Case No. S252035

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MANNY VILLANUEVA
Plaintiffs-Appellants-Petitioners,

v.

FIDELITY NATIONAL TITLE COMPANY,
Defendant-Appellee-Respondent.

FIDELITY NATIONAL TITLE COMPANY'S ANSWER TO APPELLANTS' PETITION FOR REVIEW

Appeal from Judgment of the Superior Court of
the State of California, County of Santa Clara
The Honorable Peter H. Kirwan
Case No. 1-10-CV-173356
Court of Appeal Case Nos. H041870 & H042504

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I. INTRODUCTION

Villanueva's[1] Petition for Review should be denied because he asks this Court to consider issues not raised in the Court of Appeal and because review is not "necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(c)(1) and (b)(1).)

First, the unanimous decision of the Sixth District (the Opinion) presents no conflict or important question of law regarding the statutory immunity provided for under the unambiguous plain language of Insurance Code section 12414.26. Instead, the Opinion simply applies the plain language of the statutory immunity to the facts of this case consistent with the well-settled law set forth in *Quelimane Company, Inc. v. Stewart Title Guaranty Company* (1998) 19 Cal.4th 26. The Opinion reaches the unremarkable conclusion that Defendant-Appellee Fidelity National Title Company (Fidelity) is immune under section 12414.26 from Villanueva's claims because Fidelity's rate-making and rate-usage conduct constituted "act[s] done, action[s] taken, or agreement[s] made pursuant to" the ratemaking authority conferred by the title insurance ratemaking chapter. (Ins. Code § 12414.26.) The Opinion undertook a painstaking, detailed analysis to understand the relevant Insurance Code sections and correctly

[1] "Villanueva" refers to Plaintiffs-Appellants-Petitioners Manny Villanueva and the certified class.

determined that the trial court had no jurisdiction to interpret whether Fidelity's rate manual sufficiently set forth rates supportive of the fees disputed by Villanueva. The Opinion also compares the present facts to the facts of other cases that made the same inquiry into whether a claim relates to rate-making and rate usage activity whether under the same immunity statute or others. The Opinion does not create any tension with either the Insurance Code or those cases and creates no conflict that would cause problems for other courts applying the law in the future.

Villanueva tries to manufacture inaccurate and irrelevant "conflicts" to justify review. Making an argument that he never raised in the Court of Appeal—which alone compels denial of review—Villanueva asserts that section 12414.26 must be limited to antitrust claims not "civil proceedings" as the plain language of the statute and applicable case law dictates. In this first instance, there is no conflict; the law remains settled that section 12414.26 precludes *all* civil proceedings based on title insurance rate-making activity and courts need only determine whether each particular civil proceeding involves such activity. A review of the decisions which Villanueva urges are in conflict shows that although the facts and statutory schemes in those cases may be different, courts consistently apply statutory immunity to rate-making activities and not to conduct unrelated to rate-making.

Second, the Opinion presents no conflict or important question of law regarding the California Department of Insurance's (CDI) exclusive jurisdiction, which the Court of Appeal found supported its immunity decision. Villanueva contends the CDI has primary jurisdiction (*i.e.*, jurisdiction shared with courts) and complains that the Opinion supposedly opens the door for regulated entities to impose unlawful charges unfettered by any review or repercussion. Appellants did not raise their primary jurisdiction argument in the Court of Appeal so this Court need not consider it. (Cal. Rules of Court, rule 8.500(c)(1).) Nonetheless, the Opinion opens no such door. Far from permitting regulated entities to impose unlawful charges without concern for repercussions, the Opinion simply requires administrative proceedings instead of civil proceedings, with those civil proceedings then being subject to judicial review, as directed by the Legislature. Because the Insurance Code has a "pervasive and self-contained system of administrative procedure[,]" those administrative proceedings prevent the unlawful charges Villanueva predicts will occur. (*Farmers Ins. Exch. v. Superior Court* (1992) 2 Cal.4th 377, 396 (*Farmers Insurance*).) If an insurer charges an unlawful rate, the CDI may impose civil and criminal penalties and recover refunds. (*See, infra,* section III.B.) Contrary to Villanueva's contention, this means consumers *can* obtain restitution through the administrative process. Thus, just as before the Opinion, consumers continue to have recourse and the

CDI continues to have oversight over "unlawful overcharges." The Opinion changes nothing.

Third, the Opinion presents no conflict or important question of law regarding Insurance Code section 12414.27, a statutory provision which merely delayed the effect of new title insurance statutes in 1974. The legislative history of section 12414.27 clearly supports the implementing nature of this provision that has never before been discussed in any reported case. There is simply no basis for transforming section 12414.27—as Villanueva urges—into a means for avoiding the immunity created one section earlier in section 12414.26.

