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 No. H041870
(Santa Clara County Super. Ct. No. 1-10-CV173356)

OPENING BRIEF ON THE MERITS

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

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THE COURT'S SPECIFICATION OF ISSUES

(1) Insurance Code section 12414.26:

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

The Court asks: does this statute provide immunity to an underwritten title company for charging consumers for services for which there have been no rate filings with the Insurance Commissioner? The answer is **NO**, as we explain below in our Discussion, Part 1 (Section 12414.26).

The Court asks: by charging unfiled rates, did Fidelity act "pursuant to the authority conferred by Article 5.5"? The answer, again, is **NO**, as we also explain in Part 1.

(2) Jurisdiction of the Insurance Commissioner:

The Court asks: does the Insurance Commissioner have exclusive jurisdiction over any action against an underwritten title company for services charged to the consumer, but not disclosed to the Department of Insurance? The answer is **NO**, as we explain in our Discussion, Part 2.

INTRODUCTION [1]

Respondent Fidelity National is a title company wholly owned by a title insurer. By statutory definition, title companies like Fidelity are participants in "the business of title insurance" just as title insurers are. (Ins. Code sec. 12340.3(c).) Their rates are therefore regulated just like those of insurers. As with title insurers (and most other insurers), the Insurance Code requires title companies to file their rates with the Insurance Commissioner before charging them to the public, and authorizes them to charge *only* in accordance with these rate filings (except in unusual circumstances not applicable here). (Secs. 12401.1, 12401.7, 12401.71, 12401.8, 12414.27; see also, Opinion, 19.)

The trial court found, and the court below affirmed, that Fidelity had charged class members rates it had not filed with the Commissioner and that this violated multiple sections of the Insurance Code. (Opinion, 38, 48.)

However, the court below held that the UCL and common law breach of fiduciary duty claims were barred by the statutory immunity of Insurance Code sec. 12414.26. (Opinion, 38, 48-49.) The court also noted that the class claims "fall within the exclusive original jurisdiction of the Insurance Commissioner." (Opinion, 42, 49.)

The Insurance Commissioner strongly disagrees with the court

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[1] Matters of Form: The Insurance Code is cited as "the Code." All statutory references are to the Code unless otherwise noted. AA means Appellants' Appendix. RA mean Respondent's Appendix. The Unfair Competition Law, Bus. & Prof. C. §§ 17200 et seq. is cited as "UCL." The McBride-Grunsky Insurance Regulatory Act of 1947 is cited as "McBride-Grunsky" or "the McBride Act."

below, both as to his jurisdiction and as to statutory immunity. The Attorney General, on behalf of the Commissioner, stated the Commissioner's views in a letter to this Court in support of review:

> "[T]he court of appeal erred in barring plaintiff's UCL claims based on concepts of primary and/or exclusive jurisdiction. The regulation and administrative enforcement of title insurance is governed by California insurance law that does not preclude private UCL claims for unfiled and unapproved rates such as those at issue here. UCL actions in the circumstances of this case serve an important purpose that complement, and do not conflict with, the Department's regulatory and enforcement duties and responsibilities set out in the Insurance Code."

(Letter from Xavier Becerra, Attorney General, State of California, d. Nov. 19, 2018, at p. 3, Attachment 3 hereto.)

As to statutory immunity, the Attorney General has similarly advised this Court that the Commissioner is in full agreement with Petitioners: "The court of appeal erred in holding that plaintiff's Unfair Competition Law (UCL) claims were barred by the safe harbor for anti-trust violations in Insurance Code section 12414.26." (*Id.* at 1.)

If the opinion below is affirmed, for the first time, consumers overcharged by unlawful rates will have no meaningful remedy by which they can be made whole. The Commissioner cannot order restitution or any classwide relief, and the courts will be closed. This is not what the Legislature intended.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This certified class action concerns Fidelity's charges for two title related services, delivery of documents and drawing up deeds. The class contended that these charges were not in accordance with Fidelity's rate filings and so were unlawful.

As to the delivery service charges, the class contended first that there was simply no rate filed for this service. Alternatively, the class contended that Fidelity's filed "base rate," which it had also charged the class, was for bundled services that included deliveries. Under this theory, the delivery charges exceeded the filed rate. This required the trial court to interpret what services were covered by the "base rate."

As to the charges for deed drawing, the class also contended, first, that no rate had been filed. (AA 433:30-31; Opinion, 10, 38.) Fidelity countered that during some of the time when it charged for the "draw deed" service, Fidelity had a rate on file for a service designated "document preparation." (Opinion, 13.) Fidelity contended that this designation in its rate filing covered the deed service. This, too, required judicial interpretation to resolve. (Opinion, 37.)

The class pursued a *common law* cause of action for breach of fiduciary duty and a *statutory* cause of action for violation of the Unfair Competition Law, among others. The trial court dismissed breach of fiduciary duty and the class appealed. (Opinion, 9-10.)

A bench trial was held on the UCL statutory action. The trial court found that "Fidelity violated the law by charging for the service of delivery because the rate filings did not include a charge for the service

of delivery." (AA 1413:3-4.) In particular, the trial court found Fidelity had violated Section 12414.27, which provides: "no. . . underwritten title company. . . shall charge for any title policy or service in connection with the business of title insurance, except in accordance with rate filings which have become effective pursuant to Article 5.5."

After an exhaustive, 15 page analysis (AA 1397-1413), the trial court (correctly) found that "[t]he plain language of section 12414.27 broadly prohibits a charge for 'any' service that does not match the rate filings" and that the statute is "unambiguous." (AA 1401:3-5, 1405:1.)

As to deed drawing, the trial court interpreted Fidelity's "document preparation" rate filing as including that service. (AA 1416:10-22.) It therefore found Fidelity was authorized under Article 5.5 to charge for deed drawing during the times that rate was effective. (AA 1427:3-8.) However, during the "gap" time frame when the document preparation rate filing was *not* in effect, "charging for drawing a deed was unlawful" under Section 12414.27. (AA 1413:9-12, 1415:12-13.)

The trial court correctly rejected Fidelity's claim of immunity under Sec. 12414.26, focusing on just one of its several requirements:

> "Section 12414.26 confers immunity for an 'act done, action taken, or agreement made **pursuant to the authority conferred by Article 5.5**. . . .' Section 12414.26 does not apply because Article 5.5 did **not authorize** the unlawful charges. Nothing in Article 5.5 authorizes the charges for a service other than in accordance with rate filings."

(Opinion, 22.)

The trial court entered judgment in favor of the class. (*Id.* at 14.) Both sides appealed.

THE OPINION BELOW

The court below reversed the trial court, despite agreeing that Fidelity charged class members unlawfully – by violating at least *three separate sections* of Article 5.5. (Opinion, 38.) Breaking with all precedent, the court expanded the McBride-Grunsky immunity of Section 12414.26 to bar all civil suits – statutory and common law – challenging any unlawful conduct "**related to ratemaking**" (Opinion, 36). It expanded immunity to bar judicial interpretation of rates. (Opinon, 37.) It even extended immunity to the charging of rates "that have neither been approved nor accepted by the Insurance Commissioner." (Opinion, 25.)

To reach its result, the court offered a baffling syllogism:

> "Fidelity **failed to comply** with sections 12401.1, 12401.2, and 12401.7, all of which are in Article 5.5. In our view, this conduct constitutes acts done **pursuant to the authority conferred by Article 5.5. Thus**, the claims . . . are barred by the section 12414.26 immunity."

(Opinion, 38, emph. added)

The court left us to guess how a "failure to comply" with a statute is an act done "pursuant to the authority conferred by" that

statute. The court repeated this reasoning in its conclusion. (Opinion, 48.)

Further, the court held that the Commissioner has "exclusive original jurisdiction" over plaintiff's claims. (Opinion, 39-42, emph. added.) For this, the court offered no authority, and no specific language granting exclusive jurisdiction to the Commissioner.

On this issue, the court below ignored this Court's landmark decision in *Farmers Ins. v. Sup. Ct.* (1992) 2 Cal.4th 377, and subsequent opinions on this issue.

DISCUSSION

We divide our discussion into two parts, one for each issue specified by the Court. Within these, we identify and discuss certain included issues not specifically identified by the Court, but which we respectfully believe will assist the Court in rendering its decision. (Cal. Rules of Court, Rule 8.520(b)(3).) Having carefully reviewed this Court's questions, and before turning directly to them, we offer a very important point of clarification. For most lines of insurance, the terms "charge" and "rate" are not at all synonymous. But for title companies, they *are*.

The term "rate" is statutorily defined to mean "the charge . . . to the public," with a few exceptions not applicable here. (Sec. 12340.7.) Since "rate" and "charge to the public" are synonyms, any charge to the public that was not filed with the Commissioner is an unfiled rate.

Sometimes, an unfiled rate is charged where there is no rate for the service on file at all. Sometimes, an unfiled rate is charged where there *is* a rate on file for the service, but the filed rate was not the one actually charged; instead, a higher rate was charged for that service.

In *both* cases, the rate charged is *unfiled*. The statutory scheme recognizes no difference between the two. Both are equally unauthorized. They violate identical code sections: 12414.27, 12401.1, 12401.7.

ISSUE ONE: Section 12414.26 Does Not Immunize Fidelity.

A. In construing Section 12414.26, the objective is to effectuate its intended purpose.

The "fundamental rule" of statutory construction is to "ascertain the intent of the Legislature" so as to effectuate the "purpose" of the law. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 976.)

B. Section 12414.26 is the last enacted of four nearly identical McBride-Grunsky immunity statutes. Courts afford them a consistent, harmonious construction.

Section 12414.26 is one of four essentially identical provisions modeled on the immunity section of the 1947 McBride-Grunsky Act. The original (§ 1860.1) applied to all but seven classes of insurance. Thereafter, the Legislature extended McBride-Grunsky immunity to three additional classes: workers compensation (§ 11758, added 1951), senior citizen health (§ 795.7, added 1963), and title (§12414.26, added 1973).

§ 1860.1 (1947), applicable to property & casualty insurance, part of the McBride-Grunsky Act, model for the others:

"No act done, action taken, or agreement made pursuant to the authority conferred by this chapter shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this state heretofore or hereafter enacted which does not specifically refer to insurance."

§ 11758 (1951), applicable to workers compensation insurance:

"No act done, action taken, or agreement made pursuant to the authority conferred by this article shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this state heretofore or hereafter enacted which does not specifically refer to insurance."

§ 795.7 (1963), applicable to senior citizen health insurance:

"No act done, action taken, or agreement made pursuant to the authority conferred by this article shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this state heretofore or hereafter enacted which does not specifically refer to insurance."

