S252035

IN THE SUPREME COURT OF CALIFORNIA

MANNY VILLANUEVA et al.,
Plaintiffs and Appellants,

vs.

FIDELITY NATIONAL TITLE COMPANY,
Defendant and Appellant.

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

REPLY BRIEF

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

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INTRODUCTION

As Fidelity concedes, the Insurance Commissioner, represented by the Attorney General, agrees with us that "section 12414.26 only grants immunity for antitrust actions and the Commissioner does not have exclusive jurisdiction over rate setting." (Answer 72.)

And Fidelity does not dispute that there is no legal distinction between charging a rate for a service for which no rate was filed, and charging a rate higher than the filed rate. *Both* are unfiled rates. (AOB 18.) We respectfully ask the Court to make this very clear.

Fidelity agrees that under Article 5.5, it "may not charge a rate that has not been filed with Commissioner," and concedes that it did so anyway. (Answer 11, 25.) We, and the Court, have asked Fidelity to explain how the admitted failure to comply with Article 5.5 can also be an "act done pursuant to the authority conferred by" that very statute, as required by the immunity provision? (AOB 16-17.) Fidelity does not offer a logical answer, since none is possible.

We urge the Court to consider and give meaning to each of the 60 words the Legislature uses in Section 12414.26. In contrast, Fidelity consistently dodges the Legislature's actual language via paraphrases and ellipses. So we ask: why is Fidelity afraid of the statute's actual words?

ISSUE ONE: Section 12414.26 Does Not Immunize Fidelity

A. Fidelity ignores the Legislature's actual words, misrepresenting the language via paraphrase and ellipses. The scope is "very narrow."

Fidelity argues: "If the Legislature had intended the immunity to be so narrow, it would have so written the statute." (Answer 35.) But the Legislature *did* write a very *narrow* statute, constraining it via no fewer than five limiting clauses:

» 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.

(§ 12414.26.)

In claiming the scope is "broad," Fidelity cites one stray observation in one opinion: *MacKay v. Superior Court* (2010) 188 Cal.App.4th 1427, 1443. But elsewhere, *McKay* confirms the statute is "*very* narrow." Fidelity does not address *MacKay*'s conflicting characterizations.

Neither does Fidelity dispute the rule that immunity statutes are "strictly construed." (AOB 22, citing cases.)

Instead, Fidelity ignores the actual words, using paraphrases and rewrites to suit its own broad interpretation. Fidelity ignores that the Legislature expressly limited immunity to civil proceedings under "enacted" "state" law, and to "acts," "actions" and "agreements." Fidelity offers no explanation for the unusual language.

Fidelity's typical rewrite uses just ten of the statute's **60** words: "Section 12414.26 grants **immunity from lawsuits challenging any 'act** done . . . pursuant to the authority conferred by Article 5.5. . . .'" (Answer 13, ellipses in original.) Fidelity won't take the Legislature's full 60 words head-on. The reason is obvious.

B. Fidelity misconstrues this Court's holding in *Quelimane.* We respectfully suggest this Court clarify it here.

Fidelity grounds its argument in a profound misunderstanding of *Quelimane v. Stewart Title* (1998) 19 Cal.4th 26.

Fidelity misunderstands *Quelimane* to hold that *any* insurer misconduct related in *any* way to "ratemaking"/"rate setting" is immunized by section 12414.26 (and by extension, by all McBride-Grunsky immunity statutes). (Answer 28-29.) It (mis)understands this rule to apply not only to the antitrust/concerted action actually presented in *Quelimane,* but also to individual actions.

According to Fidelity, charging unfiled rates was "an act done pursuant to the authority conferred by Article 5.5 because it was [somehow] an activity related to rate setting." (Answer 30.)

As Fidelity notes, some lower courts "have relied on *Quelimane* to hold that section 12414.26 grants immunity for all activities related

to the setting or regulating of rates." (Answer 29.) They ignore the context of *Quelimane*: it was a Cartwright Act case. (19 Cal.4th at 35, 39, 43.) Moreover, the *particular type of antitrust misconduct* alleged was a conspiracy "to *deny* title insurance," i.e., a "boycott," not a conspiracy to *fix rates*. (*Id.* at 48.)

Thus, the issue was whether section 12414.26 immunizes concerted action that denies insurance (i.e., boycotts), in *addition* to immunizing concerted action related to rate setting (i.e., rate fixing). The sole question was: "whether the Insurance Code displaces the UCL and provides the only remedies for plaintiffs who have been harmed *by an alleged conspiracy* among title insurers *to refuse to sell* title insurance." (*Id.* at 33.)

This Court therefore did not decide whether immunity applies to individual misconduct, or just to concerted action:

> "We decide here ***only*** whether a title insurer's *violation of the Cartwright Act* in conduct *unrelated to rate fixing* may be the predicate for a UCL action."

(*Id.* at 33, 51.)

This Court held that, *in a concerted action case,* section 12414.26 immunity "does **not** displace the UCL except as to title insurance company activities related to rate setting." (*Id.*) This Court explained: "The scope of [12414.26] is expressly limited to articles 5.5 and 5.7. . . . Article 5.5 applies only to rate regulation [i.e., to *ratemaking*], article 5.7 only to advisory organizations which supply data related to *rate making*." (*Quelimane*, 19 Cal.4th at 44-45.)

Here, plaintiffs' UCL and breach of fiduciary duty claims are not

predicated on Fidelity's violations of the ratemaking statutes (Article 5.5) or to the ratemaking data sharing statutes (Article 5.7). Rather, they are predicated on Fidelity's violations of section 12414.27, which specifies that rates *charged* to the public must be "in accordance with" filed rates which have become effective.

Section 12414.27 is found **not** in Article 5.5 or Article 5.7, but in Article 6.9, and for this reason alone is outside the scope of the immunity statute. Fidelity offers nothing to rebut our analysis.

Instead, Fidelity relies on two lower courts (*Walker* and *Krumme*) that apparently misunderstood *Quelimane,* at least to an extent.

Walker "relied on the statement in *Quelimane* that a UCL 'claim premised upon rate setting activities would be barred by the applicable immunity statutes.'" (Answer 29, quoting *Walker v. Allstate* (2000) 77 Cal.App.4th 750, 758.) But the plaintiffs there never asked the court to distinguish the antitrust holding in *Quelimane* from the individual insurer misconduct they alleged. They did not examine *Quelimane* at all, at first "ignored" section 12414.26, and in reply provided "hardly any analysis." (*Id.* at 755.) Accordingly, the court never considered the antitrust distinction.

Krumme quoted *Quelimane* in dicta for the proposition that the Insurance Code does not displace the UCL "except as to activities related to rate setting." (Answer 29, citing *Krumme v. Mercury Ins.* (2004) 123 Cal.App.4th 924, 936-937.) As in *Walker*, *Krumme* did not have occasion to consider the critical distinction between the individual insurer conduct before it, and concerted activity.

Fidelity and the court below misunderstand *Quelimane* to hold

that the Legislature's phrase, "pursuant to the authority conferred by Article 5.5," immunizes *any* act "related" to ratemaking, even the charging of an unfiled, unlawful rate, whether in the antitrust context or not. We respectfully ask this Court to clarify that it did *not* so hold in *Quelimane*. We also respectfully ask it to disapprove any discussions in *Walker* and *Krumme* to the extent they are inconsistent with that clarification.

C. Fidelity asserts that immunity applies broadly to actions grounded on "any law." Not so.

Fidelity argues, "under any other law of this state enacted" cannot be construed to refer only to "antitrust laws," and that "if the Legislature had intended the immunity statute to be so narrow, it would have so written the statute." (Answer 35, 49-50.)

Fidelity ignores that *other* identically worded McBride-Grundy immunity statutes have been interpreted by California courts – including this Court – to mean what Fidelity says they can't possibly mean: that immunity is limited to "*antitrust* laws:"

- *SCIF*, 24 Cal.4th at 938: immunity under section 11758 extends only "to concerted activity."

