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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

PAUL C. ACREE, FRANK GRANATA, SHERI GRANATA, and BARBARA J. WAGNER, suing individually, on behalf of the general public and on behalf of all other similarly situated,

Plaintiffs,

vs.

GENERAL MOTORS ACCEPTANCE CORPORATION, and DOES 1 through 20, inclusive,

Defendants.

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AND RELATED CROSS-ACTION.

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No. 531927 Dept. 40

First Amended Tentative Decision

This case came on for trial on May 30, 1995, in Department 40, the Honorable James L. Long, judge presiding. J. Thomas Hannan, Esq., Ronald Lovitt, Esq., and Barry Baskin, Esq. appeared on behalf of plaintiffs Paul Acree, Frank Granata, Sheri Granata, and Barbara Wagner, individually as well as all others similarly situated in this class-action. Edmund T. King II Esq., Mark D. Lonergan Esq., John B. Sullivan Esq., and Jan T. Chilton Esq., appeared on behalf of defendant General Motors Acceptance Corporation (hereinafter referred to as "GMAC").

On July 12, 1995, the jury trial on the legal causes of action was completed with the jury rendering a verdict in favor of plaintiffs and against defendant GMAC for breach of contract and awarded damages in the amount of $1,863,187. After reopening discovery for a limited purpose, the Court then conducted a court trial and heard evidence, oral and documentary, on plaintiffs' equitable causes of action. On September 19, 1995, the Court issued its ruling on the equitable causes of action, which is incorporated herein, finding that defendant GMAC committed unfair business practices in violation of Business and Professions Code section 17200. Thereafter, the Court heard and received evidence on the issues of equitable relief and after final arguments and briefing by counsel, the matter was taken under submission for decision on January 26, 1996.

The Court has heard evidence, both oral and documentary, and has considered the arguments of counsel, the points and authorities submitted and the pleading on file. After considering counsels' proposals to the tentative decision, the Court issues its first amended tentative decision on plaintiffs' equitable causes of action and their entitlement to prejudgment interest (infra, pp. 52-55) in the above entitled matter as follows:

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FIRST AMENDED TENTATIVE DECISION ON EQUITABLE CAUSES OF ACTION

Plaintiffs' amended complaint alleges causes of action for breach of contract, violations of Business & Professions Code sections 17200 et seq., unjust enrichment and declaratory relief.

The complaint seeks damages, disgorgement of profits, restitution, and declaratory and injunctive relief. The Court held that the action was proper for class treatment and certified a plaintiff class. The Court, however, refused to certify a cross-defendant class, and GMAC subsequently filed an appeal and a petition for a writ of mandamus. The appeal was dismissed and the writ denied.

This class and private attorney general action is brought against defendant, GMAC. GMAC is a finance company and subsidiary of General Motors (hereinafter referred to as "GM"). GMAC routinely purchases conditional car sale contracts from GM dealerships.[1] GMAC as lien holder under these conditional sale contracts, retains a security interest in the financed vehicles until the consumer pays off the automobile loan balance. As such, GMAC has a legitimate need to protect its financial interests by ensuring that physical damage insurance is maintained on these vehicles.

These conditional sale contracts, provide GMAC with the authority to protect its collateral by placing physical damage insurance coverage (hereinafter referred to as "force place" or

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[1] Of the conditional sale contracts purchased from GM dealerships, one is prepared by GMAC and the other is prepared by Law Printing Company. For purposes of this case, these sales contracts are similar.

"force placed") on uninsured vehicles.[2] This type of insurance is known as collateral protection insurance (hereinafter referred to as "CPI").[3]

GMAC, as a matter of practice, only purchases CPI policies from its wholly owned subsidiary Motors Insurance Corporation (hereinafter referred to as "MIC"). When GMAC procures CPI coverage, it forwards to MIC the entire premium balance owed on the CPI policy. GMAC then adds the amount of this CPI premium, and the finance charges thereon, to the customer's account. GMAC and MIC have hired Automated Tracking Services (hereinafter referred to as "ATS"), to find those customers who fail to maintain insurance as required under the conditional sale contract.

In the breach of contract, Business & Professions Code sections 17200 et seq., and unjust enrichment causes of action, plaintiffs challenge the same features of GMAC's collateral protection insurance program. Accordingly, plaintiffs contend that GMAC should not have:

(1) charged customers for insurance that included Day One Coverage;

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[2] The insurance clause of the conditional sales contracts prepared by Law Printing Company provides in pertinent part:

> You agree to keep the vehicle insured in favor of us with a policy satisfactory to us, with comprehensive theft and collision coverage, insuring the vehicle against loss in amounts not less than the unpaid sums owed under this contract. If you fail to maintain such insurance, we may, at our option, procure such insurance ... and you agree to pay for the insurance and finance charges on the premiums ...."

[3] Until the late 1980's, the CPI policies procured by GMAC only protected its interests. Afterwards, GMAC began to purchase dual interest coverage, known as CPIP. Unlike single interest coverage, dual interest coverage allows either GMAC or the customer to make a claim. Unless otherwise indicated, CPI refers to both dual and single interest coverage.

(2) charged customers for insurance that included amounts to cover tracking costs;

(3) charged customers for dual interest insurance with a $200 deductible or single interest insurance with no deductible;

(4) charged customers for insurance with terms longer than one year;

(5) calculated refunds of unearned premiums by methods other than pro rata by time; and

(6) charged customers amounts of insurance that included expense reimbursements.

In addition, plaintiffs allege that GMAC failed to procure reasonably priced CPI and purchased worthless CPI by calculating premiums based on the consumer's outstanding loan balance while paying claims according to the least of the loan balance, actual cash value, or repair costs.

At trial, plaintiffs presented an accounts receivable theory in an attempt to show that all CPI customers had been damaged. According to this theory, GMAC's payment of CPI premiums to MIC constitutes payment by customers. Plaintiffs also presented Thomas Randlett, an auditor, to testify that customers paid for CPI once GMAC made an accounting entry on its books reflecting CPI premiums, and the finance charges thereon, as a debt owed. The Court rejected plaintiffs' argument and held that GMAC's payment of CPI premiums did not constitute payment for the purpose of establishing damages.

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However, the Court's decision on this question was limited solely to the issue of payments with respect to breach of contract damages, and with the exception of plaintiffs' unjust enrichment claim, did not pertain to issues of equitable relief with regard to the equitable causes of action.

Additionally, the evidence showed that some customers completely paid their CPI charges, some paid nothing, and others made partial payment. In the interest of fairness, the Court declined to allow evidence of aggregate payment or nonpayment by the class. Because of the aforementioned, the Court bifurcated the trial into liability and damage phases.

On July 25, 1995, the Court granted plaintiffs' request to reopen discovery and ordered GMAC to respond to interrogatories requesting customer payment information on an individualized basis, to wit; those class members who paid their entire CPI premiums, those who paid some, and those who paid none. On August 2, 1995, GMAC filed a petition for a writ of mandamus with the Court of Appeal primarily to overturn this Court's decision to reopen discovery and its order assessing GMAC the costs of answering the interrogatories. The writ was denied.

I. The Jury's Verdict on the Breach of Contract Claims Does Not Preclude this Court From Finding Violations of Business & Professions Code section 17200 et seq. (Unfair Competition)

"It is well established that, in a case involving both legal and equitable issues, the trial court may proceed to try the equitable issues first, without a jury ... and that if the court's determination of those issues is also dispositive of the legal issues, nothing further remains to be tried by a jury." (Raedeke v. Gibralter Sav. & Loan Assn. (1974) 10 Cal.3d 665,671; see also Peterson v. Peterson (1946) 74 Cal.App.2d 312, 321.) The preferable practice is for the court to hear the equitable cause of action first, since under California law, the jury is bound by any factual findings the court makes in its determination of the equitable issues. (Dills v. Delira Corp. (1956) 145 Cal.App.2d 124.)

In this case, this Court exercised its discretion to try the legal and equitable causes simultaneously. The Court recognized that the trial would be lengthy and sought to preserve judicial resources by avoiding the unnecessary expense of duplicating evidence and testimony of expert witnesses in two separate trials. Although the theories of liability for the alleged breach of contract, unjust enrichment, and unfair competition causes of action differ greatly, the underlying facts and conduct of the parties giving rise to both causes of action are closely knitted and nearly identical.

On July 12, 1995, the jury found by special verdict, that GMAC breached either the express or implied terms of the contract by the method it used in crediting accounts with refunds of unearned CPI premiums. The jury, however, did not find that GMAC's other practices breached the contract's express or implied terms.

GMAC contends that this Court, now sitting in equity, cannot find it liable for those practices for which the jury did not find a breach of contract. According to GMAC, any court finding of liability for practices which the jury did not find a breach of contract would violate its jury trial rights.

GMAC cites federal civil rights cases which hold that a court in determining equitable claims, is bound by prior, factual jury determinations. (See Wade v. Orange County Sheriff's Office (1988) 844 F.2d 951; Los Angeles Police Protective League v. Gates (1993) 995 F.2d 1469.)

The federal cases cited by GMAC are inapposite to this case. In the federal cases cited, the analysis of the legal and equitable claims required the same factual analysis and considerations. In the present case, the jury, in the breach of contract cause of action, weighed the facts to determine whether GMAC violated the contract's express terms or its implied terms of good faith and fair dealing. In contrast, an allegation of a cause of action for unfair competition under Business & Professions Code section 17200 et seq. and unjust enrichment requires the Court to determine under the facts whether a defendant's business practice offends an established public policy or whether the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. (People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal.App.3d 509, 530.) The theories implicated in this equitable unfair competition claim differ greatly from those in the breach of contract action and thus require a different factual analysis. In this action, GMAC's right to a jury trial for breach of contract is not compromised by the Court's independent review and factual findings on the equitable issues discussed below.

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II. Primary Jurisdiction Doctrine

One of plaintiffs' claims is that GMAC overcharged plaintiffs by procuring CPI from MIC, its subsidiary, at unreasonably high insurance premium rates. Plaintiffs have, through their expert witnesses, sought to persuade this Court that the CPI rates charged by MIC included business expenses chargeable to GMAC's business concern that were wrongfully included in the setting of the insurance premiums.

GMAC, on the other hand, alleges that the primary jurisdiction doctrine, bars this Court from considering whether GMAC procured insurance with excessively high premiums.

The doctrine of primary jurisdiction applies "where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." (U.S. v. Western Pac. R. Co. (1956) 352 U.S. 59, 64.) In such instances, the court, as a matter of policy, should suspend the judicial process and refer such issues to the appropriate administrative body. The doctrine advances two important policies. It helps to ensure the uniform application of regulatory laws, and also enhances judicial decision-making by initially allowing the appropriate administrative body the opportunity to arrive at determinations through the utilization of its expertise in the area. (Farmers Ins. Exchange v. Superior Court (1992) 2 Cal. 4th 377, 391.)

