S252035

IN THE SUPREME COURT OF CALIFORNIA

MANNY VILLANUEVA ET AL.,
Plaintiffs and Appellants,

v.

FIDELITY NATIONAL TITLE COMPANY,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, SIXTH APPELLATE DISTRICT
COURT OF APPEAL NO. H041870 | SANTA CLARA COUNTY SUPERIOR COURT NO. CV173356

ANSWER BRIEF

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ATTORNEYS FOR DEFENDANT AND RESPONDENT
FIDELITY NATIONAL TITLE COMPANY

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Introduction

Plaintiffs in this class action allege respondent Fidelity National Title Company (Fidelity) committed an unlawful business practice in violation of the Unfair Competition Law (UCL) (Bus. & Prof. Code, §§ 17200 et seq.) by not including charges for overnight mail delivery fees, courier fees, and document preparation or "draw deed" fees in the schedule of rates Fidelity filed with the Department of Insurance. In the case of named plaintiff Manny Villanueva, these charges were $75 to prepare a deed for a mortgage refinance, $11.20 to send the

documents by overnight mail, and $15 to courier final copies of the documents.

Plaintiffs do not dispute that these services were necessary to close their mortgages and benefitted them. They do not dispute that the amounts of the fees charged were reasonable. They concede Fidelity informed them in advance of the fees and they had agreed to pay them.

And yet, Plaintiffs seek nearly $35 million in restitution and attorney's fees, plus injunctive relief.

The trial court found Fidelity had violated the Insurance Code by charging fees that had not been listed in its schedule of rates and granted an injunction. But the court denied Plaintiffs' claims for restitution because Plaintiffs had suffered no injury as a result of Fidelity's conduct.

The Sixth District Court of Appeal reversed the judgment against Fidelity, holding that Fidelity is immune under Insurance Code section 12414.26[1] from private lawsuits challenging rates for title insurance and that the Insurance Commissioner has

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[1] Further undesignated statutory references are to the Insurance Code.

exclusive jurisdiction over any claimed ratemaking violations.

This court granted review, limiting the issues to be briefed and argued to the following:

> (1) Insurance Code section 12414.26 provides: "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." 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? Stated otherwise, by charging unfiled rates, did Fidelity act "pursuant to the authority conferred by Article 5.5"?
>
> (2) 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?[2]

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[2] Plaintiffs' opening brief raises three additional issues: (1) section 12414.26's immunity applies only to claims based on allegations of actions in concert (AOB 23-34); (2) the immunity applies only to allegations of affirmative conduct, not to allegations of omissions (AOB 36); and (3) the

Summary of Argument

Section 12414.26 grants immunity from lawsuits challenging any "act done . . . pursuant to the authority conferred by Article 5.5 . . . ." Article 5.5 (§§ 12401-12401.10), entitled "Rate Filing and Regulation," "regulat[es] rates for the business of title insurance" and authorizes entities engaged in that business to charge rates for their services. (§ 12401.) An underwritten title company's act of charging a rate, therefore, is an "act done . . . pursuant to the authority conferred by Article 5.5" within the meaning of section 12414.26, even if it is alleged the company failed to comply correctly with Article 5.5 by charging for a service it had not first listed with the Commissioner.

Allowing a claimant to defeat this immunity from suit simply by alleging that the underwritten title company failed to comply with Article 5.5 would defeat the purpose of section 12414.26, because whether the immunity applied would depend upon the merits of the allegations and, thus, could not be

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immunity does not apply to common law causes of action, such as breach of fiduciary duty (AOB 36-37). We will address the first issue during our discussion of the specific issues identified by the court and the second and third issues at the end of this brief.

determined until after the claim was fully litigated. Rather, to be effective at all, a grant of immunity from a civil suit must be enforceable by demurrer. A "hindsight immunity" that applies only once it has been determined that the challenged rate was, in fact, properly listed could not be enforced until the end of trial, rendering the immunity useless.

Fidelity's construction of section 12414.26, with which the Court of Appeal agreed, is supported by the history of the statute and the purpose for the immunity. It finds further support in the 1988 passage of Proposition 103, which made state law, including the UCL, applicable to rate violations for other types of insurance, but not title insurance, which was expressly exempted from Proposition 103's reach. Section 12414.26, therefore, continues to provide full immunity from civil suits under laws such as the UCL that allege rate violations for title insurance.

The immunity granted by section 12414.26 works in tandem with the Legislature's grant of exclusive jurisdiction to the Commissioner over claims that an underwritten title company failed to comply with Article 5.5. Article 6.7 (§§ 12414.13-

12414.19) sets out a comprehensive administrative scheme conferring jurisdiction on the Commissioner to resolve grievances that an entity engaged in the business of title insurance has failed to comply with the requirements and standards of Article 5.5.

Article 6.9 (§§ 12414.20-12414.31) includes both section 12414.26, which immunizes underwritten title companies from civil proceedings alleging violations of other state law, and section 12414.29, which provides, "[t]he administration and enforcement of Article 5.5 . . . of this chapter shall be governed solely by the provisions of this chapter" and "[t]he provisions of this chapter . . . shall constitute the exclusive regulation of the conduct of escrow and title transactions by entities engaged in the business of title insurance . . . ."

Thus, section 12414.26 immunizes underwritten title companies from claims of rate violations brought under other state law; article 6.7 sets out the administrative scheme through which the Commissioner is to resolve such claims; and section 12414.29 makes the administrative procedure exclusive.

Finally, the administrative scheme provides an adequate means of adjudicating a claim that an underwritten title company failed to comply with Article 5.5 and provides an adequate remedy, including restitution, should the claim be resolved in the claimant's favor.

Statement of Facts

In 2006, Manny and Sonia Villanueva refinanced the mortgage on their home. Fidelity provided escrow services, charging a base rate of $250. The Villanuevas signed escrow instructions that " 'authorize[d] and instruct[ed] [Fidelity] to charge each party to the escrow for their respective Federal Express, special mail handling/courier and/or incoming/outgoing wire transfer fees' . . . ." (*Villanueva v. Fidelity National Title Co.* (2018) 26 Cal.App.5th 1092, 1102, original brackets.) The estimated closing statement in the escrow instructions stated the escrow charges would include $30 for overnight delivery and $30 for " 'Outside Courier/Special Messenger.' " (*Ibid.*)

Fidelity then arranged for California Overnight and FedEx to deliver documents by overnight mail and collected a fee of $11.20 for those services.

(*Villanueva, supra*, 26 Cal.App.5th at pp. 1102-1103.) Fidelity also collected $15 for First Courier to deliver documents from Fidelity's office to the mortgage broker and a document preparation fee described as a "draw deed" fee. (*Id.* at pp. 1101, 1103.)

The Villanuevas' escrow closed on May 31, 2006. (*Villanueva, supra*, 26 Cal.App.5th at p. 1102.) Four years later, Manny Villanueva became the named plaintiff in a class action lawsuit alleging, as relevant here, that Fidelity violated the UCL by unlawfully "charging him and others for delivery services and draw deed fees that were not listed on Fidelity's rate filings with the Insurance Commissioner." (*Id.* at p. 1104.) The trial court certified a class of " ' "[a]ll persons for whom [Fidelity] performed residential escrow services in a transaction that occurred in California, and who were charged for courier, overnight, messenger, or other delivery services and/or draw deed fees in connection with that transaction, during the period May 28, 2006 through September 30, 2012." ' " (*Ibid.*, original brackets.)

The trial court conducted a bench trial on the UCL claim. Evidence showed that, as required by

sections 12401.1 and 12401.2, Fidelity filed with the Commissioner a schedule of rates or "rate manual." The schedule of rates governing the Villanueva transaction stated " '[f]or escrows involving the refinancing of an existing deed of trust . . . ,' . . . the charge shall be $250 on transactions up to and including $1 million." (*Villanueva, supra*, 26 Cal.App.5th at p. 1103.) "The schedule provided that '. . . "Refinance Escrow Services" shall include . . . (d) standard in-house courier services.' " (*Ibid.*) "The schedule also lists nine 'Refinance Related Services,' which are described as charges '[i]n excess of escrow services included in the above[-]referenced paragraphs.' The nine services listed include 'Document Preparation' at $75 per document, but not delivery or courier services by outside vendors like FedEx, California Overnight, or First Courier." (*Ibid.*)

Although the schedule listed "Document Preparation" services, it did not specifically list "draw deed fees." As Fidelity read the Insurance Code, it did not "require it to file rates for '[p]ass [t]hrough' delivery fees that it collects from its customers and passes through to third party delivery service

providers." (*Villanueva, supra*, 26 Cal.App.5th at p. 1105.) Rather, Fidelity's understanding was "that the Insurance Code requires it to file rates only for services 'it performs' (§ 12340.7) and that it was not required to file rates for delivery services performed by others." (*Ibid.*)

Plaintiffs sought restitution in the amount of $13.1 million for third-party delivery fees and $10.7 million for draw deed fees listed only as document preparation fees on Fidelity's rate filings. (*Villanueva, supra*, 26 Cal.App.5th at p. 1105.) Certain class members who had obtained Fidelity's services in real estate sale transactions (as opposed to refinance transactions) during a "Gap Period" (May 28, 2006 to February 2, 2008), and were charged "draw deed" fees that were not listed in any manner on the rate filings, sought $1.8 million in restitution. (*Id.* at pp. 1105-1106.)

