Supreme Court No. S157001

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

◇

PAULINE FAIRBANKS and MICHAEL COBB,
Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES,
Respondent.

FARMERS NEW WORLD LIFE INSURANCE CO., *ET AL.*
Real Parties in Interest.

◇

Court of Appeal No. B198538
Superior Court No. BC305603, Honorable Anthony Mohr, Judge Presiding

◇

PETITIONERS' OPENING BRIEF ON THE MERITS

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INTRODUCTION

The Consumer Legal Remedies Act (CLRA) is a major piece of legislation intended to put California consumers on a more equal footing with businesses that would take advantage of them. The question here is whether consumers should be denied the benefits of the CLRA in fighting unfair and deceptive practices by insurance companies. In what follows, Petitioners will show that there is no

justification for exempting insurance companies from the CLRA's reach.

The CLRA applies to unfair and deceptive practices in the lease and sale of goods and services, and, contrary to holding of the Court of Appeal here (Opn., p.3), insurance falls within the plain meaning of "service" within the Act, whether measured by dictionary definitions, the understanding of the courts and legislature of this and other states, or Farmers itself, in its communications with the public.

This Court has described the insurance industry as providing a "vital service labeled quasi-public in nature...." *Egan v. Mutual of Omaha Insurance Company* (1979) 24 Cal.3d 809 at 820. It would be a betrayal of that understanding to hold that this major piece of consumer protection legislation does not apply to such an industry by interpreting the term "services" in the Act as excluding insurance.

Further, if there were any doubt on the subject, it would be dispelled by the Legislature's emphatic direction that the CLRA must be construe liberally in favor of the consumer, Civil Code section 1470.

The fact that insurance is within the plain meaning of "service"

within the meaning of the act, reinforced by the requirement of liberal construction, definitively resolves the question, obviating the need to resort to any other means of determining legislative intent. *People v. Licas* (2007) 41 Cal. 4th 362, 367; *Mejia v. Reed* (2003) 31 Cal. 4th 657, 663. Assuming that there is a place for consideration of legislative history and public policy, however, those factors too point in the direction of the inclusion of insurance under the CLRA.

First, there is no affirmative evidence in the historical record of a legislative decision not to include insurance within the Act's coverage (see pp. 29, below).

Second, there is the fact that the authors of the National Consumer Act, which served as a basis for the legislative deliberations that led to the CLRA's passage, included in their text the comment that "[i]nsurance is clearly a service and should be under the same kind of regulation as any other service (Exhibit 19[1])." There is good reason to believe that the Legislature, guided by that understanding, decided that, rather than explicitly include insurance

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All exhibits referred to (hereinfter designated "Ex.", are exhibits to the Petition for Writ of Mandate herein, unless otherwise indicated).

or any other field of business in its definition of "service," it would use a broad definition which would encompass insurance along with every other industry which consumers and their families rely upon to meet their needs.

As to public policy, Farmers and the Court of Appeal below raise the question whether insurance should have a special status because it is regulated by the Insurance Commissioner, and that regulation might be disrupted by consumer actions under the CLRA, which are in any case unnecessary in light of the fact that insurance is a regulated industry (Opn., pp. 13-15).

The response to that contention is also clear.

First, the fact that an industry is regulated does not mean that consumers should not be able to assert their own rights when taken advantage of by unfair and deceptive practices (see pp. 38-40, below).

Second, there is no evidence that such causes of action would disrupt the regulatory system, and a large body of evidence showing that the availability of other private causes of action has not done so (see pp. 40-43, below).

Finally, there is Insurance Code section 1861.03(a), enacted by

the voters as part of Proposition 103 in 1988, which explicitly negates any such special status for insurance as a "regulated industry," affirming that insurance is to be treated the same way as any other business in California.

Every state except one with a consumer protection statute like the CLRA which has considered the issue presented here has decided that it gives consumers the right to sue insurance companies along with any other business that seeks to take unfair advantage of them (see pp. 20-23, below). California should join the vast majority of jurisdictions which have been faced with the issue in ensuring that consumers are not deprived of effective remedies against insurance companies which resort to unfair and deceptive practices.

STATEMENT OF THE CASE

On November 5, 2003, Petitioner Pauline Fairbanks filed a class action in Los Angeles Superior Court against Farmers New World Life Insurance Co. and Farmer's Group Inc (Farmers) for violation of Business and Professions Code section 17200, breach of contract, breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, fraudulent inducement, and

negligent supervision (Ex. 1).

The original complaint, and the amended complaints which followed (the Third Amended Complaint which was the object of the Motion for Judgment on the Pleadings giving rise to these proceedings is Ex. 2, and the now operative Fourth Amended Complaint is Ex. 17) have all focused on Real Parties' universal insurance policies: the Farmer's Flexible Premium Universal Life Policy and Farmer's Universal Life policy. Both are interest-sensitive universal life policies, meaning that the premiums, current value of the policy, and likelihood that the policy will stay in force until maturity, depend upon the interest and risk rates set for the policies by Farmer's over time. Both Petitioners had such policies (Exs. 2 and 17, paras. 1 and 2).

The complaints allege various misrepresentations and deceptive and unfair practices in the design and marketing of the policies. A major focus is the systematic underfunding of the policies which will likely result in their lapse before maturity (see Ex. 17, paras. 73-77). For example (see Ex. 2, paras. 4-6), it was represented to Cobb that his FFUL policy would last until age 95 with a planned

premium was $146.00 per month, on the basis of an illustration which showed that his policy would remain in-force even at the (least-favorable) guaranteed interest and risk rates, but went only through age 65 (Exh. 30 to Ex. 2). However, when Cobb actually reached age 65, in 2005, his annual statement revealed that his policy would lapse in two years, at age 67 (Exh. 31 to Ex. 2).

On January 16, 2007, Real Parties filed their motion for judgment on the pleadings of the CRLA cause of action in Petitioners' Third Amended Complaint. On February 9, 2007, Respondent Court granted the motion for judgment on the pleadings (Exhibit 14). On February 28, 2007, Respondent Court file its order granting judgment on the pleadings based on its conclusion that "insurance is neither a good nor a service within the meaning of the CLRA (Exhibit 16)."

On April 27, 2007, Petitioners filed their petition for writ of mandate seeking review of the judgment on the pleadings in the Second District Court of Appeal. On May 15, 2007, the Court of Appeal, Division Three, issued an order to show why the writ should not be granted. On August 22, 2007, the Court of Appeal denied the

petition by published opinion.

Petitioners filed their Petition for Review on October 2, 2007. This Court granted the Petition on November 14, 2007.

ARGUMENT

I. THE RULES OF STATUTORY CONSTRUCTION ENUNCIATED BY THIS COURT COMPEL THE CONCLUSION THAT THE CLRA APPLIES TO PROTECT CONSUMERS AGAINST UNFAIR AND DECEPTIVE PRACTICES IN THE SALE OF INSURANCE.

The CLRA is a broad-ranging statute intended by the Legislature to facilitate consumer actions to redress unfair and deceptive practices in the "sale or lease of goods and services to any consumer...." Civil Code section 1770. The question here is whether consumers should be denied the right to use the CLRA in response to "unfair and deceptive practices" in the sale of insurance.

As the term "goods" is defined as "tangible chattels", Civil Code section 1761(a), the issue is more specifically whether insurance is a "service" within the meaning of the Act, which defines "service" as "work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods." Civil Code section 1761(b). Application of the

rules of statutory construction enunciated by this Court leaves no doubt that insurance is a "service" within the meaning of the CLRA.

A. INSURANCE IS WITHIN THE PLAIN MEANING OF THE TERM "SERVICES" IN CIVIL CODE SECTION 1761(B), AS VIEWED IN THE CONTEXT OF THE CLRA.

As this Court has recently confirmed statutory construction must

> begin with the plain language of the statute, affording the words of the provision their ordinary and usual meaning and viewing them in their statutory context, because the language employed in the Legislature's enactment generally is the most reliable indicator of legislative intent.
>
> *People v. Watson* (2007) 2007 42 Cal. 4th 822, 2007 Cal. LEXIS 14280, p. 10.

The first step in deciding whether insurance is covered by the CLRA is, therefore, to determine whether insurance falls within the plain meaning of "services" in section 1761(b) as seen in the context of the CLRA as a whole, including Civil Code section 1770's mandate that the CLRA "shall be liberally construed to promote its underlying purposes..." of facilitating consumer actions in response to unfair and deceptive business practices.

1. INSURANCE POLICIES ARE WITHIN THE DICTIONARY AS WELL AS THE STATUTORY DEFINITION OF "SERVICE."

The Merriam-Webster On-Line Dictionary (2008) gives, among others, these relevant definitions of the term "service":

> **2 a** the work performed by one that serves <good service>; **b** help, use, benefit <glad to be of *service*> **c :** contribution to the welfare of others **4 :** the act of serving : as **a :** a helpful act <did him a *service*> **b :** useful labor that does not produce a tangible commodity -- usually used in plural <charge for professional *services*>.

The CLRA itself defines "service" in much the same way, as "work, labor, and services... including services furnished in connection with the sale or repair of goods," except that it limits the services covered to those made available to consumers as such, excluding those supplied for "commercial or business use." Civil Code section 1761(b).

Insurance Code section 22 defines insurance as "a contract of indemnity." Certainly, both insured and insurer regard "contracts of indemnity" such as life, automobile and fire insurance provide for the insured and the insured's family as a "benefit" and a "contribution to [their] welfare...."

Further, in most, if not every case, insurance policies offer far more than a bare contract of indemnity. The efforts expended by insurance agents and others in offering policies that meet insureds needs, in helping them keep those policies in force, and in responding to their claims, is also service. It is "work performed by one that serves," and "useful labor that does not produce a tangible commodity." In other words, insurance policies are not only contracts of indemnity. They are bundles of services by which insurers purport to enhance the security of families they serve.

So for example, all insurers, including Farmers, offer such services as "underwriting services, actuarial calculations, and claims handling (see Reply to Opposition to Petition for Writ of Mandate, p. 4)."

More specifically, because the universal life insurance policies at issue here might require payments in addition to regularly scheduled premiums to keep them from lapsing, and were marketed as providing insureds with flexibility to meet the changing needs of their families over time, with opportunities to raise and lower premiums, and to take money out of the accumulation account for various

purposes before maturity, the insureds required continued guidance from their insurance agents over the life of the policy to ensure that the policies would remain in force and be used to best advantage. Farmers offered a range of services in connection with those policies purporting to help the insureds achieve those goals, including, for example, (1) sending out annual reports to insureds purporting to inform them of the current status and future prospects for their policies each year (see Exs. 8 and 31 to Ex. 2), (2) undertaking "to review the insurance coverages and needs of, and to provide advice and counsel to Farmers customers on the subject of what would be in the customers best interest with respect to the acquisition of a new insurance policy (Ex. 17, para. 95)," and (3) providing guidance to policyholders as to when they should withdraw money from their accumulation accounts, or change premium payments (see PRH 4-5).

The application of the CLRA to such bundles of services was the subject of *Hitz v. Interstate Bank* (1995) 38 Cal.App.4th 274.

