S252035

IN THE SUPREME COURT OF CALIFORNIA

MANNY VILLANUEVA et al.,
Plaintiffs and Appellants,

vs.

FIDELITY NATIONAL TITLE COMPANY,
Defendant and Appellant.

After a Decision by the Court of Appeal
Sixth Appellate District
Case Nos. H041870, H042504
(Santa Clara County Super. Ct. No. 1-10-CV173356)

REPLY TO ANSWER TO PETITION FOR REVIEW

Service on the Attorney General and District Attorney required
by Bus. & Prof. Code § 17209 and Cal. Rules of Court, Rule 8.29

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I. INTRODUCTION

Fidelity concedes that this is the first published decision ever to hold that:

- immunity extends to *unfiled*, *unapproved* rates;

- courts cannot interpret filed rates;

- the Insurance Commissioner has *exclusive, original* jurisdiction over such claims.

Even Fidelity agrees that the courts will be closed to members of the public when they are unlawfully charged: the opinion "requires administrative proceedings instead of civil proceedings" when "regulated entities. . . impose unlawful charges." (Answer, p. 7.)

Fidelity responds by asserting that "consumers *can* obtain restitution through the administrative process." (Answer, p. 7, emph. by Fidelity.) It repeats this again and again. (See, e.g., Answer, pp. 10, 28, 30; Response to United Policyholders letter, pp. 2-3.) Fidelity's assertion is not remotely true, and even the court below did not make this claim.

II. Fidelity repeatedly asserts that the available administrative remedies include restitution and refunds. This is just not true.

Fidelity asserts that the Commissioner has administrative authority to award "refunds" and "restitution" by which consumers "may be made whole." (Answer, pp. 7, 10, 28, 30; Response to Consumer Attorneys of Calif. letter, p. 2.) Fidelity repeatedly asserts that: "The Insurance Code provides a wide array of remedies, including refunds." (Response to United Policyholders letter, pp. 2-3; Response to CAOC letter, p. 2.)

A. The California Department of Insurance ("CDI") states that restitutionary relief is not available.

As the Department's Senior Staff Counsel informed the Superior Court:

"**No procedure is available at CDI for obtaining restitution. . . .**"

(Letter, d. 10.22.2010, from CDI Senior Staff Counsel to parties and LASC, cc'd to CDI General Counsel, *Wilmot-Munro v. First America Title*, LASC Case No. BC370141, p. 2, attached pursuant to CRC 8.504(e)(1)(C).)

The Department's statement was in response to a Superior Court primary jurisdiction referral, in a title insurance class action. The Commissioner, having no restitutionary or class remedy available, declined jurisdiction.

B. Courts agree that CDI cannot award restitution.

The courts have uniformly concluded that the Commissioner has no administrative authority to award a restitutionary remedy. The Commissioner's power "does not include imposition of civil liability on those who engage in unfair business practices," and "his or her power is limited to enjoining future unlawful conduct and suspending or revoking a license or certificate." (*Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 605.)

Fidelity claims *Stevens* "address[es] the administrative remedies provided under the UIPA [Unfair Insurance Practices Act]" and so has "no relevance" here. (Response to United Policyholders letter, p. 3.) Fidelity is incorrect. *Stevens*, like *Villanueva*, involves a UCL suit (Bus. & Prof. Code, § 17200, et seq.) *only*. (*Stevens*, *supra*, 75 Cal.App.4th at 598, et seq.) *Stevens* discusses the UCL on literally every page of its opinion, save one. (*Id*. at 608.) It makes mention of the UIPA.

In *State Comp. Ins. Fund v. Superior Court* (2001) 24 Cal.4th 930, 938 ("*SCIF*"), when the insurer made the same unsubstantiated claim as Fidelity makes, this Court noted that the insurer did not offer "any authority allowing the Insurance Commissioner to order a carrier to refund all improperly collected premiums to the insured." In *SCIF*, this Court considered the same immunity issue as here, under one of the four identically worded McBride-Grunsky sister statutes.

Even the opinion below correctly notes that the Commissioner "could not seek restitution." (Opinion, p. 49.) Fidelity

claims the court is just restating Petitioners' position. (Answer, p. 27.) This is highly doubtful, since the court spends literally three full pages recapping the administrative procedure statutes – without once pointing to anything suggesting the Commissioner has authority to award restitution. (Opn., pp. 38-42.) Since the whole thrust of the case was to obtain restitution, the court certainly would have mentioned such a procedure if it saw one.

