IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
Case No. S157001

PAULINE FAIRBANKS et al.,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent;

FARMERS NEW WORLD LIFE INSURANCE COMPANY et al.,

Real Parties in Interest.

AFTER A DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION THREE, CASE NO. B198538

FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
HONORABLE ANTHONY J. MOHR
LOS ANGELES SUPERIOR COURT CASE NO. BC305603

REAL PARTIES IN INTEREST'S ANSWER BRIEF ON THE MERITS

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I. INTRODUCTION

In *Civil Service Employees Ins. Co. v. Superior Court* (1978) 22 Cal.3d 362, 376, this Court stated that the Consumers Legal Remedies Act ("CLRA") "does not directly apply to the present case because insurance is technically neither a 'good' nor a 'service' within the meaning of the" CLRA. This Court's statement in *Civil Service Employees* could not be clearer, and California and federal court decisions have consistently followed and applied the Court's conclusion that the CLRA does not apply to insurance.

Petitioners Pauline Fairbanks and Michael Cobb ("Petitioners") ask this Court to repudiate its conclusion in *Civil Service Employees* and hold that the CLRA *does* apply to insurance. But Petitioners have failed to advance any compelling reason why this Court should abandon its statement in *Civil Service Employees*. They cite no authority that either rejects or undermines this Court's statement, or that holds that insurance is a good or a service within the meaning of the CLRA.

In any event, an independent analysis of both the plain language and the legislative history of the CLRA confirms that insurance does not fall within the statute, as both the Court of Appeal and the trial court found in this case.

First, under the plain language of the CLRA, insurance is neither a "good" nor a "service." The CLRA's definition of "goods" is limited to "tangible chattels." Because, as Petitioners concede, insurance is intangible property, not a "tangible chattel," it is not covered under the CLRA's definition of "goods."

Insurance also does not fall within the definition of "services," defined by the CLRA 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." Insurance is none of these things. Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event. Ins. Code § 22. Accordingly, it does not fall within the CLRA.

Petitioners' reading of the CLRA would defeat the Legislature's intent to cover *tangible* property and exclude *intangible* property from the scope of the statute. Virtually every "intangible" good (e.g., securities, bank loans and credit cards) carries with it some ancillary activities that could be characterized as "services." If, as Petitioners contend, the presence of such services renders a transaction subject to the CLRA, the limitation of the CLRA to *tangible* goods evaporates. In structuring the statute to distinguish between tangible and intangible goods, the Legislature did not intend for the CLRA to apply in the all-encompassing way suggested by Petitioners.

Second, even if it were not clear from the plain language of the CLRA whether insurance fell within the statute's ambit, the legislative history of the act reflects that insurance was intentionally omitted from the definition of "services." Unlike the model National Consumer Act, from which the California Legislature primarily drew support in drafting the CLRA, the CLRA does *not* expressly include insurance in the definition of services. As the Court of Appeal reasoned, the "obvious conclusion is that the Legislature intentionally omitted insurance because it did not intend for the CLRA to apply to insurance." Moreover, there is nothing in the legislative history to support Petitioners' contention that the omission of

"insurance" from the CLRA's definition of "services" was due to a perceived redundancy.

Third, allowing a CLRA remedy for deceptive insurance marketing practices would undermine this Court's holding in *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287, which held that the Legislature did not intend to provide a private right of action for violations of the Unfair Insurance Practices Act ("UIPA"). Contrary to Petitioners' assertion, defendants and real parties in interest Farmers New World Life Insurance Company ("FNWL") and Farmers Group, Inc. (collectively "Farmers") are not arguing that insurance is exempt from coverage under the CLRA merely because insurance is a regulated industry. Rather, Farmers contends that if insurance were considered a "service" under the CLRA, many of the unfair and deceptive practices prohibited by the UIPA would *also* constitute "proscribed practices" under the CLRA. Thus, interpreting the CLRA to apply to insurance would undermine *Moradi-Shalal* by allowing a private right of action for the very conduct that is *not* the subject of private litigation under the UIPA. The Court of Appeal properly found that, in enacting the CLRA, the Legislature did not intend to drastically expand, *sub silentio*, the reach of the UIPA to include private rights of action.

Fourth, Petitioners' discussion of other jurisdictions' treatment of insurance under various consumer protection statutes in those states is unavailing. In states where courts have found that consumer protection statutes apply to insurance, the decisions turn on the language of the acts in question. Because of the broader language in other states' consumer protection statutes, how those states have construed their respective statutes does not bear on how this Court should interpret the CLRA. California has

its own statutes and unique legislative history and case authority, each of which compels the conclusion that the CLRA does not apply to insurance.

As both the Court of Appeal and the Superior Court correctly found, the CLRA applies only to alleged misconduct in connection with the sale of certain "goods" or "services," as defined in the CLRA, and insurance is neither. Accordingly, the trial court's order granting Farmers' motion for judgment on the pleadings with respect to Petitioners' CLRA claim should be affirmed.

II. STATEMENT OF THE CASE

Petitioners filed this lawsuit in November 2003 on behalf of themselves and a putative nationwide class of Farmers Universal Life ("FUL") and Farmers Flexible Universal Life ("FFUL") policyholders. (Exhibit ("Ex.") Ex. 1.[1]) The thrust of Petitioners' allegations is that Farmers committed unfair, deceptive or fraudulent acts in marketing and selling FUL and FFUL life insurance policies. (Exs. 1-3.)

On October 23, 2006, Petitioners filed a Third Amended Complaint alleging four causes of action: (1) violations of Business & Professions Code section 17200 (the "UCL"); (2) negligent misrepresentation; (3) fraud; and (4) violations of the CLRA. (Ex. 3.) Each of the first three purported claims were based upon the same factual allegations which

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[1] All references to exhibits herein are to the Appendix of Exhibits filed by Petitioners in the Court of Appeal in support of their Petition for Writ of Mandate.

formed the basis for the CLRA cause of action. (*Id.*) Farmers has filed an answer to the first three causes of action, denying liability.[2]

Farmers filed a motion for judgment on the pleadings attacking Petitioners' cause of action under the CLRA, on the grounds that the life insurance policies issued to Petitioners did not fall within the ambit of the CLRA. (Exs. 8 and 13.) Petitioners opposed that motion. (Ex. 11.) On February 9, 2007, the trial court granted Farmers' motion for judgment on the pleadings with regard to Petitioners' CLRA claim (Ex. 15), and filed its order granting the motion on February 28, 2007. (Ex. 16.)

On April 27, 2007, Petitioners filed a petition for writ of mandate in the Court of Appeal, requesting that the court issue a peremptory writ of mandate ordering the Superior Court to vacate its order granting judgment on the pleadings as to Petitioners' cause of action under the CLRA, and to enter a new order denying the motion. On May 15, 2007, the Court of Appeal for the Second Appellate District, Division Three, issued an order to show cause regarding why the relief sought in the petition should or should not be granted. Farmers filed an opposition to the writ petition on May 31, 2007, and Petitioners filed their response on June 14, 2007. The Court of Appeal heard oral argument from the parties on July 17, 2007.

On August 22, 2007, the Court of Appeal ruled that Farmers' motion for judgment on the pleadings as to Petitioners' CLRA claim was properly granted by the Superior Court. In so ruling, the court held that insurance

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[2] Petitioners have filed a motion for class certification in the Superior Court, to which Farmers has filed a written opposition. At the time this Answer Brief was filed, the Superior Court had not ruled on Petitioners' motion.

did not fall within the scope of the CLRA. The court's opinion, authored by Justice H. Walter Croskey, was certified for publication. In response to a written request by Farmers, the opinion was modified, without a change in the judgment, on September 5, 2007.

Petitioners filed a petition for rehearing in the Court of Appeal on September 7, 2007, which was denied. Petitioners then filed a petition for review in this Court on October 2, 2007. This Court granted review on November 14, 2007.