The Legislature has enacted statutes empowering the California Insurance Commissioner with authority to approve insurance rates for automobile liability and physical damage insurance. (See Chapt. 9 of Part 2 of Div. 1 of the Insurance Code, commencing with § 1850.4) California insurance laws equally apply to the approval of rates charged by MIC for its CPI program. (Ins. Code, §§ 1851 and 1861.01.)

Insurance Code section 1858 establishes an administrative scheme under which any person aggrieved by any rate charged, rating plan, rating system or underwriting rule may file a complaint with the Commissioner. If, after considering the insurer's response, the Commissioner finds that probable cause for the complaint exists, the Commissioner may investigate further, order corrective action, conduct public hearings and issue a final decision on the matter. (Ins. Code, §§ 1858.1 and 1858.2.) Insurance Code section 1858.6 further provides for judicial review following any finding, ruling or order made by the Commissioner with regard to the rate violation.

In this case, plaintiffs challenge the fairness of the CPI rates and allege that GMAC wrongfully charged the plaintiff class with CPI rates that included "tracking costs" and expense reimbursements from MIC to GMAC. GMAC counters that its rates, the allocation of tracking costs, and the expense reimbursements paid by MIC to GMAC have been reviewed and approved by the Michigan and New York departments of insurance as proper expenses chargeable to MIC. Although the above-specified issues are addressed below in greater detail, the Court will stay judicial action if it finds that the fact-finding and expertise of the California Insurance Commissioner

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and Department of Insurance is needed to resolve these factual issues and provide a record for subsequent judicial review.

III. Unfair Competition and Business & Professions Code section 17200.

Determining whether GMAC committed unfair business practices requires the Court to examine GMAC's conduct in the context of its inter-corporate relationship with MIC. The evidence clearly established an intimate inter-corporate relationship between GMAC and MIC. GMAC wholly owns MIC, and the companies consolidate their financial reporting. According to a GMAC in-house memorandum, GMAC payments to MIC for CPI policies do not affect overall profits and merely shift losses from GMAC and MIC. GMAC and MIC continuously consulted each other regarding the implementation of the CPI program. Further, GMAC and MIC have overlapping corporate boards with GMAC officials constituting a majority on MIC's board of directors. Joe Pero, president of MIC, stated that Robert O'Connel, the Chairman of the Board and Chief Executive Officer of GMAC, is his boss. The evidence shows that fundamental and long-term strategic policies of MIC are either expressly or impliedly ratified by GMAC.

An equitable claim may be brought under section 17200 of the Business & Professions Code to contest business practices which are unfair, deceptive, fraudulent, or unlawful. Unfairness includes any practice that is immoral, unethical, oppressive, unscrupulous, or otherwise substantially injurious to consumers. (People v. Casa Blanca Convalescent Homes, Inc., supra, at p. 530.) Unfairness may be based on any act that is contrary to common law, statute, public policy or other concept of unfairness. (Id., at p. 530.) In Motors, Inc. v. Times Mirror Co. (1980) 102 Cal.App.3d 735, 740, the Court declared that the determination of whether conduct is unfair involves "an examination of its impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer."

An unlawful business act or practice includes "anything that can properly be called a business practice and at the same time is forbidden by law." (Barquis v. Merchants Collection Assn. (1972) 7 Cal.3d 94, 113; People v. McKale (1979) 25 Cal.3d 626, 632.) An action under section 17200's prohibition of unlawful business practices borrows violations of other law and treats those violations as independently actionable under section 17200. (Farmers Ins. Exchange v. Superior Court, supra, at p. 384.)

A business practice that is deceptive or fraudulent also violates Business & Professions Code section 17200. A business practice is fraudulent if members of the public are likely to be deceived by it. (Committee on Children's Television Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 211.)

Plaintiffs' claim under the "unlawful" prong is based on their assertion that GMAC's collateral protection insurance violates Civil Code section 2982.8 (Rees-Levering Act) and case law. Plaintiffs allege that GMAC violated these laws by procuring collateral protection insurance "under terms which

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are not authorized by its financing agreements with its borrowers."

The Court finds that plaintiffs' contention, under this unlawful prong, is without merit as Civil Code section 2982.8 expressly allows a creditor to procure insurance and to charge finance charges for amounts advanced to procure the insurance in cases, such as this, where the consumer is obligated to maintain insurance under the conditional sale contract and fails to do so. Furthermore, the cases cited and discussed by plaintiffs in Plaintiffs' Trial Brief (pp. 29-30) are no longer applicable in light of the addition of section 2982.8 to the Rees-Levering Act. Specifically, section 2982.8 was intended to abrogate any contrary rule in Winters v. Security Pacific National Bank (1975) 49 Cal.App.3d 510, regarding the money advanced to procure insurance.

In addition, the Court does not find that express statutory authorization is required for using the Rule of 78s in calculating refunds on unearned CPI premiums, and as such, GMAC's CPI refund practices are not unlawful or within the meaning of section 17200 of the Business and Professions Code on that basis. (infra, p. 28.)

In this case, plaintiffs have not met their burden of proof to show that GMAC committed an unlawful business practice in violation of section 17200 of the Business & Professions Code. The Court does not find that GMAC violated any provisions of Civil Code section 2982.8 or case law, and as such, finds that GMAC's practice of procuring CPI and adding the amount for CPI insurance to the loan balance is not an unlawful business practice.

IV. Collateral Protection Insurance Features

Plaintiffs' cause of action for Unfair Competition alleges that GMAC wrongfully purchased collateral protection insurance with the following features:

1) Day One Coverage;
2) built-in tracking costs in the premium rate;
3) expense reimbursements built into the premium rate;
4) excessive policy terms of longer than a year;
5) low deductibles;
6) premium rates based on the outstanding balance of the car loan; and
7) termination of long-term policies refunded on less than pro rata basis.

A. Day One Coverage

Under the CPI master policy, MIC agrees to insure vehicles for physical damage immediately upon a lapse in private insurance coverage. Vehicles that sustain physical damage prior to being detected by ATS' tracking process are thus covered under the CPI program. Day One Coverage, as this CPI feature is termed, ensures that continuous physical damage protection is maintained. Since Day One Coverage is a component of the CPI program, its costs have been built into the CPI rate structure and are consequently passed on to all "force placed" customers in the form of premium charges. Plaintiffs allege that GMAC violated Business & Professions

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Code section 17200 by charging customers for insurance that included the Day One Coverage feature.

At trial, GMAC presented evidence of the benefits of Day One Coverage. GMAC has a strong business interest in ensuring that all of the vehicles it finances maintain continuous physical damage protection because it has title to these vehicles and holds them as collateral until the consumers pay off their car loans. GMAC introduced evidence that owners are less likely to continue loan payments when their vehicles are damaged or otherwise not in driving condition. The Court finds that GMAC has a legitimate interest in ensuring that its collateral is repaired in the event that any physical damage occurs.

Day One Coverage also benefits consumers "force placed" with CPI since they also have an obvious interest in ensuring that the vehicles they are purchasing maintain continuous physical damage coverage. Further, Day One Coverage allows GMAC to provide consumers with an extended notice cycle. Without it, GMAC would likely be more quick to "force place" its consumers. Consumers thus have more time to cure their failure to provide proof of insurance before actually being placed with CPI.

The Court has considered the evidence presented and weighed the utility of Day One Coverage against any harm it may cause to the plaintiff class. The Court finds that GMAC did not commit an unfair business practice by charging customers for insurance that included Day One Coverage. By agreeing to the terms of the conditional sale contract, CPI customers agreed to maintain continuous physical damage coverage on their financed vehicles.

Allocating the entire cost of Day One Coverage to CPI customers is not an unfair practice because these customers actually suffered a lapse in physical damage coverage. According to the evidence, some CPI customers were "force placed" after their uninsured vehicles sustained physical damage. These customers had a lapse in physical damage protection. The remaining group of CPI customers were "force placed" when they failed to provide proof of insurance following a two to three month notice cycle. This second group of customers also had a lapse in coverage protection.[4/]

Furthermore, the Court finds no merit in plaintiffs' claim that GMAC committed a deceptive or fraudulent business practice by failing to provide information about Day One Coverage in the conditional sale contract. Where there is a subsequent lapse in private insurance, the consumer is notified that Day One Coverage will be included in the CPI. The conditional sale contract informs consumers of their obligation to maintain continuous insurance coverage and further states that if they do not, GMAC may procure insurance in order to provide the required continuous coverage.

After weighing the utility of Day One Coverage against any harm it causes to CPI customers, the Court finds that GMAC did not commit an unfair or fraudulent business practice by

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4/ A certain number of customers may have been placed with CPI prior to having a lapse in car insurance. These customers may have voluntarily chosen CPI coverage or alerted GMAC sufficiently in advance on their intention to not obtain their own insurance. No evidence regarding the size of this group was presented at trial.

purchasing insurance policies that included the Day One Coverage feature.

B. Tracking Costs Included in CPI Premium

Initially, GMAC branches individually tracked their loan portfolios to determine whether its customers were maintaining car insurance. In the mid 1980's, GMAC and MIC entered into a joint venture with ATS.[5] Under this agreement, ATS agreed to track GMAC accounts for proof of insurance.

In 1991, ATS began to track GMAC accounts nation-wide. Around that time, GMAC and MIC agreed to split ATS's tracking costs 80 percent / 20 percent, respectively. The New York Department of Insurance approved MIC's filing regarding the 80 percent / 20 percent split. MIC's share of tracking costs was also later approved by the Michigan Department of Insurance when it approved MIC's rate filings.

Plaintiffs allege that GMAC violated Business & Professions Code section 17200 by including tracking costs in its CPI program. Plaintiffs maintain that tracking is a cost of doing business, and that consequently, GMAC should have spread these costs among all consumers by including it in the finance charge.

The evidence shows that tracking benefits GMAC by enabling it to quickly and efficiently detect lapses in insurance coverage. GMAC has a legitimate interest in quickly detecting uninsured vehicles in order to minimize the period of time they are without insurance. Likewise, CPI customers benefit from

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[5] GMAC has a right of first refusal in the sale of ATS.

CPI because they too have an interest in maintaining continuous coverage on these vehicles.

Plaintiffs allege that CPI customers have been charged an unfair proportion of tracking costs to monitor GMAC's loan portfolio and that these costs are improperly included in the collateral protection insurance rates. Plaintiffs argue that although CPI customers constitute about two percent of all GMAC customers, they are charged for 80 percent of all tracking costs. In order to determine whether CPI customers are aggrieved by the CPI rate charged, a full review and analysis of MIC's rate approval application would be required.

In this case, MIC filed applications with the departments of insurance in Michigan and New York which approved the tracking costs and the 80 percent /20 percent split. In exercising its discretion, this Court finds that this issue should first be addressed by the California Insurance Commissioner through the administrative complaint process given the expertise and fact-finding power of the Department of Insurance. (Ins. Code, §§ 1858 et seq.) The Court invokes the doctrine of primary jurisdiction and orders judicial determination of whether GMAC committed an unfair business practice with regard to the allocation of the tracking costs stayed pending any action by the Insurance Commissioner.

