Case No. S226529

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

Plaintiffs and Respondents,

v.

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

Defendant and Appellant.

AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF DEFENDANT AND APPELLANT DAVE JONES

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

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I. INTRODUCTION

This Court's order granting review states the issue as follows: "whether the Commissioner has the statutory authority to promulgate a regulation specifying that the communication of a replacement cost estimate which omits one or more of the components in subdivisions (a)-(e) of section 2695.183 of title 10 of the California Code of Regulations is a 'misleading' statement with respect to the business of insurance. (Cal. Code of Regs., tit. 10, § 2695.183, subd. (j).)" (AOB at 1.)

Amicus curiae United Policyholders (hereinafter "UP"), a non-profit insurance consumer organization, respectfully submits the following brief in support of Defendant-Appellant Commissioner of the Department of Insurance (hereinafter "the Commissioner") in the above-referenced case. UP concurs in Defendant-Appellant's contentions that adoption of Cal. Code Regs., tit. 10 § 2695.183 – ("the Regulation") is necessary to promote the public welfare and well within the Commissioner's express authority and urges the California Supreme Court to reverse the decision of the Court of Appeal.

The Commissioner adopted the Regulation to protect the public ***and*** effectuate the California Legislature's intent to solve a serious

problem that has plagued homeowners throughout California after every major wildfire in the last two decades: Wildfire victims chronically find their policy limits grossly inadequate to cover the cost of replacing their homes, despite the fact that their policies were described at the point of sale as providing "replacement cost" protection. Post-disaster underinsurance is so severe that cities, counties, the American Red Cross, and several charitable foundations have partnered with UP to help solve the problem after past disasters.[1] However, consumer education alone is not solving the problem. The Regulation is a much-needed step in the direction of ensuring that consumers will no longer be deceived or misled by insurers and their agents/brokers about their home insurance at the point of sale.

Long before the adoption of the Regulation, systemic underinsurance of California homes was exposed in industry publications[2], at community meetings in disaster areas, press conferences organized by panicked homeowners and print and

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1 *See* Partnering with the Red Cross, What's UP? (May 2010) at http://www.uphelp.org/library/partnering-red-cross-great-grant-news/2010-05-01.

2 (*See* construction cost estimating firm Marshall & Swift press release, August 17, 2009, "California Wildfires Highlight Need to Protect Homes Against Underinsurance" https://www.marshallswift.com/pressreleases.aspx?ReleaseID=15.)

broadcast media.[3] For example, after the 2007 San Diego wildfires, 66% of survey respondents reported being underinsured. The average amount by which people reported being underinsured was $319,500. For the recent Valley and Butte Fires, 53% and 65% of survey respondents, respectively, reported being underinsured by an average of $103,000.[4]

The root causes and nuances of the problem have been dissected in legislative hearings[5], law review articles[6] and lawsuits.

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[3] (*See* post-disaster surveys conducted by local governments and community organizations in partnership with United Policyholders at http://www.uphelp.org/library/resource/survey_results#a.)

[4] (*See* http://www.uphelp.org/roadmap-recovery-surveys.) Although this shows that underinsurance is still a significant problem, it indicates that perhaps the Regulation was having some positive effect before the court below's decision.

[5] (*See* CA B. An., A.B. 2119 Sen., 9/03/1993 ["…(Petris)…a measure enacted in response to the disastrous Oakland Hills Fire of 1991. SB 1854 requires insurers selling homeowners insurance to make a series of disclosures to consumers."]; CA B. An., S.B. 1855 Assem., 8/04/2004 ["Rationale: This bill sponsored by CDI, requires insurers to provide more information to policyholders to reduce the likelihood that a home is underinsured. Following the southern California fires that destroyed over 3,500 homes in 2003, many policyholders discovered that they did not carry adequate coverage."].)

