CIVIL JUSTICE
ASSOCIATION OF CALIFORNIA

July 18, 2022

Hon. Tani G. Cantil-Sakauye, Chief Justice
and Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Letter Brief in Support of Review in *PacifiCare Life and Health Ins. Co. v. Lara*, S275018. CRC 8.500(g).

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Interest of Amicus and Importance of Issue

The Civil Justice Association of California (CJAC) urges the Court to grant review in this case to address the important public interest issue it presents and provide uniformity of decision:

> **Does Ins. Code section 790.03(h) authorize the Insurance Commissioner to penalize insurers for one-time, unknowing violations of that statute if they do not constitute a pattern or general business practice?**

CJAC is a longstanding non-profit association of businesses, professional associations and financial institutions dedicated to making our liability laws more fair, uniform and certain. Toward this end, CJAC participates as amicus curiae in cases that determine who gets paid or penalized, and how much, when the actions of some are alleged to occasion harm to others. We have read the petition and briefs filed by the parties in this case and believe the issue here significantly impacts CJAC's principal purposes.

The importance of the issue presented to the administration of justice cannot be gainsaid. When it first percolated up the appellate ladder, the appellate court reversed the trial court's conclusion that the answer to it was "No." (*PacifiCare Life & Health Ins. Co. v. Jones* (2018) 27 Cal.App.5th 391, 397 (*PacifiCare I*).) Although this Court denied review, it is well settled that its denial was not an expression on the merits of the case. "[R]efusal to grant a hearing in a particular case is to be given *no weight* insofar as it might be deemed that we have

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acquiesced in the law as enunciated in a published opinion of a Court of Appeal when such opinion is in conflict with the law as stated by this court." (*People v. Triggs* (1973) 8 Cal.3d 884, 890; italics added.)

This issue is now up for review a second time, but with a full record demonstrating how, in practice, the Commissioner's regulations misapply section 790.03(h). In this instance, the court of appeal has reversed the trial court's judgment based solely on *PacifiCare I* without even considering whether (1) the Commissioner's application of the regulations strays from the statutory text, or (2) the independent grounds for affirming the trial court's judgment. (*PacifiCare v. Lara*, 2022 WL 1315467)(*PacifiCare II*).)

This entire 14-year process from the filing of the Commissioner's administrative complaint to *PacifiCare II* is neither fair, efficient, economical or certain. What's more, it is occasioned by regulations that conflict with the governing statute upon which they are ostensibly based (section 790.03(h)), and an interpretation of that statute which this Court long ago repudiated, not once but twice. A fully developed record from a lengthy trial is now available to show just how these invalid regulations enable the Commissioner to arbitrarily impose huge financial penalties upon insurers by creating a bevy of individual technical violations where the insured, in this case health care beneficiaries, suffered no appreciable harm.

A lawless administrative agency is one that adopts and applies regulations beyond its legislatively conferred authority. Courts are the prime branch of government for curbing such abuses of power. Here a respected trial court judge carefully considered the Commissioner's exorbitant penalty based on his novel interpretations and applications of the Unfair Insurance Practices Act (see Ins. Code § 790.03(h)). Twice the trial court has restrained the Commissioner, only to be reversed by the appellate court deciding in favor of the agency on the basis of a statutory interpretation overruled by this Court. In the meantime, the Department of Insurance continues to impose its highly questionable regulations against insurers for allegedly unfair claims practices.

When, as here, an intermediate appellate court refuses to honor this Court's most recent interpretation of a statute, when it dismisses the punctuation of a statute as irrelevant, when it ignores the legislative history, and when it reverses a judgment without considering the

independent grounds for affirmance, this Court must say "enough is enough." It's time for this Court to provide critically needed, uniform guidance to litigants, counsel, courts and the Commissioner.

Why Review is Warranted

1. The Appellate Opinion's Reliance on *Royal Globe* for Determining the Scope and Application of Ins. Code section 790.03(h) instead of the Reversal of that Opinion by *Moradi-Shalal* interpreting this same Code section Substantially Differently from *Royal Globe*, Justifies Review.

Ins. Code § 790.03(h) defines and prohibits insurers from committing "unfair methods of competition and unfair and deceptive acts or practices in the business of insurance [by] . . . *[k]nowingly* committing or performing with such *frequency* as to *indicate a general business practice* any of" 16 enumerated unfair claims settlement practices. (Italics added.)

