No. S153846

In the Supreme Court of the State of California

PAMELA MEYER et al.,

Plaintiffs and Appellants

vs.

SPRINT SPECTRUM, L.P.,

Defendant and Respondent.

After Decision by the Court of Appeal, Fourth Appellate District,
Division Three, Case No. G037375
On Appeal from the Superior Court of the State of California, County of
Orange, Honorable Sheila Fell, Judge Presiding
Superior Court Case No. 04CC06254

Service on the Attorney General and Orange County District Attorney Required by California Business and Professions Code Section 17209 and California Rule of Court 8.29(a)

ANSWER TO AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES

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I. INTRODUCTION

In its Amicus Curiae Brief ("ACB") in support of plaintiffs, the National Association of Consumer Advocates ("NACA") argues that the Consumers Legal Remedies Act ("CLRA" or "Act") [Cal. Civ. Code § 1750 et seq.] does not require that a consumer must suffer damage as a result of unlawful business conduct to have standing to bring suit, and that the Court of Appeal below erred by construing it to do so.[1]

Defendant and respondent Sprint Spectrum L.P. ("Sprint") has anticipated the substance of NACA's arguments in its Answer Brief on the Merits ("ABOM") and thus responds only briefly below. In a word, NACA has no more power to rewrite the statute than do plaintiffs: the Act requires that a "consumer" must "suffer[ ] . . . damage as a result of" unlawful business conduct to have standing to sue. § 1780(a).

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1 All unspecified statutory references are to the California Civil Code.

II. ARGUMENT

A. The Court Of Appeal Was Right And NACA Is Wrong: The CLRA's Terms Do In Fact Require Damage As A Result Of Unlawful Business Conduct For Standing

NACA argues that the Court of Appeal erred in construing the CLRA to require that a plaintiff suffer damage as a result of unlawful business conduct for standing. (NACA ACB 3-12) It ignores the Act's plain text.

First, NACA asserts that inserting an unconscionable provision in a contract constitutes unlawful business conduct. Therefore, it continues, "[i]t is plain that the Legislature did not intend to require consumers to wait until *after* they suffer" damages as a result of unlawful business conduct to sue. (NACA ACB 8 (italics in original)) It is plain, however, that the Legislature *did* so intend. NACA is correct that the CLRA states that inserting an unconscionable provision in a contact is unlawful. *See* § 1770(a)(19). But the Act next states plainly who may sue for redress: only those consumers who suffer "damage as a result of" such unlawful business conduct. § 1780(a).

Second, by way of fallback, NACA asserts that the "damage" required for standing under the CLRA [*id.*] is not equivalent to the "[a]ctual damages" available as relief [§ 1780(a)(1)]. But the Court of Appeal did not conflate "damage" for standing and "actual damages" for relief. It stated only that

"*[s]ome* 'damage' must befall the consumer" to confer standing, and that such "damage" need not amount to "pecuniary loss." (Slip op. at 15 (italics added)) In so stating, it made no misstatement whatsoever. It recognized that although the CLRA may not require *much* for standing, it nevertheless requires *something*—and that *something* is "damage" of some sort.

Third, NACA asserts even if the CLRA did not require damage as a result of unlawful business conduct for standing, it would still require that a "plaintiff must be a *consumer*." (NACA ACB 10 (italics in original)) The question, however, is not whether the Act requires a plaintiff to be a "consumer"—it does [§ 1780(a)]—but whether it *also* requires the plaintiff to have "suffer[ed] . . . damage as a result of" unlawful business conduct [*id.*]. As the language quoted establishes, the Act answers that question, and answers it "yes."

Fourth, NACA asserts that if the CLRA requires damage as a result of unlawful business conduct for standing, some such conduct would escape suit if it did not cause damage. Precisely. The Act does not confer standing based on the bare existence of some such conduct, but only on the existence of such conduct *resulting in damage*. No harm, no foul—or better, no suit.

In sum, the CLRA's terms require damage as a result of unlawful business conduct for standing.

B. The Court Of Appeal Was Right And NACA Is Wrong: The CLRA's Purpose Does Indeed Warrant Requiring Damage As A Result Of Unlawful Business Conduct For Standing

NACA next asserts that the CLRA's purpose of protecting consumers from the economic problems stemming from unlawful business conduct compels construing the Act *not* to require damage as a result of such conduct for standing—otherwise, says NACA, the Act could not "prevent" such problems from arising but only provide relief after the fact [NACA ACB 2]. Not so.

