No. B251625

COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

Afsheen Alborzian and Fabiola Alborzian

***Plaintiffs and Appellants*,**

vs.

JPMorgan Chase Bank, N.A. and Professional Recovery Services, Inc.,

***Defendants and Respondents*.**

APPEAL FROM THE ORDER OF THE SUPERIOR COURT OF THE COUNTY OF LOS ANGELES
HONORABLE ELIHU M. BERLE, PRESIDING
CASE NO. BC482047

AMICUS CURIAE BRIEF OF HOUSING AND ECONOMIC RIGHTS ADVOCATES AND PUBLIC COUNSEL IN SUPPORT OF PLAINTIFFS/APPELLANTS

ARTHUR D. LEVY (SBN: 95659)
445 Bush Street, Sixth Floor
San Francisco, California 94108
Telephone: (415) 702-4550
Facsimile: (415) 814-4080

HOUSING AND ECONOMIC RIGHTS ADVOCATES
ELIZABETH S. LETCHER (SBN: 172986)
NOAH ZINNER (SBN: 247581)
PO Box 29435
Oakland, California 94604
Telephone: (510) 271-8443
Facsimile: (510) 868-4251

Counsel for Amici Curiae

Table of Contents

INTRODUCTION 1

DISCUSSION 6

1. **The Courts Have Consistently Interpreted Section 580b as Rendering Purchase Money Mortgages Non-Recourse From Loan Inception: the Lender Must Look Solely to the Security to Compel Repayment of the Loan.** 6

2. **State and Federal Fair Debt Collection Statutes Prohibit Chase from Using Unfair or Deceptive Means to Collect Purchase Money Mortgage Deficiencies.** 10

3. **Chase's "Window of Opportunity" Letter Used Deceptive and Misleading Means to Collect Purchase Money Mortgage Deficiencies Barred by Section 580b.** 13

4. **Appellants Have Standing on their Rosenthal Act Cause of Action.** 22

CONCLUSION 26

CERTIFICATE OF WORD COUNT 28

TABLE OF AUTHORITIES

Cases **Page(s)**

Baker v. G. C. Services Corp.,
(9th Cir. 1982) 677 F.2d 775 .... 21, 23

Bargioni v. Hill,
(1963) 59 Cal. 2d 121 1

Brown v. Jensen,
(1953) 41 Cal. 2d 193 .... passim

Camacho v. Bridgeport Fin., Inc.,
(9th Cir. 2008) 523 F.3d 973 11

Clark v. Capital Credit & Collection Servs.,
(9th Cir. 2006) 460 F.3d 1162 12

Cornelison v. Kornbluth,
(1975) 15 Cal.3d 590 .... 1, 6

DeBerard Properties v. Lim,
(1999) 20 Cal. 4th 659 .... 2, 8

Dreyfuss v. Union Bank of California,
(2000) 24 Cal. 4th 400 9

Duffy v. Landberg,
(8th Cir. 2000) 215 F.3d 871 12

Evon v. Law Offices of Sydney Mickell,
(9th Cir. 2012) 688 F.3d 1015 23

Evory v. RJM Acquisitions Funding L.L.C.,
(7th Cir. 2007) 505 F.3d 769 .... 19, 20

Gonzales v. Arrow Financial Services, LLC,
(9th Cir. 2011) 660 F.3d 1055 .... passim

Cases (Continued) **Page(s)**

McCollough v. Johnson, Rodenburg & Lauinger, LLC,
(9th Cir. 2011) 637 F. 3d 939 11

Palm v. Schilling,
(1988) 199 Cal.App.3d 63 8

Roseleaf Corp. v. Chierighino,
(1963) 59 Cal.2d 35 .... 1, 2

Spangler v. Memel,
(1972) 7 Cal. 3d 603 .... 7, 8

Swanson v. S. Or. Credit Serv., Inc.,
(9th Cir. 1988) 869 F.2d 1222 15

California Statutes

Civil Code, § 1788 .... passim

Civil Code, § 1788.17 .... 9, 11, 23

Code of Civil Procedure section 580b .... passim

Code of Civil Procedure section 580d 10

Federal Statutes

15 U.S.C. § 1692 .... passim

15 U.S.C. § 1692(e) .... passim

15 U.S.C. § 1692(l) 11

15 U.S.C. § 1692e(10) 11, 13, 14, 19

15 U.S.C. § 1692e(2) 11, 17

15 U.S.C. § 1692e(5) 11, 19, 20

15 U.S.C. § 1692k 23

INTRODUCTION

During the Great Depression, the California Legislature resolved to protect home buyers against all personal liability on purchase money mortgages. By enacting Code of Civil Procedure section 580b in 1933,[1] the Legislature laid down the rule that purchase money mortgages covered by the statute are non-recourse — lenders must make purchase money loans knowing they can look solely to the security in case of default and cannot pursue the borrower personally if, as during the Depression and the recent foreclosure crisis, the property value declines to less than the loan balance.

