SUPREME COURT
FILED

FEB 18 2020

Jorge Navarrete Clerk

Deputy

S252035

IN THE SUPREME COURT OF CALIFORNIA

MANNY VILLANUEVA ET AL.,
Plaintiffs and Appellants,

v.

FIDELITY NATIONAL TITLE COMPANY,
Defendant and Respondent.

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

CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS BY THE CALIFORNIA DEPARTMENT OF INSURANCE AND CONSUMER WATCHDOG, CONSUMER FEDERATION OF AMERICA, & CONSUMER FEDERATION OF CALIFORNIA

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FIDELITY NATIONAL TITLE COMPANY

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Introduction

Defendant Fidelity National Title Company submits this consolidated answer to the amicus curiae briefs filed in support of plaintiffs by the California Department of Insurance (Department) and Consumer Watchdog, Consumer Federation of America, and Consumer Federation of California (Consumer Watchdog).

Argument

I. Amicus Curiae Brief by the California Department of Insurance

A. Section 12414.26 does not grant Fidelity immunity from liability but it does grant immunity from civil suits challenging rates charged by title insurers

Amicus curiae the California Department of Insurance (Department) argues that "Fidelity is not immunized from liability for charging unfiled rates." (Dept. Br., p. 9; *id.* at pp. 1-2.) We agree. By its terms, Insurance Code section 12414.26 does not grant immunity from liability and Fidelity is subject to discipline imposed by the Insurance Commissioner for any failure to comply with the requirements of article 5.5 (§§ 12401-12401.10).[1]

Fidelity is, however, immune under section 12414.26 from civil suits filed by consumers challenging rates under laws such as the Unfair Competition Law (UCL) (Bus. & Prof. Code, §§ 17200 et seq.) that do not specifically refer to insurance. The immunity in section 12414.26 bars any civil suit that is based on an act done or action taken "pursuant to the authority conferred by Article 5.5."

The Department asserts that section 12414.26 does not apply here "[b]ecause Fidelity failed to file

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[1] Undesignated statutory references are to the Insurance Code.

its rates and acted in abrogation of the statutory authority, rather than pursuant to it . . . ." (Dept. Br., p. 2; *id.* at p. 10.) Under this reasoning, section 12414.26 would provide immunity only from civil suits based on acts alleged to be lawful and to comply with each requirement of article 5.5. A mere allegation in a civil suit that a rate charged failed to comply with the requirements of article 5.5 would defeat the immunity granted by section 12414.26.

The Department argues that its interpretation is compelled by "the plain language of section 12414.26" (Dept. Br., p. 10), but the language of section 12414.26 is not so plain. The phrase "pursuant to the authority conferred by Article 5.5" in section 12414.26 can reasonably be understood to refer not to an act that complies in all respects to the requirements of article 5.5, but to an act that is governed by article 5.5.

The stated purpose of article 5.5 is to "regulat[e] rates for the business of title insurance." (§ 12401.) The Department acknowledges that "Article 5.5 relates to rate filing and regulation, for title insurers . . . ." (Dept. Br., p. 5.) Because article 5.5 regulates rates charged by title insurers, the act of charging rates is an act done pursuant to the authority conferred by article 5.5 and is subject to the requirements of article 5.5.

This is consistent with this court's holding in *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 44, that "Article 5.5 applies only to rate regulation." *Quelimane* stated "that the Insurance Code does not displace the UCL except as to title insurance company activities related to rate setting" and referred to "the restriction to ratemaking-related activities in Insurance Code sections 12414.26 and 12414.29." (*Id.* at pp. 33, 46.) Charging rates, whether properly filed or not, is an activity related to ratemaking and is governed by article 5.5.

Interpreting section 12414.26 to bar civil suits based on acts related to rate regulation is more reasonable than the meaning proposed by the Department. Limiting the immunity provided by section 12414.26 to acts that are lawful and comply in every way with the requirements of article 5.5, as amici and plaintiffs propose, would render that immunity largely meaningless. All a consumer would have to do is allege, without proof, that a fee charged was not properly filed or was excessive or unfairly discriminatory to require the insurer to defend itself in a civil action. The insurer would be immune only from civil suits that allege a charged fee complied in all respects with article 5.5. Fidelity cannot imagine what the grounds for such a suit would be.