C. The Insurance Code does not authorize the Commissioner to award restitutionary relief.

The Insurance Commissioner derives his/her authority from the Insurance Code. There, the Legislature simply chose not to delegate him/her the authority to award consumers monetary relief. The remedy the Code does authorize for those aggrieved by a title company rate are:

§ 12414.16 – Commissioner can prohibit "further use" of an unlawful rate after a hearing, and if violation is "willful" can suspend or revoke certificate of authority;

§ 12414.17 – Commissioner can suspend or revoke a certificate of authority for failure to comply with an order;

§ 12414.25 – Commissioner can collect a penalty payable to the state (not to a consumer) of up to $100 for failure to comply with a final order, or up to $5,000 for a willful failure to comply;

§ 12921 – when settling an enforcement action, Commissioner can obtain attorney fees and costs, and future costs of ensuring compliance with the agreement.

§ 12921.9 – Commissioner can issue "legal opinion" (which he did on behalf of the class in *Villanueva*);

§ 12928.6 – the Commissioner can sue to enjoin violations.

The Code sets forth similar non-restitutionary remedies for the other lines.

The Legislature has even limited what the Commissioner can negotiate via an administrative *settlement*. "A settlement may only include the sanctions provided by this code or other laws regulating the business of insurance," except that the settlement may include the Department's fees and enforcement costs. (Ins. Code § 12921(b)(4).) Since there is no authority for restitution elsewhere, this statute prohibits the Commissioner from leveraging restitution through a settlement.

D. None of Fidelity's "authority" substantiates its assertions.

Despite the foregoing, Fidelity asserts that the available administrative remedies include full refunds and restitution. Fidelity cites:

§ 12409. (Answer, p. 28.) "Penalty for Unlawful Rebate." This section allows monetary penalties where companies pay unlawful "rebates and commissions" for business referrals. Does not authorize penalties for any other conduct, such as charging unfiled rates. Does not authorize refunds or restitution payable to a consumer, only penalties payable to the "people of California."

§ 12410 "[all available remedies]". (Answer, p. 28.) Allows injunctive relief (pursuant to § 12928.6) against companies that pay unlawful "rebates and commissions" for business referrals. Does not apply to any other misconduct, such as charging unfiled rates. Does *not* authorize restitution payable to consumers. Authorizes prospective injunctions only, yet Fidelity at least three times claims it provides "all available remedies."

§ 12414.25. Authorizes penalties payable to the state (not to a consumer) of up to $100 for noncompliance with a prior order, or up to $5,000 for willful noncompliance. Does not authorize penalties for unlawful charging: only for violations of prior, final orders.

None of this "authority" remotely supports Fidelity's assertions regarding restitution and refunds. Fidelity's remaining "authority" is:

• **Trial testimony of a CDI non-attorney rate *analyst* with no experience in rate enforcement.** (Answer, p. 28; RT, pp. 978:11-13; 979:3-4; 982:22-27; 983:14-19.) Testified to "belief" that Commissioner has authority to seek restitution on behalf of consumers. (RT, p. 1219:1-9.) But is hardly an expert on the Commissioner's statutory authority: also testified to his "belief" that the Commissioner adopts regulations via "a request to the Congress or to the legislature for approval." (RT, p. 1220:1-5.) Strangely, also testified that CDI received its "very first" title industry filings in 1996, though title insurers have been required to file rates since at least 1949 (former §§ 12401, 12403, added by Stats. 1949, Ch. 891.) and

title/escrow companies since 1973. (§ 12401, et seq., added by Stats. 1973, Ch. 1130.)

• **Footnote 3 in the opinion below**. (Answer, p. 28.) References a civil lawsuit filed in 1999 in the name of the People of California, the Commissioner, and the State Controller against Fidelity and others by the Attorney General. (Answer, p. 28, citing Opn., 5-6, fn 3.) Attorney General and several district attorneys obtained restitution in October 2002, via consensual settlement, without the Commissioner's participation. (RA, 00720-752.) During the suit, the Commissioner's action was limited to injunctive relief.

As Fidelity well knows, the Commissioner settled separately the year before for *non*-restitutionary relief *only*. The Commissioner obtained no restitution for any consumers in *his* settlements – just reimbursement of the Department's costs plus payment to the Department for "consumer education." (RA, 00720-752, 01241-44, 01253; 17-WTR Calif. Regulatory Law Reporter 239, 268-269 (Winter 2001).)

