In the Supreme Court of the State of California

EDUARDO DE LA TORRE and LORI SAYSOURIVONG, **Plaintiffs and Petitioners,** **v.** **CASHCALL, INC.,** **Defendant and Respondent.**	Case No. S241434

On Certified Question from the United States Court of Appeals for the Ninth Circuit, Case Nos. 14-17571, 15-15042
[California Rules of Court, rule 8.548]

BRIEF OF THE ATTORNEY GENERAL AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS

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INTRODUCTION AND STATEMENT OF INTEREST

Unconscionability limits on interest rates are nothing new. Courts have applied common-law price unconscionability doctrine to interest rates—the "price" term of a loan—for at least a century in California. When the Legislature codified the unconscionability doctrine in 1979, it did so specifically to protect consumers from being charged excessive prices on credit sales. The doctrine has historically supplemented usury laws and statutory rate caps as an additional protection against excessive interest rates.

Senate Bill 447, the Legislature's 1985 amendment to the California Financing Law, did not displace decades of common law applying unconscionability doctrine to excessive interest rates.[1] Nothing in the language or legislative history of that bill suggests the Legislature intended to exempt lenders subject to the California Financing Law from unconscionability principles that apply to all contracts, including loans. To the contrary, the statutory language and legislative history show that the Legislature *added* a provision confirming that existing unconscionability principles continued to apply to loans governed by the statute. Applying these well-settled principles to interest rates does not require courts to engage in "economic regulation."

As the State's chief law enforcement officer, the Attorney General is responsible for enforcing state law, including the Unfair Competition Law, Business and Professions Code section 17200 et seq. ("UCL"), and the California Financing Law, Financial Code section 22000 et seq., on behalf of the people of the State of California. The Attorney General has a strong

[1] As of October 4, 2017, the "California Finance Lenders Law" was renamed the "California Financing Law." (Stats. 2017, ch. 475, § 4, p. 3575.)

interest in ensuring that the California Financing Law is properly construed. The Attorney General submits this amicus curiae brief under California Rules of Court, rule 8.520(f), in support of Plaintiffs Eduardo De La Torre and Lori Saysourivong ("Plaintiffs") to provide additional support for the view that the unconscionability doctrine protects consumers from excessive interest rates on loans governed by the California Financing Law.[2]

ARGUMENT

I. INTEREST RATES HAVE LONG BEEN SUBJECT TO COMMON-LAW UNCONSCIONABILITY LIMITS

A. Courts Have Historically Restricted the Enforcement of Unconscionably High Interest Rates

"Price unconscionability"—the concept that an excessive price can render a contract unconscionable and unenforceable—has long been a fundamental aspect of the common law of contracts. The United States Supreme Court recognized common-law price unconscionability at least as early as 1870, in *Scott v. United States* (1870) 79 U.S. (12 Wall.) 443 [20 L.Ed. 438]. The Court in *Scott*, while construing the terms of a shipping contract, noted that a court of law should not enforce an "unreasonable and unconscionable" contract as written, but rather only as the contracting party "is equitably entitled to." (*Id.* at p. 445.) For this proposition, the Court cited *Baxter v. Wales* (1815) 12 Mass. 365, in which the Massachusetts Supreme Judicial Court found the annual price in a contract to lease cattle to be "unconscionable," even though the contract was exempt from Massachusetts's usury statute. (*Baxter*, *supra*, 12 Mass. at pp. 366-367.) *Scott* also relied on two English common-law decisions from the 17th and 18th centuries where the courts did not enforce agreed-upon prices in

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[2] The Attorney General takes no position on the underlying merits of Plaintiffs' claim that the loans in this case are unconscionable.

contracts on the grounds they were excessive. (See *Scott*, *supra*, at p. 445, citing *James v. Morgan* (K.B. 1675) 83 Eng. Rep. 323, 323 [1 Lev. 111] [reducing contract price of horse from agreed-upon price to reasonable price], and *Thornborow v. Whitacre* (K.B. 1706) 92 Eng. Rep. 270, 270-271 [2 Ld. Raym. 1164] [upon the court noting the contract price was excessive, the parties settled on a reduced price].)[3]

In *Hume v. United States* (1889) 132 U.S. 406 [10 S.Ct. 134, 33 L.Ed. 393], the Supreme Court affirmed a lower court's reduction of the price term of a contract on the ground that the price was unconscionably high. (*Id.* at p. 415.) The defendant in *Hume*, a government hospital, refused to pay the balance on the contract because the written price was 30 to 40 times the market value for the purchased goods. (*Id.* at p. 409.) The trial court found the price "grossly unconscionable" and reduced the plaintiff's contract damages to reflect the market value of the goods, rather than the price as written. (*Id.* at pp. 410-411.) The Supreme Court affirmed. (*Id.* at p. 415.) The Court defined such "unequitable and unconscientious bargains" as a species of fraud—separate from actual, "*dolus malus*" fraud—that would justify a refusal to enforce the contract even in the absence of mistake or fraudulent intent. (See *id.* at pp. 411, 413-414.)