The question in *Hitz* was whether a credit card contract is a "consumer contract for the provision of 'services'" within the meaning of Civil Code section 1761(c). The bank asserted that it was

not, on the basis that section 1761(c), like the CLRA, should be read to exclude the provision of credit from its coverage because "the Legislature deleted purchasers of 'credit' from the initial proposed definition" of "services" in the CLRA 38 Cal.App.4th at 286, footnote 7. The *Hitz* court rejected that argument on the basis that it

> ...overlooks the dual nature of a credit card agreement. We need not decide whether an extension of credit is a consumer contract within the meaning of subdivision (c)(1), because a credit card agreement is much more than that, encompassing *convenience services* in addition to extension of credit.
>
> 38 Cal.App.4th at 286.

More recently, the court in *Berry v. American Express* (2007) 147 Cal.App.4th 224, has adopted the argument of the bank in *Hitz*, holding that, because the Legislature had deleted references to such financial services from earlier versions of the Act, the provision of credit cards does not fall within the CLRA. The *Berry* court did not, however, consider the *Hitz* court's holding that the additional "convenience services" offered by credit card companies bring credit cards within the reach of the CLRA, whether or not the provision of credit as such falls within it.

In the recent case of *Jefferson v. Chase Home Financial* (N.D.

Cal.2007) 2007 WL 1302984, the District Court again faced the question of whether misrepresentations in the sale of financial services fall within the ambit of the CLRA, and concluded *Berry* was wrongly decided, because it "failed to consider whether, as the *Hitz* court concluded, a credit card agreement involves other services in addition to simply an extension of credit." 2007 WL 1302984, p. 4. More recently, in the District Court in *Hernandez v. Hilltop Financial Mortgage, Inc.* (2007) 2007 U.S.Dist.LEXIS 80867, followed *Jefferson* and rejected *Berry* to hold that the CLRA covers mortgage loans.

As already seen, insurance policies also offer consumers many "services" beyond the "contracts of indemnity" that are the defining elements of those policies. The bundles of services that are insurance policies (and specifically, Farmers universal life insurance policies) fall within the ambit of "services" under the CLRA, therefore, not only because the provision of insurance *as such* is a service, but also because they provide a whole range of other related services to the policyholder.

2. FARMERS REPRESENTS TO THE PUBLIC THAT ITS INSURANCE POLICIES OFFER SERVICES.

The conclusion that insurance policies provide "services" is confirmed by Farmers own description of its offerings in its presentations to the public.

In the "Saving for Retirement" section of its website (see Ex. 1 to Motion for Judicial Notice, filed contemporaneously with this Brief) Farmers calls life insurance itself a service:

> At Farmers we offer many services to help you prepare for your retirement - from IRA's to Mutual Funds and Variable Annuities to Life Insurance.

Further, in the "Report Insurance Claims" section (Ex. 2 to Motion for Judicial Notice), Farmers emphasizes that it does provide services to its insureds far beyond the bare provision of a "contract of indemnity":

> We're here to care, and take care, of everything you need.

Such statements to the public are better indications of what Farmers takes to be the "ordinary and usual meaning" of the terms "services" and "insurance" as understood by its insureds than the legal arguments it has made in these proceedings. Having told their

insureds, and potential insureds, that life insurance is a "service," and that it will "take care, of everything you need," Farmers cannot now be heard to assert that their insurance policies do *not* fall within the plain meaning of "services."

3. THIS AND OTHER CALIFORNIA COURTS, AND THE CALIFORNIA LEGISLATURE, HAVE LONG ASSUMED THAT INSURANCE IS A SERVICE.

As this Court observed 50 years ago, consumers buy personal insurance policies, not "to obtain a commercial advantage," but for "the peace of mind and security" they provide. *Crisci v. Security Insurance Company* (1967) 66 Cal. 2d. 425 at 434. Three years later, in *Egan v. Mutual of Omaha Insurance Company, supra*, 24 Cal.3d 809 at 820, this Court explained the special character of the relationship between insurance company and policyholder by describing insurance as a "vital service labeled quasi-public in nature."

So too, in *Kagan v. Gibraltar Savings and Loan Association* (1984) 35 Cal.3d 582, this Court assumed insurance was a service within the meaning of the CLRA, while the Court of Appeal made the

same assumption in *Massachusetts Mutual Life Insurance Company v. Superior Court* (2002) 97 Cal.App.4th 1282, involving life insurance claims similar to those at issue here.

Further, in Insurance Code section 12156, the Legislature defined "the selling or giving, with a service contract or as a result of membership in or affiliation with a motor club, of a policy of insurance covering liability or loss by the holder resulting from injury or damage to person or property arising out of an accident" as an "insurance service."

This Court did state, in dictum in *Civil Service Employees v. Superior Court* (1978) 22 Cal.3d 362 at 376, that insurance is "technically neither a 'good' nor a 'service'," and some federal district courts have followed that dictum without further discussion or analysis. *Bacon v. American International Group* (C.D. Ca.2006) 415 F.Supp.2d 1027 at 1036; *Migliaccio v. Midland National Life Insurance Company* (N.D.Ca.2006) 436 F.Supp.2d 1095, 1108-09; *Newland v. Progressive Corporation* (E.D. Ca.2006) 2006 U.S.Dist.Lexis 62359, pp. 13-14.

This Court's dicta should, of course, be followed, by this as by other courts, "when it demonstrates either a thorough analysis of the issue" or "compelling logic." *Rodrigo v. Koryo Martial Arts* (2002) 100 Cal. App. 4th 946, 956 n.3. But the *dictum* at issue here makes no contribution to the consideration of the issue. It is unaccompanied by analysis, and was not made in a context where, as here, the CLRA's protection of consumers was at stake.

Civil Service Employees was *not* a CLRA case. It was a class action against an insurer for breach of contract. The issue was whether the trial court could, consistent with due process, order the defendant in a class action to pay the cost of initially notifying class members of the pendency of the action. 22 Cal.3d 362, 365-66.

The *Civil Service Employees* court noted that section 1781(d) of the CLRA provides that the court can order either party to notify the members of the class. It then went on to point out that it did not matter whether this case was a CLRA case or not, because, as it had already held in *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 820, the CLRA provisions on class action procedure "could and should appropriately be utilized by trial courts in all class actions." 22

Cal.3d at 376. It was in the course of making that point that the court noted that

> section 1781 subdivision (d) does not directly apply to the present case because insurance is technically neither a "good" nor a "service."
>
> 22 Cal.3d at 376.

This Court did not suggest why that was the case. There was no need to, because the very point being made was that it made no difference for purposes of class action procedure whether the case before the court fell within CLRA or not.

Further, the very language of the dictum undercuts any persuasive force it might have with regard to the reach of the CLRA. It states that insurance is not "technically" either a good or a service. But what difference does a "technical" point make to the application of a statute which must, according to the command of the Legislature, be "liberally construed and applied to promote its underlying purposes...." Civil Code section 1760.

Still, it is understandable that some other courts, and especially the federal courts, have used the *Civil Service* dictum as one indicator of how this Court might interpret the CLRA in future. That does not

mean, however, that it can offer this Court any guidance as to how it should decide the issue of the CLRA's application to insurance now that it squarely presented.

4. ALL BUT ONE OF THE COURTS IN OTHER JURISDICTIONS THAT HAVE CONSIDERED THE ISSUE HAVE FOUND INSURANCE TO BE A SERVICE.

All but one of the states which has decided the question at issue here under similar consumer protection statutes, including Colorado, Pennsylvania, Massachusetts, Kentucky, Illinois, and New Jersey and Texas, have decided that insurance policies are within the plain meaning of the term "service." Decisions from other jurisdictions as to the plain meaning of a statutory term are persuasive authority in California, *Prudential Ins. Co. of America, Inc. v. Superior Court* (2002) 98 Cal.App.4th 585, and the straightforward and forceful character of the decisions from various states holding insurance policies to be within the plain meaning of "service" make them especially persuasive.

Thus, in *McCrann v. Klaneckey* (Tex. App.1984) 667 S.W.2d 924, a Texas court held that,"an insurance policy *is* covered by the

definition of 'services'" in the Texas Deceptive Trade Practices Act, which is almost word for word the same as that in the CLRA. Under the Texas statute,

> (2) "Services" means work, labor, and services for use, including services furnished in connection with the sale or repair of goods.
>
> V.T.C.A. section 17.45(2).

So too, the Kentucky Supreme Court *Stevens v. Motorists Mutual Insurance Co.* (Ky.1988) 759 S.W.2d 819, declared unequivocally that

> ...the purchase of an insurance policy is the purchase of a "service" intended to be covered by the Consumer Protection Act. The Stevens purchased a homeowners' insurance policy protecting their home against certain losses and are the class of persons who purchased services primarily for personal, family, or household purposes.
>
> 759 S.W.2d at 820.

The same is true of the Illinois court's decision in *Fox v. Industrial Casualty Insurance Co.* (Ill.App. 1981) 424 N.E.2d 839, which held that

> [t]he sale of insurance is clearly a service and insureds are thus consumers and within the protection of the Consumer Fraud Act.
>
> 98 Ill.App3d 543 at 545.

A Pennsylvania court concluded that

> ... no one could argue that... insurance coverage is not a service or a product which can be subjected to consumer fraud.
>
> *Deetz v. Nationwide Mutual Insurance Co.* (1980) Pa. D.&C.3d 499.

The Massachusetts Supreme Judicial Court found that the sale of insurance policies is the sale of services as well as property, reasoning that, while the insurance contract as such creates a property right, the terms of the insurance policy "generally includes services in connection with the ongoing protection of all persons within its purview." *Dodd v. Commercial Union Insurance Company* (Mass.1977) 365 N.E.2d 802 at 81.

The Supreme Court of Kentucky, in holding that "the purchase of an insurance policy is a purchase of a 'service' intended to be covered by the Consumer Protection Act," noted that four states, Montana, Louisiana, Vermont and Michigan, had ruled to the contrary. It pointed out, however, that three of the four, all except Vermont (in *Wilder v. Aetna Life & Casualty Insurance Co.* [1981] 433 A.2d 309) were compelled to do so by an *explicit* statutory exemption for the "regulated insurance industry." *Stevens v.*

Motorists Mutual Insurance Co. (Ky.1988) 759 S.W.2d 819 at 820-21.

Finally, the Colorado Supreme Court, in *Showpiece Homes Corp. v. Assurance Company of America* (Colo.2001) 38 P.3d 47 at 57, surveying the states which had dealt with the issue and, finding that only Vermont has taken the contrary view, held

> ... the reasoning of the majority of foregoing cases to be sound, and accordingly, that the sale of insurance can be classified as a sale of goods, services or property and is thus subject to the provisions of the CCPA [Colorado Consumer Protection Act].
>
> 38 P.2d at 57.

5. IN LIGHT OF THE LEGISLATURE'S MANDATE OF LIBERAL CONSTRUCTION, THIS EVIDENCE OF PLAIN MEANING COMPELS THE CONCLUSION THAT THE SALE OF INSURANCE POLICIES IS A SERVICE WITHIN THE MEANING OF THE CLRA.

Finally, all of this evidence must be considered in light of the Legislature's liberal construction mandate.

It has been shown above that insurance falls within a number of the dictionary definitions of "service," that Farmers represents its policies to the public as providing services to its policyholders, that a number of California cases either describe insurance as a service or

treat it as such without question, that the Legislature so defines it in another context, and that the courts of all but one of the other states which have considered the question have found insurance policies to be within the plain meaning of "service."