The Court notes, however, that from the expert testimony presented, there does not appear to be anything inherently wrong with allocating tracking costs to those individuals who are force placed with CPI. In the opinion of this Court, such a business practice would not be deemed an unfair or fraudulent business practice as CPI customers actually caused GMAC to incur these expenses. GMAC's justification for purchasing CPI that included tracking costs would outweigh any harm it imposes on the class. GMAC should be able to purchase CPI with tracking costs built into the premium.

C. Expense Reimbursements

Plaintiffs allege that expense reimbursement agreements entered into between GMAC and MIC violated section 17200 of the Business & Professions Code as this expense was included as an insurance expense for the purpose of setting MIC's collateral protection insurance rates. Plaintiffs presented evidence that GMAC and MIC entered into these agreements in order to justify excessive CPI rates. GMAC contends that it incurred these expenses nationwide in handling insurance related matters and that the New York Department of Insurance approved MIC's payment of these expenses.

Plaintiffs' contention that the reimbursement of expenses from MIC to GMAC was improperly included in the CPI rate charged raises the issue of whether CPI customers were aggrieved by the CPI rate charged. It is apparent that the determination of this issue would require a thorough review of the rate making process. In exercising its discretion, this Court finds that the issue should first be addressed by the California Insurance Commissioner through the administrative complaint process given the expertise and fact-finding power of the Department of Insurance. (Ins. Code, §§ 1858 et seq.) The Court invokes the doctrine of primary jurisdiction and orders

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judicial determination of this issue stayed pending any action by the Insurance Commissioner.

D. Excessive Policy Terms

Plaintiffs challenge GMAC's practice of buying collateral protection insurance with terms longer than a year. The premium costs for the multi-year insurance policy are prepaid to MIC at the election of GMAC and added to the outstanding balance of the consumer's loan amount if the consumer fails to remit payment in full to GMAC for the collateral protection insurance. Although GMAC is entitled to impose the maximum finance charge on amounts advanced for insurance under Civil Code section 2982.8(e), plaintiffs assert that this practice is unfair since finance charges are unnecessarily imposed on CPI customers for the entire prepaid premium when an identical policy is available from MIC for a shorter duration. It is undisputed that the larger the insurance loan, the larger the finance charges accrue in any given month.

There was credible evidence that MIC had available CPI with a term of one year which would have permitted GMAC to purchase annual CPI for each subsequent year on the loan if needed. [Ex 1880, Miller memo of 1-2-92.] The business need to purchase multi-year CPI was not in keeping with the statistical data produced by GMAC. The data showed that of all persons force placed with CPI, 10 percent of those persons immediately canceled the coverage and purchased their own automobile insurance. Another 50 percent of the group canceled within six months, and eventually a total of 68 percent canceled within one year and replaced the CPI with their own insurance. It is clear then that 78 percent of those force placed with CPI only needed insurance coverage for less than a year before canceling.

GMAC offered testimony that it was justified in its business practice of purchasing the multi-year insurance policy over the one year policy as a means to generate administrative costs savings even though there was never a study performed to support this conclusion. GMAC asserted that cost savings would result in not having to purchase CPI annually or to generate new coupon payment books every year if the multi-year insurance premium was evenly spread out over the life the loan balance. GMAC explained that if CPI was purchased on a yearly basis, each year's premium would have to be added to the loan balance and amortized over the remaining balance of the loan period thus necessitating a higher monthly payment each subsequent year to meet the demand to pay off the financed insurance premiums during the loan period. GMAC wanted to avoid aggravating the consumer because of this result in purchasing CPI on a yearly basis.

The practice of purchasing a multi-year insurance policy and adding the entire insurance premium amount to the outstanding automobile loan is harmful and is substantially injurious to consumers because of the unnecessary increase in finance charges. Since CPI is available to GMAC on a yearly basis, there is no rational justification to compel the consumer to finance the entire insurance premium for a multi-year policy over the duration of the loan period.

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In mitigation to any harm suffered by the consumer with regard to finance charges assessed against the entire premium amount, GMAC offered testimony that if the consumer refused to make payments for 60 days or more on the insurance premium, GMAC would delete all the finance charges and transfer the outstanding insurance premium amount to a separate account known as account 55-1. When the insurance amount is placed in this account, finance charges no longer accrue. When the loan balance for the automobile purchase is paid off, GMAC will then negotiate payment on the outstanding balance on the insurance premium.

This Court is also aware that those individuals who comply with GMAC's demand and meet their new monthly payments on the insurance premiums of their multi-year policy are not given the benefit of having their finance charges on the insurance premiums reversed and the insurance premiums deferred and placed into account 55-1 for later negotiations.

The Court finds, by substantial evidence, that GMAC was aware that a large majority of the consumers did not require CPI coverage for a period in excess of one year. GMAC did not justify its practice of procuring CPI for a term in excess of a year. This Court holds that GMAC's practice of purchasing a multi-year insurance policy and imposing finance charges on the entire amount constitutes an unfair business practice under Business & Professions Code section 17200.

E. Selection of Deductible

Plaintiffs contend that GMAC committed an unfair and fraudulent business practice by selecting and purchasing collateral protection insurance with an unreasonably low deductible. GMAC's practice is to select single interest insurance with a zero deductible and dual interest policies with a $200 deductible. Plaintiffs base their contention on the fact that the unreasonably low deductibles selected by GMAC resulted in a higher premium insurance charge to the consumer. Plaintiffs presented evidence to show that GMAC failed to follow its own in-house recommendation of selecting a $750 deductible which would have provided the optimum savings to the consumer in balance with the potential losses to GMAC. (See Miller memo; R.T. p. 1130, lines 1-3 [Garamendi].) Evidence showed that in 1992, MIC sought and was granted approval from the Michigan Department of Insurance to offer insurance with a range of deductibles.

Plaintiffs also claim that it is an unfair business practice for GMAC to select the deductible level without giving the consumer a choice. Plaintiffs argue that it is unfair for GMAC to impose an unreasonably low deductible for CPI while allowing customers who purchase their own private insurance to freely choose their own deductible. Plaintiffs' expert witness, John Garamendi testified that it was unfair and unreasonable for GMAC to select insurance with a $200 deductible and that it would have been fairer to give the consumer a choice so that their own individual economic circumstances could have been taken into account. In his testimony, he stated that selecting a $500 deductible would have resulted in a 10 percent premium reduction; a $750 deductible in a 18 percent premium reduction; and a $1,000 deductible in a 25 percent premium reduction. Although he conducted no cost analysis of what would be involved from an administrative stand point for GMAC to offer the consumer a choice of deductibles, Mr. Garamendi stated that GMAC already had an administrative system in place in which they could have offered the consumers a choice when they are notified of the "force placed" insurance.

GMAC argues that it is a fair and reasonable business decision to choose a zero deductible for single interest insurance and a $200 deductible for dual interest insurance because the zero and low deductible insures that the consumer's automobile will be repaired in the event of any damage. GMAC's expert testified that the likelihood of getting the automobile repaired after it had been damaged substantially decreases with an increase of the deductible. This would lead to higher uninsured losses if the consumer fails to pay the deductible amount. (R.T. p. 1506-1507, Henderson.) The argument is that it is more affordable for the consumer to pay a $200 deductible rather than a $750 deductible should the automobile be damaged.

In response to the contention that the $750 deductible was the deductible most beneficial to the consumer, GMAC argues that, on average, most people purchased private insurance with a $250 deductible. GMAC further points out that the analysis by Miller in support of the $750 deductible was flawed because the study did not consider the increase in uninsured losses to GMAC if the consumer fails to pay the deductible.

Based on the evidence presented and the merits of the arguments, the Court finds that when the customer is force placed with collateral protection insurance, the lower deductible minimizes the risk of loss to GMAC for any damage to the vehicle when the consumer refuses or fails to pay the deductible to repair the vehicle. Furthermore, as the customer is properly notified of the amount of the deductible when the collateral protection insurance is "force placed", the Court does not find that GMAC committed an unfair or fraudulent business practice by purchasing physical damage insurance with a zero or $200 deductible.

F. Selection of Coverage Amount and Payment of Claims

It is GMAC's practice to purchase CPI for the amount of the customer's outstanding loan balance. Under CPI, however, claims are settled by the least of outstanding loan balance, actual cash value (also known as market value) or repair cost. Plaintiffs allege that GMAC violated Business and Professions Code section 17200 by charging customers for premiums based on outstanding loan balance while paying out claims according the least of the three payment options.

Plaintiffs' witness, Robert Hayes, testified that inequity results from insuring vehicles for loan balance and subsequently paying claims based on the lesser of the three above-mentioned payment options. According to Hayes, if the loan balance is greater than market value or repair cost, the customer is paying for unnecessary insurance. Conversely, when the loan balance is less than the market value or repair cost, the customer's equity in the vehicle remains unprotected. Hayes testified that the more fair approach would be for claims

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to be paid out according to the manner in which the premium is based.

GMAC states that customers are not harmed when cars are insured for loan balance and claims are paid according to the least of loan balance, market value, or repair cost. According to GMAC, premium charges to CPI customers as a whole are unaffected by this practice because rates are derived from an analysis of projected losses and desired profit margins. GMAC also contends that CPI is not designed to serve as a substitute for private automobile insurance and disclaims any obligation to insure the equity interests of those force placed customers whose loan balances are less than the vehicles' market value or repair costs.

The Court does not find that GMAC is under any obligation to protect the equity interests that its customers may have in these vehicles.

The Court holds that GMAC is entitled to protect its financial interests by procuring insurance for the amount of the loan balance. As such, the relevant inquiry is whether Business and Professions Code section 17200 is violated by the practice of paying the least of loan balance, actual cash value, or repair cost.

The Court does not find sufficient evidence to hold GMAC liable under Business and Professions Code section 17200 for the manner in which claims are settled. The decision to pay claims according to the least of loan balance, actual cash value, or repair cost is one made by MIC as insurer. Although plaintiffs established GMAC's ownership and general control of

MIC, they have not shown, by a preponderance of the evidence, that GMAC actively participated in formulating MIC's claims settlement practices.

Furthermore, the Court is not persuaded by plaintiffs' contention that this practice, as a whole, resulted in greater premiums being charged to the class.

G. Terminated Long-term Policies were Refunded on Less than a Pro Rata Basis

It was GMAC's practice to "force place" consumers with a CPI policy term that extended through the duration of the loan period in which the consumer repaid the loan. At any time during this period, the consumer was entitled to cancel the collateral protection insurance policy by replacing it with private insurance. When CPI is canceled midway through the policy term, the consumer receives a rebate on the unearned insurance premiums from the loan balance of the conditional sale contract.

