

SUPREME COURT
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IN THE SUPREME COURT OF CALIFORNIA

MANNY VILLANUEVA et al.,
Plaintiffs and Appellants,

v.

FIDELITY NATIONAL TITLE COMPANY,
Defendant and Respondent.

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

**APPLICATION TO SUBMIT AMICUS CURIAE
BRIEF AND AMICUS CURIAE BRIEF OF
UNITED POLICYHOLDERS IN SUPPORT OF
PETITIONERS MANNY VILLANUEVA, ET AL.**

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For Amicus Curiae,
UNITED POLICYHOLDERS

DEC 19 2019


CLERK SUPREME COURT

CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208, United Policyholders make the following disclosures regarding persons or entities having a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves: There are no interested persons or entities who must be identified pursuant to Rule 8.208.

DATED: December 19, 2019

By:



Amy Bach, Esq.(SBN 142029)
Mark Dillman, Esq.(SBN 327965)

APPLICATION TO SUBMIT AMICUS CURIAE BRIEF IN SUPPORT
OF PETITIONERS & STATEMENT OF INTEREST

Pursuant to California Rule of Court 8.520(f), proposed amicus curiae, United Policyholders, respectfully seeks permission to file the accompanying amicus brief in support of Petitioners Manny Villanueva, et al. in the above-captioned case.¹

United Policyholders (“UP”) is a non-profit organization based in San Francisco, California that serves as a voice and information resource for insurance consumers across all 50 states. The organization is tax-exempt under Internal Revenue Code §501(c)(3). UP is funded by donations and grants and does not sell insurance or accept money from insurance companies.

UP’s work is divided into three program areas: *Roadmap to Recovery*[™] (disaster recovery and claim help for victims of wildfires, floods, and other disasters); *Roadmap to Preparedness* (insurance and financial literacy and disaster preparedness), and *Advocacy and Action* (advancing pro-consumer laws and public policy). UP hosts a library of tips, sample forms, and articles on commercial and personal lines insurance products, coverage, and the claims process at www.uphelp.org.

¹ No party or counsel for a party authored this amicus brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than United Policyholders and their counsel made a monetary contribution intended to fund the preparation or submission of the amicus brief.

From the organization's inception, United Policyholders has consistently engaged with the California Department of Insurance on a wide range of matters. UP initiatives relate to insurance forms, rates, claims handling, consumer services, and the Insurance Commissioner's authority to regulate the industry. UP has extensive first-hand experience with how the limits of the agency's authority necessitate the private bar's engagement. The private bar provides an essential complement to the agency's regulatory and consumer protection functions.


A diverse range of policyholders throughout California communicate on a regular basis with UP, which allows us to provide topical information to courts via the submission of amicus curiae briefs in cases involving insurance principles that are likely to impact large segments of the public and business community. One of UP's past amicus briefs cited by the California Supreme Court was in *Association of California Insurance Companies v. Dave Jones, Insurance Commissioner*, Case No. S226529, Cuellar, J., January 23, 2017 (Ct.App. 2/1 B248622, Los Angeles County Super. Ct. No. BC463124) and its arguments have been adopted by the Supreme Court in *TRB Investments, Inc. v. Fireman's Fund Ins. Co.*, 40 Cal.4th 19 (2006) and *Vandenberg v. Superior Court*, 21 Cal.4th 815 (1999). UP has filed amicus *curiae* briefs in over 400 cases throughout the United States.

Commentators have stressed that an amicus curiae is often in a superior position to “focus the court’s attention on the broad implications of various possible rulings.” (Robert L. Stern et al., *Supreme Court Practice* 570-71 (6th ed. 1986) (quoting Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 608 (1984)).) This case will have broad implications for consumers in California to not only hold their title insurance companies accountable for misconduct, but insurers across multiple lines.

UP therefore respectfully seeks permission to file the accompanying amicus brief for further discussion in support of Petitioners’ arguments.

DATED: December 19, 2019

By:



Amy Bach, Esq.(SBN 142029)
Mark Dillman, Esq.(SBN 327965)

For Amicus Curiae,
UNITED POLICYHOLDERS

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INTRODUCTION

The Insurance Code, authored with consumer protection as a primary consideration, requires title insurance companies to file their rates with the Insurance Commissioner. Title companies are authorized to charge consumers only those filed rates, unless unusual circumstances exist that are not present in this case (i.e. “unusual insurance risk” or “unusual services performed”). (Cal. Ins. Code secs. 12401.1, 12401.7, 12401.71, 12401.8.)¹

The lower courts found and confirmed that Fidelity charged class members rates that had not been filed according to the Insurance Code. (Opinion, 38, 48.) The sixty words of section 12414.26, all of which must be given meaning and effect, are:

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.