III. STANDARD OF REVIEW

A defendant's motion for judgment on the pleadings "is equivalent to a demurrer and is governed by the same standard of review." *Pang v. Beverly Hosp, Inc.* (2000) 79 Cal.App.4th 986, 989. All material facts that were properly pleaded are deemed true, but not the contentions, deductions, or conclusions of fact or law. *Id.* If the pleading defect cannot be cured, then this Court must affirm the granting of defendant's motion. *Id.* Finally, the judgment will be affirmed if it is proper on any grounds raised in the defendant's motion even if the court did not rely on those grounds. *Id.*

IV. UNDER THE PLAIN LANGUAGE OF THE CLRA, INSURANCE IS NEITHER A "GOOD" NOR A "SERVICE"

This Court's role in construing a statute is to ascertain the intent of the Legislature in order to effectuate the purpose of the law. *People v. Johnson* (2002) 28 Cal.4th 240, 244. Because the statutory language is generally the most reliable indicator of that intent, the Court looks first at the words themselves, giving them their usual and ordinary meaning and construing them in context. *Id.* If the plain language of the statute is clear and unambiguous, the inquiry ends. *Id.* If the statutory language contains

no ambiguity, the Legislature is presumed to have meant what it said, and the plain meaning of the statute governs. *Id.*

The CLRA renders unlawful certain enumerated "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." Civ. Code § 1770 (italics added). The CLRA defines "goods" as "tangible chattels bought or leased for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for these goods, and including goods which, at the time of the sale or subsequently, are to be so affixed to real property as to become a part of real property." Civ. Code § 1761(a). "Services" under the CLRA are defined 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." Civ. Code § 1761(b).

The Court of Appeal's decision, which found that insurance is neither a good nor a service within the meaning of the CLRA, is legally sound and is supported by ample authority. As this Court noted in *Civil Service Employees Ins. Co. v. Superior Court*, *supra*, 22 Cal. 3d at p. 376, insurance is neither a "good" nor a "service" as defined for purposes of the CLRA. As such, the CLRA does not extend to the alleged conduct at issue in this case, and Farmers was entitled to judgment on the pleadings with respect to Petitioners' CLRA claim.

A. The CLRA's Definition of "Goods" Is Limited to "Tangible Chattels," and Insurance Is *Intangible* Property

Insurance does not fall within the CLRA's definition of "goods," which includes only "tangible chattels." Civ. Code § 1761(a). Plainly, an insurance policy is not a "tangible chattel." While the paper on which the

policy is printed is tangible, that paper has no intrinsic value and exists only as indicia of a contract between the insurer and policyholder; thus, it is not a "good" under the CLRA. *See Berry v. American Express Publishing, Inc.* (2007) 147 Cal.App.4th 224, 229, review den. May 16, 2007 (*Berry*) (holding that a credit card is not a "good" for purposes of the CLRA).

The fact that the CLRA's definition of "goods" includes only "tangible chattels" indicates that there is a separate category of property which is not covered by the act—namely, *intangible* property. If the Legislature had intended for the CLRA to apply to *all* property, including intangible property, it could have worded the statute consistent with that purpose.[3] Instead, the plain language of subdivision (b) of Section 1761 *excluded* certain categories of property when it limited the CLRA's application to only "tangible chattels." Accordingly, intangible property does not fall within the ambit of the CLRA. This interpretation follows from the long recognized principle that "every word, phrase and provision employed in a statute is intended to have meaning and to perform a useful function." *Clements v. T. R. Bechtel Co.* (1954) 43 Cal.2d 227, 233.

This Court has recognized the difference between tangible personal property and intangible personal property in the taxation context. *See Navistar Int'l Transp. Corp. v. State Bd. of Equalization* (1994) 8 Cal.4th 868, 874-875 (*Navistar*). In *Navistar* the issue before this Court was whether the sale of various categories of assets of a company were subject

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[3] Other states' consumer protection statutes expressly cover, for example, "property whether tangible or intangible," as well as "*any* services and *any* property." *See, e.g., Doyle v. St. Paul Fire & Marine Ins. Co.* (D. Conn. 1984) 583 F.Supp. 554, 556; *Pekular v. Eich* (Pa. Super. Ct. 1986) 513 A.2d 427, 433 (emphasis added).

to sales tax. *Id.* at p. 874. The Court noted that California law imposed a tax on the retail sale of tangible personal property, but not on the sale of intangible personal property. *Id.*

The *Navistar* court clarified the distinction between tangible and intangible property, stating that *intangible* property "is generally defined as property that is a 'right' rather than a physical object." *Id.* at p. 875 (citations omitted). On the other hand, *tangible* property "is that which is visible and corporeal, having substance and body as contrasted with incorporeal property rights such as franchises, choses in action, copyrights, the circulation of a newspaper, *annuities* and the like."[4] *Id.* (quotations and citation omitted; emphasis added). The Court further stated:

> An intangible right may be evidenced or represented by a physical object such as a promissory note or a certificate of stock. When an intangible right is so represented, the physical object representing the particular right, while capable of perception by the senses, is nevertheless considered intangible property for tax purposes. Thus, ... intangible property is defined as including personal property that is not itself intrinsically valuable, but that derives its value from what it represents or evidences.

Id. (citations omitted).

Insurance falls squarely within the category of intangible goods not covered by the CLRA. An insurance policy provides an intangible right (payment of benefits upon the occurrence of a contingent event) that is evidenced by a physical object—the paper constituting the insurance contract—but derives its value from what it represents or evidences, namely the contract between the insurer and policyholder. In short, a

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[4] Annuities are included in the Insurance Code's definition of "life insurance." Ins. Code § 101.

policy of insurance is a contract of indemnity,[5] and qualifies as an intangible good. *See, e.g., Capital Blue Cross & Subsidiaries v. Comm'r* (3d Cir. 2005) 431 F.3d 117, 125 (referring to insurance contracts as "intangible assets"); *In re Brookfield Clothes, Inc.* (S.D.N.Y. 1983) 31 B.R. 978, 980 (describing "intangible assets such as insurance policies, trade secrets, trademarks, names, and goodwill"); *see also Richardson v. GAB Bus. Servs., Inc.* (1984) 161 Cal.App.3d 519, 523 ("Essential to insurance is the element of shifting of the risk of loss, subject to contingent or future events, by legally binding agreement.") (citation omitted).

Even Petitioners recognized that insurance is an intangible good when they referred in their writ petition (filed in the Court of Appeal) to "intangibles such as insurance policies and securities." (Pet. for Writ of Mandate at p. 18.) In sum, the plain meaning of the term "tangible chattels" does not include insurance because insurance is intangible property.

B. Insurance Is Not a "Service" within the Meaning of the CLRA

The Court of Appeal correctly concluded that insurance is not a "service" within the plain meaning of the language of the CLRA. (Slip Opinion at p. 7.) As the court noted, "[o]bviously, insurance contracts are

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[5] A leading treatise defines insurance as follows: "Essentially, insurance is a contract by which one party (the insurer), for a consideration that usually is paid in money, ... promises to make a certain payment, usually of money, upon the destruction or injury of 'something' in which the other party (the insured) has an interest. The specific 'thing' that must be destroyed or injured in order to trigger the insurer's obligation varies according to the nature of the contract. In fire insurance and in marine insurance the thing insured is property; in life or accident insurance it is the life or health of the insured." *Couch on Insurance* § 1.6 (3d ed. 2007).

not work or labor." (Slip Op. at p. 6.) The question, then, is whether these indemnification agreements are "services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods." Civ. Code § 1761(b). The Court of Appeal observed that an insurance contract "is not something akin to a haircut, a plumbing repair, or a two-year warranty on a microwave oven – it is simply an agreement to pay if and when an identifiable event occurs." (Slip Op. at p. 6.) The court concluded that insurance "is an essentially financial transaction, completely unrelated to the sale or lease of any identifiable consumer good or service." (*Id.*)

1. This Court in *Civil Service Employees* Expressly Stated That Insurance Is *Not* a "Service" within the Meaning of the CLRA

This Court has concluded that the plain language of the CLRA does not cover insurance contracts because they do not fall within the statute's definitions of "goods" or "services." *See Civil Service Employees*, *supra*, 22 Cal.3d 362, 376. In *Civil Service Employees* the plaintiff brought a class action against an insurance company seeking to recover damages resulting from the insurer's refusal to pay benefits allegedly owed under a medical expense clause contained in an insurance policy. The trial court certified the case as a class action and granted plaintiff's motion for partial summary judgment, rejecting the insurer's interpretation of the insurance policy. Concurrently with the partial summary judgment order, the trial court ruled that the insurer had to bear the cost of notifying absent class members of the pendency of the action. The insurer petitioned this Court, seeking a writ of mandate or prohibition to compel the trial court to vacate the orders.