§ 12414.26 (1973), applicable to title, at issue here:

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

Courts consider these McBride-Grunsky style immunity statutes to be essentially identical ("virtually identical" – *State Comp. Ins. Fund v. Sup. Ct.* (2001) 24 Cal.4th 930, 938-939 ("*SCIF*"); "twins" – *Donabedian, supra*, at 990). Therefore, interpretation is governed by these canons:

- "similar statutes should be construed in light of one another." *(Krumme v. Mercury Ins.* (2004) 123 Cal.App.4th 924, 943 fn. 6.)

- "Identical words used in... a similar statute usually have the same meaning." (3B Sutherland Statutes and Statutory Construction (8th ed. 2018), § 72:4, Insurance.)

- "*[A]ll statutes in an insurance code* are intended to be part of a uniform system of regulation and are in pari materia, and *are construed together* to produce a harmonious statutory scheme." (*Id.*, emph. added.)

Accordingly, when construing and applying one of the McBride-Grunsky immunity statutes, a court will look to how the others have been construed, with the goal of establishing one consistent, harmonious construction. Thus, when this Court construed Section 11758 (workers compensation), it reviewed decisions interpreting Section 1860.1 (property & casualty). (*SCIF, supra*, at 941-942, discussing *Walker v. Allstate* (2000) 77 Cal.App.4th 750.)

Similarly, when considering how to apply Section 1860.1, the *Donabedian* court reviewed and harmonized this Court's constructions

of Section 11758 and Section 12414.26. (*Donabedian*, *supra*, at 978, 987-990.) The *Walker* court, construing Section 1860.1, reviewed this Court's *Quelimane* Section 12414.26 decision. (*Walker*, 77 Cal.App.4th at 758, 759.) And the court below (mis)analyzed *Walker* (construing Sec. 1860.1), *SCIF* (construing Sec. 11758), *Quelimane* (construing Sec. 12414.26), and others – in its failed attempt at consistent construction.

In sum, Section 12414.26 must receive the same restrictive construction afforded its identical siblings, Sections 1860.1 and 11758. This is particularly so because "immunity statutes are to be strictly construed." (*New Hampshire Ins. Co. v. City of Madera* (1983) 144 Cal.App.3d 298, 305; accord, *Baldwin v. State of California* (1972) 6 Cal.3d 424, 435-437; *Valley Title Co. v. San Jose Water Co.* (1997) 57 Cal.App.4th 1490, 1503.)

C. The Legislature did not intend to immunize the unilateral misconduct of an individual company. Immunity is limited to concerted actions.

Courts may consider the "historical circumstances" of an enactment in determining the Legislature's intent. (*People v. Jeffers* (1987) 43 Cal.3d 984, 993.) As Justice Holmes observed, "a page of history is worth a volume of logic." (*New York Trust Co. v. Eisner* (1921) 256 U.S. 345, 349.)

1. With the passage of the McCarran-Ferguson Act in 1945, the insurance industry needed to implement minimalistic state regulation to obtain federal antitrust immunity.

In 1868, the U.S. Supreme Court held that insurers were immune from federal regulation. (*Paul v. Virginia* (1868) 75 U.S. 168.) From 1890 through 1914, Congress passed three antitrust acts, from which insurers, under *Paul*, were immune. Antitrust immunity was (and remains) very important to the industry, which has historically felt its business is "unusual" in requiring "concert of action" so that "adequate statistical information" is available "to promulgate rates," i.e., to "pool experience for rate making purposes." (*SCIF, supra*, 24 Cal.4th at 939.) Absent *Paul* immunity, such activity would have subjected insurers to potential liability under the federal antitrust statutes.

In 1944, the Supreme Court reversed *Paul,* holding that insurance *is* subject to federal antitrust laws. (*U.S. v. South-Eastern Underwriters* (1944) 322 U.S. 533.) This "caused panic among insurers," and "in order

to quell the insurance industry's concerns," Congress – the next year – enacted the McCarran-Ferguson Act. (*In re Title Ins. Antitrust Cases* (2010) 702 F.Supp.2d 840, 900.) The Act's immunity was designed "explicitly" to permit insurance companies "to share loss experience to determine rates." (Uri, 17 Real Estate L.J. 313, 319 (1989).)

Importantly, McCarran-Ferguson restored federal antitrust immunity *only to the extent* state law regulated "the **business** of insurance." (15 U.S.C. §§1011-1015, §1012(b).) But at the time, virtually no state, including California, regulated insurance rates.

2. With the enactment of McBride-Grunsky in 1947, the insurance industry in California achieved both federal *and state* antitrust immunity – as to property and casualty lines.

Upon passage of McCarran-Ferguson, the insurance industry began a nationwide campaign to get the legislatures of every state to enact de minimis regulation so they would be exempt from federal "antitrust laws." (See *Donabedian v. Mercury Ins.* (2004) 116 Cal.App.4th 968, 979.) But 1946 brought California a wrinkle: the Supreme Court held that the industry had no immunity from *California* antitrust law. (*Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34.)

In 1947, to address *Speegle*, i.e., to achieve *state* antitrust immunity, the California industry achieved passage of "the *minimal*" rate regulation "required to exempt California insurance from federal antitrust law." (*Donabedian*, at 980.) This was the McBride-Grunsky Act.

(Ins. Code §§ 1850-1860.3.) Section 1860.1 was "adopted to immunize insurers from [state] antitrust laws." (*Donabedian, supra*, at 990.)

Section 1860.1 provided that: "No **act** done, **action** taken, or **agreement** made **pursuant to the authority conferred by this chapter** shall constitute a violation of or grounds for prosecution or civil proceedings under any other **law** of this state heretofore or hereafter **enacted** which does not specifically refer to insurance."

This Court has held that the Legislature's intent was "to adopt a regulatory law which would permit [the] collection of data" for "rate making purposes." (*SCIF* at 939, citing legislative history.) The McBride Act "permit[ted] concerted action among insurers in setting rates" and was "adopted to immunize insurers from antitrust laws." (*Donabedian*, at 990.) Section 1860.1 "was enacted, in the first instance, to immunize insurers from antitrust laws. . . . Its *initial* intent. . . was to exempt insurers from antitrust laws." (*MacKay,* at 1447.)

A Deputy Attorney General's report to Gov. Warren explained: "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, Letter from DOJ to Hon. Earl Warren, Governor of California, d. June 11, 1947, re: analysis of Senate Bill 1572, pp. 3, 13, Attachment 4 hereto.)

The insurance industry was clever. From a distance, it looked like

meaningful rate regulation, to satisfy McCarran-Ferguson. But close up, it wasn't. Under McBride-Grunsky, California was effectively an "open rate" state: rates were set *"by insurers* without prior or subsequent *approval* by the Insurance Commissioner." (*King v. Meese* (1987) 43 Cal.3d 1217, 1221.) In *theory*, after a rate was used, the Commissioner could *dis*approve it as too high. But the obstacles built into the system made it effectively impossible. "Under that system, California had less regulation of insurance than any other state." (*20th Century Ins. v. Garamendi* (1994) Cal.4th 216, 240.)

3. Over the next 30 years, the Legislature extended McBride-Grunsky state antitrust immunity to other lines, including workers comp and title.

McBride-Grunsky is the exact system that title insurance rates are still "regulated" under today. But back in 1947, as toothless as McBride-Grunsky was, title insurance was one of seven exempted insurance classes. (§ 1851(d), (f).)

In 1951, the Legislature enacted workers comp rate regulation parallel to McBride-Grunsky. (*SCIF*, 24 Cal.4th at 939, quoting legislative history.) It included Section 11758, a McBride-Grunsky immunity statute which this Court described as "virtually identical" to Section 1860.1. (*Id.* at 938-939.) This Court explained that its object is "to immunize insurers and rating organizations from antitrust laws so they can act in concert to make rates." (*Id.* at 940, quoting letter from Department of Insurance to this Court.)

In 1963, the Legislature regulated certain health insurance for

seniors, to allow insurers to engage in concerted action by complying with McCarran-Ferguson. Its McBride-Grunsky immunity statute is at Sectopm 795.7. Although no case has construed it, Section 795.7 is virtually identical to Sections 1860.1, 11758, and 12414.26.

On December 21, 1972, William Shernoff filed a Cartwright Act class action against virtually every title insurer in California. (*Shernoff v. Superior Court* (1975) 44 Cal.App.3d 406; see RJN Ex. D, Complaint, caption page at Attachment 2.) Within months, a regulatory bill "was introduced at the request of the California Land Title Association," the title industry lobby. (RA 1113, Enrolled Bill Memorandum from Dept. of Ins. to Governor re: Senate Bill 1293, Sept. 30, 1973, Attachment 5 hereto.) This became the Title Insurance Regulatory Act of 1973.

As shown by the legislative history, this bill, like its predecessors, was a response to antitrust concerns:

> "Under current statutory law, rates of tile insurance companies are not regulated. **Recently, several suits have been brought against title insurance companies alleging that they have violated the California antitrust statutes by conspiring among themselves to fix rates charged for title Insurance.**"

(RA 1134, Cal. State Assembly, Fin. & Ins. Comm. Analysis of Senate Bill 1293, August 27, 1973, Attachment 5 hereto.)

The legislative history of the bill shows it "establishes a McBride-Grunsky form of rate regulation for title insurance (the form of rate regulation in effect since 1948 with respect to casualty and fire insurers). . . ." (RA 1136, Assembly Floor Statement by Senator Zenovich re: Senate Bill 1293, Attachment 5 hereto; RA 1137, Senate Floor

Statement, Concurrence in Assembly Amendments to Senate Bill 1293; RA 1134, Cal. State Assembly, Fin. & Ins. Comm. Analysis of Senate Bill 1293, d. 8.29.1973.)

It included the usual McBride-Grunsky immunity language, now codified at Section 12414.26. As with the original McBride Act, the immunity was designed to allow title insurance companies "to share loss experience to determine rates." (Uri, 17 Real Estate L.J. 313, 319 (1989).) Thus, Articles 5.5 and 5.7 of the Title Insurance Act expressly authorize competing title insurers to share such information. Article 5.7 authorizes "advisory organizations," which "supply data related to ratemaking" (*Quelimane v. Stewart Title* (1998) 19 Cal.4th 26, 44-45), including loss and expense data, from one title insurer to its competitors, so long as they are also members. (§ 12340.7.) In addition, Article 5.5 authorizes title insurers and their advisory organizations to extend this data sharing nationally via out of state rating organizations.

4. Proposition 103 fundamentally changed the regulation of property and casualty rates. But title rates and other lines continue under the old McBride-Grunsky system.

In 1988, the voters enacted Proposition 103, which "made numerous fundamental changes in the regulation of automobile and other types of insurance." (*Walker, supra*, 77 Cal.App.4th at 752.) It established a rate setting process supervised by the Commissioner, via special regulations, and provided for consumer participation. (See, e.g., Secs. 1861.05-1861.10.) The Commissioner decides the rate, based on insurer and other input. "Once the Commissioner's decision is final, an

insurer must charge only the approved rate." (*Walker, supra*, at 753; § 1861.01(c).)