The Depression-era Legislature's purposes in enacting section 580b were two-fold.[2] First, the Legislature intended to protect the real estate

---

[1] Stats. 1933, c. 642, p. 1673, § 5.

[2] The Supreme Court explained the legislative rationale of section 580b as early as 1963:

> [Section 580b] compels a purchase money mortgagee to assume the risk that the security is inadequate. The purposes are to discourage land sales that are unsound because the land is overvalued and, in the event of a depression in land values, to prevent the aggravation of the downturn that would result if defaulting purchasers lost the land and were burdened with personal liability. *These purposes are served by relieving the purchaser of personal liability to any person who finances the purchase and takes as security a trust deed or mortgage on the property purchased, provided the financier intended the loan to be used to pay all or part of the purchase price.*

market systemically against spiraling property overvaluation that leads to housing bubbles. By placing the risk of overvaluations on lenders, section 580b "stabilizes purchase money secured land sales by keeping the vendor from overvaluing the property and by suggesting to the purchaser its true value." *DeBerard Properties v. Lim* (1999) 20 Cal. 4th 659, 663-664. "Precarious land promotion schemes are discouraged, for the security value of the land gives purchasers a clue as to its true market value." *Id.*, quoting *Roseleaf Corp. v. Chierighino*, 59 Cal. 2d at 42.

Second, the Legislature intended to stabilize the real estate market during economic downturns (such as the Legislature witnessed during the Depression) by relieving borrowers from large mortgage deficiency liabilities and giving them a fresh start: "Second, [section 580b] is a macroeconomic stabilization measure: if property values drop and the land is foreclosed upon, the purchaser's loss is limited to the land that he or she used as security in the transaction, purchasers as a class are harmed less than they might otherwise be during a time of economic decline, and the economy benefits." *DeBerard*, 20 Cal. 4th at 663, quoting *Roseleaf*, 59 Cal. 2d at 42.

Bargioni v. Hill (1963) 59 Cal. 2d 121, 123, citations omitted, emphasis added; *see also Roseleaf Corp. v. Chierighino* (1963) 59 Cal. 2d 35, 42; *Cornelison v. Kornbluth* (1975) 15 Cal. 3d 590, 603.

Purchase money anti-deficiency protection expresses State public policy, and is unwaivable. *DeBerard*, 20 Cal. 4th at 663-64.

Notwithstanding the 80-year pedigree of section 580b, during the recent foreclosure crisis lenders and their debt collectors have attempted to collect purchase money mortgage deficiency balances from unwitting borrowers. Deficiency collection practices have triggered several lawsuits under the fair debt collection laws and the credit reporting statutes.[3]

In amending section 580b in 2013, the Legislature confirmed the existence of these practices, and condemned them. The Senate Floor Report on S.B. 426 reported:

> The author [of the bill] contends that some lenders are attempting to collect deficiencies even after foreclosure,

[3] In addition to this case, the following recent cases have raised issues under section 580b or other California anti-deficiency statutes: *Soto v. Chase Home Finance LLC*, Napa County Superior Court Case No. 26-50251 (§ 580b deficiency collections; settled); *Herrera v. LCS Financial Services Corp.*, U.S. District Court for the Northern District of California Case No. C09-02843 TEH (§ 580b deficiency collections; settled); *Banks v. JPMorgan Chase Bank, N.A.*, Alameda Superior Court Case No. RG12614875 (§ 580b deficiency collections; pending); *Rex v. Chase Home Finance LLC*, U.S. District Court for the Central District of California (Southern Division) Case No. SACV12-609 DOC (§ 580b deficiency collections on short sales; pending); *Kuns v. Ocwen Loan Servicing, LLC*, U.S. Court of Appeals for the Ninth Circuit, Case No. 13-55562 (post-foreclosure credit reporting; appeal pending); *Coker v. JP Morgan Chase Bank*, California Supreme Court Case No. S213137 (post-short sale deficiency collections; review pending before the California Supreme Court).

