S252035

# IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**MANNY VILLANUEVA, et al.,**

*Plaintiffs and Appellants,*

vs..

**FIDELITY NATIONAL TITLE COMPANY**

*Defendant and Appellant.*

*From a Decision by the Court of Appeal, Sixth Appellate District, Case No. H041870, Santa Clara Superior Court, Case No. 1-10-CV173356*

# APPLICATION TO SUBMIT AMICUS BRIEF AND AMICUS CURIAE BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF PLAINTIFFS MANNY VILLANUEVA, ET AL.

**SHARON J. ARKIN**
(SBN: 154858)
THE ARKIN LAW FIRM
355 S. Grand Avenue, Suite 2450
Los Angeles, CA 90071
T: 541.469.2892
F: 866.571.5676

Attorney for *Amicus Curiae* Consumer Attorneys of California

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355 S. Grand Avenue, Suite 2450
Los Angeles, CA 90071
T: 541.469.2892
F: 866.571.5676

Attorney for *Amicus Curiae* Consumer Attorneys of California

## CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208, Consumer Attorneys of California certifies that it is a non-profit organization which has no shareholders. As such, *amicus* and its counsel certify that *amicus* and its counsel know of no other person or entity that has a financial or other interest in the outcome of the proceeding that the *amicus* and its counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: December 18, 2019

*Sharon J. Arkin*
SHARON J. ARKIN

# APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE AN AMICUS BRIEF IN SUPPORT OF PLAINTIFFS AND APPELLANTS MANNY VILLANUEVA, ET AL.

Consumer Attorneys of California hereby requests that its attached amicus brief submitted in support of plaintiffs and appellants Manny Villanueva, et al., accepted for filing in this action.

Counsel is familiar with all of the briefing filed in this action to date. The concurrently-filed amicus brief is very concise and addresses issues not sufficiently discussed by the parties or other amici. This brief addresses two very precise, but critically-important, points: (1) The purpose and history of filed rates, and; (2) The importance – to both consumers and competitors – of precluding regulated industries from improperly circumventing the filed rate applicable to their operations.

No party to this action has provided support in any form with regard to the authorship, production or filing of this brief.

## STATEMENT OF INTEREST OF THE *AMICUS*

The Consumer Attorneys of California ("Consumer Attorneys") is a voluntary membership organization representing approximately 6,000 associated attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent individuals subjected in a variety of ways to personal injury, employment discrimination, and other harmful business and governmental practices. Consumer Attorneys has taken a leading role in advancing and protecting the rights California consumers in both the courts and the Legislature.

As an organization representative of the plaintiff's trial bar throughout California, including many attorneys who represent consumers in insurance coverage and bad faith cases and in utilizing California's consumer protection laws, such as the Unfair Competition Law, Consumer Attorneys is interested in the significant issues presented in this case, especially with respect to insurers' obligations to comport with the limitations and restrictions imposed when their rates are regulated by the Commissioner of Insurance.

Dated: December 18, 2019

THE ARKIN LAW FIRM

By:_____

SHARON J. ARKIN
Attorneys for *Amicus Curie*
Consumer Attorneys of
California

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(SBN: 154858)
THE ARKIN LAW FIRM
355 S. Grand Avenue, Suite 2450
Los Angeles, CA 90071
T: 541.469.2892
F: 866.571.5676

Attorney for *Amicus Curiae* Consumer Attorneys of California

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## INTRODUCTION

Because the parties have thoroughly briefed many of the legal issues, this brief is focused on two narrow background points: (1) The history and purpose of filed rates; and, (2) The impact on consumers and competitors when filed rates are not enforced and when regulated entities are able to circumvent the regulatory rate limitations imposed on them.

## DISCUSSION

### 1
### THE HISTORY AND PURPOSE OF FILED RATES

One major consideration has been left out of the analysis as to whether and how the immunity provisions of Insurance Code section 12414.13 should apply: What is the purpose of filed rates and will immunity from enforcement of those rates undermine public policy and the protection of both consumers and competitors?

