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August 30, 2010

Honorable Ronald M. George, Chief Justice,
and the Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

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AUG 30 2010

CLERK SUPREME COURT

RE: *Aryeh v. Canon Business Solutions, Inc.*, No. S184929
Letter Supporting Petition for Review or, Alternatively, Supporting Request for
Depublication (Cal. Rules of Court, rules 8.500(g), 8.1125(b).)

Dear Chief Justice George and Associate Justices:

The Attorney General respectfully requests that the Court grant the petition for review in *Aryeh v. Canon Business Solutions, Inc.*, No. B213104 (June 22, 2010), reported as 185 Cal.App.4th 1159, which raises important and unresolved questions about the four-year statute of limitations for causes of action under California's unfair competition law (UCL), Business and Professions Code section 17200 et seq. Alternatively, the Attorney General requests depublication to avoid the inevitable confusion that the opinion will cause to both courts and litigants if it remains as precedent.

Though the *Aryeh* decision involves the dismissal, as time barred, of a private putative class action under the UCL, the Attorney General supports review so that the Court can resolve the applicability to UCL cases of the continuous accrual doctrine, the similarly named, but conceptually distinct, continuing violation doctrine, and the delayed discovery rule. All three of these doctrines, if incorrectly applied in public UCL prosecutions, will result in the dismissal of timely and meritorious actions by the Attorney General and other law enforcement officials.

If the Court does not grant review, the Attorney General requests that the Court depublish the opinion so that it will not exacerbate confusion in this area of the law, where the courts have not been consistent in their approaches. If allowed to remain citable as precedent, the decision may have serious adverse ramifications for law enforcement agencies that regularly rely on the UCL to combat a host of unfair, deceptive and unlawful practices.

I. Introduction

Plaintiff-appellant Aryeh brought this putative UCL class action on behalf of himself and others for overcharges by the defendant-respondent during the four years preceding the action up until the date of judgment. In Aryeh's case, respondent allegedly overcharged him repeatedly, beginning six years before the lawsuit. Although respondent continued to commit wrongful acts within four years of the date that appellant filed his action, the appellate court held that the cause of action accrued when respondent committed the first act six years earlier. The court held that appellant's cause of action was time-barred and that he could not sue to redress *any* of the misconduct, no matter how recent.

The appellate court's holding flowed from its categorical rejection in UCL cases of the delayed discovery rule and "continuing violation" doctrine (which allow the plaintiff to reach conduct committed more than four years before the plaintiff files the complaint), and its failure to apply the "continuous accrual" doctrine. Under the delayed discovery rule, the statute of limitations begins to run when the plaintiff learns of the wrongful act rather than when the defendant commits the act.¹ Under the continuing violation doctrine, acts that occur outside the limitations period are actionable if they are part of a single course of conduct that continues into the limitations period. The court held that, as a matter of law, neither the delayed discovery rule nor the continuing violation doctrine applies in UCL cases. Further, the court held that Aryeh could not recover even for acts that respondent committed within four years of the lawsuit. The court should have applied, but did not apply, the *continuous accrual* doctrine. Under that doctrine, where a defendant repeatedly commits similar wrongful acts, each act will give rise to a new cause of action. An action to redress violations thus committed within the limitations period is timely; an action to redress violations outside the limitations period is not.

Thus, the opinion below addresses three important UCL questions of law: (1) where the defendant has committed a series of wrongful acts over a period of more than four years, whether a cause of action continuously accrues from each act or whether the plaintiff is barred by the statute of limitations from suing at all because of the failure to bring an action within four years of the first wrongful act; (2) whether the delayed discovery rule applies to UCL cases, an issue on which the appellate courts are divided; and (3) whether the continuing violation doctrine applies to UCL cases.

The appellate court's decision to preclude recovery even for recent bad acts where the conduct began outside the limitations period, as well as its wholesale rejection of the delayed discovery rule and the continuing violation doctrine in UCL cases, significantly undermines the effectiveness of California's consumer protection laws. First, the decision threatens to hinder public actions brought by the Attorney General and other law enforcement agencies because courts may apply the appellate court's holdings in public actions. Second, it cripples private

¹ The Attorney General takes no position on the question whether application of the delayed discovery rule should save Aryeh's complaint under the facts presented here.

consumer actions by barring many timely lawsuits against defendants who have been engaging in the misconduct for more than four years.