notwithstanding the fact that the purpose of the anti-deficiency statutes is to relieve the borrower who has been foreclosed upon from any remaining debt. It is unclear whether these lenders are doing this fraudulently (i.e., knowing that they have no right to collect and hoping to take advantage of the borrower's lack of knowledge) or if these lenders genuinely believe that their loans are not covered by the anti-deficiency statutes. Alternatively, it may be that some creditors believe that the anti-deficiency statute simply means that the creditor is unable to obtain a judgment from the court, but it does not mean that the underlying debt is extinguished. *This bill seeks to clarify that where a statute prohibits a deficiency judgment, the underlying debt is effectively extinguished and, as such, is no longer owed and cannot be collected. Arguably, existing law and basic logic already presume this – if the court cannot award a deficiency judgment, there is no longer any debt that can be collected. But some lenders have allegedly been exploiting a formalistic distinction between failure to obtain a judgment, on the one hand, and the existence of an underlying debt, on the other, in*

> *order to convince borrowers that they still owe the deficiency. Even if the failure to obtain a deficiency judgment does not theoretically extinguish the debt, the debt is practically extinguished if the creditor has no power to collect it.*

Appellants' Request for Judicial Notice Ex. 1, at p. 3, emphasis added.

When the Legislature placed the risk of property overvaluation squarely on lenders as a counterweight against runaway real estate values, and when it exonerated borrowers from large deficiency liabilities to give them a fresh start, it did not intend to allow lenders to use deceptive debt collection techniques to make good on the very loan losses section 580b placed on the lenders themselves. The debt collection practices appellants challenge here threaten the Depression-era Legislature's purposes in enacting section 580b — purposes the Legislature has consistently protected and expanded with each successive amendment of the statute, and which the California courts have vigilantly protected for over 60 years.

Respondents' arguments threaten to roll back section 580b jurisprudence to a state that has not existed since at least before the Supreme Court decided *Brown v. Jensen* (1953) 41 Cal. 2d 193, sixty-one years ago. Because of the historic and ongoing prominence of California anti-deficiency protection in California's real property security law, amici

submit this brief to provide the Court deeper context for its consideration of the issues in this case.

DISCUSSION

1. The Courts Have Consistently Interpreted Section 580b as Rendering Purchase Money Mortgages Non-Recourse From Loan Inception: the Lender Must Look Solely to the Security to Compel Repayment of the Loan.

Since its enactment in 1933, section 580b has eliminated all personal liability on purchase money mortgages within its scope. The statute bars a "deficiency judgment." A "deficiency judgment" refers to a personal judgment against the borrower for the loan balance remaining over and above the fair value of the security. *Cornelison v. Kornbluth,* 15 Cal. 3d at 603 (emphasis added). By barring liability for a personal judgment, section 580b extinguishes the borrower's personal liability on a purchase money loan; the Legislature eliminated any basis for a lender's cause of action to collect a deficiency. That has been true since 1933; nothing in later amendments, including the one in 2013, has ever altered that principle.

There is no dispute in the parties' briefs that section 580b renders purchase money loans non-recourse as to the borrower, and there can be none. If there ever was any question about the borrower's personal liability for a loan covered by section 580b, *Brown v. Jensen* laid it to rest in 1953, and the courts since then have rebuffed all attempts to defeat this principle,

or circumvent it.

In *Brown*, the Court was presented with the case of a "sold out junior" who was pursuing a personal judgment against the borrower on a purchase money mortgage covered by section 580b. The lender had lost its security when the senior lender had foreclosed, rendering the security for the second loan valueless. The junior lender argued that section 580b was no bar to a personal judgment against the borrower because there had been no foreclosure sale "under" the second. *Brown*, 41 Cal. 2d at 196.

The Court rejected the argument: a purchase money lender must "look solely to the security" — that is, a purchase money loan is non-recourse:

> The question is, therefore, did plaintiff take a purchase money trust deed on the property when it was purchased? If she did, then section 580b is applicable and *she may look only to the security. That is the clear import of the wording of section 580b. The one taking such a trust deed knows the value of his security and assumes the risk that it may become inadequate.*

Id. at 197, emphasis added.

Over the ensuing 60 years since then, the Supreme Court has

consistently defended *Brown* against attack and intrusion. In *Spangler v. Memel* (1972) 7 Cal. 3d 603, the Court rejected an invitation to overrule or limit *Brown*, and instead emphatically reaffirmed *Brown's* non-recourse principle:

> The section [580b] states that *in no event* shall there be a deficiency judgment, that is, whether there is a sale under the power of sale or sale under foreclosure, or no sale because the security has become valueless or is exhausted. (*Brown v. Jensen*, *supra*, 41 Cal. 2d at 198; original italics.)

Id. at 609.