Fidelity's inaccurate representation is particularly disappointing, since Fidelity, as a party, obviously knows the truth, and since the cited documentation proving the Commissioner's settlement was *non*-restitutionary is in Fidelity's own Respondent's Appendix.

Clearly, this civil litigation provides no support for Fidelity's assertions. The lawsuit was (obviously) not an administrative proceeding; restitution was not obtained by the Commissioner, but by the AG a year after the Commissioner's *non*-restitutionary

settlement; and the restitution was not an administrative remedy; an administrative remedy is by definition *non*judicial. (Blacks Law Dictionary (9th ed. 2009), p. 1407-08.)

• **Litigation settlement referenced in *First American Title v. Superior Court* (2007) 146 Cal.App.4th 1564, 1568.** (Answer, p. 28.) The restitution paid to California consumers was achieved by the *Colorado* Division of Insurance, not by the *California* Commissioner. *He* obtained only a *penalty* payable to the state. Moreover, this consensual settlement did not pertain to rate overcharges, but rather kickbacks paid for business referrals:

> "In November 2004, the *Colorado* Division of Insurance began an investigation into unlawful title insurance practices, in which it uncovered a reinsurance *kickback* scheme. . . . for the referral of customers. . . . [In] 2005, Colorado announced that *it* had reached a settlement with First American Title Insurance Company by which that entity agreed to refund $24 million to consumers *nationwide*. . . . Some $15 million of the First American Title Insurance Company settlement consisted of the share of the *Colorado* settlement payable to California consumers. *This* amount was described as 'a full refund of the ceded premium,' [i.e., of the kickbacks] which was to be refunded to some 38,000 individuals. The remaining $5 million *was a penalty* obtained by the *California* Department of Insurance."

(*First American*, *supra*, 146 Cal.App.4th at 1568, emph. added.)

Obviously, *none* of this substantiates Fidelity's repeated claims that "an administrative proceeding before the CDI" can yield a "full complement of remedies including restitution." (Answer, pp. 10, 30.)

III. Consumers have no *right* to an administrative hearing. "Judicial review" under § 12414.19 affords *no* remedy.

The administrative procedure touted by the court below (pp. 38-42) does not actually give complainants any right to have their complaints *heard*. (§ 12414.13 -.16.) The Commissioner can deny a complaint without hearing it simply because he "has information concerning a similar complaint." (§ 12414.13.) In this case, 500,000 people have similar complaints. Should one person complain, the Commissioner is authorized to refuse to hear the remaining 499,999 complaints.

Similarly, the Commissioner can refuse to hear a complaint if he "believes" it has no probable cause, or if he "believes" it was not made in "good faith." (*Id*.) There are no standards for forming these "beliefs," and no supporting findings are required.

Additionally, a complaint will not be heard unless the Commissioner "finds" probable cause, and also finds the complainant would be "aggrieved" if the violation is proven. (*Id*.) Again, there are no standards for these "findings."

And even if a consumer gets past these hurdles, Sec. 12414.15 gives the Commissioner additional unfettered discretion to refuse to hear the complaint. It provides only that the Commissioner "*may*

hold a public hearing," and "may" is permissive, not mandatory. (Ins. Code § 16.)

And if the Commissioner does hear a complaint, and does find for the complainant, the Commissioner has no authority to award money, as shown above, and so will not.

The Section 12414.19 "judicial review" touted by both Fidelity and the court below is totally *meaningless*. First, review must be "in accordance with the Code of Civil Procedure." And because the statutory scheme does not *require* the Commissioner to hold a hearing, a consumer cannot seek review by administrative mandamus. (Code Civ. Proc. § 1094.5; *Saleeby v. State Bar of Calif.* (1985) 39 Cal.3d 547, 560-561.) The only judicial review available is ordinary mandamus, under Code Civ. Proc. sec. 1085. (See, e.g., *Schwartz v. Poizner* (2010) 187 Cal.App.4th 592.)

Ordinary mandamus can only "compel the performance of a clear, present, and ministerial duty where the petitioner has a beneficial right to performance of that duty." (*Id*. at 596.) Since the Commissioner has no authority to award monetary relief, let alone a "clear, present and ministerial duty" to do so, ordinary mandamus will never provide a remedy. That the court below trumpeted this useless procedure is just one more reason for this Court to grant review.

