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)

PETITIONER'S MOTION FOR JUDICIAL NOTICE

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Manny Villanueva and the class members

Pursuant to rule 8.54 of the California Rules of Court and Evidence Code sections 452(b) and 459, appellants/petitioners Manny Villanueva and the class members move for judicial notice of the following documents:

1. **Legislative History of California Statutes 1973, Chapter 1130, Senate Bill 1293.** (Respondent's Appendix, Vol. V, 970-1226.)

Senate Bill 1293 revised provisions for regulation of underwritten title companies, provided for mandatory rate filing by controlled escrow companies, and added Insurance Code section 12414.26, the immunity statute at issue here. The legislative history is relevant because this appeal will turn in part on this Court's interpretation of Section 12414.26. Indeed, the trial court took judicial notice of this legislative history, and relied on it in its Statement of Decision. (AA 1403, 1408, 1412-1413.) The Court of Appeal also took judicial notice, and repeatedly cited the legislative history in its opinion. (Opinion, 11-12, 44-48.)

Appellate courts must take judicial notice of any matter properly noticed by the trial court. (Evid. Code § 459(a).) Judicial notice may be taken of "statutory law of this state," "resolutions and private acts of ... the Legislature of this state," and "official acts of the legislative, executive, and judicial departments ... of any state." (Evid. Code §§ 451(a), 452(a), 452(c).) This includes legislative bills and history. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 544, fn. 4; *Arce v. Kaiser Found. Health Plan* (2010) 181 Cal.App.4th 471,

484 ("reports of legislative committees and commissions are part of a statute's legislative history, and may properly be subject to judicial notice as official acts of the Legislature").) Additional categories of "cognizable legislative history" properly subject to judicial notice to aid in determining legislative intent include: versions and drafts of a legislative bill; legislative analyst reports; enrolled bill reports; and floor statements of legislators. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 31-32, 37; *People v. Acosta* (2002) 29 Cal.4th 105, 119 n.5; *Elsner v. Uveges* (2004) 34 Cal.4th 915, 934, fn. 19 (collecting cases); *In re Siller* (1986) 187 Cal.App.3d 36, 46.)

2. **Letter from Department of Insurance to Los Angeles Superior Court, d. October 22, 2010, declining jurisdiction in *Wilmot-Munro v. First American Title*, Case No. BC370141.** (A true and correct copy is attached as Exhibit A.)

This letter from the California Department of Insurance ("CDI" or "the Department") to the Los Angeles Superior Court is relevant because it confirms that: "No procedure is available at CDI for obtaining restitution or other relief sought by plaintiffs. . . ." (Ex. A, at p. 2.) The Department's statement was in response to a Superior Court primary jurisdiction referral in *Wilmot-Munro v. First American Title*, an unrelated title company class action. The Commissioner, having no restitutionary or class remedy available, declined jurisdiction.

Consistent with the Department's position set forth in this letter, the opinion below correctly notes that the Commissioner "could not seek restitution" on behalf of consumers like Villanueva and the class members. (Opinion, 49.) Despite this, Fidelity is nevertheless expected to argue that consumers can obtain restitution through the Department's administrative procedures. (See Answer to Petition for Review, at 7-8, 27-28.)

Although this letter was not presented to the trial court below, judicial notice may be taken of official acts of state executive departments. (Evid. Code § 452(c).) Courts commonly do so. (*Landstar Global Logistics, Inc. v. Robinson & Robinson, Inc.* (2013) 216 Cal.App.4th 378, 388, fn. 4 (taking judicial notice of letter from State Department to President Reagan); *In re H.C.* (2017) 17 Cal.App.5th 1261, 1268, fn. 4.)

3. **First Amended Complaint, filed July 19, 1999, and Stipulation to File Second Amended Complaint, filed Oct. 8, 2002, *People v. Fidelity National Title*, Sacramento Superior Court, Case No. 99AS02793.** (True and correct copies are attached hereto as Exhibit B and Exhibit C, respectively.)

These court records are relevant because they disprove Fidelity's contention that the CDI obtained restitution for consumers. Specifically, in its Answer to the Petition for Review and in response to amicus letters, Fidelity repeatedly claimed that the CDI "obtained refunds for customers" in *People v. Fidelity National*

Title. (Answer, p. 28, citing to Opinion at pp. 5-6, fn. 3; Fidelity' Response to Amicus Curiae Letter of United Policyholders, at pp. 2-3; Fidelity's Response to Amicus Curiae Letters of Public Citizen Litigation Group, et al., at p. 9.)

These court records from *People v. Fidelity* prove that Fidelity's contention is false. They show that the Commissioner's action was limited to injunctive relief, and that the CDI did **not** obtain restitution for consumers. Rather, the Attorney General and several district attorneys obtained restitution, via consensual settlement, without the Commissioner's participation. (RA 720-752.)

Although these court records from *People v. Fidelity* were not presented to the trial court below, judicial notice may be taken of relevant "records of any court of this state." (Evid. Code § 452(d).) Courts commonly do so. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 726 (court records from other proceedings involving party held judicially noticeable because relevant to discredit party).)

4. **Complaint (Unlawful Combinations in Restraint of Trade and Price Fixing Under Cartwright Act), filed Dec. 21, 1972, *Shernoff v. Title Ins. & Trust Co., et al.*, Los Angeles Superior Court, Case No. EAC14740.** (A true and correct copy is attached as Exhibit D.)

This court record is relevant because it shows that in late 1972, William Shernoff filed this Cartwright Act class action against a group of title insurers, alleging price fixing and restraint of trade.

Within months, at the request of the title industry, the California Legislature extended McBride-Grunsky immunity to title insurance, enacting The Title Insurance Regulatory Act of 1973. This is further evidence that the intent of the immunity statute was to immunize against state antitrust violations.

Although this court record from *Shernoff* was not presented to the trial court below, judicial notice may be taken of relevant "records of any court of this state." (Evid. Code § 452(d).) Courts commonly do so. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 726 (court records from other proceedings involving party held judicially noticeable because relevant to discredit party).)

5. Letter from General Counsel, Department of Insurance, to this Court, dated Nov. 19, 2010, requesting depublication of *MacKay v. Superior Court* (2010) 188 Cal.App.4th 1427.
(A true and correct copy is attached as Exhibit E.)

This letter from the Department of Insurance to this Court is relevant because it confirms the Commissioner's position that the McBride-Grunsky immunity statute affords immunity only against antitrust claims (i.e., concerted acts), not the unilateral misconduct of an individual actor: "the Department consistently since enactment of Proposition 103 has taken the position that Section 18601 and 1860.2 immunize insurers only for lawsuits alleging improper *concerted* activities authorized by the Insurance Code; Sections 1860.1 and 1860.2 do not immunize insurers from lawsuits

alleging that an *individual insurer's* rates or components of rates are illegal." (*Id.* at pp. 2-3.) This matter was not presented to the trial court. Judicial notice may be taken of it both as an "official act" of an executive department of this state and as a "record of any court of this state." (Evid. Code §§ 452(c), 452(d).)

6. **Letter from California Department of Justice to Hon. Earl Warren, Governor of California, dated June 11, 1947, regarding analysis of Senate Bill 1572.** (A true and correct copy is attached as Exhibit F.)

This legislative analysis of Senate Bill 1572, which enacted the McBride-Grunsky Act in 1947, is relevant because it explains that "acts in concert" are "expressly exempted from prosecution or civil proceedings under any law of this State which does not expressly refer to insurance. This, obviously, includes the Cartwright Act concerning combinations in restraint of trade.... [The § 1860.1 immunity statute] in effect, exempts acts of insurers and other persons done under the provision of the bill **from the Cartwright Act** and any other **restraint of trade** or **similar provisions** of California law." (RJN Ex. F, at pp. 3, 13.)

Although this matter was not presented to the trial court, judicial notice may be taken of the "decisional... and statutory law of this state" and "official acts of the legislative, executive, and judicial departments ... of any state." (Evid. Code §§ 451(a), 452(c).) This includes legislative history. (*Doe v. City of Los Angeles* (2007) 42

Cal.4th 531, 544, fn. 4.) Legislative analyst reports constitute "cognizable legislative history" properly subject to judicial notice to aid in determining legislative intent. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 31-32, 37.)

DATED: April 11, 2019

SHERNOFF, BIDART, ECHEVERRIA
THE BERNHEIM LAW FIRM

By: _____
Bernie Bernheim, Esq.
Nazo S. Semerjian, Esq.
Attorneys for Plaintiffs, Appellants
and Cross-Respondents
Manny Villanueva, and
500,000 Members of the Certified Class

I, Nazo S. Semerjian, declare as follows:

I am an attorney admitted to practice law before all courts of the State of California, and counsel of record for petitioner Manny Villanueva. I have personal knowledge of the foregoing facts and if called as a witness I could testify competently that they are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 11th day of April 2019, at Studio City, California.

_____
Nazo S. Semerjian

PROPOSED ORDER

Petitioner's motion for judicial notice is granted. The court takes judicial notice of the exhibits attached to the motion.

DATED: _____ _____

CHIEF JUSTICE

EXHIBIT A

STATE OF CALIFORNIA
Steve Poizner, *Insurance Commissioner*

DEPARTMENT OF INSURANCE
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October 22, 2010

Via E-Mail and U.S. First Class Mail

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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

EXHIBIT B

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EXHIBT I
RJN 005

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

THE PEOPLE OF THE STATE OF CALIFORNIA; KATHLEEN CONNELL, CONTROLLER OF THE STATE OF CALIFORNIA; AND PEOPLE OF THE STATE OF CALIFORNIA, *ex rel.*, CHUCK QUACKENBUSH, INSURANCE COMMISSIONER of THE STATE OF CALIFORNIA,

Plaintiffs,

v.

FIDELITY NATIONAL TITLE INSURANCE COMPANY, a California corporation; SPRING MOUNTAIN ESCROW CORPORATION, a California corporation; WEST COAST ESCROW COMPANY, a California corporation; all those similarly situated; and DOES 1 through 2000,

Defendants.

CASE NO.: 99AS02793

CLASS ACTION

FIRST AMENDED COMPLAINT FOR VIOLATIONS OF THE UNCLAIMED PROPERTY ACT, UNFAIR COMPETITION and BUSINESS PRACTICES ACTS

(Code of Civ. Proc. § 1500 *et seq.*; Bus. & Prof. Code § 17200 *et seq.*; Ins. Code §§ 12413.5 and 12928.6.)

THE PARTIES

1. The Plaintiffs.

Plaintiff, the People of the State of California, by Bill Lockyer, Attorney General of the State of California, Terence Hallinan, District Attorney of the City and County of San Francisco, and Louise H. Renne, City Attorney of the City and County of San Francisco, and Plaintiff Kathleen Connell, Controller of the State of California, and People of the State of California, *ex rel.* Chuck Quackenbush, Insurance Commissioner of the State of California, allege the following upon information and belief:

1. The Attorney General brings this class action on behalf of the People of the State of California on his own complaint, and on the complaints of the Controller of the State of California in her official capacity and the Commissioner of Insurance in his official capacity. The District and City Attorneys for the City and County of San Francisco also bring this class action on behalf of Plaintiff, the People of the State of California, on their own complaints.

2. Plaintiff, Kathleen Connell, Controller of the State of California, brings this class action with respect to the First Cause of Action only.

3. Plaintiff, People of the State of California, *ex rel.* Chuck Quackenbush, bring this class action with respect to the Second Cause of Action only.

II. The Named Defendants.

4. Plaintiffs allege, on information and belief, that defendant FIDELITY NATIONAL TITLE INSURANCE COMPANY ("FIDELITY") is, and at all relevant times was, a California corporation and an underwritten title insurance company, as defined by Insurance Code section 12340.5, doing business in California in numerous California cities and counties.

5. Plaintiffs allege, on information and belief, that defendant SPRING MOUNTAIN ESCROW CORPORATION is, and at all relevant times was, a California corporation and a controlled escrow company, as defined by Insurance Code section 12340.6, doing business in California in numerous California cities and counties.

6. Plaintiffs allege, on information and belief, that defendant WEST COAST ESCROW COMPANY is, and at all relevant times was, a California corporation and an independent escrow company, doing business in California in numerous California cities and counties.

III. The Class Defendants and Allegations.

7. Pursuant to Code of Civil Procedure section 382, plaintiffs seek certification of a class of defendants to include all title insurers (Ins. Code § 12340.4),[1] all underwritten title insurance companies (Ins. Code § 12340.5)[1], and all controlled escrow companies (Ins. Code § 12340.6)[1] except those excluded in footnote 1 below, and all independent escrow companies (Fin. Code §17006) (hereinafter collectively "escrow and title companies")

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[1]The following entities are specifically excluded from this Defendants' Class Action: Old Republic Title Company, a California corporation; Old Republic Title Holding Company, Inc., a California corporation; Old Republic Title Information Concepts, a California corporation; Old Republic National Insurance Company; and Old Republic International Corporation, a Delaware corporation.

doing business in the State of California from 1970 to the present, who:

a. hold, or held, dormant, unclaimed escrow funds; and/or,

b. charged California home buyers and other escrow customers $10.00 or more for delivery services or administrative fees; and/or,

c. charged California home buyers and other escrow customers reconveyance fees; and/or,

d. earned interest, or its equivalent, from financial institutions on customers' deposited escrow funds.

8. Although the exact number of class defendants is unknown to plaintiffs at this time, plaintiffs are informed and believe and thereon allege, that the number of escrow and title companies which meet the above-definition of a class defendant exceeds five-hundred fifty (550) and is, therefore, so numerous that joinder is impossible.

9. There is a well-defined community of interest in the questions of law and fact affecting the class defendants named in this action. Prosecution of separate actions by plaintiffs against individual class defendants would create a risk of inconsistent and varying adjudications concerning the subject of this action, which could establish incompatible standards of conduct for escrow and title companies doing business throughout the State of California. The questions of law and fact common to the members of the defendant class predominate over any questions which may affect only individual members. These common questions of law and fact include, but are not limited to:

a. whether title and escrow companies doing business in the State of California failed to comply with their legal obligation to escheat unclaimed escrow funds to the State;

b. whether title and escrow companies illegally retained fees charged to home buyers and other customers for services that the title and escrow companies did not, and never intended to provide, and/or whether title and escrow companies improperly retained fees charged

to home buyers and other customers for services that the title and escrow companies did not ultimately provide; and

c. whether title and escrow companies earned interest, or its equivalent, from financial institutions on customers' deposited escrow funds without transferring or crediting such earned interest to customers' accounts, and whether such actions violated California law, including, but not limited to, Insurance Code section 12413.5 and Financial Code 17409.

10. The named defendants' anticipated defenses are typical of the anticipated defenses of the other members of the defendant class.