Under CPI, the refund of unearned premiums was computed by a method commonly known as "Rule of 78s" or sum of the digits.[6] Under this method, the policy premium is earned unevenly through time with a greater proportion of the policy premium earned during the earlier part of the policy period. Plaintiffs allege that GMAC acted deceptively by causing MIC to obtain approval in Michigan to refund unearned premium on a pro rata by time basis and by representing to consumers that

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[6] GMAC calculates refunds of unearned premiums for multi-year CPI policies by resorting to certain tables created by the Insurance Services Organization. These tables compute earned CPI premiums in a manner similar to the Rule of 78s method. In order to remain consistent with the terminology used at trial, the Court will refer to GMAC's calculation method as the Rule of 78s.

refunds would be calculated on such a basis, when in fact, refunds were calculated on the less generous, Rule of 78s basis. Plaintiffs argue that when there is a midterm cancellation of CPI coverage, GMAC should credit customer accounts on a pro rata by time basis.

At trial, plaintiffs introduced testimony that the common interpretation of the term "pro rata" is evenly through time. MIC's filings with the Michigan Department of Insurance simply indicated that refunds would be calculated on a pro rata basis. Mr. Boor, the chief actuary at MIC, interpreted this as meaning pro rata by time. In an inter-office memorandum, Mr. Boor, expressed concern that MIC's refund practices were thus out of line with its state filings.

Similarly, the evidence established that CPI certificates issued to "force placed" customers indicated that earned premium would be computed according to the "customary pro rata table". At trial, plaintiffs presented evidence that there were, in fact, two different tables, one pro rata by time and the other a rule of 78 table. These tables are complex and difficult to decipher. The tables were not sent to customers.

Plaintiffs contend that the practice of calculating CPI refunds under the Rule of 78s is an unlawful business practice because it lacks express statutory authorization. They claim that under the Supreme Court's decision in Drennan v. Security Pacific National Bank (1981) 28 Cal. 3d 764. cert. denied, 454 U.S. 833, the Rule of 78s may only be used when specifically authorized by statute. Plaintiffs claim that the legislature has not specifically authorized the computation of accelerated

CPI premiums, and that GMAC has overreached the limits of the law by using such a refund method in computing unearned CPI premium refunds.

GMAC argues that its representations concerning its method of refund calculations were not misleading and adequately conveyed to customers its refund practices. GMAC suggests that customers were not deceived because a customer who was unclear as to the meaning of "pro rata" or "customary table" could simply call and obtain information. The certificates indicated the name of the local GMAC servicing center. GMAC further argues that the California Legislature has specifically authorized the use of the Rule of 78s for computing unearned finance charges to be refunded on prepayment of the amounts due under a conditional car sales contract. (Civ. Code, § 2982(f)(1).)

Based on the evidence presented, this Court declines to follow plaintiffs' assertion that the practice of calculating CPI refunds under the Rule of 78s is illegal or unfair under section 17200 simply because it lacks express statutory authorization. Although the Supreme Court in <u>Drennan</u> expressed reservation in the Rule of 78s calculation of accelerated earned finance charges on car loans, this Court does not infer that the Rule of 78s is improper unless authorized by statute for the purpose of calculating unearned CPI premiums.

At trial, the evidence established a strong business justification for calculating unearned CPI refunds under the Rule of 78s. According to the testimony, there is a greater risk of physical damage to automobiles at the beginning of the policy term and, this risk diminishes throughout the course of the term. Based on this evidence, the Court finds that it is appropriate for CPI premiums to be earned unevenly through the policy term.

However, the Court finds that GMAC's practice of rebating premiums which are not computed on a pro rata by time basis is a deceptive business practice in violation of section 17200 of the Business and Professions Code. GMAC's active participation in the area of refunds was evidenced by the fact that the issued certificates listed GMAC branches as servicing centers. Further, CPI rebates are handled by GMAC and are applied directly to the customer's outstanding loan balance with GMAC. GMAC committed a deceptive business practice by failing to credit customer accounts in accordance with the filings and representations it made to CPI customers.

V. Competitive CPI Rates

Plaintiffs' allege that GMAC could have purchased cheaper collateral protection insurance. Plaintiffs, through testimony by Robert Hayes, contend that GMAC, with its large book of business could have successfully negotiated less expensive physical damage coverage from a private insurance provider such as State Farm.

GMAC argued that it could not have entered the car insurance market and procured private physical damage coverage on behalf of each CPI customer. GMAC also presented testimony that the CPI rates charged to CPI customers were competitive. Michael Miller, an actuary, studied the competitiveness of MIC's rates by comparing them with those of four CPI providers.

In this study, MIC's rates were lower than three of the four sampled CPI providers.

Determining whether GMAC unfairly overcharged the class for CPI coverage that it procured through MIC requires a comprehensive examination of MIC's rate filings. This issue must first be raised before the California Insurance Commissioner through the administrative complaint process, given the expertise and fact-finding power of the Department of Insurance. (Ins. Code, §§ 1858, et seq.) The Court invokes the doctrine of primary jurisdiction and orders judicial determination of whether GMAC committed an unfair business practice with regard to premium charges stayed pending any action by the Insurance Commissioner.

The Court, however, makes certain findings based on the evidence and credibility of the witnesses. The Court does not find that GMAC could have entered the private car insurance market and procured physical damage coverage for individual CPI customers. In addition, have failed to establish that GMAC charged customers for uncompetitive CPI premiums.

VI Affirmative Defenses

GMAC claims that, based upon the conduct of its customers, several affirmative defenses preclude plaintiffs' from obtaining equitable relief.

A. Unclean Hands

GMAC contends that the unclean hands doctrine bars plaintiffs from receiving equitable relief. GMAC states that CPI customers have breached on their promise to maintain continuous physical damage insurance on their vehicles. In further support of their unclean hands defense, GMAC also points out that many CPI customers are delinquent on their automobile payments and have completely failed to pay for CPI.

Generally, the unclean hands doctrine is invoked to prevent a party who has violated "conscience, good faith or other equitable principles" in his or her prior conduct from obtaining equitable relief. (Fireboard Paper Products Corp. v. East Bay Union of Machinists (1964) 227 Cal.App.2d 675, 727.) Whether an unclean hands defense is successful depends in part "...upon the nature of the misconduct, and the relationship of the misconduct to the claimed injuries." (Blain v. Doctor's Co. (1990) 222 Cal.App.3d 1048, 1060.)

"The misconduct which brings the clean hands doctrine into operation must relate directly to the transaction concerning which the complaint is made, i.e., it must pertain to the very subject matter involved and affect the equitable relations between the litigants." (Fireboard Paper Products Corp. v. East Bay Union of Machinists, supra, at p. 728.) The claimed misconduct must "infect" the cause of action being considered by the court, and equitable relief will not be denied simply because the plaintiff acted improperly in the past or because prior misconduct may have indirectly affected the problem before the court. (Id. at p. 728-729.)

The defense of unclean hands is not necessarily a complete defense and public policy may favor the nonapplication of the doctrine. (Health Maintenance Network v. Blue Cross of So. California (1988) 202 Cal. App.3d 1043, 1061.) Courts will reject the defense when its application will cause an inequitable result. (Womack v. Womack (1966) 242 Cal.App. 2d 572, 579.) For instance, it cannot be used to prevent a court from exercising its statutory authority to enjoin acts which are against public policy. (Kofsky v. Smart & Final Iris Co. (1955) 131 Cal. App.2d 530.)

After considering the evidence and weighing the equitable interests involved, the Court finds that unclean hands do not bar plaintiffs from equitable relief. The failure by CPI customers to maintain continuous physical damage automobile insurance is not sufficiently related to the transaction directly at issue in this case; namely conduct associated and relating specifically to the CPI program. Irrespective of the customers' earlier failure to maintain continuous physical, the fact remains that GMAC chose to reinstate these contracts as opposed to repossessing the vehicles. GMAC is required to maintain and manage its CPI program in a manner that complies with Business and Professions Code section 17200 and cannot use the customers' earlier failure to maintain continuous physical damage insurance as justification for committing unfair business practices.

The Court also rejects GMAC's claim that those customers who have not paid on their automobile loans or who have completely failed to pay CPI charges are barred from equitable relief by unclean hands. The important public policy objectives of Business and Professions Code section 17200 et seq. would be thwarted if GMAC were able to successfully assert the unclean hands doctrine and avoid enforcement of section 17203.

As to those customers who have failed to pay for proper CPI charges, the Court intends to fashion equitable relief in a manner which permits GMAC to offset the delinquent amounts it is owed. Further, this law suit does not preclude GMAC from seeking legal recourse with respect to delinquent debts it is allegedly owed.

B. Laches

GMAC contends that plaintiffs' claims are barred by laches. According to GMAC, customers failed to timely object to its practices and as a result of such silence and delay, it did not pursue the delinquent amounts owed it. GMAC contends that it has been prejudiced because this delay caused it to refrain from pursuing delinquent CPI debts.

The equitable defense of laches is applicable when there is such an unreasonable delay by the plaintiff in asserting a right that the granting of relief would be inequitable. (Cahill v. Superior Court of San Francisco (1904) 145 Cal. 42.) It "...requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay." (Conti v. Board of Civil Service Commissioners (1969) 1 Cal. 3d 351, 359.) The determination of what constitutes an unreasonable delay involves considerations of the nature of the case and the relief sought, circumstances justifying the delay, and whether the rights of the defendant have been prejudiced by the delay. (Cahill v. Superior Court of San Francisco, supra, at p. 46; Los Angeles Fire & Police Protective League v. City of Los Angeles (1972) 23 Cal.App. 3d, 67, 74.)

Based on the facts in this case, the Court rejects GMAC's laches defense. Although customers may have been provided with information concerning the amount of CPI finance charges, there is no evidence that CPI customers, in any way, acquiesced to GMAC's practices. In addition, GMAC has not established that plaintiffs' unreasonably delayed in filing and pursuing this suit. Finally, GMAC has not shown that it will be prejudiced, in the event that this Court provides plaintiffs with equitable relief. As stated above, GMAC will have the opportunity to apply individual offsets and is not precluded by this law suit from pursuing payments owed by delinquent customers.

C. Estoppel and Waiver

GMAC contends that plaintiffs waived or are estopped from claiming that that they paid unfairly excessive finance charges with respect to multi-year CPI policies. According to GMAC, CPI customers received a notice along with their certificate of CPI which specified the term of coverage as well as the total amount of CPI premium and finance charges. GMAC claims that the customers' decision not to avoid these finance charges after receiving notice constituted a waiver of their rights or precludes them from now complaining about the additional finance charges resulting from multi-year CPI placements.

"The essence of an estoppel is ... that the party to be estopped has by false language or conduct led another to do that which he would not otherwise have done and as a result thereof that he has suffered injury." (<u>In re Lisa R.</u> (1975) 13 Cal.3d 636, 645.) For the defense to be successful, "(1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." (Gaunt v. Prudential Ins. Co. (1967) 255 Cal.App.2d 18, 23.)

A waiver occurs when there is a relinquishment of a known right. (Insurance Co. of the West v. Haralambos Beverage Co. (1987) 195 Cal.App.3d 1308, 1321.) This may occur either intentionally or by an act which, is so inconsistent with an intent to enforce the right, that it induces a reasonable belief that the right has been relinquished. (Id. at p. 1321.)