The trial court found that section 12414.27 "prohibits Fidelity from charging for any service that does not match its rate filings, including delivery services." (*Villanueva, supra*, 26 Cal.App.5th at p. 1107.) The court concluded Fidelity "violated section 12414.27 by charging for delivery services

because its rate filings did not include a rate for such service or a general statement that the rate would be that charged by a third party delivery service." (*Ibid.*)

The court rejected Plaintiffs' theory that Fidelity had acted unlawfully by charging its customers "draw deed fees" that had been listed in rate manuals as "document preparation" fees, concluding that drawing a deed was document preparation and that Fidelity had complied with its rate filing requirements by listing "document preparation" fees. (*Villanueva, supra*, 26 Cal.App.5th at p. 1107.) The court concluded, however, that Fidelity had acted unlawfully by charging "draw deed fees" to customers during the "Gap Period . . . 'for sale/resale transactions (as contrasted with refinance transactions)' " because Fidelity's rate filings during that period did not include " 'a rate for either . . . drawing a deed or document preparation.' " (*Ibid.*)

But the trial court denied restitution because Plaintiffs had " 'received the benefit of their bargain' and . . . did not contend that the services were unwarranted, 'unsatisfactory, or unfairly priced, and all of the services and rates were disclosed up-front

and agreed to by Plaintiffs.' " (*Villanueva, supra*, 26 Cal.App.5th at p. 1108.) It held "that (1) Plaintiffs benefitted from Fidelity's preparation of deeds and its negotiation of low third party delivery service fees that were lower than those charged by other escrow holders; (2) the fees were disclosed to and approved by Plaintiffs in their estimated closing statements; (3) Plaintiffs failed to show economic injury as a result of omissions from rate manuals they neither reviewed nor relied on; and (4) awarding restitution would 'put Plaintiffs in a better position than they expected to receive.' " (*Ibid.*)

The trial court did, however, grant injunctive relief, despite the fact that Fidelity's most recent rate filings included rates for delivery services, reasoning that it was " 'appropriate to enjoin Fidelity from charging for the service of delivery unless its rate filing includes the charge or a statement that the rate will be the amount charged by the third party vendors for delivery fees.' " (*Villanueva, supra*, 26 Cal.App.5th at p. 1108.)

The trial court also rejected Fidelity's claim that it was immune from suit under section 12414.26 (*Villanueva, supra*, 26 Cal.App.5th at p. 1108),

concluding: " '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 the rate filings.' " (*Id.* at p. 1114.)

The trial court denied Plaintiffs' request for $9,439,929 in attorney's fees. (*Villanueva, supra*, 26 Cal.App.5th at p. 1109.)

Both parties appealed, and the Court of Appeal reversed the judgment on the ground that Fidelity was immune from suit under section 12414.26. (*Villanueva, supra*, 26 Cal.App.5th at pp. 1133, 1136.) The court focused on the statutory language in section 12414.26 that provides immunity for any act done "pursuant to the authority conferred by Article 5.5," which this court held in *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 46, meant the action was "related to ratemaking." (*Villanueva, supra*, 26 Cal.App.5th at pp. 1124-1125.) The Court of Appeal held that the UCL causes of action were related to ratemaking because the theories of liability asserted by Plaintiffs "required the court to interpret Fidelity's rate filings to determine whether they encompassed the charges at

issue" and, thus, "involved acts done 'pursuant to the authority conferred by Article 5.5.' " (*Id.* at p. 1125.)

The Court of Appeal also considered the statutory scheme governing the Commissioner's authority and responsibility to adjudicate consumer grievances about rates charged, rating plans or rating systems following or adopted by a regulated title entity, and its further responsibility to respond to a title entity's failure to comply with the requirements and standards of Article 5.5. (*Villanueva, supra*, 26 Cal.App.5th at pp. 1126-1127.) It held: "The statutes in article 6.7 of Chapter 1, particularly sections 12414.13, 12414.14, and 12414.21, expressly provide that Plaintiffs' claims fall within the exclusive original jurisdiction of the Commissioner. Thus, article 6.7 of Chapter 1 supports our conclusion that this case is barred by the immunity in section 12414.26." (*Id.* at p. 1128.)

This court granted review.

Statutory Framework

Title insurance is governed by chapter 1 (Title Insurance) of part 6 (Insurance Covering Land) of division 2 (Classes of Insurance) of the Insurance Code. (§§ 12340 et seq.) The " '[b]usiness of title

insurance' " includes escrow services performed by "an underwritten title company or a controlled escrow company." (§ 12340.3.)[3]

Article 5.5 (§§ 12401 et seq.), which governs "Rate Filing and Regulation,"[4] authorizes a regulated title entity to charge rates to customers and states what such an entity must do in connection with making, filing, and charging rates. The purpose of Article 5.5 "is to promote the public welfare by

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[3] See section 12340.5: " 'Underwritten title company' means any corporation engaged in the business of preparing title searches . . . upon the basis of which a title insurer writes title policies."

See also section 12340.6: " 'Controlled escrow company' means any person . . . whose principal business is the handling of escrows of real property transactions in connection with which title policies are issued, which . . . is controlled by . . . a title insurer . . . ."

As did the Court of Appeal, we sometimes will use the term "regulated titled entities" to refer to both. (*Villanueva*, *supra*, 26 Cal.App.5th at p. 1111.)

[4] The "rate" charged by a title insurer, underwritten title company, or controlled escrow company is "the charge or charges . . . made to the public . . . for all services it performs in transacting the business of title insurance." (§ 12340.7.) The term "rate" excludes "miscellaneous charges," which are defined as "conveyancing fees, notary fees, inspection fees, tax service contract fees and such other fees as the commissioner by regulation may prescribe." (*Ibid.*)

regulating rates for the business of title insurance as herein provided to the end that they shall not be excessive, inadequate or unfairly discriminatory." (§ 12401.)

Unlike other forms of insurance (see, e.g., § 1861.05 [automobile insurance]), the Commissioner does not have the "power to fix and determine a rate level" for title insurance. (§ 12401.) Rather, "[e]very title insurer, underwritten title company, and controlled escrow company shall file with the commissioner its schedules of rates . . . ." (§ 12401.1.) This schedule of rates must be prominently displayed in each escrow office and copies of the schedule must be provided to the public upon request. (§ 12401.9.) An underwritten title company may not charge a rate that has not been filed with the Commissioner. (§ 12401.7.)[5]

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[5] "No title insurer, underwritten title company or controlled escrow company shall use any rate in the business of title insurance prior to its effective date nor prior to the filing with respect to such rate having been publicly displayed and made readily available to the public for a period of no less than 30 days in each office of the title insurer, underwritten title company, or controlled escrow company in the county to which such rate applies . . . ." (§ 12401.7.)

Article 6.7 (Hearings, Procedure, and Judicial Review) provides a comprehensive administrative mechanism for resolving a claim that a regulated title entity has failed to comply with Article 5.5. (§§ 12414.13 et seq.) The Commissioner, subject to judicial review, determines the merits of such a claim.

Article 6.9 (Examinations, Penalties and Miscellaneous) grants the Commissioner power to ascertain whether a regulated title entity has complied with the requirements and standards of Article 5.5. (§§ 12414.20 et seq.)

Section 12414.29 states: "The administration and enforcement of Article 5.5 . . . of this chapter shall be governed solely by the provisions of this chapter." It further provides: "Except as provided in this chapter, no other law relating to insurance and no other provisions in this code heretofore or hereafter enacted shall apply to or be construed as supplementing or modifying the provisions of such articles unless such other law or other provision expressly so provides and specifically refers to the sections of such articles which it intends to supplement or modify."

Section 12414.26 grants immunity from a civil suit for any act done pursuant to the authority granted in Article 5.5: "No act done, action taken, or agreement made pursuant to the authority conferred by Article 5.5 . . . 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."

Argument

I. Section 12414.26 grants immunity from civil suits challenging any rate charged, whether or not that rate was properly filed

A. An underwritten title company acts pursuant to the authority conferred by Article 5.5 whenever it charges customers for services related to title insurance

Section 12414.26 grants immunity from a civil suit for any "act done, action taken, or agreement made pursuant to the authority conferred by Article 5.5 . . . ." Article 5.5 "regulat[es] rates for the business of title insurance . . . ." (§ 12401.) It requires every regulated title entity to "file with the commissioner its schedules of rates" (§ 12401.1) and prohibits that entity from charging rates for its

services until it has complied (§ 12401.7). Thus, a civil suit challenging a rate or fees charged by an underwritten title company for escrow services challenges an act (the charging of rates) "done . . . pursuant to the authority conferred by Article 5.5" within the meaning of section 12414.26.

This reading of section 12414.26 is consistent with this court's sole decision interpreting the statute. *Quelimane, supra,* 19 Cal.4th 26, 33, held that "plaintiffs who have been harmed by an alleged conspiracy among title insurers to refuse to sell title insurance on real property acquired at a tax sale" could bring an action under the UCL. The title insurer in that case did not have immunity under section 12414.26 because "the Insurance Code does not displace the UCL *except as to title company activities related to rate setting.*" (*Ibid.*, italics added.) This court explained: "Article 5.5 applies only to rate regulation . . . ." (*Id.* at p. 44.) *Quelimane* later referred to "the conduct of title insurers that is not related to ratemaking" and "the restriction to ratemaking-related activities in Insurance Code sections 12414.26 and 12414.29." (*Id.* at p. 46.)

Quelimane did not say that the immunity provided by section 12414.26 applied only to rates that had properly been filed with the Commissioner or complied in all respects with Article 5.5 but, rather, applied to "activities related to rate setting" and the general "regulation" of "rate[s]." (*Id.* at pp. 33, 44.)

The Courts of Appeal have relied on *Quelimane* to hold that section 12414.26 grants immunity for all activities related to the setting or regulating of rates. *Walker v. Allstate Indemnity Co.* (2000) 77 Cal.App.4th 750, 758, noted that this court "had occasion to consider the effect of sections 12414.26 and 12414.29" in *Quelimane* and held as follows: "While allowing the plaintiffs' unfair competition claim to proceed, the court took care to recognize that other such claims premised upon ratesetting activities would be barred by the applicable immunity statutes . . . ."

Similarly, *Krumme v. Mercury Ins. Co.* (2004) 123 Cal.App.4th 924, 936-937, quoted *Quelimane* for the rule that: "The Insurance Code does not . . . displace the UCL 'except as to . . . activities related to rate setting.' " *Krumme* went on to hold: " 'In

general, a claim that directly challenges a rate and seeks a remedy to limit or control the rate prospectively or retrospectively is an attempt to regulate rates . . . .' " (*Id.* at p. 937.)

Fidelity's conduct of charging rates for services, whether or not they had been listed in its schedule of rates, was an act done pursuant to the authority conferred by Article 5.5 because it was an "activit[y] related to rate setting." (*Quelimane*, *supra*, 19 Cal.4th at p. 33.) Thus, a civil suit challenging the rates or fees charged by an underwritten title company challenges an act (the charging of rates and fees) authorized and regulated by Article 5.5 and is barred by section 12414.26, even if the plaintiff alleges that the rates were not properly filed.[6]

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[6] Plaintiffs appear to acknowledge that the act of charging a rate is an "act done . . . pursuant to the authority conferred by Article 5.5," (§ 12414.26) stating in their opening brief that section 12401.3 (which appears in Article 5.5) "confers authority on title companies to set rates . . . ," and "[s]ection 12401.7 confers authority on title companies to use rates . . . ." (AOB 38-39.)