None of the Proposition 103 changes apply to title companies. They are exempt (§ 1851(e)), and continue to be regulated by the old McBride-Grunsky system.

5. All California courts that have considered the issue have held that the McBride-Grunsky immunity statutes (at least those not affected by Prop 103) only immunize concerted action.

In 1998, in a Cartwright Act antitrust case, this Court for the first time considered a McBride-Grunsky immunity statute, specifically Section 12414.26. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 35, 39, 43.) The plaintiffs alleged "a conspiracy to *deny* title insurance," not to fix rates. (*Id.* at 48.) As one of the title insurers advised this Court: "This is not a case about rates. . . ." (*Quelimane Co. v. Stewart Title Guaranty Co.*, Appellants' Opening Brief, Dec. 5, 1996, 1996 WL 33425208 (Cal.), *24.)

This Court explained that it was *not* deciding the overall scope of Section 12414.26 immunity: "We decide here ***only*** whether a title insurer's *violation of the Cartwright Act* in conduct *unrelated to rate fixing* may be the predicate for a UCL action, and if this complaint states a cause of action under the UCL for violation of the Cartwright Act. We decline the invitation to go beyond the issues raised in the petition for review." (*Id.* at 33, 51, emph. added.)

This Court explained that Section 12414.26 did not preclude

plaintiff's action because Section 12414.26 is "restricted to rate-making related activities," and that an insurer's "conduct unrelated to rate fixing may be the predicate for a UCL action." (*Quelimane*, 19 Cal.4th at 44, 47, 51.)

Properly understood, this Court's holding was limited to concerted action cases, i.e., to the question of: "whether the Insurance Code [incl. § 12414.26] displaces the UCL and provides the only remedies for plaintiffs who have been harmed *by an alleged conspiracy* among title insurers *to refuse to sell* title insurance..." (*Id.*) In other words, *in a concerted action case,* Section 12414.26 immunity "does not displace the UCL, except as to title insurance company activities related to rate setting." (*Id.* at 33.)

As the USDC correctly noted, this Court in *Quelimane* "did not specifically address the circumstances in which Section 12414.26 may displace claims in the rate setting context." (*Lyons v. First Am. Title* (N.D. Cal. 2009) 2009 WL 5195866, *5.) This Court simply declined to address whether the immunity statute can apply outside the context of an antitrust suit, to actions against individual insurers. This Court certainly did *not* hold that insurers have immunity from *all* lawsuits alleging *any* conduct "related to ratemaking." But this is exactly what the court below understood *Quelimane* to hold. (Opinion, 30-31, 36-37.)

The next California court to consider one of the McBride-Grunsky sister statutes was the Second DCA, in *Walker, supra.* The court noted that plaintiffs, in their opening brief, simply "ignore[d]" the immunity statute, and in their reply, did no more than "string together pages of

statutory quotations with hardly any analysis." (77 Cal.App.4th at 755.) Accordingly, *Walker* had no reason to analyze the legislative history of the safe harbor, nor to address the antitrust limitation, and didn't.

In 2001, this Court considered the scope of Section 11758, applicable to workers compensation, and virtually identical to Section 12414.26. After reviewing the legislative history, this Court held that immunity extends only "to concerted activity otherwise barred by the antitrust laws, *and not to the individual misconduct of an insurer*." (*SCIF, supra*, 24 Cal.4th at 938.)

In 2004, the Second DCA held that Section 1860.1 – identical to the immunity statute this Court construed in *SCIF – also* does not bar an action which "challenges *the unilateral conduct* of a single insurer, does not involve *concerted action*, and has *no antitrust implications*. . . ." (*Donabedian, supra*, 116 Cal.App.4th at 990-991, emph. added.)

The Court explained that the legislative intent behind § 1860.1 was "to permit concerted action among insurers in setting rates," and that it was "adopted to immunize insurers from antitrust laws." (*Id.* at 990.) "The case law does not support the argument that [the immunity statute] applies to an individual carrier's conduct." (*Id.* at 972.)

In 2008, the Second DCA again confirmed that the legislative intent behind Section 1860.1 was "to *authorize cooperation* between insurers in rate making and other related matters." (*Fogel v. Farmers Group* (2008) 160 Cal.App.4th 1403, 1410.)

In 2010, a different division of the Second DCA decided *MacKay v. Superior Court* (2010) 188 Cal.App.4th 1427. The court reviewed the legislative history and confirmed that the immunity statute "was

enacted, in the first instance, to immunize insurers from antitrust laws.... [I]ts *initial* intent... was to exempt insurers from antitrust laws." (*Id.* at 1444, 1447, emph. in original.)

MacKay then held, rather remarkably, that by enacting Proposition 103 in 1988, the voters had *changed the legislative intent* of the statute, *but without changing any of its words*. *MacKay* cited no precedent for such a procedure. Nevertheless, *MacKay* declared that the "purpose for which [Section 1860.1] was initially enacted" is "now superseded" and that, after the passage of Proposition 103, Section 1860.1 is no longer to be interpreted "in accordance with its *initial* intent, which was to exempt insurers from antitrust laws." (*MacKay, supra,* 188 Cal.App.4th at 1446, 1448, emph. in original.)

If *MacKay* was correctly decided, then the passage of Proposition 103 was a hugely important fork in the road for McBride-Grunsky immunity law. Section 1860.1 – its purpose purportedly changed in 1988 by Proposition 103 – went spinning off *in a new direction*: post-1988, it applies to certain suits alleging *individual* insurer misconduct. Section 12414.26 and the two other McBride-Grunsky immunity statutes were exempt from, and therefore unaffected by, Proposition 103. Even under *MacKay*'s reasoning, their purpose remains just as it had been before Prop 103: applicable to antitrust actions only.

In December 2009, the USDC, applying California law, held that: "the exhaustion requirement under section 1860.1 and 1860.2 only applies to activity barred by the antitrust laws." (*Cole v. Hartford Financial Services* (C.D. Cal. 2009) 2009 WL 10675233, * 4, following *Donabedian, supra,* 116 Cal.App.4th at 990-91.)

6. The Commissioner has informed this Court that his view is the same as Petitioners': immunity extends to antitrust actions only.

In *this* case, the Attorney General of California has advised this Court of the Commissioner's view that the court below "erred in holding that plaintiff's Unfair Competition Law (UCL) claims were barred by the safe harbor for anti-trust violations in Insurance Code section 12414.26." (Letter from Xavier Becerra, Attorney General, State of California, to this Court, at p. 1, Attachment 3 hereto.)

The Commissioner has held this position consistently for at least 20 years and so advised this Court on multiple occasions.

In 1999, Commissioner Quackenbush sent a letter to this Court requesting depublication of *VPS Management v. Pacific Rim Assurance*, Case No. B126145. In his letter, the Commissioner explained that Section 11758, like Sections 1860.1 and 12414.26, is intended 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." (See RJN Ex. E, Letter from General Counsel, Department of Insurance, to Supreme Court, d. Nov. 19, 2010, requesting depublication of *MacKay v. Sup. Ct.*, at p. 4.) This Court then depublished the *VPS* decision (previously published at 71 Cal.App.4th 427).

In 2010, Commissioner Poizner petitioned to depublish *MacKay*, *supra*, informing this Court that: "the Department consistently since

enactment of Proposition 103 [in 1998] 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." (RJN Ex. E, Letter from General Counsel, Department of Insurance, to Supreme Court, requesting depublication, at pp. 2-3.)

Courts are unanimous. At least for lines not affected by Prop 103 (like title), McBride-Grunsky statutes only immunize concerted action. Of the four opinions to have considered the concerted action issue (*SCIF*, *MacKay*, *Cole* and *Donabedian*), **none** have ruled contrary. The Commissioner's position is consistent: a filed and approved rate can be challenged as unlawful in court, since the immunity only attaches to concerted action.

D. To achieve its purpose, the Legislature used 60 words, each of which must be given meaning.

The immunity statute is a single 60-word sentence comprising five separate elements:

» No **act** done, **action** taken, or **agreement** made

» **pursuant to the authority conferred by Article 5.5** (commencing with Section 12401) **or Article 5.7** (commencing with Section 12402) **of this chapter**

» shall constitute a violation of or **grounds for** prosecution or **civil proceedings**

» under any other **law** of this state heretofore or hereafter **enacted**

» which does not specifically refer to insurance.

(Ins. Code § 12414.26.)

As the court below reads the section, the Legislature's language of limitation and qualification "becomes meaningless." (*Manufacturers Life v. Sup. Ct.* (1995) 10 Cal.4th 257, 273-74: "a construction which renders a part of a statute meaningless or inoperative" is precluded.)

E. Scope limitation: "act. . . action. . . agreement"

As shown in Section C above, the Legislature intended to afford immunity against antitrust actions only. This intent is evident from the Legislature's limitation of immunized conduct to "acts, actions and agreements" only. This wording is strikingly unusual because it does not immunize omissions. The phrase appears in all four McBride-Grunsky immunity statutes, but in no other California statute. In contrast, the phrase "acts or omissions" appears in more than 600 California statutes. The intent is apparent from antitrust law. Antitrust violations require as an element an affirmative "unlawful act." (See, e.g., *Alfred M. Lewis v. Warehousemen Local 542* (1958) 163 Cal.App.2d 771, 783-784.)

F. Scope limitation: "under. . . any. . . law. . . enacted"

As this Court explained: "Well-established canons of statutory construction preclude a construction which renders a part of a statute meaningless or inoperative," and courts "must give significance to every part of a statute to achieve the legislative purpose." (*Manufacturers Life, supra*, at 273-74.)

By its plain language, Section 12414.26 extends immunity only to "civil proceedings under any other **law** of this state heretofore or hereafter **enacted** which does not specifically refer to insurance." (Emph. added.)

"**Enacted** law" is "law that has its source in legislation; written

law." (Black's Law Dictionary (9th ed. 2009) p. 963.) "Written law," in turn, is: "Statutory law, together with constitutions and treaties, as opposed to judge-made law." (*Id.*) **Common** law, in contrast, is "the body of law derived from judicial decisions, rather than from statutes or constitutions; case law." (*Id.* at 313.) Courts recognize this distinction between "enacted law" and "common law." (*Maryland Casualty v. Fidelity & Casualty Co.* (1925) 71 Cal.App. 492, 497.)

To bar the common law breach of fiduciary cause of action, the court below applied a snippet of the statute, out of context, i.e.: "immunity bars 'civil proceedings.'" (Opinion, 49.) The court omitted the words immediately following, which expressly limit immunity to only those proceedings brought under a "law. . . enacted."

The court's construction not only ignores the Legislature's plain language, but also its intent to provide a specific and limited immunity from California antitrust statutes.

G. Scope limitation: "Pursuant to the authority conferred by" language.

1. Article 5.5 plainly states the authority it confers on title companies. That authority does not include charging unfiled rates.

