No. S226529

IN THE
SUPREME COURT OF CALIFORNIA

ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES and PERSONAL INSURANCE FEDERATION OF CALIFORNIA,
Plaintiffs-Respondents,
v.
DAVE JONES, in his capacity as the Commissioner of the California Department of Insurance,
Defendant-Appellant

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

APPLICATION TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* CONSUMERS FOR AUTO RELIABILITY AND SAFETY, EAST BAY COMMUNITY LAW CENTER, HOUSING AND ECONOMIC RIGHTS ADVOCATES, PUBLIC COUNSEL, AND PUBLIC GOOD LAW CENTER IN SUPPORT OF DEFENDANT-APPELLANT

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APPLICATION TO FILE *AMICUS* BRIEF

Pursuant to the California Rules of Court, rule 8.520(f), the organizations described below respectfully request permission to file the attached brief as *amici curiae* in support of Defendant-Appellant Commissioner of Insurance Dave Jones.

This application is timely made within 30 days after the filing of the reply brief on the merits. No party or counsel for any party in the pending appeal authored the proposed *amicus* brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief, and no other person or entity made a monetary contribution intended to fund the preparation or submission of the brief other than the *amici curiae*, their members, or their counsel in the pending appeal.

I. BACKGROUND OF *AMICI CURIAE*

Consumers for Auto Reliability and Safety (CARS) is a national, award-winning non-profit auto safety and consumer advocacy organization dedicated to preventing motor vehicle-related fatalities, injuries, and economic losses. CARS has spearheaded enactment of many landmark laws to protect the public and successfully petitioned the National Highway Traffic Safety Administration and various state agencies for promulgation of consumer protection regulations. The United States Congress has repeatedly invited the President of CARS to testify on behalf of American consumers regarding auto safety practices and policies, including air bags and other automatic restraint systems, the safety hazards posed by salvage and flood vehicles, mandatory binding arbitration in auto sales

contracts, and various fraudulent and predatory auto sales practices, which affect the ability of car buyers to afford advanced safety systems. CARS supports robust regulation by California's insurance commissioner to address ongoing price gouging and other violations of the law perpetrated by auto insurance companies, at the expense of the motoring public.

The **East Bay Community Law Center (EBCLC)** is the largest provider of free legal services in Alameda County and a nationally-recognized poverty law clinic. EBCLC's Consumer Law Practice, in particular, provides legal assistance to hundreds of low-income consumers in the East Bay annually who are suffering from financial abuse. Some of the most unfair and deceptive practices that EBCLC encounters come from insurance companies who engage in deceptive sales techniques, sell policies that are essentially worthless to consumers, and/or routinely deny valid claims.

Housing and Economic Rights Advocates (HERA) is a California statewide, not-for-profit legal service and advocacy organization. HERA's mission is to ensure that all people are protected from discrimination and economic abuses, especially in the realm of housing. Through its extensive work with low and moderate income consumers on mortgage and homeownership issues, HERA frequently receives complaints from Californians regarding property insurance costs and coverage. HERA's clients, like the vast majority of consumers, lack information about the nature of these policies and rely on government oversight and regulation to make sure that insurers treat them fairly when they most need it.

Public Counsel is the nation's largest pro bono law firm. Founded in 1970, Public Counsel strives to achieve three main goals: foster economic justice by providing individuals and institutions in underserved communities with access to quality legal representation; protect the legal rights of disadvantaged children; and represent immigrants who have been the victims of torture, persecution, domestic violence, trafficking, and other crimes. Through a pro bono model that leverages the talents and dedication of thousands of attorney and law student volunteers, along with an in-house staff of more than 75 attorneys and social workers, Public Counsel annually assists more than 30,000 families, children, immigrants, veterans, and nonprofit organizations and addresses systemic poverty and civil rights issues through impact litigation and policy advocacy. The Consumer Law Project at Public Counsel deals with a wide range of consumer issues and advocates for strengthened consumer protections and regulation of financial consumer products. Given the reach and importance of insurance services, Public Counsel believes robust and flexible oversight is critical to safeguarding the rights of the low-income consumers the firm represents.

The **Public Good Law Center** is a public interest firm dedicated to the proposition that all are equal before the law. Through amicus participation in cases of particular significance for protection of consumers – particularly low-income consumers – Public Good seeks to ensure that the safeguards of the law remain available to everyone. Public Good has submitted amicus briefs in this Court, in the United States Supreme Court, and in Courts of Appeals around the

nation in consumer protection cases. The breadth and reach of the insurance industry, and its impact on all California consumers, underscore the importance of clarifying the full extent of the authority that the commissioner of insurance has been provided by the Constitution and legislature of the state.

II. INTEREST OF *AMICI CURIAE*

Amici are organizations dedicated to the protection of consumers, especially consumers of limited means, in fields including automobiles, health, housing and other areas in which insurance plays a vital role. Accordingly, *amici* are keenly aware of the importance of delineating the broad and flexible authority of the commissioner of insurance to issue rules addressing unfair or deceptive insurance practices. Because such rules apply across the board, as opposed to enforcement actions that affect insurers one by one, they produce a level playing field that benefits both insurance companies and consumers.

The diversity of the fields collectively represented by *amici* illustrates the potential impact of the Court's decision. Unfair and deceptive insurance company practices continually emerge in each of those fields, harming both consumers and insurers who do not wish to engage in unfair practices but fear the effect on market share of refusing to do so. The most effective response to those ever-changing practices – and the solution that the legislature and voters of California have selected – is to provide the state's insurance commissioner with regulatory authority sufficient to respond across the board to the practices as they arise. The history of the Unfair Insurance Practices Act and of the elected constitutional

office of commissioner of insurance demand nothing less.

III. NEED FOR FURTHER BRIEFING

Amici believe that further briefing is necessary to explore matters not fully addressed by the parties' briefs, particularly the legislative history of the Unfair Insurance Practices Act and the experience of other states in defining the role of insurance commissioner and implementing their own unfair insurance practices acts. *Amici* are confident that these additional matters, and the perspective of organizations working on behalf of consumers in a wide range of fields affected by unfair insurance practices, can add substantially to the Court's analysis.

IV. CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the accompanying brief be accepted for filing in this case.

Dated: April 11, 2016

Respectfully submitted,

By: 

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INTRODUCTION AND SUMMARY OF ARGUMENT

Seeking to rein in insurance practices that have misled homeowners about the amount of coverage offered by their home replacement policies, California's commissioner of insurance promulgated a much-needed regulation requiring insurers to provide certain disclosures to consumers and training to broker-agents. That regulation – California Code of Regulations, title 10, section 2695.183 – represents a considered, practical and necessary rule that epitomizes the commissioner's broad authority to issue regulations aimed at preventing unfair and deceptive acts and practices.

The Commissioner's briefs in this case have explained what Section 2695.183 (the Regulation) is: a gap-filling measure clarifying what constitutes an untrue, misleading or deceptive practice under Section 790.03 of the Insurance Code.[1] (Commissioner's Opening Brief on the Merits (OBM) at p. 3; Reply Brief (RB) at pp. 1, 15.) Respondents (collectively, ACIC) nonetheless argue that the Regulation exceeds the insurance commissioner's authority – authority that ACIC asserts is limited and tightly conscribed. (Answer Brief on the Merits (ABM), at p. 25.) In fact, the opposite is true. From the time of enactment of the Unfair Insurance Practices Act (UIPA) (Ins. Code, §§ 790 - 790.15) in 1959, through the passage of Proposition 103 in 1988 establishing the insurance commissioner as one of only eight elected executive positions in the state, and continuing in the

[1] All statutory references are to the California Insurance Code unless otherwise specified.

1990s and 2000s with legislative amendments focused specifically on the problem of underinsurance (OBM at pp. 7-8), the legislature and the people of California have steadily increased the insurance commissioner's authority and responsibility. The commissioner's current authority and responsibility easily encompass the carefully drawn Regulation at issue in this case.

Section 2695.183 is a reasonable response to the looming problem of underinsurance, adopted after careful consideration by the commissioner and with substantial input from the insurance industry. The Regulation provides needed protections to consumers who cannot be expected to know – without the mandated disclosures – what the full cost of replacing their homes will be.

ACIC's attack on the Regulation seeks not only to abrogate a modest but crucial protection for consumers but also to curtail the commissioner's rulemaking authority and reverse more than half a century of steady and unambiguous progress in protecting California consumers. Respondents' argument relies on parsing putatively ambiguous text and revisions, a largely futile endeavor since the California legislature provided little explanation for passing the Act other than its desire to keep pace with other states that had already passed similar laws. Lacking in ACIC's argument is an appreciation for the UIPA's broader context. California did not pass the UIPA in a vacuum; in fact, every other state has its own version of a UIPA, and each of those—like California's—is closely based on the National Association of Insurance Commissioners' Model Act of 1947.

Looking to the history of the Model Act and to other states' experience

with their own UIPAs reveals two crucial points: First, the drafters of Model Act of 1947, the act upon which California's (and other states') UIPAs were based, strove to give insurance commissioners power and flexibility sufficient to combat a broad array of unfair acts and practices. They recognized, however, that the Model Act as drafted might not be adequate to that purpose. California's legislature recognized those limitations when it amended the Act in 1971 to include a broad catchall provision empowering the insurance commissioner to promulgate rules and regulations. Second, other states' courts have considered language nearly identical to California's UIPA and taken a practical approach to reading the Act in which the Commissioner has broad rulemaking authority regardless of ambiguous language like "administer" or similar terms.

In other words, there was nothing at all extreme or excessive in the promulgation of Section 2695.183. The Regulation is a reasonable means of preventing the insurance industry from misleading policyholders into underinsuring their homes, and the commissioner was well within his authority to issue it.

The judgment of the court of appeal should be reversed.

ARGUMENT

I. THE REGULATION IS NECESSARY TO PREVENT UNFAIR OR DECEPTIVE PRACTICES IN THE SALE OF HOME REPLACEMENT POLICIES.

The promulgation of Section 2695.183 fell squarely within the insurance commissioner's responsibility to protect policyholders from unfair or deceptive practices. The commissioner issued the Regulation in response to a series of complaints from California homeowners who discovered, after wildfires wrecked their homes, that the "complete" home replacement policies they had been promised by insurers were in fact inadequate. (See Cal. Dept. of Ins., Response to Comments of National Association of Mutual Insurance Companies (NAMIC) and the Pacific Association of Domestic Insurance Companies (PADIC) (Nov. 17, 2010), <http://www20.insurance.ca.gov/epubacc/REG/151770.htm>.) The commissioner found that insurers had at times claimed a home replacement policy was "complete" even though the insurer had "fail[ed] to take into consideration certain factors" relevant to the cost of replacement, precipitating the post-wildfire underinsurance problems. (*Id.*) The Regulation specifically focuses on consumers who wish to fully insure against the full value of home replacement, and not those homeowners who might choose to be underinsured in exchange for lower premiums. (*Id.*)

It is unfair and deceptive—both under the UIPA's outlined definitions in Section 790.03 of the Insurance Code and under a common sense reading of the terms—for insurers to promise "complete" home replacement policies to

prospective customers when those policies in fact fail to account for full home replacement costs. Section 790.03, subdivision (b) prohibits "Making or disseminating . . . any statement . . . which is untrue, deceptive, or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue, deceptive, or misleading." The marketing and offering of inadequate home replacement policies comes under the broad terms of Section 790.03, subd. (b), since the insurer is claiming that a policy is complete even though the insurer should know that its statement is "untrue, deceptive, or misleading" because it has failed to describe and provide for all likely replacement costs.

