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NETSCAPE COMMUNICATIONS
CORPORATION and AMERICA ONLINE, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

NETSCAPE COMMUNICATIONS CORPORATION, a Delaware corporation; and AMERICA ONLINE, INC., a Delaware corporation;

Plaintiffs,

v.

FEDERAL INSURANCE COMPANY, an Indiana corporation; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., a Pennsylvania corporation; ST. PAUL MERCURY INSURANCE COMPANY, a Minnesota corporation; EXECUTIVE RISK SPECIALTY INSURANCE COMPANY; a Connecticut corporation, and DOES 1 through 50,

Defendants.

CASE NO. C-06-00198 JW (PVT)

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' NINTH CAUSE OF ACTION, MOTION TO STRIKE PRAYER, OR ALTERNATIVELY FOR MORE DEFINITE STATEMENT; MEMORANDUM OF POINTS AND AUTHORITIES

Date: February 27, 2006
Time: 9:00 a.m.
Judge: Hon. James Ware
Courtroom 8

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I. INTRODUCTION

In their Complaint, Plaintiffs Netscape Communications Corporation and America Online ("Insureds") allege that Defendants unreasonably and in bad faith breached the terms of their liability insurance policies by refusing to defend and indemnify them in connection with four different class actions alleging, among other things, claims for invasion of privacy. Additionally, and separate and apart from their assertion that Defendants breached their contracts to Insureds in bad faith, Insureds allege that Defendants have an *improper business policy and practice* of automatically denying all claims – such as those at issue in the underlying class actions – implicating the "personal injury" coverages of their liability policies when privacy violations are alleged. Implicit in the Insureds' allegations is their assertion that Defendants intentionally fail and refuse to undertake any investigation whatsoever when such personal injury claims are submitted for their handling. Instead, such claims are summarily denied, resulting in the sale of illusory coverage. All of this is done to further Defendants' own financial interests.

For purposes of this motion, Insureds' allegations – and reasonable inferences from those allegations – must be accepted as true. If proven, the Defendants' business policy and practice is both fraudulent and unfair under the express provisions of California Business and Professions Code section 17200 et seq. ("Section 17200"), and substantial case law interpreting that statute. For example, courts have specifically held that a Section 17200 claim was properly stated by an insured against his or her insurance company when

- An insurer was alleged to have charged an insured a premium based on unsound actuarial principles. Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042 (9th Cir. 2000).
- A disability insurer was accused of implementing a policy of improperly targeting claims for termination. Hangarter v. The Paul Revere Life Ins. Co., 236 F.Supp.2d 1069

(N.D.Cal. 2002); aff'd in part and rev'd in part on unrelated grounds sub nom., Hangarter v. Provident Life and Acc. Ins. Co. 373 F.3d 998 (9th Cir. 2004); and

- An insurance company allegedly had a policy of demanding improper reimbursement of medical payments made to its insureds. Progressive West. Ins. Co. v. Yolo County Sup. Ct., 2005 Cal. App. LEXIS 1979 (2005).

In each circumstance cited, the insured's allegations of programmatic mishandling of their insureds' rights and claims was held to be a sufficient statement of an unfair business practice under Section 17200. So too here, as the Insureds allege that a business policy requiring the wholesale rejection of privacy claims is the basis of Defendants' liability. Because Insureds' have sufficiently alleged a claim for relief under these and the other authorities cited herein, Defendants' motions to dismiss and related motions must be denied.[1]

II. FACTUAL BACKGROUND

A. *Underlying Privacy Lawsuits Against Netscape and AOL*

In 2000, four putative class action lawsuits were filed against Netscape and AOL (hereinafter, the "Underlying Actions") seeking, among other things, compensatory damages and other relief for Netscape's and AOL's alleged interception of consumers' private electronic communications. Complaint, ¶¶ 15,16. Specifically, the Underlying Actions alleged that two Netscape software products, Netscape Communicator and SmartDownload, operated in tandem to surreptitiously collect personal and private information from consumers by causing them to (unwittingly) disclose through the Internet the electronic address of files they downloaded, together with identifying codes. Id. at ¶16. It was further alleged in the Underlying Actions that records of sites consumers visited were monitored, captured and transmitted to, among others, Netscape and AOL, thereby imparting the contents of consumers' communications to parties

