

COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

AMERICAN INSURANCE ASSOCIATION,)	3d Civ. No. C 045 000
etc., et al.,)	
)	
<i>Plaintiffs and Respondents,</i>)	(S.C.S.C. No. 03 CS 00839)
)	
vs.)	
)	
JOHN GARAMENDI, etc., et al.,)	
)	
)	
<i>Defendants and Appellants.</i>)	
<hr/>		
)	

**APPLICATION OF UNITED POLICYHOLDERS
FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT
OF DEFENDANTS AND APPELLANTS, AND AMICUS CURIAE BRIEF**

*Appeal from Judgment Granting Peremptory
Writ of Mandate of the Superior Court of the
State of California, County of Sacramento*

Hon. Raymond M. Cadei

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COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

AMERICAN INSURANCE ASSOCIATION, et al.,

Plaintiffs and Respondents,

vs.

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE ARTHUR G. SCOTLAND, PRESIDING JUSTICE:

Pursuant to *California Rule of Court* 13(c), and through this Application, UNITED POLICYHOLDERS (UP) hereby requests permission for leave to file an amicus curiae brief on the merits in the matter of *American Insurance Association et al., vs. John Garamendi, etc., et al.*, Court of Appeal Case No. C045000, in support of Defendants and Appellants GARAMENDI, *et al.* This application is timely, and made slightly more than one month after the filing of Appellants= Reply Brief. A copy of AMICUS= proposed brief is attached hereto.

UNITED POLICYHOLDERS (UP) was founded in 1991 as a non-profit organization dedicated to educating the public on insurance issues and consumer rights. The organization is tax-exempt under *Internal Revenue Code* '501(c)(3). UP is funded by donations and grants from individuals, businesses, and foundations.

UP serves as a resource for insurance claimants and actively monitors legal and marketplace developments affecting the interests of all policyholders. UP receives frequent invitations to testify at legislative and other public hearings, and to participate in regulatory proceedings on rate and policy issues.

A diverse range of policyholders throughout the United States communicate on a regular basis with UP, which allows it to provide important and topical information to courts throughout the country 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, 119 S.Ct. 710, and its arguments were adopted by the California Supreme Court in *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815. UP has filed amicus briefs on behalf of policyholders in over one hundred cases throughout the United States.

I have reviewed the briefs submitted by the parties and am therefore familiar with the issues in this case and the scope of their presentation. I believe UP can be of assistance to this Court by providing briefing that materially adds to and

complements the parties' briefs. To date, no amicus briefs whatsoever have been submitted herein.

The brief on behalf of UP discusses the statutory authority which *is* granted the Insurance Commissioner in *Ins. Code* '1858(a), upon the complaint of any person, to review any underwriting rules followed or adopted by an insurer concerning the A. . . manner in which the . . . [underwriting] rule has been applied with respect to the insurance afforded to that person.@ 10 C.C.R. ' 2361 (' 2361) properly regulates *what* criteria may constitute an underwriting rule.

In contrast, the briefing of the parties focuses primarily on *Insurance Code* '791.12 as authority for the promulgation of '2361. But UP believes that '791.12 is not the sole source of the Commissioner=s authority to adopt regulations concerning *what* lawful criteria may be used by insurers when underwriting homeowner=s insurance policies. Section 791.12 concerns *where* insurers may obtain accurate information about such lawful criteria, because it is part of the Insurance Information and Privacy Protection Act (IIPPA), *Ins. Code* "791, *et seq.*

UP=s perspective provides an additional basis for reversing the Judgment. This Court=s decision will provide guidance on a recurring issue of great public importance:

***the Commissioner=s authority to regulate
the underwriting of homeowner=s policies.***

To properly inform the Court regarding these and other related matters,

permission is respectfully requested to file the following amicus curiae brief in support of Defendants and Appellants GARAMENDI, *et al.*

Dated: April 30, 2004

STEVEN W. MURRAY, APC
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by _____
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COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

AMERICAN INSURANCE ASSOCIATION, et al.,

Plaintiffs and Respondents,

vs.

JOHN GARAMENDI, etc., et al.,

Defendants and Appellants.

**AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS
IN SUPPORT OF DEFENDANTS AND APPELLANTS**

INTRODUCTION

This appeal presents a single issue of law: Did the Insurance Commissioner exceed his statutory authority by promulgating 10 C.C.R. '2361 ('2361')?¹ The trial court ruled that he did, perceiving an inconsistency with *Insurance Code* '791.12.²

In this case, the Insurance Commissioner has adopted a regulation primarily regarding the underwriting of homeowner insurance policies. The regulation appears to

¹ See CT 811-812, 828-829, and AOB pp. 3-5.)

² AIA agrees. (See Respondent's Brief at p.1, 1st sentence.)

conflict with the provisions of Insurance Code section 791.12. That statute governs adverse underwriting decisions@ (CT 1408, &4.)

The following will show that the *Insurance Code* '1858³ is an authoritative source of the Commissioner=s power to establish the *Insurance Code* underwriting *criteria* comprising '2361, while '791.12⁴ relates to permissible sources and disclosures and the accuracy of *information*

³ **'1858. Complaint requesting review; hearing; denial; request for review to insurer or rating organization**

- (a) Any person aggrieved by any rate charged, rating plan, rating system, or *underwriting rule* followed or adopted by an insurer or rating organization, may file a written complaint with the commissioner requesting that the commissioner review the manner in which the rate, plan, system, or rule has been applied with respect to the insurance afforded to that person. In addition, the aggrieved person may file a written request for a public hearing before the commissioner, specifying the ground relied upon. (Italics added.)

⁴ **' 791.12. Adverse underwriting decision; prohibited grounds**

- No insurance institution or agent may base an adverse underwriting decision in whole or in part on the following:
- (a) On the fact of a previous adverse underwriting decision or on the fact that an individual previously obtained insurance coverage through a residual market mechanism; provided, however, an insurance institution or agent may base an adverse underwriting decision on further *information* obtained from an insurance institution or agent responsible for a previous adverse underwriting decision. The further *information*, when requested, shall create a conclusive presumption that the *information* is necessary to perform the requesting insurer=s function in connection with an insurance transaction involving the individual and, when reasonably available, shall be furnished the requesting insurer and the individual, if applicable.
- (b) On personal *information* received from an

insurers may use to decide whether such criteria are met.

The Regulation establishes what the criteria are, which is different from where to find out information about a person to see if he or she measures up to such standards.

ARGUMENT

A. SECTION 1858 (a) REGULATES UNDERWRITING

insurance-support organization whose primary source of *information* is insurance institutions; provided, however, an insurance institution or agent may base an adverse underwriting decision on further personal *information* obtained as the result of *information* received from an insurance-support organization.

- (c) On the fact that an individual has previously inquired and received *information* about the scope or nature of coverage under a residential fire or property insurance policy, if the *information* is received from an insurance-support organization whose primary source of *information* is insurance institutions and the inquiry did not result in the filing of a claim. (Italics added.)

Underwriting is the process whereby an insurer decides the risks it will or will not insure, so that it can intelligently make economic decisions about which risks to transfer to itself.

A>Underwriting is a label commonly applied to the process, fundamental to the concept of insurance, of deciding which risks to insure and which to reject in order to spread losses over risks in an economically feasible way. [Citations.]@
(*Smith vs. State Farm* (2001) 93 Cal.App.4th 700, 726.)

Thus an Aunderwriting rule@ within the meaning of '1858 includes one which restricts conditions on obtaining a policy, or affects the premium⁵ which an insurer might charge for such policy.

A. . . An underwriting rule is properly characterized as a rule followed or adopted by an insurer or a rating organization which either (1) *limits* the conditions under which a policy will

⁵ Technically the terms Arate@ and Apremium@ mean different things. AAs used in section 1858, the rate charged obviously refers to the premium charge for the policy of insurance, which may cause an aggrieved party to complain. Technically, a premium and a rate differ in insurance law. A premium means the amount paid to the company for insurance. [Citation.] A rate >is the formula by which a premium is calculated,= the latter being the product of applying >the rate to the specific risk presented by the insured.= [Citations.]@ (*Karlin vs. Zalta* (1984) 154 Cal.App.3d 953, 971, fn. 12.)

be issued or (2) *impacts* the rates that will be charged for that policy.@ (*Smith, supra*, 93 Cal.App.4th at 726, original italics.)