[6] (*See* Softening the Short Shrift: Regulating Homeowner's Insurance Limits as Causes of Underinsurance, Joshua Fox, 46 Cal. W. L. Rev. 369, 374, 394 (Spring 2010) [Stating, *inter alia*, "insurers have both the incentive and ability to set low policy

There has been extensive media coverage of post-disaster insurance gaps and the fact that agents and companies continue to chronically underestimate the replacement value of the homes they're insuring and mislead their customers as to the adequacy of their coverage.[7] Three successive administrations of California Insurance Commissioners conducted fact-finding on the post-disaster underinsurance phenomenon and held hearings over a 22-year period. Two facts consistently emerged: A replacement cost estimate of a

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limits…and…homeowner's insurance policyholders are ill-equipped to determine the appropriate limits for their insurance policies."; *see also* When Enough is Not Enough: Correcting Market Inefficiencies in the Purchase and Sale of Residential Property Insurance, Kenneth S. Klein, 18 Va. J. Soc. Pol'y & L. 345 (Fall 2011) [for the proposition that underinsurance is in fact pervasive and any effective proposal for remedial action must include insurers providing complete information to potential customers regarding total-loss rebuilding costs.].)

[7] (*See, e.g*. "A Year Later, Fire Victims Say Insurers Misled Them" http://articles.latimes.com/2008/oct/23/business/fi-underinsure23; *see also* "Survey shows 2007 wildfire victims grossly underinsured, majority of claims not resolved" http://yubanet.com/california/Survey-Shows-2007-Wildfire-Victims-Grossly-Underinsured.php#.VwfajSz2azk; *see also* "Avoiding Underinsurance," "Underinsurance 101, Causes and Solutions", and other UP reports and publications at http://uphelp.org/library/guide/underinsurance_help.; *see also* *California Bush Fire Victims Discover Belatedly They Are Underinsured, Vittorio Hernandez,* (June 6, 2008) http://www.uphelp.org/news/california-bush-fire-victims-discover-belatedly-they-are-underinsured/2008-06-06.)

home *must factor in* the main components of the individual home and the possibility of post-disaster construction cost increases. An estimate that does not include those items cannot be fairly characterized as a "replacement cost" estimate.

Far from being the radical and intrusive mandate Plaintiff-Respondents have mischaracterized it to be, the Regulation takes a very modest approach. It gives insurers the option not to communicate an estimate of a home's replacement value to a consumer at all:

> **(m) No provision of this article shall be construed as requiring a licensee to estimate replacement cost or to set or recommend a policy limit to an applicant or insured. No provision of this article shall be construed as requiring a licensee to advise the applicant or insured as to the sufficiency of an estimate of replacement cost.**

(Cal. Code Regs., tit. 10, § 2695.183, subd. (m) (emphasis added).)[8]

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[8] The above language was included in the Regulation over the objections of United Policyholders. We contend that insurers and their sales agents ***should*** be affirmatively required to recommend

In addition, the Regulation is consistent with Cal. Ins. Code § 10102; the mandatory California Residential Insurance Disclosure form. By setting forth a list of items that must be included if an estimate is to be characterized as a replacement cost estimate, the Regulation complements the statutorily required disclosure that provides: "The estimate to replace your home should be based on construction costs in your area and should be adjusted to account for the features of your home. ***These features include but are not limited to the square footage, type of foundation, number of stories, and the quality of the materials used."*** (Cal. Ins. Code § 10102 (emphasis added).)

The Regulation simply requires that ***if*** an insurer (or their representative) ***chooses*** to give a consumer an estimate of the cost of replacing their home, that estimate must factor in square footage, demand surge, the roof, and the main components of the home so as to be complete. Again – the Regulation merely requires, as does the California Residential Insurance Disclosure form, that insurers'

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dwelling insurance limits adequate to replace a home. But no such requirement exists in the challenged regulation.

communications to consumers not be **incomplete**.[9] And Cal. Ins. Code § 790.03 already specifies that misleading statements violate the Unfair Insurance Practices Act ("UIPA"), the Regulation is merely a clarification of what that means in a particular context.