11. Plaintiffs allege, on information and belief, that the named defendants can fully and adequately represent the interests of the defendant class. The named defendants have no interest which is now or may become antagonistic to the interest of the defendant class and have an interest in retaining attorneys with sufficient experience and ability to represent the interests of the defendant class.

12. Plaintiffs allege, on information and belief, that at all relevant times, some or all of the defendants acted as the agent of the others, and that all of the defendants acted within the scope of their agency if acting as an agent of another.

13. Plaintiffs allege, on information and belief, that defendants have concealed the facts giving rise to this complaint, resulting in the tolling of the applicable statutes of limitation.

III. The Doe Defendants.

14. The true names and capacities, whether individual, corporate, associate, or otherwise, of defendants DOES ONE through TWO THOUSAND, are unknown to plaintiffs who therefore sue each and every such defendant by such fictitious names, and will amend the complaint to show the true names and capacities of the DOE defendants as soon as they are ascertained. Plaintiffs allege, on information and belief, that each and every defendant designated as a "DOE" is legally responsible in some manner for the events and happenings

alleged in this complaint.

THE CLASS CLAIMS

15. Plaintiffs allege, on information and belief, that defendants, and each of them, are, and at all relevant times were, "holders" of unclaimed property within the meaning of the Unclaimed Property Law (Code of Civ. Proc. § 1500 *et seq.*), and are, and at all relevant times were, title insurers (Ins. Code § 12340.4), underwritten title insurance companies (Ins. Code § 12340.5), controlled escrow companies (Ins. Code § 12340.6), and/or independent escrow companies (Fin. Code § 17006), and "persons" acting within the meaning of Business and Professions Code sections 17200 *et seq.* and 17500 *et seq.*.

16. During all relevant times, defendants, and each of them, provided escrow services in the State of California. Defendants frequently acted as the escrow agent in connection with the sale, refinancing and exchange of real property.

17. Defendants and each of them, served as escrow agents in connection with construction loans, land exchanges, and other transactions. Defendants and each of them, collected fees for the purpose of providing services to buyers, sellers and lenders. Defendants and each of them, enriched themselves at the public's expense by engaging in unlawful schemes relating to escrow services provided by defendants.

18. As escrow agent, defendants and each of them, established and maintained escrow accounts. In connection with transactions related to real property, such as the sale or refinance of real property, the parties to the transaction would deliver funds to defendants as the escrow agent. Deposits made into a residential escrow account are referred to as "receipts." The first receipt may consist of a deposit given by the buyer to the buyer's real estate agent, who then places the money into an escrow account. Additional down payments may be required in the weeks following the initial deposit. More money may be deposited in the account as the loan is funded. Defendants and each of them, and each of them, were instructed to hold the money in the account until certain conditions were met. Upon the fulfillment of those conditions, defendants and each of them, were obligated to disburse account money to the persons entitled to receive it. Disbursements are often made to pay for the cost of inspections, to cover the realtors'

commissions, to pay off previous loans, to pay off lien holders, and to provide any residual amount to the seller. Theoretically, an escrow account should balance at zero when the account is closed. In other words, the sum of receipts into the account should equal the sum of disbursements out of the account so that at the end of the escrow all funds have been disbursed.

19. As escrow agent, defendants and each of them, held money in the accounts as a neutral third party and as a fiduciary. They did not own the funds. The money in the accounts, by definition, always belonged to others. As escrow agent, defendants and each of them, were required to track all receipts and disbursements from each escrow account. Plaintiffs allege, on information and belief, that at any point during the relevant time period, defendants and each of them, maintained escrow accounts that collectively held hundreds of millions of dollars. The exact amounts, however, are presently unknown to plaintiffs.

20. Specifically, plaintiffs allege, on information and belief, that defendants and each of them, intentionally took millions of dollars of escrow funds, which remained unclaimed in escrow accounts, that should have been escheated to the State of California. Defendants and each of them, instead took the money as corporate revenue or income. Defendants and each of them, knew or should have known that this practice was illegal under the California Unclaimed Property Law (Code of Civ. Proc. § 1500 *et seq.*).

21. Plaintiffs allege, on information and belief, that defendants and each of them, also charged home buyers and other customers improper fees for services that defendants did not, and never intended to provide. Fees were charged for reconveyances that never occurred, or which were paid by other parties. Fees were charged for delivery services which were not performed, or which greatly exceeded actual charges. Illegal administration fees were also assessed. Defendants and each of them, compounded their wrongful conduct by representing to the home buyers that such fees would be used to pay any charge assessed by other entities. Instead, those funds, purportedly held to pay such fees, were converted into company income.

22. Plaintiffs allege, on information and belief, that defendants and each of them, also collected millions of dollars in interest payments, or payments in lieu of interest, from

banks. None of this interest was paid to escrow depositors, as required by Insurance Code section 12413.5 and Finance Code section 17409.

23. Plaintiffs did not discover the facts constituting defendants' illegal conduct until a date within the limitations periods governing this action. Plaintiffs allege, on information and belief, that defendants fraudulently and deceitfully concealed and misrepresented material facts, preventing plaintiffs from discovering the basis for plaintiffs' causes of action against defendants until a date within the applicable limitations periods.

I. The Taking of Unclaimed Property.

24. The Unclaimed Property Law ("UPL") requires the holder of abandoned property to escheat it to the State Controller after the passage of a certain number of years. (Code of Civ. Proc. § 1500 *et seq.)* Until 1987, the UPL required the holder to escheat property after seven years. The Legislature reduced the escheat period to five years in 1988, and to three years (the current escheat period) in 1990.

25. The escheat requirements of the UPL apply to funds left unclaimed in escrow accounts. (Code of Civ. Proc. § 1510 (intangible personal property such as cash held in a fiduciary capacity for the benefit of another person is subject to the UPL).) The escrow agent -- the "holder"-- must escheat any money in the escrow account that has gone unclaimed for the escheat period.

26. The holder escheats unclaimed money by paying it to the Controller within the statutory period. The holder must also provide the Controller with a "holder report" containing detailed information. (Code of Civ. Proc. §§ 1530 and 1532.) The Controller deposits the money in the Treasurer's "Unclaimed Property Fund" in an account titled "Abandoned Property." The Controller must, within a year, publish a newspaper notice that is likely to alert the apparent owner of the existence of the unclaimed money. (Code of Civ. Proc. § 1531.) Any person who claims an interest in escheated money may file a claim with the Controller, who must act on the claim within 90 days. (Code of Civ. Proc. § 1540.)

27. Plaintiffs allege, on information and belief, that defendants and each of them, did not always disburse all funds from the escrow accounts. Money sometimes remained

unpaid and unclaimed for years. If a payee of a check drawn on the escrow account never presented or cashed the check, the money intended to pay the outstanding check remained in that account. Likewise, when a vendor was owed money from the account, but was not paid, credit balances were created in the escrow accounts. Plaintiffs do not presently know the number or percentage of dormant accounts that contained such unclaimed funds.

28. Plaintiffs allege, on information and belief, that defendants, and each of them, decided to treat most of the unclaimed funds as income. They escheated little or no money to the State.

29. Plaintiffs allege, on information and belief, that defendants, and each of them, have, and are still, engaged in the illegal practice of not escheating unclaimed funds to the State and under reporting the amount due for escheatment. Defendants instead took, and continue to take, this money as income, book it as reserves for payment of other obligations, or both.

II. Improper Charges.

30. Plaintiffs allege, on information and belief, that defendants also charged many California home buyers and other escrow customers fees for services which were never performed, or which in fact cost much less than the amount charged.

31. For example, on information and belief, plaintiffs allege that defendants represented to their customers that defendants would hold reconveyance fees until mortgages was paid off. Defendants further represented that they would apply such fees to payment of local counties' fees for recording deeds of reconveyance. Defendants and each of them, knew these representations to be false.

32. At the times defendants and each of them, charged the reconveyance fees, they knew they were rarely called upon to perform a reconveyance. In the majority of instances, the subsequent buyer, the subsequent lender, or the initial buyer upon refinancing or sale, paid the costs associated with the reconveyance, including the county recorder fees. Defendants and each of them, almost never were called upon to handle the transaction.

33. Plaintiffs allege, on information and belief, that defendants, and each of them, also routinely charged customers for expensive delivery services, charging $10.00 or more,

when in fact such services were rarely or never used, or were done by much less expensive means.

34. Plaintiffs allege, on information and belief, that defendants, and each of them, also routinely assessed illegal administration fees.

35. Rather than refunding such fees to their customers, plaintiffs allege, on information and belief, that defendants and each of them, transferred the money to income. In violation of the UPL, defendants failed to escheat such fees to the State.

III. Secret Interest.

36. California law also regulates escrow and title companies' receipt of any interest earned on deposited escrow funds. Escrow and title companies must pay to the depositing party all interest earned on funds deposited in connection with any escrow. (Ins. Code § 12413.5 and Fin. Code § 17409.) The law prohibits these entities from transferring any such interest to the accounts of the escrow and title companies.

37. Plaintiffs allege, on information and belief, that, during the past two decades, defendants and each of them, devised and carried out similar schemes with member banks and insured non-member banks to receive interest, or monies in lieu of interest, on escrow funds deposited by defendants in demand deposit accounts with banks in violation of Insurance Code section 12413.5 and Financial Code section 17409. Some defendants characterized such schemes as "cost avoidance," and the consideration they received from the banks as "earnings credits." These earnings credits were functionally identical to interest payments. To carry out this scheme, for a number of years, banks made payments of interest disguised as earnings credits to defendants, sometimes through intermediaries. These payments were the equivalent of the defendants' receipt of interest payments. During the past four years alone, defendants and each of them, received tens of millions in illegal earnings credits from various banks. Defendants and each of them, bargained with each bank for the illegal interest that the bank would pay them. That amount equaled or nearly equaled the amount of the cost avoidance "earnings" provided by the respective banks on their prior monthly account analysis statements. Defendants and each of them, negotiated with each bank a formula based on a percentage of each bank's net earnings on

defendants' demand deposit account. The negotiated rate ranged from 60% to 100% of the deposit banks' net earnings on the deposits.

FIRST CAUSE OF ACTION

(Brought by Kathleen Connell, Controller of the State of California)

Unclaimed Property

(Code of Civil Procedure section 1500, *et seq.*)

38. The allegations in this Cause of Action are brought by the Controller. The Controller incorporates by reference the allegations contained in Paragraphs 1 through 37, inclusive, as though fully set forth herein.

39. Defendants and each of them, have failed to escheat unclaimed property as required by the Code of Civil Procedure, Part III, Title 10 commencing with section 1500.

40. The Controller is informed and believe and thereon allege, that defendants and each of them, as well as their affiliates failed and refused to escheat unclaimed funds, and income or increment thereon, as they were obligated to do from 1970 to the present time. In 1990 and in the subsequent years, some defendants have purported to escheat unclaimed funds to the State but, in fact, the amounts escheated have been only a tiny portion of their true obligations.

WHEREFORE, the Controller prays for judgment as set forth below.

SECOND CAUSE OF ACTION

Suit for Injunctive Relief

(Brought by the People of the State of California, ex rel. Insurance Commissioner Chuck Quackenbush.)

(Insurance Code § 12413.5 and 12928.6)

41. The allegations in this Cause of Action are brought by the Commissioner of Insurance in his official capacity in the name of the People of the State of California, pursuant to Insurance Code section 12928.6. The Commissioner incorporates by reference the allegations contained in Paragraphs 1 through 37, inclusive, as though fully set forth herein.

42. The Commissioner is informed and believes and alleges thereon, that title insurers, underwritten title insurance companies and controlled escrow companies[2] have failed to disclose and failed to pay to the depositing party the interest earned on funds deposited in connection with any escrow as required by Insurance Code section 12413.5, and continue to violate this provision up through the present time.

43. Pursuant to Insurance Code section 12928.6, the Commissioner seeks injunctive relief enjoining the sub-class of Defendants defined in paragraph 42 from continuing to engage in practices that are in violation of Insurance Code section 12413.5.

THIRD CAUSE OF ACTION

Unfair Competition and Unfair Business Practices

(Brought by the People of the State of California)

(Business & Professions Code §§ 17200, *et seq.* and 17500, *et seq.*)

44. The People of the State of California restate and incorporate paragraphs 1 through 37 inclusive, as though fully set forth herein.

45. Business and Professions Code section 17200 provides that unfair competition shall mean and include any "unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."

46. Business and Professions Code section 17500 provides that it is unlawful for any person or entity, with intent directly or indirectly to dispose of personal property or to perform services, or to dispose of anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate before the public any statement concerning such personal property or services, or concerning any circumstance or matter of fact connected with the proposed performance or disposition, which is untrue or misleading, and which is known or reasonably should be known to be untrue or misleading.

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[2] Subject to the exclusion of footnote 1.

47. Defendants and each of them, engaged in unfair competition within the meaning of Business and Professions Code section 17200 and in unfair competition within the meaning of Business and Professions Code section 17500.

48. Each of the acts alleged as failures to escheat, as the charging of improper fees and as the retention of interest or payments in lieu of interest, violated section 17200 and 17500.

49. The People of the State of California allege, on information and belief, that defendants' unfair business practices under Business and Professions Code section 17500 also included, without limitation, the following:

a. With intent to induce depositing parties to enter into escrow contracts with defendants, the defendants, and each of them, represented in numerous escrow instruments, and orally, that any funds defendants earned or received on the escrow account that were not used or applied to accomplish the transaction for which the escrow was established would be returned to the depositing parties.

b. Defendants' representations were untrue or misleading, and defendants knew them to be untrue and misleading. Defendants, and each of them, did not return any earnings received on escrow accounts to the depositing parties. Rather, defendants, and each of them, treated these earnings as income or reserves, and took these earnings into account in determining net profits and compensation for officers and employees. This misconduct violated Insurance Code section 12413.5 and Financial Code section 17409.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that this Court grant the following relief and judgment against defendants:

1. For certification of a defendant class, pursuant to Code of Civil Procedure section 382, to include all title insurers (Ins. Code § 12340.4), all underwritten title companies

(Ins. Code § 12340.5), all controlled escrow companies (Ins. Code § 12340.6), and all independent escrow companies (Fin. Code § 17006) doing business in the State of California from 1970 to the present, who:

a. hold, or held, dormant, unclaimed escrow funds; and/or,

b. charged California home buyers and other escrow customers $10.00 or more for delivery services or administrative fees; and/or,

c. charged California home buyers and other escrow customers reconveyance fees; and/or,

d. earned interest, or its equivalent, from financial institutions on customers' deposited escrow funds.

