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November 14, 2018

The Honorable Tani Cantil-Sakauye, Chief Justice, and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Villanueva v. Fidelity National Title Co.*, Supreme Court of California Case No. S252035
(Sixth Appellate District, Nos. H041870, H042504)
Amicus Letter in Support of Petition for Review

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to Rule 8.500(g) of the California Rules of Court, Public Citizen submits this letter as amicus curiae to urge the Court to grant the pending petition for review in the above-entitled case.

INTRODUCTION

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.

As explained below, the court of appeal's decision in this case, if left in place, would have wide-ranging implications for Californians' ability to hold accountable insurance companies that engage in misconduct. The decision misunderstands the scope of section 12414.26 of California's Insurance Code, and is inconsistent with this Court's decision in *State Compensation Ins. Fund v. Superior Court* (2001) 24 Cal. 4th 930 (*SCIF*). For these reasons, Public Citizen urges this Court to grant the petition for review.

DISCUSSION

Under Article 5.5 of the chapter of California's Insurance Code regulating 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 of this chapter." Cal. Ins. Code § 12414.26. The issue in this case is whether an insurer that charges rates that it unlawfully

failed to file with the Department of Insurance, in violation of Article 5.5, has acted "pursuant to the authority conferred by Article 5.5," and is thus shielded from civil liability under section 12414.26.

In *SCIF*, 24 Cal. 4th 790, this Court considered the question whether a workers' compensation insurer that engaged in misconduct resulting in excessive rates was immune from civil liability under a provision substantively identical to section 12414.26. 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. *Id.* 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 the relevant provision of the California Insurance Code. That provision—which uses the same words as the provision at issue in this case—barred 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, required the insurer to provide information to the Rating Bureau, and prohibited the insurer from giving false or misleading information. *Id.* at p. 942.

Rejecting the insurer's claim of immunity, this Court recognized that, under the plain text of the statute, 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. Thus, the Court concluded, SCIF's alleged unilateral misconduct was in no sense authorized by Article 3, and the statute therefore did not prohibit a civil legal action based on that misconduct. *See id.* at p. 938.

In reaching this conclusion, this 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. 936–937, 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").

This Court also 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. 936, but that there was no indication that it applied to misconduct outside of "such authorized cooperation," *id.*

The Court also found support for this view in the legislative history behind another immunity provision substantively identical to both sections 11758 and 12414.26 (section 1860.1). The Court therefore concluded that the provisions 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.

This case involves a statutory provision identical to the provision in *SCIF*, and presents a similar set of circumstances: 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. 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 insured's claim was 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.

Nonetheless, the court of appeal held that section 12414.26 precluded plaintiffs' suit. *See id.* The court held that the insurer had "failed to comply with … article 5.5," by charging unfiled rates, but concluded that this misconduct "constitutes '[a]cts done ... pursuant to the authority conferred by Article 5.5." *Id.* at p. 1126 (quoting Cal. Ins. Code § 12414.26). According to the court of appeal, the statute broadly immunizes actions that are "related to ratemaking activity." *Id.* at p. 1125.

The court of appeal's decision cannot be squared with this Court's decision in *SCIF*. The court failed to consider that, under *SCIF*, an act done in violation of the Insurance Code cannot be an action taken "pursuant to the authority conferred by" the Code. Indeed, under the court of appeal's reasoning, the insured in *SCIF* should have been precluded from suit, because the insurer's conduct there was similarly prohibited by the relevant sections in Article 3 of the Insurance Code, and the claims surely related to ratemaking activity. Thus, under the reasoning of the court of appeal in *Villanueva*, the insurer's misconduct in *SCIF* would have constituted an act done "pursuant to the authority conferred" by Article 3. Further, it would make no sense to hold, as *SCIF* did, that an entity misreporting information that led to a higher *filed rate* is not immune from liability, if an entity assessing a rate that *was never filed* is immunized, as the court below held. If anything, *SCIF* was a more difficult case than this one, because, as this Court acknowledged, the action there had the effect of challenging rates that had been approved by the Rating Bureau. *See* 24 Cal. 4th at p. 930.

Extending the statute 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* 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 clarify that an insurer that has not filed its rates may not use section 12414.26 as a shield against liability.

The court of appeal's decision also ignored this Court's admonition in *SCIF* that the statute immunizes only claims alleging "concerted activity otherwise barred by the antitrust laws." *SCIF*, 24 Cal. 4th at p. 938. Plaintiffs allege no concerted activity here that would implicate the antitrust laws. Rather, they allege "individual misconduct of an insurer regarding its insured," *id.*—precisely the type of conduct this Court explained in *SCIF* should not be immunized, *see id.*

If the court of appeal's decision were allowed to stand, its reasoning would, if followed by other courts, 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 courts commonly interpret in unison. *See* Cal. Ins. Code § 11758 (workers compensation insurance); *id.* § 795.7 (senior citizens' health insurance). Moreover, as this Court recognized in *SCIF*, and as the court of appeal noted below, 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. *See SCIF*, 24 Cal. 4th at p. 938; *Villanueva*, 26 Cal. App. 5th at p. 1134.

CONCLUSION

The court of appeal's disregard for this Court's precedent and the plain import of the statute thus present a significant threat to the legitimate interests of California insurance consumers meriting review and correction by this Court. Accordingly, the Court should grant the pending petition for review and hold that consumers such as the plaintiffs here can bring an action to remedy insurer misconduct.

Respectfully Submitted,

Sean M. Sherman
Attorney for Public Citizen

Proof of Service
C.C.P. § 1013(a)(3)

Case Name: *Villanueva v. Fidelity National Title Co.*
Supreme Court of California Case No.: S252035
Sixth Appellate District, Case Nos.: H041870, H042504

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Date: November 14, 2018

Sarah Lubiner