B. Section 12414.26 immunity must apply to claims that a rate or fee was not properly filed for it to serve its purpose of relieving insurers of the burden of defending civil suits involving ratemaking activity

If all a plaintiff has to do to avoid section 12414.26 immunity is allege that a rate charged was not properly filed, the statutory immunity is rendered meaningless.

By stating that an act done pursuant to the authority conferred by Article 5.5 shall not "constitute . . . grounds for . . . civil proceedings under any other law . . . ," section 12414.26 provides "an *immunity from suit* rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial." (*Mitchell v. Forsyth* (1985) 472 U.S. 511, 526, original italics, overruled on other grounds in *Pearson v. Callahan* (2009) 555 U.S. 223; *Hunter v. Bryant* (1991) 502 U.S. 224, 227 ["because '[t]he entitlement is an *immunity from suit* rather than a mere defense to liability,' [citation], we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation" (original italics)]; *Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 342.) "An immunity defense is

effectively lost if an immune party is forced to stand trial or face the other burdens of litigation." (*Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal.App.4th 1185, 1189.)

Thus, for the immunity to be effective at all, a UCL claim that is based on an act that is related to ratemaking must not be able to survive a demurrer. "If such protection is to be meaningful it must be effective to prevent suits . . . from going beyond demurrer. Avoiding the expense and burden of having to defend an action . . . is precisely the goal which the principles of absolute immunity and privilege were intended to achieve." (*Howard v. Drapkin* (1990) 222 Cal.App.3d 843, 864 [discussing quasi-judicial immunity and the litigation privilege].)

However, at the time a civil suit is filed, no facts have yet been determined; there are only allegations that may or may not later be proven. If section 12414.26 does not provide immunity from a civil suit challenging a rate until there has been a finding that the rate was properly filed, then a mere allegation that a rate is unfiled will be sufficient to allow a civil action to survive a demurrer, obviating the immunity from suit. (*Quelimane, supra,* 19

Cal.4th at p. 47 [" '[I]t is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading . . . [and] "admits the truth of all material factual allegations in the complaint . . . ." ' "].)

Moreover, if the defendant disputes the allegation that a rate was not properly filed, as was the case here, and this raises a triable issue of fact, then whether the immunity applies cannot be determined until after a trial. If the court then found that the rate had, in fact, been sufficiently listed with the Commission, only then would it become clear that section 12414.26 had barred the litigation all along. This would make a farce of the statute and the purpose of the immunity, which is to preclude civil litigation entirely and give the Commissioner exclusive jurisdiction to determine whether a rate is valid.

That is exactly what happened in this case regarding Plaintiffs' claim that, outside the Gap Period, Fidelity had not properly filed its rate for drawing a deed because it listed a fee for document

preparation but not for drawing a deed. At the conclusion of the trial, "the court rejected Plaintiffs' assertion that drawing a deed was different from document preparation." (*Villanueva, supra*, 26 Cal.App.5th at p. 1107.) The trial court held "that Fidelity 'did not violate the law by charging for the service of drawing a deed outside the Gap Period.' " (*Ibid.*) Fidelity, therefore, had been immune from this claim all along and should never have had to litigate it – a catch-22 that will recur every single time such a claim fails if this court adopts Plaintiffs' position. In reality, this "hindsight immunity" is no immunity at all.

Accordingly, the immunity from civil suit provided by section 12414.26 would offer little protection if it applied only to rates that had, in fact, been properly filed. All a plaintiff would have to do to avoid the immunity provided by section 12414.26 and bring a civil action is allege that the rate was not properly filed.

C. Plaintiffs' argument that section 12414.26 applies only to actions brought under state antitrust statutes is contrary to the text of the statute

When interpreting statutes, the court looks first "to the words of the statute, as they are generally the most reliable indicators of the legislation's purpose." (*In re H.W.* (2019) 6 Cal.5th 1068, 1073.) "Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.)

The language in section 12414.26 that no act done pursuant to the authority conferred by Article 5.5 shall constitute grounds for civil proceedings "under *any other law of this state* heretofore or hereafter enacted which does not specifically refer to insurance" (italics added) cannot reasonably be construed to refer only to "any antitrust laws." "Any other law" means *any other law*. If the Legislature had intended the immunity to be so narrow, it would have so written the statute. That it did not do so should be enough to put to rest Plaintiffs' contrary argument. (See AOB 36-37, 50-51.)

Moreover, very few provisions in Article 5.5 refer to concerted action. Section 12401.5 allows the exchange of information between the Commissioner, title insurers, and advisory organizations, while section 12401.6 provides that "[n]othing in the article shall be construed to prohibit concert of action between entities under the same general management and control." But the majority of Article 5.5's provisions set standards and establish procedures for the making, filing, and use of rates. The Legislature could have expressly limited the immunity to the state's antitrust laws or to the code provisions allowing actions in concert, but instead applied the immunity to Article 5.5 in its entirety.

II. Legislative history establishes section 12414.26 was intended to grant broad immunity to title insurers from civil suits raising rate-related claims

The plain text and logic of Section 12414.26 defy Plaintiffs' narrow interpretation of the statute. But to the extent more is needed to conclusively establish the reach of the statutory immunity, it is found in the history of the statute and the Legislature's evident purpose in enacting it. That

purpose aligns directly with the Court of Appeal and Fidelity's interpretation.

When construing statutes, courts may consider the legislative history of a statute, as well as the wider historical circumstances of its enactment. (*Burden v. Snowden, supra,* 2 Cal.4th 556, 562.) "To further our understanding of the intended legislative purpose, we consider the ordinary meaning of the relevant terms, related provisions, terms used in other parts of the statute, and the structure of the statutory scheme." (*In re H.W., supra,* 6 Cal.5th 1068, 1073.)

Section 12414.26, adopted in 1973, was modeled on section 1860.1, which was adopted as part of the McBride-Grunsky Insurance Regulatory Act of 1947 (hereafter McBride-Grunsky Act). (Former §§ 1850 et seq.) An understanding of section 12414.26, therefore, begins with the McBride-Grunsky Act.

A. The McBride-Grunsky Act of 1947

The McBride-Grunsky Act was adopted in response to the U.S. Supreme Court's decision in *United States v. South-Eastern Underwriters Assn.* (1944) 322 U.S. 533, 553, which reversed 75 years of

contrary jurisprudence to hold that insurance transactions reaching across state boundaries constitute interstate commerce that are subject to "the regulatory power of Congress under the Commerce Clause."

During that 75-year period, most states, including California, had created independent administrative agencies to oversee the business of insurance within their borders. (Randall, *Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners* (1999) 26 Fla. St. U. L.Rev. 625, 630.) Chief Justice Stone, dissenting in *South-Eastern,* explained that "[t]hrough their plenary power over domestic and foreign corporations which are not engaged in interstate commerce, the states have developed extensive and effective systems of regulation of the insurance business," and in doing so were "often solving regulatory problems of a local character with which it would be impractical or difficult for Congress to deal through the exercise of the commerce power." (*South-Eastern, supra,* 322 U.S. at p. 580 (dis. opn. of Stone, C.J.); *id.* at p. 585 (dis. opn. of Jackson, J.).)

The ruling in *South-Eastern* was greeted with alarm.[7] "[Critics] released an emotional outburst concerning the decision. . . . Congress regarded the decision as 'precedent-smashing.' Newspapers raised a hue and cry about the decision." (Rose, *State Regulation of Property and Casualty Insurance Rates* (1967) 28 Ohio St. L.J. 669, 687, *available at* https://bit.ly/2xCtsmT, fns. omitted (hereafter, Rose).) "The industry predicted that the natural result of increased competition arising from the decision would render many companies insolvent. The industry argued that existing regulatory statutes were designed to preserve solvency, and that the application of the federal antitrust laws to exclude state regulation would have a disastrous result." (*Ibid.*, fns. omitted.)

Congress responded quickly, enacting legislation to permit federal regulation of the insurance industry only to the extent it was not regulated by state law. " 'The impact of the court's

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[7] Thirty-five states had filed amicus briefs arguing against the conclusion ultimately reached by the majority. (See *South-Eastern*, *supra*, 322 U.S. at p. 595, fn. 18 (dis. opn. of Jackson, J.).)

decision was almost immediately restricted through the enactment of the McCarran-Ferguson Act [15 U.S.C. §§ 1011-1015], which declared that the business of insurance should continue to be "subject to the laws of the several States which relate to the regulation or taxation of such business." ' " (*Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1257, fns. omitted.) Critically, though, " 'the act also provided that federal regulatory legislation would be "applicable to the business of insurance *to the extent that such business is not regulated by State law.*" ' " (*Ibid.*, original italics.)

The insurance industry pushed the states to take up Congress's offer and enact regulations that would forestall federal regulation. Soon, " 'state insurance commissioners and industry representatives joined forces in a nationwide movement which sought the enactment in every state of legislation that would satisfy the requirements for state regulation established by the McCarran-Ferguson Act and thereby exempt insurers from federal regulatory legislation.' " (*Amwest, supra*, 11 Cal.4th at p. 1257.)

The states' most immediate concern was that federal antitrust legislation, such as the Sherman Antitrust Act of 1890, would prevent insurance companies from sharing information, and would upset the balance state regulations had struck between free market pricing and limiting unfettered competition that had been designed to protect both insurers and consumers.[8]

But by the time *South-Eastern* was decided, many states had in place regulations reaching well beyond encouraging insurers to share information, and the concerns of the states were by no means limited to the danger of subjecting the industry to

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[8] The states largely believed unfettered competition would cause harm to the insurance industry. "When losses were low and profits handsome, new companies entered the market. No artificially imposed barriers impeded entry and no substantial economies of scale existed to discourage entrants. As a result of the vigorous, unimpeded competition in the 1800's, premiums failed to cover operating costs and by 1877 approximately 3,000 companies had failed." (Rose, *supra*, 28 Ohio St. L.J. at p. 677 [discussing the fire insurance industry]; see Kimball, Insurance and Public Policy (1960) p. 94.) The states, therefore, had enacted a variety of statutory schemes in an attempt to limit but not wholly eliminate concerted action. (Rose, *supra*, at pp. 681-682.)

federal antitrust legislation. Chief Justice Stone, dissenting in *South-Eastern,* noted that "there cannot but be serious doubt as to the validity of state taxes which may now be thought to discriminate against the interstate commerce, [citation]; or the extent to which conditions may be imposed on the right of insurance companies to do business within a state; or in general the extent to which the state may regulate whatever aspects of the business are now for the first time to be regarded as interstate commerce." (*South-Eastern*, *supra*, 322 U.S. at pp. 581-582 (dis. opn. of Stone, C.J.).)