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[3] Some legal scholars have traced the origins of common-law unconscionability back centuries to the Roman doctrine of *laesio enormis* ("abnormal harm"), which allowed for the rescission of real property contracts that did not reflect a fair price, and the corresponding "just price" doctrine from the Middle Ages, which precluded the enforcement of contracts with unfair prices. (See Cellini & Wertz, *Unconscionable Contract Provisions: A History of Unenforceability from Roman Law to the UCC* (1967) 42 Tul. L. Rev. 193, 193-194; see also 1 Corbin on Contracts (1989 supp.) § 128A, p. 264 ["The oldest form of unconscionability is where someone takes advantage of another's necessities or naiveté to charge an unconscionably high price."].)

California courts have applied price unconscionability to interest rates for over a century. The California Supreme Court recognized that an interest rate could be unconscionable as early as 1912, in *Bridge v. Kedon* (1912) 163 Cal. 493. The plaintiff in *Bridge* sued to enforce several loans he had made to the defendant, who argued that the loans had been discharged and, alternatively, should not be enforced because the interest rates were unconscionable. (*Id.* at pp. 495, 501-502.) The trial court enforced the loans, but found that the "rates of interest were exorbitant, and that the contracts were to that extent unfair and unconscionable." (*Id.* at p. 495.) The trial court therefore reduced the interest rates to a "reasonable and fair amount" of 12 percent per annum. (*Ibid.*) The Supreme Court affirmed, holding that the trial court had "eliminated the unfair and inequitable elements of the transaction" by reducing the interest rates to a reasonable rate. (*Id.* at pp. 501-502.) The Court noted that, in its review of the case law for similar loans, courts had "almost invariably deducted exorbitant interest or other unconscionable charges . . . and ha[d] enforced the charge only to the extent that it was just, fair, and reasonable." (*Id.* at p. 502.)

In an earlier case, *Boyce v. Fisk* (1895) 110 Cal. 107, the Court declined to find an interest rate unconscionable, but in doing so, recognized common law in other States that unconscionable interest rates should not be enforced as written, at least in situations where one party clearly took advantage of unequal bargaining strength. (*Id.* at pp. 113-115, citing *Brown v. Hall* (1889) 14 R.I. 249, 250, 256 [reducing excessive interest rate on mortgage to a reasonable rate despite the absence of applicable usury laws], *Hough's Adm'rs v. Hunt* (1826) 2 Ohio 495, 502 ["Where the inadequacy of price is so great that the mind revolts at it, the court will lay hold on the slightest circumstances of oppression or advantage to rescind the contract."], *Butler v. Duncan* (1881) 47 Mich. 94, 96–97 [10 N.W. 123, 123] [finding mortgage "of so unconscionable a nature that a court of chancery could not lend its aid in enforcing it"], and *Sime v. Norris* (Pa. 1871) 8 Phila. 84, 85-86 [applying California law, finding that loan "though lawful, was an oppressive and unconscionable one" and reducing interest rate to California legal rate of interest].) The Court in *Boyce* distinguished these authorities from the case before it on the grounds that, although the interest rate was high, there was no evidence the loan was the product of "oppression and overreaching as warrant the inference of undue advantage." (*Boyce v. Fisk, supra*, at p. 112, 114-115.) In other words, *Boyce* stands for the principle later stated in *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913 ("*Perdue*") that "[a]llegations that the price exceeds cost or fair value, *standing alone*, do not state a cause of action" for unconscionability. (*Id.* at p. 926 [emphasis added].)

More recently, in *Carboni v. Arrospide* (1991) 2 Cal.App.4th 76 ("*Carboni*"), the Court of Appeal had "little trouble" finding that a personal loan with a 200 percent annual interest rate was unconscionable, particularly where the evidence showed that the rate was ten times the prevailing market rate for similar loans. (*Id.* at p. 83.) And in *Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982 ("*Orcilla*"), the Court of Appeal held that the plaintiffs had stated an equitable cause of action that a mortgage interest rate was unconscionable where "the monthly loan payments exceeded the [plaintiff] couple's income by more than $1,000." (*Id.* at p. 998; see also *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 110 [holding that plaintiffs had a valid claim for unconscionability based on high mortgage interest rate].)

Thus, for essentially all of American history (and in the common law for centuries prior), price unconscionability doctrine has protected consumers from excessive prices, including interest rates.

