UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

VICKI L. PINERO, individually and on behalf of all others similarly situated,	)	Civil Action No. 08-03535
Plaintiffs,	)	Sec. R JUDGE SARAH S. VANCE
v.	)	Mag. 3 MAGISTRATE JUDGE DANIEL E. KNOWLES, III
JACKSON HEWITT TAX SERVICE INC.; JACKSON HEWITT INC.; and, CRESCENT CITY TAX SERVICE, INC. d/b/a JACKSON HEWITT TAX SERVICE,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR *DE NOVO* REVIEW OF APRIL 21, 2009 DISPOSITIVE MAGISTRATE RULING

Plaintiff, Vicki L. Pinero, submits this memorandum in support of her request per L.R. 74.1 and Fed. R. Civ. P. 72(b) for *de novo* review of the dispositive April 21, 2009 ruling issued by Magistrate Judge Daniel E. Knowles, III.

I. INTRODUCTION

On February 26, 2009, plaintiff filed a Motion for Leave to File Third Amended Class Action Complaint against the defendants, Jackson Hewitt Tax Service

Inc. ("JHTSI); Jackson Hewitt Inc. ("JHI"); and, Crescent City Tax Service, Inc. d/b/a Jackson Hewitt Tax Service (jointly referred to as "Defendants"). Pursuant to her motion, plaintiff sought to include a claim under La. Rev. Stat. § 9:3572.1, *et seq.* (the "LA Loan Broker Statute"). *See* Docket No. 77.

On April 21, 2009, Judge Knowles denied plaintiff's leave motion, finding the proposed amendment would be "futile in that [the proposed claim] is barred by the applicable statute of limitations[.]" Docket No. 117, at p. 1. The Court ruled: (a) plaintiff's proposed LA Loan Broker Statute claim is barred by the 60-day peremptive period set forth in La. Rev. Stat. § 9:3552(E) of the Louisiana Consumer Credit Law for claims against "extenders of credit"; (b) alternatively, plaintiff's proposed LA Loan Broker Statute claim is prescribed by the 1-year prescriptive period for torts set forth in La. Civ. Code art. 3492; and, (c) the doctrine *of contra non valentem* does not apply. *Id.*

Plaintiff disagrees with the Court's ruling for 4 reasons. First, the 60-day peremptive period in § 9:3552(E) *by its very terms only* applies to claims brought under § 9:3552. Plaintiff does *not* assert a claim under § 9:3552. Instead, plaintiff asserts a claim under the LA Loan Broker Statute, specifically § 9:3572.12(D), against Defendants who acknowledge that they may be subject to loan broker licensing requirements. Considering this fact, the 60-day peremptive period in § 9:3552(E) is inapplicable to plaintiff's proposed claim.

Second, § 9:3552, including the 60-day peremptive period, *by its very terms only* applies to "extenders of credit." Defendants are *not* "extenders of credit." JHTSI and JHI acknowledged this fact in their supplemental opposition memorandum to plaintiff's

leave motion, stating "Jackson Hewitt does not dispute that it is not a bank[.]" Docket No. 105, at p. 4. Considering Defendants are not "extenders of credit," § 9:3552 is irrelevant to plaintiff's proposed claim *and* the 60-day peremptive period in § 9:3552(E) is inapplicable.

Third, the 1-year prescriptive period in Article 3492 does *not* apply to plaintiff's LA Loan Broker Statute claim. Plaintiff's proposed claim does not sound in tort. Instead, the proposed claim is akin to a contract or quasi contractual claim, making the default 10-year prescriptive period in Article 3499 applicable.

Fourth, Judge Knowles concluded the doctrine *of contra non valentem* does not apply because plaintiff could by reasonable diligence have learned of Defendants' failure to be properly licensed and of her claim under the LA Loan Broker Statute. Plaintiff respectfully disagrees. No person would have had reason to suspect at an earlier date that Defendants, the second largest tax return preparer in the U.S., were not properly licensed. Within a few weeks of learning Defendants were not licensed, plaintiff sought leave to amend her complaint. In light of these facts, and to the extent the Court were to rule the 1-year prescriptive period applies to plaintiff's proposed claim, the Court should apply the "discovery rule" and find plaintiff's proposed claim timely.

II. PROCEDURAL HISTORY

On February 26, 2009, plaintiff sought leave to amend her complaint to assert a claim under the LA Loan Broker Statute. *See* Docket No. 77. Defendants opposed the leave motion. *See* Docket Nos. 81 & 86. Plaintiff filed a reply to Defendants' opposition. *See* Docket No. 96.

