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Statute of Limitations in Civil Conspiracies

Assembly Committee on Judiciary

ASSEMBLY COMMITTEE ON JUDICIARY

STATUTE OF LIMITATIONS IN CIVIL CONSPIRACIES

Hearing of October 27, 1980
California Museum of Science & Industry
Space Building - Muses Room
700 State Drive, Exposition Park
Los Angeles, California

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CHAIRMAN JACK R. FENTON: The subject of today's hearing is the statute of limitations in civil conspiracies.

Statutes of limitations are the time periods within which lawsuits may be filed. They are intended to protect persons from having to defend against suits based on events that are so old that important evidence and witnesses may no longer be available.

In Wyatt v. Union Mortgage Co., the California Supreme Court held that when two or more persons carry out an unlawful scheme to harm another person, the statute of limitations does not begin to run until the last overt act in furtherance of the agreement or conspiracy has been completed.

Today, the Committee will receive testimony on whether the Legislature should make any changes in this "last overt act" rule. We will examine whether that rule is necessary in order to protect victims of conspiracies without unfairly burdening defendants in such cases.

Our first witness is Brian Van Camp. How are you Brian?

MR. BRIAN VAN CAMP: Just fine, Mr. Chairman, thank you. Mr. Chairman, I'm appearing today on behalf of Union Home Loan Mortgage Company. And as you suggested we are here to present testimony on what is basically the continuation of the McVittie bill, which was heard by this body and actually passed by this Committee in the Assembly in the last session. It was defeated, however, on the Senate side on what we perceive to be basically a procedural objection, that is in the minds of the Senators the wrongful joinder of that act or that bill with another bill related but not right on the same subject.

The issue today, in our humble view, is not whether mortgage loan brokers have done anything wrong in the distant past. The fact is, when I was Commissioner of Corporations I was disturbed by reports of some of the problems in that industry but I'm firmly convinced that through the deliberations of this Committee, the Assembly and the Legislature, many, if not all,of those abuses, have been addressed from a legislative standpoint and are behind us, and not the subject of today's hearing. Nor is this an attempt to reargue the Wyatt case, which in our view, was a case of bad facts making bad law. That case at the trial level was not taken seriously and the facts were not put in contention,and when the jury awarded judgment for the plaintiffs the appellate courts were pretty well stuck with the facts as they were deduced at trial which was basically without opposition from the defendants. Rather this is an attempt to balance the legitimate needs of the plaintiffs to get to have time, first of all, to discover the wrong done to them and then to proceed in an orderly fashion to prepare a

case and file it against the defendants. This is an attempt to balance that very legitimate right with the legitimate needs of the potential defendants to have their claims adjudicated before key witnesses die or disappear and before records are lost or destroyed. Largely, in the past, this has been a balancing which has been the subject of well argued debate before the legislative committees and has generally resulted in well reasoned rules balancing these critical needs against each other.

Recently, however, as you have said, the statute of limitations concerning tort actions has been substantially modified by several appellate courts in California in a way which substantially broadens the opportunities for potential plaintiffs to bring suit in the civil tort area. Emerging case law now states that if it is alleged and proven that two or more persons have conspired to commit a tort, then the statute of limitations does not begin to run or is,in fact, tolled until the commission of the so-called last overt act by the defendants. This rule has been applied regardless of the time of discovery of the commission of the actions constituting the original tort. And then, reading the cases, the last overt act apparently may include virtually any further business dealings between the claimant and the alleged defendants following the original tortious conduct including the mere acceptance of loan repayments at any time after the original loan had been entered into, assuming two or more persons had conspired to make the loan improperly.

We believe the holding in the Wyatt and similar cases presents two basic problems. The first is that the plaintiffs who are alleged to have been defrauded by more than one person enjoy a longer period of time within which to file their actions, even given identical injuries than another plaintiff who was wronged by only one person. The second problem, we believe, involves the so-called last overt act doctrine which revives, in our view to an unreasonable extent, torts which otherwise would have long been barred by the ordinary running of the applicable statute of limitations. Considering the first objection, the judicial cases do not discuss any policy reasons for holding open the time for filing suit in cases where more than one tortfeasor had participated to cause injury to a person as opposed to cases where the injury is only caused by one person. Further, in the context of ordinary commercial transactions almost any tort feasor can be said to have acted jointly with someone else since under the theory of respondeat superior, the employer is liable for tortious conduct of its employee. Therefore, if the conduct was incurred within the scope of the employee's duties, the plaintiff is virtually always going to be able to allege more than one individual as a defendant. The new judicially created conspiracy exception therefore extends the time within which the Legislature has otherwise set down for bringing the action in such cases. That new rule apparently would now start to run not after discovery of the wrong, but after the last overt act.

We believe that tolling the running of the statute of limitations from the commission of the last overt act, however, is justifiable in the criminal context in which the doctrine arose. There the conspiracy itself is a wrongdoing. In the civil law cases, however, the courts have consistently held that no civil liability arises from the bare agreement of persons to act unlawfully, independent of their other actions. The purpose of a civil conspiracy allegation is

to permit joinder as defendants of all parties to the tort regardless of whether they actually participated in the commission of that tort. The statute of limitations in cases involving civil conspiracies is that period specified for actions based upon the underlying wrongful conduct which was the actual subject of the conspiracy.

Again in the commercial banking and lending areas, the Supreme Court's new doctrine is carried to an unreasonable extent. The last overt act constituting the fraudulent loan transaction there was a mere acceptance of loan payments made over the course of the time of the repayment of the loan. The reasonable application of this rule could well extend the time within which to bring their actions.

CHAIRMAN FENTON: Let me interrupt you one minute, Brian, so I can introduce Assemblymen Art Torres from Los Angeles, Dave Stirling from Whittier and Willie Brown from San Francisco.

MR. VAN CAMP: Thank you, Mr. Chairman. We believe that the natural extension of the Wyatt holding would keep alive actions for upwards of decades. Assume that a 30 year loan had been made under improper circumstances at the outset. Under such circumstances and the new rule, the time for bringing that action would be three years past the final payment of that loan, possibly 33 years after the loan had been made. The natural consequences of that would be a difficulty in trying the case as well as an enlargement of the damages, usually the longer the time runs since the occurrence of the problem, the higher the damages. It allows the potential plaintiff to sit in the weeds and wait for further overt acts, largely controlled by himself in making the repayments and expand the damages and largely diminish the capability of the defendants to adequately try the case.

Viewed in the context of even non-commercial transactions, however, the last overt act doctrine creates similarly anomalous results. In the libel and slander area, for instance, if the plaintiff can find at least one publication or statement of a defamatory nature within the statutory period he can use that statement to revive and make actionable any previous libelous or slanderous remarks made by the same persons regardless of time at which such previous statements were made, and regardless of the fact that the plaintiff had known all along of such earlier statements. Since the courts have held that the knowledge or discovery of alleged tortious conduct has no bearing on the tolling of the statute of limitations as long as the last overt act has not been completed, this doctrine bears no relationship to other cases where the law tolls the running of statutes of limitations for what we believe are good causes. Thus, if after the commission of the tort a defendant conceals the fact of the wrongdoing from the plaintiff, the statute of limitations does not begin to run until the plaintiff actually discovers or should reasonably have discovered the fact of the wrongdoing.

Similarly, if the plaintiff is in a relationship with the defendant, where the defendant is pledged to guard the best interests of the plaintiff, then the statute of limitations, again, reasonably does not begin to run during the continuation of that relationship. Thus, persons who are under the care of a physician, an attorney, a guardian, a trustee or other similar fiduciaries do not have the statute of limitations running against them for as long as such persons

continue in that relationship of protection or care from the defendant absent the actual or constructive discovery of the wrongful act.

In ordinary business transactions, however, absent a special showing, all parties are presumed to be on an equal footing and do not need the additional assistance which the last overt act doctrine confers upon them. Again, in the lending arena,once the loan is made and the facts constituting its illegality are discovered, then presumably the borrower is in no worse position than any other plaintiff who has discovered the commission of the wrongful acts against him, and the new law should encourage him to reduce his claim to an action brought against the defendants within a reasonable time. This we believe the Legislature in the past has encouraged, but the courts have discouraged with their recent pronouncements.

For the above reasons, the Legislature,in our view, should act with all deliberate speed to preserve the integrity of its previously enunciated policies governing the filing of actions to maintain the delicate balance between the rights of plaintiffs to seek redress for wrongful actions, and the rights of defendants to bring forth clear evidence pertaining to such allegations. More specifically, the Legislature should, in our view, amend the Code of Civil Procedure to make it clear that once the tortious conduct has been discovered, the statute of limitations should commence to run regardless of either the number of tortfeasors who have committed the wrongful actions or the later occurrence of so-called overt acts. If such acts occur they will certainly also be actionable, but such acts should not of themselves operate to extend the life of lawsuits citing earlier conduct by the tortfeasor which would otherwise be barred by the ordinary running of the stature of limitations. The Legislature should make it clear that such broad claims do not suddently spring to life because of the commission of new wrongful acts. Further, the Legislature should address the so-called civil conspiracy theory and confirm that it is not sufficient to toll the running of the statute of limitations on claims which would otherwise be barred. Once the claimant has discovered the alleged wrong, a claim should be filed on a timely basis regardless of the number of persons alleged to be involved in its perpetration. Finally, in giving redress to this area of the law, we cannot and do not urge that any revision in the law be made retroactively. Lawsuits are currently working their way through the courts on the basis of the rulings handed down in Wyatt and others. Such lawsuits, in our view, should not and cannot be adversely affected by any legislation which this Committee would consider in the coming session of the Legislature. In addition, the Legislature should probably provide that actions may still be maintained under the Wyatt doctrine through, say, June 30, 1982.

We appreciate the consideration of the Committee to this urgent problem which in our view has done violence to the delicate balance between the justifiable needs of both plaintiffs and defendants, especially in the commercial area. The needs of business people and others in this state to be able to plan their affairs and avoid the necessity of defending stale claims which are not capable of determination on the basis of current information or with the assistance of witnesses who can adequately recall all pertinent events, makes this suggested amendment urgent for your considered deliberation. Thank you for your timely consideration.

CHAIRMAN FENTON: Thank you very much. Edwin Freston.

MR. EDWIN FRESTON: I am Edwin Freston, a lawyer from Los Angeles. I'm in private practice. I am not appearing on behalf of any specific client although our office would tend to represent clients that would have the same interests in legislation as Mr. Van Camp. A civil conspiracy, as Mr. Van Camp mentioned, is not a tort as contrasted with a criminal conspiracy. As Wyatt has correctly pointed out, it implicates all who agree to a plan to commit a wrong, and tacit consent is enough to bring someone within the gambit of a conspiracy. Thus, a conspiracy is nothing more than a method of creating a joing liability for defendants who did not actually directly participate in the wrongful act or for defendants who are only slightly culpable as compared with the culpability of the principal actor. The rule as it presently exists in California developed from the Schessler v. Keck case where the court of appeal applied the criminal law conspiracy to a civil conspiracy based on an argument made by the plaintiff's counsel that a criminal conspiracy rule should apply and the defendant's counsel's incorrect concession that that was the applicable rule. So the line of cases in California developed from a mistake by defendant's counsel in failing to cite the Bowman v. Wohlke decision which is discussed both in Chief Justice Bird's opinion in Wyatt and by Justice Richardson's concurrence in Wyatt.

It's my view that Bowman properly applies the civil conspiracy rule and the statute of limitations the way it ought to be applied. The reason I say that, aside from questions of freshness of evidence and the things that Mr. Van Camp principally referred to, is that the rule doesn't make sense. To give an example of why I contend that the rule doesn't make sense, I'm going to draw from a case that was somewhat a companion case to the Wyatt case. I was counsel for certain of the defendants in the case Pardee v. United States Power Squadrons which was decided by the court of appeal in Los Angeles. The Supreme Court granted a hearing in that case while Wyatt was pending. After the Wyatt decision had been decided, that's prior to argument of my case, the Supreme Court retransferred the case to the court of appeal for a modification of the opinion to include reference to Wyatt. As I think I mentioned the Pardee case is not published. I should also mention that the Pardee case is dismissed and settled so that the parties there no longer have any particular interest in where the rule goes. I should also point out I'm going to use some of the names out of the Pardee case for convenience, it shouldn't be taken as a suggestion by me that any of the wrongful conduct was actually carried out. We'll treat is as a hypothetical.

The case was for the tort of interference with business advantage or for inducing breach of contract. And, according to the plaintiff, the tort was carried out by one of the defendants, Mr. Hutchings, in November of 1971 by causing action to terminate the plaintiff's contract with another. The notice of the termination was mailed to the plaintiff, and let's assume that that notice was mailed by Mr. Quint who was also a defendant, and let's assume that Mr. Quint agreed with Mr. Hutchings' action, although Mr. Quint didn't take the action, all he did was take the letter to the post office. Under the rule of Wyatt and prior cases, Mr. Quint can be held as a conspirator in the tort of inducing the breach of this contract. Let's assume that the old contract ends in February of 1972, that is about three months after the action was taken, and that a new contract with an

outsider, Mr. Coy, is made in March of 1972. Now you have an action filed in March of 1973, and that's roughly the sequence of things in this decision. Is the action good against the defendants? If you have a conspiracy, the action is good against all the defendants because Mr. Quint's a member of the conspiracy, he mailed the letter and agreed with it, the new contract was made with Mr. Coy in March of 1973. All these things are in furtherance of the conspiracy. I should point out that every time something is done under this new contract or it's renewed in future years you could say that also is in furtherance of the conspiracy so that statute never really starts running. I was told a story, and it may be apocryphal, that a trial judge in a conspiracy case where this was being discussed made the comment to the defendant's counsel, "As far as I'm concerned the defense of this case is in furtherance of the conspiracy." Okay, so there you've got a case where Mr. Quint can be held as a principal, even though he's only,let's say, on the periphery of the things. Mr. Hutchings is the more culpable defendant. Now, let's assume that Mr. Hutchings did all those things by himself with no conspiracy. Is Mr. Hutchings, now the more culpable person, going to be held? The answer is no. He's not, because the tort's complete, the damage is done in November of 1971. Assuming you've got a one-year statute, and I should have used '74 in my example because it's a two-year statute, it's too late for the plaintiff to file an action against Mr. Hutchings. So what you have is, by virtue of a conspiracy, you bring in someone who is only slightly culpable on the outside, and he may be held forever, but if you don't have the conspiracy, the man against whom the real problem lies, the most culpable person is off scot free. I submit that simply doesn't make sense as a matter of justice.

ASSEMBLYMAN DAVE STIRLING: Without the conspiracy theory, what would the statute have been, a two-year statute? Under what theory?

MR. FRESTON: Yes, it would have been a two-year statute on inducing breach of contract or interference.

ASSEMBLYMAN STIRLING: That's statutory?

MR. FRESTON: Yes, it's a miscellaneous tort in the catch-all provision in the Code of Civil Procedure.

ASSEMBLYMAN STIRLING: Is it triggered upon knowledge of the inducement or upon the inducement itself, or the knowledge of it later?

MR. FRESTON: It would say it's triggered on the damage in this particular case, the contract was lost.

ASSEMBLYMAN STIRLING: Well, okay, not as it relates to the conspiracy theory, but on the inducement statute of limitation. When does that one trigger, on the act itself of inducement or upon the knowledge by the damaged party that there was an inducement?

MR. FRESTON: Well, I would say, I'm not sure the cases have defined this down to the last degree that the statute is going to start running when the plaintiff has suffered damage by virtue of the interference. There may be an effort to induce a breach of contract, but there's no breach, the relationship goes on as it was before, the plaintiff is not damaged. I don't think there is a cause of action there.

The contract in this particular instance was terminated by a notice of November of 1971, the termination became effective during February of 1972 and you can argue that the tort was complete in November, 1971. I think you can also argue that the tort was complete. The damage was suffered by February 1972. The tort is clearly complete before this March of 1972 new contract with somebody else. The plaintiff was not a party to the new contract at all. In Wyatt,...

ASSEMBLYMAN STIRLING: Was the plaintiff aware of that new contract?

MR. FRESTON: Well, of course, the plaintiff was aware his own contract was terminated. Even if there had been no...

ASSEMBLYMAN STIRLING: Is that not when the damage would actually occur?

MR. FRESTON: No, if there had been no new contract, there still would have been damage because the plaintiff...

ASSEMBLYMAN STIRLING: But, is that not when he learned that his own contract had been terminated. Isn't that when the damage occurred?

MR. FRESTON: I would say that that's correct.

ASSEMBLYMAN STIRLING: And, so it would be two years from that date?

MR. FRESTON: Yes, that was our position and that was November of 1971. The new contract doesn't affect his damage. He loses his -- I'm going work for you, I've lost my contract, even if no one else does work for you. I have had my damage.

ASSEMBLYMAN STIRLING: And the plaintiff waited more than two years from that date?

MR. FRESTON: Yes.

ASSEMBLYMAN STIRLING: Why?

MR. FRESTON: You'd have to ask the plaintiff. I certainly can't answer that.

ASSEMBLYMAN STIRLING: Then it didn't come out during the course of the law and motion discussions on this particular subject?

MR. FRESTON: The mental gymnastics the plaintiff went through did not come out. But he knew in November of 1971 that he was losing his contract. He was out of business with respect to that contract, and his contract actually,in fact, ended during February of 1972. Now the new contract is in furtherance of a conspiracy, but that particular activity was not a plaintiff-related activity in the sense that the further activities in the Wyatt case were, because the plaintiff didn't participate in those activities even though it was in furtherance of that conspiracy which led to the loss of the plaintiff's own contract.

ASSEMBLYMAN STIRLING: Then you try to figure the justification of the conspiracy theory being created anyway.

MR. FRESTON: Well, I understand why the conspiracy is there, and it's because someone else like Mr. Quint helped Mr. Hutchings in some way to do a wrongful act, and Mr. Quint's just as liable as Mr. Hutchings, even though Mr. Quint did some incidental things.

ASSEMBLYMAN STIRLING: But isn't it really for the purpose of simply extending the statute? Wasn't the conspiracy theory which extends the statute of limitation period, wasn't that basically created by the courts so as to give this particular plaintiff a longer period of time within which to file the suit?