Seventeen years ago, this Court carefully reviewed the statutory language. It decided that the Legislature's inclusion of the phrase "authority conferred by" was of notable importance. The authority conferred by Article 5.5 is readily discerned from the statutes:

- Section 12401 states the purpose of Article 5.5 and prohibits the Commissioner from setting a rate. It does not confer any authority on title companies.

- Section 12401.1 mandates the filing of a schedule of rates and mandates that the rate filing set forth an effective date, thereby conferring on title companies the authority to do those things.

- Section 12401.2 mandates establishment of classifications to determine rates, and thereby confers authority on title companies to do that.

- Section 12401.3 prohibits rates from being excessive, inadequate, or unfairly discriminatory, and by implication confers authority on title companies to set rates within those guideposts.

- Section 12401.4 confers authority on title companies to exchange information and experience data;

- Section 12401.5 confers authority on the Commissioner to make regulations to require reporting of financial data and to make statistical plans, and confers no authority on title companies.

- Section 12401.6 confers authority on related title companies to engage in concert of action on the setting of rates.

- Section12401.7 confers authority on title companies to use rates, after the passage of the effective date of the rate filing, and after public display of the rate filing for 30 days.

- Section 12401.71 confers authority on title companies to use a reduced rate less than 30 days after filing the rate and after public display.

- Section 12401.8 confers authority on title companies to charge in excess of a rate filing if unusual services are requested or unusual risks are assumed, conditioned on written approval by the rate payor and certain other conditions.

- Section 12401.9 sets forth formatting requirements for rate filings and requires copies to be made available to the public if requested, and by implication confers on title companies the authority to comply with this requests.

And, according to Fidelity: "Article 5.5 *prohibits* the use of unfiled rates." (RB 4.)

Here, Fidelity charged rates that "have neither been approved nor accepted by the Insurance Commissioner." (Opinion, p. 25.) In so doing, Fidelity "violated sections 12401.1, 12401.2, and 12401.7, which are in Article 5.5." (Opinion, 48.)

2. All courts and commentators agree that immunity does not extend to unfiled or unapproved rates, except the court below.

In *MacKay, supra*, plaintiffs alleged in a UCL action that the insurer had charged according to its *filed and approved* rating plan, but complained that it included an "illegal" rating factor. (188 Cal.App.4th at 1431-32, 1434, 1440-41.) Whether the Commissioner had approved the rate was disputed. Determining that he *had* approved the rate was the threshold predicate to application of the immunity statute, and so the court resolved this first, finding as a matter of undisputed fact that the Commissioner *had* approved the rate. (*Id.* at 1434-1440.)

In construing the immunity statute, the court was careful to explain that it "does *not* exempt *all* ratemaking acts." Rather, it only "exempts acts done 'pursuant to the *authority conferred* by this chapter.'" (*Id.* at 1443.) Immunity "does not extend to insurer conduct *not* taken pursuant to that authority." (*Id.* at 1450.)

The court held that unlike an insurer charging an unfiled or unapproved rate (as here), "[a]n insurer charging a *preapproved* rate is doing an act or taking an action pursuant to the authority conferred by this chapter." (*Id.* at 1443.) The immunity "exempts <u>such</u> acts." (*Id.*, emph. added.) But where "the underlying conduct challenged was *not* the charging of an approved rate," the immunity statute "would <u>not</u> be applicable." (*Id.* at 1449-1450.)

The court described its application of immunity as "limited" and was careful to note the statute is "very narrow." (*Id.* at 1443, 1449-50.)

The outcome in *Walker, supra*, was also entirely predicated on

the fact that the rates there were *approved* by the Commissioner. In *Walker*, the plaintiffs were literally suing to have the filed and approved rates held noncompliant with the elaborate Prop 103 ratemaking regulations. The plaintiffs even sued the Commissioner, as well as 70 insurers. *Walker* simply barred "claims based upon an insurer's charging rates that have been *approved* by the Commissioner. . . ." (77 Cal.App.4th at 756.) Where the Commissioner has not "approved" the rate charged, there can be no immunity under *Walker*. As the *Walker* court explained:

> "The statute refers to an 'action taken...pursuant to the authority conferred by this chapter...' Whatever else the *amended* McBride Act [i.e., Proposition 103] does, it definitely confers authority upon the Commissioner to approve rates. Moreover, an insurer's action of collecting premiums *consistent* with an *approved* rate is certainly done pursuant to the authority conferred on the Commissioner by the amended McBride Act [i.e., Proposition 103]."

(*Id.* at 756-57.)

Subsequent courts, including this Court, have repeatedly emphasized that *Walker* involved a direct challenge to filed and approved rates: "*Walker* involved a challenge to approved rates." (*Donabedian*, 116 Cal.App.4th at 991-992.) "The causes of action [in *Walker*] were each bottomed on the insurer charging *approved* rates alleged nevertheless to be 'excessive'. . . . [Plaintiffs] were attempting to challenge. . . the *method* by which the rates were *set*, arguing that the 'rates were *approved* without compliance with generic factors

regulations, rendering them 'illegal and void.'"(*SCIF, supra*, 24 Cal.4th at 942, emph. added.)

Several district courts have addressed this issue in recent years. In 2010, a U.S. District Court analysed the scope of McBride-Grunsky immunity in light of *Walker, Fogel, Krumme* and *MacKay.* (*Wahl v. American Security Ins. Co.* (N.D. Cal. 2010) 2010 WL 4509814, at *2-3, emph. added.) The court concluded that:

> "Effectively, challenges to the *reasonableness* of an *approved* rate fall within the exclusive ambit of the chapter and are exempt. . . . Otherwise, those engaged in the business of insurance must comport with California laws, including the UCL."

(*Id.* at *3, emph. added.)

> "*MacKay, Walker* and the various other cases [incl. *Krumme*] on which [the insurer] relies for its McBride Act 'defense,' as it were, were limited to situations where a plaintiff challenged a charged rate *as excessive per se.* . . ."

(*Id.*, emph. added.)

In 2012, another USDC construed Section 1860.1 and concluded: "challenges to the *reasonableness* of an *approved* rate fall within the exclusive ambit of the chapter and are exempt. . . . On the other hand, Insurance Code section 1860.1 protects from prosecution under laws outside the Insurance Code only acts done, actions taken and agreements made '***pursuant to the authority*** conferred by the ratemaking chapter. It does not extend to insurer conduct *not* taken pursuant to that authority." (*Ellsworth v. U.S. Bank* (N.D. Cal. 2012) 908 F.Supp.2d 1063, 182, emph. added.)

In 2015, a USDC again reviewed California immunity jurisprudence in a case involving filed and approved rates. (*King v. National Gen. Ins.* (2015) 129 F.Supp.3d 925, 934.) After reviewing *Walker*, *Donabedian*, *MacKay*, *Wahl* and *Ellsworth*, the USDC distilled the scope of immunity to be: "Where a plaintiff's claims challenge the *reasonableness* of an *approved* rate, courts have found those claims to be precluded by Section 1860.1." (*Id.* at 935.) As the USDC stated:

> "Defendants contend that each of Plaintiffs' claims 'are inextricably intertwined with Defendants' approved rate filings, seeking an adjudication challenging the DOI Commissioner's decisions, and requiring extensive interpretation and enforcement of the DOI's rulings and approvals.'. . . Here, Plaintiffs do not advance a theory based on the premise that the rates *approved* by the DOI were *incorrect*. . . . Plaintiffs do not challenge the *reasonableness* of any particular insurance rate, nor do they attack acts done pursuant to the DOI's rate-making authority. . . . Thus, neither Section 1860.1 nor the filed rate doctrine precludes Plaintiffs from litigating their claims in court."

(*Id.* at 935, emph. added.)

In sum, these federal cases have concluded that the "pursuant to the authority of" element means that only a challenge to the *reasonableness* of a *filed* and *approved* rate is immunized.

Indeed, it is by now settled *textbook* law that –

- "The use of rates or rating factors that have *not been approved* by the Commissioner or *which otherwise violate* the Insurance

Code *can* be subject to challenge via the UCL." (Riehle, et al, Cal. Antitrust & Unfair Comp. Law (Matthew Bender 2016) §7.09.)

And that –

- "Insurers *remain* subject to Unfair Competition Law challenges to ratemaking practices that do *not* involve an *approved* rate." (32 No. 19 Insurance Litigation Reporter 612 (2010).)

3. Section 12414.27 informs the construction of 12414.26.

Article 6.9, Section 12414.27 provides:

" no. . . underwritten title company. . . shall charge for any. . . service in connection with the business of title insurance, except in accordance with rate filings which have become effective pursuant to Article 5.5. . . ."

This is an affirmative prohibition against charging any rates other than those on file. The court below construed Article 5.5 as (somehow) conferring authority on title companies to charge rates not on file. (Opinion, 38, 48.) So the court's construction creates a direct conflict between Article 5.5 and Article 6.9. It should therefore be rejected pursuant to the principles of construction applicable to the Insurance Code mandating that all statutes in an insurance code "are construed together to produce a harmonious statutory scheme." (3A Sutherland, *supra*, § 72:4.)

H. Part One: Concluding Analysis – The class claims are not barred by Section 12414.26.

1. Section 12414.26 must be construed so as to *effectuate* the *purpose* as the Legislature intended.

The "fundamental rule" of statutory construction is to "ascertain the intent of the Legislature *so as to effectuate the purpose of the law.*" (*Donabedian, supra,* at 977, emph. added.) To accomplish this, the Court must review the statute's words, determine whether the literal meaning "comports with" the statute's "purpose," and then "select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute." (*Id.*)

2. Section 12414.26 must be construed consistently and harmoniously with its sister statutes.

The preceding rules apply to the interpretation of any statute. But because of the special nature of Section 12414.26, *additional* rules apply. First, because the section is *essentially identical* to three other McBride-Grunsky statutes, it must be construed pursuant to the rule that similar statues are construed *in light of one another. (Krumme,* at 943 fn. 6.) As noted above, "Identical words used in... a similar statute usually have the same meaning." (3B Sutherland, *supra,* at § 72:4.)

This is particularly important since these are not just any statutes, but are all part of a unitary insurance code, and as also noted above, *must* be harmonized within the unitary scheme. (3A Sutherland,

supra, at §72:4.)

Therefore, in construing and applying Section 12414.26, this Court must strive to be as consistent as possible with how other courts, and this Court, have construed its sister statutes in the past.

And separately and additionally, because it is an immunity / "safe harbor" statute, Section 12414.26 must be construed as strictly and narrowly as possible. (*New Hampshire Ins. Co., supra,* 144 Cal.App.3d at 305; accord, *Baldwin, supra,* 6 Cal.3d at 435-437; *Valley Title Co.., supra,* 57 Cal.App.4th at 1503.)

3. Section 12414.26 is a single, 60 word sentence. It is best analyzed by separating it into its elements, each of which adds limitations on immunity.