On April 1, 2009, Judge Knowles heard argument on plaintiff's leave motion. *See* Docket No. 98. The Court permitted further briefing on the statute of limitations. *Id.*

On April 6, 2009, plaintiff filed her supplemental memorandum in support of her leave motion, addressing the prescription issue. *See* Docket No. 101. On April 8, 2009, JHTSI and JHI filed their supplemental opposition memorandum. *See* Docket No. 105. On April 13, 2009, plaintiff filed her reply to JHTSI and JHI's supplemental opposition memorandum. *See* Docket No. 112.

On April 21, 2009, Judge Knowles denied plaintiff's leave motion. *See* Docket No. 117. As noted, Judge Knowles concluded the proposed amendment would be "futile" because plaintiff's proposed claim under the LA Loan Broker Statute is "barred by the applicable statute of limitations[.]" *Id.* at p. 1.

III. FACTS

As set forth in plaintiff's motion papers, a "loan broker" must be licensed in Louisiana.[1] La. Rev. Stat. § 9:3572.2 excludes certain persons from the definition of "loan broker." Since 2003, § 9:3572.2(B)(9) has excluded from the definition of "loan broker" "[a]n *income tax preparer who is an authorized Internal Revenue Service e-file provider* and whose *only brokering activity is facilitating refund anticipation loans*," *i.e.*,

[1] A "loan broker" is "any person who, for compensation or the expectation of compensation, obtains or offers to obtain a consumer loan from a third party either for another person domiciled in Louisiana, or for another person wherever domiciled, if the broker is operating in Louisiana." La. Rev. Stat. § 9:3572.1. Per La. Rev. Stat. § 9:3572.3(A)(1), "[u]nless a person has first been licensed by the commissioner [of financial institutions] . . . , he shall not engage in the business of loan brokering[.]"

"RALs." La. Rev. Stat. § 9:3572.2(B)(9) (emphasis added). [2]

Upon information and belief, Defendants are "income tax preparers" and "authorized Internal Revenue Service e-file providers." However, the exclusion in § 9:3572.2(B)(9) does *not* apply to Defendants because Defendants' brokering activity is *not* limited to "only brokering . . . refund anticipation loans." *Id.* Instead, Defendants broker many types of non-RAL products. As alleged, Defendants brokered a Pre-File Money Now Loan to plaintiff, which is *not* a RAL.[3] Defendants also broker other non-RAL products, including Holiday or HELP Loans; Flex Loans; and, iPower Loans.[4] Defendants are *not* licensed as loan brokers, even though they are well aware of their obligation to be licensed for their brokering activity.[5]

Pursuant to § 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

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[2] A "refund anticipation loan" or "RAL" is "a loan whereby the creditor arranges to *be repaid directly by the Internal Revenue Service* from the anticipated proceeds of the debtor's income tax refund." La. Rev. Stat. § 9:3572.2(B)(9) (emphasis added).

[3] The Pre-File Money Now Loan is not a "refund anticipation loan" or "RAL" under § 9:3572.2(B)(9) because the creditor providing the loan does not arrange to be repaid directly from the IRS from the anticipated proceeds of the customer's income tax return. Instead, this short-term loan is due on a certain date and is arranged to be repaid directly by the customer.

[4] The non-RAL products, particularly the "Pre-Season Products," have been the subject of justifiable criticism. These short-term usurious loans are rarely clearly explained to consumers. Further, low-income and uneducated Americans are often the target of these abusive loans, which include APRs into the triple digits. (The APR associated with plaintiff's Pre-File Money Now Loan is 118.905%. *See* Docket No. 77, Proposed Amend. Compl., at ¶ 46, Exhibit HH.). John Hewitt, *one of the founders of Jackson Hewitt*, called these loans "a kind of predatory lending." Mr. Hewitt has publicly stated his disapproval of such loans, comparing their high fees to cash-advance, "payday" loans.