After another 25 years passed, the Supreme Court was invited to rule in 1998 that a borrower could waive statutory non-recourse protection, at least in a post-mortgage transaction, such as a loan modification. In *DeBerard Properties v. Lim,* 20 Cal. 4th at 659, the Court emphatically rejected the waiver argument. *Id*. at 663 ("To allow a purchase money creditor to circumvent the absolute rule by enforcing a ... waiver of section 580b in exchange for other concessions would [flout] the very purpose of the rule…."), quoting *Palm v. Schilling* (1988) 199 Cal.App.3d 63, 76.

DeBerard revisited 45 years of section 580b jurisprudence and reaffirmed the *Brown-Spangler* doctrine: "The one taking ... a [purchase

money] trust deed knows the value of his security and assumes the risk that it may become inadequate. Especially does he know the risk where he takes, as was done here, a second trust deed." *Id*. at 668; quoting *Brown*, 41 Cal.2d at 259.

Chase does not dispute appellants' arguments and cases that section 580b eliminates the borrower's personal liability on a purchase money mortgage entirely. *See* Chase Respondent's Brief at p. 13. Chase sidesteps the issue and cites no case holding to the contrary — there is none.

Chase instead argues that the *Brown* jurisprudence does not "prohibit[] a lender from using non-judicial communications to resolve an outstanding debt." *Id.* This is technically correct as far as it goes; the problem with the point is that Chase does not go far enough.

Appellants' debt collection cause of action against Chase is not predicated on section 580b. Their debt collection cause of action against Chase is instead based on the Rosenthal Fair Debt Collection Practices Act (the "Rosenthal Act," Civil Code §§ 1788 *et seq*.) AA 77-79. The Rosenthal Act incorporates the anti-deception provisions of the federal Fair Debt Collection Practices Act (the "FDCPA," 15 U.S.C. §§1692 *et seq.*) in state law. Civ. Code, § 1788.17. The central question for the Court is not whether Chase violated section 580b as such, but whether Chase violated

the Rosenthal Act.[4]

2. State and Federal Fair Debt Collection Statutes Prohibit Chase from Using Unfair or Deceptive Means to Collect Purchase Money Mortgage Deficiencies.

Chase's central argument is it can collect purchase money deficiency balances barred by section 580b as long as it doesn't sue for a deficiency judgment because section 580b does not "extinguish" the debt. This argument is a red herring.

Even if section 580b does not "extinguish" the debt entirely, [5] the FDCPA and the Rosenthal Act outlaw deceptive or misleading means in collecting *any debt,* including a mortgage deficiency within section 580b. Just because the deficiency is not "extinguished" does not free Chase to

---

[4] Chase argues that appellants have not made any claim against it under the FDCPA. Chase's Respondent's Brief at pp. 29-30. Accordingly, *amici* are addressing their arguments to appellants' First Cause of Action, under the Rosenthal Act. AA 77-79. Because the Rosenthal Act expressly incorporates section 1692e of the FDCPA, the discussion below applies with equal force to appellants' UCL claim to the extent predicated on section 1692e. AA 78 (¶ 38); 80 (¶ 46); 84 (¶ 65).

[5] As explained, *Brown* and its progeny have consistently interpreted section 580b as barring recourse against the borrower and limiting it solely to the security. However, the statute does not "extinguish" the debt for limited purposes of collecting from other security held for the debt, or from *bona fide* third party guarantors. *E.g.*, *Dreyfuss v. Union Bank of California* (2000) 24 Cal. 4th 400, 408. The 2013 amendment of section 580b did not change this rule. The bill added new subsection (c) to section 580d to make clear that the new legislation did not affect the liability of other collateral and guarantors for the debt. Stats. 2013, c. 65 (S.B. 426), § 2.

engage in deceptive or misleading collection practices, any more than in the case of any other kind of debt.

Instead, the key issue is whether Chase's collection letter violated the Rosenthal Act and the provisions of the FDCPA that the Legislature incorporated by reference in the Rosenthal Act. As will be shown, the federal and California fair debt collection laws are broadly interpreted to protect unwitting borrowers against the collection tactics Chase employed here.

The Fair Debt Collection Practices Act was enacted in 1977 as a broad remedial statute designed to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). The FDCPA broadly prohibits "any false representation or deceptive means to collect or attempt to collect any debt." 15 U.S.C. §§ 1692e.

The FDCPA is a strict liability statute and does not require proof of intentional violation. *McCollough v. Johnson, Rodenburg & Lauinger, LLC* (9th Cir. 2011) 637 F. 3d 939, 948. Although the Federal Trade Commission is empowered to enforce the FDCPA, 15 U.S.C. § 1692l,

Congress encouraged private enforcement by permitting aggrieved individuals to bring suit as private attorneys general. *Camacho v. Bridgeport Fin., Inc.* (9th Cir. 2008) 523 F.3d 973, 978.

