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IN THE SUPREME COURT OF CALIFORNIA

FIRE INSURANCE EXCHANGE,
Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,
Respondent;

RICHARD BALLESTER,
Real Party in Interest.

AFTER A SUMMARY DENIAL OF PETITION FOR WRIT OF MANDATE OR OTHER APPROPRIATE WRIT BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FIVE
CASE NO. B232866

PETITION FOR REVIEW

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PETITION FOR REVIEW

ISSUE PRESENTED

Should this Court overrule *Colonial Life & Accident Ins. Co. v. Superior Court* (1982) 31 Cal.3d 785 (*Colonial Life*) to the extent it permits discovery of private non-party information that is not directly relevant to the allegations in the pending litigation?

INTRODUCTION
WHY REVIEW SHOULD BE GRANTED

Oliver Wendell Holmes wisely observed that "precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten." (Holmes, The Common Law (1881) p. 35.) So it is with this Court's opinion in *Colonial Life*. The rationale and legal underpinning of *Colonial Life* have disappeared and the time has come for this Court to overrule it, or at the very least, greatly curtail its application.

This petition presents a straightforward and significant issue about protecting non-party private information from unnecessary compelled disclosure. Here, Fire Insurance Exchange (FIE) was ordered to produce to plaintiff Richard Ballester private information regarding non-party insureds that was not directly relevant to Ballester's lawsuit against FIE. Even though such information is squarely protected from disclosure by constitutional and statutory rights to privacy (see Cal. Const., art. I, § 1; Ins. Code, §§ 791.13, 12919, 12921.4), respondent court ruled that *Colonial Life* was controlling, and required FIE to produce the private information. (Exh. 25, pp. 490 ["I think the *Colonial Life* case is dispositive of the issue in terms of the [sic] what the plaintiff wants to do"], 491 [*Colonial Life* "is the controlling case here"].)

This Court should grant review, and hold that *Colonial Life* is no longer good law to the extent it supports the discovery ordered here. In *Colonial Life*, this Court held that plaintiffs suing their insurer could seek discovery of claim files concerning non-party

insureds in order to identify evidence supporting the plaintiffs' then-existing cause of action under Insurance Code section 790.03, and to support their claim for punitive damages. Prior to *Colonial Life,* this Court in *Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal.3d 880 (*Royal Globe*) held that a private right of action existed for violation of Insurance Code section 790.03. In the three decades since *Colonial Life* was decided, the legal landscape has completely changed: The justification for allowing discovery of non-party private information in *Colonial Life* no longer exists; and courts are more protective of non-party privacy rights, refusing to compel discovery absent proof the information being sought is *directly relevant* to the pending litigation.

First, this Court overruled *Royal Globe.* It held insureds can no longer bring a private cause of action for violation of Insurance Code section 790.03. (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 304 (*Moradi-Shalal).*) Here Ballester did not and cannot allege a private cause of action under Insurance Code section 790.03. Moreover, Ballester's claim under Business and Professions Code section 17200 does not and cannot bring him within the ambit of *Colonial Life.* (See *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 283 (*Manufacturers Life*).) Thus, this first underpinning for the *Colonial Life* decision fails; it can no longer support an order compelling discovery of private information in other, non-party insureds' claim files.

Second, after *Colonial Life* was decided both the United States Supreme Court and this Court have held that a plaintiff is

not permitted to rely on evidence of dissimilar conduct to recover punitive damages. (*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 423 [123 S.Ct. 1513, 155 L.Ed.2d 585] (*State Farm*); *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191 (*Johnson*).) Here, the trial court granted Ballester's request for broad discovery of private information that is not narrowly tailored to track the misconduct alleged in his complaint. The order therefore compels production of private information that could *not* support Ballester's punitive damages claim. Thus, this second underpinning of *Colonial Life* likewise fails; it too cannot support the discovery that respondent court ordered.

In addition, this court has held that " 'courts must balance the right of civil litigants to discover relevant facts against the privacy interests of persons subject to discovery.' " (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1199 (*John B.*); accord, *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 370 (*Pioneer Electronics*).) Here, respondent court decided (erroneously) that it did not have to balance plaintiff's need for the information against the privacy rights of third-parties because *Colonial Life* had already balanced those interests in favor of compelling discovery.

