Defenses And Limits Of Calif. Consumer Protection Laws

By Jason E. Fellner and Charles N. Bahlert

California is often perceived as an “anti-business” and “pro-consumer” state, with numerous statutes regulating specific industries and laws designed to protect consumers from unlawful or misleading business practices. This article examines two statutes specifically — California’s Unfair Competition Law and Consumers Legal Remedies Act — and the impact these statutes have on the liability of a working professional. The article first outlines the primary elements and available remedies of the UCL and CLRA, followed by an application from a recent lawsuit. Licensed professionals ought to be aware of these statutory schemes in their respective practice areas to avoid being a target of these types of claims.

California’s Unfair Competition Law

California's Unfair Competition Law defines “unfair competition” as including “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising” and any act prohibited by California's Business and Professions Code §§ 17500 et seq. (false advertising)[1]. The purpose of the UCL “is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.”[2] Accordingly, the UCL's coverage is “sweeping, embracing ‘anything that can properly be called a business practice and that at the same time is forbidden by law.’”[3]

The Three Prongs of the UCL

The “unlawful,” “unfair” or “fraudulent” prongs constitute separate and independent causes of action.[4] The UCL’s “unlawful” prong prohibits “‘wrongful business conduct in whatever context such activity might occur.’”[5] Thus, the “unlawful” prong is essentially an incorporate-by-reference provision, making independently actionable any violations of state or federal statutes, rules or regulations[6]. As a corollary, “[i]f the borrowed violations of law or predicate claims lack merit, then the unfair competition claim necessarily fails.”[7]

The UCL’s “unfair” prong standard is less clear. There is a three-way split in authority that applies either a balancing test, a tethering test, or a test derived from the Federal Trade Commission (the FTC test). A court applying the balancing test “weigh[s] the utility of the defendant’s conduct against the gravity of the harm to the alleged victim.”[8] The California Supreme Court in Cel-Tech found the balancing test too nebulous: “Courts may not simply impose their own notions of the day as to what is fair or unfair.”[9] For that reason, the court required that “any finding of unfairness ... be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition.”[10]

The FTC test, meanwhile, is more specific still: “(1) [t]he 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.”[11] The Ninth Circuit, however, did not follow the FTC line of reasoning from Camacho:

> While we agree with the Fourth District [in Camacho] that Cel-Tech effectively rejects the balancing approach, we do not agree that the FTC test is appropriate in this circumstance.

> Though the California Supreme Court did reference FTC's Section 5 as a source of "guidance," that discussion clearly revolves around anti-competitive conduct, rather than anti-consumer conduct. Accordingly, we decline to apply the FTC standard in the absence of a clear holding from the California Supreme Court.[12]

Accordingly, until the California Supreme Court provides otherwise, there are three lines of authority to determine whether or not a business practice is unfair.

Last, the "fraud" prong of a UCL claim requires plaintiffs to "show that 'members of the public are likely to be deceived.'"[13] The California Supreme Court held this standard "is that of the ordinary consumer acting reasonably under the circumstances" rather than a "least sophisticated" standard[14].

UCL Limitations

Despite the broad scope of a potential UCL claim, the available remedies are rather quite limited. The focus of the UCL is "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."[15] Significantly, there are no monetary damages awarded. Instead, there are only two remedies available: injunctive relief to enjoin the unfair business practice and restitution, which typically amounts to the money paid by the plaintiff to the defendant (i.e., disgorgement of money or property unlawfully obtained)[16]. Accordingly, while UCL remedies are "cumulative … to the remedies or penalties available under all other laws of this state," they are narrow in scope[17]. Moreover, the UCL does not authorize attorney fees[18].

In addition to its somewhat benign remedies, UCL claims have been made less pervasive by the implementation of more stringent standing requirements following the passing of Proposition 64 in November 2004. No longer can individuals not suffering loss or harm sue on behalf of the "general public." Now, a plaintiff is entitled to bring a UCL claim only if he or she "suffered injury in fact and has lost money or property as a result of the unfair competition."[19] A UCL plaintiff must: "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, and (2) show that that economic injury was the result of, i.e., caused by, the unfair business practice or false advertising that is the gravamen of the claim."[20] "[I]njury in fact is 'an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not 'conjectural' or 'hypothetical.'"[21]

