

EASTERN DISTRICT OF LOUISIANA

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE
TO FILE THIRD AMENDED CLASS ACTION COMPLAINT**

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I. INTRODUCTION

During the April 1 hearing, opposing counsel fundamentally abandoned all arguments as to why plaintiff's leave motion should not be granted, except for one argument relegated to a footnote in defendants' opposition memorandum. *See* Docket No. 81, at p. 8, fn. 5. According to defendants, plaintiff's leave motion should be denied because plaintiff's proposed claims under the LA Loan Broker Statute are prescribed under La. Civ. Code art. 3492. Defendants are wrong.

The 1-year prescriptive period set forth in La. Civ. Code art. 3492 does *not* apply to plaintiff's proposed claims. Plaintiff's claims do *not* sound in tort. Instead, plaintiff's statutory or equitable claims for recoupment or restitution are subject to the 10-year prescriptive period set forth in La. Civ. Code art. 3499.

II. PROCEDURAL HISTORY

As discussed during the April 1 hearing, defendants filed a motion to dismiss plaintiff's remaining claims for fraud, unfair trade practices, and invasion of privacy. *See* Docket Nos. 59 & 87. Defendants' motion was heard the morning of April 1, before Chief Judge Sarah S. Vance. The Court ordered plaintiff to "amend [her] fraud claim within 15 days." Docket No. 97. *Plaintiff's amended complaint must be filed by April 16, 2009.*

Also as discussed during the April 1 hearing, plaintiff seeks to add an additional plaintiff—Erick G. Adkins. To avoid multiple amended complaints, plaintiff is requesting that she be granted leave to file the attached amended complaint, which includes: (a) the revisions requested by Judge Vance; (b) the proposed new claims; and,

(c) the new plaintiff, Mr. Adkins. *See* Exhibit A, Prop. Amend. Compl. The attached complaint also:

- Addresses defendants' argument that plaintiff does not allege she paid any fees to defendants by specifically alleging such;
- Specifically includes an alternative claim for enrichment without cause and payment of a thing not owed, in the event the Court were to rule that the LA Loan Broker Statute does not provide an express private cause of action, or in the event the Court were to rule that the claim under the LA Loan Broker Statute is prescribed.

Id.

Plaintiff requests that her leave motion be granted before the April 16, 2009 deadline, so that she can file the attached amended complaint and avoid filing multiple amended complaints.

III. LAW AND ARGUMENT

“Liberative prescription is a mode of barring of actions as a result of inaction for a period of time.” La. Civ. Code art. 3447. In other words, “liberative prescription is a period of time fixed by law for the exercise of a right.” *State Through Div. of Admin. v. McInnis Bros. Const.*, 701 So.2d 937, 939 (La. 1997); *see also Hendrick v. ABC Ins. Co.*, 2000-2403 (La. 2001), 787 So.2d 283, 289 (“Liberative prescription, one of the three types of prescription in Louisiana, bars a demand for enforcement of a legal right when there has been inaction for a period of time.”).

“Under our law, prescriptive statutes are to be strictly construed *against prescription* and in favor of the claim that is said to be extinguished. Of the two possible constructions, the one that maintains enforcement of the claim or action, rather than the one that bars enforcement, should be adopted.” *Louisiana Health Service and Indem. Co.*

v. Tarver, 635 So.2d 1090, 1098 (La. 1994) (emphasis added); *see also Bustamento v. Tucker*, 607 So.2d 532, 537 (La. 1992) (same); *Lima v. Schmidt*, 595 So.2d 624, 629 (La. 1992) (same); *Castano v. American Tobacco Co.*, 870 F.Supp. 1425, 1430 (E.D. La. 1994) (same). Said another way, “[c]ourts should resolve doubts about a prescription question *in favor of giving the litigant his day in court.*” *Orthopaedic Clinic of Monroe v. Ruhl*, 34,700 (La.App. 2d Cir. 2001), 786 So.2d 323, 328 (emphasis added); *see also H.H. White, L.L.C. v. Hanover Ins. Co.*, 559 F.Supp.2d 714, 716 (E.D. La. 2008) (“[T]his Court is mindful that it ‘should resolve doubts about a prescription question in favor of giving the litigant his day in court.’”); *Global ADR, Inc. v. City of Hammond*, 2003 WL 22533645, *2 (E.D. La. 2003) (“Prescriptive statutes are strictly construed against prescription and in favor of the obligation sought to be extinguished.”).