For these reasons, this court should grant review and hold that *Colonial Life* is no longer good law to the extent it supports the discovery ordered here.

STATEMENT OF THE CASE

A. Ballester's home is damaged by a fire. He makes a claim under his Fire Insurance Exchange (FIE) policy.

On October 30, 2009, a fire erupted in Ballester's garage. (Exh. 1, p. 3.) The fire and suppression efforts damaged portions of his home, primarily in the area of the garage. (Exh. 1, pp. 3, 4.)

FIE had issued an insurance policy covering fire damage to Ballester's home, which was in effect at the time of the fire. (Exh. 12, p. 323.) Ballester promptly notified FIE of the loss. (Exh. 1, p. 4; exh. 14, p. 357.) Ballester also retained his own contractor, Gary Griffiths from Frontier Construction & Interiors (Frontier), to estimate the extent of damage to his home and help present his insurance claim to FIE. (Exh. 3, p. 86; exh. 14, pp. 357-358.)

B. FIE repeatedly investigates Ballester's loss, and then pays almost the entire amount he claimed was due.

FIE's adjuster, Mark Blaha, inspected Ballester's home numerous times during the months following the fire. In November 2009, Blaha initially estimated the repair cost at $62,923.52. (Exh. 3, p. 86; exh. 14, p. 358.) About a year later, after several more inspections, interim revisions to the repair cost estimate, changes by the building inspector regarding the scope of required electrical repairs (necessitating the complete rewiring of Ballester's entire house), and payments to Ballester based on those estimates, Blaha

increased his repair cost estimate to $115,535.06 and FIE paid the additional amount it owed. (Exh. 14, pp. 360-365.) Blaha contended that each revision to his estimate was based on new information about additional damage to the home discovered subsequent to his initial inspection, revised building inspector requirements, and by the roofing contractor's inability to match the tile color of the partially damaged roof (necessitating a complete new roof). (Exh. 14, p. 365.)

Griffiths, on the other hand, claimed that Blaha's revisions to his estimates were not based on new information discovered during reconstruction. Rather, they were made because (1) Griffiths rejected FIE's unreasonably low estimates, (2) Griffiths insisted that Ballester's home could not be properly repaired to its pre-loss condition based on FIE's estimate; and (3) because Ballester filed a lawsuit against FIE in July 2010. (Exh. 22, p. 468.)

C. Ballester sues FIE for breach of contract, insurance bad faith, and unfair business practices.

On July 14, 2010, Ballester filed suit against FIE alleging causes of action for (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; and (3) violation of Business and Professions Code sections 17200, et seq. (Exh. 1.) Ballester alleged that FIE made an unreasonably low offer to resolve his fire damage claim. (Exh. 1, pp. 5-6.) He further alleged that FIE follows a pattern and practice of making an initial "low ball" offer to resolve an insured's claim, and if that offer is rejected, slowly and

incrementally increases its offer, with no intention of ultimately paying the true value of the claim. (Exh. 1, p. 15; exh. 3, p. 84.)

D. Ballester seeks discovery of other FIE claims files.

Ballester propounded his first set of special interrogatories. (Exh. 7, pp. 165-174.) Ballester's special interrogatory number 25 asked FIE to: "[i]dentify by name, address, and telephone number each and every of YOUR other insureds who made first party homeowner claims for the repair of their home, where Mark Blaha had any involvement in the handling or supervision of the claim, and where coverage was denied in whole or in part. This interrogatory only applies to claims made within the last (5) years." (Exh. 7, p. 171.) Interrogatory number 26 asked for the same information as special interrogatory number 25, but replaced "Mark Blaha" with "Charlie Horn." (Exh. 7, p. 172.)

Ballester also propounded his first set of requests for identification and production. (Exh. 7, pp. 192-199.) Request for production number 21 asked FIE to: "Identify and produce the claim file for each and every of YOUR other insureds who made first party homeowner claims for the repair of their home, where Mark Blaha had any involvement in the handling or supervision of the claim, and where coverage was denied in whole or in part. This Request only applies to claims made within the last (5) years." (Exh. 7, p. 199.) Request for production number 22 asked for the same documents as request for production number 21, but replaced "Mark Blaha" with "Charlie Horn." (Exh. 7, p. 199.)

