Case No. 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

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS BRIEF OF PUBLIC CITIZEN AND PUBLIC JUSTICE IN SUPPORT OF APPELLANT AND SUPPORTING REVERSAL

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS

Pursuant to California Rule of Court 8.520(f), Public Citizen and Public Justice respectfully seek permission to file the accompanying amicus brief in support of plaintiffs-appellants Manny Villanueva, et al.

Amicus curiae Public Citizen is a non-profit consumer advocacy organization with members in all 50 states, including California. The organization engages in research, education, lobbying, and litigation on a wide range of public-health and consumer issues. Public Citizen has long fought against efforts by corporations to use regulations intended to protect consumers as a shield against accountability. Public Citizen often represents consumer interests in litigation, including as amicus curiae in this Court and the United States Supreme Court.

Amicus curiae Public Justice is a national advocacy organization dedicated to pursuing high impact lawsuits to advance consumer rights, civil rights and civil liberties, workers' rights, environmental sustainability, and the preservation and improvement of the civil justice system. A key element of Public Justice's mission is ensuring that consumers and others harmed by corporate wrongdoing are able to use the civil justice system to hold the wrongdoers accountable. To that end, Public Justice frequently represents consumers and their interests in litigation, including before this Court.

This case presents the question whether Section 12414.26 of the Insurance Code, which provides that an insurer shall not be subject to civil legal proceedings (except under laws that specifically refer to insurance) for an "act done, action taken, or agreement made pursuant to the authority conferred by Article 5.5 of this chapter," provides immunity to an underwriting title company that charged rates that it unlawfully failed to file with the Department of Insurance. Below, the court of appeal held that the company's failure to file rates, in violation of Article 5.5, constituted an act done "pursuant to the authority conferred" by that article, and that the plaintiffs' suit was therefore barred by section 12414.26. That decision, if left in place, would have

wide-ranging implications for Californians' ability to hold insurance companies accountable for misconduct. The decision misunderstands the scope of section 12414.26 of California's Insurance Code and, as explained in the attached amicus brief, is inconsistent with this Court's decision in *State Compensation Insurance Fund v. Superior Court* (2001) 24 Cal. 4th 930 (*SCIF*).

No party or counsel for a party authored this amicus brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici Public Citizen, Public Justice, and their counsel made a monetary contribution intended to fund the preparation or submission of the amicus brief.

Dated: December 4, 2019

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208, proposed amici Public Citizen and Public Justice make the following disclosure regarding persons or entities having a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves: There are no interested persons or entities who must be identified pursuant to Rule 8.208.

Dated: December 4, 2019

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AMICUS BRIEF OF PUBLIC CITIZEN AND PUBLIC JUSTICE IN SUPPORT OF APPELLANT AND SUPPORTING REVERSAL

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BACKGROUND AND SUMMARY OF ARGUMENT

Under Article 5.5 of the chapter of the California Insurance Code that addresses title insurance, regulated entities are required to file their rates with the Department of Insurance and are prohibited from charging any rate prior to its filing. *See* Cal. Ins. Code. §§ 12401.1, 12401.7. Section 12414.26 of the Insurance Code provides that an insurer shall not be subject to civil legal proceedings (except under laws that specifically refer to insurance) for an "act done, action taken, or agreement made pursuant to the authority conferred by Article 5.5" or Article 5.7 of the chapter governing title insurance. Cal. Ins. Code § 12414.26.

The issue in this case is whether section 12414.26 shields from liability an insurer that charges rates that it failed to file with the Department of Insurance, in violation of Article 5.5. Although the court of appeal held that it does, section 12414.26 provides immunity only for "action[s] taken ... pursuant to the authority conferred by" Article 5.5 (and Article 5.7, which is not at issue here). Nothing in Article 5.5 authorizes an insurer to charge unfiled rates, and, accordingly, section 12414.26 provides no immunity for such conduct. This conclusion follows directly from the plain language of section 12414.26, is confirmed by this Court's decision in *State Compensation Insurance Fund v. Superior Court* (2001) 24 Cal. 4th 930 (*SCIF*), and is supported by case law on the federal filed-rate doctrine.

Fidelity argues that section 12414.26 should be construed to cover claims concerning the charging of unfiled rates, which is unlawful under the statute, to avoid factual disputes that potentially might be resolved in favor of an insurer. As with any type of immunity, a defendant can avail itself of immunity under section 12414.26 only when it establishes that the immunity applies. Recognizing that section 12414.26 does not provide immunity to insurers when their actions are not authorized by Article 5.5 does not, as

defendant Fidelity argues, "make a farce out of the statute and the purpose of immunity." Answer Br. 33.