The fact that Respondents prefer to remain free to provide incomplete and misleading information to property owners at the point of sale is not a sound basis for invalidating an important consumer protection regulation. Plaintiff-Respondents participated in the drafting process that led to issuance of the regulation, got almost everything they asked for, and signaled general assent. But when a new Commissioner took office, they mounted the legal challenge that led to this proceeding. The victory Plaintiff-Respondents had scored in the drafting process – an express statement that they have no obligation to provide replacement estimates at all – was apparently not sufficient for them. To accomplish their goal of thwarting the Regulation's objective, Plaintiff-Respondents misled the lower court **by conflating "accuracy" with "completeness."** The Regulation

[9] (*See* Klein, *supra,* 18 Va. J. Soc. Pol'y & L. 345, 378-380 (§ III.(B)(1)).)

requires completeness, not accuracy.[10] For all of these reasons, and for those stated below, UP respectfully requests that this Court reverse the decision of the Court of Appeal and find that Plaintiff-Respondents were not entitled to the declaratory relief that was granted.

II. STATEMENT OF INTEREST

United Policyholders ("UP") is a non-profit organization based in California that serves as a voice and information resource for insurance consumers in the 50 states. The organization is tax-exempt under Internal Revenue Code § 501, subd. (c)(3). UP is funded by donations and grants and does not accept money from insurance companies.

UP has extensive experience with the underinsurance problem that led to the adoption of the Regulation through direct contact with thousands of homeowners after devastating wildfires. During the 12-24 months it generally takes for people to repair, rebuild and recover, UP hosts educational workshops and communicates regularly with the

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[10] As the Department has pointed out in its briefing, the focus of the regulation is *completeness* not *accuracy*, an important distinction that the lower court seemed to ignore in its ruling (*See* RF Vol. IV, 1093).

victims through a Roadmap to Recovery™ program. UP coordinates these services with the California Department of Insurance, the American Red Cross as well as local government officials and organizations in the affected communities and monitors individual and community experiences in the long-term disaster recovery process by conducting surveys at the six-month and one-year mark.

UP's Executive Director is a member of the U.S. Treasury Department's Federal Advisory Committee on Insurance and currently in her sixth consecutive term as an official consumer representative to the National Association of Insurance Commissioners. She has served as a consultant to the California State Senate and the California Earthquake Authority Product Enhancement Committee. UP was an active participant in the informal and formal proceedings that led up to the issuance of the Regulation.

A diverse range of policyholders throughout California communicate on a regular basis with UP, which allows us to provide topical information to courts via the submission of *amicus curiae* briefs in cases involving insurance principles that are likely to impact large segments of the public and business community. UP's amicus brief was cited in the U.S. Supreme Court's opinion in *Humana v.*

Forsyth (1999) 525 U.S. 299, 314, and its arguments have been adopted by the California Supreme Court in *TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19 and *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815. UP has filed *amicus curiae* briefs in nearly 400 cases throughout the United States.

III. THE REGULATION IS A PRAGMATIC APPROACH TO ALLEVIATING AN EPIDEMIC OF UNDERINSURANCE

A person's home is generally his or her most valuable asset, both from a financial and a human perspective. It is neither logical nor true that homeowners would knowingly expose or underinsure that most valuable asset. The fact that so many disaster victims find out after the fact that the home insurance sold to them as "replacement coverage" does not in fact cover the cost of replacing their home is clear evidence that Plaintiff-Respondents' members are providing misleading and incomplete information at the point of sale.

A properly insured dwelling is one that is covered by a policy with high enough limits to pay for what it would cost to rebuild that dwelling with a like kind and quality structure at its existing location and in compliance with local building codes/ordinances in the event of a total loss. Calculating that cost requires a complete review of the size, style, components and materials of the dwelling, as well as

consideration of local market conditions. Insurance producers and insurers know this and are advertising "full coverage" and leading consumers to believe they are buying full coverage (read: full replacement value), but chronically setting dwelling limits too low. In total loss scenarios where the error is exposed, they point the finger at the insured as the party responsible for the inadequate protection.