[1] Defendants Federal Insurance Company and Executive Risk Specialty Insurance Company filed a joint Motion to Dismiss, and Defendant St. Paul Insurance Company filed a separate Motion to Dismiss. For the sake of efficiency, and because most of the arguments in Defendants' separate motions were identical, Plaintiffs file this single Opposition in response to both Motions to Dismiss.

who were not authorized, entitled, or otherwise intended to view such private communications. Id. Among the claims asserted were violations of two federal statutes: The Electronic Communications and Privacy Act (18 U.S.C. §§ 2511 and 2520) and the Computer Fraud and Abuse Act (18 U.S.C. § 1030). Id.

In addition, shortly after the filing of the Underlying Actions, New York's Attorney General initiated an investigation into certain privacy-related consumer protection issues (the "Attorney General's Investigation"). Complaint, ¶ 17. At its core, the Attorney General's Investigation focused on privacy violations similar to those asserted in the Underlying Actions. Id.

B. *Defendants' Refusal to Provide Coverage for the Underlying Actions*

Upon receipt of the complaints in the Underlying Actions and the Attorney General's Investigation (the "Privacy Suits"), AOL and Netscape gave notice of those proceedings to Defendants for purposes of triggering defense and, if necessary, indemnity obligations. Complaint, ¶18. All Defendants summarily denied coverage pursuant to their business policies of automatically rejecting coverage for privacy-related claims. Complaint, ¶¶ 22-29, 78. As a result of the Defendants' improper business policies, Plaintiffs were forced to use their own resources to defend against the Privacy Suits' allegations. Complaint, ¶¶ 33-34. In all, Plaintiffs incurred and paid in excess of $4,273,064 in attorneys' fees, consultants' fees and other expenses in connection with their defense. Complaint, ¶ 33. Defendants have never reimbursed Plaintiffs any part of that sum. Id. Likewise, Defendants refused to reimburse a single penny of the $100,000 paid to resolve the Privacy Suits. Complaint, ¶ 34. [2]

[2] An appeal in the Underlying Actions is currently pending and, therefore, Plaintiffs are continuing to incur additional defense costs. Moreover, depending on the outcome of the appeal, the Insureds may be found liable to the plaintiffs in the Underlying Actions for up to $1,340,113.86. Complaint, ¶ 34.

C. *Plaintiffs Were Compelled to File This Action*

On December 12, 2005, Plaintiffs filed the instant action against Defendants to recover defense and settlement costs incurred in connection with the Privacy Suits; to enjoin Defendants' unfair business practices; and obtain restitution of all sums improperly obtained by Defendants. Defendants removed this case to federal court on January 11, 2006. Thereafter, Defendants filed separate motions to dismiss Plaintiffs' Ninth Cause of Action for Unfair Business Practices under California Business and Professions Code section 17200.

III. DEFENDANTS' MOTIONS TO DISMISS SHOULD BE DENIED

A. *Rule 12(b)(6) Motions Should Rarely Be Granted Because of the Federal Rule's Liberal Pleading Standard*

The strict standard for granting a motion to dismiss under Rule 12(b)(6) is set forth in Conley v. Gibson, 355 U.S. 41 (1957). A motion to dismiss under Rule 12(b)(6) must not be granted "unless it appears *beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. at 45-46 (italics supplied). As the Ninth Circuit Court of Appeals has observed, a "motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." Gilligan v. Jamco Develop. Corp., 108 F.3d 246, 249 (9th Cir. 1997).

