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Does the California Unfair Competition Law Forbid Lenders from Charging California Borrowers Banker's Interest Based on a 360-Day Year?

William McGrane [*]

This article explores whether the financial industry's use of a year of 360 days versus a year of 365 days amounts to an unfair business act or practice under California's Unfair Competition Law.

"Banker's Interest" is a hoary term describing the use of any non-Gregorian Year to calculate the "annual" rate of interest charged on loans.[1] Charging borrowers Banker's Interest causes any numerically stated interest rate employing same (the "Stated Rate") to understate the true cost of funds (the "Effective Rate"), at least to some extent.[2]

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[1] The terms "Exact Banker's Interest" and "Unfair Banker's Interest" as used throughout this article are defined, *infra*, in the text. The separate phenomenon of "Banker's Interest"—meaning the use by banks and other lenders of the 360/360 method of calculating annual interest often employed in residential lending—is beyond the scope of this article, other than to note that the author is presently counsel for plaintiffs in *Keen et. al. v. JP Morgan Chase Bank, N.A.*, No. 3:15-cv-01806-WHO (N.D. Cal. filed April 21, 2015), which recently filed case challenges the use of the 360/360 method based on the resulting understatement of the finance charge disclosure requirements of the Truth in Lending Act, 15 U.S.C. §§ 1601–1651, when Federal National Mortgage Association loan forms are employed by lenders engaged in making conforming loans. The Gregorian Calendar is described at L.E. Doggett, *Calendars*, in Explanatory Supplement to the Astronomical Almanac (P. Kenneth Seidelmann ed. 2006), *available at* http://eclipse.gsfc.nasa.gov/SEhelp/calendars.html#Greg (last visited May 19, 2015). Finally, Allan W. Vestal, *No Longer Bending to the Purposes of the Money Lenders: Prohibiting the "Bank Method" of Interest Calculation*, 70 N.C.L. Rev. 243 (1991) ("Vestal Article"), provides a comprehensive description of the long history of the use of Unfair Banker's Interest by financial institutions in both England and the United States as a surreptitious means of taking advantage of the borrowing public.

[2] As is explained in the Vestal Article at 247, n. 18, the extent of understatement occasioned by the use of Unfair Banker's Interest is calculated by multiplying the Stated Rate by 1.0139 (i.e., 365/360). Thus, and for example:

Stated Rate	Effective Rate
3	3.0417
6	6.0833

This inevitable disparity between the Stated Rate and the Effective Rate occurs because charging a borrower Banker's Interest means calculating a true cost of funds based on (i) first calculating "annual" interest over a non-Gregorian Year and (ii) next adding into that so-called "annual" interest amount a separate charge for any previously uncharged-for-days in the actual Gregorian Year at issue. In modern times, any confusion occasioned borrowers by the Banker's Interest phenomenon is usually ameliorated by way, *inter alia*,[3] of a narrative English description made somewhere in the loan documents which advises the borrower that—regardless of the Stated Rate—interest is actually being charged by the lender for all Gregorian Year days that happen to fall in any year or portion of a year in which the particular loan is outstanding.

For purposes of this article what will be called Unfair Banker's Interest (meaning the use of a 360-day year, which is expressed mathematically as the 365/360 Method) is contrasted with what will be called Exact Banker's Interest (meaning the use of a 365-day year, which is expressed mathematically as the 365/365 Method).

When a Stated Rate is calculated using Exact Banker's Interest, a borrower only pays a per diem charge for the one extra day that occurs in the Gregorian Year every fourth year.[4] When Unfair Banker's Interest is used in conjunction with a Stated Rate, however, a borrower pays a per diem charge for the

9	9.1250

On a jumbo $1,000,000, 40-year term, fully amortizing six percent per annum fixed interest rate home loan, the more than eight basis point spread between Stated Rate and Effective Rate equals $833 in just the first year of such a loan. For a discussion of what constitutes a "basis point," *see* Simon Constable, *What is a Basis Point and Why is it so Important*?, The Wall Street Journal (Sept. 4, 2013), *available at* http://online.wsj.com/news/articles/SB10001424127887324823804579017141254359828.

