Supreme Court No. S157001

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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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

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PETITIONERS' REPLY BRIEF ON THE MERITS

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PETITIONERS' REPLY BRIEF ON THE MERITS

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I. FARMERS HAS FAILED TO SHOW THAT THE INSURANCE IS NOT WITHIN THE PLAIN MEANING OF "SERVICES."

A. FARMERS DOES NOT MAKE GOOD ITS CLAIM OF SHOWING THAT INSURANCE DOES NOT FALL WITHIN THE DICTIONARY DEFINITION OF "SERVICE."

Farmers asserts that insurance does not fall within the dictionary definition of "service," but attempts to support that claim

only with a brief and ineffectual attack on Petitioners showing that it does fall within the definition of "service" in the Merriam-Webster On-Line Dictionary (2008) (AB 16).

Petitioners showed in the Opening Brief that insurance falls within the Merriam-Webster definition of "service" because a "service" is something that is of "help, use, benefit" to others, or makes a "contribution to the welfare of others," something which is certainly true of a contract of insurance and the performance due under it (OB 10-12).

Farmers' argument to the contrary is that this "proves too much," because "in any contractual arrangement," including contracts for the sale of the intangible goods explicitly excluded from CLRA coverage, "the parties thereto are likely receiving some 'benefit'," (AB 16).

Even if Farmers' argument were sound, it would not prove Farmers' claim that insurance is *not* within the dictionary definition of "service." It would only show that the definition was too broad to distinguish "services" from intangible goods. But the argument is not sound. It is based on an inaccurate statement both of the dictionary

meaning of "service and" of Petitioners' position. Neither the dictionary nor Petitioners' argument gives "service" so expansive a reach. The definition includes, not all forms of "benefit," or "contributions to welfare," but those arising from "work performed": "useful labor that does not produce a tangible [or intangible] commodity."

Insurance falls within that definition because a policy of insurance – unlike an intangible commodity of intrinsic value such as a share of stock, or a contract to provide a tangible or intangible commodity – is of value because it represents the insurer's promise to *do* something: to provide security against the risk of loss. The insurer provides such security by transferring the risk of loss from the insured to itself and seeing to it that the risk is broadly *shared.*

> In the insurance contract, the risk of an actual loss is distributed (socialized) among a large group of persons exposed to a comparable risk of loss.
>
> 1-1 Appleman on Insurance (2007) section 1.3; *Group Life & Health Insurance Co. v. Blue Shield of Texas* (1979) 440 U.S. 205, 212-213 ("fundamental object" of insurance is to "distribute the loss over as wide an area as possible).

This "true underwriting of risks" is "the one earmark of

insurance as it has commonly been conceived of in popular understanding and usage." *Group Life & Health Insurance Co. v. Blue Shield of Texas*, *supra*, 440 U.S. at 212, quoting *SEC v. Variable Annuity* (1959) 359 U.S. 65 at 73.

Farmers has failed entirely to show that this benefit provided by insurance to insureds does not fall within the dictionary definition of – or, more broadly, within the plain meaning of – "service."

B. THE AUTHORITIES CITED IN THE OPENING BRIEF ALSO SUPPORT THE CONCLUSION THAT INSURANCE IS WITHIN THE PLAIN MEANING OF "SERVICE."

Petitioners showed in the Opening Brief that a number of California authorities, judicial and statutory, either explicitly describe insurance as a "service," or assume it to be such (AOB 16-18).[1] Farmers claims to have shown those authorities to be inapposite ((AB 1-18), but those claims are baseless.

Thus, Farmers claim that *Massachusetts Mutual Life Insurance Company v. Superior Court* (2002) 97 Cal.App.4th 1282, which

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[1] Petitioners erroneously included in that group *Kagan v. Gibraltar Savings and Loan Association* (1984) 35 Cal.3d 582, which is relevant because it assumed that IRAs fell within the broad language of the CLRA. Petitioners regret any confusion that may have been caused by the error (see AB 17).

involved life insurance claims similar to those at issue here, is irrelevant because it did not actually discuss the issue of whether insurance is a service under the CLRA (AB17), is beside the point. The point is that neither the insurance company nor the court in that case thought to question the assumption that insurance *does* fall within the CLRA.

Nor does Farmers cast doubt on the relevance of this Court's statement in *Egan v. Mutual of Omaha Insurance Company* (1979) 24 Cal.3d 809 at 820, that the insurance industry provides a "vital service labeled quasi-public in nature...."

Farmers contends that *Egan* is irrelevant to the question of whether insurance provides a service to policyholders, because it refers to insurance as a "public" service, distinct from the "narrower definition" of service in the CLRA (AB 17-18).

Farmers analysis goes wrong for a number of reasons.

First, this Court's comments in *Egan* about the "public" aspect of the service insurers provide must be seen in context. The context was to make the point that

> [t]he special relationship between the insurer and the insured illustrates public policy considerations that may support exemplary damages.
>
> 24 Cal.3d 809 at 820.

It was the services which insurers offer to their insureds which the *Egan* court was describing as "quasi-public" and "affected with the public interest." It is in the private interest of individual insureds, as well as in the public interest, that insurers provide a means by which each insured's risks are "socialized," that is, broadly shared with others exposed to the same risks. 1-1 Appleman on Insurance, *supra*, section 1.3.

Further, Farmers' reference to the 'narrower" CLRA definition is misplaced. In light of the legislative command, Civil Code section 1470, to construe all of the terms in the CLRA liberally in favor of the consumer, the concept of "service" cannot be regarded as "narrow." The only limitation on the "services" covered by the CLRA is that they be for "other than a commercial or business use...." Civil Code section 1471(b). That the "services" covered by the CLRA are limited to the sphere of private life does not mean that they cannot also be "affected with the public interest," as the *Egan* court

said of insurance.

Farmers has failed to refute Petitioner's showing that, with the exception of this Court's *dictum* in *Civil Service Employees v. Superior Court* (1978) 22 Cal.3d 362, 376, our courts have generally assumed insurance to be a service in California law.

II. FARMERS HAS FAILED TO SHOW THAT THE LEGISLATURE INTENDED TO EXCLUDE SERVICES FROM CLRA COVERAGE IF THEY WERE RELATED TO INTANGIBLE GOODS.

Petitioners showed in the Opening Brief , with the support of *Hitz v. Interstate Bank* (1995) 38 Cal.App.4th 274, *Jefferson v. Chase Home Financial* (N.D. Cal.2007) 2007 WL 1302984, and *Hernandez v. Hilltop Financial Mortgage, Inc.* (2007) 2007 U.S.Dist.LEXIS 80867, that insurance policies, and in particular those at issue here, can also qualify for CLRA coverage because, like the credit card contracts in *Hitz*, and the mortgage loans in *Jefferson* and *Hernandez,* they provide consumers with a bundle of services in addition to that which is their central object (AOB 11-14).

In response, Farmers contends that the Legislature intended to "exclude" intangible goods from the CLRA, and that, because such

additional services are provided with virtually all "intangible" goods, it would defeat the Legislature's intent to find CLRA coverage on that basis (AB 21-25). Thus, Farmers' asserts, a distinction must be made between cases in which services are incidental to the purchase of an intangible, in which case there is no CLRA coverage, and cases in which the service is "*the object of the transaction...*," in which the CLRA applies (AB 24).

