

SUPREME COURT
FILED

JAN 21 2020

Jorge Navarrete Clerk

S252035

Deputy

**IN THE
SUPREME COURT OF CALIFORNIA**

MANNY VILLANUEVA ET AL.,
Plaintiffs and Appellants,

v.

FIDELITY NATIONAL TITLE COMPANY,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, SIXTH APPELLATE DISTRICT
COURT OF APPEAL No. H041870 | SANTA CLARA COUNTY SUPERIOR COURT No. CV173356

**CONSOLIDATED ANSWER TO AMICUS CURIAE
BRIEFS BY PUBLIC CITIZEN AND PUBLIC JUSTICE,
CONSUMER ATTORNEYS OF CALIFORNIA, &
UNITED POLICYHOLDERS**

CALIFORNIA APPELLATE LAW GROUP LLP

Ben Feuer* (No. 247502)
Julia Partridge (No. 83926)
Greg Wolff (No. 78626)
96 Jessie Street
San Francisco, CA 94105
TEL: (415) 649-6700 • FAX: (415) 726-2527
ben.feuer@calapplaw.com
julia.partridge@calapplaw.com
greg.wolff@calapplaw.com

HAHN LOESER & PARKS, LLP

Steven A. Goldfarb (No. 317540)
Michael J. Gleason (No. 279434)
600 W. Broadway, Suite 1500
San Diego, CA 92101
TEL: (619) 810-4300 • FAX: (619) 810-4301
sag@hahnlaw.com
mgleason@hahnlaw.com

ATTORNEYS FOR DEFENDANT AND RESPONDENT
FIDELITY NATIONAL TITLE COMPANY

RECEIVED

JAN 21 2020

CLERK SUPREME COURT

S252035

**IN THE
SUPREME COURT OF CALIFORNIA**

MANNY VILLANUEVA ET AL.,
Plaintiffs and Appellants,

v.

FIDELITY NATIONAL TITLE COMPANY,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, SIXTH APPELLATE DISTRICT
COURT OF APPEAL No. H041870 | SANTA CLARA COUNTY SUPERIOR COURT No. CV173356

**CONSOLIDATED ANSWER TO AMICUS CURIAE
BRIEFS BY PUBLIC CITIZEN AND PUBLIC JUSTICE,
CONSUMER ATTORNEYS OF CALIFORNIA, &
UNITED POLICYHOLDERS**

CALIFORNIA APPELLATE LAW GROUP LLP

Ben Feuer* (No. 247502)
Julia Partridge (No. 83926)
Greg Wolff (No. 78626)
96 Jessie Street
San Francisco, CA 94105
TEL: (415) 649-6700 • FAX: (415) 726-2527
ben.feuer@calapplaw.com
julia.partridge@calapplaw.com
greg.wolff@calapplaw.com

HAHN LOESER & PARKS, LLP

Steven A. Goldfarb (No. 317540)
Michael J. Gleason (No. 279434)
600 W. Broadway, Suite 1500
San Diego, CA 92101
TEL: (619) 810-4300 • FAX: (619) 810-4301
sag@hahnlaw.com
mgleason@hahnlaw.com

ATTORNEYS FOR DEFENDANT AND RESPONDENT
FIDELITY NATIONAL TITLE COMPANY

Table of Contents

Table of Authorities	3
Introduction.....	4
Argument.....	5
I. Brief by Public Citizen and Public Justice.....	5
A. <i>State Compensation Insurance Fund v. Superior Court</i> did not address the issue in this case.....	7
B. The federal filed rate doctrine is inapposite	12
C. Conclusion	16
II. Brief by Consumer Attorneys of California.....	16
III. Brief by United Policyholders	17
Conclusion	18
Certificate of Word Count.....	20