[3] The Federal Truth in Lending Act is also often argued as ameliorating confusion occasioned borrowers by the use of Banker's Interest. *See* 15 U.S.C. §§ 1637, 1637a, 1638. However, and as is demonstrated *infra*, a lender's conduct in first confusing consumer borrowers and then attempting to unconfuse consumer borrowers by explaining away the initial confusion when there was no reason to confuse the consumer borrower to begin with may itself be a type of unfair business act or practice under the UCL (as that term is defined *infra*) regardless of the truthfulness of the explanation.

[4] Because one out of every four Gregorian Calendar years has 366 days, the use of Exact Banker's Interest serves a necessary purpose because (i) there is no other way except by use of narrative English to alert the borrower to the lender's intention to make a per diem charge for that one extra Gregorian Calendar day and (ii) the consequent discrepancy between the Stated Rate and the Effective Rate is only one Gregorian Calendar day's extra interest for every four Gregorian Calendar years any particular loan is outstanding.

additional five days that occur in the Gregorian Year each year over and above 360 days.

In fact, using anything but Exact Banker's Interest always makes the Stated Rate an unnecessarily understated indicator of the true cost of any money borrowed from any lender. The issue presented by this article is whether that fact—i.e., the fact that there is no demonstrably good reason to use a 360-day versus a 365-day year to calculate the Stated Rate—should be held to render the financial industry's long-standing practice of charging California borrowers Unfair Banker's Interest an unfair business act or practice under the California Unfair Competition Law ("UCL").[5]

THE DEFINITION OF WHAT IS AN UNFAIR BUSINESS ACT OR PRACTICE UNDER THE UCL

The UCL defines "unfair competition" to include "any . . . unfair . . . or fraudulent business act or practice . . . ."[6] In *Bias v. Wells Fargo & Co.*,[7] the court said:

> The California Supreme Court has not established a definitive test to determine whether a business practice is 'unfair' in consumer cases. Three tests for unfairness exist in the consumer context. Under the first test, a business practice is unfair where the practice implicates a public policy that is 'tethered to specific constitutional, statutory, or regulatory provisions.'[8] The second test 'determine[s] whether the alleged business practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers and requires the court to weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim.[9] Under the third test, 'unfair' conduct requires

[5] Cal. Bus. & Prof. C. §§ 17200–17210.

[6] Cal. Bus. & Prof. C. § 17200.

[7] 942 F. Supp. 2d 915, 933 (N.D. Cal. 2013). *See also Welsh v. American Home Mortgage Assets, LLC*, 2014 U.S. Dist. LEXIS 139337, at *31–32 (N.D. Cal. Sept. 30, 2014); *Jackson v. Atlantic Savings of America*, 2014 U.S. Dist. LEXIS 136521, at *24–25 (N.D. Cal. Sept. 26, 2014); *Amacker v. Bank of America*, 2014 U.S. Dist. LEXIS 134854, at *28–29 (N.D. Cal. Sept. 24, 2014); *Kenery v. Wells Fargo, N.A.*, 2014 U.S. Dist. LEXIS 117550, at *20–21 (N.D. Cal. Aug. 22, 2014).

[8] *Aleksick v. 7-Eleven, Inc.*, 205 Cal. App. 4th 1176, 1192–1193 (2012); *Gregory v. Albertson's, Inc.*, 104 Cal. App. 4th 845 (2002). This test is an application of the test used in *Cel-Tech Communications, Inv. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163 (1999) to non-consumer UCL cases.

[9] *Graham v. Bank of America, N.A.*, 226 Cal. App. 4th 594, 612 (2014); *Drum v. San*

> that: '(1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided.[[10]]' [All internal citations omitted.]

It is worth noting that, in consumer cases, the "unfair" and the "fraudulent" prongs tend to merge together. That is, to be "unfair," business acts or practices must also be found "fraudulent."[11] In this context, "fraudulent" only means that members of the public are likely to be misled by the "unfair" practices being litigated.[12]

Fernando Valley Bar Assn., 182 Cal. App. 4th 247, 256 (2010); *Smith v. State Farm Mutual Automobile Ins. Co.*, 93 Cal. App. 4th 700, 718–19 (2001).

[10] *Camacho v. Automobile Club of Southern California*, 142 Cal. App. 4th 1394, 1403 (2006). In *Lozano v. AT&T Wireless Servs.,* 504 F.3d 718, 736 (9th Cir. 2007) the Ninth Circuit rejected the use of the third test, saying it was originally intended to apply to anti-competitive conduct, not consumer practices. But a later Ninth Circuit decision acknowledged that the third test is sometimes used. *See Davis v. HSBC*, 691 F.3d 1152, 1170 (9th Cir. 2012).