Farmers' premises are unsound.

First, the language of the CLRA does *not* indicate an intent to ensure exclusion of intangible goods from coverage. Rather, Section 1760(a) provides that CLRA coverage does attach to a transaction *just because* it involves a sale of tangible goods, but does not attach to a transaction involving the sale of intangible goods *just because* it involves the sale of intangible goods.

But to provide that the sale of intangibles is not enough in itself to qualify a transaction for coverage is not the same as providing that it *disqualifies* the transaction for coverage. The difference is made clear by the provision which excludes construction and sale of housing. That provision explicitly states that "[t]he provisions of this

title shall not apply" to any such transaction. Civil Code section 1754. That language makes clear legislative intent that transactions for sale or construction of a home be *excluded* from CLRA coverage.

The same cannot be said for the sale of intangible goods. Particularly in light of the mandate of liberal construction, the language of section 1760(a) *cannot* be held to indicate an intent to *exclude* such transactions from CLRA coverage where other language indicates their inclusion, as is the case where services that would otherwise be covered by the CLRA are associated with the sale.

Second, there is no basis for the distinction between services which are "incidental" and those which are the "object" of the transaction in the language of the CLRA. To narrow the ambit of the CLRA by use of that distinction is therefore to fly in the face of the requirement that the CLRA be liberally construed in favor of the consumer. Indeed, even section 1754's clear exclusion of real estate transactions and contracts to construct a home must be read narrowly in light of the liberal construction requirement.

In *Cartwright v. Viking Industries, Inc.* (E.D.Cal. 2008) 2008 U.S.Dist.Lexis 10240, defendant argued that the CLRA was not

applicable to claims for the installation of defective windows in homes under section 1754. The *Cartwright* court rejected that argument concluding that "[b]ecause the protections of the CLRA are to be liberally construed and exceptions to such protections narrowly construed, the court will not expand the CLRA's specific exclusions to encompass the sale of defendant's Window Products." 2008 U.S.Dist.Lexis 10240, p. 16.

In short, if there is otherwise good reason to provide CLRA coverage to a transaction, the fact that the transaction involves a sale of intangible goods does not justify exclusion from coverage.

Farmers also seeks to distinguish *Hitz*, *Jefferson,* and *Hernandez* on other grounds, but the attempts are unavailing.

Farmers asserts (at AB 18-19) that *Hitz* is irrelevant on the basis (1) that *Hitz* did not deal with insurance but credit cards, and was not decided under the CLRA, and (2) that its example of a "convenience" service not involving the extension of credit was the use of credit cards by those who pay their full balance each month which, Farmers asserts (without citation of authority) does involve the extension of credit. However, (1) the *Hitz* court's reasoning was

founded on the CLRA, see 38 Cal.App.4th at 286, footnote 7, and (2) the *Hitz* court based its distinction between "convenience services" and the extension of credit, not, like Farmers, on its own speculation, but on a "textbook on commercial banking." 38 Cal.App.4th at 286.

Farmers' critiques of *Jefferson* and *Hernandez* are equally unavailing.

Farmers attacks the *Jefferson* court's reasoning (and that of the *Hernandez* court following it) as flawed, because the *Jefferson* court "acknowledged that its decision was contrary to *McKell v. Washington Mutual Inc.*(2006) 142 Cal.App.4th 1457", and criticized the decision in *Berry v. American Express* (2007) 147 Cal.App.4th 224 (AB 19-21 and footnote 8).

The truth is, however, that neither the *Jefferson* court nor the *Hernandez* court acknowledged that their decisions were contrary to *McKell*. Rather, they both distinguished *McKell* on the basis that the plaintiff in *McKell* had failed to indicate on what basis their claim would fall under the CLRA, while Jefferson and Hernandez alleged misrepresentations in financial "services." Further, both the *Jefferson* and *Hernandez* courts reasonably concluded that *Berry* was wrongly

decided because the *Berry* court failed to follow *Hitz* in considering the "convenience services" provided by credit card companies.

Farmers also insists that the *Jefferson* court was wrong in finding that Chase's representations regarding the crediting of prepayments fell within the CLRA, because to treat practices relating to mortgage payment terms as "services" would be to obliterate the exclusion of the extension of credit as such from CLRA coverage as found by *Berry* (AB 20).

Setting aside for the moment the issue of whether *Berry* correctly decided that the extension of credit should be excluded from CLRA coverage, however, the underlying question is the one the *Cartwright* court addressed: is it the "protections" or the "exclusions" in the CLRA which must be liberally construed? 2008 U.S.Dist.Lexis 10240, p. 16. Section 1470 leaves no doubt as to the answer: it is the consumer protections which must be read broadly, even if to do so would be to cut back on such purported "exclusions" as that the *Berry* court found for the extension of credit.

Finally, Farmers' asserts that the additional services Petitioners show to be attached to Farmers' universal life policies are not really

services to the insureds at all. According to Farmers, neither the work done by insurance agents, nor the work done by insurance companies in underwriting, actuarial calculations, and claims handling, constitute services sold to the insured (AB 22).

That is not so. It is through its underwriting and actuarial work is enabled to "socialize" individual insured's risks, which is the principle benefit an insurance policy provides. 1-1 Appleman on Insurance, *supra*, section 1.3. Further, while Farmers now describes its claims-handling to this Court as a matter of merely calculating the amount owed under the contract and sending it to the insured (AB 22), it has represented to the public that it does far more for its insureds than that ("We're here to care, and take care, of everything you need", Ex. 2 to Motion for Judicial Notice).

As to the agent's services to the insured, Farmers' argues that there is no basis in the allegations of the complaint or any other documents for the Court for Petitioners' contention that the holders of the universal life policies at issue here required continued guidance from their agents over the whole life of the policy (AB 23). That is flatly untrue.

Farmers told its agents in the Sales Guide it distributed nationally that the FFUL could be "programmed to meet the changing needs of your clients for life," and describing how premiums and coverage could be raised and lowered as the circumstances of their clients families changed (Additional Motion for Judicial Notice, Ex. 1). The agent would necessarily be involved in that "programming" as those circumstances changed over time.

Further, as pointed out in the Opening Brief (OB 6), these are policies in which current value and likelihood of staying in force until maturity depend upon the interest and risk rates set for the policies by Farmer's over time (Exs. 2 and 17, paras. 1 and 2). Given that fact, insureds' ran the risk that their policies might lapse before maturity if they did not pay amounts which could change over time. It was that risk, and Farmers' misrepresentation of it, which form the basis for Petitioners' principal claims (see Ex. 17, para. 34(b)). Even if policyholders were not interested in changing making changes over time to meet their "changing needs," they needed their agents' continuing advice and guidance to manage that risk.

In sum, the Farmers' sale of the policies at issue here was a sale

of services within the meaning of the CLRA, both because the provision of insurance is itself a service, and because of the bundle of additional services which were – or should have been – provided along with the insurance bring the policies within the CLRA.

