S157001

IN THE
SUPREME COURT OF CALIFORNIA

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.,
Defendants and Real Parties in Interest.

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION THREE, CASE NO. B198538
LOS ANGELES COUNTY SUPERIOR COURT CASE NO. BC305603

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF 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 IN SUPPORT OF DEFENDANTS AND REAL PARTIES IN INTEREST FARMERS NEW WORLD LIFE INSURANCE COMPANY AND FARMERS GROUP, INC.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF 1

AMICI CURIAE BRIEF 5

INTRODUCTION 5

LEGAL ARGUMENT 7

I. THE LEGISLATURE'S DECISION TO OMIT THE TERM "INSURANCE" FROM THE CLRA'S DEFINITION OF "SERVICES" IS STRONG EVIDENCE THE LEGISLATURE INTENDED THAT THE ACT NOT APPLY TO INSURANCE 7

A. The Legislature's decision to omit from legislation a specific provision that appeared in the model law on which the legislation was based is strong evidence of legislative intent 7

B. Because the NCA specifically defined services to include insurance, the Legislature's decision to omit insurance from the CLRA's definition of services is strong evidence the Legislature intended that the CLRA not apply to insurance 9

II. THE LEGISLATURE'S TREATMENT OF MONEY AND CREDIT UNDER THE CLRA IS STRONG EVIDENCE THE LEGISLATURE INTENDED THAT THE ACT NOT APPLY TO INSURANCE 13

CONCLUSION 17

CERTIFICATE OF WORD COUNT 18

TABLE OF AUTHORITIES

Page

Cases

American Nat. Bank & Trust Co. v. Schigur
(1978) 83 Cal.App.3d 790 8

Berry v. American Express Publishing, Inc.
(2007) 147 Cal.App.4th 224 15

Canal-Randolph Anaheim, Inc. v. J. E. Wilkoski
(1980) 103 Cal.App.3d 282 12

Dodd v. Henkel
(1978) 84 Cal.App.3d 604 . . . . . 8, 10

Dyna-Med, Inc. v. Fair Employment & Housing Com.
(1987) 43 Cal.3d 1379 14

Hutchins v. Security Trust etc. Bank
(1929) 208 Cal. 463 8

Kusior v. Silver
(1960) 54 Cal.2d 603 . . . . . 7, 10

Statutes

Civil Code

§ 1761, subd. (a) 10

§ 1761, subd. (b) 9

§ 1761, subd. (d) 14

§ 1770, subd. (a) 14

Rules

Cal. Rules of Court

rule 8.204(c)(1) 18

rule 8.520(f) 1

Miscellaneous

Assem. Com. on Judiciary, Analysis of Assem. Bill. No. 292 (1970 Reg. Sess.)

April 20, 1970 9

Aug. 7, 1970, § 1.1761, subd. (d) 15

Jan. 21, 1970, § 1.1761, subd. (e) 14, 15

Jan. 21, 1970, § 1.1770 & subd. (r) 10, 14

National Consumer Act (1970)

§ 1.301, subd. (37) 9, 10, 11, 12

§§ 2.101-2.210 13

Uniform Consumer Credit Code (1968) § 2.105, subd. (3) 12

Webster's II New Riverside Dict. (1984) 16

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE:

Pursuant to California Rules of Court, rule 8.520(f), 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 respectfully request permission to file the attached brief as amici curiae.

American Council of Life Insurers (ACLI) is the largest life insurance trade association in the United States, representing 353 member companies, 282 of whom do business in California. ACLI members account for 91 percent of all life and annuity payments and 90 percent of total life insurance coverage in California.

The American Insurance Association (AIA) is a leading national trade association representing major property and casualty insurers writing business in California, nationwide and globally. AIA members, including companies based in California and other states, collectively underwrote over $18 billion in direct property and casualty premiums in this State in 2006. AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the state and federal levels and files amicus briefs in cases before federal and state courts on issues of importance to the insurance industry and marketplace.