[5] In its 2006 10-K, JHTSI acknowledged "many states . . . have statutes regulating, through licensing and other requirements, the activities of brokering loans and offering credit repair services to consumers as well as local usury laws which could be applicable in certain circumstances." In its 2007 and 2008 10-Ks, JHTSI once again acknowledged that it may be subject to state loan broker statutes.

the non-RAL product they improperly brokered to her, plus damages in the amount of twice the total fees Defendants received. The 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).[6]

In his April 21, 2009 ruling, Judge Knowles properly framed the issue as follows:

> Presently before the Court is plaintiff's proposed Third Amended Complaint which alleges a violation of L.R.S. 9:3572 (the "LA Loan Broker Statute"). Plaintiff's proposed Count 10 alleges that Jackson Hewitt violated an obligation under the aforesaid statute by engaging in loan-brokering without a proper license. The facts alleged in support of Count 10 are that, on or about January 6, 2006 (over three years ago), plaintiff visited Jackson Hewitt and obtained a "Pre-File Money Now Loan." Plaintiff alleges that Jackson Hewitt presented her with a Santa Barbara Bank & Trust (SBBT) Money Now Loan Application and Agreement. Plaintiff further states that she filled out the application and received a $438.00 check. Additionally, plaintiff's $550 "Pre-File Money Now Loan" was due on February 17, 2006. Plaintiff's allegations include that none of the non-RAL loan brokered products including Plaintiff's "Pre-File Money Now Loan" are set up to be paid directly by the IRS; therefore, defendants are in violation of the statute. Under Louisiana's Loan Broker Statute, defendants are required to be licensed as a loan broker when facilitating and brokering non-RAL loan products. Plaintiff seeks return of all fees paid to defendant (an unlicensed broker) *and damages*.
>
> This case is in its infancy and thus the sole issue before the Court on plaintiff's Fed. R. Civ. P. 15(a) motion to amend is whether the claim set

[6] As the quoted language indicates, the LA Loan Broker Statute prohibits "[t]he contracting to receive any fee, interest, or other charge in violation of [the statute]" *and* the receiving of any such fee, interest, or charge. La. Rev. Stat. § 9:3572.12(D). As to the prohibition against "contracting" for such a fee, interest, or charge, § 9:3572.12(D) grants a private remedy to any "aggrieved person." With respect to the prohibition against "receiving" such a fee, interest, or charge, § 9:3572.12(D) grants a private remedy to "the person by whom it has been paid."

forth in Count 10 is futile.

Docket No. 117, at pp. 2-3.[7]

Judge Knowles also properly described the parties' respective positions as follows:

> Defendants contend that the aforesaid proposed claim is futile. In this regard, Jackson Hewitt submits that, assuming there is a private right of action under L.R.S. § 9:3572.1, plaintiff failed to comply with LRS 9:3552, which imposes strict notice and statute of limitations requirements which are not satisfied. Defendants emphasize that plaintiff's proposed claim is time barred under LRS 9:3552(E), which permits only sixty days since the date plaintiff's last payment was due within which to bring an action. Plaintiff's claim is barred on the face of the pleadings and thus it is the plaintiff's burden to demonstrate that the action has not prescribed. Based upon the plaintiff allegations, it is clear that three years have elapsed since plaintiff's final payment and the date upon which she sought leave to amend. Plaintiff's loan was due on February 17, 2006 and plaintiff did not seek leave to amend until February 26, 2009. Alternatively, defendants contend that this is a delictual action barred by the statute of limitation (one year liberative prescription) set forth in La. Civ. Code Article 3492 which governs actions *ex delicto.*
>
> Plaintiff contends that her proposed claim under L.R.S. 9:3572.1 *et seq.* is subject to the 10-year prescriptive period set forth in La. Civil Code Article 3499 applicable to personal actions—i.e., the "catch-all provision" that applies to actions not specifically covered by any other prescriptive period. As to the 1-year prescriptive period set forth in Article 3492, plaintiff submits that it is inapplicable because plaintiff's claim does not sound in tort. Plaintiff argues that her claim under Louisiana's Loan Broker Statute is most analogous to the *quasi*-contractual remedies of unjustment enrichment per La. Civ. Code Article 2298 and reimbursement of payment of a thing not owed per La. Civ. Code Article 2299. Finally and, in the event that this Court is not convinced, plaintiff argues that the doctrine of *contra non valentum agere nulla currit praescriptio* applies so as to suspend prescription until recently, when plaintiff learned of the defendants' failure to be properly licensed.

[7] In addition to seeking to add a claim under the LA Loan Broker Statute, plaintiff has also requested permission to include a Count 11 for enrichment without cause per La. Civ. Code art. 2298, and payment of a thing not owed per La. Civ. Code art. 2299. *See* Docket No. 103. Plaintiff's request to include these additional claims is set for hearing on May 13, 2009. *See* Docket No. 120.