III. FARMERS ARGUMENT THAT "LIBERAL CONSTRUCTION" IS UNAVAILING HERE DEPENDS UPON THE CLAIM THAT IT HAS FAILED TO PROVE: THAT INSURANCE CANNOT BE FOUND WITHIN THE PLAIN MEANING OF "SERVICE" UNDER THE CLRA.

Farmers warns that the CLRA must not be rewritten under the guise of liberal construction (AB 25). That is true. But it is irrelevant where, as here, Petitioners invoke liberal construction to support an application of the statute which is consistent with its plain language.

This Court said in *Latourette v. Workers' Comp. Appeals Bd.* (Cal. 1998) 17 Cal. 4th 644 at 651-652 quoting *Pacific Indem. Co. v. Ind. Acc. Com.* (1945) 26 Cal. 2d 509 at 514, that the policy of liberal construction of workers' compensation legislation requires that "[a]ny reasonable doubt... should be resolved in favor of the employee." The Chief Counsel for the Assembly Judiciary Committee at the time of the CLRA's passage, echoed that holding in seeing in section 1470's mandate of liberal construction of the CLRA a made for courts

to "*...when in doubt, decide in the consumer's favor....*" Reed, "Legislating for the Consumer: An Insider's Analysis of the Consumers Legal Remedies Act," (1971) 2 Pac.L.J. 1 at 8 (emphasis in the original).

Here, as made clear above, Farmers cannot come close to showing beyond a reasonable doubt that holding insurance to be a service is incompatible with plain meaning of the CLRA. On the contrary, Petitioners have made a more than plausible case for insurance being within the plain meaning of "services" under the CLRA, and Farmers has failed to mount an effective challenge to it.

IV. EVEN IF LEGISLATIVE HISTORY WERE RELEVANT HERE, FARMERS HAS FAILED TO SHOW THAT IT SUPPORTS EXCLUSION OF INSURANCE FROM THE CLRA'S COVERAGE.

Contrary to Farmers assertions (AB 26), resort to legislative history is inappropriate here because the plain meaning of "services" in the CLRA, considered in the light of the mandate for liberal construction in favor of the consumer, establishes that the CLRA applies to insurance. *People v. Licas* (2007) 41 Cal. 4th 362, 367; *Mejia v. Reed* (2003) 31 Cal. 4th 657, 663.

However, even if legislative history were relevant here, Farmers' attempts to show that such history supports the exclusion of insurance from the ambit of the CLRA would be ineffectual (AB 26-33), as shown below.

A. FARMERS HAS FAILED TO CARRY ITS BURDEN OF SHOWING THAT THE LEGISLATURE INTENDED TO RESTRICT THE GENERAL LANGUAGE OF THE CLRA TO PURCHASES OF SMALL SCALE HOUSEHOLD GOODS AND SERVICES.

Farmers points out that, according to *Berry*, 147 Cal.App.4th at 230, the CLRA was adopted in response to the Kerner Comission report to deal with "unscrupulous conduct by 'merchants' against low-income persons" and that an Assembly Committee listed among the things to be covered by the Act "purchases of small scale household goods and services," such as tires, perfume, bread and appliances (AB 27).

But even assuming that the Legislature's attention in enacting the CLRA centered on the sale of household goods and services by unscrupulous merchants, the Legislature decided to use general terms in the statute, covering the sale of all tangible goods and all services

sold or leased for private and household (rather than commercial) use. Farmers provides no legal authority that would justify limiting those general terms to the particular "small-scale" transactions which may have been at the center of the Legislature's attention in adopting them. In light of the mandate of liberal construction, there cannot possibly be a justification for doing so. Farmers does not claim that only those with low incomes can sue under the CLRA, but there is no more reason to limit its reach to small-scale purchases than to limit its protections to those with low incomes.

Further, the Legislature's concern that "low income persons were the most common victims of deceptive sales practices, yet the least likely to seek legal help," 147 Cal.App.4th at 230, is as applicable to insurance as to household goods. Insurance, and particularly life insurance, is not a luxury for the wealthy. It is at least as much a necessity for people of low income as for the affluent. That is what makes it "a vital service labeled quasi-public in nature." *Egan vs. Mutual of Omaha Insurance Company*, *supra*, 24 Cal.3d at 820.

Indeed, the focus on protecting low income people from

deceptive practices is particularly apt given the facts of this case. Universal life insurance, which is marketed on the basis that the premiums can be kept low in the early years of the policy, would be particularly attractive to low income people who cannot afford whole life policies. Further, it is those very low premiums which lead to the underfunding and forfeiture of the policies in later years, precisely the kind of deceptive practice which from which the CLRA is intended to protect low income people against (see Ex. 17, pp. 512-19).

Farmers focuses on legislative history showing that the CLRA was intended to fill a gap in the legal remedies available to low income people for dealing with unscrupulous merchants. As the Assembly Judiciary Committee put it,

> Existing law provides no satisfactory remedy against such practices. The consumer is forced to sue in an action on the contract – in many cases damage is incurred but no contract is ever consummated – or he must bring an action for fraud, an action which contains some of the most difficult allegations to prove found in our law.
>
> AB 28.

Farmers argues for the exclusion of policyholders from CLRA protection based on the assumption that no such gap existed in the remedies available to fight deceptive practices in the sale of

insurance. That argument too should be rejected.

First, Farmers claims that there is no such gap because insurance always involves a contractual relationship and therefore gives rise to a contract cause of action (AB 29). That assertion distorts both the import of the Assembly committee's report and the reality of the policyholders' situation when, as here, they discover that they bought their insurance policies on the basis of misrepresentations.

The argument assumes that the Legislature intended to give remedies under the CLRA only where the absence of a contract cause of action relegated victims of deceptive practices to their cause of action for fraud. That is obviously not the case. The quote from the Committee report points out only that the contract remedy is not available in many cases. It does not suggest that CLRA relief should be limited to such cases. Rather, the report indicates that neither the common law cause of action for contract nor that for fraud had offered low income people adequate relief, and that the CLRA, allowing for simplified allegations and remedies such as injunctions and class litigation, would make such relief more readily available.

Further, as shown by this case, contract relief is not always available to victims of deceptive practices in the sale of insurance. In its current form, the complaint alleges, not that Real Parties breached their contractual obligations, but that they misrepresented the nature of universal life insurance, selling it as lifetime protection at low rates, when in fact the systematic underfunding of the policies was likely to lead to their early lapse (see Ex. 17, p. 514).

Farmers also points out that if Petitioners prevail on their remaining non-CRLA causes of action, they will have the whole array of legal and equitable remedies available to them even without the CLRA (AB 29). They fail, however, to note the extent of the contribution made to that array by the UCL (Business & Professions Code section 17200, et seq.), which was first adopted in 1977, *after* the CLRA. Those remedies could not have been in the minds of the legislators contemplating adoption of the CLRA in 1970. In any case, Farmers ignore the fact that the same array of remedies is now available under the UCL and common law causes of action for all claims that could be made under the CLRA, not just insurance claims.

Farmers also argues that because the UIPA was already in place

at the time the CLRA was under consideration by the Legislature, providing administrative remedies for unfair and deceptive practices in the insurance industry, "the Legislature did not have insurance in mind when it enacted the statute (AB 29-30)."