E. FIE objects on grounds the discovery is unduly burdensome, seeks irrelevant information, and infringes upon the privacy rights of FIE's other insureds.

FIE responded to Ballester's special interrogatories. (Exh. 7, pp. 176-190.) As pertinent to this petition, FIE objected to and declined to answer special interrogatory number 25 on the grounds: "The interrogatory seeks material manifestly irrelevant to the litigation and not reasonably calculated to lead to discovery of admissible evidence. The interrogatory seeks information protected from disclosure by third party privacy rights. The interrogatory further is overly broad, unduly burdensome, and without reasonable limitation." (Exh. 7, pp. 187-188.) FIE objected to special interrogatory number 26 on similar grounds.

FIE also responded to Ballester's first set of requests for identification and production. (Exh. 7, pp. 209-218.) FIE objected to and refused to produce documents responsive to Ballester's request for production numbers 21 and 22 on the same grounds that it refused to answer special interrogatories numbers 25 and 26. (Exh. 7, pp. 215-216.)

F. Ballester moves to compel responses to his discovery demands, which the trial court grants over FIE's opposition.

The parties exchanged meet and confer letters. (Exh. 7, pp. 220-230, 234-243, 245-249.) Ballester asserted that the discovery sought information germane to his bad faith and punitive damages claims, which was discoverable pursuant to *Colonial Life*. (Exh. 7, pp. 221-226, 234-241.) FIE reasserted its objections. (Exh. 7, pp. 247-249.)

Ballester then moved to compel discovery. (Exhs. 3-7.) FIE opposed the motions to compel (exhs. 12-14, 16), and objected to the evidence supporting Ballester's motions (exh. 17). FIE's opposition and supporting papers demonstrated that (a) production of the discovery would violate third party privacy rights, (b) the requested claim files were not relevant to Ballester's claims, (c) the discovery demands were overly broad and unduly burdensome, and (d) Ballester's motions were not supported by admissible evidence. (Exh. 12, pp. 329-335; exh. 13, pp. 350-355.) Ballester then filed reply briefs (exhs. 19, 20), objections to FIE's evidence (exh. 18), and new evidence supporting his motions to compel (exhs. 21-22).

At the April 5, 2011, hearing on Ballester's motions to compel, respondent court stated that *Colonial Life* was controlling authority. (exh. 25, pp. 490 ["I think the Colonial Life case is dispositive of the issue in terms of the [sic] what the plaintiff wants to do"], 491 [*Colonial Life* "is the controlling case here"]), granted Ballester's motions, overruled FIE's evidentiary objections, and

issued a minute order compelling FIE to respond without objections to Ballester's discovery demands. (Exh. 23, p. 477; exh. 25, p. 495.)

However, at Ballester's suggestion, the court responded to FIE's argument regarding burden by altering the scope of production, ordering FIE to produce: (1) the names and addresses of the insureds who filed the first fifty and the last fifty claims for the periods of April 5, 2009 through April 5, 2010, and April 5, 2010 through April 5, 2011, where Charlie Horn was involved as a supervisor (removing the qualification that the claims be "denied in whole or in part"); and (2) either the name and addresses of insureds whose claims were denied in whole or in part within the last five years, and handled by Mark Blaha, or if less burdensome, the names and insureds of all of the insureds whose claims were handled by Mark Blaha within the past five years. (Exh. 25, pp. 495-496; exh. 26, p. 503.)

Respondent court filed a final written order on April 22, 2011, confirming and restating its April 5, 2011 order. (Exh. 26.)

G. FIE files a petition for writ of mandate, which the Court of Appeal summarily denies.

Three weeks later FIE filed a petition for writ of mandate with the Court of Appeal, Second Appellate District, seeking relief from the trial court's order compelling discovery of non-party insureds' claim files. The Court of Appeal summarily denied the petition. (B232866, May 18, 2011 order.)