See also *Union Labor Life Ins. Co. vs. Pireno* (1982) 458 U.S. 119, 130; 102 S.Ct.

3002: ABoth the >spreading= and the >underwriting= of risk refer in this context to the transfer of risk characteristic of insurance . . . The transfer of risk from insured to insurer is effected by means of the contract between the parties B the insurance policy B and that transfer is complete at the time that the contract is entered.@

Ins. Code '1858(a) expressly grants the Commissioner the power to act on the complaint of any person by reviewing any underwriting rule followed or adopted by an insurer concerning the A. . . manner in which the . . . [underwriting] rule has been applied with respect to the insurance afforded to that person.@ Section 1858 and its succeeding statutes set forth a detailed administrative procedure for the Commissioner to hold hearings for such complainants. (*Farmer=s Ins. Exchange vs. Superior Court* (1992) 2 Cal.4th 377, 384; *Karlin, supra*, 154 Cal.App.3d at 970-972.)

The statute also provides for an individual insured to utilize such administrative remedy. (*Wilkinson vs. Norcal Mutual Ins. Co.* (1979) 98 Cal.App.3d 307, 317.) Indeed, A. . . the Insurance Commissioner and the Department of Insurance possess sophisticated bodies of expertise in this field which make them particularly able to handle these matters.@ (*County of Los Angeles vs. Farmer=s Ins. Exchange* (1982) 132 Cal.App.3d 77, 87.)

Although '1858(a) expressly authorizes the regulation of Aunderwriting

rules followed or adopted by an insurer, still A . . . [m]uch is necessarily left to the Insurance Commissioner, who has broad discretion to adopt rules and regulations as necessary to promote the public welfare. (Calfarm Ins. Co. vs. Deukmejian (1989) 48 Cal.3d 805, 824.)⁶ This fundamental principle has just been reaffirmed in State Farm vs. Garamendi (April 26, 2004, No. S102251) ___ Cal.4th ___, Slip Op. p.11.)

Section 2361 was promulgated to protect California residents, as the Commissioner explained in the July 21, 2003 Adoption of Regulation. (CT 812-827.) Thus this Court's task concerns the legality not the wisdom of the regulation. Given the Commissioner's broad discretion to promulgate rules considered necessary for the public's welfare, the judicial inquiry is whether such regulation is within the scope of the authority conferred on the Commissioner and whether it is reasonably necessary given the applicable statutory purposes. (State Farm,

⁶ It is important to remember that insurance is not treated like any other form of private enterprise. It is rigidly regulated by the state because it is affected with the public interest. Insurance, moreover, is a highly regulated industry, and one in which further regulation can reasonably be anticipated. . . . It is no longer open to question that the business of insurance is affected with the public interest. . . . Neither the company nor a policyholder has the inviolate rights that characterize private contracts. The contract of the policy holder is subject to the reasonable exercise of the state's police power. (Calfarm, supra, 48 Cal.3d at 830; 20th Century vs. Garamendi (1994) 8 Cal.4th 216, 240, 253.)

The unanimous court in *Calfarm* further noted that the U.S. Supreme Court also spoke of the "special relationship" between government and the insurance industry as justifying more extensive regulation than might be permitted for other industries. (Ibid. at fn. 26.) Also, *Amwest Surety vs. Wilson* (1995) 11 Cal.4th 1243, 1257-1258, and *Karlin, supra*, 154 Cal.App.3d at 966-968, explain the historical bases of California's regulation of insurance.

The obligations of an insurer are rooted in their status as purveyors of a vital service labeled quasi-public in nature. Suppliers of services affected with a public interest must take the public's interests seriously, where necessary placing it before their interests in maximizing gains and limiting disbursements. . . . (Foley vs. Interactive Data Corp. (1988) 47 Cal.3d 654, 684-685; *Cates Construction vs. Talbot Partners* (1999) 21 Cal.4th 28, 44.)

supra, Slip Op. at p.9.)