This type of underinsuring also satisfies the plain meanings of "unfair" and "deceptive." An "unfair" practice is "[n]ot honest, impartial, or candid; unjust," or "[i]nequitable in business dealing." (Black's Law Dict. (10th ed. 2014).)[2] A "deceptive act" is "likely to deceive a consumer acting reasonably under similar circumstances." (*Id.*) In interpreting similarly worded statutes, this Court and the courts of appeal have offered analogous definitions. (See, e.g., *Chern v. Bank of Am.* (1976) 15 Cal. 3d 866, 875 [discussing Bus. & Prof. Code, § 17500 (False Advertising Law)] ["a statement is false or misleading if members of the public

[2] California courts have struggled with defining "unfair" in the context of the similarly worded Unfair Competition Law (UCL), Bus. & Prof. Code, § 17200 et seq. (See, e.g., *Zhang v. Superior Court* (2013) 57 Cal.4th 364, 380, fn. 9 [citing a string of contradictory cases for the proposition that "[t]he standard for determining what business acts or practices are 'unfair' in consumer actions under the UCL is currently unsettled"]; *Walker v. Countrywide Home Loans, Inc*. (2002) 98 Cal.App.4th 1158, 1170 ["No clear test to determine what constitutes an unfair business practice has been established in California."].)

are likely to be deceived"]; *Lavie v. Procter & Gamble Co.* (2003) 105 Cal. App. 4th 496, 508 [discussing Bus. & Prof. Code, §§ 17200 (Unfair Competition Law) & 17500]["the standard to be applied . . . is whether it is 'likely to deceive' the consumer"]; *Brockey v. Moore* (2003) 107 Cal. App. 4th 86, 99 [Unfair Competition Law & False Advertising Law] [test is whether "members of the public are likely to be deceived"].)

Under any common definition, the Regulation combats practices that are both unfair and deceptive. (Ins. Code, § 790.02.) The Regulation discourages unfairness by preventing insurers from unjustly and inequitably promising illusory "complete" home replacement benefits whose falsity will become apparent only when the policyholder is most vulnerable and in the weakest negotiating position (i.e., after a disaster). And the Regulation works against deception by providing for clear disclosures to consumers and the proper training of broker-agents in home replacement estimates.

More broadly, the UIPA suggests that unfair or deceptive acts or practices are those that run contrary to the public interest. (Ins. Code, § 790.06 [allowing the commissioner to take action against unfair acts and practices when "a proceeding by him or her in respect thereto would be in the interest of the public"].) The commissioner has given ample consideration to those interests, as evidenced by extensive hearings and explanations for the regulation. (See, e.g., Response to NAMIC and PADIC, *supra* ["When an estimate of replacement cost is communicated to an insured and or applicant, it is in the best interest of all

concerned that the sources and methods used to generate the estimate be current. It does no good if the estimate is based upon information that is not accurate."]; *id.* ["The Department believes it is in the best interest of consumers and licensees that the regulations be implemented as soon as is practical given the significance of assuring that broker-agents receive training on estimating replacement cost, and that licensees communicating estimates for replacement cost do so in accordance with the proposed regulations."].) The commissioner's decision to regulate inadequate home replacement policies is essential to protecting the public and well within the authority granted by the UIPA.

II. THE COMMISSIONER'S EFFORTS TO PREVENT INADEQUATE HOME REPLACEMENT POLICIES FALL SQUARELY WITHIN HIS RESPONSIBILITY TO PROTECT THE PUBLIC.

The Regulation represents a vital step in protecting both policyholders and the general public, the commissioner's defining responsibility.

The commissioner's responsibility to the public is underscored by his status as one of only eight statewide elected executive officials in California. (See California Constitution, art. 3, § 8.) California is one of only twelve states in which the commissioner is an elected official. (See Nat'l Assoc. of Insurance Comm'rs, *State Commissioners-2014*, <http://www.naic.org/documents/members_state_commissioners_elected_appointed.pdf>.) Accordingly, as compared with unelected directors of other California agencies or with insurance commissioners in the thirty-eight states whose commissioner is appointed rather than elected, the

California insurance commissioner answers directly to the public. (See *Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal. App. 4th 1354, 1372 ["In providing for an elected rather than appointed commissioner, the voters made the Insurance Commissioner responsive to the voters, not the Legislature"].)

That public responsibility not only provides an independent electoral check on the commissioner's actions, but also emphasizes the primacy of consumer protection among the commissioner's duties. In addition, it helps to explain the wide discretion afforded the commissioner. (See *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal. 3d 805, 824 ["Much is necessarily left to the Insurance Commissioner, who has broad discretion to adopt rules and regulations as necessary to promote the public welfare"].)

The commissioner's responsibility to the public takes on a potential additional dimension with respect to underinsurance: protecting the taxpayers who would likely have to step in to cover homeowners' uninsured costs or, in a sufficiently severe catastrophe, to prop up the insurance industry. A legislative committee examining the aftermath of wildfires early in the last decade observed that some insurers who had issued inadequate home replacement policies "offered to pay beyond policy limits." (Sen. Banking, Finance & Ins. Com., Analysis of Sen. Bill No. 2 (2005–2006 Reg. Sess.) (April 6, 2005), p. 5.) Though it may have bought peace at the time, clearly this is not a financially sustainable model. If, in order to gain market share, an insurance company offers home replacement policies with lower premiums (and lower policy limits), it cannot long continue to

pay above those policy limits. When there are more than a few instances of underinsured homes being destroyed, as with wildfires of the type predicted to plague California in the future (see Jason Samenow, *Dangerous Increase in Risk of Large U.S. Wildfires Predicted by Mid-Century* (Aug. 27, 2015) WASH. POST [reporting on NOAA estimates that "[v]ast areas . . . including the Great Basin, Sierra Nevada, and Pacific Northwest see the risk of very large fires increasing by 200 to 500 percent"]), the insurer will quickly stop making those payments. (See Response to NAMIC and PADIC, *supra* [noting that after wildfires in 2003, 2007, and 2008, "fire survivors complained about problems including their experience that after the fire they learned that the replacement value estimates made in setting coverage limits for their homes was incomplete and too low, causing underinsurance issues to arise during efforts to rebuild or replace their residences."].) And with widespread uncovered losses to homeowners, government – i.e., taxpayers – will have to step in and pick up the tab that should have been paid by the insurers (and their premium-paying insureds). The tacit government guarantee would mean the "moral hazard" that insurance is said to present to consumers would apply no less powerfully to insurance companies. (See *Aug. Entm't, Inc. v. Philadelphia Indem. Ins. Co*. (2007) 146 Cal. App. 4th 565, 581, quoting *May Dept. Stores Co. v. Federal Ins. Co.* (7th Cir. 2002) 305 F.3d 597 [Posner. J.] ["'Moral hazard' is the term used to denote the incentive that insurance can give an insured to increase the risky behavior covered by the insurance"].)

Suffice it to say that, against this backdrop, it makes no sense for ACIC to claim that "public policy considerations do not support" the Regulation. (ABM, at p. 5.) If, as Respondents contest, the commissioner can only address the problem of underinsurance through retroactive cease and desist orders or seeking injunctions once the culprits are revealed, it will already be too late. As an elected representative of the people of California, the commissioner has a responsibility to the public to prevent misrepresentations of home replacement policies – *before* the next disaster strikes.

III. CALIFORNIA HAS VESTED THE COMMISSIONER OF INSURANCE WITH SIGNIFICANT POWER AND FLEXIBILITY IN COMBATTING UNFAIR AND DECEPTIVE PRACTICES.

As the Appellant's briefs explain, claims that the insurance commissioner's inherent authority is tightly constrained find no support in the text of the UIPA. (OBM, at pp. 20-21.) ACIC's assertions also find no support in the legislative history of the NAIC Model Act, which (because the UIPA was adopted wholesale from the Model Act) is effectively a legislative history of the California statute as well. To the contrary, that history makes clear that the commissioner was intended to have broad and flexible powers to address and contain unfair and deceptive practices.

A. The California Legislature Expanded Upon The Model Act In Order To Provide The Commissioner With Authority Sufficient To Combat A Wide Variety Of Unfair And Deceptive Acts And Practices.

The NAIC developed its Model Act in 1947 to provide for the identification and elimination of unfair and deceptive acts and practices in the insurance industry. The Model Act provides insurance commissioners with the authority (1) to issue cease and desist orders for acts defined in the Act and/or (2) to go to court to enjoin previously undefined types of acts. Although California adopted this scheme in 1959, the legislature later recognized the Model Act's limited ability to keep pace with the insurance industry's ever-evolving business tactics. The addition of Section 790.10 represented an explicit and unequivocal expansion of the commissioner's authority to engage in discretionary rulemaking. That authority encompasses the Regulation.

1. The primary goal of the NAIC Model Act was to fully protect policyholders.

The history of the Model Act reveals an overarching goal of empowering insurance commissioners to fully protect consumers from harm by the insurance industry. At the time of drafting the Model Act, the NAIC's bylaws stated that the association's objective was

> to promote uniformity in legislation affecting insurance; to encourage uniformity in departmental rulings under the insurance laws of the several states; to disseminate information of value to insurance supervisory officials in the performance of their duties and to establish ways and means of *fully protecting the interests of insurance policyholders* of the various states, territories and insular possessions of the United States.

(NAIC Constitution and Bylaws, NAIC Proceedings, p. 3, Appendix at p. C [emphasis added].)

Any consideration of the California insurance commissioner's authority under the UIPA needs to take into account that the mission of the NAIC, the bill's main architect, was to "fully protect" policyholders. Developments in the UIPA since California adopted the NAIC Model Act, including promulgation of Section 2695.183, evince the same mission of protecting policyholders to the greatest possible extent.

2. The NAIC Model Act addresses disparities between insurance premiums and policy benefits.

In discussions leading up to the release of the Model Act, NAIC participants recognized the problem of inadequate insurance and sought to address it through the Act. In one of the NAIC's final meetings considering the Model Act, the Committee specifically singled out inadequate policy benefits, stating that the practice "could not continue." (Report of Committee on Rates and Rating Organizations and Federal Legislation, NAIC Proceedings (Dec. 3-7, 1946), p. 216, Appendix at p. E; see also *id.* ["[I]t is a known fact that there are a number of companies operating in that business which provide inadequate policy benefits at excessive prices."].)

