B204878

IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION THREE

SUPERIOR DISPATCH,

Plaintiff and Appellant,

vs.

INSURANCE CORPORATION OF NEW YORK,

Defendant and Respondent.

Appeal from Los Angeles County Superior Court
Superior Court Case No. NC 037014
Honorable Judith Vander Lans

AMICUS BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA AND UNITED POLICYHOLDERS

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CONSUMER ATTORNEYS OF CALIFORNIA
and UNITED POLICYHOLDERS

INTRODUCTION

Consumer Attorneys of California hereby responds to this Court's invitation issued by order of March 2, 2009 for submission of *amici* briefs on the delineated questions.

STATEMENT OF INTEREST

Consumer Attorneys of California - The Consumer Attorneys of California ("Consumer Attorneys") is a voluntary membership organization representing approximately 6,000 associated attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent individuals subjected in a variety of ways to personal injury, employment discrimination, and other harmful business and governmental practices. Consumer Attorneys has taken a leading role in advancing and protecting the rights of injured Californians in both the courts and the Legislature.

United Policyholders - The financial security that insurance policies provide is critical to consumers and is an integral part of the fabric of our economy and our society. United Policyholders is a non-profit charitable organization founded in 1991 that is helping preserve the integrity of the insurance system by serving as an information resource on policyholders'

interests, rights and duties. Donations, grants and volunteer labor support the organization's work.

United Policyholders monitors the national insurance marketplace with a particular focus on California. The organization's staff and volunteers participate in public policy forums, disseminate information about the claim process, and file amicus briefs in cases involving coverage and claim disputes. United Policyholders serves as a clearinghouse on consumer issues related to commercial and personal lines insurance products. (www.unitedpolicyholders.org.)

LEGAL ARGUMENT

I.

THE PURPOSE OF SECTIONS 2695.4 AND 2695.7:

TO PROTECT INSUREDS

As parties struggle with statutes and regulations, the focus often turns to the words and grammar of the provisions, while the purpose of the provisions become blurred. Yet it is fundamental that any interpretation and application of an enactment must be tested by its consistency with the

Legislature's or regulator's intent. "In interpreting regulations, the court seeks to ascertain the intent of the agency issuing the regulation by giving effect to the usual meaning of the language used so as to effectuate the purpose of the law, and by avoiding an interpretation which renders any language mere surplusage." *Modern Paint and Body Supply, Inc. v. State Bd. of Equalization,* 87 Cal.App.4th 703, 708, 104 Cal.Rptr.2d 784, 787 (2001).

"The rules governing interpretation of statutes generally apply also to initiatives and regulations." *Spanish Speaking Citizens' Foundation, Inc. v. Low,* 85 Cal.App.4th 1179, 1214, 103 Cal.Rptr.2d 75, 100 (2000).

> We do not construe statutes in isolation, but rather read every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness. . . . We must consider the consequences that might flow from a particular construction and should *construe the statute so as to promote rather than defeat the statute's purpose and policy*.

Spanish Speaking, etc., 85 Cal.App.4th at 1214, 103 Cal.Rptr.2d at 100 (citations and internal quotations omitted; emphasis added).

This appeal requires a court to interpret and apply administrative

regulations *that are designed to protect the rights of insureds,* promulgated by the Insurance Commissioner under authority of Insurance Code sections 790 *et seq.*, known generally as the Unfair Claims Practices Act. Insurance Code section 790 is the Legislature's explanation of the purpose of the Act:

> The purpose of this article 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, Seventy-ninth Congress) . . . by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

The Legislature explicitly authorized the Insurance Commissioner to adopt regulations to promote the purposes of the Unfair Practices Act. Ins.C. § 790.10 ("The commissioner shall, from time to time as conditions warrant, after notice and public hearing, promulgate reasonable rules and regulations, and amendments and additions thereto, as are necessary to administer this article."). The Commissioner's Fair Claims Settlement Practices Regulations include Title 10, sections 2695.4 and 2695.7 of the

Code of Regulations.

