Supreme Court No. S157001

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

◇

PAULINE FAIRBANKS and MICHAEL COBB,
*Petitioners,*

v.

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

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

◇

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

◇

# PETITIONERS' REPLY TO AMICUS BRIEF FILED BY AMERICAN COUNCIL OF LIFE INSURERS, AMERICAN INSURANCE ASSOCIATION, ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES, ASSOCIATION OF CALIFORNIA LIFE AND HEALTH INSURANCE COMPANIES, PACIFIC ASSOCIATION OF DOMESTIC INSURANCE COMPANIES, AND PERSONAL INSURANCE FEDERATION OF CALIFORNIA

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## I. THE LEGISLATURE'S DECISION NOT TO ADOPT THE NCA'S EXPLICIT REFERENCE TO INSURANCE IS NO BASIS FOR CONCLUDING THAT INSURANCE SHOULD BE EXCLUDED FROM THE CLRA'S PROTECTION.

Amici contend that there is "strong evidence" that the Legislature intended to exclude insurance from the CLRA in the

Legislature's decision not to follow the National Consumer Act (NCA) in explicitly including "insurance" in its definition of the "services" it covers. Amici support that claim with citations of cases involving the modification of other model legislation adopted in California (ACB 7-8). Amici's argument is unpersuasive for a number of reasons.

First, Amici ignore the rule which bars resort to legislative history unless to resolve an issue that can be resolved by reference to the plain meaning of the statutory language. *People v. Licas* (2007) 41 Cal. 4th 362, 367; *Mejia v. Reed* (2003) 31 Cal. 4th 657, 663. Here, the plain meaning of the term "service" in the CLRA, liberally construed in favor of the consumer as the CLRA mandates, includes insurance (see Petitioner's Opening Brief on the Merits [OB] 9-27).

Quoting *Canal-Randolph Anaheim v. J.E. Wilkoski* (1980) 103 Cal.App.3d 282 at 293, Amici asserts that "[l]iberal construction may not be utilized to include within a statute that which the Legislature did not intend." The point is sound when used, as in *Canal-Randolph*, to support legislative intent as already found in the plain meaning of the statutory language and a long history of case law and

commentary, and in the absence of any legislative mandate of liberal construction. 103 Cal.App.3d 282, 290-93. It has no role where, as here, Farmers attempts to use legislative history to challenge the plain meaning of a statute which includes a legislative mandate of liberal construction.

Second, the authorities Amici cite regarding model acts arose from circumstances very different from those out of which the CLRA emerged.

In *Kusior v. Silver* (1960) 54 Cal.2d 603, 617-18, the Legislature had adopted much of the "Uniform Act on Blood Tests to Determine Paternity" in full, but had omitted a provision which would have abrogated an existing California precedent. The Supreme Court was satisfied on that basis that the existing precedent should stand.

*Dodd v. Henkel* (1978) 84 Cal.App.4th 604, 609, dealt with another section of the same legislation as *Kusior*, one which had been adopted virtually verbatim from the "Uniform Act on Blood Tests to Determine Paternity", except that it omitted a single sentence authorizing the affirmative use of blood tests to prove the identity of

the father (as opposed to its use to eliminate potential candidates). The *Dodd* court found that to be "a strong indication of legislative intent" not to authorize such affirmative use. 84 Cal.App.4th at 610.

*American National Bank and Trust Co. Of Eau Claire, Wisconsin v.Schigur* (1978) 83 Cal.App.3d 790, 793-94, involved the verbatim adoption of language from the Model Business Corporations Act, expect for the omission of a single two-word phrase which happened to be critical to the issue raised in that case. The *American National Bank* court inferred legislative intent from that crucial omission.

Here, on the other hand, the CLRA was far from a verbatim adoption of the NCA. Rather, while the Legislature drew ideas from the NCA in writing the CLRA, there is little evidence of a direct borrowing of language from the NCA, and no evidence that it used the NCA as a "drafting template (see Consumer Attorneys of California Amicus Brief, pp. 12-13)."

Specifically, the divergence in form and content between CLRA's definition of "services" and that in the NCA goes far beyond the omission or inclusion of the term "insurance."