LEGAL ARGUMENT

THIS COURT SHOULD GRANT REVIEW AND HOLD THAT *COLONIAL LIFE* IS NO LONGER GOOD LAW TO THE EXTENT IT SUPPORTS DISCOVERY OF NON-PARTY PRIVATE INFORMATION THAT IS NOT DIRECTLY RELEVANT TO THE UNDERLYING LITIGATION.

A. Non-party insureds have fundamental and compelling privacy interests that courts must protect.

The first provision of the California Constitution states that "privacy" is one of the "inalienable rights" of "[a]ll people." (Cal. Const., art. I, § 1.) It is a right "on a par with defending life and possessing property" (*Vinson v. Superior Court* (1987) 43 Cal.3d 833, 841) and "is a 'fundamental interest' of our society" (*Garstang v. Superior Court* (1995) 39 Cal.App.4th 526, 532 (*Garstang*); *Kahn v. Superior Court* (1987) 188 Cal.App.3d 752, 765.)

Under the California Constitution, " '[t]he right of privacy is the right to be left alone.' " (*White v. Davis* (1975) 13 Cal.3d 757, 774; accord, *Pioneer Electronics*, supra, 40 Cal.4th at p. 367 [under the California Constitution, the definition of the right of privacy is simply the " 'right to be left alone' "].) It follows that a person's constitutionally protected right to privacy includes the rights to control disclosure of their name, home address and telephone number to someone seeking that information. (See *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 81 (dis. opn. of Mosk, J.)

(*Hill*); *Planned Parenthood Golden Gate v. Superior Court* (2000) 83 Cal.App.4th 347, 358-359 (*Planned Parenthood Golden Gate*) ["discovery order . . . [¶] impinges on nonparties' residential privacy interests by compelling disclosure of residential addresses and telephone numbers"].)

The California Legislature has expressly determined that this right to privacy extends to information about insureds possessed by insurance companies,[1] and has established a clear prerequisite for discovering this type of information. (See Ins. Code, §§ 791.13, 12919, 12921.4.) As explained by this Court, Insurance Code "[s]ection 791.13 prevents an insurance company from disclosing 'any personal;[2] or privileged[3] information about an individual

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[1] Insurers, as the custodians of their insureds' private information, have standing to assert the privacy interests of their insureds in opposition to discovery. (See *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 658; *Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516, 525-526 (*Board of Trustees*) [" 'The custodian [of private information] has the right, in fact the duty, to resist attempts at unauthorized disclosure and the person who is the subject of [it] is entitled to expect that his right will be thus asserted' "]; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2010) ¶ 8:296, pp. 8C-86 to 8C-87.)

[2] " 'Personal information' means any individually identifiable information gathered in connection with an insurance transaction from which judgments can be made about an individual's character, habits, avocations, *finances*, occupation, general reputation, credit, health or any other personal characteristics . . . includ[ing] an individual's *name and address* . . . ." (Ins. Code, § 791.02, subd. (s), emphases added.)

[3] " 'Privileged information' means any individually identifiable information that both: [¶] (1) Relates to a claim for insurance (continued...)

collected or received in connection with an insurance transaction' " unless the insurer receives within one year prior to the disclosure the individual's signed and dated written authorization for the release. (*Colonial Life, supra,* 31 Cal.3d at p. 792, fn. 10; see *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 35, fn. 1 ["Insurance Code section 791 et seq., which created the Insurance Information and Privacy Protection Act . . . limits 'the disclosure of information collected in connection with insurance transactions' "]; see also *Mead Reinsurance Co. v. Superior Court* (1986) 188 Cal.App.3d 313, 321-322.) [4]

(...continued)
benefits or a civil . . . proceeding involving an individual. [¶] (2) Is collected in connection with or in reasonable anticipation of a claim for insurance benefits or civil . . . proceeding involving an individual . . . [and] shall . . . be considered 'personal information' under this act if it is disclosed in violation of Section 791.13." (Ins. Code, § 791.02, subd. (v).)