MR. FRESTON: I would have to say I don't believe that's true. As I mentioned, the rule between at least the time of Bowman v. Wohlke, and the case I mentioned, Schessler v. Keck, the rule in California was that each tort -- I think you had multiple defamations there. I had a case in the mid '60's involving multiple defamations. Each defamation is its own cause of action. And the statute runs on each one from the time of the publication of the defamation. And the only reason that the civil conspiracy tolling situation arose in California, which it did in Schessler v. Keck -- that's the first case I've ever found dealing with it that way -- was because the defendant who had a good defense in Bowman v. Wohlke, conceded that he didn't have a defense when the plaintiff,grasping for straws,cited a criminal case where a conspiracy is a substantive crime. The plaintiff makes that argument, the defense says, "Yes, that's right. I lose on that issue." It really wasn't reasoned. The court was misled and that has led to a long line of cases dealing with that situation. I have never seen a case that dealt with the problem that I just presented to you where you've got a slightly culpable co-conspirator which runs the thing out, whereas if the bad guy did it all by himself, he'd be off scot free.

ASSEMBLYMAN STIRLING: Okay, but to conclude this point, what we're saying is that this theory was created basically by the court, perhaps through the default of a plaintiff in an earlier case. That really has as its only purpose of extending of the amount of time that the plaintiff has to sue. Isn't that what we really come out with? That's all it basically does. It was created for the purpose, this theory was created for the purpose of allowing the plaintiff a longer period of time within which to bring suit.

MR. FRESTON: You mean the conspiracy theory was? No, I don't agree with that. I think the conspiracy theory was created for the purpose of making a defendant responsible for a tort even though he didn't actually directly commit the tort. That's the purpose for a civil conspiracy.

ASSEMBLYMAN STIRLING: That's the result of it, that's not the purpose of it. The purpose was to give the plaintiff a longer period of time to sue. That's what it comes out to be isn't it?

MR. FRESTON: No, well the civil conspiracies situation was in existence prior to this century, I can't tell you how far back it goes.

ASSEMBLYMAN STIRLING: But never applied in a way like this.

MR. FRESTON: And, it was in existence during a lengthy period of time and applied by the California Supreme Court in the situation...

ASSEMBLYMAN STIRLING: I'm sorry. I'm asking the purpose of the Wyatt rule, not the conspiracy theory, I understand that. I mean the rule was apparently created by the court for the purpose of giving the plaintiff a longer period of time to sue.

MR. FRESTON: You mean the Wyatt rule. Well that's what Wyatt did with it. Yes, as I say, in Bowman v. Wohlke the Supreme Court said, "Yes, in conspiracies. Everybody's responsible, but it doesn't extend the statute." That was the point I was making. So the principal reason for civil conspiracy is not to extend the statute of limitations, that was an afterthought.

ASSEMBLYMAN STIRLING: I understand that.

ASSEMBLYMAN WILLIE L. BROWN, JR.: Let me ask a question of you Mr. Freston. Prior to either the Wyatt case or the second case you cited, had the statute of limitations ever been extended by virtue of the fact that a civil conspiracy was involved?

MR. FRESTON: Not that I am aware of in California. As I say, there is a California Supreme Court case which said it is not extended. And Chief Justice Bird and Justice Richardson differ on their interpretation of that case. I suggest that Justice Richardson's reading on that case is correct, and that the Supreme Court had said it does not extend.

ASSEMBLYMAN BROWN: As the law now stands in the Wyatt and the Schessler cases, the statute of limitations is never tolled if there is a civil conspiracy.

MR. FRESTON: Is never tolled if there is a civil conspiracy? I would say it is tolled if there is a civil conspiracy so long as anything is done that can be pointed to as being some sort of act in furtherance of the conspiracy, and that's an extremely broad concept.

ASSEMBLYMAN BROWN: But it only commences to be tolled from the date of that last alleged act?

MR. FRESTON: That's when the statute starts running, that's correct.

CHAIRMAN FENTON: Okay. Do you have anything else?

MR. FRESTON: Yes, I'd just like to make one other comment which I think ties into this and goes to the question of discovery and the running of the statute. I think the courts have commenced to broaden that, this relates to it, it is not precisely the point, but I think that the Committee should consider the judicial enlargement of the typical fraud statute of limitations rule that the statute starts to run from discovery whenever that may be, and the possibility of having two rules should exist. Mainly, where you have a special relationship such as the fiduciary relationship, discovery makes very good sense. Where you have no special relationship between the parties, I think the

traditional rule that the statute starts running when the cause of action is complete perhaps may make more sense. The effect of this is to shift the burden a little bit because it is very simple for a plaintiff to stand up and say, "I didn't know," which shifts a tremendous burden to a defendant in fiduciary cases that makes good sense. In ordinary cases, I think that where a person has suffered damage, that should be enough to start the statute of limitations running, requiring him to figure out what's going on, unless you have a rule which is similar to what is generally followed in the federal courts, and which the courts in California have occasionally applied, although usually they don't find they need to. That is, the statute is tolled during such period of time in those situations where the defendant in involved in fraudulent concealment of the cause of action. Lest somebody argue that this means a plaintiff may not really be hurt for years and years, and the statute will have run, I suggest that in these situations the case of action actually matures when the plaintiff suffers damage. And if the damage isn't really suffered until later, the court is going to find that the cause of action didn't accrue until that later time. And I would call the Committee's attention to a case of some years ago that points this out, though not quite in the statute of limitations concept and is narrower than courts would find today in product liability and what not, but that case is Hale v. DePaoli, 33 Cal. 2d, in 1948, where the defendant negligently manufactured a porch railing, and 19 years later it broke, the plaintiff was hurt, there was no problem with the cause of action. So I'm not suggesting that in that case the cause of action would have been barred some 18 years ago or so. I think you very much for your time.

CHAIRMAN FENTON: Thank you very much. Douglas DeVries.

MR. DOUGLAS DeVRIES: Thank you, Mr. Chairman, and members of the Committee. My name is Douglas DeVries, I'm an attorney in Sacramento, a member of the California Trial Lawyers Association, and in the spirit of full disclosure, I'm a partner of Rodney Klein who, today, along with Irv Dungan is in a trial in Sacramento against Union Home Loan on behalf of five families who have the threat of losing their homes being held over them today. In that context, I take exception to Mr. Van Camp's remarks that the abuses of this industry are behind us, and especially with respect to Union Home Loans.

ASSEMBLYMAN STIRLING: Does that case involve this particular point that we're talking about.

MR. DeVRIES: These are the Wyatt facts. Our office is associated with Mr. Dungan on 30 cases. I understand that there are others pending in Los Angeles, which I believe some of the other witnesses can address.

CHAIRMAN FENTON: I'm sure Mr. Emkin's people will tell us about that.

MR. DeVRIES: These are basically the same Wyatt facts, and it's an ongoing problem.

Generally, in terms of policy underlying the statute of limitations in this context, and statutes generally, we believe that the law should be enacted to protect the victims rather than the perpetra-

tors of fraud. And this would especially be true in the context of fiduciary relationships, which by definition involve people with superior knowledge and expertise who are, in effect, advising the people that come to them about how to manage their affairs. And when they take advantage of that situation to bilk those people, you have a situation where the law must favor the victim. Another policy that comes into play here, I believe, is the policy that disputes between citizens should be resolved on their merits, and it is in that context that it is generally held that the statute of limitations is a disfavored defense. It's a procedural bar to keep people from courts and allow them to resolve their disputes on their merits. So, what you have is a limited purpose for a statute of limitations that has as its primary purpose, as the Wyatt court said, the protection of defendants only in the context of allowing them not to be burdened with defending against stale claims.

Now, in the context of the Wyatt case and ones before this Committee, there are three basic areas that I believe we can address in stale claims. One is the availability of evidence. Well, in the situation you have before you, you have a scheme that is an ongoing manipulation of loans and loan interest where the loans are continually being collected on, up to and often including the time the complaint is filed. The evidence is clearly all there, because the account in effect is still open at the time of discovery.

CHAIRMAN FENTON: What's the time of discovery that you're referring to?

MR. DeVRIES: Well, the situation for instance on a three year loan, such as the Wyatt facts -- when the loan comes around to the three years, and the balloon payment that was hidden from the person becomes evident, and they realize that they owe as much or more than they actually borrowed, they have knowledge of facts they didn't have when the loan was taken out. Now the question is, and I think this gets to another point, are the people sleeping on their rights, when they don't file a suit right then? Well as the Wyatt court pointed out in recognizing the situation, they're in a trap from which there is very little escape. The people you're talking about are people that probably wouldn't have qualified for the loans in terms of the full payment of the loans. All they were paying was interest and a very small part of the principal. In that case, I believe it was $18 a month. Now, when they discovered that, the option that's given to them is not to renew the loan, rather, it's to negotiate a new loan for which a brokerage fee is collected. Now their alternative to that is to go out and look for other money.

CHAIRMAN FENTON: Well isn't there also an alternative of filing the lawsuit when they discover it?

MR. DeVRIES: Well you have a problem. You still have the loan, you still have the threat of foreclosure.

CHAIRMAN FENTON: Can't you stay that with your lawsuit based on fraud?

ASSEMBLYMAN BROWN: Yes, that's automatic.

MR. DeVRIES: Yes, that's right. Those are stayed, but we're getting off the point. That's when they get to a lawyer. What these people are doing -- The question in the statute of limitations situation as to whether a plaintiff is sleeping on his rights, is not whether there are procedural remedies available to them. What we're talking about is, as Mr. Van Camp said, balancing the equities between the parties. Well, what those parties were doing, in these cases, was trying to meet their financial obligations to a party who they thought they didn't understand. Not somebody that had defrauded them. They went to look for other money, and when they made applications for other money, to see if they could get a loan to pay off that loan, credit inquiries then went to the sister corporations of Union Home Loan, Western Computer Services, for instance, who told the people asking for credit information, "No, these people own us money. They're a bad credit risk." So they couldn't get the money. So then they go back, so then they renew the loan. In other words, they kept their relationship.

ASSEMBLYMAN BROWN: Let me ask a question. If an inquiry is made to a credit reporting agency and there is a debt outstanding, how does the credit agency avoid revealing that information if they are literally bound to properly represent what the true facts are from their knowledge?

MR. DeVRIES: That's exactly right. They report it, it's true. The people were in default. They didn't pay their...

ASSEMBLYMAN BROWN: But they have to report that, do they not?

MR. DeVRIES: Yes.

ASSEMBLYMAN FROWN: Well, how would they not report it, and be helpful in assisting people to get another loan?

MR. DeVRIES: It's not a matter of their not reporting it. For instance, what if they renewed the loan? In other words, if you understand the facts of the Wyatt situation, a payment that was late was considered to put them in a position where their loan would not be renewed. So the only way you could pay off the first loan, was to get a second loan, a new loan. It wasn't continuing the existing obligation, it was creating a new loan for which there was a brokerage fee. In other words, when you got to the end of the first loan, the Union Home Loan was not continuing the same relationship. They wanted to create a new relationship.

CHAIRMAN FENTON: Well, if the same thing occurred at the end of the second loan that had occurred at the end of the first, then you would continually toll the statute until the people decided they want to do something legally. Is that what you're saying?

MR. DeVRIES: No. What I'm saying is that the people that were involved in the 1960's, into the 1970's, with Union Home Loan, were trying to fulfill their obligations under their loans in good faith.

CHAIRMAN FENTON: I understand that.

MR. DeVRIES: All right. What put them in the courts was their realization that the real damage they were going to suffer was at the end, always at the end. It was when all the late charges that they didn't know about kept accruing. It was when they discovered that what they were doing was -- every time there was a late charge they were paying interest.

CHAIRMAN FENTON: That was on the first loan?

MR. DeVRIES: Right. And then their homes were going to be taken away from them. That's when they went to lawyers.

CHAIRMAN FENTON: On the first loan, before they negotiated the second one?

MR. DeVRIES: The first loan didn't exist anymore.

CHAIRMAN FENTON: They had negotiated the second one?

MR. DeVRIES: Right.

CHAIRMAN FENTON: All right. My question to you, if for instance they hadn't gone to a lawyer at the second loan, and let's say at the end of the second one the same thing again, do you feel that the statute should continually be tolled?

MR. DeVRIES: No.

CHAIRMAN FENTON: You understand what I'm asking you?

MR. DeVRIES: I do.

CHAIRMAN FENTON: I'm not quarreling with you. I'm just trying to get your reasons.

MR. DeVRIES: What I'm suggesting is, in the context of what a conspiracy is, whether it's tort or not a tort, or whether the Wyatt case has in fact, changed the statute of limiations or not, I think answers your question. The nature of the wrong alleged in the Wyatt case, and upon which the jury gave its verdict, was that the defendant had designed a scheme that went beyond a three year loan relationship. It had as its purpose the maintenance of an on going relationship with a victim, from whom money could be obtained, on an on going basis.

CHAIRMAN FENTON: I know that.

MR. DeVRIES: That's the nature and scope of (inaudible).

CHAIRMAN FENTON: I know that. But if they did this the second time, and they hid it again, with your theory, you would continually toll the statute, right?

MR. DeVRIES: Well, it's not my theory. It's the idea...

CHAIRMAN FENTON: Well, it is what you're telling us now.

MR. DeVRIES: It's the idea that as long as the defendant

is perpetrating the tort, it's an ongoing tort, that tort has not concluded.

CHAIRMAN FENTON: Regardless of the fact that the plaintiff has discovered it, knows about it, knows about the extra charges and so forth, and for whatever reason gets another loan, then as long as this relationship exists, and they are committing a tort, then the statute should be tolled until the plaintiff brings an action?

MR. DeVRIES: Until the defendant terminates the wrong doing.

CHAIRMAN FENTON: Either way. Okay.

MR. DeVRIES: Because we're not talking about a situation where there was a misunderstanding. We are talking about a combination, a scheme...

CHAIRMAN FENTON: I understand that.

MR. DeVRIES: ...that was designed to take advantage of these people as long as you could keep them ignorant of their rights.

CHAIRMAN FENTON: But when the baloon payment becomes due, they discover that they've been victimized. Right?

MR. DeVRIES: Well, they discover that their homes are going to be taken away from them.

CHAIRMAN FENTON: Yes. Now they discover they're paying more and probably owe more than they originally borrowed?

MR. DeVRIES: Yes. They knew that.

CHAIRMAN FENTON: Okay.

ASSEMBLYMAN BROWN: Mr. DeVries, should there be a statute of limitations at all?

MR. DeVRIES: Yes.

ASSEMBLYMAN BROWN: Then tell us in the context of the Wyatt matter, when the statute should commence to run, and to what extent should it run?

MR. DeVRIES: We agree with the holding in Wyatt and the cases that held the same things in other areas before the Wyatt case, such as Schessler, and about four or five others cited by the courts in areas other than loan frauds. The courts held that if the nature of the tort is such than is being perpetrated by a combination of two or more people,on an ongoing basis, such that the defendants are benefiting from their wrong doing, at the very least the statutes should not commence to run until such time as the wrongful conduct has terminated. The statute of limitations was not changed by the Wyatt decisions. The question is when the fraud is completed. As long as you have people in combination still perpetrating the fraud, the tort has not concluded.

CHAIRMAN FENTON: Are there other types...

ASSEMBLYMAN BROWN: Wait a minute. I'm waiting for the answer to my question.

MR. DeVRIES: So the answer is when the tort concludes, assuming that the person has knowledge of the facts constituting the fraud, the statute commences to run.

ASSEMBLYMAN BROWN: And it is your theory then that from the first contract, that there is no cessation. If they're ten additional separate contracts, it relates back to a continuation of the first contract. That's your theory.

MR. DeVRIES: That's the scheme. That's not my theory. That was the scheme. You see...

ASSEMBLYMAN BROWN: Wait a minute, wait a minute. That is your theory. That would have to be your theory.

MR. DeVRIES: Yes.

ASSEMBLYMAN BROWN: That would have to be your theory, otherwise, your theory would have to obviously be that if from day one, through day fifteen with contract fifteen, the circumstances are similar. The funding source is similar, the procedures are similar. The balloon payment is similar, then you, under your theory, argue that all fifteen contracts shall be the subject of a lawsuit, rather than just the contract discovered within the two year period.

MR. DeVRIES: Yes, I agree with you, that is my theory, but with one point of clarification. The plaintiff must still prove that one of the purposes for getting the person into the first loan was to get them hooked on, as the court referred to it, a treadmill, that would allow you to keep bringing them back in for the similar loans.

ASSEMBLYMAN BROWN: So, under your theory, you would concede if on the eight contracts there is a transfer of business relationships from X to Y, and Y had no way of having knowledge of anything X did period, the records would not reflect it,et cetera, then the first eight, when the lawsuit is commenced, could only be against X and not against Y.

MR. DeVRIES: Correct.

ASSEMBLYMAN BROWN: Is that a concession that you make?

MR. DeVRIES: Yes.

ASSEMBLYMAN BROWN: Is that a concession that's made in the Wyatt case?

MR. DeVRIES: I believe so. That in fact was not in the Wyatt case because it happened that all the defendants were in the conspiracy. But, with one exception in the facts, I think it was Mrs. Flink...

ASSEMBLYMAN BROWN: Well, I don't know the case. I don't know what you're talking about.

MR. DeVRIES: With the exception of one defendant. Yes, if the person then is outside of the conspiracy, and that conspiracy is no longer perpetrating the underlying tort of fraud on the person, and they have knowledge of facts, they have an obligation to file a lawsuit within three years.

ASSEMBLYMAN BROWN: So, your theory finally is, I take it Mr. DeVries, that as a minimum, the statute of limitations should not commence to run until there is total cessation of conduct by the alleged conspirators?

MR. DeVRIES: Directed against that plaintiff.

ASSEMBLYMAN BROWN: That plaintiff and then you add, on top of that, the fact that the plaintiff must have acquired knowledge, or had a reasonable opportunity to acquire knowledge at or about the time of the cessation.

MR. DeVRIES: Or before.

ASSEMBLYMAN BROWN: Is the same theory applicable where it is only a single tortfeasor?