In ruling on a motion to dismiss, the Court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164 (1993); Pareto v. FDIC, 139 F.3d 696, 699 (9th Cir. 1998). The Federal Rules do not require a claimant to set out in detail the facts upon which he bases his claim. Conley v. Gibson, 355 U.S. 41 (1957) (underscore supplied). To the contrary, all the Federal Rules require is "a shōrt and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Id. at 47 (footnote omitted). See also Swierkiewicz v. Sorema, 534 U.S. 506, 508 (2002) (A complaint "must contain only a short and plain statement of the claim showing the pleader is entitled to relief"); Maduka v. Sunrise Hosp., 375 F.3d 909, 912

(9th Cir. 2004). Dismissal is appropriate only if the plaintiff fails to assert a cognizable legal theory or to allege sufficient facts under a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

B. *Plaintiffs' Ninth Cause of Action Properly Pleads A Claim Under California Business and Professions Code Section 17200*

California Business and Professions Code section 17200 et seq. ("Section 17200") prohibits "unfair competition" which is defined to mean "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code, § 17200 et seq. Courts have thus construed the statute as prohibiting three different types of conduct: (1) acts or practices which are "unfair"; (2) acts or practices which are "unlawful"; and (3) acts or practices which are "fraudulent." Progressive West Ins. Co. v. Yolo County Sup. Ct., 2005 Cal.App. LEXIS 1979, *38 (2005); Pastoria v. Nationwide Ins., 112 Cal. App. 4th 1490, 1496 (2003); Schall v. Hertz Corp., 78 Cal. App. 4th 1144, 1167 (2000). Each type of (mis)conduct is actionable under Section 17200, and case law sets forth distinct tests for determining whether a complainant has properly pled one or more violations of Section 17200.

Toward this end, pleading a "fraudulent" business act or practice requires only that the complainant allege that members of the public are "likely to be deceived" by the defendant's conduct. Progressive West Ins. Co., 2005 Cal.App. LEXIS 1979 at 40-41; Schall, 78 Cal.App.4th at 1167.

An "unfair" business act or practice under Section 17200 necessitates allegations that the conduct "offends an established public policy" or "is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." Smith v. State Farm Mutual Automobile Ins. Co., 93 Cal. App. 4th 700, 719 (2001). The "unfair" prong of the Section 17200 test is "intentionally broad, thus allowing courts maximum discretion to prohibit new schemes to defraud." Id. at 718. When determining whether a business act or practice is "unfair," the court must engage in a "balancing test" – *i.e.*, it must examine the impact of the practice on the victim balanced against the justifications and motives of the alleged wrongdoer. Progressive West Ins.

Co., 2005 Cal.App. LEXIS 1979 at 44-45; Smith, 93 Cal.App.4th at 718. By its nature, such an analysis is fact-driven. Accordingly, courts have held that, prior to discovery, it is improper to determine whether such an "unfair" claim under Section 17200 is properly pled. Progressive West Ins. Co., 2005 Cal.App. LEXIS 1979 at 46; Schall, 78 Cal.App.4th at 1167.

Finally, a business practice is "unlawful" when it is "forbidden by law." Progressive West Ins. Co., 2005 Cal.App. LEXIS 1979 at 46. Thus, if the complainant alleges a statutory violation, "there is an unlawful act upon which to base an unfair competition claim," and a challenge to the complaint should be overruled. Pastoria v. Nationwide Ins., 112 Cal.App.4th 1490, 1497 (2003).

Less than six weeks ago, California's Court of Appeal held that an insured properly pleaded a Section 17200 claim against his insurance company based on allegations strikingly similar to those now challenged. Progressive West Ins. Co., 2005 Cal.App. LEXIS 1979, *38 (2005). In Progressive, an insurer sued its insured (Preciado) for reimbursement of medical payments. Preciado filed a cross-complaint alleging, among other things, a claim under Section 17200 based on his assertion that Progressive had a "pattern and practice" of making improper demands for reimbursement of medical payments from its insureds. Id. at 37. In particular, Preciado relied on the following two allegations in support of his Section 17200 claim:

- Progressive has a "pattern and practice of seeking med-pay reimbursement even though it never engaged in any discussion, analysis, or conclusion that the injured party has in fact been made whole" and "continues to seek[] sums it is not entitled to as a matter of law to further its unlawful scheme"; and
- Progressive has a "pattern and practice of ignoring California law by seeking 100% reimbursement for the amounts paid under its med-pay provision. This systematic scheme is contrary to California law, and is nothing more than a sharp, illicit business practice."