The insurer in *Civil Service Employees* attacked the validity of the trial court's class certification order insofar as that order required it initially to bear the cost of notifying absent members of the class of the pendency of the action. The insurer argued both that the trial court lacked authority to shift such notice costs to a defendant and that, even if the court possessed such authority, its order violated due process by requiring a defendant "to finance" a lawsuit against itself.

After considering and rejecting the insurer's argument that federal authority prohibited such a preliminary cost-shifting order, this Court stated:

> In California, in contrast to the federal realm, the Legislature has specifically authorized trial courts in class actions to impose the cost of notice upon either the plaintiff or the defendant. Civil Code section 1781, subdivision (d), a provision of the Consumer Legal Remedies Act enacted in 1970 to facilitate consumer class actions, explicitly provides that "[if] the action is permitted as a class action, the court may direct *either party* to notify each member of the class of the action." (Italics added.)
>
> **Although section 1781, subdivision (d) does not directly apply to the present case because insurance is technically neither a "good" nor a "service" within the meaning of the act (Civ. Code, § 1761, subds. (a), (b))**, we expressly held in *Vasquez v. Superior Court* ..., that the class action procedures prescribed by the Consumer Legal Remedies Act could and should appropriately be utilized by trial courts in all class actions.

Id. at 376 (emphasis added).

This Court's statement that the CLRA "does not directly apply to the present case because insurance is technically neither a 'good' nor a 'service' within the meaning of the act" could not be clearer. This statement reflects that the Court expressly considered whether the CLRA applied to insurance and, after reviewing and interpreting the statute, the

Court found it did not. Petitioners offer no compelling reason why this Court's statement either does not apply here or should not be followed.

Instead, Petitioners attempt to trivialize this express statement by asserting that it was "dictum." However, "dictum of the Supreme Court commands serious respect." *Santa Monica Hosp. Med. Ctr. v. Superior Court* (1988) 203 Cal.App.3d 1026, 1033. Moreover, "[t]o say that dicta are not controlling ... does not mean that they are to be ignored; on the contrary, dicta are often followed." *California Apt. Ass'n v. City of Stockton* (2000) 80 Cal.App.4th 699, 710 (2000) (internal quotes and citation omitted).

Petitioners assert that "the very language of the dictum undercuts any persuasive force it might have with regard to the reach of the CLRA." (Petitioners' Opening Brief on the Merits ("Pet'r's Br.") at p. 19.) This is because, Petitioners contend, the *Civil Service Employees* court stated that "insurance is *technically* neither a 'good' nor a 'service." (*Id.*; italics added.) Petitioners' argument ignores the fact that statutory interpretation is, in its very essence, a "technical" exercise, requiring a "technical" analysis of the meanings of the words and phrases which are at issue. Moreover, Petitioners cannot avoid the fact that this Court's statement that the CLRA "does not directly apply" to insurance was specifically directed to the "reach of the CLRA," and was not offered in a vacuum. Thus, Petitioners' assertion that this Court's statement in *Civil Service Employees* should be disregarded because it is a "technical point," is not an escape hatch from the clear import of the language in that case.

2. Both California and Federal Cases Have Followed This Court's Statement That Insurance Is Not Covered by the CLRA

Three separate federal district courts confronted with the precise issue presented here have found this Court's guidance to be compelling and have applied the statement in *Civil Service Employees* that "insurance is technically neither a 'good' nor a 'service' within the meaning of the" CLRA to dismiss CLRA claims. *See Estate of Migliaccio v. Midland Nat'l Life Ins. Co.* (C.D. Cal. 2006) 436 F.Supp.2d 1095, 1109 (*Estate of Migliaccio*) ("The Court has located no subsequent authority which calls into question the California Supreme Court's dicta in *Civil Services Employees*... . [T]he Court finds that *Civil Services Employees* remains the strongest indication of how the California Supreme Court[] would resolve this issue"); *Bacon ex rel. Moroney v. American Int'l Group* (N.D. Cal. 2006) 2006 U.S. Dist. LEXIS 17881, *25-29 (*Bacon*); *Newland v. Progressive Corp.* (E.D. Cal. 2006) 2006 U.S. Dist. LEXIS 62359, *13-15 (*Newland*).[6]

Both *Estate of Migliaccio* and *Bacon* applied this Court's guidance in *Civil Services Employees* to find that the CLRA did not cover annuities, which the California Insurance Code includes in the definition of "life insurance." *See* Ins. Code § 101. The *Newland* court, following *Civil Service Employees*, found that the statute did not apply where insureds

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[6] As reflected in *Estate of Migliaccio*, the decision in *Bacon* was initially published at 415 F.Supp.2d 1027, and later depublished by the trial judge. In any event, unpublished federal district court opinions are properly cited to, and may be considered by California state courts as persuasive authority. *City of Hawthorne ex rel. Wohlner v. H.C. Disposal Co.* (2003) 109 Cal.App.4th 1668, 1678, fn. 5.

brought a CLRA action based on their insurance carrier's purportedly "unreasonable" denial of benefits under an automobile insurance policy.

The statement in *Civil Service Employees* has also been followed in analogous cases involving alleged deceptive practices by credit card issuers. In *Berry v. American Express Publishing, Inc.*, *supra*, 147 Cal.App.4th 224, 232-233, a credit cardholder sued under the CLRA, claiming that American Express had charged him for magazines he never ordered. In a case of "first impression" the court held that "the extension of credit, such as issuing a credit card, separate and apart from the sale or lease of any specific goods or services, does not fall within the scope of the [CLRA]." *Berry*, *supra*, 147 Cal.App.4th at p. 232-233. In so holding, the court noted:

> [a]lthough CLRA has been interpreted broadly, courts have not expanded it beyond its express terms. For example, despite the potential for unfair or unlawful insurance practices, the California Supreme Court observed that CLRA did not apply to an automobile insurance policy, "because insurance is technically neither a 'good' nor a 'service' within the meaning of the act... ."

Id. (citing *Civil Service Employees*, *supra*, 22 Cal.3d at p. 376).

Berry has been followed in a number of credit card cases in which plaintiffs asserted claims under the CLRA. *See Van Slyke v. Capital One Bank*, 503 F.Supp.2d 1353 (N.D. Cal. 2007) (*Van Slyke*) (CLRA inapplicable to alleged deceptive credit card practices in the subprime market); *Augustine v. FIA Card Servs., N.A.* (E.D. Cal. 2007) 485 F.Supp.2d 1172, 1174-1175 (*Augustine*) (CLRA inapplicable to claim for retroactive interest rate increases by credit card issuer); *In re Late Fee & Over-Limit Fee Litig.* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 86408, *35 (*Late Fee Litig.*) (dismissing CLRA claim for excessive late fees, or over-

limit fees, because credit card accounts are not "goods or services" subject to the CLRA).

The *Berry* analysis applies here, and insurance therefore falls outside the reach of the CLRA.

3. Insurance Does Not Fall within the Dictionary Definition of "Service"

Petitioners' Opening Brief cites one dictionary definition of "service" that they contend supports their position that insurance should be construed as a "service" within the meaning of the CLRA. In particular, they seize upon two aspects of the definition they cite -- "help, use, benefit" and "contribution to the welfare of others." (Pet'r's Br. at p. 10.) Petitioners assert that "'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.'" (*Id.*)

Petitioners' argument proves too much. Under Petitioners' view, virtually *every* contract would qualify as a "service" under the CLRA, because, in any contractual arrangement, the parties thereto are likely receiving some "benefit." It cannot be that everything which "benefits" someone qualifies as a "service" within the meaning of the CLRA. Indeed, intangible goods (such as a trademark or a stock certificate) could presumably "benefit" someone or "contribute to their welfare," but nonetheless are not covered by the CLRA.

