

**COURT OF APPEAL, STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION 5**

No. A126539

UNITED FARMERS AGENTS ASSOCIATION, INC.,

Plaintiff/Appellant,

v.

FARMERS GROUP, INC., ET AL.,

Defendants/Respondents.

REPLY BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT, COUNTY OF SAN FRANCISCO
CASE NO. CGC 07-463516

The Honorable Paul H. Alvarado, presiding
The Honorable Patrick J. Mahoney, presiding
The Honorable Charlotte Walter Woolard, presiding

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May 13, 2010

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REPLY ARGUMENT

1. THE ESSENTIAL FLAW IN FARMERS' DEMURRER: THE REAL PARTIES IN INTEREST ARE NOT BARRED

It has been clear from the outset that the real parties in interest in this declaratory judgment action are the current members of the Association who have contracts with Farmers. The Complaint states that the action is brought on their behalf, that they are currently threatened with injury, and that they would have justiciable cases and standing to bring individual declaratory judgment actions in their own right. Instead, they have chosen to bring one overall declaratory action through their Association, seeking declarations interpreting certain provisions of their contracts in order to remove uncertainty and reduce the potential for future injury and widespread, repetitive litigation.

It has also been clear from the outset that, as the real parties in interest, it is the individual members to whom we must look for any possible application of the statute of limitations governing breach of contract actions. That exercise would have no impact on the Association's declaratory action, however, unless one could show that literally every current member had accrued a cause of action for breach of contract on the same issues over four years ago. (Associations are

entitled to obtain declaratory relief on behalf of some of their members even if others will not derive a benefit.)

The record at this stage does not provide any basis for a conclusion that members of the Association are barred by the statute of limitations. There is no allegation in the Complaint and no information from any other source from which one could reason that any member of the Association (much less all of them) accrued the four elements of a cause of action for breach of contract four years before the Complaint was filed.

When Farmers launched its demurrer in the court below, it knew very well that there is nothing in the record to support an argument that the real parties in interest are barred. During the pre-demurrer phase (when Farmers was attacking the Association's derivative standing), Farmers stated repeatedly that the members of the Association were "free to present their claims in a separate action" and could "bring their own actions based on real harm." (APPX 62, ¶ 41). To get around this when it got to the demurrer phase, Farmers invented a different theory that was the reverse of the position that it is now taking in its appeal brief. It conceded that members of the Association may not be barred, but argued that the "relevant question" is not whether the members are

barred but whether the Association, itself, is barred “as an entity.” See, e.g. APPX 71, lines 14-19 (Farmers’ demurrer to the Second Amended Complaint):

As both UFAA and Defendants acknowledge, however, nothing prevents individual agents from filing actions which have not been barred by applicable statutes of limitation. The relevant question is whether UFAA, *as an entity*, is barred from pursuing an action, which, *as to that entity*, accrued far more than four years ago, and which is governed by the statute of limitations applicable to a breach of written contract.

(The first emphasis is Farmers’. The second emphasis is added.)

Throughout the remainder of the lower court proceeding and up until Farmers’ just-filed appellate brief, the issue framed by Farmers was whether the Association was barred “as an entity,” with all parties agreeing that there is no evidence barring the members. See, e.g., the Association’s opening brief (“Brief of Appellant”) at 12:

Farmers concedes that the *members* of the Association, who are the real parties in interest, are not barred by the statute but maintains that the Association is barred *as an entity*.

Now, apparently recognizing that the “entity” theory it pursued below will not work (with no contract of its own, the Association obviously could not accrue a breach of contract claim), Farmers is

reversing its position and agreeing that the relevant inquiry is not whether the Association is barred as a separate entity, but whether the individual members are barred.

Farmers is now in the correct frame of reference, focusing on the real parties in interest, but it has no factual basis to argue that even a single member (much less all of them) accrued the four elements of a cause of action for breach of contract over four years before the Complaint was filed. Farmers' new brief states (correctly) that the Association's rights are "derivative of its members rights," but nowhere in the brief does Farmers point to any allegation or other evidence that any member is barred by the statute. That would be impossible, since no such evidence exists in this record. Any attempt to bar the members would also contradict Farmers' pre-demurrer statements that members of the Association are "free to present their claims in a separate action" and can "bring their own actions based on real harm."

2. THE DETERMINATIVE FACTS

The Association brings this declaratory action "on behalf of its members who have contracts with the Farmers Group...." (APPX 26, 52.) The action arises out of attempts by Farmers "to impose improper contract interpretations on independent contractor insurance agents who

have contracts with the Farmers Group.” (APPX 27, 53.) The action “seeks declaratory relief only” (APPX 28, 54), “requesting that the rights and duties of the Farmers Group and the members under the contracts be adjudicated, i.e., that the contracts be interpreted.” (APPX 28-29, 40-41, 54-55, and 63.)

The members of the Association “are suffering threatened injury ... and would have justiciable cases had they, themselves, brought suit.” (APPX 28, 54.) They “have standing to sue in their own right.” (*Id.*)

Farmers conceded in the pre-demurrer phase that the individual members of the Association would be “free to present their claims in a separate action” and could “bring their own action based on real harm.” (APPX 62.) In the demurrer phase, Farmers again conceded that “nothing prevents individual agents from filing actions which have not been barred by applicable statutes of limitation” and stated that “[t]he relevant question is whether UFAA [the Association], *as an entity*, is barred from pursuing an action which, *as to that entity*, accrued more than four years ago...” (APPX 71. The first emphasis is Farmers’. The second emphasis is added.)

