S184929

IN THE Supreme Court
OF THE STATE OF CALIFORNIA

JAMSHID ARYEH,

Plaintiff and Appellant,

vs.

CANON BUSINESS SOLUTIONS, INC.,

Defendant and Respondent,

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT • DIVISION EIGHT • CASE NO. B213104

BRIEF OF THE CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF REAL PARTIES IN INTEREST AS *AMICUS CURIAE*

DAVID M. ARBOGAST (SBN 167571)
darbogast@law111.com
ARBOGAST & BERNS LLP
6303 Owensmouth Avenue, 10th Floor
Woodland Hills, California 91367-2262
Phone: (818) 961-2000
Fax: (818) 936-0232

J. MARK MOORE (SBN 180473)
mark@spiromoss.com
Denise L. Díaz (SBN 159516)
deniseldiaz@gmail.com
SPIRO MOSS LLP
11377 W. Olympic Boulevard, Fifth Floor
Los Angeles, CA 90064-1683
Phone: (310) 235-2468
Fax: (310) 235-2456

Attorneys for Amicus Curiae Consumer Attorneys of California

SERVICE ON THE CALIFORNIA ATTORNEY GENERAL AND THE LOS ANGELES COUNTY DISTRICT ATTORNEY PURSUANT TO BUSINESS & PROFESSIONS CODE § 17209 AND C.R.C. RULE 8.29

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
C.R.C. Rule 8.208

The following application and brief are made by the Consumer Attorneys of California ("CAOC"). CAOC is a non-profit organization of attorneys and is not a party to this action. CAOC is not aware of any entity or person that must be listed under (d)(1) or (2) of rule 8.208.

Dated: March 21, 2011

Respectfully submitted,

By: _____

David M. Arbogast (SBN 167571)
darbogast@law111.com
ARBOGAST & BERNS LLP
6303 Owensmouth Avenue, 10th Floor
Woodland Hills, CA 91367-2262
Tel.: (818) 961-2000
Fax: (818) 936-0232

J. Mark Moore (SBN 180473)
mark@spiromoss.com
Denise L. Díaz (SBN 159516)
deniseldiaz@gmail.com
SPIRO MOSS LLP
11377 W. Olympic Boulevard, Fifth Floor
Los Angeles, CA 90064-1683
Phone: (310) 235-2468
Fax: (310) 235-2456

Attorneys for Amicus Curiae
Consumer Attorneys of California

APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF AND APPELLANT

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE:

The undersigned respectfully request permission to file a brief as *amicus curiae* in the matter of Jamshid Aryeh v. Canon Business Solutions, Inc. (2010) 111 Cal.Rptr.3d 211 (hereafter Aryeh) under Rule 8.520(t) in support of Plaintiff and Appellant, on behalf of Consumer Attorneys of California ("CAOC").

CAOC, founded in 1962, is a voluntary non-profit membership organization of approximately 3,000 consumer attorneys practicing in California. Its members predominantly represent individuals subjected to a variety of unlawful and harmful business practices, including consumer fraud, personal injuries, wage and hour violations, and insurance bad faith.

CAOC has taken a leading role in advancing and protecting the rights of injured citizens in both the courts and the Legislature. This has often occurred through class and other representative actions under this state's Unfair Competition Law (Bus. & Prof. Code §§17200 *et seq.*) (UCL). Recently, CAOC has participated as *amicus* in In re Tobacco II Cases, (2009) 46 Cal.4th 298; Prachasaisoradej v. Ralphs Grocery Co. (2007) 42 Cal.4th 217; Californians for Disability Rights v. Mervyn's, LLC,

(2006) 39 Cal.4th 223; and Elsner v. Uveges (2004) 34 Cal.4th 915. CAOC has also participated as an *amicus* in many cases pending at the intermediate appellate level.

CAOC has a substantive and abiding interest in ensuring that the delayed discovery rule is correctly interpreted and applied in a manner consistent both with the Supreme Court's precedents and with the strong public policies underlying the UCL, which this Court has consistently affirmed.

With respect to Rule 8.520(f)(4), no party or counsel for a party has authored the proposed brief in whole or in part. No party or counsel for a party, and indeed no person, save the authors themselves, has made a monetary contribution to fund the preparation or submission of the following amicus brief.

The proposed brief follows.

Executed in Los Angeles, California, this 21st day of March, 2011.

Application for Leave to File Amicus Brief

Respectfully submitted,

By: _____

David M. Arbogast (SBN 167571)
darbogast@law111.com
ARBOGAST & BERNS LLP
6303 Owensmouth Avenue, 10th Floor
Woodland Hills, CA 91367-2262
Tel.: (818) 961-2000
Fax: (818) 936-0232

J. Mark Moore (SBN 180473)
mark@spiromoss.com
Denise L. Díaz (SBN 159516)
deniseldiaz@gmail.com
SPIRO MOSS LLP
11377 W. Olympic Boulevard, Fifth Floor
Los Angeles, CA 90064-1683
Phone: (310) 235-2468
Fax: (310) 235-2456

Attorneys for Consumer Attorneys of California

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

FEDERAL CASES

STATUTES

TREATISES

INTRODUCTION

The third issue this Court accepted for its consideration when it granted Appellant's Petition for Review is the applicability of the "delayed discovery rule" under California's Unfair Competition Law, Bus. & Prof. Code §§ 17200 *et. seq.* ("UCL"). This Court has previously observed that the question whether the delayed discovery rule applies to UCL claims is not settled. Grisham v. Philip Morris U.S.A. (2007) 40 Cal.4th 623, 634 n.7, 54 Cal.Rptr.3d 735. In the appeal below, the court of appeal cited Snapp & Assoc. Ins. Serv., Inc. v. Malcolm Bruce Burlingame Robertson, (2002) 96 Cal.App.4th 884, 117 Cal.Rptr.2d 331 for the proposition that the delayed discovery rule does not apply to UCL claims. Other cases, as this Court knows, are to the contrary.