In this case, neither the elements for estoppel or waiver are present. GMAC has not shown that the conduct of CPI customers, i.e., their failure to contest the finance charges shown in the notices received after being "force placed", constituted an intent to forfeit any claims against the imposition of finance charges on multi-year CPI. No evidence has been presented to show a relinquishment, intentional or otherwise, of any rights. Furthermore, GMAC has not shown how it relied to its detriment on the acts or omissions of its customers.

The Court, in the exercise of its discretion, also rejects this defense because its application in the context of this consumer class action suit would cause an inequitable result.

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D. Mitigation

GMAC claims that plaintiffs are not entitled to equitable relief because they failed to mitigate or minimize their CPI charges by purchasing their own private automobile insurance.

In raising the defense of mitigation, the defendant has the burden of proving that the plaintiff failed to "do everything reasonably possible to negate his own loss and thus reduce the damages for which the other party has become liable." (Brandon & Tibbs v. George Kevorkian Accountancy Corp. (1990) 226 Cal.App.3d 442, 460.)

GMAC's mitigation claim is without merit. Here, CPI customers, remain in a valid contractual relationship with GMAC as a result of GMAC's decision to procure CPI and continue on with the car sales contract. Once GMAC "force places" CPI and continues on with the contractual relationship, its customers have no continuing obligation to purchase their own private automobile insurance.

GMAC has not shown how the mitigation defense is appropriate in the context of a restitution or unjust enrichment cause of action. Here, plaintiffs claim that GMAC has failed to provide the correct refund amounts and improperly charged customers for finance charges on multi-year CPI. They seek recovery of excess payments made to GMAC as well as relief from the obligation of paying these amounts. The failure by customers to obtain their own automobile insurance did not increase the amount of monetary relief they now seek from GMAC. Had customers obtained their own insurance, GMAC would be without the extra CPI premiums and finance charges it has collected, and its accounts would not contain excessive charges.

Finally, there is no evidence that CPI customers were in a position, financially, to mitigate their harm by purchasing their own private insurance and that they acted unreasonably by failing to obtain private automobile insurance once they were "force placed".

VII. Monetary Relief

Plaintiffs maintain that customers are entitled to restoration of overpayments that were made as a result of GMAC's two unfair business practices. They seek restitution under Business and Profession Code section 17203 for all customers who received incorrect CPI refund amounts due to GMAC's use of the Rule of 78s for computing refunds of unearned premiums and for restoration of the additional finance charges which were imposed and paid as a result of GMAC's purchase of multi-year CPI. Plaintiffs also seek monetary relief, under the alternative theory of unjust enrichment, for overpayments on CPI, and finance charges thereon made by class members during the class period of February 1, 1989 to August 31, 1994.

In the equitable relief segment of the trial, plaintiffs presented evidence of monetary losses sustained by CPI customers. Plaintiffs' expert, Dr. Blaine Nye, examined GMAC's customer accounts for the class period of February 1989 to August 31, 1994 and calculated the amount of over-payments made by each customer during that time period. For each customer, Nye separately calculated the overpayments made as a result of GMAC's refund and multi-year placement practices. After obtaining separate over-payment figures for both practices, Nye chose the higher of the two to represent monetary harm sustained by that particular customer.[7] According to Nye, the two combined unfair business practices resulted in approximately $4.3 million in CPI over-payments from February 1, 1989 to August 31, 1994.[8]

Nye did not rely on actual account data for computing overpayments made by customers between September 1, 1994 to November 1, 1995. He extrapolated from the account data available for the class period and estimated the number of additional CPI placements and cancellations as well as CPI overcharge and payment amounts that occurred between September 1, 1994 and November 1, 1995. (R.T. p. 4123, lines 13-28; p. 4124, lines 1-6.) Nye used these estimates to calculate CPI overpayments occurring between September 1, 1994 and November 1, 1995. He concluded that customers paid approximately $1.9 million of CPI over-charges during that time period.

Based on his calculations, Nye concluded that 31,935 customers made a total of $6,313,917 in CPI over-payments. (R.T. p. 4129, lines 6-14.) After adding interest, which he calculated at 7 percent for a total of $1,023,483, Nye

[7] According to plaintiffs, there is a "tension" between the harm caused from GMAC's refunding practices and its practice of purchasing multi-year CPI. They assert that the harm caused by the refunding practice is greater in the beginning and diminishes throughout the course of the policy term. Conversely, the harm caused by GMAC's imposition of finance charges on the entire term of a multi-year policy increases during the course of the policy term.

[8] In using the general term "CPI overpayment", the Court is referring to both the excess payments that have been made on CPI as a result of inadequate refunds and the additional finance charges stemming from the purchase of multi-year CPI policies.

testified that CPI over-payments totaled $7,337,400. (R.T. p. 4128, lines 10-11.) [9]

According to Nye, there were also over seventy seven thousand customer accounts reflecting a total of $17,763,757 in unpaid CPI overcharges. (R.T. p. 4127, lines 4-15.). Nye testified that combined, the amounts of CPI over-payments and unpaid overcharges total approximately $25 million. (R.T. p. 4128, lines 26-27.)

GMAC contends that CPI customers are not entitled to monetary relief because plaintiffs have failed to prove that it has profited or been unjustly enriched by these two practices. GMAC claims that plaintiffs' evidence concerning unjust enrichment improperly focused on measuring losses sustained by customers rather than establishing profits or benefits it obtained. GMAC asserts that it retains none of the money which plaintiffs seek restoration of because it has not acquired any money through the CPI program. According to GMAC, it pays the entire CPI premium to MIC up front and then charges the customer.

GMAC claims that plaintiffs have not shown that any harm was caused by its use of the Rule of 78s method in calculating unearned premium refunds. According to GMAC, the misdisclosures did not cause any monetary harm because customers received the certificates containing the refund information after they were placed into the CPI program.

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9 Plaintiffs claim that information learned during the equitable relief segment of trial regarding historical changes in CPI rates render their calculation of over-payments too low..

At trial, GMAC also disputed the accuracy of Nye's calculations of customer CPI over-payments. GMAC's expert, Herbert Walter, testified that as a result of several errors in his calculations, Nye's computation of CPI over-payments are inaccurate. Walter testified that Nye made improper assumptions concerning the timing of customer payments. He also claimed that in calculating charges for annual CPI policies, Nye improperly assumed that single interest customers would not have been placed with CPI when their outstanding loan balance fell below $2,000 or when there was less than six months remaining on the conditional sales contract.[10] According to Walter, Nye also failed to take into consideration GMAC's conversion to dual interest CPI rates when he calculated what the costs of annual CPI policies would have been for those originally "force placed" with multi-year, single interest CPI.

After correcting errors which he believed Nye made in his calculations, Walter recalculated CPI over-payments using Nye's method and determined that over $4 million in CPI over-payments of CPI were made from February 1989 to August 31, 1994.

GMAC did not provide any estimates concerning CPI over-payments occurring between September 1, 1994 and November 1, 1995 and maintains that plaintiffs failed to show that customers suffered monetary losses during that time period. According to GMAC, Nye's estimate of CPI over-payments during this time period is speculative and unreliable because it is

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[10]Walter also testified that Nye failed to consider a recent change in its policy in which customers are given a 60 day grace period before being placed with CPI.

based on assumptions regarding future CPI placements, payment patterns, and cancellations.

GMAC also offered testimony that the method Nye used to calculate CPI over-payments was itself flawed. GMAC claimed that Nye inappropriately performed separate calculations of economic detriment caused by GMAC's use of the Rule of 78s and purchase of multi-year policies and then chose the greater of the two. According to GMAC, Nye also overstated excess payments by failing to account for the benefits in premium savings conferred by both challenged practices.

Walter offered what he contended was a more appropriate method for calculating CPI over-payments. In his alternative method, Walter accounted for benefits GMAC claims to have conferred to customers by using the two practices. According to Walter, customers made a total of approximately $2.8 million in CPI overpayments. (R.T. p. 4348, lines 16-17.)[11]

A. CPI customers are entitled to restitution of over-payments made on the additional CPI finance charges which were imposed as a result of GMAC's purchase of multi-year CPI policies as well as for CPI over-payments made due to GMAC's use of the Rule of 78s in computing refunds.

Business and Professions Code section 17203 states in pertinent part:

> " The Court may make such orders or judgments ... as may be necessary to prevent the use or employment... of any practice which constitutes unfair competition... or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition."

[11] GMAC maintains that the Court should consider the economic benefits that are conferred to all CPI customers by the two unfair practices, and that as such, no CPI over-payments have occurred.

The basic equitable principles underlying section 17203 provide courts with broad discretion in fashioning relief that is necessary to accomplish complete justice between the parties. (People v. Thomas Shelton Powers, M.D., Inc. (1992) 2 Cal.App. 4th 330, 341; Fletcher v. Security Pacific National Bank (1979) 23 Cal.3d 442, 452. [12]) In determining whether a particular situation merits the exercise of its equitable power, courts follow the basic principle that the character of a transaction is determined by looking at its substance rather than its mere form. (Civil Code section 3528.)

Restitution and/or disgorgement of profits are the forms of monetary relief available under section 17203. (Bank of the West v. Superior Court (1992) 2 Cal.4th 1254, 1260 footnote 3.) It is within the inherent equitable power of the trial court to order restitution as a form of ancillary relief. (People v. Superior Court (Jayhill Corp.) (1973) 9 Cal.3d 283, 286.) Restitution, under Business and Professions Code section 17203, serves to "foreclose retention by the violator of its ill-gotten gains" and deters future unfair business practices. (Fletcher v. Security Pacific Bank, supra, at 449.) In Fletcher, the Supreme Court stated, "[t]he requirement that a wrongdoing entity disgorge improperly obtained moneys surely serves as the prescribed strong deterrent." (Id. at p. 450.)

Clearly, section 17203 of the Business and Professions Code provides courts with broad restitutionary powers. (Consumers Union of U.S., Inc. v. Alta Dena Certified Dairy

[12] Fletcher dealt with relief under Business and professions Code section 17235. The language of sections 17203 and 17235 is nearly identical, and based on legislative intent, have similar interpretations. (Bank of the West (1992) 2 Cal. 4th at 1272-73)

(1992) 4 Cal.App.4th 963, 975.) For example, in order to ensure that complete justice between the parties is accomplished, restitution may be ordered even without individualized proof that the money to be restored was in fact obtained by the defendant as a direct result of the unlawful business practice. (Fletcher v. Security Pacific National Bank, supra, at p. 450-453.) Further, a court may deter future unfair business practices by ordering disgorgement of profits even though direct cognizable victims cannot be identified. (People Thomas Shelton Powers M.D., Inc., supra, at p. 341.)

The Court finds that the evidence presented has established that many customers made over-payments on CPI to GMAC as a result of GMAC's refund practices and its purchase of multi-year policies. The fact that excessive premiums and finance charges were charged and paid is illustrated by the testimony of both Nye and Walter. Nye testified that customers made approximately $4.3 million in excessive payments during the class period. Using Nye's method for computing excess payments, Walter calculated that class members made approximately $4.2 million in overpayments. Excluding GMAC's benefits conferred argument, Walter's own method for calculating excess payments also showed that approximately $2.8 million in CPI over-payments were made between February 1, 1989 and August 31, 1994. Based on the testimony, the Court finds Nye's calculation of CPI overcharges and overpayments to be the appropriate measure of CPI overcharges and overpayments.

