In the Supreme Court of the State of California

MANNY VILLANUEVA ET AL.,

Plaintiffs and Appellants,

v.

FIDELITY NATIONAL TITLE COMPANY,

Defendant and Respondent.

Case No. S252035

Sixth Appellate District, Case No. H041870
Santa Clara County Superior Court, Case No. H042504
The Honorable Pete H. Kirwan, Judge

APPLICATION AND PROPOSED AMICUS CURIAE BRIEF BY CALIFORNIA DEPARTMENT OF INSURANCE IN SUPPORT OF APPELLANTS

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APPLICATION BY AND INTERESTS OF AMICUS CURIAE CALIFORNIA DEPARTMENT OF INSURANCE

The California Department of Insurance (Department) respectfully requests leave, pursuant to California Rules of Court, rule 8.520(f), to file in this case the attached amicus curiae brief in support of plaintiffs and appellants Manny Villanueva and class members.[1]

The Department oversees the business of insurance in this state, including interpreting and implementing the insurance laws. Since its founding in 1868, the Department's core mission has been to protect insurance consumers, while also ensuring a stable marketplace and consistent regulatory environment.

The Department supports the position of plaintiffs and appellants, because there is no immunity for charging unfiled rates and consumers may properly bring actions against insurers for charging unfiled rates in violation of the Insurance Code. Moreover, in the Department's experience, private unfair competition law claims complement the Department's enforcement actions, helping to ensure a well-regulated insurance market and a level playing field for members of the industry.

Based on its historic knowledge, as well as the cumulative experience of the office, the Department is uniquely positioned to assist this Court with the issues in this case. Accordingly, the Department respectfully submits this amicus curiae brief to assist this Court in determining this matter.

SUMMARY OF POSITION

Insurance Code section 12414.26 does not immunize underwritten title insurance companies from liability for charging consumers rates that

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[1] No party nor counsel for any party in the pending case authored any portion of the proposed amicus curiae brief or contributed financially to the preparation of the brief.

were not filed with the California Insurance Commissioner.[2] By its plain language, section 12414.26 immunizes underwritten title insurance companies from acts done pursuant to the authority conferred by articles 5.5 and 5.7 of the title insurance law. Those articles, in turn, require rates to be filed with the Commissioner and authorize certain concerted ratemaking activity which would otherwise be subject to liability under antitrust laws. They do not provide any authority to charge consumers rates which were never filed with the Commissioner.

This is established by *State Compensation Ins. Fund v. Superior Court* (2001) 24 Cal.4th 930, 936 (*SCIF*), wherein this Court held a similar immunity statute related to workers' compensation insurance only applies to acts taken pursuant to the relevant statutory authority. Accordingly, section 12414.26 does not immunize Fidelity National Title Company (Fidelity) from liability, because it, in violation of the title insurance law, never filed the rates at issue.

Because Fidelity failed to file its rates and acted in abrogation of the statutory authority, rather than pursuant to it, this Court need not consider the extent of immunity for acts taken. But, as this Court held in *SCIF*, *supra*, 24 Cal.4th at p. 936, immunity only applies to only certain concerted ratemaking activity which would otherwise be barred by antitrust laws. In barring plaintiffs' claims based on Fidelity's unilateral charging of unfiled rates, the Court of Appeal relied on two lower court opinions, *Walker v. Allstate Indemnity Co.* (2000) 77 Cal.App.4th 750 and *MacKay v. Superior Court* (2010) 188 Cal.App.4th 1427. But, the insurers in those cases, unlike Fidelity here, were found to have complied with (or, in the words of the statutes, "acted pursuant to") the applicable statutory scheme.

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[2] Unless otherwise specified, all further statutory references are to the Insurance Code.

Moreover, those opinions involved an immunity statute, section 1860.1, which is applicable only to lines of insurance impacted by Proposition 103. Proposition 103 fundamentally changed the ratemaking process for certain lines of insurance, but it had no effect on title insurance. Therefore, to the extent *Walker* and *MacKay* relied on Proposition 103's changes to the ratemaking process, and to changes in the statutory scheme for impacted lines of insurance, they are inapplicable to the title insurance statutes at issue here.

Finally, the Commissioner does not have exclusive jurisdiction over an action against an underwritten title company for rates charged to the consumer, but not disclosed to the Department. This Court's holding in *Farmers Ins. Exch. v. Superior Court* (1992) 2 Cal.4th 377, 391 compels this conclusion. In *Farmers*, this Court held a claim for unfair competition in violation of the unfair completion law (UCL), Business and Professions Code section 17200 et seq., is "originally cognizable" in the courts. Moreover, the overall purpose of the Insurance Code would be undercut if private UCL enforcement actions in circumstances such as this were barred. In the Department's experience, private enforcement is an important complement to the Department's jurisdiction and consumer protection mission. Without private enforcement of the UCL, it is possible a court could determine there is no available remedy to require return of illegally collected charges. This is because authority to enforce the UCL is not extended to the Department (Business and Professions Code section 17204) and the Commissioner's powers expressly enumerated in section 12414.16 do not include restitution. The Department therefore views consumers as entitled to pursue actions based on rates which were never filed with nor disclosed to the Commissioner—and this view is entitled to great weight under the principles of administrative law.