The NAIC targeted the problem of inadequate policies by including a broad provision addressing underinsurance in the defined unfair acts. (See NAIC Model Act §4(a)(1), §4(a)(2) [prohibiting "Misrepresentations and False Advertising of

Policy Contracts" and "False Information and Advertising Generally"], Appendix at p. Q.) The language contained in that section of the Model Act became Section 790.03(a) and (b) of the UIPA. The history of the Model Act thus indicates that the UIPA was intended to allow the commissioner to prevent the misleading offering of inadequate insurance, precisely the issue before the Court in this case.

3. The NAIC Model Act created a regulatory structure predicated on the legislature and courts, which California later expanded to explicitly include discretionary rulemaking by the commissioner.

Twelve years after California's adoption of the Model Act, the legislature decided the commissioner needed more flexibility in establishing uniform practices for the insurance industry. By enacting Section 790.10, the legislature recognized that the NAIC's limited model did not adequately combat unfair practices and rejected the idea that unfair acts and practices are so settled that an exhaustive list of enumerated practices could be sufficient.

The original Model Act had cabined the commissioner's explicit powers, allowing her only to issue cease and desist orders to combat defined violations and/or to bring an action in court to enjoin unfair practices the Act did not specify. But the drafters anticipated that additional administrative powers, like those ultimately added by California, might prove necessary. (See NAIC Model Act §§ 6, 9.) The NAIC created only a "limited" power in regard to unspecified acts for two reasons: (1) "[b]ecause of the experience of the states in regulating the business over a period of many years, unfair and deceptive practices are well

known to the regulatory authorities and consequently should be set forth in the statute itself" so as to provide notice to the industry; and (2) because the association was entering a "new and broader regulatory field," it cautiously sought "enlargement of procedural authority only as its need is demonstrated." (NAIC Dec. 3-7 Report, pp. 216–17; Appendix at pp. E, F.)

However, the NAIC never intended for this limited enumerated authority to substantially constrain the commissioner. Instead commissioners would need significant discretion: "in order to cope with the situation an extremely flexible unfair trade practices act was required." (NAIC Dec. 3-7 Report, p. 216, Appendix at p. E.) To this end, the NAIC recognized that the Model Act might be only a starting place for the states, which could later add new provisions and procedures expanding a commissioner's power. (Report of Subcom. on Federal Trade Commission Act, NAIC Proceedings (Mar. 11-15, 1946), p. 146, Appendix at p. Q.) Thus, in setting out the commissioner's original powers, the NAIC determined that "[i]f experience demonstrates that a considerable number of cases arise under the omnibus clause [the judicial injunction procedure], it may well be that additional defined practices should be enumerated or that *a more direct administrative procedure will be required*." (*Id.* at p. 217; Appendix at p. F (emphasis added).) Indeed, although it ultimately did not include the provision in the Act, the NAIC considered granting the commissioner broader rulemaking authority. (*See* Joint Report of Committees on Rates and Rating Organizations, NAIC Proceedings (Oct. 23-26, 1946), p. 175; Appendix at p. J [discussing a

proposal, which the committee "looked with favor upon," to allow the commissioner to "determine unfair acts and practices other than those specifically enumerated"].) Participants in the NAIC proceedings expressed concern that providing an exhaustive list of unfair acts and practices would unduly limit the commissioner's powers to protect policyholders: "[I]t was contended that if all potential unfair practices were enumerated, any statute covering them would be carried to unreasonable and unworkable lengths or conceivably might be incomplete." (Joint Report of Committees on Rates and Rating Organizations, NAIC Proceedings (Sept. 5-7, 1946), Appendix at p. M; see also *id.* [noting a proposal that "the Commissioner should be empowered to promulgate rules and regulations covering unfair trade practices, with the proviso, however, that such rules and regulations could not be adopted except upon notice and after full hearing to all interested parties and with an appropriate provision for judicial review"]).

In 1971, the California legislature, recognizing these concerns, added rulemaking powers to the UIPA. Assemblyman Jack Fenton, the sponsor of the 790.10 rulemaking provision, stated that Section 790.03 merely set out the "quite general terms" of what constitutes unfair acts or practices. (Sen. Com. on Ins. and Fin. Insts., Hearing on AB 1353 (1971 Reg. Sess.).) This is a far cry from ACIC's unsupported claim that the legislature "explicitly defined the acts or practices it considers to be unfair or deceptive" through a "finely-reticulated . . . list." (ABM, p. 34.)

The legislature's decision to provide the commissioner with greater authority stemmed from a recognition that "since the insurance business . . . is becoming more and more competitive the possibilities of unfair or deceptive trade practices are increasing." (Asm. Com. on Fin. and Ins., Report on AB 1353 (1971 Reg. Sess.).) Section 790.10 "gives the Insurance Commissioner the authority to promulgate rules and regulations so that if the need therefor arises, he can, without delay, promulgate necessary rules making [unfair or deceptive trade] practices definite and specific for the benefit of the public *without having to wait for the Legislature to act at a later date*." (*Id.* (emphasis added).) Whereas the original NAIC Model Act, and indeed California's pre-1971 UIPA, vested express authority for enumerating unfair acts and practices in the legislature or the courts, the addition of Section 790.10 represents a clear expansion of the commissioner's authority to promulgate rules.

The expansion of the commissioner's power to make unfair and deceptive practices definite through rulemaking runs directly counter to ACIC's claim that "[t]he legislature has reserved that power for itself and, over the years, has continued to exercise that closely-guarded prerogative itself." (ABM, p. 34.) In fact, the legislature specifically acknowledged both its difficulties handling the increasing number of unfair and deceptive practices and the resulting need for the commissioner to have greater discretion. (*See* Asm. Com. on Fin. and Ins., Report on AB 1353 (1971 Reg. Sess.).) Equally unsupported is ACIC's argument that, because the legislature still retains and has exercised the power to amend and

broaden Section 790.03, the commissioner has no discretionary authority to assess unfair and deceptive acts and practices. (*See* RAB, pp. 31–33.) Such a reading would render Section 790.10 surplusage: if the legislature intended to retain exclusively for itself the power of delineating unfair acts and practices, why would it grant the commissioner explicit rulemaking power?

Seeking to evade the implications of the enactment of Section 790.10, ACIC suggests that this Court must consider whether, theoretically, an insurance company could violate the Regulation while still technically giving a truthful home replacement estimate. (See ABM, pp. 13-14, 43.) Although such a scenario could be envisioned here—as with virtually any disclosure regime[3]—it is irrelevant to the issue of the scope of the commissioner's authority. What matters is whether requiring insurance companies to provide prospective customers a more complete picture of home replacement policies is a "reasonable" and "necessary" means of addressing the problem of misleading underinsurance. (Ins. Code § 790.10.) That it surely is. The regulation therefore falls squarely within the commissioner's authority under Section 790.10.

[3] A food company might argue, for example, that federal nutrition fact disclosure regulations, 21 C.F.R. § 101.9, designed to prevent companies from portraying unhealthy foods as healthy, are invalid because a company could fail to comply with the regulations but nonetheless offer a healthy product.

B. Reading The Unfair Insurance Practices Act In A National Context Underscores The Commissioner's Broad Authority To Promulgate Disclosure Regulations.

California's UIPA is at least as robust as the unfair insurance practices acts in other states where insurance commissioners exercise significant rulemaking authority. The enactment of the UIPA in 1959 reflected California's joining a nationwide consensus that regulatory agencies were best equipped to combat unfair and deceptive insurance industry trade practices. Legislative history reveals that the UIPA's passage was motivated in large part by a desire to keep pace with other states. (See, e.g., J. Thomas, Memo. from Dept. of Ins. to Hon. Edmund G. Brown (June 30, 1959) [noting that California was "almost the only state which has not enacted some form of the 'model' act," which could result in California companies being prejudiced]; J. O'Connel, Memo to Hon. Edmund G. Brown (June 25, 1959) [listing no reasons for adoption of the model act other than its passage in every state "with the possible exception of Illinois"].) Given the UIPA's ties to the 1947 Model Act adopted in similar form by every state in the nation, it is instructive to look to those other states' experience for guidance and comparison.

Doing so reveals three things: First, there is no support in other states for Respondents' argument that the word "administer" limits the commissioner's rulemaking powers. Second, many states, along with California, recognize that insurance commissioners should have broad authority, particularly with regard to

combatting and delineating unfair practices.[4] And third, the structure of the UIPA stands in contrast to similar codes in many other states, which authorize private intervenors to pursue unfair insurance acts and practices – a difference that suggests the insurance commissioner has greater authority in California than elsewhere.

1. State courts have neither speculated about, nor been preoccupied with, differences between the term "administer" and its synonyms.

The Commissioner's briefs establish both the likely source of the word "administer" in Section 790.10 (the California Administrative Procedure Act, Govt. Code, § 11340 et seq.) and the fact that California courts understand the term broadly. (OBM, at pp. 20-21.) ACIC's attempt to find limits in that particular word flounders still further in the face of evidence from other states' choice of terms in their unfair insurance practices laws. Those states have not distinguished between the word 'administer' and its synonyms when confronted with provisions similar to California's Section 790.10. (See Part III.B.2, *infra*.) Here, there is likewise no reason to exhaustively parse Section 790.10's language.

With no legislative history or California case law to support their interpretation of "administer" (other than the ambiguous fact that an earlier draft used the term "implement"), respondents rely upon the U.S. Supreme Court's

[4] Although every state has a version of the 1947 Model Act, very few state courts have had the opportunity to assess their respective commissioner or insurance department's powers to promulgate rules – perhaps because potential challengers have thought such authority uncontestable.

analysis in *Lopez v. Monterey County* for the proposition that the word limits an agency to only nondiscretionary acts. (See ABM, at p. 29.) In fact, the *Lopez* Court came to precisely the opposite conclusion—that "administer" encompasses both discretionary *and* nondiscretionary acts. (*Lopez v. Monterey Cty.* (1999) 525 U.S. 266, 277–79, *abrogated on other grounds by Shelby Cty., Ala. v. Holder* (2013) 133 S. Ct. 2612, 186.) The court found that the phrase "seek to administer" does not apply "*only* where the jurisdiction exercises some element of discretion or policy choice"; the word "'administer' also encompasses nondiscretionary acts by covered jurisdictions endeavoring to comply with their States' superior law." (*Id.* (emphasis added).)

Applying this analysis to Section 790.10, it is clear that the insurance commissioner has authority both to "comply with" the UIPA in a nondiscretionary way and to "exercise[] some element of discretion" in combatting unfair acts and practices. (See *id.*)

Respondents also argue that "administer" has a more limited meaning than a synonym like "implement." (ABM, at p. 29.) This conclusion is based only on Respondents' say-so; unlike the Commissioner's reading of "administer," it has no support in California legislative history, case law, or any dictionary. Furthermore, examining the farrago of terms used in UIPA laws around the country suggests that whatever difference may exist among those words cannot bear the weight that Respondents place on them. (See, e.g., "enforce and administer" (Minn. Stat. Ann., § 72A.19 Subd. 2); "implement[]" (Conn. Gen. Stat. Ann., § 38a-819; N.H.