The evidence also establishes that customers, many of which are outside of the plaintiff class, have paid excessive finance charges and received incorrect refund amounts since the close of the class period.

The Court has considered the evidence presented with respect to the question of whether monetary relief should be denied on the basis that GMAC's practices resulted in lower CPI premiums overall and rejects GMAC's assertion that certain quantifiable, monetary benefits which must be accounted for in assessing monetary losses inured to customers as a result of the challenged practices. The Court is not persuaded by the argument that CPI premiums would have been higher had GMAC purchased CPI on an annual basis and calculated refunds on a pro rata by time basis. This claim is speculative. It assumes that higher CPI rates would have been sought for annual term CPI and that an application for such rates would have been approved. Further, with respect to GMAC's refund method, the CPI rate filings indicated refunds would be calculated pro rata. As such, the Court has no reason to assume that CPI rates were based on a Rule of 78s refund method.

After considering the evidence and weighing the respective equities, the Court finds that customers are entitled, under section 17203 of the Business and Professions Code, to restoration of CPI over-payments that were made as a result of GMAC's two unfair business practices. Specifically, CPI customers are entitled to equitable monetary relief under Business and Professions Code section 17203 for the additional CPI finance charges paid from February 1, 1989 up to the date an injunction is entered. They are also entitled to monetary relief for CPI overpayments made during that time period as a result of GMAC's failure to calculate refunds of unearned CPI premium according to pro rata by time.

CPI customers are entitled to be restored, monetarily, by GMAC. GMAC was an active participant in the implementation and promotion of the two practices which harmed its customers. There is substantial evidence that many customers paid CPI charges which are excessive under the Court's ruling, directly to GMAC. Furthermore, the Court finds that to the extent that GMAC initially forwarded CPI premiums to MIC, the over-payments were acquired or were ultimately acquired by GMAC. (Ante, p. 10.)

In addition to restoring CPI and interest overpayments to customers, restitution will deter GMAC from committing these or similar unfair practices in the future. GMAC chose to purchase multi-year CPI policies resulting in enormous amounts of additional finance charges knowing that up to 78 percent of those force placed with CPI canceled insurance coverage within one year. Its representations to customers that earned CPI premiums would be computed according to the customary "pro rata" tables created the perception that refunds would be calculated pro rata by time. By compelling GMAC to restore to customers their CPI over-payments, the Court seeks to deter GMAC from such unfair practices in the future.

The Court rejects GMAC's contention that plaintiffs were required and failed to prove that its misdisclosures with respect to refunds actually caused harm to customers. Although GMAC's misdisclosures occurred after CPI had been placed, customers are entitled to have their refunds calculated in a manner that is consistent with GMAC's representations. It would be unfair for GMAC to avoid fulfilling these representations.

B. Unjust Enrichment

In addition to their request for restitution under Business and Professions code section 17203, plaintiffs also call on this Court to exercise its equitable discretion and award monetary relief in order to prevent GMAC's unjust enrichment. As distinguished from their unfair business practices claim, plaintiffs unjust enrichment claim is limited to over-payments made by class members during the class period of February 1, 1989 to August 31, 1994.

Based on the evidence presented (Ante, pp. 37-40), the Court finds that class members who did not receive a pro rata by time calculation of refunds of unearned CPI premium between February 1, 1989 and August 31, 1994, but instead received refunds calculated under the Rule of 78s, made CPI over-payments to GMAC. As GMAC will be unjustly enriched if permitted to retain payments on CPI premiums which it did not in fact earn, the Court holds that class members are entitled to restitution.

The Court also finds that many class members made overpayments to GMAC on finance charges for multi-year CPI between February 1, 1989 and August 31, 1994. As GMAC will be unjustly enriched should it be permitted to retain these finance charge over-payments, the Court holds that class members are entitled to restitution of these sums.

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After considering the testimony and evidence presented, the Court finds the unjust enrichment calculation method of plaintiffs' expert, Dr. Nye, to be the proper measure of unjust enrichment. However, to the extent that Nye's calculation of unjust enrichment resulting from the purchase of multi-year policies includes CPI premiums, it must be adjusted. Except for any changes that must be made to delete these premium amounts, the Court finds that GMAC was unjustly enriched in the amount of $4,358,710 between February 1, 1989 and August 31, 1994.

However, rather than providing plaintiffs with a lump sum unjust enrichment award, the Court intends to provide equitable relief through an ordering GMAC to correct its CPI accounts. As Nye's unjust enrichment calculations are reasonable estimates, the restoration of customers will be better achieved through a correcting of accounts process.

VIII. Correction and Crediting of Customer CPI Accounts

Plaintiffs have proposed a framework which they suggest will provide complete and comprehensive equitable relief to all CPI customers. They ask the Court to order GMAC to correct its records so that each customer's account only reflects CPI charges which are appropriate under the Court's ruling. They claim that an ancillary accounting must be performed before GMAC can properly and completely correct its records.

Plaintiffs maintain that ordering GMAC to correct its records is necessary since the over-payment figures provided by Nye are reasonable estimates which were provided for the limited purpose of illustrating the fact and magnitude of unjust enrichment. Based on the large number of accounts involved and the difficulty in manipulating the available data, they claim that a correction of records is the best way method for determining the amount of monetary relief GMAC's customers are entitled to. They suggest that monetary relief be provided to those customers whose accounts show a negative balance following the correction process.

In addition to ensuring that the appropriate amount of monetary relief is provided, plaintiffs claim that a correction of records is needed in order to relieve customers from unpaid CPI overcharges. They ask the Court to order GMAC to credit all accounts by the amount of unpaid overcharges being assessed as a result of multi-year policies and the use of the rule of 78s. According to plaintiffs, it is unfair for GMAC to maintain accounts reflecting these overcharges. They claim that these unpaid overcharges disadvantage customers because customers must pay them before GMAC will relinquish title to the financed vehicles.

GMAC claims that ordering it to correct all of its CPI records would be inappropriate and unfair. GMAC contends that the costs of complying with such an order would be grossly disproportionate to any benefits it would confer to plaintiffs.

According to GMAC, there are a great number of dormant accounts wherein appropriate CPI charges greatly exceed any applicable credits. GMAC contends that it will never receive any payments on the overwhelming majority of these dormant accounts. GMAC claims that, given the burdensome and costly nature of the correction process, it would therefore be unreasonable to order a correction of these accounts. With respect to 55-1 accounts, GMAC argues that finance charges have been permanently reversed thereby alleviating any need to order a correction of these accounts.

GMAC also asserts that it would be unfair to compel it to credit customers who were charged more as a result of these practices while allowing customers whose charges were lower as a result of these practices to retain the benefits they have received.

GMAC further claims that ordering a correction of accounts would be unfair considering the respective equities. According to GMAC, it would be especially unfair to correct the accounts showing unpaid overcharges as these customers breached their obligations to make car payments, maintain insurance, and pay on the CPI premiums advanced by GMAC. GMAC contends that the harm incurred by these customers is insignificant compared to the amounts that they owe GMAC for both the automobile loans and CPI.

Unless expressly or impliedly restricted, a court retains its general equity jurisdiction in providing relief against unfair business practices. (People v. Jayhill Corporation, supra, at p. 286.) By providing that courts may "make such orders or judgments... as may be necessary...", section 17203 of the Business and Professions Code intends to provide the court with the flexibility needed to achieve an equitable resolution to unfair business practices. As such, the court may "exercise the full range of its inherent powers in order to accomplish complete justice between the parties, restoring ...

the status quo ante as nearly as may be achieved." (Id. at p. 286.)

The Court, in exercising its discretion under Business and Professions Code section 17203, hereby orders GMAC to correct those CPI accounts which were overcharged from February 1, 1989 up to the date of injunction. GMAC shall credit these customer accounts by the amount of CPI premium and finance overcharges and provide customers with monetary payment where necessary. The Court finds that ordering a correction of CPI accounts is necessary for an accurate and complete restitution award. Relying on a lump sum figure as the exact measurement of monetary relief is not desirable given the great number of accounts involved, the complexity involved in manipulating customer account data, and the fact that evidence of over-payments occurring between September 1, 1994 and November 1, 1995 was based upon reasonable estimates.

The Court also finds it necessary to order a correction of accounts containing unpaid CPI charges in order to protect customers from GMAC's unfair business practices. Although GMAC may not be actively seeking to collect on many of these accounts, the Court will not permit it to retain these overcharges on its accounts. The evidence established that customers were harmed by having unpaid overcharges remain on their accounts because these amounts serve as a basis upon which GMAC may refuse to transfer title to customer vehicles.

As 55-1 accounts contain no finance charges, GMAC need not correct these accounts. However, as explained below, GMAC shall be enjoined from subsequently adding or seeking to collect any CPI finance charges on its 55-1 accounts. (<u>infra</u>, p. 62.)

In performing the accounting necessary to correct its customer CPI accounts, GMAC shall follow the approach that plaintiffs' expert Dr. Nye, employed for calculating CPI overpayments. However CPI premiums shall not be considered in the correction of excess charges stemming from multi-year CPI placements.

IX. OFFSET

GMAC maintains that equitable relief provided to CPI customers should be offset by the delinquent amounts owed for both the vehicle loans and CPI insurance. According to GMAC, the offset amount should be computed and applied against customers on an aggregate basis. GMAC claims that the aggregate amount owed by the class exceeds $140 million. GMAC argues that it would be inequitable to allow these customers, as a group, to recover any monetary amount given the aggregate amount they owe on their automobile loans and CPI. At trial, GMAC also presented individual offset figures with respect to both his and Nye's calculations.

Plaintiffs contend that an offset of delinquent amounts owed under the conditional car sale contract is inappropriate. They claim that issues relating to the conditional sale contract constitute separate, unrelated transactions and have been handled as such throughout the trial.

Plaintiffs also argue that the Court should deny any offset claims based upon unpaid CPI amounts. They claim that it would be inequitable to permit offset of these amounts because of GMAC's manner of allocating customer payments. According to plaintiffs, GMAC first allocated customer payments to unpaid car debts and applied any remaining payment amounts to the CPI premium.

A. GMAC Is Entitled to Offset Delinquent Amounts Owed for Both CPI and Car Loans.

The right of setoff is grounded in principles of equity. (Kruger v. Wells Fargo Bank (1974) 11 Cal.3d 352, 363.) "[I]t is well settled that a court of equity will compel a set-off when mutual demands are held under such circumstances that one of them should be applied against the other and only the balance recovered." (Salaman v. Bolt (1977) 74 Cal.App. 3d 907, 918 (citing Harrison v. Adams (1942) 20 Cal.2d 646, 648).) Under this equitable doctrine, a judgment debtor who has a claim against his judgment creditor may request that his claim be set off against his creditor's judgment. (id. at p. 918.) This equitable right is based on "the idea that mutual existing indebtedness, arising out of contracts between the parties to the record, creates payment of both demands so far as they equal each other. (Advance Industrial Finance Co. v. Western Equities, Inc. (1959) 173 Cal.App.2d 420, 426.) Setoff will be permitted when there is some peculiar circumstances based upon equitable grounds such as fraud or insolvency of the party against whom setoff is sought. (id. at p. 427.; Harrison v. Adams, supra, at p. 648.)