For these reasons, Fidelity respectfully requests that the Court deny the Petition.

II. BACKGROUND

As noted in the Opinion, and briefly summarized here, this case centers on statutory rate regulation in the title insurance industry. When enacted, the purpose of article 5.5 of Chapter 1, entitled "Rate Filing and Regulation," was "to promote the public welfare by regulating rates for the business of title insurance as herein provided to the end that they shall not be excessive, inadequate or unfairly discriminatory." (Opinion at pp. 27-28 *citing* Stats. 1973, ch. 1130, p. 2307 and Ins. Code § 12401.) The provisions of Insurance Code Article 5.5 (sections 12401 to 12401.10) require regulated title entities to establish "basic classification of coverages

and services to be used as the basis for determining rates" (Ins. Code § 12401.2) and to file their "schedules of rates . . . and every modification thereof" that they propose to use in California with the CDI. (*Id.* at § 12401.1.)

Section 12401.1 provides in relevant part: "Every . . . underwritten title company . . . shall file with the commissioner its schedule of rates, . . . and every modification thereof which it proposes to use in this state . . . Every filing shall set forth its effective date, which shall be not earlier than the 30th day following its receipt by the commissioner, and shall indicate the character and extent of the coverages and services contemplated." (Ins. Code. § 12401.1.)

Section 12401.3 contains detailed standards that "apply to the making and use of rates" under article 5.5. It repeats the purpose of the statutory scheme that "[r]ates shall not be excessive or inadequate, . . . nor shall they be unfairly discriminatory" and, among other things, defines when a rate is "excessive" or "inadequate." (Ins. Code § 12401.3(a).) The Insurance Code's Article 5.5 governs both a regulated entity's charging of filed rates and its charging of rates that were not filed. (See Ins. Code §§ 12401.1, 12401.3, 12401.7, 12401.71, and 12401.8.) The Insurance Code also creates specific steps for a title insurer to comply with rate making and rate usage requirements (*ibid.*) and provides for administrative review and enforcement to ensure compliance. (Ins. Code §§ 12414.13-

12414.19.)

In sum, the Insurance Code comprehensively governs all rate-making related conduct of regulated entities like Fidelity and contains its own pervasive and self-contained system of administrative procedure and enforcement. As such, section 12414.26 provides a grant of statutory immunity from all civil proceedings (and criminal proceedings) related to rate-making activity:

> **§ 12414.26 Immunity from prosecution or civil proceedings**
>
> No act done, action taken, or agreement made pursuant to the authority conferred by Article 5.5 (commencing with [§]12401) or Article 5.7 (commencing with [§]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.

(Ins. Code § 12414.26.)

As the Opinion correctly held, Villanueva asserted claims based on rate-making activity which cannot be addressed in a civil proceeding. Such claims could have been addressed by an administrative proceeding before the CDI, which could have yielded a full complement of remedies, including restitution if a right to restitution was established. Of course, the Superior Court below found no restitution was available in any event, because Villanueva—irrespective of the alleged violations—suffered no injury in fact, received the benefit of the bargain, and was not entitled to restitution under the UCL based upon both legal and equitable principles.

III. THE LACK OF GROUNDS FOR REVIEW

Review is not "necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) The Court of Appeal applied well-settled law to the unique facts of this unremarkable case in which—even setting aside immunity—the trial court determined no consumer was injured.

A. The Opinion Presents No Conflict Or Important Issue For Review On Statutory Immunity

Villanueva seeks to create conflict where none exists. The Opinion applied unambiguous, statutory plain language to unique facts just as the courts did in every other case cited by Villanueva. That some cases find statutory immunity applies and some find otherwise, does not mean a reviewable conflict exists. The disparate immunity findings are just the ordinary work of the courts applying specific immunity statutes to the unique facts before them. The courts' work will continue because the Court of Appeal here made no determinations as to any other case, let alone any other immunity statutes, and certainly did not "immunize[] most of the insurance industry from all liability for unlawful overcharges" as Villanueva urges. (Petition For Review (PFR) at p. 9, § I.)

1. Villanueva's Request To Rewrite Section 12414.26's Unambiguous Plain Terms Is Better Directed To the Legislature

In the first instance, Villanueva's Petition should be seen for what it

is: a request to rewrite section 12414.26's unambiguous statutory plain language. Such a request can only be directed to the Legislature.