Table of Authorities

Cases

<i>Carlin v. DairyAmerica, Inc.</i> (9th Cir. 2013) 705 F.3d 856.....	12, 13, 14
<i>Christensen v. Lightbourne</i> (2019) 7 Cal.5th 761.....	17, 18
<i>Gilmore v. State Compensation Ins. Fund</i> (1937) 23 Cal.App.2d 325	9
<i>In re Blue Cross Blue Shield Antitrust Litigation</i> (N.D. Alabama 2017) 238 F.Supp.3d 1313	13, 14
<i>Quelimane Co. v. Stewart Title Guaranty Co.</i> (1998) 19 Cal.4th 26.....	11
<i>State Compensation Insurance Fund v. Superior Court</i> (2001) 24 Cal.4th 930.....	passim
<i>Walker v. Allstate Indemnity Co.</i> (2000) 77 Cal.App.4th 750.....	10, 12, 14
<i>Yamaha Corp. of America v. State Bd. of Equalization</i> (1998) 19 Cal.4th 1.....	18

Statutes

Former Ins. Code, § 11750.....	8
Ins. Code, § 11758	7, 10
Ins. Code, § 12401	6, 8, 15, 16
Ins. Code, § 12401.1	11
Ins. Code, § 12414.26	passim
Ins. Code, § 12414.29	14
Ins. Code, § 1860.1	10, 14, 15
Ins. Code, § 1860.2	14, 15
Ins. Code, § 1861.03	14

S252035

**IN THE
SUPREME COURT OF CALIFORNIA**

MANNY VILLANUEVA ET AL.,
Plaintiffs and Appellants,

v.

FIDELITY NATIONAL TITLE COMPANY,
Defendant and Respondent.

**CONSOLIDATED ANSWER TO AMICUS CURIAE
BRIEFS BY PUBLIC CITIZEN AND PUBLIC JUSTICE,
CONSUMER ATTORNEYS OF CALIFORNIA, &
UNITED POLICYHOLDERS**

Introduction

Defendant Fidelity National Title Company files this consolidated answer to the amicus curiae briefs filed in support of plaintiffs by Public Citizen and Public Justice (Public Citizen), Consumer Attorneys of California (Consumer Attorneys), and United Policyholders (UP).

Fidelity will file a separate consolidated answer to the amicus curiae briefs by the Department of Insurance and Consumer Watchdog.

Argument

I. Brief by Public Citizen and Public Justice

Public Citizen’s amicus brief demonstrates the fallacies in plaintiffs’ claims. Public Citizen asserts that “[t]he issue in this case is whether [Insurance Code] section 12414.26 shields from liability an insurer that charges rates that it failed to file with the Department of Insurance, in violation of Article 5.5.” (Pub. Citizen Br., p. 1.) But, of course, section 12414.26 does not shield the insurer from “liability,” but only from a private civil suit challenging rates for title insurance.¹ The Insurance Commissioner has full authority to protect consumers by imposing appropriate sanctions for an insurer’s failure to properly file its rates.

Public Citizen reasons that because article 5.5 does not authorize an insurer to charge unfiled rates, “section 12414.26 provides no immunity for such conduct.” (Pub. Citizen Br., p. 1.) Amicus reaches the wrong answer by asking the wrong question. The proper question is not whether the insurer has complied with the requirements of article 5.5, but whether the civil suit challenges an action that is

¹ Undesignated statutory references are to the Insurance Code.

“done . . . pursuant to the authority conferred by Article 5.5” (§ 12414.26.) Article 5.5 “regulat[es] rates for the business of title insurance” and authorizes title insurers to charge rates for their services. (§ 12401.) Section 12414.26 bars consumers from bringing civil suits challenging the validity of those rates. A consumer cannot defeat that immunity simply by alleging that a challenged rate was not properly filed. The Insurance Commissioner has exclusive jurisdiction to determine whether the insurer has complied with the requirements of article 5.5.