If upheld, the court of appeal's interpretation of section 12414.6 would have wide-ranging implications for Californians' ability to hold insurance companies accountable for misconduct. This Court should reverse the court of appeal and hold that section 12414.26 does not provide immunity to an insurer that charges for services for which there have been no rate filings with the Department of Insurance

ARGUMENT

1. This case turns on the scope of section 12414.26 of the California Insurance Code, which concerns title insurance. That section is substantively identical to another provision of the Code, section 11758, which concerns workers compensation. In *SCIF*, this Court addressed the scope of section 11758. Its holding there directs the outcome here.

In *SCIF*, the Court considered whether a workers' compensation insurer that engaged in misconduct resulting in excessive rates was immune from civil liability under section 11758. There, the insurer misreported inflated financial information to the Workers' Compensation Insurance Rating Bureau, which the Department of Insurance relied on to set the rates the insurer could charge. *SCIF*, 24 Cal. 4th at pp. 933–34. The result was that insureds were charged higher rates than they would have been if the insurer had provided accurate financial information to the Rating Bureau. *Id.* The insureds brought a class action to recover for the excessive rates, and the insurer moved for judgment on the pleadings, arguing that the action amounted to "a ratemaking case" and was thus barred by section 11758, the relevant provision of the California Insurance Code. That provision—using words identical to those in section 12414.26—bars civil legal proceedings based on any "act done, action taken or agreement made pursuant to the authority conferred by" Article 3 of the relevant Insurance Code chapter. Cal.

Ins. Code § 11758. Article 3, in turn, requires the insurer to provide information to the Rating Bureau, and prohibits the insurer from giving false or misleading information. *SCIF*, 24 Cal. 4th at p. 942.

Rejecting the insurer's claim of immunity, this Court in *SCIF* recognized that, under the plain text of section 11758, immunity extended only to actions taken "*pursuant to the authority* conferred by" Article 3 and not to *all* actions taken "pursuant to" Article 3. *See id.* at p. 936 (emphasis in original). Although Article 3 obliged an insurer to report its financial information to the Rating Bureau, Article 3 did not authorize an insurer to engage in misreporting. *See id.* at pp. 936–37; *see also id.* at p. 937 (noting that "numerous Courts of Appeal decisions in other contexts have sanctioned civil claims against SCIF and other workers' compensation insurers alleging that their misconduct resulted in unjustifiably higher premiums" and collecting cases). Indeed, Article 3 squarely prohibited the insurer from providing false or misleading information to the Rating Bureau. *See* Cal. Ins. Code § 11755 (2018). The Court therefore concluded that SCIF's alleged unilateral misconduct was not authorized by Article 3 and that the statute did not prohibit a civil legal action based on that misconduct. *See SCIF*, 24 Cal. 4th at p. 938. The Court explained that, although challenges to "the manner in which premiums or rates are set by the Rating Bureau" or claims premised on insurers "charging approved rates alleged nevertheless to be 'excessive'" are precluded by section 11758, *see id.* at pp. 936–37, 942, challenges to unilateral insurer misconduct resulting in higher rates are not, *see id.* at p. 942 ("Here, of course, [plaintiff] does not challenge the method by which the rate or premium charged was set, but rather the insurer's misallocation of certain expenses.").

In *SCIF*, this Court also addressed, and rejected, the insurer's argument that the immunity provision should be broadly interpreted to cover "all aspects of the insurance business." *Id.* at p. 940. In particular, the Court

held that the provision's plain language indicated that it applied to "cooperation between insurers ... in ratemaking" that would otherwise be barred by antitrust laws, *id.* at p. 936, but that there was no indication that it applied to misconduct outside of "such authorized cooperation," *id.* The Court found support in the legislative history of section 11758 and another immunity provision substantively identical to both sections 11758 and 12414.26 (section 1860.1). It concluded that the provision immunized only "concerted activity otherwise barred by the antitrust laws, and not ... the individual misconduct of an insurer regarding its insured." *Id.* at p. 938.