Such principles . . . are not merely empty rhetoric. (ALRB vs. Superior Court (1976) 16 Cal.3d 392, 411.) There is a strong presumption that '2361 was regularly adopted and a court is not to independently impose its policy views on the Commissioner.

Moreover, these issues do not present a matter for the independent judgment of an appellate tribunal; rather, both come to this court freighted with the strong presumption of regularity accorded administrative rules and regulations. [Citation.] And in considering whether the regulation is reasonably necessary under the foregoing standards, the court will defer to the agency's expertise and will not superimpose its own policy judgment upon the agency in the absence of an arbitrary and capricious decision. [Citation.] (ALRB, *supra*, 16 Cal.3d at 411.)

Protecting the public was also the purpose of the correlative regulations adopted in 1995 which are currently the law. In 10 C.C.R. '2360(b), Eligibility Guidelines are defined to be . . . specific, objective factors, or categories of specific, objective factors, which are selected and/or defined by an insurer, and which have a substantial relationship to an insured's loss exposure. In 10 C.C.R. '2360.1, such definition is applied to homeowner's insurance, while '2360.2⁷ states

⁷ Analogous language is used in *Ins. Code* '10086.5, at note 10, *post*.

that any A. . . insured or applicant who meets the eligibility guidelines [for a particular line of insurance] shall qualify to purchase the insurance.@

But the Commissioner also has the *implied* power to regulate underwriting as authority need only be fairly implied by the enabling legislation.

AH[is] powers are not limited to those expressly conferred by statute; rather it 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.@ (*Calfarm, supra*, 48 Cal.3d at 824-825, quoting *Rich Vision Centers vs. Bd. of Med. Examiners* (1983) 144 Cal.App.3d 110, 114.)

This Court concurs. (*Duarte & Witting vs. New Motor Veh. Bd.* (2002) 104 Cal.App.4th 626, 635-636; *Frankel vs. Bd. of Med. Exam.* (1996) 46 Cal.App.4th 534, 544.)

Because '1858(a) charges the Commissioner with determining whether a complainant is aggrieved by an insurer=s underwriting rule, this implied power means substantive underwriting regulations are necessary to carry out that duty.

ATo do so, the commissioner must establish rules to resolve various interstitial legal, policy, and technical issues. An administrative official may frame rules deliberately in quasi-

legislative proceedings to adopt regulations.@ (20th Century,.
supra, 8 Cal.4th at 280.)⁸

Since the Legislature authorized the Commissioner to deal with underwriting rules, issuing a regulation to make standards uniform B which gives notice to insurers so decisions are not made on ad hoc basis B is entirely reasonable and desirable.

Aln adjudication, the judge applies declared law; he does not entertain the question whether its underlying premises are sound. That is as it should be. Otherwise, standardless, ad hoc decision making would result.@ (20th Century, *supra*, 8 Cal.4th at 312.)

⁸ See CT 812-827.

The Commissioner acts in a quasi-legislative capacity when adopting regulations, as here, because '2361 formulates a rule which is to be prospectively applied. (20th Century, *supra*, 8 Cal.4th at 275.) ***What good is the administrative remedy the Legislature authorized in '1858, et seq., if the Commissioner cannot promulgate regulations in his quasi-legislative role so hearings can be held under the existing statutes? How effective can this administrative procedure be to an individual⁹ who elects to pursue it, if there are no underwriting standards of general application for use by either the Commissioner or by insurers whose rules are complained of?***

⁹ The Legislature intended the Commissioner to afford immediate relief to aggrieved persons by amending '1858 in 1987 to permit the filing of complaints directly with the Commissioner. (*Donabedian vs. Mercury Ins.* (2004) 116 Cal.App.4th 968, 980, fn. 3.)