[11] In *Medrazo v. Honda of North Hollywood*, 205 Cal. App. 4th 1 (2012), the motorcycles in a Honda dealership's showroom did not have the required "hanger tags"—the motorcycle equivalent of a window sticker—stating the price and related costs (taxes, delivery charges, etc.) of the vehicle. The Superior Court held that the information was otherwise disclosed to the plaintiff in the sales contract itself and therefore the missing information was not the cause of his damage. The Court of Appeal reversed, reasoning that "the Supreme Court [in *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009) ("*Tobacco II*")] . . . explained that an actual reliance requirement does not apply to UCL actions that are not based upon a fraud theory." The plaintiff's injury, according to the Court of Appeal, derived from her purchasing a vehicle which the Honda dealership was simply not legally allowed to sell *ab initio*. This 'illegal sale equals fraud' approach to liability under the UCL, however, has been rejected by, *inter alia*, *Pratt v. Whole Foods Mkt. Cal., Inc.*, 2014 U.S. Dist. LEXIS 46409, at *27–28 (N.D. Cal. Mar. 31, 2014); *Leonhart v. Nature's Path Foods, Inc.*, 2014 U.S. Dist. LEXIS 46413, at *26–27 (N.D. Cal. Mar. 31, 2014); *Thomas v. Costco Wholesale Corp.*, 2014 U.S. Dist. LEXIS 46405, at *22–23 (N.D. Cal. Mar. 31, 2014); *Victor v. R.C. Bigelow, Inc.*, 2014 U.S. Dist. LEXIS 34550, at *22–23 (N.D. Cal. Mar. 14, 2014); *Figy v. Amy's Kitchen, Inc.*, 2013 U.S. Dist. LEXIS 167723, at *10, n.1 (N.D. Cal. 2013).

[12] *Graham v. Bank of America, N.A.*, 226 Cal. App. 4th 594, 613 (May 23, 2014); *Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 1167 (2000). *See Tobacco II*, *supra*, 46 Cal. 4th at 312 ("A [common law] fraudulent deception must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs damages. None of these elements are required to state a claim for injunctive relief" under the UCL. [Citations omitted.] This distinction reflects the UCL's focus on the defendant's conduct, rather than the plaintiff's damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices.").

TEST ONE: CAUSING INJURY THAT OFFENDS PUBLIC POLICY

It is the public policy of California that borrowers be made fully aware of the true costs of borrowing money. Section 22161 of the California Finance Lenders Law[13] states:

> No person subject to this division shall do any of the following:
>
> (a) Make a materially false or misleading statement or representation to a borrower about the terms or conditions of that borrower's loan, when making or brokering the loan.
>
> (b) Advertise, print, display, publish, distribute, or broadcast, or cause or permit to be advertised, printed, displayed, published, distributed, or broadcast in any manner, any statement or representation with regard to the business subject to the provisions of this division, including the rates, terms, or conditions for making or negotiating loans, that is false, misleading, or deceptive, or that omits material information that is necessary to make the statements not false, misleading, or deceptive, or in the case of a licensee, that refers to the supervision of the business by the state or any department or official of the state.

And Section 22164 states:

> If any person engaged in the business regulated by this division refers in any advertising to rates of interest, charges, or cost of loans, the commissioner shall require that the rates, charges, or costs are stated fully and clearly in the manner that he or she deems necessary to give adequate information to prospective borrowers. If the rates or costs advertised do not apply to loans of all classes made or negotiated by the person, this fact shall be clearly indicated in the advertisement.

Section 22001 states that the law should be "liberally construed and applied to promote its underlying purposes and policies," which include "protect[ing] borrowers against unfair practices by some lenders, having due regard for the interests of legitimate and scrupulous lenders."

Federal policy expressed in the Truth in Lending Act[14] ("TILA") also promotes borrower awareness. Section 1601(a) states that:

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strength-

[13] Cal. Fin. C. § 22161.

[14] 15 U.S.C. §§ 1601–1651.