That evidence in itself firmly establishes that insurance falls within the plain meaning of "service" as used in the CLRA.

Further, when the Legislature wanted to exclude some field of business from the general terms "goods and services" in the CLRA, it did so explicitly. Civil Code section 1754 explicitly excludes the construction or sale of a residence from the CLRA's ambit. Civil Code section 1755 excludes liability for owners or employees of advertising media, unless they are proven to have had knowledge of the deceptive practices at issue. In the absence of any such exclusion, it must be assumed that insurance falls within the CLRA's ambit.

That conclusion is made more certain by the Legislature's mandate that the CLRA be liberally construed.

\\\

Civil Code section 1760 provides that the CLRA

> shall be liberally construed to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.

According to James A. Hayes, principal author of the bill and then Chairman of the Assembly Judiciary Committee, the Legislature included the mandate of liberal construction "in order to indicate more fully the intent of the Legislature with respect to this measure," because it had "charted a new course for the protection of the consumer in the CLRA, and "anticipates controversy and debate will attend application of the measure...." J. of the Cal. Ass'y (1970) at 8464, 8466-67; *see id.* at 2117-2119, 3651-3653.

Another commentator who participated in drafting the CLRA has affirmed that the liberal construction mandate is a legislative direction to courts that they should "...*when in doubt, decide in the consumer's favor*..." Reed, "Legislating for the Consumer: An Insider's Analysis of the Consumers Legal Remedies Act," 2 Pac.L.J. 1 at 8 (emphasis in the original).

Not even the Court of Appeal opinion here purported to find *beyond doubt* that insurance is not a service within the meaning of the CLRA. At most it asserted the issue to be uncertain (Opn., p. 7). In the context of the Legislature's liberal construction mandate, therefore, there can be no justification for excluding unfair and deceptive practices in selling insurance from the CLRA's reach.

The District Court in *Jefferson v. Chase Home Financial, supra,* 2007 WL 1302984, faced with the question of whether legislative history might justify exclusion of deception in the sale of financial services from the ambit of the CLRA, found that, in light of the Legislature's liberal construction mandate, it could not

> ...conclude that the California Supreme Court would expand the CLRA's specified exclusion or read into the CLRA exclusions that are not present on the face of the statute.
> 2007 WL 1302984, p. 3.

That reasoning is applicable here as well, and it confirms that, in the absence of an explicit exclusion, the CRLA must be held to apply to insurance.

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II. EVEN ASSUMING THAT LEGISLATIVE INTENT AND POLICY CONSIDERATIONS ARE RELEVANT HERE, THEY SUPPORT THE CONCLUSION THAT THE INSURANCE CANNOT BE EXCLUDED FROM THE CLRA'S COVERAGE.

Legislative history, *People v. Licas, supra,* 41 Cal. 4th 362, 367, and related policy issues, *Mejia v. Reed, supra,* 31 Cal. 4th 657, 663, become relevant to the interpretation of a statute only to the extent that the plain meaning of statutory terms is ambiguous. Here, as already seen, insurance is within the plain meaning of service, especially when considered in the context of the CLRA's mandate of liberal construction in favor of the consumer. There was, therefore, no justification for the Court of Appeal's resort to legislative history and policy to support its decision (Opn., pp. 9-15).

Even if such resort had otherwise been appropriate, however, a proper consideration of those factors supports, rather than undermining, the conclusion that the CLRA should apply to the unfair and deceptive practices of insurance companies such as Farmers.

\\\

A. THE CLRA'S LEGISLATIVE HISTORY DOES NOT SUPPORT THE EXCLUSION OF INSURANCE FROM ITS COVERAGE.

Even if it were relevant, legislative history would not support the exclusion of unfair and deceptive practices by insurance companies from the CLRA's ambit.

As already seen, the court in *Berry v. American Express*, *supra*, 147 Cal.App.4th 224, found that the issuance of credit cards is not a service within the meaning of the CLRA, though there is no explicit exclusion of credit cards in the Act. The *Berry* court concluded that the Legislature intended to exclude the extension of credit from the sale of "services" it covered, because the terms "credit" and "money" were explicitly included in an earlier version of the bill became the CLRA, but later cut from it. 147 Cal.App.4th 224, 232.

The Court of Appeal here found that the *Berry* reasoning justified the exclusion of insurance from the CLRA as well, on the basis that the National Consumer Act, which the Legislature used as source material for the CLRA, explicitly included insurance in its definition of "services," while the CLRA does not (Opn., p. 9-10).

But, while the *Berry* decision was based on affirmative evidence in the legislative record that the Legislature deliberately deleted references to financial services from the statute, there is no such evidence here.

On the contrary, the record affirmatively establishes that neither house of the Legislature ever considered a version of the legislation that would have included the word "insurance" in any context. There were fifty-six amendments to the CLRA bill introduced in the Assembly, and fifty-two in the Senate. 2 J. Ass'y (1970) at 2117-2120, 3651-3653, 3868-3869; 4 J. Ass'y (1970) 8212-8217. The specific exceptions to CLRA coverage in sections 1754 and 1755 were added by amendment. *Id.* at 2118, 3651. Yet, the word "insurance" appears nowhere in the Legislature's records regarding the adoption of the CLRA.

Any suggestion that the Legislature ever actually entertained a version of the CLRA which adopted the National Consumer Act's definition of services, including its explicit reference to insurance, and then deliberately deleted the reference to insurance as it did with "credit" and "money," is, therefore, negated by the record.

On the contrary, whatever role the example of the National Consumer Act may have played in other aspects of the CLRA, the resemblance between the definition of services in the National Consumer Act and that in the CLRA is minimal.

The CLRA defines services as

> work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods.
>
> Civil Code section 1761(b).

The National Consumer Act, on the other hand has this definition:

> (37) "Services" includes
> (a) work, labor, and other personal services,
> (b) privileges with respect to transportation, hotel and restaurant accomodations [sic], education, entertainment, recreation, physical culture, hospital accomodations [sic], funerals, cemetary [sic] accomodations [sic], and the like, and
> (c) insurance.
>
> Ex. 19.

The only similarity is in the first few words of the definition. After that there is a dramatic parting of the ways, with the CLRA including *none* of the many specifics enumerated in the National

Consumer Act. Given that fact, no negative conclusion can be drawn from the lack of an explicit reference to insurance in the CLRA.

Further, if the Legislature's decision not to adopt the National Consumer Act's explicit reference to insurance were treated as good reason for excluding insurance from the CLRA's ambit, it would compel the exclusion of the other broad fields of business explicitly included in the National Consumer Act's definition as well, including: transportation, hotels, restaurants, education, entertainment, recreation and hospital services.

No one could suggest, however, that any such wholesale exclusions are justified. On the contrary, the published opinions show that the CLRA has been applied without challenge to the fields of "transportation," including automobile sales, *Alan v. American Honda Motor Co., Inc.*(2007) 40 Cal.4th 894, leasing, *Kim v. Euromotors* (2007) 149 Cal. App. 4th 170, repairs, *Lebrilla v. Farmers Group* (2004) 119 Cal. App. 4th 1070, and rentals, see *Aron v. U-Haul Co. of California* (2006) 143 Cal. App. 4th 796, to "education," *Lee v. S. Cal. Univ.* (2007) 148 Cal. App. 4th 782, *Payne v. Nat'l Collection Sys.* (2001) 91 Cal. App. 4th 1037, to

"entertainment", see *Gallin v. Superior Court* (1991) 230 Cal. App. 3d 541, to "recreation," see *Outboard Marine Corp. v. Superior Court* (1975) 52 Cal. App. 3d 30, and to "hospital accommodations," see *Parnell v. Adventist Health System/West* (2005) 35 Cal.4th 595, *Cruz v. Pacificare Health Systems* (2003) 30 Cal.4th 303, and *Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066.

From the record, then, it appears that the California Legislature decided from the outset not adopt the National Consumer Act approach to defining "services" by reference to a lengthy list of particulars, including insurance, and instead decided to use broad, general terms which would be understood to take in such fields as transportation, recreation, education, entertainment and the provision of hospital services, as well as insurance.

In fact, there is a basis in the National Consumer Act for taking the contrary view, that the Legislature affirmatively intended insurance to covered though it did not explicitly include the term in the CLRA. The drafters of the National Consumer Act included in its text the comment that "[i]nsurance is clearly a service and should be

under the same kind of regulation as any other service (Ex. 19)." The presence of that comment in this text which the Legislature admittedly used as source material for the CLRA tends to support the conclusion that our legislators found no need for an explicit reference to indicate that insurance was a "service" within the meaning of the Act. It also supports the conclusion that *Berry* (which the District Courts in *Jefferson v. Chase Home Financial, supra*, 2007 WL 1302984, and *Hernandez v. Hilltop Financial Mortgage, Inc., supra*, 2007 U.S.Dist.LEXIS 80867 in any case found to be wrongfully decided, see pp. 13-14, *supra*) is inapposite here.

In sum, even if it were relevant, legislative history would not support the exemption of the insurance industry from liability under the CLRA.

B. PUBLIC POLICY CONSIDERATIONS WOULD ALSO COMPEL THE CONCLUSION THAT INSURANCE CANNOT BE EXCLUDED FROM CLRA COVERAGE.

The Court of Appeal concluded as a matter of public policy (Opn., pp. 13-15), as well as legislative history, that the CLRA should not apply to insurance, principally on the basis that the UIPA already

provided the Insurance Commissioner the power to deal with unfair and deceptive practices in the insurance industry when the CLRA was adopted, and, therefore, (1) it was unnecessary to include insurance within the ambit of the CLRA, and (2) to do so would be to destroy the preexisting regulatory structure. Because, as shown above, insurance is included within the plain meaning of "service" in the CLRA, public policy is no more admissible in deciding the question at issue here than legislative history. Even if it were relevant, however, the contention that public policy points toward the exemption of insurance from the CLRA would have to be rejected.

The first problem with the contention that the insurance industry is exceptional, and must be exempted from private causes of action because it is already regulated, is that they are based entirely on speculation, both about the Legislature's intent and about the likely consequences of allowing such private causes of action. On the other hand, the contrary position, that regulation of the insurance industry can and should go forward effectively side-by-side with private causes of action, is based on clearly articulated legislative intent, and on the historical record of having allowed individuals to

continue to bring a variety of other private causes of action against insurance companies ever since the adoption of the UIPA (see pp. 41-43, below).

But the primary barrier to accepting Farmer's claim of exemption for insurance companies based on the exceptional character of insurance as a regulated industry is that Insurance Code section 1861.03(a), enacted by the voters as part of Proposition 103 in 1988, explicitly rejects it. It provides that "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) (emphasis added)."

The People, in enacting that language, could hardly have made it clearer that the existence of a preexisting regulatory structure specifically aimed at insurance *cannot* justify the exemption of insurance from general legislation, such as the CLRA, which is aimed at protecting consumers from unfair and deceptive practices in the

sale of goods and services. Mere speculation about some alternative legislative intent, or about the potential consequences of applying the CLRA to insurance, cannot withstand the force of that provision.

Second, there is the mandate of liberal construction in the CLRA itself. That provision is an explicit declaration of the Legislature's policy decision that the interests of consumers in using the facilities offered by the CLRA to respond to unfair and deceptive practices in any field of business that touches them *as* consumers is paramount. Again, speculation cannot stand up against that explicit statement of policy.