Id.

For its part, Progressive challenged the sufficiency of what it said were boilerplate allegations by filing a demurrer to Preciado's Section 17200 claim. Relief was denied. According to California's Court of Appeals, claims under Section 17200 can be based on conduct which is "fraudulent," "unfair" or "unlawful." Progressive West Ins. Co., 2005 Cal.App. LEXIS 1979 at 11. In terms of Preciado's specific allegations, the court held that the complaint properly alleged a claim under both the "fraud" and "unfair" prongs of the test. Two different reasons supported this conclusion: *First*, Preciado alleged that Progressive demands 100 percent reimbursement from its insureds without regard to whether the insured may have a set-off under common law principles. Id. at 12. This conduct, according to the court, "is likely to deceive the public" and, therefore, properly states a cause of action for fraudulent business practices under Section 17200. Id. *Second*, the court held that the same allegations by Preciado support his claim under the "unfair" prong since the balancing test is "fact intensive" and "not conducive to resolution at the demurrer stage" because "[t]he facts and evidence have not yet been adduced." Id. at 13.

Here, Netscape's and AOL's Section 17200 claim effectively tracks Preciado's claim, and is sufficiently pled under Progressive West Ins. Co. and its predecessors. As set forth in the Insureds' Complaint, Netscape and AOL allege that Defendants "have a policy and practice of automatically denying all claims that implicate their 'personal injury' and/or 'Media Activities' coverages when privacy allegations are asserted against their insureds."[3] See Complaint, ¶ 78. Netscape and AOL further allege that Defendants' practices are "unfair and present a continuing threat to Netscape, AOL and members of the public" because they "deprive policyholders of the insurance coverage they intend to purchase and believe they have purchased." See Complaint, ¶

[3] Defendants make much of the fact that Plaintiffs pled this allegation on information and belief. St. Paul Motion at 2, 6. Given the absence of any discovery in this action, the form and propriety of the Insureds' assertion is manifest. Moreover, it is perfectly proper to plead such matters on information and belief. See, e.g., Pastoria, 112 Cal.App.4th at 1496-1497 (Court held that insured properly stated a Section 17200 claim based on allegations, *made on information and belief*, that the insurer failed to inform him of impending changes to his policy before he purchased it).

79. As in Progressive, such allegations support the "fraud" for pleading Section 17200 claims because such conduct – selling illusory coverages to policyholders – is likely to deceive members of the public about the scope and nature of coverage purchased from Defendants. Further, the Complaint's allegations support the "unfair" prong of Section 17200's pleading test because Defendants' alleged conduct (to be borne-out by discovery) must be viewed, per se, as "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers" unless counter-balanced by Defendants' "justifications and motives" which may (or may not) be proven through discovery. Progressive West Ins. Co., 2005 Cal.App. LEXIS 1979 at 45-46.

1. California's Unfair Insurance Practices Act and Moradi-Shalal Do Not Bar Plaintiffs' Section 17200 Claim

Defendants mistakenly argue the Insureds' Section 17200 claim is based on California's Unfair Insurance Practices Act ("UIPA"), Cal. Ins. Code section 790 et seq. and, as such, it is improper. Defendants are wrong.

First, Plaintiffs' Section 17200 claim does not allege a violation of the UIPA. The Insureds' Complaint does not even mention the UIPA, nor any reliance on the acts prohibited as "unfair claims settlement practices" by the UIPA. See Cal. Ins. Code section 790.03. Rather, the Insureds contend Defendants committed fraudulent and unfair business practices when they sold insurance policies with broad "personal injury" or "Media Activities" coverages which they had no intention of honoring in the context of privacy-related claims.