IV. The opinion below rewrites the immunity statute. Petitioners ask the Court to correct this, and to effect the Legislature's intent.

Fidelity's central claim is that "the Opinion simply applies the plain language of the statutory immunity to the facts of this case." (Answer, p. 5.) Actually, the exact opposite is true. The opinion consistently ignores or misapplies the plain language, confounding the Legislature's intent.

A. Plain Language: "Pursuant to the authority conferred by Article 5.5. . . ."

The statute is one 60 word sentence. To qualify for immunity, an action must meet every one of its multiple criteria. One of the most important is that the conduct complained of was "done pursuant to the authority of" either the ratemaking article (Art. 5.5) or the advisory organization article (Art. 5.7). The court below handles this language as follows:

> "Fidelity **failed to comply** with sections 12401.1, 12410.2, and 12401.7, all of which are in [the ratemaking article]. In our view, this conduct constitutes acts done **pursuant to the authority conferred by [that article.]** **Thus**, the claims . . . are barred by the section 12414.26 immunity."

(Opinion, p. 38, emph. added.)

Not surprisingly, Fidelity does not even try to explain this tortured result. Presumably, Fidelity, too, is stymied by a holding that a "failure to comply" with a statute is also an act done

"pursuant to the authority conferred by" that statute. This holding stretches the plain language far beyond its breaking point, and this alone justifies review.

B. Plain Language: "under any other law. . .enacted"

The court below barred Petitioner's common law action for breach of fiduciary duty, purporting that the "immunity bars 'civil proceedings.'" (Opinion, p. 49). It thereby ignored the language limiting immunity to proceedings brought under a "*law* of this state heretofore or hereafter *enacted*." (§ 12414.26, emph. added.) "Enacted law" is "law that has its source in legislation." (Black's Law Dictionary (9th ed. 2009) p. 963.) For 100 years at least, courts have recognized this important distinction between "enacted law" and "common law." (See, e.g., *Maryland Casualty Co. v. Fidelity & Casualty Co.* (1925) 71 Cal.App. 492, 497.) By holding that immunity applies to *all* civil proceedings, including those grounded in common law, the opinion renders "enacted" surplusage, an impermissible construction. (*State Farm v. DMV* (1997) 53 Cal.App.4th 1076, 1081.)

No prior court has held that statutory immunity can apply to common law rate actions. Contrary to Fidelity's assertion, *Walker v. Allstate* (2000) 77 Cal.App.4th 750 did not consider this issue, since it was never raised), and of course a case is not authority for a proposition not considered. (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388.)

Fidelity also says this distinction "makes no sense." (Response to United Policyholders letter, p. 6.) Fidelity is wrong; it makes perfect sense because the Legislature's intent was to immunize conduct that would otherwise violate California's antitrust statutes, primarily the Cartwright Act. (See Petition, pp. 13-17 and authority cited there, and *Cole v. Hartford Financial* (CD Calif. 2009) 2009 WL 10675233, *4, following *Donabedian v. Mercury Ins.* (2004) 116 Cal.App.4th 968, 990-91.) Regardless, neither Fidelity nor the court below has authority to override the Legislature's plain language.

C. Plain Language: "acts, actions, agreements"

The opinion similarly ignores the plain language limiting immunity to "acts, actions and agreements." The statute does not extend immunity to *omissions*; i.e., to *failures* to act. Had the court below considered this, it would have noticed this strikingly unusual language, which appears in the four McBride-Grunsky safe harbor statutes and in no other California statute. In contrast, the phrase, "act or *omission*," appears in more than 600 California statutes.

This anomaly is again explained by the Legislature's intent to immunize antitrust liability only, and itself evidences that intent: antitrust law cannot be violated by omission; affirmative acts are required. (See, e.g., *Alfred M. Lewis v. Warehousemen Local 542* (1958) 163 Cal.App.2d 771, 783-84.)

D. The court below rewrites the statute.

It is not Petitioners who rewrite Sec. 12414.26; it is the court below. The Legislature drafted an intricate, multi-limitational, 60 word sentence, to implement a very limited immunity :

> **No act done, action taken, or agreement made pursuant to the authority conferred by Article 5.5 (commencing with Section 12401) or Article 5.7 (commencing with Section 12402) of this chapter) shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this state heretofore or hereafter enacted which does not specifically refer to insurance.**

Petitioners insist that each one of these 60 words be given full effect. The court below does not, and instead offers a new, nine word reconstruction:

> **"Conduct related to ratemaking is barred by statutory immunity."** (Opinion, p. 36.)