2. For damages according to proof;

3. For all costs of this action, including reasonable attorneys fees and court costs;

4. For unclaimed property due to the State of California in an amount according to proof.

5. For interest on non-escheated funds, including earnings or benefits accrued by the defendants, and each of them, on such unescheated funds prior to the escheatment date, in addition to mandatory interest at the rate of twelve percent (12%) from the escheatment date forward under Code of Civil Procedure section 1577 for failure to escheat;

6. For civil penalties under Code of Civil Procedure section 1572;

7. For interest on damages not awarded under the Unclaimed Property Act; that pursuant to Business and Professions Code section 17203 defendants, and each of them, be ordered to restore to plaintiffs all funds acquired by the unfair, fraudulent and misleading business practices alleged;

8. That, pursuant to Business and Professions Code section 17206, defendants, and each of them, pay a civil penalty of $2,500 for each violation of Business and Professions Code section 17200 based on a number of violations and an amount of penalty per violation to be ascertained in accordance with the evidence. These penalties shall be cumulative

to any other penalties or other remedy;

9. That pursuant to Business and Professions Code section 17536, defendants, and each of them, be assessed a civil penalty not to exceed $2,500 for each violation of section 17500, based on a number of violations and an amount of penalty per violation to be ascertained in accordance with the evidence. These penalties shall be cumulative to any other penalties or other remedy.

10. That pursuant to Business and Professions Code sections 17203, 17204, 17535, and Insurance Code section 12928.6, defendants, and each of them, be enjoined from performing or proposing to perform any of these acts of unfair competition within California;

11. That pursuant to Business and Professions Code sections 17203 and 17535 and the Court's inherent power, defendants, and each of them, be ordered to restore the amount of the overcharges to every depositor unfairly and unlawfully deprived of earnings on escrow deposits as described above, cumulative to any other remedy;

12. That pursuant to Business and Professions Code sections 17203 and 17535 and the Court's inherent equitable power, defendants, and each of them, be ordered to disgorge their ill-gotten gains to every depositor unfairly and unlawfully deprived of earnings on escrow deposits as described above, cumulative to any other remedy; and disgorge the cost avoidance earnings obtained as or in lieu of interest, along with interest at the legal rate;

13. That pursuant to Business and Professions Code sections 17206 and 17536 and the Court's inherent equitable power, plaintiffs recover their costs, including costs of investigation and suit incurred by the Attorney General's, Insurance Commissioner's and State Controller's Offices; and

14. That pursuant to Insurance Code section 12928.6, all title insurers, underwritten title insurance companies and controlled escrow companies be enjoined from engaging in practices that are in violation of Insurance Code section 12413.5.

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15. For such other relief as this court deems just and proper.

DATED: July 19, 1999

Respectfully submitted,

BILL LOCKYER, Attorney General
of the State of California
LINDA A. CABATIC
Senior Assistant Attorney General
PAUL H. DOBSON
Supervising Deputy Attorney General
BRIAN TAUGHER
JEFFREY L. SIMPTON
Deputy Attorneys General

LARRY G. RASKIN
Deputy Attorney General
Attorneys for the People of the State of California; State Controller Kathleen Connell and Insurance Commissioner Chuck Quackenbush

TERRENCE HALLINAN
District Attorney
DAVID A. PFEIFER
JUNE D. CRAVETT
Assistant District Attorneys

By: _____
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Assistant District Attorney
Attorneys for Plaintiff, the People of the State of California

LOUISE H. RENNE, City Attorney
PATRICK J. MAHONEY, Chief Trial Attorney
MATTHEW D. DAVIS, Deputy City Attorney

By: _____
MATTHEW D. DAVIS
Attorneys for Plaintiff, the People of the State of California

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13. That pursuant to Business and Professions Code sections 17206 and 17536 and the Court's inherent equitable power, plaintiffs recover their costs, including costs of investigation and suit incurred by the Attorney General's, Insurance Commissioner's and State Controller's Offices; and

14. That pursuant to Insurance Code section 12928.6, all title insurers, underwritten title insurance companies and controlled escrow companies be enjoined from engaging in practices that are in violation of Insurance Code section 12413.5.

15. For such other relief as this court deems just and proper.

DATED: July 19, 1999

Respectfully submitted,

BILL LOCKYER, Attorney General
of the State of California
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Senior Assistant Attorney General
PAUL H. DOBSON
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Deputy Attorney General
Attorneys for the People of the State of California; State Controller Kathleen Connell and Insurance Commissioner Chuck Quackenbush

TERRENCE HALLINAN
District Attorney
DAVID A. PFEIFER
JUNE D. CRAVETT
Assistant District Attorneys

By: JUNE D. CRAVETT
Assistant District Attorney
Attorneys for Plaintiff, the People of the State of California

SIGNATURES CONTINUED NEXT PAGE

Date: July 19, 1999

LOUISE H. RENNE, City Attorney
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MATTHEW D. DAVIS, Deputy City Attorney

By: _____
MATTHEW D. DAVIS
Attorneys for Plaintiff, the People of the State of California

I:\GVTRASK\fidelity\1stamdcomplaint2.wpd

EXHIBIT C

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Attorneys for the People of the State of California
(Additional counsel for the Plaintiffs on following page)

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

THE PEOPLE OF THE STATE OF CALIFORNIA AND KATHLEEN CONNELL, CONTROLLER OF THE STATE OF CALIFORNIA,

Plaintiffs,

v.

FIDELITY NATIONAL TITLE INSURANCE COMPANY; FIDELITY NATIONAL TITLE COMPANY; FIDELITY NATIONAL TITLE INSURANCE COMPANY OF CALIFORNIA, INC.; FIDELITY NATIONAL FINANCIAL, INC.; ROCKY MOUNTAIN SUPPORT SERVICES, INC.; FIDELITY NATIONAL LOAN PORTFOLIO SERVICES; CALIFORNIA TRACKING SERVICE, INC.; TICOR TITLE INSURANCE COMPANY; SECURITY UNION TITLE INSURANCE COMPANY; CHICAGO TITLE COMPANY; CHICAGO TITLE INSURANCE COMPANY; CHICAGO TITLE AND TRUST COMPANY; and TITLE ACCOUNTING SERVICES CORPORATION;

Defendants.

CASE NO.: 99AS02793

STIPULATION TO FILE SECOND AMENDED COMPLAINT

TERENCE HALLINAN,
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Attorneys for the People of the State of California

Defendants Fidelity National Title Insurance Company, Fidelity National Title Company, Fidelity National Title Insurance Company of California, Inc., Fidelity National Financial, Inc., Rocky Mountain Support Services, Inc., Fidelity National Loan Portfolio Services, California Tracking Service, Inc. (hereafter collectively "Fidelity Title"), Ticor Title Insurance Company, Security Union Title Insurance Company, Chicago Title Company, Chicago Title Insurance Company, Chicago Title and Trust Company, Title Accounting Services Corporation (hereafter collectively "Chicago") (hereafter Chicago and Fidelity Title are collectively referred to as "Fidelity") appeared through their attorneys Latham & Watkins, by Stephen Stublarec. Plaintiff, the People of the State of California ("the People"), appeared through the Attorney General, Bill Lockyer, by Deputy Attorneys General Ronald A. Reiter and Christina V. Tusan; through the District Attorney of San Francisco, Terence Hallinan, by Assistant District Attorney June Cravett, and through the City Attorney of San Francisco, Dennis Herrera, by Deputy City Attorney Donald P. Margolis

Defendants by and through their counsel hereby stipulate to Plaintiff's filing of the Second Amended Complaint attached hereto as Exhibit A.

Date: October 2, 2002

Latham & Watkins

By _____
Stephen Stublarec
Attorneys for Defendants

Date: 10/4/02

Bill Lockyer, Attorney General of the State of California
Herschel T. Elkins, Senior Assistant Attorney General
Ronald A. Reiter, Supervising Deputy Attorney General
Christina V. Tusan, Deputy Attorney General

By _____
Christina V. Tusan
Deputy Attorney General

Attorneys for the People of the State of California

Date: 10/3/02

Terence Hallinan, District Attorney of San Francisco
June Cravett, Assistant District Attorney

By _____
June Cravett
Assistant District Attorney

Attorneys for the People of the State of California

Date: Oct 3, 2002

Dennis Herrera, City Attorney of San Francisco
Donald P. Margolis, Deputy City Attorney

By _____
Donald P. Margolis
Deputy City Attorney

Attorneys for the People of the State of California

DATED: OCT - 8 2002

SO ORDERED: LOREN E. McMASTER

JUDGE OF THE SUPERIOR COURT

EXHIBIT A

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(Additional counsel for the Plaintiffs on following page)

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

THE PEOPLE OF THE STATE OF CALIFORNIA AND KATHLEEN CONNELL, CONTROLLER OF THE STATE OF CALIFORNIA,

Plaintiffs,

v.

FIDELITY NATIONAL TITLE INSURANCE COMPANY; FIDELITY NATIONAL TITLE COMPANY; FIDELITY NATIONAL TITLE INSURANCE COMPANY OF CALIFORNIA, INC.; FIDELITY NATIONAL FINANCIAL, INC.; ROCKY MOUNTAIN SUPPORT SERVICES, INC.; FIDELITY NATIONAL LOAN PORTFOLIO SERVICES; CALIFORNIA TRACKING SERVICE, INC.; TICOR TITLE INSURANCE COMPANY; SECURITY UNION TITLE INSURANCE COMPANY; CHICAGO TITLE COMPANY; CHICAGO TITLE INSURANCE COMPANY; CHICAGO TITLE AND TRUST COMPANY; and TITLE ACCOUNTING SERVICES CORPORATION;

Defendants.

CASE NO.: 99AS02793

SECONDED AMENDED COMPLAINT FOR CIVIL PENALTIES, INJUNCTION & OTHER EQUITABLE RELIEF

(Bus. & Prof. Code § 17200 *et seq.*; Bus. & Prof. Code § 17500 *et seq.*; Code of Civ. Proc. § 1500 *et. seq.*;)

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Attorneys for the California State Controller

Plaintiff, the People of the State of California, by Bill Lockyer, Attorney General of the State of California, Terence Hallinan, District Attorney of the City and County of San Francisco, and Dennis Herrera, City Attorney of the City and County of San Francisco and Plaintiff Kathleen Connell, Controller of the State of California, allege the following upon information and belief:

The Plaintiffs

1. The Attorney General, the District Attorney of the City and County of San Francisco, and the City Attorney of the City and County of San Francisco bring this action on behalf of the People of the State of California on their own complaints.

2. Plaintiff, Kathleen Connell, Controller of the State of California, brings this action, in her official capacity, with respect to the First Cause of Action only.

The Defendants

3. Defendant Fidelity National Title Insurance Company is, and at all relevant times was, a California corporation and a licensed underwritten title insurance company doing business in California in numerous California cities and counties, including the counties of Sacramento and San Francisco.

4. Defendant Fidelity National Title Company is, and at all relevant times was, a California corporation and a licensed underwritten title company doing business in California in numerous California cities and counties, including the counties of Sacramento and San Francisco.

5. Defendant Fidelity National Title Insurance Company of California, Inc. is, and at all relevant times was, a California corporation and a licensed underwritten title company doing business in California in numerous California cities and counties, including the counties of Sacramento and San Francisco.

6. Defendant Fidelity National Financial, Inc., is, and at all relevant times was a Delaware Corporation doing business in California.

7. Defendant Rocky Mountain Support Services, Inc., is, and at all relevant times was, an Arizona Corporation doing business in California.

8. Defendant Fidelity National Loan Portfolio Services is, and at all relevant times was, doing business in California.

9. Defendant California Tracking Service, Inc. is, and at all relevant times was, doing business in numerous California cities and counties, including the counties of Sacramento and San Francisco.

10. Defendant Chicago Title Insurance Company is, and at all relevant times was, a California corporation and a licensed underwritten title insurance company doing business in California in numerous California cities and counties, including the counties of Sacramento and San Francisco.

11. Defendant Chicago Title Company is, and at all relevant times was, a California corporation and a licensed title company doing business in California in numerous California cities and counties, including the counties of Sacramento and San Francisco.

12. Defendant Ticor Title Insurance Company is, and at all relevant times was, a California corporation and a licensed underwritten title insurance company doing business in California in numerous California cities and counties, including the counties of Sacramento and San Francisco.

13. Defendant Security Union Title Insurance Company is, and at all relevant times was, a California corporation and a licensed underwritten title insurance company doing business in California in numerous California cities and counties, including the counties of Sacramento and San Francisco.

14. Defendant Chicago Title and Trust Company is, and at all relevant times was, an Illinois corporation with its principal place of business in Chicago, Illinois.

15. Title Accounting Services Corporation is, and at all relevant times was, doing business in California.

16. At all relevant times, some or all of the defendants acted as the agent of the others, and that all of the defendants acted within the scope of their agency if acting as an agent of another.

17. Certain of the Defendants are, and at all relevant times were, title insurers (Ins. Code § 12340.4) or underwritten title insurance companies (Ins. Code § 12340.5) and served as escrow agents in connection with home sales transactions, home mortgage loans, construction loans, land exchanges, and other transactions. Other defendants are affiliates of the title insurers. These defendants charged and collected fees for services and amounts purportedly for costs and expenses in connection with providing services to buyers, sellers, and lenders.

18. As escrow agents, defendants held money in the accounts as a neutral third party and as a fiduciary. Consumers (i.e., individual, natural persons or trusts) who were parties to real property transactions, involving the sale or encumbrance of residential real property containing one-to-four-dwelling units, delivered funds to defendants to hold as escrow agent in an escrow account until certain conditions were met. Upon the fulfillment of those conditions, defendants were obligated to disburse funds held in escrow to the persons entitled to receive the funds. Defendants did not own the funds. Defendants were required to track all receipts and disbursements from each escrow account.

FIRST CAUSE OF ACTION

(Brought by Kathleen Connell, Controller of the State of California)

Unclaimed Property

(Code of Civil Procedure section 1500, et. seq.)

19. The allegations in this Cause of Action are brought by the Controller. The Controller incorporates by reference the allegations contained in Paragraphs 1 through 18, inclusive, as though fully set forth herein.

20. The Controller alleges, on information and belief, that during the period commencing May 19, 1995 through the present, defendants, and each of them, intentionally took escrowed funds that should have been escheated to the State of California. Defendants, and each of them, instead took the money as corporate revenue or income. Defendants and each of them, knew or should have known that this practice

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was illegal under the California Unclaimed Property Law (Code of Civ. Proc. § 1500 *et seq.*).

21. The Controller alleges, on information and belief, that during the period commencing May 19, 1992 through the present, defendants and each of them, did not always disburse all funds from the escrow accounts. Money sometimes remained unpaid and unclaimed for years. If a payee of a check drawn on the escrow account never presented or cashed the check, the money intended to pay the outstanding check remained in that account. Likewise, when a vendor was owed money from the account, but was not paid, credit balances were created in the escrow accounts.