In what follows, Petitioners will show more fully why, if public policy considerations were admissible here, they would compel the conclusion that the CLRA should be applicable to insurance.

1. RESPONDENTS WOULD HAVE TO SATISFY A HEAVY, IF NOT UNSURMOUNTABLE, BURDEN TO ESTABLISH THAT INSURANCE SHOULD BE EXEMPTED FROM THE CLRA ON THE BASIS OF PUBLIC POLICY CONCERNS.

In its discussion of policy concerns, the Court of Appeal purported to place the burden on Petitioners to show that the CLRA

encompasses insurance although it was "silent" on the issue (Opn. p. 14).

That approach to fundamentally flawed for two reasons.

First, the CLRA is not "silent" on insurance, because, though not explicitly mentioned, insurance falls within the plain meaning of "services" as defined in the dictionary, as used by Farmers itself, as used in other California statutes, and as understood in published opinions from the courts of California and all but one of the other states which have considered the issue (pp. 9-23).

Second, it ignores the impact of the Legislature's liberal construction mandate.

The only explicit statement of policy concerns in the CLRA is that the statute " shall be liberally construed to promote its underlying purposes...." Civil Code section 1760. That policy further reinforces the conclusion that anyone who would place limits on the CLRA's reach beyond those explicitly imposed by the Legislature bears a heavy, if not impossible, burden of persuasion. Whether or not that burden can ever be met, it is clear that it cannot be met by mere speculation.

2. THERE IS NO EVIDENCE THAT THE LEGISLATURE INTENDED TO EXEMPT INSURANCE FROM THE CLRA OUT OF CONCERN FOR THE INSURANCE COMMISSIONER'S AUTHORITY UNDER THE UIPA.

The Court of Appeal reasoned that the CLRA arose out of a concern to give low-income consumers an efficient and effective remedy for unfair business practices when they had none, but that no such remedy was required for unfair practices by insurance companies, because the Legislature had already provided a remedy by giving the Insurance Commissioner the power to enjoin and punish them under the UIPA. That fact, the Court of Appeal concluded, "supports our conclusion that the Legislature did not have insurance in mind when it enacted the CLRA (Opn., p. 11)."

The assumption behind that argument is that a reasonable Legislature would see no reason to provide consumers with a private cause of action to combat unfair practices for which it had already provided an administrative remedy. But there are good reasons to believe that the value of providing an expeditious private cause of action to consumers is not obviated by the existence administrative

remedies.

In *Lemelledo v. Beneficial Management Corp. of America* (N.J.1997) 696 A.2d 546, the New Jersey Supreme Court was faced with defendant corporation's contention was that "because lenders offering credit insurance are regulated by several State agencies," they should not be subject to private actions under New Jersey's Consumer Fraud Act (CFA). 696 A.2d at 552.

The New Jersey court responded that

> [w]hen remedial power is concentrated in one agency, underenforcement may result because of lack of resources, concentration on other agency responsibilities, lack of expertise, agency capture by regulated parties, or a particular ideological bent by agency decisionmakers.
>
> 696 A.2d at 553.

But there is a remedy for "[t]he primary risk of underenforcement – the victimization of a protected class...." Such underenforcement

> – can be greatly reduced by allocating enforcement responsibilities among various agencies and among members of the consuming public in the forms of judicial administrative proceedings and private causes of action.
>
> *Id.*

Noting that "[i]n the modern administrative state, regulation is

frequently complementary overlapping, and comprehensive," the *Lemelledo* court held that the presumption of CFA coverage could be overcome only by showing that "a direct and unavoidable conflict exists between application of the CFA and application of the other regulatory scheme or schemes." 696 A.2d at 554.

The situation is even clearer here, because of the Legislature's mandate that the CLRA be "liberally construed" in favor of the consumer. In light of the Legislature's explicit declaration of its pro-consumer policy, there is all the more reason to insist that, if any limits at all can be placed the statute's protective reach beyond those explicitly enacted by the Legislature, they can be justified only by a showing of overwhelming need, a showing which Respondents have not even begun to make here.

3. THE CONTENTION THAT ALLOWING CLRA CLAIMS AGAINST INSURANCE COMPANIES WILL HAVE A DEVASTATING IMPACT ON THE INSURANCE COMMISSIONER'S AUTHORITY UNDER THE UIPA IS NOT ONLY SPECULATIVE, BUT CONTRARY TO THE AVAILABLE EVIDENCE.

The Court of Appeal asserted that to apply the CLRA to insurance would "wreak havoc on the established code and decades of

case history (Opn., p. 13)." Specifically, the Court of Appeal maintained that to allow consumers use the CLRA to challenge unfair and deceptive practices by insurance companies would "undermine the holding of" *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, that the UIPA did not create private causes of action (Opn., p. 13), and "swallow the UIPA whole by allowing a private right of action where the courts have explicitly held that a private right of action under that statute was never intended (Opn., p. 14)."

But, this Court has already made it clear that *Moradi-Shalal* was not intended to immunize insurers from liability for their unfair and deceptive practices. As the Court held in *Manufacturer's Life Insurance Co. v. Superior Court* (1995) 10 Cal.4th 257 at 263, *Moradi-Shalal* cannot be regarded as having "granted the insurance industry a general exemption from state antitrust and unfair business practice statutes." It did not preclude private causes against insurers, and specifically life insurers, under other statutes, such as the Cartwright Act, Business & Professions Code sections 167200, *et seq.*, or the Unfair Competition Law, Business & Professions Code

sections 17200, *et seq.*

The Court of Appeal found *Manufacturer's Life* to be inapposite here, because, unlike the CLRA, both the Cartwright Act and the UCL were already in force at the time the UIPA was passed, and the UIPA did not destroy pre-existing causes of action under those statutes: "[i]ts language neither creates new private rights *nor destroys old ones*." 10 Cal.4th 257 at 279 (quoted at Opn., p. 15). On the other hand, the Opinion continues, "we simply hold that the [later passed] CLRA did not sub silentio destroy the pre-existing regulatory scheme created by the UIPA (Opn., p. 15)."

The practical question is, however, why we should believe that allowing causes of action under the CLRA against insurance companies would destroy the UIPA regulatory scheme, when the historical record shows that allowing such actions under Cartwright Act and the UCL to insurance have not.

The Opinion does suggest that consumer actions for damages under the CLRA are more likely to be destructive of UIPA regulation than actions for injunctive relief under the UCL (Opn., p. 15, footnote 9), but it neither indicates why that would be the case, nor takes

account of the fact that damages *can* already be recovered under the Cartwright Act. Business and Professions Code section 16750.

Nor does the Opinion advert to the fact that this Court also held in *Moradi-Shalal* that "the courts retain jurisdiction to impose civil damages or other remedies against insurers in appropriate common law actions, based on such traditional theories as fraud, infliction of emotional distress, and (as to the insured) either breach of contract or breach of the implied covenant of good faith and fair dealing." 46 Cal.3d at 304-05.

There is no evidence that allowing such common law actions for damages has significantly interfered with, let alone destroyed, the UIPA regulatory scheme any more than allowing private causes of action under the Cartwright Act and the UCL. True, the Legislature's purpose in passing the CLRA was simply to provide consumers with more "efficient and economical procedures" for obtaining damages and equitable relief than were available to them through the common law actions. Civil Code section 1760 (see Opn, p. 11). But, assuming that the Legislature accomplished its purpose, and that consumers now have an easier time in obtaining relief, that is hardly a reason for

limiting the CLRA's ambit.

On the contrary, it shows only that the policy issue here is between a speculative concern over possible interference with UIPA regulatory scheme on the one hand, and the express intent of the Legislature to enhance the power of consumers to fight unfair and deceptive business practices on the other.

As noted above, the New Jersey Supreme Court insisted in *Lemelledo* that actions should be allowed under consumer fraud legislation unless "a direct and unavoidable conflict exists" between the actions authorized by that legislation and other regulatory schemes. 696 A.2d at 554. Nothing remotely like such a conflict has been shown to exist here.

In the absence of anything more than speculation about the impact of allowing consumers to bring CLRA actions against insurance companies, and in the face of (1) Insurance Code section 1861.03(a), which explicitly affirms that the existence of a regulatory structure specifically aimed at the insurance industry does not immunize insurance companies from the general laws governing the conduct of business, and (2) Civil Code section 1470, which

mandates a liberal interpretation of the CLRA in favor of the consumer, the case could not be made for excluding insurance from the reach of the CLRA on the basis of public policy concerns, even if insurance were not within its plain meaning.

CONCLUSION

For the reasons stated above, Petitioners respectfully request that decision of the Court of Appeal excluding insurance from the reach of the CLRA be reversed.

DATED: January 11, 2008

Respectfully submitted,

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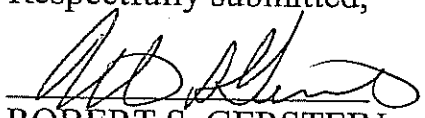
STATEMENT OF COMPLIANCE

Pursuant to Rule of Court 14(c)(1), I certify that the **PETITION FOR REVIEW** is proportionately spaced, has a typeface of 14 points or more, and contains 8,173 words.

DATED: January 11, 2008

Respectfully submitted,



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Appendix A

LEXSEE 2007 U.S. DIST. LEXIS 36298

T.C. JEFFERSON, on behalf of himself and all those similarly situated, Plaintiffs, v. CHASE HOME FINANCE LLC, Defendant.

NO. C06-6510 TEH

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2007 U.S. Dist. LEXIS 36298

May 3, 2007, Decided
May 3, 2007, Filed

COUNSEL: [*1] For T. C. Jefferson, on behalf of himself & all those similarly situated, Plaintiff: James A. Quadra, LEAD ATTORNEY, G. Scott Emblidge, Rebecca Bedwell-Coll, Robert D. Sanford, Samantha Zutler, Moscone Emblidge & Quadra, LLP, San Francisco, Ca.; Mark T. Johnson, James C. Sturdevant, Monique Oliver, The Sturdevant Law Firm, San Francisco, CA.

Chase Home Finance LLC, Defendant: George G. Weickhardt, LEAD ATTORNEY, John A. Rowland, Pamela J. Zanger, Ropers Majeski Kohn & Bentley, San Francisco, CA.; Danielle J. Szukala, LeAnn Pedersen Pope, Robert Jerald Emmanuel, Burke Warren Mackay & Serritella, PC, Chicago, IL.

JUDGES: THELTON E. HENDERSON, JUDGE.

OPINION BY: THELTON E. HENDERSON

OPINION

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

This matter came before the Court on Monday, April 30, 2007, on Defendant Chase Home Finance LLC's ("Chase's") motion for judgment on the pleadings. After carefully reviewing the parties' written and oral arguments, the complaint, and relevant law, the Court now GRANTS IN PART and DENIES IN PART the motion for the reasons set forth below.

BACKGROUND

Plaintiff T.C. Jefferson brought this lawsuit on behalf [*2] of himself and the following putative class: "All persons residing in the State of California who have made prepayments on notes to CHASE that CHASE failed to promptly apply to accounts within the time period of August 24, 2002 through the date of resolution of this action." Compl. P 11. Jefferson is scheduled to file his class certification motion by June 11, 2007, with the motion hearing to be noticed for September 10, 2007.