- *Donabedian v. Mercury Ins.* (2004) 116 Cal.App.4th 968, 990-991: Section 1860.1 does not bar "challenges [to] unilateral conduct. . . ."

- *MacKay*, 188 Cal.App.4th at 1444, 1447: Section 1860.1 "was enacted, in the first instance, to immunize insurers from antitrust laws."

- *Cole v. Hartford* (C.D.Cal. 2009) 2009 WL 10675233: Section 1860.1 "only applies to activity barred by the antitrust laws."

Fidelity argues: "'Any other law' means any other law." (Answer 35.) But the statute actually says: "any other law of this **state** heretofore or hereafter **enacted** which **does not specifically refer to insurance**." This does not mean "any other law." It means state statutory law that does not refer to insurance.

Fidelity ignores the Legislature's use of unique language that pointedly immunizes only "**acts, actions and agreements**," and excludes "omissions." Fidelity never disputes that antitrust liability is unusual in that it cannot be predicated on omissions. (AOB 36.)

Fidelity argues that the majority of Article 5.5's provisions "set standards and establish procedures for the making, filing, and use of rates." (Answer 36.) But as Fidelity admits, Article 5.5 allows "exchange of information between the Commissioner, title insurers, and advisory organizations," and provides for "concert of action. . . ." (*Id.*)

Moreover, Fidelity omits all reference to Article 5.7, consistently using ellipses to excise Article 5.7 from the statutory language. Article 5.7 expressly authorizes the sharing of ratemaking data via advisory organizations that "supply data related to ratemaking." (*Quelimane*, 19 Cal.4th at 44-45; § 12401.5.) Such data sharing would otherwise violate

the antitrust laws. (*SCIF* at 939-940.)

And Fidelity ignores that the majority of the provisions of the original McBride-Grunsky Act (and the parallel workers compensation statutes) *also* "set standards and establish procedures for the making, filing, and use of rates;" yet courts have held *their* immunity provisions apply only to antitrust actions. (*SCIF* at 938; *Donabedian* at 990-991; *MacKay* at 1444, 1447; *Cole* at *4.)

Finally, Fidelity argues section 11758, applicable to workers compensation and construed in *SCIF*, means something completely different than section 12414.26, despite the identical wording. Fidelity points out that former section 11750 stated that the purpose of the article containing section 11758 is to promote public welfare "by regulating concert of action." (Answer 86-88.) Because there is no comparable provision in the Title Insurance Regulatory Act, Fidelity argues *SCIF* does not apply.

This holds no water. McBride-Grunsky, like the Title Insurance Regulatory Act, has no comparable provision expressly referencing concert of action. Nonetheless, courts hold that McBride-Grunsky immunity (section 1860.1) is limited to concerted action, citing *SCIF*. (*Donabedian* at 990-991; *Cole* at *4.)

D. Legislative history confirms that the Legislature intended to immunize concerted actions only.

1. Fidelity agrees: sections 1860.1 and 12414.26 are of identical scope.

We agree with Fidelity on two critical points:

- "When construing statutes, courts may consider the legislative history . . . as well as the wider historical circumstances of its enactment." (Answer 37.)

- Section 12414.26 was "modeled on section 1860.1, which was adopted as part of the McBride-Grunsky Act... An understanding of section 12414.26, therefore, begins with the McBride-Grunsky Act." (*Ibid.*)

2. The intent of section 1860.1 was to immunize insurers from rate fixing liability under state antitrust statutes.

As Fidelity states, the U.S. Supreme Court in 1944 held that insurance is subject to federal antitrust law. (Answer 37-38.) This was "greeted with alarm" by the insurance industry, who believed "application of federal antitrust laws . . . would have a disastrous result." (Answer 39.) "Congress reacted quickly," enacting the McCarran-Ferguson Act, immunizing insurance from federal antitrust liability conditioned on the states regulating insurance. (Answer 39-40.) McBride-Grunsky was the result.

But Fidelity's recounting omits the key event responsible for section 1860.1: this Court's decision in *Speegle v. Board of Underwriters* (1946) 29 Cal.2d 34, a Cartwright Act antitrust case. There, this Court held that insurance is subject to *state* antitrust law. (*Id.* at 49-51.)

Section 1860.1 (and thus 12414.26) was a direct response to *Speegle* (i.e., to the expansion of *state* antitrust law), **not** a direct response to McCarran-Ferguson. The rate regulatory provisions of McBride-Grunsky qualified California for McCarran-Ferguson immunity from Federal antitrust law, but 1860.1 "was adopted to immunize insurers from [state] antitrust laws." (*Donabedian*, 116 Cal.App.4th at 982, 990.) Section 1860.1 (and 12414.26) were enacted *solely* to address *Speegle*, and had nothing to do with McCarran-Ferguson compliance. There would be no need for section 1860.1 (and 12414.26) but for *Speegle*.

Fidelity has no response, other than to rely on a two-sentence excerpt buried in *MacKay* (Answer 44), citing nothing more than a letter from Deputy A.G. Haas to Governor Earl Warren. The *MacKay* excerpt states:

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

(188 Cal.App.4th at 1445.) *MacKay*'s use of passive voice ("it was recognized") makes us question exactly *who* considered the immunity language, "broader?" Deputy AG Haas? Actually not, as we shall see. Certainly not the Legislature, subsequent courts, or even the *MacKay* court itself (elsewhere in its opinion).

This two sentence throwaway in *MacKay*, citing only Haas's letter, is the *sole* statement by *any* court that the Legislature intended McBride-Grunsky immunity to be "broader" than exemption from antitrust laws. Thus, it warrants a little scrutiny. What did Haas really write and mean?

On close reading, it becomes clear that he meant section 1860.1 was enacted to counter *Speegle* by immunizing against concerted action suits brought under both the Cartwright Act and *similar statutes*.

The Haas language *MacKay* and Fidelity cite is found within Section (4) of Haas's letter. Haas's caption for this entire discussion is:

> **"Authorization of cooperation between insurers in rate-making and related matters."**

Under that, he writes:

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

Fair Trade Act are applicable to insurance, the exemption applies to them also."

(RJN Ex. 4, Haas Letter at p.3, Attachment 1 hereto.)

Neither *MacKay* nor Fidelity reference Haas's *specific* discussion of Section 1860.1. Haas wrote:

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

(*Id.* at 13.)

Read in context, it is clear Haas used "broad" to acknowledge that immunity from concerted action suits extended beyond just the Cartwright Act, to other "restraint of trade" or "similar" California statutes. (*Id.*) Haas said nothing about immunity extending beyond restraint of trade.

Finally, even if Haas's letter stands for what Fidelity says it does, it doesn't evidence legislative intent, because it was not available to the whole Legislature, nor is Haas a Legislator, nor is he writing on behalf of the Legislature or any Legislator. The letter sheds no light on legislative intent. (*Cal. Teachers Ass'n v. SDCC* (1981) 28 Cal.3d 692, 700-701.)

The *MacKay* excerpt's persuasive value is further undermined by the fact that *MacKay* itself repeatedly contradicts it. Elsewhere, *MacKay* describes the immunity statute as "very narrow," i.e., *not* "broad." (*Id.* at 1443.) Elsewhere, *MacKay* says the Legislature in 1947 enacted

section 1860.1 "in the first instance, to immunize insurers from antitrust laws" (*id.* at 1444), and that its initial intent "was to exempt insurers from antitrust laws." (*Id.* at 1447.)

3. The intent of Section 12414.26 was the same as 1860.1: to immunize against rate fixing liability under state antitrust statutes.

Fidelity agrees that in enacting 12414.26 in 1973, the Legislature gave the title industry "the **same** immunity" McBride-Grunsky gave other insurers. (Answer 48-49.) This is also confirmed in the legislative history:

> "This bill makes title insurance subject to the **same** rate regulation provisions applicable to property and casualty insurers. . . ."

