CALIFORNIA APPELLATE LAW GROUP
APPELLATE COUNSEL IN CALIFORNIA, THE NINTH CIRCUIT, AND THE SUPREME COURT

July 11, 2022

Via TrueFiling

Chief Justice Cantil-Sakauye
& Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Letter of Amici Curiae Supporting Petition for Review in *PacifiCare Life and Health Insurance Co. v. Lara*, No. S275018

Dear Chief Justice Cantil-Sakauye and Hon. Associate Justices:

The Chamber of Commerce of the United States of America ("U.S. Chamber") and the California Chamber of Commerce ("CalChamber") submit this letter in support of the petition for review filed by PacifiCare Life and Health Insurance Company.

The U.S. Chamber is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the executive branch, and the courts. To that end, the U.S. Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

CalChamber has more than 13,000 members, both individual and corporate, representing virtually every economic interest in the state. While CalChamber represents several of the largest corporations in California, 75 percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and employment climate by representing business on a broad range of legislative, regulatory, and legal issues.

No party or counsel for any party funded or authored this letter.

This is the second time amici have filed a letter in this case supporting a petition for review brought by PacifiCare. The first letter followed the Court of Appeal's shocking holding in *PacifiCare Life & Health Ins. Co. v. Jones* (2018) 27 Cal.App.5th 391 *(PacifiCare I*) that a portion of the ruling in *Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal.3d 880, 891, which was repudiated and overruled over 30 years ago in *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, remains binding precedent. The appellate court dismissed *Moradi-Shalal*'s explanation that a single instance of misconduct cannot constitute an unfair claims settlement practice under UIPA as nothing more than dicta.

In its letter urging review of *PacifiCare I,* amici explained that the Court of Appeal was simply wrong. *Moradi-Shalal* specifically and expressly explained that the *Royal Globe* majority used a false premise to conclude that an insurer's liability for damages might be predicated on a single act. The *Royal Globe* majority had concluded that private litigants could bring an action to impose liability on an insurer for engaging in an unfair practice as defined by Insurance Code section 790.03, subdivision (h) ("section 790.03(h)"). (*Royal Globe*, *supra*, 23 Cal.3d at p. 884.) That premise then necessitated the further holding adopted by the Court of Appeal in *PacifiCare I* – that an action under section 790.03(h) can be based upon a single

wrongful act even though the section explicitly defines a violation as " '[k]nowingly committing or performing [specified conduct] *with such frequency as to indicate a general business practice*.' " (*PacifiCare I*, *supra*, 27 Cal.App.5th at p. 411, italics added.) This interpretation was necessary because, as a practical matter, private litigants generally do not have the ability to prove a widespread pattern of wrongful practices. (*Moradi-Shalal*, *supra*, 46 Cal.3d at p. 303.) For *Royal Globe*'s holding that private rights of action are allowed to have any meaning, section 790.03(h) therefore *had* to be interpreted to allow a single act to be a violation. (*Royal Globe*, *supra*, 23 Cal.3d at p. 891.)

As *Moradi-Shalal* further explained, the decision to interpret section 790.03(h) to allow liability for a single wrongful act despite the language of the statute created an "analytical difficulty." (*Moradi-Shalal*, *supra*, 46 Cal.3d at p. 303.) The court then found, "[a]lthough the *Royal Globe* majority believed this proof problem justified its conclusion that a single act will subject the insurer to liability for damages for unfair practices, it is more likely that the majority's initial premise – that a direct action is permitted under section 790.03 – was incorrect." (*Ibid.*) When *Moradi-Shalal* overruled *Royal Globe*'s basic premise, it also removed any reason to follow *Royal Globe*'s problematic construction of section 790.03(h).

Moradi-Shalal additionally quoted with approval Justice Richardson's dissent in *Royal Globe*, which had "criticized the majority for holding that a single act of misconduct could constitute a violation of section 790.03 . . . [when] section 790.03, subdivision (h), expressly refers to the commission of unfair settlement practices 'with such frequency as to indicate a general business practice . . . .' " (*Moradi-Shalal*, *supra*, 46 Cal.3d at p. 295.) This court further observed that "the cases from other states *without exception* reject *Royal Globe*'s holding that an action under section 790.03 could be based upon a single wrongful act," acknowledging that "[s]uch unanimity of

disagreement strongly suggests we erred in our contrary holding." (*Id.* at p. 303.)

In sum, *Moradi-Shalal* held that section 790.03 does *not* permit a single instance of misconduct to constitute an unfair claims settlement practice. It further held that interpreting section 790.03 to do so creates an analytical difficulty, that other states have rejected such an interpretation, and that the only justification for such an interpretation rests on a false premise. That the Court of Appeal would nonetheless adopt the precise interpretation *Moradi-Shalal* rejected is indeed shocking. It is even more shocking in light of this court's subsequent observation that the decision in *Moradi-Shalal* "approved the reasoning of Justice Richardson's *Royal Globe* dissent, holding that the UIPA contemplated only administrative sanctions for practices amounting to a pattern of misconduct." (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 379, fn. 8.)