To answer whether the statute applies, the Court of Appeal was required only to analyze whether Villanueva challenged an "act done, action taken, or agreement made [by Fidelity] pursuant to the authority conferred by Article 5.5." (Ins. Code § 12414.26; see also Opinion at p. 36 ["whether the action is barred by statutory immunity turns on the wrong alleged."].) The Court of Appeal did so, recognizing that all of Villanueva's claims challenged Fidelity's rate-making activities (including rate usage) which Fidelity performed pursuant to authority conferred by Article 5.5. (Opinion at pp. 36-38.)

The entire action was about Fidelity's rate-making and rate-usage activities. For each claim, the court examined Fidelity's making of rate manuals and the language Fidelity chose to describe the fees it charged or collected. (Opinion at pp. 36-38.) Even for Delivery Theory No. 1 and the Gap Period Draw Deed Theory, in which Villanueva asserted there was no filed "*rate*" (*i.e.*, a dollar amount charge) such that Fidelity was allegedly using rates without having first filed them, the Court was required to interpret *statements* in rate filings to determine if they sufficiently addressed the challenged fees as Fidelity asserted or if they were deficient as Villanueva asserted. (*Id.* at pp. 14, 28 n. 10, 40 n. 14.) For example, under Delivery Theory No. 1, the Court was required to evaluate statements

such as "Residential Loan Escrow Services do not include . . . special delivery or courier fees . . . ." and "[u]nless specifically indicated, Residential Loan Escrow Services do not include…expedited or overnight delivery fees…." (6 Appellants' Appendix (AA) 1377:12-1378:15.) The trial court cited similar statements in non-parties' rate manuals as examples of compliant filings such as "The OneRate shown in this Section does not include [X, Y, Z.]" (7 AA 1404, fn. 45; 2 Respondent's Appendix (RA) 232, ¶ E-1a.) However, the trial court declined to address, even upon Fidelity's objections to the Statement of Decision, why Fidelity's substantially similar "statements" did not preclude a finding of an Insurance Code violation. (6 AA 1377:10-1380:3.) The challenge to the "Gap Period Draw Deed Fees" additionally required examination of Fidelity's rate-making and rate usage to determine whether the fees were addressed by and charged under an "unusual services" provision permitted by statute. (Opinion at p. 13.) Thus, the Opinion's conclusion that under these facts Villanueva challenged an "act done, action taken, or agreement made [by Fidelity] pursuant to the authority conferred by Article 5.5 [governing rate making and usage]" such that immunity applied, is unremarkable. (Opinion at pp. 36-38.) Courts routinely apply plain statutory language. Villanueva's arguments that the statute should not be applied according to its plain language but instead be rewritten can only be directed to the Legislature.

2. No Conflict Exists In How Courts Are Applying Statutory Immunity Provisions To The Unique Facts Before Them

In an effort to show a conflict that necessitates rewriting section 12414.26, Villanueva urges that the Opinion conflicts with other case law because in some cases immunity applied and in others it did not. (PFR at pp. 10-16 at §§ II. and III.) There is no conflict.

The Opinion recognizes that disparate determinations of immunity does not mean that immunity cases are in tension. Instead, as the Opinion recognizes, despite the different contexts of the cases and the nuances of the respective statutory schemes, one thing is clear: immunity applies to rate-making activities because rate-making activities are "act[s] done, action[s] taken, or agreement[s] made pursuant to the authority conferred by Article 5.5." (*See* Opinion at pp. 36-37.) That bedrock principle was established in *Quelimane*, in which this Court held that the statutory immunity in section 12414.26 applies to "title insurance company activities related to rate setting." (*Quelimane, supra*, 19 Cal.4th at 33; Opinion at pp. 27, 34, 36, and 37.) That bedrock principle is also followed in the cases cited by Villanueva. The Court of Appeal analyzed the particular facts of cases that addressed section 12414.26 or statutes analogous to section 12414.26 and recognized that consistent with the statutory plain language and the holding in *Quelimane*, a determinative factor for applying section 12414.26 immunity can be whether rate-making activity is at issue. (*Id*. at pp. 29-36.)