B. Unconscionability Doctrine Supplements Usury Laws as a Protection Against Excessive Interest Rates

Common-law price unconscionability doctrine historically has existed side-by-side with, and supplemented, usury laws and statutory interest rate caps. In cases where usury laws and statutory rates caps did not apply, courts have nonetheless reviewed interest rates for unconscionability. In *Carboni*, for example, the Court of Appeal held that the interest rate on the subject loan was unconscionably high and unenforceable even though the loan was exempt from California's usury laws. (See *Carboni*, *supra*, 2 Cal.App.4th at p. 80, fn. 4.)

As in California, courts in many other States have refused to enforce unconscionably high interest rates despite the absence of applicable usury laws or statutory rate caps. (See, e.g., *State ex rel. King v. B & B Investment Group, Inc.* (N.M. 2014) 329 P.3d 658, 662-663, 672 ("*B & B Investment Group*") [finding annual interest rates of 1,147 to 1,500 percent on loans under $300 to be substantively unconscionable, despite repeal of statutory interest rate limits]; *Drogorub v. Payday Loan Store of WI, Inc.* (Ct. App. 2012) 345 Wis.2d 847, ¶¶ 18-20 [826 N.W.2d 123] (unrep. disp.) [finding 294 percent interest rate unconscionable despite the lack of applicable usury laws]; *First Mut. Corp. v. Grammercy & Maine, Inc.* (1980) 176 N.J.Super. 428, 439-440 [423 A.2d 680, 687] [noting that courts refuse to enforce unconscionable interest rates "even though the borrower was a corporation not entitled to the defense of usury"]; *Westchester Mortgage Co. v. Grand Rapids & I.R. Co.* (Sup. Ct. 1926) 213 N.Y.S. 593, 598-599 [finding that interest rate was unconscionable under Rhode Island law "even in the absence of statute law against usury"].); *Baxter v. Wales*, *supra*, 12 Mass. at pp. 366-367 [finding lease payments unconscionable despite exemption from usury laws].) Legal scholars have also noted for years that unconscionability limits on interest rates exist alongside usury laws as an alternative check on excessive interest rates. (1 Corbin on Contracts (1950) § 129, p. 402 [noting that very high interest rates may be found unconscionable in the absence of an applicable usury statute].)

II. THE LEGISLATURE HAS ENACTED SEVERAL STATUTES CONFIRMING THAT PRICE UNCONSCIONABILITY APPLIES TO INTEREST RATES

The California Legislature confirmed that unconscionability applies to interest rates on consumer loans when it (a) enacted Civil Code section 1670.5 specifically to address excessive prices and finance charges on consumer credit sales and (b) amended the California Financing Law to add new penalties for unconscionable loans as an alternative to fixed interest rate caps to protect consumers against excessive interest rates. Nothing in the language or legislative history of either statute suggests that the Legislature intended to give lenders subject to the California Financing Law a "safe harbor" to charge unconscionable interest rates.

A. California's Unconscionability Statute Was Enacted To Combat Excessive Charges on Credit Sales

The Legislature codified common-law unconscionability in Civil Code 1670.5 to protect consumers from unconscionable prices in credit transactions. Civil Code 1670.5 was enacted as part of a 1979 consumer protection bill designed to stop a wave of scams by home improvement contractors that resulted in consumers losing their homes to foreclosure. (See Stats. 1979, ch. 819, § 1, p. 2827.) The purpose of the bill, according to the Assembly Judiciary Committee's report, was to halt a scheme where contractors would "sell people shoddy goods at inexcusably high prices, arrange payment schedules that will be difficult if not impossible for the customer to meet, and secure the contract with a lien on the customer's home." (Assem. Com. on Judiciary, Bill Digest for Assem. Bill No. 510 (1979-1980 Reg. Sess.) as amended Aug. 17, 1979, p. 2; see also Sen. Com.

on Judiciary, Analysis of Assem. Bill. No. 510 (1979-1980 Reg. Sess.) as amended July 9, 1979, p. 2.) The contractors would "prey on uneducated people who lack the sophistication to protect themselves," charge them "unconscionable prices" on the installment contracts, and then foreclose on the customer's home when the customer defaulted, "pocketing the value of the equity in the home." (Assem. Com. on Judiciary, Bill Digest for Assem. Bill No. 510 (1979-1980 Reg. Sess.) as amended Aug. 17, 1979, p. 2.) These "overpriced" installment sales contracts often contained "hidden finance charges." (Dept. Consumer Affairs, Enrolled Bill Rep. on Assem. Bill No. 510 (1979-1980 Reg. Sess.) Sept. 18, 1979, p.1.)

