S252035

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MANNY VILLANUEVA, et al.,
Plaintiffs and Appellants,

v.

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)

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS BRIEF OF CONSUMER WATCHDOG, CONSUMER FEDERATION OF AMERICA, AND CONSUMER FEDERATION OF CALIFORNIA IN SUPPORT OF PLAINTIFFS MANNY VILLANUEVA, ET AL.

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rule of Court 8.520(f), Consumer Watchdog, Consumer Federation of America, and Consumer Federation of California respectfully seek permission to file the accompanying amicus brief in support of Plaintiffs and Appellants Manny Villanueva, et al.

Counsel for proposed amici is well acquainted with the statutes and case law that are at issue in the matter.[1] The proposed amicus brief is intended to assist the Court by addressing, in greater detail than the Parties here or the Court of Appeal, the serious and complex issues concerning the construction of Proposition 103's provisions, their interplay with pre-existing provisions of the Insurance Code that were retained by the Proposition 103 voters, and the extensive and conflicting case law that the parties here rely upon. The Court's decision in this case will not only determine the legal rights of millions of Californians who must transact business with underwritten title companies and title insurers, but potentially affect the enforcement of Proposition 103's reforms.

STATEMENT OF INTEREST OF THE AMICI CURIAE

Amicus Curiae Consumer Watchdog is a non-profit, non-partisan charitable citizen organization incorporated in California in 1985. A core mission of the organization is to defend the provisions of Proposition 103, the insurance reform initiative approved by California voters on November 8, 1988, and to protect Californians against unfair and abusive insurance rates and practices through enforcement of that measure. The organization's attorneys have participated in nearly every landmark case concerning Proposition 103's constitutionality and scope, including many

[1] The undersigned is the author of Proposition 103 and the founder of Consumer Watchdog.

of the cases decided by this Court.[2] Additionally, Consumer Watchdog has appeared as a party, or acted as amicus curiae, in numerous court cases and administrative actions before the California Department of Insurance in which the immunity issues presented by this case have arisen.[3] Consumer Watchdog and the Californians on whose behalf the organization advocates are vitally interested in the question of whether insurance companies can be judicially immunized for violations of Proposition 103, as well as of other non-Proposition 103 lines of insurance, such as title.

Consumer Federation of America (CFA) is an association of non-profit consumer organizations established in 1968 to advance the consumer interest through research, advocacy, and education. Today, more than 250 consumer groups participate in the federation. CFA, a nonpartisan, 501(c)(3) nonprofit organization, engages in research, advocacy, education, and service.

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[2] See, e.g., *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805 [upholding Proposition 103]; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216 [upholding regulations implementing Proposition 103]; *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243; *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473; *Spanish Speaking Citizens' Foundation v. Low* (2000) 85 Cal.App.4th 1179; *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029; *The Foundation for Taxpayer and Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354; *Association of California Insurance Companies v. Poizner* (2009) 180 Cal.App.4th 1029; *Mercury Casualty Company v. Jones* (2017) 8 Cal.App.5th 561); *Mercury Insurance Co. v. Lara* (2019) 35 CalApp.5th 82, *rev. denied*, August 14, 2019.

[3] Consumer Watchdog submitted amicus curiae briefs in *Donabedian v. Mercury Insurance Co.* (2004) 116 Cal.App.4th 968; *Poirer v. State Farm Mut. Auto Ins. Co.* (October 15, 2004) (unpublished) 2004 WL 2325837; *Fogel v. Farmers Group, Inc.* (2008) 160 Cal.App.4th 1403; and, with eight other citizen organizations, unsuccessfully sought this Court's review or depublication of *MacKay v. Superior Court* (2010) 188 Cal.App.4th 1427 (*See* Supreme Court Docket No. S188184).

Property and casualty insurance is one of CFA's core issues, and the organization is nationally recognized for its focus on insurance rates, rating and underwriting practices, insurers' claims handling practices, and anti-competitive practices.[4] CFA has identified and challenged significant problems in the insurance marketplace, including actuarially unsound rating practices of auto insurers,[5] the use of unfairly discriminatory "price optimization" strategies by insurance companies,[6] and the consumer impact of reverse competition in some lines of insurance, including the title insurance market.[7] With respect to title insurance, CFA has provided testimony before state legislatures and regulators concerning title industry

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[4] Links to more than 20 property and casualty insurance–related reports by CFA are at https://consumerfed.org/cfa-studies-on-the-plight-of-low-and-moderate-income-good-drivers-in-affording-state-required-auto-insurance./.

[5] See Hunter & Heller, *Private Passenger Auto Premiums and Rating Factors — Are They Actuarially Sound?* (2017), https://consumerfed.org/wp-content/uploads/2017/10/auto-premiums-and-rating-factors-hunter-heller.pdf.

[6] See, for example, *Smoking Gun Reveals Allstate's Illegal Auto Insurance Pricing Scheme* (2014), https://consumerfed.org/press_release/smoking-gun-reveals-allstates-illegal-auto-insurance-pricing-scheme-company-will-charge-30-more-if-a-consumer-is-born-on-jan-12-1968-instead-of-april-9-1968/; *Consumer Group Calls on NAIC to Recommend Prohibition on the Use of Price Optimization in Insurance* (2015), https://consumerfed.org/press_release/consumer-group-calls-on-naic-to-recommend-prohibition-on-the-use-of-price-optimization-in-insurance/; and *Consumer Groups Applaud California Insurance Commissioner Jones for Prohibiting Insurance Companies From Using "Price Optimization" Techniques* (2015), https://consumerfed.org/press_release/consumer-groups-applaud-california-insurance-commissioner-jones-for-prohibiting-insurance-companies-from-using-qprice-optimizationq-techniques/.

[7] See, for example, Testimony of J. Robert Hunter, CFA Director of Insurance, Before House Comm. on Fin. Servs. Subcomm. on Housing & Commty. Opportunity, *Title Insurance Cost and Competition* (2006) https://consumerfed.org/wp-content/uploads/2010/08/Title_Insurance_Testimony042606.pdf.

practices that raise costs for consumers[8] and urged federal agencies to intervene to prevent anti-competitive mergers in the industry.[9]

CFA's insurance experts have been working to improve consumer protections in state insurance markets for decades and are particularly familiar with California's insurance reform law. CFA's current Director of Insurance was retained by the California State Assembly to write a 1986 report addressing the California insurance market during the mid-1980s.[10] Since then, CFA has issued several reports concerning the auto insurance market in California and Proposition 103, which was the public policy response to the conditions described in the 1986 report and which reflects many of the solutions advocated in that report.[11] Most recently, CFA issued

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[8] See, for example, *CFA Testimony to N.Y. State Dep't of Fin. Servs. on Title Insurance* (2013), https://consumerfed.org/testimonial/cfa-testimony-to-ny-state-dept-of-financial-services-on-title-insurance/.

[9] See *CFA Asks DOJ to Block Merger of Title Insurance Giants Fidelity National and Stewart Information Services* (2018), https://consumerfed.org/press_release/consumer-group-asks-doj-to-block-merger-of-title-insurance-giants-fidelity-national-and-stewart-information-services/.

[10] *Insurance in California: A 1986 Status Report for the Assembly* (1986) [extensively detailing problems facing individual, business, and government insurance consumers in California at the time and proposing legislative solutions], https://consumerfed.org/wp-content/uploads/2020/01/NICO-Insurance-in-California-A-1986-Status-Report-for-the-Assembly.pdf.

[11] See *Auto Insurance Regulation: What Works 2019* (2019), https://consumerfed.org/wp-content/uploads/2019/02/auto-insurance-regulation-what-works-2019.pdf; *What Works: A Review of Auto Insurance Rate Regulation in America and How Best Practices Save Billions of Dollars* (2013), https://consumerfed.org/pdfs/whatworks-report_nov2013_hunter-feltner-heller.pdf; and *State Automobile Insurance Regulation: A National Quality Assessment and In-Depth Review of California's Uniquely Effective Regulatory System* (2008), https://consumerfed.org/reports/state-automobile-insurance-regulation-a-national-quality-assessment-and-in-depth-review-of-californias-uniquely-effective-regulatory-system/.

a 2018 report that calculated the total auto insurance consumer savings associated with the passage of Proposition 103 to be $154 billion.[12]

Consumer Federation of California (CFC) and its predecessor, the Association of California Consumers, has been advocating for consumers in California for 60 years and is an affiliate of the Consumer Federation of America. CFC is a non-profit 501(c)(4) federation of individual consumer members and several organizational members that are comprised of California consumers, including consumer groups, senior citizen, labor and other organizations.

CFC campaigns for state and federal laws that place consumer protection ahead of corporate profit. CFC provides testimony before the California Legislature and state agencies in support of consumer protections and against incursions on consumer rights. As part of its work, CFC, along with its affiliated 501(c)(3) organization Consumer Federation of California Education Foundation (CFCEF), is actively engaged in consumer protection issues concerning property and casualty insurance. Over the past seven years, CFC and CFCEF have engaged in more than one dozen ratemaking, rulemaking, and non-compliance matters that CFC or CFCEF either initiated or in which it was approved to participate pursuant to Proposition 103.[13]

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[12] See *30 Years and $154 Billion of Savings: California's Proposition 103 Insurance Reforms Still Saving Drivers Money* (2018), https://consumerfed.org/press_release/30-years-and-154-billion-of-savings-californias-proposition-103-insurance-reforms-still-saving-drivers-money/.

[13] See Insurance Code section 1861.10, subd. (b). Among these matters are *In the Matter of the Proceeding Other Than a Rate Hearing — Investigatory Hearing on the Use of Group Rating in Private Passenger Automobile Insurance; In the Matter of the Proposed Rulemaking, Gender Non-Discrimination in Automobile Insurance Rating*, REG-2018-00020; *In the Matter of the Rate Application of Kemper Independence Insurance Company and Unitrin Auto and Home Insurance Company*, file number PA 2017-00002; *In the Matter of the Rates and Class Plan Application of Loya*

Dated: January 17, 2020

CONSUMER WATCHDOG

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Casualty Insurance Company, file number PA 2016-00010; *In the Matter of the Rate Application of State Farm General Insurance Company,* file number PA 2015-00004; and *In the Non-Compliance Matter Regarding GEICO Insurance*, file number IP-2015-00005.

CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208, proposed amici Consumer Watchdog, Consumer Federation of America and Consumer Federation of California certify that they are non-profit organizations and have no shareholders. As such, amici and their counsel certify that they know of no other person or entity that has a financial or other interest in the outcome of the proceeding that the amici and their counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: January 17, 2020

CONSUMER WATCHDOG

By: _____

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AMICUS BRIEF OF CONSUMER WATCHDOG, CONSUMER FEDERATION OF AMERICA, AND CONSUMER FEDERATION OF CALIFORNIA IN SUPPORT OF PLAINTIFFS MANNY VILLANUEVA, ET AL.