Again, the 60 words of the statute are:

» No act done, action taken, or agreement made

» pursuant to the authority conferred by Article 5.5 (commencing with Section 12401) or Article 5.7 (commencing with Section 12402) of this chapter

» shall constitute a violation of or grounds for prosecution or civil proceedings

» under any other law of this state heretofore or hereafter enacted

» which does not specifically refer to insurance.

» "act[s] done, action[s] taken, or agreement[s] made":

Via this phrase, the Legislature limited immunity to proceedings grounded in a title company's acts, actions and agreements. The Legislature did not extend immunity to a title company's wrongful *omissions*, such as failures to disclose or other breaches of duty by inaction. Importantly, this unusual language appears in all four McBride-Grunsky safe harbor statutes but in no other California statute. In contrast, more than 600 statutes use the words, "*act or omission*."

» "law of this state. . . enacted

The Legislature included another unique, and somewhat obscure, limitation: immunity extends only to proceedings brought under *enacted* laws of this state which do not specifically refer to insurance. "Enacted law" means statutes and constitutions. (Black's Law Dictionary (9th ed. 2009), p. 963; *Maryland Casualty, supra*, 71 Cal.App. At 497.) Thus, the Legislature expressly excluded common law proceedings from immunity. Why? And what *are* the California statutes that do not "specifically refer to insurance" that the Legislature specifically wanted to address? Again, the Legislature incorporated this awkward construction into each of the four McBride-Grunsky immunity statutes but into none of its thousands of other enactments. What was the intent?

From the legislative history and historical context discussed in Section C, *supra*, we know the answer: the purpose of Section 12414.26 is to immunize against state statutory antitrust claims, particularly under the Cartwright Act. This explains the unusual reference to

"agreements," the limitation for statutory actions not specifically referencing insurance, and the limitation to affirmative misconduct. As noted previously, an unlawful act or agreement is a prerequisite for antitrust violations. (See, e.g., *Alfred M. Lewis, supra*, 163 Cal.App.2d at 783-84.) One cannot act in concert by omission.

» "pursuant to the authority conferred by" Articles 5.5 and 5.7

Finally, as noted in this Court's grant of review, the Legislature incorporated yet another limitation: only conduct and agreements done "pursuant to the authority conferred by" Articles 5.5 or 5.7 are potentially immunized. As discussed in Section G above, pursuant to the authority conferred by Article 5.5, title companies must file their schedules of rates, and all modifications, with the Commissioner. (§12401.1.) They must put the effective date on each filing, and the effective date has to be at *least* 30 days after it is filed. (§ 12401.1.) Also pursuant to the authority of Article 5.5, title companies can charge in excess of their rate filings for *unusual* services or risks, but only with the payor's written approval. By negative implication, Article 5.5 does not confer authority to charge in excess of rate filings for services that are *not* unusual. (§ 12401.8.) And title companies can, pursuant to the authority conferred by Article 5.5, exchange information and experience data. (§ 12401.4.)

Article 5.7 grants operational authority to "advisory organizations," which as this Court has explained, act as a conduit for sharing data related to ratemaking. (*Quelimane* at 44-45; § 12340.8.)

Articles 5.5 or 5.7 confer no authority to title companies

pursuant to which they can charge rates that have not been filed. In fact, Article 5.5 expressly prohibits title companies from using a rate before its effective date (§ 12401.7), which can be no less than 30 days *after* the rate is filed. (§ 12401.1.)

If Article 5.5 were construed as conferring authority pursuant to which a title company could charge unfiled rates, this would put Article 5.5 into direct conflict with Article 6.9, which provides at Section 12414.27: "no. . . underwritten title company. . . shall charge. . . . *except in accordance with rate filings* which have become effective pursuant to Article 5.5." As noted, this disharmonious construction would violate the principle that all statutes in an insurance code "are intended to be part of a uniform system of regulation" and "are construed together to produce a *harmonious* statutory scheme." (3A Sutherland, supra, at §72:4.)

4. Application: Section 12414.26 does not immunize Fidelity from either the UCL or common law causes of action arising out of its charging of unfiled rates.

This Court asks: Does Section 12414.26 provide immunity to an underwritten title company for charging consumers for services for which there have been no rate filings with the Insurance Commissioner? The answer is no, for several reasons. First, "an" underwritten title company, as referenced by the Court, means a single company, like Fidelity here, not acting in concert with others. For this reason alone, the statute does not provide immunity.

If the consumer's action is brought under *common law*, like the

breach of fiduciary duty cause of action considered and rejected by the court below (Opinion, 2), then for this additional reason, the statute provides no immunity. The Legislature did not immunize any common law actions; one of the qualifications for immunity is that the action is brought under a "law of this state. . . enacted." "Enacted law" is statutory law.

And by charging unfiled rates, Fidelity did not act "pursuant to the authority conferred by Article 5.5." As discussed earlier, nothing in Article 5.5 confers authority on title companies to charge unfiled rates.

5. In sum, the Legislature's intent was to immunize the title industry from state statutory antitrust actions arising out of conduct authorized by Articles 5.5 or 5.7.

This is the only possible construction of Section 12414.27 that:

- effectuates the true purpose of the statute as the Legislature intended it, as revealed by the statutory language, the legislative history and historical context;

- construes "*similar statutes...in light of one another*" and avoids giving identically worded statutes opposing meanings;

- maintains a harmonious statutory scheme within the Code;

- conforms to the rule that immunity / "safe harbors" are strictly construed;

- furthers the important public policy that victims of unlawful conduct should be made whole (Civil Code sec. 3523);

- furthers the important public policy "in favor of trial on the merits" (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 235);

- comports with the longstanding position of the Insurance Commissioner; and

- harmonizes with the decisions of this Court, the Court of Appeal and the US District Courts.

We respectfully submit that it is the construction this Court should announce.

ISSUE TWO: The Commissioner does not have exclusive original jurisdiction over the subject claims.

A. Pursuant to the principles this Court announced in *Farmers* and *Jonathan Neil & Assocs.*, the Commissioner's jurisdiction over this case is, at most, primary, not exclusive.

The court below concluded that the Legislature had "expressly" conferred "exclusive original jurisdiction" to the Commissioner over the monetary claims of consumers who paid unlawful title charges. (Opinion, 42.) In so doing, the court considered none of the relevant precedents, including this Court's own opinions explaining the Commissioner's jurisdiction over rate related claims. In those decisions, this Court explains exactly why the Commissioner's jurisdiction over the claims at issue is at most primary, i.e., concurrent, and is certainly *not* exclusive.

In 1992, this Court issued its landmark decision in *Farmers*, *supra*. There, this Court crystalized the distinction between the administrative exhaustion doctrine, which applies "where an agency *alone* has *exclusive* jurisdiction over a case," from "primary" jurisdiction, "where *both* a court and an agency have the legal capacity to deal with the matter." (*Id.* at 390-391, emph. added.) Primary jurisdiction is discretionary, and "answers the question, *when* a court may act, not the question *whether* it may act." (*Id.* at 390-391 & fn. 7.)

This Court explained that exclusive administrative jurisdiction/exhaustion only applies "where a claim is *cognizable* in the first instance by an administrative agency **alone**. . . . 'Primary jurisdiction,' on the other hand, applies where a claim is originally

cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. . . ." (*Farmers*, *supra*, 2 Cal.4th at 390.)

In *Farmers*, this Court considered a UCL cause of action brought by the Attorney General. The predicate unlawful acts were the insurer's alleged violations of both the automobile insurance rate-making statute (Section 1861.02), and the statute governing the Commissioner's rate approval process (Section 1861.05). Among other violations, the UCL action challenged the insurer's unlawful use of certain criteria "for the *setting* of automobile insurance rates and premiums." (*Id.* at 382, emph. added.)

This Court noted that addressing the UCL claim would require inquiry "into the insurer's rate making process in order to determine what the rate would be for a good driver without the discount. Thereafter one must discern whether the rate offered . . . is 20 percent below what the insured would otherwise have been charged." (*Id.* at 399.) The Court recognized that these questions require "expertise presumably possessed by the Insurance Commissioner." (*Id.* at 398.)

This Court also reviewed the property & casualty insurance administrative complaint and review procedures found at Sections 1858, et seq. (*Id.* at 384-85.) Portions of those complaint procedures, i.e., those dating to the original McBride-Grunsky enactment, are basically the same as the title rate complaint procedures at Section 12414.13 et seq. However, the administrative procedures reviewed in *Farmers* were in other aspects far more robust, having been

strengthened by pro-consumer amendments enacted via Proposition 103 and by the Legislature. (*Id.* at 384.)

Nonetheless, this Court held that these comparatively robust complaint procedures did *not* confer exclusive jurisdiction on the Commissioner. Neither did the fact that analysis of the plaintiff's claim would "require a searching inquiry in the factual complexities of automobile insurance ratemaking and the conditions of that market during the turbulent time here involved." (*Id.* at 399.)

Rather, this Court held: "[t]he Business and Professions Code claim in count 2 is 'originally cognizable in the courts,' and thus it triggers application of the *primary* jurisdiction doctrine." (*Id.* at 391.) Therefore, the Commissioner's jurisdiction was concurrent, not exclusive.

Twelve years later, in *Jonathan Neil & Assocs.*, this Court reaffirmed that the key factor in the jurisdictional analysis is whether the claims are "originally cognizable in court." (*Jonathan Neil & Assocs. v. Jones* (2004) 33 Cal.4th 917, 933.) The case involved a civil suit for fraud and breach of contract. "At the heart" of the action was "a dispute about interpretation of [a rate manual rule] regarding the method of computing insurance premiums. . . ." (*Id.* at 934.)

In the instant case, Fidelity's rate manual to be interpreted was filed with the Commissioner. (Opinion, 7-8, 36-37.) In *Jonathan Neil*, the rate manual to be interpreted was not only *filed* with the Commissioner, it was *promulgated* by the Commissioner. (*Id.* at 925-926.) Nevertheless, this Court again held that the doctrine of primary jurisdiction applied even here – *not* the doctrine of administrative

exhaustion (i.e., exclusive jurisdiction). (*Id.* at 933.) This Court recognized that claims for fraud and breach of contract are originally cognizable in court, and that the Commissioner "has no authority to decide these common law claims, but can only make a determination regarding some of the issues in the case." (*Id.*)

The same year, the Second DCA decided *Donabedian, supra*. This was a UCL action alleging premium overcharges, predicated on the insurer's violation of the same rate regulatory statutes as in *Farmers*. The court of appeal applied the principles established by this Court. It held that the claim arising from violation of the rate regulation statutes "was originally cognizable in the courts under the UCL" and that "the Commissioner therefore did not have exclusive jurisdiction over the matter." (*Donabedian*, supra, 116 Cal.App.4th at 986.)