As noted in Rene Sacacas, *The Filed Rate Doctrine: Casualty or Survivor of Deregulation*, 39 Duq. L. Rev. 1, 1, ("Sacacas"), industries which "are essential to economic growth and industrial development" are heavily regulated. "Absent a healthy profile in each of these industries, a nation cannot prosper." (*Ibid.*) As such,"[o]wing to their powerful influence

over economic growth, these industries have been viewed as too important to the nation's well-being to be abandoned to individual economic interests. Accordingly, our society has treated them differently. We have regulated them." (*Ibid.*)

Such regulation goes back for at least two millennia: "Study reveals that barge traffic on the Nile was regulated by the Pharaohs, and the Romans even regulated the size of the wheels on delivery vehicles operating within their city limits. During the Middle Ages, millers were required to grind for all on equal terms and blacksmiths were penalized for refusing to shoe horses. In England, common carriers were regulated during the reign of William and Mary." (*Ibid.*)

Modern day regulation comes in the form of the "filed rate doctrine" or "filed tariff doctrine." That doctrine "forbids a regulated entity from charging rates for its services other than those properly filed with the appropriate . . . regulatory authority." (*Id.*, p. 4.)

Although "prices are meant to be adjusted to meet competition in a free market economy . . . Regulated businesses . . . must dance to a different rhythm." (*Ibid.*)

Historically, there have been forceful reasons for permitting this apparent unfairness to take place: The "preservation of the responsible . . . agency's primary jurisdiction over unjust discrimination;" and "the agency's control over the reasonableness of rates, and the assurance that regulated companies charge only those rates of which the appropriate

agency, and the public, have been made aware." (*Ibid.*)

Thus, "[u]nder the filed rate doctrine, a [regulated entity] was prohibited from offering customers rebates and discounts that are at odds with the filed tariff, which historically reflected a regulator's careful evaluation and affirmative approval of costs and prices. In addition to furthering the non-economic goal of fairness, prohibiting price discrimination limited a monopolist's ability to use its market power to extend its monopoly into secondary markets." (Jim Rossi, *Why the Filed Rate Doctrine Should Not Imply Blanket Judicial Deference to Regulatory Agencies*, 34-Fall Admin. & Reg. L. News 11, 11 (Fall 2008).)

Thus, the filed rate doctrine fulfills two public policy goals: It protects consumers from price gouging and it protects markets from anti-trust monopolies.

As discussed in the next section, the appellate court's finding that consumers (and, presumably, competitors) cannot challenge an insurer's violation of the filed rates undermines both public purposes underlying the filed rate doctrine.

## 2.

## CHARGES OUTSIDE THE FILED RATES UNREASONABLY BURDEN CONSUMERS AND RELIEF BY WAY OF ACIVIL ACTION IS NECESSARY TO PROVIDE A REMEDY

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."

*Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137, 163.

It has been the mandate in California since its legal codes were enacted in 1872 that: "For every wrong there is a remedy." (Civil Code section 3523.) That code section has *never* been amended, superseded or altered in the nearly 150 years since its enactment.

"The common law principle that there is a remedy for every wrong is rooted in the Magna Carta. It is ubiquitous in American law, explicit in the texts of 38 state constitutions, and implicit elsewhere. This principle states a 'remedial imperative' of the common law: If government does not provide redress for wrongs, society might fall apart." (John Vail, Jane Perkins, *Chipping at the Core of Justice*, 40 APR Trial 28, 28 (2004).)

In fact, "[providing remedies for wrongs is a primary

purpose of government." (*Ibid.*)

As the California courts repeatedly point out, section 3523 cannot address or correct moral wrongs, only *legal* wrongs: "The proposition that courts should strain to provide remedies for every 'wrong' in the moral sense flies directly in the face of this longstanding authority that only legal wrongs must be redressed." (*The MEGA Life & Health Ins. Co. v. Superior Court* (2009) 172 Cal.App.4th 1522, 1527.)

But, in this case, it *is* a legal wrong at issue. As noted above, consumers are entitled to rely on the rates filed with a regulatory agency. (*Sacacas, supra*, at p. 4.) Such rate filings "cabin" the prices consumers will pay and assure that they will not be discriminated against when rebates, credits or discounts are offered to others. (*Ibid.*) The filed rate doctrine also protects consumers where, as here, a regulated entity attempts to add a "surcharge" to the filed rate and thereby extract more money from the consumers and thereby obtain more profit.

The briefs of plaintiffs and appellants cohesively and coherently explain the legislative and legal reasons why Insurance Code section 12414.13 does not afford an immunity in the context of the facts here. But it is equally important to confirm that the fundamental public policies underlying the filed rate doctrine similarly confirms that insurers, like other regulated entities, are bound by their filed rates and cannot be permitted to extort even small sums from their hundreds of thousands of customers without recourse and return of those

illegally-obtained profits.

## 3.

## THE UCL IS DESIGNED TO AMELIORATE THE HARM TO COMPETITION FROM THE MISCONDUCT

The UCL claims alleged in this case similarly warrant examination and review in light of the historical purposes of the filed rate doctrine. In this context, the filed rate doctrine attempts to achieve a restraint on anti-trust monopolization.