The allegations in this case relate to mortgage loans issued by Chase and loans now managed by Chase after Chase purchased notes held by other companies. Borrowers, including Jefferson, are required to make monthly payments under these mortgages and are also allegedly able to make additional payments against their principal balances without penalty.

However, Jefferson alleges that he made mid-monthly prepayments on his mortgage that were not promptly applied to his account. Instead, Chase allegedly "placed PLAINTIFF's mid-monthly prepayments into a 'suspense account' until *after* CHASE calculates the interest due on the note for the following month." *Id.* P 1. Jefferson further alleges that the use of such "suspense accounts" was a regular practice, resulting [*3] in:

> (a) consumers continuing to accrue interest on principal amounts that were artificially high due to DEFENDANTS' failure to apply payments against the principal in a prompt manner, (b) the loss of interest consumers would have enjoyed on the amounts had such amounts remained in their possession, and (c) the payment of interest or investment returns to Chase while Chase wrongfully held these amounts in "suspension accounts."

Id. P 9. Based on these allegations, Jefferson asserts four causes of action on behalf of the putative class: (1) violation of the Consumer Legal Remedies Act ("CLRA"), *Cal. Civ. Code §§ 1750 et seq.;* (2) deceptive advertising practices, *Cal. Bus. & Prof. Code § 17500*; (3) violation of *California Business and Professions Code sections 17200 et seq.;* and (4) conversion.

Chase now moves for judgment on the pleadings on Jefferson's first and fourth causes of action. Chase contends that the CLRA does not apply to mortgages and that Jefferson's conversion claim cannot lie because Jefferson fails to allege that Chase converted specific, identifiable property. [*4] The Court addresses each claim in turn below.

LEGAL STANDARD

Granting a motion for judgment on the pleadings under *Federal Rule of Civil Procedure 12(c)* is proper when "the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." *Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1550 (9th Cir. 1989).* In analyzing a *Rule 12(c)* motion, the court must assume the pleading's factual allegations to be true and must construe all reasonable inferences in favor of the nonmoving party. *Gen. Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church, 887 F.2d 228, 230 (9th Cir. 1989).*

DISCUSSION

I. First Cause of Action for Violation of the CLRA

Chase first moves for judgment on the pleadings on Jefferson's first cause of action for violation of the CLRA. Of relevance to this case, the CLRA prohibits certain "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended [*5] to result or which results in the sale or lease of goods or services to any consumer." *Cal. Civ. Code § 1770(a).* Jefferson contends that Chase engaged in four such prohibited practices: misrepresenting the sponsorship or approval of services, *id. § 1770(a)(2);* representing that services had characteristics, uses, and benefits which they did not have, *id § 1770(a)(5);* advertising services "with intent not to sell them as advertised," *id. § 1770(a)(9);* and "[r]epresenting that a transaction confers or involves rights, remedies, or obligations which it does not have or involve," *id. § 1770(a)(14).*

Chase argues that the CLRA does not apply to this case because the prerequisite "transaction intended to result or which results in the sale or lease of goods or services to any consumer," *id § 1770(a),* does not exist. For support, Chase relies on *McKell v. Washington Mutual, Inc., 142 Cal. App. 4th 1457, 49 Cal. Rptr. 3d 227 (2006).* As an intermediate appellate court decision, *McKell* is "persuasive" authority, but it is not binding if this Court concludes that the California Supreme Court would rule otherwise; federal courts must apply "California [*6] law as we believe the California Supreme Court would apply it." *In re K F Dairies, Inc. & Affiliates, 224 F.3d 922, 924 (9th Cir. 2000).*

In *McKell,* the plaintiffs alleged that the defendants overcharged them for "underwriting, tax services, and wire transfer fees in conjunction with home loans. Defendants [allegedly] charged plaintiffs more for these services than defendants paid the [third-party] service providers." *142 Cal. App. 4th at 1465.* The appellate court sustained the trial court's demurrer of the plaintiffs' CLRA claims, concluding that the defendants' "actions were undertaken in transactions resulting in the sale of real property," as opposed to "the sale or lease of goods or services," and that the CLRA therefore did not apply. *Id. at 1488.*

For the reasons discussed below, this Court does not find *McKell* to be persuasive, nor does the Court conclude that the California Supreme Court would reach the same result as *McKell* on the facts of this case. First, as Jefferson correctly observes, the court in *McKell* provided no analysis before reaching its conclusion that the CLRA did not apply; the court simply [*7] stated that, "Plaintiffs cite no authority or make no argument demonstrating that Washington Mutual's actions were undertaken 'in a transaction intended to result or which results in the sale or lease of *goods or services." Id.* (citing *Cal. Civ. Code § 1770(a)*). Here, by contrast, Jefferson argues that Chase made misrepresentations in connection with the sale of financial services. For instance, Jefferson specifically alleges that "DEFENDANTS' mortgage notes and other documents relating to these mortgages specifically include provisions allowing California consumers to make . . . prepayments without penalty, and/or provisions that such payments will be applied to the account principal or unpaid interest." Compl. P 8.

Moreover, the CLRA defines "services" as "work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods." *Cal. Civ. Code § 1761(b).* Chase cited this definition in its papers, but it provided no written argument as to why the financial services allegedly offered by Chase would not fall under this description. At oral argument, Chase appeared [*8] to contend that the phrase "including services furnished in connection with the sale or repair of goods" served to limit the CLRA to such services. However, this argument fails on its face, as "including" indicates exactly that -- inclusiveness -- rather than an exhaustive list. Chase further

argued at the hearing that the CLRA should not apply to real estate lending because that market is already heavily regulated, but Chase pointed to nothing in the CLRA that specifically excludes real estate lending. [1] Because the CLRA must be "liberally construed," *Cal. Civ. Code § 1760*, this Court cannot conclude that the California Supreme Court would expand the CLRA's specified exclusions or read into the CLRA exclusions that are not present on the face of the statute.

1 Although not cited by either party, *California Civil Code section 1754* provides that the CLRA "shall not apply to any transaction which provides for the construction, sale, or construction and sale of an entire residence or . . . for the sale of a lot or parcel of real property, including any site preparation incidental to such sale." However, this provision bars application of the CLRA only to transactions for the sale or construction of real property; it does not also exclude financial services related to such transactions.

[*9] In fact, the California Supreme Court and a district court in the Central District of California (in a case not cited by either party) have applied the CLRA to allegations involving financial services. *Kagan v. Gibraltar Sav. & Loan Ass'n, 35 Cal. 3d 582, 596-97, 200 Cal. Rptr. 38, 676 P.2d 1060 (1984)* (applying the CLRA to claims regarding management fees in connection with individual retirement accounts); *Estate of Migliaccio v. Midland Nat'l Life Ins. Co., 436 F. Supp. 2d 1095, 1109 (C.D. Cal. 2006)* (denying motion to dismiss CLRA claims based on "estate and financial planning" services). In a related context, an intermediate California appellate court concluded that credit card agreements encompass convenience services in addition to an extension of credit and that, therefore, such agreements qualify as contracts for "services" under a non-CLRA statute. *Hitz v. First Interstate Bank, 38 Cal. App. 4th 274, 286-88, 44 Cal. Rptr. 2d 890 (1995)*. Chase did cite to one recent case where an intermediate California appellate court concluded that issuance of a credit card does not constitute a "service" under the CLRA, but this Court does not find that case persuasive here because (a) the state [*10] court relied heavily on the legislature's consideration and rejection of including "credit" as part of the CLRA's definitions and (b) the court failed to consider whether, as the *Hitz* court concluded, a credit card agreement involves other services in addition to simply an extension of credit. *Berry v. Am. Express Publ'g, Inc., 147 Cal. App. 4th 224, 229-33, 54 Cal. Rptr. 3d 91 (2007)*. Similar to the court in *Hitz*, this Court concludes that the transactions between Chase and Jefferson involve more than the provision of a loan; they also include financial services.

In light of all of the above, the Court cannot say with any confidence that the California Supreme Court would reach the same result as the *McKell* court on the facts of this case. Particularly in light of the Supreme Court's application of the CLRA to financial services agreements in *Kagan*, Chase has failed to persuade this Court that financial services related to real estate transactions are excepted from the CLRA's scope. Consequently, Chase has failed to meet its burden of establishing that it is entitled to judgment as a matter of law, and this Court therefore DENIES Chase's motion for judgment on the pleadings [*11] on Jefferson's CLRA claim.

II. Fourth Cause of Action for Conversion

Chase also moves for judgment on the pleadings on Jefferson's fourth cause of action for conversion. The elements of a conversion claim are: "(1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages." *Burlesci v. Petersen, 68 Cal. App. 4th 1062, 1066, 80 Cal. Rptr. 2d 704 (1998)*. The parties agree that "money cannot be the subject of an action for conversion unless a specific sum capable of identification is involved." *Haigler v. Donnelly, 18 Cal 2d. 674, 117 P.2d 331 (1941)*. However, this does not mean that "each coin or bill [must] be earmarked" before a conversion claim may lie. *Id.*

Chase again relies on *McKell*, where the court explained that, "Plaintiffs cite no authority for the proposition that a cause of action for conversion may be based on an overcharge. Consequently, they have failed to demonstrate that they have stated a cause of action for conversion." *142 Cal. App. 4th at 1492*. Contrary to Chase's assertions, however, Jefferson in this case does not base his [*12] conversion claim on an overcharge of interest. While overcharging interest is one of the alleged *results* of Chase's actions in this case, the conversion claim stems from the alleged act of failing to apply prepayments against the principal due on Jefferson's loans, not from the alleged resultant overcharge in interest. Thus, *McKell* is distinguishable on its facts.

Similarly, a second case cited by Chase is also factually distinguishable. In *Vu v. California Commerce Club, Inc.*, the court held that the plaintiffs failed to state a claim for conversion because they did not "identify any specific identifiable sums that the [defendant card] club took from them. . . . Indeed, the gist of plaintiffs' case was that much of the money they lost was taken by persons other than the club or its employees." *58 Cal. App. 4th 229, 235, 68 Cal. Rptr. 2d 31 (1997)*. Here, by contrast, Jefferson specifically alleges that Chase converted the mid-monthly prepayments he made on his mortgage account, and Chase cites no authority for the proposition

that any further level of specificity is required at this stage of the proceedings.

Chase's attempt to distinguish this case from *Chazen v. Centennial Bank, 61 Cal. App. 4th 532, 71 Cal. Rptr. 2d 462 (1998)*, [*13] is therefore also unpersuasive. In that case, the court held that the plaintiffs stated a claim for conversion against a bank where the bank allegedly used funds from accounts held in trust for plaintiffs to pay bank fees owed by the trustee. Chase argues that *Chazen* can be distinguished because "the conversion at issue there involved three specifically identified fiduciary accounts against which the bank had wrongfully executed the right of set off." Reply at 3. Like the plaintiff in *Chazen*, however, Jefferson also specifically identifies the account at issue, albeit not by number, by alleging that Chase unlawfully converted the funds he paid to his specific mortgage account with Chase. Thus, the Court finds no basis for accepting Chase's argument that Jefferson's conversion claim fails to identify the funds in question with the requisite specificity. [2]

2 Additionally, Chase is incorrect that this case is distinguishable from *Chazen* because "Chase is not alleged to have *stolen* Plaintiff's funds." *Id.* Contrary to Chase's contention, Jefferson does essentially allege that Chase "stole" his funds by failing to apply them to the principal balance on Jefferson's mortgage loan.