None of the nine words in this "simplified" recast appear in the actual statute, except "to." The court cannot substitute its own, reductive immunity test for the one the Legislature enacted. Only the Legislature can grant immunity; courts cannot. (*Aron v. U-Haul* (2006) 143 Cal.App.4th 796, 804.)

V. Fidelity says the case law is in harmony. But *objective* commentators do not agree.

Fidelity complains that "Villanueva tries to invent conflict" in the case law. (Answer, p. 16.) Actually, the opposite is true: Fidelity does its level best to invent *harmony*. Consider, for example, how Fidelity "harmonizes" this opinion with *MacKay v. Superior Court* (2010) 188 Cal.App.4th 1427. First, Fidelity says, correctly, that the opinion extends immunity to "*all* civil proceedings. . . related to ratemaking." (Answer, p. 10.) Then Fidelity says, also correctly, that *MacKay* holds that immunity does "*not* exempt . . . *all* ratemaking acts." (Answer, p. 16, citing *MacKay*, at 1443.) " This is anything *but* harmony.

Fidelity and the court below also regard *Walker* and *Donabedian* as harmonious. Objective commentators disagree, observing that *Walker* is simply "inconsistent and largely irreconcilable" with the Second District's subsequent 2004 decision in *Donabedian, supra,* 116 Cal.App.4th 968. (27 No. 2 Insurance Litigation Reporter, *supra*, at 73.) As a leading treatise explains: "If *Donabedian*'s statutory analysis is correct, private attorneys general should have the right to enforce Proposition 103's ratemaking provisions," and "if *Walker*'s analysis is correct," that would mean "exclusivity of the commissioner's jurisdiction." (Dimugno & Glad, supra, §66:19.)

"[I]n *contrast* to the *Walker* court's view on the *same question," Donabedian* held that the statutory scheme does *not* preclude a UCL suit for violation of the rate statutes. (44 U.S.F. Law

Rev., *supra*, at 879, emph. added.) The two are, simply, "inconsistent opinions." (*Id*. at 867.)

The next two relevant opinions after *Donabedian* are *Farmers v. Superior Court* (2006) 137 Cal.App.4th842 and *Fogel v. Farmers Group* (2008) 160 Cal.App.4th 1403, from different divisions of the 2nd District. As the USF Law Review observes, these "add to the confusion" by "each interpreting *Donabedian* differently."(44 U.S.F. Law Rev., *supra*, at 855-856, 867, emph. added.) The opinion below relies heavily on *Walker* and *MacKay*. *Mackay*, in turn, is based on the (unfounded) idea that there is a California filed rate doctrine applicable to insurance, which originated in a *Walker* footnote. *Fogel*, however, holds the opposite, causing a literal "divide" – which this Court should finally address.

As the Washington Law Review comments: "The lower California courts *expressly disagree* with each other about whether [the] filed rate [doctrine] applies to California insurance cases other than health insurance. On one side of the *divide*. . . at least two cases [*Mackay; Walker*] have held that plaintiffs may not challenge an approved rate under a law that is outside the Insurance Code." (Comment, *A Nuanced Approach: How Washington Courts Should Apply The Filed Rate Doctrine,* 92 Wash. L. Rev. 481 (2017), at 509, emph added.) "On the other side of the divide" is *Fogel,* holding the filed rate doctrine does not apply to California insurance rates." (160 Cal.App.4th at 509.)

As the Rutter Guide emphasizes: "There is a *split of authority* whether California recognizes the filed rate doctrine." (Croskey, et

al., California Practice Guide: Insurance Litigation (Rutter 2018) §14:364, emph. in original.) "Clarity on the filed rate doctrine in California would require either a California Supreme Court case on the topic or for the lower courts to begin overruling their prior (contradictory) cases." (92 Wash. L. Rev., *supra*, at 512.)

Although the opinion does not *expressly* discuss the filed rate doctrine, its analysis depends on *MacKay,* and *MacKay* depends on the filed rate doctrine.