Public Citizen asserts that applying section 12414.26’s immunity from private civil suits in this case “would have wide-ranging implications for Californians’ ability to hold insurance companies accountable for misconduct.” (Pub. Citizen Br., p. 2.) That much is true. Unlike other forms of insurance, for which Proposition 103 granted consumers the ability to hold insurance companies accountable for misconduct, title insurers are immune from private civil actions challenging the validity of rates; the Insurance Commissioner is charged with the responsibility to hold title insurers accountable for

misconduct involving charged rates, not individual consumers.

A. *State Compensation Insurance Fund v. Superior Court* did not address the issue in this case

Public Citizen relies on *State Compensation Insurance Fund v. Superior Court* (2001) 24 Cal.4th 930 (*SCIF*), which interpreted Insurance Code section 11758 governing workers' compensation insurance. Unlike title insurers, which set their own rates and are only required to file those rates with the Insurance Commissioner, premiums for workers' compensation insurance were set by the Department of Insurance based on information collected from insurance companies by the Workers' Compensation Insurance Rating Bureau (Rating Bureau). (*SCIF, supra*, 24 Cal.4th at p. 933.) Thus, while the language of section 11758 is nearly identical to the language of section 12414.26, the similarity ends there.

Section 11758 provides immunity from civil suits based on an " 'act done . . . pursuant to the authority conferred by' " article 3, chapter 3, part 3 of division 2 of the Insurance Code. (*SCIF, supra*, 24 Cal.4th at p. 935.) In interpreting section 11758, this

court relied on the fact that, at the time, former section 11750 stated that the purpose of article 3 was to “ ‘regulat[e] concert of action between insurers in collecting and tabulating rating information.’ ”

(*SCIF, supra*, 24 Cal.4th at p. 935.) Because “section 11758 refers to an ‘act done . . . *pursuant to the authority conferred by this article,*’ ” and “what is authorized by article 3 is ‘cooperation between insurers . . . in ratemaking,’ ” *SCIF* held that the scope of section 11758’s immunity was limited “to such authorized cooperation in ‘ratemaking and other related matters.’ ” (*SCIF, supra*, 24 Cal.4th at p. 936, original italics.)

Section 12414.26 grants immunity for acts done pursuant to the authority conferred by article 5.5. Article 5.5 does not contain a provision similar to former section 11750 stating that the purpose of article 5.5 is to regulate concert of action. Rather, the purpose of article 5.5 is not just to regulate concert of action between insurers but to “regulat[e] rates for the business of title insurance as herein provided to the end that they shall not be excessive, inadequate or unfairly discriminatory.” (§ 12401.) Unlike article

3 at issue in *SCIF*, article 5.5 regulates rates charged by title insurers.

SCIF also is of little relevance here because, contrary to Public Citizen's claim, it was not a ratemaking case. (Pub. Citizen Br., p. 4.) *SCIF* held that the State Compensation Insurance Fund, a state agency empowered to "maintain an insurance business 'competitive with other insurers'" (*Gilmore v. State Compensation Ins. Fund* (1937) 23 Cal.App.2d 325, 329), was not immune from civil liability "for allegedly misallocating an insured employer's expenses and reporting that misinformation to a ratemaking organization, resulting in higher premiums for its insured." (*SCIF, supra*, 24 Cal.4th at p. 932.)

SCIF conceded that the civil suit against it " 'relate[d] to the alleged misreporting of "medical-legal" costs, not the calculation of rates" (*SCIF, supra*, 24 Cal.4th at p. 936.) This court recognized that the plaintiff did not "challenge the manner in which premiums or rates are set by the Rating Bureau. Rather, it disputes the manner in which *SCIF* analyzed and allocated [the plaintiff's] financial data prior to the data being sent to the Rating

Bureau.” (*Id.* at pp. 936-937.) Although the misconduct alleged by the plaintiff in *SCIF* affected the amount of insurance premiums, *SCIF* was not a ratemaking case because the alleged misconduct occurred prior to the ratemaking process.