> ened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this title [15 USCS §§ 1601 et seq.] to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

Lender arguments that Unfair Banker's Interest cannot be the subject of a UCL claim because it is already regulated by TILA will not succeed. In *Cel-Tech Comms. Inc. v. L.A. Cellular Tel. Co.*,[15] the California Supreme Court explained that the UCL is preempted only if TILA provides a "safe-harbor" that forbids any state law regulation:

> Specific legislation may limit the judiciary's power to declare conduct unfair. If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination. When specific legislation provides a "safe harbor," plaintiffs may not use the general unfair competition law to assault that harbor . . . To forestall an action under the unfair competition law, another provision must actually "bar" the action or clearly permit the conduct.

In *Davis v. HSBC Bank*,[16] the Ninth Circuit applied this rule to TILA, holding that an annual fee disclosure on an application form, the form of which was mandated by TILA Regulation Z, could not be the subject of a UCL claim, whereas the advertising for the credit card, not addressed by Regulation Z, could be made the subject of a UCL claim.

TILA is agnostic on whether Banker's Interest can be used.[17] TILA does not bar California from holding the use of Unfair Banker's Interest is "unfair." It is not a "safe-harbor."

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[15] 20 Cal. 4th 163, 183 (1999).

[16] 691 F.3d 1152 (9th Cir. 2012).

[17] See 12 C.F.R. § 226.17(c)(3); FDIC, Compliance Examination Manual—March 2014, V-1.15, *available at* https://www.fdic.gov/regulations/compliance/manual (last visited Oct. 16, 2014) ("Regulation Z does not require the use of one method of interest computation in preference to another (although state law may)"). But it requires the effects of the increased interest charges be disclosed. *Id.* ("Disclosure violations may occur, however, when a financial institution applies a daily interest factor based on a 360-day year to the actual number of days between payments. In those situations, the financial institution must disclose the higher values of the finance charge, the APR, and the payment schedule resulting from this practice.")

TEST TWO: CAUSING INJURY WITHOUT ANY SUFFICIENT OFFSETTING UTILITY

The consumer injury arising from charging Unfair Banker's Interest is in the deceit practiced upon the consumer, who unwittingly pays more for a loan than he or she anticipated. Lenders argue that there is no deceit because the popular understanding of what constitutes a year is not definitive and that said popular understanding is, in fact, inconsistent with trade usage in the financial industry. However, and as one commentator pithily observed: "[That] is the type of argument that is plausible only when uttered in the soothing and solemn voice of an impeccably dressed senior partner."[18]

This year-is-not-a-year argument was readily dismissed by the California Supreme Court in *Chern v. Bank of America* ("*Chern*"):[19]

> We agree with plaintiff that the practice of computing interest quoted as a "per annum" rate on the basis of a 360-day year is likely to deceive the public. "Per annum" means literally "by the year." (Black's Law Dict. (4th ed. 1968) p. 1292; American Timber & Trad. Co. v. First Nat. Bank of Oregon (9th Cir. 1973) 511 F.2d 980, 983*, cert. den,* (1975) 421 U.S. 921.) As commonly understood, a year has either 365 or 366 days. (*Id.*) In the absence of evidence to the contrary, we must assume that the public is likely to understand that a "per annum" rate is an annual rate based on a 365-day calendar year. The fact that it may be "customary" business practice within the banking community to quote interest rates on the basis of a 360-day year does not necessarily establish that the practice is not misleading to the general public with whom defendant deals.[20]

Lenders also sometimes argue that the *de minimis* nature of the injury is evidence that a borrower did not rely on the difference between the Stated Rate and Effective Rate in taking a loan, and that *de minimis non curat lex*—the law does not deal with trifles.[21] Whether the injury is "substantial" to any specific

[18] Vestal Article at 249.

[19] 15 Cal. 3d 866, 876 (1976).

[20] In *American Timber & Trading Co. v. First Nat'l Bank*, 511 F.2d 980, 982 (9th Cir. 1973) ("*American Timber*") the court concluded that the bank violated the Oregon usury laws by charging the maximum allowed rate and using Unfair Banker's Interest—thus putting the Effective Rate over the limit. The question whether the bank can re-define "year" in the contract is discussed below.

