Case No. S252035

SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Manny Villanueva, et. al.,
Plaintiffs and Appellants

v.

Fidelity National Title Company
Defendant and Respondent

After a Decision of the Court of Appeal
Sixth Appellate District
No. H041870
Santa Clara Superior Court No. CV173356
Honorable Peter Kirwan, Judge

AMICUS BRIEF OF THE AMERICAN ESCROW ASSOCIATION IN SUPPORT OF RESPONDENT FIDELITY NATIONAL TITLE COMPANY AND SUPPORTING AFFIRMANCE

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APPLICATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-RESPONDENT

The American Escrow Association (AEA), pursuant to Rule 8.520(f) of the California Rules of Court, respectfully applies for leave to file the following brief as *amicus curiae* in support of defendant-respondent Fidelity National Title. *Amicus curiae* American Escrow Association (AEA) is a non-profit, tax-exempt 501(c)(6) trade association with thousands of members across the United States, mostly in western states and more specifically the majority in California. Members are individuals who perform escrow settlement functions of the type present in this matter. Members include individuals who work for the Defendant-Respondent as well as other regulated title entities, plus individuals who work for non-title insurance entities such as licensees regulated by the California Department of Business Oversight and California Department of Real Estate controlled escrow operations. AEA also has members in other parts of the country: some who work for lenders who close transactions such as the refinance loan closed in this matter and some who work for closing attorneys.

AEA has assisted courts in cases similar to the present matter in the past through amicus filings. These are cases in which consumers seek damages on claims of harm resulting from some type of alleged technical violation of law, notwithstanding the fact that there was no real-world

harm. For example, we have been on *amici* briefs to assist the court in two petitions in the Supreme Court of the United States on writs of certiorari to the United States Court of Appeals for the Ninth Circuit, No. 17-806, *Spokeo Inc., Petitioner* v. *Thomas Robins, Individually and on behalf of all others similarly situated, Respondent* and No. 10-708, *The First American Corporation and First American Title Insurance Company, Petitioners,* v. *Denise Edwards, Respondent.* AEA is concerned that the Court may be misled by arguments of consumer harm from consumer advocacy groups when, in fact, there is no actual consumer financial harm from the claimed conduct of omitting certain fees from rate filings. In claims such as this matter, to the extent the purposes of the California Insurance Code are not met the Department of Insurance can adequately and sufficiently address any failure through exclusive jurisdiction. We support the statutory immunity conclusion the court of appeal reached.

Furthermore, all fees complained about in this case were for escrow services provided by the escrow side of the company operations. During the course of the escrow settlement process, the Plaintiff was advised early of those fees by and through written instructions and the final fees were included in the settlement statement.

Therefore, to assist the Court in analyzing the consumer protection issues presented by this matter, and better inform the court on germane aspects of escrow settlement processes and procedures, along with providing

information on relevant aspects of mandatory federal loan-related disclosures which must be timely delivered during the course of the escrow settlement process, this applicant respectfully requests that our application be granted.

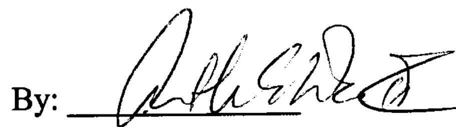
The author of the brief has served in his position for more than 25 years concentrating on federal matters; and he has also become familiar with standard business practices and procedures as well as legal principles within and among the states including the District of Columbia. The majority of the individual members of the Association live and work in California.

The author has limited his brief to considerations specific to the escrow services complained about (as to fees charged) and our brief is an important supplement to the legal arguments on statutes and cases provided by counsel for the other parties. The author explains the significance of these considerations to the two questions posed. Accordingly, and again, we respectfully request our application request be granted.

This application has been reviewed and approved by the Board of Directors of the American Escrow Association.

No party and no counsel for a party to the case has authored the proposed amicus brief in whole or in part and no party, other than *amicus curiae,* has made a monetary contribution regarding the brief and its preparation.

Dated January 20, 2020 Respectfully submitted,

By: 

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ARGUMENT

INTRODUCTION

The regulated underwritten title insurer in this case provided services in connection with a home loan refinancing transaction which included title insurance. Such as entity, under Section 12489 of the Insurance Code may:

> engage in the business of preparing title searches, title reports, title examinations, or certificates or abstracts of title, upon the basis of which a title insurer writes title policies, and (2) conduct escrow services through business locations, as defined in Section 12340.13, in counties in which the underwritten title company is licensed to conduct escrow services regardless of the location of the real or personal property involved in the transaction.

The fees complained about were for services provided by the escrow side of operations which oversaw the loan closing. They all relate to customary escrow practice in California, and the description below would be similarly true in a number of other states.

ESCROW –WRITTEN INSTRUCTIONS; HANDLING AND OVERSIGHT OVER CLOSING PROCESSES; DISCLOSURES

Standard practice includes advance disclosure of estimated fees and disclosure of final charges at closing through the company escrow closing system accompanied by written instructions which guide the process and

inform the consumer. The communication of and acceptance of all these components to and by the consumer are affirmed by dated signature(s) of the consumer(s).