STATUTORY BACKGROUND

I. TITLE INSURANCE RATE PREFILING REQUIREMENTS UNDER ARTICLE 5

As part of his responsibilities, the Commissioner regulates the "business of title insurance." (§ 12401.) The "business of title insurance" includes the performance of "any service in conjunction with the issuance or contemplated issuance of a title policy including but not limited to the handling of any escrow, settlement or closing in connection therewith." (§ 12340.3, subd. (c).) The Commissioner regulates the title insurance business "to promote the public welfare," "to permit and encourage competition between persons or entities engaged in the business of title insurance on a sound financial basis," and to ensure that rates are not "excessive, inadequate or unfairly discriminatory." (§ 12401.) However, the Commissioner does not "fix and determine a rate level by classification or otherwise." (*Ibid.*)

Maximum information about title insurance rates benefits consumers and promotes meaningful competition in the title insurance industry. (See Cal. Ins. Comr., Opn. 11-7-2013 (Nov. 7, 2013) 2013 WL 5966277, at *1.) Accordingly, the Legislature has required that "[e]very title insurer, underwritten title company, and controlled escrow company shall file with the commissioner its schedule of rates . . ." (§ 12401.1.) Every schedule of rates "shall set forth the entire charge to the public for each type of title policy included within such schedule," and "shall indicate the character and extent of the coverages and services contemplated." (*Ibid.*) "[R]ates" which are required to be included with the filing are "the charge or charges, whether denominated premium or otherwise, made to the public by . . . an underwritten title company . . . for all services it performs in transacting the business of title insurance." (§ 12340.7.) While certain "miscellaneous charges" may be excluded from filed rates, "miscellaneous charges" are

expressly limited to "conveyancing fees, notary fees, inspection fees, tax service contract fees and such other fees as the commissioner by regulation may prescribe." (*Ibid.*)

Rate schedules must be filed with the Commissioner at least thirty days before such rates are charged. (§ 12401.1.) But the Commissioner does not approve the rates. (*Ibid.*) Instead, the rates in an insurer's filing are automatically effective on the listed effective date, which must be at least thirty days after they are filed. (§§ 12401.1, 12401.7.) "[N]o title insurer, underwritten title company or controlled escrow company shall charge for any title policy or service in connection with the business of title insurance, except in accordance with rate filings which have become effective pursuant to [those provisions]". (§ 12414.27.)

II. SECTION 12414.26 AND RELATED MCBRIDE-GRUNSKY IMMUNITY STATUTES

A. Section 12414.26 and Title Insurance

Section 12414.26, at issue in this case, provides:

> No act done, action taken, or agreement made pursuant to the authority conferred by Article 5.5 (commencing with Section 12401) or Article 5.7 (commencing with Section 12402) of this chapter shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this state heretofore or hereafter enacted which does not specifically refer to insurance.

(§ 12414.26.)

Article 5.5 relates to rate filing and regulation, for title insurers, underwritten title companies, such as Fidelity, and controlled escrow companies. (§ 12401.) Contained within article 5.5 are statutes requiring underwritten title insurance companies to establish basic classifications of coverages and services to be used as the basis for determining rates (§ 12401.2) and to file their schedule of rates with the Commissioner

(§ 12401.1). Moreover, the companies are authorized to charge such rates thirty days after filing (§§ 12401.1, 12401.7), even if they shared data and information about loss experience in a way that might otherwise constitute antitrust violations, provided the rates are not excessive, inadequate, or unfairly discriminatory. (See, e.g., §§ 12401.3, 12401.4, 12401.6.)

Article 5.7, in turn, authorizes advisory organizations. (§ 12402.) Such advisory organizations are a common mechanism through which insurers share data. (§ 12340.8 [definition of advisory organization].) In the context of the insurance business, data sharing, including shared risk assessment and loss experience is necessary for sound rate setting. (*SCIF*, *supra*, 24 Cal.4th at pp. 939-940; see also Cal. Ins. Comr., Opn. 11-7-2013 (Nov. 7, 2013) 2013 WL 5966277, at *1.)

B. Similar Immunity Statutes for Other Lines of Insurance

Because of the important role of data sharing in the industry, the Legislature originally enacted language akin to that of section 12414.26 as part of the McBride-Grunsky Regulatory Act of 1947. In so doing, the Legislature expressly stated that its purpose was: "to promote the public welfare by regulating insurance rates as herein provided to the end that they shall not be excessive, inadequate or unfairly discriminatory, [and] to authorize the existence and operation of qualified rating organizations and advisory organizations . . ." (See Stats. 1947, ch. 805, § 1, p. 1896.) The Legislature specified that "[i]t is the express intent of this chapter to permit and encourage competition between insurers on a sound financial basis and nothing in this chapter is intended to give the Commissioner power to fix and determine a rate level by classification or otherwise." (*Ibid.*)

As part of McBride-Grunsky, the Legislature enacted section 1860.1, which provides limited immunity for certain concerted ratemaking activity in the automobile and homeowners' insurance context. Thereafter, the