It makes far more sense to interpret section 12414.26 to provide immunity from civil suits that challenge acts that are related to rate regulation, such as the charging of rates. A consumer who believes a rate had not been properly filed can seek relief by bringing an administrative claim to the Commissioner, but a consumer may not bring a civil suit challenging activities related to ratemaking.

The Department again conflates section 12414.26's immunity from civil suits with immunity from liability by arguing that section 12414.26 could not grant "immunity for any activities that could conceivably be described as touching upon ratemaking . . . ." (Dept. Br., p. 11.) The Department explains: "For instance, it is hard to believe that a title insurer would enjoy immunity from liability if it correctly filed 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." (*Id.* at pp. 11-12.) Neither of these examples would fall within section 12414.26's immunity from civil suits because neither activity relates to rate regulation. Fraudulently charging customers for services that were not performed has nothing to do with ratemaking. Neither does discriminating against customers on the basis of race.

A claim that a title insurer charged a rate that was not properly filed is a claim related to rate regulation and falls within the scope of the immunity from civil suits granted by section 12414.26.

B. Section 12414.26 immunity applies to all activity related to ratemaking, not just concerted action

The Department argues that the scope of the immunity granted by section 12414.26 is limited "to certain concerted ratemaking activities which would otherwise be barred by antitrust laws." (Dept. Br., p. 14.) This argument is based primarily on legislative history, but the legislative history of section 12414.26 demonstrates it was not limited to concerted action but, rather, was intended to bar all civil suits based on ratemaking activity.

As explained in detail in Fidelity's Answer Brief (Ans. Br., pp. 36-50), section 12414.26 was modeled on section 1860.1, which was adopted as part of the McBride-Grunsky Insurance Regulatory Act of 1947 (McBride-Grunsky Act). (Former §§ 1850 et seq.) The Department states that "the Legislature enacted McBride-Grunsky to minimally regulate insurers so that they would be exempt from antitrust laws, including the Cartwright Act." (Dept. Br., p. 16.) We agree that this was a primary motive for

the insurance industry to ask the Legislature to regulate it. But the Department then makes a dizzying leap in logic to assert that this "establishes that only certain types of concerted ratemaking activity that would otherwise be subject to the Cartwright Act are immunized." (*Ibid.*)

There is no doubt that the Legislature, at the prompting of the insurance industry, was motivated by a desire to prevent antitrust laws from prohibiting concert of action between insurers, but the scope of the immunity granted in section 12414.26 is, by its terms, far more sweeping. The Legislature could have granted limited immunity only from civil suits based on concert of action, but it did not do so; it granted broad immunity from civil suits based upon any "act done, action taken, or agreement made" that relates to ratemaking. (§ 12414.26.) The Legislature could have granted limited immunity from civil proceedings based only on antitrust laws, but it did not do so; it granted broad immunity from "civil proceedings under any other law of this state . . . which does not specifically refer to insurance." (*Ibid.*) "The McBride-Grunsky Act did more than immunize insurers from antitrust laws." (*MacKay v. Superior Court* (2010) 188 Cal.App.4th 1427, 1444.)

The Department relies upon the statement in section 12401 that "[i]t is the express purpose of this

article to permit and encourage competition between persons or entities engaged in the business of title insurance" without seeming to recognize that this purpose is not limited to permitting concert of action. (Dept. Br., p. 17.) Rather, the purpose of article 5.5 is to minimally regulate title insurers and permit market forces to determine rates. Nothing in the language of section 12414.26 or its legislative history supports the Department's argument that it is limited to permitting concert of action.

C. Section 12414.29 bars a UCL action to enforce the requirements of article 5.5 related to ratemaking

Plaintiffs' civil suit alleged that Fidelity violated the UCL by charging fees that had not been filed with the Commissioner as required by article 5.5. (*Villanueva v. Fidelity Nat. Title Co.* (2018) 26 Cal.App.5th 1092, 1099.) This suit is barred by section 12414.29, which provides: "The administration and enforcement of Article 5.5 . . . shall be governed solely by the provisions of this chapter. . . . [N]o other law relating to insurance . . . 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 . . . ."

Quoting a single sentence in *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553 (superseded by statute as noted in *Arias v. Superior Court* (2009) 46 Cal.4th 969, 977), the Department argues that section 12414.29 does not bar this suit because "UCL actions do not constitute 'administration and enforcement' of a predicate law" because "private litigants 'enforce *the UCL*' " rather than enforce the predicate law. (Dept. Br., p. 21.) This argument does not withstand scrutiny.

