S252035

IN THE SUPREME COURT OF CALIFORNIA

MANNY VILLANUEVA, et al.,
Plaintiffs and Appellants,

v.

FIDELITY NATIONAL TITLE COMPANY,
Defendant and Appellant.

After Decision of the Court of Appeal
Sixth Appellate District
Case No. H041870
(Santa Clara County Super. Ct. No. 1-10-CV173356)

CALIFORNIA LAND TITLE ASSOCIATION'S AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT AND APPELLEE FIDELITY NATIONAL TITLE COMPANY

Service on the Attorney General and District Attorney required by Bus. & Prof. Code § 17209 and Cal. Rules of Court, Rule 8.29

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I. INTRODUCTION

In granting review, this Court posed two narrow questions for briefing and argument: (1) whether Insurance Code section 12414.26's immunity for acts done "pursuant to the authority conferred by Article 5.5" bars a civil action against an underwritten title company for charging for an escrow service for which it *allegedly* has no filed rate with the Department; and (2) whether the Commissioner has exclusive jurisdiction pursuant to section 12414.29 over claims challenging an underwritten title company's charges on the ground they *allegedly* are unfiled.[1] *See Villanueva v. Fidelity Nat'l Title Co.*, 2018 Cal. LEXIS 9670 (Dec. 12, 2018) (order granting review).

Amicus California Land Title Association ("CLTA") concurs with Fidelity National Title Company's ("Fidelity") arguments in its Respondent's Answer Brief ("RAB") that show both questions should be answered affirmatively. CLTA does not repeat those arguments here. Rather, this amicus brief focuses on the following five points not addressed by the parties.

[1] Unless otherwise indicated, all "section" references are to the Insurance Code; all "Commissioner" references are to the Insurance Commissioner; all "Department" references are to the Department of Insurance; and all "Regulated Title Entities" references are to "title insurers," "underwritten title companies" and "controlled escrow companies," as defined in sections 12340.4 through 12340.6.

First, in Section II.A below, CLTA examines the link between the "unfiled" rate legal theory and four cases that Villanueva's new counsel in this Court—Steven J. "Bernie" Bernheim ("Bernheim")—commenced over a decade ago against different Regulated Title Entities on behalf of different clients—Patrick Kirk ("Kirk"), Elizabeth Wilmot ("Wilmot"), Wendy Kaufman ("Kaufman") and Jeffrey Sjobring ("Sjobring"). When viewed in the context of Bernheim's representation of them in those cases, it is no coincidence that Kirk, Wilmot, Kaufman and Sjobring submitted amicus letters in support of Villanueva's Petition For Review.

Importantly, examination of Bernheim's other rate cases demonstrates that, contrary to what those amicus letters suggest, it is unlikely that any other case asserting the "unfiled" rate legal theory will ever be brought. Indeed, since filing the above cases more than a decade ago, Bernheim has filed no other "unfiled" rate case, save one—which the plaintiff (James Muehling) voluntarily dismissed in 2014 when that Regulated Title Entity's pending summary judgment motion showed the challenged charge was in fact for a service within the Regulated Title Entity's filed schedule of fees. And this case apparently is the only rate case filed by any counsel other Bernheim.

This backdrop also illustrates that Bernheim improperly veered off track in Villanueva's Opening Brief ("POB") in this Court to reargue issues that he lost in Kirk's, Kaufman's and Sjobring's cases—issues that

Villanueva never raised in the Court of Appeal and that are beyond the scope of the grant of review in this Court. *See* Villanueva's POB at 23-34, 36-37 (asserting that section 12414.26's immunity applies only to claims based on allegations the defendant acted in concert with others and/or allegations of defendant's affirmative conduct, and does not apply to common law causes of action, such as breach of fiduciary duty—all arguments that Villanueva never made in the Court of Appeal).

Second, in Section II.B below, CLTA presents an overview of the Department's treatment of "miscellaneous charges" that are excluded from section 12340.7's definition of "rate" or "rates," and for which, consequently, no filed rate is required under section 12401.1. After enactment of the above regulatory scheme in 1973, the Department initially took the position that no filed rates were required for Regulated Title Entities' charges for ancillary escrow services such as wire transfers, delivery fees, etc. Rather, the Department and the Regulated Title Entities treated such fees as "miscellaneous charges" so no rate file filings were expected or made for such ancillary services. Decades later, though, beginning in 1999, during market conduct examinations of Regulated Title Entities, the Department shifted course and no longer treated such escrow fees as "miscellaneous charges" outside of section 12401.1's filing requirement.

Unsurprisingly, Regulated Title Entities settled these disputes with their regulator by filing rates for the newly disputed charges without admitting any wrongdoing. Notably, the Department did not seek any refund to consumers as a result of the prior charges, a point which illustrates that there is no inherent harm in unfiled rates. In fact, the subsequently filed rates accepted by the Department were the same as (or higher than) the challenged charges had been. That is true with respect to the Regulated Title Entities' subsequently filed schedule of rates in the *Kirk* case and in this case.

Third, and relatedly, in Section II.C below, CLTA addresses the role of independent escrow companies ("IEC") in the title market. Unlike Regulated Title Entities, IECs are independent from any title insurer. IECs are *not* regulated by the Department and are *not* required to file their rates. Nonetheless, they lawfully provide the *same* escrow services as Regulated Title Entities do. This point is significant because it also illustrates that there is nothing inherently harmful in an *unfiled* rate. Whether the parties in a residential real estate transaction choose an IEC or a Regulated Title Entity to provide escrow services for their transaction turns on myriad factors unrelated to whether the escrow company does or does not have filed rates.

