DOING BUSINESS IN THE GOLDEN STATE: CALIFORNIA CONSUMER PROTECTION

Michelle Park Chiu & Joseph Duffy
with assistance from Louis Lee
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- Overview of Relevant Laws: Bus. & Prof. Code Sections 17200, 17500
  - Prongs of the Consumer Protection Statutes
  - Relief Permitted
  - Special Considerations for Class Action Litigation
  - Special Considerations for Government Enforcement Actions
- Recent Trends
  - Privacy litigation
  - Point-of-sale litigation
  - Labeling
  - Song-Beverly litigation moving towards general false advertising
  - Enforcement litigation trends
- Defenses

- Unlawful business acts
- Unfair business acts
- Fraudulent business acts
- Unfair, deceptive, untrue or misleading advertising

- A practice is "unlawful" if it violates a law other than the UCL. Farmers Ins. Exch. v. Super. Ct., 2 Cal. 4th 377, 383 (1992).
  - Laws that can be "borrowed":
    - Federal Statutes and Regulations
    - State Statutes and Regulations
    - Local Ordinances
    - Common Law Doctrines
- But where there is a "safe harbor," cannot be liable under the UCL.
- A plaintiff may bring an action under the UCL even if the underlying law does not authorize private actions. Zhang v. Super. Ct., 57 Cal. 4th 364, 369 (2013).

- Two definitions of "unfair," different for a competitor or consumer case.
  - Competitor cases: An "unfair" business practice is "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999).
  - *Luxul Tech., Inc. v. Nectarlux, LLC*, 78 F. Supp. 3d 1156, 1174 (N.D. Cal. 2015):
    - Allegation in competitor case that defendant made statements to customers questioning the validity of plaintiff's patents, plaintiff brought UCL claim under "unfair" act prong.
    - Plaintiff alleged defendants had represented to actual and potential customers that there was ongoing litigation in Taiwan related to one of plaintiff's patents.
    - The Court explained it was required to "balance 'the impact' of defendants' alleged wrongful conduct on Plaintiff against Defendants' justifications. Here, Plaintiff has adequately pled that Defendants' representations have resulted in lost customers and damaged the value of Plaintiff's brand. Defendants offer no justifications, and certainly none that would defeat Plaintiff's claim as a matter of law at the pleading stage."

- *RLH Industries, Inc. v. SBC Communications, Inc.*, 133 Cal. App. 4th 1277 (2005).
  - Plaintiff brought concurrent antitrust claim and UCL claim alleging unfair business acts.
  - RLH alleged the defendants violated California antitrust law by requiring their local telephone service customers to obtain high voltage protection (HVP) directly from defendants or from approved HVP device makers other than RLH; in other words, illegal tying.
  - Court rejected the plaintiff's antitrust claim because defendants' HVP policy ultimately provided customers the choice between leasing defendants' HVP services or buying their own HVP devices from independent suppliers in which defendants had no financial interest. *Id.* at 1285-86.
  - The court applied the definition of "unfair" from *Cel-Tech* and reasoned: "If the same conduct is alleged to be both an antitrust violation and an 'unfair' business act or practice for the same reason—because it unreasonably restrains competition and harms consumers—the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not 'unfair' toward consumers." *Id.*
  - Court then held that the HVP policy was not independently unfair, concluding that "[e]ven if some unfair competition causes of action can survive independently of an actual antitrust violation, this one does not." *Id.*

- Three tests for determining an unfair business act:
  - **FTC Test**: the consumer injury was substantial; the injury is not outweighed by any countervailing benefits to consumers or competition; and an injury that consumers themselves could not reasonably have avoided. Camacho v. Auto. Club of S. Cal., 142 Cal. App. 4th 1394, 1403 (2006).
  - **Public Policy Test**: the public policy that is a predicate to the UCL claim must be tethered to specific constitutional, statutory or regulatory provisions. Drum v. San Fernando Valley Bar Ass'n, 182 Cal.App.4th 247, 257 (2010).
  - **Third Test**: 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." Id.
- In consumer cases, a business practice is not "unfair" if a reasonable alternative is available either from the defendant or from the defendant's competitors. *Shadoan v. World Sav. & Loan Ass'n*, 219 Cal. App. 3d 97, 103, 106 (1990).