[21] *See* Cal. Civ. C. § 3533. *But see Ballin v. Los Angeles County Fair*, 43 Cal. App. 2d Supp. 884, 887 (1941) ("The rule of *de minimis* . . . will be applied . . . only where an award of a

borrower, however, depends on the principal and interest involved. As explained in footnote 2, on a jumbo $1,000,000, 40-year term, fully amortizing six percent per annum fixed interest rate home loan, for example, the more than eight basis point differential between the Stated Rate and the Effective Rate which comes from charging a homeowner/borrower Unfair Banker's Interest (as opposed to Exact Banker's Interest) would certainly not be trifling. Nor would such a differential possibly be considered trifling in a UCL class action context.[22]

As for the utility of Unfair Banker's Interest, there are only a handful of cases that address Unfair Banker's Interest. None suggests a sensible business justification for using it. Thus, and at least following widespread availability of the personal computer, there has been no difficulty in calculating a monthly payment while charging Exact Banker's Interest.[23] Mere tradition is not a per se business justification. Tradition is also no excuse for deceiving those who are unaware of this custom.[24] Besides, Unfair Banker's Interest is not, in fact, any sort of uniform custom anyway.[25]

Charging consumers Unfair Banker's Interest only serves the lender's *illegitimate* interest in misleading consumer borrowers into thinking they are paying less interest than what they would pay if Exact Banker's Interest were used to calculate the Stated Rate. By that logic, however, there would be nothing wrong with increasing the spread between the Stated Rate and the Effective Rate by using a lunar Hebrew Year to charge what we will hereafter describe as Exorbitant Banker's Interest.[26] No matter what the hidden cost to consumer borrowers of agreeing to pay such Exorbitant Banker's Interest.[27]

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nominal amount will not carry costs and no question of right is involved. . .. Moreover, there is here involved the construction of a statute on a matter which is doubtless of interest to many persons, and for this reason also the maxim referred to should not be applied.").

[22] The subject of the propriety of class certification under the UCL for consumer borrower attacks on Unfair Banker's Interest is a complicated one, and same is not addressed in this article.

[23] At one time lenders used pre-printed charts to calculate interest payments; these pre-printed charts employed Unfair Banker's Interest. But the time of using such pre-printed charts is long gone. Vestal Article at 263.

[24] *See Chern*, quoted *supra*.

[25] *American Timber*, *supra*, 511 F.2d at 985 n.3 ("Nationwide surveys indicate that although the 365/360 method is used there is no definite, uniform, long-established custom.").

[26] *See* Stephen P. Morse, Jewish Calendar Description at http://www.stevemorse.org/hebrewcalendar/hebrewcalendar.htm (last visited Oct. 15, 2014).

[27] Using a lunar Hebrew year, *inter alia*, adds an entire extra month of interest in the 6th, 8th, 11th, 14th, 17th, and 19th years of every 19 year cycle. *See id.*

TEST THREE: CAUSING INJURY NOT REASONABLY AVOIDABLE BY THE CONSUMER BORROWER

The main line of defense by lenders is that Unfair Banker's Interest or, at least, its effect on the Effective Rate, is disclosed to the borrower—either by some fine-print definition of a "year" or by a TILA disclosure (or both)—such that the borrower either did not rely on the Stated Rate, or that the borrower could reasonably have avoided any injury by making a more careful investigation.

The mere fact that the Effective Rate could be found somewhere in the loan documents (and/or in a separate TILA statement) will not necessarily save a lender from a UCL claim. In *Chern*, a Bank agent told the borrower that the loan would be at nine percent and the promissory note read "nine per cent per annum." The TILA statement, however, described the per annum interest rate as 9 1/4% because, *inter alia*, the Effective Rate had been calculated using Unfair Banker's Interest.[28] When the borrower pointed out the discrepancy, the Bank officer said that the Bank "computed its interest in a different manner . . . for federal disclosure law purposes."[29]

In *Chern*, the California Supreme Court ruled that—despite the presence of written and oral disclosures—charging Unfair Banker's Interests could violate the False Advertising Law[30] (which *ipso facto* means it violates the UCL).[31] To begin with, *Chern* reasoned that—to the ordinary consumer—the phrase "per annum" denotes a 365-day year, and the fact that the financial community uses 360 days does not remove the practice from the category of misleading practices.[32] *Chern* then points out two ways that Unfair Business Interest can

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[28] While including Unfair Banker's Interest in the finance charge, the APR and the payment schedule is required by Regulation Z (*see supra*); that is not to say that a consumer borrower would have any reason to suspect that any portion of the finance charge, the APR or the payment schedule was a result of an understatement of the Effective Rate as a result of the application of Unfair Banker's Interest. Rather Unfair Banker's Interest is just lumped in on an undifferentiated basis with any points and/or other fees or costs associated with a loan that is otherwise subject to Regulation Z and, thus, the finance charge, the APR, and the payment schedule are none of them at all informative *vis-à-vis* the presence or extent of any Unfair Banker's Interest in any loan covered by TILA.

