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

November 29, 2018

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. Jones*, No. S252252

Dear Chief Justice Cantil-Sakauye and Honorable 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 that raise issues of concern to the nation's business community.

CalChamber is a non-profit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state of California. For over 100 years, CalChamber has been the voice of California business. 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. CalChamber often advocates before federal and state courts by filing amicus curiae briefs and letters in cases, like this one, involving issues of paramount concern to the business community.

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

Amici urge this court to grant review to resolve the uncertainty created by the Court of Appeal's shocking holding 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 thirty years ago in *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, remains binding precedent. The Court of Appeal held that this portion of *Royal Globe* survived as binding precedent because the discussion in *Moradi-Shalal* that rejected the reasoning of *Royal Globe* on this point was dicta. As explained below, whether or not this court agrees with the petition that the Court of Appeal incorrectly interpreted the applicable case law – and amici believe it should – such a dramatic resuscitation of significant precedent long thought intentionally dead and buried demands this court's careful review.

To briefly synopsize, section 790.03, subdivision (h), of the Insurance Code (section 790.03(h)) prohibits insurers from engaging in certain unfair claims settlement practices. *Royal Globe* held that a third party who is injured by an insured's negligent conduct may sue the insurer for violating this provision of the Insurance Code. (*Royal Globe*, *supra*, 23 Cal.3d at p. 884.) *Royal Globe* further held that "a single violation knowingly committed is a sufficient basis for such an action" (*id.* at p. 891); the third-party claimant need not show that the improper conduct is "committed with such frequency as to indicate a general business practice" (*id.* at p. 890).

This court overruled *Royal Globe* in *Moradi-Shalal*, holding that "the *Royal Globe* court incorrectly evaluated the legislative intent underlying the passage of section 790.03, subdivision (h) . . . ." (*Moradi-Shalal*, *supra*, 46 Cal.3d at p. 292.) Addressing the holding in *Royal Globe* "that a single act of misconduct could constitute a violation of section 790.03," *Moradi-Shalal* quoted with approval Justice Richardson's dissent in *Royal Globe*, stating: "The dissent noted that 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 pp. 295-296.) "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.' " (*Ibid.*)

This court, in *Moradi-Shalal,* left no doubt that it disagreed with the holding in *Royal Globe* that a single wrongful act could be sufficient to constitute an unfair settlement practice under section 790.03(h), criticizing the reasoning of *Royal Globe* on this point at length:

> Another area of analytical difficulty concerns the means by which the plaintiff must prove a "pattern" or "general business practice" of unfair settlement practices [citation]. As previously indicated, 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 [citation]. Such unanimity of disagreement strongly suggests we erred in our contrary holding. Yet, for the reasons stated by the majority in *Royal Globe,* the plaintiffs in these cases (whether insureds or third party claimants) seldom have the ability to prove any widespread pattern of wrongful settlement practices on the part of the insurer. [Citation.] Although 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, and that the provision was instead limited to providing *administrative* sanctions by the Insurance Commissioner, once an investigation revealed such a pattern.

(*Moradi-Shalal*, *supra*, 46 Cal.3d at p. 303.)

The Court of Appeal's decision thus disregards this court's conclusion in *Moradi-Shalal* that a single instance of misconduct cannot constitute an unfair claims settlement practice under the UIPA, reasoning that resolution of this issue was unnecessary to the decision in *Moradi-Shalal* and, thus, was dictum.

But even if the Court of Appeal was correct, this would mean only that this court's decision on this point was not controlling, not that it should be ignored. "To say that dicta are not controlling [citation] does not mean that they are to be ignored; on the contrary, dicta are often followed." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 511, p. 575.) Dicta that emanates

from this court " ' "carries persuasive weight and should be followed where it demonstrates a thorough analysis of the issue or reflects compelling logic." ' " (*Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 287; *Aviles-Rodriguez v. Los Angeles Community College Dist.* (2017) 14 Cal.App.5th 981, 990 [" 'Generally speaking, follow dicta from the California Supreme Court.' "]; *City of San Diego v. Shapiro* (2014) 228 Cal.App.4th 756, 781, fn. 24 [" 'dicta from the California Supreme Court is highly persuasive and should generally be followed' "].)