MR. DeVRIES: That issue, as has been pointed out in the Committee staff's analysis of this bill, was specifically reserved by the Wyatt court.

ASSEMBLYMAN BROWN: My question to you is should your theory apply?

MR. DeVRIES: Should the same theory apply if an individual is perpetrating an ongoing scheme?

ASSEMBLYMAN BROWN: Yes, one corporation.

MR. DeVRIES: One corporation, as a single entity?

ASSEMBLYMAN BROWN: Yes.

MR. DeVRIES: The state of the law I think is unclear. My own view, is that...

CHAIRMAN FENTON: You answered me that as long as they keep taking another payment, for instance, until they take their last payment, or commit the last act, the statute doesn't run.

MR. DeVRIES: Yes, if...

CHAIRMAN FENTON: Maybe they send them a notice that of foreclosure or something like that.

MR. DeVRIES: Yes, if that is a legitimate concern, that there is a distinction between the two, then the person who is ingenius enough to carry this off by himself, which is unlikely, but,

assuming they did, their rights should be determined with the ongoing fraud as opposed to somebody -- in other words, if the distinction is not between multiple tortfeasors and single tortfeasors, but rather between single acts of fraud, and ongoing schemes of fraud, it's the ongoing shcemes that should be treated together. Whether they are carried off by an enterprising individual, or by a combination of people.

Now, getting on to the other part of stale claims that was brought up, the notion of unavailability of witnesses. In this situation, just on the real facts of the Wyatt case, the problem the defendants have in this case is the availability of witnesses and former employees, not the unavailability. You are being asked to consider a change in law. As it stands right now the statute is the way it is. No one,certainly not Union Home Loan, has shown any prejudice by virtue of the unabailability of witnesses. In fact, the idea that they didn't defend themselves in the lawsuit is a misstatement. The principals of Union Home Loan chose not to appear at trial. Their depositions, however, had been taken and were read to the jury, and the jury had an appreciation of the relationship of the principals to the scheme.

Now, the matter of whether a criminal conspiracy is itself a crime, and whether a similar conspiracy is itself a tort, I will leave to other gentlemen who I think are probably better versed than I. I would close with just one general comment. And that is that this professed need for a change in the law from the Legislature is not being asked by the commercial banking industry. Nor in fact, is it being asked for by the mortgage brokerage industry as a whole. It is being asked for by the Union Home Loan Company, which is one company, one private company. And as to that company, I would remind each of you that the Supreme Court of California characterized them in these terms. "There was substantial evidence that appellants were involved in perfecting a scheme whoe purpose was to trap respondents on a financial treadmill from which they could not escape. There has been no counter-balancing evidence presented as to prejudice to that entity." Thank you for your time.

ASSEMBLYMAN BROWN: May I ask one question?

MR. DeVRIES: Yes.

ASSEMBLYMAN BROWN: Are they now showing up as witnesses?

MR. DeVRIES: Well, we will probably know it about a week or so.

ASSEMBLYMAN BROWN: Oh, I see. There have been no subsequent trials where persons have been subpoenaed and exercised the inability of the subpoena to reach in the certain jurisdiction.

MR. DeVRIES: Well, that may change too because I believe the subpoena range is changing to 500 miles, but I don't believe it's going to happen until after January 1st. In the meantime the five consolidated cases in trial in Sacramento right now are still in the plaintiff's phase. They're in about their fourth week. I suppose that the defendants can make their decision whether to come forward and tell their side in about a week or two.

ASSEMBLYMAN BROWN: Am I to understand you are a co-counsel in these cases?

MR. DeVRIES: No, I'm the partner of one of the co-counsels.

CHAIRMAN FENTON: Okay. Then I won't ask you the rest of the questions. Thank you very much.

Mr. Allan Emkim.

MR. ALLAN EMKIN: Mr. Chairman, members, my name is Allan Emkin. I am here representing the Legal Aid Foundation of Los Angeles. I have with me two staff attorneys from our South Central office, which is at the corner of Manchester and Broadway, in the middle of South Central Los Angeles. And they will express to you their feelings of about any proposed legislation dealing with the Wyatt holding. First, Paul Tremblay.

MR. PAUL TREMBLAY: Thank you. I want to start by giving an example of a case that I'm handling right now. It's in litigation in the courts in Los Angeles. It's a fairly recently filed case. Some of the facts I'm not sure of myself. But what we do know, the homeowners are Earry and Uretha Jones. They've owned their home since the late fifties. The home is free and clear right now, except for an obligation to Union Home Loans. The Jones' went to Union Home Loan in 1973, and they contracted for a loan in the amount of $1,400. Somehow between 1973 and 1980, they made most of the payments in this loan. We're not real sure exactly what happened during that period of time, but it's their claim at least, that they made most of the payments. They did miss some, and we wouldn't claim otherwise. In early 1980, or perhaps late 1979, Union Home Loan foreclosed, claiming that the Jones' still owed close to $1,000 dollars on this $1,400 dollars, which they had been paying on for seven years. We filed the lawsuit, and we've stayed the foreclosure, although it's certainly not an automatic procedure, as it was said earlier. There are cases where,sometimes, the request for the stay of foreclosure is denied. In this case, though, we were able to stay a foreclosure. Actually, in this case, the request for the stay of foreclosure was denied, but we were able to get the unlawful detainer transferred to superior court, so that's the way we're keeping them in possession, in the meantime, while this case is being litigated. The fraud involved in the case of the Jones' was that they were not aware that this $1,400 dollar loan included a trust deed on their property. And in their case...

CHAIRMAN FENTON: Wasn't the court concerned with potential fraud when it refused to stay the foreclosure?

MR. TREMBLAY: No, the problem in this case is that an alleged bonafied purchaser named Hubert Goldberg, who has purchased other Union Home Loan contracts before, or purchased homes at Union Home Loan sales, purchased the property, and he went in and said, "I'm an innocent purchaser." The court tended to think that he was.

ASSEMBLYMAN BROWN: And that's about the only time the court has ever denied a stay.

MR. TREMBLAY: But that happens a lot. And in those cases the homeowners will be out of possession and all their equity will be gone.

ASSEMBLYMAN BROWN: Those are a different set of facts.

MR. TREMBLAY: Certainly. I really wanted to point out that it's not automatic. You can go in and...

ASSEMBLYMAN BROWN: No, it isn't. But there has to be a different set of facts. If it's the original trust deed, and the original trustor, and the original trustee, and the original beneficiary, it's almost automatic.

MR. TREMBLAY: I would concede that.

CHAIRMAN FENTON: Is that correct?

MR. TREMBLAY: Yes, although without the Wyatt rule it certainly wouldn't be. Because,in this case, the Jones' didn't know about the fact of a trustee until the house was in foreclosure. And they didn't come to a lawyer until -- well they didn't get notice of the sales, so they didn't come to me until after the sale. Now let's assume that...

ASSEMBLYMAN BROWN: They didn't get notice of the sale?

MR. TREMBLAY: No, they didn't get notice of the sale either.

ASSEMBLYMAN BROWN: Is that an established fact or an alleged fact?

MR. TREMBLAY: It's an alleged fact. In this case,they didn't know, they didn't discover the fraud until very late, so Wyatt would not be directly applicable. We could assume that there are similar situations where they would discover the fact that there's a trust deed soon after the incidence of the loan. But that's not the time that they go to lawyers. I mean they don't go to lawyers until the property is actually in foreclosure. And if that had happened in this case it would have been seven years later. Without Wyatt, the statute of limitations would have tolled, and even though these folks stand to lose their home, without a rule like the Wyatt rule, their house would be gone. There's no statute of limitations applicable to trustee sales.

CHAIRMAN FENTON: But in your case you have a presumed bonafide purchaser, right?

MR. TREMBLAY: We disagree that he's a bonafide purchaser.

CHAIRMAN FENTON: But if you do, then Wyatt wouldn't apply in any event, if the court buys it.

MR. TREMBLAY: Well, no, it damages against Union Home Loan, you could go after Union Home Loan.

CHAIRMAN FENTON: Yes, that was what I was bringing up.

MR. TREMBLAY: Well, without Wyatt they couldn't even go after Union Home Loans for damages relating to the original fraud.

CHAIRMAN FENTON: No, I understand that.

ASSEMBLYMAN BROWN: Why not?

MR. TREMBLAY: Because without Wyatt the statute would have tolled. I mean would have...

ASSEMBLYMAN BROWN: Not accurate, not accurate. If, in fact, there was no opportunity to discover the underlying fraud, not until the underlying fraud was discovered, or there was a reasonable opportunity where it should have been discovered, would the statute commence to run?

MR. TREMBLAY: Well, that's correct. I was changing my facts almost to a hypothetical. Let's assume that they did discover in '74 that there was a trust deed. But these people lived down in Watts where there are not many lawyers available, they can't -- they're just not going to do anything, because they don't think that that's a real problem at the time. They know it's fraud, but they don't really think that their house is going to be lost. This is only $25.00 a month payments. It's not the kind of thing where people honestly fear that their house will be taken for this kind of a small loan. When they go to lawyers is when their house is in foreclosure, or when their house is sold. And in many, many loans, that's longer than three years after the contract was entered into. And since there's no statute of limitations for trustee sales, some trustees and some beneficiaries can wait till the statute of limitations have expired.

ASSEMBLYMAN BROWN: Suppose that law was changed to say that you literally renew the statute if you wait beyond the normal period, (inaudible) before you proceed to foreclose. Suppose the law was changed to say that the statute actually commences to run from the time that you take that step to collect. What would your reaction be?

MR. TREMBLAY: I think I would support that. If it were an additional three years after.

ASSEMBLYMAN BROWN: You understand, there literally has to be some point beyond which a procedural defense should become a bar.

MR. TREMBLAY: Certainly, and there is in Wyatt. I mean in Wyatt when the conspiracy ends the statute brings to run.

ASSEMBLYMAN BROWN: I understand. Now I'm asking you not about the Wyatt situation, I'm asking you about the situation that you just presented.

MR. TREMBLAY: In my situation your recommendation would be helpful...

ASSEMBLYMAN BROWN: You can't get any better knowledge than being evicted.

MR. TREMBLAY: That's true.

ASSEMBLYMAN BROWN: There's no better notice. Would you agree?

MR. TREMBLAY: That's true.

ASSEMBLYMAN BROWN: All right. So you then would support the theory that from the day you are evicted, that statute, whatever it be, should commence to run?

MR. TREMBLAY: That would take care of the problem with foreclosure that I was addressing.

CHAIRMAN FENTON: That was not actually eviction he's referring to but rather notice of foreclosure, or something like that.

MR. TREMBLAY: Something like that. Yes.

ASSEMBLYMAN BROWN: Yes. Some objective measurement that persons who are in the commercial field could rely upon. So they would know that point beyond which their books can be closed on the Jones incident will be three years from the date that they initiated the foreclosure action. Or the foreclosure action was initiated.

MR. TREMBLAY: I agree that that would deal with the problem that I brought up, yes.

ASSEMBLYMAN BROWN: It may not have satisfied them.

CHAIRMAN FENTON: Right.

MR. EMKIN: Exactly. It would not satisfy this type of scheme because you would have a continuing point where you could go after the original act.

ASSEMBLYMAN BROWN: Except it seems to me very rational and very reasonable to say to the commercial world, "You can run that scheme, but if you attempt to collect on that scheme by taking the property that is the point at which the statute commences to run."

CHAIRMAN FENTON: Otherwise it continues, no statute.

ASSEMBLYMAN BROWN: Otherwise, it's open-ended until you do that.

MR. EMKIN: The only question would be, how creative they become in transferring the property.

ASSEMBLYMAN BROWN: We understand that the talent on the other side is better than the talent on your side.

MR. EMKIN: I would differ with that.

ASSEMBLYMAN BROWN: I don't mean any disrespect. I just mean the creativity is there, so we might as well not attempt to legislate to block the creativity because the geniuses are incredible when it comes to those kinds of schemes. But we do need to be rational and reasonable in how we try to regulate them. We'll figure out how to do something else to them, when we find out their next step.

MR. BRYON J. GROSS: I think Mr. Brown has really focused in on what I was going to point out, an element of the problem.

CHAIRMAN FENTON: State your name for the record.

MR. GROSS: Yes, my name is Bryon Gross, staff attorney in the South Central office of Legal Aid also. The gentleman speaking on behalf of Union Home Loans seemed very concerned about the plaintiff waiting, storing up his or her damages and waiting to sue and benefitting from the Wyatt rule by doing that. And I think that we really need to focus on the defendant waiting and not taking action specifically because of the statute of limiation. We had a case in our office, actually it was one of Elena's cases. I'm sure she would have loved to be here to tell you about it. There was a home improvement case, it was a home imporvement case which you've heard so much about. You looked puzzled, Mr. Brown.

ASSEMBLYMAN BROWN: I want to know who this Elena is?

MR. EMKIN: Elena is a legal services attorney.

ASSEMBLYMAN BROWN: Oh, I see. All right.

MR. GROSS: She's a senior attorney in our office and has apparently appeared before Mr. Fenton's committee. Anyway, she had this home improvement case where a contract was made with the home improvement company and sold to a finance agency. The work was never finished. The finance agency gave the right to rescission notices long after the contract was done. They were not given at the right time, and when the client got that, they immediately sent them in and thought they had rescinded the contract. And therefore it took no further action. The holder of the contract waited longer than three years because he knew that that was the statute of limitations for fraud, and he waited longer than three years, purposely did not make any attempts to collect payments from people. Didn't make any attempts to collect on the contract. Didn't hassle them or anything, and then popped up with the foreclosure when he thought the statute of limitations had run.

ASSEMBLYMAN BROWN: All right. Let me stop you there, Mr. Gross. Suppose the law was such that from the date they sent that back, the statute ran, both as to his right to file the claim and their right obviously to defend it, would not, once he waits that entire period of time bar him from proceeding?

MR. GROSS: No, he...

ASSEMBLYMAN BROWN: Wait a minute, along the foreclosure line? You follow what I'm suggesting?

MR. GROSS: No, I'm sorry I don't follow you. If he was not allowed to, if the statute of limitations on his action did not lapse...

ASSEMBLYMAN BROWN: He can't foreclose, if he goes beyond.

MR. GROSS: I think there should be.

ASSEMBLYMAN BROWN: Would that not solve another one of the problems?

MR. GROSS: Yes it would. And that would make it much clearer too. You wouldn't have to...

ASSEMBLYMAN BROWN: From the date of the notice of rescission, the statute commenced to run on his right to foreclosure, and exercise his rights as the creditor against the debtor.

MR. GROSS: That would somewhat solve the problem. Now, in this case, it so happened that the people actually sent in a written notice of rescission. There might be cases where an unsophisticated homeowner might not actually do that, and I don't think it would completely solve that problem, because the finance agency would still be able to come in and foreclose after three years. I don't think that they should be allowed to wait. We've seen many cases where numerous finance agencies had just sat on the contracts and waited for years purposely, you know, to let the statutes run. As long as they have that economical hold over the person that was pointed out in the Wyatt, I don't think they should be allowed to use that statute of limitations to their benefit. The person speaking for Union Home Loans focused on this 30 years as if it was an incredibly long time, and it was a stale claim. But the point is, the claim was still alive. That bank or savings and loan or loan broker still has power over that person's property, and is able to come in and foreclose on that property.

I'd just like to point out also that the Wyatt case is not a fluke case and the other gentleman was speaking about the five consolidated trials in Sacramento. We know there's many Union Home Loan cases. But Union Home Loan is not the only finance agency that perpetrated this scheme. I had some clients come in last month. A really sweet hard working elderly couple. They live in Watts. They worked all their lives and now they're on Social Security. Their house was almost entirely paid for, and they just wanted to borrow some money to do some home improvement. They got a loan for $21,000. About $5,000 of that was for commission and brokers fees. They were told that they were going to pay $300 a month and at the end of the year the loan would be renewed. Now they didn't know what that meant. They thought well, they said as long as your payments are current your loan will be renewed. Well fine, but at the end of the year they found out that all they'd been paying was interest. It wasn't a renewable loan. The finance agency offered them a new loan. The loan was now $22,000. Now they owed actually $1,000 more than they did after the first year of paying $300 a month. Now these people signed the new loan, they didn't know what else to do. They were up against a foreclosure. Fortunately, they came into me and I'm going to try to get them a legitimate loan from somewhere. They're up against foreclosure now because they have a year on the second loan as long as they make their payments. You know, we have time to arrange a fully amortized loan for them from a legitimate lending agency.

CHAIRMAN FENTON: Well, assuming for the sake of discussion you're not able to get them another loan, you presumably will allege there's fraud involved.

MR. GROSS: Right, then I'll have to file a lawsuit. But it won't be a problem in their case because they discovered it.

ASSEMBLYMAN BROWN: Let's take it a little bit further then. Let's say that they did come to you and at the end of the year you haven't been able to put together an amortized loan. And for the next three years you keep them renewing, and it goes not for $22,000, it's

now up to $27,000, with the fees and all that other stuff. The original $21,000 is going up to $27,000, and they've been paying $300 a month for four years. Under those circumstances when they've been to see you, and you've laid out to them what their problem is, when should the statute commence to run?

CHAIRMAN FENTON: Thanks, Willie, for phrasing my question.

MR. GROSS: In the circumstances where they've been to see me? I don't think that that should change it. I think that as long as the scheme is going on -- they came to see me and I explained it to me, and I explained it to them, but they might have come to see someone else.

MR. EMKIN: What if they had gone to a private attorney who asked for cash up front. And they were $20.00 over our poverty limit. They cannot get free legal services. They're not going to get a private lawyer to take their case on spec. And in fact, even though they might have gotten some legal advice, they couldn't execute.

CHAIRMAN FENTON: Well, wouldn't that lawyer then suggest they go to you?

MR. EMKIN: They might be $25.00 a month over our very limited income category.

MR. GROSS: Or they might try to reach us and our appointments might be filled that week. We have a real struggle to satisfy the legal needs in the community.

CHAIRMAN FENTON: Okay, go ahead.

MR. GROSS: That's all I want to say. I feel that that should not toll it.

ASSEMBLYMAN BROWN: That's a fair response.

