PUBLIC INVESTORS ADVOCATE BAR ASSOCIATION
1225 West Main Street, Suite 126 | Norman, OK 73069
Toll Free (888) 621-7484 | Fax (405) 360-2063
www.piaba.org

August 9, 2021

VIA TRUE FILING
Honorable Chief Justice Tani Cantil-Sakauye
and Associate Justices
California Supreme Court
350 McAllister St., Room 1295
San Francisco, CA 94102

Re: *Williams v. National Western Life Insurance Co.,* Supreme Court Case No. S269978; Appellate Court Case No. C090436; Amicus Letter of the Public Investors Advocate Bar Association in Support of Petition for Review

Dear Justice Tani Cantil-Sakauye and Associate Justices,

The Public Investors Advocate Bar Association ("PIABA") submits this letter as amicus curiae in support of the Petition for Review of Barney Thomas Williams in the above-referenced matter of *Williams v. National Western Life Insurance Co.,* Supreme Court Case No. S269978, Appellate Court Case No. C090436 ("*Williams"*). PIABA is a national organization of attorneys who advocate on behalf of savers, investors and retirees in disputes with their financial professionals. The *Williams* decision raises two issues of critical importance to investors. The first is whether insurance carriers may be held to be responsible for the acts of independent producers who transact business on behalf of multiple carriers. The second is whether there is a private right of action under Cal. Insurance Code § 785, which imposes a duty of good faith and fair dealing upon insurers and insurance agents to prospective customers who are age 65 or older.

Our members have seen an explosion of cases in recent years in which independent insurance agents who market themselves as financial advisors and/or retirement planners recommend to prospective clients that they invest their retirement monies into costly and unsuitable insurance products which are not regulated as securities, including indexed annuities and indexed universal life insurance policies. Insurance agents frequently recommend that prospective customers liquidate or exchange their existing IRA and/or 401(k) investments and use the proceeds to purchase indexed life insurance products. In

many instances, the agents do not carry any Errors & Omissions insurance, or do not carry sufficient insurance to fairly compensate their customers for their losses. Consequently, investors who have lost their retirement monies in unsuitable life insurance products recommended by these insurance agents are left with no recourse unless they are able to recover from the insurance companies who issued the investments. As discussed herein, the *Williams* decision, if upheld, will have the effect of absolving life insurance companies for the acts of independent agents who transact business on their behalf, despite the substantial financial benefits that those companies reap through the sales of their products. The consequences to investors will be devastating, as it would often leave them with no means to recover their losses.

The *Williams* Court's Holding That Pantaleoni Was Not the Agent of National Western Life Should Be Reviewed Because It Is Contrary to California Statutory and Case Law and Would Have Serious and Adverse Consequences on Investors if It Is Allowed to Stand

In the present case, Mr. Pantaleoni was an insurance agent appointed by National Western Life to sell its life insurance products to the public, including Mr. Williams. Pantaleoni fraudulently induced Mr. Williams to purchase an annuity. After Mr. Williams returned it and obtained a premium refund, Pantaleoni then fraudulently induced Mr. Williams to sign additional documents resulting in the reissuance of a second annuity, which Pantaleoni never delivered. When Mr. Williams complained about Pantaleoni's conduct and sought again to get his money back, National Western Life failed to investigate his complaints and instead charged him a $14,494.41 surrender penalty. In addition to suffering the surrender penalty, as a result of the decision of the Court of Appeal, Mr. Williams also has lost his general damages of $600,000 and his attorneys fees and costs that were awarded by the jury.

It has long been the law in the State of California that principals are responsible for the acts of their actual, authorized and/or ostensible agents. (Cal. Civil Code §§ 2295, 2296, 2298, 2299, and 2300.) Further, agency may be created and authority conferred by a subsequent ratification. (Cal. Civil Code § 2307.) Ratification occurs when the principal accepts the benefits of the transaction and affirms the fraudulent acts. (Cal. Civil Code § 2310; *Reusche v. California Pacific Title Insurance Company* (1965) 231 Cal. App.2d 731, 737-738.) Life insurance companies appoint agents to represent them in soliciting sales from current and prospective customers. The insurers receive substantial financial benefits from the work of the insurance agents who are appointed to sell life insurance on their behalf in the form of premiums from the customers whose business the agents have successfully solicited. The life insurance companies then pay those agents a commission from those premiums. This relationship falls squarely within the definitions of agency and ratification that are set forth in the California Civil Code.