Far from there being any conflict in the cases, the Court of Appeal was readily able to categorize them harmoniously based on the determinative factor of whether rate-making activity was challenged as follows:

- **Immunity for Rate-Making Activity:** *Walker v. Allstate Indem. Co.* (2000) 77 Cal.App.4th 750 (*Walker*) [challenge to auto insurance rates approved by Insurance Commissioner]; *MacKay v. Superior Court* (2010) 188 Cal.App.4th 1427 (*MacKay*) [challenge to use of rating factors that had been approved by the Insurance Commissioner]; *Lyons v. First Am. Title Ins. Co.* (N.D. Cal. Dec. 22, 2009, No. C 09-4156 PJH) 2009 U.S. Dist. LEXIS 119859 [race discrimination case that was actually a challenge to title insurance rates accepted by the Insurance Commissioner].
- **No Immunity for Activity Unrelated to Rate Making**: *Quelimane, supra,* 19 Cal.4th at 40 [conspiracy to refuse to provide title insurance]; *Krumme v. Mercury Ins. Co.* (2004) 123 Cal.App.4th 924 (*Krumme*) [false advertising]; *State Comp. Ins. Fund v. Superior Court* (2001) 24 Cal. 4th 930 (*SCIF*) [misallocating medical-legal expenses in reports submitted to workers compensation insurance rating bureau]; *In re Cal. Title Ins. Antitrust Litig.* (N.D. Cal. Nov. 6, 2009, C 08-01341 JSW) 2009 U.S. Dist. LEXIS 103407 [allegations related to illegal rebates, kickbacks and commissions].

The Opinion thoughtfully applies that bedrock principle to the particular facts: "*Quelimane* instructs that the immunity applies to 'ratemaking-related activities'; we must therefore determine whether the conduct at issue here is 'related to ratemaking.'" (Opinion at p. 36.) In analyzing the "alleged wrong" in *Villanueva* and comparing it to the "alleged wrongs" in these other cases, the Opinion concludes that immunity applies because this case involved rate-making activity—"act[s] done . . . [by Fidelity] pursuant to the authority conferred by Article 5.5." (*Id.* at p. 38.)

While the Court of Appeal saw harmony in the case law, Villanueva tries to invent conflict. Villanueva argues that *MacKay, supra,* 188 Cal.App.4th 1427, conflicts because *MacKay* supposedly limited immunity to situations where an insurer charged a rate pre-approved by the CDI such that immunity does not apply to all rate-making activities. (PFR at pp. 11-12, § 2.) The Opinion and *MacKay* are consistent and *MacKay* imposed no such limitation.

MacKay recognized the immunity statute there did "not exempt all acts done 'pursuant to' the chapter—which is to say, all ratemaking acts—but instead ***exempts acts done 'pursuant to the authority conferred by this chapter.***'" (*MacKay*, *supra*, 188 Cal.App.4th at 1443, emphasis added.) Likewise, the Opinion here "reject[s] the assertion that immunity applies to 'all conduct Fidelity performs in conducting the business of title

insurance.'" (Opinion at pp. 25-26.) The Opinion recognizes that "immunity by its own terms is expressly limited to 'act[s] done, action[s] taken, or agreement[s] made pursuant to the authority conferred by Article 5.5." (*Id.* at p. 27.) Thus, the Opinion maintains and does not "wipe[] out" the critical distinction of limiting immunity to its statutory grant. (*Cf.* PFR at p. 12.) And far from limiting immunity to preapproved rates as Villanueva suggests (PFR at p. 12), *MacKay* recognized the section 1860.1 immunity statute "is a very broad one." (*MacKay*, *supra*, 188 Cal.App.4th at 1443, 1445.) *MacKay* held that charging a preapproved rate was just *one* example of the types of conduct that are immune: "Insurance Code section 1860.1 exempts from other California law acts done and actions taken pursuant to the ratemaking authority conferred by the ratemaking chapter, *including the charging of a preapproved rate.*" (*MacKay, supra,* 188 Cal.App.4th at 1443, emphasis in original.)

The Opinion aligns itself with *MacKay* but recognizes that *MacKay* stopped short of addressing the present issue:

> [*MacKay* held] that a UCL action will not lie to challenge an insurance rate previously approved by the [Department] of Insurance. [Citation omitted.] The question presented here is whether the statutory immunity in Chapter 1 (§ 12414.26) bars this action challenging the use of rates for which there have been no rate filings; rates that have neither been approved nor accepted by the Insurance Commissioner.

(Opinion at p. 25.) Consistent with *MacKay,* the Opinion correctly held that Villanueva's various theories were all challenges to Fidelity's rate-making

activity because the claims challenged whether, under Article 5.5, Fidelity was required to file rates, whether Fidelity did file rates, and whether Fidelity was using rates without having filed them. Given that *MacKay* did not address the issue determined in the Opinion but instead left other courts to make similar determinations based on the facts presented to them, no conflict exists between *MacKay* and the Opinion.