MR. GROSS: I think that as long as finance agencies continue their scheme that the clients should be able to sue.

CHAIRMAN FENTON: Yes, Allan.

MR. EMKIN: It was mentioned earlier that bad facts make bad laws. Well, we're looking a a lot of bad facts throughout the whole state affecting a whole lot of homeowners. And we didn't create the bad facts. And I don't think that you should put what I call the clients of the world in jeopardy because the creator of the bad facts is now coming up with what I would call, a very, very slender legal argument to safeguard themselves from future attacks against civil conspiracy in the past. And one other issue. And that was, as Mr. Brown mentioned, what about if it was an individual? I think if the statute is amended it should include individuals who act in a similar manner. Thank you.

CHAIRMAN FENTON: Thank you. Ron Reiter.

ASSEMBLYMAN BROWN: Let me ask one question, Allan. I gather that Mr. DeVries was not totally accurate when he says only Union Home

Loan is subject to being handled in the court system by virtue of its conduct. You now talked about people who do home improvement loans...

MR. EMKIN: We're having to raise this type of issue in a number of different areas of litigation.

ASSEMBLYMAN BROWN: With other commercial lenders?

MR. EMKIN: That's correct.

ASSEMBLYMAN BROWN: I just want to make sure that we were not using time for only one person, one commercial lender.

MR. DeVRIES: Mr. Brown, may I address that point. What I said was that the only person who has come forward to ask you for relief was Union Home Loan. I didn't say they were the only people who might benefit from what they are asking for.

CHAIRMAN FENTON: While you come up Ron, I'd like to introduce Assemblywoman Maxine Waters from Los Angeles. Okay, Ron.

MR. RONALD REITER: My name is Ronald Reiter, I'm a deputy Attorney General. I concur with many of the recent remarks made of the maintenance the Wyatt rule on civil conspiracies. It's very clear, as people have so far testified, that the purpose of the statute of limitations is to prevent the assertion of stale claims. But a claim isn't stale when conspiracy is still afoot, and if acts are being done in furtherance of the conspiracy. And we believe that the Wyatt case was correct in holding that so long as acts are done to continue the conspiracy, as long as these wrongful acts are perpetrated, that the statute of limitations should not run. The issue of the statute of limitations in civil conspiracy cases is of increasing significance to our office because we prosecute cases of wrongdoing civilly, rather than criminally. And we principally use section 17200 of the Business and Professions Code as our primary vehicle for civil law enforcement. Section 17200 has a four year statute of limitations, but unlike the fraud statute of limitations, which runs from discovery, the four year statute of limitations in 17200 runs from the time of accrual of the cause of action.

CHAIRMAN FENTON: Ron, if you get complaints about any particular group perpetrating more than one fraud or scheme, I'm not going to mention any names here, do you do anything? Do you investigate that group? Do you understand my question?

MR. REITER: Yes. Yes we do.

CHAIRMAN FENTON: I imagine that's where you come in.

MR. REITER: That's right. Sometimes we are able to unearth things on our own through investigation. Other times cases are brought to us by complainants.

CHAIRMAN FENTON: Mr. Emkin and others here are indicating there are some outfits, and we won't mention names, who presumably are pursuing a questionable course of conduct. Do they bring these complaints to you, and you then investigate?

MR. REITER: Absolutely. That happens.

CHAIRMAN FENTON: What do you do then? Let's say there's ten people against one outfit, and they are involved in the same course of conduct. And let's assume that all ten of these people are losing their homes. How do you get involved? This is a civil case now. How does your office get involved?

MR. REITER: Well, if the determination has been made to file an action, we will file an action against the company. One of the things that we will seek will be restitution for those people who have been victimized.

CHAIRMAN FENTON: Then you also seek to revoke their license?

MR. REITER: On occasion, depending upon whether it's a type of organization that has a license, we may do that. We usually seek injunctive relief to prevent the cotninuing course of conduct. We will seek the imposition of civil penalties.

CHAIRMAN FENTON: So that if these people are $25.00 over the legal services limit, and they can't afford a private attorney, and it's a questionable course of conduct, would you then get involved, so that these people then have representation? Is that what occurs?

MR. REITER: Well, we don't undertake really to represent individuals.

CHAIRMAN FENTON: But the injunctive relief is basically what they want, you know. They don't want to lose their home.

MR. REITER: That's right. But we don't undertake the representation of any individuals. We can't really operate as their attorneys to represent their own interest.

CHAIRMAN FENTON: What injunctive relief do you seek?

MR. REITER: We seek injunctive relief essentially to prevent the violations of law from continuing to occur. In other words, if there had been fraudulent representations made, if there have been various illegal schemes that have been engaged in, we seek to get a court order enjoining those kinds of acts from going on in the future.

CHAIRMAN FENTON: It's the past acts you can't do anything about.

MR. REITER: Well, we try to obtain civil penalties for those past acts, and also we try to obtain restitutions.

CHAIRMAN FENTON: Well, what happens to civil penalties? Do they go to the state?

MR. REITER: They go to the state and...

CHAIRMAN FENTON: So basically, financially, there's no redress for the homeowner?

MR. REITER: Well, only through restitutions. We're able

to obtain restitution under certain circumstances. But since the focus of the office is more toward law enforcement than it is to representing...

CHAIRMAN FENTON: I'm not criticizing. I'm trying to get in my own mind how it functions.

MR. REITER: Yes. Because we don't represent individualized interests of the people, we try to get what we deem as appropriate restitution. But our primary thrust is to enjoin the continued wrongful activity, to stop the violations and also to penalize those violations.

CHAIRMAN FENTON: Excuse me, one other thing. If in your investigation you were to find another 20 individuals with the same type of contract, but haven't got to the point where the foreclosure has started, do you do anything about those cases?

MR. REITER: Absolutely. As a matter of fact very frequently we find out about cases only through one complainant, and then through the process of investigation, we may find 500 or 1,000. And then we proceed to begin enjoining the unlawful acts, but also, to the extent that we can, obtain restitution for everybody whose been harmed.

CHAIRMAN FENTON: So you can then in effect prevent some of the things from occurring to other people?

MR. REITER: That's right. As a matter of fact, I'm currently engaged in a case right now against a major home improvement contractor, an air conditioning company, that operates throughout the State of California. We're attempting to obtain foreclosure relief and the invalidation of about fifteen to twenty thousands of deeds of trust that have been placed on homes throughout the State of California. Our perspective as a law enforcement agency and a public agency, is slightly different of course than, than legal aid in the consumer type matters. That's why we of course are interested in obtaining restitution. And I mentioned our primary thrust is to prevent the continued violations of the law, and also to penalize those violations. Because our statute doesn't have us go from time of discovery, we have to sometimes rely on the civil conspiracy statute to reach those people who have been involved in concocting the scheme and in carrying it on. For example, the Legislature recently addressed the issue of people at foreclosure sales who conspire among themselves to supress bidding so that there isn't a high enough price bid at the sale. It's very hard sometimes to get into conspiracies such as that, but we think we're going to be getting into one of them. And from information that we have, five or six people have been engaging in this practice for about a twenty year period. And they have literally siphoned off millions and millions of dollars which would otherwise have gone to homeowners facing foreclosure after the sale had occurred. We're just finding out about it now, and we see that it is a continuing conspiracy. If the Wyatt rule were changed and we were limited to a statute of limitations of three or four years, it would be seventeen years worth of ill-gotten gains that we would not be able to reach. So it's very important for us to maintain the Wyatt theory.

Similarly, there are numerous instances in the foreclosure

area, for example, with companies that unwittingly trap people into signing lien contracts to their homes. Companies that act as foreclosure consultants et cetera. While the complaint that comes to us really is essentially one of fraud, we don't approach it through any kind of cause of action for fraud. We have no cause for the fraud. And again, that does not run from time of discovery, it runs from the accrual of the action which is four years from the time it happened. So unless we can attack this matter through civil conspiracy, we're to reach back beyond the four year period.

In addition to foreclosures, there are numerous other areas where public agencies get involved in a civil context. One example would be public nuisance. We might have a situation where there's a conspiracy to bury toxic wastes underground in containers which the companies may know are not going to survive very long. And this may go on for a period of twenty or thirty years. And all of a sudden, the cans will disintegrate and the toxic waste will seep into the subterranean water supplies and really cause substantial damage. The cause of action for what happened twenty or thirty years ago may be barred unless we can approach this matter through the civil conspiracy law, and reach back to the period in which the conspiracy began. So there are numerous areas where things like that occur.

The question of stale claims and the unavailability of witnesses really, I think, is not a grave or substantial issue. We have the burden of proof as any civil litigant does. We have to prove that there was a civil conspiracy and we can only do it if we have evidence. Usually the evidence will be in the hands of the defendant which we obtain through civil discovery. If there is no evidence in the hands of the defendant, or if we have no evidence on our own, we can't prove the civil conspiracy, and we can't take advantage of the more liberalized statute of limitations. So I don't think that there is that substantial concern on the stale claims.

One question was raised a bit earlier and that was essentially the discrimination between a single tortfeasor who engages in a series of acts, and a conspiracy which involves a series of acts, and why should the conspiracy be treated more harshly in a sense that if, that if you have a more liberal statute of limitations than with an individual. I think there are two points. The first point is that the conspiracies have always been regarded in the law as being much more serious and more grave than acts of single individuals because combinations of people have greater likelihood of being able to carry out their wrongful acts. So there's a greater need to attack the conspiracy from the beginning of it which may be many years before there is a need to attack the early problems of a single individual. I think the Legislature might want to consider liberalizing the statute of limitations so that single individuals can be held liable for their past misdeeds. I think Assemblyman Brown was suggesting a possibility in the arena of foreclosure in which the statute of limitations would begin to run from the time in which the creditor tried to foreclose on a security. Then, even though the fraud may have occurred ten years earlier, he is now ten years later trying to foreclose, there still is a good chance of reaching his activities.

Unless the Committee has any questions, I think I have concluded my remarks.

CHAIRMAN FENTON: Thank you very much, Ron.

MR. REITER: Thank you very much.

CHAIRMAN FENTON: Doug McKee.

MR. DOUGLAS McKEE: Mr. Chairman, and members. I am Douglas McKee for the California District Attorneys Association. Mr. Reiter has basically laid out what are the powers of the Attorney General. They basically parallel the powers that the local prosecutors have in this area and the advantages that the Wyatt case would have to the local prosecutor. I want to state on behalf of the California D. A.'s Association that we do support retention of the rule as stated in the Wyatt case. Now I'm not arguing in this instance whether or not that created a new rule or merely restated the rule as it was. But in any event, we do support retention of the Wyatt rule. Part of the reason for that is that as the first speaker for Union Home Loan stated, it's really a balance that we're talking about. A balance with regard to stale evidence, and a balance between the plaintiff and the defendant. For the California D. A.'s Association, in most instances and including this instance, we balance in favor of giving the trier of fact the greatest amount of evidence so that they can seek the truth. And that's the purpose of a trial. In either a criminal trial, or a civil trial, the trier of fact should have as much evidence as possible. It's the decision of the trier of fact whether or not that evidence is stale, whether or not the people or a private individual has sustained his or her burden. And again, we think that it's incorrect to shorten the statute of limitations in this instance. It changed the law because that would in effect, remove from the trier of fact, evidence that may be of value in cases. And in most instances, including this one, we're opposed to eliminating the limitation of evidence.

With regard to conspiracies, Mr. Reiter pointed out, in many instances you can, and that's been the theory in criminal law, that conspiracies generally have the capacity beyond the capacity of an individual to do harm. So the law has generally regarded conspiracies with stiffer penalties. I agree with Mr. Reiter. If I had a decision to make on this thing, I would get rid of what appears to have been an anomaly and I would apply the Wyatt rule also to individuals, and get rid of what may appear to be an illogical distinction in this matter. Because again, we think it's very, very important to let the trier of fact have as much evidence as possible to decide what the truth is in the matter.

At least initially we agree with the suggestion of Mr. Brown with regard to foreclosures. We would at least initially support that proposed amendment to the law. But we do oppose, from the California's D. A.'s Association, changing the standard in Wyatt. Thank you.

CHAIRMAN FENTON: Thank you, Doug. Before I call the next and last witness, there's a statement here from the State Division of Consumer Services who couldn't be here, supporting the Wyatt decision. We'll make their statement a matter of record.[1] Kathleen Hamilton.

MS. KATHLEEN HAMILTON: Good morning, Mr. Chairman and members of the Committee. My name is Kathleen Hamilton, and I'm the

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1 Appendix 1

Director of Consumer Affairs for Stanislaus County. I'm also here this morning representing the California Consumer Affairs Association, which is the statewide affiliation of local government consumer affairs programs.

Local consumer affairs agencies have two primary responsibilities; providing one-on-one consumer counseling and dispute mediation when questions or problems arise out of marketplace transactions. As we provide these services on a daily basis, we're in a particularly credible position to observe typical consumer behavior and talent as well as to assess the most persistent and solution-resistant problems encountered in the business-consumer arena.

I'm here this morning to join some of the other witnesses to express my enthusiasm for the court's decision in Wyatt v. Union Mortgage. I believe its net impact will be to afford consumers needed protection, and most importantly, latitude in those instances where lack of guile and sophistication creates a host environment for victimization. The behavior and naivete of the Wyatts throughout their transaction with Union Mortgage Company represent typical consumer behavior, and while unfortunate, that is also, in my opinion, excusable and understandable behavior. Given the vast array of transactions the average consumer can be expected to participate in in the course of a lifetime, the contemporary technology of many of those transactions, and the complexity of the legal labyrinth, it's unreasonable to expect the average consumer to possess sufficient knowledge and ability to protect himself or herself from the unscrupulous. It is therefore extraordinarily important that the court afford maximum opportunity for the consuming public to recognize a wrong, and to seek redress for that wrong.

I have had frequent conversations over the years with consumers as well as with administrative and law enforcement officials on the frustration of legitimate claims because the statute of limitations might arguably have expired. Consumers, trusting as the Wyatts were, are unaware of very concept of the statute of limitations and will unwittingly spend an inordinate period of time in the pursuit of informal resolution, before finally contacting a consumer agency or legal counsel. Consumers may even become convinced by the perpetrators themselves that their cimplaint is without merit. An article which appeared earlier this year in Psychology Today Magazine, discussed the interesting psychological relationship that can exist between business and the complaining consumer. The unfair business entrepreneur is highly skilled at manipulating consumer conduct, at undermining self esteem and confidence, and at creating the illusion of mutual trust and support. The resulting erosion of self-protecting assertiveness contributes to the problem of unchecked public abuse.

I believe the element of conspiracy, which is at the very heart of the Wyatt case, is its own best argument against the fear of vulnerability to stale claims. Where there is an incumbent responsibility to convince the court of the existence of a continuing conspiracy before asserting that a statute of limitations continues to run, there's virtually no danger of a truly stale claim being preserved. As a non-attorney who frequently finds legal jargon confusing, I believe that the semantics are beautifully adequate here. It seems to me that continuing cannot equal stale.

I would like to make a few brief observations in closing. One, my review of the issue convinces me that the Wyatt decision did not create any new law, it merely affirmed, with useful specificity, legislative intent in previous court decisions. Second, the nature of the abuses which were alleged in the Wyatt case has particular significance for effective consumer protection law enforcement. The element of misrepresentation that was at the core of the Wyatt case is at the core of most consumer fraud cases.

Lastly, it seems to me that a critical issue here is the nature of a conspiracy. Civil conspiracies, are by their very essence, designed to confuse and befuddle the victim. Their success depends upon the extent to which they are able to keep a consumer in the dark. Given that, in consort with the inherent imbalance of power and knowledge in the relationship, the equity of providing maximum opportunity for relief becomes evident. To do less would merely offer judicial sanction to the most successful conspiracies. The message would be that it's okay to defraud the public if you can just keep them on your side long enough. We're grateful for the court's resistance to that kind of reward, and we encourage the Committee's commensurate resistance to any efforts to mitigate the application of the Wyatt decision.

I'd like to thank you for the opportunity to be here this morning and appreciate your willingness to hear from a non-attorney.

CHAIRMAN FENTON: Thank you very much Kathleen. Any questions? I want to thank you all for appearing here, helping us with this very, very important and difficult problem, and with that this hearing is adjourned. Thank you.

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EXHIBIT A

STATE CAPITOL
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California Legislature

Assembly Committee on Judiciary

JACK R. FENTON
CHAIRMAN

October 23, 1980

TO: Members of the Assembly Judiciary Committee

FROM: Ray LeBov

RE: Hearing on Statute of Limitations in Civil Conspiracies

On October 27, 1980, the Assembly Judiciary Committee will hold an interim hearing on the statute of limitations in civil conspiracies. The hearing is scheduled to begin at 9:30 a.m. at the California Museum of Science and Industry, Space Building, Muses Room, 700 State Drive, Exposition Park in Los Angeles.

The purpose of the memorandum is to provide background information that may be of interest to you in preparation for the hearing.

STATUTES OF LIMITATIONS

The collective term "statute of limitations" is commonly applied to a great number of statutes which prescribe the time periods within which suits may be brought.

The main purpose of statutes of limitations is "to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." (Order of R. R. Telegraphers v Railway Exp. Agency, 321 U. S. 342 (1944)).

The chief statutes of limitations are in Code of Civil Procedure Sections 312 through 363, but there are others throughout the various codes.

CCP Section 312, the section introducing the limitation provisions of the Code of Civil Procedure, states that civil actions can only be commenced within the prescribed periods "after the cause of action shall have accrued." Generally, the cause of action accrues when the wrongful act is done and the obligation or liability arises. Strict application of this general rule could produce unfair results. Therefore, a number of exceptions have been statutorily and judicially created. The most important and common exception to the general rule of accrual is the postponing of the running of the statute on certain causes of action until the facts constituting the cause have been discovered. Some examples are actions (1) based on fraud or mistake (CCP Sec. 338(4), (2) based on breach of fiduciary duty (CCP Sec. 343), (3) for malpractice (CCP Sec. 340.5), and (4) based on rescission of contract (CCP Secs. 337(3) and 339(3)).

