No. S149178

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PAUL MILLER, individually and on behalf of others similarly situated,

Respondent and Cross-Appellant,

v.

BANK OF AMERICA, NT & SA, a California corporation, and DOES 1-50,

Appellants and Cross-Respondents.

AFTER DECISION BY THE COURT OF APPEAL,
FIRST APPELLATE DISTRICT, DIVISION THREE, CASE NO. A110137

APPEAL FROM THE SUPERIOR COURT OF THE COUNTY OF SAN FRANCISCO,
THE HONORABLE ANNE E. BOULIANE, PRESIDING JUDGE, CIVIL CASE NO. 301917

CENTER FOR RESPONSIBLE LENDING'S APPLICATION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND PROPOSED BRIEF IN SUPPORT OF RESPONDENT AND CROSS-APPELLANT PAUL MILLER

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December 14, 2007

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

I hereby certify that no entity or person has an ownership interest of 10 percent or more in the Center for Responsible Lending nor that any other person or entity has a financial or other interest in the outcome of the proceeding that the Center for Responsible Lending reasonably believes the Justices should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: December 14, 2007

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I. APPLICATION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

To The Honorable Ronald M. George, Chief Justice of The California Supreme Court:

The Center for Responsible Lending ("CRL") requests leave to file an *amicus curiae* brief in this case in support of Paul Miller, *et al.*,'s position that California law prohibits a bank's seizure of Social Security and other government benefits to cover overdraft fees.

CRL has conducted extensive research and policy work on issues related to bank overdraft practices. The banking industry has dramatically changed the character of checking accounts, as well as that of their attendant fees, in recent years. The accounts have become dual-purpose, acting as both a payment system and as a mechanism for delivering credit to bank customers. This method of providing credit—by funding overdrafts and charging overdraft fees in return—is now the primary driver behind the increasingly significant overdraft fee income collected by banks. In 2005, CRL issued a research report titled *High Cost and Hidden From View: The $10 Billion Overdraft Loan Market*, which was one of the first attempts to quantify the amount of overdraft fees paid by consumers in this new world of checking-account credit. In 2007, CRL followed up on its earlier research with two reports—*Out of Balance: Consumers Pay $17.5 Billion in Fees for Abusive Overdraft Loans* and *Debit Card Danger: Banks*

Offer Little Warning and Few Choices as Customers Pay a High Price for Debit Card Overdrafts—that quantify the cost of overdraft fees to consumers and show that most overdraft fees are triggered by small debit transactions.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

CRL is a non-profit, non-partisan research and policy organization dedicated to eliminating abusive financial practices so that low- and moderate-income households can protect their assets and build wealth. It has testified numerous times before Congress and state legislatures, regularly provides written and oral testimony to federal and state regulatory agencies, and has appeared as amicus before many courts.

CRL has offices in California, North Carolina, and the District of Columbia, and is an affiliate of the Center for Community Self-Help, which includes a credit union and a loan fund. The Self-Help Credit Union has $260 million in assets and some 12,700 deposit accounts. Self-Help's loan fund has provided more than $5 billion in financing to help over 50,000 low-wealth borrowers in forty-seven states buy homes, build businesses, and strengthen community resources. CRL's affiliation with Self-Help provides it with important insight into the business needs of financial institutions and the responsibilities of such institutions to their customers and to communities.

II. PROPOSED BRIEF OF *AMICUS CURIAE*

SUMMARY OF ARGUMENT

Previously, banks routinely declined to honor checks or electronic payments when checking account customers did not have funds in their accounts to cover those payments. A bank's decision to cover an overdraft was the exception—not the rule. Over the past decade, however, banks have increasingly used overdraft loans to regularly extend credit to their checking account customers.

Bank of America, as part of this trend, offers overdraft loans as a standard feature of its California checking accounts. Adding the overdraft loan feature allows Bank of America to authorize debit card or ATM transactions for customers with insufficient funds in their checking accounts to cover the transaction—transactions that would have been rejected without a fee a decade ago. Bank of America never asks its customers whether they want to turn a fee-free debit card transaction into a high-cost credit transaction via an overdraft loan. But its failure to ask is hardly surprising; otherwise, Bank of America would risk giving up its share of the $17.5 billion in fees that financial institutions collect each year from overdrafts.

For over thirty years, California law has protected government benefit payments by prohibiting banks from seizing those benefits to

recover debts in order to allow recipients to satisfy their current basic needs. (*Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352 (*Kruger*).) Consistent with that principle, neither Bank of America nor any other California bank should be allowed to seize Social Security payments to its elderly and disabled customers to cover overdraft loan fees.