To protect consumers from this scam, the Legislature took a number of approaches. Among other things, it enacted Civil Code section 1670.5, to make "all unconscionable contracts voidable," and incorporated the unconscionability doctrine into the Consumer Legal Remedies Act, Civil Code section 1750 et seq. ("CLRA"), to "specifically provide[] that unconscionable provisions in a consumer contract are unlawful." (Assem. Com. on Judiciary, Bill Digest for Assem. Bill No. 510 (1979-1980 Reg. Sess.) as amended Aug. 17, 1979, p. 4.) Thus, the Legislature not only codified existing unconscionability doctrine, but also provided a cause of action for consumers to affirmatively sue for damages and an injunction if a seller "insert[ed] an unconscionable provision in the contract." (See Civ. Code, § 1770, subd. (a)(19).) These unconscionability provisions were "designed to protect ignorant customers who enter into patently unreasonable contracts after having been conned by an unscrupulous dealer." (Assem. Com. on Judiciary, Bill Digest for Assem. Bill No. 510 (1979-1980 Reg. Sess.) as amended Aug. 17, 1979, p. 4.)

In enacting the unconscionability provisions, the Legislature dismissed an objection from the financial services industry that unconscionability doctrine was too vague to provide guidance to lenders.

An industry group wrote a letter to the bill's author—in an implicit acknowledgment that unconscionability principles would apply to financial products—arguing that the "unspecific standard [for unconscionability] will lead to litigation and create uncertainty in the market place." (Lawrence E. Green, Cal. Savings and Loan League, letter to Assemblyman Jack Fenton re Assem. Bill No. 510 (1979-1980 Reg. Sess.) Feb. 16, 1979, p.2; see also John M. Hunter, Law and Gov. Affairs Div., Montgomery Ward, letter to Rubin Lopez, Chief Counsel to Assem. Com. on Judiciary, re Assem. Bill No. 510 (1979-1980 Reg. Sess.) April 6, 1979, p.1 [objecting that unconscionability was "extremely vague"].) The Legislature disagreed. The subsequent committee report on the bill from the Assembly Judiciary Committee rejected the contention that unconscionability is too vague, noting that "[a] multitude of cases exist which give the concept a well-understood meaning." (Assem. Com. on Judiciary, Bill Digest for Assem. Bill No. 510 (1979-1980 Reg. Sess.) as amended Aug. 17, 1979, p. 4.)

Section 1670.5's legislative history demonstrates that the Legislature understood unconscionability to be a well-defined limit on excessive prices, including interest rates.

B. The Legislature Amended the California Financing Law To Reaffirm That Unconscionability Doctrine Applies to Excessive Interest Rates

The plain language and legislative history of the Senate Bill 447, the 1985 amendment to the California Financing Law, demonstrate that the Legislature not only intended unconscionability doctrine to continue to apply to interest rates on loans subject to the statute, but also intended to strengthen potential penalties a lender would face for charging unconscionable rates.

The Attorney General agrees with Plaintiffs that the plain language of Financial Code sections 22302 and 22303 shows that an excessive interest rate on a loan of $2,500 or more can render the loan unconscionable.[4] (See Pls.' Opening Br. at pp. 7-11.) The Attorney General adds that the plain language of the statute also shows no intent by the Legislature to restrict the already-existing application of unconscionability principles to interest rates for loans governed by the California Financing Law. To the contrary, the statutory language affirms that existing unconscionability doctrine "applies to the provisions" of such loans. (Fin. Code, § 22302.)

There is no need to harmonize sections 22302 and 22303 because there is no conflict between the language of the two sections. Section 22302 applies the unconscionability doctrine of Civil Code section 1670.5 "to the provisions of a loan contract that is subject to" the California Financing Law, providing that any loan "found to be unconscionable . . . shall be deemed in violation of" the statute. (Fin. Code, § 22302.) Nothing in the language exempts provisions like interest rates, prices, or charges—the central terms of a loan—from the unconscionability analysis. Section 22303, which applies fixed interest rate caps of one percent to two and a half percent on loans under $2,500, states that "[t]his section does not apply to

[4] The Attorney General does not agree with Plaintiffs to the extent they suggest that a hypothetical loan for less than $2,500 with an interest rate under the limits in Financial Code section 22303 could never be unconscionable. (See Pls.' Opening Br. at 10.) Section 22302 applies unconscionability to the provisions of *all* loans subject the California Financing Law and does not exempt loans within the limits of Section 22303. (Fin. Code, § 22302.) As discussed below, the unconscionability analysis does not turn on the interest rate alone, but instead depends on other factors such as procedural oppression, surprise, market price, the lender's profit margin, and other considerations. (See *post* at pp. 20-25.) These other factors may demonstrate that a loan under $2,500 is unconscionable, even if the total interest rate is within the limits of section 22303. However, the Court need not address this hypothetical, as the certified question involves only loans of $2,500 or more, which are not subject to section 22303.

any loan of a bona fide principal amount of two thousand five hundred dollars ($2,500) or more." (Fin. Code, § 22303.) In other words, section 22303 is—by its own terms—inapplicable to loans above $2,500. One section (§ 22303) "does not apply" to such loans, while the other section (§ 22302) "applies to the provisions" of such loans.