Amicus curiae Consumer Attorneys of California ("CAOC") respectfully submits that now is the time for this Court to settle this matter, and to hold that where the facts and evidence warrant its application, the delayed discovery rule can in fact apply to delay the accrual of UCL causes of action. This Court and other California courts have confirmed the application of the rule in many other contexts, and there is no good reason for it not to apply in the context of the UCL, which protects both consumers and competitors.

Individuals, corporations and other entities that engage in unfair,

unlawful or fraudulent business acts and practices should not be permitted to avoid suit under the UCL, which supplies only limited remedies, simply because their victims were unable to readily discover their wrongful conduct.

Certainly, this Court should also conclude, as urged by Appellant, that the continuous accrual and continuing violation doctrines may be invoked in UCL actions where justified by the facts. CAOC does not address those doctrines, which are amply discussed by Appellant in its briefs. Rather, given the Court's recognition that the law regarding application of the discovery rule in UCL cases is not settled, CAOC simply asks the Court to reject the proposition that the delayed discovery rule is categorically off-limits to claims under the UCL, regardless whether the facts in particular cases would otherwise warrant its application. Such a holding will enforce the Legislature's intent that the UCL be construed broadly to effectuate its purpose "to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." Kwikset Corp. v. Superior Court (2011) 51 Cal.4th 310, 120 Cal.Rptr.3d 741, 749, citing Kasky v. Nike, Inc. (2002) 27 Cal.4th 939, 949, 119 Cal.Rptr.2d 296.

LEGAL DISCUSSION

I. The UCL's Statute of Limitations Should Be Interpreted in Light of the Common Law and its Purpose to Protect Consumers

When construing a statute, the Court's primary function is to ascertain

the Legislature's intent. See, e.g., In re Harris (1993) 5 Cal.4th 813, 844, 21 Cal.Rptr.2d 373. The Court "look[s] first to the words of the statute," giving "the words their usual and ordinary meaning" and "construing them in light of the statute as a whole and the statute's purpose." Pineda v. Williams-Sonoma Stores, Inc. (2011) 51 Cal.4th 524, 529-30, 120 Cal.Rptr.3d 531 (citations omitted). This Court thus does "'not construe statutes in isolation, but rather read[s] 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.'" Id. at 530 (citations omitted). Further, the Court is "mindful of 'the general rule that civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose.'" Id. (citation omitted.)

"When statutory language is clear, judicial construction is neither necessary nor proper." Cortez v. Purolator Air Filtration Products Co. (2000) 23 Cal.4th 163, 179, 96 Cal.Rptr.2d 518 (citation omitted). The Court simply "presume[s] the Legislature meant what it said and the plain meaning of the statute governs." Pineda, supra, at 530. "Only when the statute's language is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation." Id. (citation omitted.)

As such, analysis of the UCL's statute of limitations must begin with the language of the statute itself. Pineda at 529. Section 17208 states:

> Any action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section shall be revived by its enactment.

Cal. Bus. & Prof. Code § 17208. The Legislature left the term "accrued" undefined; it left it to the courts to decide when a UCL action must be commenced.

At common law, a cause of action "accrues," or the "statute of limitations . . . begins to run[,] upon the occurrence of the last element essential to the cause of action." Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal.3d 176, 187, 98 Cal.Rptr. 837. Generally, the "plaintiff's ignorance of the cause of action . . . does not toll the statute." Id. However, courts have developed exceptions to this rule. Among them is the delayed discovery rule –"indeed, the 'most important' one." Norgart v. The Upjohn Co. (1999) 21 Cal.4th 383, 397, 87 Cal.Rptr.2d 453. Moreover, as the Legislature must have been well aware, the delayed discovery rule "may be expressed by the Legislature or implied by the courts." Id. (Citations omitted.) Thus, if the Legislature did not want the delayed discovery rule to apply to UCL claims, it would have expressly stated so.

Section 17208 must be "'construed in light of common law decisions, unless its language 'clearly and unequivocally discloses an intention to depart

from, alter, or abrogate the common-law rule concerning the particular subject matter.'" California Assn. of Health Facilities v. Dep't of Health Serv. (1997) 16 Cal.4th 284, 297, 65 Cal.Rptr.2d 872 (citations omitted). Nowhere in Section 17208 or in any other section of the UCL is there even a suggestion that the Legislature intended to abrogate the delayed discovery rule in UCL actions. Nor would doing so be consistent with the statute's overarching purpose – to protect "'both consumers and competitors by promoting fair competition in commercial markets for goods and services.'" Kwikset, supra, 120 Cal.Rptr.3d at 749, citing Kasky v. Nike, Inc., supra, 27 Cal.4th at 949.