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INTRODUCTION AND SUMMARY OF DISCUSSION

This case will decide whether California consumers have the right to sue title insurance companies for overcharges and other wrongdoing. As we show below, the Court of Appeal erred in holding that the class claims are barred by the "safe harbor" for antitrust violations in Insurance Code section 12414.26, which the court claimed conferred "exclusive jurisdiction" on the Insurance Commissioner. We respectfully urge this Court to reverse the opinion in its entirety.

Unfortunately, the Court of Appeal relied on a combination of two errant appellate decisions and dicta, that, if endorsed by this Court, would also gravely impair the right of Californians to hold *property-casualty insurance* companies accountable in court — a hard fought right that motorists, homeowners, renters, and small businesses won for themselves at the ballot box thirty years ago when they enacted Proposition 103.

Proposition 103 does not apply to title insurance (Insurance Code section 1861.13;[14] *Fairbanks v. Farmers New World Life Ins. Co.* (2009) 46 Cal.4th 56, 65). Nor do the laws and case law governing title insurance apply to the Proposition 103 lines of insurance. So why are Proposition 103 reforms potentially in jeopardy here? To construe the title insurance provisions at issue (principally section 12414.26), the Court of Appeal, and the parties here, relied primarily upon cases that adjudicated — or sometimes merely referenced in dicta — a virtually identical statute in the portion of the Insurance Code that governs property-casualty insurance: section

[14] All statutory references are to the Insurance Code unless stated otherwise.

1860.1. That statute was among those enacted by the McBride-Grunsky Insurance Regulatory Act of 1947 ("McBride Act") for a single purpose: to authorize insurance companies to engage in concerted activity when setting rates that would have otherwise violated the antitrust laws.

Section 1860.1 immunized insurance companies from statutory liability for engaging in certain concerted rate-setting activities expressly authorized by the McBride Act. A related statute barely considered by the Court of Appeal, section 1860.2, said that complaints about property-casualty rates and practices could be brought before the Insurance Commissioner. The McBride Act served as the model for the Legislature's 1973 enactment of the title statutes.

But nearly every provision of the McBride Act — including most of those that authorized concerted activity in ratemaking — was *repealed* by California voters in 1988 as part of the passage of Proposition 103, which made, as this Court has emphasized, "numerous fundamental changes in the regulation of automobile and other forms of insurance in California." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 812 ["*Calfarm*"].)

Among their most important and far-reaching reforms, the voters explicitly accorded themselves the right to sue insurance companies for violations of the initiative (§ 1861.10, subd. (a)), and furthermore made insurance companies doing business in California subject to the state's robust antitrust, consumer protection, and civil rights laws (§ 1861.03, subd. (a)) (collectively, "Public Enforcement Rights") — greatly narrowing the scope of the McBride immunity

provisions retained by the voters (see, e.g., § 1861.03, subd. (b)).[15] This Court confirmed Proposition 103's parallel administrative/civil enforcement system four years after the law's passage, in *Farmers Insurance Exchange v. Superior Court* (1992) 2 Cal.4th 377 ("*Farmers*").

Property-casualty insurance companies have not acquiesced to Proposition 103's Public Enforcement Rights, nor to the Court's decision in *Farmers*. Rather, the industry has deployed its vast legal machinery in an attempt to overturn them in the courts. Its campaign has resulted in severely conflicting appellate authority.

Carefully reading the plain text of the Insurance Code as revised by Proposition 103, and tracking *Farmers*, lower courts have rejected the industry's arguments. *Donabedian v. Mercury Insurance Co.* (2004) 116 Cal.App.4th 968 ("*Donabedian*") is the only case in which the entire statutory framework was extensively and properly evaluated. In *Fogel v. Farmers Group, Inc.* (2008) 160 Cal.App.4th 1403 ("*Fogel*"), the court refused to apply the "filed rate doctrine" to bar civil suits challenging improper insurance charges.

However, the Court of Appeal here relied primarily upon two appellate opinions that adopted the property-casualty insurance industry's construction of Proposition 103 and the McBride provisions. Those decisions are *MacKay v. Superior Court* (2010) 188 Cal.App.4th 1427 ("*MacKay*") and *Walker v. Allstate Indem. Co.* (2000) 77 Cal.App.4th 750 ("*Walker*").

According to *MacKay* and *Walker*, the scope of the McBride Act immunity *expanded* under Proposition 103. It is no longer a limited immunity for *concerted rate-setting activities between two or*

[15] For the Court's convenience, the six statutes primarily at issue here is attached as an appendix to this brief (Cal. Rule of Court 8.520 (h)).

more insurance companies. The two cases hold that it is now a blanket immunity from civil actions for any misconduct by a *single* insurance company. These cases profoundly misconstrue, or simply ignore, Proposition 103's Public Enforcement Rights.

The decision below, following the faulty reasoning of *MacKay* and *Walker*, concluded that the reference in sections 1860.1 and 12414.26 to "the authority conferred by this chapter" means *the authority to violate the law*. (*Villanueva v. Fidelity National Title Co.* (2018) 26 Cal.App.5th 1092, 1119, 1132 ("*Villanueva*").)

As this case illustrates, the errant *MacKay/Walker* analysis of the McBride Act immunity has begun to metastasize throughout the Insurance Code, afflicting appellate courts' interpretation of similar McBride Act immunity provisions present in three classes of insurance to which Proposition 103 does not apply: workers' compensation (§ 11758); senior citizens' health insurance (§ 795.7); and, as here, title insurance (§ 12414.26).

According to the *MacKay* and *Walker* decisions and the Court of Appeal:

• *Any conduct by a single insurance company that can be portrayed as "related to ratemaking" is immunized from civil suit*, even if the conduct is expressly *prohibited by law*; even if the conduct was *never disclosed* to the Insurance Commissioner and the public; and even if the misconduct concerns a company's *practices*, not its rates.

• *Any action (or omission) by the Insurance Commissioner* — from the ministerial acceptance of a filing without any review or a public hearing, to failing to respond to a private communication from an insurance company — is sufficient to confer immunity.

• The Insurance Commissioner has "*exclusive jurisdiction*" over all challenges to the conduct of an insurance company, notwithstanding this Court's unambiguous precedents interpreting the Unfair Competition Law ("UCL") (Bus. & Prof. Code, §§ 17200–17209).

• The "filed rate doctrine" — a judge-made rule originally promulgated to bar federal antitrust lawsuits challenging filed rates — *now applies in California* to bar lawsuits challenging any form of insurance company misconduct subject to the Commissioner's jurisdiction — overturning longstanding principles of this Court's jurisprudence that require an unequivocal statutory tether for "safe harbors."

• With respect to property-casualty insurance governed by Proposition 103, sections 1861.10, subd. (a) and 1861.03, subd. (a), are *nullified by conflicting statutes that were enacted forty years earlier*, and this Court's decision in *Farmers* stands *overruled*.

The Danger of Damaging Dicta: Proposition 103 in Jeopardy

Both Defendant Fidelity and Plaintiff Villanueva acknowledge that Proposition 103 differs from the title insurance statutes. But neither party has presented this Court with a detailed textual analysis of the impact of the Proposition 103 amendments to the original McBride Act provisions. From the perspective of the Proposition 103 voters and California consumers, their rights are potentially at risk in this appeal too.

In Sections I and II of this brief, amici aim to assist the Court by examining the unambiguous purpose, meaning, and scope of the 1947 McBride Act immunity, section 1860.1, which was imported without substantive change into the title provisions of the Insurance

Code in 1973. On that analysis alone, the Court of Appeal decision was incorrect: Plaintiff Villanueva's claims are not barred by the immunity.

But given the Court of Appeal's (and Fidelity's) reliance on the errant *MacKay/Walker* decisions, Section III extensively reviews the plain language of Proposition 103's provisions and their interplay with the few McBride provisions retained by the voters, outlining why the *MacKay/Walker* decisions have introduced statutory conflict where there is none, and have led to the disturbing outcome of denying Californians redress under the state's preeminent consumer protection law for unlawful insurance charges. Finally, it discusses the potentially dangerous implications of the *MacKay/Walker* cases for Californians and the Insurance Commissioner, and why judicially-generated exceptions to industry accountability, untethered to any statute, such as the "filed rate doctrine" or the nascent "related to ratemaking" immunity, are inconsistent with this Court's precedents in the modern era.

Consumer Watchdog, Consumer Federation of America, and Consumer Federation of California are well aware of the central principle that governs judicial review: the Court decides only the case before it. (*See, e.g., Hampton v. Superior Court in and for Los Angeles County* (1952) 38 Cal.2d. 652.) However, amici urge the Court to recognize that its opinion in this matter will inevitably be parsed word for word by the property-casualty industry, which will seize upon any statement or citation that might lend support to its ongoing campaign to overturn consumer rights under Proposition 103. Indeed, the review we undertake in this brief indicates that this Court's seemingly inadvertent references in *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26 ("*Quelimane*") to an

immunity for actions "related to ratemaking" rather than for "*concerted* actions related to ratemaking" have been interpreted by some tribunals as blessing the analysis of the *MacKay/Walker* cases.

For these reasons, amici seek the Court's protection for the Proposition 103 voters' exercise of their reserved initiative power. (*Rossi v. Brown* (1995) 9 Cal.4th 688, 693.) We believe that the plain language of the statutes at issue resolves the inquiry here, without the need for recourse to decisional law that adjudicates Proposition 103. However, to the extent that the statutory analysis of the errant case law conflicts with this Court's ruling — as we believe the Court will conclude — we ask the Court to disapprove it.

This approach honors the voters' right to have their own day in this Court: the opportunity to fully brief the interplay between Proposition 103's accountability provisions and the McBride Act immunity, if and when such a case reaches this tribunal.

I. The Plain Language of the McBride Statutes and Their Legislative History Confirm That the Immunity Applies Only to Concerted Action That Would Otherwise Violate the Antitrust Laws.

The model for section 12414.26 is the 1947 McBride Act. Thus, the analysis of the scope of the title statute properly begins there.

The inquiry begins by "examining the statute and giving the words their ordinary meanings." (*Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 777, quoting *People v. Cruz* (1996) 13 Cal.4th 764, 774–775.) "Where the language is clear, it should be followed." (*Rossi v. Brown*, *supra*, 9 Cal4th at 695.) "However, the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose

. . . ." (*Donabedian*, *supra*, Cal.App.4th at 977 [citations omitted.]) "If the meaning of the words is not clear, a court must take the second step and refer to the legislative history." (*Maricela C. v. Superior Court* (1998) 66 Cal.App.4th 1138, 1143–1144.)

Courts must "give significance to every part of a statute to achieve its legislative purpose" (*Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 274 ["*Manufacturers Life*"]), reading "every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness . . . so as to promote rather than defeat the statute's purpose and policy." (*Spanish Speaking Citizens' Foundation v. Low* (2000) 85 Cal.App.4th 1179, 1214.)

Finally, Proposition 103 is an initiative statute adopted by the voters pursuant to the California Constitution (Art. IV, § 1.) Particular deference is accorded to such statutes:

> [I]t is "'the duty of the courts to jealously guard [the people's initiative and referendum power]'…'[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right [to local initiative or referendum] be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.'"