As this Court has held that the Legislature did not intend private enforcement of the UIPA, see *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, this argument assumes without evidence that the Legislature believed that those administrative remedies would be sufficient (along with the common law causes of action generally available for claims of deception in the sale of goods and services) to protect low income consumers from unfair and deceptive practices by insurance companies, to the exclusion of other statutory remedies.

It is just as likely, however, that the Legislature shared the view of the New Jersey Supreme Court, in *Lemelledo v. Beneficial Management Corp. of America* (N.J.1997) 696 A.2d 546, that the concentration of remedial power in one administrative agency can lead to "underenforcement" and the "victimization of a protected class" such as low-income consumers, 696 A.2d at 553, that it did

not, therefore, regard the UIPA regulatory remedies as in themselves "satisfactory" from the perspective of those consumers, and did not intend to exclude insurance from CLRA coverage (see pp. 34-35, *infra*).

B. FARMERS HAS FAILED TO CARRY ITS BURDEN OF SHOWING THAT THE LEGISLATURE DELIBERATELY DELETED INSURANCE FROM CLRA COVERAGE.

Petitioners showed in the Opening Brief (OB 28-33) that, contrary to the Court of Appeal's view, the reasoning the *Berry* court used to exclude credit card issuance from CLRA coverage is inapplicable to insurance for a number of reasons. In now reiterating the Court of Appeal's reasoning on that point (AB 30-33), Farmers does not even attempt to answer a number of Petitioners' arguments, while giving ineffectual answers to others.

Thus, Farmers asserts that the Legislature must have intended to exclude insurance because the National Consumer Act, which it used as a source for the CLRA, explicitly included insurance among the "services" it covered, while the CLRA does not (AB 30-31). But Farmers fails to answer Petitioners' showing in the Opening Brief that

the records regarding the passage of the CLRA definitively negate any suggestion that the Legislature ever entertained a version of the CLRA which explicitly referred to insurance, as it did, according to *Berry,* regarding "credit" and "money," and deliberately deleted that reference (OB 29).

Farmers acknowledges that the authors of the National Consumer Act commented that "[i]nsurance is clearly a service and should be under the same kind of regulation as any other service," but claims that it is speculative to say that our Legislature took that comment as a reason for concluding that insurance would be covered without the need for an explicit reference (AB 32).

But Farmers does not indicate why that conclusion is any more speculative than its own conclusion that the Legislature's decision not to mention insurance explicitly showed an intention to exclude it.

Further, Farmers ignores the rest of the comment, which indicates that the authors included the word insurance in the National Consumer Act only in order to differentiate it from the Uniform Consumer Credit Code, which gave preferential treatment to insurers. As the California Legislature did not adopt the Uniform Consumer

Credit Code, see *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 824, footnote 23, it had no need to follow the National Consumer Act in making explicit reference to insurance (see Reply to Opposition to Petition for Writ of Mandate, pp. 10-11). Farmers has given this Court no reason to reject that explanation for its absence.

Farmers also responds ineffectually (at AB 32-33) to Petitioners' showing that the National Consumer Act also explicitly references many fields other than insurance, such as transportation, education, entertainment and recreation in its definition of services, but that no one would argue from the absence of explicit references to those fields in CLRA all of those fields should be excluded from its coverage (OB 31).

Farmers contends that this lengthy list was included in the National Consumer Act because the act otherwise limited coverage to "personal services," which would have excluded the listed services because they are "aimed broadly at the public." Because the CLRA is not limited to "personal services," Farmers claims, no such list was required in it (AB 32-33).

Farmers argument is meritless. In this context, services would

not be called "personal" because they are not "aimed broadly at the public," but either because they are provided "personally" by the people contracting to perform them, or because they relate to the"personal" aspects of the lives of those to whom they are offered, as opposed to their work lives, and would certainly include such things as recreation, entertainment and travel for other than business purposes. The latter distinction is made in the CLRA, which limits the services covered to those "for other than a commercial or business use."

V. APPLICATION OF THE CLRA TO INSURANCE WOULD IN NO WAY UNDERMINE *MORADI-SHALAL*.

Farmers reiterates the Court of Appeal's assertion (Opn., p. 14) that to apply the CLRA to insurance would "undermine the holding of" *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287 (AB 36)." Farmers argues that the CLRA gives consumers the right to sue for some of the very practices which the UIPA forbids to insurance companies, and that it would therefore effectively nullify *Moradi-Shalal*'s holding that the UIPA does not create private causes of action (AB 36).

Petitioners responded to that contention in the Opening Brief (OB 40-45).

First, Petitioners pointed out that this Court held in *Manufacturer's Life Insurance Co. v. Superior Court* (1995) 10 Cal.4th 257 at 263, that *Moradi-Shalal* had not "granted the insurance industry a general exemption from state antitrust and unfair business practice statutes." Following the Court of Appeal, Farmers responds that *Manufacturer's Life* held only that preexisting statutory causes of action were not nullified by the UIPA, not that new ones could be created (AB 37).

The fact is, however, that *Manufacturer's Life* held that, while the UIPA itself created no private causes of action, both preexisting statutory causes of action and common law causes of action remain undisturbed by its passage, 46 Cal.3d at 304-05, though in many cases they make it possible for individuals to sue for conduct which is also forbidden by the UIPA. This court had no occasion in that opinion to address the status of causes of action created by statutes postdating the UIPA, and made no decision on it one way or the other.

The question, however, is this: why would this Court conclude

that preexisting causes of action targeting conduct which also violated the UIPA would not "undermine" *Moradi-Shalal*, but that subsequently created causes of action would? The question is particularly apt as directed to the CLRA, which, according to Civil Code section 1760, was enacted just to give consumers more "efficient and economical procedures" to respond to the very "unfair and deceptive business practices" which also gave rise to the preexisting common law causes of action. Civil Code section 1760. Why would allowing consumers to use those more efficacious means in bringing actions against insurance companies undermine the holding of *Moradi-Shalal,* when the preexisting causes of action did not?

Farmers does not answer that question. Farmers does assert, however, that the reasoning Petitioners attribute to it – that Farmers must be contending that insurance companies' unfair and deceptive practices should be exempt from the CLRA because the insurance industry is regulated by the Insurance Commissioner under the UIPA – is a "straw-man (AB 37)." Far from being a straw-man, however, the existence of regulation under the UIPA is the only plausible

rationale for Farmers' contention that the rationale of *Moradi-Shalal* should be extended to bar CLRA actions against insurance companies, and it was the rationale used by the Court of Appeal (Opn., p. 14).

Farmers (at AB 38-39) goes on to attempt to discredit Petitioners' argument that such special treatment of insurance as a regulated industry is precluded by Insurance Code 1861.03(a), which 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)."

Farmers first asserts that the express purpose of the provision was only to remove the existing antitrust exemption for insurance, not to ensure private causes of action under the CLRA (AB 38). But the broad language quoted above makes it clear that, even if the impetus came from that antitrust concern, its effect cannot be so limited.