> The promulgation of the regulations is expressly authorized by Insurance Code section 790.10. . . . The Regulations flesh out the statutory public policy of the Unfair Practices Act, the purpose of which is to regulate trade practices in the business of insurance. . . . Section 790.03(h) specifically forbids certain unfair claims settlement practices. . . . In sum, the Commissioner's "Fair Claims Settlement Practices Regulations" represent the considered and duly promulgated public policy appropriate to the processing of its subject insurance claims in California.

Spray, Gould & Bowers v. Associated Internat. Ins. Co., 71 Cal.App.4th 1260, 1269, 84 Cal.Rptr.2d 552, 557 (1999) (citations omitted).

The construction and application of the Fair Claims Settlement Practices Regulations, therefore, must be guided by the remedial and protective purposes of the Legislature's enactments.

II.

SECTION 2695.4 REQUIRES INSURERS TO ADVISE INSUREDS ABOUT CONTRACTUAL LIMITATIONS THAT MAY APPLY TO THEIR CLAIMS

The Fair Claims Settlement Practices Regulations, Section 2695.4(a), provides:

> Every insurer shall disclose to a first party claimant or beneficiary, all benefits, coverage, time limits or other provisions of any insurance policy issued by that insurer that may apply to the claim presented by the claimant. When additional benefits might reasonably be payable under an insured's policy upon receipt of additional proofs of claim, the insurer shall immediately communicate this fact to the insured and cooperate with and assist the insured in determining the extent of the insurer's additional liability.

Because the principles of statutory construction apply to regulations as well, *Modern Paint and Body Supply, supra,* a court starts with the language of the regulation. As the Supreme Court explained in the context

of interpretation of a statute –

> In construing a statute, our role is to ascertain the Legislature's intent so as to effectuate the purpose of the law. . . . In determining intent, we must look first to the words of the statute because they are the most reliable indicator of legislative intent. . . . If the statutory language is clear and unambiguous, the plain meaning of the statute governs.

People v. Lopez, 31 Cal.4th 1051, 1056, 6 Cal.Rptr.3d 432, 435 (2003) (citations omitted).

By its plain terms, this regulation requires insurers to disclose "*all* . . . time limits . . . that may apply to the claim presented by the claimant." It is not limited to statutes of limitations. The reason for this construction of the regulation is manifest: It maximizes the protection to the insureds, which is the intent of the Unfair Claims Practices Act and of the Fair Claims Settlement Practices Regulations. A construction that requires disclosure of *all* contractual limitations buried in insurance policies assures that claims will be resolved on their merits, not by technical defenses that arose only through an insured's ignorance of its rights.

In *Spray, Gould,* an insurer obtained summary judgment against an

insured, arguing that the insured (an insurance defense law firm) failed to file its action for breach of contract and breach of the implied covenant of good faith and fair dealing within the one-year limitations period specified in the insurance policy. The insurer had not notified the firm about the contractual limitations period when it denied the claim. The firm contended that insurer's violation of Section 2695.4 should estop the insurer from relying upon the contractual limitations period. This Court agreed and reversed.

Analyzing the regulation, this Court concluded that an estoppel can arise from a party's silence if that party had a duty to speak.

> The regulation imposes on insurers an unmistakable duty to advise its claimant insureds of applicable claim time limits. The regulation directly targets the situation presented by this appeal. The regulation's purpose is salutary, designed to alert insureds to their insurance policy obligations, and to foster equity, fairness, and plain-dealing in claims handling.

Spray, Gould, 71 Cal.App.4th at 1268, 84 Cal.Rptr.2d at 556-557.

This Court also considered the public policy implications of ignoring the regulation, and of permitting an insurer to assert a contractual

limitations period as a defense despite its failure to inform its insured about contractual limitations period:

> [T]he Commissioner's "Fair Claims Settlement Practices Regulations" represent the considered and duly promulgated public policy appropriate to the processing of its subject insurance claims in California. . . . We see no reason not to adopt this carefully considered public policy as giving rise to a duty to speak for the purpose of applying the doctrine of equitable estoppel. To do otherwise would arbitrarily undermine an applicable industry standard, one expressly designed to insure fairness in the claims process and resolution of claims on the merits. There seems no valid reason to ignore its command.

Spray, Gould, 71 Cal.App.4th at 1269, 84 Cal.Rptr.2d at 557 (footnote omitted).