The Attorney General also agrees with Plaintiffs that the legislative history of Senate Bill 447 demonstrates that the Legislature intended price unconscionability to continue to apply to interest rates on loans governed by the California Financing Law. (See Pls.' Opening Br. at pp. 12-15; Pls.' Reply Br. at pp. 14-20.) As Plaintiffs note, the unconscionability provision in Senate Bill 447 was not in the original version of the bill, but was added later, following the Attorney General's objection that the bill did not sufficiently protect consumers from "exorbitant rates." (See Pls.' Mot. for Judicial Notice, Exs. D, E.) The Legislative Digest clarifies that the Legislature understood that the subject loans were already subject to unconscionability principles, and that the added provision simply "would make unconscionable loan contracts of personal property brokers and consumer finance lenders a violation of their respective licensure laws." (See *id.*, Ex. E.) And the bill's author, in a letter to the Governor, explained that the intent of the unconscionability provision was "to provide a remedy for excessive charges." (See *id.*, Ex. F.) As Plaintiffs point out, this history confirms that the Legislature intended that unconscionability would continue to be a limit on interest rates for the subject loans. (Pls.' Opening Br. at pp. 12-15.)

The Legislature's express incorporation of unconscionability doctrine while simultaneously eliminating fixed interest rate caps also reflects an understanding that unconscionability would operate as an alternative protection against excessive interest rates in the absence of usury laws. As discussed above, the Legislature enacted Civil Code section 1670.5

precisely to protect consumers against high prices and finance charges on goods and services sold to consumers on credit. (See *ante* at pp. 13-15.)

Contrary to Defendant's suggestion, the bill's stated purpose of promoting competition and allowing the "free market" to set interest rates does not conflict with the application of unconscionability doctrine. (See Def.'s Answer Br. at pp. 28-29.) As discussed above, the free market has always been constrained by the unconscionability doctrine and does not permit lenders to charge unconscionable interest rates. (See *ante* at pp. 8-13.) Unconscionability is "a doctrine fundamental to the operation of contract law, irrespective of the particular application." (*A&M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 487, fn. 12.) And the price set by the "free market" is one of the factors courts consider in determining unconscionability. (See *post* at pp. 21-22.)

Finally, eliminating unconscionability for interest rates on loans subject to the California Financing Law would conflict with the Legislature's goal of putting subject lenders "on a level playing field" with lenders that were not subject to the law. (See Sen. Com. on Banking & Commerce, Analysis of Sen. Bill No. 447 (1985-1986 Reg. Sess.) April 24, 1985, p. 1 [Def.'s Mot. for Judicial Notice, Ex. 3].) The sponsor of Senate Bill 447, the California Financial Services Association, argued for the proposed elimination of fixed interest rate caps for loans over $2,500 on the grounds that it would (a) "foster competition within the industry" and (b) put personal property brokers and consumer finance lenders "on a level playing field with banks, savings and loans, and credit unions," which were not subject to statutory interest rate caps. (*Ibid.*) However, those banks, savings and loans, and credit unions were (and are) subject to price unconscionability under Civil Code section 1670.5 and the common law. If Senate Bill 447 eliminated both the fixed rate caps *and* unconscionability limits on interest rates, as Defendant asserts, lenders subject to the

California Financing Law would have an advantage over other lenders (who would still be subject to unconscionability). Such a result would be contrary to the Legislature's intent to level the lending playing field.

C. The Legislature Did Not Create a "Safe Harbor" To Charge Unconscionable Interest Rates

In its order certifying this matter to this Court, the Ninth Circuit referenced the "safe harbor" doctrine from *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163 ("*Cel-Tech*"). (See Ninth Circuit Order Certifying Question to the Cal. Sup. Ct. at p. 10.) The Attorney General agrees with Plaintiffs that the *Cel-Tech* "safe harbor" doctrine does not apply in this case. (See Pls.' Opening Br. at pp. 20-21.) Financial Code section 22303 does not "actually bar" an action alleging unconscionable interest rates or "clearly permit" a lender to charge unconscionable interest rates. (See *Cel-Tech*, *supra*, 20 Cal.4th at p. 183.) Defendant's argument that a "safe harbor" to charge unconscionable rates is implied from the Legislature's elimination of fixed interest rate caps "is directly contrary to the approach adopted by our Supreme Court [in *Cel-Tech*]." (See *Klein v. Chevron USA, Inc.* (2012) 202 Cal.App.4th 1342, 1379.)