Farmers also points out that Proposition 103, of which section

1861.03 is a part, does not in general apply to life insurance (AB 38-39). But this Court, in *Manufacturer's Life,* made it clear that section 1861.03's broad declaration that the "insurance industry" as a whole is as subject to existing law as any other industry section may not be limited by the terms of section 1861.13. 10 Cal.4th 257, 282. Certainly, that broad declaration appears on its face to have been intended to rebut any argument that insurance should be presumed exempt from general laws because it is subject to special regulation.

Finally, then, there is no basis for concluding that either the existence of the UIPA as such, or *Moradi-Shalal's* holding that the UIPA does not create private causes of action, justify exempting the unfair and deceptive practices of the insurance industry from the CLRA.

VI. CONTRARY TO FARMERS ASSERTIONS, THE OVERWHELMING MAJORITY OF OUT-OF-STATE DECISIONS SUPPORT TREATMENT OF INSURANCE AS A "SERVICE" UNDER CONSUMER PROTECTION LEGISLATION.

Farmers attempts to distinguish a number of the cases from other jurisdictions which, as Petitioners have shown (OB 20-23), overwhelmingly support the treatment of insurance as a service under

consumer protection statutes, claiming that the statutes on which they are based give far broader coverage than the California CLRA (AB 39-41). As will be shown below, none of those distinctions withstand scrutiny.

Thus, Farmers seeks to distinguish the Texas case of *McCrann v. Klaneckey* (Tex. App.1984) 667 S.W.2d 924, claiming that the Texas court was interpreting Texas Bus.& Com. Code section 17.46, which broadly regulates false, misleading and deceptive acts or practices "in the conduct of any trade or commerce," and pointing out that certain violations of the Texas Insurance Code are incorporated into the Texas Deceptive Trade Practices Act (DTPA) by Texas Bus.& Com. Code section 17.50(a)(4) (AB 39-40).

However, while Farmers has accurately stated the Texas statutes, the truth is that neither figured in the reasoning of the *McCrann* court. That court, as accurately stated in the Opening Brief (AB 20-21), had before it the limited question of whether insurance fell within the DTPA definition of "services" as defined in Bus.& Com. Code section 17.45(2) to include "work, labor, and services for use, including services furnished in connection with the sale or repair

of goods," a definition very close to that of Civil Code section 1760(b).

The two other statutes cited by Farmers, though related to section 17.45(2), were not even *mentioned* in *McCrann.* Taking the Texas court at its word rather than putting words in its mouth, therefore, its reasoning supports the conclusion that insurance is a "service" under the CLRA as well.

The same is true of Pennsylvania.

Farmers contends, citing *Pekular v. Eich* (1986) 513 A.2d 427 at 433, that Pennsylvania law is irrelevant here, because the Pennsylvania Unfair Practices Consumer Protection Act applies to the sale of "any services and any property." Farmers contends that the inclusion of the sale of "any property" under the Pennsylvania statute makes it more expansive than the CLRA, which applies only to "tangible" goods (AB 40).

That contention would have some force if Petitioners were arguing that insurance falls within the meaning of "goods" under the CLRA, and citing *Pekular* for its holding that the sale of insurance can be regarded as a sale of property. 513 A.2d 427, 433. But that is

not the case. Instead, Petitioners contend that the sale of insurance falls under the CLRA because it is a *service*, and cite, not *Pekular*, but *Deetz v. Nationwide Mutual Insurance Co.* (1980) 20 Pa. D.&C.3d 499, in support of that contention. The *Deetz* court, applying the same kind of liberal construction as the CLRA mandates, concluded that insurance was within the plain meaning of "service" *as well as* "property," commenting that "... no one could argue that... insurance coverage is not a service or a product which can be subjected to consumer fraud." 20 Pa. D.&C.3d at 507. That conclusion as well is relevant to the question of whether insurance falls within the plain meaning of "services" for purposes of the California CLRA.

Finally, the Colorado Supreme Court, in *Showpiece Homes Corp. v. Assurance Company of America* (Colo.2001) 38 P.3d 47, which examined decisions from the courts of a number of other states which had found insurance to be a service for purposes of their consumer protection statutes, including *McCrann v. Klaneckey*, *supra*, 667 S.W.2d 924 from Texas, *Stevens v. Motorists Mutual Insurance Co.* (Ky.1988) 759 S.W.2d 819 at 820-21, from Kentucky,

and, from Massachusetts, *Dodd v. Commercial Union Insurance Company* (Mass.1977) 365 N.E.2d 802, concluded that they were soundly decided, and therefore that sale of insurance could be classified as a sale of services (or of goods or property) for purposes of the Colorado's consumer protection act. 38 P.3d 47, 57-58.

Farmers objects that the Colorado decision is irrelevant to the interpretation of the CLRA because the Colorado statute, unlike the CLRA, does not define "services (AB 40-41)." Farmers' suggestion is again that the CLRA somehow restricts the ambit of "services" in a manner which makes the Colorado court's holding that insurance is a service for purposes of consumer protection irrelevant in California. But that is not the case. The CLRA definition of 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" places only one limitation on the services covered: they must be for personal or household use, rather than commercial use. As that limitation is not at issue here, and does not differentiate the sale of non-commercial insurance policies from sale of other services, it is no basis for distinguishing the Colorado Supreme Court's decision that

insurance is service for purposes of protecting consumers from fraud in the sale of goods and services.

Farmers also contends that the New Jersey Supreme Court's decision in *Lemelledo v. Beneficial Management Corp. of America, supra,* 696 A.2d 546, is inapposite, because the New Jersey Consumer Fraud Act is broader than the CLRA, covering the sale of "merchandise," including goods, services and anything else offered for sale (AB 41). But that difference does not detract from the relevance of the *Lemelledo* court's reasoning on the more general issue of whether consumers need private causes of action to defend themselves against the fraudulent practices of industries which are subject to governmental regulation (see AOB 39-40, and *supra*, p. 22).

Finally, it remains true that, as pointed out by the Supreme Courts of Colorado *(Showpiece Homes Corp. v. Assurance Company of America, supra*, 38 P.3d 47, 57) and Kentucky (*Stevens v. Motorists Mutual Insurance Co., supra*, 759 S.W.2d 819, 820-21), only one among all of the states whose courts have considered the issue in the absence of an explicit statutory exemption for the

insurance industry did *not* find insurance to fall within the limits of its consumer protection statute: Vermont (in *Wilder v. Aetna Life & Casualty Insurance Co.* [1981] 433 A.2d 309).

California should join the Colorado Supreme Court in adopting the "sound" reasoning of the vast majority of jurisdictions, and holding that insurance is a "service" the sale of which is covered by this state's consumer fraud statute.

CONCLUSION

For the reasons stated above and in the Opening Brief, Petitioners respectfully request that the decision of the Court of Appeal holding that insurance is not a service within the meaning of the CLRA be reversed.