Fourth, in Section II.D below, CLTA illustrates how the "unfiled" rate legal theory improperly thrusts the role of interpretative ratemaking on

the trial court. It requires a trial court to make nuanced determinations regarding the nature of the challenged service and to interpret whether the Regulated Title Entity's filed rate schedules encompass the challenged service. The trial court thus effectively mandates the making and use of the Regulated Title Entity's filed rate by determining the nature of its charges and the meaning of its filed rate schedules.

Such judicial ratemaking, however, is barred by section 12414.26's immunity for Regulated Title Entities from civil proceedings challenging a Regulated Title Entity's making and use of rates pursuant to the authority conferred by Article 5.5. Likewise, judicial ratemaking is barred by section 12414.29's exclusive jurisdiction conferred on the Commissioner for the administration and enforcement of Article 5.5. Indeed, as this case illustrates, to provide any immunity at all, section 12414.26 must be enforced at the outset of the case; otherwise, the Regulated Title Entity is subjected to the burden and expense of the very civil litigation that is barred by section 12414.26. That is precisely what occurred in this case with respect to Fidelity's challenged "draw deed" charge, which the trial court found *after trial* was a service encompassed in Fidelity's filed rate for "document preparation."

Fifth, and finally, in Section II.E below, CLTA demonstrates that no deference is due the Department's opinion of the "unfiled" rate legal theory. The trial court in amicus Kirk's case found that Bernheim and the

Department acted in concert to suppress evidence about the Department's prior review and acceptance of the Regulated Title Entity's charges and filed rates that Kirk claimed were ambiguous, so as to minimize any notion that the Department's actions in approving and accepting the rates could be relied upon by the Regulated Title Entity. The evidential underpinnings of that finding were the subject of the Commissioner's unsuccessful writ proceeding attempting to block the Regulated Title Entity's trial subpoena requiring the Commissioner's production of related documents, which the Second District Court of Appeal, Division Three, in *Jones v. Superior Court*, Case No. B253605, denied *on the merits* after reviewing an evidential record (the same division that a few years earlier decided *MacKay v. Superior Court*, 188 Cal. App. 4th 1427 (2010)). This Court, en banc, denied the Commissioner's Petition For Review of the Court of Appeal's ruling on the merits. *See Jones v. Superior Court*, Case No. S216987, 2014 Cal. LEXIS 2052 (Cal. March 19, 2014).

II. ARGUMENT

A. This Court Should Disregard Villanueva's Arguments That Are Outside The Grant Of Review And Were Not Raised In The Court of Appeal.

As discussed above, the "unfiled" rate legal theory asserted by Villanueva has links to four other rate cases that his new counsel in this Court (Bernheim) filed over a decade ago against different Regulated Title Entities (First American Title Company and its affiliates) on behalf of Kirk,

Wilmot, Kaufman and Sjobring—each of whom submitted an amicus letter in support of Villanueva in this Court.[2]

Bernheim represented Kirk in his case, filed on June 15, 2007, in the trial court and Court of Appeal. *See* CLTA's concurrently filed Motion for Judicial Notice and Declaration of Susan M. Walker ("Walker Dec."), ¶¶ 4-6, Exs. B-D.[3] Kirk's amicus letter filed in this case on November 13, 2018 attached, among other things, a portion of the Statement of Decision entered on May 12, 2014 in *Kirk* ("*Kirk* SOD"). CLTA requests that the Court take judicial notice of the complete *Kirk* SOD, which is discussed below. *See* CLTA's Motion For Judicial Notice, Walker Dec., ¶ 4, Ex. B (Kirk SOD).

Bernheim presently represents Wilmot, Kaufman and Sjobring in their pending appeals in the Court of Appeal, Second District, Division Five:[4] As mentioned above, on November 16, 2018, they filed a joint

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[2] *See* Kirk's Amicus Letter filed in this case on November 13, 2018 and Wilmot's, Kaufman's and Sjobring's joint Amicus Letter filed in this case on November 13, 2018. Copies of those letters thus are in this Court's file.

[3] Page citations to CLTA's Motion For Judicial Notice are to the consecutively numbered page numbers that have been applied in that document.

[4] *See* CLTA's Motion For Judicial Notice, Walker Dec., ¶¶ 9-10, 14-17, Exs. I-J, N-Q, which attach:(1) Wilmot's Notice of Appeal, Case No. B289375 ("*Wilmot*"), whose Los Angeles Superior Court Case No. BC370141 was filed on April 26, 2007, a copy of the order from which Wilmot appeals also is available at *First Am. Title Cases v. First Am. Title Co.*, Case No. BC370141, 2018 Cal. Super. LEXIS 2992 (February 16, 2018) (order denying class certification in *Wilmot*, in which Wilmot asserts the "unfiled" rate theory with respect to a "loan tie-in" escrow service fee

amicus letter in support of Villanueva's Petition For Review. Bernheim also represents Wilmot's co-plaintiff, Jason Munro ("Munro"), in his pending appeal, Case No. B295805, from an October 23, 2018 order denying Munro's motion for leave to file a Fourth Amended Complaint in Los Angeles Superior Court Case No. BC370141—more than a decade after Bernheim filed the original complaint on April 26, 2007 in that action. *See* CLTA's Motion For Judicial Notice, Walker Dec., ¶¶ 11-13, Exs. K-L.