22. Defendants and each of them, have failed to escheat unclaimed property accruing beginning after May 19, 1995 as required by the Code of Civil Procedure, Part III, Title 10 commencing with section 1500.

23. The Controller is informed and believes and thereon alleges, that defendants and each of them, as well as their affiliates failed and refused to escheat unclaimed property accruing beginning after May 19, 1995 and income or increment thereon, as they were obligated to do.

WHEREFORE, the Controller prays for judgment as set forth below.

SECOND CAUSE OF ACTION

Unfair Competition and Unfair Business Practices

(Brought by the People of the State of California)

(Business & Professions Code 17200, et seq.)

24. Plaintiff, the People of the State of California, restates and incorporates paragraphs 1 through 18 as though fully set forth herein.

25. Beginning on May 19, 1995 and continuing to the present, defendants, and each of them, engaged in acts of unfair competition, within the meaning of Business and Professions Code section 17200, including but not limited to the following acts:

A. Defendants received funds from consumers as escrow agents for deposit in escrow accounts and placed those funds in accounts maintained at financial

institutions in connection with transactions for the transfer or financing of residential real property containing one-to-four dwelling units (hereafter "consumer escrow transactions"). Defendants engaged in various schemes with these financial institutions to receive compensation, denominated as something other than interest, for placing defendants' accounts involving consumer escrow transactions with these institutions. The consideration given by these financial institutions is sometimes referred to as "earnings credits" or "cost avoidance" and includes providing banking services at lower than standard fees and directly paying for goods and services obtained by defendants from third parties and providing loans to defendants at lower rates of interest than are available to other depositors. The "earnings credits" or other consideration paid by financial institutions to defendants are in substance, regardless of form or name, payments of interest. Defendants violated Insurance Code section 12413.5 by failing to pay over to the parties who placed funds in escrows with defendants the amount of interest which defendants received on those funds in the disguised form of "earnings credits" or other consideration, however denominated.

B. Defendants charged consumers involved in consumer escrow transactions the following fees which defendants were not lawfully entitled to charge:

1. Fees for the preparation, execution, and recordation of full reconveyances when such fees should not have been charged because: (a) defendant did not perform the reconveyance services charged for and did not pay those fees to a beneficiary or trustee under a trust deed to effect a reconveyance; or (b) defendant prepared a release of obligation or recorded a reconveyance where performance of the service was unnecessary.

2. Fees charged in connection with the preparation, issuing or recording of a release of obligation or providing notice of intent to do so.

3. Fees charged in connection with investigations or tracking of whether a beneficiary under a deed of trust has caused a reconveyance to be recorded after the obligation has been satisfied.

4. Fees for messenger services, recording services, overnight delivery services, notary services or wire transfer services that defendants did not provide or were in excess of the actual cost to defendants for these services provided by a third party.

C. Defendants and each of them made untrue or misleading statements in violation of Business and Professions Code section 17500 as set forth in paragraph 27 below and incorporated herein by reference.

THIRD CAUSE OF ACTION

Untrue or Misleading Statements

(Brought by the People of the State of California)

(Business and Professions Code § 17500 *et seq.*)

26. Plaintiff, the People of the State of California, restates and incorporates paragraphs 1 through 18, inclusive, and 24-25, inclusive, as though fully set forth herein.

27. Beginning on May 19, 1995 and continuing to the present, defendants have violated Business and Professions Code section 17500 by making or causing to be made untrue or misleading statements to consumers in consumer escrow transactions with the intent to induce them to enter into contracts with defendants for escrow services. These untrue or misleading statements include, but are not limited to, the following:

A. Defendants represented directly or by implication to consumers that escrow funds received by defendants as escrow agents and any consideration earned on those funds would be used or applied to accomplish the consumer escrow transaction, and, if not so used, would be returned to the depositing parties. The representations were untrue and misleading in that (1) Defendants charged fees to which they were not entitled as alleged in paragraph 25(B) and deducted those unlawful charges from money deposited in escrow; and (2) Defendants earned interest or other like consideration from the deposit of escrow funds with financial institutions but failed to pay the interest or other consideration to the consumers who placed the funds in escrow.

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B. Defendants represented directly or by implication that they would only retain benefits from the use of the money given to them by consumer escrow customers in a manner that was in compliance with California law. The representation was untrue or misleading in that Defendants obtained interest on funds deposited in consumer escrow transaction and failed to pay the interest to consumer escrow depositors in violation of Insurance Code section 12413.5.

C. Defendants represented directly or by implication that defendants would: (1) only charge consumers fees for messenger, recording, overnight delivery, notary, or wire transfer services actually provided by defendants; and (2) pass on to consumers actual charges for these services preformed by third parties. The representations were untrue and misleading in that Defendants charged for these services and failed to perform them and charged consumer escrow customers for more than the actual charge made by third parties for the performance of services, as alleged in paragraph 25(B)(4).

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that this Court grant the following relief and judgment against defendants:

1. That defendants pay direct and cy pres restitution;

2. That pursuant to Business and Professions Code sections 17206 defendants, and each of them, pay a civil penalty;

3. That pursuant to Business and Professions Code sections 17203 and 17204, defendants, and each of them, be enjoined from performing or proposing to perform any of the unlawful and deceptive acts set forth in this complaint;

4. That pursuant to Code of Civil Procedure section 1576, defendants pay a penalty;

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5. That pursuant to Code of Civil Procedure section 1577, defendants pay interest on unclaimed property that was not reported, delivered, or paid as required by Code of Civil Procedure section 1500 et. seq.; and

6. For all costs and fees in this action.

Date: 10/4/02

BILL LOCKYER, Attorney General
of the State of California
HERSCHEL T. ELKINS,
Senior Assistant Attorney General
RONALD A. REITER,
Supervising Deputy Attorney General
CHRISTINA V. TUSAN
Deputy Attorney General

By: Christina V. Tusan
CHRISTINA V. TUSAN
Deputy Attorney General

Attorneys for the People of the State of California

Date: 10/3/02

TERENCE HALLINAN
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DAVID A. PFEIFER,
JUNE D. CRAVETT,
Assistant District Attorneys

By:
JUNE D. CRAVETT
Assistant District Attorney

Attorneys for Plaintiff, the People of the State of California

Date: Oct 3, 2002

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DONALD P. MARGOLIS,
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By: Donald P. Margolis
DONALD P. MARGOLIS,
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Attorneys for Plaintiff, the People of the State of California

Date: _____

KATHLEEN CONNELL,
California State Controller
RICHARD J. CHIVARO,
Chief Counsel

By: _____
RICHARD J. CHIVARO
Chief Counsel

Attorneys for Plaintiff,
California State Controller

Date:_____

DENNIS HERRERA,
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DONALD P. MARGOLIS,
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By: _____
DONALD P. MARGOLIS,
Deputy City Attorney

Attorneys for Plaintiff, the People of the State of California

Date: 9/30/02

KATHLEEN CONNELL,
California State Controller
RICHARD J. CHIVARO,
Chief Counsel

By: _____
RICHARD J. CHIVARO
Chief Counsel

Attorneys for Plaintiff,
California State Controller

Fidelity Complaint final 9_30_02

EXHIBIT D

HAFIF & SHERNOFF
269 West Bonita Avenue
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Attorneys for Plaintiffs

FILED
WILLIAM G. SHARP, County Clerk
DEC 21 1972
M. Dalton
BY M. DALTON, DEPUTY

SUMMONS ISSUED

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

WILLIAM SHERNOFF, JO ANN SHERNOFF, WALDEMAR J. BOLDIG, MARGARET E. BOLDIG, on behalf of and themselves and all others similarly situated in the State of California,

Plaintiffs,

vs.

TITLE INSURANCE AND TRUST COMPANY, SECURITY TITLE INSURANCE COMPANY, TRANSAMERICA TITLE INSURANCE COMPANY, FIRST AMERICAN TITLE INSURANCE COMPANY, WESTERN TITLE INSURANCE COMPANY, CHICAGO TITLE INSURANCE COMPANY, LAND TITLE INSURANCE COMPANY, NORTHERN COUNTIES TITLE INSURANCE COMPANY, TITLE INSURANCE COMPANY OF MINNESOTA, STEWART TITLE GUARANTY COMPANY, LAWYERS TITLE INSURANCE CORPORATION, SOUTHERN COUNTIES TITLE INSURANCE COMPANY, LOUISVILLE TITLE INSURANCE COMPANY, COMMONWEALTH LAND TITLE INSURANCE COMPANY, and DOES 1 through 200 inclusive,

Defendants.

NO. EC 1474

COMPLAINT FOR DAMAGES

(CLASS ACTION BASED ON UNLAWFUL COMBINATIONS IN RESTRAINT OF TRADE AND PRICE FIXING UNDER THE CARTWRIGHT ACT).

COMES NOW THE PLAINTIFFS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, AND FOR CAUSE OF ACTION, EACH OF THEM ALLEGE:

I

The claim that is the subject matter of this action is common to all natural persons residing in the State of California (except those who are or have been during the past four years

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employees, directors or stockholders of the defendants) who have individually or jointly purchased during the four years immediately preceding the filing of this complaint, what are commonly referred to as Owners, Lenders or Joint Protection forms of C.L.T.A. (California Land Title Association) or A.L.T.A. (American Land Title Association) title insurance issued by any of the defendant title insurers on real property located anywhere within the State of California.

II

The claim of the named plaintiffs is typical and fairly representative of the claims of the other members of the class described in Paragraph I above, and the named plaintiffs, being purchasers of title insurance, as members of said class, have interests that are affected in the same manner as the interests of all other members of the class.

III

There are questions of law and fact common to the class which predominate over any questions affecting individual class members only; the primary common question of fact being the sale of title insurance (Owners, Lenders and/or Joint Protection forms) to the class members at prices in excess of those which would prevail in a price-competitive market; the primary common question of law being right of each class member to recover damages as provided for in the Cartwright Act as more particularly set forth below in Paragraph X of this complaint. All members of the class are similarly situated, the only significant difference between members being the amount which is owed to each, which amount can be determined from the defendants' records and/or relatively simple mathematical calculations once the defendants' liability under the Cartwright Act is established.

IV

The class action is superior to any other available

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method for a fair and efficient adjudication of the issues raised in this complaint since the members of the class are too numerous to bring each and every member before the Court as individual parties and since the dollar damages suffered by each class member are probably of such a relatively small dollar amount so as not to economically or practically justify individual court actions. Furthermore, relatively few class members are presently aware of the alleged wrong on the part of the defendants, and without the means of a class action available to them, few would seek redress. The alternative of individual suits by class members would require a multitude of impractically small lawsuits in inferior courts in virtually every jurisdiction in the State of California, and such prosecution of separate actions, would create a significant risk of inconsistent adjudications, which would establish incomparible standards of conduct for the parties opposing the class, and with respect to individual class members not before this court would, as a practical matter, substantially impair, impede and prejudice their ability to protect their rights and interests.

7

The persons who constitute the class are numerous, and while the exact number is unknown to the named plaintiffs at this time, the plaintiffs are informed and believe, and upon such information and belief allege that over one million members of the class have purchased one or more policies of title insurance from defendant title insurers on each of more than one million four hundred forty thousand parcels of real property in the State of California during the immediately preceding four years. The named plaintiffs are also informed and believe, and upon such information and belief allege, that a significant number of class members reside in each of the counties in this state. For all of these apparent reasons, joinder of all members of the class is impracticable.

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VI

The named plaintiffs have no interests that conflict with the interests of other members of said class and will diligently, fairly and adequately protect the interests of the class.

VII

At all times relevant to this action, the named plaintiffs have been adult residents of the County of Los Angeles and citizens of the State of California. By virtue of selling a parcel of unimproved real property located in Live Oak Canyon, California, William and Jo Ann Shernoff purchased an Owners policy of title insurance issued by the defendant Title Insurance and Trust Company on or about November 10, 1972 (Policy #7188498). Said property is located in Los Angeles County, California. By virtue of buying a residence located at 1005 Richmond Drive, Claremont, California, Margaret E. and Waldemar J. Boldig purchased a Lenders policy of title insurance issued by the defendant Security Title Insurance Company on or about November 10, 1970 (Policy #7034339). Said property is located in Los Angeles County, California. As a direct result of said purchases of title insurance coverage, the named plaintiffs have been injured in their property by the payment of an artificially high price for the aforesaid title insurance due to the absence of free competition in the setting of rates by the defendant title insurers, said insurers issuing substantially all the title insurance written in the State of California. In a similar manner, every member of the class who has purchased title insurance from any of the defendant insurers has been injured. The named plaintiffs bring this action on behalf of themselves and on behalf of each and every other purchaser of title insurance as described in Paragraph I above.

VIII

At all times herein mentioned, the defendant Chicago Title Insurance Company, the defendant First American Title

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Insurance Company, the defendant Land Title Insurance Company, the defendant Northern Counties Title Insurance Company, the defendant Security Title Insurance Company, the defendant Southern Counties Title Insurance Company, the defendant Title Insurance and Trust Company, the defendant Transamerica Title Insurance Company and the defendant Western Title Insurance Company have been title insurers incorporated and existing under the laws of the State of California. At all times herein mentioned, the following foreign title insurers have been licensed to do business and have done business within the State of California; the defendant Commonwealth Land Title Insurance Company incorporated and existing under the State of Pennsylvania, the defendant Lawyers Title Insurance Corporation incorporated and existing under the laws of the State of Virginia, the defendant Louisville Title Insurance Company incorporated and existing under the laws of the State of Kentucky, the defendant Stewart Title Guaranty Company incorporated and existing under the laws of the State of Texas and the defendant Title Insurance Company of Minnesota incorporated and existing under the laws of the State of Minnesota.

IX

The true names or capacities, whether individual, corporate, associate, or otherwise, of defendants named herein as DOE 1 through 200 inclusive are unknown to plaintiffs, who therefore sue said defendants by such fictitious names, and the named plaintiffs will amend this complaint to show their true names and capacities when the same have been ascertained. Plaintiffs are informed and believe and on the basis of such information and belief allege that at all times herein mentioned, defendants DOE 1 through 200 inclusive were the agents, servants or employees of the named defendant title insurers, were acting at all times within the scope of their agency and employment, and were acting with the knowledge and consent of their principal and employer.

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X

This action arises under the Business and Professions Code of the State of California, Sections 16700 through 16758 inclusive, all sections as amended, which sections together are commonly referred to as the Cartwright Act.

XI

Defendants Southern Counties Title Insurance Company, Security Title Insurance Company and Title Insurance and Trust Company, among others, reside or are found in the County of Los Angeles, State of California, and the Superior Court of said county is a proper place for the trial of this action.

XII

That defendants and each of them established a common standard rate for each category of policy coverage in accordance with standard forms adopted by either the California Land Title Association (CLTA) or the American Land Title Association (ALTA). A typical example of such a form is attached hereto as Exhibit "A" and is expressly incorporated herein by said reference.