(RA1122, DOI Legislative Analysis, SB 1293, 8.30.1973, Attachment 2 hereto.)

But Fidelity omits the most important part of the history: the Legislature's *reason* for extending McBride-Grunsky immunity to title insurance. That reason was an urgent plea for help from the title industry, in response to a massive Cartwright Act antitrust price fixing class action William Shernoff filed in December 1972. (AOB 27-28; RJN Ex. 4, *Shernoff* Complaint.)

As explained in the Assembly Finance & Insurance Committee Analysis, dated August 29, 1973:

> "**Recently**, several suits have been brought against title insurance companies alleging that they have violated **the California anti-**

trust statutes by **conspiring** among themselves **to fix rates**. . ." (RA1134, Attachment 3 hereto.)

This further confirms that section 12414.26's purpose was to immunize insurers from Cartwright Act and other state statutory antitrust suits related to ratemaking (i.e., based on unlawful sharing of loss and pricing data and resultant price fixing). Such suits are exactly what the property/casualty insurance industry was afraid of in 1947 and the title industry in 1973, when they convinced the Legislature to enact sections 1860.1 and 12414.26, respectively.

4. Proposition 103 does not help Fidelity.

In 1988, Proposition 103 added section 1861.10(a). Fidelity claims this "gave the public the power to enforce the initiative." (Answer 51.) According to Fidelity, there would have been "no reason" to add it "if the public already had the power to seek redress for rate grievances." (Answer 53.) Fidelity concludes that allowing a right to sue title companies for unlawful overcharges would "judicially rewrite" the statutes regulating title insurance "to give them the same effect as Proposition 103." (Answer 53.) None of this is remotely true.

Section 1861.10(a) only gives the public power to "enforce any provision of *this article*" (i.e., Article 10, §§ 1861.01-1861.16) which:

- required 20 percent rollback of insurance rates;
- requires "prior approval" by Commissioner of future rates;
- entitles qualified applicants to receive Good Driver Discount;
- prohibits using lack of insurance as eligibility criterion;

- sets stricter standards for whether rate is excessive or inadequate; and
- enables consumer participation in rate-setting process.

(§§ 1861.01, 1861.02, 1861.05.)

Allowing consumers to sue title companies for charging unfiled rates in no way "judicially rewrites" the title insurance statutes to give consumers any of these bulleted rights and powers, let alone *all* of them. Not even close.

Section 1861.10(a) was added to give consumers the new right to participate in the process of making/setting/approving rates in the first place, and to allow public advocates compensation for contributing to that process. (§ 1861.05.) But it did not give the public a *new* right to sue for charges above what the filed rates allow, which is what our case is about. *That* right *always* existed. (Discussion, Part One, §§ B-F.)

Fidelity's position is at odds with *SCIF*: that an insured *could* sue to recover overcharges in a Proposition 103 exempt line of insurance – workers compensation, just as here. (24 Cal.4th at 936.) This Court obviously did not thereby "rewrite" the statutes regulating workers compensation to give them "the same effect as" as Prop 103. (Answer 53.)

Proposition 103 also added section 1861.03(a), which Fidelity claims "changed then-existing law by making rates and ratemaking activities subject to the laws of California that apply to other businesses." According to Fidelity, this, again, was only necessary because section 1860.1 provided broad immunity from California law, and 1861.03 was in effect needed to undermine the (purported) broad

immunity. (Answer 51, 53.). But according to *MacKay*, section 1861.03 "does *not* undermine" the immunity of 1860.1. (*MacKay*, 188 Cal.App.4th at 1443, 1444; accord *Walker*, 77 Cal.App.4th at 756.)

E. Article 5.5 does not confer authority to charge unfiled rates.

Fidelity's own authority explains that the immunity language "does not exempt *all* ratemaking acts," but *only* "acts done 'pursuant to the authority conferred by'" the statute. (*MacKay*, at 1443.) Immunity "does *not* extend to insurer conduct *not* taken pursuant to that authority." (*Id.* at 1450.)

Fidelity concedes that only acts done "pursuant to the authority conferred by Article 5.5" can be immunized. (Answer 13.) Fidelity also concedes that Article 5.5 requires Fidelity to "file with the commissioner its schedules of rates (§ 12401.1)," and prohibits Fidelity "from charging rates for its services until it has complied (§ 12401.7)." (Answer 27-28.) Finally, Fidelity readily admits it charged unfiled rates. (Answer 18-19.)

So we – and this Court – ask: how can Fidelity's admitted failure to comply with a statute also be an "act done pursuant to the authority conferred by" that very statute? (AOB 16-17.) Fidelity's Kafka-esque response is that it acts "pursuant to the authority conferred by Article 5.5 *whenever* it charges customers," even when it charges an unfiled rate that violates the statute. (Answer 27.)

Fidelity's only "support"? A transparently false syllogism, i.e., that Article 5.5 (supposedly) authorizes Fidelity to charge "any rate," so

the "act of charging any rate" (filed or unfiled, prohibited or not) must be immunized. (Answer 13, 27.)

The obvious flaw is that Article 5.5 does *not* authorizes Fidelity to charge "any rate." It only authorizes rates *filed* with the Commissioner which have become *effective* after public display. (§§ 12401.1, 12401.7.) Nothing in Article 5.5 confers authority to charge *un*filed rates.

Fidelity argues that *Fogel v. Farmers* (2008) 160 Cal.App.4th 1403 construed "pursuant to the authority" to encompass all conduct "regulated" by the ratemaking statutes, not just conduct that "complie[s] with the requirements. . . ." (Answer 80.) Fidelity misconstrues *Fogel*. There, as here, plaintiffs challenged the charging of **unapproved** fees. Held: immunity does not apply because the ratemaking chapter "**does not authorize the collection of [the] fee**." (*Id.* at 1414.)

As Fidelity correctly notes, *Fogel* is "instructive": it "held . . . that the suit was not barred by section 1860.1 because collecting fees as an attorney in fact is **not** an 'act done . . . pursuant to the authority conferred by' Chapter 9." (Answer 79, citing *Fogel* at 1416.) Here, Fidelity's act of charging an unfiled fee is – similarly – **not** an act done "pursuant to the authority conferred by" Article 5.5.

In *SCIF,* this Court recognized that immunity extends only to actions taken "pursuant to the authority conferred by" the ratemaking article, and *not* to *all* actions taken "pursuant to" that article. (24 Cal.4th at 936.) In *SCIF*, that article required insurers to report their financial information, but prohibited *misreporting*. (*Id.* at 936-937.)

Litigation based on that misconduct could not be immunized. (*Id.* at 938.) Now, Fidelity asks this Court to wipe out the critical distinction *SCIF* announced.

Importantly, as here, the *SCIF* plaintiffs did not challenge "the manner in which premiums or rates are set" nor argue that the filed rates are "excessive," but instead challenged "individual misconduct of an insurer regarding its insured." (*Id.* at 936-938, 942.) This Court held: claims premised on insurers "charging **approved rates** alleged nevertheless to be 'excessive'" are precluded, but challenges to unilateral insurer misconduct that results in unlawful charges are *not*. (*Id.* at 936-937, 942.)

Fidelity argues neither *MacKay* nor *Walker* specifically holds that "immunity does not extend to unfiled or unapproved rates." (Answer 80-85.) Yet Fidelity acknowledges that both "held that an insured may not bring a civil action challenging a rate . . . that had been **approved**." (Answer 81.) *MacKay* even holds that if, as here, the challenged conduct is "*not* the charging of an approved rate," the immunity statute "would *not* be applicable." (188 Cal.App.4th at 1449-1450.)

Fidelity cites *MacKay* for the proposition that sections 1860.1 and 1860.2 "taken together" appear to exempt insurance "ratemaking" from all California laws outside the ratemaking chapter itself. (Answer 82, citing *MacKay* at 1441-1442.) Fidelity says that analogously, sections 12414.26 and 12414.29 "taken together" create an identical exemption.