“The character of an action disclosed in the pleadings determines the prescriptive period applicable to that action.” *Starns v. Emmons*, 538 So.2d 275, 277 (La. 1989); *see also SS v. State ex rel. Dept. of Social Services*, 2002-0831 (La. 2002), 831 So.2d 926, 931 (“When evaluating which prescriptive period is applicable to a cause of action, courts first look to the character of the action disclosed in the pleadings.”); *Morris Kirschman & Co., L.L.C. v. Sicuro*, 2004 WL 169819, *2 (E.D. La. 2004) (“In Louisiana, ‘the character of an action disclosed in the pleadings determines the prescriptive period applicable to that action.’”). “The allegations and prayer of the petition determine the true nature of the action and the applicable prescriptive period.” *State v. Ferek*, 652 So.2d 597, 598 (La.App. 1st Cir. 1995). “[I]n order to determine the . . . applicable prescriptive period in [a] case, [the court must] look to the closest analogous situation provided for in

the Code.” *Dean v. Hercules, Inc.*, 328 So.2d 69, 72 (La. 1976).

A. Plaintiff’s Proposed Claims Are subject to a 10-Year Prescriptive Period

“Unless otherwise provided by legislation, a personal action is subject to a liberative prescription of ten years.” La. Civ. Code art. 3499 (emphasis added). “A personal action is one brought to enforce an obligation against the obligor, personally and independently of the property which he may own, claim, or possess.” La. Code Civ. Proc. art. 422. A “personal action” is distinct from a “real action,” which is an action “brought to enforce rights in, to, or upon immovable property.” *Id.* “The terms ‘real’ or ‘personal’ under Louisiana law correspond roughly to the common-law concepts of ‘rights *in rem*’ and ‘rights *in personam*.’” *Moreland v. Rucker Pharmacal Co., Inc.*, 59 F.R.D. 537, 541 (W.D. La. 1973).

The 10-year prescriptive period set forth in Civil Code article 3499 “is a ‘catch-all provision’ that covers personal actions not specifically covered by any other prescriptive period.” *Parry v. Administrators of Tulane Educational Fund*, 2002-0382 (La.App. 4th Cir. 2002), 828 So.2d 30, 40. In the words of the Louisiana Supreme Court, “[t]he law has established the prescription of ten years for personal actions, as the general rule. Those provisions of the Code which establish lesser terms of prescription should be restrained to the particular cases which they regulate, and to what is expressly included in their dispositions.” *Lacoste v. Benton*, 3 La. Ann. 220, 221 (La. 1848). In summary, “when the Legislature has failed to assign a specific prescriptive period to cover the specific type of personal action at issue,” then the 10-year prescriptive period set forth in Civil Code article 3499 applies. *Parry*, 828 So.2d at 40; *see also* La. Civ. Code art. 3499,

Comment (b) (“A personal action is subject to a liberative prescription of ten years in the absence of a legislative provision that either establishes a shorter or longer period or declares the action to be imprescriptible.”).

Pursuant to La. Rev. Stat. § 9:3572.12(D), plaintiff has a private right of action against defendants to recover all fees, interest, and other charges defendants received related to the loans they improperly brokered, plus damages in the amount of twice the total fees defendants received. *See* Docket Nos. 77 and 96. In relevant part, the LA Loan Broker Statute provides:

The contracting to receive any fee, interest, or other charge in violation of this Chapter shall result in forfeiture by the loan broker to the benefit of the aggrieved person of the entire fee, plus damages in the amount of twice the fee. **In case the fee has been paid, the person by whom it has been paid may recover from the loan broker the amount of the fee thus paid, plus damages in the amount of twice the fee.**

La. Rev. Stat. § 9:3572.12(D) (emphasis added).

Plaintiff’s proposed claims under the LA Loan Broker Statute are most analogous to the “quasi contractual” remedies of enrichment without cause per La. Civ. Code art. 2298,¹ and payment of a thing not owed per La. Civ. Code art. 2299.² Indeed, as explained in plaintiff’s reply memorandum, and as specifically alleged in the attached proposed amended complaint, even if the Court were to rule the LA Loan Broker Statute does not provide an express private right of action, plaintiff would still have an equitable

¹ *See* La. Civ. Code art. 2298 (“A person who has been enriched without cause at the expense of another person is bound to compensate that person. The term ‘without cause’ is used in this context to exclude cases in which the enrichment results from a valid juridical act or the law.”).