Villanueva also argues that the Opinion conflicts with *Fogel v. Farmers Group* (2008) 160 Cal.App.4th 1403. (PFR at p. 11, § 2.) It does not. *Fogel* did not address an issue presented in the Opinion—*i.e.*, "whether a *regulated* entity is required to include the cost of services performed by third parties in its rate filings." (Opinion at p. 37, emphasis added.) Rather, *Fogel* held that immunity does not cover an unregulated rate charged by an *unregulated* entity. (*Fogel*, 160 Cal.App.4th at 1417 ["it makes little sense to immunize the *unregulated* attorney-in-fact from a lawsuit"].) Here, unlike *Fogel*, the premise of Villanueva's UCL claim was that a regulated entity was improperly charging rates that were regulated by the rate-filing chapter. As here, *Fogel* simply applied the "plain language of the statute" to come to its result. (*Id.* at 1416.) Therefore, no conflict exists with *Fogel*.

3. Villanueva's Assertion Of An Antitrust Limitation Was Not Raised Below And Nonetheless Has Been Correctly Rejected By Other Courts

Villanueva seeks to establish conflict by arguing that unlike the Opinion, some courts narrowly limit statutory immunity to antitrust claims.

(PFR at pp. 13-16, § III.) As an initial matter, Villanueva never raised this argument with the Court of Appeal so this Court should not consider it. (Cal. Rules of Court, rule 8.500(c)(1).) Nonetheless, no conflict or tension exists because Villanueva's proposed antitrust-limitation has been uniformly rejected for many years.

Nearly a decade ago, in *MacKay*, the Second District rejected the identical antitrust-limitation-argument in a section of its opinion entitled "Legislative History Does Not Limit Insurance Code Section 1860.1 To Concerted Acts." (*MacKay, supra,* 188 Cal.App.4th at 1444.) As support, *MacKay* cited a First District case from nearly two decades ago that negated such a limited application of immunity based on the broad purpose of the immunity clause as applied to rate-making activity. (*Ibid* quoting *Walker, supra,* 77 Cal.App.4th at 756.)

Contrary to Villanueva's argument (PFR at pp. 15-16), *MacKay* did not use the passage of Proposition 103 to expand immunity "in a new direction" beyond antitrust actions. Instead, *MacKay* showed that the immunity statute there was never narrowly limited to concerted action by insurers, even before the passage of Proposition 103:

> [W]hile the initial motivation behind Insurance Code section 1860.1 may have been exemption from antitrust laws in particular, it was recognized that the language of the exemption was, in fact, broader. Deputy Attorney General Harold Haas wrote Governor Warren, prior to its enactment, explaining, "The exemption is a very broad one. . . . If other business regulations such as the Fair Trade Act are applicable to

> insurance, the exemption applies to them also." [quotation omitted]
>
> ***Insurance Code Section 1860.1 was always understood to have a broader reach than simply an exemption from antitrust laws***; . . .

(*MacKay*, *supra*, 188 Cal.App.4th at 1444-1447, emphasis added.)

Likewise, Villanueva cannot rely on *SCIF, supra,* 24 Cal.4th 930, as a source of conflict. (PFR at p. 13.) *MacKay* addressed *SCIF* nearly a decade ago and explained that the worker compensation statute at issue in *SCIF* expressly declares its purpose "to be the regulation of concert of action between insurers." (*MacKay*, *supra*, 188 Cal.App.4th at 1447 ["For this reason, we find the plaintiffs' reliance on [*SCIF*] unpersuasive."].) The concerted-action-limit in the worker compensation statute does not exist in the title insurance statute.

Nor can Villanueva rely on the Second District's 2004 decision in *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968 (*Donabedian*), as a source of conflict. (PFR at p. 15.) *Donabedian* determined that, unlike here, the UCL claim was expressly authorized by the Insurance Code sections that applied to the auto insurance at issue there. (*Donabedian*, 116 Cal.App.4th at 987 citing Ins. Code §§ 1861.03(a) and 1861.10(a).) The court held "[i]t would make little sense" if the immunity statute there were interpreted to preclude that express statutory authorization of suit. (*Id.* at 991.) Given that holding, *Donabedian* did not

need to reach the issue of whether the immunity statute there was limited to concerted action cases. *Donabedian* nonetheless quoted *SCIF* at length and simply reiterated *SCIF's* antitrust finding, which does not apply to the current situation as shown above. (*Id.* at 990-991.) Indeed, when the same appellate district addressed the issue six years later in *MacKay* it did not even recognize *Donabedian* as conflicting authority. (*MacKay*, *supra*, 188 Cal.App.4th at 1447.) Rather, it cited *Donbadian* for the historical context of being enacted "in the first instance, in order to immunize insurers from antitrust laws." (*Id.* at 1444 [citing *Donabedian*].) *MacKay* pointed out "[t]his, however, is the beginning of the analysis not the end of it" and went on to demonstrate how immunity was not limited to antitrust actions. (*Ibid.*)