First, as we repeatedly note, our suit does not concern "ratemaking" at all, but rather the charging of unfiled rates. Second, Fidelity's thesis turns on its assertion that section **12414.29** is

"modeled" on **1860.2**. (Answer 81-82.) This is incorrect: 12414.29 contains key qualifying language absent from 1860.2, specifically the words, "***notwithstanding any local regulation or ordinance***."

This Court held in *Quelimane* that the addition of this language to section 12414.29 means that it preempts only local regulation. (19 Cal.4th at 45.) We base *our* claims on state law, to which section 12414.29 has no application. *MacKay's* analysis of section 1860.2 is therefore inapposite here.

Finally, Fidelity nitpicks at three federal cases we cite (Answer 90-92), but cannot counter their core holding: the immunity statutes bar challenges to filed/approved rates only. (AOB 42-44.) Tellingly, Fidelity cannot point to even one decision extending immunity to unfiled/unapproved rates.

Fidelity's reliance on *Walker, Krumme* and *MacKay* is misplaced; each turns on the fact that the rates were filed and approved. (*Walker*, at 75; *Krumme*, at 936-37; *Mackay*, at 1443.) And *none* considered the "enacted law" language, or the affirmative acts and agreements limitation.

Fidelity says we "appear to acknowledge that the act of charging a rate is an 'act done . . . pursuant to the authority conferred by Article 5.5.'" (Answer 30, fn.6, citing AOB 38-39.) Fidelity misunderstands. We acknowledge that Article 5.5 confers authority on Fidelity to charge a *filed* and *publically posted* rate – *any* such rate, regardless of how high or how unreasonable. But *nowhere* do we acknowledge that the act of charging an *un*filed rate is done pursuant to the authority conferred by Article 5.5. (AOB 11, 15-17, 37-44.)

The trial court got it right: "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." (Answer 21-22.)

Simple logic tells us that Fidelity's unlawful act of charging an *unfiled* rate in admitted violation of Article 5.5 can't be an act done pursuant to the authority conferred by that same Article.

As Fidelity says, "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*." (Answer 92-93, quoting *Dyna-Med v. FEHC* (1987) 43 Cal.3d 1379, 1392.)

We wholeheartedly agree.

F. Immunity is expressly limited to "acts" done (not omissions), and applies only to "enacted" law (not common law).

1. The plain language of the statute controls: its immunity applies only to "enacted" law.

The court below held that "immunity bars 'civil proceedings,'" including plaintiffs' "breach of fiduciary duty" claims. (Opinion 49.) This holding must be reversed because it is contrary to section 12414.26's express language, which limits immunity to "civil proceedings under any law of this state heretofore or hereafter enacted."

Courts must give significance to a statute's every word. (*Manufacturers Life*, 10 Cal.4th at 273-274.) Here, Fidelity does not

dispute that "enacted law" is statutory law (AOB 36-37), but argues that excluding common law claims from immunity is "inconsistent" with an intent "to grant immunity from civil challenges to ratemaking activity." (Answer 93.)

We agree. The Legislature did use language inconsistent with an intent to grant immunity to all civil challenges to ratemaking activity – because the Legislature did not intend to grant such immunity. The language used *is* consistent with the true legislative purpose: to immunize conduct that would otherwise violate California's antitrust statutes, primarily the Cartwright Act. (See AOB 23-32; *Cole v. Hartford*, at *4, following *Donabedian*, 116 Cal.App.4th at 990-91.)

Fidelity's interpretation must be rejected because it renders the term "enacted" meaningless, in contrast to our interpretation which gives significance to that term. Our interpretation is consistent with, and furthers, the Legislature's intent to limit immunity to statutory antitrust actions.

The court below had no authority to override the plain language limiting immunity to "enacted" law, mandating reversal on this point. Fidelity asks this Court to save this issue "for another day," but if not expressly reversed, this erroneous holding will be binding throughout California. (CRC 8.1115(e)(2).) Fidelity asserts this Court limited review to the "statutory UCL claim" (Answer 93), but the grant of review makes no mention of any particular causes of action. Fidelity also ignores CRC 8.520(b)(3), which expressly permits discussion of all issues "fairly included" within those specified. This is certainly one.

More than 18 years have passed since this Court last considered

the McBride-Grunsky immunity issue; it may be another 18 years until it does so again. We therefore urge this Court to seize today's opportunity to clarify all that it can now, before moving on.

2. The plain language explicitly limits immunity to an "act . . . action . . . or agreement."

A safe harbor statute does not immunize omissions, unless it says so "explicitly." (*Krumme*, at 940, fn. 5.) Fidelity never disputes that the explicit language here excludes omissions, nor does Fidelity dispute that the Legislature has used this construction *only* in the McBride-Grunsky immunity statutes. Nevertheless, Fidelity asserts it would be "nonsensical" not to extend the scope of the immunity beyond the words of the statute. (Answer 92.) As noted, courts don't have the authority to do that.

In any event, Fidelity misses our point. The Legislature has defined actionable malfeasance to be "acts and omissions" in more than 600 statutes, but **not** in **this** statute – a fact Fidelity doesn't dispute. (AOB 36.) Unique language implies unique meaning; special language implies special significance. And that significance becomes apparent when the legislative history is viewed in the context of antitrust law. Fidelity does not dispute, and therefore concedes, that antitrust statutes proscribe only affirmative acts, actions and agreement, not failures to act. (AOB 36.)

The Legislature used special language to limit the type of malfeasance to be immunized. That limitation exactly describes the type of malfeasance addressed by antitrust statutes, and not that

addressed by most others. Together with the legislative history, the Legislature's intent becomes even more clear: McBride-Grunsky immunity was directed at antitrust liability only.

Fidelity offers no explanation for the Legislature's unique choice of words – presumably because the only explanation is the one above.

G. Fidelity argues the public must be denied due process whenever Fidelity asserts an immunity defense.

Fidelity says letting courts decide the predicate facts for establishing immunity "would defeat the purpose." (Answer 13, 31.) According to Fidelity, the Legislature intended to deprive the public of its Constitutional right to have courts decide foundational factual disputes. (Answer 14, 32-33.) This is plainly *wrong* and repugnant to due process. "A fair trial in a fair tribunal is a basic requirement of due process." (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1025.) Statutory immunities "operate as affirmative defenses" which "must be pleaded and *proved*." (*Quigley v. Garden Valley Fire Protection Dist.* (2019) 7 Cal.5th 798, 808-809.)

Fidelity claims fives cases hold plaintiffs cannot challenge the factual basis for an immunity defense. (Answer 31-32.) But none so hold. And each involves *governmental immunity* which, unlike ordinary immunity, is applied broadly on public policy grounds. (*Hunter v. Bryant* (1991) 502 U.S. 224, 229.) Even in *governmental* immunity cases, courts protect plaintiffs' due process rights. (*Martinez v. County of LA* (1996) 47 Cal.App.4th 334, 344 [affirming summary judgment because "*facts* . . . properly call for" immunity].)

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

A. The Commissioner views his jurisdiction to be concurrent, not exclusive. This Court has repeatedly held that his position is entitled to "great weight."

Fidelity concedes that the Commissioner's long-standing position is that "section 12414.26 only grants immunity for antitrust actions" and "**the Commissioner does not have exclusive jurisdiction over rate setting**." (Answer 72.) But Fidelity asks this Court to extend no deference to the Commissioner's position (Answer 72), based on its misreading of *Yamaha v. State Bd. of Equalization* (1998) 19 Cal.4th 1. Fidelity believes that under *Yamaha*, the Commissioner's view "is entitled to no more than 'consideration and respect by the courts.'" (Answer 73.) But this Court actually held that:

> "the binding power of an agency's interpretation of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation."

(19 Cal.4th at 7.)

This Court carefully noted that "because the agency will often be interpreting a statute within its administrative jurisdiction, it may possess special familiarity. . ." (*Id.* at 11.)