Another Slice of the Consumer Protection Pie — The CLRA

The CLRA is another California statute designed to protect consumers from unfair or deceptive acts.[22] Unlike the UCL's broad prohibition of "unlawful" or "unfair" acts, the CLRA prohibits 24 separate business acts or practices it deems unlawful.[23] To assert a CLRA claim, a plaintiff must allege and prove that the defendant committed one of the proscribed acts "in a transaction intended to result or which results in the sale or lease of goods or services to any consumer."[24] The CLRA defines "goods" as "tangible chattels bought or leased for use primarily for personal, family or household purposes ..." and "services" as "work, labor and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods."[25]

While the scope of the CLRA is narrower than the UCL, the available remedies are far greater. In addition to providing equitable relief like injunctive relief and restitution, the CLRA provides for actual damages and punitive damages.[26] The CLRA also allows for reasonable attorney fees and court costs to the prevailing party.[27] Thus, while there is some overlap with the UCL, the CLRA provides California plaintiffs with an additional arrow in their quiver of potential claims against professionals.

UCL and CLRA Impact on Professional Liability

A recent case illustrates the implications of UCL and CLRA claims brought against a licensed professional. In Giorvas v. Grow, et al.,[28] the jury trial centered on the plaintiff's claims of elder abuse,

breach of fiduciary duty, professional liability and fraud against multiple defendants and sought recovery of $20 million in emotional and economic damages. In addition to these and other claims, the plaintiff alleged a UCL claim focused primarily on the unlawful prong, as well as a CLRA claim centered around allegations of misrepresentations and false advertising.

Despite the successful outcome (the jury deliberated for less than two hours and reached a verdict in favor of defendants on all counts), this case illustrates how difficult it can be to completely eliminate a claim before trial based on California's sweeping consumer protection laws. The court did not grant the defendant's motion for summary judgment/adjudication as to the plaintiff's UCL claim due to the possibility that a lone provision of the Insurance Code may validly serve as the predicate statutory "unlawful" violation. This alleged violation was based solely on the plaintiff's allegation that the purchased insurance product (an annuity) was unsuitable because it contained a (standard) unemployment benefit rider which was unnecessary given the fact that the plaintiff was over the age of 65. The court ruled that because this lone alleged insurance code violation survived, so too did the plaintiff's UCL claim. Furthermore, the court ruled that the plaintiff had standing based on her proffered evidence which comprised of speculative damages claims that turned the common financial disclaimer "past performance is not an indicator of future results" on its head.

While the defendants could not dismiss the plaintiff's UCL claim on a pretrial motion, the defendants were successful in dismissing the plaintiff's CLRA claim through a motion for summary adjudication. The defendants argued that it is well established in California that a life insurance product like an annuity is not a "good" or "service" within the meaning of the CLRA.[29] Despite this bright-line rule, the plaintiff attempted to muddy the waters with argument suggesting that the defendant's alleged job title altered the analysis. The defendants successfully argued, however, that the focus of the CLRA prohibitions is on what is sold, not who sells it.

Conclusion

California's UCL and CLRA statutes provide overlapping but potentially very different risks to a working professional. The scope of a UCL claim is far broader, but the potential financial exposure for a professional in a single-plaintiff case is far less, limited primarily to injunctive relief and restitution. Meanwhile, the CLRA's available remedies, with actual damages, punitive damages and attorney fees, is far more potent. Of course, the professional's activities must fall within one of the CLRA's 24 prohibited acts or practices and qualify as a good or service as defined by the CLRA.

Accordingly, professionals targeted by consumers, must be prepared to defend against these consumer protection statutes as well, and will be challenged to eliminate the claims pretrial. These statutory schemes allow consumers and plaintiffs to enlarge their potential claims and recovery by virtue of the statutory remedies permitted. The legislature and the courts should take the necessary steps to reign in these consumer protection laws that allow for these lawsuits to go on far too long.

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DISCLOSURE: Jason Fellner represented the defendants in Giorvas v. Grow.

Jason Fellner is a shareholder and Charles Bahlert is an associate at Murphy Pearson in San Francisco.

[1] See Cal. Bus. & Prof.Code §§ 17200 through 17209.

[2] Kwikset Corp. v. Superior Court (2011) 51 Cal. 4th 310, 320.

[3] Cel-Tech Communications Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal. 4th 163, 180.