In the same year as Congress enacted the FDCPA (1977), the California Legislature enacted the Rosenthal Act to provide borrowers state law protection and remedies against debt collection abuse. Stats. 1977, c. 907, p. 2771, § 1. The Rosenthal Action incorporates certain provisions of the FDCPA, and makes them independently actionable as a matter of state law. Civ. Code, § 1788.17.

The provisions incorporated by section 1788.17 include section 1692e of the FDCPA. Section 1692e prohibits

- "[t]he false representation of character, amount, or legal status of any debt" (15 U.S.C. § 1692e(2));
- "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer" (§ 1692e(10)); and
- the "threat to take any action that cannot legally be taken or that is not intended to be taken" (15 U.S.C. § 1692e(5)).

A violation of any of these subsections of section 1692e of the federal act is a violation of the Rosenthal Act.

The FDCPA applies the objective "least sophisticated debtor" standard of liability under section 1692e — "an objective analysis that takes into account whether the 'least sophisticated debtor would likely be misled by a communication." *Gonzales v. Arrow Financial Services, LLC* (9th Cir. 2011) 660 F.3d 1055, 1061. Mirroring the overarching purposes of the fair debt collection statutes themselves, this lenient standard is "'designed to protect consumers of below average sophistication or intelligence,' or those who are 'uninformed or naive,' particularly when those individuals are targeted by debt collectors." *Id.* at 1062, quoting *Duffy v. Landberg* (8th Cir. 2000) 215 F.3d 871, 874-75. The Court should read Chase's letter as it would be read by "the gullible as well as the shrewd ... the ignorant, the unthinking and the credulous." *Clark v. Capital Credit & Collection Servs.* (9th Cir. 2006) 460 F.3d 1162, 1171, internal citation omitted.

3. Chase's "Window of Opportunity" Letter Used Deceptive and Misleading Means to Collect Purchase Money Mortgage Deficiencies Barred by Section 580b.

In their Third Amended Complaint, appellants expressly allege that Chase's "window of opportunity" collection letter violated the Rosenthal Act. AA 78 (¶ 39); 89-90. They allege, in substance, violations of section 1692e. AA 78 (¶ 38).

Section 1692e(10) generally outlaws any "any false, deceptive, or misleading representation or means." A statement in a letter that is literally true may nevertheless be deceptive and violate section 1692e. *Gonzales*, 600 F.3d at 1062. Even if a letter can be read in an accurate and non-deceptive sense, it will still be considered inaccurate or deceptive if it can be reasonably read to have two or more different meanings, one of which is inaccurate or deceptive. *Id.* at 1061. "[C]onsumers are under no obligation to seek explanation of confusing or misleading language in debt collection letters." *Id.* at 1062.

In *Gonzales*, the parties did not dispute that the debt collector could not lawfully report the obsolete health club accounts in question to credit bureaus (just as there is no question here that section 580b bars personal liability). *Id.* at 1062. The collector nevertheless sent plaintiff a collection letter stating "*if we are reporting the account [to credit bureaus]*, the appropriate credit bureaus will be notified that this account has been settled." *Id.*, emphasis added. The collector, Arrow, defended the FDCPA claim, arguing that "because the letters employ conditional language ("*if* we are reporting the account"), it is wholly unreasonable to infer that Arrow could or would report the account." *Id.*, emphasis in original.

Applying the least sophisticated debtor standard, the Court of

Appeals recognized that there were two possible readings of the phrase "if we are reporting the account." *Id.* at 1063. The first was that Arrow was not reporting the account at all, and would make no further report. "But the phrase also suggests that, under some set of circumstances applicable to the recipient, Arrow could and would report the account." *Id.*

The Court found this second reading deceptive because Arrow could not lawfully report the accounts at all:

> Absent any possibility that Arrow could report the accounts, there would be no reason for Arrow to assert its intention to make a positive report in the event of payment. Only the first reading is actually correct, but the second reading is far from "bizarre" or "idiosyncratic"— it is eminently reasonable. *As there is no circumstance under which Arrow could legally report an obsolete debt to a credit bureau, the implication that Arrow could make a positive report in the event of payment is misleading*.

Id. at 1063, emphasis added.

The Court declined to permit Arrow to "undermine the consumer protection goals of the statute" through a "flimsy disguise of conditional language," and found the phrase "if we are reporting the account, the

appropriate credit bureaus will be notified that this account has been settled" misleading and in violation of 15 U.S.C. § 1692e(10). *Gonzales*, 600 F.3d at 1063.