Association of California Insurance Companies (ACIC) is an affiliate of the Property Casualty Insurers Association of America, a leading national property/casualty insurance company trade group with more than 1,000 members. ACIC represents more than 300 property/casualty insurance companies doing business in California. ACIC member companies write almost 40 percent of the total property/casualty insurance in California, including 53 percent of personal automobile insurance, 43 percent of commercial automobile insurance, 35 percent of homeowners insurance, 31 percent of business insurance, and 43 percent of private workers compensation insurance.

Association of California Life and Health Insurance Companies (ACLHIC) is a nonprofit trade association which represents the interests of life and disability insurers doing business in California. Its current membership of 36 companies is comprised of both domestic and foreign insurers which write a substantial amount of premium in this state.

Pacific Association of Domestic Insurance Companies (PADIC) represents small to mid-sized property and casualty insurers and related business and consumer interests in the western United States, including about a dozen property and casualty carriers domesticated in California. PADIC works with consumers, policyholders, media, regulators, and legislators to improve consumer understanding of insurance issues and policies, keep costs and prices at a reasonable level, and improve the competitive business environment.

Personal Insurance Federation of California (PIFC) is a California-based trade association that represents insurers who write approximately 40 percent of the personal lines insurance sold in California. PIFC represents the interests of its members on issues affecting homeowners, earthquake, and automobile insurance before the California Legislature, the California Department of Insurance, and the California courts.

The issue on which this court has granted review, whether insurance is a good or service subject to the Consumer Legal Remedies Act, is of vital interest to amici, as their members collectively write

most of the policies of insurance in California. This court's decision may affect the members' potential liability under the Act.

As counsel for amici, we have reviewed the briefs filed in this case and believe this court will benefit from additional briefing regarding the significance of the Act's drafting history in construing the Act. As we show, the drafting history establishes the Legislature's intent that the Act not apply to insurance.

Accordingly, amici respectfully request that this court accept and file the attached amici curiae brief.

Dated: July 3, 2008

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AMICI CURIAE BRIEF

INTRODUCTION

The drafting history of the Consumers Legal Remedies Act (CLRA or Act) establishes the Legislature did not intend the Act to apply to insurance.

First, this court and others have explained that when the California Legislature adopts a model act but omits from the California legislation a provision that appeared in the model act, the legislation should not be construed to include the omitted provision. The courts reason that by omitting a provision that appeared in the model act, the Legislature evinces its intent that the provision not apply in California. Here, the Legislature based the CLRA on a model law, the National Consumer Act (NCA), that specifically defined services to include insurance for purposes of the NCA. The Legislature, however, omitted insurance from the CLRA's definition of services. The Legislature thus evinced its intent that the Act not apply to insurance.

Second, early drafts of the CLRA covered not just goods and services but also money and credit. The Legislature thus understood that services were distinct from, and did not include, money and credit. The Legislature later removed money and credit from the scope of the Act, thus evincing its intent that the Act not apply to those financial arrangements. Nonetheless, to sweep insurance into the scope of the Act, plaintiffs propose a broad definition of services that

would also include money and credit, a definition that cannot be squared with the Legislature's drafting decisions. Further, the Legislature's treatment of money and credit demonstrates that, to the extent the Legislature considered extending the Act to financial transactions at all, the Legislature did not extend the Act to insurance.

Because the Legislature did not intend the CLRA to govern insurance, the Court of Appeal properly rejected plaintiffs' claims under that Act based on the life insurance policies at issue here.

LEGAL ARGUMENT

I.

THE LEGISLATURE'S DECISION TO OMIT THE TERM "INSURANCE" FROM THE CLRA'S DEFINITION OF "SERVICES" IS STRONG EVIDENCE THE LEGISLATURE INTENDED THAT THE ACT NOT APPLY TO INSURANCE.

A. The Legislature's decision to omit from legislation a specific provision that appeared in the model law on which the legislation was based is strong evidence of legislative intent.