(*Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal. App. 4th 1473, 1485–1486 [citations omitted]). And, indeed, the voters instructed the courts to liberally construe Proposition 103. (Prop. 103, § 8; see Amici's Motion for Judicial Notice ("MJN"), Exh. A [text of Proposition 103 as enacted].)

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The McBride Act was the product of the property-casualty insurance industry's determination to limit California's regulation of

its anti-competitive practices in setting rates. (*Donabedian*, *supra*, 116 Cal.App.4th at 979, quoting this Court's discussion in *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1257.) The impetus was a series of federal rulings reversing longstanding jurisprudence that permitted insurance companies to collude to fix insurance rates. In *United States v. South-Eastern Underwriters Ass'n* (1944) 322 U.S. 533, the U.S. Supreme Court concluded that such concerted action violated the federal antitrust laws.

The insurance industry turned to the legislative branch for relief, and in 1945 Congress enacted the McCarran-Ferguson Act ("McCarran"), exempting insurers from federal antitrust law "to the extent that [the business of insurance] is [] regulated by state law." (15 U.S.C. § 1012.) At the behest of the insurance lobby, every state legislature proceeded to enact laws to meet the federal standard for exemption. (*Donabedian*, *supra*, 116 Cal.App.4th at 978–979.)

The California Legislature followed suit, spurred by this Court's decision in *Speegle vs. Board of Fire Underwriters of the Pacific* (1946) 29 Cal.2d 34, which concluded that the insurance industry was not exempt from the Cartwright Act.

The explicit purpose of the McBride Act was to enable insurance companies doing business in California to qualify for the McCarran "state regulation" exemption from federal antitrust laws — and, at the same time, authorize them to continue to engage in *joint rate-setting conduct* that would otherwise have been a violation of the Cartwright Act. (*See* former Cal. Ins. Code § 1850, added by Stats. 1947, c. 805, § 1, p. 1898, repealed by Proposition 103, section 7.)[16]

[16] MJN, Exh. B contains the text of the McBride Act as enacted and as amended by Proposition 103.

As the Insurance Commissioner explained to Governor Earl Warren in urging his signature on the McBride legislation:

> [T]o prevent the application of the Federal Anti-Trust Laws to this necessary activity in the insurance field of interstate commerce it is essential that state legislation be enacted to affirmatively authorize such *concert of action in the making of insurance rates*.

(MJN, Exh. C [Letter from J.R. Maloney, Deputy Insurance Commissioner, on behalf of Wallace K. Downey, Insurance Commissioner, to Gov. Earl Warren, June 10, 1947, pp. 1–2], emphasis added.)

The McBride Act's "regulation" of the insurance industry was pretextual, intended only to satisfy the McCarran threshold requirement for exemption from federal antitrust laws. The McBride Act provided "standards" by which insurance rates could be judged — "[r]ates shall not be excessive or inadequate . . . nor shall they be unfairly discriminatory" (former § 1852, subd. (a)), added by Stats. 1947, c. 805, § 1, p. 1896, repealed by Proposition 103, section 7)[17] — but emasculated those standards by stating that "[n]o rate shall be held to be excessive unless . . . a reasonable degree of competition does not exist in the area . . . ." (Former § 1852.) Thus, even if an insurer's rate was determined to be excessive in response to a complaint, the Commissioner was prohibited from taking any action so long as there was "competition" in the marketplace. (*Donabedian*, *supra*, 116 Cal.App.4th at 980–981.)

More pertinently, the McBride Act prohibited the Commissioner from regulating insurers' rates and practices. Former

[17] Unless otherwise noted, further references to "former" sections are to McBride Act statutes added by Stats. 1947, c. 805, § 1 and repealed by Proposition 103, section 7, Gen. Elec. (Nov. 8, 1988).

section 1850 stated: "[N]othing in this chapter is intended to give the Commissioner power to fix and determine a rate level by classification or otherwise." As this Court has noted, the McBride Act "established the 'open competition' system of regulation" (*20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 273 ("*20th Century*")), under which "'rates [were] set by insurers without prior or subsequent approval by the Insurance Commissioner . . . .'" (*Id*. at 240, *quoting King v. Meese* (1987) 43 Cal.3d 1217, 1221.) "'California ha[d] less regulation of insurance than any other state, and in California automobile liability insurance [was] less regulated than most other forms of insurance.'" (*20th Century*, *supra*, 8 Cal.4th at 216, 240, *quoting King v. Meese*, *supra*, 43 Cal.3d at 1221.) "Such control of rates as may be said to have existed under the 'open competition' system was essentially through market forces alone . . . ." (*Id*. at 300.)

Having established the level of "regulation" thought necessary to meet the McCarran requirement, the 1947 Legislature turned to its other goal. "One primary purpose of the McBride Act was 'to authorize *cooperation between insurers in rate making* and other related matters." (*Donabedian*, *supra*, 116 Cal.App.4th at 979, citing the McBride Act's purposes [former § 1850, emphasis added].)

To this end, the McBride Act explicitly authorized "[c]oncerted action" (former § 1853): "two or more insurers may act in concert with each other and with others" (*id.*), "[a]greements to adhere to rates" (former § 1853.6), and the "[e]xchange of information and experience data" through insurer-controlled "rating" organizations

that collected loss data, projected that data into the future, and then disseminated proposed rates to all insurers (former § 1853.7).[18]

To protect the industry from lawsuits challenging these authorized anticompetitive activities, the Legislature enacted two statutes.

Section 1860.1. In language that closely parallels McCarran,[19] section 1860.1 reads:

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

The phrase "authority conferred by this chapter" had a *very specific and narrow meaning in the McBride Act*: it referred to the statutory authority conferred on two or more insurance companies to engage in concerted activities in the formulation of rates that, were they not expressly authorized by the McBride Act, would violate the antitrust laws. The phrases "act done," "action taken," and "agreement made" referred to the "concerted action" and "agreements" authorized by sections 1850, 1853, 1853.6, and 1853.7. This is confirmed by the legislative history of section 1860.1, including the aforementioned

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[18] At the time, it was thought that insurance companies could not adequately assess risk without these anticompetitive arrangements, which inevitably led to outright price fixing. (*See*, *e.g.*, Weinstock & Maloney, *History and Development of Insurance Law in California*, WEST'S INSURANCE CODE ANNOTATED LXVI (1971); Angoff, *Insurance Against Competition: How the McCarran-Ferguson Act Raises Prices and Profits in the Property/Casualty Insurance Industry*, 5 Yale J. on Regulation 397, 404–408 (1988).)

[19] McCarran provides that no federal law shall "invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance unless such Act *specifically relates to the business of insurance.*" (15 U.S.C. § 1012(b), emphasis added.)

Insurance Commissioner's analysis (MJN, Exh. C, pp. 1–2), and by a memorandum, prepared by the California Attorney General's office for Governor Earl Warren, that analyzed the legislation line by line. It stated:

> [The McBride Act] authorizes insurers to act in concert in rate-making, rating practices, etc., under prescribed requirements [and] exempts them from legislation *forbidding such practices* in other businesses when so acting[.]

(MJN, Exh. D [Memorandum from Harold B. Haas, Deputy Attorney General, California Dept. of Justice, to Gov. Earl Warren, June 11, 1947], p. 1, emphasis added.)

Concerning section 1860.1, the Attorney General wrote:

> [The McBride Act] 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, citation omitted.)

Referring specifically to the authority of the Insurance Commissioner under the McBride Act to "license and supervise rating organizations," the Memorandum further confirms that section 1860.1 was intended only to immunize concerted action authorized by the McBride Act:

> The exemption from the Cartwright Act and similar laws, accomplished by a section exempting activities pursuant to authority conferred by the bill from prosecution or civil action, also enters into this, since these organizations thereby become immune to action under the Cartwright Act.

(*Id*. at 3.)

Section 1860.2 reads:

> The administration and enforcement of this chapter shall be governed solely by the provisions of this chapter.

> Except as provided in this chapter, no other law relating to insurance and no other provisions in this code heretofore or hereafter enacted shall apply to or be construed as supplementing or modifying the provisions of this chapter unless such other law or other provision expressly so provides and specifically refers to the sections of this chapter which it intends to supplement or modify.

The first sentence instructed that the provisions of the Chapter alone govern its "administration and enforcement." Sections 1858–1859.1 established an administrative complaint process that permitted an aggrieved consumer to submit any complaint about an insurer's rates, premiums, or practices in the first instance to *the insurance company* itself. If the complaint was rejected, the consumer could appeal to the Insurance Commissioner, who could summarily deny a hearing in its sole discretion, and often did. (*King v. Meese*, *supra*, 43 Cal.3d at 1241.) Should a hearing substantiate misconduct, the Commissioner could provide prospective relief only — under the 1947 enactment, the Commissioner had no authority to order refunds, restitution, or disgorgement. Judicial review was available by way of writ of administrative mandamus under Code of Civil Procedure section 1094.5. (§ 1858.6.) This miserly administrative process was rarely invoked and, according to a state investigation, never resulted in a successful challenge to an insurer's rates.[20]

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[20] An investigation by the California "Little Hoover Commission" "was unable to find a single formal determination made by the Department in the past 25 years that a rate is excessive." It further found that "[s]ince the enactment of [the McBride Act] in 1948 [*sic*] the Insurance Commissioner has never fined an insurance company for excessive rates." (Commission on California State Government Organization and Economy, *A Report on the Liability Insurance Crisis in the State of California* (July 1986) at 29, https-//lhc.ca.gov/report/report-liability-insurance-crisis-state-california.)

The second sentence of section 1860.2 addresses the application of two categories of "other" laws: "other law relating to insurance" and "other provisions of this Code," i.e., the Insurance Code. Unlike the antitrust immunity in section 1860.1, section 1860.2 does not refer to "any other law of this State." Insurance companies argued that section 1860.2 exempts them from challenges that might arise under other provisions within the Insurance Code, or other unspecified laws "relating to insurance," that reside outside the chapter.

The legislative history confirms that the collective aim of the two McBride Act provisions was to enable the industry to engage in certain specified conduct related to rate fixing that would otherwise violate state antitrust laws. As the Insurance Commissioner's letter to the Governor explains:

> 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. If other business regulations such as the Fair Trade Act[21] are applicable to insurance, the exemption applies to them also.

(MJN Exh. C, at 3, citation omitted.)

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[21] It is likely that the Attorney General was referring to the Unfair Practices Act of 1935, which barred differential pricing "with the intent to destroy the competition of any regular established dealer." Grether, *Experience in California with Fair Trade Legislation Restricting Price Cutting*, 24 Cal. L. Rev. 640, 645 (1936), http://scholarship.law.berkeley.edu/californialawreview/vol24/iss6/2. The Fair Trade Act legalized resale price maintenance (*ibid.*) and thus would not logically be a statute from which the Legislature would want to "exempt" insurance companies under section 1860.2.

In the years following their enactment, the two McBride Act provisions were interpreted to bar statutory challenges to anticompetitive conduct authorized by the McBride Act.

With that background, we turn to the 1973 amendments to the provisions of the Insurance Code governing title insurance.

II. The 1973 Title Insurance Amendments Imported the McBride Immunity for Concerted Action in Ratemaking; the Amendments Should Be Construed to Confer the Same Limited Immunity.