[4] See Cel–Tech Commc'ns Inc. v. Los Angeles Cellular Tel. Co. (1999) 20 Cal.4th 163 (citations omitted).

[5] People ex rel. City of Santa Monica v. Gabriel (2d Dist. 2010) 186 Cal. App. 4th 882.

[6] See Cel–Tech, 20 Cal.4th at 180.

[7] Portney v. CIBA Vision Corp. (C.D. Cal. 2009) 2009 WL 305488, *7.

[8] State Farm Fire & Cas. Co. v. Super. Ct. (1996) 45 Cal. App. 4th 1102, 1104 (citations omitted).

[9] Cel–Tech Commc'ns Inc. v. Los Angeles Cellular Tel. Co., 20 Cal.4th at 182.

[10] Id. at 186–187. See also In re Firearm Cases (2005) 126 Cal.App.4th 959, 981 ("In light of the Supreme Court's caution that businesses must be able to 'know, to a reasonable certainty, what conduct California law prohibits and what it permits,' we do not believe a UCL violation may be established without a link between a defendant's business practice and the alleged harm.").

[11] Camacho v. Automobile Club of Southern California (2006) 142 Cal.App.4th 1394, 1403.

[12] Lozano v. AT & T Wireless Services Inc. (9th Cir. 2007) 504 F.3d 718, 736.

[13] Bank of the West v. Superior Court (1992) 2 Cal.4th. 1254, 1267.

[14] Lavie v. Procter & Gamble Co. (2003) 105 Cal.App.4th 496, 512.

[15] In re Steroid Hormone Product Cases, (2d Dist. 2010) 181 Cal. App. 4th 145, 154, as modified on denial of reh'g, (Feb. 8, 2010).

[16] See Yanting Zhang v. Superior Court (2013) 57 Cal. 4th 364, 371. ("[A]n action under the UCL 'is not an all-purpose substitute for a tort or contract action.' Instead, the act provides an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices. As [the court has] said, the 'overarching legislative concern [was] to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition.' Because of this objective, the remedies provided are limited.").

[17] Id.

[18] Walker v. Countrywide Home Loans Inc. (2d Dist. 2002) 98 Cal. App. 4th 1158.

[19] Bus. & Prof. Code § 17204.

[20] Kwikset Corp. v. Superior Court (2011) 51 Cal. 4th 310, 317.

[21] Id. at 322-23 (alteration marks omitted) (quoting Lujan v. Defenders of Wildlife (1992) 504 U.S. 555, 560.

[22] See Cal. Civ. Code § 1750 et seq.

[23] Section 1770 lists the CLRA's prohibitions, which include, but are not limited to, the following: "(5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he or she does not have; ... (7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another; (9) Advertising goods or services with intent not to sell them as advertised; ... and (14) Representing that a

transaction confers or involves rights, remedies or obligations that it does not have or involve, or that are prohibited by law."

[24] Cal. Civ. Code § 1770(a).

[25] Cal. Civ. Code § 1761(a)-(b).

[26] See Cal. Civ. Code § 1780(a) ("Any consumer who suffers any damage ... may bring an action against that person to recover or obtain any of the following: (1) Actual damages, but in no case shall the total award of damages in a class action be less than one thousand dollars ($1,000). (2) An order enjoining the methods, acts or practices. (3) Restitution of property. (4) Punitive damages. (5) Any other relief that the court deems proper.").

[27] See Cal. Civ. Code § 1780(e) ("The court shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section. Reasonable attorney's fees may be awarded to a prevailing defendant upon a finding by the court that the plaintiff's prosecution of the action was not in good faith.").

[28] Case No. 115CV285323 (Cal. Super. Ct., Santa Clara County).

[29] Fairbanks v. Los Angeles County Superior Court (2009) 46 Cal. 4th 56, 61 (holding that "life insurance," which includes annuities within its definition under the Insurance Code [Cal. Ins. Code § 101], is a "contract of indemnity" and not a "good" or a "service" within the meaning of the CLRA); Estate of Migliaccio v. Midland Nat'l. Life Ins. Co. (C.D. Cal. 2006) 436 F. Supp. 2d 1095, 1109 (holding that "to the extent plaintiffs' CLRA claim is predicated on defendants' sale of annuities, as distinct from their providing estate or financial planning, such a claim cannot lie" because "annuities do not fall within the ambit of the CLRA.").

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