SCIF held that section 11758 did not provide immunity for misconduct that occurred prior to the ratemaking process, even when such misconduct affected premiums: “Given that premiums set for workers’ compensation policies are dependent in part on the financial information submitted by the insurer, insurer misconduct in handling the insured’s workers’ compensation claims or other financial information can always potentially result in higher premiums. . . . It is doubtful section 11758 intended to paint with so broad a brush.” (*SCIF, supra*, 24 Cal.4th at p. 938.)

SCIF did not address whether section 11758 would bar a civil suit that challenged the ratemaking process. *SCIF* discussed the holding in *Walker v. Allstate Indemnity Co.* (2000) 77 Cal.App.4th 750, which held that the immunity in section 1860.1 barred a civil suit “seeking damages or disgorgement of allegedly excessive premiums.” (*SCIF, supra*, 24

Cal.4th at pp. 941-942.) The plaintiffs in *Walker* “were attempting to challenge . . . the method by which the rates were set” (*Ibid.*) *SCIF* distinguished *Walker*, stating: “Here, of course, [the plaintiff] does not challenge the method by which the rate or premium charged was set” (*Ibid.*)

Public Citizen argues that “as in *SCIF*, the plaintiffs [in the present case] do not challenge ‘the manner in which premiums or rates are set,’” but that is not accurate. (Pub. Citizen Br., p. 4.) Under section 12401.1, rates are set by the title insurer filing its rates with the Insurance Commissioner. Plaintiffs in this case challenge the manner in which Fidelity filed its rates. Unlike *SCIF*, this is a ratemaking case.

Only three years before *SCIF*, this court said in *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 33, that “the Insurance Code does not displace the UCL *except as to title insurance company activities related to rate setting.*” (Italics added.) Nothing in *SCIF* questions the continuing validity of this statement.

B. The federal filed rate doctrine is inapposite

Public Citizen next asserts that section 12414.26 “is in some respects ‘analogous to’ the federal ‘filed rate doctrine.’” (Pub. Citizen Br., pp. 5-6.) Public Citizen cites in support *Walker*, which described the doctrine as “the rule against the retroactive voiding of rates.” (77 Cal.App.4th at p. 757.) In a footnote, *Walker* observed that the federal filed rate doctrine was “analogous” and consistent with its interpretation of the McBride Act, “to the extent it is relevant at all.” (*Id.* at p. 757, fn. 4.)

Public Citizen argues that because the federal filed rate doctrine applies only to rates that actually were filed, it follows that the immunity from civil suits in section 12414.26 does not apply in this case because the disputed rates were not filed. In fact, the federal scheme is irrelevant because it has nothing to do with the regulation of title insurance embodied in article 5.5.

The federal filed rate doctrine is a judicially created rule. (*Carlin v. DairyAmerica, Inc.* (9th Cir. 2013) 705 F.3d 856, 858 & fn. 1.) It “‘arises from decisions interpreting federal statutes that give federal agencies exclusive jurisdiction to set rates for specified utilities, originally through rate-setting

procedures involving the filing of rates with the agencies.’ ‘At its most basic, the filed rate doctrine provides that state law, and some federal law (e.g. antitrust law), may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question.’ ” (*Id.* at p. 867.)

“ ‘Simply stated, the doctrine holds that any “filed rate” – that is, one approved by the governing regulatory agency – is per se reasonable and unassailable in judicial proceedings. . . .’ [Citation.] But, just as the doctrine insulated rates that are filed with a regulatory agency, “[t]he filed rate doctrine[] “forbids a regulated entity to *charge* rates for its services *other than* those properly filed with the appropriate federal regulatory authority.” ’ [Citation.]” (*In re Blue Cross Blue Shield Antitrust Litigation* (N.D. Alabama 2017) 238 F.Supp.3d 1313, 1323, original italics, ellipses, and second and third brackets.)