[*14] However, although Chase did not raise this issue in its motion papers, the Court questioned the parties at oral argument regarding whether Jefferson satisfies the first element of conversion -- namely, that he owns or has the right to possess the money in question. On this point, Chase has the stronger argument. The cases relied on by Jefferson involve money being held on a plaintiff's behalf by another party as an agent or trustee. For example, the money in *Chazen* was being held in trust for the plaintiffs by the defendant banks. Similarly, in *Fischer v. Machado, 50 Cal. App. 4th 1069, 1073-74, 58 Cal. Rptr. 2d 213 (1996)*, the money had been accepted by the defendant as an agent for the plaintiff, and the defendant-agent allegedly used the funds for its own benefit rather than paying the money to the plaintiff-principal. Likewise, in *Weiss v. Marcus, 51 Cal. App. 3d 590, 599, 124 Cal. Rptr. 297 (1975)*, the plaintiff stated a claim for conversion where he had an attorney's lien on funds paid to the defendants. Unlike in those cases, Jefferson fails to allege that he had any ownership rights to the funds at issue once he transmitted those funds to Chase as payments on his mortgage, nor [*15] does Jefferson allege that an agency or trust relationship existed between Chase and Jefferson. It does not appear, for instance, that Jefferson could at any point have demanded that Chase return his prepayments to him in the way that the plaintiffs in the above cases could have asserted their ownership rights to the questioned funds. While it seems unlikely that Jefferson will be able to cure this deficiency by an amended pleading, the Court cannot say that it would be impossible for him to do so. Accordingly, the Court GRANTS Jefferson's motion for judgment on the pleadings without prejudice.

CONCLUSION

For the reasons stated above, the Court GRANTS IN PART and DENIES IN PART Chase's motion for judgment on the pleadings. The motion is DENIED as to Jefferson's CLRA claim but GRANTED without prejudice as to Jefferson's conversion claim. If Jefferson wishes to file an amended complaint to attempt to cure the deficiencies of his conversion claim, he must do so on or before **May 24, 2007.** Failure to file a timely amended complaint shall result in dismissal of Jefferson's conversion claim with prejudice.

IT IS SO ORDERED.

Dated: 05/03/07

THELTON E. HENDERSON, [*16] JUDGE

UNITED STATES DISTRICT COURT

Appendix B

2 of 9 DOCUMENTS

SERGIO HERNANDEZ AND MARIA HERNANDEZ, Plaintiffs, v. HILLTOP FINANCIAL MORTGAGE, INC., FIELDSTONE MORTGAGE COMPANY CO., COUNTRYWIDE HOME LOANS, INC., AND AMERIQUEST MORTGAGE CO., Defendants.

No. C 06-7401 SI

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2007 U.S. Dist. LEXIS 80867

October 22, 2007, Decided
October 22, 2007, Filed

COUNSEL: [*1] For Sergio Hernandez, Maria Hernandez, Plaintiffs: Alan Emmerson Ramos, Law Offices of Alan E. Ramos, Pleasanton, CA; Geoffrey Wm. Steele, Lafayette, CA.

For Hilltop Financial Mortgage, Inc., Defendant: Byron H. Done, Attorney at Law, Walnut Creek, CA.

For Fieldstone Mortgage Company, Defendant: Sunny S. Huo, LEAD ATTORNEY, Joshua Eric Whitehair, Michael Jan Steiner, Severson & Werson, San Francisco, CA.

For Countrywide Home Loans, Inc., Defendant: Aaron Michael McKown, Sr, Lawrence L. Yang, Bryan Cave LLP, Irvine, CA.

For Ameriquest Mortgage Company, Defendant: Mia S. Blackler, Buchalter Nemer, San Francisco, CA.

JUDGES: SUSAN ILLSTON, United States District Judge.

OPINION BY: SUSAN ILLSTON

OPINION

ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AND GRANTING AMERIQUEST'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

On October 3, 2007, the Court heard argument on defendants' motion to dismiss for failure to state a claim and on defendant Ameriquest's motion to dismiss for lack of subject matter jurisdiction. Having considered the arguments of counsel and the papers submitted, the Court hereby DENIES defendants' motion to dismiss for failure to state a claim and GRANTS Ameriquest's [*2] motion to dismiss for lack of subject matter jurisdiction.

BACKGROUND

This action arises from two mortgage loans received by plaintiffs Sergio and Maria Hernandez. [1] Each loan transaction took place with different companies. However, both situations share similar circumstances: all discussions with plaintiffs took place in Spanish, plaintiffs received and executed documents solely in English without an interpreter present, and the English documents allegedly contained misrepresentations of the terms agreed to during negotiations.

1 The Court takes the following factual background largely from the First Amended Complaint ("FAC"), the allegations of which must be taken as true at this stage. *See Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987).*

Plaintiffs first refinanced with defendant Ameriquest Mortgage Company on January 9, 2004. As plaintiffs speak limited English, all negotiations regarding the refinance were done in Spanish. Ameriquest's employee assured plaintiffs that their monthly payment of $ 1,384.98 included property taxes and property insurance premiums. Later, at the Hernandez home and just before plaintiffs executed the loan documents, a notary public, hired [*3] by Ameriquest, again assured plaintiffs that the payments included property taxes and property insurance premiums. Plaintiffs then executed the loan docu-

ments, which were all in English. Ameriquest did not provide plaintiffs with versions translated in Spanish. Unable to read English, plaintiffs did not realize that the papers detailed that their monthly payment of $ 1,384.98 only included principal and interest, not property taxes and property insurance premiums.

Burdened by the added costs of these taxes and insurance premiums, plaintiffs began discussions in December 2004 with defendant Hilltop Financial Mortgage Company about refinancing their Ameriquest loan. Plaintiffs conducted discussions with Hilltop's agent Edward Salem primarily in Spanish. Mr. Salem told plaintiffs that refinancing with Hilltop would cost approximately $ 120 more per month, but it would include property taxes and property insurance premiums and do so at a less expensive rate than they were currently paying. He made the additional promise that the loan would pay off about $ 4,000 in consumer debt and give them $ 10,000 in cash. On or about February 11, 2005, plaintiffs executed the Hilltop loan documents. [*4] Plaintiffs were again provided with documents completely in English and did not bring nor did Hilltop provide an interpreter. Among the loan documents, Hilltop gave each plaintiff a "Notice of Right to Cancel" form. The document required that dates be filled in at the end of the following two sentences: (1) "If you cancel by mail or telegram, you must send the notice no later than midnight of " and (2) "I received **Notice of Right to Cancel** in Duplicate this Date , ." (emphasis in original). In copies eventually sent to plaintiffs and in copies obtained by plaintiffs from the escrow agent for the loan, both notices were left blank in the space requiring the date. [2]

2 Plaintiffs allege Hilltop, Fieldstone, Countrywide or an agent subsequently doctored the Notice of Right to Cancel forms by writing in the missing dates. FAC P 39; *See* Exhibit H.

In or about March, 2005, plaintiffs learned that their higher monthly payments ($ 1,508.42 compared to $ 1,384.98 per month under the Ameriquest loan) did not in fact cover property taxes and property insurance premiums despite the assurances received from Mr. Salem. Instead, defendant Fieldstone [3] wanted an additional $ 350 for property [*5] taxes and property insurance premiums (the same amount plaintiffs had previously been paying). Additionally, the Hilltop/Fieldstone loan only paid $ 1,323.00 in consumer debt (as opposed to the promised $ 4,000) and plaintiffs received a cash payment of only $ 4,046.15 (as opposed to the promised $ 10,000 cash payment). On or about April 1, 2005, Fieldstone assigned its rights in the loan to defendant Countrywide. Plaintiffs believe Countrywide assigned partial interest in the Hilltop/Fieldstone loan to an investor who now along with Countrywide are the current assignees of the loan.

3 After escrow closed on or about February 2005, Hilltop assigned its rights in the loan to defendant Fieldstone.

On November 7, 2005, plaintiffs sent Countrywide their notice of rescission. Defendants allegedly received the notice on November 9, 2005. Twenty-three days later, on December 2, 2005, Countrywide faxed plaintiffs a letter denying plaintiffs' notice of rescission. On December 1, 2006, plaintiffs filed this complaint and, on May 21, 2007, they filed their First Amended Complaint ("FAC").

LEGAL STANDARD

I. Failure to state a claim upon which relief can be granted

Under *Federal Rule of Civil Procedure 12(b)(6)*, [*6] a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. The question presented by a motion to dismiss is not whether the plaintiff will prevail in the action, but whether the plaintiff is entitled to offer evidence in support of the claim. *See Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), overruled on other grounds by Davis v. Scherer, 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984).*

In answering this question, the Court must assume that the plaintiff's allegations are true and must draw all reasonable inferences in the plaintiff's favor. *See Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987).* Even if the face of the pleadings suggests that the chance of recovery is remote, the Court must allow the plaintiff to develop the case at this stage of the proceedings. *See United States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981).*

If the Court dismisses the complaint, it must then decide whether to grant leave to amend. The Ninth Circuit has "repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of [*7] other facts." *Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000)* (citations and internal quotation marks omitted).

II. Subject matter jurisdiction

Federal Rule of Civil Procedure 12(b)(1) allows a party to challenge the jurisdiction over the subject matter of the complaint. The party invoking the jurisdiction bears the burden of establishing that the Court has the requisite subject matter jurisdiction to grant the relief requested. *See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 376-78, 114 S. Ct. 1673, 128 L. Ed.*

2d 391 (1994). Under this standard, all factual allegations pled by the plaintiff must be accepted as true and construed in the light most favorable to the plaintiff. *See NL Indus. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1984)*.

If subject matter jurisdiction exists over one or more claims, a federal court may exercise supplemental jurisdiction over "all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." *28 U.S.C. § 1367*. A district court has discretion to hear such claims "where there is a substantial federal claim arising out of a common nucleus of operative [*8] fact." *Hoeck v. City of Portland, 57 F.3d 781, 785 (9th Cir. 1995)*. If "state issues substantially predominate, . . . the state claims may be dismissed without prejudice and left for resolution to state tribunals." *United Mine Workers v. Gibbs, 383 U.S. 715, 726-27, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)*.

DISCUSSION

Plaintiffs bring nine causes of action based on alleged unfair trade practices and misrepresentations made when plaintiffs refinanced their mortgage loan on two occasions, first with defendant Ameriquest and then with defendant Hilltop who subsequently assigned its loan rights to defendant Fieldstone, and then Fieldstone to defendant Countrywide. Plaintiffs' first claim alleges a violation of the Truth in Lending Act ("TILA"). Their second claim is for violations of the California Translation Act ("CTA"). Their third and fourth claims allege violations of the California Consumer Legal Remedies Act ("CLRA"). The remaining claims are for violations of various state laws and a common law fraud claim. Plaintiffs do not allege each of their nine claims against all four defendants.

Of the nine causes of action, each defendant moves to dismiss certain claims alleged against it. Defendant Countrywide moves to dismiss [*9] the TILA, CTA, and fraud claims for failure to state a claim. Defendants Hilltop and Fieldstone move to dismiss the CLRA claim for failure to state a claim. Finally, defendant Ameriquest seeks to dismiss all claims against it -- alleged violations of the CLRA, California Business and Professions Code, and a fraud claim -- for lack of subject matter jurisdiction.