After considering the contentions of both parties, the Court in the exercise of its discretion, finds that GMAC is entitled to offset, on an individual customer basis, the delinquent amounts owed it under the automobile loan as well as CPI charges. This offset shall apply to both the legal and equitable relief recovered by plaintiffs. Based on the evidence, it is likely that without such an offset, GMAC as a practical matter, would not otherwise be able to collect amounts it is legally entitled to under the conditional sale contract on many of these accounts.

B. By crediting customer accounts which reflect amounts owed for both the automobile loan and CPI, GMAC will receive an offset.

Based on its intention to order a correction and crediting of CPI accounts, this Court will not provide GMAC with a lump sum offset award. Rather, GMAC will receive an individualized offset by the process of crediting CPI overcharges against the outstanding balance owed it on each account.

X. Prejudgment Interest on the Jury's Damage Award

Plaintiffs seek prejudgment interest on the jury's $1.8 million breach of contract damage award under California Civil Code section 3287(a). They request that interest be calculated at 10 percent pursuant to California Civil Code section 3289(b).

During the equitable relief portion of the trial, plaintiffs presented two alternative methods of measuring prejudgment interest. The first method assumed that the breach occurred on the date the customer canceled their CPI policy and calculated interest for each customer from that date through November 1, 1995. That total amount of interest accrued under this method was approximately $601,958. The second method assumed that breach occurred on the date the customer received the incorrect credit of the unearned premium on their account and calculated interest from that date through November 1, 1995. The total amount of prejudgment interest under this second method was approximately $419,000.

Plaintiffs also request prejudgment interest, calculated at seven percent, for the equitable monetary relief awarded by the Court. Nye computed prejudgment interest of $1,023,483. (R.T. p. 4126, line 19.)

GMAC contends that plaintiffs are not entitled to prejudgment interest under California Civil Code section 3287(a) because damages were not certain or reasonably capable of being made certain as required under that section. GMAC also claims that, given the respective equities, the Court should decline to exercise its equitable discretion to award plaintiffs prejudgment interest.

California Civil Code section 3287(a) provides that interest is recoverable on damage awards if the right to recovery vested on an identifiable date and the damage amount is "certain or capable of being made certain by calculation". Prejudgment interest is measured from the date when damages are certain or capable of being calculated to a certainty. (Polster, Inc. v. Swing (1985) 164 Cal.App.3d 427, 434.) "[O]ne purpose of [Civil Code] section 3287(a), and of prejudgment interest in general, is to provide just compensation to the injured party for loss of use of the award during the prejudgment period- in other words, to make the plaintiff whole as of the date of the injury." (Lakin v. Watkins Associated Industries (1993) 6 Cal.4th 644, 663.)

When damages are certain, prejudgment interest is recoverable as a matter of right under Civil Code section 3287(a). (National Farm Workers Service Center, Inc. v. M. Caratan, Inc. (1983) 146 Cal.App.3d 796, 809.) Damages are certain where the parties' dispute concerns issues related to liability rather than the amount due. (Clark Equipment Co. v. Mastelotto, Inc. (1978) 87 Cal.App.3d 88, 98.)

Prejudgment interest is not authorized under Civil Code section 3287(a) when the amount of damage awarded depends upon a judicial determination of conflicting evidence. (Superior Motels, Inc. v. Rinn Motor Hotels, Inc. (1987) 195 Cal.App.3d 1032, 1072-1073.) However, questions as to how damages are to be calculated will not render damages uncertain within the meaning of this section where the defendant has sufficient information to enable calculation. (Republic Indemnity Co. v. Maier Brewing Co. (1967) 249 Cal.App.2d 495, 500; Bott v. American Hydro 5th Cir. (1972) 458 F.2d 229.)

The Court finds that class members are entitled to prejudgment interest, calculated at 10 percent, on the jury's breach of contract award under Civil Code section 3287(a). Prejudgment interest is appropriate because damages are calculable and certain. GMAC had in its possession, at all times, customer account data enabling the computation of contract damages. Further, although GMAC challenged the accuracy of plaintiffs damage calculations, it did not present to the jury any alternative damage figures or alternative methods for calculating damages. In the damage phase of trial, the main issues raised by GMAC concerned questions of liability and whether damages in fact occurred.

Based on the evidence, the Court finds that the breach of contract occurred on the date that customers received the incorrect refund credit of the unearned CPI premium to their account. As such, customers are entitled to prejudgment interest of $419,405.

The Court finds that prejudgment interest for class members is adequate based on the prejudgment interest amount awarded on the legal cause of action. As the amount of monetary relief to which non-class members are entitled is uncertain, and given the Court's decision to provide equitable relief through a correction of records and crediting of accounts process, the Court, in the exercise of its discretion, denies the request for prejudgment interest on the equitable relief award.

XI. Equitable relief must be administered in a manner which avoids double recovery.

In the breach of contract cause of action, the jury awarded class members $1,863,187 after finding that GMAC committed a breach of contract by using the Rule of 78s to refund midterm CPI cancellations. The Court's ruling with respect to GMAC's refund practices is based on the same or similar practices upon which the jury found liability. Any equitable recovery obtained by those class members who are entitled to breach of contract damages will be tailored to avoid double recovery. The procedure for avoiding double recovery in the course of the correction and crediting of accounts process will be contained in the Court's order for a reference.

XII. THE COURT, ON ITS OWN MOTION, WILL DIRECT A REFERENCE TO OVERSEE THE CORRECTION OF ACCOUNTS PROCESS.

California Code of Civil Procedure section 638 et seq. provides the procedural framework through which the Court may order a reference. A reference may be had "upon the agreement of the parties" under Code of Civil Procedure section 638. In the event that one or both parties do not consent to a reference, the court, on the application of any party or on its own motion, may direct a compulsory reference. (Code of Civil Procedure §639.)

Code of Civil Procedure section 639(a), permits the appointment of a referee when the examination of a long account is required in order to resolve issues of fact. Under Code of Civil Procedure section 639(b), the Court may appoint a referee in order to carry a judgment or order into effect.

In addition, Business and Professions Code section 17203 enables the Court to enter orders necessary to provide relief against unfair business practices. (Ante, p. 48.)

It is the Court's intention to order a limited reference under sections 639(a) and (b) of the Code of Civil Procedure and Business and Professions Code section 17203, for the limited purposes of completing an accounting and enforcing the Court's order that GMAC correct its customer accounts. The Court finds that a further examination of customer accounts is needed in order to identify additional customers entitled to equitable relief and to determine the appropriate amounts to be credited under this judgment. In addition, a reference is necessary in order to handle the administrative and other ministerial tasks necessary for the complete enforcement of the Court's judgment.

As a general matter, the referee will be charged with overseeing the correction and crediting process. He or she will ensure that the correction of accounts process occurs in a manner which is consistent with the factual findings, legal determinations, and declarations of this Court. The referee shall also be vested with the authority to resolve disputes arising in the course of the correction process. Reports and determinations made by the referee will be subject to final review by this Court. The specific powers, duties, and responsibilities of the appointed referee shall be set forth in the order directing a reference.

As it is GMAC's responsibility under the Court's judgment to correct its records and credit customer accounts, it will bear the costs incurred by this procedure. In addition, GMAC will pay the referee fees and costs incurred in the enforcement of the Court's judgment. As was clearly evident from GMAC's previous examination of its customer CPI accounts, these numerous accounts are kept in such a way that makes manipulating customer account data complex and difficult. After considering the respective equities of the case, the Court finds that GMAC should incur the costs of ensuring that their customers are restored to their rightful position.

For purposes of referee fees and costs, plaintiffs are the prevailing party. Referee fees and costs will be determined by the Court at a later date and shall be based upon considerations regarding the nature and degree of difficulty involved with respect to the referee's tasks of carrying out the Court's order. Referee fees and costs will also be based upon the referee's skill and experience level. The Court will entertain the issue of attorneys' fees and costs upon noticed motion by the parties.

XIII. INJUNCTIVE RELIEF

Plaintiffs seek to enjoin GMAC from continuing its practice of calculating refunds under the Rule of 78s and from purchasing multi-year policies. They claim that an injunction is necessary as GMAC has shown no inclination to discontinue either practice. They contend that these practices are unlawful given the Court's ruling on liability. Additionally, they claim that GMAC's use of the Rule of 78s is illegal under California law because there is no express statutory authorization for its use in this context.

GMAC argues that injunctive relief is improper because it would intrude into matters intimately connected with insurance premiums and rate setting. GMAC contends that matters concerning CPI premiums and rate setting are appropriate for review by the legislature or agencies charged with regulating and enforcing such issues. According to GMAC, legislative or administrative review of these practices is required as injunctive relief would constitute judicial regulation of CPI prices. GMAC asserts enjoining these practices would unfairly constrict its business flexibility and place its program at a competitive disadvantage with other CPI providers.

GMAC claims that issues relating to CPI premiums and rate setting are involved, and that plaintiffs must therefore exhaust their administrative remedies. Additionally, GMAC reasserts the primary jurisdiction doctrine in arguing against injunctive relief.

GMAC also contends that the injunctions requested by plaintiffs are over-broad in scope in that they go beyond the violations found by the Court. According to GMAC, injunctive relief relating to its use of the rule of 78s should solely address the disclosure problems found by the Court. With respect to its purchase of multi-year policies, GMAC requests that any injunctive relief granted be tailored so as to solely address issues related to the imposition of additional finance charges resulting from that practice.

A. Injunctive Relief from GMAC's Unfair Business Practices is Proper Under Section 17203.

Business and Professions Code section 17203 provides in pertinent part, "[a]ny person performing or proposing to perform an act of unfair competition ... may be enjoined..." An injunction may thus be granted under section 17203 when there is a showing of threatened future harm or that section 17203 violations will continue. (People v. Toomey (1984) 157 Cal.App.3d 1, 20.)

A court is not limited under Business and Professions Code section 17203 to simply granting prohibitory injunctions and may make "such order or judgments ... as may be necessary to prevent the use or employment ... of any practice which constitutes unfair competition". For instance, orders may be made for the purposes of correcting misperceptions created by deceptive practices and deterring future section 17200 violations. (Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy supra, at p. 975.)

However section 17203 does not permit injunctions or court orders which constitute judicial regulation of prices charged by a defendant doing business in a highly regulated industry such as banking. (California Grocers Assn. v. Bank of America (1994) 22 Cal.App.4th 205.)

