United Policyholders™

381 Bush Street, 8th Floor
San Francisco, CA 94104
415.393.9990
www.uphelp.org

November 5, 2018

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

**Re: *Villanueva v. Fidelity National Title Co.*, S252035; Published (2018) 26 Cal.App.5th 1092.**

**Amicus Curiae Letter in Support of Petition for Review, pursuant to California Rules of Court, rule 8.500(g)**

**Request for Depublication in the alternative, if review is denied, pursuant to California Rules of Court, rule 8.1125(a).**

To the Chief Justice and Associate Justices of the California Supreme Court:

Pursuant to California Rule of Court 8.500(g), amicus curiae United Policyholders ("UP"), respectfully requests that the Court grant the petition for review in *Villanueva v. Fidelity National Title Co.*, S252035; published at (2018) 26 Cal.App.5th 1092 (hereafter, "*Villanueva*"). Alternatively, should review be denied, UP respectfully requests depublication pursuant to Rule 8.1125(a).

Left standing as precedential authority, the *Villanueva* decision will, for the first time, strip California consumers of all right to monetary relief when insurers charge unfiled, unapproved rates, or otherwise charge in violation of the Insurance Code. *Villanueva* is the first

published decision to afford insurers *total immunity* from all lawsuits that contain any rate related allegations. *Villanueva* thereby greatly magnifies the already existing conflicts and uncertainty in this area of law – uncertainty which has becomes a major problem for consumers seeking relief.

UP strongly believes that this Court's best approach is to grant review and take a careful look at *Villanueva*, and at the decisions it relies on. However, if this Court is for some reason unable to review this astonishingly anti-consumer opinion, at an absolute minimum, the opinion must be depublished.

United Policyholder's Interest as Amicus Curiae

United Policyholders ("UP") is a non-profit consumer advocacy organization dedicated to helping preserve the integrity of the insurance system. UP serves as a voice and an information resource for consumers in all 50 states and is based in San Francisco, California. UP's work is supported by donations, grants, and volunteer labor. UP does not sell insurance or accept funding from insurance companies.

While much of UP's work is aimed at helping individuals and businesses purchase appropriate insurance and repair, rebuild, and recover after disasters through its *Roadmap to Preparedness* and *Roadmap to Recovery Programs*, through its *Advocacy and Action* Program, UP engages with regulators, including the California

Department of Insurance and Commissioner Dave Jones, other public officials, academics, and various stakeholders in connection with legal and marketplace developments relevant to all policyholders and all lines of insurance.

A diverse range of individual and commercial policyholders throughout the U.S. regularly communicate their insurance concerns to UP which allows UP to submit amicus curiae briefs to assist state and federal courts decide cases involving important insurance principles. UP has filed amicus curiae briefs in more than 360 cases throughout the U.S. since the organization's founding in 1991. UP's amicus curiae brief was cited in the U.S. Supreme Court's opinion in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999) and arguments from UP's amicus curiae brief were cited with approval by this Court in *Vandenburg v. Superior Court*, 21 Cal. 4th 815 (1999).

Why Review is Imperative

*Villanueva* bars from the courts all consumers victimized by any "rate-related" insurer misconduct – whether or not the rates were filed with the Insurance Commissioner, approved by him, or were otherwise unlawful. As the court framed it:

> "the question presented here is whether the statutory immunity. . . bars this action challenging the use of rates for which there have been *no* rate filings; rates that have *neither* been *approved nor accepted* by the Insurance Commissioner."

(*Villanueva*, 26 Cal.App.5th at 1116, emph. added.)

*Villanueva* holds that 500,000 Californians – members of a certified class that went to trial and achieved a judgment – should have been denied access to the courts from the beginning. If *Villanueva* stands, millions more will surely be barred from the court as well.

At least two things about *Villanueva* are exceptionally striking:

First, the court explicitly recognizes that the defendant *did* in fact charge the 500,000 members of the public illegally: "by charging for [the] services, Fidelity has violated sections 12401.1, 12401.2, and 12401.7," of the Insurance Code. (26 Cal.App.5th at 1133.)

Second, the court freely acknowledged it was leaving these 500,000 consumers – and all subsequent title insurance consumers – with no way *to recover the money* they were illegally charged. The court held that the consumers' only "remedy" was to complain to the Insurance Commissioner, while correctly recognizing that the Commissioner "could not seek restitution." (*Id.* at 1133-1134.) But according to the court, the Commissioner's inability to seek redress on behalf of consumers is "*not relevant*." (*Id.* at 1134.) We strongly disagree.