The rationale of *Spray, Gould* is as vital today as it was ten years ago, when this Court handed down the decision. Insurers still use contractual limitations periods to shorten the time that their insureds have to challenge in court denials of benefits, indemnity or coverage. The public

policy of full information and disclosure to insureds has not diminished.

III.

SECTION 2695.7 SPECIFIES THE TIME IN WHICH INSURERS MUST ADVISE INSUREDS ABOUT STATUTORY AND CONTRACTUAL LIMITATIONS THAT MAY APPLY TO THEIR CLAIMS

Section 2695.7(f), which is also part of the Insurance Commissioner's Fair Claims Settlement Practices Regulations, provides:

> Except where a claim has been settled by payment, every insurer shall provide written notice of any statute of limitation or other time period requirement upon which the insurer may rely to deny a claim. Such notice shall be given to the claimant not less than sixty (60) days prior to the expiration date; except, if notice of claim is first received by the insurer within that sixty days, then notice of the expiration date must be given to the claimant immediately. With respect to a first party claimant in a matter involving an uninsured motorist, this notice shall be given at least thirty (30)

> days prior to the expiration date; except, if notice of claim is first received by the insurer within that thirty days, then notice of the expiration date must be given to the claimant immediately. This subsection shall not apply to a claimant represented by counsel on the claim matter.

Applying the plain meaning rule of construction, *People v. Lopez,* 31 Cal.4th at 1056, 6 Cal.Rptr.3d at 435, the regulation by its terms requires an insurer to notify a claimant about statutes of limitations and *other time periods* upon which an insurer may deny a claim. The regulation addresses the Insurance Commissioner's reasonable understanding that insurance claims can be subject to many different time limits.

The first time limits are statutes of limitations – the limitations periods enacted by the Legislature. *E. g.* C.C.P. § 337 (four years to file action for breach of written contract). The second are contractual – provisions drafted by insurers to shorten the period (typically, to one year) in which an insured must file an action. The provision in Insurance Corporation of New York's insurance policy in this appeal is typical. There are also other time limits that insurers (and at times statutes) impose upon their policyholders that would fall under Section 2695.7(f). An

example of such a provision is the 60-day limit for an insured to present a signed and sworn proof of loss to an insurer, as required in standard form fire insurance policies. Ins. C. § 2071 ("The insured shall . . . within 60 days after the loss, unless the time is extended in writing by this company, the insured shall render to this company a proof of loss, signed and sworn to by the insured . . .."). Other insurance policies have "proof of loss" time limits that are conditions of recovery of benefits under the insurance policy. *E. g. Olson v. Standard Marine Ins. Co.,* 109 Cal.App.2d 130, 240 P.2d 379 (1952) (jewelry and fur insurance policy requiring sworn proof of loss presented within ninety days of loss).

Unlike Section 2695.4, this regulation specifies time requirements that the insurer must satisfy apropos of notice of the time limitations that the claimant must satisfy. The second sentence commands the insurer to provide notice of time limits at least sixty days before expiration of the limits. If the insurer learns of the loss with less than sixty days left in the time period, it must give notice to the claimant immediately.

IV.

SECTION 2695.7(F) APPLIES TO TIME LIMITS THAT COULD JUSTIFY DENIAL OF A CLAIM AS WELL AS TIME LIMITS THAT COULD ESTABLISH A DEFENSE IN A JUDICIAL ACTION

Section 2695.7(f) applies to a "claimant" which, under Section 2695.2(c), is "a first or third party claimant as defined in these regulations." A "first party claimant" is "any person asserting a right under an insurance policy as a named insured . . .." 10 Cal.Code Reg. § 2695.2(f).[1] A "third party claimant" is "any person asserting a claim against any person or the interests insured under an insurance policy." 10 Cal.Code Reg. §

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[1] These amici curiae understand that the insurer in this appeal contends that Section 2695.4 does not apply, because the insurance policy it sold to Superior Dispatch did not have first party insurance and Superior Dispatch did not own the truck that it was shipping. (Resp. Brf. at 12-13.) This position is based on characterizations of coverage (first party coverage for loss sustained to insured's property versus third party liability coverage). The Fair Claims Settlement Practices Regulations define "first party" differently. "'Claimant' means a first . . . party claimant *as defined in these regulations* . . .." 10 Cal. Code Reg. § 2695.2(c). *As defined by the regulations,* "first party claimant" is "any person asserting a right under an insurance policy as a named insured." If the named insured is asserting rights against his insurer, to obtain the benefit of the coverage he purchased, he is a "first party claimant" under the Regulations. The plain meaning of the regulation is broad enough to encompass a named insured trying to get coverage for a loss for which it will be liable to a customer (or any other third party, for that matter).