Contrary to what those amicus letters suggest, it is unlikely that any other case asserting the "unfiled" rate legal theory will ever be brought. Rather, examination of Bernheim's other rate cases and this case demonstrates that they are a small, closed universe of claims. Indeed, since filing the above cases more than a decade ago, Bernheim has filed no other

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that she claims was not included in the Regulated Title Entity's filed rates for "concurrent junior mortgage" services and/or "document preparation" services); (2) Kaufman's Notice of Appeal, Case No. B293701 ("*Kaufman*"), whose Los Angeles Superior Court Case No. BC 382826 was filed on December 22, 2007; and (3) Sjobring's Notice of Appeal, Case No. B293732 ("*Sjobring*"), whose Los Angeles Superior Court Case No. BC329482 was filed on February 25, 2005; a copy of the order from which Kaufman and Sjobring appeal also is available at *First Am. Title Cases v. First Am. Title Ins. Co.*, Case Nos. BC329482 and BC382826, 2018 Cal. Super. LEXIS 2989 (August 29, 2018) (order granting the Regulated Title Entity's motions for judgment on the pleadings in *Sjobring* and *Kaufman*, in which Sjobring and Kaufman assert they were charged the Regulated Title Entity's filed rate for one type of title policy but should have been charged its filed rate for a different type of title policy). The Judicial Council consolidated Wilmot's, Kaufman's and Sjobring's cases in the trial court under JCCP Case No. 4751. *See* CLTA's Motion For Judicial Notice, Exs. V-W.

"unfiled" rate case, save one—which the plaintiff (James Muehling) voluntarily dismissed in 2014 in the face of the Regulated Title Entity's pending summary judgment motion showing that the challenged charge was in fact for an escrow service that was within the Regulated Title Entity's filed schedule of fees.[5]

Before trial in this case, Fidelity filed a schedule of rates that included the challenged charges. *See Villanueva v. Fidelity National Title Co.*, 26 Cal. App. 5th 1092, 1108 (2018) ("*Villanueva*") (observing that the trial court awarded injunctive relief notwithstanding that Fidelity's rate schedule filed with the Department while the case was pending included rates for the challenged delivery fees). Similarly, the Regulated Title Entities in the *Kirk* case had filed a schedule of rates that expressly revised rates for the challenged services before Bernheim filed his lawsuits. *See, e.g.*, CLTA Motion For Judicial Notice, Walker Dec., ¶4, Ex. B (*Kirk* SOD), p. 64, lines 10-14; p. 67, lines 8-13.

The backdrop of the other cases makes clear that Bernheim improperly veered off track in Villanueva's briefing in this Court to argue

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[5] *See* CLTA's Motion For Judicial Review, Walker Dec., ¶¶ 18-21, Exs. R-U (Order entered September 10, 2014 dismissing *Muehling v. First American Title Company*, Case No. RG 12659372 ("*Muehling*") pursuant to his counsel's request). *Muehling* also was coordinated under JCCP Case No. 4751 with the *Wilmot*, *Kaufman* and *Sobring* actions and was transferred from Alameda County Superior Court to Los Angeles County Superior Court. *See* CLTA's Motion For Judicial Review, Walker Dec., ¶ 22, Ex. V.

issues that were defeated in *Kaufman, Sjobring* and *Kirk*—issues that Villanueva never raised in the Court of Appeal and that are outside this Court's grant of review. *See* Villanueva's POB at 23-34, 36-37 (asserting that section 12414.26's immunity applies only to claims based on allegations the defendant acted in concert with others and/or allegations of the defendant's affirmative conduct, and does not apply to common law causes of action, such as breach of fiduciary duty); *cf.* Villanueva's briefs filed in the Court of Appeal in which none of those arguments were made, which documents were transferred to this Court's file; *see also* CLTA's Motion For Judicial Notice, Walker Dec., ¶ 4, Ex. B (*Kirk*, SOD), p. 77, line 26 to p. 78, line 20 (rejecting argument that scope of immunity is limited to antitrust claims); id., Walker Dec., ¶¶ 14-17, Ex. N, p. 230, lines 18 to p. 231, line 24, and Ex. P, p. 272, line 18 to page 273, line 24.[6]

Accordingly, this Court should disregard Villanueva's arguments that are outside this Court's grant of review and that Villanueva never raised in the Court of Appeal. *See* Cal. Rules of Court, 8.520(b)(3); *City of Burbank v. State Water Resources Control Bd.*, 35 Cal.4th 613, 628 (2005)

[6] CLTA cites these trial court rulings not for any precedential value, but rather to evidence the reason that Bernheim improperly went off topic in Villanueva's briefing in this Court to relitigate arguments that he lost in *Kaufman* and *Sjobring* (that Villanueva never made in the Court of Appeal) for the benefit of the appeals pending in *Kaufman* and *Sjobring*. *See, e.g.*, *Williams v. Chino Valley Independent Fire Dist.*, 61 Cal.4th 97, 113 (2015) (noting, without objection, that the plaintiff "references an unpublished case" simply to demonstrate as background for the issue under review).

(declining to address argument made by appellant because the "Court of Appeal did not discuss it in its opinion" and "the issue is outside our grant of review").