"[T]he debt collector that 'goes perilously close to an area of proscribed conduct takes the risk' that it will be liable under the FDCPA for misleading consumers." *Gonzales*, 660 F.3d at 1063, quoting *Swanson v. S. Or. Credit Serv., Inc.* (9th Cir. 1988) 869 F.2d 1222, 1228.

A parallel analysis here shows that Chase's "window of opportunity" letter likewise violated section 1692e. Just as Arrow had "no reason … to assert its intention to make a positive report in the event of payment" unless the recipients of the letter believed that Arrow had reported or would report them, so Chase had no reason to offer a time-sensitive settlement under threat of "acceleration" — unless recipients of the "window of opportunity" letter believed they had personal liability to pay Chase and that Chase could sue them for the full deficiency balance if they did not accept the "opportunity" Chase offered them.

Chase's "window of opportunity" letter states:

> We are offering a short "window of opportunity" to allow you to resolve your delinquency *before your debt is accelerated.* Currently, *you owe $67,002.24 on the above-referenced*

> *account*, but we will accept $16,750.56 as settlement for your loan balance. *In order to take advantage of this opportunity, please remit the requested amount by 6/13/2011. If we do not receive payment within the specified time frame, this offer becomes null and void.*"

AA 78, 89-90, emphasis added.

One reading of Chase's letter might be— just as Arrow claimed on the credit reporting — that Chase recognized that it had no viable legal claim for the deficiency balance and did not intend to take any action if the borrower did not accept the settlement offer in time, or at least (as Chase argues) would strictly limit action to a technical "acceleration" of the debt, that is, rendering the full loan balance due. *See* Chase's Respondent's Brief at p. 25.

But Chase's narrow, technical reading does not comply with the least sophisticated debtor standard. Even if Chase's reading were a permissible one, because there is another reading that would likely have deceived the least sophisticated debtor, the letter violates section 1692e and the Rosenthal Act.

Chase's letter can reasonably be read in a far more threatening way than Chase suggests, in a manner the letter does much to suggest and

nothing to dispel:

- The offer to "resolve a "delinquency" for a specific balance the debtor allegedly "owed" would likely leave the debtor with the false impression that he/she was legally liable to pay the deficiency in full, directly contrary to section 580b and the non-recourse principle of *Brown*;
- Chase's presentation of the offer as an "opportunity" to settle the debt at a 75% discount — a generous accommodation, a favor — before Chase took adverse action by "accelerating the debt" leaves the impression that Chase had rights and powers against the debtor, should the debtor not accept the favor within the short "window of opportunity" Chase allowed;
- "Null and void" conveys the message that the debtor will be worse off for not accepting the offer, and that Chase will pursue its remedies; and
- Chase's rights and powers included "acceleration of the debt," a term that would reasonably be understood as revoking the 75% discount and taking steps, which could

> include litigation, to hold the debtor liable for the full stated $67,002.24 deficiency balance he/she allegedly "owed."

Chase's assertion that the debtor was "delinquent" and "owed" the balance conveyed the deceptive and misleading impression that he/she was personally liable to pay the deficiency, directly contrary the non-recourse protection extended by section 580b. This alone violated section 1692e(2) by "falsely representing the character, amount, [and] legal status" of the debt. The phrases "resolve your delinquency" and "you owe $67,002.24 on the above-referenced account" strongly imply, indeed necessarily assume, that the debtor believes, or at least will now understand, that he/she is personally responsible to pay the debt. Chase's letter does nothing to dispel that false impression.

Further, Chase's threat that the debt will be "accelerated," and that the settlement opportunity will become "null and void," conveys impending adverse consequences to the debtor, including possible collection litigation. While "accelerate the debt" may have technical, financial, and legal connotations, the least sophisticated debtor is not presumed to be technically, financially, or legally sophisticated; to the contrary, the least sophisticated debtor standard presumes the debtor to be "unsophisticated,

gullible, ignorant, unthinking, and credulous."

Chase acknowledges that "the term 'accelerate' is commonly defined as '[t]o increase the speed of' or '[t]o cause to occur sooner than expected." Chase Respondent's Brief at p. 25. Taken in the context of Chase's assertion that the debtor was already "delinquent" and owed the entire balance, "accelerate" could readily be understood that by declining the offer, escalated collection measures, including possible litigation and other adverse collection consequences, would speedily befall the debtor.

In fact, section 580b rendered the loan non-recourse. Chase had no right or power to "accelerate the debt" in any meaningful way to recover the debt. Chase had no lawful means of escalating the collection process in any meaningful way, and had no intention of doing so. Chase violated section 1692e(10) by using a "false representation or deceptive means to collect or attempt to collect [the] debt," and section 1692e(5) by threatening "to take any action that cannot legally be taken or that is not intended to be taken."