DATED: May 5, 2008

Respectfully submitted,

DAVID L. SHELLER
JOHN A. GIRARDI
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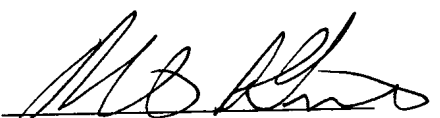


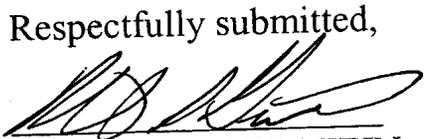
ROBERT S. GERSTEIN
Attorneys for Petitioners
Pauline Fairbanks and
Michael Cobb

STATEMENT OF COMPLIANCE

Pursuant to Rule of Court 14(c)(1), I certify that the **PETITIONERS' REPLY BRIEF ON THE MERITS** is proportionately spaced, has a typeface of 14 points or more, and contains 6,764 words.

DATED: May 5, 2008

Respectfully submitted,



ROBERT S. GERSTEIN
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Michael Cobb

Appendix A

LEXSEE 2008 U.S. DIST. LEXIS 10240

LYNDA CARTWRIGHT and LLOYD CARTWRIGHT on behalf of themselves and all others similarly situated, Plaintiffs, v. VIKING INDUSTRIES, INC., an Oregon Corporation, and Does 1 through 100, inclusive, Defendants.

CASE NO. 2:07-CV-02159-FCD-EFB

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

2008 U.S. Dist. LEXIS 10240

February 12, 2008, Decided
February 12, 2008, Filed

COUNSEL: **[*1]** For Lynda Cartwright, on behalf of themselves and all others similarly situated, Lloyd Cartwright, on behalf of themselves and all others similarly situated, Plaintiffs: David M. Birka-White, LEAD ATTORNEY, Stephen Oroza, Birka-white Law Offices, San Francisco, CA; James Belford Brown, Jennifer Anne Scott, LEAD ATTORNEYS, Herum Crabtree Brown, Stockton, CA; Robert J. Nelson, LEAD ATTORNEY, Steven Mark Swerdlow, Lieff Cabraser Heimann and Bernstein, San Francisco, CA.

For Viking Industries, Inc., an Oregon corporation, Defendant: Jon Mark Thacker, Kevin Patrick Cody, LEAD ATTORNEYS, Ropers, Majeski, Kohn and Bentley, San Jose, CA.

JUDGES: FRANK C. DAMRELL, JR., UNITED STATES DISTRICT JUDGE.

OPINION BY: FRANK C. DAMRELL, JR.

OPINION

MEMORANDUM AND ORDER

This matter comes before the court on defendant Viking Industries, Inc.'s ("Viking") motion to dismiss plaintiffs Lynda and Lloyd Cartwright's (collectively "plaintiffs") complaint pursuant to *Rules 12(b)(6)* and *9(b) of the Federal Rules of Civil Procedure.* [1] This matter is also before the court on plaintiffs' motion to permit discovery pursuant to *Rule 26(d).* For the reasons set forth below, [2] defendant's motion to dismiss plaintiffs' complaint is DENIED, and plaintiffs' **[*2]** motion for expedited discovery is DENIED.

1 All further references to a "Rule" are to the Federal Rules of Civil Procedure.

2 Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. E.D. Cal. Local Rule 78-230(h).

BACKGROUND

Plaintiffs are the owners of a residence in which defendant Viking's Series 3000 window products ("Window Products") are installed. (Plaintiffs' Complaint, filed Aug. 16, 2007 ("Compl."), P 6). Plaintiffs brought this class action on behalf of themselves and persons in California who own or owned homes in which Viking Window Products have been installed. (*Id.* P 1). Plaintiffs' claims are based on the defective nature of the Window Products and the damages caused by the defective Window Products. (*Id.* P 13). The alleged defects in the windows include the failure to resist water and air intrusion, which created water damage in the home. (*Id.* PP 13, 19).

Plaintiffs further allege Viking made fraudulent misrepresentations and omissions concerning the Window Products. (*Id.* P 15). Plaintiffs assert Viking represented that the Window Products came with a "Lifetime Warranty," would be "free from defects in material and **[*3]** workmanship," and would perform in conformance with standards promulgated by the American Architectural Manufacturers Association ("AAMA"). (*Id.*) Plaintiffs claim these representations were false because the Window Products were defective, failed prematurely, and would not satisfy AAMA standards. (*Id.* P 18).

By June of 1997, plaintiffs became aware of excess moisture near some windows and sills and contacted Viking concerning the moisture problems with the Window Products. (*Id.* P 30). A Viking representative visited plaintiffs' residence in June 1997 and advised plaintiffs

that the excess moisture was caused by problems with the heating and air conditioning unit. (*Id.*) Plaintiffs believed the Viking representative and allege they had no reason to suspect the Window Products were defective until they were advised of the pendency of the class action lawsuit, *Deist, et al. v. Viking Industries,* Case No. CV025771 (the "*Diest* action"), filed in the San Joaquin County Superior Court. (*Id.* P 31). Plaintiffs claim the filing of the *Diest* action on February 17, 2005 tolled the running of the statute of limitations for claims related to the Window Products. (*Id.* P 32).

On August 16, 2007, plaintiffs **[*4]** filed this civil class action against defendant, alleging eight causes of action: Strict Products Liability, Negligence, Breach of Express Warranty, Breach of Implied Warranty, Violation of the Consumer Legal Remedies Act, Violation of California's Unfair Competition Law, Fraudulent Concealment, and Restitution. (*Id.* PP 40-102). Defendant now moves to dismiss plaintiffs' claims pursuant to *Federal Rules of Civil Procedure 12(b)(6)* and *9(b)*.

STANDARD

A. *Rule 12(b)(6)*

On a motion to dismiss, the allegations of the complaint must be accepted as true. *Cruz v. Beto, 405 U.S. 319, 322, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972)*. The court is bound to give plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. *Retail Clerks Int'l Ass'n v. Schermerhorn, 373 U.S. 746, 753 n.6, 83 S. Ct. 1461, 10 L. Ed. 2d 678 (1963)*. Thus, the plaintiff need not necessarily plead a particular fact if that fact is a reasonable inference from facts properly alleged. *See id.*

Nevertheless, it is inappropriate to assume that the plaintiff "can prove facts which it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." *Associated Gen. Contractors of Calif., Inc. v. Calif. State Council of Carpenters, 459 U.S. 519, 526, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. **[*5]** Moreover, the court "need not assume the truth of legal conclusions cast in the form of factual allegations." *United States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th Cir. 1986)*.

Ultimately, the court may not dismiss a complaint in which the plaintiff has alleged "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)*. Only where a plaintiff has not "nudged [his or her] claims across the line from conceivable to plausible," is the complaint properly dismissed. *Id.* "[A] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)* (quoting *Hudson v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)*).

In ruling upon a motion to dismiss, the court may consider only the complaint, any exhibits thereto, and matters which may be judicially noticed pursuant to *Federal Rule of Evidence 201. See Mir v. Little Co. Of Mary Hospital, 844 F.2d 646, 649 (9th Cir. 1988)*; *Isuzu Motors Ltd. v. Consumers Union of United States, Inc., 12 F. Supp. 2d 1035, 1042 (C.D. Cal. 1998)*.