In declaring certain business conduct unlawful, the CLRA subjects offenders to liability, including actual damages and punitive damages. §§ 1770, 1780(a). Most businesses—which are law-abiding—will avoid engaging in unlawful business conduct and will thereby avoid giving rise to the economic problems that might follow. Some, of course, will not—but they will pay the price and present a cautionary tale to others.

In any case, the "purpose" of a statute, including the CLRA, is "not a mantra" that can be "invoke[d]" to avoid its terms. *In re Young*, 32 Cal. 4th 900, 909 (2004) (internal quotation marks omitted). It follows that even in "construe[ing]" the Act "liberally" in light of its purpose [§ 1760], as it recognized it had to do [slip op. at 12], the Court of Appeal could not "omit what ha[d] been inserted" in the Act. *Manufacturers Life Ins. Co. v. Super. Ct.*, 10 Cal. 4th 257, 274 (1995). That means that it could not omit

"damage as a result of" unlawful business conduct [§ 1780(a)] as the Act's requirement for standing.

Indeed, courts divine a statute's purpose primarily from its text because the text reflects the balance of purposes that obtained legislative approval. Here, the Legislature undoubtedly considered not only the consumer protection purpose that NACA invokes but also weighed how to accomplish that purpose without unduly burdening California businesses with excessive litigation. As the voters would later conclude in amending the Unfair Competition Law [Cal. Bus. & Prof. Code § 17200] through Proposition 64, the Legislature concluded when it passed the CLRA that the appropriate balance was to permit consumers to sue if they suffer damage as a result of unlawful business conduct, but to foreclose private litigation brought on behalf of uninjured persons. *That* purpose is the one that appears plainly in the Act's text.

Therefore, the CLRA's purpose supports requiring damage as a result of unlawful business conduct for standing.

C. The Court Of Appeal's Proper Construction Of The CLRA's Standing Requirement Does Not Conflict With *Kagan v. Gibraltar Savings & Loan Assn.*

NACA next argues that the Court of Appeal erred in determining that its construction did not conflict with *Kagan v. Gibraltar Sav. & Loan Assn.*, 35 Cal. 3d 582 (1984). (NACA ACB 16-24) Unpersuasively.

NACA asserts that *Kagan* construed the CLRA *not* to require damage as a result of unlawful business conduct for standing. In doing so, however, it ignores the fact that *no* reported decision has ever read *Kagan* thus.[2] To be sure, it cites a number of decisions of its own, but none provides it any aid. Most address either the Unfair Competition Law [Cal. Bus. & Prof. Code § 17200 et seq.][3] or the Truth in Lending Act [15 U.S.C. § 1601 et seq.][4]—neither of which, however, contains any requirement of damage for

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2 *See Ticconi v. Blue Shield of Cal. Life & Health Ins. Co.*, ___ Cal. App. 4th ___, ___ (2008) [No. B190427, 2008 WL 510149, at *10 (Feb. 27, 2008)]; *CashCall, Inc. v. Super. Ct.*, 159 Cal. App. 4th 273, 288-91 (2008); *First American Title Ins. Co. v. Super. Ct.*, 146 Cal. App. 4th 1564, 1575 (2007); *Best Buy Stores, L.P. v. Super. Ct.*, 137 Cal. App. 4th 772, 779 (2006); *Smith v. Wells Fargo Bank, N.A.*, 135 Cal. App. 4th 1463, 1474 (2005); *Wilens v. TD Waterhouse Group, Inc.*, 120 Cal. App. 4th 746, 755 (2003); *Wang v. Massey Chevrolet*, 97 Cal. App. 4th 856, 869 (2002); *Olsen v. Breeze, Inc.*, 48 Cal. App. 4th 608, 624 (1996); *Stephens v. Montgomery Ward & Co.*, 193 Cal. App. 3d 411, 422 (1987); *Estate of Migliaccio v. Midland Nat'l Life Ins. Co.*, 436 F. Supp. 2d 1095, 1109 (C.D. Cal. 2006); *Chamberlan v. Ford Motor Co.*, 369 F. Supp. 2d 1138, 1147 (N.D. Cal. 2005); *Leardi v. Brown*, 394 Mass. 151, 161 (1985); *Cassano v. Gogos*, 20 Mass. App. Ct. 348, 352 (1985); *Tietsworth v. Harley-Davidson, Inc.*, 261 Wis. 2d 755, 766 n.4 (Wis. App. 2003), *reversed on another ground*, 270 Wis. 2d 146 (Wis. 2004).

3 *People v. McKale*, 25 Cal. 3d 626 (1979).