There is no allegation in the Complaint, and nothing in the record from any other source, indicating that any member of the Association

represented in this action accrued a cause of action for breach of contract at any time prior to the filing of the Complaint. (Appellant's Appendix and Respondents' Appendix, generally, and the entire record of proceedings, generally.)

3. FARMERS HAS NO EVIDENCE THAT INDIVIDUAL MEMBERS ARE BARRED

In Section C of its brief, on pages 16-19, Farmers abandons the theory it pursued below (that the Association is barred "as an entity") and finally acknowledges that the Association has no separate legal status, so that any statute of limitations analysis would have to focus on the individual members who are the real parties in interest, not the Association.

This acknowledgment is not accompanied, however, by any evidence that individual members are barred. Most of this section of the brief is devoted to restating the obvious and uncontested point that the Association's rights are entirely derivative of its members. The only attempt to identify a basis for barring the members comes on page 18, where Farmers states falsely that the Association "has expressly alleged ... that all elements of a breach of contract accrued as to those agents."

No such allegation appears in the Complaint, which seeks prospective declaratory relief only, in order to avoid threatened injury

and reduce the likelihood of repetitive, widespread litigation in the future. The Complaint says nothing about whether any of the individual members might have accrued all four elements of a cause of action for breach of contract in the past. To the contrary, the filings of both parties indicate that both Farmers and the Association know that individual members have “justiciable cases” and “standing to sue in their own right” (as the Complaint alleges) and are “free to present their claims in a separate action” (as Farmers states).

Absent any evidence that *any* individual member is barred by the four-year statute of limitations, where all would have to be barred in order to disable the Association’s derivative action, Farmers’ demurrer cannot be sustained.

**4. THE REST OF FARMERS’ ARGUMENTS
CONTAIN MISSTATEMENTS BUT ARE NOW
IRRELEVANT**

The remainder of Farmers’ brief (Sections A, B, D, E, F, G, and H) is devoted to issues (some of which are false) which would arise only in connection with the theory that Farmers has now abandoned, i.e., that the Association should be barred “as an entity” without regard to whether its individual members would be barred. Now that Farmers has

acknowledged that the *only* inquiry is whether the individual members would be barred, those arguments are irrelevant.

The Association's opening brief, which was addressing the theory that Farmers presented in the trial court but has now abandoned, deals adequately with these now-irrelevant arguments for the most part. There are several misstatements scattered through those arguments, however, two of which might be potentially relevant and should be corrected for the record.

In Section A, Farmers states that the Association "contends that the statute of limitations for contract claims is inapplicable to its causes of action, as the 2007 Complaint seeks no relief for an actual breach, but only prospective relief to govern the interpretation of the Agent Appointment Agreement." (at p. 12.)

Farmers describes the Complaint correctly, but the Association has never contended that the statute of limitations is inapplicable just because the Complaint seeks declaratory relief only. The statute is inapplicable because there is no indication that all four elements of a breach of contract action accrued more than four years ago either to the Association (under Farmers' previous theory) or to the individual members.

In Section D, Farmers states that the Association contends that the Court of Appeals' reversal of the summary judgment Farmers obtained on the associational standing issue makes the statute of limitations inapplicable. That is not true. The Association has referred to the prior decision in its papers but only to show that, in the course of that proceeding, Farmers consistently maintained that the Association has no legal rights or duties under any contract, which made Farmers' theory that the Association was barred "as an entity" impossible. (See the Association's opening brief, at 19.)

CONCLUSION

There is no evidence in this record that any of the current members of the Association who have contracts with Farmers, i.e. the real parties in interest, accrued the four elements of a breach of contract cause of action more than four years prior to the filing of the Complaint. Absent such evidence, there is no basis for a conclusion that any of the members are barred by the statute of limitations and, therefore, no basis for sustaining Farmers' demurrer.

DATED: May 13, 2010

Respectfully submitted,



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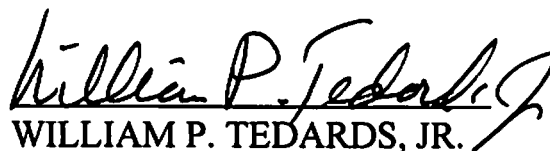
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CERTIFICATE OF COMPLIANCE

The foregoing **REPLY BRIEF OF APPELLANT**, was prepared using the following properties:

1. the typeface is proportionately spaced;
3. the type style is Times New Roman with a 14 point size;
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DATED: May 13, 2010


WILLIAM P. TEDARDS, JR.

PROOF OF SERVICE

PLEASE TAKE NOTICE THAT I am over the age of 18 and not a party to this action. I hereby certify that a copy of the **REPLY BRIEF OF APPELLANT** was served by U.S. Priority Mail, postage prepaid, this 13th day of May, 2010 to the addressees noted below:

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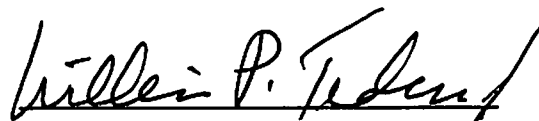
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