Second, even if the Insureds' 17200 allegations could be read to constitute conduct prohibited by the UIPA, numerous courts have upheld the propriety of such pleadings. For example, in Hangarter v. The Paul Revere Life Ins. Co., 236 F.Supp.2d 1069 (N.D.Cal. 2002), the court recognized that the insured's Section 17200 claim was proper even though based on several violations of the UIPA. Id. at 1107. "[T]his court concludes that the Defendants have violated the Unfair Insurance Practices Act, Insurance Code § 790.03, and that their bad faith in doing so, as found by the jury in this case, constitutes a violation of Cal. Bus. & Prof. Code § 17200." Id. at 1109. As such, the Hangarter court rejected the insurance company's argument –

the same argument made by Defendants here – that the insured was trying "to make an end run around" the prohibition against private causes of action brought under the UIPA. Id. at 1103-1104.[4] See also Chabner, 225 F.3d at 1049-1050 (conduct forming basis of insured's 17200 claim could also be characterized as violation of UIPA); Pastoria, 112 Cal.App.4th at 1499 (same); Progressive West Ins. Co., 2005 Cal.App. LEXIS 1979 at 45-46 (same); Kapsimallis v. Allstate Ins. Co., 104 Cal. App. 4th 667, 675-676 (2002) (same). Taken as a whole, Defendants' fundamental premise is wrong: The UIPA does not bar 17200 actions against insurance companies for fraudulent, unfair or unlawful business practices. Rather, California law requires them to stand accountable for the consequences of their misconduct.

2. Plaintiffs' Failure to Specifically Allege The Inadequacy of Legal Remedies Does Not Preclude Their Section 17200 Claim

Defendants make the erroneous argument that Plaintiffs' Section 17200 claim must be dismissed because they fail to specifically plead the "inadequacy of legal remedies" in connection with their claim. This argument is contrary to the law.[5] Indeed, a court may not grant a motion to dismiss simply because a plaintiff seeks an improper remedy. As a matter of routine pleading practice, "[i]t need not appear that plaintiff can obtain the specific relief demanded as long as the court can ascertain from the face of the complaint that some relief can be granted." Doe v. U.S. Dep't. of Justice, 753 F.2d 1092, 1104 (D.C. Cir. 1985); Massey v.

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[4] In addition, the court distinguished the case of Moradi-Shalal v. Fireman's Fund Ins. Cos., 46 Cal. 3d 287 (1988) on the ground that it did not address the issue of a claim under Section 17200. Id. at 1104.

[5] As support, Defendants cite Heighley v. J.C. Penney Life Ins. Co., 257 F.Supp.2d 1241, 1259-1260 (C.D. Cal. 2003). Although Heighley does state that pleading the "inadequacy of legal remedies" is a prerequisite for Section 17200 claims, that comment did not form the basis of the court's holding and is dicta. Moreover, that comment seems contrary to California law given that Cal. Bus. & Prof. Code section 17203 expressly authorizes a court to enjoin any person who commits an act of unfair competition, and does not require any preliminary finding of a lack of legal remedies. See Cal. Bus. & Prof. Code section 17203 ("Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction.")

Banning Unified Sch. Dist., 256 F.Supp.2d 1090, 1092 (C.D. Cal. 2003); S. Cal. Water Co. v. Aerojet-General Corp., 2003 U.S. Dist. LEXIS 26534, * 12 (C.D.Cal. 2003).