B. **[*6]** *Rule 9(b)*

Rule 9(b) of the Federal Rules of Civil Procedure provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." In order to comply with the requirements of *Rule 9(b)*, the circumstances constituting the alleged fraud "must be 'specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.'" *Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001)* (quoting *Neubronner v. Milken, 6 F.3d 666, 672 (9th Cir. 1993)*). "Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)* (quoting *Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997)*). The plaintiff "must set forth more than the neutral facts necessary to identify the transaction. The plaintiff must set forth what is false or misleading about a statement, and why it is false." *Id.* (quoting *Decker v. GlenFed, Inc., 42 F.3d 1541, 1548 (9th Cir. 1994)*) (emphasis in original).

C. *Rule 26(d)*

Federal Rule of Civil Procedure 26(d) **[*7]** generally provides that formal discovery will not commence until after "the parties have conferred as required by *Rule 26(f)*." Courts may order expedited discovery before a *Rule 26(f)* conference upon a showing of good cause. *Semitool, Inc. v. Tokyo Electron America, Inc., 208 F.R.D. 273, 276 (N.D. Cal. 2002)*. Good cause is present when "the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party." *Id. at 273*.

ANALYSIS

A. Defendant's Motion to Dismiss

1. Statute of Limitations

Defendant moves to dismiss plaintiffs' complaint on the grounds that it is barred by the applicable statute of limitations. Defendant contends that in June 1997 plaintiffs "became aware of excess moisture near some windows and sills," and that "the sheetrock in the area around the installed Window Products became discolored and mold began to grow in this area." (Compl. P 30). Defendant asserts that as of June 1997 plaintiffs were put on notice of substantial damage around the windows and that plaintiffs' "failure to discover the identity of the defendant did not postpone the accrual of a cause of action." (Viking Motion to Dismiss, filed Nov. **[*8]** 2, 2007 ("Mot."), 7).

Plaintiffs allege that in June 1997 a Viking representative concealed and misrepresented the true problems caused by the Window Products and falsely attributed the problems to the heating and air conditioning unit. (Compl. P 30). Plaintiffs assert they trusted the Viking representative and determined that the problems they experienced with moisture were unrelated to any defect in the Window Products. (*Id.* P 31). Plaintiffs contend that damage caused by the Window Products is difficult to detect, that the Viking representative concealed key facts, and that to determine the true cause of their problems required expert assistance. (*Id.* PP 22-25, 30-31).

In deciding a motion to dismiss, the court is bound to give plaintiffs the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. *Retail Clerks, 373 U.S. at 753 n.6.* When a motion to dismiss is based on the running of a statute of limitation, dismissal is granted "only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." *Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980).* **[*9]** Plaintiffs allege why they did not discover the facts upon which their claims are based until one year before the filing of this action. (Compl. PP 22-25, 30-31). Defendant's motion to dismiss only argues that plaintiffs' were unaware of "the identity of the defendant" and that this alone is not enough to toll the statute of limitations. However, plaintiffs' complaint asserts numerous reasons why the statute had not begun to run, including Viking's alleged fraud.

Defendant further argues that the statute of limitations is likely to have run on class claims because the Window Products were allegedly purchased years ago. However, the question of when the class should have known that their windows had failed and that such failure was a result of the Viking Window Products are factual questions which cannot be determined on a motion to dismiss under *Rule 12(b)(6).* Because plaintiffs have alleged why they did not discover the Window Product defects were caused by defendant until one year before the filing of this action and because the allegations of the complaint read in the light most favorable to plaintiffs, defendant's motion to dismiss plaintiffs' complaint based upon the statute of **[*10]** limitations is DENIED.

2. Breach of an Express Warranty

Defendant moves to dismiss plaintiffs' claim for breach of an express warranty because the plaintiffs have not specifically alleged which warranty applied to the sale of the Window Products. (Mot. at 3). [3] Plaintiffs have attached three documents to the complaint that they allege are express warranties used by Viking during the relevant time period. These express warranties guarantee that the Window Products would be "free from defects in material workmanship that significantly impairs their operation and proper usage . . . and applies for as long as you own them." (Compl. P 15).

> 3 The court notes that in moving to dismiss plaintiffs' claim for breach of an implied warranty, defendant contends that "it is obvious that the warranty that is applicable to plaintiffs' windows is Exhibit 3." (Mot. at 3). This contention is directly contrary to defendant's argument that plaintiffs' claim for breach of an express warranty should be dismissed because the applicable warranty is unclear.

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to **[*11]** "give the defendant direct notice of what the . . . claim is and the grounds upon which it rests." *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).* A complaint attacked by a *12(b)(6)* motion does not need detailed factual allegations. *Id.*

Plaintiffs have referenced three express warranties which guarantee that the Window Products would be "free from defects in material workmanship." (Compl. P 15). As such, plaintiffs have satisfied the threshold requirement of *Rule 8(a)* by giving defendant the factual basis for their claim for breach of express warranty. Therefore, defendant's motion to dismiss plaintiffs' claim for breach of an express warranty is DENIED.

3. Breach of an Implied Warranty

Defendant moves to dismiss plaintiffs' claim for breach of an implied warranty on the basis that: (1) all the implied warranties have been disclaimed; and (2) privity between plaintiffs and Viking is absent. (Mot. at 3-5). Defendant first contends, contrary to its express warranty argument, that a specific warranty is applicable to this action. (Mot. at 3). Defendant argues that Exhibit 3 is the "obvious" warranty that applies to plaintiffs' windows and that the disclaimer in the warranty is "ef-

fective to eliminate **[*12]** all implied warranties, including the implied warranties of merchantability and fitness for a particular purpose." (Mot. at 3). At this stage in the litigation, the court cannot determine which warranty applies to this action or the breadth of any particular disclaimer. [4] Until a specific warranty is factually established as pertaining to this action, the court cannot dismiss all implied warranty claims as a matter of law.

> 4 This order does not preclude the defendant from later arguing that all implied warranties are disclaimed by a contractual provision.

Defendant also contends that plaintiffs' claim for breach of an implied warranty must be dismissed because privity between Viking and plaintiffs is lacking. (Mot. at 5). Defendant contends the parties to the original sale were Viking and window distributors. *Id.* Defendant argues that because plaintiffs purchased the Window Products from a window distributor, and not from Viking, plaintiffs are not in privity with Viking and therefore, are not protected by implied warranties. *Id.* However, plaintiffs assert that privity exists because they are third party beneficiaries to the contract between Viking and the window distributors. (Compl. **[*13]** PP 60-63).

Under *California Civil Code § 1559*, a third party beneficiary can enforce a contract made expressly for his benefit. *Cal. Civ. Code § 1559* (2007); *see Shell v. Schmidt, 126 Cal App. 2d. 279, 272 P.2d 82 (1954)* (finding that the plaintiffs purchasing homes constituted the class intended to be benefitted, and holding that the contract must therefore be for their benefit). A contract made expressly for a third party's benefit does not need to specifically name the party as the beneficiary; the only requirement is that "the party is more than incidentally benefitted by the contract." *See Shell, 126 Cal. App. 2d at 290*; *see also Gilbert Financial Corp. v. Steelform Contracting Co., 82 Cal. App. 3d 65, 69, 145 Cal. Rptr. 448 (1978)* (finding that the plaintiff, as the owner of the building, was an intended beneficiary of the contract between the general contractor and the subcontractor).