Where the Legislature bases an act on a model law but omits from that act a specific provision that was part of the model law, that

omission is strong evidence the act should be construed to exclude the omitted provision. Thus, in *Kusior v. Silver* (1960) 54 Cal.2d 603, this court held that where the Legislature had adopted parts of the Uniform Act on Blood Tests to Determine Paternity but had omitted from the California act a specific provision that was part of the uniform act, "the failure of the Legislature to enact . . . part of the [uniform] act . . . must be deemed *an intention* not to change" California law on that point. (*Id.* at p. 618, emphasis added.)

Other California decisions are in accord. (See, e.g., *Dodd v. Henkel* (1978) 84 Cal.App.3d 604, 609-610 [where California adopted the Uniform Act on Blood Tests to Determine Paternity but "intentionally omitted the very provision which would have authorized the use suggested by appellant[,] such circumstance is a *strong indication* of legislative intent to effect only the changes actually undertaken" (emphasis added)]; *American Nat. Bank & Trust Co. v. Schigur* (1978) 83 Cal.App.3d 790, 793-794 ["The language in the Model Business Corporations Act, from which [the California statute] was derived, provided for mandatory indemnification to the extent of success 'on the merits *or otherwise*.' (Italics added.) The expression 'or otherwise' does not appear in the California enactment; from this omission we infer a *legislative intent* . . ." (second emphasis added)]; cf. *Hutchins v. Security Trust etc. Bank* (1929) 208 Cal. 463, 469-470 [where a California statute was based on a New York statute that in turn was based on an English statute, but the California and New York statutes omitted a term contained in the English statute, "[t]his is some

evidence at least of the legislative intent to so narrow the English provision"].)

B. Because the NCA specifically defined services to include insurance, the Legislature's decision to omit insurance from the CLRA's definition of services is strong evidence the Legislature intended that the CLRA not apply to insurance.

The Court of Appeal below held that because the NCA specifically defined services to include insurance but the CLRA omitted insurance from its definition of services, "[t]he obvious conclusion is that the Legislature intentionally omitted insurance because it did not intend for the CLRA to apply to insurance." (Typed opn., 10.) Established rules of statutory interpretation and the CLRA's drafting history show the Court of Appeal was correct.

The California Legislature adopted the CLRA from provisions in the NCA. (Assem. Com. on Judiciary, Analysis of Assem. Bill. No. 292 (1970 Reg. Sess.) April 20, 1970, p. 1 ["AB 292 has been adapted in large part, from provisions contained in the tentative draft of December 19, 1969, of the National Consumer Act"].) The NCA expressly defined services to include "insurance" for purposes of that act. (National Consumer Act (1970) § 1.301, subd. (37), p. 23 ["'Services' includes . . . insurance"].)

The Legislature, however, intentionally omitted insurance from the CLRA's definition of services (Civ. Code, § 1761, subd. (b) ["'[s]ervices' means work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods"].)

Consistent with the decisions of this Court and the Courts of Appeal construing similar drafting history, the Court of Appeal below properly gave significant weight to this omission of insurance from the CLRA's definition of services. (See *ante*, § I.A; see, e.g., *Kusior v. Silver*, *supra*, 54 Cal.2d at p. 618; *Dodd v. Henkel*, *supra*, 84 Cal.App.3d at pp. 609-610.) The CLRA should not be construed to include that which the Legislature intentionally omitted.

The Legislature's omission of insurance from the CLRA's definition of services is consistent with its decisions while drafting the Act to narrow it in other respects. Early drafts of the Act prohibited specific acts or practices including "any act or practice which is unfair or deceptive to the consumer" in connection with "the conduct of *any trade or commerce* . . . ." (Assem. Bill. No. 292, *supra*, as introduced Jan. 21, 1970, § 1.1770 & subd. (r), pp. 2-3, emphasis added.) As finally enacted, however, the CLRA prohibited specified acts or practices only as they related to "goods or services." (Civ. Code, § 1761, subd. (a).) The Legislature's omission of trade, commerce, and insurance from the CLRA all reflect the Legislature's intention to narrow the Act's scope.