Rev. Stat. Ann., § 417:31); "carry out" (Neb. Rev. Stat. Ann., § 44-1533; Nev. Rev. Stat. Ann., § 686A.025; "carry out and effectuate" (D.C. Code Ann., § 31-2231.25; Mo. Ann. Stat., § 375.948; Tenn. Code Ann., § 56-8-110); "defining, limiting or prescribing" (Me. Rev. Stat., tit. 24-A, § 2151-B); "implementation and administration" (27 R.I. Gen. Laws Ann., § 27-29-12); and "accomplish" (Tex. Ins. Code Ann., § 541.401), among others.)

Does "enforce and administer," from Minnesota, mean something different than "carry out and effectuate," from Tennessee? Was the Texas legislature's intent, in giving the commissioner power to "accomplish" the purposes of its insurance code, starkly different from that of the legislature in Nevada when it gave its commissioner authority to "carry out" the provisions of the Nevada code? This is the type of speculation in which Respondents have asked the Court to engage.

No state court has found that a commissioner's rulemaking authority turns on the word "administer" or any of its many synonyms. Nor has any state court pointed to legislative history that suggests the term "administer" is somehow more limiting than other similar terms.

To the contrary, this Court has used "administer" to indicate that the Commissioner has broad powers—both explicit and implicit. (See *Calfarm Ins. Co. v. Deukmejian*, *supra*, 48 Cal.3d at 824 [*"*[The commissioner's] powers are not limited to those expressly conferred by statute; rather, [i]t is well settled in this state that [administrative] officials may exercise such additional powers as are

necessary for the due and efficient *administration* of powers expressly granted by statute, or as may fairly be implied from the statute granting the powers"] [emphasis added].) In addition, the courts of appeal have used "administer" interchangeably with synonymous terms when discussing Section 790.10. (See, e.g., *Spray, Gould & Bowers v. Associated Internat. Ins. Co.* (1999) 71 Cal.App.4th 1260, 1269 [upholding a "salutary" insurance disclosure regulation based on Section 790.10 because the commissioner's regulations "*flesh out* the statutory public policy of the Unfair Practices Act" and "represent the considered and duly promulgated public policy appropriate to the *processing* of its subject insurance claims in California"] [emphasis added]; *California Serv. Station & Auto. Repair Ass'n v. Am. Home Assur. Co.* (1998) 62 Cal. App. 4th 1166, 1176 ["Regulation 2505 directly relies on the authority of Insurance Code section 790.10, which gives the California Insurance Commissioner the power to promulgate regulations as necessary to *implement* the Unfair Practices Act."] [emphasis added].)

There is, in sum, no support for respondents' claim that "administer" limits the Commissioner's authority, and there is abundant support to the contrary.

2. State commissioners have broad powers to combat unfair practices through rulemaking.

In other jurisdictions, drafters and courts have recognized that state insurance agencies require broad power to administer unfair practices acts. This authority comes from an appreciation that the insurance industry requires

particularly strong oversight. (See, e.g., *State Farm Mut. Auto. Ins. Co. v. Wyoming Ins. Dep't* (Wyo. 1990) 793 P.2d 1008, 1014 ["The nature of the insurance business makes regulation of it more necessary than is required for many other businesses."]; *Morgan v. Blue Cross & Blue Shield of Kentucky, Inc.* (Ky. 1989) 794 S.W.2d 629, 632 ["The general laws regulating trade practices need flexibility to deal with the variety of cases arising from the insurance business."].)[5]

a. In California and elsewhere, the insurance commissioner's rulemaking authority is so widely accepted that it has not been challenged.

Insurance commissioners' power to promulgate prophylactic rules has generally been so well accepted that no one has thought to contest it. Challenges focus on the ability of private parties to bring suit; the commissioner's authority is accepted. (See, e.g., *Tank v. State Farm Fire & Cas. Co.* (1986) 105 Wash. 2d 381, 393 ["the Insurance Commissioner developed comprehensive unfair practice regulations" that "generally set forth certain minimum standards which, if violated with such frequency as to indicate a general business practice, will be deemed to

[5] Even outside the insurance industry, flexibility is the byword in addressing unfair business acts and practices. (See *Barquis v. Merchants Collection Assn.* (1972) 7 Cal. 3d 94, 112 ["In permitting the restraining of all 'unfair' business practices, section 3369 [the precursor to Bus. & Prof. Code, § 17200] undeniably establishes only a wide standard to guide courts of equity; as noted above, given the creative nature of the scheming mind, the Legislature evidently concluded that a less inclusive standard would not be adequate."]; *People ex rel. Mosk v. Nat'l Research Co. of Cal.* (1962) 201 Cal. App. 2d 765, 772 ["[I]t would be impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited . . . , since unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery."] [citations omitted].)

constitute unfair claims settlement practices"]; *Melancon v. USAA Cas. Ins. Co.* (Ct. App. 1992) 174 Ariz. 344, 347 ["The summary of the rule . . . discloses that [it] was adopted to effectuate the [Ariz. Unfair Claims Settlement Practices] Act"].) In *Brosnan v. Castellanos* (N.D. Cal. July 27, 2009) 2009 WL 2246210, a federal case applying California law, the court likewise approved of the California insurance commissioner's rulemaking authority in holding that a regulation conferred no private right of action. Though the question was not directly at issue, the court viewed the insurance commissioner as having the authority to promulgate regulations to "delineate unfair … practices" under Section 790.03's defined acts. (*Id.* at *4.)

b. In states like California that explicitly authorize rulemaking, the commissioner of insurance has broad authority to combat unfair acts and practices.

In California and in other states with similar regulatory regimes, the presence of defined unfair or deceptive practices in the Code does not derogate from the Commissioner's background authority to promulgate further regulations to explicate those practices, or indeed to delineate other unfair or deceptive practices.[6]

The California commissioner is authorized to promulgate regulations to meet the consumer protective ends set out in the UIPA. (See *Spray, Gould &*

[6] The California Insurance Code expressly grants rulemaking authority to the Commissioner through Section 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." (Ins. Code, § 790.10.)

Bowers v. Associated Internat. Ins. Co. (1999) 71 Cal. App. 4th 1260, 1265.) In *Spray*, the Court of Appeal approved and applied a regulation promulgated under Section 790.10 (requiring that insureds be notified about contractual time limits for making a claim) that explicated a defined practice set out in Section 790.03(h). (*Id.* at p. 1269, fn. 7 ["[m]isleading a claimant as to the applicable statute of limitations"].) Notably, the insurance company in *Spray* did not ask the court to invalidate the disclosure requirement on the grounds that an insurer could fail to disclose time limits for claims but still not mislead an insured—i.e., the argument Respondents make here. Instead, the challenge was less convoluted and the court's response pragmatic:

> 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. 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.

(*Id.* at p. 1269.) The insurer's challenge was not permitted to "arbitrarily undermine an applicable industry standard." (*Id.*)

In this case, as in *Spray*, the insurance industry urges that a carefully thought-out standard be invalidated. Although Respondents focus on Section 790.06's judicial procedure, that provision is simply irrelevant to the outcome of this case – as it was in *Spray*. Instead, here as in *Spray*, the proper question to consider is whether the Regulation reasonably "flesh[es] out the statutory public

policy of the UIPA." (*Spray, supra*, 71 Cal. App. 4th at p. 1269.) And – here as in *Spray* – it does.

Challenges like those raised by ACIC have also been rejected, for similar reasons, by courts in other states whose commissioners have rulemaking authority. The Supreme Court of Wyoming, for example, upheld the state insurance commissioner's authority to issue a regulation prohibiting an unfair practice – indeed, a practice (unlike the present case) not already expressly defined in the Insurance Code. (*State Farm Mut. Auto. Ins. Co. v. Wyoming Ins. Dep't*, (Wyo. 1990) 793 P.2d 1008, 1010.) The presence of a judicial procedure (almost identical to Section 790.06) for addressing unspecified unfair practices was no bar to the exercise of rulemaking. Further, as here, the insurance company in *State Farm* made (and the Wyoming Supreme Court rejected) the fallacious argument that, because it could issue a noncompliant policy that would provide benefits equal to those sought by the commissioner's regulation, the regulation itself must be invalid. (*Id*. at pp. 1010-11 [citing concerns about transparency and pointing to the administrative record, which indicated that insureds were frequently injured by the practice at issue].)

Similarly, in Oklahoma, the Court of Civil Appeals found that the state's insurance code gave the insurance commissioner authority not just to explicate defined practices (as here) but to expand the list of unfair and deceptive acts or practices through rulemaking. (*American Fidelity Life Ins. Co. v. State ex rel. Holland* (Okla. Civ. App. 2013) 307 P.3d 389, 392 [upholding regulation based on

a provision, nearly identical to California's Section 790.10, giving the commissioner the ability to "adopt reasonable rules and regulations for the implementation and administration of the provisions of the Insurance Code"].) Because court the catchall provision "specifically contemplates the existence of unfair or deceptive acts or practices not listed," there was "no statutory impediment to the Commissioner's adoption of a disclosure rule." (*Id.*)

If provisions nearly identical to Section 790.10 supply commissioners in Wyoming and Oklahoma with the authority to bar practices *not* enumerated in the insurance code, then *a fortiori* California's commissioner may issue a regulation that simply clarifies a practice that is already expressly prohibited.

3. Because California, unlike many other states, does not permit private suits under its UIPA, the commissioner holds increased regulatory responsibility and authority.

Since California's UIPA does not provide for citizen enforcement, the commissioner's ability to cover the field in administering the statute is all the more critical. Many states include in their unfair insurance practices acts a right of intervenors to step in when the commissioner declines to prosecute a potentially unfair act or practice. In those states, the general public has some responsibility for enforcing the act, thereby providing a supplement to the commissioner's powers. For example, in Missouri, the state's unfair insurance practices law provides,

> If after reviewing a written complaint alleging a violation . . . the [insurance] director determines that a proceeding . . . would not be in the interest of the public, then any person who alleged commission of an unfair act or practice . . . shall be entitled to judicial review . . . . If the court, after reviewing such written complaint and written determination, finds . . . that a

> proceeding . . . would be in the interest of the public, the court may order the director to institute such proceedings.

(Mo. Ann. Stat., § 375.945 [referenced provisions omitted].) In other states, third-party intervenors can in effect take over proceedings in which the insurance commissioner has decided not to act. (See, e.g., Ark. Code Ann. § 23-66-213 (West) ["If, after a hearing . . . , the report of the Insurance Commissioner does not charge a violation of this subchapter, then any intervenor in the proceedings may . . . cause a petition, notice of appeal, or petition for writ of certiorari to be filed . . . ."]; *accord* Mont. Code Ann., § 33-18-1003; N.C. Gen. Stat. Ann., § 58-63-45; N.M. Stat. Ann. § 59A-16-28; Okla. Stat. Ann. tit. 36, § 1210.)