Fidelity ignores this Court's holding two years later that: "Courts *must* give **great weight** and respect to an administrative agency's interpretation of a **statute governing its powers and responsibilities**."

(*Ste. Marie v. Riverside County* (2009) 46 Cal.4th 282, 292.)

Nor does Fidelity address *Krumme*'s ultimate conclusion: "that the Commissioner does not view the trial court as having poached into the Commissioner's statutory domain is clearly significant. . . . we defer to his interpretation of his authority." (*Krumme*, 123 Cal.App.4th at 937.)

Fidelity says we place great emphasis on the fact that the Commissioner "agrees with [us]." (Answer 72.) Fidelity is right. We do. And we place significant emphasis on the Commissioner's Senior Staff Counsel, who wrote:

> **"No procedure is available at CDI for obtaining restitution or other relief sought by plaintiffs in the court case."**

(AOB 65, and Attachment 1 thereto.)

B. Exclusive jurisdiction arises only where the Legislature *expressly* grants *exclusive* authority to the Commissioner to resolve an issue.

We pointed to the importance of this Court's analysis in *State of California v. Altus Finance* (2005) 36 Cal.4th 1284. That analysis – which Fidelity completely ignored – is dispositive here.

In *Altus,* the Attorney General sought UCL restitution, civil penalties and injunctive relief against defendant who defrauded an insolvent insurer. (*Id.* at 1291.) This Court addressed section 1037, which grants the Commissioner – "**exclusively**" – authority to 1) "collect **all** moneys due" an insolvent insurer, and 2) "prosecute" suits

involving the insolvent insurer's "property." (§ 1037(a),(f).)

Based on that statutory language, this Court held that section 1037 is an "express limit on the authority of the Attorney General to seek a restitutionary remedy." (*Id.* at 1303.) This Court explained:

> "The Commissioner is acting primarily not as regulator but as conservator and trustee, and is given the exclusive authority to act on behalf of the insolvent insurer's policyholders and creditors in civil actions. This exclusive authority precludes the Attorney General from exercising concurrent jurisdiction in a manner that would essentially duplicate the Commissioner's legal action. The Attorney General's claim for restitution under the UCL does precisely that and is therefore barred. . . ."

(*Id.* at 1307.)

But section 1037 – which uses the word "**exclusively**" – still does not confer exclusive jurisdiction on the Commissioner to pursue civil penalties and injunctive relief. Instead, this Court held that the courts and the Commissioner have *concurrent* jurisdiction because such penalties and injunctive relief "are ***not*** primarily concerned with restoring policyholders' or creditors' property." (*Id.* at 1308.) The Commissioner has exclusive jurisdiction over the latter under the statute's express terms, but the statute does not address the former.

Fidelity's position cannot be reconciled with this Court's decision in *Altus*. Presumably, that's why Fidelity won't address it.

In *Bell v. Blue Cross* (2005) 131 Cal.App.4th 211, consistent with *Altus*, the court found no exclusive jurisdiction even though the agency was expressly authorized to enforce the statutory scheme with no

parallel authorization for suits by individuals:

> "Although the Department of Managed Health Care has jurisdiction over the subject matter . . . its jurisdiction is *not exclusive* and there is *nothing in section 1371.4 or in the Act generally to preclude a private action* under the UCL or at common law. . . ."

(*Id.* at 216.)

Fidelity's position is, again, incompatible.

We pointed to the workers compensation statutory scheme as a classic example of *actual* exclusive agency jurisdiction (AOB 56-57), because it mandates administrative proceedings as the "**exclusive** remedy." (Labor Code §§ 3601, 3602.) Fidelity's response? *Silence*.

C. Fidelity asserts Section 12414.29 confers exclusive jurisdiction on the Commissioner, but this Court has long held the opposite.

Fidelity repeatedly claims: "section 12414.29 makes the administrative procedure exclusive." (Answer 15, 44-45, 58-60, 72.)

In (purported) support, Fidelity quotes part of that statute: "The 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. . . ." (Answer 15.)

Fidelity omits, via ellipses, the important qualifier: ". . . . ***notwithstanding any local regulation or ordinance***." (§ 12414.29.)

This Court, in *Quelimane*, considered these words to be critical; so critical, in fact, that they mandated rejecting the very argument

Fidelity rehashes here:

> "[Defendant] argues that UCL actions against title insurers are precluded by the last sentence of section 12414.29 . . . We disagree. [Defendant]'s argument ignores the remainder of that sentence – ***'notwithstanding any local regulation or ordinance'*** – which makes it clear that the legislative purpose was to preempt local regulation, not to exempt title insurers from other state laws governing unfair business practices."

(*Quelimane*, 19 Cal.4th at 45.) This Court determined that the legislative history dispels "any doubt" about the purpose of 12414.29: "the regulations in the chapter to which Insurance Code section 12414.29 refers . . . are exclusive **to the exclusion of any local regulation or ordinance**. . . ." (*Id.* at 45-46.)

In *Stevens v. Sup. Court* (1999) 75 Cal.App.4th 594, 605, the court construed identically worded language, and held consistent with *Quelimane*. The courts have made it clear: section 12414.29 does not apply here.

D. Section 12414.13 does not confer exclusive jurisdiction on the Commissioner.

Fidelity continues to rely on section 12414.13, arguing that its administrative procedures grant the Commissioner "authority to determine" whether a rate charged complies with Article 5.5. (Answer 55.) Tellingly, Fidelity does not claim that section 12414.13 grants "exclusive" authority – just that it grants the Commissioner "authority," and only if an insured elects to proceed by administrative review.

Section 12414.13 provides: "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 [outcome of the review] may file a written complaint and request for hearing with the commissioner."

This is not even close to an *express* grant of *exclusive* authority, and no court has held that it is. Ever. The Commissioner's jurisdiction is not exclusive if the statute "states that an aggrieved person '*may* file a written complaint'." (*Cole*, *supra*, at *4.)

The Legislature in section 12414.13 repeatedly chose to use the word, "**may**," and expressly defined "may" to be "permissive." (§ 16.) When, as here, the Legislature has statutorily defined a word, "courts are not at liberty to look beyond the statutory definition." (*U.S. v. Smith* (9th Cir. 1998) 155 F.3d 1051.)

Indeed, administrative proceedings with "seemingly permissive" options need not be exhausted because, "even to attorneys, the word 'may' ordinarily means just that. It does not mean 'must' or 'shall.'" (*Sierra Club v. San Joaquin Local Agency* (1999) 21 Cal.4th 489, 499.)

Fidelity's only response is semantic: "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*." (Answer 55.)

Here, Fidelity in effect contends that the Commissioner's jurisdiction is always exclusive unless the statute expressly permits individual court action; in so arguing, Fidelity would turn the exclusive jurisdiction doctrine on its head. The *actual* rule is the opposite: the

Commissioner has exclusive jurisdiction only if the statute expressly grants exclusive authority to the Commissioner. (The Rutter Group, Administrative Law, at ¶ 15:770; *Bell*, 131 Cal.App.4th at 216.)

E. That the Commissioner's expertise may be needed does not confer exclusive jurisdiction. Case law confirms the Commissioner's jurisdiction is primary, i.e., shared and concurrent.

Fidelity asserts that courts have "long recognized" that issues relating to title company rates have "traditionally commanded administrative expertise." (Answer 57.) So Fidelity argues the Commissioner's expertise is needed here on a "nuanced question": whether section 12340.7 requires Fidelity "to file rates for delivery fees collected from customers and passed through to third-party delivery service providers." (Answer 56.)

Fidelity reverses itself within 15 pages – when it asks this Court to *ignore* the Commissioner's support of *our* position: "statutory construction is a matter of law for the *courts*," not for the Commissioner, Fidelity then says. (Answer 72-73).

But even if a trial court decide it needs the Commissioner's expertise, that would not confer exclusive jurisdiction. This Court has repeatedly explained that primary jurisdiction – not exclusive jurisdiction – applies where a claim "requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. . ." (*Farmers v. Superior Court* (1992) 2 Cal.4th 377, 390.)