The "safe harbor" doctrine is not applicable to this case for another reason: the doctrine should apply only to claims brought under the "unfair" prong of the UCL. The doctrine was formulated in *Cel-Tech* to limit the broad reach of what acts or practices could be considered "unfair." (See *Cel-Tech*, *supra*, 20 Cal.4th at p. 182.) The Court determined that "[s]pecific legislation may limit the judiciary's power to declare conduct *unfair*." (*Ibid.* [emphasis added].) It should not apply to cases, like this one, brought under the "unlawful" prong. (See, e.g., *Klein v. Chevron USA, Inc.*, *supra*, 202 Cal.App.4th at pp. 1376-1384 [analyzing "safe harbor" doctrine for claim brought under UCL "unfair" claim and separately addressing UCL "unlawful" and "fraudulent" claims].)

III. COURTS ARE WELL-EQUIPPED TO APPLY UNCONSCIONABILITY PRINCIPLES TO INTEREST RATES

Price unconscionability is a fundamental contract-law doctrine courts have applied to interest rates using a well-defined framework. Defendant's suggestion that the application of this established doctrine would be unworkable "economic regulation" is contradicted by decades of case law.

A. Courts Have Established a Well-Defined Framework for Applying Unconscionability to Interest Rates

As the Legislature recognized in enacting Civil Code section 1670.5, price unconscionability is an established doctrine refined over a century of California case law. (See *ante* at pp. 14-15.) Courts have developed a well-defined framework for determining whether an interest rate is unconscionable.

As an initial matter, when determining whether a contract is unconscionable, courts do not analyze individual contractual terms (such as price or interest rate) in isolation. Rather, the analysis turns on the terms of the contact as a whole, including "the circumstances of the transaction." (*Perdue*, *supra*, 38 Cal.3d at p. 926.) Unconscionability has two components, one "procedural" and one "substantive." (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1243.) Procedural unconscionability focuses "on oppression or surprise due to unequal bargaining power," while substantive unconscionability focuses "on overly harsh or one-sided results." (*Ibid.*) "The prevailing view is that [procedural and substantive unconscionability] must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability." (*Ibid.* [emphasis in original].) There is a "sliding scale" relationship between these two components of unconscionability: "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Id.* at pp. 1243-1244.)

Procedural unconscionability can be shown by "oppression" or "surprise." (*Baltazar v. Forever 21, Inc.*, *supra*, 62 Cal.4th at p. 1243.) Oppression is shown where there is "an inequality in bargaining power resulting in no meaningful choice for the weaker party." (*Carboni*, *supra*, 2 Cal.App.4th at p. 82.) Such oppression is present in most adhesion contracts, where "one party has overwhelming bargaining power, drafts the contract, and presents it on a take-it-or-leave-it basis." (*Orcilla*, *supra*, 244 Cal.App.4th at p. 997.) "Surprise" is shown where "the supposedly agreed-upon terms are hidden in a prolix document." (*Carboni*, at p. 83.) For example, procedural unconscionability may be shown were contractual terms appear in fine print. (See *Perdue*, *supra*, 38 Cal.3d at p. 928.)

Substantive unconscionability, as a general matter, refers to terms that are "overly harsh," "unduly oppressive," "so one-sided as to 'shock the conscience,'" or "unfairly one-sided." (*Baltazar v. Forever 21, Inc.*, *supra*, 62 Cal.4th at p. 1244 [citations omitted].) As applied to a price or interest-rate term, courts have developed a series of factors to determine whether the price or interest rate is justified. (See *Perdue*, *supra*, 38 Cal.3d, at pp. 926-927.) While these factors should be considered together, substantive unconscionability can be shown where just one factor demonstrates an excessive price. (See, e.g., *Carboni*, *supra*, 2 Cal.App.4th at p. 83-84 [finding interest rate substantively unconscionable based on comparison to prevailing market rate].) The factors courts should consider include:

- **Market price:** In *Perdue*, where the Court considered whether a $6 charge for processing checks drawn on bank accounts with insufficient funds was unconscionable, the Court considered the "market price" or "the price actually being paid by . . . other similarly situated consumers in a similar transaction." (*Perdue*, *supra*, 38 Cal.3d at pp. 926-927.) The Court rejected the contention that market price should be dispositive, and stressed that courts should consider other factors, in part because some markets may not be "freely competitive." (*Id.* at p. 927.) The Court of Appeal in *Carboni* also relied on market price in finding an interest rate unconscionable, noting that "the interest rate (200 percent) was approximately ten times the rate then prevailing in the credit market for similar loans." (*Carboni, supra*, 2 Cal.App.4th at p. 84; see also *Wayne v. Staples, Inc.* (2006) 135 Cal.App.4th 466, 482-483 [finding no price unconscionability where price "was comparable to the amount charged by other retailers of [the same] services"]; *California Grocers Assn. v. Bank of America* (1994) 22 Cal.App.4th 205, 216 ("*California Grocers*") ["[T]he price paid by other similarly situated consumers is a factor in determining unconscionability."].)