And what the filed-rate doctrine also achieves is certainty that competition is fair. If an insurer is not bound by its filed rate, it can make an "end-run" around the regulations simply by imposing additional "fees" over and above the rate authorized under the agency filings. Such conduct is manifestly illegal.

Business & Professions Code sections 17200, et seq. ("the UCL") are designed to stop such unlawful activity. Its intent "is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." (*Kwikset v. Superior Court* (2011) 51 Cal.4th 310, 320 (internal quotations and citations omitted.) Or, as explained in *People ex. rel. Mosk v. National Research Co. of California* (1962) 201 Cal.App.2d 765, 771: "Historically, the law of unfair competition and of trademark infringement evolved in the general field of torts. It was concerned primarily with wrongful conduct in commercial enterprises which resulted in business loss to

another, ordinarily by the use of unfair means in drawing away customers from a competitor."

And that kind of unfair competition is precisely what Fidelity National engaged in as alleged in this case. It submitted its public rate filings at a certain dollar figure; then, it increased its profits on over 500,000 transactions by adding miscellaneous "fees," thereby gaining a commercial advantage over competitors who actually followed the law. Even at a mere $10 per delivery fee, that provided Fidelity National with an effortless $5 million in additional profit while still being able to market a lower initial cost based on the filed rate.

Illegal manipulation of filed rates is precisely the type of unfair and illegal practice the UCL is intended to prevent. Again, if the immunity provisions of 12414.13 are allowed to circumvent that protection, title companies who follow the law will be unfairly disadvantaged. Or else, they, too, will join the ever-increasing spiral of charging more and different additional "fees" over and above the filed rate in order to remain competitive. Either way, consumers and the market itself will suffer.

## CONCLUSION

Because the appellate court's analysis undermines the purposes of filed rates, consumer protection and the goal of keeping competition fair, its decision should be reversed.

Dated: December 18, 2019

SHARON J. ARKIN

## CERTIFICATE OF LENGTH OF BRIEF

I, Sharon J. Arkin, declare under penalty of perjury under the laws of the State of California that the word count for this Brief, excluding Tables of Contents, Tables of Authority, Proof of Service and this Certification is less than 2,663 words as calculated utilizing the word count feature of the Word for Mac software used to create this document.

Dated: December 18, 2019

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Sharon J. Arkin

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on the interested parties in this action, as set forth below.

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| Erica Calderas | ecalderas@hahnlaw.com | e-Serve | 12-18-2019 07:50:40 AM |
| Law Firm of Hahn Loesed & Parks LLP | | 138cc562-dc62-4281-8549-53f33596bb40 | |

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| | Taras Kick<br>The Kick Law Firm<br>815 Moraga Drive<br>Los Angeles, CA 90049-1633 |
| Manny Villanueva : Plaintiff and Appellant | Mark A. Chavez<br>Chavez & Gertler, LLP.<br>42 Miller Avenue<br>Mill Valley, CA 94941 |
| Certified Class: Plaintiff and Appelant | Steven J. Bernheim<br>Nazo S. Semerdjian<br>The Bernheim Law Firm<br>11611 Dona Alicia Place<br>Studio City, CA 91604<br>Nazo S. Semerdjian |
| Fidelity National Title Company : Defendant and Appellant | Michael James Gleason<br>Steven A. Goldfarb<br>Hahn Loeser & Parks LLP<br>Erica L. Calderas<br>600 West Broadway, Suite 1500<br>San Diego, CA 92101<br><br>Rupa Gupta Singh<br>Niddrie Addams<br>Fuller & Singh LLP<br>600 West Broadway, Suite 1200<br>San Diego, CA 92101-3314 |

| | |
|---|---|
| | Julia Graffam Partridge<br>Benjamin Seth Feuer<br>California Appellate Law Group<br>96 Jessie Street<br>San Francisco, CA 94105-1626 |
| United Policyholders : Pub/Depublication Requestor | Amy Bach<br>United Policyholders<br>42 Miller Avenue<br>Mill Valley, CA 94941 |
| Consumer Watchdog : Amicus curiae | Harvey J. Rosenfield<br>Pamela Pressley<br>Consumer Watchdog<br>6330 San Vicente Boulevard, Suite 250<br>Los Angeles, CA 90048 |

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**Executed on December 18, 2019 at Brookings, Oregon.**

*Sharon J. Arkin*
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