STROOCK

OVERVIEW OF 2011 DEVELOPMENTS UNDER THE CALIFORNIA UNFAIR COMPETITION LAW AND CONSUMERS LEGAL REMEDIES ACT

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INTRODUCTION[1]

In California, plaintiffs' lawyers possess two powerful bases upon which to bring class action litigation: the Unfair Competition Law, California Business and Professions Code sections 17200 through 17209 (the "UCL"); and the Consumers Legal Remedies Act, California Civil Code sections 1750 through 1784 (the "CLRA"). The UCL forbids "unfair, unlawful and fraudulent" conduct in connection with virtually any type of business activity.[2] Indeed, with its sweeping liability standards and broad equitable remedies, the UCL has long been a primary "sword" for plaintiffs' lawyers in California. Meanwhile, the CLRA is more defined in structure, but no less potent. The CLRA applies to any "consumer" transaction involving the "sale or lease of goods or services,"[3] and authorizes recovery of actual, statutory and punitive damages.[4] The CLRA explicitly prohibits 24 separate business acts or practices, and provides for streamlined class certification and dispositive motion proceedings.

In 2011, courts continued to refine the UCL's standing requirement. That requirement was imposed on November 2, 2004 by California voters' approval of Proposition 64. Proposition 64 was a ballot initiative enacted through California's proposition system, which allows the public to make legislation. Proposition 64 put an end to "private attorney general" UCL cases prosecuted by unaffected plaintiffs, purportedly on "behalf of the general public." In addition to the standing requirement, Proposition 64 mandated that actions involving aggregated claims proceed under California's class-action standards.

Since the enactment of Proposition 64, courts have been working toward an understanding of the standing requirement, which turns upon the existence of an "injury in fact" and a "loss of money or property as a result of" a UCL violation. In 2010, in Clayworth v. Pfizer, Inc.,[5] the Court made clear that an analysis of standing – i.e., whether plaintiff has suffered an injury sufficient to sue under the UCL – is distinct from an analysis of a remedy that might apply – i.e., whether plaintiff might achieve meaningful relief through litigation of the claim. This ruling disposed of a line of decisions stating that, in order to have standing, a UCL plaintiff had to possess a claim under which restitution could be awarded. These pre-Clayworth decisions had denied standing to plaintiffs seeking only injunctive relief.

Then, in Kwikset Corp. v. Superior Court,[6] the California Supreme Court found that standing requires an "economic injury" "caused by" a practice in violation of the UCL. Decisions in 2011, applying Kwikset, have focused on the meaning of "economic injury," and particularly when the Article III injury-in-fact requirement also is implicated. Likewise, standing

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[1] The research in this Overview is current through February 29, 2012 with the exception of a decision from March included in the discussion of arbitration. The authors thank Catherine Huang and Vona Enaughe, associates with Stroock, for their invaluable assistance with this year's Overview.

[2] See Cal. Bus. & Prof. Code § 17200.

[3] See Cal. Civ. Code §§ 1770 (stating prohibited practices) and 1761 (definitions).

[4] See Cal. Civ. Code § 1780(a).

[5] 49 Cal. 4th 758 (2010).

[6] 51 Cal. 4th 310 (2011).

in class actions was examined by the courts, including based on differing UCL and Article III requirements.

Arbitration issues once again loomed large in 2011. On April 27, 2011, the United States Supreme Court issued its long-anticipated decision in AT&T Mobility LLC v. Concepcion.[7] AT&T Mobility confirmed that arbitration agreements governed by the Federal Arbitration Act (the "FAA") must be enforced as written. Critically, this includes arbitration agreements that contain "class action waiver" provisions, i.e., terms requiring arbitration on an individual, non-class basis. Since AT&T Mobility, the vast majority of courts have held, very simply, that motions to compel arbitration must be granted and arbitration agreements enforced as written. Courts in California, however, have taken divergent views on AT&T Mobility's effect on claims for public injunctive relief under the UCL and CLRA. Some courts have carved out exceptions for UCL and CLRA claims, while others have held that, under AT&T Mobility, any rule exempting such claims from arbitration is preempted by the FAA. The Ninth Circuit Court of Appeals recently agreed with the latter view, holding that UCL and CLRA claims for public injunctive relief are arbitrable under the FAA. In the end, the issue may be brought before the California Supreme Court and, possibly, the United States Supreme Court.

[7] __ U.S. __, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011).