[4] *Colonial Life* sets forth the procedure by which the insurer obtains an insured's written authorization for the disclosure of private information pursuant to section 791.13. (*Colonial Life, supra,* 31 Cal.3d at p. 792, fn. 10)

B. Private information is not discoverable absent: (1) proof of direct relevancy; (2) careful balancing of the need for the discovery against the right of privacy; and (3) narrow tailoring regarding the scope of information produced.

Discovery of private information is never justified based on the mere assertion that it might lead to admissible evidence: " ' "When compelled disclosure intrudes on constitutionally protected areas, it cannot be justified solely on the ground that it may lead to relevant information." ' " (*Board of Trustees, supra,* 119 Cal.App.3d at p. 525; accord, *Lantz v. Superior Court* (1994) 28 Cal.App.4th 1839, 1854, 1857 (*Lantz*); *Garstang, supra,* 39 Cal.App.4th at p. 533; *Ombudsman Services of Northern California v. Superior Court* (2007) 154 Cal.App.4th 1233, 1250-1251 (*Ombudsman*); *Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1017 (*Davis*) ["Mere speculation as to the possibility that some portion of the records might be relevant to some substantive issue does not suffice" to justify discovery of private information]; see *Olympic Club v. Superior Court* (1991) 229 Cal.App.3d 358, 363 ["In ordinary civil litigation, a plaintiff's need for information will not easily override a third party's privacy rights"].)

For this reason, "[t]he burden is on the party seeking the constitutionally protected information to establish *direct relevance.*" (*Davis, supra,* 7 Cal.App.4th at p. 1017, emphasis added; accord, *Ombudsman, supra,* 154 Cal.App.4th at p. 1251 ["The person seeking discovery of material protected by the constitutional right to

privacy 'has the burden of making a threshold showing that the evidence sought is "directly relevant" to the claim or defense' "]; *John B., supra,* 38 Cal.4th at p. 1200 ["where a plaintiff seeks discovery from a defendant concerning . . . matters protected by the constitutional right of privacy, the 'intrusion upon . . . privacy may only be done on the basis of " *'practical necessity'* " ' " (emphasis added)]; *Lantz, supra,* 28 Cal.App.4th at pp. 1853-1854 ["when the constitutional right of privacy is involved, the party seeking discovery of private matter . . . must demonstrate a *compelling need* for discovery" (emphasis added)], 1855 [" 'An impairment of an interest of constitutional dimension passes constitutional muster only if it is *necessary* to achieve the compelling interest' "]; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra,* ¶ 8:320, at p. 8C-103.)

"And even when discovery of private information is found directly relevant to the issues of ongoing litigation, it will not be automatically allowed; there must then be a *careful balancing* of the compelling public need for discovery against the fundamental right of privacy." (*Lantz, supra,* 28 Cal.App.4th at p. 1854, emphasis added, internal quotation marks omitted; accord, *Pioneer Electronics, supra,* 40 Cal.4th at p. 371 [" 'Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests' "]; *Los Angeles Gay & Lesbian Center v. Superior Court* (2011) 194 Cal.App.4th 288, 306-307; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra,* ¶ 8:323, at p. 8C-104.) " '[T]he balance will *favor privacy for confidential information* in third party

. . . files *unless* the litigant can show a *compelling need* for the particular documents and that the information cannot reasonably be obtained through depositions or from nonconfidential sources.' " (*Ombudsman, supra,* 154 Cal.App.4th at p. 1251, emphases added.)

Finally, "even where the plaintiff can establish a compelling . . . [need for] discovery, precision of compelled disclosure is required so that the right of privacy is not curtailed except to the extent necessitated by the legitimate governmental objective." (*John B., supra,* 38 Cal.4th at p. 1199, internal brackets, quotation marks, and ellipses omitted; see *id.* at p. 1200 [" ' "compelled disclosure must be narrowly drawn to assure maximum protection of the constitutional interest at stake" ' "(internal brackets omitted)]; *Lantz, supra,* 28 Cal.App.4th at p. 1855 ["if an intrusion on the right of privacy is deemed necessary under the circumstances of a particular case, any such intrusion should be the minimum intrusion necessary to achieve its objective"]; *Davis, supra,* 7 Cal.App.4th at p. 1014 ["The scope of any disclosure must be narrowly circumscribed, drawn with narrow specificity, and must proceed by the least intrusive manner"]; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra,* ¶¶ 8:328 to 8:329.1, pp. 8C-108 to 8C-109.)