For the following reasons, the Court DENIES the motions to dismiss filed by defendants Hilltop, Fieldstone, and Countrywide, and GRANTS Ameriquest's motion to dismiss for lack of subject matter jurisdiction.

I. Motion to dismiss plaintiffs' claim under the Truth in Lending Act

Defendant Countrywide argues plaintiffs' TILA claim should be dismissed for two reasons: (1) plaintiffs failed to file their complaint within TILA's one year statute of limitations pursuant to *15 § 1640(e)*; and (2) plaintiffs failed to make an offer to tender in their notice of rescission.

A. Statute of limitations

Defendant Countrywide moves to dismiss plaintiffs' TILA claim as untimely. When a plaintiff seeks damages for violations of *§ 1635*, as is the case here, the statute of limitations for bringing the claim is "one year from the date of the occurrence [*10] of the violation." *15 U.S.C. § 1640(e)*. The Ninth Circuit has yet to rule on when the one year statute of limitations begins to run if a creditor fails to return a borrower's money or property within the twenty days required by *§ 1635(b)*. Defendant argues that the violation took place on November 29, 2005 when it failed to return plaintiffs' payments within twenty days of receiving the notice of rescission. The Court finds this interpretation sensible because otherwise no consistent and discernable date could alert parties that a violation occurred and the statute of limitations has begun to run.

Given the above analysis and conclusion, plaintiffs filed their complaint two days late by waiting until December 1, 2006 to file. However, factual circumstances, fairness principles, and an effort to effectuate the congressional purposes of TILA warrant an equitable tolling of the statute of limitations. *See King v. State of Cal., 784 F.2d 910, 915 (9th Cir. 1986)* ("The Supreme Court has repeatedly applied equitable tolling to statutes of limitations to prevent unjust results or to maintain the integrity of a statute.") (citations omitted); *Williams v. Public Finance Corp., 598 F.2d 349, 357 (5th Cir. 1979)* [*11] (stating "[t]he purpose of according borrowers a right of rescission [under *§ 1635* is it] serves to blunt unscrupulous sales tactics by giving homeowners a means to unburden themselves of security interests exacted by such tactics."). No statutory language or clear case law existed to sufficiently put plaintiffs on notice that the statute of limitations began running at the conclusion of the twentieth day, November 29, 2005. Plaintiffs interpreted the date of violation to be December 2, 2005, the day they received defendant's letter informing them that defendant would not honor their right to rescission. Plaintiffs' interpretation is evidenced by the filing of their complaint on December 1, 2006, just a day before the statute of limitations would have barred their complaint had December 2 been the date of the occurrence of the violation. Thus, in the absence of clear authority dictating when the statute of limitations begins to run when seeking damages under *§ 1635(b)* and to effectuate the purposes of TILA, the Court finds the statute of limitations should be tolled for

two days given the facts here and plaintiffs' complaint allowed to proceed.

B. Offer to tender in the notice of rescission [*12] under TILA

Defendant Countrywide argues that plaintiffs' claim for rescission under TILA fails as a matter of law because plaintiffs did not tender, or make an offer to tender, the loan proceeds to defendant in plaintiffs' notice of rescission. However, no language in the statute or regulations requires the consumer to tender or make an offer to tender the loan proceeds in his notice of rescission to the creditor. *See 15 U.S.C. § 1635(b); 12 C.F.R. § 226.23(a)(2).* TILA 's Regulation Z, which tracks *§ 1635*, states only that "[t]o exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of communication." *See 12 C.F.R. § 226.23(a)(2).* Furthermore, in accordance with *12 C.F.R. § 226.23(b)(2)*, a creditor must alert the borrower of his right to rescind by supplying the borrower with a notice to cancel form. *See 12 C.F.R. § 226.23(b)(2)*, Appendix H-8. That model form requires the consumer to include nothing more than his signature, date, and the statement, "I wish to cancel." *Id.* It does not place an obligation on the borrower to tender the loan proceeds. Additionally, defendant cites no case law requiring a consumer to include [*13] in his notice of rescission an offer to tender. All cases cited by defendant support the proposition that a court may alter the parties' obligations once the notice of rescission has been effected rather than alter the requirements a notice must contain. [4] Thus, the Court concludes that plaintiffs had no obligation to tender or make an offer to tender the loan proceeds in their notice of rescission. [5]

4 A district court has the discretion to modify the sequence events of rescission in the procedural steps that follow the notice of rescission. *See 12 C.F.R. § 226.23(d)(4); Yamamoto v. Bank of New York, 329 F.3d 1167, 1173 (9th Cir. 2003)* (finding that the sequence of rescission procedures may be altered by the court).

5 Defendant Countrywide also contends that rescission is not available as a remedy because plaintiffs do not have the ability to tender the loan proceeds. This argument is misplaced at this stage for 12(b)(6) purposes. The cases cited by defendant to support this proposition all dealt with litigation at the summary judgment stage and, thus, after parties participated in discovery. *See Am. Mortgage Network, Inc. v. Shelton, 486 F.3d 815, 818 (4th Cir. 2007); Powers v. Sims & Levin, 542 F.2d 1216, 1220 (4th Cir. 1976).* [*14] If appropriate, defendant may renew this argument at a later stage in litigation upon a fuller factual record. Defendant further argues that the notice of rescission was invalid because plaintiffs failed to provide the statutory basis for rescission. Defendant's argument lacks merit because the statute does not require the borrower to provide such information. Moreover, defendant's reliance on *Belini v. Washington Mutual Bank, 412 F.3d 17, 27 n.6 (1st Cir. 2005)*, is unavailing because defendants did not suffer any prejudice since plaintiffs did in fact cite *15 U.S.C. § 1601 et seq.* in their letter stating they wish to cancel. *See* Ex. H.

II. Motion to dismiss plaintiffs' claim under the California Consumer Legal Remedies Act

Defendants Hilltop and Fieldstone move to dismiss plaintiffs' CLRA claim on the following grounds: (1) the CLRA does not apply to a mortgage loan because the loan is not a "service" as defined by the Act; and (2) plaintiffs failed to allege sufficient facts to demonstrate they met the notice and demand requirements of the CLRA.

A. Applicability of the CLRA to plaintiffs' mortgage loan

Defendants Hilltop and Fieldstone contend that the California Consumer Legal Remedies [*15] Act, *Cal. Civ. Code § 1750*, does not apply to the mortgage loan at issue here. The CLRA "shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection." *Id.* at *§ 1760.* A plaintiff may bring a claim under the CLRA when "any person" uses a statutorily prohibited trade practice "in a transaction . . . which results in the sale or lease of goods or services to any consumer." *Id.* at *§ 1770. Section 1761(a)* provides 'Goods' means tangible chattels bought or leased for use primarily for personal, family, or household purposes . . ." The CLRA defines "services" as "work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods." *Id.* at *§ 1761(b).* Finally, "'[c]onsumer' means an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes." *Id.* at *§ 1761(d).*

The California Supreme Court has not addressed the question whether a mortgage loan, and the activities involved in receiving [*16] and maintaining one, falls within the CLRA's definition of a "good" or a "service." This Court must apply "California law as we believe the California Supreme Court would apply it." *In re K F*

Dairies, Inc. & Affiliates, 224 F.3d 922, 924 (9th Cir. 2000). In similar matters involving financial transactions, the California Supreme Court and intermediate appellate divisions have found the CLRA applicable. *See Kagan v. Gibraltar Say. & Loan Ass'n, 35 Cal. 3d 582, 596-97, 200 Cal. Rptr. 38, 676 P.2d 1060 (Cal. 1984)* (applying the CLRA to claims regarding management fees in connection with individual retirement accounts); *Corbett v. Hayward Dodge, Inc., 119 Cal. App. 4th 915, 14 Cal. Rptr. 3d 741 (Cal. Ct. App. 2004)* (applying the CLRA to automobile loans); *but see Service Employees Ins. Co. v. Superior Court of San Francisco, 22 Cal.3d 362, 149 Cal. Rptr. 360, 584 P.2d 497 (Cal. 1978)* (stating, in dicta, that insurance is not a "good" or "service" under the CLRA). Although the courts in *Kagan* and *Corbett* did not specifically discuss whether the financial transaction at issue fell under the CLRA's definition of a "good" or "service," both allowed the actions to proceed, assuming the CLRA did apply. *See Kagan, 35 Cal. 3d at 587*; *Corbett, 119 Cal. App. 4th at 918*.

Defendants rely [*17] on *Berry v. American Express Publishing, Inc., 147 Cal. App. 4th 224, 54 Cal. Rptr. 3d 91 (Cal. Ct. App. 2007)* and *McKell v. Washington Mutual, Inc., 142 Cal. App. 4th 1457, 49 Cal. Rptr. 3d 227 (Cal. Ct. App. 2006)*. In *Berry*, the court analyzed whether the defendant's issuance of credit to the plaintiff constituted a "service," as defined by the *CLRA § 1761(b). Berry, 147 Cal.App.4th at 229*. The court relied heavily on the CLRA's legislative history [6] to find that extending a line of credit "separate and apart from the sale or lease of any specific good or service falls outside the scope of *section 1770*." *Id. at 232*. In *McKell*, the plaintiffs claimed that the defendants overcharged them "for underwriting, tax services, and wire transfer fees in conjunction with home loans." *McKell, 142 Cal. App. 4th at 1465*. Finding that the defendants' "actions were undertaken in transactions resulting in the sale of real property," rather than "the sale or lease of goods or services," the court held the CLRA inapplicable to the facts of the plaintiffs' case. *Id. at 1488*.

> 6 Early drafts of the CLRA defined "consumer" as "an individual who seeks or acquires, by purchase or lease, any goods, services, *money, or credit* for personal, family or [*18] household purposes." *Berry, 147 Cal. App. 4th at 230* (citing Assem. Bill No. 292 (1970 Reg. Sess.) Jan. 21, 1970) (emphasis added). The legislature provided no reason's for deleting "money" and "credit" from the definition of "consumer." *See id. at 231*.

The Court finds neither *Berry* nor *McKell* persuasive, and concludes the California Supreme Court would find that the CLRA does apply to the mortgage loans in the present case. In so holding, the Court agrees with the reasoning of several other district courts that have addressed this issue. *See Jefferson v. Chase Home Finance LLC, No. C06-6510, 2007 U.S. Dist. LEXIS 36298, 2007 WL 1302984, at *3 (N.D. Cal. May 3, 2007)* (concluding that the loan transaction between a mortgage finance company and the plaintiff involved "more than the provision of a loan; they also include [the] financial services [of managing the loan]."); *Knox v. Ameriquest Mortgage Co., No. CO5-00240, 2005 U.S. Dist. LEXIS 40709, 2005 WL 1910927, at *4 (N.D. Cal. Aug. 10, 2005)* (finding that, in the context of predatory lending allegations and after a review of the case law, "California courts generally find financial transactions to be subject to the CLRA."); *In re Ameriquest Mortgage Co., No 05-CV-7097, 2007 U.S. Dist. LEXIS 29643, 2007 WL 1202544, at *6 (N.D. III. Apr. 23, 2007)* [*19] (stating, in dicta, that "it is not inconceivable that . . . plaintiffs could prove the existence of tangential 'services' associated with their residential mortgages and establish that these transactions were covered by the CLRA.").