- A business practice is "fraudulent" under section 17200 if "members of the public are likely to be deceived." *Comm. on Children's Television v. General Foods Corp.*, 35 Cal. 3d 197, 211 (1983).
- No requirement to prove actual deception, intent to defraud, or damages. *Scnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 1167 (2000).
- Defendant may argue that the act is not "likely to mislead" an ordinary consumer. *Kunert v. Mission Fin. Servs. Corp.*, 110 Cal. App. 4th 242, 264-65 (2003).
- *Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342 (2012): Fraudulent business act claim based on a failure to disclose.
  - Court held that the complaint adequately alleged a fraudulent business act claim where defendant failed to disclose the effects of temperature increases on the volume of motor fuel sold.
  - The alleged likelihood of deception must be tethered to an actual assumption or expectation. In *Klein*, the court noted the complaint sufficiently alleged the public "did in fact have an expectation or assumption about the amount and price of fuel they would receive in each transaction."
- *Cf. Bardin v. Daimlerchrysler Corp.*, 136 Cal. App. 4th 1255, 1275 (2006). Plaintiff's allegations that defendant failed to disclose material used in component parts failed to state a claim under the UCL because the "complaint did not allege ... members of the public had any expectation or made any assumptions that [the] exhaust manifolds would be made from cast iron, as opposed to tubular steel."

- *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170, 1181-1182 (9th Cir. 2003)
  - Although actual deception, reliance and damages are not required under the above-cited authorities, "materiality" may be required.
  - The court held that a claim of false advertising that did not influence anyone's purchase decision cannot be the basis of a UCL claim.
  - Allegedly false statements were printed on the jacket of a video, sold only by telemarketers. The court explained that nothing printed in the video jacket could have been material to a consumer's telephonic purchase decision; consequently, no "reasonable person" could have been misled by a statement he or she never saw. *Id.*
- *Pastoria v. Nationwide Ins.*, 112 Cal. App. 4th 1490 (2003)
  - The court ruled that allegations were sufficient to state a claim for relief under the fraudulent business practices prong of the UCL where plaintiffs alleged:
    - They purchased insurance policies based upon the defendant insurance company's description of the premiums, lack of deductibles, and other policy benefits;
    - Less than two months later the insurer notified them of significant changes to their policies, including material increases in premiums and substantial deductibles; and
    - The insurer knew of the impending changes to the policies at the time plaintiffs purchased them, but did not communicate that to the plaintiffs. *Id.* at 1493.

- Closely related to the third prong of the consumer protection statutes
  - Almost any statement made in connection with the sale of goods or services constitutes "advertising." *Chern v. Bank of America*, 15 Cal. 3d 866, 875-876 (1976).
  - "Advertising" includes statements to a single person. *Id*. at 876.
  - "Advertising" is "misleading" if "members of the public are likely to be deceived." *Comm. on Children's Television*, 35 Cal. 3d at 211.
- Notable examples of advertisements considered misleading:
  - *People ex rel. Dep't of Motor Vehicles v. Cars 4 Causes*, 139 Cal. App. 4th 1006 (2006)
    - The court determined that the defendant charity's practice of advertising that it provided "free towing" to vehicle donors was false advertising.
    - The defendant's "advertisements did not disclose that a fee was paid to a towing company and deducted from the portion of sales proceeds distributed to charities." *Id*. at 1011. The court observed that the defendant "obtains the donation of vehicles by representing that the proceeds of the sale, or part of the proceeds, will be contributed to charities. To induce donations, respondent advertises that it provides 'free towing' of a vehicle from the donor's residence." *Id*. at 1016 (emphasis added).
    - The court concluded that "the donors have a charitable purpose and respondent represents that it will effectuate that purpose. Advertising free towing when, in fact, the cost will be deducted from the charitable contribution is necessarily deceptive." *Id*. at 1017.

- *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663 (2006)
  - Defendant's claim in advertisements that its products were "Made in the USA" were found to be deceptive when, in fact, the evidence showed that a large majority of the components of the product were manufactured outside of the United States, and merely assembled into finished products within the United States.
  - As with a fraudulent business act claim, to prevail on a false advertising claim under the UCL, the plaintiff needs to establish "that members of the public are likely to be deceived. A 'reasonable consumer' standard applies when determining whether a given claim is misleading or deceptive." *Id.* at 682.
  - In concluding that the defendant's advertisements were misleading, the court stated "[a] reasonable consumer of Leatherman's products with the 'Made in the USA' representation would not expect such foreign manufacturing." *Id.*
  - *Colgan* continues to be a popular case for current UCL trends, including cases attacking claims such as "natural," "green," or "nontoxic."