Here, as in *SCIF*, plaintiffs allege that the insurer, rather than exercising "authority" conferred by the Insurance Code, violated the Insurance Code and that the violation resulted in the insureds being charged an improper rate. And as in *SCIF*, the plaintiffs do not challenge "the manner in which premiums or rates are set" or argue that filed rates are "excessive," but challenge "individual misconduct of an insurer regarding its insured." *Id.* at pp. 936, 938, 942. Indeed, the court of appeal itself understood that the plaintiffs' claim is that it was "charged for ... services that [the insurer] did not include in its rate filings." *Villanueva v. Fid. Nat'l Title Co.* (2018) 26 Cal. App. 5th 1092, 1125.

Under this Court's reasoning in *SCIF*, an act done in violation of the Insurance Code cannot be an action taken "pursuant to the authority conferred by" the Code. Nonetheless, below, the court of appeal held that section 12414.26 broadly immunizes actions that are "related to ratemaking activity." *Id.* at p. 1125. Thus, the court held that even a "fail[ure] to comply with" Article 5.5 by charging unfiled rates "constitutes '[a]cts done ... pursuant to the authority conferred by Article 5.5.'" *Id.* at p. 1126 (quoting Cal. Ins. Code § 12414.26). This reasoning, however, contradicts the outcome in *SCIF*, where the plaintiff's claims likewise related to ratemaking activity and the insurer's conduct at issue was a failure to comply with the

relevant sections in Article 3 of the Insurance Code. Thus, under the reasoning of the court of appeal, the insurer's misconduct in *SCIF* would have constituted an act done "pursuant to the authority conferred" by Article 3 and, therefore, fallen within the scope of section 11758.

The court of appeal's decision also ignored the admonition in *SCIF* that section 11758 immunizes only those claims alleging "concerted activity otherwise barred by the antitrust laws." *SCIF*, 24 Cal. 4th at p. 938. Notably, in so holding, the Court looked to both the 1947 legislative history of the McBride-Grunsky Insurance Regulatory Act and section 1860.1 (which contains the same wording as section 11758 and section 12414.26), and the 1951 legislative history of section 11758. The Court concluded that both 1860.1 and 11758 were aimed at excepting insurers working in concert from federal antitrust regulation. The logical conclusion to be drawn from the legislature's choice to use identical wording when amending the Insurance Code to add section 12414.26, among other sections, is that it sought to achieve the identical objective. *See ZB, N.A. v. Superior Court* (2019) 8 Cal. 5th 175, 189 ("We consider the provisions' language in its 'broader statutory context' and, where possible, harmonize that language with related provisions by interpreting them in a consistent fashion." (citation omitted)); *cf. United States v. Davis* (2019) 139 S. Ct. 2319, 2329 (stating that "we normally presume that the same language in related statutes carries a consistent meaning"). Yet plaintiffs here do not allege concerted activity that would implicate the antitrust laws; they allege "individual misconduct of an insurer regarding its insured." *SCIF*, 24 Cal. 4th at p. 938. They thus allege precisely the type of conduct this Court explained in *SCIF* should *not* be immunized.

2. Extending section 12414.26 to protect an insurer that charged unfiled rates is particularly anomalous because "the scheme explicitly embodied in the Insurance Code" is in some respects "analogous to" the

federal "filed rate doctrine." *Walker v. Allstate Indem. Co.* (2000) 77 Cal. App. 4th 750, 757 n.4. Just as this Court explained in *SCIF* that the statutory immunity provisions preclude suits against insurers for "charging approved rates alleged nevertheless to be 'excessive,'" *see SCIF*, 24 Cal. 4th at p. 942, the filed-rate doctrine "precludes a challenge to the reasonableness of the rates of common carriers if the rates have been approved by an appropriate regulatory agency," *Williams v. Duke Energy Int'l, Inc.* (6th Cir. 2012) 681 F.3d 788, 796. However, "where rates are *not* filed, '[d]efendants may not use the filed rate doctrine as a shield from civil liability.'" *In re Blue Cross Blue Shield Antitrust Litig.* (N.D. Ala. 2017) 238 F. Supp. 3d 1313, 1328 (quoting *In re Transpacific Passenger Air Transp. Antitrust Litig.* (N.D. Cal. 2014) 69 F. Supp. 3d 940, 961 (emphasis in original)); *see also Williams*, 681 F.3d at p. 798 ("[T]he filed-rate doctrine applies only in challenges to the underlying reasonableness or setting of *filed* rates" (emphasis added)).