Legislature extended McBride-Grunsky immunity to workers' compensation insurance (section 11758, added in 1951), senior citizens' health insurance (section 795.7, added in 1963), and finally the title insurance context at issue in this case (section 12414.26, added in 1973). For each extension, the Legislature used the same language that it had used in section 1860.1.[3] (See §§ 1860.1, 11758, 795.7, 12414.26.) Further, the Legislature's extension of the immunity to additional lines of insurance was designed to immunize concerted action. (See, e.g., §§ 11750, subd. (a), 11750.1, subds. (b), (e), 11750.3 [referring to "concert of action between insurers", "rating organizations", and "advisory organizations" in workers' compensation insurance]; 795 [purposes of immunity statutes relating to senior citizens' health insurance includes "encouraging insurers to combine their resources and experience and to exercise their collective efforts", and "to regulate the joint activities"]; 12401.4, 12401.6, 12402, 12340.8

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[3] Section 1860.1, relating to automobile and homeowners' insurance provides, "No act done, action taken or agreement made pursuant to the authority conferred by [division 1, part 2, chapter 9 of the code] shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this State heretofore or hereafter enacted which does not specifically refer to insurance."

Section 11758, relating to workers' compensation insurance, provides, "No act done, action taken or agreement made pursuant to the authority conferred by [division 1, part 3, chapter 3, article 3 of the code] shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this State heretofore or hereafter enacted which does not specifically refer to insurance."

Section 795.7, relating to senior citizens' health insurance provides, "No act done, action taken or agreement made pursuant to the authority conferred by [division 1, part 2, chapter 1, article 6.7] shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this State heretofore or hereafter enacted which does not specifically refer to insurance."

["exchange of information and data", "concert of action", and "advisory organizations" in title insurance].)

III. PROPOSITION 103'S CHANGES TO MCBRIDE-GRUNSKY IMMUNITY DID NOT IMPACT TITLE INSURANCE

Proposition 103, passed by the California voters in 1988, made "fundamental changes" to the rate-making process for automobile and homeowners' insurance, to which section 1860.1 applies. (See *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 981.) Proposition 103 does not apply to title insurance. (§ 1851, subd. (d).)

For the lines of insurance it impacted, Proposition 103 repealed several provisions of McBride-Grunsky and replaced them with stricter standards for whether rates are considered excessive or inadequate. (*MacKay*, *supra*, 188 Cal.App.4th at pp. 1445-1446.) It also created a rate approval process. Under Proposition 103, the insurer must file a rate application with the Commissioner, there must be notice and an opportunity for public hearing on the rates, the proposed rate must be within the requirements of Proposition 103, and it ultimately must be approved by the Commissioner before an insurer can charge the rate. (*Walker*, *supra*, 77 Cal.App.4th at 752-753; see also *Donabedian*, *supra*, 116 Cal.App.4th at pp. 981-983.) Because title insurance was not among the lines of insurance impacted by Proposition 103, none of these changes apply to title insurance, and the statutes regulating title insurance remain unchanged. (§ 1851, subd. (d) [excluding title insurance from chapter of Insurance Code implementing Proposition 103].)

ARGUMENT

I. FIDELITY IS NOT IMMUNIZED FROM LIABILITY FOR CHARGING UNFILED RATES

A. The Rates at Issue Were Required to Be Filed with the Commissioner, But Were Not

As explained above, under article 5.5, title insurance rates, consisting of all charges made to the public, must be filed with the Commissioner at least thirty days before use. (§§ 12340.7, 12401.1, 12401.7.) After thirty days, they automatically become effective and the applicable statutes confer authority upon title insurers to then charge those rates to the public. (§§ 12401.1, 12401.7.) Rates which have not become effective pursuant to this authority shall not be charged. (§ 12414.27.)

This case involves certain rates charged by Fidelity, but not filed with the Commissioner. (*Villanueva v. Fidelity National Title Co.* (2018) 26 Cal.App.5th 1092, 1104.) The unfiled rates include the rate Fidelity charged consumers for overnight delivery courier services. (*Id.*) The court of appeal correctly found that, pursuant to the applicable sections of the title insurance law, such rates were required to be filed with the Commissioner, and that charging the unfiled rates was in violation of the title insurance laws. (*Id.* at pp. 1125-1126; see §§ 12401.1, 12401.2, 12401.7; see also Opn. 11-7-2013, 2013 WL 5966277, at *1.)

B. Section 12414.26 Only Immunizes Acts Done, Actions Taken, or Agreements Made Pursuant to the Authority of Articles 5.5 and 5.7

1. The Plain Language of Section 12414.26 Does Not Immunize Fidelity for Its Failure to File Rates

In "determin[ing] the Legislature's intent," this Court "begin[s] with the plain language of the statute, affording the words of the provision their ordinary and usual meaning and viewing them in their statutory context."

(*Fluor Corp. v. Superior Court* (2015) 61 Cal.4th 1175, 1198.) Here, the plain language of section 12414.26, in the context of the Insurance Code as a whole, makes clear that Fidelity's rate-filing provides no immunity from claims that it wrongfully charged additional, **unfiled** fees. Such a failure to act pursuant to the authority of the Articles is not an "act done . . . pursuantto" that authority.