The decision of the Court of Appeal effectively offers a new species of immunity to the worst offenders—those who have been the most persistent in breaking the law. There is a pressing need for the Court’s guidance on these important questions of law and to secure uniformity of decision. Accordingly, the Attorney General supports the petition for review. Alternatively, the Attorney General supports the petitioner’s request for depublication to avoid confusion on these issues and to avert the threat that timely filed law enforcement actions will be dismissed as time barred.

II. The Attorney General’s Interest as Amicus Curiae

The UCL specifically authorizes the Attorney General and other public prosecutors to enforce the UCL on behalf of the People. (Bus. & Prof. Code, § 17204.) An appeal in a private action involving the UCL, such as the appeal in this case, may have significant ramifications for law enforcement agencies, which regularly rely on this law to combat a host of unfair, deceptive and unlawful practices. The appellate court’s rulings here on the UCL’s statute of limitations, if applied in public actions, will have damaging effects on public prosecutions under that law.

Moreover, the Attorney General has a significant interest in ensuring that the state’s consumer protection statutes are properly construed and applied in private actions. Legitimate actions by private litigants both supplement law enforcement efforts and vindicate consumers’ rights. Where, as here, a Court of Appeal’s misapplication of the law improperly prevents a timely filed private action from going forward, other, subtler acts of unfair competition may go unredressed, to the public’s detriment.

III. If Left Unreviewed, the Decision Below Will Serve as Precedent to Bar Timely Filed UCL Actions

As Justice Rubin explains in his dissenting opinion, appellant sought recovery only for overcharges that occurred within four years of the lawsuit, the statute of limitations for UCL cases. Analogizing this case to one for breach of contract, in which it is well established that each breach gives rise to a new cause of action, Justice Rubin reasoned that each act constituted a separate violation of the UCL. Applying this “continuous accrual” theory, Justice Rubin concluded that each act occurring within four years of the litigation was actionable. As with each new breach of contract, each new unfair practice “starts a new accrual period.” (*Aryeh, supra*, 185 Cal.App.4th at p. 1175 (dis. opn. of Rubin, J.)) The Attorney General agrees with Justice Rubin’s conclusion that, just as one can breach the same contract over and over again in substantially the same manner, one can repeatedly violate the UCL in substantially the same manner.

If incorrectly applied to public UCL actions, the majority opinion may immunize defendants who engage in repeated acts of misconduct beginning more than four years before prosecutors file a law enforcement action. To paraphrase Justice Rubin, the UCL's remedies should not be automatically unavailable for recent misconduct merely because the first misconduct took place outside the statute of limitations. Moreover, the decision does not further the statute of limitations' "fundamental purpose . . . to give defendants reasonable repose and to protect parties from having to defend stale claims." (*Aryeh, supra*, 185 Cal.App.4th at p. 1167, citation omitted.) The majority's reasoning instead provides repose to those defendants who continue to engage in wrongful acts within the limitations period.

IV. Granting Review Will Provide Guidance About Whether the Delayed Discovery Rule and Continuing Violation Doctrine Apply to UCL Cases

a. The appellate courts are divided on whether the delayed discovery rule applies to UCL cases

The Court of Appeal stated unequivocally that the delayed discovery rule does not apply to UCL actions. (*Aryeh, supra*, 185 Cal.App.4th at p. 1165, citing *Snapp & Associates Ins. Services, Inc. v. Robertson* (2002) 96 Cal.App.4th 884, 891.) As this Court has noted, however, the issue whether the delayed discovery rule applies to unfair competition claims is "currently not settled under California law." (*Grisham v. Philip Morris USA, Inc.* (2007) 40 Cal.4th 623, 635, fn. 7 [assuming without deciding that the delayed discovery rule applies in UCL cases]; see also, *Broberg v. Guardian Life Ins. Co. of America* (2009) 171 Cal.App.4th 912, 920 ["the Supreme Court has not yet decided, and the Courts of Appeal are in disagreement, whether the so-called delayed discovery rule applies to claims for unfair competition."].)