Plaintiffs argue that the Legislature might have omitted insurance from the CLRA's definition of services only because the

NCA authors commented that "[i]nsurance is clearly a service . . . ." (Com. to National Consumer Act, *supra*, foll. § 1.301, subd. (37), p. 23; see OBOM 32-33; RBOM 24.) However, plaintiffs cite nothing to show the Legislature relied on the NCA comment. Moreover, the comment does not change the fact that the NCA specifically defined services to include insurance and the CLRA did not.

Further, plaintiffs' reading of the NCA comment is dubious given that the authors felt obliged to specify in the text of the NCA itself that insurance would be considered a service. When read in its entirety, the comment does not mean that the term services, without more, includes insurance. The comment instead reflects the view of the NCA authors that insurance *should be* treated as a service (and specifically defined as such). Thus, the NCA authors stated: "Insurance is clearly a service and *should be* under the same kind of regulation as any other service." (See Com. to National Consumer Act, *supra*, foll. § 1.301, subd. (37), p. 23, emphasis added.) The California Legislature obviously disagreed.

Plaintiffs also argue that the NCA "authors included the word insurance in the National Consumer Act only in order to differentiate it from the Uniform Consumer Credit Code [(UCCC)], which gave preferential treatment to insurers." (RBOM 24.) But the UCCC is beside the point because it was not the basis for the CLRA. Since there is no evidence from the legislative history of the CLRA that the Legislature ever considered the UCCC when it drafted and enacted the CLRA, plaintiffs' speculation that the Legislature excluded the term

insurance from the definition of services under the CLRA because California had not enacted the UCCC is without basis or merit.

Moreover, if the UCCC has any relevance, it only confirms the Legislature did not intend the CLRA to apply to insurance. When the Legislature enacted the CLRA, both the NCA and the UCCC addressed consumer remedies and expressly defined services to include at least some insurance (the NCA applying the term to all "insurance" and the UCCC to "insurance provided by a person other than the insurer"). (National Consumer Act, *supra*, § 1.301, subd. (37), p. 23; Uniform Consumer Credit Code (1968) § 2.105, subd. (3).) Thus, though the NCA and UCCC differed in whether services should be specifically defined to include some or all insurance, they were consistent in specifically mentioning insurance to the extent it was to be treated as a service. That the Legislature departed from the approaches taken by both model laws and omitted insurance entirely from the CLRA's definition of services is strong evidence the Legislature intended the CLRA not to cover insurance.

Finally, plaintiffs repeatedly assert that the CLRA should be liberally construed. (See, e.g., RBOM 16, 18.) However, "[l]iberal construction may not be utilized to include within a statute that which the Legislature did not intend." (*Canal-Randolph Anaheim, Inc. v. J. E. Wilkoski* (1980) 103 Cal.App.3d 282, 293.) Because the statutory history shows the Legislature intentionally omitted insurance from the scope of the CLRA, plaintiffs cannot invoke a rule of liberal construction to expand the Act to include insurance.

II.

THE LEGISLATURE'S TREATMENT OF MONEY AND CREDIT UNDER THE CLRA IS STRONG EVIDENCE THE LEGISLATURE INTENDED THAT THE ACT NOT APPLY TO INSURANCE.

Plaintiffs propose a broad definition of "services" that would include insurance and other financial transactions. However, the Legislature's treatment of money and credit under the Act shows the Legislature had a much narrower understanding of the term services and did not intend that term to include financial arrangements such as insurance. Further, this drafting history demonstrates that, to the extent the Legislature considered extending the CLRA to financial arrangements, the Legislature did not extend the Act to insurance.

The NCA specifically covered credit. (See National Consumer Act, *supra*, §§ 2.101-2.210, pp. 25-42.) A prefatory note to the NCA emphasized the importance of this coverage: "[E]xtensive revision of the laws affecting consumers is necessary. . . . One of the areas in which the *greatest abuses* have been practiced has been *consumer credit*." (National Consumer Act, *supra*, Prefatory Note, emphases added.)