Id. at pp. 3-4.

IV. LAW AND ARGUMENT

"Pursuant to L.R. 74.1, a district court reviews a magistrate judge's order upon motion by a party." *Barnes v. Universal Ogden Services, Inc.*, 1999 WL 438475, *2 (E.D. La. 1999). "[Fed. R. Civ. P.] 72(b) provides that a magistrate judge can make only recommendations as to dispositive motions and that the district judge, upon a *de novo* review, makes the final decision." *Vaquillas Ranch Co., Ltd. v. Texaco Exploration and Production, Inc.*, 844 F.Supp. 1156, 1160 (S.D. Tex. 1994). "*De novo* review means the court must consider the matter anew, the same as if it had not been heard before and as if no decision previously had been rendered." *Abordo v. State of Hawaii*, 938 F.Supp. 656, 658 (D. Hawaii 1996). "When conducting *de novo* review, the district court makes its own determinations of disputed issues and does not decide whether the magistrate's proposed findings are clearly erroneous." *Branch v. Martin*, 886 F.2d 1043, 1046 (8th Cir. 1989). "[A]lthough the district court need not hold a *de novo* hearing, the court's obligation is to arrive at its own independent conclusion about those portions of the magistrate's findings or recommendation to which objections are made." *Abordo*, 938 F.Supp. at 658.

A. The 60-Day Peremptive Period In § 9:3552(E) Does Not Apply To Plaintiff's Proposed Claim Under The LA Loan Broker Statute

Judge Knowles ruled plaintiff's proposed claim under the LA Loan Broker Statute is barred by the 60-day peremptive period set forth in § 9:3552(E). *See* Docket No. 117, at p. 4. The Court's ruling was based upon the belief that, "[p]ursuant to La. R.S.

9:3552(E), ***any action under the Consumer Credit Law*** must be brought within 60 days of the final payment on the contract, or within one year of the date of the violation if the transaction is a revolving loan." *Id.* at pp. 4-5 (emphasis added).

Plaintiff respectfully submits the Court is mistaken in its belief that the 60-day peremptive period in § 9:3552(E) applies to *all actions* under the "Consumer Credit Law," including plaintiff's LA Loan Broker Statute claim. The 60-day peremptive period in § 9:3552(E) does *not* apply to *all actions* provided under the "Consumer Credit Law." Instead, the 60-day peremptive period narrowly applies to *only* claims asserted under § 9:3552. Section 9:3552(E) provides:

> ***Any civil action under this section*** [*i.e.*, § 9:3552] must be brought within sixty days of final payment of the consumer credit contract, or in the case of a revolving loan or revolving charge account, within one year of the date of the violation.

La. Rev. Stat. § 9:3552(E) (emphasis added).

Plaintiff has *not* asserted a "civil action under [§ 9:3552]." *Id.* Indeed, as explained below, plaintiff could *not* assert a § 9:3552 claim against Defendants because Defendants are not "extenders of credit"—a fact Defendants readily admit.

Instead, plaintiff has asserted a civil action under the LA Loan Broker Statute, specifically § 9:3572.12(D), against Defendants. Defendants have acknowledged that they may be subject to loan broker licensing requirements. Considering plaintiff's claim against Defendants arises under § 9:3572.12(D), *not* § 9:3552, the 60-day peremptive period in § 9:3552(E) is inapplicable to plaintiff's proposed claim.

B. Section 9:3552 Is Irrelevant To Plaintiff's Proposed Claim Under The LA Loan Broker Statute

Judge Knowles apparently accepted Defendants' argument that plaintiff's § 9:3572.12 claim under the LA Loan Broker Statute is *controlled by* § 9:3552. Plaintiff respectfully submits the Court's ruling is incorrect. Section 9:3552 has nothing to do with "loan brokers."

In their opposition memorandum, Defendants argued plaintiff's proposed claim under the LA Loan Broker Statute is *subject to* the claim and notice procedures set forth in § 9:3552. *See* Docket No. 81, at p. 7. Section 9:3552 provides:

> If the court finds that the ***extender of credit*** has intentionally or as a result of error not in good faith violated the provisions of this chapter, the consumer is entitled to a refund of all loan finance charges or credit service charges and has the right to recover three times the amount of such loan finance charge or credit service charge together with reasonable attorney's fees. The right to recover the civil penalty under this subsection accrues only after
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> (i) written notice is given to the ***extender of credit*** by certified mail addressed to the ***extender of credit's*** place of business in which the consumer credit transaction arose;
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> (ii) a copy of such notice is mailed to the ***extender of credit's*** agent for service of process; and
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> (iii) thirty days have elapsed since receipt of such notice by the ***extender of credit***, and the violation has not been corrected.