No previous opinion has denied consumers the right to sue in these circumstances.

At least four (4) of the *Villanueva* holdings are entirely incorrect, as well as exceptionally injurious to the right of Californians to obtain

redress in the courts. These holdings conflict with established decisions, including this Court's, misinterpret and misapply precedent, and most significantly, the holding is potentially devastating to the public if not addressed by this Court:

● ***Villanueva*** **expands statutory immunity for insurers exponentially:** The Insurance Code contains an immunity provision enacted in 1947 as part of the McBride-Grunsky Insurance Regulatory Act, plus three subsequent, basically identical statutes (Ins. Code §§ 795.7, 1860.1, 11758, 12414.26). Courts describe these McBride-Grunsky style immunity statutes as "virtually identical" (*State Compensation Ins. Fund (Schaeffer Ambulance Svc.) v. Superior Ct.* (2001) 24 Cal.4th 930, 938-939), as "twins" (*Donabedian v. Mercury Ins.* (2004) 116 Cal.App.4th 968, 990.), or as in the opinion below, "analogous" (26 Cal.App.5th at 1125).

Section 12414.26, construed in *Villanueva*, is typical:

> "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."

*Villanueva* holds that this language immunizes from suit absolutely *any* misconduct "related" in any way to "ratemaking activities." (*Villanueva*, 26 Cal.App.5th at 1124-112, 1133.) In so holding, *Villanueva* expands the scope of immunity far beyond the plain words

of these statutes; as many times as one reads the statutes, one will never find the words "related to" nor "ratemaking" in the text. However, these are the key words of the court's unprecedented expansion of immunity.

The *actual* words of these statutes, as in the one set forth above, provide several express limitations on immunity. One such express limitation, among others, is that to be immunized, the defendant's conduct has to be done **"pursuant to the authority conferred by"** the ratemaking or concerted action statutes.

Recognizing this, the court below purported to satisfy this test with the following syllogism:

> "Fidelity *failed to comply* with sections 12401.1, 12410.2, and 12401.7, all of which are in article 5.5. In our view, this conduct constitutes 'acts done *pursuant* to the authority conferred by Article 5.5'"

(26 Cal.App.5th at 1126.)

This analysis defies logic. The court's faulty opinion holds that an insurance company that "fails to comply with a statute" acts "pursuant to the authority" of the statute. UP strongly doubts the Legislature intended the statute's terms be construed by courts this way. But *Villanueva*'s entire immunity analysis is founded on this (il)logic, so much so that the court repeated it at the end of the opinion. (*Id*. at 1133.)

The *Villanueva* court also expanded immunity to encompass the consumers' common law breach of fiduciary duty cause of action, on the ground that "immunity bars 'civil proceedings.'" (26 Cal.App.5th at 1134, citing Sec. 12414.26.) There is no language in the statute to support this interpretation.

The statute applies, subject to other limitations, only to "civil proceedings under any other *law* of this state heretofore or hereafter *enacted* which does not specifically refer to insurance." (Ins. Code §§ 795.7, 1860.1, 11758, 12414.26, emph. added.) A common law breach of fiduciary duty cause of action is not a civil proceeding under a "law. . . enacted." Enacted law is statutory law, not common law.

In addition, by barring a lawsuit alleging the unilateral misconduct of one company, with no antitrust implications, *Villanueva* expands immunity beyond what the Legislature intended, as this Court and others have held. This Court reviewed the legislative history of these statutes and held that immunity extends only "to concerted activity otherwise barred by the antitrust laws, *and not to the individual misconduct of an insurer*." (*State Comp. Ins. Fund, supra,* at 938.)

The Second Appellate District, in construing another such provision, followed this Court, holding that immunity does not attach to an action which "challenges *the unilateral conduct* of a single insurer,

does not involve *concerted action*, and has *no antitrust implications*. . . ." (*Donabedian*, *supra*, at 990-991, emph. added.)

The United States District Court, applying California law, followed suit: "the exhaustion requirement under section 1860.1 and 1860.2 only applies to activiy barred by the antitrust laws." (*Cole v. Hartford Financial Services* (CD Calif. 2009) 2009 WL 10675233, * 4, following *Donabedian* at 990-91.)

