Case No. **S241434**

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case No. S241434

SUPREME COURT
FILED
FEB 14 2018
Jorge Navarrete Clerk
Deputy

EDUARDO DE LA TORRE, et al.,
Plaintiffs, Appellants and Cross-Appellees,

vs.

CASHCALL, INC.,
Defendant, Appellee and Cross-Appellant.

ON A CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, CASE NO. 14-17571, [CAL. RULES OF COURT, RULE 8.548].

AMICI CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA AND THE CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANT, APPELLEE AND CROSS-APPELLANT

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

EDUARDO DE LA TORRE, et al.,
Plaintiffs, Appellants and Cross-Appellees,

vs.

CASHCALL, INC.,
Defendant, Appellee and Cross-Appellant.

INTRODUCTION: INTEREST OF AMICI AND IMPORTANCE OF ISSUE

The Civil Justice Association of California ("CJAC") and California Chamber of Commerce ("CalChamber") welcome the opportunity as *amici curiae* to address the issue certified to this Court for decision by the United States Court of Appeals for the Ninth Circuit:[1]

> **Can interest rates on unsecured consumer loans governed by the Finance Lenders Law (FLL), which provides no interest rate limitations on loans of $2500 or more, be deemed unconscionable under Fin. Code § 22302 and thus form the predicate for a private cause of action under the California Unfair Competition Law ("UCL"; B & P Code § 17200 et. seq.)?**

The federal district court considered this issue in the context of a putative class action and initially ruled in plaintiffs' favor by denying

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[1] By previous application CJAC and CalChamber sought and obtained the Court's permission to lodge an amici curiae brief in support of defendant by February 5. By separate accompanying application they ask that it be accepted for filing.

defendant lender's motion for summary judgment, finding that Fin. Code § 22303's "removal of interest rate limitations on loans of $2500 or more" presented "factual issues as to whether [such] loans 'shock the conscience.'" (*De La Torre v. CashCall, Inc.* (N.D. Cal. 2014) 56 F.Supp.3d 1105, 1110.) Upon reconsideration, however, the district court granted summary judgment for defendant, finding that judicial determination of whether defendant's interest rates were unconscionable would "impermissibly require the Court to regulate economic policy" because it could not fashion a remedy "without deciding the point at which [defendant's] interest rates crossed the line into unconscionability." (*Id.* at 1109-10.) Faced with this issue on appeal, the Ninth Circuit punted by certifying it to this Court for guidance. (*De La Torre v. CashCall, Inc.* (9th Cir. 2017) 854 F.3d 1082.)

How this Court decides the question is of vital interest to amici. A decision that interprets the FLL to find unsecured consumer loans above $2500 exempt from specified interest rate charges, but nonetheless subject to judicially imposed interest rate ceilings under the rubric of "unconscionability," is fraught with danger. It would require a senseless construction of the FLL, saddle courts with responsibilities they are ill-equipped to decide, run counter to the law's purpose of allowing interest rates on loans above $2500 to be set by the competitive market, and significantly restrict future access to credit for unsecured lenders desirous of obtaining loans above $2500 at fully disclosed and transparent interest rates.

As a harbinger of judicial policy, such a decision would send chills down the spines of businesses and financial institutions fearful of judicial over-regulation of practices more properly subject to, and in this case assumed by, the legislative and administrative branches of government.

CJAC, a 40-year-old nonprofit organization representing businesses, professional associations and financial institutions, is dedicated to educating the public about ways to make our civil justice laws more fair, economical, certain and uniform. Toward this end, CJAC regularly petitions the government for redress of grievances when it comes to determining who owes, how much and to whom when the wrongful acts of some are alleged to occasion injury to others. This is just such a case.

CalChamber is a nonprofit business association with more than 13,000 members, both individual and corporate, representing virtually every economic interest in the state. For more than a century, CalChamber has been the voice of California businesses. While CalChamber represents several of the largest corporations in California, 75% of its members are smaller businesses with less than 100 employees. CalChamber acts on behalf of the business community to improve the state's economic and employment climate on a broad array of legislative, regulatory, and legal issues that, like this one, threaten serious impositions.