Consistent with the NCA's scope, early drafts of the CLRA covered not just goods and services but also money and credit. The CLRA as introduced in January 1970 stated: "'Consumer' means an individual who seeks or acquires, by purchase or lease, any goods,

services, *money, or credit* for personal, family, or household purposes." (Assem. Bill. No. 292 (1970 Reg. Sess.) as introduced Jan. 21, 1970, § 1.1761, subd. (e), p. 2, emphasis added.)

Likewise, other key provisions in early drafts of the CLRA extended coverage beyond goods and services to categories including money and credit. For example, early drafts prohibited specific acts or practices including "any act or practice which is unfair or deceptive to the consumer" in connection with "the conduct of *any trade or commerce* . . . ." (Assem. Bill. No. 292, *supra*, as introduced Jan. 21, 1970, § 1.1770 & subd. (r), pp. 2-3, emphasis added.)

The Legislature, however, later deleted money and credit from the scope of the Act. As finally enacted, the CLRA was limited to goods and services. The CLRA defined a "consumer" as "an individual who seeks or acquires, by purchase or lease, any *goods or services* for personal, family, or household purposes." (Civ. Code, § 1761, subd. (d), emphasis added.) Further, the CLRA prohibited specified acts or practices only as they related to "goods or services." (*Id.*, § 1770, subd. (a).)

In construing legislation, the court "accord[s] significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.) Here, because early drafts of the CLRA covered not just goods and services but money and credit, and the Legislature later eliminated money and credit from the Act,

the Legislature must have understood services to be distinct from and not to include money and credit.

The drafting history supports no other conclusion. In early drafts of the Act, money and credit were not listed as examples of goods or services; they were listed as independent grounds for coverage under the Act. (See Assem. Bill. No. 292, *supra*, as introduced Jan. 21, 1970, § 1.1761, subd. (e), p. 2.) Further, when the Legislature dropped the terms money and credit from the Act, it did not replace those terms with any general language covering the same subjects. (See Assem. Bill. No. 292, *supra*, as amended Aug. 7, 1970, § 1.1761, subd. (d), p. 3; cf. *Berry v. American Express Publishing, Inc.* (2007) 147 Cal.App.4th 224, 232 ["deletion of the terms 'money' and 'credit' narrowed the act's scope"].)

Nonetheless, plaintiffs propose a broad definition of services that would extend the CLRA not only to insurance but to financial arrangements such as money and credit as well. Thus, plaintiffs argue that insurance is a service because "it represents the insurer's promise to *do* something: to provide security against the risk of loss." (RBOM 3, original emphasis.) However, credit is also a promise to *do* something—to extend credit. Plaintiffs' broad construction cannot be reconciled with the drafting history. Because the Legislature did not understand the term services to apply to money and credit, the Legislature clearly did not share plaintiffs' understanding of the term services as extending broadly to credit and other financial arrangements.

The Legislature's drafting decisions compel the conclusion that it intended the term services to apply in its traditional and principal sense, as meaning work performed for others. (See Webster's II New Riverside University Dict. (1984) p. 1066 [defining "service" as, inter alia, "**1.** The occupation or duties of a servant. **2.** Employment in duties or work for another, esp. for a government <public service>"].) The Legislature did not understand the term services to apply to insurance.

Further, the Legislature's decision to include money and credit in early drafts of the CLRA demonstrates that, to the extent the Legislature considered applying the Act to financial arrangements at all, the Legislature did not intend the Act to apply to insurance. If the Legislature had intended such a result, it would have specifically included insurance within the Act's scope, as the Legislature initially did with money and credit.

The drafting history thus consistently establishes the Legislature's intent that the CLRA not apply to insurance.

CONCLUSION

For the reasons set forth above and in the briefing submitted by defendants and real parties in interest Farmers New World Life Insurance Company and Farmers Group, Inc., this court should affirm the Court of Appeal's decision that the CLRA does not apply to insurance.

Dated: July 3, 2008

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DATED: July 3, 2008

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Robert H. Wright