In 1973, the title insurance industry sponsored legislation to amend the portion of the Insurance Code that governs "Insurance Covering Land" (Part 6 of Division 2 of the Insurance Code). S.B. 1293 imported the policy framework of the McBride Act and a number of its provisions nearly verbatim.

Like the McBride Act, the 1973 title amendments contain four elements:

1. Provisions intended to demonstrate state "regulation" to qualify title insurers for the McCarran exemption. Article 5.5, copying McBride, decreed that "[r]ates shall not be excessive or inadequate, as herein defined, nor shall they be unfairly discriminatory" (§ 12401.3, subd. (a)). Unlike McBride, title insurance companies are required to submit rate schedules and forms (§ 12401.1), a system known as "file and use." But, *exactly like McBride*, the law expressly denies the Commissioner the "power to fix and determine a rate level by classification or otherwise." (§ 12401.)[22] As the Department of Finance put it in a legislative memorandum to the Governor:

[22] Newly added Article 6.7 closely tracks the administrative complaint process established by section 1858 *et seq.* of the McBride Act. "Any person aggrieved" by an underwritten title company can complain to the company, and if the company refuses to grant the "relief

> 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.

(Fidelity's Motion for Judicial Notice (July 12, 2019), Exh. A [Department of Finance Enrolled Bill Report S.B. 1293], September 25, 1973].)

2. Authority for Concerted Action. Like the McBride Act, the 1973 amendments authorize the title insurance companies to engage in joint rate-setting practices that would otherwise violate the antitrust laws. Article 5.5 of the 1973 amendments (§§ 12401–12401.10) authorizes "every person or entity in the business of title insurance" to "exchange information and experience data." (§ 12401.4.) Among such entities are industry-sponsored "advisory organizations" that collect and circulate data from and to insurance companies for the purpose of enabling them to set rates defined. (§ 12340.8; see *Quelimane*, *supra*, 19 Cal.4th at 44-45.) Section 12401.5 requires all title insurance companies to collaborate with the Commissioner's collection of data and requires the Commissioner to "designate one or more advisory organizations" to assist in developing "statistical plans" or other data, which "shall be made available . . . to title

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requested," can file a complaint with the Insurance Commissioner (§ 12414.13); the Commissioner may deny the complaint if he "believes that probable cause for the complaint does not exist or that the complaint is not made in good faith" (§ 12414.13); otherwise, under certain conditions, the Commissioner "may" hold a hearing (§§ 12414.14 and 12414.15); once the administrative process is completed, "[a]ny finding, determination, rule, ruling, or order made by the commissioner" is subject to writ review. (§ 12414.19.) In short, S.B. 1293 imported the ineffectual process devised by the authors of the McBride Act.

insurers and advisory organizations." Section 12401.6 authorizes concerted rate setting action by insurers "under the same management and control." Article 5.7 (§§ 12402–12402.2) governs the conduct of insurance advisory organizations.

3. The McBride Immunity. The 1973 Legislature copied section 12414.26 verbatim from section 1860.1.

Fidelity suggests that "Article 5.5 governing title insurance has no comparable provision [to the cognate workers' compensation statute] restricting its purpose to regulating concert of action." (RB at 88). That's not the correct comparison. The statement of purpose in Article 5.5 is virtually identical to McBride's statement of purpose.[23] Moreover, like the McBride Act, the plain text of Articles 5.5 and 5.7 provide the basis for the title insurance industry's qualification under McCarran for exemption from federal antitrust laws, and as noted above, include multiple provisions authorizing two or more title insurers to exchange data directly or through advisory organizations, clearly anti-competitive activity.

It is a basic principle of statutory construction that similar statutes should be construed similarly. (*Krumme v. Mercury Ins. Co.* (2004) 123 Cal.App.4th 924, 943, fn. 6.) *Section 12414.26 has exactly the scope that section 1860.1 had when it was enacted: to immunize title insurance companies from civil liability when they engage in the concerted action authorized by the title insurance statutes.* As in the McBride Act, the "authority conferred by this chapter" is its permission to engage in joint rate setting conduct.

However, the court below adopted, and Fidelity asserts here, an entirely different interpretation of section 12414.26. Relying primarily

[23] Compare former McBride Act section 1850 (see MJN, Exh. B) with the statement of purpose set forth in title insurance section 12401.

upon the two decisions construing the McBride Act provisions, *MacKay* and *Walker* — which are discussed in Section III D of this brief — the Court of Appeal here endorsed two different constructions of section 12414.26. Both ignore the plain text and purpose of the McBride Act, the framework and substance of which the 1973 legislation adopted wholesale.

Alternative #1. The court below considered that the phrases "act done" or "action taken" might refer to *the Commissioner's actions* pursuant to the 1973 amendments, i.e., accepting documents, reviewing filings (*Villanueva*, *supra*, 26 Cal.App.5th at 1119), and approving rates (*id.* at 1122.) This reading hopelessly violates the grammar and logic of the statute, as well as the history of its cognate provision in the McBride Act.

Section 1860.1 conferred immunity upon insurers for actions which they take jointly "pursuant to the authority conferred by this chapter." A logical reading must conclude that the immunity flows to the same parties who engage in the acts — the insurers. But if the "act done" refers to the Commissioner's actions, then *the immunity would flow to the Commissioner* — not to the insurer. This is an absurd result and certainly one never contemplated by the 1947 Legislature, since the McBride Act specifically barred the Commissioner from setting rates. Article 5.5 requires that rate schedules be submitted to the Commissioner; but that is not a significant distinction: like the McBride Act, that Article expressly bars the Commissioner from approving rates. As noted above, the McBride Act concerted action immunity was never intended to immunize the Commissioner's actions, because under the McBride Act, the Commissioner had no power.

Alternative #2. Ultimately, the Court of Appeal was persuaded by Fidelity's argument that the phrases "act done" or "action taken" refer to a *single insurance company's* conduct when operating under the 1973 amendments: specifically, filing its rate schedules with the Commissioner. (*Id*. at 1125.) This reasoning expands what was once a concerted action immunity to an immunity for unilateral conduct.[24]

In this case, however, the challenged conduct is neither concerted action, nor even a unilateral action, undertaken by the insurance company ostensibly in compliance with the statute. Rather, the issue here is whether Fidelity is immune from civil suit for imposing *unfiled* charges in violation of section 12414.27, which *unambiguously prohibits such charges:*

> [N]o title insurer, underwritten title company or controlled escrow company shall charge for any title policy or service in connection with the business of title insurance, except in accordance with rate filings which have become effective pursuant to Article 5.5 (commencing with Section 12401) of this chapter….

The Court of Appeal correctly determined that Fidelity had unequivocally violated the law:

> Fidelity *failed* to establish rates for third party delivery services and document preparation for sales escrows …. its rate filings *failed* to indicate the character and extent of all the services contemplated. [] Fidelity also used rates or charges prior to any effective date established by a rate filing *in violation of* section 12401.7. Thus, Fidelity *failed to comply* with sections 12401.1,

[24] Both interpretations of section 12414.26 orphan the phrase "agreement made," which clearly refers to an agreement to engage in concerted action. This is a red flag that the construction is improper. (*Aguilar v. Ass'n for Retarded Citizens* (1991) 234 Cal.App.3d 21, 28–29 [ignoring words in the statute renders them "mere surplusage"].)

> 12410.2 [*sic*], and 12401.7, all of which are in article 5.5 of Chapter 1.

(*Id.* at 1125–1126, emphasis added.)

However, it reached this conclusion:

> *In our view, this conduct constitutes "act[s] done ... "pursuant to the authority conferred by Article 5.5"* (§ 12414.26).

(*Id.*, emphasis added.)

We must pause to recognize the import of this astounding result. According to the Court of Appeal, the "authority conferred by this chapter" is the authority to *violate* its provisions prohibiting the charging of unfiled rates. This is precisely the "absurd result" that must be avoided under the rules of statutory construction. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230.) *Yet it is the logical conclusion of the statutory construction that posits that the immunity applies to the conduct of a single insurance company.*

In fairness, the court below clearly indicated it was constrained by case law to reach this troubling conclusion, in significant part by one of two decisions of this Court construing the text of the immunity statute.

In *State Compensation Insurance Fund v. Superior Court* (2001) 24 Cal.4th 930 ("*SCIF*"), the workers' compensation insurance company was accused of "either intentionally or negligently" misreporting data to the Rating Bureau (*id.* at 933), a ratemaking organization, which as a result "allowed SCIF to collect excessive premiums" (*id.* at 933–934) from its insureds, often small business entities. At issue was the scope of the immunity conferred by section 11758 of the workers' compensation law, which the Court noted was "virtually identical" to section 1860.1 of the McBride Act. (*Id.* at

939–940.) The insurer argued that its misreporting was an "act done" pursuant to "the authority conferred by" section 11758, and thus it qualified for the immunity. (That is Alternative #2 adopted by the Court of Appeal in this case; see discussion *supra*, pp. 36–37.) The Court assessed the syntax and rejected that construction, because the statute:

> refers to an "act done, action taken or agreement made *pursuant to the authority* conferred by this article ...." It does not refer to an "act done, action taken or agreement made pursuant to this article."

(*Id.* at 936, emphasis in original.) In other words, an insurance company could not syntactically both violate the statutory scheme and claim it was "authorized" to do so.

The Court went on to explain that the phrase "the authority conferred by this chapter" refers to "cooperation between insurers." (*Id.* at 936.) It concluded that the immunity *applied only "to concerted activity otherwise barred by the antitrust laws, and not to the individual misconduct of an insurer . . . ."* (*Id.* at 938, emphasis added.) The Court further stated that "in order for the miscalculating and misreporting of loss information to fall within the scope of section 11758's immunity, it appears it *must be related to such authorized cooperation* in 'ratemaking and other related matters.'" (*Id.* at 936, emphasis added.)

The Court's analysis in *SCIF* is correct and on point: The immunity is limited to concerted action authorized by the statute.

Unfortunately, the Court's decision a few years earlier in *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, is not quite as precise. In that case, the Court considered whether consumers could bring an action under the Unfair Competition Law ("UCL") (Bus. & Prof. Code §§ 17200–17209) alleging a

"conspiracy" to "refuse to issue" title insurance. (*Quelimane*, *supra*, 19 Cal.4th at 36, 48.) The question before the Court was whether a UCL challenge to "concerted activities for *an unlawful purpose* such as activities in restraint of trade" under the Cartwright Act — concerted activities that are *outside* those permitted under the statutes — was barred by section 12414.26. (*Id.* at 37.) The lower court had misread *Manufacturers Life*, *supra*, to bar a UCL action based on a predicate violation of the Cartwright Act, absent an express pronouncement by the Legislature that the UCL applied to insurance companies. (*Ibid*.)

Quelimane determined that the alleged violations of the Cartwright Act did *not* constitute conduct subject to the immunity clause. That was correct. Second, it held that neither the immunity provisions nor *Manufacturers Life* barred a UCL action, and the Cartwright Act violations could serve as the predicate for a UCL action. (*Id.* at 33.) As far as it goes, *Quelimane* answers the questions in this matter, because it holds that concerted actions that are *outside the properly interpreted scope of the immunity* are not immunized.