2659.2(x).

A typical interaction between insurer and insured is a property damage or fire loss claim. The insured suffers a loss, contacts his insurer, and the two of them begin the process of investigating it, establishing coverage for it, and valuing it. Again, the present appeal is an example of just such an interaction.

Another interaction, not uncommon, involves a third party who has a cause of action against an insured, and the insurer negotiates directly with that third party. This is occurs in cases involving automobile collisions and incidents on homeowners' premises, for example. *See Regus v. Schartkoff,* 156 Cal.App.2d 382, 319 P.2d 721 (1958) (in third-party's action against insured arises from dog bite, insurer's representation that it would settle if third-party would not retain counsel and refrain from filing suit created estoppel to assert statute of limitations defense but, on the particular facts, estoppel expired before suit filed).

Section 2659.7(f) may not be a model of clarity, because it attempts to cover with one sentence a wide variety of circumstances. It is possible to construe the first sentence two different ways. "[A]ny statute of limitation or other time period requirement upon which the insurer may rely to deny a claim" can mean that notice must be provided about "statutes of limitation" in general, *plus* "other time period requirements upon which the insurer

may rely to deny a claim." It is also possible to read the statute as requiring notice of "any statute of limitation . . . upon which the insurer may rely to deny a claim." Determining the correct way to parse this sentence (assuming there is a correct way) may not be necessary, however, if the regulation is interpreted to effectuate the legislative and administrative intent.

Because the purpose of the claims handling regulations (and the statutory authority on which they are based) is to protect first party claimants and third party claimants, the regulation should be read broadly, to effectuate that legislative and regulatory purpose. In the context of a first-party claimant (as defined by the regulations), "other time period" that could be a basis for denial of a claim could be contractual "sworn proof of loss" time limits.

In the context of a third party claim, a "statute of limitations" could be a basis upon which an insurer may deny a claim. A third party (for example, a driver who is struck by an insured) engaged in negotiations directly with the liability insurance carrier may be ignorant of the statutory limitations period or be lulled into believing that the insurer will not assert it as a reason to refuse the pay a claim. Section 2695.7(f) is a command to the insurer that – even as to adversaries – the insurer must be forthright and candid. It must caution the third-party claimant that a statute of limitations

is approaching and, if the claim is not resolved before expiration of the limitation period, the claim will be denied.[2]

Of course, in the context of a third party claimant, untimeliness of the claim can be a basis for "denial" *as well as* a defense in a judicial action against the insured. For this reason, it does not make a difference whether "statute of limitations" stands independently or is modified by "upon which the insurer may rely to deny a claim." In either case, the regulation is a command to the insurer that, when dealing with third party claimants, the insurer must treat them fairly too. Section 2695.7(f) is a recognition that, thus, that as between the insurer and a claimant (whether insured or third-party), the insurer has superior knowledge about the law and claims handling. The regulation prevents an insurer from taking advantage of that superior knowledge to the detriment of the third party claimant.

Section 2695.7(f) thus is not limited to limitations provisions that could justify denial of a claim; it also applies to statutes of limitations that can establish a defense in a judicial action.

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[2] Further, it is certainly possible for an insurer to comply with the regulation's time requirements – sixty days before expiration of the limitations period – when dealing with a third party claimant. An insurer negotiating directly with a third party claimant can easily notify her that the statute of limitations will expire in sixty days and, if not resolved, the claim will be denied on that basis. The regulation also applies if, in the rare case, the insurer receives the third party's claim less than sixty days before expiration of the limitations period.

V.