When Congress enacted the McCarran-Ferguson Act, it thus was well aware that many, if not most, states had established comprehensive schemes governing rates and ratemaking activity, and was further aware that states were concerned about the effect of the decision in *South-Eastern* on the overall state regulation of insurers. Congress could have chosen to allow the states to override only federal antitrust legislation, but instead it allowed, with some limitations, the states to prevent application of *any* federal regulatory legislation to the business of insurance. In light of the expressed

concerns that federal regulation would interfere with the general ability of the states to regulate the business of insurance, Congress's choice to allow the states to override any federal regulatory legislation was not accidental.

California responded to Congress's invitation to displace federal regulation by adopting the McBride-Grunsky Act, adding chapter 9, entitled "Rates and Rating and Other Organizations" to part 2, division 1, of the Insurance Code. (Former §§ 1850 et seq.) Not surprisingly, a primary motive of the Legislature was to permit insurers to act in concert with others when making and using rates. (See former art. 2, §§ 1852-1853.10.) But "[t]he McBride-Grunsky Act did more than immunize insurers from antitrust laws." (*MacKay v. Superior Court* (2010) 188 Cal.App.4th 1427, 1444.)

It set standards for rates and ratemaking and conferred authority on the Commissioner to oversee those standards. (Former art. 2, §§ 1852-1853.10; art. 6, §§ 1857-1857.4.) It created a detailed statutory scheme for resolving grievances about rates, rating plans, or rating systems, conferring authority on the Commissioner to take remedial

action for an insurer's failure to comply with its statutory obligations, and carefully proscribed and limited the means by which a consumer might adjudicate a rate dispute. (Art. 7, §§ 1858-1858.7.) The act provided insurers with the opportunity to correct any noncompliance without penalty, unless the noncompliance was willful, and specified the penalties and remedies for willful noncompliance. The Commissioner's rulings or orders were subject to judicial review. (Art. 7, §§ 1858-1858.7; § 1859.1.)

"Thus, while the initial motivation behind Insurance Code section 1860.1 may have been exemption from antitrust laws in particular, it was recognized that the language of the exemption was, in fact, broader." (*MacKay*, *supra*, 188 Cal.App.4th at p. 1445.) " 'The exemption is a very broad one. . . . If other business regulations such as the Fair Trade Act are applicable to insurance, the exemption applies to them also.' (Deputy Attorney General Harold Haas, Interdepartmental Communication to Governor Earl Warren, June 11, 1947, p. 3.)" (*Ibid.*)

Finally, the Legislature unequivocally declared its intent to make the administrative scheme the exclusive means for resolving rate disputes. In

language that later served as the model for section 12414.29, section 1860.2 provided, as it still does, that "[t]he administration and enforcement of this chapter shall be governed solely by the provisions of this chapter," and that "[e]xcept as provided in this chapter, no other law relating to insurance and no other provisions in this code heretofore or hereafter enacted shall apply to or be construed as supplementing or modifying the provisions of this chapter unless such other law or other provision expressly so provides and specifically refers to the sections of this chapter which it intends to supplement or modify."

And in language nearly identical to what is now section 12414.26, the Legislature – which could have limited the grant of immunity to antitrust laws – instead expressed its intent in language that immunized rates and ratemaking activity from *all* state laws not specifically and expressly directed to regulating insurance. Accordingly, section 1860.1 provides, as it did when it was enacted in 1947, that "[n]o 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.*" (Italics added.)

In sum, the McBride-Grunsky Act was enacted to displace federal regulation of rates and ratemaking activity in the insurance industry. The Legislature could have specified, *but did not*, that it sought only to displace federal antitrust legislation. It could have specified, *but did not*, that although federal law was displaced, other state law would apply. Instead, in section 1860.1, the Legislature immunized rates and ratemaking from prosecution or civil proceedings under "any other law of this State" that does not specifically refer to insurance. At the same time, and as part of the same chapter, the Legislature enacted the standards for rates and ratemaking, conferred authority on the Commissioner to resolve claims that an insurer had failed to comply with those standards, carefully limited both the procedures to be used in resolving those claims and the remedies and penalties available for an insurer's noncompliance, and expressly declared that the administration and

enforcement of the chapter were to be governed solely by the chapter.

By conferring jurisdiction on the Commissioner to adjudicate rate disputes, subject to judicial review, the Legislature ensured that such disputes would not be ignored. But the limits the Legislature placed on the remedies available for a rate violation reflect an affirmative choice not to subject insurers to the more substantial liabilities and remedies that attend actions brought under other state law. Finally, the Legislature allowed for the possibility that future events might disclose a need for additional statutory controls by immunizing claims only from laws that did not specifically refer to insurance.

The history of the McBride-Grunsky Act, together with the extensive statutory scheme enacted in response to concerns about the intrusion of laws not directly tailored to insurance rates and ratemaking, thus compels the conclusion that the Legislature meant the McBride-Grunsky Act to occupy that field.

B. The extension of McBride-Grunsky style immunity to title insurers

Title insurance was one of the forms of insurance expressly exempted from the McBride-Grunsky legislation.[9] But in 1973, the Legislature substantially revised chapter 1 of part 6 of division 2 of the Insurance Code, to make "title insurance subject to the same rate regulation provisions applicable to property and casualty insurers," in other words, the forms of insurance regulated by the McBride-Grunsky Act. (Dept. of Finance, Analysis of Sen. Bill No. 1293 (1973-1974 Reg. Sess.).)

As of 1973, then, rates and ratemaking in the title insurance industry have been regulated and placed under the Commissioner's control (art. 5.5, §§ 12401 et seq.), just as rates and ratemaking conduct in other insurance industries were already under the Commissioner's control. The Legislature created an administrative scheme for adjudicating rate disputes comparable to that established by the McBride-Grunsky Act (art. 6.7, §§ 12414.13 et seq.), conferring on the Commissioner the power to take

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[9] Title insurance differs from other types of insurance because of its unique nature, which involves less risk than other types of insurance. (*Quelimane*, *supra*, 19 Cal.4th at p. 41.)

remedial measures if an insurer's "rate, rating plan or rating system . . . does not comply with the requirements and standards of Article 5.5." (§§ 12414.14, 12414.16.) A consumer's remedy for an insurer's failure to comply with Article 5.5 is to file an administrative challenge with the Commissioner (§ 12414.13), which is subject to judicial review (§ 12414.19). Insurers have the power to avoid penalties by correcting a noncompliance. (§§ 12414.14-12414.15.) The penalties and remedies for willful noncompliance are specified, and the Commissioner's rulings or orders are subject to judicial review. (§§ 12414.16-12414.17, 12414.19.)

And finally, after 1973, companies engaged in the business of title insurance have the same immunity from civil suits challenging rates and ratemaking activity granted by the McBride-Grunsky to other insurers (§ 12414.26), and the administration and enforcement of the provisions governing rates and ratemaking activity, are to be "governed solely by the provisions of this chapter." (§ 12414.29.)

In short, just as the history of the McBride-Grunsky Act compels the conclusion that the Legislature intended the immunity in that act to

extend broadly to all claims that an insurer had failed to comply with the rate and ratemaking obligations created and imposed by the act, so too the history of the 1973 revisions to the laws governing title insurance compel the conclusion that the Legislature meant the same broad immunity to extend to claims such as Plaintiffs make here: that Fidelity failed to comply with Article 5.5 by charging a rate alleged to be unlisted on the schedule of rates.

C. Proposition 103

Dissatisfaction with the regulation of some forms of insurance led to Proposition 103, which was passed in 1988 to make the McBride-Grunsky statutes more friendly to consumers by making "numerous fundamental changes in the regulation of automobile and other types of insurance." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 812.) But Proposition 103 expressly did *not* apply to title insurance. (*Id.* at p. 812, fn. 1; §§ 1851 [the provisions regarding rate approval "shall apply to all insurance on risks or on operations in this state, except: [seven classes of insurance, including] Title insurance"], 1861.05.) What Proposition 103 changed, therefore, is relevant to an understanding of

the pre-Proposition 103 law that continues to govern title insurance.

Among the changes Proposition 103 made to the law regulating rates and ratemaking of casualty insurance was the addition of section 1861.03, subdivision (a), which made the business of insurance subject to laws such as the UCL: "The business of insurance shall be subject to the laws of California applicable to any other business, including, but not limited to, the civil rights laws . . . , and the antitrust and unfair business practices laws . . . of the Business and Professions Code . . . ." There would have been no reason for such a provision if, as Plaintiffs insist, the business of insurance was already subject to the laws of California that generally apply to any business. (See *City of Huntington Beach v. Board of Administration* (1992) 4 Cal.4th 462, 468 ["[L]egislation must be construed as a whole while avoiding an interpretation which renders any of its language surplusage."].)

Proposition 103 also added section 1861.10, subdivision (a), which gave the public the power to enforce the initiative: "Any person may initiate or intervene in any proceeding permitted or established

pursuant to this chapter, challenge any action of the commissioner under this article, and enforce any provision of this article." The proceedings "permitted or established pursuant to this chapter" include both the pre-existing administrative scheme for addressing claims by "[a]ny person aggrieved by any rate charged, rating plan, rating system . . . ," (§ 1858) and newly added proceedings requiring the Commissioner to approve all rates before they might take effect and to conduct hearings for the purpose of determining whether a rate change application should be approved (§ 1861.05).[10]

By adding this right to intervene, the "drafters sought to 'enable consumers to permanently unite to fight against insurance abuse . . . .' " (*State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1045.) The proponents of Proposition 103 asserted that "a permanent, independent

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[10] Subdivision (b) of section 1861.10 added: "The commissioner or a court shall award reasonable advocacy and witness fees and expenses to any person who demonstrates that (1) the person represents the interests of consumers, and, (2) that he or she has made a substantial contribution to the adoption of any order, regulation, or decision by the commissioner or a court. Where such advocacy occurs in response to a rate application, the award shall be paid by the applicant."

consumer watchdog system will champion the interest of insurance consumers." (Ballot Pamp., Gen. Elec. (Nov. 8, 1988) argument in favor of Prop. 103, p. 100.) Again, there would have been no reason to add section 1861.10, subdivisions (a) and (b), if the public already had the power to seek redress for rate grievances by some means other than through the administrative process.

