

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF BANKING

In the Matter of:)	
)	
Consumer A and Consumer B (Complainants))	ORDER ON MOTION TO DISMISS
And)	
Countrywide Home Loans, Inc. (Respondent))	and
)	
)	ORDER ON MOTION TO CONTINUE
)	
)	

On May 22, 2009, Respondent, by and through its counsel, filed a motion to dismiss in the above entitled matter. A Motion to Continue, agreed upon by the parties, has also been filed with the Commissioner. The Motion to Continue included a request to delay the date on which Complainants must file a response to the continuance motion. In the interests of economy of the time of the Commissioner and the parties, I am issuing this Order prior to filing of a response by the Complainants.

The Motion to Dismiss cites three arguments for dismissal: *res judicata*, complainants' failure to include this claim in a bankruptcy filing and an allegation that there are no viable RSA 358-A Claims.

RES JUDICATA

The cases cited by the Respondent correctly define when *res judicata* applies in New Hampshire. But, this matter is clearly distinguishable from the cited cases. In *Eastern Marine Construction Corp. v. First Southern Leasing, Ltd.*, 129 N.H. 270 (1987), the Court defined "cause of action" to "collectively refer to all theories on which relief could be claimed on the basis of the factual transaction in question." The expansion of the definition of "cause of action" enunciated in *Eastern Marine* is grounded in the presumption that the plaintiff has "had a full and fair opportunity to litigate the issue." *Farm Family Mutual Insurance Company v. Margaret Ann Peck*, 143 N.H. 603 (1999). Further, in *Eastern Marine*, the court noted that "[a] litigant is free to join all claims and seek all forms of relief, whether they be legal or equitable, in one suit."

In this matter, all theories "on which relief could be claimed" in Superior Court could not include the RSA 383:10-d claim. Since entities regulated by the Banking Commissioner are exempt from RSA 358-A, no claim for unfair and deceptive trade practices could be brought in any New Hampshire court. Thus, the complainants could not "join all claims and seek all forms of relief."