Stop Youth Addiction recognized that " ' "[i]n essence, an action based on [the UCL] to redress an unlawful business practice 'borrows' violations of other laws and treats these violations, when committed pursuant to business activity, as unlawful practices independently actionable under section 17200 et seq. . . . ." ' " (17 Cal.4th at pp. 566-567, quoting *Farmers Insurance Exchange v. Superior Court* (1992) 2 Cal.4th 377, 383, original brackets.) While a UCL suit is not the same as a private right of action under the predicate statute, there is no denying that the UCL action enforces the predicate statute by "borrow[ing]" the violation and treating it as an unlawful business practice. In considering a UCL cause of action based on alleged violations of the Insurance Code, this court stated: "The gravamen of the People's action under [the UCL] is alleged

violation of three specific 'Good Driver Discount policy' provisions" of the Insurance Code. (*Farmers*, at p. 398.)

Stop Youth Addiction held that it does not follow from the fact that the Legislature provided only for "direct enforcement" of Penal Code section 308 "by public lawyers" and did not provide "a private right of action" that "a private UCL action that ' " 'borrows' violations" ' [citation] of section 308 to establish predicate 'unlawful' [citation] business activity is barred." (17 Cal.4th at p. 566, italics omitted.) This court reaffirmed, however, that "the UCL cannot be used to state a cause of action the gist of which is absolutely barred under some other principle of law." (*Ibid.*)

This court rejected the view "that a private plaintiff lacks UCL standing whenever the conduct alleged to constitute unfair competition violates a statute for the direct enforcement of which there is no private right of action." (*Stop Youth Addiction*, *supra*, 17 Cal.4th at p. 565.) But crucially, this court explained that this was true only when the UCL claim is not " 'based on conduct which is . . . immunized by another statute.' " (*Ibid.*) In the present case, section 12414.29 expressly bars an action under any other law to enforce the provisions of article 5.5. And section 12414.26 provides that no

action taken pursuant to the authority conferred by article 5.5 "shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this state . . . ."

Stop Youth Addiction held: "Simply no basis exists for concluding that, by identifying and penalizing in Penal Code section 308 . . . certain tobacco sales practices, the Legislature intended to bar unfair competition causes of action based on such practices." (17 Cal.4th at p. 565.) *Stop Youth Addiction* did not consider the effect of a law similar to section 12414.29 that expressly bars an action under any other law to enforce the requirements of article 5.5.

The sentence in *Stop Youth Addiction* quoted by the Department appears in a section rejecting the argument that "a private UCL action predicated on Penal Code section 308 threatens to put the public prosecutor's discretionary decisionmaking within the influence or control of an interested party." (*Stop Youth Addiction*, *supra*, 17 Cal.4th at p. 574.) Read in context, the statement that "the fact that a UCL action is based upon, or may even promote the achievement of, policy ends underlying section 308 . . . does not, of itself, transform the action into one for the 'enforcement' of section 308" (*id.* at p. 576) means only that a UCL suit based on a predicate

violation of section 308 is not the same as a private right of action under section 308.

This court did not address in *Stop Youth Addiction* whether a UCL suit based on a predicate violation of the provisions of article 5.5 would be barred by section 12414.29 "and, of course, 'an opinion is not authority for a proposition not therein considered.' " (*People v. Williams* (2005) 35 Cal.4th 817, 827.)

The Department next argues that section 12414.29's command that "no other law relating to insurance . . . shall apply to or be construed as supplementing or modifying the provisions of" article 5.5 actually means " 'no other law or provision *in the insurance code*.' " (Dept. Br., p. 21, original italics.) That is not what the statute says. Section 12414.29 says: "[N]o other law relating to insurance . . . shall apply to or be construed as supplementing or modifying the provisions of" article 5.5. "[N]o other law" means no other law. Had the Legislature meant to limit section 12414.29 to other provisions in the Insurance Code, it could easily and clearly have said so.

The Department urges that the UCL does not "supplement or modify the substance of the predicate laws themselves." (Dept. Br., p. 21.) But the statute also says that other laws shall not "apply to" article

5.5. When a UCL claim is predicated on an alleged violation of the Insurance Code, it is a law relating to insurance that is being applied to article 5.5 in violation of section 12414.29.