The lower court's per se rule against applying the delayed discovery rule in UCL cases would shield defendants that engage in long term campaigns of deception to sell their products – as the tobacco companies did, for example. (See *Grisham v. Philip Morris USA, Inc., supra*, 40 Cal.4th at p. 636 [Court rejected defendant's argument for conclusive presumption that public was aware of smoking's addictiveness and health risks, noting that tobacco companies may have "systematically suppressed and concealed material information and waged an aggressive campaign of disinformation about the health consequences of tobacco use."].) Concomitantly, the Court of Appeal's holding in this case would greatly disadvantage honest companies that advertise their wares truthfully. It would also wrongly protect other defendants whose misconduct may go unnoticed, such as makers of goods with latent defects or fiduciaries who breach their duties to beneficiaries. Accordingly, the Attorney General respectfully requests that the Court resolve the conflict on this important issue.

b. The *Aryeh* court's categorical rejection of the continuing violation doctrine in UCL cases wrongly dismisses the important policies that the UCL furthers

Courts have applied the continuing violation doctrine to cases brought under a variety of remedial statutes to hold a defendant liable for an entire course of conduct, even if the defendant engaged in some of that conduct outside the limitations period. (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 812.) This Court, for example, has applied the doctrine in an employment discrimination case under the Fair Employment and Housing Act (FEHA). (*Ibid.*) The Court noted that FEHA is to be liberally construed, and that this liberal construction extends to FEHA's statute of limitations. (*Id.* at p. 819.) Other courts have applied the doctrine to cases under California's fair debt collection practices laws. (See *Komarova v. National Credit Acceptance, Inc.* (2009) 175 Cal.App.4th 324, 345.)

The court below held that the continuing violation doctrine does not apply in UCL cases as a matter of law. The appellate court reasoned that the doctrine should not apply in the case before it because "[r]outinely billing and collecting for 'test' copies is not the type of harassing and egregious conduct the continuing violation doctrine is designed to deter." (*Aryeh v. Canon Business Solutions, Inc., supra*, 185 Cal.App.4th at p. 1170.) The court, however, went further in holding that the doctrine *never* applies in a UCL case, stating that "[n]o comparable policy considerations compel applying the continuing violations doctrine to violations of the UCL." (*Ibid.*)

Contrary to the conclusion of the court below, this Court has stated unambiguously that "[p]rotection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society." (*Ford Dealers Assn. v. Dept. of Motor Vehicles* (1982) 32 Cal.3d 347, 356, quoting *Vasquez v. Super. Court (Karp)* (1971) 4 Cal.3d 800, 808.) UCL actions often redress "egregious and harassing conduct," such as those actions that redress debt collection abuses or other harassment of consumers. Because of the importance of consumer protection, the UCL, like the fair housing and employment laws, is broadly construed. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 209-210.) The UCL's broad construction should extend to its statute of limitations. The Attorney General thus requests this Court's guidance on the important question of whether, and in what circumstances, the continuing violation doctrine should be applied to advance the UCL's remedial purpose.

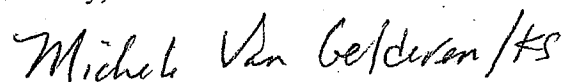
V. Conclusion

The Attorney General respectfully requests that the Court grant the petition to ensure that timely consumer protection actions are allowed to proceed, and to address the important issues whether the delayed discovery rule and continuing violation doctrine apply to UCL cases. Without this Court's guidance, both private plaintiffs and public prosecutors will likely face obstacles in litigating against bad actors, in particular those who have been flouting the law for many years and who are the most effective at concealing their wrongdoing. However, if the

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Court determines that review is not appropriate, the Attorney General requests that the Court depublish the opinion to prevent confusion among courts and litigants, and to eliminate the risk that this decision presents—that timely filed public and private UCL actions will be wrongly dismissed as time barred.

Sincerely,

Handwritten signature of Michele Van Gelderen in black ink.

MICHELE R. VAN GELDEREN
Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

MVG

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: Jamshid Aryeh vs. Canon Business Solutions, Inc., et al.
No.: California Supreme Court Case No. S184929

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 30, 2010, I served the attached

**LETTER SUPPORTING PETITION FOR REVIEW OR, ALTERNATIVELY,
SUPPORTING REQUEST FOR DEPUBLICATION DATED AUGUST 30, 2010**

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

See Service List Attached

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 30, 2010, at San Francisco, California.

Sandy Shum

Declarant



Signature

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