In 2004, this Court heard a dispute over interpretation of a complicated rate manual rule "regarding the method of computing insurance premiums." (*Jonathan Neil & Assocs. v. Jones* (2004) 33 Cal.4th 917, 933-934.) The Commissioner had *himself* drafted the rates. (*Id.* at 925-926.)

Even so, "the doctrine of primary jurisdiction rather than exhaustion of remedies [i.e., exclusive jurisdiction] applied," because fraud and breach of contract claims (even if grounded on Insurance Code rate violations) are "originally cognizable" in court. (*Id.* at 933-934.)

Fidelity offers no rebuttal.

Pretending this Court never decided *Jonathan Neil*, Fidelity instead cites *Chicago Title v. Great Western Financial* (1968) 69 Cal.2d 305, decided 50 years ago before title rates were regulated.

Not surprisingly, *Chicago Title* is a statutory antitrust case alleging rate fixing – the very conduct the Legislature intended to immunize via McBride-Grunsky (*Donabedian*, 116 Cal.App.4th at 980, 990) and which this Court said was immunized in *Quelimane*. (See Discussion, Issue One, § B.)

Fidelity cites *Chicago Title*'s generic observation – made in the context of antitrust allegations – that "a court is not the appropriate initial arbiter of factors involved in insurance costs." (Answer 57.)

Our case involves neither antitrust allegations nor "factors" involved in setting "insurance costs," but rather charges never filed, and costs never presented to or reviewed by the Commissioner. Moreover, the particular charges *here* – "document preparation," "overnight mail"

and "courier" – are not even arguably within the Commissioner's specialized expertise.

Plus, the Court's comment about "insurance costs" applied to just *one* of the eleven antitrust counts under consideration: "sale of title insurance below cost . . . for purpose of injuring competitors." (*Id.* at 320-323.)

This Court has since noted that the comment Fidelity cites is dictum, and has clarified that *Chicago Title* "did **not** hold" that the Legislature "granted the insurance industry a general exemption" from unfair business practices statutes. Rather, the Legislature intended that rights and remedies under those statutes were "**cumulative**" to the Commissioner's powers. (*Manufacturers Life*, 10 Cal.4th at 263.)

Fidelity cites *SCIF*, 24 Cal.4th at 943, for the unremarkable proposition that "calculation of insurance premiums and interpretation of SCIF's reporting requirements . . . is best suited to the administrative process." (Answer 57.) Again, this does not help Fidelity. Our case does not involve *calculation* of rates and premiums, nor "reporting requirements." Rather, we are concerned with something totally different: unfiled rate charges.

And even if our case *did* involve the way Fidelity *calculated* the rates it charged, and even if that calculation method *were* well suited to the Commissioner's administrative process, the Court's directive would invoke the *primary* jurisdiction doctrine only. It would **not** confer exclusive jurisdiction.

Finally, Fidelity claims that *Farmers* "recognized that the Commissioner has exclusive jurisdiction over claims that insurers

violated statutes setting standards for rates." (Answer 76.) This is a gross oversimplification. In *Farmers*, the plaintiff brought two claims: the first for direct violations of the Insurance Code, and the second for UCL claims based on those same statutory violations. (*Id.* at 381-382.) This Court held:

> "Count 1 [for direct Insurance Code violations] presented a question of exhaustion of administrative remedies . . . over which the Insurance Commissioner has been given exclusive jurisdiction. . . . **By contrast**, count 2 [for UCL violations] is 'originally cognizable in the courts,' and thus triggers application of the primary jurisdiction doctrine."

(*Id.* at 391.)

Here, we assert no direct Code violations. Rather, our claims – common law breach of fiduciary duty and statutory UCL – are originally cognizable in court. Fidelity concedes: "The doctrine of primary jurisdiction *applies where a claim is originally cognizable in the courts*." (Answer 60.) Therefore, the Commissioner does **not** have exclusive jurisdiction.

Importantly, as Fidelity admits, *Farmers* based its limited finding of exclusive jurisdiction on "section 1860.2." (Answer 61-62.) Fidelity now claims that "section 12414.29 was modeled" on section 1860.2, implying that section 12414.29 (like section 1860.2) must therefore confer exclusive jurisdiction. (Answer 44-45, 62.)

But this Court held in *Quelimane* that section 12414.29 contains critical language ("*notwithstanding any local regulation or ordinance*") which limits its application: it only preempts *local* regulation. (19

Cal.4th at 45.) Fidelity ignores that the Legislature chose not to include this critical language in **section 1860.2**. Thus, section 1860.2 is **not** limited to preempting local regulation. Accordingly, section 1860.2 (and the case law applying it in property/casualty insurance cases) tells us nothing about the nature of the Commissioner's jurisdiction in title insurance cases. Section 12414.29 applies in title insurance cases, and this Court has long held that it does **not** confer exclusive jurisdiction. (*Id.* at 45.)

In *Altus*, this Court explained that, pursuant to *Farmers*, even a comprehensive rate regulatory scheme is not sufficient to confer exclusive jurisdiction: "The Commissioner had primary jurisdiction over the complaint. . . . [T]here was *nothing in the regulatory scheme to suggest an exception to the rule*. . . ." (36 Cal.4th at 1306.)

Fidelity has no answer to *Altus*, and so ignores it.

F. Immunity statutes do not confer exclusive jurisdiction on the Commissioner.

Fidelity asserts: "section 12414.26 immunizes regulated title companies from actions brought under other state law. . . . Thus, the Commissioner has exclusive jurisdiction. . ." (Answer 59.) This is a non sequitur.

Section 12414.26 does not confer exclusive jurisdiction. No court has so held. Rather, under section 12414.26, a given claim is either immunized or not, depending on the allegations. If **immunized**, then the case cannot proceed in court, period, regardless of whether the Commissioner has jurisdiction.

Similarly, the source of the Commissioner's jurisdiction (primary, exclusive, or non at all) has nothing to do with whether there is civil litigation immunity. The two concepts – litigation immunity under a safe harbor statute and administrative jurisdiction – are independent of each other. Nevertheless, Fidelity doubles down on its bizarre argument, relying on cases interpreting the safe harbor statute in the *property/casualty insurance* context to "prove" that the Commissioner has exclusive jurisdiction in the *title insurance* context. (Answer 74-79.) According to Fidelity, "the case law interpreting section 1860.1 consistently holds that the Commissioner has *exclusive* jurisdiction over ratemaking disputes." (Answer 74-75.)

No, it doesn't.

First, Fidelity purports to summarize *Krumme v. Mercury Ins.* (2004) 123 Cal.App.4th 924 as follows : "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.'" (Answer 75.)

Krumme actually held:

> "a claim predicated on a violation of the Insurance Code *not related to ratemaking* may thus be framed as a claim under the UCL" *and* "a judicial act constitutes rate regulation **only** if its principal purpose and direct effect are to control rates. . . ."

(*Id.* at 937.)

Krumme held that the Commissioner did **not** have exclusive jurisdiction, and did not disturb the trial court's finding that the defendant effectively charged more than the filed rate by adding

unauthorized fees to the premiums. "None of plaintiff's claims challenges any rate or premium which [defendant] submitted or obtained approval from the [Commissioner]." (*Id.* at 936-37.)

Thus, *Krumme* is "limited to situations where a plaintiff challenged a charged [filed and approved] rate as excessive per se, and effectively asked the Court to calculate an alternative rate it deemed more 'fair.' This is not the situation here." (*Wahl v. American Sec. Ins.* (N.D.Cal. 2010) 2010 WL 4509814, at *3.)

As noted in Issue One, Section B, to the extent *Krumme* construed this Court's *Quelimane* holding to be that McBride-Grunsky immunity bars *all* lawsuits related in *any* way to ratemaking, *Krumme* misunderstood *Quelimane*.