A. Common Law Rules of Accrual Applying to UCL Actions

"The general rule for defining the accrual of a cause of action sets the date as the time 'when, under the substantive law, the wrongful act is done,' or the wrongful result occurs, and the consequent 'liability arises....'" Norgart, supra, 21 Cal.4th at 397 (citing 3 Witkin Cal. Procedure (4th ed. 1996) Actions, § 459, p. 580). "In other words, a cause of action accrues upon the occurrence of the last element essential to the cause of action." Howard Jarvis Taxpayers Ass'n v. City of La Habra (2001) 25 Cal.4th 809, 815, 107 Cal.Rptr.2d 369 (citations and internal quotation marks omitted). See also Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal.4th 797, 806-807, 27 Cal.Rptr.3d 661 (citation omitted). Further, generally "a cause of action accrues when the

wrongful act is done and not when a plaintiff discovers he or she has a cause of action to pursue." Moreno v. Sanchez (2003) 106 Cal.App.4th 1415, 1423, 131 Cal.Rptr.2d 684 (citing Neel, supra, 6 Cal.3d at 187).

B. Development of Delayed Discovery Rule

To ameliorate the harshness of these rules, courts have developed exceptions. "[I]ndeed, the 'most important' one – is the discovery rule." Norgart, supra, 21 Cal.4th at 397 (citations omitted). It "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." Id. (citations omitted). A "plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof - when, simply put, he at least 'suspects ... that someone has done something wrong' to him, ... 'wrong' being used, not in any technical sense, but rather in accordance with its 'lay understanding.'" Id. at 397-398 (quoting Jolly v. Eli Lilly & Co. (1988) 44 Cal.3d 1103, 1110, n.7, 245 Cal.Rptr. 658).

Though using "the term 'elements,' [this Court] do[es] not take a hypertechnical approach to the application of the discovery rule. Rather than examining whether the plaintiffs suspect facts supporting each specific legal element of a particular cause of action, [the Court] look[s] to whether the plaintiffs have reason to at least suspect that a type of wrongdoing has injured

them." Fox, supra, 35 Cal.4th at 807. "'It is irrelevant that the plaintiff is ignorant of ... the legal theories underlying his cause of action. Thus, if one has suffered appreciable harm and knows or suspects that ... blundering is its cause, the fact that an attorney has not yet advised him does not postpone commencement of the limitations period.'" Norgart, supra, 21 Cal.4th at 398 n.2 (quoting Gutierrez v. Mofid (1985) 39 Cal.3d 892, 897-898, 218 Cal.Rptr. 313).

"[W]ithin the applicable limitations period, [plaintiff] must indeed seek to learn the facts necessary to bring the cause of action in the first place - he 'cannot wait for' them 'to find' him and 'sit on' his 'rights'; he 'must go find' them himself if he can and 'file suit' if he does." Norgart, supra, 21 Cal.4th at 398 (quoting Jolly, 44 Cal.3d at 1111). Further, "plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation." Fox, supra, 35 Cal.4th at 808. The delayed discovery rule therefore "does not encourage dilatory tactics because plaintiffs are charged with presumptive knowledge of an injury if they have 'information of circumstances to put [them] on inquiry' or if they have 'the opportunity to obtain knowledge from sources open to [their] investigation.'" Id. at 807-808 (citations omitted).

The "discovery rule most frequently applies when it is particularly difficult for the plaintiff to observe or understand the breach of duty, or when the injury itself (or its cause) is hidden or beyond what the ordinary person could be expected to understand." Shively v. Bozanich (2003) 31 Cal.4th 1230, 1248, 7 Cal.Rptr.3d 576. See also Neel, supra, 6 Cal.3d at 188; Moreno, supra, 106 Cal.App.4th at 1423; Leaf v. City of San Mateo (1980) 104 Cal.App.3d 398, 406, 163 Cal.Rptr. 711. California courts thus have applied the delayed discovery rule in a variety of contexts:

- **Professional malpractice**: See, e.g., Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal.3d 176, 187, 98 Cal.Rptr. 837 (attorneys); United States Liab. Ins. Co. v. Haidinger-Hayes, Inc. (1970) 1 Cal.3d 586, 596-597, 83 Cal.Rptr. 418 (insurance agents); Amen v. Merced County Title Co. (1962) 58 Cal.2d 528, 534-535, 25 Cal.Rptr. 65 (escrow-holders); Huysman v. Kirsch (1936) 6 Cal.2d 302, 312-313 (medical); Seelenfreund v. Terminix of Northern Cal., Inc. (1978) 84 Cal.App.3d 133, 148 Cal.Rptr. 307; Cook v. Redwood Empire Title Co. (1969) 275 Cal.App.2d 452, 455, 79 Cal.Rptr. 888 (title companies); Twomey v. Mitchum, Jones & Templeton, Inc. (1968) 262 Cal.App.2d 690, 725, 69 Cal.Rptr. 222 (stockbrokers); Moonie v. Lynch (1967) 256 Cal.App.2d 361, 365-366, 64 Cal.Rptr. 55 (accountants).

- **Libel**: See, e.g., Mancuso v. Oceanside Unified School Dist. (1979) 88 Cal.App.3d 725, 731, 152 Cal.Rptr. 27.