CIVIL CONSPIRACIES

A civil conspiracy is not in itself actionable. It is a means by which two or more persons who agree to perform a wrongful act may each be held liable for the resulting damage, regardless whether they actually commit the tort themselves.

The basis for an action charging civil conspiracy is not the agreement itself, but the damage suffered as the result of a tort or torts committed in furtherance of a joint design. There is no civil cause of action unless a wrongful act, resulting in damage to the plaintiff, is alleged and proven. Therefore, the statute of limitations does not begin to run at the time of the agreement; the cause of action does not accrue until an overt act constituting a tort is either done or discovered, whichever the controlling statute provides. Additionally, in Wyatt v Union Home Mortgage Co., 24 Cal. 3d 773 (1979), the California Supreme Court held that when a civil conspiracy is properly alleged and proved, the statute of limitations does not begin to run on any part of the plaintiff's claims until the "last overt act" pursuant to the conspiracy has been completed.

WYATT V UNION HOME MORTGAGE CO.

In this case, the plaintiff alleged and proved a conspiracy to commit fraud and breach of a fiduciary duty.

The complaint was based on Union's misleading television commercials, its misrepresentation about the terms of a loan (including the interest rate, the amount of the loan payment, and the policy on late charges), its failure to call plaintiff's attention to unfavorable provisions buried in the loan papers, and its extraction of late charges on a second loan despite the timely payment of all installments. The complaint alleged that all of the foregoing resulted from a fraudulent conspiracy engaged in by all of the defendants (Union Mortgage Co., its affiliated corporations, their principal shareholders, and several of the corporation's officers and directors.)

If the statute of limitations were to run from the "accrual" of the cause of action as defined in Section 338 of the Code of Civil Procedure (that is, from the discovery of the fraudulent acts), then some of the plaintiff's claims in Wyatt would not have been asserted within the three year period that is permitted in such actions. However, under the "last overt act" rule, all of plaintiffs claims were timely brought.

In holding that the "last overt act" delays the running of the statute of limitations, the Court reasoned that "so long as a person continues to commit wrongful acts in furtherance of a conspiracy to harm another, he can neither claim unfair prejudice at the filing of a claim against him nor disturbance of any justifiable repose built upon the passage of time." Wyatt, (Supra at p. 787.) The Court pointed out that the defendants had continued their tortious conduct in furtherance of the conspiracy until (and even after) the filing of the complaint. The majority opinion further stated that "When, as here, the underlying fraud is a continuing wrong, a convincing rationale exists for delaying the running of the statute of limitations. Just as the statute of limitations does not run against an action based on fraud so long as the fraud remains concealed, so ought the statute to be tolled even after the fraud is discovered, for so long as the sheer economic duress or undue influence embedded in the fraud continues to hold the victim in place." (p. 788)

In his dissenting opinion, Justice Richardson argued that the "last overt act" doctrine should not be applied in civil cases. He stated that acceptance of that rule amounts to a concession that the continuing unlawful scheme is in itself a tort. Further, Justice Richardson contended that the "last overt act" rule is not justified by the equitable considerations raised in its defense. He distinguished the rule from other safeguards, such as delaying accrual until

the discovery of the claim, which have been developed "to assure that the strong public policies represented by the statute of limitations do not foreclose a plaintiff's remedy for wrongs committed against him.... In contrast, the 'last overt act' doctrine operates mechanically, without reference to plaintiff's diligence, affording plaintiff the bonanza of a tolled statute for torts upon which he long since should have commenced suit." (p. 785)

The dissenting opinion argued that the rule "encourages injured parties to sit by until the conspirational scheme has operated with full force and has run its extended ultimate course." This rule, Justice Richardson concluded, "...defeats the purposes of the statute of limitations while serving no legitimate needs of injured plaintiffs." (p. 796)

ALTERNATIVES

The purpose of this hearing is to examine whether the Legislature should amend, repeal, or let stand the "last overt act" rule of Wyatt.

There is no specific legislative proposal before the Committee relating to the statute of limitations in civil conspiracies. However, on April 30, 1980 this Committee passed AB 2382 (McVittie) by a vote of 8-2. As passed by the Committee, AB 2382 would have amended Section 338 of the Code of Civil Procedure to provide that, in actions for relief on the ground of fraud or mistake, the occurrence of any overt act subsequent to discovery of the facts constituting the fraud or mistake would not toll the statute of limitations. In addition, AB 2382 would have added Section 354.5 to the Code of Civil Procedure to provide that, in all tort actions (whether the defendant has acted independently, jointly or in concert or combination), the time for commencement of an action against shall not be extended because of the occurrence of any overt act in furtherance of the tort which occurs subsequent to the time of the initial injury or damage to the plaintiff from the tort.

The above provisions of AB 2382 were subsequently dropped by the bill's author. The bill was enacted (Chapter 1307, Statutes of 1980), but,as chaptered, contained only provisions unrelated to the statute of limitations in civil conspiracies.

Proponents of abolishing the "last overt act" rule have argued:

1. Enactment of statutes of limitations is properly a legislative and not a judicial function.

2. The rule will encourage stale lawsuits, making it difficult or impossible for defendants to disprove fraudulent or nonmeritorious claims.

3. There is no reason to treat multiple tortfeasors differently from a single tortfeasor. (Note: In Wyatt, the Supreme Court pointed out that it was not, in that case, deciding whether the "last overt act" principle would apply in cases where the continuing fraud is pursued by one person acting alone.)

The following are the main arguments that have been advanced in favor of maintaining the rule:

1. Persons who continue to commit wrongful acts in furtherance of a conspiracy to harm another cannot be unfairly prejudiced by the filing of claims against them. It is their own conduct which keeps the cause of action alive.

2. Repeal of the "last overt act" rule would result in additional lawsuits having to be filed to cover each subsequent wrong, leading to a multiplicity of suits and, therefore, greater costs to the court and to all parties.

[S.F. No. 23748. Aug. 10, 1979.]

JOSEPH R. WYATT et al., Plaintiffs and Respondents, v.
UNION MORTGAGE COMPANY et al., Defendants and Appellants.

SUMMARY

Plaintiffs brought an action against a mortgage loan broker, its affiliated corporations, their principal shareholder, and several of the corporations' officers and directors, seeking compensatory and punitive damages for breach of duties allegedly owed to plaintiffs during the negotiation of a second mortgage loan. The complaint alleged that the broker's misleading television commercials, its misrepresentations about the terms of the initial loan, including the interest rate, the amount of the loan payment and the policy on late charges, its failure to call plaintiff's attention to unfavorable provisions buried in the loan papers, and its extraction of late charges on the second loan despite the timely payment of all installments, was a breach of the fiduciary duty which is owed by a mortgage loan broker to those who engage its brokerage services. The complaint further alleged that the foregoing resulted from a fraudulent conspiracy engaged in by all of the defendants. The jury assessed separate awards against each defendant, totalling $25,000 in compensatory damages and $200,000 in punitive damages. The trial court denied defendants' motion for new trial after plaintiffs consented to a reduction of the compensatory award to $1,000. (Superior Court of El Dorado County, No. 22595, Charles F. Fogerty, Judge.)

The Supreme Court affirmed. The court held the jury justifiably concluded that the broker did not satisfy its fiduciary obligation of disclosure and good faith toward plaintiffs in regard to the initial loan by its materially misleading and incomplete information given in response to plaintiffs' questions about rate of interest, late payments, and the size of the balloon payment due at the end of the loan period. The court also held there was substantial evidence of actual fraud involved in the second loan, arising out of defendants charging plaintiffs with several late charges in the absence of any evidence that such charges were proper.

Noting that the record disclosed a tightly knit, family-oriented business operation under the principal shareholders' close personal control, the court held the breaches of fiduciary duties owed to plaintiffs were undertaken pursuant to established company policies agreed to by each of the defendants. The court further held that when a civil conspiracy is properly alleged and proved, the statute of limitations does not begin to run on any part of the plaintiff's claims until the "last overt act" pursuant to the conspiracy has been completed, and the "last overt act" was defendants' collection a few weeks before trial of the final payment of the second loan. Accordingly, the court held the trial court correctly refused to instruct the jury on the statute of limitations. The court also held the evidence was sufficient to justify awarding punitive damages, and that the amount awarded was not excessive. (Opinion by Bird, C. J., with Tobriner, Mosk, Manuel and Newman, JJ., concurring. Separate concurring and dissenting opinion by Richardson, J., with Clark, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Brokers § 22—Duties and Liabilities of Brokers—Duty of Full Disclosure—Mortgage Loan Broker.**—A mortgage loan broker is customarily retained by a borrower to act as the borrower's agent in negotiating an acceptable loan. All persons engaged in this business are required to obtain real estate licenses. (Bus. & Prof. Code, §§ 10130 and 10131, subd. (d).) Thus, general principles of agency (Civ. Code, §§ 2228 and 2322, subd. (3)), combine with statutory duties created by the Real Estate Law (Bus. & Prof. Code, § 10176, subds. (a), (i)), to impose on mortgage loan brokers an obligation to make a full and accurate disclosure of the terms of a loan to borrowers and to act always in the utmost good faith toward their principals. A real estate licensee is charged with the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision.

(2) **Brokers § 22—Duties and Liabilities of Brokers—Duty of Full Disclosure—Breach—Mortgage Loan Brokers.**—In an action by borrowers against a mortgage loan broker for breach of its fiduciary duty, there was sufficient evidence for the jury to conclude that the broker did not satisfy its fiduciary obligations of disclosure and good faith in regard to a loan, where, while the borrowers did not read the

written loan documents before signing them, they did ask the broker about the rate of interest, late payments, and the size of the balloon payment due at the end of the loan period, and in response to their questions received materially misleading and incomplete information.

[See **Cal.Jur.3d,** Brokers, § 70; **Am.Jur.2d,** Brokers, §§ 84, 85.]

(3) **Insurance Companies § 9—Agents and Brokers for Insurer—Disclosure.**—Oral misrepresentations made by an agent to a policy holder are actionable, despite the fact that the written policy itself accurately discloses all terms. If the agent of the insurer undertakes to advise a policy holder, it is his duty to make no false or misleading statement in that respect.

(4) **Brokers § 22—Duties and Liabilities of Brokers—Duty of Full Disclosure—Mortgage Loan Brokers.**—The rule that a fiduciary's duty may extend beyond bare written disclosure of the terms of a transaction to duties of oral disclosure and counseling, applies to transactions with mortgage loan brokers. Accordingly, where a husband and wife were persons of modest means and limited experience in financial affairs, whose equity in their home was their principal asset, and who retained a mortgage loan broker to negotiate for them highly complex loan terms, and where they may be assumed to have justifiably relied on the broker's expertise, the broker's failure to disclose orally the true rate of interest, the penalty for late payments or the swollen size of a balloon payment constituted a breach of the broker's fiduciary obligations.

(5) **Brokers § 23—Duties and Liabilities of Brokers—Actions Against Brokers—Mortgage Loan Broker—Fraud.**—In an action by borrowers against a mortgage loan broker, there was evidence of actual fraud involved in the loan, where the borrowers testified that, mindful of late charges incurred on a prior loan, they made timely payment of all installments on the second loan, but the broker nevertheless charged the borrowers with several late charges, and where the broker introduced no evidence to support the contention that such late charges were proper. The jury could reasonably have inferred that the late fees were erroneously imposed and that the error was part of a scheme to defraud the borrowers.

(6) **Conspiracy § 12—Civil—Elements.**—As long as two or more persons agree to perform a wrongful act, the law places civil liability for the

resulting damage on all of them, regardless of whether they actually commit the tort themselves. Accordingly, a plaintiff is entitled to damages from those defendants who concurred in the tortious scheme with knowledge of its unlawful purpose. Furthermore, the requisite concurrence and knowledge may be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances. Tacit consent as well as express approval will suffice to hold a person liable as a coconspirator.

(7) **Corporations § 39—Officers and Agents—Liability—Torts.**—Directors and officers of a corporation are not rendered personally liable for its torts merely by reason of their official positions, but may become liable if they directly ordered, authorized or participated in the tortious conduct. Personal liability, if otherwise justified, may rest on a conspiracy among the officers and directors to injure third parties through the corporation.

(8) **Corporations § 30—Stockholders—Liability—Torts.**—Shareholders of a corporation are not normally liable for its torts, but personal liability may attach to them through application of the "alter ego" doctrine, or when the shareholder specifically directed or authorized the wrongful acts.

(9) **Conspiracy § 15—Civil—Actions—Evidence—Mortgage Loan Brokers—Corporations, Shareholders, Officers and Directors.**—In an action against a mortgage loan broker, its affiliated corporations, their principal shareholder, and several of the corporations' officers and directors, alleging that the broker's misleading television commercials, its misrepresentations about the terms of a loan, its failure to call plaintiffs' attention to unfavorable provisions in the loan papers, and its extraction of late charges on a loan despite the timely payment of all installments, breached the fiduciary duty owed to plaintiffs, the evidence was sufficient to show a conspiracy among all defendants. The evidence showed it was company policy to lure potential borrowers such as plaintiffs into their offices through misleading "bait and switch" advertising, that the principal shareholder instructed other company officials that late charges were a great source of income, and that it was company policy that if the first payment was late, all the rest of the payments would automatically be late. Further, the business was a tightly knit, family oriented operation under the principal shareholder's close personal control,

and each of the individual defendants was an officer or director of one or more of the corporations and each was active in some management position at some time during the years when the conspiracy was alleged to have occurred. Moreover, all the headquarters offices of the corporations were in the same building.

(10) **Limitation of Actions § 30—Commencement of Period—Civil Conspiracy—Last Overt Act.**—When a civil conspiracy is properly alleged and proved, the statute of limitations does not begin to run on any part of a plaintiff's claims until the "last overt act" pursuant to the conspiracy has been completed. Accordingly, in an action by borrowers against a mortgage loan broker and other related defendants in which liability was premised on the theory of civil conspiracy through a breach of duties owed to plaintiff during the negotiation of a mortgage loan, the last overt act was defendants' collection a few weeks before trial of the final payment of the loan and, accordingly, the trial court correctly refused to instruct the jury on the statute of limitations.

(11) **Limitation of Actions § 3—Nature and Purpose.**—Statutes of limitations have, as their general purpose, to provide repose and protect persons against the burden of having to defend against stale claims. So long as a person continues to commit wrongful acts in furtherance of a conspiracy to harm another, he can neither claim unfair prejudice at the filing of a claim against him nor disturbance of any justifiable repose built on the passage of time.

(12) **Limitation of Actions § 57—Tolling or Suspension of Statute—Fraud—Continuing Wrong.**—When the underlying fraud of a cause of action is a continuing wrong, a convincing rationale exists for delaying the running of the statute of limitations. Just as the statute of limitations does not run against an action based on fraud so long as the fraud remains concealed, so ought the statute to be tolled even after the fraud is discovered, for so long as the sheer economic duress or undue influence embedded in the fraud continues to hold the victim in place.

(13) **Damages § 25—Exemplary or Punitive Damages—Persons Liable—Mortgage Loan Brokers.**—Where there was substantial evidence to support the jury's determination that mortgage loan brokers were guilty of fraud when they conspired to breach their fiduciary duty toward plaintiffs for whom they negotiated a loan, punitive damages were appropriate.

(14) **Damages § 16—Excessive and Inadequate Damages—Punitive Damages.**—In an action against a mortgage loan broker, its affiliated corporations, their principal shareholder, and several of the corporations' officers and directors for fraud and breach of fiduciary duties during the negotiation of a mortgage loan, an award of $200,000 in punitive damages, apportioned among eight corporate and individual defendants, was not excessive, where the concealment from borrowers of the company policy regarding fraudulent collection of late charges comprised the core of defendants' wrongful conduct, and where plaintiffs introduced direct evidence showing that the late charge policy brought in millions of dollars during the years plaintiffs' loans were being serviced. Moreover, the structure of the corporations was such that the jury could reasonably infer that the individual defendants had personally profited from the wrongful conduct. The purpose of punitive damages is to penalize wrongdoers in a way that will deter them and others from repeating the wrongful conduct in the future.

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OPINION

BIRD, C. J.—This is an appeal brought by a mortgage loan broker, its affiliated corporations, their principal shareholder, and several of the

corporations' officers and directors from a judgment which imposed on them compensatory and punitive damages for breach of duties which were allegedly owed to respondents during the negotiation of a second mortgage loan. Liability of all but one of the appellants is premised on a theory of civil conspiracy. Appellants contend that (1) the record discloses neither the breach of a duty nor the existence of a conspiracy, (2) the trial court erred in concluding that the statute of limitations on respondents' claims was tolled until the "last overt act" in the conspiracy, and (3) punitive damages were excessive.

I

Stockton Home Mortgage Company (Stockton) and Union Home Loans (formerly Union Mortgage Company) (Union) are affiliated corporations engaged in the mortgage loan brokerage business. Stockton operates primarily in northern California, while Union's business is confined to the southern part of the state. Appellant Western Computer Service (Western) is the servicing agent for loans negotiated by Stockton and Union, and appellant Secured Investment Corporation (Secured) is its predecessor. Appellant Irving Tushner (Tushner) is the principal and controlling shareholder of Stockton, Union, Western and Secured. All of the corporations use the business name "Union Home Loans" and are headquartered at the same Los Angeles address. Appellants Esther Flink (Flink) and Elinore Tushner are Tushner's sister and former wife, respectively; each served one or more of the appellant corporations as an officer or director during some or all of the time described in the complaint. Appellant David Marks (Marks) served as president of Secured and Western during a portion of the period at issue.

The essential facts elicited at trial, viewed most favorably to respondents, appear as follows: In 1966, Stockton carried on an extensive television advertising campaign in the Sacramento area. One frequently aired advertisement announced that a $1,000 loan could be paid back completely, principal and interest, for $18 per month. In fact, no such loan was available.