Thus, other states divide authority between the commissioner, who can prosecute defined unfair acts and practices, and intervenors, who can pursue acts that are not defined or cases that the commissioner has chosen not to take up.[7] But no such language empowering intervenors appears in the California UIPA.[8] The

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[7] There are at least twenty states that provide intervenors with a right of action. (See Ala. Code § 27-12-22; Ark. Code Ann. § 23-66-213; Del. Code Ann. tit. 18, § 2307 (d); Ga. Code Ann. § 33-6-11; 215 Ill. Comp. Stat. Ann. 5/430; Ind. Code Ann. § 27-4-1-9; Md. Code Ann., Ins. § 27-105; Mass. Gen. Laws Ann. ch. 176D, § 9; Mich. Comp. Laws Ann. § 500.2045; Miss. Code. Ann. § 83-5-47; Mo. Ann. Stat. § 375.945; Neb. Rev. Stat. Ann. § 44-1531; Nev. Rev. Stat. Ann. § 686A.170; 53 N.J. Prac., Insurance Codes Annotated 17:29B-10; N.M. Stat. Ann. § 59A-16-30; N.Y. Ins. Law § 2408; N.C. Gen. Stat. Ann. § 58-63-45; Okla. Stat. Ann. tit. 36, § 1210; S.C. Code Ann. § 38-57-210.)

[8] Nor does the UIPA provide a private right of action, which would also serve as a check on unfair practices. Many other states do include such a right in their unfair insurance practices act. (See, e.g., N.M. Stat. Ann. § 59A-16-30; Fla. Stat. Ann. § 624.155; *O'Fallon v. Farmers Ins. Exch.* (1993) 260 Mont. 233, 242; *State Farm Mut. Auto. Ins. Co. v. Reeder* (Ky. 1988) 763 S.W.2d 116, 117; *Griswold v. Union Labor Life Ins. Co.* (1982) 186 Conn. 507, 520; *Sparks v. Republic Nat. Life Ins.*

Commissioner's sole authority is supported by the history of the UIPA and the NAIC's Model Act before it. (*Zhang v. Superior Court* (2013) 57 Cal. 4th 364, 384 ["When the Legislature enacted the UIPA, it contemplated only administrative enforcement by the Insurance Commissioner."].)

Because private parties cannot enforce violations of the UIPA, then either California has a significantly weaker consumer protection scheme than states that allow third party intervenors—an unlikely outcome—or Section 790.10 fills in that enforcement gap by providing the commissioner with broad discretion. In this case, the commissioner found that incomplete estimates constitute an unfair or deceptive practice under Section 790.03 and has acted in accordance with the rulemaking authority of Section 790.10. As a result, despite ACIC's argument to the contrary, there is no need for the commissioner to pursue the judicial enforcement procedures of Section 790.06.

The statutory system has worked as designed. Section 2695.183 is a valid (and valuable) product of the insurance commissioner's rulemaking authority.

CONCLUSION

The California Insurance Commissioner has broad discretionary authority to administer the UIPA by promulgating rules and regulations. Section 2695.183 represents a textbook exercise of that authority.

Co. (1982) 132 Ariz. 529, 541; *Jenkins v. J. C. Penney Cas. Ins. Co.* 721 (1994) 167 W. Va. 597, 607, overruled on other grounds by *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W. Va. 155, 451 S.E.2d; *Farmer's Union Cent. Exch. Inc. v. Reliance Ins. Co.*, 626 F. Supp. 583, 590 (D.N.D. 1985).)

The judgment of the court of appeal should be reversed.

Dated: April 11, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies, pursuant to the California Rules of Court, rule 8.204(c)(1), that the enclosed brief contains 7,356 words, including footnotes and headings but exclusive of tables and signature block, this certificate of compliance, and declaration of service. Counsel derives this number from the word count provided by Microsoft Word word-processing software.

Dated: April 11, 2016 By: 

Seth E. Mermin
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APPENDIX A

AN ACT RELATING TO UNFAIR METHODS OF COMPETITION AND UNFAIR AND DECEPTIVE ACTS AND PRACTICES IN THE BUSINESS OF INSURANCE

Chicago Draft, January 24, 1947

Section 1—Declaration of Purpose.

The purpose of this Act 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 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.

Section 2—Definitions.

When used in this Act:

(a) "Person" shall mean any individual, corporation, association, partnership, reciprocal exchange, inter-insurer, Lloyds insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including agents, brokers and adjusters.

(b) "Commissioner" shall mean the ("Commissioner") of Insurance of this state.

Section 3—Unfair Methods of Competition or Unfair and Deceptive Acts or Practices Prohibited.

No person shall engage in this state in any trade practice which is defined in this Act as or determined pursuant to this Act to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

Section 4—Unfair Methods of Competition and Unfair or Deceptive Acts or Practices Defined.

(a) The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

(1) Misrepresentations and False Advertising of Policy Contracts. Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon, or making any false or misleading statement as to the dividends or share of surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any company for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender his insurance.

(2) False Information and Advertising Generally. Making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading.

(3) Defamation. Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting or encouraging the making, publishing, disseminating or circulating of any oral or written statement or any pamphlet, circular, article or literature which is false, or maliciously critical of or derogatory to the financial condition of an insurer, and which is calculated to injure any person engaged in the business of insurance.

(4) Boycott, Coercion and Intimidation. (a) Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of the business of insurance, or (b) by any act of boycott, coercion or intimidation monopolizing or attempting to monopolize any part of the business of insurance.

(5) False Financial Statements. Filing with any supervisory or other public official, or making, publishing, disseminating, circulating or

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delivering to any person, or placing before the public, or causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false statement of financial condition of an insurer with intent to deceive.

Making any false entry in any book, report or statement of any insurer with intent to deceive any agent or examiner lawfully appointed to examine into its condition or into any of its affairs, or any public official to whom such insurer is required by law to report, or who has authority by law to examine into its condition or into any of its affairs, or, with like intent, wilfully omitting to make a true entry of any material fact pertaining to the business of such insurer in any book, report or statement of such insurer.

(6) Stock Operations and Advisory Board Contracts. Issuing or delivering or permitting agents, officers, or employees to issue or deliver, agency company stock or other capital stock, or benefit certificates or shares in any common-law corporation, or securities or any special or advisory board contracts or other contracts of any kind promising returns and profits as an inducement to insurance.

(7) Unfair Discrimination. (a) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract.

(b) *Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever.

(8) Rebates. (a) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of life insurance, life annuity or accident and health insurance, or agreement as to such contract other than as plainly expressed in the contract issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance, or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends of other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract; or giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such insurance or annuity or in connection therewith, any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract.

(b) Nothing in clause 7 or paragraph (a) of clause 8 of this subsection shall be construed as including within the definition of discrimination or rebates any of the following practices: (i) in the case of any contract of life insurance or life annuity, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance, provided that any such bonuses or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the company and its policyholders; (ii) in the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount which fairly represents the saving in collection expense; (iii) readjustment of the rate of premium for a group insurance policy based on the loss or expense experience thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year.

*In the event that unfair discrimination in connection with accident and health coverage is treated in other statutes the above section should be omitted.

(See footnote [1])

(9) Any violation of any one of Sections ....., ...[2]

(b) The enumeration in this Act of specific unfair methods of competition and unfair or deceptive acts and practices in the business of insurance is not exclusive or restrictive or intended to limit the powers of the Commissioner or any court of review under the provisions of Section 9 of this Act.

Section 5—Power of Commissioner.

The Commissioner shall have power to examine and investigate into the affairs of every person engaged in the business of insurance in this state in order to determine whether such person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice prohibited by Section 3 of this Act.

1. Attached to the report of this committee of December 3-7, 1946, was Exhibit B entitled "An Act Relating to Unfair Practices in the Business of Insurance." Section 4, subsection 9, of that draft contained a paragraph which is herewith quoted in full:

> "(9) Requiring as a condition precedent to loaning money upon the security of a mortgage upon real property, that the owner of the property to whom the money is to be loaned, negotiate any policy of insurance covering such real property through a particular insurance agent or broker or brokers, provided, however, that this provision shall not prevent the exercise by any insurance company of its right to approve or disapprove of the insurance company selected by the borrower to underwrite the insurance."

The committee has given serious consideration to the practice followed by some lenders in insisting upon control of the insurance upon property subject to these transactions. In some states the practice is already prohibited; by-law section 422 (a) of the New York Penal Code prohibiting such transactions in connection with real property is an illustration. The committee feels that no distinction should be drawn between transactions involving real or personal property. In our earlier draft we had incorporated the language above quoted. It has been called to our attention, however, that such a statute affects people and institutions generally in addition to those normally subject to regulation under an insurance regulatory statute. For that reason the committee feels that statutes of this type, in order to be effective, should be incorporated in a general statute rather than in an insurance regulatory statute.

We have been at pains to point this out lest our action in deleting the former Section 9 from the present draft be construed as an abandonment by the committee of its condemnation of the practice.

2. Insert section numbers of any other sections of the Insurance Law which it is deemed desirable or necessary to include as an unfair trade practice.

B

CONSTITUTION AND BY-LAWS

CONSTITUTION OF NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

Article 1. *Name*: This organization shall be known as the National Association of Insurance Commissioners.

Article 2. *Object*: The object of this Association shall be to promote uniformity in legislation affecting insurance; to encourage uniformity in departmental rulings under the insurance laws of the several states; to disseminate information of value to insurance supervisory officials in the performance of their duties and to establish ways and means of fully protecting the interests of insurance policyholders of the various states, territories and insular possessions of the United States.

Article 3. *Membership*: The membership of this Association shall consist of the commissioner, director, superintendent or other official who by law is charged with the responsibility of supervising the business of insurance within each state, territory or insular possession of the United States. Only members and their duly authorized representatives as defined in Article 4 hereof shall be eligible to hold office in the Association and to serve on committees of the Association. Members of the Association of Superintendents of Insurance of the Provinces of Canada shall be eligible to participate in all meetings of this Association without the power to vote.

Article 4. *Power to vote*: Each member of the Association shall have the power to vote either in person or if absent by delegating such power in writing to a duly authorized representative who shall be some person officially connected with his department, who is wholly or principally employed by said department and who is a legal resident of the state, territory or insular possession wherein the department is located. No state, territory or insular possession shall have more than one vote.

Article 5. *Officers*: Officers of the Association shall be a president, first vice-president and secretary-treasurer.

Article 6. *Committees. Executive Committee*: There shall be an executive committee of ten members, including a chairman thereof, and ex-officio the officers and the retiring president, who shall act as vice chairman. Six of the ten members shall consist of one member from each of the six zones, to be elected by the members of the respective zones annually prior to or during the Association's annual meeting.

Standing Committees: As soon as convenient after the annual meeting, the president shall appoint the chairmen, the members of the fol-

premium charged.'' This provision was incorporated in the bill to provide a Commissioner with an effective method of dealing with those companies which have persisted in writing policies providing benefits which are not reasonable in relation to the premium charged. Under this bill the Commissioner will be able to prohibit the use of policies which are fraudulent or manifestly unfair to the public.