SUMMARY OF ARGUMENT

When, in 1985, the Legislature removed all interest rates on unsecured consumer loans *above* $2500, but set specific interest rates for

loans *below* that amount, it did not confer upon courts authority to regulate interest rates for loans greater than $2500 because they may felt by some to be "unconscionable." To construe the pertinent statutes of the FLL (Fin. Code §§ 22302 & 22303) as providing otherwise defies common sense, defeats the purpose of the FLL to let competition by lenders in the free market determine interest rates on loans above the $2500 threshold, and thrusts upon courts complex economic burdens they are ill equipped to discharge.

Moreover, hitching the statutory prohibition against unconscionable contracts to the UCL's "unlawful" prong so as to allow judicial regulation of interest rates – a necessary step to plaintiffs' successful prosecution of their claim – would constitute judicial overreaching. It would transform what is a well-settled affirmative defense into an affirmative cause of action that is based upon a broad and amorphous standard – "unconscionability" – that provides no guidance to lenders as to permissible interest rates.

The setting of interest rates on loans is the responsibility of legislatures and administrative bodies upon whom the legislature has expressly conferred that authority. In the case of unsecured consumer loans above $2500, the Legislature left setting interest rates to the marketplace; and the Court should not displace that determination by conferring that authority upon the judiciary.

ARGUMENT

I. TO HOLD THAT THE FLL'S EXPRESS EXEMPTION FROM INTEREST CEILINGS FOR UNSECURED CONSUMER LOANS IN EXCESS OF $2500 IS SUBJECT TO JUDICIALLY IMPOSED INTEREST RATE CEILINGS UNDER THE RUBRIC OF "UNCONSCIONABILITY," WOULD DEFY COMMON SENSE AND CONFLICT WITH THE PURPOSE OF THE STATUTE.

A. It is Illogical to Construe the FLL as Permitting an Affirmative Claim by a Borrower against a Lender on "Unconscionability" Grounds where the Loan Amount Exceeds $2500.

The parties provide extensive dueling arguments over the meaning of sections 22302[2] and 22303[3] of the FLL and how best to harmonize them. While amici believe defendant presents the better, more sound and

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[2] Fin. Code § 22302 provides: "(a) Section 1670.5 of the Civil Code applies to the provisions of a loan contract that is subject to this division.

(b) A loan found to be unconscionable pursuant to Section 1670.5 of the Civil Code shall be deemed to be in violation of this division and subject to the remedies specified in this division."

[3] Fin. Code § 22303 provides: "Every licensee who lends any sum of money may contract for and receive charges at a rate not exceeding the sum of the following:

(a) Two and one-half percent per month on that part of the unpaid principal balance of any loan up to, including, but not in excess of two hundred twenty-five dollars ($225).

(b) Two percent per month on that portion of the unpaid principal balance in excess of two hundred twenty-five dollars ($225) up to, including, but not in excess of nine hundred dollars ($900).

(c) One and one-half percent per month on that part of the unpaid principal balance in excess of nine hundred dollars ($900) up to, including, but not in excess of one thousand six hundred fifty dollars ($1,650).

(d) One percent per month on any remainder of such unpaid balance in excess of one thousand six hundred fifty dollars ($1,650).

This section does not apply to any loan of a bona fide principal amount of two thousand five hundred dollars ($2,500) or more as determined in accordance with Section 22251."

persuasive interpretation, there is a canon of judicial construction not addressed that is dispositive for defendant — a statute "must be given a *reasonable* and *common sense* interpretation consistent with the apparent *purpose* and intention of the lawmakers, *practical* rather than *technical* in nature, which upon application will result in *wise policy* rather than *mischief or absurdity*." (*DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 992; citations omitted; italics added.)

While section 22303 of the FLL sets maximum interest rate charges for unsecured consumer loans of less than $2500, but provides no interest ceilings for loans in excess of $2500, section 22302 provides that "[a] loan found to be unconscionable pursuant to section 1670.5 of the Civil Code shall be deemed to be in violation of this division and subject to the remedies specified in this division." Those remedies are vested solely in the Commissioner of Corporations, and include suspension or revocation of a lender's license. (Fin. Code § 22700.)