THE TOLLING RULE OF *PRUDENTIAL -LMI*

In *Prudential-LMI Com. Ins. v. Superior Court*, 51 Cal.3d 674 (1990) the California Supreme Court applied the doctrine of equitable tolling to an insured's first party claim for property damage. In question four of this Court's order of March 2, 2009, the Court inquires whether that doctrine applies to third party liability policies as well as to first party policies. But as discussed, above, this case, in fact, relates to a first party claim, i.e., a claim by an insured under its own policy. While the claim is for indemnification in this case, rather than payment for property damage, it is still fundamentally a first party claim. On that basis, there is no rational justification for refusing to apply the *Prudential-LMI* estoppel doctrine in this case.

The larger question – and which seems to be the question this Court is actually asking – is whether under a standard liability policy in which the insured requests defense and indemnification, does *Prudential-LMI* apply? And the answer to that larger question is the same: When an insured seeks a defense under a liability policy, and the requested defense is denied, *Prudential-LMI* should still be applied to the first party request for coverage, even though the requested coverage relates to a third party claim.

It is still the insured's right to coverage (i.e., a defense) which is at issue. The same is true when the insured requests indemnification (e.g., a settlement) for the third party's claims. In that situation, the rationale for application of the tolling doctrine applies with equal force as it does under a standard first party claim under a property damage policy.

Indeed, the same equitable tolling doctrine already applies in those situations. For example, when an insurer refuses to provide defense or indemnification of the insured in an underlying third-party claim, the time within which to sue the insurer for bad faith "is equitably tolled until the underlying action is terminated by final judgment." *Lambert v. Commonwealth Land Title Ins. Co.*, 53 Cal.3d 1072, 1077 (1991). Similarly, the time within which to bring an action for the insurer's refusal to settle the underlying third-party action is tolled until there is a final judgment in the underlying action. *Archdale v. American International Specialty Lines Ins. Co.*, 154 Cal.App.4th 449, 478-479 (2007).

As a practical matter, therefore, the same equitable tolling principles apply to third-party claim situations as to first-party claims under *Prudential-LMI*. The difference, of course, is that in the third-party context, where the insurer has the right and duty to defend the underlying claim, the tolling is for a much longer period than the mere claim adjustment period in the standard first party *Prudential-LMI* context.

VI.

SECTION 2695.4 AND 2695.7 APPLY TO SUPERIOR DISPATCH'S CLAIM

Setting aside, for the moment, that counsel represented Superior Dispatch for part of the time, after the insurer already denied the claim, both Section 2695.4 and 2695.7(f) apply to the claim for insurance benefits. The parties in this appeal debate whether Section 2695.7(f) is the "more specific" regulation and thus, as the insurer would have it, supplant Section 2695.4. "[T]he rule that a specific provision will control over a general provision is simply a tool for ascertaining and carrying out the intent of the Legislature." *People v. Jenkins,* 28 Cal.3d 494, 505, 170 Cal.Rptr. 1 (1980).

The rule of "specific over general," while not a disfavored rule of construction, is invoked only when two statutes (or regulations) are irreconcilable. "If we can reasonably harmonize two statutes dealing with the same subject, then we must give concurrent effect to both, even though one is specific an the other general." *Garcia v. McCutchen,* 16 Cal.4th 469, 478, 66 Cal.Rptr.2d 319, 325 (1997) (citations and internal quotations omitted). This rule of construction "applies when an irreconcilable conflict exists between the general and specific provisions." *Pacific Lumber Co. v.*

State Water Resources Control Board, 37 Cal.4th 921, 942, 38 Cal.Rptr.3d 220, 236 (2006).

These two regulations may overlap to some extent, but they are not irreconcilable. Section 2695.4 applies only to first party claimants (such as Superior Dispatch); Section 2695.7(f) applies to "claimants" (which includes first and third party claimants). Both command insurers to provide critical information to claimants about time limits that could be used to defeat their recovery (whether by denial of a claim or defense in judicial action). Section 2695.7(f) goes further than Section 2695.4, because it specifies *when* notice of time limits must be provided (sixty days for most claimants, thirty days for uninsured motorist coverage claimants).