Moreover, under the circumstances here, the Insured's Complaint is clear that injunctive relief is *necessary* to remedy Defendants' Section 17200 violation. See Complaint, ¶¶ 78-80. Towards this end, Insureds alleged that Defendants' insurance policies were "occurrence-based" and that the limits of insurance have not been exhausted. See Complaint, ¶¶ 22, 24, 38, 44, 50. Stated otherwise, the Insureds and their Defendants have an on-going contractual relationship: The underlying insurance policies remain in force, and may be called upon to provide coverage for future claims. In the event the Insureds are sued for privacy violations, they will again be exposed to Defendants' fraudulent and unfair policies and practices of automatically denying such claims. As such, the proper remedy at this time is thus an injunction against such ongoing (improper) conduct.

3. Plaintiffs' Request for Restitution and Disgorgement Is Appropriate

Defendants further argue that Plaintiffs' Section 17200 Claim should also be dismissed because it "improperly seeks monetary damages." St. Paul Motion at 8. Defendants' argument is both legally and factually wrong.

As a legal matter, a motion to dismiss for failure to state a claim may not be based on a complainant's request for relief, even if the relief requested is improper. S. Cal. Water Co. v. Aerojet-General Corp., 2003 U.S. Dist. LEXIS 26534, * 12 (C.D.Cal. 2003) ("A Rule 12(b)(6) motion will not be granted merely because [a] plaintiff requests a remedy to which he or she is not entitled."); see also Massey v. Banning Unified Sch. Dist., 256 F.Supp.2d 1090, 1092 (C.D. Cal. 2003). Rather, even where a complainant demands relief which is not legally available, a motion to dismiss must be denied if *any* relief would be available to the complainant. Doe v. U.S. Dep't. of Justice, 753 F.2d 1092, 1104 (D.C. Cir. 1985); Massey v. Banning Unified Sch. Dist., 256 F.Supp.2d 1090, 1092 (C.D. Cal. 2003); S. Cal. Water Co. v. Aerojet-General Corp., 2003 U.S. Dist. LEXIS 26534, * 12 (C.D.Cal. 2003). Accordingly, Defendants' motion to dismiss on this basis must be rejected.

As a factual matter, Defendants' are also wrong when they state that the Insureds' Complaint "improperly seeks monetary damages" and that the "purported restitution and disgorgement remedy sought by Plaintiffs is virtually indistinguishable from what Plaintiffs seek as damages under the contract and tort claims." St. Paul Motion at 8-9. In connection with their Section 17200 Claim, the Insureds do not seek compensatory damages. Rather, they seek "an order directing Defendants to disgorge to the public all funds and profits acquired by means of any act or practice" which is found by the court to violate Section 17200. See Complaint, Prayer for Relief, ¶ 14. Such relief is expressly authorized by the statute governing remedies for Section 17200 violations. See Cal. Bus. & Prof. Code section 17203 ("The court may make such orders … as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.").

In this regard, Defendants' reliance on Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134 (2003), is misplaced. There, plaintiff was seeking disgorgement of all profits earned by Lockheed Martin due to its alleged unfair business practices in connection with bids for military contracts. Plaintiff was Lockheed Martin's competitor. By way of recompense under Section 17200, Plaintiff's complaint there demanded that all disgorged profits be paid *to him*. As a result, the court held that plaintiff's disgorgement claim was not proper under Section 17203 because it was not restitutionary in nature. Rather, plaintiff did not have an ownership interest in the profits it was seeking, and never did. Korea Supply Co., 29 Cal.4th at 1149. Furthermore, it was unclear whether plaintiff (or some other third party) would have obtained the contract in the absence of Lockheed Martin's unfair business practices. Id. Based on this analysis, the court noted that awarding plaintiff disgorged profits would essentially provide him with the compensatory damages he was seeking in other causes of action which required differing degrees of proof than Section 17200.

By contrast, the Insureds' Complaint does not demand payment of disgorged profits to them. Rather, Plaintiffs specifically request that the court enter an order directing Defendants to "disgorge to the public" all funds obtained through their unfair and fraudulent business practices.

The remedy sought is thus *restitutionary*: All improper profits would be paid directly to the victims of Defendants' unfair and fraudulent business practices. Korea Supply Co. does not bar this remedy but plainly supports it. Korea Supply Co., 29 Cal.4th at 1152 ("Actual direct victims of unfair competition may obtain restitution as well.")