Insurers are strictly regulated concerning cancellation and termination of many personal and commercial risks. *Ins. Code* '675, *et seq.* sets forth numerous requirements before any such action is lawful, while *Ins. Code* '1861.03(c) restricts the non-renewal of automobile insurance policies. (*Calfarm, supra*, 48 Cal.3d at 830-831.) In *Ins. Code* '10086.5¹⁰ the Legislature specifically restricted an insurer=s right to cancel, terminate or non-renew such policies unless certain criteria are met. Indeed, subdivision (c) thereof requires that the applicable ***underwriting standards*** not be unfairly applied. See also *Ins. Code* '678.5, and '13600 and 13601. Regulation is thus the rule, not the exception. (See fn. 6, *ante.*)

As our high court has just explained, *Ins. Code* '1861.03(a) A. . . is not limited in scope to rate regulation. It also addresses the underlying factors that may impermissibly affect rates charged by insurers and lead to insurance that is unfair, unavailable, and unaffordable. (*State Farm, supra*, Slip Op. at p.11.) By parity of reasoning, A. . . the Commissioner undoubtedly has the authority under [1858 to determine] whether these [underwriting rules] are impermissibly affecting the

¹⁰ **10086.5. Nonrenewal, rejection or cancellation of policy by insurer after acceptance of coverage; prohibition**

(a) The Legislature hereby finds and declares that the continued regulation of the business practices of insurers and their products is in the interest of the citizens of the state and that the control and limitation of unlawful *nonrenewal, rejection, or cancellation* of residential property insurance after an offer of earthquake coverage is accepted is an essential component of that regulation which is necessary to effectuate an adequate and complete system and regulation of insurer and producer business practices. The Legislature finds that this chapter continues to provide critical protection to insureds in this state from the numerous consequences that would occur in the absence of that regulation.

(b) An insurer shall not refuse to *renew, reject, or cancel* a policy of residential property insurance after an offer of earthquake coverage is accepted solely because the insured has accepted that offer of earthquake coverage, except in cases in which the policy is terminated by the named insured.

(c) *Underwriting standards* applicable to residential property insurance shall not be applied in a discriminatory fashion against any person who accepts or elects to continue earthquake coverage.@ (Italics added.)

fairness, availability and affordability of insurance.@ (*Id.* at 11-12.)

B. SECTION 791.12 CONCERNS THE RIGHT OF PRIVACY

The Legislature created the Insurance Information and Privacy Protection Act (IIPPA) in 1980, enacting *Insurance Code 791, et seq.*, including '791.12.

A. .the enactment, also in 1980, of Insurance Code section 791 et seq., which created the Insurance Information and Privacy Protection Act. This act **limits the disclosure** of information collected in connection with insurance transactions and enables insurance applicants and policyholders to **obtain the reasons** for any adverse underwriting decision." (*Heller vs. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 35, fn. 1, internal punctuation and quotations omitted, emphasis added.)

Such privacy protection was based on the NAIC Model Insurance Information and Privacy Protection Act. Its purpose is set forth in *Ins. Code* '791, and concerns the establishment of standards for collecting, using and disclosing accurate **information** regarding insurance transactions.

AThe act specifies when an insurance carrier must disclose to its insureds or potential insureds information

received which pertains to insurance decisions, such as the denial of benefits. The act limits the dissemination of information about insureds to other persons and entities, and provides remedies to persons whose rights are violated if information is inappropriately released.@ (*Griffith vs. State Farm* (1991) 230 Cal.App.3d 59, 65.)¹¹

As noted, the purpose of IIPPA, including '791.12, is to limit disclosure of information about applicants and insureds, and to enable them to obtain and verify the accuracy of the reasons for insurers' denials of insurance transactions. ('791; *Heller, supra*, 8 Cal.4th at 35, fn. 1.)¹²

¹¹ In addition to *Heller*, another Supreme Court decision is consistent with this protection of privacy@ purpose. In *Connecticut Indemnity Co. vs. Superior Court* (2000) 23 Cal.4th 807, 818, the court noted that there were certain types of information A. . . not to be the kind of private or personal information protected by the act, and hence disclosure of that information would not violate the act.@

¹² Two other arguments raised by AIA also need to be corrected. *Quelimane vs. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 43, is inapposite. (See Respondent's Brief at 20-21.) *Quelimane* involved several title insurers who allegedly violated their duty to issue title insurance policies to persons who acquired the ownership of land pursuant to tax sales. (*Id.* at 36.) The Court rejected any judicially imposed duty to sell insurance in the absence of any Legislative directive. (*Id.* at 43.) Here the Commissioner is not requiring any insurer to sell homeowners insurance, he is only establishing standards for those which do. And there *is* a Legislative directive. But if insurers want to withdraw from the California market because of '2361, they are free to do so. (*Ins. Code* '674.6.)