Because plaintiffs' claims arise from Fidelity's unfiled rates, they are not based on any "act done, action taken, or agreement made pursuant to the authority conferred by Article 5.5 [] or Article 5.7." (§ 12414.26, internal citations omitted.) Article 5.5 confers upon Fidelity the authority to charge the rates it has filed with the Commissioner, and article 5.7 authorizes advisory organizations, but Fidelity did not file the charges at issue here. Fidelity acted in abrogation of the authority conferred by those articles. Therefore, Fidelity did not act "pursuant to" the authority conferred by articles 5.5 and 5.7, and it is not immunized by section 12414.26. Indeed, the use of *unfiled* rates is governed by section 12414.27, which is contained within a different article of the insurance code, article 6.9, relating to, among other things, examinations and penalties. (§ 12414.27.) Accordingly, charging unfiled rates is not an act done pursuant to the authority of articles 5.5 and 5.7, and Fidelity is not immunized by section 12414.26.

SCIF, *supra*, 24 Cal.4th at p. 936, is instructive. (See *Krumme v. Mercury Ins.* (2004) 123 Cal.App.4th 924, 943 fn. 6 ["similar statutes should be construed in light of one another"].) In *SCIF*, this Court considered section 11758, the immunity statute related to workers' compensation insurance. Workers' compensation insurance—like the title insurance at issue here—was not affected by Proposition 103. In *SCIF*, the plaintiffs were business entities that purchased workers' compensation liability insurance from SCIF. (*SCIF*, *supra*, 24 Cal.4th at p. 933.) They

alleged the fund misallocated their insurance expenses and misreported their financial information to the Workers' Compensation Insurance Rating Bureau, resulting in higher premiums being charged to them. (*Id.* at pp. 932-934.) This Court concluded that the plaintiffs' claims were not barred, reasoning that "[b]y its terms, section 11758 refers to an 'act done, action taken or agreement made *pursuant to the authority* conferred by this article . . .'" (*SCIF*, *supra*, 24 Cal.4th at p. 936, emphasis added by Court.) This Court noted the statute does not more broadly "refer to an 'act done, action taken, or agreement made pursuant to this article.'" (*Ibid.*)

Fidelity (ABM, p. 28) places great weight on a single sentence in *Quelimane Co., Inc. v. Stewart Title Guar. Co.* (1998) 19 Cal.4th 26, 33, stating that "the Insurance Code does not displace the UCL except as to title company activities related to rate setting." But that sentence addresses a distinction quite different from the one at issue here. *Quelimane* concerned a claim under the UCL that various title insurers had unlawfully conspired not to sell title insurance at all for a certain type of property sale. (*Id.* at p. 36.) As *Quelimane* recognized, concerted action that has nothing to with rate-setting is not covered by section 12414.26, because the scope of immunity under section 12414.26 is "expressly limited to articles 5.5 and 5.7 of division 2, part 6 of the Insurance Code." (*Id.* at p. 44; see also *SCIF*, *supra*, 24 Cal.4th at p. 936 [scope of immunity under analogous provision is expressly limited an "act done, action taken, or agreement made pursuant to" the articles authorizing concerted ratemaking activity].) That does not mean that there is immunity for any activities that could conceivably be described as touching upon ratemaking, especially when those activities do not involve actions taken pursuant to the authority conferred by articles 5.5 and 5.7. For instance, it is hard to believe that a title insurer would enjoy immunity from liability if it correctly filed its rates but fraudulently charged those rates to customers who did not receive the services at issue, or if it

steered customers to different rates according to their race. The key fact, in each instance, would be that the act complained of—charging for undelivered services, or discriminating based on race—would not be an "act done, action taken, or agreement made pursuant to" (*SCIF*, *supra*, 24 Cal.4th at p. 936) the articles specified in the immunity statute. Here, too, inasmuch as plaintiffs' claim concerns allegations about things not done pursuant to the immunity provision's specified articles, under *Quelimane* and *SCIF* alike, immunity would be improper.

2. Case Law Addressing *Approved* Rates in the Proposition 103 Context is Not Applicable to Fidelity's Unfiled Title Insurance Rates

While this Court found immunity was limited in *SCIF*, *supra*, 24 Cal.4th at p. 926, Fidelity relies on post-Proposition 103 district court of appeal cases regarding the property-casualty immunity statute codified at section 1860.1 to argue the immunity under section 12414.26 should be more expansive. But, even these cases only hold section 1860.1 precludes challenges to *approved* rates. (See, e.g., *Walker*, *supra*, 77 Cal.App.4th at p. 756; *MacKay*, *supra*, 188 Cal.App.4th at pp. 1448-1449; see also *Donabedian*, *supra*, 116 Cal.App.4th at p. 992.) For example, in *MacKay*, *supra*, 188 Cal.App.4th at p. 1432, plaintiff challenged certain rating factors used by an automobile insurer. The Second District Court of Appeal found the factors were approved by the Department, and held prior approval of a rate precludes a civil action challenging it. (*MacKay*, *supra*, 188 Cal.App.4th at pp. 1442-1443.) The court noted the "limited nature" of its holding, cautioning section 1860.1:

> protects from prosecution under laws outside the Insurance Code only 'act[s] done, action[s] taken [and] agreement[s] made pursuant to the authority conferred by' the ratemaking chapter. It does not extend to insurer conduct *not* taken pursuant to that authority.