It will be noted that this bill provides a much less detailed regulatory machinery than that provided in the model fire and casualty rating bills. The reasons for providing different administrative machinery for dealing with this particular phase of the business is set forth in our report of October 23-26. This bill does not attempt to deal with all improper or deceptive practices in the accident and health field. Such activities are covered in the unfair trade practices act set forth later and will be discussed under the heading of ''Unfair and Deceptive Practices in the Insurance Business.''

Attention is particularly directed to the footnote on the accident and health regulatory bill. The degree of existing regulation of this field varies from state to state. Many different types of carriers are engaged in this business, some of whose activities are regulated under specific statutes or sections of the statutes relating to the individual type of carrier. In states which adopt the form of regulation set forth in Exhibit A, it will be necessary to integrate this statute with the overall regulatory scheme in order to avoid conflicts and duplications and at the same time to make sure that this line of the business is adequately regulated irrespective of the type of carrier engaged in carrying on the business.

Unfair and Deceptive Practices in the Insurance Business

Reference is made to the October 23-26 report of this Committee under the heading, ''Federal Trade Commission Act.'' That report outlined a number of alternative methods of dealing with the subjects embraced within the Federal Trade Commission Act on a state level and for that reason we shall not restate these optional methods of treatment of this problem in this report.

Following a series of conferences between the All-Industry Committee and this Committee and an adjustment of certain ideas set forth in the proposals of both committees, a proposed bill was prepared, a copy of which is annexed hereto and marked Exhibit B. An initial draft of this bill, dated December 3, 1946, was approved by a majority vote of the All-Industry Committee and is on file with this Committee, but the draft attached contains certain additional changes made by this Committee upon which the All-Industry Committee has not yet had an opportunity to act.

From the first the members of this Committee have felt that if the problems created by the S.E.U.A. case and U. S. Public Law 15 were to be solved upon a state level, it was necessary to devise an integrated program. The job could not be done by a patchwork approach; the parts had to fit together within the contemplation of U. S. Public Law 15. This point can best be illustrated by a reference to the situation which confronted this Committee in connection with conditions in the accident and

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health business. As we pointed out in our previous report, it is a known fact that there are a number of companies operating in that business which provide inadequate policy benefits at excessive prices. This situation could not continue. The problem was how to regulate it. Should it be done by a rate regulatory bill such as the model bills? Should it be treated through a bill of the type set forth earlier in this report? Should it be regulated under an omnibus unfair trade practices act at a state level? If a decision was reached not to deal with this problem under a bill similar to the model rating bills and if no accident and health bill of the type set forth earlier in this report was adopted, it was apparent that in order to cope with the situation an extremely flexible unfair trade practices act was required. In the illustration given this Committee has presupposed that the states wanted to cope with this problem on a state level; otherwise existing federal acts designed to cope with this problem would become automatically operative after January 1, 1948. Similar illustrations could be given in other branches of the business.

This brings us to a consideration of Exhibit B. That bill may be described as an unfair and deceptive practices act containing prohibitions against certain enumerated practices and an omnibus provision designed to cover unenumerated practices. It is the belief of this Committee that to the extent possible this act provides adequate machinery for dealing with the scope of the Federal Trade Commission act on a state level. We do not claim that this act can prevent the Federal Trade Commission from exercising the broad powers conferred upon it to act as the investigatory agent of Congress.

In the drafting of this bill certain prohibited practices have been set forth. Most practices in the insurance business inimical to the public welfare are well known and may be defined in a bill of this type. However, these practices sometimes vary from state to state and consequently legislation which might be necessary in one state would not be necessary in another. The Committee emphasizes that where this legislation is introduced consideration should be given to the purely local problems of the state in drafting the definitive section of the bill.

It will be noted that under this proposed bill, while power is conferred upon the Commissioner to issue cease and desist orders in connection with the enumerated practices, his power in connection with the unenumerated practices is limited. Authority has been given to him to initiate proceedings, subpoena witnesses, conduct hearings and make findings as to unenumerated practices. However, before his findings may be enforced it is necessary to bring an action in court through the medium of the Attorney General of the state. That this procedure is more circuitous than one giving the Commissioner power to issue cease and desist orders in any case is apparent. In considering this more restrictive form of administrative procedure the Committee was influenced by certain considerations: (1) Because of the experience of the states in regulating the business over a period of many years, unfair and deceptive practices are well known to the regulatory authorities and consequently should be set forth in the statute itself. This procedure, in the opinion of the Committee, is to be commended because under it people subject to the law know in advance what they may not do. (2) Although the history of state legislation in the insurance business

extends back to 1807, until the present time no state had ever found it necessary to create a state counterpart of the Federal Trade Commission Act, or to entrust to state regulatory officials the specific power contained in the attached bill. The definitive approach had been uniformly followed. In so far as the proposed statute is concerned, state regulation is about to enter a new and broader regulatory field in which we should seek an enlargement of procedural authority only as its need is demonstrated.

If an adequate, overall regulatory pattern is enacted, including a comprehensive enumeration of prohibited practices, the Committee was of the opinion that there should be relatively few occasions for the use of this omnibus provision. In this connection it must be remembered that that provision of the omnibus section enabling the Commissioner to initiate proceedings, hold hearings and make a report should in many instances deter those who are engaged in questionable practices, thus eliminating the necessity for court procedure. If experience demonstrates that a considerable number of cases arise under the omnibus clause, it may well be that additional defined practices should be enumerated or that a more direct administrative procedure will be required.

Proposed Amendments to the Model Rating Bills

Attached to this report (marked Exhibit C) is a report of the Sherman Act Subcommittee of the All-Industry Committee dated December 5, 1946, containing proposed amendments to the model rating bills. The All-Industry Committee by a majority vote adopted the report of its Sherman Act Subcommittee recommending these changes. This Committee gave careful consideration to the proposed amendments but time did not permit sufficient discussion to enable the members of this Committee to reach a final conclusion and for that reason no action was taken by this Committee upon the proposals.

The Committee completed its labors at a late hour on Saturday night, December 7, in order to have this material mimeographed for distribution to the members of the Association when the mid-year meeting convenes on Sunday, at 2:30 P.M. While every effort was made to guard against inaccuracies, time did not permit as careful and detailed a check of the language as the Committee would have preferred. At the first opportunity the Committee will review this material and make whatever editorial corrections may be necessary.

There were certain phases of the proposed bills which require additional study. Furthermore, the Committee felt that upon further consideration it might well be advisable to include in the definitive sections certain additional practices not enumerated. A proposed solution of the interstate advertising problem was explored preliminarily but no final conclusion was reached and this subject requires additional study. A supplemental report will be issued covering these phases of the matter at the earliest opportunity, for the Committee has kept constantly in mind the fact that many state legislatures will be meeting in January, 1947.

Respectfully submitted,

Charles F. J. Harrington, Mass., *Chairman*

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The Regulation of the accident and health business was discussed and a reported bill for future consideration accompanied the report.

Title insurance was discussed and left for further consideration.

The Clayton Act was discussed by the industry and a memorandum submitted at the close of the meeting, but time didn't permit its consideration. The Risk Research Institute expressed certain views in a letter concerning the rating bills, which was received by the Committee and filed.

The exhibits attached to these reports are A, B and C, dealing with the Robinson-Patman Act, various reports of the Industry Committee; Exhibit D, dealing with the Federal Trade Commission Act, and under the title, "An Act Relating to Unfair Practices in the Insurance Business," — and Exhibit E, which was another approach to the Federal Trade Commission Act; and Exhibit F, which was a filing and a rate approval bill for the accident and health business.

As I said, the only action that was recommended was on the Robinson-Patman Act.

Mr. Chairman, I move the adoption of this report.

President Dineen: Do I hear a second?

Commissioner Larson (Florida): I second the motion.

President Dineen: We have a motion, made and seconded, that this report be adopted. All in favor, signify by saying "Aye." All opposed, "No." The "Ayes" have it and it is so ordered.

JOINT REPORT OF COMMITTEE ON RATES AND RATING ORGANIZATIONS AND FEDERAL LEGISLATION OF NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS ON MEETING HELD AT HOTEL COMMODORE, NEW YORK, OCTOBER 23-26, 1946

The following members of the committees were present at this meeting:
Charles F. J. Harrington, Massachusetts, *Chairman*
Maynard Garrison, California
J. Edwin Larson, Florida
Newell R. Johnson, Minnesota
Robert E. Dineen, New York
Seth B. Thompson, Oregon

The following Commissioners were also present:
W. Ellery Allyn, Connecticut
David A. Forbes, Michigan
Walter Dressel, Ohio
J. Austin Carroll, Rhode Island

The following departmental personnel also attended:
E. A. Faircloth, Florida

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Alfred J. Bohlinger, New York
Thomas C. Morrill, New York
Victor Cohen, New York
George McAteer, Washington

William C. Green, Assistant Attorney General of the State of Minnesota, was also in attendance.

The All-Industry Committee was in session at the same time and a number of consultations were held between that group and this committee.

The subjects considered by this committee were as follows:

1. Treatment of the Robinson-Patman Act on a state level.

2. Treatment of the Federal Trade Commission Act on a state level.

3. Proposals for the regulation of the accident and health business.

The committee was also asked to consider the regulation of the title insurance business but the pressure of other business prevented that particular problem from being considered at this meeting. Other aspects of the rating problem were likewise not considered for the same reason.

Robinson-Patman Act

The committee had before it and gave consideration to the reports of the Robinson Patman Act Subcommittee of the All-Industry Committee dated September 19, 1945, October 19, 1945, and September 7, 1946. Copies of these reports are attached hereto, made a part hereof and marked Exhibits "A," "B" and "C." These reports were unanimously approved by the All-Industry Committee and for the purpose of this report are treated as the reports of the All-Industry Committee.

The committee voted unanimously to accept these reports. It was the opinion of the committee that the suggested legislative procedure provided an adequate and satisfactory method of dealing with the Robinson-Patman Act on a state level and the committee recommends for use in the states the proposals therein contained.

Federal Trade Commission Act

Numerous proposals as to how this problem should be treated were considered. In general and in brief, the following proposals were submitted to your committee:

(1) No legislation on a state level should be enacted and the regulation of unfair practices should be left to the Federal Trade Commission.

(2) Each state should enact a so-called "baby federal trade commission act" paralleling the language, in general, of the Federal Trade Commission Act.

(3) Each state should enact a "baby federal trade commission act" with the exception that all prohibited practices should be promulgated by the Commissioner in the form of rules, following notice and hearing to all interested parties. This suggested modification is along the lines of the

procedure contained in the Federal Administrative Procedure Act (Public Law 404, 79th Congress).

(4) Each state should pass an act giving the Commissioner the power to restrain and enjoin unfair practices by the use of cease and desist orders. To the extent possible, the legislature should set forth in definitive form the prohibited acts or practices. To the extent that it was not possible for the legislature to do this, the Commissioner should be entrusted with the power to define the additional prohibited acts and practices under the procedure set forth in (3) above.