According to the Office of Legislative Counsel, SB64 is still pending, so the Bill's misstated status affords AIA no assistance. (Respondent's Brief at 22-25.) Even if it had been rejected, our high court has frequently noted that arguments based on the Legislature's failure to pass a law are unpersuasive. AAs we have often observed, >Unpassed bills, as evidences of legislative intent, have little value.= [Citations.]@ (*Granberry vs. Islay Investments* (1995) 9 Cal.4th 738, 746.) Moreover, *Cooper vs. Swoap* (1974) 11 Cal.3d 856 is inapposite here. *Cooper* involved three rejections by the Legislature to enact a particular provision to a welfare bill, yet the administrative agency's director insisted that the agency could to what it wanted to regardless of what the Legislature did. (*Cooper, supra*, 11 Cal.3d at 865, fn. 12.) None of SB64's proposed amendments even mentioned '1858(a). Since there is no way of knowing the Bill's ultimate fate, such circumstances are little evidence of the Legislature's intent. (*Grupe Dev. Co. vs. Superior Court* (1993) 4 Cal.4th 911, 923.)

CONCLUSION

The right of privacy relates to the protected interest of prohibiting the unauthorized disclosure of information about individuals (and sometimes certain business entities.) In light of a statute commanding the Commissioner to deal with the complaints of persons aggrieved by underwriting rules, a different law which limits sources of information and disclosures cannot be used to prevent the Commissioner from performing his duty. That duty includes A . . . the broad discretion to adopt rules and regulations as necessary to promote the public welfare.@ (*Calfarm, supra*, 48 Cal.3d at 824; *State Farm, supra*, Slip Op. at p.9.)

Although it is understandable that a busy trial judge does not have the time or resources to independently research this highly technical and detailed area of the law, it is apparent that he erred in focusing on '791.12 as the sole source of the Commissioner=s authority to promulgate '2361. As a result, the relief sought by the Commissioner and the Department is warranted. The Judgment should be reversed and a new Judgment entered, denying the Petition for a Peremptory Writ of Mandate.

Dated: April 30, 2004

Respectfully submitted,

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by _____
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**CERTIFICATION OF LENGTH OF BRIEF
(Rule 14(c)(1))**

I HEREBY CERTIFY that this Application and Amicus Brief of UNITED POLICYHOLDERS contains 5,048 words, which is less than the total words permitted by said Rule. This certification is based on the computer program used to prepare this Brief.

DATED: April 30, 2004

STEVEN W. MURRAY

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years, and am not a party to the within action; my business address is 15910 Ventura Boulevard, Suite 1525, Encino, California 91436.

On the date hereinbelow specified, I served the foregoing document(s) described below on the interested parties in this action by placing true copies thereof enclosed in (a) sealed envelope(s) addressed as follows:

Date of Service : April 30, 2004

Document(s) Served : APPLICATION OF UNITED POLICYHOLDERS FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS AND APPELLANTS, AND AMICUS CURIAE BRIEF

Parties Served : SEE ATTACHED SERVICE LIST

X (BY U.S. MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Encino, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

— (BY FEDERAL EXPRESS) I caused such envelope(s) to be delivered by air courier, with next day service.

— (BY PERSONAL SERVICE) I caused such envelope(s) to be delivered by hand to the offices of the addressee(s).

— (BY FACSIMILE SERVICE) I transmitted said document(s) via facsimile machine. The facsimile machine I used complied with *Rule* 2003 and no error was reported by the machine.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

— (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

EXECUTED at Encino, California on April 30, 2004

CINDY L. SLEMAN

AIA vs. GARAMENDI
3d Civ. No. C 045 000

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