An insured that knowingly and willfully underinsures his or her home must bear the consequences of having purchased inadequate financial protection. Neither the regulation at issue nor a*micus curiae* seek protection for that insured.

An insured that unknowingly underinsures their home by relying on calculations provided by a licensed producer and insurer that purport to represent the cost of replacing their home, should not bear the consequences of their innocent mistake and misplaced reliance. That is the protection the Regulation provides. It was adopted after substantial study and public input, including from insurers, and it is reasonable and necessary.[11] Deceptive communications related to home insurance and replacement values

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[11] (*See* New rules aim to curb homeowner underinsurance, Penni Crabtree (June 27, 2011) http://www.uphelp.org/news/new-rules-aim-curb-homeowner-underinsurance/2011-06-27.)

have been wreaking havoc in disaster areas for over twenty years. The Regulation needs to be upheld and enforced.

IV. PRIOR TO ISSUANCE OF THE WRIT BY THE LOWER COURT, THE REGULATION WAS STARTING TO HAVE ITS INTENDED EFFECT

Following the Oakland Hills Firestorm in 1991, the California Legislature passed Senate Bill 1854 in response to the widespread "underinsurance problem" revealed by the Firestorm.[12] The California Department of Insurance ("Department") then promulgated Insurance Code regulations (*Stats. 1992 c. 1089 operative July 1, 1993, amended by Stats. 1993, c. 11, S.B. 52 § 1, effective May 5, 1993)* and created the "California Residential Property Insurance Disclosure" Form ("Disclosure"), which must be given to consumers when purchasing a homeowner's insurance policy. (Cal. Ins. Code § 10101 et seq.) The Disclosure requires, *inter alia*, that consumers are made aware of certain policy provisions, limits, coverage options, and exclusions, with the goal of reducing underinsurance. (*Id.*)

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[12] (*See, e.g., 20 years after Oakland firestorm, insurance snags remain*, Angela Woodall, Los Angeles Times, November 1, 2011 (http://articles.latimes.com/2011/nov/01/business/la-fi-oakland-fire-20111101).)

Despite the efforts of the Legislature and the Department "underinsurance" was again a significant problem following the 2003 San Diego Firestorm. Recognizing that Cal. Ins. Code § 10102 alone had not solved the "underinsurance" problem in California, the Legislature updated the Disclosure in 2004 and again in 2006 (*A.B. 2119 § 4, Stats, 2004, c. 385 S.B 1855 § 2 Stats. 2006, c. 137, A.B. 1946, § 2*). AB 2119 and 1946 amended the Insurance Code to provide added specificity regarding disclosure of policy limits, coverage options, and exclusions. (Cal. Ins. Code § 10103 et seq.) Nevertheless, after a series of 2007 San Diego wildfires, most famous of which was the "Witch Creek Fire", "underinsurance" again reared its ugly head and created a renewed cry for more reforms.[13]

The Legislature responded by amending the Disclosure yet again to require inclusion of a Homeowner's Bill of Rights (*Stats 2010, c. 589, A.B. 2022 § 4, operative July 1, 2011)* and the Department promulgated the Regulation. (Cal. Ins. Code § 10103.05; § 790.10; Cal. Code Regs., tit. 10, § 2695.183.) As a result, continuing education providers had enhanced their curriculum

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[13] *See* UP Survey finding that 66% of homeowners found themselves "underinsured" (www.uphelp.org/roadmap-recovery-surveys).

pursuant to a related regulation requiring Broker-Agent Training on Estimating Replacement Value. Samples of course outlines emphasize the list of components of a home that must be included if a consumer is given a replacement cost estimate at the point of sale. Again – that list is consistent with Cal. Ins. Code § 10102.[14]

Homeowners and Fire Department officials in San Diego participated in a news conference celebrating the issuance of the Regulation.[15] Disaster survivors, community and public officials and consumer advocates jointly expressed optimism that the Regulation would remedy a core cause of the problem – **incomplete calculations passed off to homeowners as "replacement cost" estimates at the point of sale.** And while the Regulation fell short of UP's preferred solution (*a clear legal duty imposed on insurers to recommend adequate replacement cost policy limits*), it was confident its standards (*and remedy*) would succeed in deterring sales representatives from misleading consumers at the point of sale and

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14 ("Homeowners Insurance Valuation" 2011 CyberCE, Inc & WCS Publishing, Bullhead City, AZ 86430, http://cyberce.biz/ResourceViewer.aspx?resid=960.)