- **Seller's profit:** The Court in *Perdue* also directed courts to consider "the cost of the goods and services to the seller [and] the inconvenience imposed on the seller." (*Perdue, supra*, 38 Cal.3d at p. 927 [citation omitted].) In *Perdue*, the Court found that a 600 to 2,000 percent profit margin on overdraft charges merited "further inquiry" as to whether the charge was unconscionable. (*Id.* at p. 928.) Other California courts have similarly considered a seller's cost or profit margin in determining price unconscionability. (E.g., *Moran v. Prime Healthcare Management, Inc.* (2016) 3 Cal.App.5th 1131, 1147-1149 [holding that plaintiff had stated a valid claim for price unconscionability where defendant allegedly charged uninsured patients rates that "far exceed the actual cost of care" and defendant's profits were allegedly "far beyond any reasonable profit margin"]; *Wayne v. Staples, Inc.*, *supra*, 135 Cal.App.4th at p. 483 [holding that "a 100 percent markup [for the service] . . . does not shock the conscience as a matter of law"]; *California Grocers*, *supra*, 22 Cal.App.4th at p. 216 [finding that a 100 percent markup for an overdraft fee "is wholly within the range of commonly accepted notions of fair profitability"].)

- **Disparity between price and value:** The Court in *Perdue* also directed courts to consider "the true value of the product or service." (*Perdue*, *supra*, 38 Cal.3d at p. 927.) For this proposition, the Court cited *American Home Improvement, Inc. v. MacIver* (1964) 105 N.H. 435 [201 A.2d 886], where the New Hampshire Supreme Court held that a home improvement contract was unconscionable and unenforceable because price and finance charges far exceeded the value of the goods and services the purchasers received. (See *Perdue*, at p. 927 [citing *American Home Improvement*, *supra*, 201 A.2d at p. 888-889]; see also *Freeman v. Henry Ow* (N.D. Cal. Nov. 16, 2016, No. 16-CV-04817-JST) 2016 WL 6778667, at *5 [applying California law, finding that "the disparity between the price that [purchaser] paid for his property interest and its true value suggests substantive unconscionability"].) Courts in other States have similarly found that a "[g]ross disparity between price and value can be used to demonstrate unconscionability." (*James v. National Financial, LLC* (Del. Ch. 2016) 132 A.3d 799, 816; accord *B & B Investment Group*, *supra*, 329 P.3d at p. 672 [finding loans unconscionable because they were "objectively low-value products and are grossly disproportionate to their price"]; *Jones v. Star Credit Corp.* (Sup. Ct. 1969) 298 N.Y.S.2d 264, 267 [finding that a sizeable "value disparity itself leads inevitably to the felt conclusion that knowing advantage was taken of the [consumers]"].)

- **Borrower's ability to repay:** In the context of loans to consumers, California courts have also considered whether the borrower has an ability to repay the loan in determining whether the loan is unconscionable. In *Orcilla v. Big Sur, Inc.*, for example, the Court of Appeal held that the borrowers had sufficiently alleged that a mortgage was substantively unconscionable based on "the allegation that the monthly loan payments exceeded the couple's income by more than $1,000." (*Orcilla*, *supra*, 244 Cal.App.4th at p. 998.) Similarly, in *Lona v. Citibank, N.A.*, the Court of Appeal reversed the lower court's grant of summary judgment to a lender on an unconscionability claim because there was evidence that the loans were "made to [the borrower] without reasonable consideration of his ability to repay the loans." (*Lona v. Citibank, N.A.*, *supra*, 202 Cal.App.4th at pp. 110-111.) "Given the extreme disparity between the amount of the monthly loan payments and [the borrower's] income, this was sufficient to create a triable issue on the question of whether the loans were . . . *substantively* unconscionable." (*Id.* at p. 111 [emphasis in original].) Courts in other States also consider a borrower's ability to repay as a factor in determining whether a loan is unconscionable. (E.g., *Gulfco of Louisiana, Inc. v. Brantley* (2013) 2013 Ark. 367, 10 [430 S.W.3d 7, 13] ["[A]nother factor which may contribute to a finding of unconscionability is a belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract."].)

- **Other potential factors:** In addition to these factors, courts in other States determining whether loans are unconscionable have considered other circumstances in the loan transaction. (See *Perdue*, *supra*, 38 Cal.3d at p. 926 [noting that case law from other jurisdictions "provide[s] a useful guide" to analyzing price unconscionability claims].) For example, evidence that the loan was structured intentionally to avoid lending regulations would weigh in favor of unconscionability. (See *James v. National Financial, LLC*, *supra*, 132 A.3d at pp. 834-837.) Also, the presence of other extremely one-sided or onerous terms—though not substantively unconscionable alone—could contribute to a finding of that a loan was unconscionable. (See *id.* at p. 821.)