This case presents the question of whether section 12414.26 provides immunity for claims against title insurance companies that failed to file rates with the Insurance Commissioner. The Court of Appeal held that by charging unfiled rates, Fidelity acted *pursuant* to the authority conferred by

¹ All further statutory references are to the California Insurance Code unless otherwise stated.

Article 5.5. Moreover, the Court of Appeal held that the Insurance Commissioner has *exclusive* original jurisdiction over the class' claims. (Opinion, 38, 48).

If the Court of Appeal's above-mentioned holdings are affirmed, insureds across multiple lines of insurance will be adversely impacted and left without any way to seek a meaningful remedy for insurer misconduct. The Court of Appeal misconstrues the scope of Section 12414.26 and incorrectly states that the Insurance Commissioner has exclusive original jurisdiction over the class' claims.

DISCUSSION

"Unfiled rates" are at the center of this discussion. UP agrees with Petitioners, and Fidelity does not dispute, that there is no legal distinction between charging a rate for a service for which no rate was filed, and charging a rate higher than the filed rate. Both are unfiled rates, both are unauthorized, both have the same adverse effect of overcharging consumers, and therefore, both actions should be considered synonymously when a violation of the applicable Insurance Code Section occurs.

I. SECTION 12414.26 DOES NOT PROVIDE IMMUNITY TO AN UNDERWRITTEN TITLE INSURANCE COMPANY FOR CHARGING CONSUMERS FOR SERVICES FOR WHICH THERE HAVE BEEN NO RATE FILINGS WITH THE INSURANCE COMMISSIONER.

A. The Scope of Section 12414.26 Should Be Limited to Antitrust Violations.

UP agrees with the Insurance Commissioner that the scope of section 12414.26 should be limited to antitrust violations. The Attorney General, on behalf of the Commissioner, stated that, “the Court of Appeal erred in holding that plaintiff’s Unfair Competition Law (UCL) claims were barred by the safe harbor for anti-trust violations in Insurance Code section 12414.26.” (AOB 83; Letter from Xavier Becerra, Attorney General, State of California, to this Court, at p. 1.)

It is usually presumed that, “the same language in related statutes carries consistent meaning.” (U.S. v. Davis (2019) 139 S. Ct. 2319, 2329.) Section 12614.26 is nearly identical to three other immunity statutes across other lines of insurance and, therefore, should be afforded similar interpretation. (*See Code* §§ 11758 (applicable to workers compensation insurance); 795.7 (applicable to senior citizens health insurance); and 1860.1 (applicable to property and casualty insurance, among others).) This Court reviewed section 11758, applicable to workers compensation insurance, and determined that extending immunity only “to concerted activity otherwise barred by the antitrust laws, and not to the individual misconduct of an insurer” was supported by the legislative history. (*State Comp. Ins. Fund (“SCIF”) v. Superior Court* (2001) 24 Cal.4th 930.) The Insurance Commissioner also places great weight on this Court’s holding in

SCIF. (AOB 84 “[T]his Court held that section 11758 applies only to concerted activity otherwise barred by the antitrust laws.” (citing *SCIF*.) Section 12614.26 should therefore also apply only to concerted activity. This Court’s holding in *SCIF* is representative of a general consensus of holdings that Petitioners bring to this Court’s attention. (See *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968; *Cole v. Hartford Financial Services* (C.D. Cal 2009) 2009 WL 10675233; *MacKay v. Superior Court (21st Century Ins.)* (2010) 188 Cal.App.4th 334.)

By barring a lawsuit alleging no antitrust implications, the Court of Appeal has expanded immunity beyond what the Legislature intended. Petitioners here do not allege concerted activity, but rather individual misconduct of an insurer not intended to be immunized. If the lower court decision stands, a class of 500,000 plaintiffs would only be a small portion of the potential persons harmed. Insurers, not only in the business of title insurance, but across workers compensation, senior citizens health insurance, and property and casualty insurance, will be negatively impacted. Insurers immunity cannot be mistakenly expanded to non-antitrust claims, closing the only meaningful channel harmed consumers have to hold insurers directly accountable for their actions.