Further, as Fidelity has demonstrated, those arguments are meritless, and this Court should disregard them.

That said, it cannot go without stating that Justice H. Walter Croskey, who authored the opinion in *Mackay*, served on the Court of Appeal for 26 years before he passed away in 2014 and is generally recognized as a preeminent Justice and insurance law expert. In *Mackay*, Justice Croskey thoroughly disposed of the argument that Villanueva raises for the first time in this Court that section 1860.1 (and section 12414.26 by analogy) applies only to concerted action between insurers. *See, e.g., MacKay*, 188 Cal.App.4th at 1447-1448 ("Plaintiffs argue that Insurance Code section 1860.1 can have no present application except with respect to concerted action between insurers, even though it is clear that (1) Insurance Code section 1860.1 was always understood to have a broader reach than simply an exemption from antitrust laws; and (2) Proposition 103 clearly intended to eliminate the then existing antitrust exemption. In sum, we conclude that it is inappropriate to limit the interpretation of Insurance Code section 1860.1 by the now-superseded purpose for which it was initially enacted. Instead, it is properly interpreted in the context of the entirety of the ratemaking chapter, as we have done above.") Villanueva's

dismissive remarks criticizing *Mackay* in his Petitioner's Reply Brief ("PRB") should be disregarded. *See, e.g.*, PRB at 19.

B. The Department's Treatment Of "Miscellaneous Charges" Illustrates That There Is No Inherent Injury To Consumers By Unfiled Rates.

The Department's treatment of "miscellaneous charges" that are excluded from section 12340.7's definition of "rate" or "rates," and for which section 12401.1's filing requirement consequently does not apply, illustrates the lack of inherent harm to consumers by "unfiled" rates. As recounted by the trial court in *Kirk*, after enactment of the above regulatory scheme in 1973, the Department initially took the position that no rates were required for Regulated Title Entities' charges for ancillary escrow services such as wire transfers, delivery fees, etc. CLTA's Motion For Judicial Review, Walker Dec., ¶ 4, Ex. B (*Kirk* SOD), p.67, lines 4-8.[7] Rather, the Department and the Regulated Title Entities treated such fees as "miscellaneous charges" not subject to rate regulation. *Id.* Decades later, though, beginning in 1999, during market conduct examinations of Regulated Title Entities, the Department piecemeal shifted course and no longer treated such fees as "miscellaneous charges." *Id.* at p. 67, lines 9-11.

Unsurprisingly, some Regulated Title Entities resolved the newly disputed charges with their regulator by filing schedules of rates that

[7] CLTA discusses the *Kirk* SOD not for any precedential value, but simply for its real world depiction of this regulatory process.

expressly included or revised rates for them without admitting any wrongdoing, as occurred in *Kirk*. *Id.*, p. 67, lines11-12; p. 71, line 9 to p. 72 line 11. Notably, the Department did not seek any refund to consumers as a result of the prior charges, a point which illustrates that there is no inherent harm in unfiled rates. In fact, the subsequently filed rates were essentially the same as (or higher than) the challenged miscellaneous charges had been. *Id.*, 73, lines12-14; p. 84, lines18-21.

Viewed from the foregoing perspective, it is unsurprising that the Legislature immunized Regulated Title Entities from "civil proceedings" challenging their acts done with the authority conferred by Article 5.5 for the making and use of rates (§ 12414.26), and conferred exclusive jurisdiction on the Commissioner for the administration and enforcement of Article 5.5's requirements. *Id.*, § 12414.29. Article 5.5, found in sections 12401 to 12401.10, provides Regulated Title Entities with authority in the first instance to determine whether a particular escrow service fee is within section 12340.7's definition of "rate" or "rates," which excludes "miscellaneous fees"; and whether a particular charge is excepted from section 12401.7's filing and use requirements, such as section 12401.8's exception for "unusual services."

Although title insurance is colloquially referred to as a "file and use" line of business, the Department in practice reviews rate filings before their effective date for ambiguity and whether they comply with section 12401's

proscription that they not be excessive, inadequate or discriminatory. *Id.*, § 12401.7. In *Kirk*, for example, for many years, the Department sent letters of "approval" or "acceptance" for the Regulated Title Entity's "$60 minimum" sub-escrow fee and other rates at issue that Kirk contended were ambiguous, before demanding that the Regulated Title Entity file a revised schedule of rates. CLTA's Motion For Judicial Review, Walker Dec., ¶ 4, Ex. B (*Kirk* SOD), p. 69, lines 8-12.

The Department's oversight also includes reviewing a Regulated Title Entity's escrow fees during market conduct examinations. In *Kirk*, for example, in a December 2006 market conduct examination, after years of acceptance and approval, the Department objected to the "$60 minimum" sub-escrow rate. *Id.*, 72, lines 8-17. The Department and Regulated Title Entity reached a settlement of the issues identified by the market conduct examination. *Id.*, p. 72, line 21 to p. 73, line . As a result, the Regulated Title Entity filed a revised sub-escrow rate that applied a flat $125 fee for all sub-escrow transactions. *Id.*, p. 73, lines12-15.

In addition to the Department's direct oversight as described above, section 12414.13 provides that any person "aggrieved by *any* rate charged" by a Regulated Title Entity (emphasis added), i.e. whether the rate is filed or unfiled, may file a complaint with the Commissioner. The Commissioner handles such complaints pursuant to the administrative procedures set forth in Article 6.5 (sections 12414.13 through 12414.18).

