S226529

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

Plaintiffs and Respondents,

v.

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

Defendant and Appellant.

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

AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND APPELLANT DAVE JONES

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TABLE OF AUTHORITIES

Federal Cases

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INTRODUCTION

I urge the Court to reverse the decision in *Association of California Insurance Companies v. Jones (ACIC)* (2015), 185 Cal. Rptr. 3d 788, on two grounds. First, that decision erroneously decided a fundamental administrative law issue, incorrectly interpreting a statute that was intended to grant *adjudicative* authority to the Insurance Commissioner to limit the Commissioner's *rulemaking* authority. Second, the *ACIC* decision misapplied the standard of judicial review appropriate for regulations duly promulgated under the Administrative Procedure Act.

ARGUMENT

The Insurance Commissioner's Authority to Adopt Regulations

The *ACIC* decision construed the Insurance Commissioner's power to adopt regulations under California Insurance Code § 790.10. The regulation in question dealt with replacement cost estimates furnished to prospective policy-holders. It established that a failure to follow the requirements set forth in the regulation would be considered a misleading statement and thus would constitute an unfair insurance practice. The Court of Appeal overturned this regulation because it held that the Commissioner could identify additional unfair insurance practices only through the adjudicatory device described in § 790.06.

I believe this decision is wrong. A statute should never be construed to preclude an agency from addressing a problem through a regulation because it could also address the same problem through adjudication. This is true whether or not the statute authorizing adjudication is unusual like § 790.06. The Legislature must specifically say so if it wants to limit the scope of a rulemaking power, which it did not do in this case. Nothing in § 790.06 stated that it was the one and only mechanism for the Insurance Commissioner to define an unfair insurance act or practice. The *ACIC*

decision nevertheless limited the Commissioner's rulemaking power because of questionable inferences from the structure of the statute. This approach threatens the ability of many California agencies to resolve regulatory problems through rulemaking.

Rulemaking is superior to case-by-case adjudication for making policy. Rulemaking enables public participation through the notice-and-comment process, whereas adjudication excludes public participation. The procedure used in rulemaking (that is, consideration of written comments filed by stakeholders) is far superior as a policy-making vehicle to the trial-type process used in adjudication, especially when the rule is detailed and technical as is the one at issue in this case. Rulemaking treats all regulated parties alike, rather than singling out one of them for regulatory treatment. It brings benefits to all insurance consumers rather than those purchasing insurance from a single company. In addition, regulations are published in a single searchable volume (the California Code of Regulations), and thus are much more accessible to the public than adjudicatory decisions. In California, all rules are checked for legality by the Office of Administrative Law, which often avoids the need for judicial review. Thus, the fact that an agency might be able to deal with a problem through adjudication should never be construed as a limitation on the agency's power to achieve the same result through rulemaking (absent explicit language in the statute that precludes rulemaking).

Under both California and federal administrative law, an agency's rulemaking power is not circumscribed by the fact that the agency could address the same problem through adjudication. The agency has discretion to choose the most appropriate modality for declaring its policy. (See, e.g, *Ford Dealers Ass'n v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, 362, 185 Cal.Rptr. 453 [statute prohibiting car dealers from making

misleading statements supported regulations prohibiting dealer from adding on charges for which it had been reimbursed by manufacturer]; *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 824, 258 Cal.Rptr. 161 ["No provision bars the commissioner from consolidating cases or issuing regulations of general applicability. Thus there is nothing here which prevents the commissioner from taking whatever steps are necessary to reduce the job to manageable size."].)

Under federal law, numerous cases have recognized and approved of an agency's authority to adopt rules even though it could have addressed the same problem through adjudication. For instance, *Heckler v. Campbell,* (1983) 461 U.S. 458, allowed the Social Security Administration to adopt the "grid" regulations concerning the methodology for determining the availability of jobs to disabled persons, even though the statute provided for individualized hearings. "A contrary holding would require the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding." (*Id.* at p. 467.)

Therefore, the fact that § 790.06 *authorizes* the Insurance Commissioner to define an unfair insurance act or practice by adjudication should not be read to *restrict* the Commissioner's authority to do so by regulation. This is particularly true where, as here, the Legislature has expressly granted the Insurance Commissioner broad authority to "promulgate reasonable rules and regulations, and amendments and additions thereto, as are necessary to administer" the Unfair Practices Act. (Cal. Ins. Code, § 790.10.)

The Appropriate Standard of Review of a Regulation

There is an additional issue of fundamental importance raised by *ACIC,* one that has generated conflicting opinions from the courts of appeal. It concerns the standard of judicial review of an agency's

interpretation of a statute that is embodied in a regulation. In general, while a reviewing court has independent judgment power over issues of statutory interpretation, it is required to give deference to the agency's construction. The extent of that deference is situational and depends on whether the agency has a comparative interpretive advantage over the court and whether the circumstances of the interpretation indicate that it was probably correct. (See *Yamaha Corp. v. State Board of Equalization* (1998) 19 Cal.4th 1, 12, 78 Cal.Rptr. 2d 1.) *Yamaha* cites my work on this subject. (See *id.* at p. 12 [citing and discussing Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies* (1995) 42 UCLA L. Rev. 1157, 1192-1209].)