The foregoing is supported by the unambiguous language of the California Insurance Code. Cal. Insurance Code Section 31 defines an insurance agent as a person who is authorized, by and on behalf of an insurer, to transact insurance. Transacting insurance includes the solicitation, negotiation, and/or execution of an insurance contract (Cal. Ins. Code § 35.) Cal. Insurance Code §§ 1704(a) and 1731 provide that a person who is appointed to and who solicits life, health, or disability insurance business on behalf of a variety of different insurance carriers is an agent of each of those carriers. Moreover, the scope of Cal. Insurance Code §§ 31, 35, 1704(a), and 1731 is not limited to captive agents and/or employees of an insurance carrier.

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Accordingly, in *Loehr v. Great Republic Insurance Co.* (1990) 226 Cal. App.3d 727, 733-34, the court, following Cal. Insurance Code §§ 1704(a) and 1731, held that an insurance company was vicariously liable for a health insurance agent's acts, errors, and omissions with regard to his solicitation, sale, and servicing of the insurance policy at issue, notwithstanding the fact that the agent was an independent agent who was authorized to transact business on behalf of several different insurance carriers. As the *Loehr* court explained:

> Secondly, as discussed, the Insurance Code specifically provides that an individual can be an agent of several different insurance carriers at the same time. [citations] The fact that Doyle was an "independent" insurance agent so licensed to transact insurance business for several different carriers did not insulate Great Republic from responsibility for Doyle's actions as its agent, or make appellant liable therefor. (*Loehr, supra,* 226 Cal. App.3d at 734.)

Similarly, in *O'Riordan v. Federal Kemper Life Assurance Co.* (2005) 36 Cal.4th 281, 288, this Court held that an independent health insurance agent, who was appointed to transact insurance business on behalf of the defendant insurer as well as multiple other insurers, was an agent of the insurer and that the agent's knowledge and conduct therefore was imputed to the insurer.

Loehr has been the law in California for thirty-one years. Prior to the *Williams* decision, *Loehr* had never been criticized nor even distinguished. On the contrary, several California federal district courts have followed Cal. Insurance Code § 1731 and *Loehr* in ruling that independent insurance agents who transact business for several different carriers are agents for all carriers with whom they are appointed, and that those carriers are therefore vicariously liable for their agents' acts (See e.g., *All Star Seed v. Nationwide Agribusiness Ins. Co.* (S.D. Cal. 2014) 2014 U.S. Dist. LEXIS 44798 at *27-28; *Maraldo v. Life Ins. Co. of the Southwest* (N.D. Cal. 2012) 2012 U.S. Dist. LEXIS 109185 at *10, fn. 2; *Small v. Travelers Prop. Cas. Co. of Am.* (S.D. Cal. 2010) 2010 U.S. Dist. LEXIS 153300 at *7-8.)

Williams attempts to distinguish *Loehr* on the facts by reasoning that the insurance agent in *Williams* was an independent contractor. That purported distinction is not an accurate characterization of the facts of *Loehr* or of its holding. The dispositive issue in *Loehr,* as in *Williams,* was whether an insurer is vicariously liable for the acts of an independent insurance agent who is appointed to transact insurance business on behalf of multiple carriers. In virtually every case involving independent insurance agents, the agents are independent contractors of the insurance companies for whom they are appointed because they transact business for multiple companies. Indeed, that is what distinguishes independent insurance agents from captive insurance agents. Consequently, if the *Williams* decision stands, it will effectively eviscerate the holding of *Loehr*.