- Injunctive relief
- Restitution
- Civil penalties
- No punitive damages available
- No attorney’s fees available

- The UCL states "any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction."
  - The Legislature "intended … to permit courts to enjoin ongoing wrongful business conduct in whatever context such activity might occur." *Barquis v. Merchants Collection Ass'n*, 7 Cal. 3d 94, 111 (1972).
- Injunctive powers of the court are broad: "A court of equity may exercise the full range of its inherent powers in order to accomplish complete justice between the parties, restoring if necessary the status quo ante as nearly as may be achieved." *Jayhill*, 9 Cal.3d at 286.

- *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy*, 4 Cal. App. 4th 963, 972-974 (1992).
  - The court held that injunctive relief awarded in an UCL action may also include an order for mandatory, affirmative disclosures.
  - The court affirmed the trial court's order requiring a dairy company that was liable of false advertising to place a warning on all of its advertisements and products for the next 10 years, stating that there is no proof (a) that pasteurization reduces the nutritional value of milk or (b) that the risks of consuming raw milk outweigh any of its alleged health benefits.
  - The court's rationale for requiring the mandatory disclosure was that "an injunction against future violations might have some deterrent effect, [but] it is only a partial remedy since it does not correct the consequences of past conduct. An 'order which commands a party only to go and sin no more simply allows every violator a free bite at the apple.'" *Id*. at 973.

- As illustrated by *People v. Toomey*, 157 Cal. App. 3d 1 (1984), and *Strumlauf v. Starbucks Corp.*, 192 F. Supp. 3d 1025 (N.D. Cal. 2016), when considering whether to grant injunctive relief for a UCL claim, courts consider the possibility of repeated harm.
  - In *Toomey*, defendant was found liable under the UCL for distributing coupon books for his casino that contained misleading and/or false advertisements. The court found that the defendant's cessation of those advertisements prior to the time of trial did not bar injunctive relief where the defendant continued to sell other similar coupon books.
  - In *Strumlauf*, plaintiffs alleged they would not have purchased certain Starbucks lattes if they had known they were being "underfilled." The court held that, once plaintiffs learned of the misrepresentations, they were not in danger of being misled in the future—and thus did not have the required standing to seek injunctive relief.

- Restitution is discretionary, and stems from the court's power to grant injunctive relief. *ABC'Int'l Traders, Inc. v. Matsushita Electric Corp.*, 14 Cal.4th 1247 (1997).
- Restitution is cumulative as to other remedies within the UCL and as to remedies provided by other laws. *People ex rel. Lockyer v. Fremont Life Ins. Co.*, 104 Cal. App. 4th 508, 523 (2002).
- No individualized proof of harm required. *Id.* at 532.
- Restitution awards must be limited to funds in which the victim had an ownership interest. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1149 (2003).
  - No lost profits available under restitution
  - Wages unlawfully withheld from an employee are recoverable
  - Amounts unlawfully withheld from insurance premium deductions

- Recoverable in enforcement actions only. *Bank of the West v. Super Ct.*, 2 Cal. 4th 1254, 1266 (1992).
- Note: penalties are mandatory when a violation of the UCL is found in an enforcement action.
- Statutory maximum of $2,500 per violation (Bus. & Prof. Code Sec. 17206)
  - Courts consider factors such as the "nature and seriousness of the misconduct," the number of violations, the length of time the misconduct occurred, willfulness of the conduct, and the defendant's assets and net worth
- Different theories for counting the number of violations:
  - Per victim test
  - Per act test
  - Hybrid methods

- Certification of UCL Claims for Class Actions
  - Proof of "commonality" through statistical sampling? *See Duran v. U.S. Bank*, 59 Cal. 4th 1 (2014).
  - Sampling is allowed, provided there are certain safeguards
  - Even when statistical methods are appropriate, they cannot be a substitute for common proof
  - Due Process right to assert defenses
  - Plaintiff must present trial plan at class certification stage
  - Sampling model must be developed by expert

- Section 17200 is an important tool for law enforcement agencies. Although section 17200 is purely a civil statute, violations of section 17500 can be prosecuted either civilly or criminally.
- Civil actions under section 17200 may be brought in the name of the People of the State of California by (1) the Attorney General, (2) any district attorney, (3) any city attorney in a city having a population in excess of 750,000, or (4) with the consent of the district attorney, by any city prosecutor in any city having a full-time city prosecutor.
  - The statute also provides for penalty-sharing amongst the various regulators depending on which office brings the complaint on behalf of the People of the State of California.
  - In some cases, private plaintiffs wait for the enforcement action to proceed first, then use the findings as res judicata against the defendant.
- Public enforcement of section 17500 violations is even broader: Suit may be brought by (1) the Attorney General, (2) any district attorney, (3) county counsel, (4) city attorney, or (5) city prosecutor.