15 (*Insurance Commissioner: Time to prepare for wildfires,* Elizabeth Marie Himchak, Pomerado News (July 7, 2011). http://www.pomeradonews.com/2011/07/07/insurance-commissioner-time-to-prepare-for-wildfires/.)

augment the Legislature's efforts to mandate disclosures as a means of eradicating the economic devastation caused by underinsurance.

The severe underinsurance the Regulation addresses is not caused by homeowners being "cheap" and skimping on insurance on purpose. It is caused by deceptive communications at the point of sale. The vast majority of underinsured homeowners *followed an agent or insurer's recommendations and purchased an amount of home insurance that was based on a replacement estimate provided by the agent or insurer.*

Insurance sales representatives routinely perform a calculation of a home's replacement value when generating a quote for a new or replacement policy and include the homeowner to rely on the accuracy of the calculation. They advertise themselves as experts in protecting people's assets. That expertise and the quality of the protection they sell is the essence of their sales pitch. When a consumer authorizes an insurance sales representative to bind coverage and issue a policy, they are reasonably relying on that professional's calculation and expertise. The notion that an insurance sales representative would undermine their own credibility by disclaiming the ability to sell appropriate coverage for a home is

absurd, as is the notion that an agent or broker would send a prospective customer out to get a contractor bid before selling them a policy. Contractors are not in the business of providing free estimates for hypothetical construction projects.

Moreover, it is fantasy to suggest that an insurer will agree to insure a home based on a policyholder's determination of value. Insurers use software programs and underwriting guidelines to determine the policy limits they place on a dwelling at the point of sale. That is how limits are established. The Regulation does not change that reality nor does it in any way regulate underwriting at the point of sale despite industry contentions to the contrary.

The Regulation is a common sense approach. Consistent with the warning that appears in the disclosure form mandated by the California Insurance Code, the Regulation reflects the simple truth that **a home will be underinsured if the policy limits are set on the basis of an estimate that is missing key cost factors**. The Regulation simply recites the same list that appears in the mandated Residential Disclosure form (again – square footage, type of foundation, number of stories, quality of materials, demand surge, etc.) adding necessary specificity to a replacement cost estimate.

V. CALIFORNIA LAW IMPLIES A QUASI-FIDUCIARY DUTY OWED TO AN INSURED

The specificity *described above* is warranted where a replacement cost estimate is provided by insurance sales professionals because they have a **quasi-fiduciary duty** to their clients. In order to successfully meet the requirements of Cal. Ins. Code § 1749.85, subd. (a) and Cal. Code Regs., tit. 10, § 2188.65, a Property and Casualty Broker-Agent and Personal Lines Broker-Agent (producers), must have significant knowledge in the proper methods of estimating the replacement value of structures. Specifically, the Property and Casualty Broker-Agent or the Personal Lines Broker-Agent that transacts, negotiates or sells homeowners' insurance would be required to complete a minimum of three hours of homeowners' insurance valuation training. California case law supports the **cause and effect** of the Regulation, that is, imposing a heightened duty owed by the insurer to its insured [or consumers at-large as potential customers/future policyholders].

California courts have in past cases recognized a "quasi-fiduciary" duty between an insurer and an insured. (*Gibson v. Gov't Employment Ins. Co.* (1984) 162 Cal.App.3d 441, 446 [describing the relationship between an automobile insurer and its insured as a

fiduciary relationship].) As a fiduciary, the insurer would owe the insured, *inter alia*, the duty of candor.[16] Certainly the scope of the relationship between the insurer and insured would, at minimum, include disclosure by the insurer of necessary information required for completeness, resulting in the homeowner purchasing a policy based on this information, or at minimum a consumer's informed decision.