Here, the plain language in the Insurance Code that applies to title insurance, including section 12414.26, imposes no antitrust limitation and bars *all* civil and criminal proceedings "under ***any other law of this state*** heretofore or hereafter enacted which does not specifically refer to insurance." (Ins. Code § 12414.26, emphasis added.) The case law uniformly supports applying this language, consistent with its plain terms, without any antitrust limitation. Any antitrust limitation would have to be imposed by the Legislature and the fact that the Legislature has not seen fit to enact such a limitation in the face of the cases cited by Villanueva simply confirms no such limitation was ever intended. In any event, no conflict exists among courts on this issue so no need for review exists.

4. The Opinion Does Not "Misread" The Holding In *Quelimane*

Villanueva argues that the Opinion—as well as the Courts of Appeal in *Krumme*, *MacKay*, and *Walker*—"misread" the holding in *Quelimane* that immunity applies to civil proceedings based on title insurance rate-making activities. (PFR at pp. 17-19, § IV.) Any "misreading" belongs to Villanueva and not the First, Second, and Sixth Districts, all of which based their reading of *Quelimane* on solid ground.

The second paragraph of *Quelimane* holds: "We conclude that the Insurance Code does not displace the UCL except as to title insurance company activities related to rate setting." (*Quelimane*, *supra*, 19 Cal.4th at 33.) *Quelimane* simply applied, and did not rewrite, the controlling statutory language of section 12414.26. Villanueva argues that the holding became "dictum" because the particular facts in "*Quelimane* did not involve conduct related to rate setting." (PFR at p. 18.) But applying a general rule that statutory immunity applies to rate-making activity as conduct authorized under Article 5.5, and concluding that no rate-making activity was at issue, does not moot or dilute the general rule. In other words, that the particular activity in *Quelimane* did not involve rate-making does not erase the general rule that *Quelimane* laid out in its opening two paragraphs that immunity applies to title insurance rate-setting activity. Courts do not apply *Quelimane* by that case's particular facts, but rather by

applying *Quelimane's* general rule to the facts of the case before them.

Next, Villanueva offers an out-of-context quote in his attempt to extremely limit the precedential value of *Quelimane*. (PFR at p. 17.) But when *Quelimane* stated that it "decide[s] here only whether a title insurer's violation of the Cartwright Act in conduct unrelated to rate fixing may be the predicate of a UCL action," it was not eliminating the general rule laid out in its introductory paragraphs. (*Quelimane, supra*, 19 Cal.4th at 51.) Instead, the Court simply responded to a request by amicus curiae to "exercise restraint in construing and applying the UCL to insurance industry practices because of the potentially destabilizing effect of such suits." (*Id.* at pp. 50-51.) Read in context, *Quelimane* declined to consider the general applicability of the UCL to "insurance industry practices" but it did not disavow the general rule it expressly recognized—that immunity bars a UCL claim regarding title insurance rate-setting activities.

Finally, the court in *Quelimane* was only asked to decide the case before it and not to identify every circumstance that could trigger immunity. Nonetheless, *Quelimane* did not, as Villanueva asserts, "**decline**[] to address whether the immunity statute can apply outside the context of an antitrust suit." (PFR at p. 18.) To the contrary, *Quelimane* clearly recognized immunity could apply to rate-setting activities done pursuant to the authority conferred by Article 5.5 and did not "announce[]" any concerted-action-"limitation[] on its holding" as Villanueva asserts.

(*Ibid*.) If *Quelimane* had intended such a significant limitation on its general rule—which would have rewritten section 12414.26 contrary to its plain terms—it would have expressly said so. Thus, the fact that lower courts as in *Krumme*, *MacKay*, and *Walker* must and do continue to apply immunity statutes to the facts presented to them—just as *Quelimane* did—is unremarkable and provides no basis for review.

B. The Opinion's Recognition Of The Insurance Commissioner's Jurisdiction To Hear Consumer Complaints Does Not Provide Grounds For Review

Villanueva next argues that the Opinion's "holding regarding exclusive jurisdiction" conflicts with *Farmers Insurance, supra,* 2 Cal.4th 377 and *Jonathan Neil & Associates v. Jones* (2004) 33 Cal.4th 917 (*Jonathan Neil*), because it did not analyze "primary jurisdiction." (PFR at pp. 19-26, § V.)