(5) The Commissioner should be entrusted with the power to issue cease and desist orders in connection with unfair acts and practices. However, all unfair acts and practices are defined by rules promulgated by the Commissioner following notice and hearing, along the lines of the Federal Administrative Procedure Act. This is a so-called "baby federal trade commission act." It becomes a definitive plan, in effect, upon promulgation of rules by the Commissioner.

(6) Under this plan all unfair acts and practices are prohibited. The statute itself contains a list of prohibited acts or practices. Since this list is not all-inclusive, the Commissioner is empowered in all other cases to conduct hearings as to whether or not an act or practice complained of constitutes an unfair act or practice. If it does, the Commissioner makes a report in writing stating his findings. Thereafter the Commissioner may, through the Attorney General, file a petition in court to restrain the violation. If the court adopts the Commissioner's contention, a cease and desist order is issued by the court. The Commissioner has no power under this proposal to do more than make a finding as to whether or not an act or practice is unfair and he may not issue the cease and desist order himself. With the exception of those prohibited acts or practices specifically enumerated in the statute, the actual definition of an unfair act or practice is by judicial rather than administrative determination, and the issuance of all cease and desist orders, whether or not the practices are enumerated, is entrusted to the courts.

(7) This plan is similar to (6) except that the authority to determine the unenumerated unfair practices and to issue cease and desist orders in all cases is entrusted in the first instance to the Commissioner rather than to the courts.

A refinement of plans (6) and (7) contemplated that the Commissioner should have the power to issue cease and desist orders as to the acts and practices specifically enumerated in the act but not as to those of which he was the arbitrator.

All of the plans considered contained provisions for judicial review.

The merits and demerits of these plans were exhaustively explored and discussed by members of your committee and by other interested parties.

Your committee was unanimous upon the proposition that the regulation of unfair acts and practices should not be left to the Federal Trade Commission in Washington. Its views on this subject have been outlined in

previous reports and in the supporting memoranda of the Commissioners' legislative proposal submitted to the Congress in 1944.

The committee looked with favor upon two alternative methods of dealing with this problem, copies of which are attached and marked Exhibits "D" and "E." In both alternatives unfair methods of competition and unfair or deceptive acts and practices are prohibited. The general idea of these two proposals is based upon the so-called definitive approach, namely, to enumerate specific unfair acts and practices in the business which are generally known. The committee recognized, however, that the enumeration of specific acts and practices would not completely occupy the field and that therefore provision had to be made for an omnibus section to cover unenumerated acts and practices.

The proposals differ, however, in the following respects. One plan (Exhibit "D") follows the procedure outlined in the Federal Trade Commission Act and empowers the Commissioner, after hearing, to determine unfair acts and practices other than those specifically enumerated and to issue cease and desist orders as to all unfair practices whether enumerated or not. Under the alternative proposal (Exhibit "E") the power to make adjudications as to unfair acts and practices and to issue cease and desist orders in connection therewith is given to the courts through the medium of the Attorney General.

These bills are receiving additional study by the members of the committee and will be the subject of further consideration at the committee's next meeting, which will be held some time before the December meeting of the Association in New York.

Accident and Health

Certain conditions in the accident and health business have been a source of grave concern to the members of the National Association of Insurance Commissioners and to the members of this committee. For years many states have passed upon the forms used in the accident and health field. It has been suggested, however, that supervision of forms is not enough and that rates should likewise be supervised, possibly under the ordinary rate regulatory bill. While the committee recognized that this is a possible solution to the problem, the complexities of the accident and health business and the fact that it is transacted by different types of carriers induced the committee to consider first the merits of a separate approach.

The committee is agreed that legislation should be enacted prescribing standards not only for the forms but for the premiums because there is a direct relationship between the coverage and the premium charged. The problem is further complicated because certain companies act in concert and desire to continue that procedure. If these companies are to continue these activities, the committee recognizes that legislation is necessary in this respect.

In addition to regulation of rates under a rate regulatory law, three additional proposals were considered. One was submitted by the Bureau of Personal Accident and Health Underwriters under date of October 16, 1946; another was submitted by the Health and Accident Underwriters Conference under date of October 17, 1946, and a third was developed as a result of a study of these two and legislation now in force in certain

Mr. Chairman, in order that there may be an opportunity for any objections to this method of procedure, I move that this report be adopted at this session and made a part of the record.

President Dineen: Do I hear a second?

Commissioner Larson (Florida): I second it.

President Dineen: Is there any debate? All in favor, signify by saying "Aye." All opposed, "No." The "Ayes" have it and it is so ordered.

COMMITTEE ON RATES AND RATING ORGANIZATIONS COMMITTEE ON FEDERAL LEGISLATION N.A.I.C.

Syracuse, N. Y., September 5-7, 1946

The Committee on Rates and Rating Organizations and the Committee on Federal Legislation of the National Association of Insurance Commissioners met at the Hotel Syracuse, Syracuse, New York, on September 5, 6 and 7, 1946, following a meeting of the Executive Committee at the same place on September 4 and 5. The subcommittee on devising a method for the examination of rating bureaus, consisting of Commissioners Gough of New Jersey, chairman, Forbes of Michigan and Thompson of Oregon, were also in session conducting hearings and meetings on September 5 and 6.

The following members of the Committee on Rates and Rating Organizations and Federal Legislation were present at the Syracuse meeting: Charles F. J. Harrington, Massachusetts, Chairman; Newell R. Johnson, Minnesota; Robert E. Dineen, New York; J. Edwin Larson, Florida; Seth B. Thompson, Oregon, and Maynard Garrison, California. The seventh member of the committee, Commissioner McCormack of Tennessee, was not present, having previously notified the Committee of his inability to attend.

In addition to the committee members enumerated above, there were also present at the meetings the following Commissioners, some of whom are members of the Executive Committee:

N. P. Parkinson, Illinois*
William P. Hodges, North Carolina*
Oscar W. Carlson, Utah*
Wade O. Martin, Jr., Louisiana*
Luke J. Kavanaugh, Colorado*
Gregg L. Neel, Pennsylvania*
Walter Dressel, Ohio*
J. Austin Carroll, Rhode Island
William A. Sullivan, Washington
represented by Robert D. Williams
(*member of Executive Committee)

The following departmental personnel were also present at the meetings:

S. D. Mills, New Jersey
E. A. Faircloth, Florida
Joseph Kolkmeyer, Ohio
Walter F. Martineau, New York

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Alfred J. Bohlinger, New York
Thomas C. Morrill, New York
Joseph F. Collins, New York

The All-Industry Committee was in session at the same hotel on the same dates and there were a series of conferences between representatives of the All-Industry Committee and the Commissioners' committees as well as an interchange of ideas.

The All-Industry Committee submitted its report on the Federal Trade Commission Act to the Committee on Federal Legislation, advising that the report was not final and was due to receive further consideration by the members of the All-Industry Committee. The All-Industry Committee also submitted to the Committee on Federal Legislation the report of the Subcommittee on the Robinson-Patman Act, stating that this report had been unanimously adopted by the members of the Committee. Copies of both of these reports are attached hereto.

The All-Industry Committee did not submit at this meeting a report on the treatment of the Clayton Act and the Committee on Federal Legislation requested the submission of a report covering tying-in contracts so that the same would be available for consideration at the next meeting of the Committee on Federal Legislation.

The All-Industry Committee likewise did not submit a report on the proposed treatment of the accident and health companies but the Committee on Federal Legislation was advised that a special subcommittee of the All-Industry Committee dealing with the accident and health problem requested a conference with the Committees on Federal Legislation and Rates and Rating Organizations at the next scheduled meeting.

No consideration was given at this meeting to the question of underwriting profit since that problem is now being explored by a subcommittee of the Fire and Marine Committee, consisting of Commissioners W. Ellery Allyn, Connecticut; Charles F. J. Harrington, Massachusetts, and Robert E. Dineen, New York.

Time did not permit the consideration at this meeting of the treatment of such related problems as compulsory insurance, aviation insurance, reinsurance, etc.

Commissioner Garrison of California submitted a memorandum discussing principles applicable to rating bills. By unanimous consent this memorandum was received and made a part of the records of the Committee.

A substantial amount of time was devoted to a discussion of the basic philosophy as to the proposed treatment of the Federal Trade Commission Act on a state level during which ideas advanced by the industry and by the Commissioners were considered. In order to keep this report within reasonable limits it will not be possible to discuss in detail all of the varying views advanced in connection with this phase of the discussion and it must be kept in mind that no final conclusions were reached.

Among the ideas expressed was the view that it would be impractical to enact so-called individual federal trade commission acts giving each Commissioner the power to determine what constituted unfair trade practices. It was contended that the adoption of such a plan would lead to

lack of uniformity in administration and conflicting interpretations of the same practices in different jurisdictions. On the other hand, it was asserted that if individual federal trade commission acts were not enacted in each state, the field would not be covered completely, thereby creating dual jurisdiction with its attendant problems and that as a consequence state supervision would be impaired. Proponents of the individual federal trade commission acts approach called attention to the wide discretionary powers now vested in Insurance Commissioners under existing laws and asserted that the dangers of conflicting state rulings inherent in the adoption of such a policy were overemphasized.

There was another school of thought which suggested that the insurance business should know what constituted unfair trade practices and that the prohibition against such practices should be imposed in the law. As against this argument it was contended that if all potential unfair practices were enumerated, any statute covering them would be carried to unreasonable and unworkable lengths or conceivably might be incomplete.

It should again be emphasized that no effort is made herein to enumerate all of the arguments pro and con which were advanced in connection with this problem. During the colloquy an alternative approach to the problem presented itself. It was suggested that individual federal trade commission acts paralleling the Federal Trade Commission Act be enacted in each state but with this difference, namely, that the Commissioner should be empowered to promulgate rules and regulations covering unfair trade practices, with the proviso, however, that such rules and regulations could not be adopted except upon notice and after full hearing to all interested parties and with an appropriate provision for judicial review. It was pointed out that Congress itself has recently approved this very procedure in connection with administrative acts by passing the Administrative Procedure Act*, which was signed by President Truman on

* PUBLIC LAW 404, 79th CONGRESS—ADMINISTRATIVE PROCEDURE ACT

"Sec. 4. Except to the extent that there is involved (1) any military, naval, or foreign function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts —

"(a) NOTICE. — General notice of proposed rule making shall be published in the Federal Register and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

"(b) PROCEDURES. — After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or argument with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by law to be made upon the record after opportunity for or upon an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions in this subsection.

"(c) EFFECTIVE DATES. — The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

"(d) PETITIONS. — Every agency shall accord any interested person the right to petition for the issuance, amendent, or repeal of a rule."

Approved June 11, 1946.

June 11, 1946. This Committee felt that this idea was well worth further exploration and is to conduct further studies along this line in the hope that it will be able to report at the next meeting of the Committee which has been tentatively scheduled for October in Chicago.

