ROBINSON & COLE LLP

DEBBIE J. GEZON

1600 Rosecrans Avenue
Media Center 4th Floor
Manhattan Beach, CA 90266-3708
Fax (213) 596-0493
dgezon@rc.com
Direct (310) 321-7666

Admitted in California

Via FedEx

May 27, 2014

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Bock v. Hansen*, Case No. S218270
Amici curiae letter in support of petition for review (Rule 8.500(g))

To the Chief Justice and Associate Justices:

We represent the American Insurance Association, the Property Casualty Insurers Association of America doing business as the Association of California Insurance Companies, the Personal Insurance Federation of California, the Chamber of Commerce of the United States of America and the National Chamber Litigation Center, Inc. (collectively, "Amici"). The Amici write in support of the Petition for Review filed by Craig Hansen, the defendant and respondent in the above-captioned case.

I. Interests of the Amici

The American Insurance Association (AIA) is a leading national trade association representing property and casualty insurers writing insurance policies in California, nationwide and globally. AIA's members, including companies based in California and numerous other states, range in size from small companies to the largest insurers with global operations. On issues of importance to the property and casualty insurance industry and marketplace, AIA advocates sound public policies on behalf of their members in legislative and regulatory forums at the state and federal levels and files amicus curiae briefs in significant cases before federal and state courts, including this Court.

The Association of California Insurance Companies is the California voice of the Property Casualty Insurers Association of America (PCI), a national trade association which does business in California as ACIC. PCI is composed of more than 1,000 member companies, representing the broadest cross section of insurers of any national trade association. PCI members write nearly 40 percent of the

property/casualty business in the United States and 32.4 percent of the property/casualty business in California.

The Personal Insurance Federation of California is a trade organization existing to promote the interests of insurance companies doing business in California. Its membership is comprised of insurance companies that collectively underwrite the majority of personal lines auto and property insurance in California.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents 300,000 direct 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 Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber and its affiliate, the National Chamber Litigation Center, Inc., regularly file amicus briefs in state and federal courts in cases that raise issues of concern to the nation's business community. This is such a case.

II. Reasons for Granting Review

In *Bock*, the Court of Appeal reversed a Superior Court decision that had sustained a demurrer with respect to a claim against Craig Hansen, individually, asserting that Hansen, acting as an insurance adjuster, had committed the tort of negligent misrepresentation. The claim alleged that Hansen committed a negligent misrepresentation by misstating whether particular portions of a property insurance claim were covered under a homeowner's insurance policy. The Court of Appeal issued its decision even after a settlement had been reached. It wrote an opinion that sharply criticized Hansen's alleged conduct without any evidence being introduced, and at a point in the litigation when evidence would never be developed (because the case had settled). Because of the nature of the issue presented and how the opinion is written, if *Bock* is not reviewed by this Court or depublished (as Amici have requested in a separate letter), the Court of Appeal's opinion is likely to cause substantial problems for the court system and the insurance industry. The opinion will create confusion in California insurance law and agency law, adversely affect insurers' ability to do business in California, and burden the California courts with additional parties being sued and new claims being asserted in lawsuits that have traditionally been adjudicated as straightforward breach-of-contract disputes.

The Court of Appeal's opinion will create confusion because it can be read as either: (1) creating, for the first time, a "special relationship" between an employee of an insurance company and an insured, under which an insurance adjuster *personally* owes a new common law duty to an insured that other corporate employees do not owe to customers of their employer; or (2) substantially broadening the scope of all California employees' personal liability to consumers they deal with on a daily basis.

A. The Court of Appeals' Finding of a "Special Relationship" Between an Insurance Adjuster and an Insured Warrants Review

In concluding that an insurance adjuster has a "special relationship" to an insured, the Court of Appeal relied heavily on *Vu v. Prudential Prop. & Cas. Ins. Co.*, 26 Cal. 4th 1142, 1151-52 (2011). In *Vu*, there was no insurance adjuster who was party to the case, and this Court did not address the obligations of an insurance adjuster. It noted that an insured "must depend on the good faith and performance of the insurer." It then held, however, that an insurer's "representation" that a policy does not cover a claim cannot defeat a statute of limitations defense, unless there is a misrepresentation of fact. *Vu* was a particularly thin reed for the Court of Appeal to use to create a new "special relationship" between insurance adjusters and insurance customers. To the extent this Court has recognized a "special relationship" between insureds and insurers, that has been premised chiefly on the duty of a liability insurer, when defending its own insured in a lawsuit, to protect the insured's interests. *See Jonathan Neil & Assoc., Inc. v. Jones*, 33 Cal. 4th 917, 937 (2004).[1] If the *Bock* decision is interpreted as creating a new "special relationship" between a property insurance adjuster and a customer of the insurer, the opinion imposes potential *personal* liability on adjusters that other similarly-situated corporate employees do not bear. *See, e.g., Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 512 & n.4 (1994) (explaining how "agent's immunity rule" protects employees from personal liability when acting on behalf of a corporation).