In addition, and unlike most other transactions, "the position of a consumer who procures homeowners insurance from an insurance agent differs from that of other consumers in that the insurance buyer may, like wildfire victims discussed above, be ignorant of what he or she needs in the first place."[17] Studies show that nearly half of all surveyed homeowners incorrectly believed that their insurer or agent bore the responsibility of accurately communicating the replacement costs of their dwelling, further underscoring the need for the Regulation.[18] Case law to date offers insureds little recourse when

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16 (Black's Law Dictionary (9th ed. 2009) [The term "fiduciary" generally designates a person "required to act for the benefit of another on all matter within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor."].)

17 (Fox, *supra,* 46 Cal. W. L. Rev. at p. 371.)

18 (*See, e.g.*, *supra*, *id.* at p. 371, fn. 16 ["Given the widespread erroneous belief that insurers are obligated to 'diagnose' an accurate

they find themselves innocently but detrimentally underinsured. Agents/brokers (producers) do not have an affirmative duty to sell adequate replacement cost coverage even though insureds think that is what they are buying. (*See, e.g., Desai v. Farmers* (1996) 47 Cal.App.4th 1110; *Everett v. State Farm* (2008) 162 Cal.App.4th 649 [producers have only a general duty to exercise reasonable care and skill procuring the insurance *the customer requests*].)

These cases, which we respectfully submit were wrongly decided, are allowing insurers and their sales representatives to attract and retain market share by charging lower premiums based on the incomplete and inaccurate dwelling replacement cost estimates they provide to property owners at the point of sale. As a result, property owners are being led to believe their homes are insured for an amount that will cover the cost of replacing the home after a total loss, when in fact they will come up short during the rebuilding process. Consumers have no recourse, as insurers are generally unwilling to retroactively adjust Coverage A limits and agents/brokers are not generally liable under common law for providing an incomplete

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replacement cost, reports that approximately two-thirds of homes in the U.S. are underinsured seem unsurprising."].)

replacement cost estimate unless the insured can prove the agent/broker failed to procure coverage as specifically requested.

VI. THE LOWER COURT'S RULING DISRESPECTS THE COMMISSIONER AND UNDERMINES HIS ABILITY TO EXECUTE HIS REGULATORY AND CONSUMER PROTECTION FUNCTIONS

The lower court's ruling did not give the Commissioner the deference and respect he is afforded under the law. It is well-established that California Courts are to presume that regulations like the one at issue here are correct and valid from the outset. (*Tomlinson v. Qualcomm, Inc.* (2002) 97 Cal.App.4th 934, 941; *Bell v. Board of Supervisors* (1994) 23 Cal.App.4th 1695, 1710.) The burden of proof placed on the challenger is an exceedingly difficult one to meet, as Courts give "***great weight and respect*** to the administrative construction." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12 (emphasis added).) Regulations such as the one at issue here must stand unless the challenger proves that the agency has "***clearly*** overstepped its statutory authority[.]" (*Ford Dealers Assn. v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, 356 (emphasis added).) Courts are especially reticent to reject an agency's regulation when it is consistent with the governing statute and reasonably necessary to effectuate its purpose. (Cal. Gov. Code,

§ 11342.2; *Yamaha Corp. of America, supra*, 19 Cal.4th at 10-11.) Courts do not need to find that a regulation is explicitly authorized by the statute in order to uphold it. Rather, they only need to find that '"the [agency] ***reasonably*** interpreted the legislative mandate.' [Citation.]" (*County of Santa Cruz v. State Bd. of Forestry* (1998) 64 Cal.App.4th 826, 834 (emphasis added); *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 108.)