Considerable discussion also took place in connection with the proposed treatment of the Robinson-Patman Act on a state level. It was pointed out that the common anti-discrimination statute in use in most states today went even further than the prohibitions of the Robinson-Patman Act which are more limited in their application. While no conclusion was reached at this meeting on the general problem, it was felt that the suggestions advanced in the report of the Robinson-Patman Act Subcommittee might furnish a working basis for the solution of this particular phase of the problem and it is hoped that final decision will be reached at the forthcoming Chicago meeting.

The Committee unanimously designated Commissioners Harrington, Johnson and Dineen, with Commissioner Harrington as Chairman, to serve as a Conference Committee representing the Committee in any consultations and discussions with the Industry on the subjects now under joint consideration by the All-Industry Committee and the Committee on Rates and Rating Organizations and the Federal Legislation Committee. All members of the National Association of Insurance Commissioners will, of course, be welcome to attend all meetings of the Subcommittee as well as the full Committee. (Commissioner McCormack took no part in this meeting.)

Respectfully submitted,

Charles F. J. Harrington, *Chairman,* Mass.
Robert E. Dineen, New York
Newell R. Johnson, Minnesota
J. Edwin Larson, Florida
James M. McCormack, Tennessee
Seth B. Thompson, Oregon
Maynard Garrison, California

REPORTS OF ALL-INDUSTRY SUBCOMMITTEE ON FEDERAL TRADE COMMISSION ACT

Report submitted at March 11-15, 1946, meeting of All-Industry Committee, incorporating following earlier reports:

1. Report submitted at September 19-20, 1945, meeting of All-Industry Committee;
2. Report submitted at October 18-19, 1945, meeting of All-Industry Committee.

REPORT OF SUBCOMMITTEE ON FEDERAL TRADE COMMISSION ACT

French Lick, March 11-15

The first report of this Subcommittee, copy of which is attached, was submitted at the meeting held in New York City on September 19th and

June 11, 1946. This Committee felt that this idea was well worth further exploration and is to conduct further studies along this line in the hope that it will be able to report at the next meeting of the Committee which has been tentatively scheduled for October in Chicago.

Considerable discussion also took place in connection with the proposed treatment of the Robinson-Patman Act on a state level. It was pointed out that the common anti-discrimination statute in use in most states today went even further than the prohibitions of the Robinson-Patman Act which are more limited in their application. While no conclusion was reached at this meeting on the general problem, it was felt that the suggestions advanced in the report of the Robinson-Patman Act Subcommittee might furnish a working basis for the solution of this particular phase of the problem and it is hoped that final decision will be reached at the forthcoming Chicago meeting.

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Respectfully submitted,

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REPORT OF SUBCOMMITTEE ON FEDERAL TRADE COMMISSION ACT

French Lick, March 11-15

The first report of this Subcommittee, copy of which is attached, was submitted at the meeting held in New York City on September 19th and

20th. It was adopted by the All-Industry Committee at that meeting by a motion which also directed the Subcommittee to proceed with its studies and draft a pattern or structure of legislation to be submitted to the entire Committee at its meeting in Chicago on October 18th and 19th. Pursuant to such instruction the Subcommittee continued its study and completed a draft of a pattern of legislation for the strengthening of the state laws bearing on unfair trade practices. The draft was made a part of the Subcommittee's second report which was submitted at the Chicago meeting on October 18th and 19th. A copy of that report is also attached. Following presentation of the report, the following motion was made and adopted:

> "That it is the sense of the All-Industry Committee that it approve the type of approach recommended in the bill if it is the pleasure of the Committee to attempt to cover the field through state legislation with respect to matters covered by Section 5 of the Federal Trade Commission Act."

The full Committee then proceeded to hear the reports of the Robinson-Patman and Clayton Act subcommittees, with the result that the following motion was made and adopted and made applicable to the reports of all subcommittees:

> "That the report be approved and submitted to the Insurance Commissioners, it being stated that the Legislative recommendations therein are tentative and have not been ratified or approved in detail by the constituent organizations, that further consideration will be given to these recommendations by the constituent organizations, and if revisions are to be suggested they will be submitted to this Committee."

At the meeting in Chicago on Nevember 26 and 27, the Subcommittee distributed to the members of the All-Industry Committee a pattern bill embodying refinements over the bill submitted on October 19. However, debate upon and adoption of a motion to the effect that the full committee would report to the insurance commissioners at Grand Rapids, Michigan, on the rating question only precluded any consideration of the report of the Federal Trade Commission Subcommittee at that meeting.

The Subcommittee has redrafted the draft of bill submitted with its report of October 19, 1945. A copy of the bill as so redrafted is hereto attached. The Subcommittee again directs attention to the fact that through its further studies a much more comprehensive picture of unfair trade practices covered by both Federal and State enactments has been developed since the submission of the first draft at the October 19 meeting. In the opinion of the Subcommittee, existing state laws must be strengthened if the business is to be in a position to demonstrate that the states are adequately covering the field, and in this connection unfair trade practices recognized as such and already dealt with by the Federal Trade Commission must be considered in the drafting of an effective bill. On the other hand, it must be recognized that no statute of this character can specify every act, method or practice within the field occupied by the Federal Trade Commission Act since the limits of that field are fixed by the Commission's

own concept of what is unfair and deceptive. All that can be expected is a reasonably adequate coverage of sufficient extent to reflect a considered exercise of legislative judgment and declaration of policy for the respective states.

The Subcommittee is of the opinion that the draft of bill hereto annexed accomplishes that objective. The following unfair trade practices have been included in the bill:

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
Discrimination
Rebates

A number of other subjects were discussed by the Subcommittee but after consideration were excluded. Fraud, barratry, bribery, commercial bribery and the making of political contributions have been excluded for the very good reason that they should be dealt with under general state statutes applicable to business generally and not as unfair trade practices confined to the insurance business. These offenses are presently dealt with in several states by general statutes not applying specifically to the business of insurance and additional similar statutes can be enacted where necessary.

Another example of a possible exclusion would be the "alteration of applications" which is covered by statute in some states. Obviously, however, these enactments are for the protection of the companies and are not designed to protect prospective policyholders and the public generally.

A practice recognized by the Federal Trade Commission as an unfair trade practice is that of "Advantage of dealing with seller." This has not been included for the reason that if any misrepresentation is involved, it would be covered by paragraph (a) in the pattern bill dealing with misrepresentations.

There are other items which have been dealt with under the Federal Trade Commission Act or through State laws, such as "elimination of competition," "sales below cost," and "rate wars" but it seemed to the Subcommittee that these three subjects would be covered in connection with the rating bills.

It is the judgment of this Subcommittee that the draft of bill here submitted is sufficient in its coverage of the field of unfair trade practices. The Subcommittee further believes that its content, taken together with the declaration of legislative intent and policy, is more than ample to convince Congress that the states, in their considered exercise of legislative judgment and in direct response to the invitation in Public Law 15, have provided a basis for adequate and effective regulation of unfair or deceptive trade practices.

Respectfully submitted,

SUBCOMMITTEE ON THE FEDERAL
TRADE COMMISSION ACT

Many homeowners feared running out of ALE money before they could reconstruct their homes. At the 2003 hearing, the Chair of the committee required every insurance company present (most of the major companies) to state publicly whether they were willing to extend ALE beyond the 12 month period typically in an insurance policy, in light of the disaster. Most insurers agreed to do so, and some noted that they already offered 24 months of ALE coverage. Prior to the El Cajon hearing, the Chair succeeded in convincing Allied Insurance Company to extend ALE beyond the one year limit in its policy as long as the claimant was in negotiations over settlement. Staff was able to verify that nearly every Allied insured received an extension, and many of those claims have since been settled.

Allstate Insurance Company refused to extend the time limit for its policyholders. Some Allstate's policyholders did obtain additional sums from the company after the Chair and staff worked with the insurer and policyholders to document additional living expenses incurred but not reported during the

first year after the fire. Other policyholders received accelerated payments as a result of intervention with Allstate, while some also remain dissatisfied with the insurer.

Of all complaints heard in both hearings, none was more frequent nor so moving as the discussion of underinsurance. In case after case, homeowners reported that they thought they had enough insurance, only to discover that they were significantly underinsured-sometimes hundreds of thousands of dollars short. One woman testified in San Diego after wheeling a shopping cart with her personal possessions into the hall where the hearing was being held. In the months after this hearing, the committee was able to work with this woman's insurer to obtain accelerated payments from her insurer. She has since begun reconstructing her home.

Staff of the committee also visited San Diego in the month prior to the hearing and spoke directly to homeowners at home sites, in a city hall, a community college, and at an evening meeting in the community of Crest. Both in these meetings and during public hearings, it became apparent that at least one way to avoid being underinsured was to be in the construction business and to know the costs of reconstruction. Absent such unique knowledge, however, the types of individuals who were underinsured spanned nearly every occupational group and type of person, including doctors, lawyers, business owners, religious personnel, insurance adjusters, steel workers, long-time residents and retirees, and relatively new homeowners. In hearings held by the DOI to educate the public and to determine if market conduct exams needed to be commenced, underinsurance was a major issue.

The insurance industry had many explanations about why people from nearly every walk of life were underinsured. Some insurers felt that few of their policyholders were underinsured, and they offered to pay beyond policy limits. Staff is aware of many insurers who paid beyond policy limits. Industry representatives also placed responsibility on homeowners who decided to pay less for coverage than

would have been needed to be fully covered or who failed to disclose new room additions, expensive features of the home or to "schedule" expensive personal property.

Another explanation for underinsurance appears to be that homeowners' insurance coverage has changed dramatically in the past ten years. As recently as a decade ago, "guaranteed replacement cost" policies were the norm. Such policies guaranteed to replace the home regardless of the policy's limits.

R

CERTIFICATE OF SERVICE

I, the undersigned, declare:

I am employed in the County of San Francisco, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 125 Cambon Drive, 5D, San Francisco, CA 94132.

On the date set forth below, I caused a copy of the following document to be served:

APPLICATION TO FILE BRIEF AND BRIEF OF AMICI CURIAE CONSUMERS FOR AUTO RELIABILITY AND SAFETY, EAST BAY COMMUNITY LAW CENTER, HOUSING AND ECONOMIC RIGHTS ADVOCATES, PUBLIC COUNSEL, AND PUBLIC GOOD LAW CENTER IN SUPPORT OF DEFENDANT-APPELLANT

On the following interested parties in this action by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, for deposit with the United States Postal Service at San Francisco, California, addressed as set forth below:

Clerk of the Court
Court of Appeal, Second Appellate District, Div. One (Case No. B248622)
Ronald Reagan State Building
300 S. Spring Street, 2nd Floor
Los Angeles, CA 90013

Clerk of the Court
Los Angeles Superior Court (Case No. BC463124)
The Honorable Gregory W. Alarcon, Dept. 36
Stanley Mosk Courthouse
111 North Hill Street
Los Angeles, CA 90012

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Gene Livingston, Esq.
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(Attorneys for Plaintiffs and Respondents)

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 11, 2016, at San Francisco, California.

Dated: April 11, 2016

By: 
Vanessa Buffington