As Professor Burke states in his law textbook at page 155, "Real Estate Transactions, Sixth Edition": "In many states in the western United States, the use of escrows is commonplace in all types of real property transactions."

The law text goes on to describe the use of written instructions to effectuate the purposes of the parties. Indeed, it is fundamental to the understanding of an escrow settlement agent to recognize the significance of and adherence to written instructions to understand the escrow settlement process at all.

The author writes: "In the mortgage transaction an escrow agent is authorized to accept: a note and necessary preconditions of a mortgage loan, and finally, the mortgage loan proceeds from the lender. All the documents, checks, and payments required for the closing pass through the hands of the escrow agent. She discharges all liens affecting the marketability of title, pays for the services rendered in the course of the transaction, and finally disburses the proceeds." Id at pages 155-156.

The successful escrow settlement agent diligently carries out her duties including the duty to comply strictly with the escrow instructions.

To further explain this and understand important details of the interaction of the different business functions of an underwritten title company, it is helpful to look at Policy Statement 1996-4, found at 61 FR 49397-49400, of the Department of Housing and Urban Development, which defined "core title services" as:

a. The examination and evaluation, based on relevant law and title insurance underwriting principles and guidelines, of the title evidence… to determine the insurability of the title being examined, and what items to include and/or exclude in any title commitment and policy to be issued;

b. The preparation and issuance of the title commitment, or other document, that discloses the status of the title as it is proposed to be insured, identifies the conditions that must be met before the policy will be issued, and obligates the insurer to issue a policy of title insurance if such conditions are met;

c. The clearance of underwriting objections and the taking of those steps that are needed to satisfy any conditions to the issuance of the policies;

d. The preparation and issuance of the policy or policies of title insurance;

e. The handling of the closing or settlement, when it is customary for title insurance agents to provide such services….

Standard and customary practice is for the escrow department to oversee and handle all aspects of c. and e. The remainder of this brief focuses on the functions within e. the handling of the closing process.

The standard practice on the disclosures would be as follows. Escrow is opened by the lender and a title report is ordered by the escrow settlement agent. An estimate of the escrow fees, title premium, endorsement fees, recording fees and charges for other ancillary services is provided by the escrow settlement agent to the lender, enabling the lender to complete the timely delivery of an estimate to the consumer. When the loan documents are first received by escrow in a refinance loan transaction, an estimated settlement statement reflecting fees and charges is prepared by escrow and explained to the consumer with signature(s) obtained. The lender and escrow settlement agent collaborate to determine the charges applicable to the loan transaction. The court of appeal included the fact that estimated fees were provided as part of the written instructions. During the closing process a final statement of those fees and charges is prepared and delivered to the consumer. This summarizes standard escrow practices in general, the use of written instructions and the many disclosures provided.

ANALYSIS AND INITIAL ARGUMENT

The question of adherence to written instructions in this case is directly addressed by the court of appeal. As described in its opinion at page 6 (references are to the 53 page opinion format posted on the

California Courts website) the transaction occurred in accordance with standard practice as described above, to wit in accordance with written instructions with advance disclosure of estimated fees and exactly as the parties expected—new loan; payoff of existing first and second lien positions of previous loans; payment of various fees; and, finally, net (loan) proceeds disbursement. The court carefully includes these details, again at page 6:

"In their escrow instructions, the Villanuevas "authorize[d] and instruct[ed] [Fidelity] to charge each party to the escrow for their respective Federal Express, special mail handling/courier and/or incoming/outgoing wire transfer fees" and to "select special mail/delivery or courier service to be used." In the estimated closing statement, which was part of the escrow instructions, Fidelity estimated the escrow charges would include….."

In brief, early notice of types of fees and acceptance of expected charges occurred, and they were both done through direct engagement with the consumer.

All the fees and charges for these services would be within the regulated title entity's legal duty to file rate schedules by category. That includes third party charges—the express mailing fees—imposed on the consumer. It is our understanding that prior to use the items must be filed. In this case the failure is one of omission. But to isolate the single technical failure without taking into account all the other consumer protections

provided through disclosures and obtaining of signatures is an analytical mistake. The third-party charges for necessary express mailing costs were in fact disclosed prior to being imposed on the consumer. What should be isolated is leaving the matter entirely to the Insurance Commissioner. The mechanism to achieve that is statutory immunity.

FEDERAL SETTLEMENT STATEMENTS AND OTHER MANDATORY FEDERAL DISCLOSURES; TRUTH IN LENDING ACT AND REG. Z; ADDITIONAL ARGUMENT

The national form (at the time of the transaction), the prescribed "Uniform Settlement Statement" under The Real Estate Settlement Procedures Act of 1974 ("RESPA") was the HUD-1 form as described in the court of appeal opinion at footnote 4. As stated by the court of appeal the federal process includes both an estimate (good faith estimate) by lenders at the time of application for a loan and the HUD-1 at the time of the loan closing, citing *Washington Mutual Bank v. Superior Court* (1999) 75 Cal. App. 4th 773,776. The regulator, the Department of Housing and Urban Development later issued a standard form truncated from the full HUD-1, optional for transactions without sellers, which was named the HUD-1A.