Lured by the advertising claims, respondents, Joseph and Clarice Wyatt, visited Stockton's Sacramento office in November 1966. They sought to retain Stockton's services to negotiate a second mortgage loan on their home for purposes of completing certain home improvements. (Such loans are solicited by mortgage brokers from private, noninstitutional lenders.) Respondents agreed in writing to a loan negotiated by

Stockton in the gross amount of $1,325 (including the brokerage fee and closing charges), with payments of $20 per month over 36 months (the 1966 loan). The loan officer orally advised respondents that a "small" balloon payment would be due in the 37th month. (A balloon payment is the amount necessary to amortize principal and interest unpaid at maturity when the prescribed monthly installments have been insufficient to do so.) Because Mr. Wyatt worked seasonally as a construction laborer, respondents specifically inquired of the loan officer about the "grace period" for late installments and were told that a late charge would not be assessed until a payment was 10 days overdue. In response to respondents' further questions about the interest rate, the loan officer quoted a figure of "seven or eight percent."

At a second session, the loan officer produced a "stack" of loan documents, including a retainer agreement, a promissory note, escrow instructions, and a second trust deed. The officer leafed through the documents, briefly describing each and showing respondents where to sign. However, he never pointed out significant provisions of the written agreements or suggested that respondents read them carefully. The loan instruments actually imposed an annual interest rate of 10 percent, allowed only a five-day "grace period" for delinquent payments, and assessed a *late charge* of 1 percent of the original loan balance for each overdue installment (i.e., $13.25 for each $20 installment). The actual estimated balloon payment, assuming all installments were timely paid, was set forth in the broker's loan statement as $950.70. However, the written loan agreement further provided that monthly installments would be applied first to accrued late charges and interest, rather than to reduction of principal; unreduced principal would thus be deferred until the end of the loan term, accruing additional interest in the interim. All these amounts would be added to the final balloon payment.

Respondents were late with several of their payments on the 1966 loan. Consequently, they faced a balloon payment in March 1970 of $1,340, more than the original loan principal. When respondents asked why the final payment was so high, the late charge and interest provisions of the loan agreement were explained to them. Stockton refused to extend the term of the 1966 loan, and respondents were unable to find other financing. Therefore, in March 1970, they agreed to refinance the unpaid balance through Stockton. A loan (the 1970 loan) was then negotiated in the aggregate principal amount of $2,000, with payments of $45 per month for 36 months; the loan document disclosed an estimated balance due in the 37th month of $816.18. Provisions for interest and late charges

were similar to the 1966 loan. Late charges were again assessed during the term of the 1970 loan, and the actual amount demanded by Stockton at maturity (April 1973) was $1,193.16.

After repeated threats of foreclosure on their home, respondents brought suit in July 1973. Their complaint alleged, in substance, that Stockton's misleading television commercials, its misrepresentations about the terms of the 1966 loan, its failure to call respondents' attention to the very unfavorable provisions buried in the loan papers, and its extraction of late charges on the 1970 loan despite the timely payment of all installments, breached the fiduciary duty which is owed by a mortgage loan broker to those who engage its brokerage services. The complaint further alleged that the foregoing resulted from a fraudulent conspiracy engaged in by all of the appellants. Respondents sought compensatory and punitive damages, and imposition of a constructive trust.

The parties stipulated to the issuance of a preliminary injunction staying the foreclosure on respondents' residence pending a final determination of the action, and for so long as monthly installments were paid toward the balance claimed due. In June 1975, two weeks before trial, respondents, finding other financing, repaid the 1970 loan.

To prove the existence of a conspiracy among the appellants, respondents produced, at trial, a former employee who had prepared some of the advertising for the affiliated corporations after 1966. Confirming the use of the misleading television commercials in Sacramento during 1966, this employee testified that appellant Tushner had frequently stated, in meetings attended by all of the other individual appellants except Flink, that it was company policy to pursue late charges vigorously as a prime source of income, and that, if one payment was delinquent, all subsequent payments were also to be considered late. "Late charge" income figures for Secured and Western were introduced at trial for the years 1966 through 1974; the annual amounts increased from approximately $152,000 in 1966 to over $1 million for the two corporations combined in 1971.

The individual appellants were beyond subpoena range and declined to testify at trial. However, respondents read into the record selected portions of appellants' depositions, which described the corporate positions occupied by each and their respective duties. The jury assessed separate awards against each appellant, totalling $25,000 in compensatory damages and $200,000 in punitive damages. The trial court denied

appellants' motion for new trial after respondents consented to a reduction of the compensatory award to $1,000.

II

This court must first decide whether the jury verdict is supported by evidence that the appellants did in fact breach fiduciary obligations owed to the respondents. Appellants take the position that their duty of disclosure was fully met when they presented to respondents written loan documents containing all the information required by Business and Professions Code section 10241.[1] Appellants also claim they never charged respondents' account with late charges unless payments were actually overdue.

(1) A mortgage loan broker is customarily retained by a borrower to act as the *borrower's agent* in negotiating an acceptable loan. All persons engaged in this business in California are required to obtain real estate licenses. (Bus. & Prof. Code, §§ 10130 and 10131, subd. (d).) Thus, general principles of agency (Civ. Code, §§ 2228 and 2322, subd. 3) combine with statutory duties created by the Real Estate Law (see Bus. & Prof. Code, § 10176, subds. (a), (i)) to impose upon mortgage loan brokers an obligation to make a full and accurate disclosure of the terms of a loan to borrowers and to act always in the utmost good faith toward their principals. "The law imposes on a real estate agent 'the same obligation of undivided service and loyalty that it imposes on a trustee in favor of his beneficiary.' [Citations.] This relationship not only imposes upon him the duty of acting in the highest good faith toward his principal but precludes the agent from obtaining any advantage over the principal in any transaction had by virtue of his agency. [Citation.]" (*Batson* v. *Strehlow* (1968) 68 Cal.2d 662, 674-675 [68 Cal.Rptr. 589, 441 P.2d 101].) A real estate licensee is "charged with the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision. [Citations.]" (*Rattray* v. *Scudder* (1946) 28 Cal.2d 214, 223 [169 P.2d 371, 164 A.L.R. 1356]; see also *Realty Projects, Inc.* v. *Smith* (1973) 32 Cal.App.3d 204, 210 [108 Cal.Rptr. 71]; *Smith* v. *Zak* (1971) 20 Cal.App.3d 785, 792-793 [98 Cal.Rptr. 242].)

(2) In the present case, respondents testified they did not read the stack of written loan documents before signing them in 1966. However, respondents did ask the broker about the rate of interest, late payments, and the size of the balloon payment due at the end of the loan period. In

[1]The 1973 amendments to the law on real property loans (Bus. & Prof. Code, § 10241.1 et seq.) are not applicable to the present case.

response to their questions, respondents received the materially misleading and incomplete information already described in this opinion. (*Ante,* pp. 779, 780.) Given this evidence, the jury justifiably concluded that Stockton did not satisfy its fiduciary obligations of disclosure and good faith toward its principal in regard to the 1966 loan.

(3) In the context of insurance policies, this court has long recognized that oral misrepresentations made by an agent to a policyholder are actionable, despite the fact that the written policy itself accurately discloses all terms. "[I]f the agent of the insurer *undertakes to advise* [a policyholder], . . . it should be the duty of such representative to make no false or misleading statement in that respect." (*Glickman* v. *New York Life Ins. Co.* (1940) 16 Cal.2d 626, 634 [107 P.2d 252, 131 A.L.R. 1292].) Other cases have similarly held that the existence of a confidential relationship may justify reliance upon oral misrepresentation of the terms of a contract. (See *Security-First Nat. Bank* v. *Earp* (1942) 19 Cal.2d 774, 777 [122 P.2d 900]; *Kloehn* v. *Prendiville* (1957) 154 Cal.App.2d 156, 161-162 [316 P.2d 17].)

(4) There is a second reason why appellants breached their fiduciary obligations toward respondents. In the context of insurance policies, this court has recognized that a fiduciary's duty may extend beyond bare written disclosure of the terms of a transaction to duties of oral disclosure and counseling. The leading case is *Raulet* v. *Northwestern etc. Ins. Co.* (1910) 157 Cal. 213 [107 P. 292], where this court refused to enforce a clause in a fire insurance policy on furniture which voided the policy if the property was or became encumbered with a chattel mortgage. The court wrote as follows: " 'It is a matter almost of common knowledge that a very small percentage of policy-holders are actually cognizant of the provisions of their policies. . . . The policies are prepared by the experts of the companies, they are highly technical in their phraseology, they are complicated and voluminous. . . . The insured usually confides implicitly in the agent securing the insurance, *and it is only just and equitable that the company should be required to call specifically to the attention of the policy-holder such provisions as the one before us.*' " (*Id.,* at p. 230, italics added; see also *Motor T. Co.* v. *Great American Indem. Co.* (1936) 6 Cal.2d 439, 444 [58 P.2d 374]; *Glickman* v. *New York Life Ins. Co., supra,* 16 Cal.2d at pp. 631-632.)

The reasoning of these cases applies to transactions with mortgage loan brokers as well. Here, the record discloses that respondents were persons of modest means and limited experience in financial affairs, whose equity

in their home was their principal asset. They retained a mortgage loan broker to negotiate for them highly complex loan terms and they may be assumed to have justifiably relied on the latter's expertise. Against such a backdrop, the broker's failure to disclose orally the true rate of interest, the penalty for late payments or the swollen size of the balloon payment clearly constituted breach of the broker's fiduciary obligations. It is noteworthy also that the provisions regarding interest rate, late charges and balloon payment were highly unfavorable to the borrower and yet the broker made no attempt to draw his clients' attention to these matters.

(5) The evidence of actual fraud involved in the 1970 loan is a third reason for finding the appellants guilty of breaching their fiduciary duties. Respondents testified that, mindful of the late charges incurred on the first loan, they made timely payment of all installments until February 1972. Thereafter, payments were made by respondents' disability insurer and the timeliness of those payments is not contested. Nevertheless, appellants charged the Wyatt account on the 1970 loan with several late charges. At trial, they introduced no evidence whatsoever to support their contention that these late charges were proper. The jury once more could reasonably have inferred that the late fees were erroneously imposed and that the error was part of a scheme to defraud respondents.

III

Appellants next contend that there is no substantial evidence of a conspiracy. Appellants stress that no one except Stockton participated in the making of loans to the Wyatts; they further claim that none of them had knowledge of what the employees of Stockton discussed with the Wyatts during the loan transactions.

Appellants mischaracterize what is necessary to support a finding of a civil conspiracy. **(6)** As long as two or more persons agree to perform a wrongful act, the law places civil liability for the resulting damage on *all* of them, regardless of whether they actually commit the tort themselves. (*Unruh* v. *Truck Insurance Exchange* (1972) 7 Cal.3d 616, 631 [102 Cal.Rptr. 815, 498 P.2d 1063].) "The effect of charging . . . conspiratorial conduct is to implicate all . . . who agree to the plan to commit the wrong as well as those who actually carry it out. [Citations.]" (*Black* v. *Sullivan* (1975) 48 Cal.App.3d 557, 566 [122 Cal.Rptr. 119].)

Therefore a plaintiff is entitled to damages from those defendants who concurred in the tortious scheme with knowledge of its unlawful purpose.

(*Black* v. *Sullivan, supra,* 48 Cal.App.3d at p. 566.) Furthermore, the requisite concurrence and knowledge "'"may be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances."'" (*Chicago Title Ins. Co.* v. *Great Western Financial Corp.* (1968) 69 Cal.2d 305, 316 [70 Cal.Rptr. 849, 444 P.2d 481].) Tacit consent as well as express approval will suffice to hold a person liable as a coconspirator. (*Holder* v. *Home Sav. & Loan Assn.* (1968) 267 Cal.App.2d 91, 108 [72 Cal.Rptr. 704].)

(7) Directors and officers of a corporation are not rendered personally liable for its torts merely because of their official positions, but may become liable if they directly ordered, authorized or participated in the tortious conduct. (*United States Liab. Ins. Co.* v. *Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 595 [83 Cal.Rptr. 418, 463 P.2d 770].) Personal liability, if otherwise justified, may rest upon a "conspiracy" among the officers and directors to injure third parties through the corporation. (*Golden* v. *Anderson* (1967) 256 Cal.App.2d 714, 719-720 [64 Cal.Rptr. 404]; cf. *Gruenberg* v. *Aetna Ins. Co.* (1973) 9 Cal.3d 566, 576 [108 Cal.Rptr. 480, 510 P.2d 1032]; *Wise* v. *Southern Pacific Co.* (1963) 223 Cal.App.2d 50, 72 [35 Cal.Rptr. 652].) **(8)** Shareholders of a corporation are not normally liable for its torts, but personal liability may attach to them through application of the "alter ego" doctrine (see, e.g., *Associated Vendors Inc.* v. *Oakland Meat Co.* (1962) 210 Cal.App.2d 825, 836-837 [26 Cal.Rptr. 806]), or when the shareholder specifically directed or authorized the wrongful acts.

(9) When judged against these legal standards, the record supports the jury verdict. First, evidence was introduced at trial to show it was company policy to lure potential borrowers such as respondents into their offices through misleading "bait and switch" advertising. Secondly, on several occasions, appellant Tushner instructed other company officials that "late charges were a great source of income," and that "it had been a policy of the company that if the first payment was late, all the rest of the payments would automatically be late."

The record further discloses a tightly knit, family-oriented business operation under appellant Tushner's close personal control. Tushner owned all or a controlling interest in each of the affiliated corporations. Each of the other individual appellants was an officer or director of one or more of the corporations and each was active in some management position at some time during the years when the conspiracy is alleged to have occurred.

Finally, all the headquarters offices of appellant corporations were in the same building. The first loan papers signed by respondents at Stockton's Sacramento office included a deed of trust containing printed instructions that, when recorded, the deed should be mailed to "Union Home Mortgage Company." Soon after the loan papers were negotiated, a letter was sent to respondents on the letterhead of "Union Home Loans." The letter instructed respondents to mail all payments to Secured Investment Corporation in Los Angeles. The procedure on the second loan was similar, except that payments were mailed to Western Computer Services.

From the above evidence, the jury could reasonably conclude that the breaches of fiduciary duties owed to respondents were undertaken pursuant to established company policies agreed to by each of the appellants.

IV

(10) Appellants contend that the statute of limitations barred respondents' claims. They reason that the three-year period allowed for commencing actions based on fraud (Code Civ. Proc., § 338, subd. 4) had passed, the complaint having been filed six years after the first loan and more than three years after the second loan.[2]

However, the trial judge correctly noted that, when a civil conspiracy is properly alleged and proved, the statute of limitations does not begin to run on any part of a plaintiff's claims until the "last overt act" pursuant to the conspiracy has been completed. (*Schessler* v. *Keck* (1954) 125 Cal.App.2d 827, 832-833 [271 P.2d 588].) Here the "last overt act" was appellants' collection a few weeks before trial of the final payment on the 1970 loan. This was the culminating act in the conspiracy to defraud respondents which began with the first tortious act in 1966. Therefore, the trial judge correctly refused to instruct the jury on the statute of limitations.

Appellants would have this court repudiate the "last overt act" doctrine of *Schessler* v. *Keck, supra,* 125 Cal.App.2d 827. *Schessler* derived the doctrine by analogy to the law regarding *criminal* conspiracies. However, appellants stress, it is only because a criminal conspiracy is itself a

[2]The gravamen of respondents' cause of action is that the appellants committed actual and constructive fraud by conspiring to breach their fiduciary duties toward the respondents. Therefore, Code of Civil Procedure section 338, subdivision 4 states the applicable statute of limitations.

punishable and continuing wrong that courts stay the running of the statute of limitations until acts in furtherance of the conspiracy have ceased. This rationale, appellants conclude, is absent in the case of a civil conspiracy, precisely because such a conspiracy is neither a punishable offense standing alone nor a wrong capable of supporting a cause of action by its own weight.

The differences between civil and criminal conspiracies are accurately characterized by appellants. However, they are somewhat beside the point. **(11)** Statutes of limitations have, as their general purpose, to provide repose and to protect persons against the burden of having to defend against stale claims.[3] (*Telegraphers* v. *Ry. Express Agency* (1944) 321 U.S. 342, 348-349 [88 L.Ed. 788, 792-793, 64 S.Ct. 582]; *Shain* v. *Sresovich* (1894) 104 Cal. 402, 406 [38 P. 51].) So long as a person continues to commit wrongful acts in furtherance of a conspiracy to harm another, he can neither claim unfair prejudice at the filing of a claim against him nor disturbance of any justifiable repose built upon the passage of time.

In the present case, for instance, appellants stood accused of continuing their tortious conduct in furtherance of the conspiracy up until—and even after—the filing of the complaint. It was their own conduct that kept the cause of action against them alive. Therefore, no considerations of justice or equity require us to overrule the consistent line of cases that have applied the "last overt act" doctrine to civil conspiracies. (*Bedolla* v. *Logan & Frazer* (1975) 52 Cal.App.3d 118, 136-137 [125 Cal.Rptr. 59]; *Kenworthy* v. *Brown* (1967) 248 Cal.App.2d 298, 301 [56 Cal.Rptr. 461]; *Schessler* v. *Keck, supra,* 125 Cal.App.2d at pp. 832-833.)[4]

[3]Thus, the concurring and dissenting opinion misreads this court's opinion when it states that the majority view the statute of limitations as "intended primarily to confer 'respose' on deserving defendants." (Conc. and dis. opn., *post,* at p. 797.) We give equal consideration above to protecting persons "against the burden of having to defend against stale claims." In the present case, as the concurring and dissenting opinion itself points out, a witness to the actual conspiracy was still available and testified at trial.

[4]Contrary to the claim of the concurring and dissenting opinion (*post,* at p., 795), acceptance of the "last overt act" doctrine does not mean accepting the view that the civil conspiracy is itself a tort. Instead, it is precisely because the civil conspiracy is not a tort or a cause of action itself that the tolling of the statute of limitations on the underlying torts in this case becomes relevant at all.