Section 22302 by its plain language applies to all unsecured consumer loans, which means those above and below the $2500 threshold may run afoul of the "unconscionability" prohibition as to all features of the contracts except interest rates. An interest rate *below* the maximum specified for loans of less than $2500 cannot reasonably be deemed unconscionable solely by virtue of the lower interest rate itself, though that is the logical extension of plaintiffs' contention that all loan terms (including interest) are subject to unconscionability challenge. Perhaps plaintiffs felt it necessary to argue that all loan terms are subject to a

challenge on unconscionability grounds in order to support their contention that loans over $2500 where no interest rate ceilings exist may be deemed "unconscionable," a simplistic "what's good for the goose is good for the gander" approach, but it does not wash. Only interest rates in *excess* of the maximum amounts set by statute for loans of $2500 or less, can, *solely* as to interest rates, be found unlawful or arguably "unconscionable." With no interest rate ceilings set for loans above $2500, however, courts are not authorized to impose their own notions of appropriate interest rates under the guise of "unconscionability."

Plaintiffs contend that under section 22302, loans in excess of $2500 that are "unconscionable" can be regulated by courts and that a "conscionable" rate in this case is one below 90%.[4] (Opening Brief on the Merits, p. 5.) This defies logic and common sense; and "courts must avoid statutory constructions that lead to illogical or absurd results." (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 142.) Why, one should reasonably ask of such an interpretation, would the Legislature set detailed rates for loans under $2500 while setting no maximum interest rate charges for loans above that amount, but delegate to the judiciary unbridled authority to set whatever rates it feels under the circumstances is "conscionable" or "unconscionable"? And why would the financial lending community support a bill – SB 447 (1985), which it indisputably did – that delegated such immense, uncabined authority to

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[4] This rate was certified by the district court when it defined the class.

courts to order restitution or disgorgement to all borrowers who entered into loan contracts above $2500?

These questions are rhetorical, for the answer is plainly that the Legislature would not, unless comatose or asleep at the switch when SB 447 percolated through the legislative process, enact such a draconian measure. Plaintiffs' attempt to parse the FLL and harmonize section 22302 with section 22303 to achieve that result is not practical, a mechanistic approach to statutory interpretation, but not a literate one.[5]

Significantly, section 22302's "unconscionability" provision merely incorporates by reference Civil Code § 1670.5(a)[6], which predates the enactment of Fin. Code §§ 22302 and 22303. No case, until this one, has sought to marry the statutory "unconscionability" prohibition to contractual "interest rates" charged by lenders and then bootstrap that combination as a predicate to the "unlawful" prong of the UCL to forge a

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[5] Amici are mindful of Justice Traynor's observation that we need "literate, not literal" judges. (Roger J. Traynor, *Reasoning in a Circle of Law* (1970) 56 *VA. L. REV.* 739, 749.)

[6] This section provides: "(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.

prosecutable private right of action by the borrower against the lender.[7] Indeed, only two reported appellate opinions have considered whether an interest rate on a loan is unconscionable, each reaching conflicting conclusions to the other. The most recent one is *Carboni v. Arrospide* (1991) 2 Cal.App.4th 76, in which the court found an interest rate of 200% on a secured loan substantively unconscionable because the cost to the borrower was "overly harsh" and "not justified by the circumstances." *Carboni* can be distinguished from the issue certified here on numerous grounds, one of which is that it "presented the classic situation in which a party asserted unconscionability as a *defense* to the enforcement of a contract and the court was therefore able to fashion a remedy avoiding the unconscionable provision." (*De La Torre v. CashCall, Inc., supra,* 56 F.Supp.3d at 1108-09.)

Here, of course, plaintiffs seek by class action to "flip" the affirmative unconscionability *defense* into an affirmative *claim* by bootstrapping it to the "unlawful" prong of the UCL. The problem with this gambit is that it necessarily begs the question (*petitio principii*)[8] by assuming that

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[7] A boolean search of California opinions in the Westlaw database ("ucl 'unfair competition law' /25 interest /5 rates") produced five opinions, two of which are unpublished, and none of which discuss anything helpful to resolution of the issue certified here: *Corbett v. Superior Court* (2002) 101 Cal.App.4th 649; *Wertheim, LLC v. Currency Corporation*, 2012 WL. 1854944; *Jiagbogu v. Bank of America, N.A.*, 2014 WL 2879939; *Parks v. MBNA America Bank, N.A.* (2012) 54 Cal.4th 376; and *Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410.