As the petition for review cogently explains, there is good reason to believe the Court of Appeal was simply wrong, but even if its ruling is correct, it should be this court, and not the Court of Appeal, that decides whether this portion of *Royal Globe* survived this court's later contrary decisions in *Moradi-Shalal* and *Zhang v. Superior Court* (2013) 57 Cal.4th 364, 379, fn. 8. As the Court of Appeal said in this case: "We cannot read the Supreme Court's mind. We can only apply its precedents – no matter how old or how often criticized a precedent may be." (Slip opn. at p. 19.) This court should declare whether the Court of Appeal correctly read those important precedents.

Review is especially necessary because this decision conflicts with this court's observation in *Zhang* that the decision in *Moradi-Shalal* "approved the reasoning of Justice Richardson's *Royal Globe* dissent, holding that the UIPA contemplates only administrative sanctions for practices amounting to a pattern of misconduct." (*Zhang*, *supra*, 57 Cal.4th at p. 379, fn. 8.) The decision also conflicts with contrary statements by the Court of Appeal in *Carlton v. St. Paul Mercury Ins. Co.* (1994) 30 Cal.App.4th 1450, 1459, fn. 1 ["*Moradi–Shalal* held the Insurance Commissioner is authorized to impose administrative sanctions if investigation reveals a *pattern* of unfair settlement practices, as opposed to a single wrongful act."], *Neufeld v. Balboa Ins. Co.* (2000) 84 Cal.App.4th 759, 762 ["Indeed, the very language of the Unfair Practices Act indicates that a private cause of action is not within the [UIPA's] purview: Subdivision (h), which introduces the litany of things that insurers shouldn't do, is framed in terms of many instances, not just a single case, thus signaling that the statute does not contemplate a private cause of action for a single instance of malfeasance . . . ."], and *Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (1996) 44 Cal.App.4th 194, 200 ["An insurer who regularly engages in unfair practices may have to pay a penalty to the state government."].

If left to stand, the Court of Appeal's decision will have serious negative repercussions for insurance companies in California. It would allow the Insurance Commissioner to penalize an insurance company for a single, isolated violation committed without actual knowledge. Thus, an insurer could be penalized under section 790.03(h)(1) if an agent inadvertently misrepresents to a single claimant "pertinent facts or insurance policy provisions relating to any coverages at issue" based on the constructive knowledge of other, better informed, agents. Or, under subdivision (h)(2), a penalty could be based on a single instance of failing "to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies" based on a finding that the agent had implied knowledge of an unreturned telephone call. The same is true of failing to confirm or deny coverage within a reasonable time under subdivision (h)(4), or failing to inform an insured upon request of the basis for paying a claim under subdivision (h)(9).

In particular, section 790.03(h)(11) prohibits "[d]elaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either, to submit a preliminary claim report, and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information." Under the Court of Appeal's decision, an insurance company could be penalized if an agent delayed a claim by inadvertently asking an insured to re-submit information based on the agent's implied, rather than actual, knowledge that the insured already had provided this information to another agent. Surely, this type of isolated, inadvertent violation was not the sort of unfair claims settlement practices section 790.03 was intended to prevent.

Conclusion

The Court of Appeal decision uses questionable reasoning to reach a disturbing holding that will have serious negative repercussions for the insurance industry and resurrects a portion of the important decision in *Royal Globe* long thought defunct.

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

Respectfully Submitted,

California Appellate Law Group LLP
Ben Feuer (No. 247502)
Julia Partridge (No. 83926)

By /s/ Ben Feuer
Ben Feuer

Attorneys for Amici Curiae
The Chamber of Commerce of the United States of America & the California Chamber of Commerce

Proof of Service

I, A. Kathryn Parker, 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 November 29, 2018 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, following the ordinary business practices of the California Appellate Law Group LLP, I mailed the above document to the parties listed below. I am readily familiar with the practice of the California Appellate Law Group LLP for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service in San Francisco, California, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing.

The envelopes were 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 November 29, 2018, I caused the within document to be electronically served on all parties and the Court of Appeal through 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 and that this declaration was executed on November 29, 2018 at San Francisco, California.

/s/ A. Kathryn Parker
A. Kathryn Parker