Neither is the opinion harmonious with this Court's decision in *SCIF*. The court's sole justification for not following *SCIF* is its claim that the conduct there was "*unrelated to ratemating*." (Opinion, 35-36.) This completely contradicts the established understanding of *SCIF*, as noted in the authoritative Matthew Bender treatise, California Antitrust & Unfair Competition Law (2016): "there was *no doubt* that SCIF's alleged misconduct was *directly related* to the process by which workers' compensation *rates* and premiums were determined." (*Id.* at §7.10, emph. added.)

Until now, it has been hornbook law that *unapproved* rates can be challenged in court: "The use of rates or rating factors that have *not been approved* by the Commissioner or *which otherwise violate* the Insurance Code *can* be subject to challenge via the UCL." (Riehle, et al, California Antitrust & Unfair Competition Law (Matthew Bender 2016) §7.09.) "Insurers *remain* subject to Unfair Competition Law challenges to ratemaking practices that do *not* involve an *approved* rate." (32 No. 19 Insurance Litigation Reporter 612 (2010).)

But under this opinion, insurers for the first time have immunity for using unfiled, unapproved rates.

Nor can the opinion below be reconciled with the synthesis of California law offered by the federal courts. After reviewing *Walker, MacKay,* and other McBride-Grunsky immunity cases, the United States District Court decided: "Effectively, challenges to the *reasonableness* of an *approved* rate fall within the exclusive ambit of the chapter and are exempt. . . Otherwise, those engaged in the business of insurance must comport with California laws, including the UCL." (*Wahl v. American Security Ins.* (ND Cal. 2010) 2010 WL 4509814, at *3, emph. added.) "*MacKay, Walker* and the various other cases on which [the insurer] relies for its McBride Act 'defense,' as it were, were limited to situations where a plaintiff challenged a charged rate *as excessive per se*, and effectively asked the Court to calculate an *alternative rate* it deemed more '*fair*'." (*Id.*, emph. added.)

Overall, commentators agree that "there is *no clear direction* concerning the scope of the Insurance Commissioner's statutory jurisdiction over rates and rate matters." (Wells, *Ships Passing in the Night: How California's Statutory Framework Directs Traffic*, 44 U.S.F. Law Rev. 853, 856, emph. added.)

The opinion does not even acknowledge – let alone address – the conflicts among these decisions. Nor does it acknowledge its own departures from their holdings. Instead, it dismisses *SCIF* and *Donabedian* via meaningless distinctions, and misapplies others.

(Opionion, pp. 34-35.) Some, it simply ignores. As Fidelity says, the court below "saw harmony in the case law." (Answer, p. 16.)

VI. The opinion's exclusive jurisdiction holding conflicts with this Court's decisions in *Farmers (1992)* and *Jonathan Neil*.

Both *Farmers (1992)* and *Jonathan Neil & Assoc's. v. Jones* (2004) 33 Cal.4th 917 center around ratemaking activities, and the latter specifically involves rate *interpretation*. (Petition, pp. 20-22.) *Farmers* acknowledges the immunity statute, and both acknowledge the comprehensive administrative procedure. (Answer, pp. 7, 24-26.) Yet both hold that the Commissioner does *not* have exclusive original jurisdiction over ratemaking complaints. (Answer, pp. 24-26.)

Yet below, in total opposition, the court holds that purely *because* there is a (purportedly) comprehensive administrative procedure (as there was in both *Farmers* and *Jonathan Neil*), the Commissioner *has* exclusive original jurisdiction. (Opinion, 42.) These disparate results cannot be reconciled, regardless of Fidelity's convoluted parsing.

Nor does Fidelity offer an explanation for the opinion's failure to address this Court's holdings rejecting exclusive jurisdiction of the Commissioner. Instead, Fidelity complains that Petitioners did not themselves invoke the primary jurisdiction doctrine to pursue an administrative process. (Answer, p. 24.) Fidelity says this Court, therefore, need not consider the opinion's clear conflict with this Court's jurisdictional decisions. (*Id*.)

But Fidelity misunderstands how primary jurisdiction works. It is a discretionary doctrine that *trial courts*, not plaintiffs, invoke. (*AICCO v. Insurance Company of N.A.* (2001) 90 Cal.App.4th 579, 594, emph. added.) The trial judge below chose not to. That has no bearing on Petitioners' right to rely in *this* Court on *this* Court's binding jurisdictional rulings that the Commisioner's jurisdiction is *not* exclusive, particularly since Petitioners cited both *Farmers* and *Jonathan Neil* to the court of appeal below. (See, e.g., Combined Appellant's Reply, p. 36; Appellant's Amended Opening Brief, p. 55.)