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

The CLRA, on the other hand, succinctly defines services as "work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods." Civil Code section 1761(b).[1]

That is a relationship between model legislation and California statutes very different from those out of which *Kusior, Dodd,* and *American National Bank* arose. It is reasonable to draw conclusions from the omission of a particular provision or phrase in an otherwise largely verbatim enactment of a model act. It is not reasonable to draw such a conclusion from the omission of a single term in a list included in model legislation where, not just that term, but the entire

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[1] That language appears to have been drawn verbatim, not from the NCA, but from California's own Unruh Act. Civil Code section 1802.2. See Amicus Brief of United Policyholders, pp. 1-12.

list has been omitted from the California statute. Further, Amici make no attempt to answer the question (raised in Petitioners' Opening Brief on the Merits, pp. 31-32) why other things on the omitted list, such as education, entertainment and recreation, are not also excluded from CLRA coverage.

Amici do attempt to respond to the NCA's authors' comment that "[i]nsurance is clearly a service and should be under the same kind of regulation as any other service (Ex. 19; see OB 32-33)," but their response is unconvincing.

Amici argue that the statement does not mean that insurance *is* a service, but only that it *"should be* treated as a service (and specifically defined as such) (ACB 11)." That "interpretation" stands the statement on its head. As the authors of the NCA wrote it, it can only mean that *because* insurance "is clearly a service," it should be regulated like other services. Amici's effort to make it say just the opposite must be rejected.

Amici's exegesis of the NCA authors' comment that "insurance" was explicitly included in the NCA definition of services only to distinguish the NCA from the Uniform Consumer Credit Code

(UCCC) (ACB 11-12) is also unconvincing.

The NCA's authors comment begins with the statement that the NCA definition of "services" is identical with that in the UCCC, except that it includes all insurance, while the UCCC includes only insurance provided by a person other than the insurer. It then goes on to explain that the UCCC gives the insurance industry "preferential treatment," which the NCA rejects in order to give "the consumer has maximum protection in procuring necessary insurance (Ex. 19)."

Amici respond that the UCCC is irrelevant because there is no evidence that the Legislature considered it (ACB 11). But that is beside the point. The Legislature did consider the NCA draft, including the comment quoted above. That comment makes it clear that the NCA authors understood that insurance "is clearly a service," but thought it necessary to reference it explicitly solely to differentiate the NCA's approach to insurance from that in the UCCC. The Legislature did not need to consider the UCCC to grasp that point.

The same answer is appropriate for Amici's assertion that, because both the UCCC and the NCA refer explicitly to insurance –

one in very limited form and the other without limitation –, the absence of any such explicit reference to insurance in the CLRA is "strong evidence" of an intention to exclude it (ACB 12).

The NCA authors' comment makes it clear that the UCCC made explicit reference to insurance in order to limit its application only to "insurance provided by a person other than the insurer," while the NCA included it without qualification in order to eliminate any doubts that it was adopting the UCCC limitation. There is no reason to believe that the California Legislature shared either intention.

In sum, the legislative history of the CLRA's relationship to the NCA draft gives no support to Amici's contention that the Legislature intended to exclude insurance from "services" under the Act.

## II. THE LEGISLATURE'S DECISION NOT TO MAKE EXPRESS REFERENCE TO MONEY AND CREDIT DOES NOT SUPPORT THE EXCLUSION OF INSURANCE EITHER.

Amici argue that Petitioners broad definition of services "would include insurance and other financial transactions," but that, as the court in *Berry v. American Express* (2007) 147 Cal.App.4th 224, held, the Legislature showed by its separate treatment of – and

then its deletion of references to – "money and credit," that it did not regard the provision of money and credit as services. From those premises, Amici draw the conclusion that the Legislature did not regard insurance as a service, and intended to exclude it from CLRA coverage (ACB 13-16).