"The Filed Rate Doctrine simply does not protect a rate filer who, after securing approval of a filed rate, charges its policyholders a rate higher than that approved." *In re Blue Cross Blue Shield Antitrust Litig.*, 238 F. Supp. 3d at p. 1328. Similarly here, this Court should reject Fidelity's plea to use section 12414.26 as a shield against liability for misconduct concerning rates that it did not file.

3. Fidelity argues that the immunity granted by section 12414.26 would be meaningless if it did not extend to claims that an insurer charged *unfiled* rates. Answer Br. 31. According to Fidelity, section 12414.26 must extend to claims based on unfiled rates to avoid litigation to resolve factual disputes over whether challenged rates were filed or unfiled. Such litigation must be avoided, Fidelity posits, because if an insurer ultimately prevails on that issue, it should not have had to litigate in the first place. Answer Br. 33. In other words, Fidelity argues that section 12414.26 should be construed to

cover claims based on *unlawful* unfiled rates so that Fidelity does not have to establish that it charged lawful filed rates.

Fidelity ignores that a defendant's defense of statutory immunity, like other defenses, will often turn on proof of facts. Fidelity's argument that it should be immune from proceedings designed to resolve those factual disputes has no support in the case law. Rather, the cases it cites stand for the proposition that courts should strive to decide immunity issues early in the litigation, including on interlocutory review. None stands for the remarkable proposition that, to avoid factual disputes, courts should construe a statutory immunity provision to encompass a broader range of unlawful conduct than its terms cover.

For example, *Mitchell v. Forsyth* (1985) 472 U.S. 511, cited by Fidelity, involved a government official's claimed defense of qualified immunity, which the United States Supreme Court described as "an immunity from suit." *Id.* at p. 526. In such cases, a defendant asserting qualified immunity is entitled to dismissal on a motion to dismiss or demurrer if the plaintiff's allegations do not state a claim of violation of clearly established law. *Id.* And the denial of a claim of qualified immunity, "to the extent that it turns on an issue of law," is immediately appealable. *Id.* at p. 530. If, however, the court denies the claim to qualified immunity at the motion to dismiss or demurrer stage, the case will proceed, with any factual disputes as to whether the immunity defense applies determined on summary judgment or at trial. *See Johnson v. Jones* (1995) 515 U.S. 304, 319–20 (holding that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial"). This longstanding approach—far from rendering the doctrine of qualified immunity a "farce," Answer Br. 33—ensures that

defendants receive immunity when, and only when, the facts establish that they are entitled to it.

Here, the superior court held that Fidelity had *unlawfully* charged certain unfiled rates. *Villaneuva*, 26 Cal. App. 5th at p. 1107. This Court should reject Fidelity's theory that, to avoid making Fidelity prove that its conduct falls within the scope that the Legislature sought to protect, the Court should read section 12414.26 to protect conduct outside that scope.

4. The court of appeal's reasoning, if adopted here, would preclude suits challenging unilateral insurer misconduct across a wide range of subject areas, effectively immunizing insurers from liability for the precise misconduct that is proscribed under the Insurance Code. Although section 12414.26 relates only to title insurers, underwritten title companies, and controlled escrow companies, the Insurance Code contains several similar provisions that are commonly interpreted in unison. *See, e.g.*, Cal. Ins. Code § 11758 (workers compensation insurance); *id.* § 795.7 (senior citizens' health insurance). Moreover, as this Court recognized in *SCIF*, 24 Cal. 4th at p. 938, and as the court of appeal noted below, *Villanueva*, 26 Cal. App. 5th at p. 1134, absent the ability to bring an action seeking a remedy for the insurer's allegedly unlawful actions, consumers may be denied recompense for improperly collected rates because of limitations on the powers of the Insurance Commissioner.

CONCLUSION

The Court should reverse the decision of the court of appeal and hold that consumers such as plaintiffs here can bring an action to remedy insurer misconduct.

Dated: December 4, 2019

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CERTIFICATE OF WORD COUNT

Pursuant to California Rule of the Court 8.520(c), I certify that, according to the word-count feature in Microsoft Word, this Amicus Curiae Brief contains 2,546 words, including footnotes, but excluding the application and the content identified in rule 8.520(c)(3).

Dated: December 4, 2019

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PROOF OF SERVICE

I, the undersigned, am over 18 years of age, employed in the County of San Francisco, California, and not a party to this case. My business address is 201 Filbert Street, Suite 201, San Francisco, CA 94133. On December 4, 2019, I caused a true and correct copy of the attached Brief of Amicus Curiae to be served on each party and person required to be served, as follows:

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