We submit our *amicus curiae* brief to urge this Court to remain faithful to both the law and policy established by *Kruger*. The Court of Appeal failed to do so for two reasons: (1) it ignored long-standing California law that defines Bank of America's collection of debts, which include overdraft loan fees, as setoffs; and (2) it failed to recognize that overdraft fees are merely an evolved form of the revolving credit charges that *Kruger* held banks cannot collect by seizing government benefit payments.

ARGUMENT

A. SETTLED CALIFORNIA LAW PROHIBITS COLLECTION OF OVERDRAFT FEES THROUGH SETOFF AGAINST EXEMPT PUBLIC BENEFIT PAYMENTS.

This Court in *Kruger* quite clearly established that under the common law of California a "bank may not set off its claims against [an] account" that "consists of monies derived from" public benefit payments exempted from attachment under the California Code of Civil Procedure. (11 Cal.3d at p. 371.) *Kruger* is not limited to setoffs arising from a

specific type of debt. Instead, *Kruger* focuses on the exempt nature of the assets involved regardless of the nature of the debt:

> [T]he exercise of a banker's setoff against unemployment and disability benefits diverts money intended by the state to pay the current living expenses of the unemployed and the disabled into payment of past debts accumulated by the bank, leaving the intended beneficiaries no alternative but to seek additional relief from the state. Thus to permit bankers' setoffs against unemployment and disability benefits will frustrate the Legislature's objectives in providing such benefits and in protecting them from seizure by creditors. We conclude, therefore, that deposits derived from unemployment and disability benefits are immune from setoff.

(*Id*. at p. 367.) Because there is no question in this case that the plaintiff class's accounts included exempt public benefit payments, *Kruger* applies so long as the bank's actions constituted common law setoff.

A setoff arises under California common law when a bank holds funds in a general deposit account and the depositor simultaneously owes a matured debt to the bank. That means that in California, "[a] bank has an equitable right to set off a matured debt, owed the bank by a depositor, against funds in the customer's demand deposit account." (*Martin v. Wells Fargo Bank* (2001) 91 Cal.App.4th 489, 494.) California law mirrors the common law right of setoff observed across the country. Summarizing decisions from around the country, a leading bank law treatise states that "a bank may set off deposits in its hands against a matured indebtedness of its depositor. Such right grows out of the debtor and creditor relationship

existing between a bank and its depositor, and the bank has a right to apply a deposit to the payment of the depositor's matured debts or obligations held by the bank . . . ." (5A Michie on Banks and Banking (2003) § 114, pp. 459-460.)

Because the plaintiff class in this case consists of individuals who had Bank of America checking accounts containing Social Security payments while simultaneously owing overdraft fees to Bank of America, *Kruger*'s prohibition of making a setoff against accounts holding public benefits payments fully applies. Faced with a clear-cut violation of California law against setoff of exempt public benefit payments, Bank of America asks this Court to carve out the heretofore unknown legal concept of "account balancing" from the venerable definition of setoff. The bank has identified no case law (other than the Court of Appeal's opinion in this case) that either has recognized such a concept or so limited the definition of setoff. Consequently, the decision of the Court of Appeal should be overturned and the trial court's verdict for the plaintiffs reinstated based on the settled common law of California.

1. California Law Has Long Characterized Overdraft Fees as Debts.

The essential feature of the plaintiffs' claim in this case is that *none* of the class members had adequate funds in their accounts the cover the overdraft and the concomitant fees *at the time* the overdraft fee was

charged. Those overdraft fees were not debited against funds in an account. Instead, what occurred was that Bank of America—at its own option without any inquiry to the customers—extended loans to the depositors without sufficient funds in their accounts and charged them a fee for that service.

Long-settled California law is clear that an overdraft of a deposit account constitutes a debt. In *Popp v. Exchange Bank* (1922) 189 Cal. 296, this Court held that an overdraft in a checking account was a "pre-existing debt" that could serve as valuable consideration for a subsequent note given to the bank. (*Id*. at p. 300; see also *Hurlbut v. Quigley* (1919) 180 Cal. 265, 268 [explaining that "the company desired to give a new note for said *debts*" that included a $3,000 "balance . . . in the form of an *overdraft*" (Italics added.)].) Two years later, the Court of Appeal observed as a matter of "well-settled law that an overdraft is in legal effect a loan of that much money by the bank to the drawer of the check." (*Faulkner v. Bank of Italy* (1924) 69 Cal.App. 370, 376.) Nothing in the subsequent years has changed these holdings. (See, e.g., *Torrance National Bank v. Enesco Federal Credit Union* (1955) 134 Cal.App.2d 316, 320 ["An overdraft is in legal effect a loan by the bank to its depositor."].) Because the overdraft itself constitutes a loan, blackletter law dictates that the additional fees charged for that loan also constitute a debt the customer owes to the bank.