[8] *People v. Guiton* (1993) 4 Cal.4th 1116, 1132 (concurring opn. by Mosk, Associate Justice).

defendant's interest rates, notably lower than the 200% found unconscionable in *Carboni*, are *a fortiori* unconscionable in the context of an unsecured consumer loan subject to no express interest rate limits. (Fin. Code § 22303.) This attempt by plaintiffs to "get around the whole argumentative process"[9] by assuming as true the point that has to be demonstrated to be true is an informal material fallacy, dooming it from any serious consideration. "No legal argument can be acceptable unless based on the canons of logical thinking." (Ruggero J. Aldisert, *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* (3rd ed. 1997) xxvi.)

In an earlier opinion in conflict with *Carboni*, the appellate court rejected plaintiff's argument that an industrial loan with an interest rate greater than the usury law allowed was "unconscionable" as a matter of law even though it agreed the rate charged was in fact "unconscionable." (*Peoples Finance & Thrift Company of Beverly Hills v. Mike-Ron Corp., Inc.* (1965) 236 Cal.App.2d 897.)[10] That opinion was based on a distinction analogous to Fin. Code § 22303 and its applicability to this case – the statute provided interest rate ceilings for industrial loans under a certain amount, but did not specify any rate limitations for loans over that amount. Accordingly, the court ruled interest rate restrictions on

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[9] D. Q. McInerny, *BEING LOGICAL* (2005)109.

[10] SB 447 was enacted after *People's Finance* but before *Carboni*, which is perhaps helpful in interpreting the meaning of Fin. Code § 22303 since in enacting statutes the legislature is presumed to have knowledge of existing judicial decisions and to have acted in the light thereof. (*Stafford v. Realty Bond Service Corp.* (1952) 39 Cal.2d 797, 805.)

industrial loans below $5000 were valid and enforceable but above that amount "until the legislature exercises the power granted to it . . . to regulate the business lenders in a manner appropriate to each exempted class, the class not so governed by legislation is subject to . . . no interest rates or charges." (*Id.* at 901.)

B. To Hold, as a Matter of Law, that Unsecured Consumer Loans for more than $2500 are Subject to Judicial Regulation for "Unconscionability" solely on the Basis of the Interest Rate Charged, Defeats the Purpose of the FLL.

"[I]f a statute is to make sense, it must be read in the light of some assumed *purpose*. A statute merely declaring a rule, with no purpose or objective, is nonsense."[11] "Rules of statutory construction require courts to construe a statute to promote its *purpose*, render it reasonable, and *avoid absurd consequences*." (*Ford v. Gouin* (1992) 3 Cal.4th 339, 348; italics added.)

The purpose of the FLL is to "ensure an adequate supply of credit to borrowers in this state" and "foster competition among finance lenders." (Fin. Code § 22001 (a).) A principal means of achieving that goal is to reduce or eliminate limitations on interest rates and let the free-market set the rates through competition by lenders. As the California Consumer Services Agency advised the Governor when SB 447 was before him for signature or veto on the FLL sections this Court must now parse, "Limiting

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[11] Llewllyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed* (1950) 3 VAND. L. REV. 395, 400 (italics added), reprinted in Singer, STATUTES AND STATUTORY CONSTRUCTION §48A:08, p. 639 (2000 ed.).

interest or cost of credit charges has the effect of benefitting the 'haves' (those who can afford to pay) at the expense of the 'have nots.' The result will be less credit available to higher risk applicants if charges cannot be made to cover the additional risk." (Shirley Chilton, Secretary of State and Consumer Services Agency, Memorandum to Governor George Deukmejian, Sept. 3, 1985.) Hence Fin. Code § 22303 was signed into law setting interest rate ceilings on unsecured consumer loans below $2500 while clarifying that no ceilings applied on such loans for amounts greater than $2500. This compromise approach of the FLL was consistent with the deregulation principle and reasoning underlying it:

> Those (economists) who oppose interest rate restrictions view credit markets as relatively efficient when left alone to operate freely. According to this position, free competitive markets lead to an optimum allocation of resources and maximum individual satisfaction. Consequently, interferences with normal credit flows by use of imposed ceilings on lending or deposit rates can only create inefficiencies in financial markets which hamper production and exert an adverse influence on the distribution of goods and services.

(Norman N. Bowsher, *Usury Laws: Harmful When Effective* (1974) 56 *FED. RES. BANK OF ST. LOUIS* 16, 17.)