(*Id.* at p. 1449.) And, in *Walker*, the court found, "the insurers . . . charged the rates approved by the commissioner," (*Walker*, *supra*, 77 Cal.App.4th at p. 759), and held that claims based on "an insurer's charging a rate that has been approved by the commissioner pursuant to the McBride Act [as amended by Proposition 103]" are barred. (*Id.* at p. 756.) Moreover, in *Donabedian*, wherein the court held that the plaintiffs' claims were not barred, the court distinguished *Walker* because "*Walker* involved a challenge to approved rates. . . . This case does not." (*Donabedian*, *supra*, 116 Cal.App.4th at p. 992 [citing *SCIF*, *supra*, 24 Cal.4th at pp. 941-942]; see also *MacKay*, *supra*, 188 Cal.App.4th at pp. 1449-1450 [distinguishing the conduct at issue in *Donabedian* from that in *Walker* because the conduct in *Donabedian* was "*not* the charging of an approved rate," emphasis in original].)

These cases demonstrate that insurers do not act pursuant to the authority conferred by the applicable ratemaking statutes when they do not meet the filing, or approval, requirements of those statutes. Because Fidelity did not file the rates at issue (*Villanueva*, *supra*, 26 Cal.App.5th at p. 1104), it did not act pursuant to the authority conferred by the applicable ratemaking statutes. Therefore, even under *Walker* and *MacKay*, Fidelity is not entitled to immunity, and section 12414.26 does not bar plaintiffs' claims.

II. IMMUNITY UNDER SECTION 12414.26 ONLY EXTENDS TO CERTAIN CONCERTED RATEMAKING ACTIVITY WHICH WOULD OTHERWISE BE SUBJECT TO ANTITRUST LAW

A. Only Certain Concerted Ratemaking Activity Is Immunized

As set forth above, Fidelity did not file the rates at issue, and the failure to file rates is not an "act done, action taken, or agreement made pursuant to the authority conferred by" articles 5.5 and 5.7. Accordingly,

this Court need not decide the scope of immunity conferred by section 12414.26. But, to the extent this Court considers the scope of immunity, this Court should reaffirm its holding in *SCIF*, *supra*, 24 Cal. at p. 936, which limits the scope of immunity to certain concerted ratemaking activities which would otherwise be barred by antitrust laws.

In determining that plaintiffs' claims in *SCIF* were not barred, this Court considered the applicable article regarding workers compensation insurance, finding it authorized "cooperation between insurers, rating organizations and advisory organizations . . . [that] would otherwise be barred by the antitrust laws." (*SCIF*, *supra*, 24 Cal.4th at p. 936.) Similarly, the title insurance law authorizes concerted ratemaking action that would otherwise be barred by antitrust laws, through the use of advisory organizations. (See §§ 12340.8 [definition of advisory organization; purpose of sharing of forms and ratemaking data among member insurers], 12401.4 ["exchange of information"], 12401.6 ["concerted action"].) Here, Fidelity did not act "pursuant to" such authority. Not only did it fail to act, i.e. never file the rates at issue, despite the requirement to do so, but plaintiffs' claims do not arise from allegations Fidelity engaged in data sharing or any cooperation of the type that would otherwise be barred by the antitrust laws.

B. Legislative History Supports the Conclusion Section 12414.26 Only Provides Narrow Immunity for Certain Concerted Ratemaking Activity

The legislative history confirms the limited nature of the statutory immunity. The history of section 12414.26 dates back to 1944, when the United States Supreme Court, in *United States v. South-Eastern Underwriters Ass'n.* (1944) 322 U.S. 533, held that the insurance business was subject to federal antitrust statutes. Given the "widespread view that it is very difficult to underwrite risks in an informed and responsible way

without intra-industry cooperation," Congress and the insurance industry then sought to exempt "cooperative ratemaking efforts" from the antitrust laws. (*Group Life & Health Ins. Co. v. Royal Drug Co.* (1979) 440 U.S. 205, 221.)

To achieve this objective, Congress passed the McCarran-Ferguson Act, codified at 15 U.S.C. §§ 1011-1015. (*Karlin v. Zalta* (1984) 154 Cal.App.3d 953, 966-967.) McCarran-Ferguson "declar[ed] that it was in the public interest for the business of insurance to continue under state regulation and specifically exempted such business from the operation of federal antitrust laws to the extent that it was regulated by state law." (*Ibid.*, citing 15 U.S.C. §§ 1011-1015.) Congress granted insurers a temporary moratorium, until June 30, 1948, from federal antitrust laws, including the Sherman Act, at which time federal restrictions would become applicable "to the extent that [the insurance] business is not regulated by State law." (*SCIF*, *supra*, 24 Cal.4th at p. 938, quoting 15 U.S.C. § 1012, subd. (b).)

Thereafter, in *Speegle v. Bd. of Fire Underwriters of the Pacific* (1946) 29 Cal.2d 34, 44-45, while recognizing that "a certain amount of cooperation between insurers is required by the very nature of the insurance business," this Court nevertheless held that the Cartwright Act, Business and Professions Code section 16700 et seq., applies to the insurance trade. The Cartwright Act is patterned after the federal Sherman Act and forbids combinations in restraint of trade. (*Ibid.*) It defines "trusts," unlawful and void as against public policy, except as otherwise provided therein, as "a combination of capital, skill or acts by two or more persons," formed to, among other things, "create or carry out restrictions in trade or commerce," or to "make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description," designed for specific purposes, including to fix or establish prices. (See Bus. & Prof. Code, §§ 16720, 16726; see also Stats. 1941, c. 526, p. 1835, § 1.)