(See *Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1176.)

California's treatment of overdrafts as loans matches the law from the rest of the country. Citing cases from more than a dozen states, a leading bank law treatise summarizes that "[a]n overdraft of the customer's account amounts to a simple loan of the money due on demand; he thereby becomes the debtor and the bank the creditor." (5B Michie on Banks and Banking (2002) § 301, pp. 383-384, fns. omitted; see also *id*. at p. 384 fn. 6 ["When a customer deposits money with a bank, a creditor-debtor relationship is established; to extent that overdrafts are allowed, that relationship is reversed."].) California law also harmonizes with federal banking laws that include overdrafts in various provisions that apply to loans. Federal regulations state that "[l]oans or extensions of credit for purposes of [federal law limiting national banks' outstanding loans] include . . . [a]n overdraft, whether or not prearranged. . . ." (12 C.F.R. § 32.2(k)(1)(v) (2007); see also OCC Interpretative Letter 914 (Aug. 3, 2001), 2001 WL 1090788 [noting an overdraft meets the definition of "credit" under at least three different federal banking regulations]; OCC Interpretative Letter (May 22, 1984), 1984 WL 164096 ["[W]hen a bank pays a check written on nonsufficient funds, it, in effect, extends a loan to the customer in an amount equal to the amount of the check minus the

amount that is present in the customer's checking account. . . . [A] national bank may pay checks written on nonsufficient funds and charge interest on the amount of credit that is extended."].)) Similarly, the United States Court of Appeals for the District of Columbia Circuit has held that "[a] loan is made (and 'money lent' [under 12 U.S.C. § 36(f) (1970)]) when the customer receives funds on which he immediately begins to pay interest . . . by cashing an overdraft 'check' (plastic or paper) at a [ATM]." (*Independent Bankers Association of America v. Smith* (D.C. Cir. 1976) 534 F.2d 921, 948.)

The fact that Bank of America charges the overdraft fees at a time when the customers' checking accounts contain insufficient funds to cover the debit fatally flaws the Court of Appeal's attempt to apply the novel concept of "account balancing" to this case. The "account balancing" theory relies on the false premise that the bank's activity at issue in this

case consists of nothing more than the mere day-to-day netting of credits and debits to a customer's checking account.[1]

If the disputed practice in this case were merely debiting bank fees from a checking account containing funds, it is true that no setoff would take place. When debits, including bank fees, are being applied against an account containing funds adequate to pay the fee, the customer never creates a debt between herself and the bank. (Cf. 12 C.F.R. § 32.2(k)(1)(v) (2007) [excluding "intra-day overdraft[s] for which payment is received before the close of business of the bank that makes the funds available" from the definition of "loans or extensions of credit" for purposes of federal law limiting the amount of outstanding bank loans].)

But this case is not a dispute over fees related to the quotidian netting of incoming and outgoing flows in the customer's checking

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[1] This false premise is apparent in the Court of Appeal's explanation, in creating its novel "account balancing" exception to *Kruger*, that "[m]aintaining a deposit account, especially one with overdraft protection, inherently requires ongoing adjustment of the account balance to reflect debits, including payments and fees, and credits. As has been said in different contexts, it is common knowledge that bank statements on checking accounts 'consist of debit and credit entries based on the deposits received, the checks written and the service charges to the account.' [Citation.]" (51 Cal.Rptr.3d at p. 231.) Similarly, Bank of America suggests that this Court carve out from *Kruger* a concept of "account balancing" that recognizes "the ordinary arithmetic that is required to accurately balance a deposit account." (AAB 16; see also *id*. at p. 17 ["Indeed, a bank cannot accurately maintain a customer's checking account without performing that balancing."].)

account. Instead, it is about the discreet issue that arises only in the case when the account has insufficient funds and the bank charges a fee to lend the customer money to cover the overage. Nothing in the day-to-day netting process requires the bank to make this loan, as Bank of America's very own account agreement recognizes by providing that the bank *may* make an overdraft loan when a customer attempts a transaction for which she has insufficient funds. (A956.)