But statements in *Quelimane* concerning what conduct is *within* the scope of the immunity appeared to articulate an exception to that rule.

After confirming the narrow scope of section 12414.26's immunity, *Quelimane* said, "[w]e 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 51, emphasis added.) Then this: "[T]he Insurance Code does not displace the UCL *except as to title company activities related to rate setting*." (*Id*. at 33, emphasis added.)

Amici would read these statements by this Court to refer to "*concerted*" activities between two or more insurance companies that are "related to rate setting," or, in antitrust parlance, the "fixing of rates." Such activities are indeed authorized by the title statutes (see discussion *supra*, pp. 33–34) and are therefore immunized by section 12414.26. That is certainly the logical interpretation of the statute based on its plain text and straightforward genealogy.

However, the Court of Appeal in this case seized upon the remarks in *Quelimane* as justification for adopting the alternative constructions of the immunity proffered by the industry. It said: "*Quelimane* instructs that the immunity applies to 'ratemaking-related activities,'" — far beyond concerted action. (*Villanueva*, *supra*, 26 Cal.App.5th at 1124.)

Nothing in the title statutes or their legislative history suggests that the Legislature intended section 12414.26 to extend beyond concerted anti-competitive conduct to bar challenges to unilateral violations of its non-antitrust provisions. Put another way, when importing McBride's antitrust immunity into the title insurance framework in 1973, the Legislature had the opportunity to revise the text to provide the vastly expanded immunity the title industry now claims for it. The Legislature did not do so.

Instead of carefully parsing the title insurance statutes by reference to their cognate provisions in the pre-Proposition 103 McBride Act, the Court of Appeal and Fidelity rely on the two appellate decisions construing property-casualty lines of insurance governed by Proposition 103, i.e. *Walker* and *MacKay.* (*Quelimane*, *supra*, 19 Cal.4th at 1121–1124.) After a survey of those and other cases, during which the court below cites *Farmers* without discussion and glancingly mentions *Donabedian*, the Court of Appeal concluded

that "this case is more like the cases that involved activities *related to ratemaking* than those that did not." (*Villanueva*, *supra*, 26 Cal.App.5th at 1124, emphasis added.) *But the opinion does not articulate what that distinction is.*

Perhaps because it could not. If the operative test for civil immunity is now whether the activities are "related to ratemaking," it is difficult to reconcile *Villanueva*, which rejected a challenge to unfiled overcharges, with *Quelimane*, which concerned the calculation of rates, and which the Court placed safely outside the "related to ratemaking" kill zone.

Amidst the echo chamber of appellate decisions, no court has identified a basis — at least one that survives acknowledged rules of statutory construction — for extending the antitrust immunity, as the Court of Appeal did here, to any unilateral insurer conduct "related to ratemaking." This is strikingly true in the context of construing the Insurance Code as it has been amended by the voters through Proposition 103, to which this brief now turns.

III. Proposition 103 Created an Unqualified Private Right of Action; the Cases that Expanded the McBride Immunity Were Wrongly Decided.

Notwithstanding the plain language employed by the voters and this Court's ruling in *Farmers*, several decisions misconstruing Proposition 103 have propagated throughout California's insurance jurisprudence. Although title insurance is not subject to Proposition 103, the Court of Appeal below relied on those decisions. Moreover, it ignored statutes and jurisprudence that contradict its decision. As a result, not only is the right of title consumers to challenge unlawful practices at stake, so is the authority to enforce the reforms of Proposition 103 in civil courts. For these reasons, a full

discussion of Proposition 103 is necessary to expose the faulty reasoning of the cases relied upon by the court below.

A. Proposition 103 Replaced the McBride Act with a Regulatory Framework that Holds Insurance Companies Accountable in the Courts.

Thirty-five years ago, California experienced a "liability insurance crisis," during which insurance for motorists, homeowners, renters and businesses became unaffordable and often unavailable.[25] The McBride Act regime drew enormous criticism; a legislative analysis published at the time concluded that "[t]he McBride-Grunsky Act must be judged a failure."[26]

In 1987, this Court adjudicated a lawsuit arising from a combination of unaffordable insurance rates and a litany of arbitrary and discriminatory practices by insurance companies freed of any regulatory or judicial accountability under the McBride Act. (*King v. Meese*, *supra*, 43 Cal.3d at 1237–1247, Broussard, J., concurring.) The Court noted that the Insurance Commissioner had failed to use what little authority it had to remedy the manifold injustices. (*Id.* at 1241.) However, the Court stated it was incumbent on the legislative branch to remedy the abuses. (*Ibid.*) State lawmakers did not heed this

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[25] See *Calfarm*, *supra*, 48 Cal.3d 805 and *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1260–1266 (background of Proposition 103); *see also* Rosenfield, *Auto Insurance: Crisis and Reform*, 29 Univ. of Memphis L. Rev. 69, 75–80.

[26] MJN, Exh. E (Sen. Claims and Corporations Comm., Analysis of Assem. Bill 1687 (1987–1988 Reg. Sess.) July 15, 1987, p. 4 [analyzing legislation amending the McBride-Grunsky complaint process].) See also, e.g., Auditor General of California, *The Department of Insurance Needs to Further Improve and Increase Its Regulatory Efforts* (June 1987), https://www.auditor.ca.gov/pdfs/oag/p-650.pdf.

Court's call. But the voters heard it and took the matter into their own hands one year later.

Declaring that "the existing laws inadequately protect consumers and allow insurance companies to charge excessive, unjustified and arbitrary rates" (Prop. 103, § 1 Findings & Decls.), Proposition 103 replaced the discredited McBride Act with a new statutory regime, found in Article 10 (of Chapter 9 of Part 1 Division 2) of the Code.

The center of Proposition 103's comprehensive scheme for controlling insurance rates and premiums is its paramount emphasis on the accountability of both insurance companies and the Insurance Commissioner directly to the public. Indeed, hoping to evade those reforms, the insurance industry placed a competing measure on the same ballot that would have explicitly nullified Proposition 103's provisions. It was defeated by the voters.[27] Its rejection is powerful evidence of the voters' intention to enact each provision of Proposition 103, of which they are deemed aware. (See *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 252; *Taxpayers v. Fair Political Practices Comm'n* (1990) 51 Cal.3d 744, 769.)

Throughout Proposition 103, the voters manifested in plain terms their intent to retain an active role in ensuring the proper

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[27] Proposition 104 contained provisions cancelling out each of Proposition 103's reforms and specified that "if it receive[d] a higher number of votes than other measures on this ballot, then those provisions in other measures … shall have no effect." (MJN, Exh. F [Ballot Pamphlet, Legislative Analyst Analysis of Proposition 104, p. 144, 145; text of proposed § 67 of Proposition 104, p. 157], also available at https://repository.uchastings.edu/ca_ballot_props/988.) In the Ballot Argument in Favor of Proposition 103, proponents pointed out the impact of the competing initiatives. (MJN Exh. G, [Proposition 103 Ballot Pamphlet arguments, p. 100].)

enforcement of the provisions of Proposition 103. The voters imposed reforms in five categories: immediate rate reductions (§ 1861.01); regulation of automobile underwriting practices (§§ 1861.02, 1861.03, subd. (c)); regulation of property-casualty rates (§§ 1861.05–1861.09); elimination of barriers to competition in the marketplace (§ 1861.03(b); *see also* §§ 1861.04, 1861.12); and public participation and insurer accountability (§§ 1861.10, 1861.03). The last category of reforms is at issue in this case.

This Court has noted that, under Proposition 103, "much is necessarily left to the Insurance Commissioner," which the voters made an elected post (section 12900). (*Calfarm*, *supra*, 48 Cal.3d 805, 824; *20th Century*, *supra*, 8 Cal.4th 216, 245.) But the voters chose not to leave *everything* to the Commissioner. They established, in section 1861.10, subd. (a), an additional, independent check upon the conduct of the insurance companies and the Commissioner: the *unqualified* right to enforce the Insurance Code in the judicial branch as well as before the Department of Insurance (CDI). It provides:

> Any person may initiate or intervene in any proceeding permitted or established pursuant to this chapter, challenge any action of the commissioner under this article, and enforce any provision of this article.

Clause 1 specifies that "any person" may "initiate or intervene in any proceeding permitted or established pursuant to this chapter." Chapter 9 includes both Proposition 103 and the remains of the McBride Act; therefore, "proceeding permitted" includes any legal action brought under the general laws of California pursuant to section 1861.03 (discussed below), and the McBride Act administrative process (discussed below). "[P]roceeding established" means any matter connected with the administrative regulation of insurance companies enacted by Proposition 103, including

challenges to rate applications (§ 1861.05) and the McBride era administrative complaint process (§§ 1858 *et seq.*) by a person who no longer had to be "aggrieved."

Clause 2 allows "any person" to "challenge any action of the commissioner under this *article* [Article 10, i.e., Proposition 103]." (Emphasis added.) "Challenge" includes initiating a lawsuit in California courts.

Clause 3 of § 1861.10(a) specifies that "any person" may "enforce any provision of this article [Proposition 103]." Clause 3 authorizes citizens to go directly to court to enforce the provisions of the Insurance Code added by Proposition 103 against insurance companies.

Nothing in the plain language of section 1861.10, subd. (a) limits or qualifies the private right of action. Proposition 103 makes no distinction between "filed" or "unfiled," "approved or unapproved" rates, or between the regulation of rates, the specified rating factors that automobile insurers may utilize in underwriting, or any other mandate of Proposition 103.

Consumers and insurance companies have routinely utilized these provisions over the preceding thirty years to initiate and intervene in numerous civil court proceedings to enforce Proposition 103.

1861.03, subd. (a). To expand the rights and remedies that can be "enforced" under section 1861.10(a), the voters granted themselves the protection of all California's laws, from which insurance companies had previously argued they were *exempt* by virtue of sections 1860.1 and 1860.2. Section 1861.03, subd. (a), provides that *all* state laws applicable to other businesses apply to the insurance

industry. It expressly references several key consumer remedies, including the UCL:

> The business of insurance shall be subject to the laws of California applicable to any other business, including, but not limited to, the Unruh Civil Rights Act (Civil Code Sections 51 through 53), and the antitrust and unfair business practices laws (Parts 2 and 3, commencing with section 16600 of Division 7, of the Business and Professions Code).

Thus, Proposition 103 offers consumers the alternative to seek recourse from either the regulatory agency or the judicial branch, without any requirement that administrative remedies be exhausted, as this Court recognized in *Farmers*, *supra*, 2 Cal.4th at 390–391.)

B. The Voters Gutted the McBride Act, Retaining Only a Few Provisions and Greatly Narrowing Their Scope.

"If nothing else is clear, this is: Proposition 103 was intended to do away with the 'open competition system'" of the McBride Act. (*20th Century*, *supra*, 8 Cal.4th at 300.) Proposition 103 repealed *every* provision of the McBride Act that was inconsistent with the initiative statute. (Prop. 103, § 7 Repeal of Existing Law [See MJN, Exh. A].)