In response to *Speegle*, the Legislature enacted McBride-Grunsky to minimally regulate insurers so that they would be exempt from antitrust laws, including the Cartwright Act. (*SCIF*, *supra*, 24 Cal.4th at pp. 939-940.) Section 1860.1 was enacted as part of McBride-Grunsky, as were former sections 1850, setting forth its purpose, and sections permitting rating organizations and permitting insurers to act in concert. (*MacKay*, *supra*, 188 Cal.App.4th at pp. 1445-1446.) When McBride-Grunsky was being considered, the Department of Justice's report to Governor Earl Warren explained that the point of the legislation was to "expressly exempt," from the Cartwright Act and similar provisions of California law which do not specifically relate to insurance "acts in concert." (See Petitioner's Motion for Judicial Notice, at Ex. F, p. 63.) The then-Commissioner also expressed his view that the legislation was "essential" to prevent the application of antitrust laws to "concert of action in the making of insurance rates [] not only desirable but necessary by reason of the very nature of insurance." (*SCIF*, *supra*, 24 Cal.4th at pp. 939-940.)

Accordingly, the legislative history establishes that only certain types of concerted ratemaking activity that would otherwise be subject to the Cartwright Act are immunized. And, like antitrust law, which requires an affirmative act, i.e. the formation of a trust with unlawful purposes, section 1860.1 and the related immunity statutes, including section 12414.26, rely upon the party asserting immunity to have taken concerted action or made an agreement pursuant to the relevant authority. (See Bus. & Prof. Code, § 16720; *Ashi Kasei Pharma Corp. v. CoTherix, Inc.* (2012) 204 Cal.App.4th 1, 8 [elements of Cartwright Act violation include "illegal acts done"]; see also §§ 1860.1, 11758, 795.7, 12414.26.)

The legislative history of the specific statutes related to title insurance, in turn, shows that section 12414.26 was "patterned after" the almost identical language of section 1860.1, and that it arose from similar concerns

about antitrust suits. (See Assem. Com. on Finance and Insurance, Analysis of Sen. Bill No. 1293 (1973 Reg. Sess.) Aug. 27, 1973 [noting recent lawsuits brought against title insurance companies for violation of California antitrust statutes by conspiring to fix rates charged for title insurance], attached as Attachment 5 to Appellant's Opening Brief on the Merits.) Indeed, the Legislature set forth the article's purpose, which was substantially the same as that set forth in section 1850:

> . . . to promote the public welfare by regulating rates for the business of title insurance as herein provided to the end that they shall not be excessive, inadequate or unfairly discriminatory. It is the express intent of this article to permit and encourage competition between persons or entities engaged in the business of title insurance on a sound financial basis, and nothing in this article is intended to give the commissioner power to fix and determine a rate level by classification or otherwise.

(§ 12401.) Similar to its intent when it originally enacted section 1860.1, when the Legislature enacted section 12414.26 it only intended immunity for certain types of concerted ratemaking activity that would otherwise be subject to the Cartwright Act or other antitrust laws.

This Court considered the legislative history of section 11758 in *SCIF* and determined that the history supported "interpreting section 11758 to only apply to concerted activity otherwise barred by the antitrust laws, and not to the individual misconduct of an insurer regarding its insured." (*SCIF*, *supra*, 24 Cal.4th at p. 938; see also *King v. Meese* (1987) 43 Cal.3d 1217, 1240 [noting McBride-Grunsky is "minimal regulation required to exempt California insurance from federal antitrust law"].) Similarly, the legislative history confirms that section 12414.26 provides immunity for a limited class of suits: those alleging concerted activity in ratemaking that would otherwise violate antitrust laws. (*Quelimane*, *supra*, 19 Cal.4th at p.

44.) Accordingly, it does not immunize the conduct at issue here—Fidelity failing to file its rates.

Moreover, to the extent the courts in *Walker* and *MacKay* read Proposition 103 as amending the original legislative intent of section 1860.1 (see *Walker*, *supra*, 77 Cal.App.4th at p. 756; *MacKay*, *supra*, 188 Cal.App.4th at pp. 1446-1447), such analysis is not applicable here, because Proposition 103 did not change the title insurance statutes. (§ 1851, subd. (d).)[4]

III. THE DEPARTMENT DOES NOT HAVE EXCLUSIVE JURISDICTION OVER THE CLAIMS AT ISSUE

A. Nothing in the Insurance Code Provisions Relating to Title Insurance Bars Private Litigants from Bringing an Action to Enforce the UCL

This Court also granted review to decide whether the Department of Insurance has exclusive jurisdiction over disputes based on title insurance charges not disclosed to the Department. The Department's jurisdiction over *unfiled* title insurance charges is not exclusive, and cannot be made so merely because the claims are predicated on rating issues made unlawful by the Insurance Code.[5]

This Court held that the Department does not have exclusive jurisdiction over such UCL claims in *Farmers*, *supra*, 2 Cal.4th at p. 391.