As the record in this case demonstrates, the FLL has achieved its purpose. The sub prime lending market is highly competitive. According to the state Department of Business Oversight ("Department") 2010 report, "licensed lenders made 253,878 unsecured loans." (Answer Brief on the Merits ("ABM"), p. 13.) A total of 37,077 of these loans were for amounts of $2500 or more, and 28,950 of these loans carried APRs between 40 and

99 percent. (*Id.* at 14.) "The Department's annual reports for other years during the [plaintiffs'] 'class period' confirm that, in each year, there were tens of thousands of loans at rates exceeding plaintiffs' 90 percent unconscionability cut-off." (*Id.*) Despite defendant's cautious underwriting practices, 45 percent of loans it made to the class (60,981) defaulted; and about a quarter (33,315) of the class repaid less $2600 less than they borrowed from defendant, and 5,401 borrowers "defaulted without making a single payment." (*Id.* at 16.)

These statistics and others set forth by defendant in its brief (ABM, pp. 11-16.), show that the sub prime lending market is highly competitive and defendant's lending practices are in line with (*i.e.*, not excessive or outliers to) other loan competitors.

In contrast to the situation in *Carboni* where the defendant lender could not justify its price of credit (which was ten times the value of the loan because ten times the prevailing rate for the same type of loan), the defendant here did not charge excessive interest rates on its loans above $2500. In fact, even after increasing its interest rates in 2005 to 135 percent, defendant did not reach "its targeted profitability of 15-20 percent." (*Id.* at 12.)

Finally, defendant has never concealed its interest rates. None of its ads promised a low interest rate. To the contrary, when the ads did mention the interest rates specifically, they either stated the highest interest rate available or noted generally that the loans earned a high interest rate. The general theme of the ads was that defendant offered a

convenient and quick way to obtain a loan for borrowers who may have had past credit problems. In addition, at multiple points in the application process, defendant has consistently disclosed all loan terms, including the interest rate.

After defendant approves an application, borrowers log on to defendant's website to sign the promissory note. The promissory note includes a Truth in Lending Act ("TILA") disclosure, which lists the APR, the finance charge, the amount financed and the total payments if the loan goes to term. The note also discloses the payment schedule (including the number of payments and each payment amount), the potential for late fees, and the fact that there is no prepayment penalty. Loan agents review the loan terms with borrowers, who can print or save the promissory note they sign online.

Beginning August 5, 2009, on the promissory note itself, borrowers were required to certify that they read and understood the amortization schedule, which was electronically linked to the promissory note. Since August 2005 (when it raised the interest rate to 96%), defendant's promissory notes prominently explained that (l)the loan carried a high interest rate, (2) borrowers should obtain financing elsewhere if available, and (3) they should pay the loan as soon as possible.[12]

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[12] This information is set forth in bold, large font, and all capital letters: "This loan carries a very high interest rate. You may be able to obtain credit under more favorable terms elsewhere. Even though the term of the loan is 42 months, we strongly encourage you to pay off the loan as soon as possible. You have the right to pay off all or any portion of the loan at any time without (continued...)

This aforementioned evidentiary scenario from the record in this case shows a highly competitive market for sub prime consumer loans above $2500, one working as the Legislature intended it to work when it enacted sections 22302 and 22303 as part of the FLL in 1985. As Will Rogers said of such situations, "If it ain't broke, don't fix it." Plaintiffs' attempt to throw a monkey wrench into the works under the guise of fixing what obviously "ain't broke" benefits none but plaintiffs' lawyers who, if the Court approves their peculiar parsing of the statutes informing the issue before it, will be the main beneficiaries through attorney fees far greater than what any prevailing class member client will ever receive.

Authorizing courts to set interest rates on the basis of "unconscionability" for loans greater than $2500 will destabilize the unsecured consumer lending market. Businesses, especially financial lenders, require and thrive on competition, but abhor and fear government regulation that lacks certainty, uniformity and predictability.[13] These goals cannot be achieved by regulation dependent on numerous judicial fora using the vague standard of "unconscionability" to determine what interest

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[12](...continued)
incurring any penalty. You will, however, be required to pay any and all interest that has accrued from the funding date until the payoff date."