Justice Richardson's reliance (*post,* at pp. 792, 793) on *Bowman* v. *Wohlke* (1913) 166 Cal. 121 [135 P. 37] is also misplaced. The court there simply held that, under then existing statutory provisions, "causes of action for injuries to property may not be united in one action with causes of action for injuries to the person or character." (*Id.,* at p. 124.) The court also held that statutory rules governing pleading required causes of action united in one complaint to be stated separately. (*Id.,* at p. 127.) The plaintiff had tried to avoid the effect of these rules by arguing that his allegations of civil conspiracy in effect created a

The situation of the respondents, on the other hand, demonstrates the equities served by the "last overt act" doctrine in cases where the fraud is of a continuing nature. There was substantial evidence that appellants were involved in perfecting a scheme whose purpose was to trap respondents on a financial "treadmill" from which they could not escape. Once trapped by the unexpectedly large balloon payment due at the end of the first loan, the respondents found themselves forced to refinance the loan, much as appellants planned. (Efforts to obtain financing from other sources failed.) This permitted the repetitive collection of brokerage fees and late charges from respondents, depleting their resources and moving foreclosure ever closer.

(12) When, as here, the underlying fraud is a continuing wrong, a convincing rationale exists for delaying the running of the statute of limitations. Just as the statute of limitations does not run against an action based on fraud so long as the fraud remains concealed, so ought the statute to be tolled *even after the fraud is discovered, for so long as the sheer economic duress or undue influence embedded in the fraud continues to hold the victim in place.*[5]

None of the cases relied on by appellants has disapproved the holding in *Schessler.* In *Agnew* v. *Parks* (1959) 172 Cal.App.2d 756 [343 P.2d 118], plaintiff alleged a conspiracy to obstruct the orderly prosecution of her malpractice action. However, the face of the complaint made apparent that the last fraudulent act pursuant to the conspiracy occurred more than three years prior to the filing of the pleading. Under these circumstances, the court held that defendants' motion for nonsuit was properly granted. Such a holding, of course, is entirely consistent with *Schessler.* That case still requires a plaintiff to allege that at least some act pursuant to the conspiracy was still being performed (or was only discovered) within the applicable statute of limitations time period.

single cause of action, uniting all the wrongs done in furtherance of the conspiracy. (*Id.*, at p. 124.) This was the argument the court rejected in *Bowman* v. *Wohlke.* Nothing in today's opinion changes that result. In fact, issues concerning joinder or separate statement of causes of action are not germane to this case. Moreover, unlike the plaintiff in *Bowman* v. *Wohlke*, plaintiff here has never argued that civil conspiracy itself is a cause of action.

[5]This court need not decide today the question of whether this principle would apply, even if the continuing fraud were pursued by one person acting alone. (For a discussion of the effect that proof of undue influence or duress has on the running of the statute of limitations in other kinds of cases, see *Developments in the Law—Statutes of Limitations* (1950) 63 Harv.L.Rev. 1177, 1219.)

That *Schessler* and *Agnew* v. *Parks* are entirely consistent was made clear in *Bedolla* v. *Logan & Frazer, supra,* 52 Cal.App.3d at pages 136-137, where the court wrote: "[W]hile the cases support the proposition that a cause of action based on civil conspiracy accrues on the date of the commission of the last overt act in pursuance of the conspiracy (*Schessler* v. *Keck* (1954) 125 Cal.App.2d 827, 832-833 . . .), it is imperative for the plaintiff to allege when the last overt act took place (*Agnew* v. *Parks, supra*)." Since over four years had lapsed between the "last overt act" of the conspiracy and the filing of the complaint, the *Bedolla* court held that the statute of limitations had run on the cause of action. (See also *Kenworthy* v. *Brown, supra,* 248 Cal.App.2d at pp. 301-303; *Filice* v. *Boccardo* (1962) 210 Cal.App.2d 843, 846 [26 Cal.Rptr. 789]; *Teitelbaum* v. *Borders* (1962) 206 Cal.App.2d 634, 637-638 [23 Cal.Rptr. 868].)

Finally, it is noteworthy that many of the arguments now urged against the "last overt act" doctrine were presented to the Court of Appeal in *Rodriguez* v. *North American Aviation, Inc.* (1967) 252 Cal.App.2d 889 [61 Cal.Rptr. 579]. In that case plaintiff charged defendants with conspiring to defame him by publishing defamatory remarks on or about October 9, 1962, then again on October 31, 1963. Plaintiff alleged that he was dismissed from his employment on October 31, 1963, due to these defamations. He filed suit on October 13, 1964. The applicable statute of limitations was one year.

The trial court sustained a demurrer to the entire complaint but the Court of Appeal reversed, relying on the fact that the complaint had been filed within one year of the "last overt act" pursuant to the alleged conspiracy. (*Id.,* at pp. 893-894.) Thus, even while expressing some doubt about the wisdom of the *Schessler* case in dicta, the *Rodriguez* court went on to use the "last overt act" doctrine to judge the sufficiency of the pleading before it.

The *Rodriguez* court specifically declined to rule on whether the statute of limitations barred recovering damages flowing from the earlier publication, finding it impossible to tell from the complaint whether the plaintiff meant to claim separate damages for each of the two publications. Because the Court of Appeal thus avoided this issue, the *Rodriguez* case gives little support to appellant's argument that the statute of limitations has run at least on the first of the two loans obtained by the respondents. This court is satisfied that *Schessler* v. *Keck, supra,* 125 Cal.App.2d 827 correctly states the law of this state.

V

Appellants' final contentions concern the jury's decision to award punitive damages.[6] Appellants first argue that the evidence was not sufficient to justify awarding punitive damages. Even if there was justification for punitive damages, appellants urge this court to find that the amount awarded was excessive as a matter of law.

(13) Appellants' first argument is totally without merit. There was substantial evidence to support the jury's determination that the appellants were guilty of fraud when they conspired to breach their fiduciary duty toward the respondents. Therefore, this was an entirely appropriate case in which to award punitive damages. Fraudulent misrepresentations by real estate brokers have supported punitive damages in the past. (See, e.g., *Ward* v. *Taggart* (1959) 51 Cal.2d 736, 743 [336 P.2d 534].)

(14) Nor can this court agree that the amount of punitive damages was excessive as a matter of law. As a recent case makes clear, the purpose of punitive damages is to penalize wrongdoers in a way that will deter them and others from repeating the wrongful conduct in the future. (*Neal* v. *Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928, fn. 13 [148 Cal.Rptr. 389, 582 P.2d 980].) "How much" in punitive damages is enough to accomplish this purpose in a particular case is not susceptible of mathematical definition. (*Finney* v. *Lockhart* (1950) 35 Cal.2d 161, 164 [217 P.2d 19].)

In the present case, the concealment from borrowers of the company policy regarding "late charges" comprised the core of appellants' wrongful conduct. At trial respondents introduced direct evidence showing that the "late charge" policy was the income-generating motor for Secured and Western, bringing in millions of dollars during the years respondents' loans were being serviced by one of the two companies.[7] The structure of the corporations was such that the jury could reasonably infer that the individual appellants (shareholders, officers or directors of

[6]Civil Code section 3294 provides in pertinent part: "[W]here the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

[7]The parties stipulated the "late charge" income of Secured to be as follows: $151,841.15 (1966); $492,629.99 (1967); $664,409.36 (1968); $558,552.85 (1969); $668,673.78 (1970); $647,797.63 (1971). The parties stipulated the "late charge" income of Western to be as follows: $451,833.69 (1971); $565,173.87 (1972); $459,984.02 (1973); $517,570.28 (1974).

Secured or Western or one of its affiliates) had personally profited from the wrongful conduct. Therefore, an award of $200,000, apportioned among eight corporate and individual appellants, was not excessive. Indeed, the trial judge, in denying appellants' motion for new trial, thought the award showed remarkable restraint. This court agrees. The uncontested evidence shows that the award was much less than the income directly generated by appellants' wrongful conduct.

The judgment is affirmed.

Tobriner, J., Mosk, J., Manuel, J., and Newman, J., concurred.

RICHARDSON, J.—I concur in the reasoning of parts II and III of the majority opinion; I also agree that punitive damages, if properly awarded on all counts of the complaint, were not excessive. I respectfully dissent, however, from the judgment of affirmance, because I believe the statute of limitations barred much of respondents' complaint. In my view, the "last overt act" doctrine should not be applied in civil cases.

As the majority concedes, the maxim that the statute of limitations on a "conspiracy" is tolled until commission of the "last overt act" originated in criminal law, where it remains the prevailing rule. (*Grunewald* v. *United States* (1957) 353 U.S. 391, 396-397 [1 L.Ed.2d 931, 938-939, 77 S.Ct. 963, 62 A.L.R.2d 1344]; *People* v. *Zamora* (1976) 18 Cal.3d 538, 548 [134 Cal.Rptr. 784, 557 P.2d 75]; *People* v. *Crosby* (1962) 58 Cal.2d 713, 728 [25 Cal.Rptr. 847, 375 P.2d 839]; see generally, Annot. 62 A.L.R.2d 1369, 1371-1375.) Criminal conspiracy is a punishable offense *separate* from the substantive crime to the commission of which the conspirators have agreed. (Pen. Code, § 182.) At common law, criminal sanctions could be imposed even where the conspirators had taken no action to accomplish the unlawful purpose of the conspiracy. (See *Hyde* v. *United States* (1912) 225 U.S. 347, 359 [56 L.Ed. 1114, 1123, 32 S.Ct. 793].) Modern statutes require some "overt act" in furtherance of the conspiracy as an element of the crime (e.g., Pen. Code, § 184); the most frequently stated reason for this rule is that it permits a conspirator to repent and withdraw from the scheme before any decisive action is taken. (E.g., *People* v. *Olson* (1965) 232 Cal.App.2d 480, 490 [42 Cal.Rptr. 760].) However, the substantive crime need not have been completed, nor must the "overt act" itself be criminal, because it is the agreement itself which forms the basis of prosecution. (*People* v. *Saugstad* (1962) 203 Cal.App.2d 536, 540 [21 Cal.Rptr. 740]; *People* v. *Reed* (1961) 188 Cal.App.2d 395,

407 [10 Cal.Rptr. 536]; *People* v. *Klinkenberg* (1949) 90 Cal.App.2d 608, 635-636 [204 P.2d 47, 613]; *People* v. *Corica* (1942) 55 Cal.App.2d 130, 134 [130 P.2d 164].)

As we explained in *Zamora*, the "last overt act" rule in criminal conspiracy thus arises from an analytical focus on the *continuation of the unlawful agreement* as a criminal offense *in and of itself.* (18 Cal.3d at pp. 548-549, fn. 7.) Where the purposes of the conspiracy can be consummated, if at all, only by successive acts over a period of time, the *crime* of conspiracy is deemed a "continuing" one; the successive "overt acts" in furtherance of the unlawful agreement "mark the duration, as well as the scope" of the crime. (*Fiswick* v. *United States* (1946) 329 U.S. 211, 216 [91 L.Ed. 196, 200, 67 S.Ct. 224]; see *Yates* v. *United States* (1957) 354 U.S. 298, 334 [1 L.Ed.2d 1356, 1384, 77 S.Ct. 1064].)

Civil conspiracy, on the other hand, has experienced an entirely different and separate development. (*de Vries* v. *Brumback* (1960) 53 Cal.2d 643, 649-650 [2 Cal.Rptr. 764, 349 P.2d 532].) The gist of an action charging civil conspiracy is not the agreement itself, but the damage suffered as the result of a tort or torts committed in furtherance of the joint design. No conspiracy, however atrocious, gives rise to any civil cause of action unless an underlying civil wrong, resulting in damage, is alleged and proven. (*Unruh* v. *Truck Insurance Exchange* (1972) 7 Cal.3d 616, 631 [102 Cal.Rptr. 815, 498 P.2d 1063]; *Chicago Title Ins. Co.* v. *Great Western Financial Corp.* (1968) 69 Cal.2d 305, 316 [70 Cal.Rptr. 849, 444 P.2d 481]; *Orloff* v. *Metropolitan Trust Co.* (1941) 17 Cal.2d 484, 488 [110 P.2d 396].) Allegations of conspiracy add nothing whatever that is substantive to a civil complaint; their only purpose is to permit joinder as defendants of all parties who agreed to the tort, regardless of whether they directly participated in its commission. (*Mox Incorporated* v. *Woods* (1927) 202 Cal. 675, 677-678 [262 P. 302]; *Wise* v. *Southern Pacific Co.* (1963) 223 Cal.App.2d 50, 64 [35 Cal.Rptr. 652].) The applicable statute of limitations for a civil conspiracy is that for the underlying tort. (*Kenworthy* v. *Brown* (1967) 248 Cal.App.2d 298, 301 [56 Cal.Rptr. 461]; *Agnew* v. *Parks* (1959) 172 Cal.App.2d 756, 765 [343 P.2d 118].)

These long established principles were applied by us in *Bowman* v. *Wohlke* (1913) 166 Cal. 121 [135 P. 37], to prevent the improper inclusion of separate torts in a single complaint under a "conspiracy" theory. There, plaintiffs joined claims for injury to person, property, and reputation, then generally not permitted under former Code of Civil

Procedure section 427. (But see Code Civ. Proc., § 427.10.) When defendants appealed the verdict and denial of their new trial motion on grounds of misjoinder, plaintiffs asserted that such separate claims could be combined since the various torts alleged had been committed pursuant to a continuing conspiracy against them.

We rejected that view. "[I]t has been said," we observed, "that 'the allegation and proofs of a conspiracy in an action of this character is [*sic*] only important to connect a defendant with a transaction and to charge him with the acts and declarations of his co-conspirators, where otherwise he could not have been implicated.' (*Brackett* v. *Griswold,* 112 N.Y. 454, . . . See, also, 8 Cyc. 647; *Doremus* v. *Hennessey,* 62 Ill.App. 391.) The effect of this well-settled doctrine in so far as the case before us is concerned is clear. The complaint alleged various causes of action for different torts, all committed, it is true, in pursuance of a single conspiracy, but each, nevertheless, giving rise to a separate cause of action for the injury caused by the particular wrongful act. Whether or not the various causes of action could properly be united depended on our statutes relating to the joinder of causes of action in one complaint." (P. 126.)

Bowman thus represents this court's clear view, not heretofore repudiated, that allegations of civil "conspiracy" do not change the legal nature and effect of causes of action for the separate underlying torts. Nonetheless, the majority, in a footnote, dismisses *Bowman* as inapposite. Rather, it relies upon a Court of Appeal decision, *Schessler* v. *Keck* (1954) 125 Cal.App.2d 827 [271 P.2d 588]. There, plaintiff sued three defendants for slanderous remarks allegedly made by them over a period of several years. She asserted that the remarks were part of a conspiracy to injure her in her profession Only one of the publications had occurred within the one-year limitations period normally applicable to defamation actions. (Code Civ. Proc., § 340, subd. 3.) The two defendants to whom the earlier statements were attributed successfully demurred on grounds of the statute. The Court of Appeal reversed the judgment of dismissal.

Citing *People* v. *Hess* (1951) 104 Cal.App.2d 642 [234 P.2d 65], a criminal case, as its sole primary authority, the *Schessler* court concluded that the conspiracy allegations permitted suit against all defendants on all publications, since the statute did not begin to run on any of the torts until there was "a cessation of the wrongful acts committed in furtherance of the conspiracy." (125 Cal.App.2d at p. 832.) This doctrine has

concededly been acknowledged in a number of subsequent California appellate decisions. (E.g., *Bedolla* v. *Logan & Frazer* (1975) 52 Cal.App.3d 118, 136 [125 Cal.Rptr. 59] [finding "last overt act" occurred outside limitation period]; *Kenworthy* v. *Brown, supra,* 248 Cal.App.2d 298, 302 [same]; see *Filice* v. *Boccardo* (1962) 210 Cal.App.2d 843, 846 [26 Cal.Rptr. 789].)

Recognizing the confusion and potential abuse inherent in the *Schessler* rule, however, other districts of the Court of Appeal have resisted its full implications. In *Agnew* v. *Parks, supra,* 172 Cal.App.2d 756, for example, it was held that, despite allegations of "conspiracy," the statute of limitations runs separately on each "separate, distinct and complete" act which violates the rights of another. *Schessler* was not mentioned. (P. 765.)

As the majority indicates, *Agnew* found plaintiff's claim barred because her complaint revealed that the last "fraudulent" act therein alleged had occurred more than three years before suit was commenced. (P. 766.) Read in context, however, this holding only reaffirms the unassailable principle that an action for fraud, even if joined with conspiracy claims, must be filed within three years after the act constituting "fraud" takes place. (See Code Civ. Proc., § 338, subd. 4.) *Agnew* does not support a rule that commencement of the statute of limitations for *all* tortious acts in a conspiracy is blindly deferred until commission of the last "overt" act in the conspiracy.

More recently, in *Rodriguez* v. *North American Aviation, Inc.* (1967) 252 Cal.App.2d 889 [61 Cal.Rptr. 579], another conspiracy case involving multiple slander, the court applied the "last overt act" rule at the pleading stage, but only because it concluded that the complaint essentially sought damages only for the most recent, still timely publication. Significantly, and voicing its doubts, the *Rodriguez* court observed: "We have not been cited any case, nor has our research produced one, in which one overt act committed within the statutory period and one prior thereto executed in pursuance of a conspiracy, have been considered in relation to the statute of limitations, except *Schessler* v. *Keck, supra,* and in that case the issue is not clear-cut . . . . [¶] If . . . plaintiff were to . . . seek recovery [for damages] . . . resulting from separate and completed acts of slander committed before the statutory period, it is doubtful that the action as to such acts and damages could escape the bar of the statute of limitations." (Pp. 893-894.)

The majority suggests that appellants' acts may be linked by the conspiracy into a "continuing wrong," thereby tolling the statute of limitations until appellants' tortious conduct finally ceased. For several reasons, I disagree.

First, the majority's proposal ignores the well settled principle, discussed above, that the focus of a civil conspiracy action is indeed upon the separate torts, not the "continuing" nature of the scheme itself. Despite the majority's protestations to the contrary, acceptance of any "last overt act" rule amounts to a concession that the continuing unlawful scheme is in itself a tort. This is clearly *not* the law (*Bowman* v. *Wohlke, supra,* 166 Cal. 121, 126), and the majority errs in characterizing the fraud as "a continuing wrong" (*ante,* pp. 787-788). Rather, there were several, separate, successive tortious acts, each one independently actionable.