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[4] The jurisprudence beneath the *Walker* line of cases with respect to the scope of immunity in a Proposition 103 case, and where the rate has been filed, is complex, unsettled, and beyond the scope of review granted in this case. The Commissioner respectfully requests the Court limit its opinion in this case to the title-immunity statute's application to unfiled rates, and that the Court decline here to opine on *Walker's* conclusions that are not relevant to adjudication of this matter.

[5] Because the Court's scope of review appears to be limited to the Department's jurisdiction over unfiled title insurance charges, other situations not before this Court are not discussed.

Farmers established that UCL claims are originally cognizable in the courts, such that litigants need not exhaust administrative remedies before pursuing a civil action to enforce unfair competition claims that are predicated upon Insurance Code rate violations. In *Farmers*, the Attorney General brought a UCL cause of action against insurers based on allegations they had violated Proposition 103 by refusing to offer a "Good Driver Discount policy" to all eligible drivers (see § 1861.16). *Farmers* held the People's UCL claim was "originally cognizable in the courts", and thus it could apply the primary jurisdiction doctrine if the Court thought the Commissioner's expertise would be helpful in deciding the issues, but the claim was not disallowed. (*Farmers*, *supra*, 2 Cal.4th at p. 391.)

Fidelity argues that *Farmers* turned on the fact that Proposition 103 contained a provision that expressly applied the UCL to the property-casualty insurance industry. But while *Farmers* did acknowledge this fact, it was by no means crucial to the case's reasoning. Indeed, this Court has confirmed that any law may serve as a predicate for an UCL violation, whether or not the predicate specifically confers a private right of action. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 562 ["it is in enacting the UCL itself, and not by virtue of particular predicate statutes, that the Legislature has conferred upon private plaintiffs 'specific power'"].) So even though Proposition 103 contains a provision that expressly allows UCL actions, it is not necessarily of any consequence that the Insurance Code statutes related to title insurance do not contain a similar provision. The Court's reliance upon section 1861.03 was in no way an inverse ruling that its absence would have prevented an UCL action.

Fidelity also argues that the last sentence of section 12414.29 bars UCL actions against title insurers. Section 12414.29 provides:

> The administration and enforcement of Article 5.5 . . . and Article 5.7 . . . of this chapter shall be governed solely by the

> provisions of this chapter. Except as provided in this chapter, no other law relating to insurance and no other provisions in this code heretofore or hereafter enacted shall apply to or be construed as supplementing or modifying the provisions of such articles unless such other law or other provision expressly so provides and specifically refers to the sections of such articles which it intends to supplement or modify. The provisions of this chapter and regulations adopted pursuant thereto shall constitute the exclusive regulation of the conduct of escrow and title transactions by entities engaged in the business of title insurance as defined in Section 12340.3, notwithstanding any local regulation or ordinance.

(§ 12414.29.) While, "a plaintiff may not bring an action under the unfair competition law if some other provision bars it," this Court has stressed on many occasions, "[t]hat *other provision must actually bar it, however, and not merely fail to allow it.*" (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 184, emphasis added.)

Thuss, in *Quelimane*, this Court expressly rejected the argument Fidelity now makes, ruling section 12414.29, including the last phrase "notwithstanding any local regulation or ordinance," "makes it clear that the legislative purpose was to preempt local regulation, not to exempt title insurers from other state laws governing unfair business practices." (*Quelimane*, *supra*, 19 Cal.4th at p. 45; see also *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 267-268 [holding lines of insurance not affected by the passage of Proposition 103 were not generally exempt from state unfair business practices statutes].) In other words, this sentence prohibits other *municipal regulation*—not private lawsuits. For example, in *Stevens v. Superior Court (API Insurance Services, Inc.)* (1999) 75 Cal.App.4th 594, 605, the court found an analogous provision contained within section 1633.5,

related to production agencies, preempts local regulation and does not prohibit a private action for violations of the UCL. Consequently, section 12414.29 provides no support for Fidelity's argument.

Nor do the first two sentences of section 12414.29 contain language that would bar UCL lawsuits related to title insurance ratemaking. The first sentence addresses "administration and enforcement" of Articles 5.5 and 5.7. (§ 12414.29; see *Quelamine*, *supra*, 19 Cal. 4th at pp. 44-45.) But UCL actions do not constitute "administration and enforcement" of a predicate law, such as those found in articles 5.5 and 5.7. Rather, private litigants "enforce *the UCL* by means of restitution and an injunction." (*Stop Youth Addiction, supra*, 17 Cal.4th at p. 576, emphasis in original.) Enforcement of the UCL by means of its remedies serves a particularly important purpose where, as here, the Commissioner's own authority to order restitution has been called into question. The second sentence of section 12414.29, meanwhile, bars laws "relating to insurance" and laws in "this code" from "supplementing or modifying" articles 5.5 and 5.7. As explained by the Department of Justice's legislative analysis of analogous section 1860.2, this language means that "no other law or provision *in the insurance code* is to be construed as modifying or supplementing the chapter[.]" (See Petitioner's Motion for Judicial Notice, at Ex. F, p. 73, emphasis added.) But, the UCL neither creates insurance-related laws nor adds provisions to the Insurance Code. Thus, section 12414.29 does not preclude the application of the UCL. At most, the UCL only creates supplementary prosecutorial enforcement rights. Borrowing from the predicate laws as they are written does not supplement or modify the substance of the predicate laws themselves.