Key to the trial court's answer of "No" to the issue presented are three regulations the Commissioner relied upon in fining PacifiCare $173,603,750 (more than 15 times the amount of the Administrative Law Judge's recommended penalty of $11,518,350). These regulations are at odds with section 790.03(h) upon which they were ostensibly based and contrary to its mandate that punishments pursuant to the statute apply only to insurers "knowingly" engaged in a "pattern of misconduct." The trial court found these specific regulations invalid because they squarely conflict with section 790.03(h).[1]

PacifiCare I's reversal was based on its assertion that statements in *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 303 (*Moradi-Shalal*), and *Zhang v. Superior Court* (2013) 57 Cal.4th 364, 379-380, fn. 8 (*Zhang*) that section 790.03(h) applied *only* to insurers

[1] (1) 10 CCR § 2695.1(a) providing that a violation occurs when the prohibited settlement practice is either "knowingly committed on a *single* occasion," or "performed with such *frequency* as to indicate a *general business practice*" (italics added); (2) Reg. 2695.2(1) defining the word "knowingly" in the statute to include *implied* and *constructive knowledge*; and (3) Reg. 2695.2(y) defining the word "willful" without requiring *any specific intent* to cause harm or violate the law (italics added).

engaged in a "pattern of misconduct" was not binding on it. According to *PacifiCare I*: the "only binding interpretation of that statutory language is found in *Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal.3d. 880, 891 – an overruled case which held that a private right of action implied by section 790.03(h) can be violated by an insurer's *single knowing act*." (Italics added.)

PacifiCare I's ruling and its reassertion in *PacifiCare II* that *Royal Globe's* gloss on section 790.03(h) continues to apply in determining the validity of the Commissioner's Regulations is tortured, result driven and in conflict with this Court's subsequent overruling of *Royal Globe* based on the latter's misinterpretation of section 790.03(h). "A regulation is not valid or effective unless it is consistent with and not in conflict with the enabling statute . . . [and] [a] regulation conflicts with the statute if it would 'alter or amend the [governing] statutes or enlarge or restrict the agency's statutory power.' " (*California Teachers Assn. v. California Com. on Teacher Credentialing* (2003)111 Cal.App.4th 1001, 1011, quoting *City of San Jose v. Department of Health Services* (1998) 66 Cal.App.4th 35, 42.) *PacifiCare I and II* are wrong in ignoring this legal proposition.

Specifically, *Moradi-Shalal* overruled *Royal Globe*, and by doing so interpreted the scope of section 790.03(h) quite differently from *Royal Globe*. This Court observed,"Despite . . . that section 790.03(h) proscribes 'k]nowingly committing or performing [proscribed acts] with such frequency as to indicate a general business practice' . . ., the *Royal Globe* majority held that a 'single violation knowingly committed is a sufficient basis for such an action.'" (*Moradi-Shalal*, *supra*, 46 Cal.3d at 294.) In expressly disapproving of this statement by *Royal Globe*, *Moradi-Shalal* referred approvingly to Justice Richardson's dissent in *Royal Globe*.

> The dissent noted that section 790.03(h), expressly refers to the commission of unfair settlement practices "with such frequency as to indicate a general business practice. . .." In the dissent's view, "By adopting subdivision (h) of section 790.03, the Legislature had no intent to create any civil liability to anyone for the acts specified in that subdivision. Rather, such acts were to be considered unfair practices subject to administrative regulation and discipline and *then only if committed with the requisite frequency*." (*Moradi-Shalal*, 46 Cal.

3d at 295-296, quoting from Justice Richardson's dissent in *Royal Globe*, 23 Cal.3d at 895; italics added.)

After *Moradi-Shalal* was decided, this Court again expressly approved its narrowing construction of section 790.03(h): "We approved the reasoning of Justice Richardson's *Royal Globe* dissent, holding that the statute [790.03(h)] contemplates only *administrative sanctions for practices amounting to a pattern of misconduct*." (*Zhang*, *supra*, 57 Cal.4th at 379, fn. 8; italics added.)

The Commissioner and the Court of Appeal in *PacifiCare I* brush aside this important gloss placed on section 790.03 by *Moradi-Shalal* and *Zhang* by calling it "dicta." We think otherwise,[2] but as Justice Otto M. Kaus long ago sagely advised trial judges and intermediate appellate court judges, "follow dicta from the California Supreme Court . . . That was good advice then and good advice now." (*Hubbard v. Superior Court* (1997) 66 Cal. App. 4th 1163, 1169, citing to and quoting from *People v. Trice* (1977) 75 Cal.App.3d 984, 987.) "Even if properly characterized as dictum, statements of the Supreme Court should be considered persuasive." (*United Steelworkers of America v. Board of Education* (1984) 162 Cal.App.3d 823, 835.)