Next, according to Fidelity, *Donabedian* purportedly holds that under section 1860.1, "the commissioner had exclusive jurisdiction to adjudicate complaints about insurance rates." (Answer 75.)

Donabedian's actual holding: section 1860.1 was "adopted to immunize insurers from antitrust laws;" accordingly, it does not bar a court action which "challenges the unilateral conduct of a single insurer, does not involve concerted action, and has no antitrust implications." (116 Cal.App.4th at 990-991.)

Moreover, *Donabedian* held that even though the overcharge claim arose from violations of the rate regulation statutes, it was "originally cognizable in court," so the Commissioner "did **not** have exclusive jurisdiction." (*Id.* at 986.)

Here, plaintiffs' UCL and breach of fiduciary duty claims are predicated on Fidelity's violations not of statutes addressing

rate*making*/rate *setting* (found in Articles 5.5 and 5.7), but rather on section 12414.27, a statute addressing rate *charging*, found in Article 6.9. Section 12414.27 specifies that the rates a title company *charges* must be "in accordance with" its rate filings. Nothing in *Donabedian* suggests that a company's violations of same are not "originally cognizable in the courts." Accordingly, the Commissioner does **not** have exclusive jurisdiction.

Next, according to Fidelity, *Walker* held that section 1860.1 "provide[s] exclusive original jurisdiction over issues related to ratemaking." (Answer 75-76, quoting *Walker*, 77 Cal.App.4th at 754-755.) But like *Donabedian*, *Walker* illustrates why the Commissioner does **not** have exclusive jurisdiction here.

Walker was brought "against over 70 insurers," for claims arising "in an exclusively ratemaking context." (*Id.* at 752, 759.) *Donabedian* emphasized this distinction: "*Walker* is inapposite. . . ***Walker* involved a challenge to approved rates. This case does not.**" (*Donabedian*, 116 Cal.App.4th at 991-992.)

This Court emphasized: "The causes of action [in *Walker*] were each bottomed on the insurer charging *approved* rates alleged nevertheless to be 'excessive' . . . [Plaintiffs] were attempting to challenge. . . the *method* by which the rates were *set*, arguing that the [approved] rates were . . . 'illegal and void.'" (*SCIF*, 24 Cal.4th at 942.) That was not the case in *SCIF*, and it is not the case *here*.

Finally, Fidelity relies on a 35 year old decision, *Karlin v. Zalta* (1984) 154 Cal.App.3d 953, even though its continued validity has been repeatedly questioned. According to Fidelity, *Karlin* "held that the

McBride-Grunsky Act provides immunity for activities that fall within the purview of the Act, such as ratemaking," and that "the setting of rates for casualty insurance lies exclusively within the province of the McBride Act." (Answer 76, 77.)

Even if Fidelity's gloss were correct, *Karlin* has no application *here*. The activity *we* complain of is *charging* unfiled rates. This activity does not fall within the purview of (the "authority conferred by") Article 5.5 or Article 5.7. This is not a rate*making/*rate *setting* activity, but a rate *charging* activity. We do not complain about how Fidelity "made" or "set" its unfiled rates, i.e., whether these unfiled rates were set at unreasonably high levels or were fair and properly set.

No. Our complaint is that Fidelity *charged* these unfiled rates, whether Fidelity had first *made/set* them too high, too low or just right. *Charging* unfiled rates is unlawful under section 12414.27 regardless of how they were *set/made*. We don't challenge the setting or making of Fidelity's rates. We challenge that the rates, once made/set, were *charged* to the class "other than in accordance with rate filings," a violation of section 1241.27. So even under Fidelity's restatement of *Karlin*, our lawsuit is not barred.

In any event, Fidelity confuses *Karlin*'s dicta with its holding. *Karlin* was purely a concerted action case. (*Id*. at 964, 966.) *Karlin* held that section 1860.1 was "design[ed] to avoid a situation in which **concerted action in ratemaking** might be held to violate antitrust provisions in other statutes." (*Id*. at 973.) *Karlin* does not address unilateral misconduct, and as we have emphasized throughout, concerted action cases are *different*.

As this Court later explained, "contrary to [the] dictum" in *Karlin*, "this Court did not hold there that the Legislature had granted the insurance industry a general exemption from . . . unfair business practices statutes. Rather, the Legislature intended that rights and remedies available under those statutes were to be cumulative to the powers the Legislature granted to the Insurance Commissioner." (*Manufacturers Life*, 10 Cal.4th at 263.)

Finally, the *Karlin* plaintiffs challenged the actual setting/making of the filed rates, alleging that defendants conspired to "fix" rates at artificially *high* levels. (*Id.* at 974.) Here, the class does not challenge Fidelity's filed rates, nor does it allege that Fidelity conspired to artificially fix rates.

G. We explain, without rebuttal, how and why the administrative procedure is inadequate. Fidelity just reasserts its false narrative that the Commissioner can award restitution.

Fidelity concedes: "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." (Answer 70, quoting *Ramos v. County of Madera* (1971) 4 Cal.3d 685, 691.) And Fidelity does not address the rule that a class need not exhaust administrative remedies if no classwide relief is available, and so concedes it. (*Tarkington v. CUIAB* (2009) 172 Cal.App.4th 1494, 1510.)

We say one way to know that the Commissioner's jurisdiction is

not exclusive is that he cannot afford an adequate administrative remedy. Fidelity asserts that we "confuse" the doctrine of exhaustion of remedies with the doctrine of exclusive jurisdiction. (Answer 70.) But it's actually Fidelity that's confused.

"Administrative exhaustion" and "exclusive jurisdiction" are two sides of the same coin: "Exhaustion applies where an agency alone has exclusive jurisdiction." (*Farmers*, 2 Cal.4th at 390-391.) And it is a "settled maxim that exhaustion does not apply where the administrative remedy provided is either unavailable or inadequate to afford the relief sought." (*Lopez v. Civil Service Com.* (1991) 232 Cal.App.3d 307, 313.)

Fidelity asserts that Article 6.7 "provides a comprehensive administrative mechanism for resolving a claim that a regulated title company failed to comply with Article 5.5," and "provides an adequate remedy, including restitution." (Answer 16, 26.) But Fidelity is wrong on at least **three** counts:

First, the class claim here is not based on Fidelity's failure to comply with Article 5.5. Fidelity did fail to comply. But that's not what the class is suing over. Rather, as the trial court (AA1401-1405) and court of appeal (Opinion 42-48) acknowledged, the class is suing over Fidelity's violation of section 12414.27, which is outside Article 5.5 and provides that Fidelity cannot charge for any service "except in accordance with rate filings which have become effective." Even Fidelity acknowledges: "The [trial] court concluded Fidelity 'violated section 12414.27 . . . because its rate filings did not include a rate for such service.'" (Answer 19-20.)

Second, the administrative mechanism is entirely inadequate, for reasons Fidelity ignores – and therefore concedes. "Failure to respond in an opposition brief to an argument put forward in an opening brief constitutes waiver." (*Stichting Pensioenfonds v. Countrywide Financial* (C.D.Cal. 2011) 802 F.Supp.2d 1125, 1132.)

Argument regarding inadequacy:	**Fidelity's response:**
Administrative procedures do not give consumers *right* to have complaint *heard*. (AOB 66.)	Conceded
Commissioner may dismiss complaint with no investigation or hearing if he "believes" no probable cause exists; no criteria for establishing such "belief." (§ 12414.13.)	Conceded
Commissioner may dismiss complaint without investigation or hearing if he "believes" it wasn't made in "good faith;" no criteria for establishing such "belief." (*Id.*)	Conceded
Complaint will not be heard unless Commissioner finds complainant would be "aggrieved" if violation is proven. (*Id.*)	Conceded
Commissioner can dismiss complaint if he "has information concerning a similar complaint." (*Id.*) Commissioner can hear one class member's complaint and dismiss 500,000 others on ground they are "similar."	Conceded
Commissioner may refuse to hear complaint, even if he has probable cause. (§ 12414.13.)	Conceded
Commissioner's decision is not subject to meaningful "judicial review." (AOB 67.)	Conceded

Third, the administrative scheme does not provide an adequate remedy. Fidelity is unable to point to any instance of the Commissioner obtaining restitution in a contested administrative proceeding. And Fidelity concedes that the administrative mechanism cannot afford classwide relief.