[13] "[B]usinesses require predictability in order to maintain efficient organization and operation of resources. This predictability is required not only in determining a business's own internal procedures, but also with respect to a business's relationship to, and rights under, the law so that it may plan and accurately assess the risk of future litigation or liability." (Benjamin F. Tennille, Lee Applebaum, Anne Tucker Nees, *Getting to Yes in Specialized Courts: The Unique Role of ADR in Business Court Cases* (2010) 11 *Pepp. Disp. Resol. L.J.* 35, 41.)

rates in any given situation will pass muster. " 'Unconscionability' does not have a precise legal definition, but has been described as extreme unfairness." (*BLACK'S LAW DICT.* (9th ed. 2009) p. 1663; see *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 487.) This is a vague and amorphous standard that lends itself to varied interpretations and applications. "The vice of vagueness . . . in . . . statutes is the treachery they conceal . . . in determining . . . what acts are prohibited." (*United States v. Cardiff* (1952) 344 U.S. 174, 176.) "It is true that '[c]ivil as well as criminal statutes must be sufficiently clear as to give a fair warning of the conduct prohibited, and they must provide a standard or guide against which conduct can be uniformly judged by courts. . ..' " (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 231 and authorities cited therein; *Orloff v. Los Angeles Turf Club* (1951) 36 Cal.2d 734, 739.) Indeed, different notions by different courts of what constitutes an "unconscionable" interest rate is inevitable under the construction of the FLL plaintiffs urge this court to embrace. Instability from a lack of uniformity is the necessary outcome should this Court succumb to that construction, a result inimical to the public interest and contrary to the purpose of the FLL.

II. COURTS ARE ILL-EQUIPPED TO REGULATE AND DETERMINE PERMISSIBLE VERSUS IMPERMISSIBLE INTEREST RATES FOR CONSUMER LOANS UNDER AN "UNCONSCIONABILITY" STANDARD, WHICH IS WHY THE UCL SHOULD NOT BE USED FOR THAT END.

In granting defendant's motion in this case for summary judgment, the district court was strongly influenced by recognition that "California

courts have held that the judicial alteration of interest rates constitutes impermissible economic policy-making." (*De La Torre v. CashCall, Inc.*, 56 F.Supp.3d at 1109, citing and quoting from *California Grocers Ass'n v. Bank of Am.* (1994) 22 Cal.App.4th 205, 217.) In *California Grocers,* the trial court found that a bank's check-processing fee was unconscionable and issued an injunction prospectively slashing that fee nearly in half for a period of ten years. (*Id.*) The court of appeal reversed, holding the injunction "an inappropriate exercise of judicial authority." (*Id.*) *California Growers* also noted, as previously mentioned, that the legislature could have—but did not—expressly authorize its affirmative assertion as a UCL claim instead of a defense, in contrast to other consumer protection statutes. (*Id.*)

Courts have, however, often refused on abstention grounds to permit other statutory provisions to be bootstrapped to the UCL and enforced by that law's equitable remedies of restitution, disgorgement and injunction. The reasons for UCL abstention in these opinions are instructive as to why the Court should here also avoid marrying the "unconscionability defense" to the UCL's "unlawful" prong for the purpose of affirmatively regulating interest rates on loans where the legislature has seen fit, as with § 22302, to provide no interest rate restrictions for unsecured consumer loans above $2500.

Amici contend that determining whether any particular interest rate is unconscionable often, if not usually, requires a highly complicated and fact intensive analysis. Depending on the kind of transaction involved

there are various ways for determining whether an interest rate is so high as to deemed unconscionable. For example, at least four independent measures exist for determining whether an interest rate is unconscionable for financing the purchase of retail goods: (1) Price Over Cost—the sales price of the good compared to merchant cost; (2) Net Profit—the sales price compared to the merchant's total costs of operation, including the cost of the good sold; (3) Retail Price Comparison—the sales price compared to that of other retailers selling the same good; or (4) Similarly Situated Retailer Comparison—the sales price compared to just those 'similarly situated' merchants. (Steven W. Bender, *Rate Regulation at the Crossroads of Usury and Unconscionability: the Case for Regulating Abusive Commercial and Consumer Interest Rates under the Unconscionability Standard* (1994) 31 *Hous. L. Rev.* 721, 754.)