La. Rev. Stat. § 9:3552(A)(1)(a)(i)-(iii) (emphasis added).

As the above emphasized language indicates, § 9:3552 *only* applies to "extenders of credit." An "extender of credit" is defined as follows:

> The term "extender of credit" or "creditor" as used in this Chapter includes *a seller* in a consumer credit sale, revolving charge account, or transaction

> made with the use of a seller credit card or otherwise, *or a lender* in a consumer loan, a revolving loan account, or a lender credit card transaction. "Creditor" also includes a subsequent assignee or transferee of the consumer's obligation, but does not include a bona fide pledgee.

La. Rev. Stat. § 9:3516(18) (emphasis added).

In his April 21, 2009 ruling, Judge Knowles stated "[p]laintiff fails to explain why her claim *against a lender* under the [Louisiana Consumer Credit Law] for charging or setting improper fees is not governed by § 3552(E)'s 60-day peremptive period." Docket No. 117, at p. 6 (emphasis added). As the italicized language indicates, the Court apparently assumed Defendants are "lenders." This assumption is without any basis and contradicted by Defendants' opposition memorandum, wherein Defendants properly admit they are *not* a bank. *See* Docket No. 105, at p. 4. To be sure, Defendants are *not* "sellers" or "lenders," but instead "loan brokers" as defined in the LA Loan Broker Statute. By statutory definition, therefore, Defendants are *not* "extenders of credit." Considering this fact, § 9:3552's civil penalties provision for "extenders of credit" is irrelevant to plaintiff's proposed claim. Further, § 9:3552(E)'s 60-day peremptive period is inapplicable to plaintiff's proposed claim because, as noted above, plaintiff does not assert a claim under § 9:3552, and because Defendants are not "extenders of credit."

Completely ignoring the limitation for "extenders of credit," Defendants argue "the plain language of § 9:3552 requires that any and all violations of *'this chapter,'* which includes § 9:3572.12, is subject to the provisions of § 9:3552." Docket No. 81, at p. 7 (emphasis added). This argument is easily dismissed.

Like § 9:3552, the LA Loan Broker Statute also purports to apply to all violations

of the Louisiana Consumer Credit Law. Section 9:3572.12 provides "[t]he contracting to receive any fee, interest, or other charge *in violation of this Chapter* [Chapter 2—the Louisiana Consumer Credit Law] 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." La. Rev. Stat. § 9:3572.12(D) (emphasis added). Section 9:3572.12 was enacted in 1986, *after* § 9:3552 was enacted. *See* 1986 La. Acts. 729. Considering § 9:3572.12(D) was enacted after § 9:3552, *and applying Defendants' logic*, why is not § 9:3552 claims "governed by" § 9:3572.12(D)? The reason is the statutes are *independent*. While both statutes are contained in the Louisiana Consumer Credit Law, they are distinct acts and operate and apply independently, just like other statutes contained in the Consumer Credit Law such as the Credit Repair Services Organizations Act, La. Rev. Stat. § 9:3573.1, *et seq.*

In summary, a plaintiff cannot sue a defendant under § 9:3552, unless (a) the defendant is an "extender of credit" and (b) the defendant has violated an obligation set forth in the statute. Similarly, a plaintiff cannot sue a defendant under the LA Loan Broker Statute, unless (a) the defendant is a "loan broker" and (b) the defendant has violated an obligation set forth in the LA Loan Broker Statute.[8]

[8] In other filed memoranda, plaintiff provides other reasons as to why Defendants' "theory" cannot work. *See* Docket No. 96, at pp. 13-14. For example, when originally enacted, the "Louisiana Consumer Credit Law" included only §§ 9:3510 to 9:3568. *See* 1972 La. Acts 454. The newly enacted "chapter" did *not* include the sections set forth in the LA Loan Broker Statute, which were enacted as a separate piece of legislation in 1986 to regulate "loan brokers." With this understanding in mind, § 9:3552's reference to other "provisions of this chapter" is intended to apply to only the original sections included in the original "chapter" enacted as part of the original Consumer Credit Law, *i.e.*, §§ 9:3510 to 9:3568.