In California Grocers, the trial court found that a bank violated Business and Professions Code section 17200 and issued an injunction requiring it to lower its fees to a certain amount for at least 10 years. The Court of Appeals reversed, finding that the injunction constituted judicial review of one service fee charged by one bank and that this was an inappropriate method of regulating such fees. The appellate court found that the price controls resulting from the injunction had economic policy implications which were more appropriate for the legislature or regulation by the proper administrative agency.

After considering the contentions of both parties, the Court denies plaintiffs request to enjoin GMAC's use of the Rule of 78s in calculating unearned CPI premiums. A determination of whether using the Rule of 78s to calculate refunds of unearned CPI premiums should be enjoined because it is unfair or otherwise improper requires a comprehensive assessment of issues pertaining to CPI rate setting. In consideration of the doctrine of primary jurisdiction, the

Court finds that this issue should first be addressed by the California Insurance Commissioner through the administrative complaint process given the expertise and fact-finding power of the Department of Insurance. (Ins. Code, §§ 1858 et seq.)

Further, the Court does not find the practice of calculating unearned CPI refunds under the Rule of 78s to be an unfair business practice within the meaning of section 17200 or otherwise illegal under California law. Although there is no express statutory authority for using this method to compute CPI refunds, the Court does not find such authority to be required. (Ante, p. 27-28.)

The Court, however, finds that plaintiffs' are entitled to narrowly tailored injunctive relief for purposes of protecting CPI customers from the harms that have been identified. Although use of the Rule of 78s for computing unearned CPI premiums is a permissible practice, GMAC's certificate of insurance is misleading as it creates the perception that refunds will be calculated on a pro rata by time basis. As such, it is inappropriate for CPI premiums to be earned unevenly through the policy term. With respect to the purchase of multi-year CPI policies, the Court has found that the additional finance charges on the CPI portion which extends beyond one year was harmful to customers. There is no evidence that GMAC has discontinued these practice or altered them in such a way so as to avoid inflicting the harms identified by the Court.

As set forth below, the Court, in the exercise of its discretion, enjoins GMAC from indicating to customers that it will provide refunds according to "the customary pro rata tables" and subsequently calculating refunds under the Rule of 78s. GMAC is further enjoined from imposing finance charges on CPI policy for coverage periods extending beyond one year.

B. Injunctive Order

1. <u>GMAC is Prohibited from Charging its Customers for CPI Finance Charges Beyond One Year Segments.</u>

In order to halt the occurrence of unfair business practices in violation of Business and Professions Code section 17200, GMAC is hereby enjoined under Business and Professions Code section 17203 from charging customers for finance charges on that portion of CPI which provides coverage beyond one year. Although GMAC is not prohibited from purchasing multi-year CPI policies, it may not impose finance charges under Civil Code section 2982.8(e) for CPI premiums that reflect CPI charges extending beyond one year. Should GMAC purchase multi-year CPI policies, it may only impose finance charges in one year increments of earned CPI premium and must wait until the expiration of the CPI term on which finance charges are being assessed before charging interest on CPI for the next one year CPI period.

GMAC is also enjoined from collecting the additional finance charges accruing as a result of multi-year placements on its 55-1 customer accounts.

2. <u>GMAC is Enjoined From Computing Earned Premiums According to the Rule of 78s When it has Represented Computation by a "Pro Rata" Basis.</u>

GMAC is hereby enjoined from calculating CPI refunds by using an accelerated method for computing earned CPI premiums that is similar to the method known as the rule of 78s for those customers who have received CPI certificates which state that earned premiums would be computed according to the "customary pro rata tables" or similar language. GMAC must follow through with the representations made to customers regarding the computation of refunds and may not cure this defect by providing its existing customers that have been force-placed with a new certificate that indicates earned premiums will be computed under an accelerated method.

As to future CPI placements, GMAC is enjoined from providing customers with CPI certificates which uses language referencing pro rata or customary pro rata tables with respect to refunds if it intends to calculate CPI refunds for those customers under the Rule of 78s or similar method.

XIV. DECLARATORY RELIEF

In granting the equitable relief discussed above, the Court further exercises its discretion and grants declaratory relief to resolve the rights and liabilities of the parties with respect to GMAC's business practices of employing the Rule of 78's to compute refunds of unearned CPI premiums and imposing finance charges on multi-year CPI policies.

GMAC, as the holder of the conditional sale contract, is entitled to procure collateral protection insurance (CPI) when the customer fails to maintain insurance on the car. (Civil Code, § 2982.8.) Under its existing business practice, GMAC exclusively procures multi-year term CPI policies from MIC, a subsidiary that is wholly owned by GMAC.

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GMAC's business practice of purchasing CPI which includes Day One coverage is not unfair, illegal, or deceptive within the meaning of section 17200 of the Business and Professions Code.

GMAC's business practice of purchasing single interest CPI with a zero deductible or dual interest CPI with a $200 deductible is not unfair, illegal or deceptive within the meaning of section 17200 of the Business and Professions Code.

The practice of purchasing CPI for which premiums are determined based upon the customer's outstanding loan balance is not made unfair, illegal or deceptive under section 17200 of the Business and Professions Code, even when claims are paid based upon the lesser of outstanding loan balance, actual cash value, or cost of repair.

Rebate of Unearned Premium after Cancellation

After a customer is force-placed with multi-year term insurance, GMAC provides the customer with certificate of insurance that indicates that earned premiums will be computed according to the customary "pro rata" tables. The customer may, at any time, cancel the CPI by procuring his or her own insurance.

When multi-year CPI is canceled by the customer, GMAC is entitled to the earned premiums and the customer is entitled to a rebate of the unearned premium.

The practice of calculating refunds of unearned CPI premiums under the Rule of 78s is not an unfair business practice within the meaning of section 17200 of the Business and Professions Code. The lack of express statutory authority for refunding

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unearned CPI premiums under the Rule of 78s does not make it illegal under California law.

Where it has been disclosed in writing to the customer, as here, that the earned premiums will be computed according to the customary "pro rata" tables, the customer has every expectation that a rebate of the unearned premium will be computed on a pro rata by time basis. The tables themselves, which do not accompany the CPI certificate of insurance, cause confusion and do not adequately inform the customer that earned premiums will be computed under the Rule of 78's method.

GMAC's existing practice of rebating unearned CPI premiums which is computed by a method commonly referred to as the Rule of 78's, is a deceptive business practice in violation of section 17200 of the Business and Professions Code when this method of computing the rebate has been misdisclosed to customer.

GMAC's unfair business practice of computing unearned CPI premiums under the Rule of 78's has caused harm to customers because customers would have received a larger rebate if the rebate had been computed on a pro rata by time basis. As it is GMAC's practice to calculate refunds of unearned CPI for customers who have been "force placed" with annual CPI policies on a pro rata basis, these customers are not harmed by GMAC's refund practices.

Customers who have canceled CPI polices which contain the reference to the customary "pro rata' table are entitled to a maximum rebate of the unearned premium that is computed on a pro rata by time basis.

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GMAC shall credit such customer's existing account with the correct rebate of unearned premium that is computed on a pro rata by time basis. The credit that shall be applied to the existing account is the difference between the rebate of unearned CPI premium computed under the Rule of 78's method and the pro rata by time method. If the customer's account has been closed for the reason of full payment under the conditional sale contract, GMAC shall credit the customer in the form of monetary relief.

Finance Charges on Multi-year CPI Premiums

After a multi-year CPI policy is "force placed" on the customer, it is at the election of GMAC to prepay the entire premium costs for the multi-year insurance policy to MIC, its wholly owned subsidiary. It is then GMAC's existing business practice to impose the maximum finance charge under the conditional sale contract for the entire premium amount regardless of whether the premium has in fact been actually earned. Evidence at trial showed that MIC has available CPI with a term of one year which would have permitted GMAC to purchase annual CPI for each subsequent year on the car loan.

GMAC's business need to prepay and procure multi-year CPI is not in keeping with the statistical data produced by GMAC that showed that 78 percent of those customers "force placed" with CPI only needed insurance coverage for less than a year before canceling.

GMAC's existing practice of prepaying a multi-year insurance policy and imposing finance charges on the entire amount is an unfair business practice in violation of section 17200 of the Business and Professions Code. This unfair business practice is harmful and injurious to customers because of the unnecessary increase in finance charges on CPI premiums that have not been earned and in light of the evidence that a large number of customers only need insurance coverage for less than a year before canceling.

Although customers are obligated to pay finance charges for amounts advanced for insurance under subdivision (e) of section 2982.8 of the Civil Code, GMAC is not entitled to impose finance charges for the entire premium amount when it elects to purchase and prepay premiums on a multi-year policy when annual CPI polices are available through MIC. Under the facts in this case, GMAC is entitled, at most, to impose finance charges on the insurance premium that is earned on an annual policy that is computed on a pro rata by time basis.

Customers who have paid finance charges for “force-placed” multi-year CPI premiums, that have not been earned, have overpaid such finance charges to GMAC. Customers are entitled to a refund of such overpayment by way of a credit to their existing account or by way of monetary relief if the account has been closed for the reason of full payment under the conditional sale contract.

With the exception of those who have had their accounts transferred to account 55-1 and have had their CPI finance charges permanently reversed, customers whose account are delinquent are entitled to receive a credit to their account for excessive finance charges imposed for CPI premiums that have not been earned on an annual basis.

CPI customers who have been "force placed" with CPI for terms of one year or less were not assessed additional CPI finance charges and therefore have not been harmed by GMAC's practice of purchasing multi-year policies.

Restitution

GMAC customers are entitled to be restored of both excess CPI and finance charge paid between February 1, 1989 and December 31, 1995 under Business and Professions Code section 17203.

GMAC will be unjustly enriched if it is allowed to retain the benefits of the unearned CPI premiums and excess finance charges paid between February 1, 1989 and August 31, 1995 as the result of its unfair business practices.

In satisfaction of both plaintiffs' Business and Professions Code section 17200 and unjust enrichment claims, customers are entitled to restitution for these amounts either by way of a credit on each customer's individual account or by way of monetary relief if the account has been closed for the reason of full payment under the conditional sale contract.

To insure that a proper credit is applied to the correct account for all customers affected by the Court's ruling and judgment in this case, an accounting is ordered.

GMAC is entitled to individual offsets for delinquent amounts owed by its customers, both under the automobile contract and for CPI charges.

Class members who are entitled to breach of contract damages based upon overpayments of CPI premiums as a result of GMAC's use of the Rule of 78s in calculating refunds may not receive a double recovery. As such, any equitable relief obtained by these class members must be tailored so as to avoid double recovery.

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A reference will be ordered under California Code of Civil Procedure section 639 (a) and (b), as well as Business and Professions Code section 17203, for the purpose of enforcing this Court's order compelling GMAC to correct and credit customer accounts.

Pursuant to California Rules of Court, Rule 232, this amended tentative decision will be deemed the Court's statement of decision unless, within 10 days, either party specifies controverted issues or makes proposals not covered herein.

DATED: APR 26 1996

JAMES L. LONG

JUDGE OF THE SUPERIOR COURT