4. Plaintiffs' Section 17200 Claim is Pled in Sufficient Detail

Contrary to Defendants' assertions, Plaintiffs' Section 17200 claim complies with the pleading standards set forth in Federal Rule 8(a). As stated there, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." F.R.Civ. Proc. 8(a). "The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002). Here, Defendants are hardly confused. They know what they did and, to the extent they claim ignorance, the Complaint provides them with adequate notice, viz: The Insureds allege that Defendants violated Section 17200 with their "policy and practice of automatically denying all claims that implicate their 'personal injury' and/or 'Media Activities' coverages." Complaint, ¶ 78. This plain and straight-forward statement provides Defendants with "fair notice" of the claim against them and the grounds upon which it rests, thereby enabling them to respond, undertake discovery and prepare for trial. See Conley, 355 U.S. at 47-48.

C. ***In The Event Plaintiffs' Complaint Is Found Insufficient, Leave To Amend Should Be Granted***

For the reasons set forth above, Plaintiffs' Section 17200 claim is sufficiently pled, and Defendants' Motions to Dismiss must be denied. If, however, the Court determines that there is a deficiency in the Insureds' Section 17200 cause of action, leave to amend should be granted. See Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986) ("If a complaint is dismissed for failure to state a claim, leave to amend should be granted unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency."); Neubronner v. Milken, 6 F.3d 666, 672 (9th Cir. 1993)

(Courts may dismiss claims with prejudice where plaintiffs have failed to plead with the requisite particularity after "repeated opportunities."); Doe v. U.S., 58 F.3d 494, 497 (9th Cir. 1995) (Leave to amend should be granted even if the plaintiff did not request leave, unless it is clear that the complaint cannot be cured by the allegation of different facts). As a precautionary matter, the Insureds respectfully request leave to amend in the event Defendants' motion to dismiss are granted.

IV. DEFENDANTS' MOTION TO STRIKE SHOULD BE DENIED

Defendant St. Paul moves to strike Plaintiffs' Prayer for Relief as to their Section 17200 claim based on their claim that Plaintiffs' request for injunctive relief and restitution "are improper under California law." St. Paul Motion at 12. As discussed more fully above, Plaintiffs' Section 17200 claim is properly pled and they are, therefore, entitled to obtain one or more of the available remedies set forth in Section 17203, i.e. an injunction and restitution. See Cal. Bus. & Prof. Code, § 17203. Given the on-going contractual relationship between the Insureds and Defendants, an injunction is necessary here to prevent Defendants from committing the same fraudulent and unfair business acts in connection with future claims. Additionally, restitution is necessary to restore to Plaintiffs sums obtained by Defendants as a result of their fraudulent and unfair practices (i.e., a return of premiums, interest on (or profits made from) funds improperly withheld, etc.). For all these reasons, St. Paul's Motion to Strike should be denied.

V. DEFENDANTS' MOTION FOR A MORE DEFINITE STATEMENT SHOULD BE DENIED

Defendant St. Paul also moves for a more definite statement under Rule 12(e), ostensibly because it "cannot ascertain what unfair business practice St. Paul is being accused of having." St. Paul Motion at 13. St. Paul's motion is meritless. As set forth clearly and concisely in the Insureds' Complaint, St. Paul is accused of violating Section 17200 via its "policy and practice of automatically denying all claims that implicate their 'personal injury' coverages … when

privacy allegations are asserted against their insureds." Complaint, ¶ 78. St. Paul is on notice of its alleged wrongdoing. Its Motion for a More Definite Statement should be denied.

VI. CONCLUSION

For all the foregoing reasons, Defendants' motions to dismiss, and related motions, should be denied. To the extent Defendants' motions are granted, either in whole or in part, the Insureds request leave to amend their Complaint.

Dated: February 6, 2005

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