4 *Schnall v. Amboy Nat. Bank*, 279 F.3d 205 (3d Cir. 2002); *Mars v. Spartanburg Chrysler Plymouth, Inc.*, 713 F.2d 65 (4th Cir. 1983); *Brown v. Marquette Sav. and Loan Ass'n*, 686 F.2d 608 (7th Cir. 1982); *Dzadovsky v. Lyons Ford Sales, Inc.*, 593 F.2d 538 (3d Cir. 1979); *Redhouse v. Quality Ford Sales, Inc.*, 511 F.2d 230 (10th Cir. 1975).

standing. By contrast, some do in fact involve the CLRA—but none denies the Act's standing requirement.[5]

The absence of any support for NACA's assertion is hardly surprising. *Kagan* did *not* hold that the CLRA does not require damage as a result of unlawful business conduct for standing; it merely stated that such damage is not limited to "pecuniary loss," but extends to the "infringement of any legal right" to be free from such conduct. *Kagan*, 35 Cal. 3d at 593. The consumer there suffered damage in the form of economic, if not pecuniary, loss because she suffered transaction and opportunity costs. *Id.* at 587-89.

The Court of Appeal's construction does not conflict with *Kagan*.

D. The Court Of Appeal's Proper Construction Of The Standing Requirement Of The CLRA Does Not Undermine The Act's Purpose

In construing the CLRA to require damage as a result of unlawful business conduct for standing, the Court of Appeal implied, consistently with Sprint's analysis [ABOM 15-16], that damage in the form of economic loss sufficed. (Slip op. at 15)

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5 *Benson v. Kwikset Corp.*, 152 Cal. App. 4th 1254 (2007); *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663 (2006); *Mass. Mut. Life Ins. Co. v. Super. Ct.*, 97 Cal. App. 4th 1282 (2002); *Chamberlan*, 369 F. Supp. 2d at 1183.

Again NACA argues that the Court of Appeal erred [NACA ACB 25-27; *see id.* at 9 n.4]—again unpersuasively.

NACA's assertion, in effect, is that the CLRA *should* not require damage as a result of unlawful business conduct for standing. NACA purportedly fears that such conduct, even if it causes no damage, might nevertheless "impose[ ]" some supposedly "unacceptable chilling effect." (*Id.* at 26) NACA's complaint, however, does not go to whether the Act requires damage—it does—but whether it is wise to do so. "Courts," of course, "do not sit as super-legislatures to determine the wisdom . . . of statutes . . . ." *Estate of Horman*, 5 Cal. 3d 62, 77 (1971). The Legislature enacted the CLRA. NACA should take its complaint there.[6]

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6 In addition to arguing that the Court of Appeal erred by construing the CLRA to require damage as a result for unlawful business conduct for standing, NACA argues that the Court of Appeal erred by upholding the trial court's order sustaining Sprint's demurrer to plaintiffs' fourth amended complaint without leave to amend. (NACA ACB 23-24) In support of its assertion that the insertion of an unconscionable provision in a contract necessarily causes damage, NACA cites *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000), *La Sala v. American Sav. & Loan Assn.*, 5 Cal. 3d 864 (1971), *Martinez v. Master Protection Corp.*, 118 Cal. App. 4th 107 (2004), *O'Hare v. Municipal Resource Consultants*, 107 Cal. App. 4th 267 (2003), and *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519 (1997). None of those decisions, however, supports NACA's assertion because none of them even addresses the CLRA or its requirement of damage as a result of unlawful business conduct for standing.

III. CONCLUSION

On one point at least, Sprint is in agreement with NACA: "The CLRA does not allow, and never has allowed, lawsuits to be brought by unaffected parties." (NACA ACB 11) Rather, as Sprint has demonstrated, the Act requires, and always has required, lawsuits to be brought by "consumer[s] who suffer[ ] . . . damage as a result of" unlawful business conduct. § 1780(a).

Because that is so, this Court should affirm the judgment of the Court of Appeal.

DATED: March 6, 2008.

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By _____
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CERTIFICATE OF WORD COUNT COMPLIANCE

The foregoing Answer to Amicus Curiae Brief contains 2,051 words, including footnotes but excluding tables and this certificate. In preparing this certificate, I have relied on the word count generated by Microsoft Office Word 2003.

Executed on March 6, 2008, at San Francisco, California.

Raymond A. Cardozo

Meyer et al. v. Sprint Spectrum LP
Cal. Supreme Ct. No. S153845 (Cal. App. 4/3 No. G037375
Orange County Superior Court No. 04CC06254 (Class Action))

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, Two Embarcadero Center, Suite 2000, San Francisco, CA 94111-3922.

On March 6, 2008, I served the following document(s) by the method indicated below:

ANSWER TO AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of 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 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 this Declaration.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 6, 2008, at San Francisco, California.

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