations clearly indicate our position with respect to these items. Since the Industry Advisory Committee had specific bill language to work with in this connection, the Committee has taken the liberty of setting out its comments, in Appendix A attached to this Report, on both the substance and

the language of the bill. Some of the comments will duplicate those made in this Report, however, we thought it might be useful to the reader if the comments were repeated. The Advisory Committee is prepared to discuss this bill further if the Subcommittee wishes us to do so.

VI. Conclusion.

We trust the Subcommittee will agree that the Industry Advisory Committee has made substantial progress on its assignment. After receiving the comments of the Subcommittee, it is intended that the Advisory Committee will be divided into task force for the purpose of preparing drafts of language to revise the Model Act. The entire Advisory Committee will then meet to consider these drafts and prepare an agreed revision of the Model Act. We would then propose to meet with the [*353] Subcommittee in early Fall for the purpose of reviewing our work product. In that way the Advisory Committee should be prepared to present a final report and revised Model Act to the Subcommittee sufficiently in advance of the December NAIC meeting to enable the Subcommittee to act at that meeting.

Repsectfully submitted.

Industry Advisory Committee

By: Robert S. Seiler, Chairman

Members of the Industry Advisory Committee:

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Mr. Richard A. Edwards

Mr. Otis L. Frost, Jr.

Mr. Howard Hassard

Mr. Robert N. Tyler

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Mr. Donald A. Straub

Mr. Donald McHugh

Mr. William Pugh

APPENDIX A

Industry Advisory Committee Comments on the Bill Revising The New Hampshire Unfair Trade Practices Act

(Section references and page references as to those contained in the Bill)

SECTION 417:4 (I) Page 1

This subsection is a redraft of the Model Act and adds subparagraphs (f), (g) and (h) as specific unfair acts. Misrepresentations of the type specified in subparagraphs (a) through (h) are unfair trade practices in the offer or sale of insurance or in the inducement of the exercise of a right of ownership.

[*354] COMMENTS

1. As redrafted the language applies to "misrepresenting, directly or indirectly,". How does one indirectly misrepresent? The modifying phrase should probably be stricken.

SECTION 417:4 (XVI) Page 3

This provision would give the Commissioner the power to define unfair trade practices by rule or regulation.

COMMENTS

This provision should be deleted. There are two principal reasons for such a position, as follows:

a. The prohibited acts under this Chapter are really penal in nature and are, perhaps, the most serious with which an insurance company can be confronted from the standpoint of its reputation and its image with the public. To be held guilty of an unfair trade practice is a very serious matter comparable if not in fact a civil crime. For this reason the scope of the acts constituting unfair trade practices should be defined by the legislature and not be the executive. The section in question provides no standards whatsoever for such definition and it is doubtful whether or not standards would be effective in any event. Far too many states today permit regulations to become effective without the protection of a hearing and, in any event, it is extremely difficult to be confronted with the commissioners of 50 different states reacting to such provision.

b. This power is subject to abuse resulting from competitive pressure brought upon the Commissioner to protect supposed financial prerogatives.

## PROOF OF SERVICE

I, Carol Aranda, declare as follows:

I am employed in the County of San Francisco, State of California, I am over the age of eighteen years and am not a party to this action; my business address is 555 Mission Street, Suite 3000, San Francisco, CA 94105-0921, in said County and State. On May 19, 2016, I served the within:

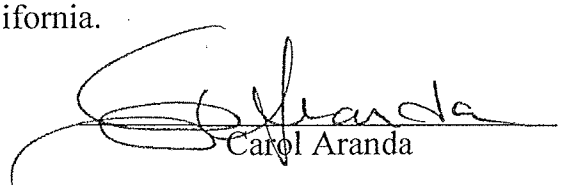
**ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES & PERSONAL INSURANCE FEDERATION OF CALIFORNIA'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS**

to each of the persons named below at the address(es) shown, in the manner described.

**[SEE ATTACHED SERVICE LIST]**

☑ **BY MAIL**: I placed a true copy in a sealed envelope addressed as indicated on the attached service list for collection and mailing at my business location, on the date mentioned above, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service in a sealed envelope with postage fully prepaid. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained in the proof of service.

I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document(s), and all copies made from same, were printed on recycled paper, and that this certificate was executed on May 19, 2016 at San Francisco, California.



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