- **Defamation**: See, e.g., Burdette v. Carrier Corp. (2008) 158 Cal.App.4th 1668, 1679, 71 Cal.Rptr.3d 185.

- **Breach of fiduciary duty**: See, e.g., Neel, supra, 6 Cal.3d at 190 (breach of attorney's duty to client); Jefferson v. J.E. French Co. (1960) 54 Cal.2d 717, 720, 7 Cal.Rptr. 899 (breach of agent's duty to his principal); San Leandro Canning Co., Inc. v. Perillo (1931) 211 Cal. 482, 486-487 (breach of corporate director's duty); Cortelyou v. Imperial Land Co. (1913) 166 Cal. 14, 20, 134 P. 981 (breach of trustee's duty); National Automobile & Cas. Ins. Co. v. Pitchess (1973) 35 Cal.App.3d 62, 64-65, 110 Cal.Rptr. 649 (sheriff's breach of duty to attaching creditor); Schneider v. Union Oil Co. (1970) 6 Cal.App.3d 987, 993, 86 Cal.Rptr. 315 (breach of corporation's duty to stockholder).

- **Breach of contract**: See, e.g., April Enterprises, Inc. v. KTTV and Metromedia, Inc. (1983) 147 Cal.App.3d 805, 826 195 Cal.Rptr. 421.

- **Underground trespass:** See, e.g., Oakes v. McCarthy Co. (1968) 267 Cal.App.2d 231, 255, 73 Cal.Rptr. 127.

- **Negligently manufactured drugs**: See, e.g., Frederick v. Calbio Pharmaceuticals (1979) 89 Cal.App.3d 49, 53-54, 152 Cal.Rptr. 292; Warrington v. Charles Pfizer & Co. (1969) 274 Cal.App.2d 564, 569-570, 80 Cal.Rptr. 130.

- **Product liability**: See, e.g., G.D. Searle & Co. v. Superior Court (1975) 49 Cal.App.3d 22, 25, 122 Cal.Rptr. 218.

- **Latent defects in real property**: See, e.g., Allen v. Subdean (1982) 137 Cal.App.3d 216, 222, 186 Cal.Rptr. 863.

- **Fraud**: See, e.g., Watts v. Crocker-Citizens National Bank (1982) 132 Cal.App.3d 516, 183 Cal.Rptr. 304; Cal. Code Civ. Proc. § 338.

- **Misrepresentation**: See, e.g., Balfour, Guthrie & Co. v. Hansen (1964) 227 Cal.App.2d 173, 38 Cal.Rptr. 525.

In April Enterprises, supra, 147 Cal.App.3d 805, which collected many of these cases, the court of appeal observed:

> A common thread seems to run through all the types of actions where courts have applied the discovery rule. The injury or the act causing the injury, or both, have been difficult for the plaintiff to detect. In most instances, in fact, the defendant has been in a far superior position to comprehend the act and the injury. And in many, the defendant had reason to believe the plaintiff remained ignorant he had been wronged. Thus, there is an underlying notion that plaintiffs should not suffer where circumstances prevent them from knowing they have been harmed. And often this is accompanied by the corollary notion that defendants should not be allowed to knowingly profit from their injuree's ignorance.

Id. at 831.

C. The Unsettled State of Law Regarding Applicability of the Delayed Discovery Rule to UCL Claims

This Court previously recognized that the law is unsettled on the question of whether the delayed discovery rule applies in UCL actions. Grisham v. Philip Morris U.S.A. (2007) 40 Cal.4th 623, 634 n.7, 54 Cal.Rptr.3d 735 ("We assume for purposes of this discussion that the delayed discovery rule applies to unfair competition claims. We note that this point is currently not settled under California law"). As shown below, California state

courts and federal courts applying California law disagree whether the rule is applicable, although the current trend, at least since this Court's statement in Grisham, is to find that it does apply to at least some claims under the UCL. CAOC respectfully submits that the Court should put an end to the controversy and find that the rule can and does apply to UCL claims where warranted by the facts.

1. Early Cases Holding the Delayed Discovery Rule Inapplicable to UCL Claims

Stutz Motor Car of America, Inc. v. Reebok International, Ltd. (C.D. Cal. 1995) 909 F. Supp. 1353 ("Stutz") appears to be the first case to suggest that the delayed discovery rule does not apply in UCL actions. In that case, Plaintiff Stutz Motor Car of America, Inc. ("Stutz") sued Reebok International ("Reebok"), an athletic shoe manufacturer, alleging that Reebok misappropriated the plaintiff's trade secret and infringed Stutz's patent. (Id. at 1356.) Stutz alleged a number of claims, including a UCL claim. Reebok moved for summary judgment on the UCL claim, arguing that the claim was barred by the statute of limitations. Id. at 1363. In response, Stutz invoked the rule of equitable tolling based on fraudulent concealment. Id. at 1364. The district judge found equitable tolling inapplicable because the evidence showed Stutz had constructive if not actual knowledge of the potential claim against Reebok well before filing its complaint. Id. at 1363-1364.