4. Petitioners Rely on Inapposite Authorities in Support of Their Claim that Insurance Is a "Service"

Petitioners cite various cases in support of their claim that insurance falls with the scope of the CLRA, but none of these authorities supports

their position. First, Petitioners incorrectly assert that this Court and others in the state "have long assumed that insurance is a service." (Pet'r's Br. at p. 16.) Petitioners can only make this statement by ignoring *Civil Service Employees*, and other cases following it, which have expressly stated that insurance is *not* a service within the meaning of the CLRA.

Petitioners cite *Kagan v. Gibraltar Sav. & Loan Ass'n* (1984) 35 Cal.3d 582 (*Kagan*), and *Mass. Mut. Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282 (*Mass. Mutual*), neither of which is authority for the proposition that life insurance is a good or service under the CLRA. Not only did *Kagan* not involve insurance, it did not opine as to the definition of "goods" and "services" under the CLRA, and thus had no reason to address this Court's earlier statement in *Civil Service Employees* to the effect that insurance is not a "good" or "service" within the meaning of the CLRA. Likewise, in *Mass. Mutual*, although the Court of Appeal affirmed certification of a class action against an insurer that included, *inter alia*, a CLRA claim, there is no indication that any party ever raised a question as to whether insurance is a good or service under the CLRA, and the court did not discuss the issue. For these reasons, the courts in *Bacon* and *Estate of Migliaccio* found that *Kagan* and *Mass. Mutual* were irrelevant to the issue whether insurance is covered by the CLRA. Moreover, nowhere does either *Kagan* or *Mass. Mutual* refer to *Civil Service Employees*, let alone attempt to distinguish or disapprove of that case in any way. In short, neither case considered whether the CLRA applies to insurance.

Petitioners' reliance on *Egan v. Mut. of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 820 (*Egan*), is also misplaced. *Egan*, which was a bad faith case and did not involve any claims under the CLRA, merely referred to insurers generally as "supplier[s] of a **public** service," without considering

whether insurance met the narrower definition of "service," as that term is defined by the CLRA. *Id.* (emphasis added). Indeed, a "public service" is "a service rendered in the public interest," which is distinct from the definition of "service" in the CLRA -- "work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods." Civ. Code § 1761(b). Nor did *Egan* disapprove of the statement in *Civil Service Employees*, made one year earlier, that insurance is "neither a 'good' nor a 'service'" within the meaning of the CLRA.

Petitioners cite *Hitz v. Interstate Bank* (1995) 38 Cal.App.4th 274, for the proposition that insurance policies include "services" within the meaning of the CLRA. In *Hitz* plaintiff credit cardholders sued a bank to invalidate late and over-limit fees charged under their credit cards, contending that these fees were invalid liquidated damages under Civil Code section 1671(d), which limits liquidated damages in consumer contracts for the purchase of "personal property or services." The *Hitz* court ruled that even if a credit card's extension of credit does not constitute "services," credit cards provide additional "convenience services" by allowing cardholders to make "cashless" purchases and then pay off their balance in full each month without a finance charge. *Id.* at p. 287. On this basis, the court found that the credit card agreements provided "services," and that Section 1671 applied.

Hitz is not authority for applying the CLRA to insurance. First, *Hitz* was decided under a different statute, Civil Code section 1671, and did not involve a determination of that statute's application to insurance. Further, the court's "convenience services" analysis was flawed, even under that statute. The court assumed that the purported "convenience services"—

cashless and checkless purchasing—did not involve an extension of credit. However, the court overlooked the fact that credit *is* extended to those cardholders who make purchasers and pay off their balances each month, but only for a shorter period of time (30 days or less) and with no interest. Moreover, *Berry* and its progeny (*Augustine, Van Slyke* and *Late Fee Litig.*), which are cases brought on behalf of credit cardholders alleging CLRA claims after *Hitz*, have each found that the CLRA is *inapplicable* to such claims, declining to follow *Hitz*, either expressly or implicitly.[7] None of these cases found that ancillary activities performed in connection with credit card agreements make them subject to the CLRA.

Petitioners' reliance on two mortgage loan cases, *Jefferson v. Chase Home Fin. LLC* (N.D. Cal. 2007) 2007 WL 1302984 (*Jefferson*), and *Hernandez v. Hilltop Fin. Mortg., Inc.* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 80867 (*Hernandez*), is also misplaced. In *Jefferson*, plaintiffs sued a mortgage lender, Chase, claiming that it failed to promptly credit the borrowers' accounts with mid-monthly prepayments, thereby improperly accruing interest on the accounts, allegedly in violation of the CLRA, the UCL and other California laws. The court denied defendants' motion to dismiss the CLRA claim, concluding that "financial services relating to real estate transactions" are covered by the CLRA. *Jefferson, supra*, 2007 WL 1302984 at p. *3. In so ruling, the *Jefferson* court acknowledged that its decision was contrary to the California Court of Appeal's decision in *McKell v. Washington Mut., Inc.* (2006) 142 Cal.App.4th 1457 (*McKell*).

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[7] While *Van Slyke* expressly referenced *Hitz*, the *Berry*, *Augustine*, and *Late Fee Litig.* courts effectively rejected the reasoning of *Hitz* without directly citing that case.

McKell held that the CLRA did *not* apply to alleged overcharges for underwriting, tax services and wire transfer fees charged in conjunction with the making of home loans, because plaintiffs had failed to allege the sale or lease of "goods" or "services" within the meaning of the CLRA. *Id.* at 1488.

The *Jefferson* court criticized *McKell*'s lack of "analysis," but its own reasoning is seriously flawed. First, the court attempted to distinguish *McKell* by stating that defendant Chase allegedly made "misrepresentations in connection with the sale of financial services." *Jefferson*, *supra*, 2007 WL 1302984 at p. *2. However, the only support cited by the court for this proposition was a provision in the borrowers' mortgage notes allowing prepayments without penalty. Thus, the court found "financial services" simply in the payment terms of the notes. Such an expansive view of "services" would give no effect to the Legislature's deliberate exclusion of "credit" transactions from the CLRA, as discussed in *Berry*, *supra*, 147 Cal.App.4th at p. 230-232. Oddly, the *Jefferson* court went on to *criticize* *Berry* for taking into account the legislative history showing that the Legislature rejected the inclusion of "credit" transactions within the CLRA. *Jefferson*, *supra*, 2007 WL 1302984 at p. *3. Finally, the court cited *Estate of Migliaccio* without mentioning that the *Migliaccio* decision held that the sale of annuities was *not* subject to the CLRA. *Id.* In short, *Jefferson* was incorrectly decided, even as to the mortgage loan allegations before it, and

the decision is not persuasive authority that the CLRA extends to insurance.[8]

5. Petitioners' "Service" Argument Would Effectively Nullify the CLRA's Distinction Between Tangible and Intangible Property

Relying on the *Hitz* line of cases, Petitioners attempt to force insurance within the scope of the CLRA by arguing that insurance policies are "not only contracts of indemnity," but are also "bundles of services by which insurers purport to enhance the security of families they serve." (Pet'r's Br. at p. 11.) If adopted, Petitioners' reading of the CLRA would defeat the Legislature's intent to cover *tangible* property and exclude *intangible* property from the scope of the statute. Virtually all "intangible" property carries with it some ancillary activities that could be characterized as "services." If, as Petitioners contend, the presence of such services renders a transaction subject to the CLRA, the limitation of the CLRA to *tangible* goods evaporates.