Moreover, these issues all concern the court's subject matter jurisdiction. As Fidelity itself argued below, and as the opinion below holds, issues "affecting the trial court's subject matter jurisdiction are *never* forfeited and can be asserted for the first time on appeal, *at any stage of the appellate process*." (Opinion, p. 23, citing *Consolidated Theaters v. Theatrical State Employees Union* (1968) 69 Cal.2d 713, 721, emph. added.) The proceedings here are certainly a stage of the appellate process.

VII. Conclusion.

In addition to the matters emphasized above, Petitioners remain firm that:

- *Walker*, *Krumme v. Mercury Ins.* (2004) 123 Cal.App.4th 936, and the opinion below misapplied this Court's limited holding in *Quelimane*;
- the Legislature intended the four McBride-Grunsky immunity statutes to apply to antitrust actions only;

- courts *are* allowed to interpret rates; and
- Sec. 12414.27 requires title charges to be in accordance

with rate filings. (1 Cal.Jur.3d, Abstractors & Title Insurers, §25, n.4.)

We respectfully urge this Court to grant review on all issues raised in the Petition, to secure uniformity of decision, to settle important questions of law and to safeguard a core principle of our jurisprudence: that for every wrong there *is* a remedy. (Civil Code sec. 3523.)

DATED: November 16, 2018

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CERTIFICATION OF WORD COUNT

The undersigned certifies, pursuant to California Rules of Court, Rule 8.504(d), that this brief contains 4,282 words, including footnotes, as shown by the word count function of the computer program used to prepare the brief.

DATED: November 16, 2018

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SUBJECT: Wilmot-Munro v. First American Title Insurance Company
Los Angeles Superior Court Case No. BC370141

Dear Counsel:

In previous correspondence, the parties advised the Department ("CDI") that the Superior Court stayed plaintiffs' claims relating to a loan tie-in fee charged by First American and ordered plaintiffs to exhaust their administrative remedies with CDI before further court proceedings in the above-captioned case ("Court Case").

On September 14, 2010, we sent a letter ("Letter") notifying you that CDI previously concluded an administrative proceeding on the loan tie-in fee issue. We explained that in 2007, CDI entered into a settlement with First American resolving a 2004 market conduct examination, which asserted violations related to loan tie-in fees, among other violations. The purpose of the Letter was to apprise the Court of prior administrative activity at CDI related to the loan tie-in fee issue.

Proceedings in the Court Case following our sending the Letter reflect a misunderstanding of the Letter. To clarify:

1. The Letter was not meant to (and did not) express a view about the viability in court of plaintiffs' claims in the putative class action.

2. The Letter was not meant to suggest that CDI has jurisdiction over plaintiffs' claims in the Court Case by virtue of "continuing jurisdiction" over the settlement. Our continuing jurisdiction over the settlement extends to First American's compliance with the terms of the settlement. Plaintiffs' claims in court are different claims. Plaintiffs are not contending that First American is violating the terms of the settlement. Accordingly, CDI's continuing jurisdiction over the settlement does not create jurisdiction over claims in the Court Case.

3. No procedure is available at CDI for obtaining restitution or other relief sought by plaintiffs in the Court Case.

Please promptly transmit this letter to the Court.

Sincerely,

Mary Ann Shulman
Senior Staff Counsel

cc: Adam M. Cole, General Counsel, California Department of Insurance

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 11611 Dona Alicia Place, Studio City, California 91604.

On November 16, 2018, I mailed a copy of the foregoing **REPLY TO ANSWER TO PETITION FOR REVIEW** on the interested parties and persons in this action, as follows:

SEE ATTACHED SERVICE LIST

I am readily familiar with the firm's practice of collection and processing correspondences for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles County, California in the ordinary course of business.

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

Executed on November 16, 2018, at Studio City, California.

Nazo S. Semerjian

SERVICE LIST

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Clerk Sixth District Court of Appeal 333 W. Santa Clara Street, Suite 1060 San Jose, California 95113	***Court of Appeal (First Class U.S. Mail)***
California Supreme Court 350 McAllister Street, Room 1295 San Francisco, California 94102-4797	***California Supreme Court (To be submitted by Express Mail on November 17, 2018)***
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