C. *Colonial Life* does not justify the discovery of private information that is not directly relevant to the underlying litigation.

1. The legal underpinning of the *Colonial Life* decision no longer exists.

Respondent court ruled that *Colonial Life* authorized Ballester to obtain discovery information regarding FIE's non-party insureds. (Exh. 25, pp. 490 ["I think the *Colonial Life* case is dispositive of the issue in terms of the [*sic*] what the plaintiff wants to do"], 491 [*Colonial Life* "is the controlling case here"].) Respondent court erred. *Colonial Life* does not justify the discovery that was ordered here since the legal underpinning of that decision no longer exists.

In *Colonial Life*, an insured brought a direct action against an insurer for violating Insurance Code section 790.03, subdivision (h),[5]

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[5] Insurance Code section 790.03, subdivision (h), provides, in relevant part, that the following constitutes unfair and deceptive acts or practices in the business of insurance:

"(h) Knowingly committing or performing with such frequency as to indicate a general business practice any of the following unfair claims settlement practices:

(1) Misrepresenting to claimants pertinent facts or insurance policy provisions relating to any coverages at issue.

(2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.

(continued...)

breach of contract and insurance bad faith. (*Colonial Life, supra,* 31 Cal.3d at p. 788.) The insurer sought writ relief from an order compelling it to produce to the plaintiff the names, addresses and claims files of non-party insureds. (*Id.* at pp. 787-788.) The insurer objected to the discovery primarily on relevancy grounds. (*Id.* at pp. 788-790.)

This Court denied the insurer's petition for writ relief, holding that the information was relevant to both the plaintiff's direct action for violating Insurance Code section 790.03 under *Royal Globe, supra,* 23 Cal.3d 880, and to the plaintiff's claim for punitive damages. (*Colonial Life, supra,* 31 Cal.3d at pp. 789-792.) However, in the quarter-century since *Colonial Life* was decided, the legal landscape has changed completely. The two reasons why the Supreme Court found discovery of non-party claim files to be relevant in *Colonial Life* no longer have any legal support.

This Court has already rejected the first reason why discovery was allowed in *Colonial Life.* An insured may no longer sue an insurer in a direct action for violation of Insurance Code section

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(...continued)

(3) Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies.

(4) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss requirements have been completed and submitted by the insured.

(5) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear."

790.03, subdivision (h). (*Moradi-Shalal, supra,* 46 Cal.3d at p. 304 ; see also *Manufacturers Life, supra,* 10 Cal.4th at p. 283; *Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061, 1070.)

Thus, the initial justification for the discovery in *Colonial Life* is wholly lacking here. In other words, even if a direct action for violation of Insurance Code section 790.03 justified discovery of private information regarding non-party insureds despite the privacy rights afforded by Insurance Code section 791.13 in *Colonial Life,* that does not justify similar discovery in this case where no such claim can be pursued. It follows that *Colonial Life* is not controlling here because Ballester (unlike the *Colonial Life* plaintiff) did not and cannot allege a private cause of action under Insurance Code section 790.03.

An insurance bad faith claim, such as Ballester's claim against FIE, requires proof that the insurer unreasonably withheld benefits that were due under the terms of the insured's policy. (See, e.g., *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 819; *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 36.) Such a claim thus does not hinge on how the insurer has adjusted other claims. (*Waller,* at p. 36.) In contrast, a *Royal Glo*be claim was established by "showing either that the acts that harmed him were knowingly committed or were *engaged in with such frequency as to indicate a general business practice.*" (*Colonial Life, supra,* 31 Cal.3d at p. 791, emphasis added.) It follows that the scope of allowable discovery in a *Royal Globe* lawsuit was far broader than what is

allowed in a bad faith action, especially when that discovery seeks disclosure of private information regarding non-party insureds.