Of *crucial* importance to the correct analysis of the scope of the immunity, the voters authorized certain specified concerted conduct in connection with rate setting to continue:

• The voters retained several provisions of the McBride Act that permit joint activities: section 1853.5 (concerted action among insurers with common ownership or management); section 1853.8 (agreements to apportion risks); section 1855 (operation of advisory organizations); and section 1856 (joint underwriting and reinsurance).

• Section 1861.03, subd. (b), enacted by Proposition 103, includes a narrow "safe haven" for collection and sharing of ratemaking data:

> Nothing in this section shall be construed to prohibit (1) any agreement to collect, compile and disseminate historical data on paid claims or reserves for reported claims, provided such data is contemporaneously transmitted to the commissioner, or (2) participation in any joint arrangement established by statute or the commissioner to assure availability of insurance.

(Section 1860.1.)

To avail themselves of the immunity for the limited concerted rate setting activity permitted by Proposition 103, the concerted action referenced in section 1860.1 must be "pursuant to the authority conferred by this chapter." Thus, section 1860.1 *still serves its traditional purpose* by providing immunity for the enumerated joint conduct. (*Donabedian*, *supra*, 116 Cal.App.4th at 990–991.) The basic *meaning* of that section remains unchanged; however, the voters contracted the *scope* of the immunity it confers upon property-casualty insurance companies. This limitation was confirmed by antitrust guidelines issued by the Attorney General in 1990:

> While the initiative did not repeal [section 1860.1], it provided specifically, in section 1861.03, subdivision (a), for the application of certain general-purpose laws. This specific provision in Proposition 103 prevails over the earlier provision of Section 1860.1, the continued existence of which is thus no impediment to the application of the Cartwright Act to the business of insurance formerly governed by this provision of the McBride-Grunsky Act."

(State of California, Department of Justice, *Antitrust Guidelines for the Insurance Industry*, March 1990, at p. 23.)

• Section 1860.2. Section 1861.10, subd. (a), is within Chapter 9. Thus the provisions of Proposition 103 that "authorize [a private lawsuit] are not 'other law' — they are part of the same chapter as section 1860.1." (*Donabedian*, *supra*, 116 Cal.App.4th at 977.) And the "administration and enforcement" of Proposition 103 is shared by the Commissioner and consumers. As *Donabedian* explains, anyone may "initiate . . . any proceeding" that Chapter 9 "permit[s] or establishe[s]," and anyone may "enforce any provision of" Proposition 103. (*Donabedian*, *supra*, 116 Cal.App.4th at 987.)

In summary, a careful analysis of the provisions enacted by Proposition 103 demonstrates that the measure expressly authorizes private plaintiffs to bring suit under the UCL to challenge violations of Proposition 103. And the interplay between the Proposition 103 enactments and the provisions of the McBride Act preserved by the voters reveals a carefully erected statutory framework that, correctly construed, is internally consistent and harmonious.

C. Case Law Confirms the Private Right of Action.

The Public Enforcement Rights created by Proposition 103 have been a particular target of the insurance industry.

1. *Farmers*.

This Court adjudicated the first challenge to industry violations of Proposition 103 in *Farmers* in 1992. The Attorney General, acting under the authority of sections 1861.10(a) and 1861.03(a), filed a civil suit against Farmers Insurance Exchange, alleging that Farmers had charged unfairly discriminatory *rates* and engaged in illegal underwriting *practices*, including charging a previously uninsured motorist a higher premium — a particularly pernicious practice that the Court had discussed at length in 1987 in *King v. Meese*, *supra*, 43

Cal.3d at 1225, and that California voters specifically barred (§ 1861.02(c); see also § 1861.02(a), prescribing the "rating factors" an automobile insurance company must use to set "rates and premiums," and requiring rulemakings for "optional" rating factors). (*Farmers*, *supra*, 2 Cal.4th 377, 381–382.)

The Court rejected the insurers' argument that the suit was barred by the so-called "exclusive jurisdiction" doctrine. (*Id*. at 384, 390–91). As noted *supra*, the Court concluded that Proposition 103 provided "'alternative' or 'cumulative' administrative and civil remedies." (*Id.* at 393–94.)

Importantly, the Court adopted the judicial doctrine of "primary jurisdiction," under which the courts retain jurisdiction but have the discretion to request the technical "expertise presumably possessed by the Insurance Commissioner." (*Id*. at 398.)

In short, *Farmers* decisively decided the Proposition 103 immunity issue twenty-six years ago.[28]

2. *Donabedian*.

In 2004, the Second District Court of Appeal (Division 1) reviewed an order dismissing a class action lawsuit that challenged one of the very same practices at issue in *Farmers*: surcharging previously uninsured motorists in violation of section 1861.02, subd.

[28] In a footnote (p. 382, fn.1), the Court opined that section 1860.2 "appear[ed]" to preclude suit with regard to the *first* cause of action, which alleged both an Unfair Competition Law claim and a direct claim against Farmers for violation of sections 1861.02 and 1861.05. However, this was dicta and erroneous: the issue was neither briefed nor argued before the Court (*see Hart v. Burnett* (1860) 15 C. 530, 598 ["A decision is not even authority except upon the point actually passed upon by the Court and directly involved in the case]). And as noted above, section 1860.2 is not a bar.

(c). Mercury Insurance Company, the respondent, argued that sections 1860.1 and 1860.2 applied to bar the UCL claim.

Donabedian conducted the thorough statutory analysis that other courts have eschewed. The court exhaustively examined the statutory framework of the Insurance Code—reviewing the plain meaning of the McBride provisions and sections 1861.10, subd. (a), and 1861.03, subd. (b), and their purpose and legislative history. (*Id.* at 977–983.) It concluded:

> In sum, as Mercury would have it, a violation of Proposition 103 would always fall within the exclusive jurisdiction of the Insurance Commissioner and would never give rise to a civil action in the first instance. But that interpretation is contrary to the Proposition's plain language and the analysis in *Farmers*. *It would make little sense if Proposition 103--which subjects insurers to the UCL--were interpreted to preclude a civil action alleging a violation of that very Proposition*.

(*Id.* at 991, citations omitted, emphasis added.)[29]

3. *Fogel.*

After *Donabedian*, the insurance industry pivoted its arguments to propose that the judiciary adopt the "filed rate doctrine" to immunize challenges to insurance company misconduct. That issue was front and center four years later, in *Fogel v. Farmers* (2008) 160 Cal.App.4th 1403. In that case, Division 4 of the Second District addressed a UCL challenge to certain fees, collected by Farmers in connection with the sale of automobile, home, and business insurance, which the plaintiffs claimed were "excessive." That court examined the McBride era statutes and legislative history (*id.* at 1407);

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[29] Contemporaneously with *Donabedian*, Proposition 103's enforcement rights were also litigated in *Poirer v. State Farm Mutual Automobile Insurance Co.* (B165389) 2004 WL 2325837 (unpublished decision).

acknowledged in passing sections 1861.10, subd. (a), and 1861.03, subd. (b) (*id.* at 1408, 1410); and cited *Donabedian*. It pointedly mentioned *Walker* (and this Court's failure to disapprove it). (*Id.* at 1415–1416.) However, the *Fogel* court chose not to decide whether section 1860.1's immunity applied only to concerted action. (*Id.* at 1416). Even though the fees at issue were charged in connection with the sale of insurance, the court determined that they were based on a separate subscriber agreement that "did not arise from any authority conferred by Chapter 9" (*id.* at 1416–1417) and hence were not subject to the McBride immunity, even under the expanded application to unilateral conduct advanced by the insurance industry.

As for the "filed rate doctrine," the court concluded that it had never been adopted in California, and that Proposition 103 and the federal tariff system, from which the "filed rate doctrine" originated, were not "analogous." (*Id.* at 1418.)

D. The *MacKay/Walker* Decisions Misconstrue or Ignore All Four Provisions of the Insurance Code as Amended by Proposition 103 and Are Not Good Law.

The Court of Appeal decision acknowledges *Farmers* without comment (*Villanueva*, *supra*, 26 Cal.App.5th at 1112), and *Fogel* not at all. It cursorily attempts to distinguish *Donabedian* by suggesting that it did not address a challenge to rates, but to the post-review application of the Mercury's rating factors to the public (*id.* at 1122). (Note that by suggesting so, the court is asserting that "unfiled" rates are not immunized, in contradiction to its holding.) The Court of Appeal and Fidelity here prefer to rely on the authority of two cases, *MacKay* and *Walker*, which badly misconstrued the law.

1. *Walker* Expanded the Scope of Immunity Beyond Concerted Action and Was Unable to Construe the Proposition 103 Statutes.

(a) *Walker* Offered Two Constructions of Section 1860.1 that Expanded the Immunity to Apply to Unilateral Actions by the Commissioner or an Insurance Company.

The first appellate decision to diverge from this Court's decision in *Farmers* was *Walker*, decided in 2000. The plaintiffs in that case filed a class action lawsuit against multiple insurance companies challenging as "excessive" auto insurance *rates* that had been approved by the Commissioner pursuant to section 1861.05. (*Walker*, *supra*, 77 Cal.App.4th at 752.) The insurers demurred, arguing that sections 1860.1 and 1860.2 immunized them from suit for damages based on their use of "approved rates." (*Id.* at 753–54.) The First District Court of Appeal agreed. (*Ibid*.)

Ignoring the legislative history of section 1860.1, *Walker* read the phrases "act done" and "action taken" to refer to the *Commissioner's approval* of Allstate's rates. (*Walker*, *supra*, 77 Cal.App.4th at 756, emphasis added.) It also proposed that section 1860.1 should be read to apply to a *unilateral action* by the insurer — "charging a rate":

> If section 1860.1 has any meaning whatsoever (which under the accepted rules of statutory construction it must), the section must bar claims based upon an insurer's *charging a rate* that has been approved by the commissioner pursuant to the amended McBride Act.

(*Id.* at 756.)

Walker's two interpretations of section 1860.1 do not comport with its text, as discussed in Section I *supra*, pp. 26–27. Nor did *Walker* attempt to construe section 1860.2, other than to suggest it

conferred exclusive jurisdiction upon the Commissioner. (*Id*. at 755.) That too was incorrect, as discussed *supra*, pp. 27–29.

(b) *Walker* Ignored and Misconstrued Sections 1861.10, subd. (a) and 1861.03.

Walker also failed to reconcile the McBride Act statutes with the Consumer Enforcement Rights enacted by Proposition 103. Rather, the *Walker* court appeared to believe — erroneously — that section 1861.10(a) allows consumers to participate only in *administrative challenges* to rates under section 1861.05, *et seq*. (*Id.* at 757.) This construction renders section 1861.10, subd. (a) mere surplusage, since the administrative hearing provisions enacted by Proposition 103 already specify that consumers can file administrative challenges to rate applications. (See § 1861.05, subd. (c) [authorizing "a consumer or his or her representative [to] request[] a hearing within forty-five days of public notice" of a rate application.)[30]

In summary, rather than properly construe and harmonize the McBride Act provisions in the light of the later-enacted provisions of Proposition 103, *Walker* discerned a conflict between them.