Here, too, the UCL and breach of fiduciary duty causes of action are predicated on the defendant's charges in violation of a rate regulatory statute, albeit a very simplistic one. Section 12414.27 simply mandate that all charges by a title company must be in accordance with rate filings. Here, too, the UCL and common law causes of action are originally cognizable in the courts. Therefore – here, too – the Commissioner does not have exclusive jurisdiction.

B. The Legislature's words are clear. They nowhere grant the Commissioner exclusive jurisdiction over these claims.

The opinion below asserts that the statutes setting forth the administrative complaint procedure "*expressly* provide that Plaintiffs' claims fall within the exclusive original jurisdiction of the Insurance Commissioner." (Opinion, 42, emph added.) Despite engaging in a pages-long statutory summary, unencumbered by any citation to decisional authority, the court below failed to identify any statute providing that consumer complaints for reimbursement of unlawful title charges can *only* be decided by the Commissioner. But that is what a legislative grant of exclusive jurisdiction looks like.

And not only is a grant of exclusive jurisdiction conspicuously absent from the statutory language, the language clearly shows that the Legislature's intent was to do the opposite.

As a leading text explains, "primary jurisdiction issues usually arise when one party sues another but a nonparty agency has regulatory authority over the matter; the court and agency share *concurrent jurisdiction* but, depending on various factors, the court may exercise discretion to transfer the case to the nonparty agency. By contrast, when a statute provides that some or all of the issues in such a case can be adjudicated *only* in the nonparty agency, the *agency jurisdiction is exclusive* and the *court lacks subject matter jurisdiction* to entertain the matter." (Asimow, et el., California Practice Guide: Administrative Law (The Rutter Group: 2018) ¶ 15:770.)

The workers compensation scheme "is a classic example of exclusive agency jurisdiction. . . ." (*Id.* at ¶ 15:771.) There, the

Legislature, in a statute, expressly stated that the administrative scheme is the injured employee's "sole and *exclusive* remedy." (Labor Code §§ 3601, 3602.)

The Talent Agencies Act provides another example of an actual Legislative grant of exclusive original jurisdiction to an administrative agency, at Labor Code sec. 1700.44:

> "In cases of controversy arising under this chapter, the parties involved **shall** refer the matters in dispute to the Labor Commissioner, who **shall** hear and determine the same. . . ."

(Emph. added.) This Court held that this language means that referral of disputes to the Commissioner is "mandatory," that disputes "must be heard by the Commissioner," and that therefore the statute "by its terms, give the Commissioner exclusive original jurisdiction over controversies arising under the Talent Agencies Act. . . ." (*Styne v. Stevens* (2001) 26 Cal.4th 42, 54-56.)

The language in these grants of exclusive administrative jurisdiction is clear and mandatory.

In sharp contrast, no such language exists anywhere in the Title Insurance Act. In fact, the Legislature used express language in Section 12414.13 that makes it perfectly clear that the administrative procedure was a permissive, non-mandatory option:

> "Any person aggrieved by any rate charged, rating plan or rating system followed or adopted by a title insurer . . . ***may*** request such person or entity to review the manner in which the rate,

plan, system, or rule has been applied. . . Any person aggrieved by [the response to the] the relief requested, ***may*** file a written complaint and request for hearing with the commissioner. . ." (Emph. added.)

By repeatedly using the word "may," the Legislature unambiguously expressed its intent to create a permissive procedure: "As used in this code, the word '**shall**' is mandatory and the word '**may**' is permissive, unless otherwise apparent from the context." (Ins. Code sec. 16, emph. added.)

This Court, in another administrative law context, considered whether "seemingly permissive" options in administrative proceedings had to be exhausted. (*Sierra Club v. San Joaquin Local Agency* (1999) 21 Cal.4th 489, 503.) In holding that exhaustion was not required, this Court observed that, "even to attorneys, the word 'may' ordinarily means just that. It does not mean 'must' or 'shall.'" (*Id.* at 499.)

The court below believed that the mere *existence* of the statutory complaint and review scheme at sections 12414.13 to 12414.21 conferred the Commissioner with exclusive original jurisdiction. (Opinion, 39-42.) But this Court has previously considered and roundly rejected that exact thesis.

In 2005, this Court had occasion to review and annotate its jurisdictional analysis in *Farmers*. (*State of Calif. v. Altus Finance* (2005) 36 Cal.4th 1284, 1306-1307.) In so doing, this Court amplified its holding in *Farmers* that the existence of even a comprehensive rate regulatory scheme does not by itself confer the Commissioner with exclusive jurisdiction over rate related complaints. (*Id.*) This Court

explained:

> "[In *Farmers*], we concluded that a statutory scheme that permitted those improperly denied a good drivers discount to pursue an administrative remedy with the Commissioner (see Ins. Code, §§ 1858, 1861.02 & 1861.05) did *not* preclude the Attorney General's UCL action, although we held the Commissioner had *primary* jurisdiction over the complaint. . . . [T]here was *nothing in the regulatory scheme to suggest an exception to the rule that UCL remedies are cumulative* to remedies and penalties available under all other laws of this state."

(*Id.*, emph. added.)

Importantly, the automobile rate regulatory scheme considered in *Farmers* had been tightened and strengthened by Proposition 103 in 1988, making it far more comprehensive and rigorous than the old McBride-Grunsky scheme which continues to regulate title rates.

In sum, had the Legislature *intended* a grant of exclusive original jurisdiction over all rate related complaints, it would have said so. It knows how. (See Labor Code §§ 3601, 3602 – "sole and exclusive remedy;" Labor Code § 1700.44 – parties "shall" refer disputes to the Commissioner, who "shall" hear and determine them.)

Instead, the Legislature did the opposite, choosing language it *knows* is permissive, having so defined it in the Code. (Ins Code §16 – "may" is permissive.) In sum, the Legislature's plain words show – clearly – that it did *not* intend to confer on the Commissioner exclusive jurisdiction over claims such as those here.

C. The Commissioner does not have exclusive jurisdiction where, as here, he cannot provide an adequate remedy.

1. As a matter of law, an agency cannot have exclusive jurisdiction over a claim for which it cannot provide an adequate administrative remedy.

The court below correctly recognized that "the Insurance Commissioner... could not seek restitution" (Opinion, 49), i.e., that the Commissioner has no power to obtain a refund or other monetary remedy for persons charged an unlawful rate.

The court erred, however, in concluding that the inadequacy of the remedy: "**is not relevant to the jurisdictional analysis.**" (*Id.*)

In fact, the opposite is true. This Court and the courts below have long held that the availability of an adequate administrative remedy is not only *relevant* to a finding of exclusive administrative jurisdiction, but is a *prerequisite*.

This Court has long held that: "The rule that a party must exhaust his administrative remedies prior to seeking relief in the courts has no application in a situation where an administrative remedy is unavailable or inadequate." (*Ramos v. County of Madera* (1971) 4 Cal.3d 685, 691.)

Not long after, in the *Shernoff* Cartwright Act antitrust class action against California's title industry, the title insurers, like Fidelity here, argued "that the Commissioner possesses exclusive jurisdiction in the first instance over the subject matter" of the lawsuit. (*Shernoff, supra*, 44 Cal.App.3d at 409.) The Second DCA held that there was no exhaustion requirement because the Commissioner cannot provide a monetary remedy: "The Commissioner's disciplinary authority is limited

to restraint of future conduct by [the title insurer], and he possesses no authority to enter money judgments for past injuries. This latter authority remains in the courts. . . ." (*Ibid.*)

The Fourth DCA concurred: "[T]he doctrine of exhaustion of administrative remedies is wholly inapplicable" where "no effective administrative remedy is available." (*Lachman v. Cabrillo Pacific University* (1981) 123 Cal.App.3d 941, 946.)

In the class action setting, the unavailability of monetary compensation, as in *Shernoff*, is certainly a fatal defect in the remedy, but so is – separately – the unavailability of a statutory procedure for classwide, rather than individual, relief.

Again, this Court has long held that in a class action, if the administrative statutory scheme makes no provision for class relief, there can be no failure to exhaust administrative remedies. In *Ramos*, this Court described the identical problem that confronts the class here:

> "In no section of this chapter [of the administrative statutory scheme] is there provision for class relief. It is the *individual* who must apply for a hearing regarding *his* application for or receipt for aid. . . . It is clear that the hearing scheme established by the legislature does not contemplate class actions. There was therefore no failure to exhaust an administrative *remedy* for class relief, for no such administrative remedy exhibited."

(*Ramos*, *supra*, 4 Cal.3d at 690-691, emph. by this Court.)

The First District later followed this Court's *Ramos* decision, holding that:

> "Plaintiffs in a class action need not exhaust their administrative

> remedies prior to instituting judicial proceedings where the administrative remedies available to the plaintiffs do not provide for class relief. (*Ramos v. County of Madera*, 4 Cal.3d at 690-691.) Here, as in *Ramos*, the statutory provision of an administrative appeal is premised upon an individual claim and makes no mention of class relief. . . ."

(*Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 934.)

More recently, the Second DCA held identically, explaining that in a class action, "the relevant inquiry is whether the available administrative remedies provide classwide relief." (*Tarkington v. CUIAB* (2009) 172 Cal.App.4th 1494, 1510.) "If the remedies do not provide classwide relief, then no plaintiff need exhaust them before suing." (*Id.* at 1510.)

In the next section, we show that the administrative scheme here affords neither classwide relief nor a monetary remedy, nor even a meaningful procedure to have a complaint heard.

2. The Commissioner is not authorized to provide either class wide relief or monetary compensation.

The administrative grievance procedure is found at Sections 12414.13, et seq. As in *Ramos* and *City of Hayward*, the grievance scheme here plainly contemplates individualized treatment of complaints. The complainant is described as "a person" throughout.

"The reference to *a person* clearly contemplates individualized treatment of claims ... rather than class actions." (*Rose, supra*, 126 Cal.App.3d at 934, emph. added.) Since the administrative remedy does not provide for classwide relief, there is no exhaustion requirement and original jurisdiction lies with the courts, as held in the authority cited in the previous section.

Just as classwide relief is unavailable, so too restitution.

In 1995, this Court confirmed the *Shernoff* court's determination that the Commissioner has no authority to award money for past injuries. This Court noted that the Commissioner's "power is limited to enjoining future unlawful conduct and suspending or revoking a license or certificate." (*Manufacturers Life v. Sup. Ct.* (1995) 10 Cal.4th 257, 274.)

The Second DCA followed this Court in a UCL action four years later. (*Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 605.)

Two years later, when this Court held that statutory immunity extends only "to concerted activity otherwise barred by the antitrust laws, *and not to the individual misconduct of an insurer,*" this Court expressly noted the absence of "any authority allowing the Insurance Commissioner to order a carrier to refund all improperly collected

premiums to the insured." (*SCIF*, *supra*, at 938, emph. added.) In *SCIF*, this Court considered the same immunity issue as here, under one of the four McBride-Grunsky sister statutes.