C. The 1-Year Prescriptive Period In Article 3492 Does Not Apply To Plaintiff's Proposed Claim Under The LA Loan Broker Statute

As noted, Judge Knowles ruled alternatively in his April 21, 2009 order that plaintiff's proposed claim under the LA Loan Broker Statute is barred by the 1-year prescriptive period in Article 3492 because plaintiff's proposed claim is delictual and sounds in tort. *See* Docket No. 117, at p. 7. Plaintiff respectfully disagrees.

Citing *Thomas v. State Employees Group Benefits Program*, 05-0392 (La.App. 1st Cir. 2006), 934 So.2d 753, Judge Knowles found that tort damages "flow from the violation of a general duty owed to all persons ***or a violation of law***." Docket No. 117, at p. 7 (emphasis added). The Court's statement of the law is incorrect.

The First Circuit Court of Appeal does *not* state in *Thomas* that tort damages can "flow from . . . a violation of law." Instead, the court states tort damages "flow from the violation of a general duty owed to all persons." *Thomas*, 934 So.2d at 757. The *Thomas* court makes the following distinction:

> The classic distinction between damages *ex contractu* and damages *ex delicto* is that the former flow from the breach of a special obligation contractually assumed by the obligor, *whereas the latter flow from the violation of a general duty owed to all persons*.

Id. (emphasis added). The *Thomas* court's statement of the law has been repeated by several courts, including this court recently in *Harrell v. Fidelity Sec. Life Ins. Co.*, 2008 WL 170269 (E.D. La. 2008). In *Harrell*, this court noted:

> Courts have held that the "key in differentiating a breach of contract from a tort for prescriptive purposes is the source of the duty breached." Contract damages "flow from the breach of a special obligation contractually assumed by the obligor." Damages in tort, however, "flow from the violation of a general duty owed to all persons."

Harrell, 2008 WL 170269 at *4 (citations omitted).

While this court's statement of the law in *Harrell* is correct, it is equally true that a plaintiff is *not* required to establish her claim sounds in "contract" in order to disprove her claim sounds in "tort." As discussed below, the law is well settled that the 10-year prescriptive period in Article 3499 is the "default" and applies in all cases, absent the applicability of a shorter prescriptive period. In summary, the default 10-year prescriptive period in Article 3499 applies to plaintiff's proposed claim under the LA Loan Broker Statute, provided plaintiff's proposed claim is not delictual and does not sound in tort. As explained below, plaintiff's proposed claim is *not* delictual and does *not* sound in tort for at least 3 reasons.

First, plaintiff is *not* asserting Defendants violated Article 2315, as the failure to be licensed as a loan broker does not constitute the violation of any "general duty" giving rise to a claim under the article. *See Crump v. Sabine River Authority*, 98-2326 (La. 1999), 737 So.2d 720, 729 ("[T]he defendant's duty to remove the canal would stem from its obligation under La. Civ. Code article 2315 to repair the damage caused by its tortious conduct."); *Thomas*, 934 So.2d at 757 ("[Plaintiff's cause of action] derives from the general duty to act reasonably to avoid injury to others, imposed by La. C.C. arts. 2315 and 2316."). Instead, plaintiff is asserting a claim under the LA Loan Broker Statute, which imposes a special obligation on a loan broker to be licensed, and provides a remedy if the broker contracts without being licensed.

Second, it is true the proposed "Count 10 contains no allegations asserting a contractual *breach* by [D]efendants." Docket No. 117, at p. 7 (emphasis added).

However, plaintiff has alleged a contractual relationship between herself and Defendants. Plaintiff has asserted Defendants brokered her Pre-File Money Now Loan for a fee. *See* Docket No. 77, Proposed Amend. Compl., at ¶¶ 3, 34-35, 69 & 116. The contractual relationship between the parties is important. The LA Loan Broker Statute does not create a duty with respect to the general public, as not any member of the public can assert a claim under the LA Loan Broker Statute—only consumers who contracted with, or paid a fee, interest, or other charge to, an unlicensed loan broker may assert such a claim. In other words, only consumers who have some type of contractual relationship with an unlicensed loan broker may assert a claim, *i.e.*, persons who are *not* "juridical strangers" to the defendant. *See Terrebonne Parish School Bd. v. Mobil Oil Corp.*, 310 F.3d 870, 887 n. 44 (5th Cir. 2002) ("As to the delictual fault, most authors say that it is 'an act productive of obligations which takes place between persons juridically strangers to each other.'") (*quoting* 2 M. Planiol, Treatise on the Civil Law); Saul Litvinoff, *Contract, Delict, Morals, and Law*, 45 Loy. L. Rev. 1, 39 (1999) ("The purpose of delictual liability is to bind a person to make compensation for the damage he has wrongfully caused to another in the absence of a contractual relation. A basic assumption seems to be that wrongdoer and victim are strangers to each other.").