“[W]here rates are *not* filed with the agency, or *not* approved by the agency, the doctrine does not apply and those rates *are* subject to antitrust challenge. When rates are validly filed and approved after filing, it is not for the courts to judicially second guess how meaningful the review was leading to that approval.” (*In re Blue Cross Blue Shield Antitrust*

Litigation, supra, 238 F.Supp.3d at p. 1325, original italics.)

It is hardly surprising that the scope of the protection afforded by the federal filed rate doctrine differs from the scope of the immunity provided by section 12414.26, as the two rules bear no more than a superficial resemblance. The federal filed rate doctrine is a common law rule based largely on principles of federal preemption (*Carlin v. DairyAmerica, Inc., supra*, 705 F.3d at p. 868) while the interpretation of the immunity provided by section 12414.26 is a question of statutory construction. The federal filed rate doctrine does not aid amicus and neither does the decision in *Walker*.

Walker examined two statutes that were part of the McBride Act: section 1860.1, which is nearly identical in language to section 12414.26, and section 1860.2, which is nearly identical to section 12414.29. *Walker* held that these statutes “provide exclusive original jurisdiction over issues related to ratemaking to the commissioner.” (*Walker, supra*, 77 Cal.App.4th at p. 755.) *Walker* observed that “Proposition 103 wrought many changes to the McBride Act, including the addition of appellants’ primary authority for their suit, section 1861.03, subdivision (a), which provides in relevant part: ‘The business of insurance shall be subject to the laws of California applicable to any

other business . . . ,’” but held that, despite these changes, sections 1860.1 and 1860.2 “retain more than enough vitality to bar appellants’ present claims.” (*Walker*, at pp. 755-756.)

Public Citizen displays a misunderstanding of Fidelity’s position by asserting that “Fidelity argues that section 12414.26 should be construed to cover claims based on *unlawful* unfiled rates” (Pub. Citizen Br., pp. 6-7.) Fidelity’s position is not that section 12414.26 applies to rates that have been determined to be unlawful, but rather that section 12414.26 provides immunity from a civil suit that seeks to establish that a rate charged by a title insurer is unlawful. The purpose of this immunity would be defeated if, in order to claim the immunity, a title insurer would first have to prove the rate was lawful. Under Public Citizen’s reasoning, section 12414.26 would apply only after a rate was determined to be valid because it was properly filed and also was not excessive or unfairly discriminatory. (§ 12401.)

Section 12414.26 bars a consumer from bringing a civil suit to determine the validity of a rate charged by a title insurer. The Insurance Commissioner has exclusive jurisdiction to determine whether a rate charged by a title insurer is lawful, including whether that rate was properly filed.

C. Conclusion

The linchpin of amicus Public Citizen's and plaintiffs' argument is that article 5.5 does not authorize title insurers to charge rates that have not been properly filed. That is true. Neither does article 5.5 authorize insurers to charge rates that are excessive or unfairly discriminatory. (§ 12401.) Under plaintiffs' reasoning, therefore, section 12414.26 would provide immunity only from suits that allege that the insurer charged valid rates that were reasonable and properly filed. It is difficult to imagine what the grounds would be for such a lawsuit.

II. Brief by Consumer Attorneys of California

Amicus Consumer Attorneys of California addresses whether granting immunity from civil suits alleging that rates charged by a title insurer were not properly filed will "undermine public policy and the protection of both consumers and competitors[.]" (Consumer Attys Br., p. 5.) These are perhaps important questions, but they are not properly posed to this court. These questions are for the Legislature or, as was true for Proposition 103, the electors in the form of an initiative. Proposition 103 greatly expanded the protections afforded to

consumers of many other forms of insurance but did not extend those protections to rates charged by title insurers. If those protections are to be extended to include rates charged by title insurers, it must be done by the Legislature or by voter initiative, and not by this court.