> To read sections 1861.03 and 1861.10 as appellants urge would result in an unnecessary conflict between these statutes and section 1860.1, which embodies the finality of the commissioner's rate-making decision.

(*Id*. at 758.)

It then resolved that conflict by *permitting the older statutes to supersede the newer* ones. *Walker* simply dismissed this Court's decision in *Farmers*, incorrectly asserting that the latter did not

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[30] The court's syntactical errors were compounded by what it described as "Appellants' inability to craft a cohesive argument taking cognizance of these immunity statutes [§§ 1860.1 and 1860.2]." (*Id.* at 755.)

involve rates (*id.* at 759; see discussion of *Farmers* in Section III *supra*, pp. 48-49).

Finally, in a footnote, *Walker* suggested that the "filed rate doctrine" was "consistent with our interpretation of the statutory provisions at issue in this case." (*Id*. at 757.)

2. *MacKay* Vastly Expanded the Scope of the Section 1860.1 Immunity Beyond *Walker* to an Insurer's Failure to Comply with the Requirements of Proposition 103.

In *MacKay*, a putative class of consumers sued 21st Century Insurance Company for the conduct that was at issue in *Farmers* and *Donabedian* (and *King v. Meese*): the insurer used an internal underwriting rule — "accident verification" — to surcharge motorists who could not "verify" their accident record by showing proof of prior insurance, a violation of section 1861.02, subd. (c), as discussed *supra*, pp. 6-47. (*MacKay*, *supra*, 188 Cal.App.4th at 1432–1433.)

(a) *MacKay* Expanded the Scope of the Section 1860.1 Immunity Beyond Rates, to an Insurer's Non-Compliance with the Requirements of Proposition 103.

The Court of Appeal in *MacKay* determined that the McBride immunity applied to "issues related to ratemaking," citing the errant analysis in *Walker.* (*Id.* at 1441–1443.) Indeed, *MacKay* adopted *both* of the constructions of section 1860.1 proposed by *Walker* (and rejected by this Court in *SCIF*, *supra*, 24 Cal.4th 930 at 936–938: first, that the immunity applies to the unilateral act of a single insurance company, and second, that the immunity applied to the Commissioner's approval of the underwriting guideline. According to *MacKay*, "An insurer charging a preapproved rate is doing an *act* or

taking an *action* pursuant to the *authority conferred by the chapter*." (*MacKay*, *supra*, 188 Cal.App.4th at 1443.)

But *MacKay* went further, vastly extending its scope, and in the process, permitting the immunity to override the statutory authority the voters gave the Commissioner to regulate the insurance industry.

The *MacKay* court concluded that the underwriting guideline had been approved. But the record showed that the Commissioner routinely inserted the following disclaimer in letters approving class plans: "this approval does not constitute an approval of underwriting guidelines." The *MacKay* court cavalierly dismissed that disclaimer, and in an extraordinary usurpation of the Commissioner's authority, decreed that anything submitted to the agency is deemed approved (and therefore immunized). (*Id.* at 1435–1436, fn. 6.)

The court did not stop there, however. It further ordained that the underwriting guideline was a "rating factor" (*id*. at 1437). That pronouncement conflicted with a provision of Proposition 103 that the voters enacted to meticulously regulate the use of "rating factors": automobile insurers may utilize only three specified mandatory factors, and such "optional" rating factors that have been adopted by the Commissioner by *regulation*. (Ins. Code § 1861.02(a)(4); See *Spanish Speaking Citizens' Foundation, et al. v. Low* (2000) 85 Cal.App.4th 1179, 1186.) 21st Century's underwriting guideline was *never adopted* as a "rating factor." The judicial branch may not authorize new rating factors — that is the Commissioner's sole responsibility. (See, e.g., *The Foundation for Taxpayer and Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354, 1371–1372.)

Thus *MacKay* authorized insurance companies to circumvent the procedures enacted by the voters to protect themselves against the

unjust and discriminatory underwriting practices that this Court had noted in *King v. Meese* that were the subject of the UCL lawsuit affirmed by this Court in *Farmers* and by the court in *Donabedian*.

To justify its sudden expansion of the section 1860.1, *MacKay* had to overcome the statute's plain language and legislative history. It did so by *revising the intent* of the Proposition 103 voters:

> It is difficult to believe that Insurance Code section 1860.1 is currently intended to serve the purpose it served in 1947, as the express statement of that purpose has since been repealed … we cannot conclude that Insurance Code section 1860.1 is currently to be interpreted in accordance with its *initial* intent, which was to exempt insurers from antitrust laws.

(*MacKay*, *supra*, 188 Cal.App.4th at 1446–1447, emphasis in original.)

> [W]e conclude that it is inappropriate to limit the interpretation of Insurance Code section 1860.1 by the now-superseded purpose for which it was initially enacted. Instead, it is properly interpreted in the context of the entirety of the ratemaking chapter, as we have done above.

(*Id.* at 1443–1444.)

In other words, by passing Proposition 103, the voters' "intent" changed (even though the text of section 1860.1 did not), so that the "*purpose* for which [section 1860.1] was initially enacted" in 1947 — to immunize concerted conduct — somehow transmogrified into an *intent by the electorate to restrict consumers' ability to challenge insurance company violations of the initiative in a court of law*. (*Id.* at 1447–49, emphasis added.)

(b) *MacKay* Nullified the Public Enforcement Rights Enacted by Proposition 103.

The court in *MacKay* faced a dilemma: unlike *Walker*, where the Proposition 103 provisions were never parsed, the panel in *MacKay* had to contend with *Donabedian*'s forthright statutory analysis of sections 1861.10, subd. (a) and 1861.03. First, *MacKay* posited that section 1861.03, subd. (a) was a "general" provision that "is controlled by" the more specific provision of the McBride Act — section 1860.1, (*id*. at 1443, citing inapposite cases), ignoring the limitation by the later-enacted measure on the scope of the former. Taking another tack, *MacKay* suggested that the voters' decision to retain the McBride immunity for the limited concerted activities they authorized under section 1861.03, subd. (b) isn't important, because the voters didn't "need" to do so. (*Id.* at 1448.) The plain language of the measure proves otherwise.[31]

No doubt confounded to explain the civil enforcement rights plainly created by section 1861.10, subd. (a), *MacKay's* treatment of that provision is relegated to a footnote, where it is misconstrued, ironically in a manner that directly conflicts with a ruling by that same panel four years earlier.[32] (*MacKay*, *supra*, 188 Cal.App.4th at 1446, fn. 14.)

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[31] *MacKay* proposed that the voters must have intended that section 1860.1 convey an immunity broader than for concerted action, because section 1861.03, subd. (b) could be read to provide such an immunity on its own. But that reasoning does not account for the other concerted action authority in the McBride Act that the voters left in place (see discussion *supra,* pp. 46-47).

[32] *MacKay* asserts that section 1861.10, subd. (a), "did not create a private right of action," citing the same Division's opinion in *Farmers Ins. Exchange v. Superior* Court (2006) 137 Cal.App.4th 842. But in fact, that decision confirms that section 1861.10(a) "*confers standing*" in proceedings that include "*direct legal actions authorized by section 1861.03, subdivision (a)*," such as an Unfair Competition Law case. (*Id.* at 853, fn. 8, emphasis added.)

Finally, *MacKay* concludes that the Insurance Commissioner has "exclusive" jurisdiction over rates (*MacKay*, *supra*, 188 Cal.App.4th at 1432) and, perhaps as a hedge on its impoverished statutory analysis, asserts in the alternative that that the "filed rate doctrine" applied to immunize the insurance industry from civil challenges, for which it cites nothing more than the footnote in *Walker*, disagreeing with *Fogel*. (*Id.* at 1448–49.)

The *MacKay* and *Walker* courts have effectively overruled this Court's decision in *Farmers*.

The *Walker* and *MacKay* decisions flout bedrock rules of statutory construction. (See Section I, *supra*, p. 21.) According to these decisions, the McBride Act regulatory scheme enacted 41 years prior to the passage of Proposition 103 not only survived its repeal by the voters, but the provisions *retained* by the voters *override* the more recently enacted provisions. This analysis turns the rules of statutory construction upside down. The courts should have attempted to harmonize the provisions (*Spanish Speaking Citizens' Foundation v. Low* (2000) 85 Cal.App.4th 1179, 1214), which as this brief shows, is a straightforward task and leads inexorably to a narrow interpretation of the scope of the immunity: for concerted action in ratemaking that is expressly authorized by the Code. Instead, the two courts found a conflict. It is hornbook law that where there is a conflict between statutes, the later-enacted law must prevail. (*People v. Bustamante* (1997) 57 Cal.App.4th 693; see also Govt. Code § 9605, subd. (b).)

As this Court recently noted, to the extent the statutes are interpreted to conflict, the earlier enactments would be repealed by implication. In *Wishnev v. Northwestern Mutual Life Ins. Co.* (2019) 8 Cal.5th 199, the Court explained that when "[t]he interplay among [conflicting legislative and initiative enactments] continues to

generate confusion" (*id.* at 206), repeal by implication "'may be found where (1) "the two acts are so inconsistent that there is no possibility of concurrent operation," or (2) "the later provision gives undebatable evidence of an intent to supersede the earlier" provision,'" (*id.* at 211.) That is precisely the statutory posture here.

MacKay is a tour de force of judicial overreach, reverting the property-casualty Insurance Code to the era prior to Proposition 103, and that the voters decisively rejected. Unfortunately, this Court never had an opportunity to review *MacKay* because it was orphaned.[33]

E. The Consequences of the Purported "Related to Ratemaking" Immunity.

Considering that insurance companies will seek to exploit the pronouncements made by *MacKay* and *Walker*, and adopted by the Court of Appeal here, the consequences for *all* California consumers are potentially grave. They will argue that:

• *Any conduct* by a single insurance company that can be portrayed as "related to ratemaking" is immunized by virtue of a statute that was enacted in 1947 to allow certain collusive behavior by unaffiliated insurance companies. The scope of that vague standard is limitless.

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[33] In a clever bit of navigation around this Court's review, 21st Century settled the case with the plaintiffs a few days before the Court of Appeal issued its opinion, rendering the decision moot. Justice Croskey issued the opinion anyhow at the request of all three major insurance trade associations, citing the "public interest." (*MacKay*, *supra*, 188 Cal.App.4th at 1451, fn. 21.) Consumer Watchdog moved to intervene in order to obtain standing to seek review by this Court. The Court denied the motion. (2010 WL 4601802.) Consumer Watchdog and eight other statewide organizations then sought review and/or depublication by this Court; those requests were denied. (*See* Supreme Court Docket No. S188184.)

• The immunity applies even if the conduct is expressly *unlawful*.

• The immunity applies not only to "rates" that are subject to prior approval under Proposition 103 (See *Calfarm*, *supra*, 48 Cal.3d 805; *20th Century Ins. Co. v. Garamendi*, *supra*, 8 Cal.4th 216), but also to a *panoply of practices* that an insurance company may employ — many of which the voters prohibited or restricted under Proposition 103.