Those procedures provide a panoply of remedies for violations of Article 5.5 as may be appropriate for the circumstances, including requiring corrective action by the Regulated Title Entity (§ 12414.1), suspending or revoking the Regulated Title Entity's license (§ 12414.16), and/or, where warranted, ordering restitution to customers. *See* Cal. Ins. Code § 12414.18 (incorporating Cal. Govt. Code § 11519, subd. (d), which grants authority to order "restitution for any financial loss or damage found to have been suffered by a person in the case"). Section 12414.19 also provides that the Commissioner's rulings regarding alleged violations of Article 5.5 are subject to judicial review. Customers challenging a Regulated Title Entity's charges accordingly are not without a remedy that ultimately is subject to judicial review.[8]

[8] Solely by way of background for Kirk's amicus letter filed in this Court and not for any precedential value, it bears noting that Justice Paul Turner, then Presiding Justice of the Court of Appeal, Second Appellate District, in the opinion he authored in *Kirk* affirming the *Kirk* SOD, recognized the adequacy of the statutory administrative remedies. See CLTA's Motion For Judicial Notice, Walker Dec., ¶¶ 3-5, Ex. C, at pp. 110-111. A copy of this unpublished decision is also available at *Kirk v. First American Title Co.*, Case No. B257508, 2016 Cal. App. Unpub. LEXIS 4668 at *20 (June 22, 2016), *review denied* on September 14, 2016, Case No. S236137, 2016 Cal. LEXIS 7701 (holding "that customers facing an ambiguous rate are not without a remedy" because "Insurance Code sections 12414.13 and 12414.14 provide that customers under these circumstances can file a complaint with the insurance commissioner," and that the "insurance commissioner's ruling is ultimately subject to judicial review") (citing Cal. Ins. Code § 12414.19).

The above conclusions are plain from the face of the operative statutes' clear language. Fidelity has demonstrated in its RAB that the applicable case law (*see, e.g.*, RAB at 80-91) and legislative history of the pertinent statutes (*see, e.g.*, RAB at 36-53) also support affirming these conclusions. CLTA thus does not repeat Fidelity's analysis here.

C. The IECs That Serve The Title Industry Without Any Filed Rates Illustrate That There Is No Inherent Injury To Consumers In Unfiled Rates.

In simple terms, escrow in the context of a residential real estate sale or refinancing transaction is the process whereby the parties to the transaction hire a neutral third party to handle their exchange of money and related documents necessary for closing the transaction. To place Villanueva's "unfiled" rate legal theory in proper perspective, it bears emphasizing that individuals who are buying, selling or refinancing residential property in California may use an IEC for their transaction. An IEC is an escrow company that is independent from a title company. Significantly, an IEC is *not* regulated by the Department and is *not* required to file its rates with the Department or any other governmental entity for the same escrow services offered by a Regulated Title Entity. [9]

[9] IECs are regulated by the Commissioner for the California Department of Business Oversight pursuant to Division 6 of the California Financial Code (commencing with section 17000), which contains no requirement that an IEC file any rates with any regulatory body. *See* https/dbo.ca.gov/escrow-law/.

A particular transaction could involve both an IEC and a Regulated Title Entity. This occurs, for example, when an IEC engages a Regulated Title Entity to handle a "sub-escrow" or portion of the transaction, such as receiving the lenders' funds, paying off the prior loans, and transferring the funds at the close of escrow. *See, e.g.*, CLTA's Motion For Judicial Notice, Walker Dec., ¶ 5, Ex. C, p. 100 (recounting that the buyer and seller in the subject residential real estate sale transaction contracted with an IEC to handle the transaction, which in turn engaged an "underwritten title company" to provide "sub-escrow" services related to a portion of the transaction) (also available at *Kirk*, 2016 Cal. App. Unpub. LEXIS 4668, at *3-4).[10]

IECs and Regulated Title Entities are both required by federal law to itemize and disclose their charges for escrow services to their customers in each transaction. That is, in virtually all residential real estate transactions, federal law requires that escrow agents itemize on estimated and final HUD-1 closing statements every escrow service fee they charge in a residential real estate sale transaction. *See* Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. § 2603(a); 12 C.F.R. § 1024.8 (addressing requirements for HUD-1 form); *Washington Mutual Bank v.*

[10] The unpublished Court of Appeal decision in *Kirk* is not cited for any precedential value, but rather to illustrate the role of an IEC in real estate transactions.

Superior Court, 75 Cal.App.4th 773, 776, 779 (1999) (RESPA requires "the use of a standard disclosure form at the time of settlement, or closing, that is known as an 'HUD-1 form'") (citation omitted); *see* 76 Fed. Reg. 78977-79017 (Dec. 11, 2011) (version of regulation in effect during relevant period).

Neither the required HUD-1 form nor the applicable regulations make any mention of filed rates, which is unsurprising as they apply both to IECs, which have no obligation to file rates, and to Regulated Title Entities, which are obligated to file rates in California by section 12401.1. *See, e.g.*, 12 C.F.R. § 1024.8 (requirements for HUD-1 form include no mention of filed rates; 76 Fed. Reg. at 79003-79007 (sample HUD-1 and HUD-1A forms in effect during relevant period). As the trial court recounted below, the Department does not regulate how HUD-1 statements are completed and has no regulations regarding how services performed by a Regulated Title Entity are to be described on a HUD-1. *See* CLTA's Motion For Judicial Notice, Walker Dec. ¶ 3, Ex. A (Statement of Decision in this case ("*Villanueva SOD*"), at p. 47, lines 21-24). [11]

Thus, an escrow customer could receive the exact same escrow services from two neighboring escrow businesses—one (the Regulated Title Entity) that has a filed rate schedule, and one (the IEC) that does not.