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

These decisions simply acknowledge what the Insurance Code makes plain: the Legislature never delegated to the Commissioner any authority to award injured consumers monetary relief, such as refunds or restitution, on either a classwide *or* individual basis. The only remedies the Code does authorize for those aggrieved by a title company rate are:

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

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

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

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

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

§ 12928.6 – the Commissioner can sue to enjoin violations.

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

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

And the Insurance Commissioner has expressly confirmed all this to the courts. For example, in another ongoing title company class action proceeding, *Wilmot-Munro v. First American Title Ins. Co.*, the Commissioner notified the Los Angeles Superior Court, via letter to the parties from his Senior Staff Counsel:

> **"No procedure is available at CDI [California Department of Insurance] for obtaining restitution or other relief sought by plaintiffs in the Court Case. Please promptly transmit this letter to the Court."**

(Letter, d. 10.22.2010, from Dept. of Ins. to parties and Superior Court, cc'd to CDI General Counsel, *Wilmot-Munro v. First America Title Ins. Co.*, Case No. BC370141, at p. 2, Attachment 1 hereto.)

Tellingly, Fidelity can point to no statutory authority whatsoever authorizing the Commissioner to award refunds and restitution,

because there *is* none.

The reality is that if this Court affirms the court below, California consumers charged unlawful rates will be sentenced to a forum that – *as a matter of law* – is powerless to make them whole. This is certainly not what the Legislature intended.

3. The administrative complaint procedure is wholly inadequate. Consumers have no *right* to an administrative hearing. "Judicial review" under Section 12414.19 affords *no* remedy.

The administrative procedure touted by the court below (Opinion, 38-42) does not actually give complainants any right to have their complaints *heard*. (§§ 12414.13 -.16.) The Commissioner, at his option, can dismiss a complaint without investigation or a hearing simply because he "believes" it has no probable cause, or if he "believes" it was not made in "good faith." (§ 12414.13.) There are no standards for forming these "beliefs," and no supporting findings are required.

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

He can even dismiss a complaint if he "has information concerning a similar complaint." (*Id.*) In this case, 500,000 people have similar complaints. Should one person complain, the Commissioner is authorized to refuse to hear the remaining 499,999 complaints.

And even if a consumer gets past these hurdles, Section 12414.15 gives the Commissioner additional unfettered discretion to refuse to hear the complaint. It provides only that the Commissioner "*may* hold a public hearing," and "may" is permissive, not mandatory. (Ins. Code § 16.)

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

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

Ordinary mandamus can only "compel the performance of a clear, present, and ministerial duty where the petitioner has a beneficial right to performance of that duty." (*Id.* at 596.) Since the Commissioner has no authority to award monetary relief, let alone a "clear, present and ministerial duty" to do so, ordinary mandamus will never provide a remedy.

D. The Commissioner's position is that his jurisdiction is primary, not exclusive. He should be afforded deference.

1. The Commissioner's position is that he has primary (shared) jurisdiction, not exclusive jurisdiction.

Throughout the insurance industry's campaign to immunize itself from consumer court actions, the Commissioner has always maintained that the Commissioner *shares* jurisdiction with the court, i.e., that the Commissioner has primary, not exclusive, jurisdiction over cases where insurers charge unlawful rates.

In *this* case, the Attorney General has written to inform the Court of the Commissioner's position that "the ability of consumers to pursue private actions against insurance companies, in the Insurance Commissioner's view, are complementary to administrative enforcement, serve the public interest, and should not be barred," and that the court below "erred in holding that the Department's jurisdiction over ratemaking bars plaintiff's UCL claims relating to unfiled and unapproved insurance rates." (Letter from Xavier Becerra, Attorney General, State of California, to this Court, d. Nov. 19, 2018, at p. 1, Attachment 3 hereto.)

The Attorney General further wrote on behalf of the Commissioner that:

> "the court of appeal erred in barring plaintiff's UCL claims based on concepts of primary and/or exclusive jurisdiction. The regulation and administrative enforcement of title insurance is governed by California insurance law that does not preclude private UCL claims for unfiled and unapproved rates such as

those at issue here. UCL actions in the circumstances of this case serve an important purpose that complement, and do not conflict with, the Department's regulatory and enforcement duties and responsibilities set out in the Insurance Code."

(Letter from Xavier Becerra, Attorney General, State of California, d. Nov. 19, 2018, at p. 3, Attachment 3 hereto.)

The Commissioner's position has been consistent for more than 20 years.

In 2003, in *Donabedian, supra,* the Commissioner submitted an amicus brief in which he made his position clear:

"[F]or those cases involving an alleged violation of the Insurance Code, the Commissioner may be asked to exercise his primary jurisdiction but in those cases he does not have exclusive jurisdiction. . . . The Department simply lacks sufficient resources to pursue every allegation where an approved rate or rating factor appears reasonable on its face when approved by the Department. . . . If such litigation is dismissed by courts under the exhaustion of remedies doctrine [exclusive jurisdiction of the Commissioner], on the grounds that the issue concerns a pure question of 'rates,'... much insurer conduct which violates the law will unnecessarily persevere."

(Application of California Dept. of Ins. for Permission to File Amicus Curiae Brief and Proposed Amicus Curiae Brief (Dec. 31, 2003) 2003 WL 23280980, *3, *19.)

In 2004, in an amicus brief filed in *Poirer v. State Farm Mutual Auto Ins. Co.* (Oct. 15, 2004) 2004 WL 2325837, the Commissioner

confirmed his position that: "An 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." (See RJN Ex. E, Letter from General Counsel, Dept. of Ins., to Supreme Court, requesting depublication of *MacKay*, at p. 4.) The Commissioner further stated that: "the Commissioner may be asked by the parties or the Superior Court to exercise his primary jurisdiction, but in those cases, the Commissioner **does not have exclusive jurisdiction**. . . ." (*Ibid.*)

In 2010, the Commissioner petitioned this Court to depublish *MacKay, supra*. (RJN Ex. E, Letter from General Counsel, Department of Insurance, to Supreme Court, requesting depublication.) In that letter, the Commissioner restated and reaffirmed the same positions he had communicated to the Court of Appeal in *Donabedian* and *Poirer* and to this Court in *VPS Management*. (*Id.* at 4.)

2. The Commissioner's interpretation of his own jurisdiction should be given deference.

The Commissioner has repeatedly and consistently, over many years, informed the courts of his strongly held view: his jurisdiction over the rate regulatory statutes he enforces is primary, not exclusive.

This Court holds that an agency's "view of a statute or regulation it enforces is entitled to great weight unless clearly erroneous or unauthorized." (*Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 111, internal citations omitted.). Here, the Commissioner's view is both authorized and correct.

As one court succinctly puts it: "that the Commissioner does not view the trial court as having poached into the Commissioner's statutory domain is clearly significant, and we defer to his interpretation of his authority." (*Krumme* at 937.)

E. Part Two: Concluding Analysis – The Commissioner himself takes the position the court below erred, and that his jurisdiction over this case is not exclusive, but shared with the courts. The Commissioner is correct.

1. The Commissioner's jurisdction is concurrent under the principles this Court announced in *Farmers* and *Jonathan Neil & Assocs.*, and as followed in *Donabedian*.

Here, the class brought a UCL cause of action and a common law cause of action for breach of fiduciary duty. Underlying these claims was Fidelity's unlawful conduct in violating the Insurance Code by charging other than in accordance with its rate filings, a violation of Article 6.9, Section 12414.27. Fidelity also violated several sections of Article 5.5 relating to rates. (Opinion, 38, 48.)

The plaintiffs in *Farmers*, *supra,* and *Jonathan Neil & Assocs.*, *supra*, also pursued civil causes of action grounded on the defendant's alleged violations of sections of the Insurance Code related to rates – UCL in the former and common law counts in the latter.

This Court's holdings in those two cases are dispositive as to the Commissioner's jurisdiction here. UCL and common law claims are "originally cognizable in the courts," even if they are grounded in violations of Insurance Code provisions which the Commissioner has

jurisdiction to enforce. (*Farmers, supra*, 2 Cal.4th at 390-391, 399; *Jonathan Neil & Assocs., supra*, at 933-934.)

Accordingly, the Commissioner's jurisdiction is not exclusive, but primary, i.e., concurrent with the courts. (*Id.*) The Second DCA resolved the same issue the same way. (*Donabedian*, 116 Cal.App.4th at 986.)

2. The Legislature did not grant exclusive jurisdiction to the Commissioner.

The Legislature included no language in the statutory scheme providing that complaints over reimbursement for unlawful title charges can *only* be heard by the Commissioner, i.e., there is no mandate that these claims *shall* be heard by the Commissioner. This is in sharp contrast to statutes that actually do grant exclusive jurisdiction to administrative agencies. (e.g., Labor Code §§ 3601-3602, 1700.44.) Rather, as to title charges, the Legislature used permissive language, *allowing* – but not *mandating* – that the subject claims can be brought to the Commissioner. (§ 12414.13, using the permissive term, "may," throughout.)

3. Exclusive jurisdiction cannot lie with the Commissioner because he cannot provide an adequate remedy. He has no authority to award monetary or class wide relief.

Moreover, as this Court has long held, for an administrative agency to have exclusive jurisdiction over a claim, it must be able to provide an adequate remedy, and in class actions, that includes

classwide relief. (*Ramos, supra*, 4 Cal.3d at 690-691. See also, *Shernoff, supra*, 44 Cal.App.3d at 409; *Lachman*, supra, 123 Cal.App.3d at 946; *Rose*, supra, 126 Cal.App.3d 934; *Tarkington*, supra, 172 Cal.App.4th at 1510.) The Commissioner does not have authority to award a monetary remedy on either an individual or a class basis. (See authority cited in Section C-2, preceding.) The complaint process is procedurally inadequate as well. The Commissioner, at his option, can dismiss a complaint without investigation and can refuse to set a hearing in his sole discretion. The only judicial review available is by ordinary mandamus, which cannot provide a remedy here. (See Section C-3, preceding.)

4. The Attorney General has already filed a letter with this Court stating the Commissioner's position that his jurisdiction over this case is shared with the courts, not exclusive.

Importantly, the Commissioner is in full agreement with Petitioners as to his jurisdiction. It has been the Commissioner's position for decades that his jurisdiction over rate related claims is primary, i.e., shared with the courts, and not exclusive. The Commissioner has repeatedly reported his position to this Court and to the Court of Appeal, and has done so again in this case. Here, the Attorney General wrote to this Court on behalf of the Commissioner, stating his position that:

> "the court of appeal erred in barring plaintiff's UCL claims based on concepts of primary and/or exclusive jurisdiction. . . . UCL

actions in the circumstances of this case serve an important purpose that complement, and do not conflict with, the Department's regulatory and enforcement duties and responsibilities set out in the Insurance Code."

(Becerra Letter to this Court, *supra*, at p. 3, Attachment 3 hereto.)