The first problem with Amici's syllogism is that it depends upon the unargued assumption that insurance is a "financial transaction" just like the provision of money or credit. There is no indication that the Legislature entertained that assumption. While the Legislature first included, and then deleted, the words "money" and "credit" from the CLRA's definition of consumer, there is no record of the Legislature ever having considered including a reference to insurance, let alone deleting it. Nor do Amici offer this Court any reason to believe that the Legislature understood the words "money" and "credit" to include insurance.

Quoting *Dyna-Med, Inc. V. FEHC* (1987) 43 Cal.3d 1379 at 1386-87, Amici make the point that a court should accord "significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose." In *Dyna-Med*, however, that

point was made about the language *adopted* by the Legislature. Amici attempt to use it in support of their effort to read an exclusion of insurance into the *deletion* of the words "credit" and "money" from early versions of the CLRA. It is one thing to give every word adopted by the Legislature significance, and quite another to give significance to an unsupported assumption about what the Legislature intended to exclude when it did *not* adopt certain language.

Amici assert that Petitioners argue for a definition of services which differs from the Legislature's in being broad enough to take in credit as well as insurance, based on Petitioners statement that an insurance policy "represents the insurer's promise to *do* something: to provide security against the risk of loss (RB 3)." That definition, Amici assert, would take in a promise to provide credit as well (ACB 15).

Amici have taken that point out of context. In context, Petitioners' point was only to distinguish insurance as a service from "a contract to provide a tangible or intangible commodity," not to assert that any promise to do anything is necessarily a service (see RB 2-3).

Amici assert that "service" means "work performed for others," and conclude (without argument) that insurance does not fall within that definition (ACB 15-16). However, in the very passage of their Reply Brief from which Farmers quote, Petitioners agree that service means "work performed," that is, "useful labor that does not produce a tangible [or intangible] commodity," and then go on to show that insurance falls within that definition for the following reasons (RB 3-4).

First, at the core of insurance is something which involves "useful labor: "true underwriting of risks." That is, the distribution of the risk of loss "over as wide an area as possible" which is "the one earmark of insurance as it has commonly been conceived of in popular understanding and usage." *Group Life & Health Insurance Co. v. Blue Shield of Texas* (1979) 440 U.S. 205, 212-213, quoting *SEC v. Variable Annuity* (1959) 359 U.S. 65 at 73 (RB 3-4).

Second, in promising insureds that "[w]e're here to care, and take care, of everything you need," (Ex. 2 to Motion for Judicial Notice), insurance companies like Farmers represent that they will do "useful labor on behalf of their insureds in ways that go far beyond

underwriting (RB 13).

Amici have failed to make good on their claims that insurance is a "financial arrangement" just like the provision of credit, or that the Legislature showed an intention to exclude it from the CLRA's protection when it deleted the terms "money" and "credit" from early versions of it. Petitioners have questioned whether *Berry* was rightly decided (AB 13-14; RB 11-12). But even assuming it was rightly decided, it does not justify the conclusion that the Legislature intended to exclude insurance, as well as credit, from the CLRA's reach.

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## CONCLUSION

For the reasons stated above and in Petitioners' Opening and Reply Briefs on the Merits, the decision of the Court of Appeal should be reversed.

DATED: July 28, 2008

Respectfully submitted,

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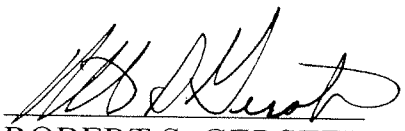

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STATEMENT OF COMPLIANCE

Pursuant to Rule of Court 14(c)(1), I certify that the **REPLY TO AMICUS BRIEF** is proportionately spaced, has a typeface of 14 points or more, and contains 2,192 words.

DATED: July 28, 2008

Respectfully submitted,

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## PROOF OF SERVICE

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

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

On July 28, 2008, I served the foregoing document described as **REPLY TO AMICUS BRIEF** on the parties interested in this action by enclosing true copies thereof in sealed envelopes with postage thereon fully prepaid, and by providing for their deposit in the United States Mail at Los Angeles, California, addressed as follows:

**SEE ATTACHED SERVICE LIST**

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

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

Executed July 28, 2008, at Los Angeles, California.

Davina Jaboury

**Fairbanks v. Superior Court**
**Supreme Court Case No. S157001**

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