Further, the *Williams* court's holding is not supported by the statutes. Specifically, the *Williams* court concluded that Pantaleoni was a *broker* rather than an *agent*. The statutory definition of a *broker* does not include life insurance agents (Cal. Insurance Code § 33.) Consequently, the Williams court improperly rewrote Cal. Insurance Code § 33 when it decided that Pantaleoni, who sold a life insurance policy on behalf of a life insurance company with whom he was appointed, was a broker and not an agent. Where, as here, the language of the statute at issue is clear and unambiguous, the plain meaning controls and meaning must be given to every word and phrase in the statute. (*People v. Cheek* (2001) 25 Cal.4th 894, 899; *Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268.) The Legislature is therefore presumed to have meant what it said when it excluded life insurance agents from the definition of a

broker. The *Williams* court did not have the right to redefine who is an agent and who is a broker when the Legislature has already enacted definitions for both.

The *Williams* court also relied heavily on dicta in *Eddy v. Sharp* (1988) 199 Cal. App.3d 858 to support its holding. In *Eddy,* the court held that the defendant, who sold a property insurance policy to the plaintiff, owed a duty to the plaintiff insured to disclose material information regarding the policy. (*Eddy, supra,* 199 Cal. App.3d at 864-866.) The language upon which the *Williams* court relied pertained to the agent's liability to the insured for his nondisclosures. However, as the *Loehr* court explained, *Eddy* did not address the issues of whether the defendant's acts or omissions were binding on the carrier, or whether the defendant was an agent of the carrier as well as of the insured, or whether the defendant was acting as an agent or as a broker. (See *Loehr, supra,* 226 Cal. App.3d at 734.) Those issues were not before the court in *Eddy.* As discussed above, *Eddy* only addressed the agent's duties, and not the carrier's obligations or its vicarious liability. Consequently, the holding of *Loehr* controls over the dicta in *Eddy* because opinions are only authorities for points that were actually considered and decided, and dicta has no binding force or effect. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620; *Levanoff v. Dragas* (2021) 65 Cal. App.5th 1079, 1095.)

The *Williams* court's reliance on *Mercury Ins. Co. v. Pearson* (2008) 169 Cal. App.4th 1064 is equally misplaced. First, *Mercury* relied exclusively on the dicta in *Eddy,* discussed above, to support its holding. *Mercury* is also factually distinguishable because it concerned the sale of an automobile insurance policy, not a life insurance product. It is therefore unclear whether the purported agents in *Mercury* were agents or whether they were brokers. This distinction is significant because, as discussed above, insurance brokers do not include persons who transact life insurance such as Pantaleoni, or persons who transact health insurance such as the individual defendants in *Loehr* and *O'Riordan.* (Cal. Insurance Code § 33.) Life insurance agents, by contrast, include life insurance licensees who are authorized to act as a life agent on behalf of a life insurer to transact life insurance business. (Cal. Insurance Code § 32.)

Indeed, *Mercury* did not address, consider, or mention Cal. Insurance Code §§ 1704 and 1731, nor *Loehr,* nor *O'Riordan*. Likewise, no evidence was presented or argument made in *Mercury* that a notice appointing the individuals who had sold the automobile policy to transact business on behalf of Mercury had been filed with the California Department of Insurance. That is not surprising, because Cal. Insurance Code §§ 1704 and 1731, and *Loehr* and *O'Riordan,* apply to life and health insurance agents, while *Mercury* involved automobile insurance and *Eddy* involved property insurance.

In short, the *Williams* court appears to have relied upon inapplicable case law and dicta to reach a conclusion that is directly at odds with *Loehr*, *O'Riordan,* multiple provisions of the Cal. Insurance Code, and the fundamental principles of agency liability and ratification that are set forth in the Cal. Civil Code.

Allowing the foregoing holding in *Williams* [that insurance carriers have no vicarious liability for independent life insurance agents who transact business on behalf of multiple carriers for whom they are independent contractors] to stand would have devastating consequences for investors and retirees. People who have been convinced by unscrupulous insurance agents to invest their life savings and retirement monies into unsuitable life insurance products would be left without any viable means of recovery for their losses. Insurers would also be absolved of any responsibility for the agents who brought them substantial benefits through the premiums they collected. Such a result is not supported by the California Insurance Code or prior case law. As previously discussed, the exact opposite is true.