The Commissioner's view of his own jurisdiction is entitled to "great weight." (*Pacific Legal Foundation., supra*, 29 Cal.3d at 111; *Krumme, supra*, 123 Cal.App.4th at 937.) This Court should rule in conformity with his position – not just because he is the Commissioner, but because he is correct.

5. Application: The Commissioner does not have exclusive jurisdiction over the action posited by the Court in its second question.

The Court asks: "[d]oes the Insurance Commissioner have exclusive jurisdiction over any action against an underwritten title company for services charged to the consumer, but not disclosed to the Department of Insurance?" (Order, d. 12.12. 2018.) **NO,** pursuant to the authority and analysis discussed above.

First, title company "charges" and "rates" are synonyms. (Section 12340.7). Thus, the Court posits that a title company is using *rates* not disclosed to the Department. Section 12401.1 mandates that: every underwritten title company "shall file with Commissioner its schedules of rates" and "every modification. . . it proposes to use. . . ."

Since the title company in the Court's question has not *disclosed* its rates to the Department, a fortiori, it has not filed them either. (A

rate filing by definition *discloses* the rate.) By not filing its rate(s), the company has violated Section 12401.1.

Further, under Section 12401.1, a rate cannot become "effective" until filed; therefore, the unfiled (undisclosed) rates at issue have never become effective. Section 12401.7 bars "use" of any rate "prior to its effective date." By *using* the unfiled rate, the company has also violated Section 12401.7.

Section 12414.27 mandates that no underwritten title company "shall charge for any. . . service. . . except in accordance with rate filings which have become effective pursuant to Article 5.5. . . ." By charging for services *other* than in accordance with rate filings that have become effective, the company in the question has also violated this statute.

Insurance rate statute violations are viable predicates for both UCL and common law actions. (*Farmers*, *supra*, 2 Cal.4th at 390-391, 399; *Jonathan Neil & Assocs., supra*, at 933-934.) As discussed in Section A, ante, such actions for restitution or damages are "originally cognizable in the courts;" under *Farmers, supra*, and *Jonathan Neil & Assocs., supra.* Therefore, the Commissioner's jurisdiction is not exclusive, but at most, primary. He also lacks exclusive jurisdiction over the actions for the additional reasons discussed throughout Part Two, *supra*.

CONCLUSION

For the reasons stated above, and summarized in the conclusion of each part, this UCL and breach of fiduciary duty class action is not barred by statutory immunity nor subject to exclusive jurisdiction of the Commissioner.

Respectfully submitted,

DATED: April 11, 2019

THE BERNHEIM LAW FIRM
SHERNOFF, BIDART, ECHEVERRIA

By: 

Bernie Bernheim, Esq.
Nazo S. Semerjian, Esq.
Attorneys for Plaintiffs, Appellants and Cross-Respondents

CERTIFICATION OF WORD COUNT

The undersigned certifies, pursuant to California Rules of Court, Rule 8.504(d), that this brief contains 13,983 words, including footnotes, as shown by the word count function of the computer program used to prepare the brief.

DATED: April 11, 2019

Nazo S. Semerjian

Attachment 1

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

Attachment 2

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SUMMONS ISSUED

C764

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

LAW OFFICES OF
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Attachment 3

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November 19, 2018

The Honorable Tani G. Cantil-Sakauye, Chief Justice,
and the Honorable Associate Justices
Supreme Court of the State of California
350 McAllister Street, Room 1295
San Francisco, CA 94102

RE: Amicus Curiae Letter in Support of Petition for Review
Villanueva v. Fidelity National Title Company, Supreme Court Case No. S252035

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to California Rules of Court, rule 8.500(g), the California Department of Insurance respectfully submits this amicus curiae letter in support of plaintiff and appellant's petition for review of the Sixth District Court of Appeal's published decision in *Villanueva v. Fidelity National Title Company*, Case Numbers H041870 and H042504. (*Villanueva v. Fidelity National Title Company* (2018) 26 Cal.App.5th 1092.)

This case presents important questions about the ability of consumers to pursue private actions against insurance companies that, in the Insurance Commissioner's view, are complementary to administrative enforcement, serve the public interest, and should not be barred by limited immunity statutes intended to address other concerns. Insurance Code section 12414.26, at issue in this case, relates to title insurance, but uses language nearly identical to other immunity provisions relating to workers' compensation insurance (§ 11758), automobile and homeowner's insurance (§ 1860.1), and senior citizens' health insurance (§ 795.7).[1] For this reason, this case may have broad implications for consumers in a variety of contexts and for the entire insurance industry.

As set forth below, **the court of appeal erred in holding that plaintiff's Unfair Competition Law (UCL) claims were barred by the safe harbor for anti-trust violations in Insurance Code section 12414.26.** Further, the court of appeal erred in holding that the Department's jurisdiction over ratemaking bars plaintiff's UCL claims relating to *unfiled and unapproved* insurance rates.

[1] All further statutory references are to the Insurance Code.

> Insurance Code section 12414.26, relating to title insurance, provides:
>
> No act done, action taken, or agreement made pursuant to the authority conferred by Article 5.5 (commencing with Section 12401) . . . of this chapter shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this state heretofore or hereafter enacted which does not specifically refer to insurance.

(§ 12414.26.) As the court of appeal recognized, the only published case considering the scope of immunity from private suits under section 12414.26 is *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26. In *Quelimane*, plaintiffs' UCL claim was based on allegations that title insurance companies unlawfully conspired to deny to issue title insurance policies on titles derived from tax deeds. (*Quelimane*, *supra*, 19 Cal.4th at p. 43.) In determining plaintiffs' claims were not barred by section 12414.26, this Court held the scope of section 12414.26 was "expressly limited" to acts done pursuant to Article 5.5 and 5.7, and rejected the defendant's contention that all UCL actions against title insurers are precluded. (*Id.* at pp. 44-45.) And this Court took a similar, narrow approach in construing a nearly identical immunity provision relating to workers' compensation insurance (§ 11758). In *State Compensation Insurance Fund v. Superior Court* (2010) 24 Cal.4th 930, this Court held that section 11758 applies only to concerted activity otherwise barred by the antitrust laws. (*Id.* at p. 938.)

Rather than looking to this Court's precedents, which stress a narrow construction of Insurance Code immunity statutes, the court of appeal relied on other intermediate appellate decisions that that are less receptive to consumer claims. (*Walker v. Allstate Indem. Co.* (2000) 77 Cal.App.4th 750, 756; *MacKay v. Superior Court* (2010) 188 Cal.App.4th 1427, 1448.) The courts in *Walker* and *MacKay* held that section 1860.1 (which contains language nearly identical to section 12414.26) bars private UCL challenges to the reasonableness of rates *filed with* and *approved by* the Commissioner. The decisions in *Walker* and *MacKay* both turned on the fact that the Insurance Commissioner approved the rates at issue; persons who might object to such rates could participate in the rate-setting administrative process; and the asserted UCL claim would have the effect of requiring courts to second-guess the wisdom of administratively set rates in a collateral proceeding, circumventing administrative review processes. (See *Walker*, *supra*, 77 Cal.App.4th at pp. 756, 759; *MacKay*, *supra*, 188 Cal.App.4th at pp. 1448-1450.)

Assuming for the sake of argument that *Walker* and *MacKay* were correctly decided[2], the circumstances of this case, involving *unfiled* and *unapproved* charges, do not present the same

[2] The Department agrees that section 1860.1 does not bar challenges to *unfiled and unapproved* rates. It is also the Department's position that section 1860.1 should not bar challenges to *filed and approved* rates.

concerns as present in those cases. Underwritten title companies like the defendant in this case are required to file with the commissioner their schedules of rates at least 30 days before charging them (§ 12401.1), but the Commissioner does not approve them. **Moreover, despite the filing requirement, the defendant here did not comply with the law; its rates at issue were *never* filed with the Commissioner. (*Villanueva, supra*, 26 Cal.App.5th at p. 1103.) Accordingly, the insurer did not act "pursuant to" Article 5.5 and the rationale for providing immunity to insurers using *approved rates* does not apply.**

In addition, **the court of appeal erred in barring plaintiff's UCL claims based on concepts of primary and/or exclusive jurisdiction. The regulation and administrative enforcement of title insurance is governed by California insurance law that does not preclude private UCL claims for unfiled and unapproved rates such as those at issue here. UCL actions in the circumstances of this case serve an important purpose that complement, and do not conflict with, the Department's regulatory and enforcement duties and responsibilities set out in the Insurance Code.**[3]

For the foregoing reasons, the California Department of Insurance respectfully requests that this Court grant the petition for review and settle important questions of law regarding how section 12414.26 and similarly worded Insurance Code anti-trust immunity statutes apply to consumer enforcement claims.

Respectfully Submitted,

HEATHER HOESTEREY
Deputy Attorney General

For XAVIER BECERRA
Attorney General

HH:jm

cc: see attached service list

[3] The court of appeal's opinion suggests restitution would be unavailable in a section 12414.13 action, which, if correct, would leave consumers to bear the injuries caused by unlawful insurance practices. (*Villanueva, supra*, 26 Cal.App.5th at p. 1134.)

Attachment 4

82656 3-44 10M SPO

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

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-

(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

Attachment 5

ENROLLED BILL MEMORANDUM TO GOVERNOR	DATE September 30, 1973
BILL NO. SB 1293	AUTHOR Zenovich

Vote—Senate X Unanimous

Ayes—
Noes—

Vote—Assembly ___Unanimous

Ayes— 68
Noes— 2 - Ghappie and Davis

SB 1293 revises provisions for licensing and regulation of underwritten title companies by the Insurance Commissioner.

The bill was introduced at the request of the California Land Title Association.

The Department of Insurance recommends approval.

Recommendation	Legislative Secretary
APPROVE	

Senate Bill 1293 - Zenovich (as amended August 27, 1973)

This bill proposes to regulate the organization and rate making of title insurance companies, underwritten title companies, and controlled escrow companies. It requires that rates be subject to the same tests as are presently applied to other types of insurance by the MacBride-Grunsky Rating Law. This requires that the rates not be inadequate nor excessive nor unfairly discriminatory.

Rates, as established by the individual companies or by rating organizations, would be filed with the Insurance Commissioner who would have the right to review such rates. Procedures are provided for the review of the rates and for administrative and judicial hearings if rates are found to be in violation of the rating act.

Under current statutory law, rates of title insurance companies are not regulated. Recently, several suits have been brought against title insurance companies alleging that they have violated the California anti-trust statutes by conspiring among themselves to fix rates charged for title insurance.

This bill would not affect those suits. However, it would subject future rating of title insurance policies to review by the Insurance Commissioner and thus permit the use of rating organizations which could be used to develop rates to be made available to the members of the rating organization. This is the current procedure used by many property and casualty insurance companies.

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 **OPENING BRIEF ON MERITS** 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 11, 2019)***
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