² *See* La. Civ. Code art. 2299 (“A person who has received a payment or a thing not owed to him is bound to restore it to the person from whom he received it.”).

claim for return of all fees, interest, and other charges paid to defendants as unlicensed loan brokers under those codal articles. *See* Docket No. 96, at p. 13; Exhibit A, Prop. Amend. Compl.

The rationale behind the codal articles and jurisprudence on quasi contract has been explained:

The rationale of the codal articles and jurisprudence governing the right to an action in quasi contract (which includes the right to demand the return of the thing or the value thereof) is prevention of the unjust enrichment which would otherwise accrue in favor of a transgressor by virtue of his receipt and permanent retention of a thing of value belonging to the aggrieved party. Obviously one should not be permitted to retain and keep an object belonging to another and enjoy the continuous use and benefits to the detriment and deprivation of the lawful owner. Under such circumstances where the object received and retained is capable of restoration equity demands its return or, in the event of its loss or destruction, restitution of the value thereof.

Schouest v. Texas Crude Oil Co., 141 So.2d 155, 160 (La.App. 1st Cir. 1962).

“A claim for restitution of payment not due is based on the doctrine of quasi contract, which prescribes only by prescription of ten years[.]” *Julien v. Wayne*, 415 So.2d 540, 542 (La.App. 1st Cir. 1982). The Louisiana Supreme Court has held:

One who receives what is not due him, whether he does so through error or knowingly, obliges himself to restore it to the one making the payment. There arises from such receiving a quasi contract to return what was so received. The action to recover the amount is prescribed only by the prescription of ten years, relating to all personal actions, except those otherwise provided for.

Smith v. Phillips, 143 So. 47, 48 (La. 1932) (citations omitted); *see also Munson v. Martin*, 192 So.2d 126, 129 (La. 1966) (“It is a demand based on a quasi contract. And

we have said on a number of occasions that the prescription against such an action is that of ten years[.]”); *Lagarde v. Dabon*, 98 So. 744, 746 (La. 1923) (“Manifestly also the only prescription applicable to such an action is that of ten years; for that is the only prescription applicable to quasi contracts; and an action for such reimbursement is clearly one for the recovery of a payment not due.”) (citations omitted); *Alonzo v. Parish of St. Bernard Through Its Duly Elected Police Jury*, 1992 WL 31844, *4 (E.D. La. 1992).

Considering the “quasi contractual” remedies of enrichment without cause and payment of a thing not owed are “the closest analogous situation provided for in the Code,” the 10-year prescriptive period applicable to these remedies should equally apply to plaintiff’s proposed claims under the LA Loan Broker Statute. *Dean*, 328 So.2d at 72.

In *Dantagnan v. I. L. A. Local 1418, AFL-CIO*, 496 F.2d 400, 401 (5th Cir. 1974), the plaintiffs brought a class action against their union for illegally collecting dues not owed. Plaintiffs contended the union failed to comply with the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411(a)(3), when raising and collecting dues. *See Dantagnan*, 496 F.2d at 401. The defendant answered, alleging the action was prescribed. *Id.*

The court first noted, “[s]ince the LMRDA does not contain a statute of limitations, federal courts entertaining suits brought pursuant to the Act must look to the law of the state in which the litigation arose, here Louisiana.” *Id.* Applying Louisiana law, the court rejected the defendant’s argument that the 1-year prescriptive period for delictual actions applied and instead found the 10-year prescriptive period for quasi contractual actions applied. *Id.* at 402. The court ruled:

[W]hether the suit is in tort or in quasi contract may only be answered by an analysis of the averments of the bill of complaint descriptive of the cause of action and the character of the relief prayed. The complaint in the case at bar is abbreviated, but sufficient to demonstrate to our satisfaction that these appellants chose to pursue an action in quasi contract. [Plaintiffs] allege that the union local has wrongfully received and retained a sum of money rightfully belonging to [them] and those they represent; they have pleaded the existence of a quasi contractual obligation on the part of the [defendant]. Moreover, although [plaintiffs] also seek attorneys' fees and injunctive and declaratory relief, the heart of their requested relief is the recovery of the amount of money allegedly illegally collected and retained. If [defendant's] action in collecting the increased dues did violate the LMRDA, [defendant] would be unjustly enriched if allowed to retain the monies. Thus [defendant's] actions, if violative of the statute, may have been tortious, but they also created a quasi contractual obligation giving [plaintiffs] the right to demand restitution.