Proposition 103 changed then-existing law by making rates and ratemaking activities subject to the laws of California that apply to other businesses. But Proposition 103, by its express and unambiguous terms, does not apply to title insurance. The statutes regulating title insurance should not be judicially rewritten to give them the same effect as Proposition 103, given that title insurance was expressly excluded from the scope of the initiative.

III. The Commissioner has exclusive jurisdiction over claims that an underwritten title company charged for a service that was not disclosed in advance to the Department of Insurance

A. The statutory scheme supports the Commissioner's exclusive jurisdiction over Plaintiffs' claims

The Commissioner is charged with determining whether a rate and any accompanying fees charged are proper. The term "rate" is broadly defined as "the charge or charges . . . made to the public by a title insurer, an underwritten title company or a controlled escrow company, for all services it performs in transacting the business of title insurance." (§ 12340.7.) But the "rate" that a regulated title entity must file with the Commissioner excludes "miscellaneous charges," which are defined as "conveyancing fees, notary fees, inspection fees, tax service contract fees *and such other fees as the commissioner by regulation may prescribe.*" (*Ibid.*, italics added.) The Commissioner, therefore, has the authority to determine what type of fees must be included in the rate that must be filed and to decide whether a particular fee is better characterized as a "miscellaneous charge" that does not have to be included in a rate.

Similarly, the Insurance Code grants the Commissioner the authority to determine whether a rate charged complies with Article 5.5. A "person aggrieved by any rate charged" is permitted to file a complaint and request a hearing with the Commissioner but first must ask the regulated title entity in writing to review the manner in which the rate was charged. (§ 12414.13.)[11] If the Commissioner determines the rate charged "does not comply with the requirements and standards of Article 5.5" (but the noncompliance is not willful), the Commissioner shall give the company a "reasonable time" to correct the noncompliance. (§ 12414.14.)

If the noncompliance is not corrected (or if the noncompliance is willful), the Commissioner may

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[11] Section 12414.13 provides, as relevant, "Any person aggrieved by any rate charged . . . *may* request such person or entity to review the manner in which the rate . . . has been applied . . . . Any person aggrieved [by the response to the request] . . . *may* file a written complaint and request for hearing with the commissioner . . . ." (Italics added.) Plaintiffs contend that the word "may" in the section signals that the administrative scheme is not exclusive. (AOB 58.) This is an impossibly tortured reading. In context, the word "may" means only that a person filing a grievance is permitted to pursue an administrative remedy; it does not mean that such a person is also permitted to seek relief through court action.

hold a public hearing and prohibit further use of the rate or, if the noncompliance was willful, suspend or revoke the certificate of authority of the regulated title entity. (§§ 12414.15-12414.16.) The Commissioner may require payment of fees or restitution (see *post* section III.C), and decisions are subject to judicial review (§ 12414.19).

In this case, for example, Fidelity believed the Insurance Code did not require it to file rates for delivery fees it collected from its customers and passed through to third-party delivery service providers. The relevant statute, section 12340.7, requires rate filings only for services it "performs," and Fidelity understood that to exclude services "perform[ed]" by others for which it simply collects fees and passes them on. The Legislature reasonably determined that the Commissioner is in the best position to balance the needs of the title insurance industry against the needs of the public on nuanced questions such as this one, decide questions like whether collecting such "pass-through" fees is tantamount to "perform[ing]" those services within the meaning of the Insurance Code (§ 12340.7), and redress any mistake.

This court long has recognized that "the regulation of rates charged by title insurers and title companies . . . has traditionally commanded administrative expertise . . . ." (*Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 323, superseded by statute on other grounds; *State Compensation Ins. Fund v. Superior Court* (2001) 24 Cal.4th 930, 943 (*SCIF*) ["the calculation of insurance premiums and interpretation of SCIF's reporting requirements . . . is best suited to the administrative process"].) For that reason, "a court is not the appropriate initial arbiter of factors involved in insurance costs." (*Chicago Title Ins.*, at p. 323.)

Manufacturers Life Ins. Co. v. Superior Court (1995) 10 Cal.4th 257, 272, described *Chicago Title Ins.* as saying "that sections of the Insurance Code . . . superseded . . . unfair competition laws *insofar as they might apply to conduct related to rates and ratemaking* which are governed by specific provisions of the Insurance Code," and those provisions in turn "authorize some practices and as to others gave the Insurance Commissioner authority to determine the propriety of the conduct." (Original italics.) *Quelimane* held that "the Insurance Code

does not displace the UCL except as to title company activities related to rate setting." (19 Cal.4th at p. 33.)

The Legislature would not have directed an insured to first seek informal resolution of a complaint about rates and fees before complaining to the Commissioner, nor would have authorized the Commissioner to deny a request for a hearing, if the insured could simply ignore these administrative procedures and file a civil suit. Nor would the Legislature have specified the relief and penalties available for violations of the chapter in the administrative process while at the same time allowing inconsistent awards of penalties and damages by means of a civil suit brought under "other state law."

Any doubt that the Commissioner's jurisdiction over the administration and enforcement of Article 5.5 is exclusive is put to rest by section 12414.29, which provides that "no other law relating to insurance and no other provisions in this code heretofore or hereafter enacted shall apply to or be construed as supplementing or modifying the provisions of such articles unless such other law or

other provision expressly so provides and specifically refers to the sections of such articles which it intends to supplement or modify."

In other words, section 12414.26 immunizes regulated title entities from actions brought under other state law, and section 12414.29 both immunizes them from other provisions of the Insurance Code and limits the means of enforcing Article 5.5 to the administrative scheme – the sole method of enforcement included in the chapter.

Thus, the Commissioner has exclusive jurisdiction to determine what fees must be included in the rate an underwritten title company must file and to determine whether the company has complied with the rate-filing requirement. A plaintiff may bring an administrative challenge to a rate charged and may seek judicial review of an adverse decision by the Commissioner, but section 12414.26 bars a plaintiff from bringing a civil action challenging the validity of a rate charged by an underwritten title company.

B. Plaintiffs' attempt to invoke the doctrine of primary jurisdiction is misplaced because that doctrine is irrelevant

The doctrine of "primary jurisdiction" " '*applies where a claim is originally cognizable in the courts*' " and arises " '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; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.' " (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 390, original italics.)

The doctrine of primary jurisdiction does not apply here because, for all the reasons previously discussed, Plaintiffs' claim is not originally cognizable in the courts. Section 12414.26's immunity prohibits resolving the claim by way of court action, and section 12414.29 mandates that the administration and enforcement of Article 5.5 "shall be governed solely by the provisions" of the chapter.

Plaintiffs nonetheless argue that *Farmers Ins.* establishes that the Commissioner's jurisdiction over their claim is at the most primary, not exclusive. Not so.

Farmers Ins. was a suit brought by the Attorney General against a variety of automobile insurers under post-Proposition 103 law, which "repealed various sections [of the McBride-Grunsky Act] that had previously exempted the business of insurance from this state's antitrust laws." (*Farmers Ins.*, *supra*, 2 Cal.4th at p. 385.) Proposition 103 "added section 1861.03, subdivision (a), which provides: 'The business of insurance shall be subject to the laws of California applicable to any other business, including, but not limited to, . . . the antitrust and unfair business practice laws . . . .' " (*Id.* at p. 386.)

The complaint in *Farmers Ins.* stated two causes of action. The first alleged that the insurers had violated sections of the Insurance Code. The second alleged that this same conduct had violated the Unfair Practices Act (UPA) (Bus. & Prof. Code, §§ 17000 et. seq.). The insurers demurred to both causes of action, arguing that the suit was precluded by the failure to exhaust administrative remedies. (*Farmers Ins.*, *supra*, 2 Cal.4th at pp. 381-382.)

This court agreed that the first cause of action alleging violations of the Insurance Code must be

dismissed because the plaintiffs had failed to exhaust their administrative remedies. Citing section 1860.2, on which section 12414.29 was modeled, the court explained, "Pursuant to the Insurance Code, the People's claims under that code are exclusively the province of the Insurance Commissioner." (*Farmers Ins.*, *supra*, 2 Cal.4th at p. 382, fn. 1.)

But because of the changes to the McBride-Grunsky Act provisions made by Proposition 103, the second cause of action, alleging a violation of the UPA, was no longer under the exclusive jurisdiction of the Commissioner – at least as to automobile insurance. The question then became whether prior resort to the administrative process nonetheless was required under the doctrine of primary jurisdiction. This court held that the doctrine applied because the resolution of the issues required the special expertise of the Commissioner and the Department of Insurance. (*Farmers Ins.*, *supra*, 2 Cal.4th at pp. 381-383, 396-401.)

Farmers Ins. thus established that where Proposition 103 had extended the laws that apply to other businesses to apply as well to insurance, a claim alleging a violation of some such other law,

such as the UPA, is originally cognizable in the courts. And when the claim is originally cognizable in the courts, the doctrine of primary insurance may apply.

But this court also confirmed that the Commissioner continues to have exclusive jurisdiction over claims that were not affected by Proposition 103. While the automobile insurance at the center of *Farmers Ins.* was subject to Proposition 103, title insurance was expressly excluded from it. The Commissioner's jurisdiction over title insurance, therefore, remains exclusive, and the reasoning of *Farmers Ins.* supports Fidelity's position that the doctrine of primary jurisdiction does not apply.

C. The exclusive nature of the Commissioner's jurisdiction is not affected by any limitation on remedies available through the administrative scheme

Plaintiffs are incorrect that the Commissioner has no "authority to award injured consumers monetary relief, such as refunds or restitution." (AOB 64.) They cite several statutes that grant authority to the Commissioner (*ibid.*) but omit the most important one: section 12414.18.

Plaintiffs do cite section 12414.16, which is entitled "Powers of commissioner" and provides that if the Commissioner finds that a rate violates Article 5.5, he may prohibit further use of that rate. If the violation was willful, the Commissioner may suspend or revoke the certificate of authority of the regulated title entity. (See also § 12414.17.)