As amici also stressed in their first letter, the Court of Appeal's interpretation of section 790.03(h) conflicts with the holdings of other courts of appeal, creating an uncertainty in the law that can only be resolved by this court and until resolved is likely to lead to long, costly litigation. By also threatening to charge enormous numbers of violations and impose unfair penalties on insurers for business conducted in California, the Court of Appeal's first opinion, and now its current opinion, create a powerful disincentive to insurers contemplating whether to provide, or to continue to provide, insurance in this state.

This case provides a striking illustration of why the Court of Appeal's logic will be so destructive going forward. In 2007, the California Department of Insurance, following the language of section 790.03(h), determined that PacifiCare had committed 90 violations over an 11-month period. A year later, the Department, having adopted regulations that permitted it to charge a violation and impose a separate penalty for every individual act irrespective of whether such act was performed

with actual knowledge, added over eight hundred *thousand* violations, many of which were the inadvertent result of simple mistakes or misunderstandings and many of which caused no actual harm. The Administrative Law Judge ("ALJ"), recognizing that the vast majority of the violations charged were the result of inadvertence, recommended a penalty of $11.5 million. The Insurance Commissioner rejected that recommendation, issuing an opinion that increased the penalty to $173.6 million – again based mostly on mistakes, misunderstandings, and inadvertence. (See PFR 10-13.)

The administrative hearing alone took nearly four years as the ALJ struggled through the immense number of charged violations. The Commissioner followed with his own hearing, and that hearing was followed with court litigation that has continued until today and will continue far into the future. The Court of Appeal has now held that the matter must be sent back to the trial court for a do-over in light of the appellate court's decision to uphold the Department's regulations. Amici had hoped that the appellate court would reconsider its earlier interpretation or at least would provide explanation and guidance to the trial court that would limit the harm from that interpretation. But the Court of Appeal did neither, declining to revisit its earlier decision and refusing to provide much guidance to the trial court, leaving that court to continue to struggle through the morass of charged violations caused in large part by an unsupportable interpretation of the Insurance Code. The trial court's decision is of course likely to lead to additional appeals, extending the litigation for years.

Moreover, this is hardly the only case that will result in protracted litigation. Amici anticipate that unless this court steps in, the Department of Insurance will continue to charge what is clearly a single business practice as a series of separate violations, each justifying a separate penalty, irrespective of whether the insurer had actual knowledge of the violation. It

seems inevitable that such charging will not go unchallenged, not only because the charges are excessive and unfair, but also because of the split in authority between the Court of Appeal in this case and the other appellate courts which have concluded that, as the Insurance Code states, a violation occurs only when an unfair practice is committed with such frequency as to indicate a general business practice.

Moradi-Shalal warned against the danger of escalating insurance costs caused by an overly broad interpretation of section 790.03(h), observing that, ultimately, it is the public that suffers from the increased costs of insurance coverage necessitated by actual and threatened suits and overwhelming damages. (*Moradi-Shalal*, *supra*, 46 Cal.3d at pp. 301-302.) The court could also have warned that an interpretation that leads to untenable liability and damages and unsustainable litigation will drive insurers out of business or out of the state. Such a result is of no benefit to anyone, but likely unavoidable if this court allows the Court of Appeal's opinion to stand.

In conclusion, the Court of Appeal's decisions have misinterpreted the Insurance Code in a manner that allows for egregious overcharging and overwhelming penalties, and that creates an irreconcilable conflict between appellate decisions. Without this court's intervention, the decisions inevitably will lead to extensive litigation as administrative bodies and courts struggle to make sense of the law.

Accordingly, amici curiae U.S. Chamber and CalChamber urge this court to grant review.

Respectfully Submitted,

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By /s/ Ben Feuer
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Proof of Service

I, Stacey Schiager, declare as follows:

I am employed in the County of San Francisco, State of California, am over the age of eighteen years, and am not a party to this action. My business address is 96 Jessie Street, San Francisco, CA 94105. On July 11, 2022, I mailed the following document:

- **Letter of Amici Curiae (Chamber of Commerce of the United States of America and the California Chamber of Commerce) Supporting Petition for Review in *PacifiCare Life and Health Insurance Co. v. Jones*, No. S252252**

I enclosed a copy of the document identified above in an envelope and deposited the sealed envelope with the U.S. Postal Service, with the postage fully prepaid. The envelope was addressed as follows:

Hon. Kim Dunning
Orange County Superior Court
Civil Complex Center, Dept. CX104
751 West Santa Ana Blvd.
Santa Ana, CA 92701

Additionally, on July 11, 2022, I caused the above-identified document to be electronically served on all parties, the superior court, and the California Supreme Court via TrueFiling, which will submit a separate proof of service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 11, 2022.

/s/ Stacey Schiager
Stacey Schiager