This Court Should Review the Holding in *Williams* That Cal. Insurance Code § 785 Does Not Create a Private Right of Action Because It Is Contrary to the Express Opinion of The California Department of Insurance and Will Cause Harm to Elderly Investors

Cal. Insurance Code § 785 provides that all insurers, brokers, agents, and others who transact insurance owe a prospective customer who is 65 years or older a duty of honesty, good faith, and fair dealing. Those protections are crucial to protect seniors who are vulnerable to losing their retirement assets through unsuitable insurance investments that are marketed by unscrupulous insurance companies and agents. However, those protections have been put at risk by the *Williams* decision holding that Cal. Insurance Code § 785 does not create a private right of action. This decision, if upheld, will prevent elderly customers who have been wronged from being able to enforce their rights.

On August 7, 2015, the California Department of Insurance issued an opinion on whether Cal. Insurance Code § 785 creates a private right of action. Its answer was an unequivocal "yes". Specifically, its opinion letter states:

> **I. Requested Opinion:**
>
> **Is a private right of action afforded for the violation of Article 6.3 (Cal. Ins. Code § 785 et. seq.)?**
>
> **II. Answer:**
>
> **Yes. California Insurance Code, Division 1, Part 2, Chapter 1, Article 6.3, specifically §785, affords a private right of action.**

The California Department of Insurance's construction regarding Cal. Insurance Code § 785 is entitled to controlling weight and substantial deference because it is an agency's construction of a statute it administers which is silent on that issue. (*Chevron U.S.A. v. NRDC, Inc.* (1984) 467 U.S. 837, 842-44.) As *Chevron* holds, where, as here, an agency has construed a statute, the court may not substitute its own construction of the statute unless the agency's construction is arbitrary, capricious or manifestly contrary to the statute. (*Id.*)

The California Department Insurance's construction of Cal. Insurance Code § 785 is not arbitrary, capricious or contrary to the statute's express language. Its opinion contains a detailed analysis of the statute, the case law, and the public policy considerations underlying Cal. Insurance Code § 785. Consequently, under the *Chevron* doctrine, the California Department of Insurance's opinion that Cal. Insurance Code § 785 affords a private right of action should have been accepted and followed by the *Williams* court.

Here, the *Williams* court did exactly what is forbidden under *Chevron*, which is to substitute its own construction of Cal. Insurance Code § 785 for that of the California Department of Insurance. The *Williams* opinion provides no policy reason for its construction or for its decision to disregard the California Department of Insurance's construction of the statute. Instead, *Williams* relies solely upon three federal district court cases for its holding that Cal. Insurance Code § 785 does not create a private

right of action. As discussed below, none of those cases provide a valid basis for rejecting the California Department of Insurance's construction of a statute that it administers or for failing to afford that construction with controlling weight.

Specifically, *In Re Nat'l Western Life Ins. Deferred Annuities Litig.* (S.D. Cal. 2006) 467 F. Supp.2d 1071 found that the plaintiffs had failed to identify whether California permitted a private right of action to enforce Cal. Insurance Code § 785. It did not hold that no such private right of action existed. Likewise, *Abbit v. ING United States Annuity Life & Insurance Co.* (S.D. Cal. 2014) 999 F. Supp.2d 1189 did not address the issue of whether Cal. Insurance Code § 785 created a private right of action. *Nat'l Western Life* and *Abbit* also predate the California Department of Insurance's 2015 opinion, which unambiguously concluded that Cal. Insurance Code § 785 affords a private right of action.

Parducci v. Overland Solutions, Inc. (2019) 399 F. Supp.3d 969 relied solely on *Nat'l Western Life* and *Abbit* for its holding that Cal. Insurance Code § 785 does not create a private right of action, even though neither of those cases made any such finding. Most significantly, *Parducci* made no mention of the California Department of Insurance's opinion, which is entitled to substantial deference and controlling weight under the *Chevron* doctrine.