D. *MacKay* and *Walker* support Fidelity's position

The Department argues that "even under *Walker* and *MacKay*, Fidelity is not entitled to immunity" because "[t]hese 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, requirement of those statutes." (Dept. Br., p. 13.) Nothing in *Walker v. Allstate Indemnity Co.* (2000) 77 Cal.App.4th 750 or *MacKay*, *supra*, 188 Cal.App.4th 1427 supports this assertion.

Walker and *MacKay* were both post-Proposition 103 challenges to rates for automobile insurance. (*MacKay*, *supra*, 188 Cal.App.4th at p. 1432; *Walker*, *supra*, 77 Cal.App.4th at p. 752.) Among other significant changes to the law governing casualty insurance, Proposition 103 required the Commissioner to approve rates for automobile insurance before those rates were used.[2] (§ 1861.05.)

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[2] As the Department explains: "Under Proposition 103, the [casualty] insurer must file a

Walker and *MacKay* held that an insured may not bring a civil action challenging a rate for automobile insurance that had been approved by the Commissioner. *Walker* ruled: "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 . . . ." (77 Cal.App.4th at p. 756.) *MacKay* added that an administrative claim was "the exclusive means of challenging an approved rate." (188 Cal.App.4th at p. 1432.) Neither *Walker* or *MacKay* addressed whether section 1860.1 would apply to a rate that had not been approved "and, of course, 'an opinion is not authority for a proposition not therein considered.' " (*People v. Williams*, *supra*, 35 Cal.4th 817, 827.)

In the course of its analysis, however, *Walker* examined how the McBride-Grunsky Act, and specifically sections 1860.1 and 1860.2, had been interpreted prior to Proposition 103 and concluded: "Historically, these sections have been interpreted to provide exclusive original jurisdiction over issues

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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." (Dept. Br., p. 8.)

related to ratemaking to the commissioner." (*Walker*, *supra*, 77 Cal.App.4th at p. 755.) *MacKay* echoed this, stating that sections 1860.1 and 1860.2, "taken together, appear to exempt insurance ratemaking (i.e., 'this chapter') from . . . all California laws outside the chapter itself [citation]." (*MacKay*, *supra*, 188 Cal.App.4th at pp. 1441-1442.)

Proposition 103 added a third statute, section 1861.03, which does not apply to title insurance and provides: "The business of insurance shall be subject to the laws of California applicable to any other business, including . . . the antitrust and unfair business practices laws . . . ." The Department acknowledges, as it must, that Proposition 103 does not apply to title insurers. (Dept. Br., p. 8.) Thus, the statements in *Walker* and *MacKay* that the pre-Proposition 103 McBride-Grunsky Act "exempt[s] insurance ratemaking . . . from . . . all California laws outside the chapter itself" (*MacKay*, *supra*, 188 Cal.App.4th at pp. 1441-1442) and "provide[s] exclusive original jurisdiction over issues related to ratemaking to the commissioner" (*Walker*, supra, 77 Cal.App.4th at p. 755) apply fully here.

E. *SCIF* is not helpful because it did not involve ratemaking activity and construed a different immunity statute that was expressly limited to concerted action

The Department urges this court to "reaffirm its holding" in *State Compensation Ins. Fund v. Superior Court* (2001) 24 Cal.4th 930 (*SCIF*), which the Department claims "limits the scope of immunity to certain concerted ratemaking activities which would otherwise be barred by antitrust laws." (Dept. Br., p. 14.) But *SCIF* did not describe the scope of immunity granted to title insurers by section 12414.26; it examined the immunity granted by a different statute in a different part of the Insurance Code that governs workers' compensation insurance. And *SCIF* involved a claim of misconduct that occurred prior to the ratemaking process and, thus, was not activity related to ratemaking. (*SCIF*, at pp. 932-933.)

The statute at issue in *SCIF* was section 11758, which grants immunity from civil suits based on an "act done . . . pursuant to the authority conferred" not by article 5.5, but by article 3 of part 3, chapter 3 of division 2 of the Insurance Code. At the relevant time, former section 11750 provided that the purpose of article 3 was to "regulat[e] concert of action between insurers in collecting and tabulating rating

information." (*SCIF, supra*, 24 Cal.4th at p. 935.) *SCIF* relied on the fact that "what is authorized by article 3 is 'cooperation between insurers . . . in ratemaking' " and held that the scope of immunity granted by section 11758 was limited "to such authorized cooperation in 'ratemaking and other related matters.' " (*Id.* at p. 936.)