To the extent the UCL may be said to supplement or modify anything related to title insurance, it would be by providing for remedies that are cumulative to the remedies spelled out in article 6.9. Thus, section 12414.29 contains no bar to laws that supplement or modify article 6.9, and it does not bar plaintiffs' claims.

B. Private UCL Actions Advance Public Policy and Complement the Department's Enforcement Actions

The Department implements the title insurance statutes at issue. When an agency, as is the case here, has a "comparative interpretive advantage" because of the agency's "expertise and technical knowledge," the agency is entitled to deference in interpreting the scope of the statutes it enforces." (*Yamaha v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12.) "[C]ourts must give great weight and respect to an administrative agency's interpretation of a statute governing its powers and responsibilities." (*Ste. Marie v. Riverside County Regional Park & Open-Space Dist.* (2009) 46 Cal.4th 282, 292.)[6] The Department interprets its jurisdiction over unfiled rates as not exclusive and does not interpret a private UCL case to be an affront to its authority. Rather, in the Department's view, private UCL actions in the circumstances of this case serve an important purpose that

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[6] In its amicus curiae brief, the California Land Title Association (CLTA) argues an UCL lawsuit based on unfiled rates invades the Commissioner's exclusive jurisdiction. But, as set forth herein, the Commissioner's jurisdiction is not exclusive, and the Commissioner views private actions based on unfiled rates as an important complement to its enforcement efforts. To the extent CLTA requests consideration of the court's comments in an unrelated trial court case as "backdrop," for its argument the Department's position is not entitled to deference, this information should not be considered by this Court. The Department disagrees with the trial court's comments in the unrelated case, but, more importantly, the trial court's comments have no relevance here because they refer to the Department's characterization of its review of *filed rates*, which is not at issue here.

complements, and does not conflict with, the Department's regulatory and enforcement duties and responsibilities under the code.

The Department regulates more than 1,400 insurance companies with over $310 billion in premium revenue. In connection with its regulatory function, it annually reviews over 200,000 complaints and inquiries and over 8,000 rate filings. Given the reality that the Department must budget its resources, private actions under the UCL serve an important role to buttress the Department's enforcement efforts. This is particularly so in the context of title insurance, which is not subject to Proposition 103's extensive rate review system. (See § 1851, subd. (d).) Unlike the rate review system in Proposition 103, title insurance operates under a system the industry colloquially refers to as "file-and-use": rates may be used thirty days after being filed with the Department. (§ 12401.1.) Accordingly, in the title insurance context, because there is less regulatory oversight for title insurers, a greater public participatory oversight benefits consumers.

Also, if the UCL is unavailable, a court may find no restitution or other remedy to force refunds of illegally collected rates, premium, or charges. Although the UCL includes a restitution remedy, Business and Professions Code section 17204 does not authorize the Department to bring a UCL action. While the Commissioner does not here endeavor to analyze the full scope of his authority under every conceivable provision within and without the Insurance Code, he does note that the powers expressly enumerated in section 12414.16 include only prohibiting the future use of the illegal charge or rate, or suspending or revoking the insurer's certificate of authority. Fidelity attempts to find restitution authority in the procedural rules for suspending or revoking a title insurer's license (§ 12414.18 [incorporating Administrative

Procedure Act, Gov. Code. § 11500 et seq.]), but even if Fidelity were correct, such authority, under Government Code section 11519, would only be available after a license revocation or suspension hearing in which the Department determined a stay of enforcement is appropriate. Under Fidelity's theory, if the facts compel imposition of an order to stop transacting insurance, the Commissioner could not provide consumers restitution unless he decided to relax penalties by staying the execution of the order. This limitation would defeat the purpose of the order, and renders the remedy Fidelity argues inadequate to address both egregious cases and those that do not warrant a suspension order. Thus, a ruling that prevents private UCL actions and finds no other restitution remedy, thereby allowing title insurers to collect and keep illegal fees, rates, premium or other charges, would greatly offend public policy.

CONCLUSION

The Department respectfully submits that the charging of unfiled rates is not an act taken pursuant to the authority conferred by articles 5.5 and 5.7 and accordingly not immunized by section 12414.26. Moreover, the Department does not have exclusive jurisdiction of the claims at issue herein.

Dated: January 21, 2020

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CERTIFICATE OF COMPLIANCE

I certify that the attached APPLICATION AND PROPOSED AMICUS CURIAE BRIEF BY CALIFORNIA DEPARTMENT OF INSURANCE IN SUPPORT OF APPELLANTS uses a 13 point Times New Roman font and contains 6,595 words.

Dated: January 21, 2020

XAVIER BECERRA
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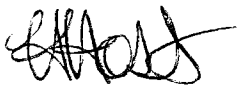

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Villanueva, Manny v. Fidelity National Title Company**

Case No.: **S252035**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On January 21, 2020, I served the attached

APPLICATION AND PROPOSED AMICUS CURIAE BRIEF BY CALIFORNIA DEPARTMENT OF INSURANCE IN SUPPORT OF APPELLANTS

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California, addressed as follows:

SEE ATTACHED SERVICE LIST

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

Pauline Santamaria
Declarant

Signature

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