Although it is unclear from the opinion whether plaintiff Stutz expressly invoked the delayed discovery rule, the district court considered its applicability. Stutz, 909 F.Supp. at 1363. It stated: "Significantly, the 'discovery rule' applicable to the claims discussed above is inapplicable on this count; thus, the statute begins to run when cause of action accrues, irrespective of whether plaintiff knew of its accrual, unless plaintiff can successfully invoke the equitable tolling doctrine." Id. In support of this conclusion, the district court cited a trio of cases: Rosack v. Volvo of Am. Corp. (1982) 131 Cal.App.3d 741, 751, 182 Cal.Rptr. 800; Pennsylvania v. Lake Asphalt & Petroleum Co., 610 F.Supp. 885, 890 (M.D.Pa.1985); and Dayco Corp. v. Firestone Tire & Rubber Co., 386 F.Supp. 546, 549 (N.D.Ohio 1974). Each of these cases was an antitrust case. None of them involved a UCL claim. Thus, not one of the cases the district court cited in Stutz support its bold, oft-cited pronouncement that the delayed discovery rule does not apply to UCL claims actually considered the issue of whether the rule does or

should apply to such claims.[1] Indeed, the cases do not even mention the delayed discovery rule.

In the proceedings below, the court of appeal cited Snapp & Assoc. Insur. Serv., Inc. v. Malcolm Bruce Burlingame Robertson (2002) 96 Cal.App.4th 884, 117 Cal.Rptr.2d 331 ("Snapp") as authority for the proposition that the delayed discovery rule does not apply to UCL claims. Aryeh, 185 Cal.Rptr. at 216. The analysis of the question in Snapp, however, cannot fairly be characterized as either thorough or persuasive.

In Snapp, Division One of the Fourth District Court of Appeal declared that the delayed discovery rule does not apply to UCL claims. Id. at 891 ("The 'discovery rule,' which delays accrual of certain causes of action until the plaintiff has actual or constructive knowledge of facts giving rise to the claim, does not apply to unfair competition actions."). However, the court cited no

---

[1] Also worth noting is the Ninth Circuit's 2002 decision in Karl Storz Endoscopy-America, Inc. v. Surgical Technologies, Inc., 285 F.3d 848 (9th Cir. 2002). There, the Ninth Circuit stated that "claims under California Business and Professions Code § 17200 et seq. are subject to a four-year statute of limitations which began to run on the date the cause of action accrued, not on the date of discovery." Id. at 857. The court neither explained how it arrived at that conclusion nor cited any cases to support it. Moreover, a later panel of the Ninth Circuit, citing this Court's Grisham opinion, observed that the law is unsettled on the issue and that, regardless, a UCL claim is not barred if the "alleged wrongs are 'multiple, continuous acts,' some of which occurred within the limitations period." Betz v. Trainer Wortham & Company, Inc., 236 Fed.Appx.253, 256 (9th Cir. May 11, 2007) (citation omitted).

California case law in reaching its conclusion. Rather, it cited Stutz, which, as discussed above, was predicated on three antitrust cases, as well as another unpublished district court holding, which had cited Stutz.[2] Nor did the Snapp court engage in any independent *analysis* as to whether, as a general matter, the delayed discovery rule *should* (or should not) apply to UCL claims where the facts and equity would potentially warrant its application.

In fact, close scrutiny reveals that the Snapp court's analysis focused entirely on whether the delayed discovery rule should apply to the plaintiff's claim in particular, based on the facts at issue in the case, not whether the rule should apply to UCL claims generally. Snapp, 96 Cal.App.4th at 891-892. Thus, the court in Snapp did not analyze leading California cases regarding application of the delayed discovery rule,[3] nor did it discuss the policies underlying the rule's application in many contexts. It also failed to cite or discuss Glue-Fold, Inc. v. Slautterback Corp., 82 Cal.App.4th 1018, 1029-1030 (2000), in which the court of appeal, despite referencing Stutz, assumed for purposes of argument that the discovery rule *did* apply to the plaintiff's UCL claims and other claims. Instead, the Snapp court simply declared, citing Stutz, that the rule does not apply.

---

2 Suh v. Yang, 987 F.Supp. 783 (N.D. Cal. 1997).

3 See, e.g., Norgart, supra, 21 Cal.4th 383; Neel, supra, 6 Cal.3d 176.

Regardless of the paucity of analysis in the opinion, Snapp's conclusion that the delayed discovery rule is inapplicable to UCL claims as a matter of law has been widely cited. See, e.g., Aryeh, 185 Cal.Rptr. at 216; Broberg v. The Guardian Life Ins. Co. of America (2009) 171 Cal.App.4th 912, 919, 90 Cal. Rptr. 3d 225 (finding that, despite Snapp, delayed discovery rule does apply at least to certain types of UCL claims); Salenga v. Mitsubishi Motors Credit of America, Inc. (2010) 183 Cal.App.4th 986, 996, 107 Cal.Rptr.3d 836 (Division One of the Fourth District citing its own holding in Snapp); See also Rambus, Inc. v. Samsung Electronics Co. Ltd., Nos. C-05-02298, C-05-00334, 2007 WL 39374, *3 (N.D. Cal. 2007) (finding delayed discovery rule inapplicable based on Snapp); Dean v. United of Omaha Life Insur. Co., No. CV 05-6067, 2007 WL 7079558, *14 (C.D. Cal. April 27, 2007); Mujica v. Occidental Petroleum Corp., 381 F.Supp.2d 1164, 1184 n.17 (C.D. Cal.2005) (following Snapp); Low v. SDI Vendome S.A., No. CV 02-5983, 2003 WL 25678880, *7 (C.D.Cal. Jan. 7, 2003) (citing Snapp as the rule).[4] Indeed, in Grisham, supra, this Court cited Snapp in the context of noting that the state of the law is unsettled, while at the same time assuming that the

---

[4] Unpublished federal decisions are citable and may be considered as persuasive authority. Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP (2010) 183 Cal.App.4th 238, 251, fn. 6; Gomes v. Countrywide Home Loans, Inc., — Cal.Rptr.3d —, 2011 WL 566737 (Cal.App. 4 Dist. Feb. 18, 2011) (citing Landmark Screens, supra).

delayed discovery rule does apply to UCL claims. Grisham, 40 Cal.4th at 634, n. 7.