Moreover, characterizing overdraft fees as a matter of ordinary "account balancing" rather than the creation of a loan or a debt ignores that Bank of America has made a deliberate choice to regularly extend credit to its customers by paying overdrafts. As a leading treatise on banking law notes, the rise of overdraft banking in recent years has expanded "the use of the bank check [into] a *credit* device apart from its *payment* function." (1 Clark & Clark, The Law of Bank Deposits, Collections and Credit Cards (2007) ¶ 3.04[1], p. 3-107.) Bank of America cannot avail itself of both the "account balancing" theory and the fee income derived from turning its checking accounts into vehicles to provide high-cost credit to its customers. It has clearly chosen the fee income from making loans and must comply with California law governing the collection of the debts from those loans. (See *infra* Section B for a discussion of banks' recent shift to promote overdraft loans.)

2. California Law Consistently Defines a Bank's Collection of Debt from its Depositors' Accounts as a Setoff.

Bank of America's decision to withdraw money from the depositors' account constitutes a setoff. The well settled common law definition of setoff is that the bank has exercised its "right to set off a matured debt, owed the bank by a depositor, against funds in the customer's demand deposit account." (*Martin v. Wells Fargo Bank*, *supra*, 91 Cal.App.4th at p. 494.) As discussed above, the overdraft fees are debts that depositors owe to the bank. Once other payments are deposited—here protected Social Security payments—Bank of America seizes those funds from the customers' checking account to pay back that debt.

Despite Bank of America's false characterization to the contrary, nothing in the venerable definition of setoff requires that the debts spring from different accounts held by the bank. Accordingly, under California law, "[t]he right of a bank to a lien or setoff is not tested by the character in which the customer becomes indebted to the bank, *but solely by the fact that he or she is indebted to it in a balance due* and accruing in the course

of business." (9 Cal.Jur.3d (2005) Banks, § 150, p. 431, italics added.)[2] The lack of such a "different account" requirement is quite sensible because any definition of setoff that turned on whether a bank has designated an overdraft to have a separate account number would merely promote form over substance—particularly when some banks provide overdraft protection by establishing a separate line-of-credit account.

Indeed, addressing the very issue presented by this case, a leading banking law treatise notes that "[a] bank's *right of setoff* may not be exercised until the day after maturity of a time instrument. There is

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[2] *McKean v. German-American Savings Bank* (1897) 118 Cal. 334 is not to the contrary. Although Bank of America is correct that the opinion contains the phrase "independent indebtedness" in conjunction with setoff (AAB 14-15), its brief fails to apprise this Court that the phrase appears only in *McKean*'s synopsis of *the appellant's argument* in that case. (118 Cal. at p. 335.) In any case, the setoff in this case *does* involve an independent indebtedness: the bank owes money to the plaintiffs based on the deposit of their Social Security funds while the plaintiffs owe overdraft fees to the bank based on its decision to lend money to the plaintiffs made wholly independent of those subsequent Social Security deposits.

This independent nature of the transaction also means that Bank of America's actions are not a recoupment. Thoroughly canvassing the very question at issue in this case of whether overdraft collection creates a setoff, two scholars have rejected the position that recovery of an overdraft is a recoupment because "[t]he bank's right to set off arose out of its voluntary act of covering the overdrafts and running a negative balance" while "[t]he debtors' rights arose out of the separate transaction of depositing money into the account." (Laurence & Jacoway, *The Application of Section 553 Set-Off Analysis to Pre-Bankruptcy Negative-Balance Checking Account Activity* (1995) 12 Bankr. Dev. J. 101, 126; cf. *University Medical Center v. Sullivan* (3d Cir. 1992) 973 F.2d 1065, 1080 ["Nor does the fact that a contract exists between the debtor and creditor automatically enable the creditor to effect a recoupment."].)

ordinarily *no distinction* between a bank's right to apply a general deposit to a debt or overdue note and its right to *apply the deposit to an overdraft*. (5A Michie on Banks and Banking, *supra*, § 115b, p. 486, italics added). Other commentators make the same conclusion—"commonly courts and banks assume that negative-balance checking activity is set-off activity"—and go on to "agree [that] . . . the application of a deposit against a negative balance is a setoff." Laurence & Jacoway, *The Application of Section 553 Set-Off Analysis to Pre-Bankruptcy Negative-Balance Checking Account Activity, supra*, 12 Bankr. Dev. J. at pp. 111-112.)