- Privacy/Song-Beverly Litigation
- Point-of-Sale Litigation
- Labeling/Pricing/Advertising Claims
- Enforcement Actions
- Defenses

- Anthem Litigation: nationwide data breach case permitted to go forward under UCL claims under "benefit of the bargain" theory, that premiums paid should have included stronger data protection
- Data Collection Statutes: trends of national litigation alleging that apps collect personal information and share it without individual consumer consent
- Song-Beverly Litigation: prohibits retailers from collecting personal information to use a credit card to purchase
- Consumer Recording/Data Collection: statutes regulating consumer recordings can be brought under the UCL; best practice is to always obtain consent, including through a retailer's website, which has been upheld as consent

- Refund Policy: location, effectiveness, policies and procedures
- Gift Card law: expiration dates, cash back requests, disclosures
- Pricing display: POS price match the price in the display?
- Online “Point of Sale” Issues

- Outlet Pricing Litigation: dozens of class actions alleging false price comparisons, relying on the UCL, FAL, and California pricing statute Section 17501
- Labels Matter: health benefits, “organic,” “all natural,” sourcing
- Greenwashing: claims regarding environmental impact
- E-Commerce activity: growing trend to focus on visual advertising, disclosures, comparative statements

- California AG's office very active in bringing lawsuits, most of which end in settlements. AG often coordinates with national efforts (other state AGs, DOJ, etc.) and usually secures largest portion of any settlements obtained for California.
  - Moody's: residential mortgage-backed securities case, $150 million to California
  - Volkswagen: diesel emissions case, $1.18 billion to California for environmental projects
  - Target: data breach case, $1.4 million payment to California out of $18.5 million
  - Wells Fargo: recording consumer calls case, $7.6 million in civil penalties
  - Mondelez: Nabisco cookies lead case, $750,000 in civil penalties
  - Aaron's: spyware case, $25 million in restitution and $3.4 million in civil penalties
  - Hyundai/Kia: misrepresentations regarding fuel economy, $3 million to California

- Arbitration Clauses
- Class Action Waivers
- Terms of Use/Terms of Membership
- Jurisdictional Challenges
- Class Action Defenses

Michelle Park Chiu
San Francisco, CA
T +1.415.442.1184
F +1.415.442.1001
Michelle.chiu@morganlewis.com

With a focus on complex litigation, Michelle Park Chiu represents clients facing unfair competition claims, including claims brought pursuant to California Bus. & Prof. Code § 17200; state and federal antitrust litigation; and financial institutions clients facing a variety of consumer claims, such as those brought under the Fair Credit Reporting Act and Truth In Lending Act. Michelle has experience in litigating class actions, government law enforcement actions, multidistrict litigation, and arbitrations. She has represented clients through all phases of litigation, from pre-trial strategy assessment to trial and appeals.

Joseph Duffy
Los Angeles, CA
T +1.213.612.7378
F +1.213.612.2501
Joseph.duffy@morganlewis.com

A nationally recognized litigator, Joseph Duffy defends class actions in US federal and state courts. As co-head of the litigation practice's Retail Industry Initiative, he focuses on the unique challenges facing retail companies, representing retailers in consumer class actions, contract disputes, and compliance and privacy matters. He also litigates class actions for financial services companies involving lending practices, foreclosure activity, and debt collection. Joseph earned recognition as a Class Actions and Mass Torts "Powerhouse" in BTI's Litigation Outlook 2014 Report.

Louis Y. Lee
San Francisco, CA
T +1.415.442.1370
F +1.425.442.1001
Louis.lee@morganlewis.com

Louis Y. Lee litigates commercial disputes, including business tort, breach of contract, fraud, and unfair competition actions. He primarily works on matters in the financial services, retail, and life sciences industries.

While in law school, Louis served as an editor of the Hastings Law Journal and participated in the Hastings Startup Legal Garage, where he helped counsel early-stage companies on patent-related issues. He also competed in the David E. Snodgrass Moot Court competition, where he was a finalist in the Best Oralist and Best Brief categories.

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