Furthermore, UP agrees with Petitioners that section 12614.26 words, “under any law...enacted” must be given meaning. (emphasis added.) “Enacted Law” is “law that has its source in legislation; written

law.” (AOB 36 (citing Black’s Law Dictionary (9th ed. 2009) p. 963).) This express language limits immunity only to enacted, or statutory, law. This means that the court below erred by affirming dismissal of the *common law* breach of fiduciary duty cause of action. Moreover, this language reinforces that the Legislature’s intent was to limit the immunity to actions brought under California’s antitrust statutes, primarily, but not solely, the Cartwright Act.

This Court’s findings in *SCIF*, while discussing section 11758 extending beyond concerted action, holds true here as well; “It is doubtful section [12414.26] intended to paint with so broad a brush.” (*SCIF*, 24 Cal.4th at p. 938.)

B. The Scope of Section 12414.26 Should be Narrowly Construed and is “expressly limited” to Acts Done “pursuant to the authority conferred by” Articles 5.5 and 5.7.

UP agrees with the Insurance Commissioner that the scope of the immunity statute, section 12414.26, must be given a “narrow construction” since “this Court took a similar, narrow approach in construing a nearly identical immunity provision.” (AOB 83 (referring to *SCIF*); *See also New Hampshire Ins. Co. v. City of Madera* (1983) 144 Cal.App.3d 298, 305 (“immunity statutes are to be strictly construed.”).) The specific language that must be given a narrow construction in section 12414.26 is, “[n]o act

done, action taken, or agreement made pursuant to the authority conferred by Article 5.5...”

Villanueva holds that the above language immunizes from suit any misconduct “related” in any way to “ratemaking activities.” (*Villanueva v. Fidelity Nat’l Title Co.* (2018) 26 Cal.App.5th at 1124-112, 1133.)

Villanueva expands the scope of immunity far beyond the plain words of the statute. The statute does not confer immunity on actions merely and broadly “related” to “ratemaking.” The actual words of the statute limit immunity to conduct done “pursuant to the authority conferred by Article 5.5.”

The Insurance Commissioner and Petitioners correctly remind this Court to refer back to *SCIF*. There, the dispute over section 11758, a nearly identical provision, involved misreporting of medical-legal costs, not the calculation of rates. (*See SCIF*, 24 Cal.4th at 936.) This Court went on to immediately make the distinction 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...’ It does not refer to an ‘act done, action taken or agreement made pursuant to this article.” (*Id.* (emphasis in the original); *See also Id.* at 942 (“Schaefer does not challenge the method by which the rate or premium charged was set, but rather the insurer’s misallocation of certain expenses.”)) The distinction between “pursuant to the *authority*” and “pursuant to” is a simple yet important one. To hold that “failing to

comply” with a statute acts “pursuant to” that statute’s authority is an extremely broad interpretation and is especially harmful when interpreting an immunity statute. The danger of broadly reading an immunity statute is further compounded when classes of consumers typically with heightened protection, insureds, are impacted. As discussed above, this case has far reaching effects beyond just title insurance.

Further, Article 5.5 does not confer authority to charge unfiled rates. It only authorizes rates filed with the Insurance Commissioner that have become effective after public display. (§§ 12401.1, 12401.7.) Here, as in *SCIF*, Petitioners are not challenging the “manner in which premiums or rates are set,” but are challenging the charging of unfiled rates. (*SCIF*, 24 Cal.4th at 936-7.) As the Insurance Commissioner points out, in making its decision, the Court of Appeal “relied on other intermediate appellate decisions that are less receptive to consumer claims.” (AOB 84 (citing *Walker v. Allstate Indem. Co.* (2000) 77 Cal.App.4th 750, 756; *MacKay*, 188 Cal.App.4th at 1448.) These cases are easily distinguished because “[t]he decisions in *Walker* and *MacKay* both turned on the fact that the Insurance Commissioner approved the rates at issue.” (Id.) This Court, in *SCIF*, looked to *Walker* and found, “If section 1860.1 has any meaning whatsoever... the section must bar claims based upon an insurer’s charging a rate that has *been approved* by the commissioner.” (*SCIF*, 24 Cal.4th at 942 (emphasis added).)