Here, Petitioners first point to "efforts expended by insurance agents and others in offering policies" (Pet'r's Br. at p. 11), but these "efforts" do not transmute insurance into "services" under the CLRA. Insurers do not offer for purchase to the public "sales activities" or "sales services." An insurance agent's attempt to sell a policy to a potential insured is not a

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[8] *Hernandez*, *supra*, 2007 U.S. Dist. LEXIS 80867, also a mortgage loan case, followed *Jefferson*. Its reasoning is flawed for the same reasons as *Jefferson*. In addition, *Hernandez* involved a number of services for which the plaintiffs were separately charged (a "loan processing fee," a "loan origination fee," an "admin fee," an "underwriting fee," and an application fee). Thus, the transaction could at least arguably be characterized as involving the "sale" of "services," unlike the insurance policies in the present case.

service "sold or leased" to the insured; it is merely activity done in furtherance of causing the parties to enter into a contract to purchase an intangible good.

Petitioners further point to "underwriting services, actuarial calculations, and claims handling" as examples of "services" offered by insurers. (*Id.*) First, underwriting and actuarial functions are not services that are "sold or leased" to the insured. Rather, they are internal business operations that are performed by insurance companies in order to determine whether (and on what conditions, including price) to insure against certain risks. Second, claims handling is merely the process of determining the amount owed by the insurance company under its contract, and assuring that payment is made to the policyholder, *i.e.*, a necessary step in complying with the insurer's indemnity obligation. If, as Petitioners contend, the presence of such functions renders the transaction subject to the CLRA, the act's limitation to *tangible* goods would be nullified, because virtually every *intangible* good carries with it some ancillary activities that could be characterized as "services."[9]

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[9] Petitioners' "services" argument would also render other provisions of the CLRA ineffective. For example, transactions for the sale of real property are *excluded* from the CLRA (Civ. Code § 1754), but invariably, some aspects of such transactions could be characterized as "services," such as a real estate agent advising purchasers and processing transaction paperwork. Under Petitioners' argument, the performance of these ancillary activities would bring real estate transactions within the CLRA, notwithstanding their express exclusion from the statute. The court in *McKell v. Washington Mut., Inc.*, *supra*, 142 Cal.App.4th 1457, properly found that real estate was not covered by the CLRA (despite the presence of such collateral "services") and this Court should do the same as to the intangible property (insurance policies) involved in the present case.

Petitioners also contend that sending out annual reports to policyholders regarding the status of their policies amounts to "services" within the meaning of the CLRA. Not so. The Court of Appeal's decision extended to "claims involving the sale **or administration** of insurance policies." (Slip Op. at p. 8; emphasis added.) As the Court of Appeal tacitly acknowledged, merely because an insurance company performs some administrative functions, such as sending out annual reports to policyholders, does not bring insurance within the definition of "services." This conclusion is consistent with *Berry* and the numerous other cases holding that credit card company practices are not within the reach of the CLRA. Obviously, a credit card issuer performs certain functions other than merely issuing the card—*e.g.*, calculating interest charges and account balances, billing cardholders monthly, paying merchants whose patrons use the cards—yet these functions did not prevent *Berry* and its progeny from finding that alleged deceptive marketing of credit cards is beyond the scope of the CLRA.

In a final attempt to bring insurance within the CLRA, Petitioners assert that, with regard to the specific life insurance policies at issue in this case, "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." (Pet'r's Br. at p. 12.) However, Petitioners make this assertion *without any citation to the complaint* or any other documents before the Court. Indeed, the complaint contains no such allegations. (*See* Ex. 3.) This unsupported statement should accordingly be disregarded. Moreover, while it is unclear exactly what Petitioners are referring to in this statement, any purported "guidance" does not relate in

any way to the "sale or of goods or services," and, if anything, is akin to the other ancillary activities discussed herein.[10]

An insurance policy does not provide "labor" or work," nor does the insurer perform "services." Instead, the insurer merely agrees to perform the contractual obligation of paying certain sums in the case of a contingent loss, and to carry out the ancillary administrative steps necessary to perform the contract (*e.g.*, sending out premium billing notices, accepting payment of premiums, crediting interest in accordance with policy terms, holding reserves to pay claims, etc.) None of these functions are independent "services" provided to customers, nor are they sold or paid for separate from the policy itself.

Petitioners' argument ignores the crucial difference between incidental services relating to the sale of intangibles, such as an insurance policy, on the one hand, and the purchase of services which are *the object of the transaction* on the other hand. *See* Melinda Rose Smolin, *Investment Securities: Beyond the Scope of California's Consumers Legal Remedies Act?* (1991-1992) 25 Loyola L.A. L.Rev. 127, 144-146 (recognizing this distinction and arguing that investment securities were not intended to come with the scope of the CLRA). Under Petitioners' interpretation of "services," everything in the stream of commerce, including intangible goods that the Legislature expressly excluded, would fall within the scope

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[10] Petitioners have moved for judicial notice of new materials (several pages purportedly printed from the website www.farmers.com) that were not before either the Superior Court or the Court of Appeal. As shown in Farmers' opposition to the motion, Petitioners fail to demonstrate the required "exceptional circumstances" supporting their motion. In any event, these website materials do not in any way establish that insurance is a "service" within the meaning of the CLRA.

of the CLRA. Virtually every "intangible" good carries with it some ancillary activity that could be characterized as "services." If, as Petitioners contend, the presence of such services renders a transaction subject to the CLRA, the limitation of the CLRA to *tangible* goods evaporates.

6. The CLRA's Provision Concerning "Liberal Construction" Does Not Render Insurance Subject to the Statute

Petitioners repeatedly assert that the CLRA must be interpreted to apply to insurance because the statute is to be "liberally construed and applied to promote its underlying purposes," citing Civil Code section 1760. Petitioners' attempt to take refuge in "liberal construction" is unavailing in this case. Petitioners' argument ignores the fact that the CLRA does have limits and has not been held applicable in all circumstances involving consumer claims. *See, e.g., Berry, supra*, 147 Cal.App.4th at p. 228 (holding that issuance of a credit card was not a "transaction intended to result or which results in the sale or lease of goods or services" under the CLRA).

As *Berry* noted, courts "cannot ... rewrite a statute under the guise of a liberal interpretation." *Berry, supra*, 147 Cal.App.4th at p. 232. As this Court has stated, liberal construction of a statute does not mean enlargement of its plain provisions. *Mulville v. San Diego* (1920) 183 Cal. 734, 739. The "rule of liberal construction is applied for the purpose of effectuating the obvious legislative intent and should not blindly be followed so as to eradicate the clear language and purpose of the statute...." *Neeley v. Bd. of Retirement* (1974) 36 Cal.App.3d 815, 822 (citation omitted); *see also Wheeler v. Bd. of Admin. of Pub. Employees' Ret. Sys.* (1979) 25 Cal.3d 600, 604 (quoting *Neeley*). As shown in section V, *infra*,

the legislative history of the CLRA does not support the expansive reading of the statute urged by Petitioners.

V. THE LEGISLATIVE HISTORY OF THE CLRA SUPPORTS THE NOTION THAT INSURANCE IS NOT COVERED BY THE ACT

If there is doubt as to the legislative purpose and intent after considering the ordinary meaning of the statutory language, the statute may be read in light of its historical background, in an attempt to determine the most reasonable interpretation. *Estate of Griswold* (2001) 25 Cal.4th 904, 910-911. As revealed in the legislative history and background for the enactment of the statute, the purpose or object to be accomplished are important factors in ascertaining the legislative intent. *Flannery v. Prentice* (2001) 26 Cal.4th 572, 579.

The plain language of the CLRA and case law from this and other courts establish that insurance does not fall within the CLRA's purview. But even if it were the case that the statutory language and existing case law did not resolve the question before this Court, the statute's legislative history confirms that CLRA does not apply to insurance.

A. The CLRA Was Enacted to Target Fraud in the Context of Traditional Purchases of Small Scale Consumer Goods and Household Services

The circumstances surrounding the CLRA's enactment shed light on its purposes, as described in *Berry*:

> [The] CLRA's enactment followed findings by the National Advisory Commission on Civil Disorders, appointed by President Lyndon B. Johnson on July 27, 1967, and chaired by Illinois Governor Otto Kerner (the Kerner Commission). Investigating the causes of recent violence in low-income urban areas, the Kerner Commission found that rioters appeared to focus on stores whose merchants had charged exorbitant prices or sold inferior goods. The report recognized that low-income persons were the most common victims of deceptive sales practices, yet the least likely to

> seek legal help. Few options and typically poor credit histories induced these consumers to buy goods and services from even the most disreputable merchant. The Legislature adopted [the] CLRA to mitigate these social and economic problems. [The] CLRA was the product of intense negotiations between consumer and business groups, and represented a compromise between the two.