"When language in a debt collection letter can reasonably be interpreted to imply that the debt collector will take action it has no intention or ability to undertake, the debt collector that fails to clarify that ambiguity does so at its peril." *Gonzales*, 600 F.3d at 1063, citing *Evory v.*

RJM Acquisitions Funding L.L.C. (7th Cir. 2007) 505 F.3d 769, 778–79.

In *Evory*, the Court upheld a 1692e claim based on a time-sensitive settlement offer like the one Chase offered here. "The concern is that unsophisticated consumers may think that if they don't pay by the deadline, they will have no further chance to settle their debt *for less than the full amount*; for the offers are in the idiom of limited-time or one-time sales offers, clearance sales, going-out-of-business sales, and other temporary discounts." *Id*. at 775, emphasis added. Debt collectors could avoid liability for imposing "false deadlines" by including clarifying language to the effect of "We are not obligated to renew this offer." *Id.* at 776.

Here, likewise, Chase could have dispelled the false impression its letter left that debtors could be held liable for the full amount of the deficiency if they did not accept the "temporary discount" by including clarifying language that the debtors were not personally liable under the anti-deficiency laws. Its failure to do so, as in *Evory*, violated section 1692e.

Chase's letter itself negates the suggestion that "accelerate" has the technical meaning "that Chase will consider the entire balance of the loan to be immediately due if the debt is not resolved." (Chase Respondent's Brief at p. 25.) The letter states that $67,002.24 was owed. This amount

already included the fully accelerated balance of the loan, not simply the installments they had failed to pay. (Chase Respondent's Brief at p. 1 ("Because the proceeds of the foreclosure sale were insufficient to pay off the amount of the second loan, Chase, the lender on that loan and junior lienholder, was still owed $67,000"[6]).

To the extent that the letter threatened acceleration of the balance, it was an idle, illegal threat because the balance had already been accelerated to the full amount of the debt. Chase's letter "threat[ened] to take any action that cannot legally be taken or that is not intended to be taken," in violation of section 1692e(5).

4. Appellants Have Standing on their Rosenthal Act Cause of Action.

Appellants' Rosenthal Act Cause of Action is distinct from their *UCL* claim and has its own standing rules. While appellants' standing under the UCL is beyond the scope of this brief, [7] UCL standing should not

---

[6] Also, "The Alborzians admit they have been in default since February 2010. *See* AA 72. And it is entirely consistent with industry lending practices that the entire loan amount will be due in the event of a default caused by nonpayment." (Chase Respondent's Brief at p. 25.) Since the collection letter was sent on May 10, 2011, the entire, accelerated amount of the loan had become due over a year earlier. AA 78, 89-90.

[7] Lest amici's silence be taken as an endorsement of Chase's position, amici agree with appellants that they have UCL standing. Legal expense incurred in response to a UCL violation is sufficient to establish standing;

be confused with standing to sue under the Rosenthal Act, which appellants clearly have.

In contrast with the UCL, the Rosenthal Act authorizes the recovery of statutory damages without any showing of actual injury. Congress authorized the recovery of statutory damages under the FDCPA to promote private enforcement of the Act even in cases where "traditional stringent evidentiary hurdles would be difficult to overcome" in proving actual damages. *Baker v. G. C. Services Corp*. (9th Cir. 1982) 677 F.2d 775, 780-81. Statutory damages are recoverable without any proof of actual damages. *Id.* Because the Rosenthal Act incorporates the federal statutory damages provision in state law, appellants have standing under their Rosenthal Act cause of action to recover statutory damages against Chase in the absence of any payment to Chase in response to the window of opportunity letter or other allegation of actual harm.

The FDCPA expressly provides for the recovery of statutory damages:

> Except as otherwise provided by this section, any debt

---

appellants need not show a right to restitution (*e.g.*, that they made a payment to Chase in response to the letter). *Kwikset v. Superior Court* (2011) 51 Cal.4th 310, 335- 37 (out-of-pocket expense sufficient to establish UCL standing; "we hold ineligibility for restitution is not a basis for denying standing under section 17204 and disapprove those cases that have concluded otherwise").

collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of

(1) any actual damage sustained by such person as a result of such failure;

(2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000 ..." (B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in

relation to the work expended and costs.

15 U.S.C. § 1692k, subd. (a), emphasis added.

The damages authorized by subdivision (2) of section 1692k, subd. (a) are commonly known as "statutory damages." *Baker*, 677 F.2d 780-81. The Rosenthal Act incorporates section 1692k in state law, including the federal provision for statutory damages. Civ. Code, § 1788.17 ("every debt collector collecting or attempting to collect a consumer debt … shall be subject to the remedies in Section 1692k").)