Further, *Nat'l Western Life, Abbit,* and *Parducci* are not controlling on this issue of state law, in any event. (*Bank of Italy etc. Assn. v. Bentley* (1933) 217 Cal. 644, 653; *Duffy v. Cavalier* (1989) 215 Cal. App.3d 1517, 1536, fn. 10.) These federal trial court decisions certainly do not and should not override or be given more weight than the California Department of Insurance's construction of a provision of the California Insurance Code, which it is responsible for administering.

Moreover, Cal. Insurance Code Section 785 sets for the standard of care for insurance companies and insurance professionals. Consequently, an insurer's breach of Cal. Insurance Code § 785 would support a negligence claim, in any event.

For the foregoing reasons and authorities, PIABA urges this honorable court to grant review of the *Williams* opinion to the extent it holds that insurers cannot be held vicariously liable for the acts of independent producers who transact business on behalf of multiple insurers, and that Cal. Insurance Code § 785 does not create a private right of action. In the alternative, PIABA requests that this honorable court order the *Williams* opinion to be de-published.

Date: August 9, 2021

Melinda Jane Steuer
Respectfully submitted on behalf of PIABA

CERTIFICATE OF SERVICE

I, Tarra M. Keesee-Chavez, declare as follows:

At the time of service, I was at least 18 years of age and not a party to this case. My business address is 1107 Second Street, Suite 230, Sacramento, CA 95814.

On August 9, 2021, I served the Amicus Letter from Public Investors Advocate Bar Association in Support of Petition for Review of *Williams v. National Western Life Insurance Company* (S269978) by United States Postal Service.

I electronically served the document through TrueFiling, pursuant to Supreme Court Rules Regarding Electronic Service, Rule 9, as follows:

Frank J. Fox (139147)
Majors & Fox LLP
3755 Avocado Boulevard, #105
La Mesa, CA 91941-7301
Telephone: (619) 234-1000
Facsimile: (619) 234-1011
Email: fjfox@majorfox.com

Mary A. Lehman (157259)
Law Offices of Mary A. Lehman
941 Orange Ave., Ste. 531
Coronado, CA 92118-2609
Telephone: 1-888-843-3777
Facsimile: 1-888-318-9839
Email: mary@lehmanappeals.com

Attorneys for Plaintiff/Respondent/Cross-Appellant/Petitioner
Barney Thomas Williams

Spencer Persson, Esq.
Davis Wright Tremaine LLP
865 S. Figueroa St., 24th Flr.
Los Angeles, CA 90017
Telephone: (213) 633-6800
Facsimile: (213) 633-6899
Electronic Service Address:
spencerpersson@dwt.com

Edward F. Donohue, Esq.
Peter L. Isola, Esq.
Peter Felsenfeld, Esq.
Hinshaw & Culbertson LLP
One California St., 18th Flr.
San Francisco, CA 94111
Telephone: (415) 362-6000
Facsimile: (415) 834-9070
Electronic Service Addresses:
edonohue@hinshawlaw.com;
pisola@hinshawlaw.com;
pfelsenfeld@hinshawlaw.com

Attorneys for Defendant/Appellant/Cross-Respondent/Respondent
National Western Life Insurance Company

I also served this document by United States Mail on the following:

Butte County Superior Court
Attention: Hon. Tamara L. Mosbarger
1775 Concord Avenue
Chico, California 95928
Butte County Superior Court
Case No. 17CV03462

Clerk of Court
Court of Appeal, Third Appellate District
914 Capitol Mall,
Sacramento, CA 95814
Third Appellate District
Case No. C090436

I enclosed a copy of the document in a sealed, addressed package and placed the package for collection and mailing. I am readily familiar with this firm's practice for collecting and processing items for mailing. On the same day that item is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed package, with postage fully prepaid, at Sacramento, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 9, 2021, at Sacramento, California.

Tarra M. Keesee-Chavez