Berry v. American Express Publishing, Inc., *supra*, 147 Cal.App.4th at p. 230.

Against this backdrop, the Legislature expressly targeted the CLRA at traditional purchases of small scale consumer goods and household services. *See* Civ. Code § 1770(a) ("transaction[s] intended to result or which result[] in the sale or lease of goods or services to any consumer"); Civ. Code § 1761(a) ("tangible chattels bought or leased for use primarily for personal, family, or household purposes"); Civ. Code § 1761(b) ("including services furnished in connection with the sale or repair of such goods"); *see also* A.B. 292, Reg. Sess. (Ca. 1970) (statement of James A. Hayes, Chairman, Assem. Com. on Judiciary) (the CLRA "is meant to provide consumers with remedies against merchants employing various deceptive practices").

Insurance is not the type of transaction sought to be reached by the CLRA, which was intended to focus on purchases of small scale household goods and services, such as the sale of tires, perfume, bread, and appliances, as well as automobile repairs. *See* Assembly Journal, Sept. 23, 1970, p. 8465-66. As noted in *Berry*, the CLRA was adopted to remedy unscrupulous conduct by "merchants" against low-income persons who were the least likely to obtain legal assistance, particularly for the small damage claims likely to arise from the conduct subject to the CLRA. *See Berry*, *supra*, 147 Cal.App.4th at p. 230.

The Legislature recognized that the proposed CLRA would lower the barriers to these consumers' access to the legal system. *See* Assem. Com. on Judiciary, Rep. on Assem. Bill No. 292 (April 20, 1970), p. 1. Prior to the CLRA's enactment, there was little incentive for consumers involved in small scale transactions to vindicate their rights through individual lawsuits against unscrupulous merchants, given the cost of litigating over relatively small sums. Moreover, these consumers were often left without any legal claims other than a difficult to prove cause of action for fraud. The CLRA enabled such individuals to pursue claims for damages under lessened standards of proof, and to seek remedies including attorneys' fees, which were previously much more difficult to obtain.

The CLRA was designed to fill the gap then existing as to such consumers' access to the legal system. *See* Assem. Com. on Judiciary, Rep. on Assem. Bill No. 292 (April 20, 1970), p. 1 ("No such remedies are presently available to the individual consumer in California law.") In response to the question, "Why is the bill needed?," the legislative history states:

> 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.

Assem. Com. on Judiciary, "Questions and Answers Regarding AB 292 (The Consumers Legal Remedies Act)" (1970), p. 1 (emphasis added). As the Court of Appeal noted, the CLRA "was intended to provide a simpler remedy where there was none, particularly in cases where there was an

unchecked history of repression by merchants in lower-income areas." (Slip Op. at p. 11.)

In the case of insurance, there was *no* need for a remedy to "fill the gap," as the insurance relationship is specifically based on a contractual arrangement which, in the event of some wrongdoing, is potentially amenable to a variety of claims including actions for breach of contract and for tortious breach of the implied covenant of good faith and fair dealing. Indeed, insurance policyholders had a broad array of remedies available to them under existing law at the time CLRA was enacted.

The present case illustrates the wide range of remedies available against insurers. Here, if Petitioners were to prevail on the merits of their remaining non-CLRA claims, they could obtain monetary damages, restitution, punitive damages, attorneys fees and injunctive relief against Farmers. Thus, Petitioners' CLRA claim seeks no relief or remedy not otherwise available if they were to prevail on their remaining claims. Moreover, given the generally higher stakes involved in insurance litigation, as opposed to small scale consumer transactions, there was already an incentive for insureds to seek redress in the courts for all variations of unlawful conduct by insurers.

At the time of the CLRA's enactment in 1970, insurance was highly regulated. The UIPA, enacted in 1959 (Stats. 1959, ch. 1737, § 1, 4187), already prohibited unfair and deceptive practices in the business of insurance, and provided for the Insurance Commissioner to enjoin such practices and impose civil penalties. Thus, when the CLRA took effect, California already had in place comprehensive measures to prohibit unfair practices in the business of insurance and to sanction the wrongdoers. While the highly regulated nature of the insurance industry certainly does

not preclude the Legislature from expanding private rights of action against insurers, the legislative history of the CLRA supports the conclusion that the Legislature did not have insurance in mind when it enacted the statute.

B. The Legislature Intentionally Omitted Insurance from the CLRA's Definition of "Services"

The legislative history reflects that the CLRA was "adapted in large part, from provisions contained in the tentative draft of ... the National Consumer Act, with the permission and unqualified support of the director and staff of the [National Consumer Law] Center." Assem. Com. on Judiciary, Rep. on Assem. Bill No. 292 (April 20, 1970), p. 1. Unlike the model National Consumer Act ("NCA"), however, the CLRA does **not** expressly include insurance in the definition of services. *See* model National Consumer Act § 1.301 (Nat'l Consumer Law Ctr. 1970) (Ex. 19 at p. 563-564). The NCA defines "services" as:

> (a) work, labor, and other personal services,
>
> (b) privileges with respect to transportation, hotel and restaurant accommodations, education, entertainment, recreation, physical culture, hospital accommodations, funerals, cemetery accommodations, and the like, and
>
> (c) ***insurance***.

Ex. 19 at p. 564 (emphasis added).

While subsection (a) of the NCA ("work, labor, and other personal services") is similar to the definition of "services" in the CLRA ("work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods"), the NCA specifically *includes* insurance within its definition of "services" to bring insurance within the meaning of the model statute, **while the CLRA does not**. The CLRA's failure to follow the model law and specifically

include insurance as a "service" strongly suggests the Legislature did not intend to include insurance under the CLRA.

The present case is similar to *Berry*, in which the court concluded that the Legislature's deletion of the terms "money" and "credit," which had appeared in early drafts of the CLRA, narrowed the act's scope. *Berry*, *supra*, 147 Cal.App.4th at p. 230-232. According to the *Berry* court, "[e]arly 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 household purposes.' " *Id.* at p. 230 (italics in original; citation omitted). However, the Legislature removed the references to "money" and "credit" before the CLRA's enactment, and the *Berry* court found that such deletions limited the scope of the act. *Id.* at p. 230-232.

Similarly, in the present case, the Legislature did *not* include the term "insurance" as part of the definition of "services" in the CLRA, even though the model National Consumer Act, which "served as a major source" for the CLRA, *did* include that term. The term "insurance," like the terms "money" and "credit" at issue in *Berry*, was not merely an *example* of a matter covered by the NCA, but was part of a provision *defining* the model statute's scope. In deleting the term "insurance" from the definition of "services," the Legislature narrowed the scope of matters covered by the CLRA. Moreover, the Legislature did not replace the language in subsections (a) and (b) of the definition of "services" in the model NCA with broader, more general language in the CLRA that included insurance.

Petitioners rely on a comment to the NCA, which states that "[i]nsurance is clearly a service and should be under the same kind of

regulation as any other service." (NCA, § 1.301, comment to subd. (37)(c).) Petitioners speculate that, based on this comment, the California Legislature did not feel the need to reference insurance explicitly, and simply assumed that insurance is undoubtedly a service. The Court of Appeal correctly rejected this argument, stating that "[w]hen the Legislature left certain phrases and words from the NCA out of the CLRA, we can only conclude that it was an intentional omission; there is nothing in the legislative history to suggest that the omission was due to a perceived redundancy... . Given the history before us, we must conclude that this is so because the CLRA has an intentionally narrower scope." (Slip Op. at p. 10-11.)

Petitioners assert that the Court of Appeal's decision "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." (Pet'r's Br. at p. 31.) In other words, their argument is that if the CLRA's omission of "insurance" were interpreted to mean that insurance is excluded from the scope of "services" subject to the Act, then the same rationale would also require the CLRA to exclude all of the things listed in subsection (b) of the NCA ("privileges with respect to transportation, hotel and restaurant accommodations," etc.). This argument must fail.