[11] The page number citations are to the consecutively numbered pages in CLTA's Motion For Judicial Notice.

The selection of which company to use for all or a portion of the escrow may be based on myriad factors, such as, for example, market power of the buyer or seller to select the company; simple convenience factors such as the location of the company's offices; established relationships between the real estate professionals and a particular company; and/or the preference of the lenders for a particular company. As the trial court below observed, Villanueva placed no importance on whether Fidelity had filed rates: "The Villanuevas did not review any of Fidelity's filed rate manuals prior to closing or before this action and, thus, did not rely upon or form any expectations based on those manuals." *See* CLTA's Motion For Judicial Notice, Walker Dec., ¶ 3, Ex. A (*Villanueva* SOD), p. 50, lines 8-10.

This backdrop illustrates that whether there is a filed rate or not for a particular escrow service does not change the nature or quality of the service that the customer receives. Relatedly, it explains why litigation based on the "unfiled" rate legal theory alleges no real-world harm to plaintiffs asserting they were charged an escrow fee by a Regulated Title Entity for which it allegedly had no filed rate. The trial court in this case, for example, concluded after trial that Villanueva's alleged "unfiled" rate theory asserted an alleged technical violation unaccompanied by any injury to him.

Villanueva did not contend that Fidelity's challenged fees were excessive, or that the actual services provided in exchange for the

challenged fees were unnecessary or performed improperly. Rather, Villanueva's entire complaint was that the challenged escrow charges allegedly were not included in Fidelity's filed rate schedules. *See Villanueva*, 26 Cal. App. 5th at 1108 (trial court awarded no restitution for technical violations as "Plaintiffs received the benefit of their bargain" and "did not contend that the services were unwarranted, 'unsatisfactory, or unfairly priced, and all of the services and rates were disclosed up front and agreed to by Plaintiffs'").

Indeed, the trial court in *Villanueva* found that "(1) Plaintiffs benefitted from Fidelity's preparation of deeds and its negotiation of low third party delivery service fees that were lower than those charged by other escrow holders; (2) the fees were disclosed to and approved by Plaintiffs in their estimated closing statements; (3) Plaintiffs failed to show economic injury as a result of omissions from rate manuals they neither reviewed nor relied on; and (4) awarding restitution would 'put Plaintiffs in a better position than they expected to receive'." *Villanueva*, 26 Cal. App. 5th at 1108 (internal quotation marks omitted). Any award of restitution thus would have entailed Plaintiffs reaping a windfall and paying nothing for escrow services that were necessary, valuable and in fact performed. The result was the same for Kirk. *See* CLTA's Motion For Judicial Notice, Walker Dec., ¶ 4, Ex. B (Kirk SOD), p. 40, lines 20-24; *id.*, ¶ 5, Ex. C, p. 114 (affirming trial court's ruling that Kirk was not entitled to restitution

for paying $100 for a sub-escrow fee for which the filed rate was "$60 minimum charge," because he paid no more than the $100 fair market value for the service he received), a copy which also is available at *Kirk*, 2016 Cal. App. Unpub. LEXIS 4668, at *14.

D. The "Unfiled" Rate Theory Seeks Judicial Interpretative Ratemaking In Violation Of Section 12414.26's Immunity And Section 12414.29's Exclusive Jurisdiction.

The "unfiled" rate legal theory effectively requires courts to "make" the applicable rate by determining factual questions regarding the nature of the services that the Regulated Title Entity provided for its challenged charges, including whether they are exempt from filing requirements. It also necessitates that the trial court interpret filed rate schedules to determine whether a challenged charge is encompassed within a filed rate. Put differently, the "unfiled" legal theory challenges the Regulated Title Entity's "basic classifications of ... services to be used as the basis for determining rates" (§ 12401.2), and its "rate schedules filed with the Commissioner" (§ 12401.1).

A Regulated Title Entity acts "pursuant to the authority conferred by Article 5.5" (§ 12414.26) in making its basic classifications of services and in filing its rates. A lawsuit based on the "unfiled" rate legal theory thus is within section 12414.26's immunity from "civil proceedings" based on acts taken pursuant to the authority conferred by Article 5.5. Further, it invades

the Commissioner's exclusive jurisdiction conferred by section 12414.29 to administer and enforce Article 5.5.

This point is evident in section 12340.7 discussed above, which defines the terms "rate" or "rates" as being synonymous with "the charge or charges ... made to the public by a title insurer, an underwritten title company or a controlled escrow company, for *all* services it performs in transacting the business of title insurance," without regard to whether they are filed or unfiled. Section 12340.7 expressly excludes "miscellaneous charges" from its definition of "rate" or "rates." Additionally, two sections in Article 5.5 expressly authorize a Regulated Title Entity to charge escrow fees other than in accordance with rate filings which have become effective: (i) section 12401.8—charges in excess of the rate filing "may be made" for "unusual services," subject to certain prerequisites; and (ii) section 12401.71(a)—a "new" rate "may" be used if it results in a reduction from an existing rate and certain prerequisites are satisfied. A Regulated Title Entity thus acts "pursuant to the authority conferred by Article 5.5" (§ 12414.26) in determining whether a particular charge is encompassed in a filed rate or is excepted altogether from filing.