XIII

The defendant title insurers, and each of them, in concert have combined among themselves for the purpose and with the effect of restraining price competition as herein set forth, and each defendant insurer has acted pursuant to said unlawful combination all to the effect that price competition has been restrained in the sale of what are commonly known as Owners, Lenders, and Joint Protection forms of title insurance, one or more forms of said insurance having been purchased by the named plaintiff, and each member of the plaintiffs' class. Specifically, the aforesaid combination of defendant title insurers engaged in the following practices alleged to be in restraint of trade within the State of California:

(1) Defendant title insurers agreed among themselves to

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establish and settle upon, and did establish and settle upon, standard and common schedules of rates for the above forms of title insurance issued by said defendant insurers and purchased by the named plaintiffs and members of the plaintiffs' class either directly from the defendant title insurers or indirectly from what are commonly referred to as underwritten title companies, the result of said rate agreements being the virtual elimination of, and absence of, any significant price competition among the defendant insurers in the sale of the aforementioned forms of title insurance;

(2) Defendant title insurers have agreed to, and have followed, a common course with respect to instituting price changes in the aforesaid common standard schedules of rates, the result of such agreements and common course of conduct being that the newly changed rate schedules became effective at or near the same time, and the identity of title insurance rates was thereby maintained;

(3) Defendant title insurers have agreed among themselves to fix at a common standard schedule the discounts from the common standard rates established in Section (1) above to be applied when new insurance is issued on previously insured property, which common discount rate schedule is commonly known as the "Short Term Rate."

XIV

Defendant title insurers' conduct as enumerated above constitutes prohibited restraints on competition under the Cartwright Act, Sections 16700 through 16758, as amended, of the Business and Professions Code of the State of California.

XV

The named plaintiffs and members of the plaintiffs' class have not been, and are not now, members of, nor have they participated in any of the alleged combinations or agreements of the defendant insurers, and they have not been, and are not now,

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associated with the defendants in any manner other than being purchasers of policies of title insurance issued by the defendant insurers.

XVI

As a proximate result of the existence and prosecution of the alleged combinations and agreements of the defendants, as aforesaid, and of the very acts and conduct of the defendants in pursuance thereof, the named plaintiffs and members of the plaintiffs' class have been injured in their property to the extent of the overcharges on the policies of title insurance issued by the defendant insurers and purchased by the named plaintiffs and members of the plaintiffs' class, the overcharges resulting from the absence of price competition among the defendant insurers for Owners, Lenders and Joint Protection title insurance coverage. The exact amount of said overcharges cannot be accurately measured and stated herein in full at this time, although the named plaintiffs are informed and believe, and upon such information and belief allege, that named plaintiffs and members of their class have purchased one or more policies of title insurance on each of more than one million four hundred forty thousand parcels of real property within the State of California during the immediately preceding four years. It is furthermore alleged upon information and belief that each purchase of title insurance from a defendant title insurer by a class member has injured said class member to an average extent of at least THIRTY-SIX DOLLARS ($36.00). Therefore, the named plaintiffs and members of the plaintiffs' class are believed to have been injured to the total extent of at least FIFTY-ONE MILLION EIGHT HUNDRED FORTY THOUSAND DOLLARS ($51,840,000.00). At such time as plaintiffs have ascertained more clearly the extent of the damages to the class, they will seek leave to amend this complaint.

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XVII

WHEREFORE, plaintiffs on behalf of themselves and all others similarly situated, pray:

(1) For the defendants to be adjudged to have violated the Cartwright Act as hereinbefore alleged;

(2) For money damages in the sum of at least FIFTY-ONE MILLION EIGHT HUNDRED FORTY THOUSAND DOLLARS ($51,840,000.00) and that said sum be trebled in accordance with Section 16750 of the Business and Professions Code of the State of California, in the sum of at least ONE HUNDRED FIFTY-FIVE MILLION FIVE HUNDRED TWENTY THOUSAND DOLLARS ($155,520,000.00);

(3) For costs of suit and litigation expenses incurred in prosecuting this action;

(4) For reasonable attorneys' fees to counsel who have acted on behalf of the members of the class;

(5) That defendant title insurers be required to furnish, a just, true and full accounting to the plaintiffs of the amounts paid for title insurance by, and the names and addresses of, the members of the plaintiffs' class who have purchased title insurance during the preceding four years and further that the defendant title insurers give notice of this class action to all members of the plaintiffs' class; and

(6) For such other and further relief as the Court may deem proper.

DATED this 20th day of December, 1972.

HAHN & SHERNOFF and
ALTON H. SAXE

By _____
HERBERT HAHN
Attorneys for Plaintiffs

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10 [illegible]
California Land Title Association
Standard Coverage Policy Form
Copyright 1963

POLICY OF TITLE INSURANCE

ISSUED BY

Title Insurance and Trust Company

Title Insurance and Trust Company, a California corporation, herein called the Company, for a valuable consideration paid for this policy, the number, the effective date, and amount of which are shown in Schedule A, hereby insures the parties named as Insured in Schedule A, the heirs, devisees, personal representatives of such Insured, or if a corporation, its successors by dissolution, merger or consolidation, against loss or damage not exceeding the amount stated in Schedule A, together with costs, attorneys' fees and expenses which the Company may become obligated to pay as provided in the Conditions and Stipulations hereof, which the Insured shall sustain by reason of:

1. Any defect in or lien or encumbrance on the title to the estate or interest covered hereby in the land described or referred to in Schedule C, existing at the date hereof, not shown or referred to in Schedule B or excluded from coverage in Schedule B or in the Conditions and Stipulations; or
2. Unmarketability of such title; or
3. Any defect in the execution of any mortgage shown in Schedule B securing an indebtedness, the owner of which is named as an Insured in Schedule A, but only insofar as such defect affects the lien or charge of said mortgage upon the estate or interest referred to in this policy; or
4. Priority over said mortgage, at the date hereof, of any lien or encumbrance not shown or referred to in Schedule B or excluded from coverage in the Conditions and Stipulations, said mortgage being shown in Schedule B in the order of its priority;

all subject, however, to the provisions of Schedules A, B and C and to the Conditions and Stipulations hereto annexed.

In Witness Whereof, Title Insurance and Trust Company has caused its corporate name and seal to be hereunto affixed by its duly authorized officers on the date shown in Schedule A.

Title Insurance and Trust Company

by [signature] PRESIDENT

Attest [signature] SECRETARY

EXHIBIT "A"

SCHEDULE B PART ONE

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.

2. Any facts, rights, interests, or claims which are not shown by the public records but which could be ascertained by an inspection of said land or by making inquiry of persons in possession thereof.

3. Easements, claims of easement or encumbrances which are not shown by the public records.

4. Discrepancies, conflicts in boundary lines, shortage in area, encroachments, or any other facts which a correct survey would disclose, and which are not shown by the public records.

5. Unpatented mining claims; reservations or exceptions in patents or in Acts authorizing the issuance thereof; water rights, claims or title to water.

CONDITIONS AND STIPULATIONS

1. DEFINITION OF TERMS

The following terms when used in this policy mean:

(a) "land": the land described, specifically or by reference, in Schedule C and improvements affixed thereto which by law constitute real property;

(b) "public records": those records which impart constructive notice of matters relating to said land;

(c) "knowledge": actual knowledge, not constructive knowledge or notice which may be imputed to the Insured by reason of any public records;

(d) "date": the effective date;

(e) "mortgage": mortgage, deed of trust, trust deed, or other security instrument; and

(f) "insured": the party or parties named as Insured, and, if the owner of the indebtedness secured by a mortgage shown in Schedule B is named as an Insured in Schedule A, the Insured shall include (1) each successive in interest in ownership of such indebtedness, (2) any such owner who acquires the estate or interest referred to in this policy by foreclosure, trustee's sale, or other legal manner in satisfaction of said indebtedness, and (3) any federal agency or instrumentality which is an owner or guarantor under an insurance contract or guaranty insuring or guaranteeing said indebtedness, or any part thereof, whether named as an Insured herein or not, subject otherwise to the provisions hereof.

2. BENEFITS AFTER ACQUISITION OF TITLE

If an Insured owner of the indebtedness secured by a mortgage described in Schedule B acquires said estate or interest or any part thereof, by foreclosure, trustee's sale, or other legal manner in satisfaction of said indebtedness, or any part thereof, or of a federal agency or instrumentality acquires said estate or interest, or any part thereof, as a successful bidder in an insurance contract or guaranty insuring or guaranteeing the indebtedness secured by a mortgage covered by this policy, or a purchaser from any of the foregoing, this policy shall continue in force in favor of such Insured, agency or instrumentality, subject to all the conditions and stipulations hereof.

3. EXCLUSIONS FROM THE COVERAGE OF THIS POLICY

This policy does not insure against loss or damage by reason of the following:

(a) Any law, ordinance or governmental regulation (including but not limited to building and zoning ordinances) restricting or regulating or prohibiting the occupancy, use or enjoyment of the land, or regulating the character, dimensions, or location of any improvement now or hereafter erected on said land, or prohibiting a separation in ownership or a reduction in the dimensions or area of any lot or parcel of land.

(b) Governmental rights of police power or eminent domain unless notice of the exercise of such rights appears on the public records at the date hereof.

(c) Title to any property beyond the lines of the land expressly described in Schedule C, or title to streets, roads, avenues, lanes, ways or waterways on which such land abuts, or the right to maintain therein vaults, tunnels, ramps or any other structure or improvement, or any rights or easements therein unless this policy specifically provides that such property, rights or easements are insured except that at the date hereof there is one or more physically open streets or highways this policy insures the ordinary rights of abutting owners for access to one of such streets or highways, unless otherwise excepted or excluded herein.

(d) Defects, liens, encumbrances, adverse claims against the title as insured or other matters (1) created, suffered, assumed or agreed to by the Insured claiming loss or damage, or (2) known to the Insured Claimant either at the date of this policy or at the date such Insured Claimant acquired an estate or interest insured by this policy and not shown by the public records unless disclosed in writing by the Insured to the Company prior to the date of this policy, or (3) resulting in no loss to the Insured Claimant, or (4) attaching or created subsequent to the date hereof.

(e) Loss or damage which would not have been sustained if the Insured were a purchaser or encumbrancer for value without knowledge.

4. DEFENSE AND PROSECUTION OF ACTIONS —NOTICE OF CLAIM TO BE GIVEN BY THE INSURED

(a) The Company, at its own cost and without undue delay shall provide (1) for the defense of the Insured in all litigation consisting of actions or proceedings commenced against the Insured, or defenses, restraining orders, or injunctions interposed against a foreclosure or sale of the mortgage and indebtedness covered by this policy or a sale of the estate or interest in said land, or (2) for such action as may be appropriate to establish the title of the estate or interest or the lien of the mortgage as insured, which litigation or action in any of such cases is founded upon an alleged defect, lien or encumbrance insured against by this policy, and may pursue any litigation to final determination in the court of last resort.

(b) In case any such action or proceeding shall be begun, or defense interposed, or in case knowledge shall come to the Insured of any claim of title or interest which is adverse to the title of the estate or interest or lien of the mortgage as insured, or which might cause loss or damage for which the Company shall or may be liable by virtue of this policy, or if the Insured shall in good faith contract to sell the indebtedness secured by a mortgage covered by this policy, or if an Insured in good faith leases or contracts to sell, lease or mortgage the estate, or if the successful bidder at a foreclosure sale under a mortgage covered by this policy refuses to purchase and in any such event the title to said estate or interest is rejected as unmarketable, the Insured shall notify the Company thereof in writing. If such notice shall not be given to the Company within ten days of the receipt of process or pleadings or if the Insured shall not, in writing, promptly notify the Company of any defect, lien or encumbrance insured against which shall come to the knowledge of the Insured, or if the Insured shall not, in writing, promptly notify the Company of any such action by reason of claimed unmarketability of title, then all liability of

For Items and Terms Contained and Described on Next Page

CONDITIONS AND STIPULATIONS Continued and Concluded From Reverse Side of Policy Face)

the Company in regard to the suit or action of such action, proceeding or matter shall cease and terminate, provided, however, the failure to notify shall in no case prejudice the claim of an Insured unless the Company shall be actually prejudiced by such failure and then only to the extent of such prejudice.

(c) The Company shall have the right at its own cost to institute and prosecute any action or proceeding or do any other act which in its opinion may be necessary or desirable to establish the title of the estate or interest or the lien of the mortgage as insured, and the Company may take any appropriate action under the terms of this policy whether or not it shall be liable thereunder and shall not thereby concede liability or waive any provision of this policy.

(d) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the Insured shall secure to it the right to so prosecute or provide defense in such action or proceeding, and all appeals therein, and permit it to use, at its option, the name of the Insured for such purpose. Whenever requested by the Company the Insured shall give the Company all reasonable aid in any such action or proceeding in effecting settlement, securing evidence, obtaining witnesses or prosecuting or defending such action or proceeding, and the Company shall reimburse the Insured for any expense so incurred.

5. NOTICE OF LOSS — LIMITATION OF ACTION

In addition to the notices required under paragraph 4(b), a statement in writing of any loss or damage for which it is claimed the Company is liable under this policy shall be furnished to the Company within sixty days after such loss or damage shall have been determined and no right of action shall accrue to the Insured under this policy until thirty days after such statement shall have been furnished, and no recovery shall be had by the Insured under this policy unless action shall be commenced thereon within five years after expiration of said thirty day period. Failure to furnish such statement of loss or damage, or to commence any such action within the time hereinbefore specified, shall be a conclusive bar against maintenance by the Insured of any action under this policy.

6. OPTION TO PAY, SETTLE OR COMPROMISE CLAIMS

The Company shall have the option to pay or settle or compromise for or in the name of the Insured any claim insured against or to pay the full amount of this policy, or, in case loss is sustained under the policy by the owner of the indebtedness secured by a mortgage covered by this policy, the Company shall have the option to purchase said indebtedness, such purchase payment or tender of payment of the full amount of this policy, together with all costs, attorneys' fees and expenses which the Company shall have become obligated to pay prior to the time of such purchase by the Company. In the event after notice of claim has been given to the Company by the Insured, the Company elects to purchase said indebtedness, the owner of such indebtedness shall transfer and assign said indebtedness and the mortgage securing the same to the Company, upon payment of the purchase price.

7. PAYMENT OF LOSS

(a) The liability of the Company under this policy shall in no case exceed, in all, the actual loss of the Insured and costs and attorneys' fees which the Company may be obligated hereunder to pay.

(b) The Company will pay, in addition to any loss insured against by this policy, all costs imposed upon the Insured in litigation carried on by the Company for the Insured, and all costs and attorneys' fees in litigation carried on by the Insured with the written authorization of the Company.