Plaintiffs allege Viking sold the windows to distributors and others ("Initial Purchasers") who were not intended to be the ultimate consumers of the Window Products. (Compl. PP 60-63). Plaintiffs claim the agreements between Viking and the Initial Purchasers were intended to benefit the homeowners, including plaintiffs. (*Id.* P 63). **[*14]** Assuming plaintiffs' allegations are true, plaintiffs have sufficiently alleged facts demonstrating that privity exists between Viking and plaintiffs. *See Shell, 126 Cal App. 2d at 290*; *see also Gilbert Financial Corp., 82 Cal. App. 3d at 69*. As alleged, plaintiffs were an intended beneficiary of Viking's warranty and thus plaintiffs may bring a claim for enforcement of the implied warranties. *Id.*

Therefore, defendant's motion to dismiss plaintiffs' claim for breach of an implied warranty is DENIED.

4. California Consumers Legal Remedies Act

Viking argues that plaintiffs' California Consumers Legal Remedies Act (CLRA) claims are barred by *California Civil Code § 1754*. Viking contends that the sale of windows which are ultimately incorporated into a building are "the construction, sale, or construction and sale of an entire residence," and thus, are expressly excluded from the CLRA under *§ 1754*. (Mot. at 6).

The CLRA prohibits certain "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer." *Cal. Civ. Code § 1770(a)* (2007). *Section 1754* **[*15]** provides, "The provisions of this title shall not apply to any transaction which provides for the construction, sale, or construction and sale of an entire residence." *Cal. Civ. Code § 1754* (2007). The CLRA is to be "liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices." *Cal. Civ. Code § 1760* (2007); *see also Kagan v. Gibraltar Sav. & Loan Ass'n., 35 Cal. 3d 582, 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); *Hernandez v. Hilltop Fin. Mortg., Inc., No. 06-7401, 2007 U.S. Dist. LEXIS 80867 (D. Cal. 2007)* (applying the CLRA to mortgage loans). As such, the exception set forth in CLRA *§ 1754* only applies in the narrow circumstances of the actual sale or construction of real property. *See Jefferson v. Chase Home Finance, No. 06-6510, 2007 U.S. Dist. LEXIS 36298, at *8 n.1 (N.D. Cal. May 3, 2007)* (finding that *§ 1754* does not exclude financial services related to such transactions).

The sale by Viking of the **[*16]** Window Products is not the sale of an entire residence. Residential sales are not the subject of the complaint. Rather, plaintiffs' allegations relate only to the sale of the Window Products separate from any "construction, sale, or construction and sale of an entire residence." *Cal. Civ. Code § 1754* (2007). Because the protections of the CLRA are to be liberally construed and exceptions to such protections narrowly construed, the court will not expand the CLRA's specified exclusions to encompass the sale of defendant's Window Products. *See id.* Accordingly, defendant's motion to dismiss plaintiffs' claims arising under the California Consumers Legal Remedies Act is DENIED.

5. Fraud

Defendant moves to dismiss plaintiffs' claim for fraud on the basis that plaintiffs' fail to plead fraud with particularity. (Mot. at 7). In order to comply with the requirements of *Rule 9(b)*, the circumstances constituting the alleged fraud "must be 'specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.'" *Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001)* **[*17]** (quoting *Neubronner v. Milken, 6 F.3d 666, 672 (9th Cir. 1993)*). The plaintiff "must set forth more than the neutral facts necessary to identify the transaction. The plaintiff must set forth what is false or misleading about a statement, and why it is false." *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)* (quoting *Decker v. GlenFed, Inc., 42 F.3d 1541, 1548 (9th Cir. 1994)*) (emphasis in original).

Plaintiffs allege Viking concealed and failed to disclose to plaintiffs that the Window Products were defective, would fail permanently, were unsuitable for their advertised use, and would not satisfy AAMA standards. (Compl. P 16). Plaintiffs were provided with brochures, a form of warranty, and other written information by Viking. (*Id.* P 28). Plaintiff were also assured of the high quality of the Window Products by the distributor. (*Id.*) Plaintiffs allege that none of the information they were provided with disclosed the true nature and quality of the Window Products. (*Id.*) Moreover, plaintiffs allege that when they contacted a Viking representative regarding the moisture surrounding the Window Products, the representative stated that such moisture was unrelated to any defects **[*18]** with the product. (*Id.* PP 30-31). Plaintiffs also allege that Viking had a duty to disclose the defects in the Window Products because (1) it was in a superior position to know the true character and quality of its Window Products, and the problems with the Window Products were latent; (2) it made partial disclosures about these products in its marketing, advertising, and warranties without revealing the true character or quality; and (3) it actively concealed the nature of the defective products. (*Id.* P 91). Plaintiffs contend that Viking actively continued to conceal the defective nature of the Window Products up until the filing of the complaint in this action. (*Id.* P 95). As such, plaintiffs have alleged what representations and omissions were made by Viking to plaintiffs, why Viking had a duty to state the facts it omitted, and the particular manner in which the statements made by Viking were false. (Compl. PP 15-18, 28, 89-97). Thus, plaintiffs have adequately put Viking on notice of the particular misconduct which forms the basis of their claim for fraud. *See Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)* (quoting *Decker v. GlenFed, Inc., 42 F.3d 1541, 1548 (9th Cir. 1994)*) **[*19]** (emphasis in original).

Therefore, defendant's motion to dismiss plaintiffs' claim for fraud is DENIED.

B. Plaintiffs' Motion for Discovery Pursuant to *Rule 26(d)*

Plaintiffs move the court for an order permitting them to conduct discovery related to class certification issues pursuant to *Federal Rule of Civil Procedure 26(d)*. Plaintiffs claim the order is necessary to allow the plaintiffs to make a timely class certification motion under *Rule 23*. *Rule 23(c)(1)* requires that: "[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action." *Fed. R. Civ. P. 23(c)(1)*. *Rule 23*, standing alone, does not provide good cause for expedited discovery because class certification can still be made "at an early practicable time" in the normal course of the litigation.

This court finds that plaintiffs' *Rule 26(d)* motion is premature. Discovery issues will be decided after the parties have filed their Joint Status Report, proposing dates for discovery and deadlines for dispositive motions. [5] Accordingly, plaintiffs' motion for expedited discovery is DENIED.

> 5 Plaintiffs may propose a specific discovery **[*20]** and briefing schedule regarding their class certification motion in this document. Moreover, plaintiffs may renew their motion for expedited discovery after submission of the Joint Status Report.

CONCLUSION

For the foregoing reasons, defendant's motion to dismiss plaintiffs' complaint is DENIED and plaintiffs' motion to permit expedited discovery is DENIED.

IT IS SO ORDERED.

DATED: February 12, 2008

/s/ Frank C. Damrell, Jr.

FRANK C. DAMRELL, JR.

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 May 5, 2008, I served the foregoing document described as **PETITIONERS' REPLY 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,
Dept. 309
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 May 5, 2008, at Los Angeles, California.

Davina Jaboury