Petitioners overlook that subsection (a) of the NCA is not identical to the definition of "services" in the CLRA. Subsection (a) of the NCA defines the services to which that provision applies as "work, labor and *other personal* services," whereas the CLRA does not use the term "personal services." (Italics added.) Given the specific reference to "personal services" in subsection (a) of the model NCA, it was necessary to

add subsection (b)'s reference to various "services" of a non-"personal" nature (*i.e.*, services aimed broadly at the public, such as transportation, hotels, restaurants, hospitals, funerals, etc.), to make clear that those *non*-personal services were within the scope of that statute's protection.[11] Because of the differences in the wording of the NCA and the CLRA, the CLRA, which is not limited to "personal services," did not need to enumerate the "non-personal" services listed in subsection (b) of the NCA.

In sum, when the California Legislature enacted the CLRA, it could have specifically included insurance in the definition of services to similarly indicate that insurance would also be regulated under the CLRA. The fact that the Legislature omitted insurance from the definition of "services" shows that the omission was an intentional expression of legislative intent to target small scale consumer transactions, and to fill the gap in situations where then-existing law provided "no satisfactory remedy" against deceptive and fraudulent practices. In short, the legislative history establishes that the CLRA does not apply to insurance.

VI. ALLOWING A CLRA CLAIM FOR INSURANCE FRAUD WOULD UNDERMINE THIS COURT'S HOLDING IN *MORADI-SHALAL V. FIREMAN'S FUND INS. COS.*

In *Moradi-Shalal v. Fireman's Fund Ins. Cos* (1988) 46 Cal.3d 287 (*Moradi-Shalal*), this Court addressed whether a private right of action existed under the Unfair Insurance Practices Act ("UIPA"). Ins. Code § 790 et seq. This Court held that "[n]either section 790.03 nor section 790.09 was intended to create a private cause of action against an insurer

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[11] Indeed, there would have been no need for the drafters of the NCA to separately list these services in subsection (b) if they viewed them as falling within "personal services."

that commits one of the various acts listed in section 790.03, subdivision (h)." *Moradi-Shalal, supra*, 46 Cal.3d at p. 304.[12] In so holding, *Moradi-Shalal* expressly overruled *Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal.3d 880, which had previously held that a litigant could bring a private action to impose civil liability on an insurer for engaging in unfair claims settlement practices under the UIPA.

Moradi-Shalal did, however, "leave[] available the imposition of substantial administrative sanctions by the Insurance Commissioner." *Moradi-Shalal, supra*, 46 Cal.3d at p. 304. Moreover, apart from administrative remedies, the Court noted 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." *Id.* at p. 304-305. The Court also noted that remedies such as punitive damages and prejudgment interest were still available against insurers. *Id.*

This Court's holding in *Moradi-Shalal* bears on the resolution of the issue before the Court in the present case, as the Court of Appeal explained: "It is clear that, if insurance were considered a 'service' under the CLRA, many of the unfair and deceptive practices prohibited by the UIPA would also constitute 'proscribed practices' under the CLRA...." (Slip Op. at p. 13-14.)

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[12] *Moradi-Shalal* has been held to abolish implicitly all private causes of action based on Section 790.03. *Smith v. State Farm Mut. Auto. Ins. Co.* (1992) 5 Cal.App.4th 1104, 1116; *see also Maler v. Superior Court* (1990) 220 Cal.App.3d 1592, 1597-1598 (*Maler*); *Zephyr Park, Ltd. v. Superior Court* (1989) 213 Cal.App.3d 833, 837-838.

The present case is illustrative. Petitioners assert that Farmers has violated the following subdivisions of Civil Code section 1770 (the CLRA's "prohibited practices"): subd. (a)(5), (7), (9), (14) and (19).[13] (*See* Ex. 3 at p. 157, ¶122.) These subsections, except for one which bans "[i]nserting an unconscionable provision" in a contract, all essentially prohibit making misrepresentations about "goods and services." The alleged violations of each of these subsections would also constitute a violation of subdivision (a) of Section 790.03 of the Insurance Code, which states, in relevant part:

> The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance.
>
> (a) Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or statement **misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby** ..., or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any company for the purpose of inducing or tending to induce the policyholder to lapse, forfeit, or surrender his or her insurance.

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[13] These subsections prohibit the following practices: (5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have; (7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another; (9) Advertising goods or services with intent not to sell them as advertised; (14) Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law; and (19) Inserting an unconscionable provision in the contract.

Moreover, violations of the subsections of the CLRA cited in Petitioners' complaint could also fall within subdivision (b) of Section 790.03 (prohibiting, *inter alia*, untrue, deceptive or misleading statements made with respect to the business of insurance).

Thus, as the Court of Appeal stated, "allowing a private right of action under the CLRA would, in effect, undermine the holding in *Moradi-Shalal* and allow a private right of action for UIPA violations. This private right of action would be based not on any express grant of the right in clear, understandable, unmistakable terms, but on a conclusion that, although the CLRA was silent on the matter of insurance, it was intended to create a private right of action for insurance practices already regulated elsewhere." (Slip Op. at p. 13-14.)

The *Moradi-Shalal* court based its decision, in part, on the legislative history of the UIPA, which described the bill as contemplating only administrative enforcement of the act by the Insurance Commissioner. *Moradi-Shalal*, *supra*, 46 Cal.3d at p. 300. Thus, the Court concluded that the Legislature never intended to create a private right of action under the UIPA. It is, therefore, irrational to suppose that the Legislature intended to create a private right of action under the CLRA for those unfair and deceptive insurance practices already prohibited by the UIPA, without saying it was doing so. As the Court of Appeal stated, "the CLRA did not sub silentio destroy the preexisting regulatory scheme created by the UIPA." (Slip Op. at p. 15.)

Petitioners argue that the holding in *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257 (*Manufacturers Life*), supports the application of the CLRA to insurance. However, the holding in *Manufacturers Life* is distinguishable from this case. In *Manufacturers*

Life, this Court allowed a class action suit under the UCL, based on an alleged violation of the Cartwright Act, to proceed in the face of a demurrer based on *Moradi-Shalal*. The Court found that the UIPA expressly preserved remedies for unlawful conduct in the insurance industry that existed at the time the UIPA was adopted, as stated in Insurance Code Section 790.09.

The court in *Manufacturers Life* stated that the "UIPA, like all statutes, is to be applied according to its terms. Its language neither creates new private rights *nor destroys old ones*." (*Id.* at p. 279; quotations omitted; italics in original.) The CLRA, unlike both the UCL and the Cartwright Act, did not exist at the time the UIPA was enacted. Thus, as the Court of Appeal in the present case observed, "since the UIPA *predates* the CLRA, it cannot be said that we are here reading the UIPA to silently destroy a *pre-existing* cause of action under the CLRA." (Slip Op. at p. 15; italics in original.)

Petitioners attempt in vain to respond to the import of *Moradi-Shalal* by incorrectly asserting that Farmers' position is that insurance is exempt from coverage under the CLRA because insurance is a regulated industry. (Pet'r's Br. at p. 35.) In support of this straw-man argument, Petitioners cite the language contained in Insurance Code section 1861.03(a), added by Proposition 103, stating 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 ..., 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)." Petitioners further argue that the language in this subsection necessarily leads to the conclusion that the CLRA applies to insurance.

Although Petitioners' argument regarding Proposition 103 is based on the misconception that Farmers is asserting an exemption under the CLRA merely because insurance is a regulated industry, Proposition 103 does not, in any event, confirm that the CLRA covers insurance. Initially, Petitioners' discussion of Proposition 103 has no bearing on Farmers' point that allowing a private action under the CLRA for deceptive practices that are also expressly prohibited by the UIPA, would undermine *Moradi-Shalal*. After Proposition 103 was enacted, *Maler v. Superior Court*, *supra*, 220 Cal.App.3d 1592, 1598, reaffirmed *Moradi-Shalal*, holding that "section 1861.03 cannot be construed to supersede *Moradi-Shalal*'s ban on a private action for damages under section 790.03." As explained above, permitting private actions under the CLRA involving insurance would, in substance, allow a private right of action for UIPA violations, which *Moradi-Shalal* prohibited. Therefore, Section 1861.03 cannot be read as creating or approving a private action under the CLRA for claims involving insurance.