Article 5.5 does not contain a provision similar to former section 11750 at issue in *SCIF* that limits the purpose of the article to permitting concert of action. The stated purpose of article 5.5 includes "regulating rates . . . to the end that they shall not be excessive, inadequate or unfairly discriminatory." (§ 12401.)

Another crucial difference is that the misconduct alleged in *SCIF* occurred prior to the ratemaking process and, thus, did not involve ratemaking-related activities. *SCIF* recognized that the plaintiff in that case did not "challenge the manner in which premiums or rates are set by the Rating Bureau. Rather, [the plaintiff] disputes the manner in which SCIF analyzed and allocated [the plaintiff's] financial data prior to the data being sent to the Rating Bureau." (*SCIF, supra*, 24 Cal.4th at pp. 936-937.) *SCIF* was not a ratemaking-related case; this case is.

F. The Department has exclusive jurisdiction to determine the validity of rates charged by title insurers

The Department urges this court to give "great weight" to its view that it does not have exclusive jurisdiction but does not discuss this court's most recent pronouncement on the weight to be accorded to an agency's legal opinion. (Dept. Br., pp. 3, 22.) *Christensen v. Lightbourne* (2019) 7 Cal.5th 761, 771-772, held that while " 'greater weight' " is given " 'where the agency has special expertise,' " an "agency's 'interpretation of the meaning and legal effect of a statute is entitled to consideration and respect,' but 'commands a commensurably lesser degree of judicial deference.' "

An issue of statutory interpretation "falls within [the court's] own peculiar competence." (*Merrill v. Department of Motor Vehicles* (1969) 71 Cal.2d 907, 917.) A "statute's legal meaning and effect [are] questions lying within the constitutional domain of the courts." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11.)

It is understandable that the Department would prefer not to have exclusive jurisdiction in light of its significant responsibilities; the Department "regulates more than 1,400 insurance companies" and "annually reviews over 200,000 complaints and inquiries and over 8,000 rate filings."

(Dept. Br., p. 23.) But the Department must look to the Legislature for relief from its burdens, or to an initiative measure like Proposition 103, rather than to this court.

The Department relies on *Farmers*, *supra*, 2 Cal.4th 377 to assert that the Department does not have exclusive jurisdiction over UCL claims "based on title insurance charges not disclosed to the Department." (Dept. Br., p. 18.) *Farmers* does not so hold.

Farmers discussed the doctrine of primary jurisdiction, not statutory immunity. (*Farmers*, *supra*, 2 Cal.4th at p. 381.) In *Farmers*, the Attorney General brought an action against various automobile insurers under the Unfair Practices Act (Bus. & Prof. Code, §§ 1700 et seq.). The automobile insurers were not immune from such a civil suit because Proposition 103 had added section 1861.03, which provides that automobile insurers are " 'subject to the laws of California applicable to any other business, including . . . unfair business practices laws . . . .' " (*Farmers*, at p. 386.)

Unlike title insurers, the automobile insurers in *Farmers* were subject both to a civil suit and to administrative remedies for the alleged violations of the Insurance Code. Section 1861.03 provides "that insurers are subject to the unfair business practices

laws *in addition to* preexisting regulations under the McBride Act . . . ." (*Farmers*, *supra*, 2 Cal.4th at p. 394.) The issue in *Farmers* was "whether this judicial action should be stayed under the doctrine of 'primary jurisdiction' pending administrative action by the Commissioner . . . ." (*Id.* at p. 381.)

The Department acknowledges that Proposition 103 made " 'fundamental changes' " to automobile and homeowners' insurance that "do[] not apply to title insurance." (Dept. Br., p. 8.) There is no statute analogous to section 1861.03 that provides that title insurers are subject to the laws of California applicable to any other business, including unfair business practices. The doctrine of primary jurisdiction is not at issue and the holding in *Farmers* does not apply here.