III. Brief by United Policyholders

United Policyholders' amicus brief largely echoes and agrees with the arguments made by plaintiffs, to which Fidelity already has responded. But one point warrants attention.

United Policyholders argues that this court “‘must give great weight’ ” to the Insurance Commissioner's views. (UP Br., p. 14.) This court recently addressed the weight to be accorded an administrative agency's view in *Christensen v. Lightbourne* (2019) 7 Cal.5th 761.

This court observed that “‘greater weight’ ” is accorded “‘where the agency has special expertise,’ ” but “‘where an agency's action is interpretive or merely ‘represents the agency's view of the statute's legal meaning and effect,’ the agency's ‘interpretation of the meaning and legal effect of a statute is entitled to consideration and respect,’ but ‘commands a

commensurably lesser degree of judicial deference.’ ”
(*Christensen v. Lightbourne*, *supra*, 7 Cal.5th at
pp. 771-772.)

An agency’s interpretation of a statute “does
not implicate the exercise of a delegated lawmaking
power; instead, it represents the agency’s view of the
statute’s legal meaning and effect, questions lying
within the constitutional domain of the courts.”

(*Yamaha Corp. of America v. State Bd. of
Equalization* (1998) 19 Cal.4th 1, 11.) “Because an
interpretation is an agency’s *legal opinion*, however
‘expert,’ rather than the exercise of a delegated
legislative power to make law, it commands a
commensurably lesser degree of judicial deference.”
(*Ibid.*, original italics.)

Conclusion

The judgment of the Court of Appeal in this
case should be affirmed.

Respectfully Submitted,

Dated: January 21, 2020

California Appellate Law Group LLP

Ben Feuer

Julia Partridge

Greg Wolff

Hahn Loeser & Parks LLP

Steven A. Goldfarb

Michael J. Gleason

By /s/ Greg Wolff

Greg Wolff

Attorneys for Respondent

Fidelity National Title Company

Certificate of Word Count
(California Rules of Court, rule 8.204(c)(1))

The text of this brief consists of 2,649 words as counted by the Microsoft Word program used to generate this brief.

Dated: January 21, 2020

/s/ Greg Wolff
Greg Wolff

Proof of Service

I, Stacey Schiager, declare as follows:

I am employed in the County of San Francisco, State of California, am over the age of eighteen years, and am not a party to this action. My business address is 96 Jessie Street, San Francisco, CA 94105. On January 21, 2020 I mailed the following document:

- **Consolidated Answer to Amicus Curiae Briefs**

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

The envelopes were addressed as follows:

Taras Kick
The Kick Law Firm
815 Moraga Drive
Los Angeles, CA 90049-1633

Sharon Joellen Arkin
Arkin Law Firm
1720 Winchuck River Road
Brookings, OR 97415

Mark A. Chavez
Chavez & Gertler, LLP.
42 Miller Avenue
Mill Valley, CA 94941

Amy Bach
United Policyholders
381 Bush Street, 8th Floor
San Francisco, CA 94104

Steven J. Bernheim &
Nazo S. Semerjian
The Bernheim Law Firm
11611 Dona Alicia Place
Studio City, CA 91436

Harvey J. Rosenfield &
Pamela Pressley
Consumer Watchdog
6330 San Vicente Boulevard
Suite 250
Los Angeles, CA 90048

Clerk, Sixth District
Court of Appeal
333 West Santa Clara Street
Suite 1060
San Jose, CA 95113

Jeffrey Rosen
Santa Clara County
District Attorney's Office
70 West Hedding Street, West Wing
San Jose, CA 95110

Clerk to the Hon. Peter Kirwan
Santa Clara Superior Court
191 North First Street, Dept. 19
San Jose, CA 95113

Additionally, on January 21, 2020, I caused the above-identified document to be electronically served on the California Attorney General, pursuant to Business & Professions Code section 17209.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on January 21, 2020, at San Francisco, California.

/s/ Stacey Schiager
Stacey Schiager