In *ACIC,* the Court of Appeal incorrectly stated that it is not required to give deference to the agency's interpretation of the scope of its own authority, citing language in *Western States. Western States* correctly stated that issues of statutory construction are subject to judicial independent judgment. However, immediately following the language quoted by the *ACIC* opinion, the *Western States* decision said: "In determining whether an agency has incorrectly interpreted the statute it purports to implement, a court gives weight to the agency's construction. How much weight ... is situational, and greater weight may be appropriate when an agency has a comparative interpretive advantage over the courts, as when the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion." (*Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401, 415-16, 159 Cal.Rptr.3d 702 (citations and internal quotation marks omitted)). Thus it is evident that the court below misinterpreted *Western States.*

The error of the court below may be traced to dictum in footnote 4 of *Yamaha,* which suggested that an agency's determination of its authority to

enact a regulation might be reviewed without according any deference to the agency's construction of the law authorizing it to act. (See 19 Cal.4th at p. 11, 78 Cal.Rptr.2d at p. 6, fn. 4.) The use of the ambiguous term "deference" in footnote 4 can be read to mean that the court should not abdicate its function of being the ultimate arbiter of statutes. On the other hand, it may mean that reviewing courts are prohibited from considering the factors of variable deference mentioned above. I believe that the first reading is correct and that the second reading is incorrect. An absolute bar on giving any deference to the agency's statutory interpretation would be contrary to the analysis in the rest of the *Yamaha* opinion. It is also contrary to federal jurisprudence addressing the same question. *City of Arlington v. FCC* (2013) – U.S. –, –, 133 S.Ct. 1863, 1870. *City of Arlington* holds that judicial deference under the federal *Chevron* doctrine is appropriate even in cases in which the agency's interpretation involves the scope of its own jurisdiction. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984) 467 U.S. 837 [104 S.Ct. 2778, 81 L.Ed.2d 694].

This Court itself has not followed the no-deference reading of the *Yamaha* footnote 4 dictum, as reflected in *American Coatings Ass'n v. South Coast Air Quality Dist.*, (2012) 54 Cal.4th 446, 460, 142 Cal.Rptr.2d 581 and *Ramirez v. Yosemite Water Co.*, (1999) 20 Cal.4th 785, 801, 85 Cal.Rptr.2d 844, as well as *Western States*. But some courts of appeal have disavowed any deference to the agency's interpretation that is contained in a regulation and determines that the agency had authority to adopt the regulation. I believe the language about the standard of review in these decisions is erroneous. In addition to *ACIC*, see *California Ass'n of Medical Products Suppliers v. Maxwell-Jolly* (2011) 199 Cal.App.4th 286, 313, 131 Cal.Rptr.3d 692, 714 [quoting *Yamaha* and deciding statutory

interpretation issue without granting any deference to agency]; *Nortel Networks, Inc. v. State Bd. of Equalization* (2011) 191 Cal.App.4th 1259, 1277, 119 Cal.Rptr.3d 905, 918 ["The agency's view is given no deference when a court decides whether a regulation lies within the scope of the agency's authority"].)

CONCLUSION

The Court should rule that a grant of adjudicatory authority does not diminish an agency's power to address the same problem through rulemaking. It should also take this opportunity to clear up confusion about the standard of judicial review of an agency's statutory interpretation when it is embodied in a regulation. The same variable deference factors that a court normally uses in evaluating an agency's statutory interpretation should be applied to reviewing an agency's regulation that defines the extent of the agency's powers.

Dated: January 28, 2016

Respectfully submitted,

By: */s/ Michael R. Asimow*
Michael R. Asimow

CERTIFICATE OF COMPLIANCE WITH RULE 8.204(C)(1)

I certify that, pursuant to California Rules of Court, rule 8.204(c)(1), the attached ***AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND APPELLANT DAVE JONES*** is proportionately spaced, has a typeface of 13 points or more, and contains 2,045 words, as determined by a computer word count.

Dated: January 28, 2016 Respectfully submitted,

By: */s/ Michael R. Asimow*
Michael R. Asimow

PROOF OF SERVICE

STATE OF CALIFORNIA

Re: *Association of California Insurance Companies et al. v. Jones*
S.Ct. No. S226529, 2nd Civ. No. B248622

I am employed in the County of Santa Clara, State of California. I am over the age of 18 and not a party to the within action. My business address is 559 Nathan Abbott Way, Stanford, California 94305.

On **January 28, 2016** I served the document described as **AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND APPELLANT DAVE JONES** on all parties in this action, as listed on the attached Service List by the method stated.

☐ If electronic-mail service is indicated, by causing a true copy to be sent via electronic transmission from Strumwasser & Woocher LLP's computer network in Portable Document Format (PDF) this date to the e-mail address(es) stated, to the attention of the person(s) named.

☐ If fax service is indicated, by facsimile transmission this date to the fax number stated, to the attention of the person named, pursuant to Code of Civil Procedure section 1013(f).

☒ If U.S. Mail service is indicated, by placing this date for collection for mailing true copies in sealed envelopes, first-class postage prepaid, addressed to each person as indicated, pursuant to Code of Civil Procedure section 1013a(3). I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Stanford, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing contained in the affidavit.

☐ If overnight service is indicated, by placing this date for collection by sending true copies in sealed envelopes, addressed to each person as indicated, pursuant to Code of Civil Procedure, section 1013(d). I am readily familiar with this firm's practice of collecting and processing correspondence. Under that practice, it would be deposited with an overnight service in Santa Clara County on that same day with an active account number shown for payment, in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **January 28, 2016**, at Stanford, California.

/s/ Patricia Adan
Patricia Adan

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S.Ct. No. S226529, 2nd Civ. No. B248622

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