Villanueva did not seek a stay of the civil proceedings, in either the Superior Court or the Court of Appeal, while he pursued the administrative process before the CDI under the doctrine of primary jurisdiction as the plaintiffs were required to do in *Farmers Insurance* and *Jonathan Neil*. Therefore, primary jurisdiction is both irrelevant and also an argument that Villanueva did not make in the Court of Appeal such that this Court need not consider it under Rule 8.500(c)(1).

Even if Villanueva had raised primary jurisdiction, however, no conflict exists with *Farmers Insurance* or *Jonathan Neil*. "Exhaustion

applies where an agency has exclusive jurisdiction over a case; primary jurisdiction where both a court and an agency have legal capacity to deal with the matter." (*Farmers Insurance, supra*, 2 Cal.4th at 390-391.) Here, the Opinion held that exclusive—rather than primary—jurisdiction applied because section 12414.26 expressly prohibits "civil proceedings" on rate-making activity and the Insurance Code grants the CDI jurisdiction to address such claims. The Opinion's "conclusion on the immunity question is strengthened by reviewing the statutes governing the Insurance Commissioner's exclusive original jurisdiction." (Opinion at p. 38.)

As pointed out in earlier decisions addressing the same argument made by Villanueva, no conflict exists with *Farmers Insurance* on this point because "the *Farmers* court did not consider whether an Unfair Business Practices Act claim arising in an exclusively rate-making context could be brought in the superior court in light of the immunity provided in Insurance Code sections 1860.1 and 1860.2." (*Walker, supra*, 77 Cal.App.4th at 759.) "While, in a brief footnote, those sections were recognized as barring statutory claims under the Insurance Code, the [*Farmers Insurance*] decision did not discuss them in the context of an Unfair Business Practices Act claim." (*Ibid.*) "And . . . while subsequent high court decisions also have upheld the viability of Unfair Business Practices Act claims against insurers in the wake of Proposition 103, the court has also continued to recognized the existence of ***statutory exceptions***

for rate-making decisions." (*Ibid.* citing *Quelimane, supra,* 19 Cal.4th at 33, 44-45, emphasis added.)

The same distinction applies to *Jonathan Neil.* (*Jonathan Neil, supra,* 33 Cal.4th at 933 [recognizing no "absolute statutory bar to prosecuting such claims absent a prior administrative determination."].)

Therefore, as courts have previously held, no conflict exists between these cases and *Quelimane's* requirement that the CDI have exclusive jurisdiction over rate-making and rate-usage activity. Given that no conflict exists because the applicable statutes exclusively vest the CDI with jurisdiction to address Villanueva's claims based on rate-making and rate usage activity, Villanueva's additional points on primary jurisdiction lack relevance. (PFR at pp. 23-26, §§ V. A., B., C., and VI.) For completeness, however, Fidelity addresses each of these points, which do not change the analysis that the CDI has exclusive jurisdiction.

First, Villanueva erroneously asserts the administrative procedure is permissive because a person "may" file an administrative complaint. (PFR at p. 23, § V. A.) Villanueva infers that he "may" alternatively file a civil proceeding. (*Ibid.*) Of course, section 12414.13 does not say that. And, given section 12414.26's express bar on civil proceedings and section 12414.19's express recognition of subsequent judicial review, section 12414.13 is fairly read not as conferring concurrent jurisdiction on a

superior court but rather as simply making a formal written complaint optional in invoking the administrative process.

Second, Villanueva's representation that the Superior Court "already complied with the principles of primary jurisdiction" at best demonstrates a misunderstanding of primary jurisdiction. (PFR at p. 23, § V. B.) Villanueva relies on a letter he elicited from the CDI years after he filed this lawsuit and trial testimony from a CDI employee. (*Id*. at pp. 23-24.) The letter and trial testimony: (1) are not the administrative procedures Villanueva needed to follow, (2) occurred years after Villanueva filed suit so the CDI had not "already spoken" on the issue, and (3) the trial court did not stay the action pending Villanueva's pursuit of administrative relief.