In brief, and to fill out the discussion, from then to now, to illustrate the continuing and expanding overlay of federal law, we add the following information. The RESPA statute has evolved over time and been supplanted under the Dodd-Frank Act through the implementing regulations by a

combined national standard with a Loan Estimate for the early disclosures and a Closing Disclosure for the final disclosures. The lender is responsible for both and as noted earlier above the settlement agent collaborates on closing fees and charges to assist with the completion of the forms.

In addition to the RESPA covered requirements the Closing Disclosure also now includes the standard lender disclosures under the Truth in Lending Act. Thus, it encompasses the costs of obtaining credit and closing on credit in addition to the costs of closing a real estate transaction (if there is also a purchase). The entire apparatus was housed under Regulation Z and that is where is remains.

Finally, at the time of the closing May 31, 2006, and now, in addition to those federal disclosures under Title 12 of the United States Code, the Respondent had to be mindful (with regard to the fees complained about) of certain requirements imposed on the lender under the Truth in Lending Act, namely those that impact the calculation of the finance charge of the loan and the computation of the "APR" Annual Percentage Rate.

That law has its own set of accuracy-related rules. Certain fees such as document preparation fees are excluded entirely under Regulation Z, Section 1026.4(c)(7) but only if they are "bona fide and reasonable in amount."

In summary, in refinance loan transactions such as in this case, an escrow settlement agent is constrained in tandem with lenders under federal

law in many ways as to borrower charges and by mandatory disclosure requirements both advance estimates and final. Those constraints and required disclosures all appear to have been respected and were effective in this case, as a general matter, in terms of charges imposed on the borrower.

More specifically as to this refinance loan transaction, when it closed in 2006 the Defendant company had: (1) obtained authorization from the consumer Plaintiff through written instructions in advance to charge these fees; (2) actually disclosed the charges in both advance estimated and final disclosures; and (3) followed standard good and adequate company practices to make the mechanism known as escrow perform efficiently and timely to meet the expectations and needs of the borrower and the lender including expedited delivery. Advance notice was given in multiple ways. There was no discernible economic harm to the Plaintiff from the rate schedule omission and no cited failure of disclosure or advance approval from the Plaintiff for fees charged in terms of the company performing escrow services.

CONCLUDING ARGUMENT--DEPARTMENT OF INSURANCE

That leaves the rate schedule matter as the sole point of complaint. We leave it to the California attorneys for the Respondent and others to supply this Court with the California statutory interpretation and case law analysis on the Article 5.5 section 12414.26 questions. For us, and beyond informing this Court on the federal overlay for this transaction and similar transactions, statutory immunity makes complete sense as a result. If a

problem occurred with respect to this and similar transactions involving omission of preceding advance notice of fees through rate filings by an underwritten title company, the only sensible answer is to leave the matter entirely to the Insurance Commissioner. That office can compare the omission with all the subsequent actions of the Respondent within the escrow settlement process' duration in light of the course of the company practices which adequately informed the consumer of the cost of closing their loan transaction. That is the approach the court of appeal followed and we urge this Court to affirm their decision.

CONCLUSION

As to the first issue taken for review--Does the statute [Insurance Code section 12414.26] provide immunity to an underwritten title company for charging consumers for services for which there have been no rate filings with the Insurance Commissioner?—the answer should be in the affirmative; and as to the second issue--Does the Insurance Commissioner 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? ----The answer should again be in the affirmative. A consumer's complaint as to the charges for escrow settlement services involving a Department of Insurance regulated provider who, from the available record, performed timely, adequately, fairly and without economic harm to the consumer should

be addressed by and resolved solely by the Insurance Commissioner if the complaint is a rate filing issue including an omitted item.

Respectfully Submitted,

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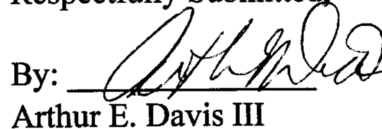
CERTIFICATE OF WORD COUNT

Pursuant to California court rule 8.520(c), I certify that, according to the word-count feature in Microsoft Word, this *Amicus Curiae* Brief contains 2050 words, excluding the application.

Respectfully Submitted,

By: 

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PROOF OF SERVICE

I, the undersigned, am over 18 years of age, employed in the County of Fairfax, Commonwealth of Virginia, and not a party to this case. My business address is 8230 Old Courthouse Rd, Suite 215, Vienna VA 22182. On January 31, 2020, I caused a true and correct copy of the attached *Amicus Curiae* brief to be served on each party and person required to be served, as follows:

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