Petitioners' argument that the voters' approval of Proposition 103 in 1988 confirms that the CLRA was intended to cover insurance fails for additional reasons. First, the express purposes of Proposition 103 had nothing to do with creating (or affirming) a private right of action against insurers under the CLRA. Ballot Pamp., Gen. Elec. (Nov. 8, 1988) analysis by Legislative Analyst, p. 98. In addition, the legislative history of Section 1861.03(a) indicates that the express purpose of this subsection was to remove the then existing *antitrust* exemption for insurance. Sen. Off. of Research, Analysis of Insurance Reform Initiatives on November 1988 Ballot (Aug. 1988) p. 18. Moreover, by its own terms, Proposition 103 applies to motor vehicle, fire and liability insurance, but not to life,

mortgage and disability insurance. Ins. Code § 1861.13; *Manufacturers Life*, *supra*, 10 Cal.4th at p. 282 ("Proposition 103 does not apply to several lines of insurance, among which is life insurance.") In short, Proposition 103 did not, *sub silentio*, expand the CLRA to cover insurance.

VII. PETITIONERS' RELIANCE ON OUT-OF-STATE AUTHORITIES IS UNAVAILING

Finally, Petitioners' discussion of other jurisdictions' treatment of insurance under various consumer protection statutes is irrelevant and unavailing. In states where courts have found that consumer protection statutes apply to insurance, the results from those jurisdictions turn on the language of the acts in question. As shown below, some statutes expressly refer to insurance as being covered, while others refer to "any trade or commerce," and still others reference "intangibles."

The laws at issue in the cases cited by Petitioners have broader application than the language of the CLRA, which limits coverage to tangible goods and particular "services." A number of these statutes cover deceptive practices in "any trade or commerce," a standard much broader than the CLRA. *See McCrann v. Klaneckey* (Tex. Ct. App. 1984) 667 S.W.2d 924 [interpreting the Deceptive Trade Practices Act (Tex. Bus. & Com. Code § 17.46, which regulates "[f]alse, misleading, or deceptive acts or practices in the conduct of *any trade or commerce* ..." (italics added)]; *Stevens v. Motorists Mut. Ins. Co.* (Ky. 1988) 759 S.W.2d 819 [interpreting Ky. Rev. Stat. Ann. § 367.170, which declares "[u]nfair, false, misleading, or deceptive acts or practices in the conduct of *any trade or commerce* ... unlawful (italics added)]; *Fox v. Indus. Cas. Ins. Co.* (Ill. App. Ct. 1981) 424 N.E.2d 839, 842 ["The Act [Ill. Rev. Stat. 1979, ch. 121 1/2, par. 261(e)] defines merchandise as including 'any objects, wares, goods,

commodities, *intangibles* ...' " (italics added)]; *Doyle v. St. Paul Fire & Marine Ins. Co., supra*, 583 F.Supp. at p. 556 ["[The Connecticut Unfair Trade Practices Act] broadly defines 'trade or commerce' and expressly covers the distribution of services and property whether *tangible or intangible*. [Conn. Gen. Stat.] § 42-110a." (italics added)].)

For example, while Plaintiffs assert that the purchase of insurance has been found to be a "service" under the Texas Deceptive Trade Practices Act (DTPA), *violations of the Texas Insurance Code are specifically incorporated in the act as DTPA violations*. *See* Tex. Bus. & Com. Code § 17.50(a)(4) ("A consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish: ... (4) the use or employment by any person of an act or practice in violation of Chapter 541, Insurance Code.")

In Pennsylvania, while courts there have found that state's Unfair Trade Practices Consumer Protection Law ("CPL") to be applicable to insurance, the CPL's language is also broader than that of the CLRA. *See Pekular v. Eich, supra*, 513 A.2d 427. According to *Pekular*, the Pennsylvania CPL declared unlawful "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." *Id.* at p. 433. The court noted that the CPL "defines 'trade' and 'commerce' as 'the advertising, offering for sale, sale or distribution of *any services* and *any property*.' " *Id.* (emphasis added). Unlike the expansive language of the Pennsylvania CPL, which applies to "any property," the CLRA has a more limited scope.

Moreover, while courts have found that the Colorado Consumer Protection Act (CCPA) applies to insurance, that statute merely contains a laundry list of prohibited deceptive trade practices, and the "terms 'goods'

and 'services' are not defined in the CCPA." *Showpiece Homes Corp. v. Assurance Co. of America* (Colo. 2001) 38 P.3d 47.

Petitioners' reliance on *Lemelledo v. Beneficial Mgmt. Corp.* (N.J. 1997) 696 A.2d 546, is also misplaced. *Lemelledo* considered whether the New Jersey Consumer Fraud Act ("CFA") applied to lenders who engaged in a practice referred to as "loan packing." As with the other out-of-state authorities cited by Petitioners, there are material differences between the language of the CLRA and the New Jersey CFA. The New Jersey statute prohibited deceptive and fraudulent practices "in connection with the sale or advertisement of any merchandise or real estate." *Id.* at p. 550. The act defined "merchandise" as "any objects, wares, goods, commodities, services or *anything offered, directly or indirectly to the public for sale.*" *Id.* (italics added). The court found that "[g]iven the broad language of the CFA, we conclude that its terms apply to the offering, sale, or provision of consumer credit." *Id.* at p. 551.

As shown above, the CLRA is expressly limited to tangible goods and specific "services." Because of the numerous variations in language among other states' consumer protection statutes, how those states have construed their respective statutes does not bear on how California courts should interpret (and already have interpreted) the CLRA. And, in any event, out-of-state authority is not binding on this Court.

VIII. CONCLUSION

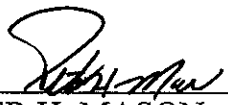
Because Farmers' alleged improper conduct resulted in the sale of insurance, and insurance is neither a "good" nor a "service" under the CLRA, Farmers' alleged activity cannot be subject to the CLRA. Accordingly, the trial court properly granted Farmers' motion for judgment

on the pleadings, and the Court of Appeal's decision denying Petitioners' writ petition should be affirmed.

Respectfully Submitted,

FULBRIGHT & JAWORSKI L.L.P.

Dated: March 14, 2008

By 
PETER H. MASON
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FARMERS NEW WORLD LIFE INSURANCE COMPANY and FARMERS GROUP, INC.

RULE 8.520(c)(1) CERTIFICATE OF COMPLIANCE

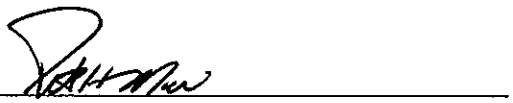
I, Peter H. Mason, declare as follows:

1. I am an attorney at law, duly licensed to practice before all the courts of the state of California, and am a partner in the law firm of Fulbright & Jaworski L.L.P., attorneys of record for Real Parties In Interest Farmers New World Life Insurance Company and Farmers Group, Inc. I have personal knowledge of the following, and can and do testify thereto.

2. The foregoing REAL PARTIES IN INTEREST'S ANSWER BRIEF ON THE MERITS is proportionately spaced, in 13 point Times Roman typeface. The brief contains 11,783 words, according to the word count provided by the Microsoft Word word-processing software.

I declare under penalty of perjury the foregoing is true and correct. Executed this 14th day of March, 2008 at Los Angeles, California.

FULBRIGHT & JAWORSKI L.L.P.

By 

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 South Flower Street, Forty-First Floor, Los Angeles, California 90071. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On March 14, 2008, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

REAL PARTIES IN INTEREST'S ANSWER BRIEF ON THE MERITS

in a sealed envelope, postage fully paid, addressed as follows:

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Following ordinary business practices, the envelope was sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

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

Executed on March 14, 2008, at Los Angeles, California.

Mylene A. Ruiz