II. Amici Curiae Brief by Consumer Watchdog

The self-described author of Proposition 103, Harvey Rosenfield, authored the amici curiae brief on behalf of Consumer Watchdog. Mr. Rosenfield's concern is that endorsing the decisions in *MacKay* and *Walker* would "gravely impair the right of Californians to hold *property-casualty insurance* companies accountable in court" (Watchdog Br., p. 17, original italics); he needn't worry. The issue before

the court in this case is the proper interpretation of section 12414.26, which applies solely to title insurance. Nothing in this court's ultimate opinion will weaken the consumer protection measures granted by Proposition 103 to consumers of property-casualty insurance.

Much of Consumer Watchdog's brief repeats plaintiffs' arguments, to which Fidelity has responded in its Answer Brief, or discusses aspects of Proposition 103 that are irrelevant. Fidelity responds, therefore, only to the following points.

A. The McBride-Grunsky Act was not limited to permitting concert of action

Fidelity agrees with Consumer Watchdog that the insurance industry's impetus for seeking state regulation was to satisfy the McCarran-Ferguson Act (Watchdog Br., p. 25) and avoid federal antitrust laws and that the resulting McBride-Grunsky Act expressly permitted concert of action that otherwise would have violated antitrust laws (*id.* at pp. 27-28). But it does not follow that the McBride-Grunsky Act was limited to permitting concert of action; it provided much broader protection to the insurance industry.

Consumer Watchdog admits that the "McBride Act's 'regulation' of the insurance industry was pretextual." (Watchdog Br., p. 26.) Even the minimal " 'standards' by which insurance rates could be judged – '[r]ates shall not be excessive or inadequate . . . nor shall they be unfairly discriminatory' " were "emasculated" by adding "that '[n]o rate shall be held to be excessive unless . . . a reasonable degree of competition does not exist in the area . . . .' " (*Ibid.*, original ellipses.) Rates were left to the control of market forces. "[T]he McBride Act prohibited the Commissioner from regulating insurers' rates and practices." (*Ibid.*)

This minimal regulation of insurance rates was left to the Commissioner. Section 1860.1 barred civil suits by consumers based on any "act done, action taken or agreement made pursuant to the authority conferred by this chapter." The Legislature could have limited this immunity to concerted action but did not.

Consumer Watchdog asserts that "[t]he phrase 'authority conferred by this chapter' had a *very specific and narrow meaning in the McBride Act*: it referred to the statutory authority conferred on two

or more insurance companies to engage in concerted activities in the formulation of rates . . . ." (Watchdog Br., p. 28, original italics.) But no authority is offered to support this supposition. Amici do not explain why the insurance industry would seek minimal regulation and then purposely limit immunity from civil suits challenging rates to suits based on concerted action. Section 1860.1 meant what it said; it bars any civil suit based on any "act done, action taken, or agreement made pursuant to the authority conferred by this chapter," not just those suits that allege concerted action.

B. Article 5.5 authorizes title insurers to set and charge rates

Turning to the phrase "pursuant to the authority conferred by Article 5.5" in section 12414.26, Consumer Watchdog argues article 5.5 grants "permission to engage in joint rate setting conduct." (Watchdog Br., p. 34.) That is not what these words say. The purpose of article 5.5 includes "regulating rates." (§ 12401.) Article 5.5 confers on title insurers the authority to charge rates. Charging rates is an action done pursuant to the authority conferred by article 5.5.

Amici claim that applying the immunity in section 12414.26 to bar a civil suit challenging an unfiled rate would mean "the 'authority conferred by this chapter' is the authority to *violate* its provisions prohibiting the charging of unfiled rates." (Watchdog Br., p. 37, original italics.) This is false logic. Article 5.5 regulates all rates charged by title insurers and grants the Commissioner the authority to determine whether those rates are lawful, including whether they have been properly filed.

To reach the result it favors, Consumer Watchdog must add some words to this court's opinion in *Quelimane*, *supra*, 19 Cal.4th 26. Amici admit that *Quelimane* said the "Insurance Code does not displace the UCL except as to title company activities related to rate setting," but attempts to explain away this clear language by saying "Amici would read these statements by this Court to refer to '*concerted*' activities between two or more insurance companies . . . ." (Watchdog Br., pp. 39-40, original italics, italics omitted.) Neither section 12414.26 nor this court's decision in *Quelimane* is limited in the manner Consumer Watchdog would prefer.