[29] *Chern*, *supra*, 15 Cal. 3d at 870.

[30] Cal. Bus. & Prof. C. §§ 17500–17509.

[31] Cal. Bus. & Prof. C. § 17200 ("unfair competition shall mean . . . any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.").

[32] In contrast, in *South Bay Chevrolet v. General Motors Acceptance Corp.*, 72 Cal. App. 4th

be considered "unfair" under the UCL, even despite disclosure. To potential borrowers, the understatement of the Effective Rate draws customers, who, once they have taken the time and effort of arranging a loan, may be uncomfortable backing out even if they learn the truth.[33] To any actual borrowers, the fact that there was a disclosure somewhere in the loan documents (and/or in a separate TILA statement) might be a defense to a breach of contract action while still being an "unfair" business practice.[34]

To put these issues in a proper perspective consider the following theorem: The fact that there is no justification of any kind for the understatement of the Effective Rate caused by utilization of Unfair Banker's Interest in the first place should color the reasonableness of a less-than-obvious disclosure.[35]

CONCLUSION

Calling 360 days a year brings to mind Humpty Dumpty's famously disingenuous approach to the meaning of words:

> "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."[36]

There is, of course, quite another way of looking at the world:

> You must remember this
>
> A kiss is just a kiss, a sigh is just a sigh.
>
> A kiss is just a kiss, a sigh is just a sigh.

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861 (1999), the Court of Appeal held that there was no violation of the UCL for using Unfair Banker's Interest because South Bay Chevrolet's business manager was already familiar with Unfair Banker's Interest and knew full well it was being used when South Bay borrowed money from its flooring lender, GMAC.

[33] A lender cannot always predict in advance what the Effective Rate will be for a loan due to variables such as closing costs. But Unfair Banker's Interest is systemic, not variable.

[34] *Chern*, *supra*, 15 Cal. 3d at 874, 876.

[35] Especially now that so many contracts are on-line and are agreed to by a click of an "accept" icon. *Cf. Chapman v. Skype, Inc.*, 220 Cal. App. 4th 217 (2013).

[36] *See* Lewis Carrol, Through the Looking Glass, and What Alice Found There (Millennium Fulcrum Edition 1.7) (1871), *available at* http://www.gutenberg.org/files/12/12-h/12-h.htm (last visited May 20, 2015).

As time goes by.[37]

If lenders desire to contort such fundamental things as how long a year lasts, then such lenders had better have a very good reason for doing what they are doing. And that is where use of Unfair Banker's Interest falls down. Unlike the clear rationale lenders have for using Exact Banker's Interest—i.e., because there is simply no other way to pick up the extra day's interest due a lender on account of those February 29 dates falling in leap years during the term of a multi-year loan other than by use of such Exact Banker's Interest—there is just no proper reason for applying Unfair Banker's Interest, any more than there could or would be a legitimate purpose served by applying Exorbitant Banker's Interest.

When things operate to mislead consumers to their detriment, unreason and unfairness are virtual synonyms under the UCL.[38] Lenders everywhere should beware.[39]

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[37] *See* Herman Hupfeld, *As Time Goes By* (1931), *available at* http://www.reelclassics.com/Movies/Casablanca/astimegoesby-lyrics.htm (last visited May 20, 2015).

[38] *See, e.g., Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 813 (N.D. Cal. 2011) (complaint stated a UCL claim under the "unfair" prong where "the Court has no basis for finding that Defendant's conduct has any utility, much less that its utility outweighs the gravity of the alleged harm to Plaintiffs.").

[39] The UCL is just one example of multiple such state law consumer protection laws in the United States. *See* William L. Stern, Business & Professions Code § 17200 Practice § 2:54 (2014) ("Every state and the District of Columbia has enacted some combination of civil or criminal penalties against acts of unfair competition or false advertising.").