Recovery of statutory damages does not require any showing of actual injury or recoverable actual damages. *Baker*, 677 F.2d 780-81; *Evon v. Law Offices of Sydney Mickell* (9th Cir. 2012) 688 F.3d 1015, 1031 ("While Evon may have waived her actual damages claim, she is still able (and has) recovered statutory damages, fees and costs."); *Davis v. Hollins Law* (E.D. Cal. June 10, 2014) 2014 U.S. Dist. LEXIS 81024, *3-*6, citing *Baker* (no proof of actual damages required to support award of statutory damages under FDCPA or Rosenthal Act).

Therefore, entirely independent of UCL standing, appellants have standing under the Rosenthal Act.

CONCLUSION

This is an important case in defending the longstanding non-recourse principle that underlies section 580b. Anti-deficiency protection has fallen under attack through modern debt collection techniques. Practices like respondents' here capitalize on debtor misunderstanding and confusion to erode the historic public policy of placing the risk that home values may be insufficient to satisfy purchase money mortgages squarely on lenders. Here, respondent attempted to foist that risk back on appellants.

The Rosenthal Act and the "least sophisticated debtor" standard are perhaps the most effective deterrence against deceptive collection practices, like Chase's window of opportunity letter here. They protect a broad spectrum of debtors against collection techniques artfully crafted to induce them to pay amounts they do not owe on purchase money mortgage deficiencies in the mistaken belief that they do owe them, or at least will be pursued for them.

The decision of the Superior Court should be reversed as a signal to the lending and debt collection industries that our anti-deficiency laws are alive and well, and that our courts will continue to defend them.

DATED: November 12, 2014 /s/ Arthur D. Levy
Arthur D. Levy

HOUSING AND ECONOMIC RIGHTS ADVOCATES
Elizabeth S. Letcher
Noah Zinner

Attorneys for Amici Curiae
HOUSING AND ECONOMIC RIGHTS ADVOCATES and PUBLIC COUNSEL

CERTIFICATE OF WORD COUNT

(California Rule of Court 8.204(c)(1))

This brief, including footnotes but excluding those portions of the brief excludable under California Rule of Court 8.204(c)(3), contains 5,525 words as counted by the Microsoft Word processing program.

Dated: November 12, 2014 /s/ Arthur D. Levy
Arthur D. Levy

PROOF OF SERVICE

I, Joshua T. Le, state:

I am a citizen of the United States. My business address is 445 Bush Street, Sixth Floor, San Francisco, CA 94108. I am employed in the City and County of San Francisco where this mailing occurs. I am over the age of eighteen years and not a party to this action. On the date set forth below, I served the foregoing document described as:

AMICUS CURIAE BRIEF OF HOUSING AND ECONOMIC RIGHTS ADVOCATES AND PUBLIC COUNSEL IN SUPPORT OF PLAINTIFFS/APPELLANTS

on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

[X] **BY FIRST CLASSS MAIL** – I am readily familiar with my firm's practices for collection and processing of correspondence for mailing with the United States Postal Service, to-wit, that correspondence will be deposited this same day in the ordinary course of business. I sealed said envelope and placed it for collection and mailing this date, following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on November 12, 2014 at San Francisco, California.

/s/Joshua T. Le
Joshua T. Le

SERVICE LIST

Neil R. Anapol
LAW OFFICES OF NEIL R. ANAPOL
2550 Hollywood Way, Suite 202
Burbank, CA 91505
AnapolLaw@aol.com

Michael Lee Cohen
Heather M. McKeon
COHEN McKEON LLP
1910 West Sunset Boulevard, Suite 440
Los Angeles, CA 90026
cohen@cohenmckeon.com
mckeon@cohenmckeon.com

Attorneys for Appellants
Afsheen Alborzian and Fabiola Alborzia

Mark Ellis
Andrew Steinheimer
ELLIS LAW GROUP, LLP
740 University Avenue, Suite 100
Sacramento, CA 95825
mellis@ellislawgrp.com
asteinheimer@ellislawgrp.com\
Attorneys for Respondent
Professional Recovery Services, Inc.

Peter Obstler
Marjory Gentry
Ginamarie Caya
ARNOLD & PORTER, LLP
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111
Peter.obstler@aporter.com
Marjory.gentry@aporter.com
Ginamarie.caya@aporter.com

Attorneys for Respondent
JPMorgan Chase Bank, N.A

Office of the Clerk
Superior Court of the County of Los Angeles
Central Civil West Courthouse
600 South Commonwealth Ave.
Los Angeles, CA 90005