Id. at 403 (quotation marks and internal brackets omitted).

Similarly, in *United Gas Pipe Line Co. v. Socony Mobil Oil Co.*, 220 F.Supp. 685, 686 (W.D. La. 1963), the plaintiff gas company entered into a contract with the defendant natural gas supplier to purchase natural gas. The contract rate for the gas exceeded the rate permitted by the Federal Power Commission pursuant to an order issued under the Natural Gas Act. *See United Gas Pipe Line*, 220 F.Supp. at 686. After the contract was signed, the plaintiff purchaser sued the defendant to recover the overpayments made to defendant due to the excessive rate charged. *Id.* The defendant answered, arguing plaintiff's claim was prescribed. *Id.*

The court rejected defendant's prescription argument and held the 10-year prescriptive period for personal actions applied to plaintiff's claim. *Id.* at 687-88. The court ruled:

The complaint filed in this case clearly indicates that plaintiff is seeking recovery of a specific sum of money unlawfully collected by defendant in

violation of the Natural Gas Act and the Federal Power Commission order. To allow defendant to retain this sum of money would unjustifiably enrich it, since the excess payments were not due, but rightfully belonged to plaintiff. Thus the tortious action of defendant also created a quasi contractual obligation giving plaintiff the right to demand restitution of the money unlawfully received by defendant.

. . . . [P]laintiff has alleged a quasi contractual obligation and thus the ten-year prescriptive period is applicable.

Id. at 688 (citations omitted).

As in *Dantagnan* and *United Gas Pipe Line*, plaintiff's proposed claims sound in quasi contract. *Most importantly*, plaintiff's proposed claims stem from a contract between plaintiff and defendants, whereby defendants agreed to broker a loan for a fee. Although plaintiff seeks other relief from defendants, the "heart of [her] requested relief is the recovery of the amount of money allegedly illegally collected and retained," *i.e.*, the fees wrongfully received, by defendants. *Dantagnan*, 496 F.2d at 403. In light of these facts, plaintiff's proposed claims under the LA Loan Broker Statute are best characterized as quasi contractual claims for recoupment or restitution. Plaintiff's proposed claims are, therefore, subject to the 10-year prescriptive period set forth in article 3499. *See also* La. Atty. Gen. Op. No. 01-0456, 2002 WL 388775 (La. A.G. Feb. 15, 2002) (10-year prescriptive period applies to claims for reimbursement of gas overcharges); *Succession of Granger v. Worthington*, 2002-0433 (La.App. 3d Cir. 2002), 829 So.2d 1108 (10-year prescriptive period for personal actions, not one-year period for delictual actions, applied to administratrix's action against decedent's cousin for recovery of succession assets); *Julien*, 415 So.2d at 542 ("What [the administratrix] is alleging is that [defendant] was paid legal fees which were not due to him, and she is asking for a

return of same. A claim for restitution of payment not due is based on the doctrine of quasi contract, which prescribes only by prescription of ten years[.]”).

On January 6, 2006, defendants brokered plaintiff’s Pre-File Money Now Loan, with her loan being due on February 17, 2006. *See* Exhibit A, Prop. Amend. Compl., at ¶¶ 46 & 50. On February 26, 2009, plaintiff sought leave to amend her complaint to assert her claims under the LA Loan Broker Statute. *See* Docket No. 77. Plaintiff’s claims are timely.

B. Contrary to Defendants’ Argument, the 1-Year Prescriptive Period Does Not Apply to Plaintiff’s Proposed Claims

“Delictual actions are subject to a liberative prescription of one year.” La. Civ. Code art. 3492. “Under Louisiana law, actions sounding in tort ‘are subject to a liberative prescription of one year.’” *Global ADR, Inc. v. City of Hammond*, 2003 WL 22533645, *2 (E.D. La. 2003); *see also Dual Drilling Co. v. Mills Equipment Investments, Inc.*, 1998-0343 (La. 1998), 721 So.2d 853, 857 (“The third action, relevant to the instant case, is known as a delictual action. It is available to an owner dispossessed as a result of an offense or quasi-offense or, in other words, a ‘tort.’”); *Hughes v. Arveson*, 924 F.Supp. 735, 738 (M.D. La. 1996) (“Louisiana Civil Code article 3492 provides for a one-year prescriptive period for offenses or quasi-offenses.”).