As discussed at length in the Commissioner's brief, the Regulation is wholly consistent with the UIPA (Cal. Ins. Code § 790 *et seq.*). In particular, and as the Commissioner points out, § 790.10 vests the Commissioner with quasi-legislative rulemaking authority in order to "clarify and fill in the details of the broad provisions of the prohibited acts or practices defined in § 790.03." (Opening Brief on the Merits, p. 6.) Further, as discussed throughout this brief, *amicus curiae* believes that the Regulation is reasonably necessary to effectuate its purpose in preventing insurers and producers from making misleading statements to insureds about replacement cost insurance coverage.

Amicus Curiae UP does not intend to be repetitious of the Commissioner's arguments. Rather, UP includes the foregoing to express our viewpoint that the Regulation is well within the Commissioner's authority and that the lower court's ruling improperly discounts the Commissioner's authority. Indeed, the lower court's failure to give proper deference to the Commissioner has already begun to energize the industry to undermine Commissioner's authority. Following issuance of the Writ by the lower court, advocates for insurers boasted of their victory over the regulator charged with overseeing their conduct. "Recent Regulatory Rulings May Provide Leverage for Insurers," wrote Barger & Wolen Attorney Suhhee Choi in a May 9, 2013 blog post on the firm's website.

Now, ignoring the substantial problem the Regulation is designed to solve, Plaintiff-Respondents insist to this Court that the Commissioner cannot regulate their communications with customers by requiring them to convey complete information. This is just wrong. The Commissioner has clear authority under Cal. Ins. Code § 790.10 to issue regulations that prevent insurers from engaging in deceptive communication practices. The UIPA provides the Commissioner's authority to implement the Regulation. It was

enacted in 1959, "…to regulate further in areas of perceived lacunae in the state control of the insurance business." (*Karlin v. Zalta* (1984) 154 Cal.App.3d 953, 972.) As the statute itself states, the UIPA is intended to allow the Commissioner a means of "…*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*." (Cal. Ins. Code § 790 (emphasis added).) The Commissioner can exercise this authority by either issuing regulations or enforcing against specific insurers.

The Commissioner here has simply exercised his authority to *define* an incomplete replacement cost estimate as a "misleading statement" within Cal. Ins. Code § 790.03. The Commissioner was well within his authority to direct that insurers provide a complete estimate – one that takes into account the square footage of property, the cost of labor, and all other relevant factors in a systemic matter designed to provide for reliable estimates. The Commissioner plainly has the power to prohibit insurers from communicating estimates that only consider some of the relevant factors, and therefore are misleading, whether or not the insurer represents them to be accurate.

Despite the Commissioner's clear authority to prevent insurers from making misleading statements to the public, Plaintiff-Respondents apparently intend to continue issuing misleading, incomplete estimates if the Court finds that the statute did not authorize the specific regulation at issue. They claim they have a right to do so if they please and assert that there is no real underinsurance problem, without any support. This proves exactly why the Regulation is reasonably necessary in the first instance.

The argument that a replacement cost estimate is not "misleading" simply because it is not represented to be accurate, and does not take into account the factors required by the Commissioner in the Regulation, is misguided. Perhaps one or two underinsured homes do not suggest a misleading system of estimates, but the pervasive nature of underinsurance does. It is not simply a coincidence that so many homeowners are underinsured. Indeed, in UP's opinion, it is more likely that the underinsurance epidemic is the result of insurers competing to sell "replacement cost" policies at the lowest prices possible but which customers trust because they are backed up by "estimates" which, unbeknownst to them, are

incomplete and as a result tend to grossly "underestimate" the "cost" of "replacing" their home in the event of a total loss.

Similarly, any argument that the Regulation fails because it calls for an "estimate" rather than the actual cost that will be incurred when the structure is replaced is nonsensical. It is impossible to know the exact cost of replacing a structure at some unknown point in the future. The best that can be done is what the Commissioner has done here – **require a complete estimate**. The old system – letting insurance sales representatives pass off incomplete estimates as "replacement cost" estimates – failed and caused serious harm.