This Court recognized that the ability to second-guess an administrative body on rates that have been approved (or alternatively not unapproved), and clogging the courts to do so, is a justifiable reason that the legislature would have enacted an immunity statute. This rationale, however, does not apply when *unfiled rates* are charged to consumers, as is the case here, since the administrative body's ability is not being second-guessed. As such, charging an *unfiled rate* is not an act done *pursuant* to the authority of Article 5.5.

C. California Courts Have Jurisdiction to Interpret Rates.

UP agrees with Petitioners that courts have jurisdiction to interpret rates. *Villanueva* holds that theories that “require the court to interpret [an insurer’s] rate filings to determine whether they encompass the charges at issue” are “a challenge to the rates as filed...and are subject to the immunity.” (*Villanueva*, 26 Cal.App.5th at 1125.) UP is not aware of any California court, until *Villanueva* that has ever held that insurers are immune from judicial interpretation of their rates.

When a court interprets rates, it is not engaging in ratemaking or “challenging” the rates as filed. Rather, it is answering the question, “what does the rate mean?” This is no different than judicial interpretation of a statute or constitution. The ‘filed rate doctrine’ is a good analogy to show that immunity should not extend to courts interpreting rates. Just as the

California Supreme Court explained that the safe harbor statute precludes suits against insurers for “charging approved rates alleged nevertheless to be 'excessive'" (*SCIF*, 24 Cal.4th at 942), the filed-rate doctrine "precludes a challenge to the reasonableness of the rates of common carriers if the rates have been approved by an appropriate regulatory agency." (*Williams v. Duke Energy Int'l* (6th Cir. 2012) 681 F.3d 788, 796.) However, "where rates are not filed, defendants may not use the filed rate doctrine as a shield from civil liability." (*In re Blue Cross Blue Shield Antitrust Litig.* (N.D. Ala. 2017) 238 F.Supp.3d 1313, 1328, quoting *In re Transpacific Passenger Air Transp. Antitrust Litig.* (N.D. Cal. 2014) 69 F.Supp.3d 940, 961.) Similarly, “the filed rate doctrine ... does not preclude courts from interpreting the provisions of a tariff and enforcing that tariff.” (*Imperial Irrigation Dist. v. Calif. Indep. Syst. Operator Corp.* (S.D. Cal 2015) 146 F. Supp.3d 1217, 1230.)

In sum, this Court should not allow 12414.26 to protect insurers from suit, and ultimately liability, for the harm caused by the failure to file rates appropriately.

II. THE INSURANCE COMMISSIONER DOES NOT HAVE EXCLUSIVE JURISDICTION OVER ANY ACTION AGAINST AN UNDERWRITTEN TITLE COMPANY FOR SERVICES CHARGED TO THE CONSUMER, BUT NOT DISCLOSED TO THE DEPARTMENT OF INSURANCE.

A. The Court of Appeal Erred in Barring Petitioners' UCL Claim Based on Concepts of Primary and/or Exclusive Jurisdiction.

UP agrees with the Insurance Commissioner's view that the "ability of consumers to pursue private actions against insurance companies" are "complementary to administrative enforcement, serve the public interest, and should not be barred by limited immunity statutes intended to address other concerns." (AOB 83.) This Court has held that "[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* (2009) 46 Cal.4th 282, 292.) The reason behind giving deference is not an arbitrary default rule, but rather a pragmatic approach for agencies and consumers to share expectations. (*See Id.* ("When an administrative interpretation is of long standing and has remained uniform, it is likely that numerous transactions have been entered into in reliance thereon, and it could be invalidated only at the cost of major readjustments and extensive litigation.)) The Commissioner has been steadfast in asserting that UCL actions, in circumstances such as this case, serve "an important purpose that *complement*, and *do not conflict* with" their role set out in the code. (AOB 85 (emphasis added).) By disagreeing with the Insurance Commissioner, the Court of Appeal has left this class of consumers, and potential future consumers, in a worse off and unfair position based on reliance of the option to adjudicate their claims through the courts. Further, consumers are

indirectly harmed when the Insurance Commissioner does not believe (s)he has exclusive jurisdiction, or the power to provide a proper remedy, and thus does not act accordingly.

Next, UP agrees with Petitioners that *Villanueva* was in conflict with two of this Court's most important decisions on jurisdiction. (*See Farmers Ins. Exchange v. Superior Court* (2008) 2 Cal.4th 377; *Jonathan Neil & Assocs. v. Jones* (2004) 33 Cal.4th 917.) This Court held in both opinions that the Insurance Commissioner's jurisdiction in rate related cases is primary, not exclusive, aligning with the Insurance Commissioner's view.