2. The Recent Trend Holds That the Delayed Discovery Rule *Does* Apply to UCL Claims

Since Snapp was decided, and particularly since this Court indicated in Grisham that Snapp was not necessarily the law, a number of courts have disagreed with Snapp's statement that the delayed discovery rule does not apply to UCL claims.

First, in Mass. Mut. Life Ins. Co. v. Superior Court (2002) 97 Cal.App.4th 1282, 119 Cal.Rptr.2d 190, the court of appeal rejected the defendant's argument that its limitations defense would require individual determinations and defeat certification of a UCL claim, observing that the UCL's statute of limitations "probably" runs "from the time a reasonable person would have discovered the basis for the claim." Id. at 1295 (citing April Enterprises, supra, 147 Cal.App.3d at 828; Samuels v. Mix (1999) 22 Cal.4th 1, 9, 91 Cal.Rptr.2d 273).

In Dean v. United of Omaha Life Insur. Co., No. CV 05-6067, 2007 WL 7079558 (C.D. Cal. Apr. 27, 2007), a class action plaintiff asserted a UCL claim based on alleged overcharges assessed by the defendant insurer ("United") on universal life insurance policies. Id. at *1-*3. United argued that the claim was barred by the statute of limitations. Id. at *14. Addressing

the parties' disagreement regarding the applicability of the delayed discovery rule, the district court noted that California law was unsettled on the issue. Id. Relying on Mass Mutual and referencing this Court's statement in Grisham, the court held:

> The coverage of the UCL statute is "sweeping, embracing anything that can properly be called a business practice and that at the same time is forbidden by law." Rubin v. Green, 4 Cal.4th 1187, 1200, 17 Cal.Rptr.2d 828, 847 P.2d 1044 (1993) (quotation marks and citation omitted). The appropriate question, therefore, is not whether the discovery rule applies to UCL actions generally, but whether the discovery rule applies to the particular type of UCL claim asserted here. The substance of [plaintiff]'s UCL claim is analogous to a common law action for fraud, for which the discovery rule is applicable by statute. See Cal. Code Civ. Proc. § 338(d). We agree with [plaintiff] that "[p]roviding less consumer protection for UCL claims than for common law claims is inappropriate." . . . We note further that, of the above cited cases on the issue, the case with a UCL claim most analogous to [plaintiff]'s found the discovery rule "probably" applicable. Mass. Mut. Life Ins. Co., 97 Cal.App.4th at 1286, 119 Cal.Rptr.2d 190 (involving suit challenging an insurer's advertising of the dividend rate paid by its life insurance policies).

Id. at *14 (some internal citations omitted).

In Broberg v. The Guardian Life Ins. Co. of America (2009) 171 Cal.App.4th 912, 90 Cal Rptr.3d 225, *review denied* May 20, 2009, the Second District Court of Appeal recognized the unsettled nature of the law before

rejecting the trial court's conclusion, and that of the court in Snapp, that the delayed discovery rule does not apply as a matter of law to UCL claims. Broberg involved a UCL claim arising from the sale of an insurance policy to the plaintiff. Id. at 915. The plaintiff alleged that the insurer had made misrepresentations both through its agent and its marketing materials. Id. at 915-917. Because of the nature of the insurance policy at issue, the plaintiff did not learn of the misrepresentations until eleven years after buying the policy. Id. at 917. The plaintiff alleged a number of claims, including one under the UCL. Id. The defendant's demurrer was sustained on statute of limitations grounds. Id. at 920. The court of appeal in Broberg reversed.

On appeal, the Broberg court considered whether the delayed discovery rule applied to the UCL claim. Broberg, 171 Cal.App.4th at 920. It took into account the conduct underlying the UCL claim and decided that the rule applied. The court explained:

> At least in the context of unfair competition claims based on the defendant's allegedly deceptive marketing materials and sales practices, which is simply a different legal theory for challenging fraudulent conduct and where the harm from the unfair conduct will not reasonably be discovered until a future date, we believe the better view is that the time to file a section 17200 cause of action starts to run only when a reasonable person would have discovered the factual basis for a claim.

Id. at 920-921 (citing April Enterprises, supra, 147 Cal.App.3d 805 (considering whether delayed discovery rule should apply to a breach of contract claim).)