In *McKell*, the court provided little analysis on the broader question regarding applicability of the CLRA to financial transactions, and instead relied largely on the fact that the plaintiffs cited no authority and made no argument explaining how the defendants' actions fell under the CLRA. *See Jefferson, 2007 U.S. Dist. LEXIS 36298, 2007 WL 1302984, at *2* (finding *McKell* unpersuasive, stating "the court in McKell provided no analysis before reaching its conclusion that the CLRA did not apply."). Plaintiffs here, however, cite to various authorities and allege in their FAC that Title arranging of the Hilltop/Fieldstone loan, including but not limited to its origination, processing, documentation, wire-transmittal and underwriting . . . constitutes 'services' within the meaning of *subsection(b) of § 1761 of the CLRA* . . ." FAC P 65. Defendants contend that those services were not the objective of the transaction. However, plaintiffs did not seek just a loan; they sought defendants' [*20] services in developing an acceptable refinancing plan by which they could remain in possession of their home. FAC P 24. Thus, unlike in *Berry*, the situation in the present case involves more than the mere extension of a credit line. Instead, the circumstances here deal not just with the mortgage loan itself, but also with the services involved in developing, securing and maintaining plaintiffs' loan. *See Hitz, 38 Cal. App. 4th 274, 286-87, 44 Cal. Rptr. 2d 890 (Cal. Ct. App. 1995)* (finding, in a non-CLRA context, that credit cards provide not only extensions of credit but also certain convenience features that constitute "services"). In fact, in an effort to create an appropriate refinancing package, plaintiffs met with defendants' agent three times before finally agreeing on a payment plan that plaintiffs and defendants found acceptable.

Defendants counter that had the loan failed, they would not have received any payments. However, plaintiffs allege that they made various payments to defendants solely in connection with pre-loan services. *See* FAC Ex. F. For instance, plaintiffs paid to defendant Hilltop a "Loan Origination Fee" of $ 5,100, a "Processing Fee" of $ 595.00, and an "Admin Fee" of $ 495.00; [*21] to Fieldstone, plaintiffs paid a "Tax Service" of $ 70.00, an "Underwriting Fee" of $ 695.00, and an "Application Fee" of $ 75.00. When combined with the Hilltop fees, plaintiffs paid a total of $ 7,030 to defendants. Furthermore, defendants did make the loan, meaning plaintiffs would continue to pay defendants for managing the loan. In sum, the Court concludes the CLRA is applicable to the facts alleged here because defendants' actions, advising plaintiffs and managing their loan, constituted "services" as defined by *§ 1761(b)*.

B. Notice and demand requirements of the CLRA

Defendants contend that plaintiffs did not plead specific facts detailing compliance with the notice and demand requirements of *§ 1782 of the CLRA*. [7] The complaint alleges that plaintiffs "have complied with the notice and demand requirements of the CLRA, as set forth in *California Civil Code § 1782*, in conjunction with filing this action." FAC P 74. Defendants do not cite any authority requiring a complaint under the CLRA to contain more specific allegations, and the Court finds that plaintiffs have sufficiently alleged compliance. [8]

7 *Section 1782(a)* provides:

> (a) Thirty days or more prior to the commencement of an [*22] action for damages pursuant to this title, the consumer shall do the following:
>
> (1) Notify the person alleged to have employed or committed methods, acts, or practices declared unlawful by *Section 1770* of the particular alleged violations of *Section 1770*.
>
> (2) Demand that the person correct, repair, replace, or otherwise rectify the goods or services alleged to be in violation of *Section 1770*.
>
> The notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred or to the person's principal place of business within California.

8 Defendants cite only cases that determine the necessary level of compliance with *§ 1782* after the pleadings stage. *See Outboard Marine Corp. v. Superior Court of Sacramento, 52 Cal. App. 3d 30, 40, 124 Cal. Rptr. 852 (Cal. Ct. App. 1975)* (rejecting plaintiff's argument that "substantial compliance only is required by *§ 1782* . . . and that a technicality of form should not be a bar to the action."); *Von Grabe v. Sprint PCS, 312 F. Supp. 2d 1285, 1304 (S.D. Cal. 2003)* (citing *Outboard Marine* and holding a claim for damages under the CLRA requires strict adherence to the provisions of *§ 1782*); *Laster v. T-Mobile USA, Inc., 407 F. Supp. 2d 1181, 1196 (S.D. Cal. 2005)* [*23] (same).

To the extent defendants contend that plaintiffs did not in fact comply with the notice and demand requirements, they may bring a motion directed at that issue.

III. Motion to dismiss plaintiffs' claims under the California Translation Act and common law fraud

Defendant Countrywide argues that it cannot be held liable under the CTA or for committing fraud because it is merely the assignee of the loan. Countrywide relies on the fact that plaintiffs negotiated their loan agreement solely with Mr. Salem, an employee of Hilltop, not Countrywide. Thus, Countrywide argues that it cannot be held liable for violations in which it did not participate. However, the Court concludes that the plaintiffs have, as a pleading matter, sufficiently alleged that Countrywide's connection with Hilltop and Fieldstone justifies viewing Countrywide, the assignee, as the original creditor, and that an agency relationship may exist between Countrywide and other defendants.

Although neither party cites any authority on this question, the Court finds *LaChapelle v. Toyota Motor Credit Corp., 102 Cal. App. 4th 977, 126 Cal. Rptr. 2d 32 (Cal. Ct. App. 2002)*, instructive. *In LaChapelle*, the

plaintiff sought rescission of a car lease [*24] agreement; alleging the transaction violated various consumer protection acts, including the Vehicle Leasing Act (VLA). *Id. at 980.* The plaintiff brought her causes of action not only against the dealer but also against the company to whom the lease was assigned. In deciding whether the plaintiff could bring a claim against the assignee, the court held that "[t]he validity of such an argument turns on the facts in any particular case, i.e., whether an assignee's connection with the original purchase or lease transaction is so close as to justify viewing the assignee as the original creditor." *Id. at 983.* Observing that the plaintiff failed to state any facts to connect the assignee with the original creditor, the court affirmed summary judgment on the plaintiff's VLA claim. Id. Unlike the plaintiff in *LaChapelle,* plaintiffs' here allege that Countrywide may have been involved with the doctoring of the dates on the notices of the right to cancel forms. Furthermore, the Court finds that the time proximity between the closing of the escrow and Fieldstone's assignment of the loan to Countrywide, approximately one month, supports a possible connection between these two defendants.

Additionally, [*25] an agency relationship between Countrywide and the other defendants, Hilltop and Fieldstone, may exist such that Countrywide could be indirectly liable for Hilltop and Fieldstone's violation of the CTA and fraudulent misrepresentations. Although the plaintiffs do not allege an agency relationship between Countrywide and the other defendants in their complaint, it is not necessary for a pleading to allege an agency relationship in order to survive a *Rule 12(b)(6)* motion. [9] "[A]s a matter of law, allegations of agency, vicarious liability, and/or respondeat superior are not required. A person legally responsible for an act may be alleged to have committed it without going into the theories which support that ultimate fact." *Greenberg v. Sala, 822 F.2d 882, 886 (9th Cir. 1987); see also Fed. Say. and Loan Ins. Corp. v. Shearson Am., 658 F. Supp. 1331, 1343 (D.P.R. 1987)* (holding that a party can be held liable for securities fraud on an agency or a respondeat superior theory).

> 9 Countrywide's reliance on *Ruiz v. Decision One Mortgage Co., LLC., No. C06-02530, 2006 U.S. Dist. LEXIS 54571, 2006 WL 2067072 (N.D. Cal. 2006),* is unavailing. Countrywide misstated the law in Ruiz, falsely inserting a requirement for an allegation [*26] of an agency relationship in an indirect liability claim.

IV. Ameriquest's motion to dismiss plaintiffs' claims based on lack of subject matter jurisdiction

Defendant Ameriquest moves to dismiss all claims pending against it based on lack of subject matter jurisdiction. Plaintiffs allege only state law claims against Ameriquest. However, plaintiffs argue the Court may exercise supplemental jurisdiction over the claims pursuant to *28 U.S.C. § 1367(a).* The Supreme Court has held that in order for state law claims to remain in federal court, "[t]he state and federal claims must derive from a common nucleus of operative fact." *United Mine Workers v. Gibbs, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966).* Congress codified this holding in *28 U.S.C. § 1367(a),* which provides that when district courts have original jurisdiction, "the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Once a district court decides the state claims derive from the same operative facts, it possesses discretion to determine whether [*27] to deny exercising supplemental jurisdiction. *See Gibbs, 383 U.S. at 726* (holding a district court's application of supplemental jurisdiction "is a doctrine of discretion, not of plaintiff's right"); *Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988)* ("As articulated by *Gibbs,* the doctrine of [supplemental] jurisdiction thus is a doctrine of flexibility, designed to allow courts to deal with cases involving [supplemental] claims in the manner that most sensibly accommodates a range of concerns and values.").

In the instant case, the Court finds that plaintiffs' claims against Ameriquest do not share a common nucleus of operative facts from which their claims against other defendants arise. Although Ameriquest and the other defendants face similar state court claims and the scenarios of both loans are similar, the claims arise out of two different instances. As defendant Ameriquest correctly observes, negotiations for the Ameriquest loan and the Hilltop/Fieldstone loan took place nearly a year apart from each other. Additionally, aside from plaintiffs, no same persons participated in both transactions. The two loans were separate and distinct acts, each involving their own set [*28] of unique facts. Accordingly, the Court declines to exercise supplemental jurisdiction over plaintiffs' state claims against Ameriquest, and GRANTS Ameriquest's motion to dismiss for tack of subject matter jurisdiction pursuant to *Federal Rule of Civil Procedure 12(b)(1).*

CONCLUSION

For the foregoing reasons, the Court hereby DENIES the motions to dismiss of defendants Hilltop, Fieldstone, and Countrywide (Docket Nos. 23, 29, and

31), and GRANTS defendant Ameriquest's motion to dismiss. (Docket No. 17).

IT IS SO ORDERED.

Dated: October 22, 2007

SUSAN ILLSTON

United States District Judge

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 12400 Wilshire Boulevard, Suite 1300, Los Angeles, California 90025.

On January 14, 2008, I served the foregoing document described as **PETITIONERS' OPENING BRIEF ON THE MERITS** on the parties interested in this action by enclosing true copies thereof in sealed envelopes with postage thereon fully prepaid, and by providing for their deposit in the United States Mail at Los Angeles, California, addressed as follows:

California Court of Appeal
Second Appellate District, Div Three
300 South Spring Street, 3rd Floor
Los Angeles, CA 90014-1213

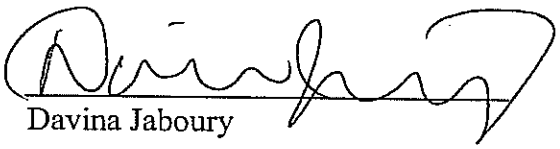
Hon Judge Anthony Mohr, Dept. 309
c/o Clerk of Los Angeles Superior Court
Central Civil West Courthouse
600 S. Commonwealth Ave.
Los Angeles, CA 90005

Richard R. Mainland
Peter H. Mason
FULBRIGHT & JAWORSKI LLP
555 South Flower Street, 41st Floor
Los Angeles, CA 90071

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed January 14, 2008, at Los Angeles, California.



Davina Jaboury