(c) No claim for damages shall arise or be maintainable under this policy (1) if the Company, after having received notice of an alleged defect, lien or encumbrance not excepted or excluded herein removes such defect, lien or encumbrance within a reasonable time after receipt of such notice, or (2) for liability voluntarily assumed by the Insured in settling any claim or suit without written consent of the Company, or (3) in the event the title is rejected as unmarketable because of a defect, lien or encumbrance not excepted or excluded in this policy, until there has been a final determination by a court of competent jurisdiction sustaining such rejection.

(d) All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the amount of the insurance pro tanto and no payment shall be made without producing this policy for endorsement of such payment unless the policy be lost or destroyed, in which case proof of such loss or destruction shall be furnished to the satisfaction of the Company; provided, however, if the owner of an indebtedness secured by a mortgage shown in Schedule B is an Insured hereunder then such payments shall not reduce pro rata the amount of the insurance afforded hereunder as to such Insured, except to the extent that such payments reduce the amount of the indebtedness secured by such mortgage. Payment in full by any person or voluntary satisfaction or release by the Insured of a mortgage covered by this policy shall terminate all liability of the Company to the Insured owner of the indebtedness secured by such mortgage, except as provided in paragraph 2 hereof.

(e) When liability has been definitely fixed in accordance with the conditions of this policy the loss or damage shall be payable within thirty days thereafter.

8. LIABILITY NONCUMULATIVE

It is expressly understood that the amount of this policy is reduced by any amount the Company may pay under any policy insuring the validity or priority of any mortgage shown or referred to in Schedule B hereof or any mortgage hereafter executed by the Insured which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment to the Insured under this policy. The provisions of this paragraph numbered 8 shall not apply to an Insured owner of an indebtedness secured by a mortgage shown on Schedule B unless such Insured acquires title to said estate or interest in satisfaction of said indebtedness or any part thereof.

9. SUBROGATION UPON PAYMENT OR SETTLEMENT

Whenever the Company shall have settled a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the Insured, and it shall be subrogated to and be entitled to all rights and remedies which the Insured would have had against any person or property in respect to such claim had this policy not been issued. If the payment does not cover the loss of the Insured, the Company shall be subrogated to such rights and remedies in the proportion which said payment bears to the amount of said loss. If loss should result from any act of the Insured, such act shall not void this policy but the Company, in that event, shall be required to pay only that part of any losses insured against hereunder which shall exceed the amount, if any, lost to the Company by reason of the impairment of the right of subrogation. The Insured, if requested by the Company, shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect such right of subrogation, and shall permit the Company to use the name of the Insured in any transaction or litigation involving such rights or remedies.

If the Insured is the owner of the indebtedness secured by a mortgage covered by this policy, such Insured may release or substitute the personal liability of any debtor or guarantor or extend or otherwise modify the terms of payment or release a portion of the estate or interest from the lien of the mortgage or release any collateral security for the indebtedness, provided such act does not result in any loss of priority of the lien of the mortgage.

10. POLICY ENTIRE CONTRACT

Any action or actions or rights of action that the Insured may have or may bring against the Company arising out of the status of the lien of the mortgage covered by this policy or the title of the estate or interest insured herein must be based on the provisions of this policy.

No provision or condition of this policy can be waived or changed except by writing endorsed hereon or attached hereto signed by the President, a Vice President, the Secretary, an Assistant Secretary or other validating officer of the Company.

11. NOTICES, WHERE SENT

All notices required to be given the Company and any statement in writing required to be furnished the Company shall be addressed to it at the office which issued this policy or to its Home Office, 433 South Spring Street, Los Angeles 54, California.

12. THE PREMIUM SPECIFIED IN SCHEDULE A IS THE ENTIRE CHARGE FOR TITLE SEARCH, TITLE EXAMINATION AND TITLE INSURANCE

CLTA 107.8 (4-10-69)
(8-71)
ALTA OR STANDARD COVERAGE

INDORSEMENT

ATTACHED TO POLICY NO. 504063

ISSUED BY

Title Insurance and Trust Company

The following exclusion from coverage under this policy is added to Paragraph 3 of the Conditions and Stipulations:

"Consumer credit protection, truth in lending or similar law."

The total liability of the Company under said policy and any indorsements therein shall not exceed, in the aggregate, the face amount of said policy and costs which the Company is obligated under the conditions and stipulations thereof to pay.

This indorsement is made a part of said policy and is subject to the schedules, conditions and stipulations therein, except as modified by the provisions hereof.

Title Insurance and Trust Company

By John J Engen SECRETARY

RJN 054

EXHIBIT E

DEPARTMENT OF INSURANCE
Legal Division, Office of the Commissioner
45 Fremont Street, 23rd Floor
San Francisco, CA 94105

Adam M. Cole
General Counsel
TEL: 415-538-4010
FAX: 415-904-5889
E-Mail: colca@insurance.ca.gov
www.insurance.ca.gov

By Hand Delivery

November 19, 2010

The Honorable Chief Justice Ronald George
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: Request to Depublish *MacKay v. Superior Court*, Case Nos. B220469 & B223772, California Court of Appeal, Second Appellate District, Division 3, Decision Filed October 6, 2010

Dear Chief Justice George and Associate Justices:

The Insurance Commissioner of California respectfully requests that the Court depublish *MacKay v. Superior Court (21st Century Insurance Co.)*, Case Nos. B220469 & B223772, California Court of Appeal, Second Appellate District, Division 3, Decision Filed October 6, 2010. In the alternative, the Commissioner urges the Court *sua sponte* to review *MacKay* and issue a decision clarifying the law in this area.

I. The Commissioner's Interest

The Insurance Commissioner is the government official entrusted with administering the Insurance Code, including the provisions added by the people through the adoption of Proposition 103, a voter initiative enacted in 1988 and in effect in California since 1989. Proposition 103 and amendments to it are codified at Insurance Code Sections 1861.01 to 1861.16. In his official capacity, the Commissioner frequently has conveyed his views on the functioning of Proposition 103 to this Court and the Courts of Appeal in amicus briefs and other submissions. (See, e.g., *Farmers Ins. Exch. v. Superior Court* (1992) 2 Cal.4th 377; *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968; *Poirer v. State Farm Mut. Auto.Ins. Co.* (2004) 2004 Cal. App. Unpub. LEXIS 9365; *State Farm Mut. Auto. Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029; *Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th1354; *Association of Cal. Ins. Cos. v. Poizner* (2009) 180 Cal.App.4th 1029.)

II. Why the Court Should Depublish *MacKay* or Clarify the Interpretation of Proposition 103

MacKay is inconsistent with this Court's decision in *Farmers Insurance Co. v. Superior Court* (1992) 2 Cal.4th 377, which holds that consumers have an original right of action in court to assert violations of Proposition 103. *MacKay* also is at odds with the longstanding Department of Insurance ("Department") interpretation of Proposition 103 and associated practices implementing that initiative in place over nearly 20 years.

III. Discussion

The Holding in *MacKay*. The court in *MacKay* held that consumers may not file lawsuits to challenge the legality of rates, or the rating factors used to determine an individual motorist's premium, if the Commissioner approved the rate or rating factor. Rather, under *MacKay*, a consumer harmed by an illegal rate must file a complaint with the Commissioner. If the Commissioner finds the rate to be illegal, the Commissioner issues an order prohibiting the insurer from using the rate going forward. If the Commissioner finds the rate to be legal, the consumer may challenge the Commissioner's decision by filing a petition for a writ of mandate in superior court. If the court finds the rate to be illegal, the court prohibits the insurer from using the rate going forward.

Since its enactment, the Department has interpreted Proposition 103 to allow a consumer to go directly to court to challenge the legality of a rate regardless of whether the Commissioner approved the rate. That position is founded on two provisions of Proposition 103:

> "[A]ny person may initiate or intervene in any proceeding permitted or established pursuant to this chapter, challenge any action of the commissioner under this article, ***and enforce any provision of this article.***" (Ins. Code § 1861.10(a) [emphasis added].)
>
> "***The business of insurance shall be subject to the laws of California applicable to any other business, including, but not limited to, the Unruh Civil Rights Act (Sections 51 to 53, inclusive, of the Civil Code), and the antitrust and unfair business practices laws (Parts 2 (commencing with Section 16600) and 3 (commencing with Section 17500) of Division 7 of the Business and Professions Code).***" (Ins. Code § 1861.03(a) [emphasis added].)

MacKay's conclusion that consumers must pursue a complaint process at the Department in lieu of filing an original action in court conflicts with prior case law and previous interpretations by the Department of Sections 1861.10(a) and 1861.03(a).

The court in *MacKay* concluded that two provisions of the 1947 McBride-Grunsky Insurance Regulatory Act, ("McBride Act"), Ins. Code §§ 1860.1 and 1860.2, immunize insurers from lawsuits challenging components of approved rate filings. However, the Department consistently since enactment of Proposition 103 has taken the position that Sections 1860.1 and 1860.2 immunize insurers only for lawsuits alleging improper ***concerted*** activities authorized by

the Insurance Code; Sections 1860.1 and 1860.2 do not immunize insurers from lawsuits alleging that an ***individual insurer's*** rates or components of rates are illegal.

The court in *MacKay* referred to *Walker v. Allstate Indemnity Co.* (2000) 77 Cal.App.4th 750. *Walker* held that the interplay of Proposition 103 and the immunity sections of the McBride Act preclude a direct lawsuit in court to challenge a ***rate***, as distinct from a rating factor approved by the Department. By its terms, *Walker* does not cover the situation here: Department approval of a rating factor, as distinct from a rate.

This Court's Decision in *Farmers*. *MacKay* is inconsistent with *Farmers Insurance Co. v. Superior Court* (1992) 2 Cal.4th 377. In *Farmers*, the Attorney General, acting on behalf of the people, filed a lawsuit in Superior Court under Business and Professions Code Section 17200 alleging that Farmers violated Proposition 103 by (1) refusing to offer and sell good driver discount policies to all qualified drivers; (2) refusing to offer qualified drivers a 20% good driver discount; (3) using the absence of prior insurance as a criterion for determining eligibility for a good driver discount and for ratemaking and premium setting; and (4) unfairly discriminating against consumers in rates and premiums by not offering good driver discounts to all qualified customers. (*Farmers, supra*, 2 Cal.4th at p. 490.)

The Court held that the Attorney General was permitted to bring a lawsuit directly in court. The Court explained that the Attorney General's Section 17200 claim is "***originally cognizable in the courts***." (*Farmers, supra*, 2 Cal.4th at p. 496 [internal quotation marks omitted] [emphasis added].) However, because the complaint raised technical issues related to Proposition 103, *Farmers* held that the trial court must stay the case and refer those issues to the Department for consideration under the "primary jurisdiction" doctrine. (*Id.* at p. 503.)

The availability of a primary jurisdiction referral protects insurers' interests. If a superior court believes a case involves technical issues within the Commissioner's expertise, the court may stay the case and refer issues to the Commissioner for his input. On referral, the insurer may defend an approved rate as legal. If the Commissioner agrees, he will so notify the court. The court will have the benefit of the Commissioner's input when it decides the case on conclusion of the referral process.

The Insurance Commissioner's Longstanding Position. For nearly 20 years the Commissioner has advised this Court and the Courts of Appeal that consumers have a right to go directly to court to assert violations of Proposition 103. For example:

- In 1991, Commissioner Garamendi sent a letter to the Court in *Farmers, supra*, 2 Cal.4th 487, supporting the right of consumers and the Attorney General to go to court to assert violations of Proposition 103.

- In 2003, Commissioner Garamendi submitted an amicus brief to the Court of Appeal in *Donabedian v. Mercury Insurance Co.* (2004) 116 Cal.App.4th 968. The Court of Appeal quoted the Commissioner's amicus brief with approval: "In enacting Proposition 103, the voters vested the power to enforce the Insurance Code in the

public as well as the Commissioner. As the plain text of Insurance Code Sections 1861.03 and 1861.10 make[s] clear, Proposition 103 established a private right of action for [its] enforcement." (*Donabedian, supra*, 116 Cal.App.4th at p. 982.)

- Also in 2003, in an amicus brief filed in *Poirer v. State Farm Mutual Automobile Insurance Co.* (2004) 2004 Cal. App. Unpub. LEXIS 9365, Commissioner Garamendi explained that Insurance Code Sections 1860.1 and 1860.2 only immunize concerted activity among insurers, not action by individual insurers in the form of rate plans approved by the Commissioner. Commissioner Garamendi stated: "[A]n original private right of action exists for violations of the Insurance Code, whether or not the alleged violation concerns an insurer's rate or class plan approved by the Department." Attached is the portion of the Commissioner's brief conveying that position.

- In 1999, Commissioner Quackenbush sent a letter to this Court requesting depublication of *VPS Management Inc. v. Pacific Rim Assurance Co.*, Case No. B126145, California Court of Appeal, decision filed March 17, 1999. In *VPS*, the Court of Appeal relied on Section 11758 of the Insurance Code, which is in an article relating to workers compensation insurance rate making and is identical to Section 1860.1, to immunize a workers compensation insurer from a lawsuit alleging that it inflated expenses in developing rates, resulting in excessive premiums. In its letter requesting depublication, the Commissioner explained that Section 11758, like Section 1860.1, is designed solely to immunize against lawsuits alleging antitrust violations: "The *VPS* decision incorrectly stretches the immunity that is provided by Insurance Code Section 11758. The purpose of that section is to immunize insurers and rating organizations from anti-trust laws so that they can act in concert to make rates." Commissioner Quackenbush's 1999 letter is attached. The Court depublished the decision. (*VPS Mgmt. Inc. v. Pacific Rim Assur. Co.*, 1999 Cal. LEXIS 4209.)

IV. Conclusion

Because a conflict exists between *MacKay, Farmers* and other appellate decisions regarding the interpretation of Proposition 103, and because for nearly 20 years the Department has interpreted Proposition 103 in a manner inconsistent with *MacKay*, the Commissioner requests either depublication of *MacKay* or that the Court *sua sponte* accept review of *MacKay* and issue a decision clarifying the law in this area.

Respectfully submitted,

Adam M. Cole
General Counsel

Attachments

EXHIBIT F

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STATE OF CALIFORNIA

SAN FRANCISCO 2

Inter-Departmental Communication

To: Honorable Earl Warren
Governor of California
State Capitol
Sacramento 14, California

File No.