No amendment to the text of section 790.03(h) has been made by the Legislature since *Moradi-Shalal* was decided, or since *Zhang*, consistent with *Moradi-Shalal*, approved and clarified its scope for administrative sanctions only when insurance practices amount to a pattern of misconduct. When, as here, "a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it." (*People v. Hallner* (1954) 43, Cal.2d 715, 719; *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 353.) In other words, construction of a statute by the most recent high court opinion becomes a part of it, and that statutory standard becomes the applicable one for measuring the validity of regulations adopted pursuant to it.

Yet the regulations adopted by the Commissioner and relied upon by him in imposing an egregious fine of more than $100 million against

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[2] See discussion on this point in PacifiCare's Reply Brief, p. 4, fn. 1.

PacifiCare are inconsistent and in conflict with section 790.03(h) because they expand the Commissioner's authority beyond the ambit of the statute. Regulation § 2695.1(b) provides that the acts can be isolated or continuing, that they can be "knowingly committed *on a single occasion*, *or* performed with such frequency as to indicate a *general business practice*." (Italics added.) Ensuing regulations deflate the statute's meaning of "knowing" by allowing the Commissioner to impute knowledge to an insurer based on documents in its files though none at the company is aware of facts supporting a violation (*e.g.* Reg. 2695.2(l), defining "knowingly committed to include constructive and implied knowledge."). As Petitioner points out, this regulatory rewrite of the statute converts it into one of strict liability contrary to its purpose and intent as limned by the text of the statute, its legislative history and opinions of this Court.

2. The Department of Insurance's Invalid Regulations Permitted its Exaggerated Extrapolation of Violations by, and the Imposition of Egregious Monetary Penalties upon, Petitioner.

What began as a finding of 90 violations against Petitioner by the Department's professional staff morphed, during the administrative hearing, into a gargantuan number of over 800,000 violations once the Commissioner retained outside trial counsel to interpret the Insurance Code rather than rely on his professional staff. These numbers were twice challenged by PacifiCare. The first time they were found unjustified by the Administrative Law Judge. The second time, the trial court found that the Commissioner had misapplied the statute on numerous grounds and in myriad ways, including his reliance on an overruled opinion that was contrary to this Court's more recent opinions.

PacifiCare's petition and its reply to the answer provide numerous examples of the Commissioner's overreaching to find multiple violations that do not exist or should be regarded as not showing a general business practice, and misapplication of huge penalties on each so-called multiple but single violations—all aided if not required by regulations at odds with the governing statute. Nonetheless, the appellate court reversed the trial court the second time around in this case, *PacifiCare II*, on the basis of its *PacifiCare I* opinion.

The Commissioner's regulations and his application of them to calculate violations produce fabricated statistics: Potemkin numbers. These are numerical facades that look like real data but aren't meaningful because "either they are born out of nonsensical measurement or they're not tied to a genuine measurement at all, springing forth fully formed from a fabricator's head. ¶ Potemkin numbers dress up nonsense in the guise of meaningful data [or violations]." (Charles Seife, *PROOFINESS: HOW YOU'RE BEING FOOLED BY THE NUMBERS* (2011 ed.), pp. 15, 38.)

The trial court's meticulous analysis of the Commissioner's data reveals his findings of Potemkin numbers of violations. This fully developed record allows the Court to review not only whether the regulations, as a matter of law, violate section 790.03(h), but also whether the application of those regulations result in the unfair and unlawful administrative findings and fines.

Conclusion

The Commissioner's and Court of Appeal's interpretation of section 790.03(h) allows the Commissioner to penalize each late payment (even when made with interest), each claims-processing mistake, and each form document that didn't contain statutory language. He took a large insurer that had millions of transactions—so of course there's going to be a lack of perfection. But he shouldn't be allowed to transform those routine and commonplace mistakes into an unfair insurance practice where, as indisputably is the case here, the mistakes are not part of a pattern or general business practice.

For all these reasons, CJAC asks that the Court grant the Petition for Review and bring clarity to the confusion and confoundment created by the appellate opinion.

Respectfully submitted,

/s/ Fred J. Hiestand
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CJAC General Counsel

Proof of service attached

PROOF OF SERVICE

I, David Cooper, am employed in the city of Sacramento, California. I am over the age of 18 years and not a party to the within action. My business address is 3418 Third Avenue, Suite 1, Sacramento, CA 95817.

On July 18, 2022, I served the foregoing document(s) described as: CJAC *Amicus Curiae* Letter Brief in Support of Review in *PacifiCare Life and Health Insurance Company v. Lara*, S275018 on all interested parties in this action by transmitting via TrueFiling to the following:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed this 18th day of July 2022 at Sacramento, California.

/s/ David Cooper
David Cooper