The United States Supreme Court has eviscerated the second reason why discovery was allowed in *Colonial Life*. Specifically, the United States Supreme Court has held that a plaintiff is not permitted to rely on evidence of dissimilar conduct to prove punitive damages. (*State Farm, supra,* 538 U.S. at p. 423; see also *Holdgrafer v. Unocal Corp.* (2007) 160 Cal.App.4th 907, 911-912 (*Holdgrafer*); Evid. Code, § 1101, subd. (a) [evidence of defendant's prior bad acts or bad character is generally inadmissible to prove a propensity or disposition to engage in conduct on a specified occasion].)

"A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." (*State Farm, supra,* 538 U.S. at p. 422-423.) "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." (*Ibid.*) "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct . . .." (*Ibid.*)

In *Holdgrafer*, the Court of Appeal equated the U.S. Supreme Court's prohibition against admitting dissimilar conduct evidence to establish reprehensibility with the similar prohibition in Evidence Code section 1101, subdivision (a). (*Holdgrafer, supra,* 160 Cal.App.4th at p. 907.) *Holdgrafer* held that these limits applied

not only to the reprehensibility analysis, but also to the question of whether the defendant acted with malice, fraud or oppression under state law, since the elements of malice, fraud and oppression are "subsumed in the factors the jury subsequently considers in assessing the degree of the defendant's reprehensibility." (*Id.* at p. 929.) Accordingly, "[*State Farm's*] proscription of dissimilar conduct to prove the amount of a punitive damages award also applies to evidence offered to prove the defendant is guilty of malice, fraud or oppression and is therefore subject to such an award." (*Id.* at pp. 929-930.)

Applying these rules, a number of California courts have narrowly defined what constitutes sufficiently similar prior conduct that is relevant to prove punitive damages. For example, in *Johnson, supra*, 35 Cal.4th 1191, the plaintiff alleged that Ford issued Owner Appreciation Certificates (OACs) giving trade-in allowances to owners who returned cars that should have been categorized as lemons under the Song Beverly Act, and then resold the cars to unsuspecting purchasers. The California Supreme Court held that evidence Ford had issued 1,300 OACs per year in California during a specific time period was irrelevant to prove reprehensibility, since there was no evidence that all the OACs were issued in cases involving defective vehicles subject to the lemon law, or that every vehicle resold after an OAC was issued involved deception regarding prior defects and repairs. (*Id.* at pp. 1210-1212.)

Similarly, in *Holdgrafer*, Unocal was sued for a pipeline leak that caused subsurface contamination, but which posed no threat to the environment or to anyone's health and safety. (*Holdgrafer,*

supra, 160 Cal.App.4th at p. 930.) Unocal did not conceal the leak and represented it would remediate the contamination to the extent required by the quality control board. (*Id.* at p. 931.) The Court of Appeal held that evidence of two prior spills that damaged or destroyed beaches, wetlands and wildlife, and which had been concealed and/or misrepresented by Unocal, were too dissimilar to the leak in question to be admissible on whether Unocal should be liable for punitive damages. (*Id.* at pp. 930-931.)

Here, respondent court has ordered FIE to produce information involving non-party insureds without regard to whether their claims involved "denials," "low-balling," or bear any relationship whatsoever to the misconduct alleged in Ballester's complaint. (See exh. 23, p. 477; exh. 25, pp. 490-497; see also pp. 23-25, *post.*) Because the discovery order is not tailored to capture only directly relevant information, it necessarily compels disclosure of private information that is *not directly relevant* to Ballester's claims. And although *State Farm, Holdgrafer,* and *Johnson* address whether evidence of dissimilar conduct is *admissible* to prove punitive damages, it is well established that discovery of constitutionally protected information cannot be justified on the ground the discovery net has been cast so broadly that it could capture relevant information. (*Board of Trustees, supra,* 119 Cal.App.3d at p. 525.) It follows that the disclosure of

constitutionally protected information cannot be justified when, as here, it is *unlikely* to lead to relevant information.[6]

2. The discovery sought by Ballester was not directly relevant to the allegations in his complaint.

Respondent court did not conduct the requisite balancing of interests. If it had, it would have been compelled to reject Ballester's overbroad discovery demands because they were not narrowly tailored to the allegations of his complaint. The privacy rights of non-parties limit the scope of permissible discovery to claims that were adjusted in the same or similar manner as Ballester alleged in his complaint. Those rights are violated where, as here, the discovery order permits discovery of *all* prior claims within a specified time period, without regard to how those clims were handled.