This is not a situation in which an insurer would be in violation of one section if it complied with the other. An insurer can provide a notice to its insured about "time limits . . . that may apply to the claim" under Section 2695.4, *and* be in compliance with the mandate to provide notice of "any statute of limitation or other time period requirement" applicable to the claim under Section 2695.7(f). Similarly, the insurer can provide these notices more than sixty days before expiration of the time limits as required by Section 2695.7(f), and be in compliance with Section 2695.4 (which does not specify a minimum amount of notice). Giving notice to a third party claimant, as required by Section 2695.7(f) does not undermine any

provision of Section 2695.4, which applies to first party claimants.

VII.

AN INSURER IS ESTOPPED TO ASSERT A TIME LIMIT AS A DEFENSE TO A JUDICIAL ACTION OR AS A REASON FOR DENIAL OF A CLAIM EVEN IF THE INSURED LATER RETAINS COUNSEL

The insurer's position in this appeal is that, despite its violations of Sections 2695.4 and 2695.7, it should not be estopped to assert the contractual limitations period. Its reasoning is that Superior Dispatch retained counsel in January 2004 – about seven months after Superior Dispatch presented the claim and almost two months after it denied the claim.

Section 2695.4 and 2695.7(f) require notices to be given. The regulations are not phrased as options – that is, that notice must be given unless the insurer believes that counsel *might* be retained in the future. The plain meaning of the regulations commands an insurer to give the claimant (first party or third party) notice of time limits that apply to the claim. *The violations of the regulations occur when the insurer denies the claim but chooses not to inform the claimant about the applicable time limits.* An

insured's act of consulting a lawyer months later does not reverse the violation or relieve the insurer of the consequences of the violation.

Spray, Gould's explanation of Section 2695.4, cited earlier in this brief, bears repeating:

> The regulation imposes on insurers an unmistakable duty to advise its claimant insureds of applicable claim time limits. The regulation directly targets the situation presented by this appeal. The regulation's purpose is salutary, designed to alert insureds to their insurance policy obligations, *and to foster equity, fairness, and plain-dealing in claims handling.*

Spray, Gould, 71 Cal.App.4th at 1268, 84 Cal.Rptr.2d at 556-557.

Equity, fairness and plain-dealing will not be fostered – it will be undermined – if the regulations are interpreted to render violations retroactively meaningless if the insured fortuitously consults an attorney after denial of the claim. Such a construction will undermine the Legislature's intent behind Insurance Code section 790.03 and the Insurance Commissioner's intent behind the Fair Claims Settlement Practices Regulations. An insurer could make a calculation that it will not

notify an insured about a limitations period and, if the insured fortuitously retains an attorney *later,* argue that its failure to provide notice was inconsequential. This construction would invite an insurer to violate the notice requirements – figuring that some insureds may never pursue their rights in court – and gamble that it would have an argument to avoid estoppel as to those who eventually retained an attorney.

There are legal consequences to an insurer that disregards those regulatory commands. The consequence is an estoppel to assert time limits against the claimant. *Spray, Gould,* 71 Cal.App.4th at 1268-1269, 84 Cal.Rptr.2d at 556-557. *Spray, Gould* explained:

> [T]he Commissioner's "Fair Claims Settlement Practices Regulations" represent the considered and duly promulgated public policy appropriate to the processing of its subject insurance claims in California. We see no reason not to adopt this carefully considered public policy as giving rise to a duty to speak for the purpose of applying the doctrine of equitable estoppel. To do otherwise would arbitrarily undermine an applicable industry standard, one expressly designed to insure fairness in the claims process and resolution of claims on the merits. There

seems no valid reason to ignore its command.

Spray, Gould, 71 Cal.App.4th at 1269, 84 Cal.Rptr.2d at 557.

A court should avoid an interpretation of the regulations that abandons this carefully considered public policy or that encourages creative ways to finesse it.

Dated: May ___, 2009

By:_____
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CERTIFICATE OF LENGTH OF BRIEF

I, Steven B. Stevens, declare under penalty of perjury under the laws of the State of California that the word count for this Brief, excluding Tables of Contents, Tables of Authority, Proof of Service and this Certification is 4494 words as calculated utilizing the word count feature of the Word software used to create this document.

Dated: May ___, 2009

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STEVEN B. STEVENS