C. Proposition 103 granted consumers the very right to bring civil suits challenging insurance rates that amici argue they already had under the McBride-Grunsky Act

If consumers could bring civil actions challenging insurance rates under the McBride-Grunsky Act, there would have been no reason for Proposition 103 to grant such rights. Consumer Watchdog explains: "The center of Proposition 103's comprehensive scheme for controlling insurance rates and premiums is its paramount emphasis on the accountability of both insurance companies and the Insurance Commissioner directly to the public." (Watchdog Br., p. 43.) The voters "established, in section 1861.10, subd. (a), an additional, independent check upon the conduct of the insurance companies and the Commissioner: the *unqualified* right to enforce the insurance Code in the judicial branch . . . ." (*Id.* at p. 44, original italics.) Section 1861.10, subdivision (a), "authorizes citizens to go directly to court to enforce the provisions of the Insurance Code added by Proposition 103 . . . ." (*Id.* at p. 45.)

Just as important, Proposition 103 permitted consumers to bring civil suits based on all state laws,

not just laws governing insurance: "To expand the rights and remedies that can be 'enforced' under section 1861.10(a), the voters granted themselves the protection of all California laws, from which insurance companies had previously argued they were *exempt* by virtue of section 1860.1 and 1860.2. Section 1861.03, subd. (a), provides that *all* state laws applicable to other businesses apply to the insurance industry. . . . [¶] . . . [¶] Thus, Proposition 103 offers consumers the alternative to seek recourse from either the regulatory agency or the judicial branch . . . ." (Watchdog Br., pp. 45-46.)

Proposition 103 does not apply to title insurance. If consumers wish to have this same ability to challenge in a civil suit rates charged by title insurers, the change must come from the Legislature or the voters in the form of an initiative measure.

D. Amici's concern that *MacKay* and *Walker* weaken the protections afforded to casualty insurance by Proposition 103 is not at issue here

Consumer Watchdog asks this court to disapprove *MacKay* and *Walker*. (Watchdog Br., pp. 23, 51, 65.) Amici correctly observe that *Walker*

held that the scope of the immunity granted by section 1860.1 was not limited to concerted action but "should be read to apply to a *unilateral action* by the insurer – 'charging a rate' . . . ." (Watchdog Br., p. 52, original italics.) But amici's primary complaint is directed toward *Walker*'s interpretation of section 1861.10, subdivision (a), which was added by Proposition 103 and does not apply to title insurers. (Watchdog Br., p. 53.)

Consumer Watchdog's disagreement with *MacKay* similarly focuses on its impact on Proposition 103. (Watchdog Br., pp. 54-59.) Amici correctly note *MacKay*'s holding "that the McBride immunity applied to 'issues related to ratemaking' " and "that the immunity applies to the unilateral act of a single insurance company." (*Id.* at p. 54.) Consumer Watchdog quotes *MacKay* for the rule: " 'An insurer charging a preapproved rate is doing an *act* or taking an *action* pursuant to the *authority conferred by the chapter*.' " (*Id.* at pp. 54-55, original italics.)

Amici do not question these holdings, which are relevant to the present case, but complain that "*MacKay* went further" and restricted the reach of

Proposition 103 by "permitting the immunity to override the statutory authority the voters gave the Commissioner to regulate the insurance industry." (Watchdog Br., p. 55.) Whether *MacKay* correctly applied the immunity provided by section 1860.1 in light of section 1861.10 and other provisions of Proposition 103 is beyond the scope of review in this case.

This court need not decide whether *MacKay* and *Walker* correctly interpreted statutes added by Proposition 103 that do not apply to title insurers.

Conclusion

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

Respectfully Submitted,

February 18, 2020

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The text of this brief consists of 5,339 words as counted by the Microsoft Word program used to generate this brief.

February 18, 2020

/s/ Greg Wolff
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Proof of Service

I, Stacey Schiager, declare as follows:

I am employed in the County of San Francisco, State of California, am over the age of eighteen years, and am not a party to this action. My business address is 96 Jessie Street, San Francisco, CA 94105. On February 18, 2020 I mailed the following document:

- **Consolidated Answer to Amicus Curiae Briefs by the California Department of Insurance and Consumer Watchdog, Consumer Federation of America, & Consumer Federation of California**

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

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Additionally, on February 18, 2020, I caused the above-identified document to be electronically served on the California Attorney General, pursuant to Business & Professions Code section 17209.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on February 18, 2020, at San Francisco, California.

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