Indeed, there is no congruence here between the information respondent court ordered FIE to produce and the allegations of the complaint. Respondent court ordered FIE to produce information relating to 200 *random* claim files that were handled by Charlie

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[6] Below, Ballester argued both *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 922-923, and *Moore v. American United Life Ins. Co.* (1984) 150 Cal.App.3d 610, expressly recognized the direct relevance and importance of how the carrier handles other similar claims to prove punitive damages. (Exh. 5, pp.133-134.) However, similar to *Colonial Life, Neal* and *Moore* were decided before *Moradi-Shalal, State Farm, Holdgrafer,* and *Johnson,* and therefore does not reflect current law.

Horn, and *all* 185 claims handled by Mark Blaha within the last five years. (Exh. 26, pp. 503.) Yet Ballester's complaint alleges that FIE engaged in a very specific course of conduct—that FIE made an unreasonably low offer to resolve his fire damage claim, and then slowly and incrementally increased its offer, with no intention of paying the full claim amount. (Exh. 1, pp. 5-6, 15; exh. 3, pp. 84, 89.)

Because respondent court ordered production of information relating to claim files where the claims were disposed of in *any manner*, the scope of the discovery is far too broad. Within that pool of files, claims could have been granted, denied in part, or denied in full. There is no indication that any of the randomly selected claim files will contain any evidence of conduct similar to that alleged in the complaint.

Respondent court ordered that, in the alternative to producing all 185 claim files handled by Mark Blaha, FIE could just produce the claims that were "denied in whole or in part," in line with the initial requests propounded by Ballester. However, that set of information is still too broad because it includes claims that were denied for *any reason*. For example, FIE must produce information about an insured's claim for water damage which was denied on the ground the policy excluded coverage for water damage. FIE also must produce information on a claim that was denied because the insured misrepresented facts on the application, justifying rescission, or where the policy had lapsed due to non-payment of

premium. This type of fishing expedition is not permitted when, as here, it infringes on non-party privacy rights.[7]

In sum, this court should grant review to clarify that an insurer cannot be ordered to produce private information about non-party insureds when that information is not directly relevant to the allegations in an insured's complaint.

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[7] Moreover, Ballester does not allege in his complaint that FIE ever *denied* his claim in whole. (Exh. 1.) Rather, the issue here is whether FIE initially undervalued the damage to Ballester's home, and then incrementally increased that valuation over time. (*Ibid.*) Therefore, evidence relating to claims that were "denied *in whole*" are not directly relevant to the allegations in Ballester's complaint. (Exh. 7, pp. 187-188, 199, emphasis added.)

CONCLUSION

For the reasons explained above, this Court should grant FIE's petition for review.

May 27, 2011

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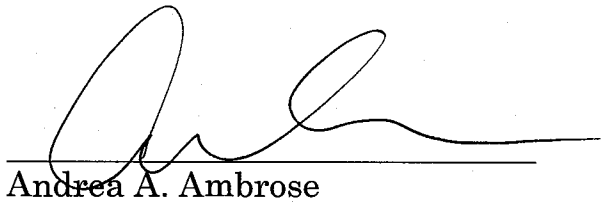
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this petition consists of 5,701 words as counted by the Microsoft Word version 2007 word processing program used to generate the petition.

Dated: May 27, 2011



Andrea A. Ambrose

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

FIRE INSURANCE EXCHANGE, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent, RICHARD BALLESTER, Real Party in Interest.	B232866 (Super. Ct. No. BC441735) (Michael C. Solner, Judge) **ORDER**

THE COURT:

The court has read and considered the amended petition for writ of mandate filed May 13, 2011. The petition is denied.

TURNER, P.J. KRIEGLER, J. KUMAR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On May 27, 2011, I served true copies of the following document(s) described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 27, 2011, at Encino, California.

Jill Gonzales

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LASC Case No.: BC441735
Court of Appeal Case No.: B232866

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