Date: June 11, 1947

Subject: S. B. 1572

From: Department of Justice
Harold B. Haas, Deputy

S. B. 1572 adds Chapter 9 to Part 2 of Division 1, Insurance Code, entitled "RATES AND RATING AND OTHER ORGANIZATIONS."

It purports to provide insurance rate regulation in order that insurance rates may not be excessive, inadequate, or unfairly discriminatory; provides for licensing rating organizations and a lesser degree of regulation of advisory organizations and "pools"; sets standards for determination of proper rates, authorizes insurers to act in concert in rate-making, rating practices, etc., under prescribed requirements; exempts them from legislation forbidding such practices in other businesses when so acting; defines powers of Insurance Commissioner in connection therewith, and provides for judicial review of his acts in connection therewith. (See section-by-section digest below.)

COMMENT: No constitutional question seems to be raised by the bill.

There are a number of legal features in the bill, mention of which is essential in order to gain a proper picture of the scope and effect of the bill. These are herewith set forth:

PURPOSES OF THE BILL

The first section of the bill declares that its purpose is to (1) promote public welfare by regulating insurance rates so that they shall not be (a) excessive, (b) inadequate, or (c) unfairly discriminatory; (2) to authorize the existence of qualified rating organizations and advisory organizations; (3) require that specified rating services of such rating organizations be generally available to admitted insurers, and (4) to authorize cooperation between insurers in rate-making and other related matters. (Sec. 1850, 1st par.)

The bill goes on to declare it to be (5) the intent of the chapter to permit and encourage competition between insurers on a sound financial basis and that (6) nothing in the bill gives the Commissioner power to determine a rate level by classification or otherwise. (Sec. 1850, 2nd par.)

(1) "Excessive, inadequate, or unfairly discriminatory" rates.

(a) Excessive rates. The bill does not permit a rate to be stigmatized as excessive simply because it is unreasonably high for the insurance provided. This must be the case but also a reasonable degree of competition must not exist in the area with respect to the classification

to which such rate is applicable. (Sec. 1852(a)) It is not specified whether or not the "competition" must offer reasonable rates or lower rates. Unless it is to be implied that such is the case, then if the same rate is observed by the competing insurers, the rate is not "excessive" under the bill and the Commissioner is without power to compel reduction. This must be considered in view of the further provision that the mere fact that members of a rating organization charge the rates adopted by the organization is not evidence of an agreement to adhere to those rates unless there is direct evidence of the existence of the agreement (Sec. 1853.6). See, also, "rate level" below.)

(b) Inadequate rates. The mere fact that the rate is unreasonably low for the insurance provided does not permit it to be stigmatized as inadequate under the bill. It must also be such that either continued solvency of the insurer is endangered by its use or the use of the rate by the insurer has or will have the effect of destroying competition or creating a monopoly. (Sec. 1852(a) So far as the standard of "inadequacy" is concerned, it follows again that so long as other insurers compete at the same rate, and are financially able to do so, the rate is not "inadequate" under the bill. (See, also, "rate level" below.)

(c) Unfairly discriminatory rates. It is possible that the power to determine whether rates are unfairly discriminatory would have some effect as to adequacy or inadequacy of rates if the bill did not, also, impose important limits on this power. In short, the maintenance of an unreasonably low or high rate on a particular class of risks might possibly be termed unfairly discriminatory as to other classes of risks which would be penalized or benefited thereby if the statute did not so expressly limit the use of the standards of "adequacy and "inadequacy" as to make this dubious. As between risks of like hazard, it is probable that the Commissioner has power under the bill to require removal of discriminations (Sec. 1852(d), last sentence) but the power to do so as between classes of risks is one which under the bill can only be made certain by court test or amendment. (See, also, "rate level", below.)

(2) "Qualified rating organizations and advisory organizations." It would seem clear that the bill gives the Commissioner fairly complete power to license and supervise rating organizations. (Defined, Sec. 1850.1; regulation,secs.1854 to 1854.4.) It is quite as clear that he has power with respect to "advisory organizations" only to require filing of membership lists, organization documents, and by-laws, rules and regulations governing activities, and such power as may arise out of a prohibition of "unfair" or unreasonable practices with respect to their activities. (Definition, Sec. 1850.2; regulation Sec. 1855.) However, he does have power to examine them at their expense, which is probably sufficient to enforce these powers. (Secs. 1857.1, 1857.3, 1857.4)

The exemption from the Cartwright Act and similar laws, accomplished by a section exempting activities pursuant to authority conferred by the bill from prosecution or civil action, also enters into this, since

these organizations thereby become immune to action under the Cartwright Act. (Speegle v. Bd. of Fire Underwriters, 29 Adv.Cal.27,121) (Sec. 1860.1)
In view of the fact that these "advisory organizations" may make underwriting rules, prepare policy forms and collect and furnish statistical information and data, the adequacy of the above legal powers given the Commissioner is a question of policy upon which, undoubtedly, the Insurance Commissioner will advise.

(3) Requirement that specified rating services be generally available to admitted insurers. This requirement appears to be complete with provision for adequate demonstration of compliance to the Commissioner. (Secs. 1854.1, 1854.2) Eligibility standards for membership, particularly, are subject to Commissioner's approval. (Sec. 1854.3)

(4) Authorization of cooperation between insurers in rate-making and related matters. The bill authorizes acting in concert by insurers respecting rates or rating systems, preparation or making of policy or surety bond forms, underwriting rules, surveys, inspections and investigations, furnishing of loss or expense statistics or other information and data, or carrying on of research. This authorization is made subject to the provisions of the bill relating to regulation of rating or advisory organizations and of joint underwriting or reinsurance (pool (Sec. 1853).

Something here should be said concerning "pools", that is joint underwriting and reinsurance. Insurance of certain commodities and products, such as cotton and oil, have been found in the past to call for insuring capacity, forms, rates, and underwriting too great for safe handling by any single insurer. As a result, companies have grouped in organizations known as "pools," for the purposes of apportioning risks, etc., under agreements as to division of business, pooling of losses and profits, etc. The bill applies substantially the same regulation to these "pools" as to "advisory organizations. (Sec. 1856, cf. sec.1855.) (See (2)"Qualified Rating and Advisory Organizations," above.)

The point is that all such acts in concert authorized by the bill are expressly exempted from prosecution or civil proceedings under any law of this State which does not expressly refer to insurance. This, obviously, includes the Cartwright Act concerning combinations in restrain of trade. (Speegle v. Bd. of Fire Underwriters, 29 Adv. Cal.27,121,) The exemption is a very broad one and is specified in the title of the bill, thus meeting any constitutional question. If other business regulations such as the Fair Trade Act are applicable to insurance, the exemption applies to them also.

(5) The intent of the bill to permit and encourage competition between insurers on a sound financial basis. No legal questions are presented by the above clause of section 1850. The effect of "competition" in respect to "adequacy" or "inadequacy" of rates in the bill has been commented on above.

(6) Rate level. The bill provides, "Nothing in this chapter is intended to give the Commissioner power to fix and determine a rate level by classification or otherwise." (Sec. 1850, 2nd par.) The meaning of this language is decidedly obscure. Whether or not a rate is "un-

reasonably high" or "unreasonably low" (sec. 1852(a)) may be determinable only on the basis of a determination of the proper rate for the classification of risk involved; that is, the "rate level by classification". (See "(a) Excessive rates" and "(b) inadequate rates", above.)

It is possible that the purpose of the clause was to emphasize such provisions as those recognizing different systems of expense provisions (sec. 1852(c))or those providing that dividends and dividend plans are not subject to control under the bill (secs. 1860, 1854.1(a)), although they may be considered in making and use of rates (sec. 1852(b) 2nd par.) all of which may make the rate or ultimate cost of insurance of the same risk and hazard different as between different insurers.

But this is merely a guess. The clause throws further doubt upon any powers of the Commissioner to require adjustment of the rate structure to eliminate excessive or inadequate rates.

The clause further raises question as to his power to require correction of unfair discriminations, since the determination as to whether a rate is unfairly discriminatory may also involve determination of a proper rate level.

Again, the whole intent of the bill, as illustrated by the provisions for rating organizations (secs. 1850.1, 1854-1854.4), for consideration of the experience of an entire class of business (sec. 1852(b)) and for collection of experience statistics (sec. 1853.7) is to permit combining of experience and other factors applicable to the business as a whole, as well as individual factors in certain cases. (Sec.1852(c)) How the Commissioner can apply these standards without resulting determination of rate levels is a problem to which any legal solution is highly dubious.

This is best illustrated by the fact that the cases interpreting statutes authorizing the Insurance Commissioner or other official to reduce excessive insurance rates have invariably arisen out of a court test of a Commissioner's action in determining that excessive rates were being charged and ordering a reduction, i.e., that the level of fire rates for various classifications was too high. (Commonwealth v. Aetna, 1929 Rep. of Va. Corp. Comm'n. 29, 160 Va. 698, 169 S.E.698; Aetna v. Travis, 121 Kan. 802, 124 Kan. 350, 257 Pac. 337, 259 Pac. 1068, cert. den. 276 U.S. 628, 48 S. Ct. 321, 72 L. Ed. 740; Aetna v. Hyde, 315 Mo. 113, 285 S.W. 65)

OTHER FEATURES OF THE BILL WHICH REQUIRE CONSIDERATION

A. The "Underwriting Profit" test. Section 1852, subd.(b) requires that one of the standards to be applied to rate-making under the bill is that "Consideration shall be given *** to a reasonable margin for underwriting profit."

As a statement of the rate base this is of great importance. In Bullion Aetna Ins. Co., 151 Ark. 519, 237 S.W. 716, it was held that the expressi

"underwriting profit" as used in an insurance rating statute, referred to the technical meaning of the term, the excess of "premiums earned" over "losses and expenses incurred." The Corporation Commission of Virginia has called attention to the fact that this measure of profit understated the profit from insurance operations and also held that income from investment of reserves should be also considered where the statute did not so limit the rate-regulatory body. (Commonwealth v. Aetna, 1929 Rep. of the State Corp. Comm'n. (Va.) 29) It was sustained in that position by the Supreme Court of that State. (Aetna v. Commonwealth, 160 Va. 698, 169 S. E. 859) Other courts have sustained different measures of profit realized from rates in determining whether the same were excessive, but have included some measure of the investment profit as well in making the determination where the statute did not prescribe "underwriting profit" as the test. (Aetna v. Hyde, 315 Mo. 113, 285 S. W. 65, Aetna v. Travis, 124 Kan. 350, 259 Pac. 1068)

The above clause relating to underwriting profit may therefore be held to the restricted meaning given in the Bullion case supra, thereby excluding consideration of an income item, income from investment of reserves, in determining whether rates are excessive or inadequate. This can easily exceed underwriting profit.

B. Agreements to adhere to rates of rating organization. The bill forbids insurers to agree to adhere to rates of a rating organization (secs. 1853.6, 1854.1(b) - a provision not made with respect to rules of an advisory organization or rules or rates of a "pool", see secs. 1855, 1856) but states that actual adherence by insurers to such rates does not support a finding of such agreement in the absence of direct evidence of the existence of the agreement.

C. Examination of insurers to determine compliance with rating bill. Examinations for this purpose cannot be made part of the usual periodic examination of the company when examiners of other States participate. (Sec. 1857.2) The inclusion in the bill of section 735, Insurance Code, (Sec.1860.3), results in requiring the Commissioner to keep the examinations private unless he deems it necessary to publish the results. The effect may be to raise question as to the Commissioner's right to disclose facts revealed thereby concerning rating practices of insurers in California, to the insurance authorities of their home States without, literally, putting them in the newspapers.

D. Moneys and profits obtained by violation of bill. It should also be noted that no express provision is made whereby the Commissioner upon notifying the insurers, and possibly calling a hearing upon a violation, may, at least from that time forward, require the insurers to refund excess premium collected by reason of an excessive or discriminatory rate, or to hold the excess, subject to refund at time of final determination. (Secs. 1858-1858.6) It is possible that a determined Commissioner might make the period of suspension dependent upon such a refund. There is no present judicial authority in California as to the validity of such an alternative penalty, although it is done from time to time by administrative agencies. But in any event, if the violation continues

during the Commissioner's proceedings, the earliest time when he can compel stoppage is 20 days after his decision finding the violation with a possible 15-day extension from the date a petition for review is filed. Presumably the court could require impound from that time on as a condition to further stay, but the absence of proper provision for requirement of impound by the Commissioner puts a premium upon stalling and delay in the Commissioner's proceedings.

E. No power is given the Commissioner to prescribe form or essential requirements of the records in respect to rates. The requirement is only that records be "reasonably adapted to its method of operation." It follows that the records and method of operation may be such as to make unfair discrimination, or excessive or inadequate rates extremely difficult to detect, if they do not actually tend to concealment. (Cf. secs. 900 et seq., Ins. Code and comment on examinations provided in bill, "C" supra.)

SECTION-BY-SECTION DIGEST

Section 1 of S. B. 1572 adds Chapter 9 to Part 2, Division 1, Insurance Code, entitled: "Rates and Rating and Other Organizations", comprising sections 1850-1860.3; section 2 amends section 1282 thereof, and section 3 adds section 754 thereto. Sections 4, 5 and 6 are provisions re construction and effect of the bill, and section 7 provides short title.

1850: Declares purpose to promote public welfare by regulating insurance rates to the end they be not excessive, inadequate or unfairly discriminatory; authorize rating and advisory organizations and require that specified rating services of rating organizations be generally available to admitted insurers and to authorize cooperation between insurers in rate-making.

Declares intent to permit competition on sound financial basis and that chapter not intended to give Commissioner power to fix and determine rate level.

1850.1: Rating organization defined. Covers all rate-making organizations whether within or without State and includes any admitted insurers acting together when not under common ownership or operating in this State under common management and other than in assigned risk plan or joint underwriting or reinsurance "pool". These exceptions are defined in sections 1853.5, 1853.7, 1853.8, and 1856.

Such definition obviously contemplates organizations such as the former Board of Fire Underwriters of the Pacific, the National Bureau of Casualty Insurers, the Towner Bureau for Surety Insurers and the National Automobile Underwriters Association, organizations which have made the bulk of the fire and casualty insurance rates in this State.

1850.2: "Advisory organization" defined. (Attorneys-at-law acting in usual course of profession excluded.) Includes all organizations which

do not make rates but which prepare policy forms, make underwriting rules, collect and furnish to admitted insurers, or rating organizations, statistical information, and act in advisory as distinguished from rate-making capacity. This is probably intended to cover such organizations as the National Board of Fire Underwriters, the American Mutual Alliance, and similar trade associations of the insurance business.

1850.3: Persons receiving rating and advisory organization services defined as "members" who participate in management and "subscribers" who merely receive the services.

1850.4: Casualty insurance defined as meaning surety, plate glass, liability, common carrier liability, burglary, and team and vehicle insurance and, if written by other than fire or marine insurers, boiler and machinery, sprinkler, automobile (this excludes automobile liability which is written under "liability"), aircraft (similarly, does not include aircraft liability), and miscellaneous, all as defined in sections 105 to 120, Insurance Code.