Numerous other federal district court cases recently have decided or at least assumed, notwithstanding Snapp and Stutz, that the delayed discovery rule does in fact apply, at least to some UCL claims. See, e.g., In re Neurontin Marketing and Sales Practices Litigation, — F.Supp.2d —, 2010 WL 4325225, ** 47-48 (D.Mass. Nov. 3, 2010) (citing Broberg in an opinion ordering defendant Phizer to pay $96 million in restitution); Clark v. Prudential Insurance Co., 736 F.Supp.2d 902, 922-23 (D.N.J. 2010) (following Broberg); Mitchell v. Skyline Homes, No. S-09-2241, 2010 WL 3784654 (E.D. Cal. Sept. 24, 2010) (citing Broberg); Stearns v. Select Comfort Retail Corp., — F.Supp.2d —, 2010 WL 2898284, *17 (N.D. Cal. July 21, 2010) (concluding, based on Broberg, that the delayed discovery rule does apply to fraud-based UCL claims but that the claim at issue did not sound in fraud and that, in view of the plaintiff's inadequate allegations, the court did not need to decide whether the discovery rule tolled the statute of limitations for the claim at issue); Burdick v. Union Security Ins. Co., Case No. CV-07-4028, 2009 WL 4798873, *10, and n. 16 (C.D. Cal. Dec. 9, 2009) (Central District of California Chief Judge Audrey B. Collins discussing, inter alia, Broberg and

Grisham and concluding that Broberg "makes clear that the discovery rule does apply at least to circumstances similar to those here."); Garcia v. Coleman, Case No. C-07-2279, 2008 WL 4166854, *10 (N.D. Cal. Sept. 8, 2008) (discussing Snapp and Grisham and assuming that the rule does apply).

II. The Delayed Discovery Rule Should Apply in UCL Actions

CAOC respectfully submits that this Court should resolve this issue now and disapprove Snapp and cases like it that conclude that the delayed discovery rule does not apply as a matter of law to UCL claims, and instead hold that it can apply, where warranted by the facts presented.

Several factors weigh in favor of applying the delayed discovery rule to UCL claims. First and foremost, "[b]y proscribing 'any unlawful' business practice, 'section 17200 'borrows' violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable." Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 561, 83 Cal.Rptr.2d 548 (citing State Farm Fire & Casualty Co. v. Superior Court (1996) 45 Cal.App.4th 1093, 1103, 53 Cal.Rptr.2d 229; Farmers Ins. Exchange v. Superior Court (1992) 2 Cal.4th 377, 383, 6 Cal.Rptr.2d 487.) If the "borrowed" violations themselves are subject to the delayed discovery rule, there is little reason to deny a plaintiff the benefit of the rule in a UCL action. Doing so would frustrate the

UCL's goal of protecting consumers and competition. See, e.g., Dean, supra, 2007 WL 7079558, *14 ("The substance of [plaintiff]'s UCL claim is analogous to a common law action for fraud, for which the discovery rule is applicable by statute. We agree with [plaintiff] that '[p]roviding less consumer protection for UCL claims than for common law claims is inappropriate.'" (citing Cal. Code Civ. Proc. § 338(d).)[5]

Furthermore, application of the delayed discovery rule – where appropriate and where the evidence supports it – would impose no undue burden on the courts or defendants. As one court of appeal explained when it applied the discovery rule in a breach of contract action,

> Applying the discovery rule to certain, rather unusual breach of contract actions poses no more burden for the courts than the date-of-injury accrual rule in most instances. The discovery rule itself contains procedural safeguards protecting against lengthy litigation on the issue of accrual. It presumes that a plaintiff has knowledge of injury on the date of injury. In order to rebut the presumption, a plaintiff must plead facts sufficient to convince the trial judge that delayed discovery was justified. And when the case is tried on the merits the plaintiff bears the burden of proof on the discovery issue. . . . . Failure to meet this burden will result in dismissal of the suit.

---

[5] In Section 338(d) of the Code of Civil Procedure, the legislature expressly provided that a claim based on fraud or mistake "is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

April Enterprises, supra, 147 Cal.App.3d at 833 (citation omitted).

Finally, and most importantly, application of the rule would best promote the purposes of the UCL – a factor that none of the courts finding the delayed discovery rule inapplicable took into account. The UCL protects "'both consumers and competitors by promoting fair competition in commercial markets for goods and services.'" Kwikset, supra, 120 Cal.Rptr.3d at 749 (citations omitted). "In service of that purpose, the Legislature framed the UCL's substantive provisions in "'broad, sweeping language.'" Id. (citing Cel-Tech, supra, 20 Cal.4th at 181). "The Legislature intended this 'sweeping language' to include "'anything that can properly be called a business practice and that at the same time is forbidden by law.'" Bank of the West v. Superior Court (1992) 2 Cal.4th 1254, 1266, 10 Cal.Rptr.2d 538.

The UCL also expressly covers past – even discontinued – acts of unfair competition. See Cal. Bus. & Prof. Code § 17203. That was not always so. Before 1992, the UCL was "limited to business practices and ongoing acts." W. Stern, Cal. Prac. Guide - Bus. & Prof. Code § 17200 (The Rutter Group 2009) ¶ 2:33. No injunctive relief was available for "past acts unless the plaintiff [could] show that the acts could be repeated." Id. In 1992, the Legislature considerably expanded the UCL's reach. Id. See also Stop Youth

Addiction, Inc. v. Lucky Stores, Inc. (1998) 17 Cal.4th 553, 570, 71 Cal.Rptr.2d 731 (superseded by statute on other grounds). The UCL now expressly reaches past – and therefore discontinued – acts of unfair competition. It provides:

> Any person who engages, *has engaged*, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person or any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition."