But section 12414.18 adds: "Except as otherwise provided in this chapter, all proceedings in connection with the denial, suspension, or revocation of a license or certificate of authority under this chapter shall be conducted in accordance with the provisions of Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, *and the commissioner shall have all the powers granted to him therein.*" (Italics added.)

One of the powers granted to the Commissioner under that chapter is the authority to order restitution. Government Code section 11519.1 grants the Commissioner the authority to order "restitution for any financial loss or damage found to have been suffered by a person in the case." Under section 12414.18, the Commissioner has the same powers

when regulating rates for title insurance and, therefore, may order restitution to victims of an unlawful rate.

Plaintiffs are mistaken when they assert the Court of Appeal in this case "correctly notes that the Commissioner 'could not seek restitution.' " (AOB 64.) The court below did not so hold; it held that whether the Commissioner could order restitution was irrelevant to the scope of the Commissioner's jurisdiction. In the course of rejecting Plaintiffs' argument that they were not required to seek relief from the Commissioner because the Commissioner had not taken action and could not order restitution, the Court of Appeal held that "the Insurance Commissioner has exclusive original jurisdiction over Plaintiffs' claims. That the Insurance Commissioner had not acted on his or her own initiative or could not seek restitution is not relevant to the jurisdictional analysis." (*Villanueva, supra*, 26 Cal.App.5th at p. 1134.)

Plaintiffs further rely on cases that are readily distinguishable. They cite *Shernoff v. Superior Court* (1975) 44 Cal.App.3d 406, 409, for the rule that the Commissioner " 'possesses no authority to enter

money judgments for past injuries. This latter authority remains in the courts . . . .' " (AOB 60-61.) *Shernoff* was not discussing the Commissioner's authority under Article 5.5 to govern rate setting by title insurers, but rather was discussing the Unfair Insurance Practices Act (UIPA). (§§ 790 et seq.) *Shernoff* relied upon section 790.09, which "expressly reserves to litigants all civil and criminal remedies against persons who have violated the law . . . ." (44 Cal.App.3d at p. 409.) The court held: " 'Section 790.09 thus contemplates a private suit to impose civil liability irrespective of governmental action against the insurer for violation of a provision of the Insurance Code.' " (*Id.* at p. 410, italics omitted.)

The UIPA was enacted in 1959 "to regulate trade practices in the business of insurance" by defining practices that " 'constitute unfair methods of competition.' " (*Assn. of California Ins. Companies v. Jones* (2017) 2 Cal.5th 376, 386-387.) The UIPA empowers the Commissioner to "bring an administrative enforcement action against, recover damages from, and enjoin any person who is or has been engaged 'in any unfair method of competition or

any unfair or deceptive act or practice defined in Section 790.03.' [Citation.]" (*Id.* at p. 388.)

While the Commissioner has the authority under the UIPA to "recover damages from" any person who has been engaged in an unfair act defined in section 790.03, the same is not true if a person engages in an unfair act that is not defined in that statute. If "the Commissioner believes a method of competition . . . 'not defined in Section 790.03' nonetheless 'should be declared to be unfair or deceptive,' " all the Commissioner may do is issue an order to show cause, conduct an investigation, and serve a written report on the insurer. "When proceeding under this provision, the Commissioner lacks the administrative authority to assess monetary penalties against the insurer or enjoin the conduct . . . ." (*Assn. of California Ins. Companies v. Jones*, *supra*, 2 Cal.5th at p. 388.)

The UIPA is not at issue here, however, and this limitation on the Commissioner's authority is irrelevant.

Plaintiffs similarly misread this court's decision in *Manufacturers Life Ins. Co. v. Superior Court*, *supra*, 10 Cal.4th 257, 266, which held "that the

UIPA does not supersede or displace actions under the Cartwright Act, and that a private cause of action may be stated under the UCA [Unfair Competition Act] for violations of the Cartwright Act, but not for violations of the UIPA." Plaintiffs quote the statement in *Manufacturers Life Ins.* that "the Commissioner's 'power is limited to enjoining future unlawful conduct and suspending or revoking a license or certificate.' " (AOB 63.) But Plaintiffs quote this statement out of context, omitting the preceding sentence that shows this court was referring only to claims under the UIPA for unfair trade practices: "The Insurance Commissioner has no power to initiate a criminal proceeding against, or an action to impose civil liability on, a person who engages in unfair trade practices. The authority of the commissioner is limited to enjoining future unlawful conduct and suspending or revoking a license or certificate." (*Manufacturers Life Ins.*, at pp. 273-274.) This court recognized that "nothing in the history of the UIPA reflects legislative intent to bring about a pro tanto repeal of the Cartwright Act or the UCA." (*Id.* at p. 275.)

Additionally, *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 605, upon which Plaintiffs rely (AOB 63) does no more than quote *Manufacturers Life Ins.* after observing that "the Insurance Commissioner's power does not include imposition of civil liability on those who engage in unfair business practices."

The language in *Shernoff*, *Manufacturers Life Ins.*, and *Stevens* discussing the scope of the Commissioner's powers under the UIPA has no bearing on this case. Neither does the language in *SCIF*, *supra*, 24 Cal.4th at page 938, that Plaintiffs quote out of context. (AOB 63-64.)

As described by Plaintiffs, *SCIF* "expressly noted the absence of 'any authority allowing the Insurance Commissioner to order a carrier to refund all improperly collected premiums to the insured.' " (AOB 63-64.) But *SCIF* was discussing the scope of the immunity provided to a workers' compensation insurer by section 11758. Unlike the statutes governing title insurance at issue here that provide immunity from civil suits, "section 11783, subdivision (a) expressly provides that SCIF may '[s]ue and be sued in all actions arising out of any act

or omission in connection with its business or affairs.' " (24 Cal.4th at p. 938.) And even in the unrelated context of workers' compensation insurance, this court did not resolve whether the Commissioner could order restitution, but simply observed that "SCIF does not point to any authority allowing the Insurance Commissioner to order a carrier to refund all improperly collected premiums to the insured." (*Ibid.*)

Plaintiffs argument that the Commissioner's jurisdiction over their claim may not be deemed exclusive because the administrative scheme offers only limited remedies for an insurer's failure to comply with Article 5.5 and does not provide for classwide relief confuses the doctrine of exhaustion of remedies with the immunity provided by section 12414.26 and the nature of the jurisdiction conferred on the Commissioner by section 12414.29. (AOB 60-67.)

The source of the authority upon which Plaintiffs rely is the doctrine of exhaustion of remedies. (See, e.g., *Ramos v. County of Madera* (1971) 4 Cal.3d 685, 691, distinguished on other grounds by *Caldwell v. Montoya* (1995) 10 Cal.4th

972, 987, fn. 8 [" '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' "].) Exhaustion is an inapposite concept, however, that presumes a civil remedy exists. By contrast, section 12414.26 grants immunity from a civil suit related to title insurance ratemaking activity: "[T]he reach of the UCL is broad, but it is not without limit and may not be used to invade 'safe harbors' provided by other statutes." (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1125.) " 'If the Legislature has . . . considered a situation and concluded no action should lie, courts may not override that determination. When specific legislation provides a "*safe harbor*," plaintiffs may not use the general unfair competition law to assault that harbor.' " (*Ibid.*, original italics.) Section 12414.26 created a safe harbor here by granting immunity from UCL actions.

Naturally, the Legislature's power to create a safe harbor from civil proceedings necessarily includes the power to require that disputes be adjudicated solely through the administrative process

and to limit the remedies available through that process. (See, e.g., *Hughes v. Argonaut Ins. Co.* (2001) 88 Cal.App.4th 517, 531.) In section 12414.29, the Legislature did just that by limiting the law that applies to violations of Article 5.5 to provisions in the chapter and conferring exclusive jurisdiction on the Commissioner to address grievances alleging an underwritten title company's failure to comply with Article 5.5.

D. The Commissioner's position that his jurisdiction is not exclusive is not entitled to deference

Plaintiffs place great emphasis on their assertion that the Commissioner agrees with them that section 12414.26 only grants immunity for antitrust actions and the Commissioner does not have exclusive jurisdiction over rate setting. (AOB 12-13, 33-34, 65, 68-71, 73-74.) Plaintiffs cite *Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 111, for the rule that "an agency's 'view of a statute or regulation it enforces is entitled to great weight' " (AOB 70), but that same case recognized the limitation on this rule, observing: "Statutory construction is a matter of law for the courts [citation], and administrative interpretations

must be rejected where contrary to statutory intent." (*Pacific Legal Foundation*, at p. 111; *Evans v. Unemployment Ins. Appeals Bd.* (1985) 39 Cal.3d 398, 407-408.)

This court has since explored this question in greater depth, explaining that an agency's interpretation of a statute is entitled to no more than "consideration and respect by the courts." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.) That's because, of course, an issue of statutory interpretation "falls within our own peculiar competence." (*Merrill v. Dept. of Motor Vehicles* (1969) 71 Cal.2d 907, 917; see *Yamaha Corp.*, at p. 7 [" '[I]t is the duty of this court . . . to state the true meaning of the statute finally and conclusively, even though this requires the overthrow of an earlier erroneous administrative construction. [Citations.] The ultimate interpretation of a statute is an exercise of the judicial power . . . conferred upon the courts by the Constitution and, in the absence of a constitutional provision, cannot be exercised by any other body' "].)

It is understandable that the Commissioner might not wish to have exclusive jurisdiction in times

of budget cuts, when additional private enforcement efforts might take some responsibility off his plate. But it is up to the Legislature alone to decide whether the Commissioner has exclusive jurisdiction and the Commissioner's desires have no bearing on what the Legislature expressly declared and intended. The question of the proper interpretation of the statutes at issue here lies squarely within the competence and the duty of this court.

E. Cases interpreting a similar statute, section 1860.1, recognize the Commissioner has exclusive jurisdiction over rate-related claims

Section 12414.26 was modeled on section 1860.1, which was added to the code as part of the McBride-Grunsky Act. Plaintiffs acknowledge that, as a general rule, when construing a statute, a court may refer to the construction of a similar statute for guidance. (AOB 21; *Williams v. Superior Court* (1993) 5 Cal.4th 337, 352.) In fact, Plaintiffs argue that section 12414.26 must be given the same construction as section 1860.1, which applies to property and casualty insurance. (AOB 22.)