Fidelity nevertheless asserts, for the first time, that section 12414.18 and Government Code section 11519.1, taken together, allow the Commissioner to "order" restitution. (Answer 63-65.) But Fidelity misreads these statutes.

Section 12414.18 applies only to "proceedings in connection with the denial, suspension, or revocation of a *license*." A proceeding to obtain a rate refund is obviously different from a proceeding to suspend or revoke a title company's license. The class here seeks a refund of unlawful charges; it does not seek relief related to Fidelity's license.

Moreover, the Commissioner *couldn't* suspend or revoke Fidelity's license unless he finds its violation "was **willful**." (§ 12414.16.) A "willful" finding would require both that Fidelity had "*actual* knowledge or belief" that its charges violated the chapter, and *also* that Fidelity had *specific intent*. (§ 12340.9.) Here, the class claims – UCL and breach of fiduciary duty – do not require those elements to be established.

Moreover, even *if* Section 12414.18 somehow applied to complaints seeking recovery of unlawful title charges (which it does *not*), the Government Code section Fidelity cites – 11519.1 – simply does not authorize the Commissioner to award restitution for unlawful title charges.

Section 12414.18 provides that the Commissioner "shall have all the powers granted to him" in **Chapter 5** of Part 1 of Division 3 of Title 2 of the Government Code. Fidelity claims that Government Code section 11519.1 (in Chapter 5) "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.'" (Answer 64-65, partially quoting Gov't Code § 11519.1(a).)

Fidelity's edit is disingenuous. The authority to order restitution extended by section 11519.1(a) is expressly limited to a "decision rendered against a licensee under Article 1 of Chapter 4 of Division 5 **of the Vehicle Code [relating to issuance of licenses to vehicle manufacturers, transporters and dealers]**." This has no application to title companies whatsoever.

Thus, Fidelity offers no applicable authority by which the Commissioner could afford even a single class member restitution, let alone classwide relief. This Court pointedly observed: "SCIF does not point to any authority allowing the Insurance Commissioner to order a carrier to refund all improperly collected premiums." (*SCIF*, at 938.) This is equally true of Fidelity *here*.

Courts have uniformly confirmed that the Commissioner's power is "limited to enjoining future unlawful conduct and suspending or revoking a license." (*Manufacturers Life*, 10 Cal.4th at 274; *Stevens*, 75 Cal.App.4th at 605; *Shernoff*, 44 Cal.App.3d at 409.)

Fidelity attempts to distinguish these decisions, incorrectly purporting that the Commissioner was proceeding under the Unfair Insurance Practices Act ("UIPA"), under which "the Commissioner lacks

administrative authority to assess monetary penalties." (Answer 67.)

But in *Manufacturers Life*, the plaintiff asserted statutory claims for violations of both the UIPA and the UCL. (10 Cal.4th at 264.) And *Stevens* is not a UIPA case at all. It involves a UCL suit *only*. (75 Cal.App.4th at 598.) *Stevens* discusses the UCL on literally every page of its opinion, save one. (*Id.* at 608.) The UIPA is mentioned just once, in a footnote. *Stevens* held that: "the Commissioner's power does not include imposition of civil liability on those who engage in unfair business practices. . . ." (*Id.* at 605.)

CONCLUSION

We respectfully ask the Court to announce that:

- Section 12414.26 affords no immunity as to actions grounded in a defendant's unilateral activity;

- Section 12414.26 affords no immunity as to common law causes of action, like the breach of fiduciary duty cause of action here;

- Section 12414.26 does not deprive courts of jurisdiction to interpret rates;

- the Insurance Commissioner does not have exclusive jurisdiction over claims by consumers charged more than allowed by the rates actually on file; and that

- the contrary rulings in the opinion below are reversed, and that the entirety of the opinion below shall no longer be citable, pursuant to California Rules of Court, rule 8.1115(e)(3).

Finally, although Fidelity asserts that the class here suffered "no actual harm," we continue to vigorously dispute this; that issue, not yet fully litigated, will be before the court below on remand, upon a favorable decision by this Court.

Respectfully submitted,

DATED: November 8, 2019

THE BERNHEIM LAW FIRM
FRIEDMAN RUBIN PLLP
SHERNOFF, BIDART, ECHEVERRIA

By: _____

Steven J. "Bernie" Bernheim, Esq.
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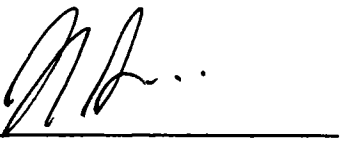
Attorneys for Plaintiffs/Appellants

CERTIFICATION OF WORD COUNT

The undersigned certifies, pursuant California Rule of Court 8.520(c)(1), that the text of this brief contains 9,935 words, including footnotes, as counted by the computer program used to generate this brief.

DATED: November 8, 2019



Nazo S. Semerjian, Esq.

Attachment 1

32656 3-44 10M SPO

STATE OF CALIFORNIA

SAN FRANCISCO 2

Inter-Departmental Communication

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

File No.

Date: June 11, 1947

Subject: S. B. 1572

From: Department of Justice
Harold B. Haas, Deputy

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

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

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

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

PURPOSES OF THE BILL

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 9: Miscellaneous.

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

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

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

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

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

Attachment 2

LEGISLATIVE ANALYSIS (REVISED 8/30/73) Business and Transportation Agency

DEPARTMENT	AUTHOR	NUMBER
DEPARTMENT OF INSURANCE	Zenovich	SB 1293 AS AMENDED 8/27/73
SUBJECT		
Title Insurance		

RECEIVED 1973 SEP 4 PM 0 31 DEPARTMENT OF INSURANCE SAN FRANCISCO

SUMMARY:

Makes various changes in statutes concerning title insurance, principally involving rate regulations.

ANALYSIS:

A. Detailed

Present law exempts title insurance from the rate regulation provisions of the Insurance Code. It requires only that the rates which are used by title insurers be filed with the Insurance Commissioner.

This bill makes title insurance subject to the same rate regulation provisions applicable to property and casualty insurers with the exception that title insurers rates are to be filed with the Insurance Commissioner, whereas property and casualty rates generally are not required to be filed.

The bill includes all of the provisions with respect to underwritten title companies which are a part of SB 293 (Department of Insurance approved proposal Bill Control No. B-73-50). The bills are double jointed.

B. Cost

Costs of rate regulation will be reimbursed by the industry. Fee changes will increase revenue to the Department by approximately $6,000 per year.

REASONS FOR RECOMMENDED POSITION:

This bill will provide rate regulation for an industry where there is none. It is in the public interest.

as

POSITION	AGENCY	GOVERNOR'S OFFICE
Support	Original Signed by Larry Thelen	POSITION NOTED
DEPARTMENT DIRECTOR		POSITION APPROVED
DATE 8/30/73	DATE SEP 4 1973	POSITION DISAPPROVED
		BY DATE

cc: Carl Brakensick, Department of Corporations
Robert Harvey, Department of Consumer Affairs
Harty Dingman, Department of Real Estate

Attachment 3

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

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

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

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

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

PROOF OF SERVICE

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

On November 8, 2019, I served a copy of the foregoing **REPLY BRIEF** on the interested parties and persons in this action, as follows:

SEE ATTACHED SERVICE LIST

I placed a true copy of the foregoing document in a sealed envelope addressed to the parties set forth on the attached service list. I placed each such envelope, with postage thereon fully prepaid, for collection and mailing at Los Angeles, California. I am readily familiar with the firm's practice of collection and processing correspondences for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

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

Executed on November 8, 2019, at Los Angeles, California.

Nazo S. Semerjian

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