*Villanueva* cannot be reconciled with these decisions.

● ***Villanueva*** **holds the Commissioner's jurisdiction is original and exclusive, contradicting this Court's decisions.** *Villanueva* thereby is in complete conflict with two of this Court's most important decisions on jurisdiction: *Farmers Ins. Exchange v. Superior Court*, 2 Cal.4th 377 (1992) and *Jonathan Neil & Assocs. v. Jones*, 33 Cal.4th 917 (2004). This Court held in both opinions that the Commissioner's jurisdiction in rate related cases is primary, not exclusive. Notably, this is also the Commissioner's position. Not only does *Villanueva* fails to distinguish this binding authority, the opinion does not even acknowledge that it *exists*.

● ***Villanueva*** **is the first published opinion to hold that insurers have immunity whenever the courts are asked to interpret rates; according to *Villanueva*, judicial rate interpretation is a "challenge to the rates." This conflicts with both the traditional**

**role of the courts and with this Court's prior decision.** *Villanueva* holds that theories that "require the court to interpret [an insurer's] rate filings to determine whether they encompass the charges at issue" are "a challenge to the rates as filed. . . .and are subject to the immunity." (26 Cal.App.5th at 1125)

No California court, until *Villanueva*, has ever held that insurers are immune from judicial interpretation of their rates. And for good reason. When a court interprets rates, it is not engaging in ratemaking or "challenging" the rates as filed. It is answering the question, "what do the rates *mean*?" This is no different than judicial interpretation of a statute or constitution. The courts, by their act of interpretation, are not "challenging" the statute or constitution, but instead are saying what the law ***is***.

Furthermore, this Court already established, in *Jonathan Neil, supra*, that the courts have concurrent jurisdiction with the Commissioner to interpret rate filings, even those promulgated *by* the Commissioner. *Villanueva* ignores *Jonathan Neil*.

● ***Villanueva*** **construes Ins. Code sec. 12414.27 as merely an obsolete savings clause, not a living requirement that title insurers charge only according to their rate filings.** Section 12414.27 was enacted as part of the Title Insurance Act of 1973, which expanded McBride-Grunsky regulation to the title industry. (26 Cal.App.5th at 1130-32.) This section includes the following prohibitory language:

> "no 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. . . "*

(Ins. Code §12414.27, emph. added.)

*Villanueva* holds that this is not a prohibition at all, despite the Legislature's words. According to the opinion, the statute's (now apparently obsolete) sole purpose was to provide a "delayed operative date" and "grace period" before full implementation of the Title Insurance Act back in 1974. (26 Cal.App.5th at 1130-32.) Now, 45 years later, the statute is presumably a nullity, according to the court below.

While no other opinion has construed this section, at least one authoritative treatise interprets the statutory language in line with the understanding of the consumers in *Villanueva*. Cal.Jur. states that this statute establishes that "no charges may be made" for title policies or services except in accordance with rate filings, i.e., as a prohibition against the very conduct the defendant engaged in. (1 Cal.Jur.3d, Abstractors and Title Insurers, §25, n.4.)

By not giving effect to the express prohibitory language which the Legislature decided to include, the opinion renders it surplusage, an impermissible construction.

Moreover, until 2007, the Commissioner included language in the Department of Insurance regulations that was basically identical to that in Section 12414.27. The language remained in the regulations, as it has in the Code, for 60 years after the need for an implementation period expired. Other language in the regulations was deleted over those years, but not the prohibitory language tracking section 12414.27. And the Legislature, similarly, amended the Title Insurance Act several times, but never deleted the section. It obviously continues to have a prohibitory purpose; its purpose as a "grace period" expired decades ago.

Request for Depublication in the Alternative, Pursuant to California Rules of Court, Rule 8.1125

While UP does urge this Court to grant review, as a second best alternative, UP respectfully requests depublication – but only if this Court does not grant review.

Conclusion

*Villanueva* is as poorly reasoned as it is far reaching, and UP therefore respectfully submits that this Court must not allow it to stand. The Petition for Review should be granted, or in the alternative, the opinion should be depublished.

Dated: November 5, 2018 Respectfully submitted.

The Hon. Tani Cantil-Sakauye
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Amy Bach, Esq., Executive Director
United Policyholders
Amy.bach@uphelp.org
California State Bar No. 142029