To the extent that *Bock* is applied to single out front-line employees of the insurance industry for special personal liability, it is contrary to the law of numerous

[1] Although insurers have certain duties under the Unfair Insurance Practices Act that do not apply to companies in other lines of business, those requirements are imposed on the insurer, not the adjuster personally. And those requirements are generally enforceable only by the Department of Insurance, not in private litigation, except where there is bad faith. *See Zhang v. Superior Court*, 57 Cal. 4th 364, 373 (2013).

other jurisdictions,[2] and is likely to have broad ramifications. In virtually every insurance coverage dispute, an insured can allege that the adjuster either incorrectly stated what the policy provided for (in the insured's view), or failed to tell the insured something important about what the policy stated (in the insured's view).

After *Bock*, many insurance coverage cases are likely to have insurance adjusters as defendants; new causes of action; more lawyers (if insurance company employees who are sued need separate counsel); and longer trials. All of this will impose greater burdens on California's court system, and it will do so without adding to the damages potentially recoverable by the insured because (as discussed further below), claims can be made against the adjuster's principal, the insurer.

In addition, insurers may face serious hiring difficulties because people will be less willing to serve as insurance adjusters when a mistake at work could result in a lawsuit against them. Even if the insurer-employer agrees to provide a defense and indemnification, the lawsuit may appear on the adjuster's personal credit report and make it more difficult for him or her to buy or refinance a home, or take out a home equity or car loan. Experienced insurance adjusters from other states may be leery of moving to California because of this law, or even working in California in the event of a catastrophe requiring outside resources. It is such catastrophes, like the Northridge earthquake, that place the greatest strain on insurers' and independent adjusting firms' workforces. If individual adjusters are concerned about bearing personal liability if they work in California, customers faced with a catastrophic loss could be forced to wait weeks or months before having their claim adjusted because of insufficient available staffing. All of this will make it significantly more difficult for insurers to do business in California than in other states that do not allow insurance adjusters to be sued personally for their actions on behalf of their employer.

There is no need for California to create such a special form of personal liability for insurance adjusters. Insureds have adequate remedies against insurers for

---

[2] *See, e.g., Dumas v. ACCC Ins. Co.*, 349 Fed. App'x 489, 492 (11th Cir. 2009); *Madison v. Nationwide Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 27906, *6-7 (W.D. Ky. Mar. 2, 2012); *St. Marie v. State Farm Fire & Cas. Co.*, 2007 U.S. Dist. LEXIS 100999, *7 (E.D. La. Mar. 28, 2007); *Tipton v. Nationwide Mut. Fire Ins. Co.*, 381 F. Supp. 2d 567, 571 (S.D. Miss. 2003); *Beaver v. Kemper Nat'l Ins. Cos.*, 1994 U.S. Dist. LEXIS 2793, *7 (E.D. Pa. Mar. 10, 1994); *Moss v. Cincinnati Ins. Co.*, 268 S.E.2d 676, 677 (Ga. App. 1980). Texas and West Virginia allow insurance adjusters to be sued personally because a statute creates that right of action. *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc,.*, 966 S.W.2d 482, 485 (Tex. 1998); *Taylor v. Nationwide Mut. Ins. Co.*, 589 S.E.2d 55, 61 (W. Va. 2003).

breach of contract and, in appropriate cases, bad faith. *See Zhang v. Superior Court*, 57 Cal. 4th 364, 373 (2013) (finding that legislature did not intend to provide a private cause of action under the Unfair Insurance Practices Act in part because insureds have an adequate remedy for common law bad faith). Punitive damages are even available on bad faith claims against insurers, in exceptional circumstances involving malicious and intentional conduct. *See Egan v. Mut. of Omaha Ins. Co.*, 24 Cal. 3d 809, 822 (1979). The remedies available to insureds against their insurers are thus more than adequate, and individual insurance adjusters are certainly not more likely to be able to satisfy a judgment than their employers, which have regulatory capitalization requirements. *See* Cal. Ins. Code § 739 *et seq.*