Courts in other states have also routinely concluded the application of checking account deposit funds to repay overdrafts on that account constitutes setoff. For example, one court observed that "[the bank] extended its own funds to [the customer] in the form of overdraft credits and then used [the customer's] subsequent deposits to repay, either in whole or in part, the overdrafts credits extended," and thus held that the customer's "checking account ledger demonstrates quite convincingly that [the bank] set-off funds deposited by [the customer]." (*Martino v. First National Bank of Harvey* (N.D. Ill. 1995) 186 B.R. 414, 436.) Similarly, another court observed a bank's "application of checks deposited . . . to reduce overdrafts in the [customer's] accounts was a lawful set-off of [the bank's] debt to [the customer] (the sum deposited) against [the customer's]

debt to [the bank] (the overdraft)." (*Bernstein v. Alpha Associates, Inc.* (Bankr. S.D.N.Y. 1983) 34 B.R. 1000, 1018-19.)[3]

Bank of America's collection of the overdraft fees from its customers' account constitutes the collection of debt according to longstanding California law. By collecting this already outstanding debt by seizing incoming Social Security payments, California law is also settled that Bank of American made use of its self-help remedy of setoff. But *Kruger* dictates that a bank cannot setoff its debts against monies, such as Social Security payments, that are otherwise exempt from execution under

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[3] This analysis readily transfers from the bankruptcy context because federal bankruptcy law "allows setoffs in bankruptcy to the same extent they are allowed under state law." (*Carolco Television Inc. v. National Broadcasting Company* (9th Cir. 1992), 963 F.2d 1269, 1277.)

The Ninth Circuit in *Lopez v. Washington Mutual Bank, FA* (9th Cir. 2002) 302 F.3d 900 distinguished the "*consensually arranged* . . . automatic payment of the loan from the account containing the Social Security funds" from "the self-help remedy of setoff." (*Id.* at p. 906, italics added.) This proposition provides no support to Bank of America because, as the Court of Appeal recognized, the very question in this case is whether the bank illegally obtained the plaintiffs' consent to withdraw the overdraft fees. *See* 51 Cal.Rptr.3d at p. 228 (noting that the trial court held that Bank of America violated the Consumer Legal Remedies Act by inserting the right to withdrawal overdraft fees into the deposit agreement with plaintiffs).

California's Code of Civil Procedure. Accordingly, Bank of America's collection of overdraft fees through setoff violated California law.[4]

B. OVERDRAFT CONSTITUES ANOTHER FORM OF THE REVOLVING CREDIT CHARGES THAT BANKS CANNOT COLLECT FROM EXEMPT PUBLIC BENEFIT PAYMENTS.

Overdraft is merely another incarnation of revolving credit charges that this Court squarely prohibited banks from collecting from exempt public benefit payments in *Kruger*. Accordingly, this Court should decline Bank of America's invitation to upset thirty years of well settled law by carving out the heretofore unknown legal concept of "account balancing" from the established definition of setoff.

In *Kruger*, this Court noted that bank credit cards were, at the time, a new substitute for what in the past would have been a multitude of third-party debts:

> With the growth of bank-sponsored credit systems, a bank may gather unto itself the debts incurred by a depositor for past living expenses and satisfy by setoff debts which, in the days before Master Charge and Bank Americard, would have been held by many separate merchants and enforceable only

[4] As the plaintiffs' briefs well document, the legislature enacted Financial Code section 864 intending to provide further protections for bank depositors beyond those under the common law recognized in *Kruger*. Moreover, nothing in the text of section 864 purports to limit or reduce restrictions that already applied to banks' use of their setoff power. Bank of America is therefore wrong that the statute overrode *Kruger*'s restriction and allowed banks to setoff against funds exempt from execution by any other creditor. (See AAB 29 [arguing Financial Code section 864 "effectively authorizes setoff *even from exempt funds*"].)

> through execution. To permit a bank which has thus collected the past obligation of its depositor to satisfy those claims from [exempt] deposits would completely defeat the state policy of preserving such deposits for the daily living expenses of the depositor.

(11 Cal.3d at p. 371, fn. omitted.) Now, some thirty years later, overdraft lending has emerged as a new source of credit—equivalent to the then-innovative bank cards in *Kruger*. Today, depository institutions including Bank of America not only allow, but even encourage, the use of checking accounts as a source of recurring credit for depositors through overdraft loans.