Second, contrary to the majority's suggestion, a "continuing wrong" doctrine is not justified by the equitable considerations raised in its defense. Rules in this area seek to balance "the practical purposes that a statute of limitations serves in our legal system"—i.e., avoidance of stale and open-ended claims—against "the practical needs of prospective plaintiffs"—i.e., preservation of an effective remedy for wrongful conduct. (*Davies* v. *Krasna* (1975) 14 Cal.3d 502, 512 [121 Cal.Rptr. 705, 535 P.2d 1161, 79 A.L.R.3d 807].) Accordingly, the law has developed numerous general safeguards, applicable to "conspiratorial" and "non-conspiratorial" torts alike, to assure that the strong public policies represented by the statute of limitations do not foreclose a plaintiff's remedy for wrongs committed against him. For example, the statute of limitations on any claim is deferred until a cause of action has "accrued." (Code Civ. Proc., § 312.) This occurs, at the earliest, when some "actual and appreciable damage" has resulted from a defendant's wrongful act. (*Davies* v. *Krasna, supra,* 14 Cal.3d at pp. 513-514; *Budd* v. *Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433].) Moreover, in appropriate cases, "accrual" may be further delayed until actual or constructive *discovery* of the claim (e.g., Code Civ. Proc., §§ 338, subd. 4 [fraud], 340.5 [medical malpractice]; *Neel* v. *Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 194 [98 Cal.Rptr. 837, 491 P.2d 421] [legal malpractice]; *Coots* v. *Southern Pacific Co.* (1958) 49 Cal.2d 805, 810 [322 P.2d 460] progressive industrial condition leading to disability; statute commences when disability occurs]; *Avner* v. *Longridge Estates* (1969) 272 Cal.App.2d 607, 616 [77 Cal.Rptr. 633] latent defects in

subdivision lot]; *Howe* v. *Pioneer Mfg. Co.* (1968) 262 Cal.App.2d 330, 348 [68 Cal.Rptr. 617] [latent product defect].)

Each of these doctrines deals directly with the "practical problems of prospective plaintiffs" in asserting an effective remedy for damage wrongfully caused by another. They ensure that the limitations period will not run before an injured party has had a realistic opportunity to sue. In contrast, the "last overt act" doctrine operates mechanically, without reference to plaintiff's diligence, affording plaintiff the bonanza of a tolled statute for torts upon which he long since could have commenced suit.

Indeed, the majority so applies the rule here. Apparently conceding respondents' *April 1970 discovery* of appellants' previous tortious conduct, the majority would *nonetheless* toll the statute in spite of full discovery so long as unsophisticated plaintiffs continue to suffer the *effects* of the fraud. (*Ante,* pp. 787-788.) For obvious reasons, this novel theory is clearly contrary to prior California law, as the majority elsewhere (*ante,* pp. 788, 789) acknowledges (*Davies* v. *Krasna, supra,* 14 Cal.3d 502, 514; *Teitelbaum* v. *Borders* (1962) 206 Cal.App.2d 634, 637-638 [23 Cal.Rptr. 868]), and notions of fundamental fairness do not compel its adoption. Discovery of a cause of action necessarily implies the ability to act in vindication of one's legal rights. (See, e.g., *Sanchez* v. *South Hoover Hospital* (1976) 18 Cal.3d 93, 101-103 [132 Cal.Rptr. 657, 553 P.2d 1129].)

The most fundamental difficulty with the "last overt act" rule, of course, is its fortuitous and random inequity. Where a *single* defendant is involved, plaintiff may clearly not avoid the statute of limitations on an earlier tort by waiting to commence suit until further tortious acts of the defendant have produced even greater damage. (*Davies* v. *Krasna, supra,* 14 Cal.3d at pp. 512-515.) There appears absolutely no reason why a different rule should apply simply because two or more persons "conspired" to commit the identical wrongs. On policy grounds plaintiffs should be encouraged to nip "conspiracies" in the bud. The "last overt act" rule applied to civil wrongs, on the other hand, encourages injured parties to sit by until the conspiratorial scheme has operated with full force and has run its extended ultimate course. The statute of limitations on each of the precedent causes of action which have fully accrued is meanwhile suspended in midair, as it were. Such a rule makes no sense, and defeats the purposes of the statute of limitations while serving no legitimate needs of injured plaintiffs.

[Aug. 1979]

Contrary to the majority's suggestion the statute of limitations is not intended primarily to confer "repose" on deserving defendants. Its most important function, one the majority declines to analyze, is to avoid the problems of proof inherent in actions based on incidents long past. (*Davies* v. *Krasna*, *supra*, 14 Cal.3d at p. 512; *Elkins* v. *Derby* (1974) 12 Cal.3d 410, 417 [115 Cal.Rptr. 641, 525 P.2d 81, 71 A.L.R.3d 839].) By the time this action was filed in July 1973, acts occurring seven years before may well have receded in the memories of available witnesses. In fact, only one witness to the actual conspiracy was presented at trial. The instant case thus illustrates, rather than refutes, the need for certitude in the application of a statute of limitations.

It has been said that the numerous decisions of other jurisdictions on this issue present "a melange of inconsistent, irreconcilable, even contradictory statements of general 'rules' relating to the subject." (Annot. 62 A.L.R.2d 1369, 1385.) My examination of these authorities fails to persuade me of the efficacy of a "last overt act" rule. The better reasoned view, I think, is that which is expressed in *Universal Film Exchanges* v. *Swanson* (D.Minn. 1958) 165 F.Supp. 95. There, the court succinctly repudiated the notion that separate torts may be "welded" into a single claim under the "hammer" of conspiracy allegations. (P. 98.)

I therefore reject the majority's conclusion that the statute of limitations for separate tortious acts committed pursuant to a civil "conspiracy" is tolled until the "last overt act" in the conspiracy. Rather, the limitations period should be deemed to commence for each underlying tort when, a known injury to plaintiff occurring, a cause of action has "accrued" thereon according to the rules normally applicable, and in no event later than plaintiffs' discovery of grounds for a cause of action. I would, accordingly, cling to our earlier *Bowman* rationale and disapprove *Schessler* v. *Keck*, *supra*, to the extent that it conflicts with these views.

Since the evidence before us would justify a finding that causes of action based on the 1966 loan "accrued" and were discovered no later than April 1970, more than three years prior to suit, appellants were entitled to instructions on the statute of limitations *as to those claims.* On the other hand, respondents' claims that late charges were improperly extracted on the *1970* loan appear to have been asserted in timely fashion. Discovery and damage with respect to these fraudulent acts could not have arisen until March or April 1973, when plaintiffs were again faced

with an unexpectedly high balloon payment. Suit was filed within three to four months thereafter. Accordingly, as a matter of law, this latter claim is not barred.

I would reverse the judgment.

Clark, J., concurred.

Appellants' petition for a rehearing was denied September 12, 1979. Clark, J., and Richardson, J., were of the opinion that the petition should be granted.

§ 335. Periods of limitation

PERIODS OF LIMITATION PRESCRIBED. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows: (Enacted 1872.)

§ 338. Three years; statutory liability, exception; trespass or injury to realty; taking, detaining or injuring goods or chattels; fraud or mistake; bond of public official; notary public, additional time, maximum limit; slander of title; false advertising

Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture.

2. An action for trespass upon or injury to real property.

3. An action for taking, detaining, or injuring any goods, or chattels, including actions for the specific recovery of personal property.

4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

5. An action upon a bond of a public official except any cause of action based on fraud or embezzlement is not to be deemed to have accrued until the discovery, by the aggrieved party or his agent, of the facts constituting said cause of action upon the bond.

6. An action against a notary public on his bond or in his official capacity except that any cause of action based on malfeasance or misfeasance is not deemed to have accrued until discovery, by the aggrieved party or his agent, of the facts constituting said cause of action; provided, that any action based on malfeasance or misfeasance shall be commenced within one year from discovery, by the aggrieved party or his agent, of the facts constituting said cause of action or within three years from the performance of the notarial act giving rise to said action, whichever is later; and provided further, that any action against a notary public on his bond or in his official capacity must be commenced within six years.

7. An action for slander of title to real property.

8. An action commenced under Section 17536 of the Business and Professions Code. The cause of action in such case shall not be deemed to have accrued until the discovery by the aggrieved party, the Attorney General, the district attorney, the county counsel, the city prosecutor, or the city attorney of the facts constituting grounds for commencing such an action.

(Amended by Stats.1957, c. 649, p. 1849, § 1; Stats.1972, c. 823, p. 1470, § 2.)

Section 3 of Stats.1972, c. 823, p. 1471, provided: "It is the intent of the Legislature, if this bill and Senate Bill No. 912 [Stats. 1972, c. 711] are both chaptered and Senate Bill No. 912 amends Sections 17535 and 17536 of the Business and Professions Code [Sections 17535, 17536 were so amended], that the amendments to Section 338 of the Code of Civil Procedure proposed by this bill be given effect in the form set forth in Section 2 of this act. Therefore, Section 2 of this act shall become operative only if this bill and Senate Bill No. 912 are both chaptered, and Senate Bill No. 912 amends Sections 17535 and 17536 of the Business and Professions Code, in which case Section 1 of this act shall not become operative."

1957 Amendment. Added subd. 7.

1972 Amendment. Added subd. 8.

Law Review Commentaries

Background and general effect of 1957 amendment. (1957) 32 S.Bar J. 529.

Condominiums, cooperatives and planned developments: Real estate developers' liability. Zad Leavy and Alan D. Ross (1968) 41 S.Bar J. 818.

Criminal discovery. Michael Moore (1968) 19 Hast.L.J. 865, 899.

Enforcing California's false advertising law: A guide to adjudication. (1974) 25 Hast.L.J. 1105.

Legal malpractice cases. Carlos Solis (1972) 7 U.S.F.L.Rev. 85.

Private environmental legal action. Terry A. Trumbull (1972) 7 S.F.L.R. 27.

Remedies for false advertising: legislative review. (1973) 4 Pacific L.J. 335.

Statute of limitations for lawyers. Ronald E. Malien (1977) 52 S.Bar J. 22.

Statute of limitations in Rule 10b–5 actions. (1975) 22 U.C.L.A.Law Rev. 947.

Wife's written consent to gifts of community property. Louis M. Brown (1962) 37 S.Bar J. 71.

Supplementary Index to Notes

Underline indicates changes or additions by amendment

EXHIBIT D

LAW OFFICES OF
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444-2800

October 21, 1980

MEMORANDUM TO ASSEMBLY JUDICIARY COMMITTEE
REGARDING FORMER AB 2382 AMENDMENTS
(To Change Statute of Limitations in Civil
Cases Where There is Continuing Wrongdoing)

The Union Home Loan Amendments contain two sections that are designed to overturn and change well established law in the State. Since 1954, 26 years ago, at least six different Appellate Courts, and the Supreme Court in Wyatt v. Union Home Loans (1979) 24 Cal.3d 773, have carefully considered the concept involved and upheld it despite all the arguements raised by various interests probably including the same arguments that are being raised before the legislature at this time.

These amendments although appearing to be innocuous, actually are very dangerous for the people of this State. The present rule established by Schessler v. Keck (1954), 125 Cal.App.2d 827, states that where a continuing course of wrongdoing whether it be fraud, negligence, intentional interference with contractural relationship, medical malpractice, legal malpractice, or any other kind of wrongdoing, which extends over a period of years, longer than the statute of limitations for any single wrongful act, where there is a scheme by two or more persons to join forces in the form of a civil conspiracy, then the statute of limitations on any wrongful act pursuant to this scheme or plan does not begin to run until the last act of the conspiracy. This of course makes great sense and six Appellate Courts (18 judges and their law clerks) as well as the Supreme Court have carefully considered this concept and have approved it. The Third District Court of Appeal did so in the Wyatt case in an opinion written by former State Senator Edward Regan.

1. These amendments seek to throw all this out and establish a very dangerous rule because this is how it would normally work. Despite the fact for example in a serious case of fraud involving home loans that are refinanced every few years, the borrower must file suit even though there is a threatening lien upon his home after he discovers he was victimized and he must file suit within three years of the discovery of the facts even though he is still subject to the continuing fraud and is very vulnerable. People in this state are reluctant to incur unknown risks in going to

Court, particularly where they are dealing with a big financial organization. This applies as well to attorneys and many, many suits that should be brought aren't because of the public's worry about legal fees and entanglements, and they just pay up and suffer.

2. Another bad aspect of these amendments are that after the first suit is filed, additional lawsuits would have to be filed to cover each of the subsequent tortious wrongs resulting in Court time waste, multiplicity of suits and further expense to all parties.

3. As soon as anyone filed suit against a lender particularly, they would report the borrowers to the various credit agencies resulting most likely in credit being cut-off often resulting in the borrower being turned down for a new loan to pay off the fraudulent one. The borrower could claim they were taken advantage of but credit agencies tend to take the position that they would put an explanation in the file, but the explanation would not be complete until after the suit went to trial and so serious credit damage could easily occur.

The argument for the bill involves something that constitutes a logical extreme. The present law has been the law of this state since 1954, the same arguments have been used in many Appellate Court briefs and rejected, and we are all aware that an extreme argument can be made when in fact it never occurs. The proposed amendments to the law would cause individuals in this state to suffer at the hands of commercial interests that would take advantage of the law by deliberately committing wrongs knowing that they could get away with most of them after three years had gone by in fraud cases and such conduct of course should not be permitted at any time.

Sincerely yours,

Irvine P. Dungan

STATE OF CALIFORNIA—STATE AND CONSUMER SERVICES AGENCY EDMUND G. BROWN JR., Governor

DEPARTMENT OF Consumer Affairs

DIVISION OF CONSUMER SERVICES
LEGAL SERVICES UNIT
1020 N STREET, ROOM A-602
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APPENDIX A

STATEMENT OF KATE DOYLE
BEFORE THE ASSEMBLY COMMITTEE ON JUDICIARY
ON THE IMPORTANCE OR MAINTAINING THE
CURRENT RULE FOR THE RUNNING OF THE
STATUTE OF LIMITATIONS IN ACTIONS IN
WHICH CIVIL CONSPIRACY HAS BEEN
ALLEGED AND PROVED

OCTOBER 23, 1980

Mr. Chairman and members of the Committee, my name is Kate Doyle. I am an attorney in the Legal Serivces Unit of the Division of Consumer Services, California Department of Consumer Affairs, and am testifying for our Department.

Initially, it should be noted that in Wyatt v. Union Mortgage Co. (1979) 24 Cal.3d 773, 157 Cal.Rptr. 392, the California Supreme Court did not establish the rule that in those cases where civil conspiracy has been alleged, the statute of limitations

for the underlying tort does not begin to run until the last overt act pursuant to the conspiracy has been completed. This rule has been applied in civil conspiracy cases by the appellate courts of our state for over 20 years.

From a policy perspective, the full import of a scheme that may be injurious to the consumer may not be recognized by the consumer until such time as the last overt act necessary to complete the scheme has taken place. In the Wyatt case the fraud included inducing consumers to make contracts on the basis of misrepresentations in advertising, and then bringing pressure to bear to keep the consumer indebted for long periods of time with ever-increasing balances upon which more and more interest could be charged. This was accomplished through the device of refinancing when the consumer could not meet the payments he had anticipated would be collected. Indeed in Wyatt until the consumers were threatened with foreclosure proceedings against their home, the full import and effect of the scheme was not recognized. It was only at this point that they took legal action. This is not an unusual pattern.

As in Wyatt, many consumers will refinance an agreement even when perhaps they should realize that misrepresentations have been made. They usually do not know the law or see themselves as having any meaningful alternatives to refinancing. Until the consumer realizes that the "friendly financier" is indeed going to foreclose, the consumer is often not on notice or sufficiently alarmed to seek professional legal advice. Prior to that point, the consumer will have been presented with

many confusing and difficult documents to sign with an accompanying soothing, encouraging and often untruthful explanation of what the forms mean.

As long as the consumer listens to what is said and does not or cannot read and understand the documents he or she is signing, and as long as threat of loss to the consumer is not apparent to him or her, the consumer can very easily be led for some time even in the face of information which could be argued as having put him or her "on notice" of a fraud. Consumers are all too frequently intimidated by business persons with whom they are dealing, and many persons feel obliged to pay their debts without complaint, even when they have good reason to believe they have not been dealt with fairly, as was certainly the case in Wyatt.

The fact pattern in the Wyatt case is in some respects a prototype for business practices which are not as uncommon as we would all like to believe. The Department of Consumer Affairs recently litigated a case regarding a scheme in which a finance company encouraged consumers who were obligees of retail installment sales contracts regulated by the Unruh Act to "flip" or change the agreements into personal loans. These new financing agreements changed the statutory regulation of the contracts such that a statute with fewer consumer protective provisions and a higher interest rate provision would apply to the agreements. Very few consumers would be likely to discover that this had taken place. If they did discover that the

new contracts were regulated by different statutes from those regulating retail installment sales contracts, the ramifications of those differences might not become apparent to them until such time as the creditor attempted to repossess security triggering the consumer to see an attorney.

Recent press coverage of home equity schemes and lien contract schemes in Los Angeles further highlight the unfortunate fact that not all business persons deal fairly with consumers. Such schemes also highlight the ease with which the consuming public can be defrauded and the slowness with which many such persons seek the assistance of an attorney even when aware that something may not be quite fair about the contract upon which they are now indebted.

It should also be kept in mind that access to legal services for low income persons is in short supply, and that for the lower middle to middle income person such access often requires a substantial outlay of funds. Consumers will not seek legal help until some severe threat is made.

For all of these policy reasons, permitting the statute of limitations to run from the date of the last overt act pursuant to the conspiracy, a time which realistically is more likely to coincide with the event which brings home to the consumer his or her potential injury resulting from the fraud, is clearly the better rule. The purpose of statutes of limitations is to prevent the pursuit of stale claims. Until the last overt act necessary to complete a conspiracy to defraud is taken, the claim cannot be stale.

For these reasons the Department of Consumer Affairs believes that the California Supreme Court correctly applied the law in ruling that the statute of limitations runs from the date of the last overt act necessary to complete the conspiracy when civil conspiracy has been alleged, particularly in consumer fraud cases, and that the long standing and prevailing rule on this subject should not be changed.

Thank you for your attention.

Respectfully Submitted,

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