B. The Court of Appeal's Potential Abrogation of the Agent's Immunity Rule Warrants Review

Alternatively, the Court of Appeal's decision can also potentially be interpreted, contrary to the "agent's immunity rule," *Applied Equipment Corp.*, 7 Cal. 4th at 512, as having broad implications for all businesses. Some lower courts might read *Bock* as ruling that *all* corporate employees are personally liable if they negligently communicate incorrect information (or possibly, fail to communicate correct information) to consumers "in a commercial setting for a business purpose." (Typed opn. 13 (quoting *Friedman v. Merck & Co.*, 107 Cal. App. 4th 454, 477 (2003)). Such a ruling potentially would create personal liability for all sorts of front-line employees who deal with the public every day. This includes customer service representatives, mechanics, bank tellers, health club receptionists, and waiters and waitresses in restaurants, among many others. New lawsuits potentially could be filed against a mechanic who makes a misstatement about what is required to fix a vehicle, or a waiter who makes a misstatement about the ingredients in a particular dish. Such a vague and easy-to-manufacture cause of action against front-line corporate employees—potentially impacting everyone who works in California and deals with customers—and the litigiousness that it could lead to should not be permitted.

C. The Likelihood That *Bock* Will Lead to Jurisdictional Gamesmanship Warrants Review

The *Bock* decision also is likely to lead to jurisdictional gamesmanship. Federal courts have always had jurisdiction over disputes between consumers in one state and a corporation that is incorporated and has its principal place of business in

another state.[3] U.S. Const. art. III, § 2; 28 U.S.C. § 1332(a). However, if a corporate employee, such as an insurance adjuster, is properly sued as a defendant and is a citizen of the same state as the policyholder, federal jurisdiction generally will not exist. Where there is an in-state defendant, federal jurisdiction exists only if there is fraudulent joinder, i.e., "the plaintiff fails to state a cause of action against [the] resident defendant, and the failure is obvious according to the settled rules of the state." *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1043 (9th Cir. 2009). After *Bock*, plaintiffs' lawyers desiring to avoid federal court will attempt to plead negligent misrepresentation claims against insurance adjusters and other corporate employees. Federal courts will need to decide whether these claims are fraudulently joined. When cases are remanded to state court because the claim against the employee does not clearly fail to state a cause of action, that will burden the state court system. The state courts will then be faced with demurrers and/or summary judgment motions which, if granted, will then result in a second removal to federal court. This increase in jurisdictional gamesmanship and jurisdictional "ping pong" will burden both the state and federal courts. Such a change should not be made lightly, on the slim basis articulated by the Court of Appeal in *Bock*, after the case had fully settled.

Bock has broad-reaching consequences for insurance cases and potentially all commercial litigation. The Court therefore should grant Craig Hansen's petition for review.

Respectfully,

Debbie J. Gezon

[3] With respect to insurance cases alone, in the Ninth Circuit, for example, there were 1,549 insurance cases filed in or removed to federal district court in 2013, according to a search of the Public Access to Court Electronic Records database.

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 1600 Rosecrans Avenue, Media Center 4th Floor, Manhattan Beach, CA 90266-3708.

On May 27, 2014, I served true copies of the foregoing letter on the interested parties in this action as follows:

Jeremy B. Rosen
Peder K. Batalden
Julie L. Woods
15760 Ventura Boulevard, 18th Floor
Encino, CA 91436-3000

Randy M. McElvain
Weston & McElvain LLP
601 South Figueroa Street, Suite 2350
Los Angeles, CA 90017-5778

Kathryn C. Curry
Kenneth Van Vleck
GCA Law Partners
2570 W. El Camino Real, Suite 510
Mountain View, CA 94040

Hon. Diane M. Price
Napa County Superior Court
Historic Courthouse
825 Brown Street
Napa, CA 94559

California Court of Appeal
First Appellate District, Division Two
350 McAllister Street
San Francisco, CA 94102-3600

I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed above and placed the envelope for collection and mailing, in accordance with our ordinary business practices, 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, 2014, at Manhattan Beach, California.