Recently, overdraft loan programs have become a major source of fee income for banks with consumers paying $17.5 billion each year in fees for overdraft loans.[5] (Halperin & Smith, Out of Balance: Consumers Pay $17.5 Billion per Year in Fees for Abusive Overdraft Loans (2007) pp. 9-11, available at <http://www.responsiblelending.org/pdfs/out-of-balance-report-7-10-final.pdf>.) Banks' overdraft programs "provide[] a handy device by which banks have entered the explosive world of revolving credit." (1 Clark & Clark, The Law of Bank Deposits, Collections and

[5] The vendors that market overdraft loan programs to financial institutions have publicly boasted about the dramatic increases in fee income that their programs generate. For example, Impact Financial Services, an overdraft program vendor, recently advertised, "Virtually all of our clients have increased the NSF fee income from 50-150% or more (with 100% or more being the norm), and those percentages are net of charge-offs, waives and refunds." (Impact Financial Services Web site <www.impactfinancial.com/about.html> [as of Jan. 14, 2006].)

Credit Cards, *supra*, ¶ 3.04[1], p. 3-107.) Thus, “banks have turned the overdraft in a standard checking account into a prearranged line of credit extended to the customer-depositor on demand.” (*Ibid*.)

Research shows at least 46% overdraft loans—like those described by class member Scott Kevin Anderson—are triggered by debit card or ATM transactions. (Compare Halperin et al., Debit Card Danger: Banks Offer Little Warning and Few Choices as Customers Pay a High Price for Debit Card Overdrafts (2007) p. 7, available at <http://www.responsiblelending.org/pdfs/Debit-Card-Danger-report.pdf> with RT 1331.) As Mr. Anderson explained in his testimony (RT 1328-1330), determining the balance in a modern checking account with electronic transactions can be a frustrating if not almost impossible endeavor much more complicated than simply balancing a checkbook register. Indeed, electronic transactions are almost impossible to accurately track for many consumers because of banks’ practices of delayed deposit crediting, manipulation of check ordering and debit clearing, and, perhaps most importantly, their failure simply to decline debit card transactions when a customer’s account has insufficient funds. (See Halperin & Smith, Out of Balance: Consumers Pay $17.5 Billion per Year in Fees for Abusive Overdraft Loans, *supra*, at p. 7.) Thus, a consumer most often has no indication at the time of an ATM or point-of-sale debit

transaction that her account is being overdrawn. (*Ibid*.) Accordingly, overdraft loans are most often mini-loans (they average $27 with an average $34 fee) provided to consumers who never consented to be in the most expensive credit program that Bank of America offers. (See *id*. at pp. 4, 8.)

Thus, just as with the credit card accounts in *Kruger*, by paying overdrafts and charging overdraft fees a bank "gather[s] unto itself the debts incurred by a depositor for past living expenses" through a revolving credit product. (*Kruger*, *supra*, 11 Cal.3d at p. 371.) Also, just like the credit cards in *Kruger*, the use of overdraft loans as a source of credit represents an evolution of the form by which credit is provided to consumers. When one looks beyond form of the overdraft program to the substance of the transaction it becomes clear that overdraft loan programs are no different than any other revolving credit program, including the credit card accounts in *Kruger*.

CONCLUSION

The Court of Appeal gutted *Kruger* by creating an exception not supported by the facts or the applicable law for credit charges that are collected from a checking account. Its decision reduces to a hollow promise the statutory exemption from debt collection for the Social Security income of more than three million Californians. Accordingly, the

decision of the Court of Appeal should be reversed and the trial court's decision should be reinstated.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

The text of CENTER FOR RESPONSIBLE LENDING'S PROPOSED BRIEF IN SUPPORT OF RESPONDENT AND CROSS-RESPONDENT PAUL MILLER consists of 4,127 words (including footnotes but excluding the table contents, the table of authorities, and certificates) as counted by Microsoft Word 2003 word-processing program.

Dated: December 14, 2007

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing CENTER FOR RESPONSIBLE LENDING'S APPLICATION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND PROPOSED BRIEF IN SUPPORT OF RESPONDENT AND CROSS-RESPONDENT PAUL MILLER were served this 14th day of December, 2007, upon the Court via Overnight Delivery and upon the following as indicated:

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I further certify that I am an active member of the State Bar of California, not a party to this action, and that the foregoing documents were all sealed and deposited for delivery as indicated above with delivery fees and/or postage prepaid.

Dated: December 14, 2007

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