Finally, the fact that plaintiff seeks "damages" does *not* mean her claim sounds in tort, as "[t]he allegation that the plaintiff has been damaged, does not determine the question, for damages result as well from the violation of contracts, either express or implied, as from the commission of offences and quasi-offences. Nor will the casual and auxiliary averments of illegality, wrong, and even violence, conclude the plaintiff as to

the character of his action[.]" *Kohn v. Town of Carrollton*, 1855 WL 4735, *1 (La. 1855). Further, plaintiff's damages do *not* flow from Defendants' breach of any "general duty." A claim under the LA Loan Broker Statute does not give rise to tort damages. Instead, the claim gives rise to special damages in the amount of whatever fee, interest, or other charge was "contracted for" or "paid," plus liquidated damages in the amount of twice whatever was contracted for or paid. *See* La. Rev. Stat. § 9:3572.12(D). Plaintiff's proposed claim, therefore, does *not* sound in tort and is *not* subject to Article 3492.

D. The 10-Year Prescriptive Period In Article 3499 Applies To Plaintiff's Proposed Claim Under The LA Loan Broker Statute

"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). 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) (same).

1. The 10-Year Prescriptive Period In Article 3499 Applies By Default To Plaintiff's Proposed Claim Under The LA Loan Broker Statute Because No Shorter Period Applies

"Unless otherwise provided by legislation, a personal action is subject to a liberative prescription of ten years." La. Civ. Code art. 3499. The 10-year prescriptive

period set forth in 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). "[W]hen 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 Article 3499 applies. *Parry*, 828 So.2d at 40.

These long-standing principles of law require the Court to find plaintiff's proposed claim is subject to the 10-year prescriptive period in Article 3499. As explained above, no shorter prescriptive period applies to plaintiff's proposed claim. In light of this fact, and considering the LA Loan Broker Statute is silent as to the applicable prescriptive period, plaintiff's proposed claim is subject to a 10-year prescriptive period. This is the precise analysis undertaken by the First Circuit Court of Appeal in *Cantrelle Fence and Supply Co., Inc. v. Allstate Ins. Co.*, 550 So.2d 1306, 1308 (La.App. 1st Cir. 1989) ("Finding no other prescriptive period specifically established for La. R.S. 22:658 actions, we apply the prescriptive period of 10 years, established by La. C.C. art. 3499.").

Moreover, when the Louisiana legislature establishes a statutory cause of action and limits the time to bring the statutory claim to less than 10 years, the legislature is generally very clear as to the applicability of a shorter statute of limitations. For

example, under the Consumer Credit Law, the legislature established a 60-day peremptive period for § 9:3552 claims. *See* La. Rev. Stat. § 9:3552(E). The legislature established a 4-year statute of limitations for claims under the Credit Repair Services Organizations Act, which is also contained in the Consumer Credit Law. *See* La. Rev. Stat. § 9:3573.12.

Absent a clear legislative provision shortening the prescriptive period, the Court must apply the 10-year prescriptive period in Article 3499. *See*, *e.g.*, 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."). Considering the law and facts, plaintiff's proposed claim is subject to the 10-year prescriptive period in Article 3499. Plaintiff's claim, therefore, is not prescribed.

2. Plaintiff's Proposed Claim Under The LA Loan Broker Statute Is Most Similar To A Claim For Enrichment Without Cause Under Article 2298, Or Payment Of A Thing Not Owed Under Article 2299, So Her Proposed Claim Should Be Governed By The Same 10-Year Prescriptive Period

In his April 21, 2009 ruling, Judge Knowles concluded, "[b]ecause plaintiff has a *delictual* cause of action, she is precluded from having an equitable remedy for unjust enrichment." Docket No. 117, at p. 8.[9] While plaintiff disagrees with the Court's statute of limitations ruling, plaintiff agrees that she cannot assert a claim for "enrichment without cause" under Article 2298 because, as Judge Knowles ruled, the LA Loan Broker

[9] Judge Knowles' ruling clearly establishes: (a) the LA Loan Broker Statute contains a private right of action; (b) Defendants violated said statute; and, (c) plaintiff stated a claim against Defendants under said statute.