In this case, for example, Fidelity concluded that because the statutory "rate" definition requires filed rates for services that "*it* performs" (§ 12340.7) (emphasis added), charges for "pass through" delivery fees performed by third parties were not required to be included in its schedule

of rates. *See Villanueva* 26 Cal. App. 5th at 1105. Fidelity also concluded that its challenged "draw deed" fees were not "unfiled" because they were encompassed within its filed "document preparation" rate. *Id.* at 1106.

On the latter issue, also discussed above, the trial court recounted that Fidelity's escrow officers, in their discretion and consistent with industry custom and practice, described the charge for "deed preparation" on a HUD-1 closing statement either as "document preparation" or "draw deed"—both of which adequately describe deed preparation. *See* CLTA's Motion For Judicial Notice, Walker Dec., ¶ 3, Ex. A (*Villanueva* SOD), p. 47, lines 18-21. The trial court agreed with Fidelity's interpretation regarding the "draw deed" fees as being within its filed "document preparation" rate, *but not until after trial. Villanueva,*26 Cal. App. 5th at 1107 (observing "the court rejected Plaintiffs' assertion that drawing a deed was different from document preparation"). As the trial court recounted:

> [Department employee] Mr. Buggage reviewed and accepted the "document preparation" rate in each relevant Fidelity rate manual, and found the rate unambiguous, interpreting it to cover the service of preparing legal documents, including deeds—as did Mr. Villanueva. Fidelity was authorized under Article 5.5 to use the document preparation rate, i.e., to charge that rate, in the manner interpreted and accepted by the CDI. [CLTA's Motion For Judicial Notice, Walker Dec., ¶ 3, Ex. A (*Villanueva* SOD), p. 48, line 22 to p. 49, line 4 (footnotes omitted) (footnotes omitted).]

Waiting until the end of trial to determine whether immunity applies, though, renders immunity useless. Section 12414.26's immunity must be applied at the outset of a case challenging a Regulated Title Entity's escrow service fees on the ground they are "unfiled," i.e., not included in its rate filings. Otherwise, there is no immunity at all, because the Regulated Title Entity already has been subjected to burden of the litigation.

The above conclusions are plain from the face of the operative statutes' clear language. Fidelity also has demonstrated in its RAB that the applicable case law (*see, e.g.*, RAB at 27-34; 74-80) and legislative history of the pertinent statutes (*see, e.g.,* RAB at 36-59) support affirming these conclusions. CLTA does not repeat Fidelity's analysis here.

E. The Department's Opinion Of The "Unfiled" Rate Theory Is Not Entitled To Deference.

As for Villanueva's reliance on the Department's opinion of the "unfiled" rate legal theory, it is entitled to no deference in light of Villanueva's position that the statutory scheme at issue is unambiguous. *See* Villanueva's POB at 15, 58. The Supreme Court has made clear that ambiguity is a prerequisite for any deference to an agency's statutory interpretation. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (instructing that "[f]irst and foremost," a court is not to afford deference to an agency's interpretation of a regulation unless the regulation is "genuinely ambiguous" and then only as a last resort after exhaustion of all

"traditional tools" of construction). Fidelity also has demonstrated in its RAB that the Department's opinion is not entitled to deference (*see, e.g.*, RAB at 72-74). CLTA does not repeat Fidelity's analysis here.

Rather, it bears recounting that the trial court in *Kirk* gave no deference to the Department's opinion because it concluded the Department and Bernheim cooperated together to suppress evidence that undercut it. Specifically, in *Kirk*, the trial court found that the Department "had a policy of reviewing all title and escrow rates for ambiguity, illegality, and non-compliance with Article 5.5 before their effective dates and when they were re-filed in conjunction with other rates." CLTA's Motion For Judicial Notice, Walker Dec., ¶ 4, Ex. B (Kirk SOD), p. 68, line 3 to page 70 line 5. It further found that: "**DOI cooperated with Plaintiff's counsel to suppress this historical information about its review**, and approval or acceptance of [the Regulated Title Entity's] rates, and to minimize any notion that the DOI's actions in approving and accepting title insurance rates could be relied upon by the insurer filing the rates." *Id.*, p. 70, lines 6-9 (emphasis added).

As examples, the trial court recounted that after a Department employee's statement was filed in the *Kirk* litigation, "Plaintiff's counsel Steven Bernheim complained directly to the Insurance Commissioner," resulting in the statement being withdrawn for a period. *Id.*, p. 70, lines 10-15. When the statement was received in evidence at trial in *Kirk*, though,

the trial court concluded "[t]he weight of the evidence at trial confirmed that the statement in the [employee's] declaration regarding the [Department's] review of title insurance filings was true." *Id.*, p. 70, lines 17-20.