Third, Villanueva complains that he lacks "adequate administrative remedies" because the Opinion recognizes the CDI could not seek restitution. (PFR at pp. 24-25, § V. C.) To the contrary, the Opinion merely recited Villanueva's contention that the CDI could not seek restitution and found it not to be relevant to the jurisdictional analysis. (Opinion at p. 49.) And, contrary to Villanueva's contention, both *Farmers Insurance* and *Jonathan Neil* recognized that the Insurance Code had a "pervasive and self-contained system of administrative procedure[.] (*Farmers Insurance*, *supra,* 2 Cal.4th at 396 quoting *Rojo v. Kliger* (1990) 52 Cal.3d 65, 87; *Jonathan Neil*, *supra,* 33 Cal.4th at 934.) Moreover, despite Villanueva's argument to the contrary, in addition to the procedures, there are also a vast

array of remedies available for violations, including refunds. (*See* Reporters Transcript (RT) 1218:22-1219:9; Ins. Code §§ 12409 and 12414.25 [civil and criminal penalties]; § 12410 [all available remedies]; Opinion at pp. 5-6, fn. 3 [citing prior settlement from CDI in which CDI obtained refunds for customers]; *First Am. Title Ins. Co. v. Superior Court (Sjobring)* (2007) 146 Cal.App.4th 1564, 1568 [noting earlier CDI investigation which resulted in a $20 million penalty which "was to be refunded to some 38,000 individuals" as a "refund of the ceded premium."].) Thus, in an administrative proceeding, the CDI could have readily found that no restitution was available based on Villanueva's failure to prove an entitlement to restitution (like the superior court did here), but not because of any lack of authority or ability of the CDI to recover funds for complainants.

Fourth, Villanueva contends that the fact that the CDI provided a legal opinion and permitted a CDI rate analyst to testify for plaintiffs regarding Fidelity's rate-making and rate usage dictates that the trial court shared jurisdiction. (PFR at p. 25, § VI.) The CDI's assistance is irrelevant to jurisdiction as "[s]ubject matter jurisdiction cannot be conferred by consent, waiver, or estoppel." (*First Sec. Bank of Cal., N.A. v. Paquet* (2002) 98 Cal.App.4th 468, 474.)

Accordingly, Villanueva fails to establish any conflict or important issue for review.

C. Review Is Not Required To Settle Any Important Question Of Law Or Conflict Regarding Section 12414.27

Below, Villanueva asserted that the challenged conduct is expressly excluded from section 12414.26 immunity because the conduct was prohibited by section 12414.27 which is in Article 6.9, not Article 5.5. (Opinion at pp. 42-43.) The Court of Appeal rightly disagreed. (*Id*. at pp. 47-48.) Villanueva contends that review of the Opinion will resolve a conflict and important questions of law regarding Insurance Code section 12414.27. (*See, e.g.*, PFR at pp. 26-29, § VII.) He is wrong.

First, Villanueva identifies no other case construing section 12414.27 so no case conflicts exist. Moreover, no tension exists between the Opinion and the general rule of statutory construction regarding giving effect to a statute's words. (PFR at p. 55.) To the contrary, the Opinion gave effect to the portion of the statute that Villanueva now calls surplusage (Opinion at pp. 48-49) and noted that it was Villanueva who failed to account for all of the statute's words. (*Id.* at pp. 43-44.) The Opinion did not create any new or different rules for statutory construction.

Second, the Opinion's discussion of section 12414.27 does not involve an important question of law. Instead, it involves a question of limited precedential, societal, or practical value. This is shown by the lack of case law on section 12414.27 and the Court of Appeal's ability to apply its plain terms, consistent with its legislative history.

In addition, Villanueva's dire prediction that without his civil proceeding title insurers will become lawless entities overcharging consumers with unlawful rates ignores reality. (PFR at p. 6.) The Opinion recognizes that while section 12414.27 is a procedural statute, other provisions of the Insurance Code substantively address charging rates other than in accordance with rate manuals. (Opinion at p. 48.) And if such conduct occurs, there are extensive administrative procedures and remedies available, as detailed above. (*See, supra,* at § III.B.) The administrative proceedings have meaningful remedies by which consumers not only may be made whole, but by which the CDI can punish and even terminate a regulated entity's license or certificate to do business. (*Ibid.*)

Accordingly, the court's discussion of section 12414.27 presents no basis for review.

IV. CONCLUSION

Supreme Court review is not necessary to secure uniformity of decision or to settle and important question of law. Accordingly, it is respectfully requested that the Petition for Review be denied.

DATED: November 6, 2018 HAHN LOESER & PARKS LLP

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DATED: November 6, 2018

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.504(d)(1))

The text of this Answer to Petition for Review consist of 5,947 words, including footnotes, as counted by the Microsoft Word (2010 version) processing program used to generate the brief.

DATED: November 6, 2018 HAHN LOESER & PARKS LLP

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Supreme Court of California

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