Awkwardly for Plaintiffs, though, the case law interpreting section 1860.1 consistently holds that

the Commissioner has *exclusive* jurisdiction over ratemaking disputes. "The elaborate statutory and administrative process for setting rates has 'been interpreted to provide exclusive original jurisdiction over issues related to ratemaking to the commissioner.' " (*Krumme, supra*, 123 Cal.App.4th at p. 936.) Thus, " '[a] person objecting to a rate . . . [could] complain to the insurer. . . . If dissatisfied with the insurer's action, he [could] request a hearing before the Commissioner.' " (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 980 [discussing the McBride- Grunsky Act provisions before Proposition 103].) Then, " '[i]f the Commissioner believe[d] the complaint state[d] probable cause to find a violation . . . , he [could] hold hearings . . . , render findings . . . , and impose sanctions. . . . His decisions [were] subject to judicial review. [Footnote.]' " (*Ibid.*) "In short, under the McBride Act, the commissioner had exclusive jurisdiction to adjudicate complaints about insurance rates . . . ." (*Id.* at p. 981.)

The Insurance Code "set[s] forth a comprehensive scheme for the regulation of rates and rating practices," and section 1860.1 "provide[s] exclusive

original jurisdiction over issues related to ratemaking to the commissioner." (*Walker*, *supra*, 77 Cal.App.4th 750, 754-755.)

Farmers Ins., *supra*, 2 Cal.4th 377, discussed *ante* in section III.B in connection with the doctrine of primary jurisdiction, similarly recognized that the Commissioner has exclusive jurisdiction over claims that insurers violated statutes setting standards for rates, unless jurisdiction has been conferred on the courts by Proposition 103. (*Id.* at pp. 382, fn. 1, 385-386, 391, 394.)

Cases interpreting section 1860.1 also consistently hold that insurers are immune from civil suits challenging ratemaking activities.

Karlin v. Zalta (1984) 154 Cal.App.3d 953, 972, superseded by statute on other grounds, held that the McBride-Grunsky Act provides immunity for activities that fall within the purview of the Act, such as ratemaking. *Karlin* arose from a class action alleging that certain physicians and insurance companies had violated the UPA by conspiring to unlawfully fix the price of medical malpractice insurance, split the resulting profits, and "establish a monopoly." (*Id.* at p. 963.) The Court of Appeal

explained that the plaintiffs would be barred by the McBride-Grunsky Act from pursuing the civil action if their complaint challenged the insurance companies' ratemaking activities. (*Id.* at p. 970.) The Act was intended to maintain "a delicate balance between concert of action among insurers . . . and an open competitive system in the setting of insurance rates" and "[t]he guardian of this balance . . . is the enforcement mechanism created in the McBride Act under the aegis of the Insurance Commissioner." (*Id.* at pp. 971-972.) "Having established this mechanism . . . , the McBride Act provides categorically for immunity from prosecution under other laws that do not specifically contravene it for activities within the McBride purview. [Citation.]" (*Id.* at p. 972.) *Karlin* held that the action could not be brought under the UPA because "the setting of rates for casualty insurance . . . lies exclusively within the province of the McBride Act." (*Id.* at p. 974.)

The allegations in the complaint fell within the scope of the McBride-Grunsky Act because the complaint was "fundamentally directed at the premium rates charged by [the defendants]." (*Karlin*,

supra, 154 Cal.App.3d at p. 974.) "It is patent from this characteristic language that the focus of plaintiff's case is the charging of excessive insurance premiums and that its gravamen falls squarely within the purview of the McBride Act, which was designed to exclusively regulate the making and use of such rates." (*Ibid.*) "[O]ne claiming to be the indirect victim of excessive insurance rates charged to an insured must seek his or her remedies within the framework of McBride." (*Id.* at p. 977.)

Walker, *supra*, 77 Cal.App.4th at page 756, similarly held that section 1860.1 provided immunity from a civil action challenging rate setting activities. *Walker* was a class action filed by automobile insurance customers against more than 70 insurers seeking disgorgement of allegedly excessive premiums. The trial court sustained the defendant insurers' demurrers without leave to amend, "reasoning that the case was essentially a rate case over which the commissioner had exclusive original jurisdiction . . . ." (*Id.* at pp. 753-754.) The Court of Appeal agreed, stating that the Insurance Code "set[s] forth a comprehensive scheme for the regulation of rates and rating practices" and section

1860.1 "provide[s] exclusive original jurisdiction over issues related to rate-making to the commissioner." (*Id.* at pp. 754-755.)

Walker found support for its holding that section 1860.1 barred the suit in this court's decision in *Quelimane* because section 12414.26 contains language that is "almost identical" to section 1860.1. (*Walker*, *supra*, 77 Cal.App.4th at p. 758.) *Walker* relied on the statement in *Quelimane* that a UCL claim "premised upon rate setting activities would be barred by the applicable immunity statutes . . . ." (*Ibid.*)

The decision in *Fogel v. Farmers Group, Inc.* (2008) 160 Cal.App.4th 1403 is also instructive. Fogel alleged that the defendant violated the UCL by acting as his attorney-in-fact (AIF) and collecting excessive fees. (*Id.* at p. 1412.) The Court of Appeal held, among other things, that the suit was not barred by section 1860.1 because collecting fees as an AIF is not an " 'act done . . . pursuant to the authority conferred by' " Chapter 9 of the Insurance Code. (*Id.* at p. 1416.) *Fogel* noted that Chapter 9 has nothing to do with the collecting AIF fees. "In fact, Chapter 9 does not refer to attorneys-in-fact at all." (*Ibid.*)

"Defendants' right to collect fees from premiums does not arise from any authority granted under Chapter 9." (*Ibid.*)

Fogel ruled that the immunity did not apply because collecting AIF fees was not regulated by Chapter 9, unlike collecting premiums. (*Fogel*, *supra*, 160 Cal.App.4th at p. 1416.) *Fogel* construed the phrase "pursuant to the authority" to mean that the conduct in question was regulated by Chapter 9, not, as Plaintiffs would have it, that the conduct must have complied with the requirements of Chapter 9.

IV. Plaintiffs' authorities do not support their arguments

Plaintiffs cite *MacKay*, *supra*, 188 Cal.App.4th 1427 and *Walker*, *supra*, 77 Cal.App.4th 750 to support their argument that "immunity does not extend to unfiled or unapproved rates." (AOB 40-41.) Neither case so held or even considered the issue.

Both *MacKay* and *Walker* addressed challenges to rates for automobile insurance following Proposition 103. As described above, one of the changes brought by Proposition 103 was to require the Commissioner to pre-approve rates for automobile insurance. (*Calfarm Ins. Co. v.*

Deukmejian, *supra*, 48 Cal.3d at p. 812, fn. 1; § 1861.05, subd. (b).) Following Proposition 103, *MacKay* and *Walker* held that an insured may not bring a civil action challenging a rate for automobile insurance that had been approved by the Commissioner. *MacKay* held "the statutory provisions for an administrative process (and judicial review thereof) are the exclusive means of challenging an approved rate" (188 Cal.App.4th at p. 1432), and *Walker* held: "If section 1860.1 has any meaning whatsoever . . . , the section must bar claims based upon an insurer's charging a rate that has been approved by the commissioner . . . ." (77 Cal.App.4th at p. 756.)

Neither case considered whether an insured could bring a civil suit challenging a rate that had not been approved by the Commissioner "and, of course, 'an opinion is not authority for a proposition not therein considered.' " (*People v. Williams* (2005) 35 Cal.4th 817, 827, quoting *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.)

The analysis in *MacKay* focused on three statutes; sections 1860.1 and 1860.2 (upon which sections 12414.26 and 12414.29 were modeled), and

section 1861.03, which was added by Proposition 103 to provide that " '[t]he business of insurance shall be subject to the laws of California applicable to any other business, including . . . unfair business practices laws . . . .' " (*MacKay, supra*, 188 Cal.App.4th at pp. 1441-1442.)

MacKay held that sections 1860.1 and 1860.2, "taken together, appear to exempt insurance ratemaking (i.e., 'this chapter') from . . . all California laws outside the chapter itself [citation]. Indeed, '[h]istorically, these sections have been interpreted to provide exclusive original jurisdiction over issues related to ratemaking to the commissioner.' [Citation.]" (*MacKay, supra*, 188 Cal.App.4th at pp. 1441-1442.)

MacKay went on to consider whether the third statute, section 1861.03, which was added by Proposition 103 and, thus, does not affect title insurance, "call[s] into question whether that interpretation is still viable." (*MacKay, supra*, 188 Cal.App.4th at p. 1442.) *MacKay* held that despite the "general provision" of section 1861.03 that the "business of insurance shall be subject to the laws of California applicable to any other business," the

specific immunity provided by section 1860.1 "exempts from other California laws acts done and actions taken pursuant to the ratemaking authority conferred by the ratemaking chapter, *including the charging of a preapproved rate.* [Citation.]" (*MacKay*, *supra*, 188 Cal.App.4th at p. 1443, original italics.)

The opening brief asserts that determining whether the Commissioner had approved the rate charged in *MacKay* "was the threshold predicate to application of the immunity statute," but nothing in *MacKay* supports this assertion. (AOB 40.) The opening brief omits a crucial portion of a sentence in *MacKay* to argue that "where 'the underlying conduct challenged was *not* the charging of an approved rate,' the immunity statute 'would not be applicable.' " (AOB 40, original italics and underscoring.) But the full sentence in *MacKay* reads as follows: "Indeed, if the underlying conduct challenged was not the charging of an approved rate, but the *application* of an unapproved underwriting guideline, Insurance Code section 1860.1 would not be applicable." (*MacKay*, *supra*, 188 Cal.App.4th at p. 1450, original italics.) This sentence in *MacKay* did not hold, as the

opening brief suggests, that the immunity provided by section 1860.1 applies to a challenge to an approved rate but not to a challenge to a rate that had not been approved. Rather, this sentence, which is dicta, says only that, unlike a challenge to an approved rate, the immunity would not bar a suit challenging "the *application* of an unapproved underwriting guideline." (*Ibid.*)

The opening brief is similarly mistaken in claiming that *Walker*, *supra*, 77 Cal.App.4th 750, was "entirely predicated on the fact that the rates there were *approved* by the Commissioner" and adding: "Where the Commissioner has not 'approved' the rate charged, there can be no immunity under *Walker*." (AOB 40-41, original italics.) In *Walker*, "[t]he causes of action were each bottomed on the insurers' charging approved rates alleged nevertheless to be 'excessive' . . . ." (77 Cal.App.4th at p. 753.) Not surprisingly, the holding in *Walker* discussed only approved rates and says nothing about whether the immunity also would apply to a rate that had not been approved.