• The immunity applies even if the conduct has *never been approved* by the Commissioner — and even if the Commissioner has *no authority to approve* the conduct.

• The immunity also applies to *any action, or even a failure to exercise prosecutorial discretion, by the Insurance Commissioner, or even agency employees.* In finding that "acts done" and "actions taken" by the Commissioner immunize the insurer from liability, *MacKay* suggests that the following could be considered evidence of approval: *the failure of the Commissioner to prosecution a violation of the law* uncovered by a field investigator; non-public communications between an insurance company and a Department rate examiner or other employee; testimony by a former Department employee, subsequently an industry consultant, that the "executive staff" of the Commissioner had concluded the illegal practice was "approvable"; and a "vague" recollection of a CDI employee that "direction from executive staff filtered down through to us that the [rule] was allowable." (*MacKay*, *supra*, 188 Cal.App.4th at 1437–1438, fn. 8.) This ostensible "authority" to violate the law conflicts with the Commissioner's statutory obligation to enforce the law (§ 12921, subd. (a)).

• The "*filed rate doctrin*e" now applies in California, notwithstanding statutes to the contrary, overturning a longstanding principle of this Court's jurisprudence: that an immunity or "safe harbor" must be established by statute. (See, e.g., *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 860 [immunity determined by principles of statutory construction, i.e., plain language]; *Kasky v. Nike, Inc.* (2016) 27 Cal.App.4th 939, 950 [private plaintiffs can enforce underlying law via UCL even when law provides only for prosecution by public officials]; *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (2009) 17 Cal.4th 553, 579 [statute must "expressly provide" that remedies are "not cumulative" to bar UCL action].) These cases authorize the application of the UCL in this matter.

• As the Insurance Commissioner explained to the *Donabedian* court, the agency "*lacks sufficient resources* to pursue every allegation where an approved rate or rating factor appears reasonable on its face when approved by the Department, but through the independent investigation and resources expended by a private attorney general, a violation of the Insurance Code is revealed." (Amicus Brief of the California Department of Insurance, December 31, 2003, 2003 WL 23290980.) Closing the courthouse doors to Californians seeking to hold an insurance company accountable for violations of Proposition 103 is an invitation to insurance company misconduct.

The *MacKay/Walker* decisions have fabricated a bar to lawsuits that does not exist in the law. Amici agree with the Commissioner that "the court of appeal erred in holding that plaintiff's claims were barred by the safe harbor for antitrust violations in Insurance Code section 12414.26" and that "the court of

appeal erred in barring plaintiff's claims based on concepts of primary and/or exclusive jurisdiction. The regulation and enforcement of title insurance is governed by California insurance law that does not preclude private UCL claims for unfiled and unapproved rates." (Xavier Becerra, letter on behalf of the Department of Insurance in support of review, November 19, 2018, pp. 1,5.)

The court below erred in denying Plaintiff Villanueva the right to challenge unlawful conduct in court.

F. Defending the Wisdom of the Proposition 103 Voters.

It is not incumbent upon the Proposition 103 voters to justify the policy choices they clearly made. Absent constitutional concerns, the Court has frequently instructed that the voters of California, through the exercise of their precious initiative rights, are entitled to the last word on public policy. As it explained in unanimously upholding Proposition 103 against a facial legal challenge in 1989: "We do not consider or weigh the economic or social wisdom or general propriety of the initiative. Rather, our sole function is to evaluate [it] legally in the light of established constitutional standards." (*Calfarm*, *supra*, 48 Cal.3rd 805, 814.) Nevertheless, amici believe it is worthwhile to restate the goals embodied in Proposition 103's Consumer Enforcement Provisions.

Proposition 103 made the office of Insurance Commissioner an elected post. But no statute can guarantee that the Commissioner or consumers will review every application and catch every error, omission or violation of the law. The Insurance Commissioner and the agency he oversees are subject to budgetary limitations; prosecutorial choices have to be made. The voters were aware of these real-world constraints, and even the possibility that an elected official might now

and again choose to ignore or even spurn the law. That the elected commissioners who administer Proposition 103 have strongly embraced the consumer enforcement rights, and rejected the industry's immunity arguments, should be of enormous significance in that regard.[34]

For those reasons, Proposition 103 placed the obligation to keep rates at proper levels not only upon the Commissioner, but *also upon the insurance companies themselves*. (§ 1861.05; *20th Century*, *supra*, 8 Cal.4th 216, at 282, *cert. denied*, 513 U.S. 1153 [insurers were on prior notice concerning possibility of refunds to consumers].)

And, for the same policy reasons, the voters accorded themselves the independent right, without any qualifications — such as "filed," "unfiled," "approved," "unapproved," "rate," or "practice" — to enforce Proposition 103's provisions through lawsuits in the courts.

Amici are of course aware that the California judiciary often grapples with resource issues as it fulfills the promise of access to justice. And perhaps there is some judicial unease when asked to resolve insurance law issues. The "filed rate doctrine" might appear to

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[34] See MJN, Exh. H, Letter from Janice E. Kerr, General Counsel, California Department of Insurance (Commissioner John Garamendi), to the California Supreme Court, December 18, 1991 re *Farmers supra*, 2 Cal.4th 377); Amicus briefs submitted by Commissioner Garamendi in *Donabedian*, *supra*, 116 Cal.App.4th and *Poirer*, *supra*, 2004 WL 2325837 (available at 2003 WL 23280980 and 2004 Cal. App. Unpub. LEXIS 9, respectively); in *Farmers Ins. Exchange v. Superior* Court (2006) 137 Cal.App.4th 842 (available at 2005 WL 3487115); MJN, Exh. I, Letter from Adam Cole, General Counsel, California Department of Insurance (Commissioner Steve Poizner) Requesting Depublication or Review of *MacKay*, *supra*,188 Cal.App.4th 1427 November 19, 2010; MJN, Exh. J, Letter from Commissioner Dave Jones Requesting Depublication of *MacKay*, January 10, 2011.

be an easy solution to these problems. But to adopt it in the face of the voters' clearly expressed authorization to hold insurance companies accountable in the courts risks another set of problems: depriving people of their right to their day in court and undermining public confidence in the judiciary.

In our modern era, courts routinely adjudicate complex matters. And this Court, by establishing the primary jurisdiction doctrine in *Farmers*, has enabled courts to have the benefit of the Commissioner's expertise — applying appropriate deference to the agency's interpretation of the statues and regulations it enforces — while preserving the right of consumers to hold insurance companies accountable, through civil lawsuits, for violations of the law.

CONCLUSION

Fidelity complains about the "burden" and "expense" of having to defend itself against civil suits challenging its rates and practices, and of course, would prefer to avoid the judicial process altogether. (RB 31–32.) In *Quelimane*, First American Title Insurance Company was joined by Farmers and State Farm, which took the opportunity to articulate their concerns about being subject to lawsuits — the "potentially destabilizing effect," the "increased discovery burden," the "incentive for frivolous actions in the availability of attorney fees offers" and "possible conflicts" with regulatory decision making — perhaps hoping to secure a reprieve from *Farmers.* (*Quelimane*, *supra*, 19 Cal.4th at 50–51.) The Court wisely declined the insurers' invitation (*ibid.*) and should do so again here.

Every potential defendant in every other industry must contend with these challenges. However, the ability of Americans to have their

day in court is a unique and important *feature* of our democracy — *not* a bug.

For all the foregoing reasons, Consumer Watchdog, Consumer Federation of America and Consumer Federation of California respectfully ask this Court to (1) reverse the decision below in its entirety, and order that it no longer be citable pursuant to California Rules of Court, rule 8.1115(e)(3); (2) confine the title insurance immunity to its original scope as it originated in the McBride Act — immunity for authorized concerted rate setting activities; (3) disapprove the reasoning of the errant *MacKay/Walker* cases to the extent it conflicts with the proper analysis of the title insurance immunity provisions discussed herein; and (4) in its decision here, preserve the opportunity for voters to fully brief the interplay between the McBride Act provisions and those enacted by the voters if and when a Proposition 103 case is presented to the Court.

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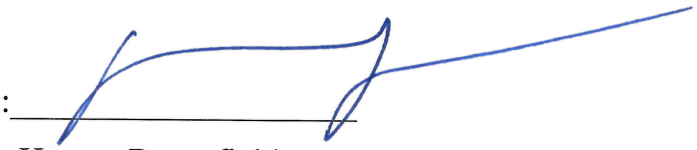
Dated: January 17, 2020

CONSUMER WATCHDOG

By: 

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WORD COUNT CERTIFICATION

I declare under penalty of perjury under the laws of the State of California that this brief contains 13,159 words, not including table of contents, table of authorities, the caption page, proof of service, and this certification page.

Dated: January 17, 2020

CONSUMER WATCHDOG

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APPENDIX

Ins. Code, § 1860.1

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

Ins. Code, § 1860.2

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

Ins. Code § 12414.26

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

Ins. Code § 12414.29

The administration and enforcement of Article 5.5 (commencing with Section 12401) and Article 5.7 (commencing with Section 12402) of this chapter shall be governed solely by the provisions of this chapter. Except as provided in this chapter, no other law relating to insurance and no other provisions in this code heretofore or hereafter

enacted shall apply to or be construed as supplementing or modifying the provisions of such articles unless such other law or other provision expressly so provides and specifically refers to the sections of such articles which it intends to supplement or modify. The provisions of this chapter and regulations adopted pursuant thereto shall constitute the exclusive regulation of the conduct of escrow and title transactions by entities engaged in the business of title insurance as defined in Section 12340.3, notwithstanding any local regulation or ordinance.

Ins. Code § 1861.03

(a) The business of insurance shall be subject to the laws of California applicable to any other business, including, but not limited to, civil rights laws (Sections 51 to 53, inclusive, of the Civil Code), and the antitrust and unfair business practices laws (Parts 2 (commencing with Section 16600) and 3 (commencing with Section 17500) of Division 7 of the Business and Professions Code).

(b) Nothing in this section shall be construed to prohibit (1) any agreement to collect, compile and disseminate historical data on paid claims or reserves for reported claims, provided such data is contemporaneously transmitted to the commissioner, (2) participation in any joint arrangement established by statute or the commissioner to assure availability of insurance….

Ins. Code § 1861.10

(a) Any person may initiate or intervene in any proceeding permitted or established pursuant to this chapter, challenge any action of the commissioner under this article, and enforce any provision of this article.

…

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 6330 San Vicente Blvd., Suite 250, Los Angeles, California 90048.

On January 21, 2020, I served the foregoing documents described as

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS BRIEF OF CONSUMER WATCHDOG, CONSUMER FEDERATION OF AMERICA, AND CONSUMER FEDERATION OF CALIFORNIA

on the interested parties in this action, as follows:

SEE ATTACHED SERVICE LIST

IF VIA ELECTRONIC SERVICE: I served the document via email.

IF VIA U.S. MAIL: I placed a true copy of the foregoing document in a sealed envelope addressed to each party as 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 January 21, 2020, at Los Angeles, California.

Kaitlyn Gentile

SERVICE LIST

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