Plaintiff’s proposed claims under the LA Loan Broker Statute are *not* tort claims. “[T]he question is, has this action been brought [against] the defendant[s] because of an alleged violation of a general duty, or of an alleged breach of a special obligation?” *State v. Fourchy*, 31 So. 325, 331 (La. 1901). Plaintiff’s damages flow from defendants’

violation of a special licensing duty, enacted to protect consumers such as plaintiff. *Cf. Simmons v. Yelverton*, 513 So.2d 504, 508 (La.App. 2d Cir. 1987) (depositor’s claims against depositary subject to 10-year prescriptive period, rather than 1-year). Plaintiff’s damages do *not* flow from the breach of any general duty owed to the public. Not any member of the public could assert a claim under the LA Loan Broker Statute—only consumers who contracted with, or received a fee from, defendants could assert such a claim. Plaintiff’s proposed claims, therefore, do *not* sound in tort and are *not* subject to Civil Code article 3492.³

Further, even if plaintiff’s proposed claims have tort “overtones,” as explained above, the claims are most similar to quasi contractual claims subject to a 10-year prescriptive period. The court, therefore, should apply the 10-year prescriptive period set forth in La. Civ. Code art. 3499. *See, e.g., Cumis Ins. Soc., Inc. v. Hill*, 574 F.Supp. 174, 175 (M.D. La. 1983) (“Where the unlawful act of one person not only damages another, but also enriches the wrongdoer, there exists an action both *ex delicto* and *quasi ex contractu* and the action to recover the unlawful gain is barred by the prescription of ten years.”) (internal quotation marks omitted); *see also Whitten v. Monkhouse*, 29 So.2d 800, 804 (La.App. 2d Cir. 1947) (same).

³ Defendants have *not* asserted any other prescriptive period applies, except the 1-year prescriptive period for torts under La. Civ. Code art. 3492. Defendants, therefore, have waived any argument that another prescriptive period applies. For the sake of completeness, however, plaintiff notes that none of the other prescriptive periods apply. Plaintiff is not seeking recovery of any fees owed to her for services she rendered. *See* La. Civ. Code art. 3494 (3-year prescriptive period). Nor is plaintiff asserting an action for annulment of a testament, or reduction of an excessive donation. *See* La. Civ. Code art. 3497 (5-year prescriptive period).

Finally, even if the 1-year prescriptive period set forth in article 3492 applied to plaintiff's proposed claims, prescription was suspended until recently when plaintiff learned of defendants' failure to be licensed. Louisiana courts have long recognized "prescription does not run against one unable to act." *Hendrick v. ABC Ins. Co.*, 787 So.2d 283, 289 (La. 2001). Under the ancient civilian doctrine of *contra non valentem agere nulla currit praescriptio*, prescription is suspended until a plaintiff knows or reasonably should know that she is the victim of a tort. *See Ruiz v. State Farm Fire and Cas. Co.*, 2007 WL 128800, *4 (E.D. La. 2007). Plaintiff was unaware of defendants' failure to be licensed until February 2009. Moreover, plaintiff had no reason to suspect at an earlier date that defendants were not properly licensed. Therefore, even under defendants' argument, plaintiff's proposed claims under the LA Loan Broker Statute are timely.

IV. CONCLUSION

For the foregoing reasons, the Court should grant plaintiff's leave motion and permit plaintiff to file the attached Third Amended Class Action Complaint.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been forwarded to all counsel of record ☒ by ECF; ☐ by email; ☐ by hand; ☐ by fax; ☐ by FedEx; ☐ by placing a copy of same in the U.S. Mail, postage prepaid this 6th day of April 2009.

/s/ Bryan C. Shartle
Bryan C. Shartle

Respectfully Submitted,

/s/ Bryan C. Shartle
David Israel (LSBA No. 7174) (T.A.)
Bryan C. Shartle (LSBA No. 27640)
Justin H. Homes (LSBA No. 24460)
SESSIONS, FISHMAN, NATHAN & ISRAEL, L.L.P.
3850 N. Causeway Blvd.
Lakeway II, Suite 200
Metairie, Louisiana 70002
Telephone: (504) 828-3700
Facsimile: (504) 828-3737

Attorneys for Plaintiff,
Vicki L. Pinero