Price unconscionability is a well-defined concept with a settled framework that guides courts in determining whether an interest rate is unconscionable and provides parties a degree of predictability and certainty.

B. Applying Long-Standing Unconscionability Principles Is Not Improper "Economic Regulation"

Applying these price unconscionability principles to interest rates is not "complex economic regulation" from which courts should abstain, as Defendant argues. To the contrary, courts have adjudicated such cases in California and other States for decades using the framework discussed above. As the legislative history for Civil Code section 1670.5 shows, the Legislature considered unconscionability to have "a well-understood meaning" based on "[a] multitude of cases." (See *ante* at 15.) Defendant's view of unconscionability as "a vague and malleable" concept (see Def.'s Answer Br. at 10) is not shared by the Legislature, which rejected the same arguments when enacting Civil Code section 1670.5.

The Court of Appeal "economic abstention" cases cited by Defendant are not applicable. (See Def.'s Answer Br. at p. 39, fn. 33.) The Supreme Court has not adopted an abstention doctrine allowing a court to refuse to adjudicate matters on the ground that they involve "complex economic regulation." The abstention doctrine cited by Defendant has been limited to several Court of Appeal decisions and Justice Brown's dissents in *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26 (see *id.* at pp. 62-64 [dis. opn. of Brown, J.]), and *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553 (see *id.* at pp. 596-597 [dis. opn. of Brown, J.]). And, even under the Court of Appeal economic abstention cases, abstention is not appropriate when the Legislature has made a policy decision and the trial court merely has to apply the law. (*Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 500-501.) Here, the Legislature has expressly directed courts to engage in unconscionability analysis *three times*: (a) in enacting Civil Code section 1670.5; (b) in amending the CLRA to prohibit unconscionable consumer contracts; and (c) in enacting Financial Code section 22302. The courts must merely apply the well-established unconscionability framework to the loans at issue.

Courts have a long history of awarding equitable remedies in price and interest rate unconscionability cases. In *Bridge v. Kedon*, this Court affirmed the trial court's reduction of unconscionable interest rates on loans of two and a half to three percent per month to a simple 12 percent annual rate. (*Bridge v. Kedon, supra*, 163 Cal. at pp. 495, 501-502.) And in *Carboni*, the Court of Appeal affirmed the trial court's reduction of an unconscionable annual interest rate of 200 percent to a 24 percent annual rate. (*Carboni, supra*, 2 Cal.App.4th at pp. 80, 87; see also *B & B Investments Group, supra*, 329 P.3d at pp. 675-676 [striking the unconscionable interest rate and applying statutory default interest rate]; *Jones v. Star Credit Corp., supra*, 298 N.Y.S.2d at 268 [reducing unconscionable credit price of freezer unit to a reasonable payment].) *California Grocers*, cited by Defendant, does not stand for the proposition that *no* remedy can ever be awarded in an interest rate unconscionability case. Rather, it simply holds that the specific remedy awarded by the trial court in that case—an injunction that imposed a 10-year cap on certain checking fees charged by the defendant—was an abuse of discretion. (*California Grocers, supra*, 22 Cal.App.4th at p. 216.)

Finally, Defendant's reliance on *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142 is misplaced, as Plaintiffs note. (See Pls.' Reply Br. at p. 24.) In *Harris*, the Court considered whether the Unruh Act, Civil Code section 51 et seq., impliedly banned discrimination on the basis of a person's economic status. (*Harris*, at p. 1148.) The Court found that such a ban would require courts to "engage in complex economic regulation," which it declined to do "*[i]n the absence of clear legislative direction.*" (*Id.*

at p. 1168 [emphasis added].) Here, in contrast, the Legislature has clearly directed courts to analyze loans for unconscionability using well-settled common law principles. (See Fin. Code, § 22302.) *Harris* is inapplicable.

CONCLUSION

An interest rate, like any other term of a loan governed by the California Financing Law, can render a consumer loan of $2,500 or more unconscionable under Financial Code section 22302.

Dated: February 5, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Brief of the Attorney General as Amicus Curiae in Support of Plaintiffs uses a 13 point Times New Roman font and contains 6,261 words.

Dated: February 5, 2018

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **De La Torre, et al. v. CashCall, Inc.**
No.: **S241434**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

On February 5, 2018, I served the attached:

BRIEF OF THE ATTORNEY GENERAL AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Los Angeles, California, addressed as follows:**[PLEASE SEE ATTACHED SERVICE LIST]**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 5, 2018, at Los Angeles, California.

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