As the trial court put it, "[t]his was not the end of Mr. Bernheim's efforts to discourage testimony from DOI representatives when he viewed it as unfavorable to his case, nor the end of the DOI's cooperation in these efforts." *Id.*, p. 70, lines 21-23. "When Dwayne Buggage, a [Department] rate analyst who had previously agreed with [the Regulated Title Entity's] interpretation of one of its rates, was designated as the person most knowledgeable to testify at a deposition, Mr. Bernheim staged a scene at the deposition, thereby preventing it from going forward. As part of this scene, Mr. Bernheim made a show of phoning the Insurance Commissioner directly to complain of the designation of Mr. Buggage. When the deposition resumed at a later date, Mr. Buggage had been replaced as the designated witness by a witness who Mr. Bernheim viewed as more favorable to his case." *Id.*, p. 70, line 23 to p. 71, line 2.

The trial court concluded that "[c]urrent employees of the DOI could not help but be aware of the history of Mr. Bernheim's contacts with the Insurance Commissioner, and were therefore aware that any testimony unfavorable to Mr. Bernheim's case would be reported promptly and directly to their ultimate boss, the Insurance Commissioner, who would

respond in a manner designed to assist Mr. Bernheim." *Id.*, p.71, lines 3-7. The trial court also commented that another witness who was "no longer an employee of the DOI, also appeared to be influenced by his contact with Mr. Bernheim" and that the "changes in [the witness's] testimony between his first deposition and his testimony at trial showed that the more exposure he had to Mr. Bernheim, the more his testimony matched Mr. Bernheim's theory of the case." *Id.*, p. 71, lines 7-11.

As a result of the above conduct, the trial court refused to credit "much of the testimony of [then] present and former DOI representatives" called as witnesses by Kirk for purposes of attempting "to minimize the history of DOI's review, acceptance, or approval of the rates at issue" and to persuade the court that the "DOI would have interpreted the rate in conformity to the theories of Plaintiff's lawyers." *Id.*, p. 71, lines 12-18.

As mentioned above, the evidential underpinnings of the above finding in *Kirk* were the subject of the Commissioner's unsuccessful writ proceeding attempting to block the Regulated Title Entity's trial subpoena requiring the Commissioner's production of related documents, which the Second District Court of Appeal, Division Three, in *Jones v. Superior Court*, Case No. B253605, denied *on the merits* after reviewing an evidential record.[12] That was the same Division that a few years earlier had

[12] *See* CLTA's Motion For Judicial Notice, Walker Dec., ¶¶ 7-8, Exs. E-H.

decided *MacKay*. The Commissioner also unsuccessfully sought this Court's review of the Court of Appeal's ruling, which this Court, en banc, denied. Villanueva's Motion For Judicial Notice, Walker Dec., ¶ 8, Ex. G, a copy of which order also is available at *Jones v. Superior Court*, Case No. S216987, *review denied*, 2014 Cal. LEXIS 2052 (Cal. March 19, 2014).

In a similar vein, in his POB, Villanueva quotes from a letter that a Department staff attorney sent to the trial court in *Wilmot*, stating no procedure was available at the Department for obtaining restitution or any other relief sought by Wilmot. *See* POB at 65.[13] Kirk's amicus letter, filed November 13, 2018 in this Court, attached an excerpt from the same letter. What Villanueva ignores is that the letter does not disclaim the general ability of the Department to obtain refunds for consumers—as that would be wrong under the official published position of the Department, the testimony of the Department, the Insurance Code, and the past settlements of the Department. Instead, the Department staff attorney merely states that the Department had entered into a settlement with the Regulated Title Entity resolving a 2004 market conduct examination that challenged, among other things, the loan tie-in escrow fee that Wilmot challenged in

[13] As Fidelity noted in its response to Kirk's amicus letter, filed on November 27, 2018, at 11 n. 2, the same Department staff attorney submitted an unofficial letter on a different topic in *Villanueva*, and the trial court declined to take judicial notice of it because it did not comply with the Administrative Procedure Act.

her action, and that there had been no violation of the settlement. *See* POB, Attachment 1.

III. CONCLUSION

For the foregoing reasons, and the reasons stated in Fidelity's RAB, CLTA respectfully requests that the Court affirm the judgment of the Court of Appeal.

Dated: December 13, 2019

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

I certify in accordance with California Rules of Court, rule 8.504(d) that this brief contains 7,874 words, including footnotes, but excluding the tables and this certification. In preparing this certification, I relied on the Microsoft Word 2010 program used to prepare this document.

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

Dated: December 13, 2019

Ronald D. Kent/gm
RONALD D. KENT

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California, I am over the age of 18 and not a party to the within action. My business address is 601 South Figueroa Street, Suite 2500, Los Angeles, CA 90017.

On December 13, 2019, I served the foregoing **CALIFORNIA LAND TITLE ASSOCIATION'S AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT AND APPELLEE FIDELITY NATIONAL TITLE COMPANY** on each interested party in this action, as follows:

See Attached Service List

[X] **(VIA MAIL)** I placed a true copy of the foregoing document in a sealed envelope addressed to each party as set forth above. I placed each such envelope, with postage thereon fully prepaid, for collection and mailing at Los Angeles, California 90017. I am readily familiar with 's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day in the ordinary course of business.

[ ] **(VIA PDF FORMAT)** I caused each such document to be transmitted by PDF Format via e-mail to the parties listed above via the 2nd District Court of Appeals' eService.

[ ] **(VIA FACSIMILE)** I caused a true copy of the foregoing document to be served by facsimile transmission to each interested party at the respective facsimile numbers listed. A transmission report was properly issued by the sending facsimile machine for each interested party.

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

Executed on December 13, 2019, at Los Angeles, California.

Jo An Mack

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