To the extent the analysis in *Walker* is useful, it favors Fidelity's position here. *Walker* observed

that "[s]ections 1860.1 and 1860.2 were part of the McBride Act and were not amended or repealed by the passage of Proposition 103. . . . [¶] Historically, these sections have been interpreted to provide exclusive original jurisdiction over issues related to ratemaking to the commissioner. [Citations.]" (77 Cal.App.4th at p. 755.) *Walker* recognized that "an insurer's action of collecting premiums . . . is certainly done pursuant to the authority conferred on the commissioner," at least when those rates have been approved by the Commissioner. (*Id.* at p. 757.) And *Walker* cites *Quelimane* for the rule that "claims premised upon ratesetting activities would be barred by the applicable immunity statutes." (*Id.* at p. 758.)

The opening brief relies on *Donabedian v. Mercury Ins. Co.*, *supra*, 116 Cal.App.4th at page 986, for the rule "that the claim arising from violation of the rate regulation statutes 'was originally cognizable in the courts under the UCL . . . .' " (AOB 55.) *Donabedian* is distinguishable.

Donabedian is another post-Proposition 103 case involving automobile insurance. It held that an insured could bring an action under the UCL alleging that the defendant insurance company "had used

applicants' absence of prior insurance, in and of itself, in determining premiums, a discount for good driving, and insurability, all in violation of Proposition 103." (*Donabedian*, *supra*, 116 Cal.App.4th at p. 972.) Like *MacKay* and *Walker*, *Donabedian* relied upon section 1861.03, holding that "Proposition 103's purpose and the plain meaning rule compel the conclusion that plaintiff may litigate his claim under the UCL." (*Donabedian*, at p. 977.) *Donabedian* recognized that under the McBride-Grunsky Act, as it existed prior to Proposition 103, "the commissioner had exclusive jurisdiction to adjudicate complaints about insurance rates . . . ." (*Id.* at p. 981.) *Donabedian* concluded: "It would make little sense if Proposition 103 – which subjects insurers to the UCL – were interpreted to preclude a civil action alleging a violation of that very Proposition." (*Id.* at p. 991.)

Plaintiffs assert that "this Court considered the same immunity issue as here" in *SCIF*, *supra*, 24 Cal.4th 930 and "held that statutory immunity extends only 'to concerted activity otherwise barred by the antitrust laws.' " (AOB 63-64.) But the workers' compensation issue this court addressed in

SCIF was based on the statutory framework governing workers' compensation insurance, which differs greatly from the framework governing title insurance.

The plaintiffs in *SCIF* brought a class action lawsuit alleging that SCIF had "misreported the insureds' financial information to the Rating Bureau," with the result that the plaintiffs had been charged higher premiums. (*SCIF*, *supra*, 24 Cal.4th at pp. 933-934.) SCIF claimed immunity under section 11758, which states, in language similar to section 12414.26: "No act done . . . pursuant to the authority conferred by this article shall constitute . . . grounds for . . . civil proceedings . . . ."

But, unlike section 12414.26, the scope of section 11758 was limited to claims involving "concert of action" by former section 11750, which states: "The purpose of this article is to promote the public welfare by regulating *concert of action* between insurers . . . [and] to authorize and regulate cooperation between insurers . . . in rate making and other related matters . . . ." (Italics added.)[12] Relying

[12] Section 11750 has been amended twice, but not in any manner relevant to the issues in this case.

on section 11750, this court found that the phrase "pursuant to the authority conferred by this article" in section 11758 referred only to concert of action, stating: "As relevant here, what is authorized by article 3 is 'cooperation between insurers . . . in ratemaking and other related matters . . . .' " (*SCIF*, *supra*, 24 Cal.4th at p. 936.)

Article 5.5 governing title insurance has no comparable provision restricting its purpose to regulating concert of action. The purpose of Article 5.5, to which the section 12414.26 immunity applies, is "to promote the public welfare by regulating rates . . . to the end they shall not be excessive, inadequate or unfairly discriminatory." (§ 12401.) In light of this broad statement of purpose, and the absence of any reference in the statement of purpose to concert of action, this court's holding in *SCIF* that section 11758 applies only to actions taken in concert should not guide its interpretation of section 12414.26.

SCIF further held that section 11758 did not grant immunity from civil liability because the case was not a ratemaking case, observing the named plaintiff did not "challenge the manner in which

premiums or rates are set by the Rating Bureau. Rather, it disputes the manner in which SCIF analyzed and allocated [the] financial data prior to the data being sent to the Rating Bureau." (*SCIF*, *supra*, 24 Cal.4th at pp. 936-937.)

This court reiterated this point by distinguishing *Walker*, *supra*, 77 Cal.App.4th 750, on the basis that the plaintiffs in *Walker* had challenged "the method by which rates were set," while the plaintiff in *SCIF* "does not challenge the method by which the rate or premium charged was set, but rather the insurer's misallocation of certain expenses." (*SCIF*, *supra*, 24 Cal.4th at p. 942.)

This court recognized that a mere allegation that SCIF's alleged misconduct could result in higher premiums was not enough to make this a ratemaking dispute, noting "[i]t is doubtful section 11758 intended to paint with so broad a brush." (*SCIF*, *supra*, 24 Cal.4th at p. 938.)

Plaintiffs claim that three federal district court decisions "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." (AOB 43, original italics.) None of these cases so held or even considered this issue.

The unpublished decision in *Wahl v. American Security Ins. Co.* (N.D.Cal. 2010) 2010 WL 4509814 held a claim that the UCL prohibited "the practice of force placing insurance" was not barred by section 1860.1 because "it is apparent from the Record that [the plaintiff] has not attacked the practice of rate *setting*, and she therefore is not limited to the administrative remedy contemplated by the [McBride-Grunsky] Act." (*Id.* at p. *1, original italics.) *Wahl* recognized that "California courts have concluded that the practice of rate *setting* is indeed exempt 'from . . . all California laws outside the chapter itself . . . .' " (*Id.* at p. *2, original italics.)

Wahl then turned to whether the immunity provision in section 1860.1 conflicts with section 1861.03, which was added by Proposition 103 and does not apply here. *Wahl* states that "challenges to the reasonableness of an approved rate fall within the exclusive ambit of the chapter and are exempt from the requirements of other laws," but *Wahl* had no occasion to consider whether section 1860.1 would

apply to an unapproved rate. (*Wahl, supra,* 2010 WL 4509814 at p. *3.)

The other federal cases Plaintiffs cite are to the same effect. The Magistrate Judge in *Ellsworth v. U.S. Bank, N.A.* (N.D.Cal. 2012) 908 F.Supp.2d 1063, 1082, quoted the language in *Wahl* discussed above and concluded section 1860.1 did not apply because "Ellsworth does not challenge the rates or the premiums he paid but instead challenges the alleged kickbacks. [Footnote.]" (*Ibid.*)

King v. National Gen. Ins. Co. (2015) 129 F.Supp.3d 925, 935, stated "Section 1860.1 precludes litigation against acts done pursuant to the DOI's [Department of Insurance's] ratemaking authority . . . ." *King* recognized that the Commissioner has exclusive jurisdiction not only over challenges to approved rates, but also over challenges to the DOI's ratemaking authority: "Thus, where the plaintiff's claim does not involve a challenge to a rate approved by the DOI or DOI's ratemaking authority, the claim does not fall within the exclusive jurisdiction of the DOI . . . ." (*Ibid.*) *King* suggests that section 1860.1 would apply not only to a challenge to an approved rate, but also to a challenge

to the reasonableness of a rate or "acts done pursuant to the DOI's rate-making authority": "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." (*Id.* at p. 936.)

V. Plaintiffs' additional arguments are outside the scope of review and are meritless

Plaintiffs make two additional arguments that exceed the scope of the issues identified by this court. We address them briefly.

Plaintiffs first argue that the immunity of section 12414.26 does not apply to omissions, because it specifies that "[n]o act done, action taken, or agreement made . . . shall constitute . . . grounds for prosecution or civil proceedings." (AOB 36.) Limiting the reach of the immunity in this way would be nonsensical, as any omission generally also can be viewed as an act or action. Here, for example, Plaintiffs claim that Fidelity *omitted* to file rates with the Commissioner, causing it to *act* by charging an unfiled rate. It would make little sense to construe the statute so that the immunity turns on whether an alleged wrong is framed as an act or as an omission. "Statutes are to be given a reasonable and

commonsense interpretation consistent with the apparent legislative purpose and intent 'and which, when applied, will result in wise policy rather than mischief or absurdity.' " (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1392, superseded by statute on other grounds.)

Plaintiffs' second argument is that because section 12414.26 refers to "civil proceedings under any other *law* of this state heretofore or hereafter *enacted*," it extends only to civil proceedings alleging a violation of statutory law and not to common law actions such as breach of fiduciary duty. (AOB 36-37.) That interpretation is inconsistent with the purpose of section 12414.26 to grant immunity from civil challenges to the ratemaking activity regulated by Article 5.5. Furthermore, it is a question that should be saved for another day; although Plaintiffs sought relief in the trial court for breach of fiduciary duty, the issue upon which this court granted review is whether section 12414.26 grants Fidelity immunity from Plaintiffs' statutory UCL claim.

Conclusion

Permitting a litigant to defeat the immunity provided by section 12414.26 simply by alleging that a rate charged by an underwritten title company had not been properly filed would result in hindsight immunity that would be all but useless. Challenges to rates charged by regulated title entities are entrusted to the exclusive jurisdiction of the Commissioner; civil suits are barred.

This result avoids the perverse incentives that propel fee-driven lawsuits like this one, which seeks tens of millions of dollars in damages even though it is undisputed that Plaintiffs received valuable services at reasonable prices to which they had agreed in advance, resulting in no actual harm to them of any kind.

Accordingly, this court should affirm the judgment of the Court of Appeal.

Respectfully Submitted,

Dated: July 12, 2019

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