1850.5: "Wilful" or "wilfully", as used in bill, limited to action with actual knowledge or belief that violation is being committed and with specific intent to commit violation (refers to sections 1858.1 et seq., infra.)

1851: Bill excludes following insurances:

(a) Reinsurance, except "pool" operations ("pool" operations defined in 1856, infra)

(b) Life insurance (rates are not now regulated)

(c) Marine, other than inland marine. Inland marine is not defined by code and is therefore left to be defined by ruling of the Commissioner or establishment by general custom of the business. (For present definition of Inland Marine see sects. 2320-2322 of Title 10, California Administrative Code.)(Rates not now regulated, but business "market" is international.)

(d) Title insurance (rates are not now regulated)

(e) Disability insurance. (This insurance is subject to anti-discrimination provisions and policy form regulation. The anti-discrimination provision is section 10401, Insurance Code.)

(f) Workmen's Compensation and Employers' Liability Insurance incidental thereto and written in connection therewith. (Workmen's compensation (not employers' liability) is subject to sections 11730-11742, Insurance Code, by the provisions of which the Commissioner prescribes minimum rates to be charged. There is no provision therein for correction of excessive or discriminatory rates.)

(g) Credit insurance, (very little written, and rates not regulated at present)

(h) Mortgage insurance (practically moribund in this State at present)

(i) Insurance transacted by county mutual fire insurers or county mutual fire re-insurers (these are the local farmers fire companies provided for by sections 5050 to 7060, Insurance Code, and the present First Reinsurance Company, provided for by sections 7080-9060, Insurance Code, the business of which is confined to reinsuring these local fire companies.

However, these organizations may write a certain amount of city residential business and are not prohibited from reinsuring their business with other stock or mutual insurers.

(QUERY: Whether such another stock or mutual insurer would then be entitled to the exemption. It probably would, as long as it confined its business to reinsurance under the above exemption for reinsurance.)

Article 2: Making and use of rates.

1852: (a) Rates not to be excessive or inadequate "as herein defined," nor unfairly discriminatory. A rate not to be held excessive unless unreasonably high for the insurance provided and a reasonable degree of competition does not exist in the area with respect to the classification to which the rate is applicable.

Rate not inadequate unless unreasonably low for the insurance provided and continued use thereof endangers solvency of insurer writing the same or rate is unreasonably low for insurance provided and use if continued will have effect of destroying competition or creating monopoly.

(b) Consideration to be given to loss experience within or without State, conflagration and catastrophe hazards, reasonable margin for underwriting profit and contingencies, prospective country-wide and local experience and all other factors, including judgment factors within and outside State. On fire insurance rates consideration may be given to experience during most recent five-year period for which available.

Consideration may also be given to dividends and similar savings to insureds.

(c) Systems of expense provisions included in rates may differ.

(d) Risks may be classified to establish rates and minimum premiums and classifications may be modified by rating plans for measuring variations in hazards and expense provisions. Such standards may measure any difference among risks that has probable effect upon losses or expenses. Classifications may be based upon size, expense, management, individual experience or location of hazard, or any other reasonabl consideration, but must apply to all other risks on substantially the same circumstances or conditions.

1853: Subject to the provisions of the bill, insurers may act in concert on rate-making, preparation of policy or bond forms, underwriting rules, surveys, inspection, furnishing of statistics and carrying on of research.

1853.5: With respect to matters listed in section 1853, companies having common ownership or operating under common management or control

in this State may act in concert as if they were a single company.

1853.6: Members and subscribers of rating or advisory organizations may use rates, systems, underwriting rules and policy or bond forms of the organizations, but shall not agree with each other or others to adhere thereto. This is subject to exceptions in 1853.5 (common management), 1853.8 (assigned risk pools), and 1856 (reinsurance pools). Fact of such use is not to be sufficient to support a finding that agreement to adhere to these rates, etc., exists and may be used only to supplement direct evidence of existence of agreement.

1853.7: Licensed rating organizations and admitted insurers are authorized to exchange information and experience data with rating organizations and insurers in this and other States, and to consult in rate-making and application of rating systems.

1853.8: Authorizes "assigned risk pools", that is, agreements among admitted insurers to apportion casualty insurance to applicants who are unable to procure the insurance through ordinary methods and with respect to the use of reasonable rate modifications, (usually surcharges for such insurance. Agreements subject to approval of the Commissioner must be submitted in writing therefor with such information as he may reasonably require. Commissioner can approve only agreements contemplating use of rates meeting standards in bill and activities and practices not unfair, unreasonable or otherwise inconsistent with bill.

Commissioner may review practices and activities under such agreements, require changes in writing on hearing with ten (10) days' notice, and for good cause after such hearing revoke approval of agreement.

1853.9: Upon compliance with chapter, insurers,organizations, etc., may operate in State. As respects risks or operations in State, no insurer shall be member or subscriber of any organization that has not complied with provisions of bill.(Limitation to risks or operation in State permits such memberships as to business in other States. This is important, as many such bureaus operate on nation-wide basis, yet might conceivably not operate in respect to risks in this State for competitiv or other reasons.)

Article 3: Rating organizations.

1854, 1854.1: These and following sections provide for the licensing of rating organizations upon payment of a $25.00 fee and filing of a written application and satisfactory evidence to the Commissioner of compliance with the provisions of the bill. Chief requirements are that the organization

(a) permit membership and withdrawal without discrimination at a reasonable cost

(b) forbid adoption of any measure to compel members or subscribers to adhere to the rates, rating plans, etc., of the organization

(c) take no measure to control dividends of members or subscribers

(d) neither practice nor sanction boycott, coercion or intimidation

(e) neither enter into nor sanction any unlawful engaging in the insurance business

(f) notify the Commissioner of any changes in the organization and its members

(g) keep proper records as defined in section 1857.

1854.2, 1854.3, 1854.4: The Commissioner shall examine the application and make further investigation as he deems desirable and must issue the license if satisfied as to business reputation, adequacy of applicant's facilities and conformity of plan of operation to the requirements of the bill. Commissioner may grant a license to act as rating organization only for selected classes or subdivisions of classes of insurance or risks if the applicant qualifies for only those classes. Licenses are continuing until revoked.

Rules governing eligibility for membership of a rating organization are subject to the Commissioner's approval. Where two or more insurers have common ownership or operate in this State under common management and are admitted for classes of insurance covered by a rating organization, the organization may require both to be members or subscribers as a condition of admitting either to membership or subscribership.

Article 4: Advisory organizations.

1855: Advisory organization must file certain information such as its foundation documents, list of members and subscribers and agent for service of process, and notify the Commissioner of any changes. Organizations are forbidden to engage in unfair or unreasonable practices with respect to their activities. No licensing is prescribed in order to act as an advisory organization.

Article 5: Joint underwriting and joint reinsurance.

1856: Insurers associate in groups under various arrangements for apportioning, distributing and reinsuring risks in fields where insurance requirements are large and peculiar, such as the insuring of the handling of cotton, grain, oil, etc. These are commonly known in the trade as "pools". With respect to such pools operating in this State, similar requirements as to furnishing information to the Commissioner, and forbidding unfair or unreasonable practices, are imposed as in the case of advisory organizations. Similarly, no licensing is prescribed.

Article 6: Records and examinations.

1857: Every insurer, rating organization, advisory organization and "pool" is required to maintain reasonable records, of the type and kind reasonably adapted to its method of operation, of its experience or the experience of its members, and other proper information, in such fashion

that the records will be available at all reasonable times to enable the Commissioner to determine compliance with the provisions of the bill. Maintenance of the records in the office of a licensed rating organization is sufficient compliance as to the members or subscribers to the extent that the insurer uses the rates, etc., of the organization. The record must be maintained in an office in this State, available for examination by the Commissioner at any time upon reasonable notice.

1857.1: The Commissioner must, at least once every 5 years as to rating organizations, and as often as reasonable and necessary in respect both to rating and other organizations, make these examinations. He may accept the report of an examination made by the insurance supervisory official of another State in lieu of his own.

1857.2: He may at any reasonable time examine any admitted insurer to ascertain compliance with the provisions of the chapter but such examination cannot be a part of a periodic general examination participated in by representatives of more than one State.

1857.3: All personnel of any organization, pool or insurer may be examined at any time under oath and shall exhibit all records and information used in the conduct of operations to which the examination relates.

1857.4: The reasonable cost of any examination shall be paid by the organization, pool or insurer to be examined.

Article 7: Hearings, procedure and judicial review.

1858: Any person aggrieved by a rating action may request the insurer or rating organization to review the same. The request must be in writing and if not granted within 30 days after it is made may treat it as rejected. Any person aggrieved by such refusal may file a written complaint and request for a hearing by the Commissioner, specifying the grounds relied on. If the Commissioner has information concerning a similar complaint or believes that probable cause for the complaint does not exist, or that the complaint is not made in good faith, the hearing can be denied. Otherwise, if he finds the complaint charges a violation and that the complainant would be aggrieved, he may act.

1858.1: The action consists of a 10-day notice to the insurer, pool, or organization, to correct the non-compliance. Notices so given are confidential as between the Commissioner and the parties unless a heaing is held thereafter. Such notice may also be given when his examination reveals a failure of compliance, unless he has good cause to believe the non-compliance is wilful. (Note the definition of "wilful" in 1850.5 above.)

1858.2: If he has such good cause, or correction is not made pursuant to notice given as above, a public hearing may be held by the Commissioner on 10-days' written notice, conforming to the requirements of an accusation as prescribed by section 11503, Government Code. The hearin

cannot include any subjects not specified in the notice to correct non-compliance, or the notice of hearing.

1858.3: Based on the hearing, the Commissioner may take the following actions upon the following findings:

(a) upon finding that a rate, etc., violates the bill, he may prohibit further use thereof after a reasonable time stated

(b) on finding of violation of the bill other than the provisions dealing with rates, rating plans, or rating systems, he may issue an order specifying the violation and require compliance within a reasonable time

(c) upon a finding that the violation was wilful, he may suspend or revoke in whole or in part the certificate of authority of the insurer or the license of the rating organization with respect to the class of insurance involved

(d) upon a finding that any rating organization has wilfully engaged in any fraudulent or dishonest act or practices, he may suspend the license of the organization, in addition to any penalties above.

1858.4: The Commissioner may suspend or revoke in whole or in part the license of any rating organization or the certificate of authority of any insurer with respect to the class or classes of insurance specified in the order where there has been a failure to comply with one of the above orders lawfully made.

1858.5: Except as above specified, all the proceedings above shall be conducted in accordance with the provisions of the administrative procedure act, Chapter 5 of Part 1 of Division 3 of Title 2, Government Code.

1858.6: Provides for court review of the Commissioner's acts under the bill, with the court directed to exercise its independent judgment on the evidence and, unless the weight of the evidence supports the findings determination, rule, ruling or order of the Commissioner, to annul the same.

Petition for review may be filed within 20 days after notice and copy of the order is mailed, or delivered, to the person affected. No such order shall become effective until after the expiration of 20 days and if petition for court review is filed for a further period of 15 days, with power in the court to further stay the effectiveness of the order.

Article 8: Penalties.

1858 and 1859.1: All persons and organizations are forbidden to wilfully withold information or knowingly give false or misleading information to the Commissioner, or to any rate organization, advisory organization, or pool, which will affect the rates, etc., to which the bill is applicable.

(a) Failure to comply with final order of the Commissioner subject to a penalty of $50.00, unless wilful, in which case subject to a penalty of $5,000.00, to be collected by civil action.

(b) Wilful violation of provisions of the bill made a misdemeanor.

Article 9: Miscellaneous.

1860: The bill does not prohibit or regulate payment of dividends to insureds. Plan for dividend payment not to be deemed a rating plan or system.

1860.1: Nothing done pursuant to authority conferred by the bill constitutes violation of any other law of the State which does not specifically refer to insurance. This, in effect, exempts acts of insurers and other persons done under the provisions of the bill from the Cartwright Act and any other restraint of trade or similar provisions of California law.

1860.2: Provides that the administration and enforcement of the chapter is governed solely by the provisions of the chapter, and no other law or provision in the insurance code is to be construed as modifying or supplementing the chapter, unless such other law or provision expressly so provides "and specifically refers to the sections of this chapter which it intends to supplement or modify."

1860.3: Specifies that certain provisions of the code are applicable to the administration, enforcement and interpretation of the chapter. These are sections 1 to 41 - the general provisions; 100 to 121 - the provisions classifying forms of insurance; 620 to 621 - the definitions of reinsurance; 700 to 701 - prescribing procedure for licensing insurance companies; 704 - authorizing suspension of certificate of authority of an insurer upon a finding of fraudulent business, failure to carry out contracts in good faith, or habitual failure to pay claims; 730 to 737 - providing for examination of insurers; 1010 to 1062 - providing for proceedings in cases of insolvency and hazardous conditions; 12903 and 12904 - authorizing the Commissioner to employ assistants and purchase books and reports in the administration of the insurance laws; 12919 - making certain communications to the Commissioner confidential and free of liability; 12921 - requiring the Commissioner to enforce the regulator laws; 12921.5 - authorizing him to cooperate with others and disseminate information; 12924 to 12926 - giving him general subpoena and investigatory powers; 12928 and 12930 - requiring him to certify violations to district attorneys and furnish certified copies of his records thereto; 12974 to 12977 - relating to accounting for and use of funds by the Insurance Commissioner.

The bill also amends section 1282 of the Insurance Code to make its provisions applicable to reciprocal or interinsurance exchanges and adds section 754 to the Insurance Code to authorize payment of fees or commissions by insurers or their agents to insurance brokers when otherwise lawful under the Insurance Code, thereby presumably eliminating the application thereto of the Federal Robinson-Pattman Act which forbids

payment of commissions to brokers by a seller under certain circumstances.

The bill also contains a clause providing that unconstitutionality of a portion of the bill shall not affect the rest of the bill.

The bill is made effective January 1, 1948, but preliminary actions, such as applications for licenses and granting of licenses by the Commissioner, may be done prior to the effective date, in order to facilitate compliance on the effective date.

The last section of the bill provides that it shall be known and cited as the "McBride-Grunsky Insurance Regulatory Act of 1947."

HBH:T

Harold B. Haas
Deputy Attorney General

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.

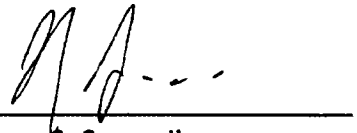
On April 11, 2019, I mailed a copy of the foregoing **PETITIONER'S MOTION FOR JUDICIAL NOTICE** on the interested parties and persons in this action, as follows:

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 April 11, 2019, at Studio City, California.



Nazo S. Semerjian

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California Supreme Court 350 McAllister Street, Room 1295 San Francisco, California 94102-4797	***California Supreme Court (To be submitted by Express Mail on April 10, 2019)***