And when it comes to interest rates on various types of loans, "cost benefit analysis" ("CBA") is the favored means of evaluating financial regulations governing interest rates, which would logically apply when courts try to regulate interest rates based on unconscionability. (Eric A. Posner & E. Glen Weyl, *Cost-Benefit Analysis of Financial Regulations: A Response to Criticisms* (2015) 124 *Yale L.J. Forum* 246.) "To perform a CBA of a financial regulation, regulators must be able to draw on financial data . . . to determine . . . relevant valuations." (*Id.* at 247.) Absent that data, they must "disregard CBA and rely on guess work . . . or be unable to regulate even when . . . regulation is socially desirable." (*Id.* at 247-248.) When, for instance, bank loans are involved, banks "must maintain a

specified minimum *ratio* of equity to assets. (*Id.* at 248.) "Should different types of equity and different types of assets be treated differently for purposes of calculating the ratio? Should the ratio depend on the type of bank – whether it is large or small, national or regional, too big to fail or not too big to fail?" (*Id.*) And what should the ratio be – 4 %, 7% or more?

These kinds of determinations are beyond the ken of courts; and when courts have been saddled with comparable complexities arguably within the purview of the UCL's "unlawful, unfair or fraudulent" prongs, they often wisely choose to abstain. An important line of cases analyzes abstention in terms of whether a finding of UCL liability would encroach on the supervisory authority of an administrative agency or impinge on an area involving complex economic policy. *People ex el. Dept. Of Transp. v. Naegeke Outdoor Advertising Co.* (1985) 38 Cal.3rd 509, 523, for instance, found abstention proper for a state law claim based on an alleged underlying violation of the federal Highway Beautification Act. And when a trial court decided to invoke equitable abstention and dismiss a UCL claim by a patient against a professional corporation for operating without a license in violation of the Knox-Keene Act, the appellate court affirmed, explaining it would "require a detailed analysis of complex corporate structures, of risk allocation via service provider capitation contracts of the cost of providing medical care, and many related factual and legal issues," which is a task "properly left to the director of the [agency]." (*Hambrick v. Healthcare Partners Med. Group, Inc.* (2015) 238 Cal.App.4th 124, 152.)

Similarly, this Court refused to recognize "disparate impact" analysis under the Unruh Civil Rights Act in evaluating whether landlord's minimum income requirement for renters had an impermissible racially discriminatory impact because it would "involve the courts of this state in a multitude of microeconomic decisions we are ill equipped to make." (*Harris v. Capitol Growth Investors XIV* (1991) 52 Cal.3d 1142, 1166.) *Desert Healthcare Dist. v. PacifiCare FHP, Inc.* (2001) 94 Cal.App.4th 781, 795 instructs that "[w]here [,as here,] a UCL action would drag a court . . . into an area of economic policy, equitable abstention is appropriate. In such cases, it is primarily a legislative and not a judicial function to determine the best economic policy."

These opinions illustrate time-tested judicial experience underscoring the wisdom of this Court holding, consistent with the federal district court, that Fin. Code § 22302 does not, by itself or when bootstrapped to the UCL, support an action based on allegedly unconscionable interest rates for unsecured consumer loans for amounts greater than $2500.

CONCLUSION

For all the aforementioned reasons, this Court should hold that section 22302 does not permit judicial imposition of interest rate caps the Legislature removed. That holding would comport with common sense and pertinent canons of statutory construction, avoid saddling courts with responsibilities they are ill-equipped to decide, further the FLL's purpose of allowing interest rates on loans above $2500 to be set by the

competitive market, and promote continued access to credit for unsecured lenders desirous of obtaining loans above $2500 at fully disclosed and transparent interest rates.

Dated: February 5, 2018

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I certify that this document, based on the word processing software used to compose and print it, contains, exclusive of the caption, tables, certificate and proof of service, less than 5,600 words.

Dated: February 5, 2018

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Fred J. Hiestand

PROOF OF SERVICE

I, David Cooper, am employed in the city and county of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3418 3rd Avenue, Suite 1, Sacramento, CA 95817.

On February 5, 2018, I served the foregoing document(s) described as: Amici Curiae Brief of the Civil Justice Association of California and the California Chamber of Commerce in Support of Defendant and Respondent in *De La Torre, et al. v. CashCall,* S241434 on all interested parties in this action by placing a true copy thereof in a sealed envelope(s) addressed as follows:

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[X](BY MAIL) I am readily familiar with our practice for the collection and processing of correspondence for mailing with the U.S. Postal Service and such envelope(s) was placed for collection and mailing on the above date according to the ordinary practice of this law firm.

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

Executed this 5th day of February 2018 at Sacramento, California.

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David Cooper