Cal. Bus. & Prof. § 17203.

Whether the delayed discovery rule should apply in UCL actions must be considered in light of this 1992 amendment. Past, discontinued, wrongful acts may be particularly difficult to uncover, even by the most diligent of would-be plaintiffs. Indeed, it is that very difficulty that gave rise to the delayed discovery rule in the first instance. See, e.g., Shively, supra, 31 Cal.4th at 1248 ("discovery rule most frequently applies when it is particularly difficult for the plaintiff to observe or understand the breach of duty, or when the injury itself (or its cause) is hidden or beyond what the ordinary person could be expected to understand"). The Legislature would have understood

that when it expanded the scope of the UCL to cover past and discontinued acts.

The Legislature also would have understood that the courts construe the UCL "in light of common law decisions" including decisions applying the delayed discovery rule. California Assn. of Health Facilities, supra, 16 Cal.4th at 297. Indeed, the Legislature could very well have *expected* the courts to imply the discovery rule whenever the evidence supported its application – much as they have done in many other contexts. See Norgart, supra, 21 Cal.4th at 397 (the discovery rule "may be expressed by the Legislature or implied by the courts"). Any other interpretation would leave some number of the past deceptive acts the Legislature expressly intended to be within the UCL's scope completely beyond its reach, simply because, perhaps, the deception at issue was effective. That hardly serves the UCL's broad, remedial purpose.[6]

---

[6] The Aryeh majority seemingly failed to appreciate this when it stated that "[a] claim for recovery of past damages is not within the contemplation of the UCL." Aryeh, 111 Cal.Rptr.3d at 220. While "damages," per se, are not recoverable under the UCL, the Aryeh majority's strange suggestion that the "streamlined" UCL is intended *only* to prevent "ongoing or threatened acts of unfair competition" is unsupportable and by no means a fair reading of this Court's decision in Cortez v. Purolator Air Filtration Products Co. (2000) 23 Cal. 4th 163, 96 Cal.Rtpr.2d 518.

CONCLUSION

For the forgoing reasons, the courts should have the power to apply the delayed discovery rule in UCL actions when the facts support its application.

Dated: March 21, 2011

Respectfully submitted,

By: _____

David M. Arbogast (SBN 167571)
darbogast@law111.com
ARBOGAST & BERNS LLP
6303 Owensmouth Avenue, 10th Floor
Woodland Hills, CA 91367-2262
Tel.: (818) 961-2000
Fax: (818) 936-0232

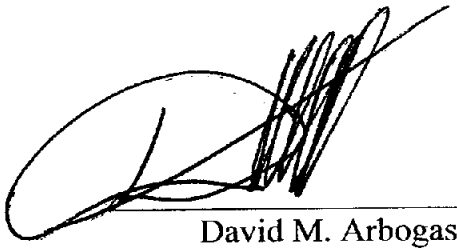
J. Mark Moore (SBN 180473)
mark@spiromoss.com
Denise L. Díaz (SBN 159516)
deniseldiaz@gmail.com
SPIRO MOSS LLP
11377 W. Olympic Boulevard, Fifth Floor
Los Angeles, CA 90064-1683
Phone: (310) 235-2468
Fax: (310) 235-2456

Attorneys for Consumer Attorneys of California

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.504(d)(1), the undersigned counsel certifies that the text of this petition uses a proportionately spaced Times New Roman 13-point typeface, and that the text of this petition consists of 5865 words as counted by the Corel WordPerfect X5 program used to generate this petition.

Dated: March 21, 2011



David M. Arbogast

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 6303 Woodland Hills, CA, 91367.

2. That on March 21, 2011, declarant served the **BRIEF OF THE CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF REAL PARTIES IN INTEREST AS AMICUS CURIAE** by depositing a true copy thereof in a United States mail box at Los Angeles, California in a sealed envelope with postage fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 21st day of March, at Los Angeles, California.

TATIANA V. ARBOGAST

ARYEH V. CANNON BUSINESS SOLUTIONS, INC. (Review Granted)
Service List - 03/21/11

Counsel for Plaintiff and Appellant

R. Duane Westrup
Mark L. VanBuskirk
Jennifer Lynn Connor
WESTRUP KLICK LLP
444 West Ocean Blvd., Suite 1614
Long Beach, CA 90802-4524

Linda Guthmann Krieger
Terrence B. Krieger
KRIEGER & KRIEGER
249 East Ocean Blvd., Suite 750
Long Beach, CA 90802

Counsel for Defendant and Respondent

Richard G. Silberberg
DORSEY & WHITNEY LLP
250 Park Avenue
New York, NY 10177-1500

Kent Jeffrey Schmidt
DORSEY & WHITNEY LLP
38 Technology Drive, Suite 100
Irvine, CA 92618-5310

Courtesy Copies

Office of the Clerk
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Office of the Clerk
California Court of Appeal
Second Appellate District
Division Eight
Ronald Reagan State Building
Los Angeles, CA 90013-1230

Consumer Law Section
Los Angeles District Attorney
210 West Temple Street, Suite 1800
Los Angeles, CA 90012-3210

Supervising Deputy Attorney General
Consumer Law Section
Office of the Attorney General
Ronald Reagan State Building
Los Angeles, CA 90013-1230