Finally, UP agrees with Petitioners that section 12414.13 does not confer exclusive jurisdiction on the Insurance Commissioner. The section reads as follows:

Any person aggrieved by any rate charged...*may* request such person or entity to review the manner in which the rate...has been applied...Any person aggrieved... *may* file a written complaint and request for hear with the commissioner. (Emphasis added)

Insurance Code sec. 16 sets out that, as used in this code, "shall" is a mandatory term, and "may" is permissive. As such, this statute cannot possibly convey exclusive jurisdiction. At the very least, this is far from a clear express grant of exclusive authority to the Insurance Commissioner. (*See Bell v. Blue Cross* (2005) 131 Cal.App.4th 211, 216.)

B. The Commissioner Cannot Provide an Adequate Remedy to Parties Harmed by Insurer Misconduct.

UP agrees with Petitioners that the Insurance Commissioner cannot provide an adequate administrative remedy, and thus, cannot have exclusive jurisdiction. This Court has held that: “The rule that a party must exhaust his administrative remedies prior to seeking relief in the courts has no application in a situation where an administrative remedy is unavailable or inadequate.” (*Ramos v. County of Madera* (1971) 4 Cal.3d 685, 691.) In his letter, the Insurance Commissioner points out that the Court of Appeal’s opinions “suggests restitution would be unavailable” which would “leave consumers to bear injuries caused by unlawful insurance practices.” (AOB 85 (footnote 3).) In *SCIF*, this Court also made the observation that “SCIF does not point to any authority allowing the Insurance Commissioner to order a carrier to refund all improperly collected premiums to the insured.” (*SCIF*, 24 Cal.4th at 938.)

Moreover, in the past nearly thirty years UP has followed the regulatory actions of each Insurance Commissioner. UP cannot recollect an instance where the Insurance Commissioner ordered any insurer or title company to restore consumers any unlawful charges, fees, or premiums, without first obtaining the company’s voluntary consent. UP has, however, observed the Insurance Commissioner justifiably fail to take action on an issue because he thought he did not have the power to do so. If the

Insurance Commissioner does not believe (s)he has the power to grant restitution, refrains from doing so, and consumers may not bring their claims to the courts, they are left solving a paradox that does not allow them to be made whole. This cannot possibly be what the legislature intended. The Insurance Commissioner does not have exclusive jurisdiction over the claims in this case.

CONCLUSION


UP respectfully asks this Court to reverse the decision of the Court of Appeal and hold that (1) section 12414.26 does not provide immunity to insurers or underwritten title companies for charging consumers for services for which there have been no rate filings with the Insurance Commissioner, and (2) that the Insurance Commissioner does not have exclusive jurisdiction over any action against an insurer or underwritten title company for services charged to the consumer, but not disclosed to the Department of Insurance.

UP also asks that, to the extent that *Walker*, *MacKay* and *Krumme* are inconsistent with our analysis, they should be disapproved.

Finally, UP asks this Court that the entire decision of the Court of Appeal no longer be citable pursuant to California Rules of Court, rule 8.1115(e)(3).

DATED: December 19, 2019

By:



Amy Bach, Esq.(SBN 142029)
Mark Dillman, Esq.(SBN 327965)

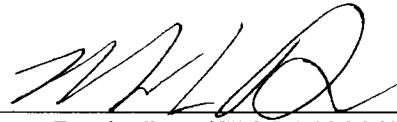
For Amicus Curiae,
UNITED POLICYHOLDERS

CERTIFICATE OF WORD COUNT

The undersigned certifies, pursuant to California Rules of Court, Rule 8.504(d), that this brief contains 3,455 words, including footnotes, but excluding the Application and Proof of Service, as shown by the word count function of the computer program used to prepare this brief.

DATED: December 19, 2019

By:



Amy Bach, Esq.(SBN 142029)

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PROOF OF SERVICE

I am employed in the City and County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is 381 Bush Street, 8th Floor, San Francisco, California 94104.


On December 19, 2019, I served the foregoing document described as **APPLICATION TO SUBMIT AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF PETITIONERS MANNY VILLANUEVA, ET AL.** on the interested parties in this action, as follows:

SEE ATTACHED SERVICE LIST

I caused the foregoing document to be served on the parties by U.S. Mail at 150 Sutter Street, San Francisco, CA 94104.

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

Executed on December 19, 2019, at San Francisco, California.



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