Statute contains a private right of action. *See* La. Civ. Code art. 2298 ("The remedy declared here is subsidiary and shall not be available if the law provides another remedy for the impoverishment or declares a contrary rule."). In contrast to a claim for enrichment without cause, a claim for payment of a thing not owed under Article 2299 is *not* subsidiary. *See* La. Civ. Code art. 2299, Comment (c) ("The remedy that Article 2299 provides is not subsidiary; this remedy is available even if other remedies are also available but there can be no double recovery.").

Regardless of whether plaintiff states a claim for enrichment without cause, or payment of a thing not owed, plaintiff's proposed claim under the LA Loan Broker Statute is most similar to these codal claims.[10] This fact is relevant to determining the applicable statute of limitations. As the Louisiana Supreme Court has ruled, "in 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).

Plaintiff has alleged a claim against Defendants under the LA Loan Broker Statute to recover all fees, interest, and other charges Defendants received related to the Pre-File Money Now Loan they improperly brokered to her, plus damages in the amount of twice the total fees Defendants received. *See* La. Rev. Stat. § 9:3572.12(D). Considering the

[10] Defendants argue plaintiff's claim is not similar to a quasi contractual claim. *See* Docket No. 105. Defendants' argument is based upon old case law, which relies upon an Article ***no longer in the Civil Code***. Article 2293 formerly provided: "Quasi contracts are the lawful and purely voluntary act of a man, from which there results any obligation whatever to a third person, and sometimes a reciprocal obligation between the parties." The Article ***was removed from the Civil Code*** per 1995 La. Acts 1041. Under current law, whether the underlying act is "lawful" or not is irrelevant to whether the act gives rise to a quasi contractual claim.

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 claim under the LA Loan Broker Statute. *Dean,* 328 So.2d at 72.

This analysis was applied by the Fifth Circuit in *Dantagnan v. I. L. A. Local 1418, AFL-CIO*, 496 F.2d 400 (5th Cir. 1974). In *Dantagnan*, the plaintiffs brought a class action against their union for illegally collecting dues not owed. *See Dantagnan*, 496 F.2d at 401. 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. *Id.* 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 to plaintiff's LMRDA claim and instead found the 10-year prescriptive period for quasi contractual actions applied to plaintiff's LMRDA claim. *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).

As in *Dantagnan*, plaintiff's proposed claim under the LA Loan Broker Statute is most similar to a claim for enrichment without cause or payment of a thing not owed, which sound in quasi contract. *Most importantly*, plaintiff's proposed claim stems from a contractual relationship 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. *Id.* In light of these facts, plaintiff's proposed claim is best characterized as and most similar to a quasi contractual claim for recoupment or restitution. Plaintiff's proposed claim, therefore, is subject to the 10-year prescriptive period set forth in Article 3499 and is timely.

E. If The 1-Year Prescriptive Period Applies, Plaintiff's Proposed Claim Under The LA Loan Broker Statute Is Not Barred Per The "Discovery Rule"

Even if the 1-year prescriptive period in Article 3492 applied to plaintiff's proposed claim under the LA Loan Broker Statute, 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. Plaintiff had no reason to suspect at an earlier date that Defendants were not properly licensed. Contrary to Judge Knowles' April 21, 2009 ruling, plaintiff's "ignorance" of the facts and her claim is *not* attributable to plaintiff's "willfulness or neglect." Docket No. 117, at p. 10. There is no visible "badge of licensure" and plaintiff had no reason to expect that the second largest tax return preparer in the U.S. would fail to obtain necessary licenses to legally conduct a major part of their business. In light of these facts, even if the Court were to conclude plaintiff's proposed claim under the LA Loan Broker Statute sounds in tort and is subject to Article 3492, plaintiff's proposed claim would be timely per the discovery rule.

V. CONCLUSION

For the foregoing reasons, the Court should set aside Judge Knowles' April 21, 2009 order and grant plaintiff leave to amend her complaint to include a claim under the LA Loan Broker Statute.

Respectfully Submitted,

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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 30th day of April 2009.

/s/ Bryan C. Shartle
Bryan C. Shartle

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