Even if some homeowners would intentionally underinsure their homes to save money, as Plaintiff-Respondents suggest, they are still hurt by incomplete estimates. Customers who may want to take a calculated risk by underinsuring their home by a certain amount in order to save money on premiums are likely to end up underinsuring their homes to a much greater extent than desired if they choose their limits relative to an already misleading estimate. But in any event, the Regulation is not aimed at saving those homeowners from themselves. Instead, it provides that *if* an estimate of replacement cost is provided, it must be complete in that all components of premises are considered

(i.e. not wholly excluded) from the estimate. Licensees can still cater to applicants and insureds who are interested in saving money on premiums by issuing them policies with limits lower than those stated in a licensee's Regulation-compliant estimate. Licensees can also refuse to issue an estimate to customers and advise they go and get their own. They can also refuse to advise the customer as to the sufficiency of an estimate of replacement cost. All that is required is that *if* they purport to sell a replacement cost insurance policy the estimate underlying the coverage limits be *complete* under Cal. Code Regs., tit. 10, § 2695.183. In other words, that they not be *misleading*.

All stakeholders, including Plaintiff-Respondents, had an adequate opportunity to participate in the rule-making process prior to the adoption. Insurers and producers had many opportunities to participate in crafting these regulations. In fact, the Commissioner, prior to issuance, adopted almost all their suggested amendments. The Commissioner has done so here, and his Regulation is a reasoned attempt, well within the authority granted to him by the UIPA, to protect Californians from the pervasive problem of underinsurance.

VII. CONCLUSION

Insurance buyers rely on insurers and their professional sales representatives to provide complete and accurate information about the products they sell. The Regulation at issue simply requires that where an insurer or its representative communicates an estimate of a home's replacement value as part of the information they give an insurance buyer, the information communicated must be complete.

In an effort to subvert the Regulation, Plaintiff Respondents seek to undermine the Commissioner's authority to do his job. The Regulation at issue here plainly promotes the public welfare by appropriately prescribing the components of a complete home replacement cost estimate to be used in situations where an insurer or its agent ***chooses*** to provide one to a consumer.

For the foregoing reasons, United Policyholders respectfully requests the appellate court's finding that Plaintiff-Respondents are entitled to declaratory relief should be reversed.

DATED: April 8, 2016

KERR & WAGSTAFFE LLP

By: ______________________

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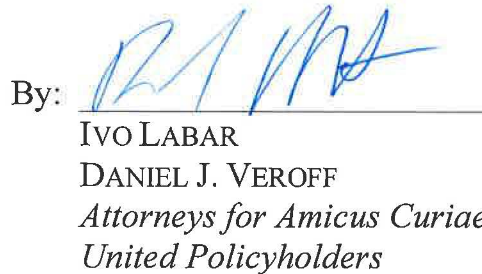
CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

Pursuant to California Rule of Court, rule 8.360 and rule 8.412, I certify that this Amicus Brief of United Policyholders in Support of Defendant and Appellant Dave Jones is proportionately spaced, has a typeface of 14-point, proportionally-spaced font, and contains 5,214 words, omitting footnotes, according to the word count feature of Microsoft Word 2010.

DATED: April 8, 2016

KERR & WAGSTAFFE LLP

By: 

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PROOF OF SERVICE

I, Ginie Phan, declare that I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 101 Mission Street, 18th Floor, San Francisco, California 94105. On April 8, 2016, I served the following document(s):

AMICUS BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF DEFENDANT AND APPELLANT DAVE JONES

on the parties listed below as follows:

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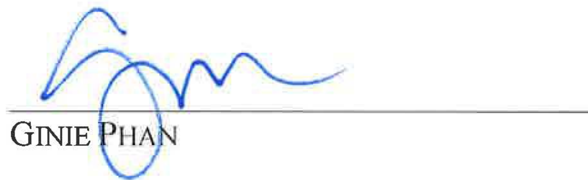
By first class mail by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid and placing the envelope in the firm's daily mail processing center for mailing in the United

States mail at San Francisco, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 8, 2016, at San Francisco, California.



GINIE PHAN