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THE UNFAIR COMPETITION LAW

I. THE STRUCTURE OF THE UCL

A. Conduct That Constitutes "Unfair Competition"

"Unfair competition" is defined in the UCL as any one of the following "wrongs":[8] (1) an "unlawful" business act or practice; (2) an "unfair" business act or practice; (3) a "fraudulent" business act or practice; (4) "unfair, deceptive, untrue or misleading advertising"; and (5) any act prohibited by sections 17500 through 17577.5.[9] These definitions are disjunctive.[10] Each of the "wrongs" operates independently from the others. "[I]n other words, a practice is prohibited as 'unfair' or ['fraudulent'] even if not 'unlawful' and vice versa."[11]

The UCL's reach is imposing: "The Legislature apparently intended to permit courts to enjoin ongoing wrongful business conduct in whatever context such activity might occur."[12] The "cleansing power" provided to a court by the UCL can pose a formidable challenge to defendants.[13]

B. What Constitutes A Business Act Or Practice?

The first three "wrongs" in the UCL require proof of a "business act or practice." Although no reported case explicitly defines the term "business" under the UCL, if the issue were

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[8] The full text of section 17200 reads as follows:

> As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with 17500) of Part 3 of Division 7 of the Business and Professions Code.

[9] Unless specified in the complaint, the UCL does not necessarily include violations of section 17500, et seq. See People ex rel. Lockyer v. Brar, 134 Cal. App. 4th 659, 666-67 (2005) (seeking to enjoin attorney from bringing "shakedown" UCL claims against small businesses). The court explained:

> We cannot agree with the Attorney General that ["et seq."] is elastic enough to stretch all the way to section 17500. Section 17200 begins part 2 of division 7 of the Business and Professions Code, and deals with unfair competition, while section 17500 begins part 3 of the same code and deals with representations to the public. The Legislature evidently thought that false advertising was sufficiently distinct from unfair competition so as not to be lumped even in the same part of a division. Nor does the body of the complaint contain any references to section 17500 or the false advertising law. The complaint thus did not give fair warning that [defendant] was subject to being enjoined from filing false advertising suits under section 17500 as well as unfair competition suits under section 17200.

Id.; see also Densmore v. Manzarek, Nos. B186036, B186037, B188708, 2008 WL 2209993, at *27 (Cal. Ct. App. May 29, 2008) (finding that dismissal of UCL claim does not require dismissal of section 17500 claim, which consists of distinct elements).

[10] See State Farm Fire & Cas. Co. v. Super. Ct., 45 Cal. App. 4th 1093, 1102 (1996).

[11] Id.

[12] Comm. on Children's Tel., Inc. v. Gen. Foods Corp., 35 Cal. 3d 197, 210 (1983).

[13] Fletcher v. Sec. Pac. Nat'l Bank, 23 Cal. 3d 442, 449 (1979).

presented, the courts may well construe the term broadly, as they otherwise have construed the UCL. With respect to the terms "act" and "practice," the UCL has been interpreted to encompass most business conduct. Even a one-time act has been deemed sufficient to allege a UCL claim.[14] However, the UCL seemingly does not apply to securities transactions.[15]

C. Who May Be Sued Under The UCL?

Unlike some other states' unfair and deceptive practices statutes, the UCL does not expressly exempt from coverage any specific industries, such as those that are highly regulated.[16] Rather, it applies to any "person,"[17] as defined under the UCL. Governmental entities do not fall within this definition and cannot be sued under the UCL.[18] Furthermore, the law is not settled

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[14] See, e.g., Allied Grape Growers v. Bronco Wine Co., 203 Cal. App. 3d 432, 452 (1988) (determining that defendant's conduct relating to single contract constituted a "practice" under the UCL).

[15] See Bowen v. Ziasun Techs., Inc., 116 Cal. App. 4th 777, 787-90 (2004). Noting that no published decision in California has addressed this issue, the Court of Appeal in Bowen analogized the UCL to the Federal Trade Commission Act (the "FTCA"). The court reasoned that the Federal Trade Commission ("FTC") historically has not viewed the FTCA as affecting securities transactions. The court further observed that federal courts, as well as 15 other states, have concluded that consumer protection statutes like the UCL do not apply to securities transactions. See also Feitelberg v. Credit Suisse First Boston, 134 Cal. App. 4th 997, 1009 (2005) (citing Bowen); Strigliabotti v. Franklin Res., Inc., No. C 04-00883 SI, 2005 WL 645529, at *10 (N.D. Cal. Mar. 7, 2005) (concluding that the UCL could be used to challenge an alleged scheme to overcharge investors in the management of securities since Bowen does not encompass all situations where securities are somehow implicated but not purchased or sold); San Francisco Residence Club, Inc. v. Amado, 773 F. Supp. 2d 822, 834 (N.D. Cal. 2011) ("It appears that federal cases refusing to apply Bowen to the UCL all involved claims that did not target a securities *transaction*. These courts refused to rely on Bowen to foreclose any UCL claim, merely because the case involved securities in a general sense."; but, finding that the UCL did not cover plaintiffs' claim, which focused on purchase of securities); Benson v. Betz v. Trainer Wortham & Co., Inc., No. C 03-03231 SI, 2011 WL 1990565, at *6 (N.D. Cal. May 23, 2011) ("No court, however, has allowed Section 17200 claims to proceed where, as here, the predicate acts are securities transactions.").

[16] But see discussion infra p. 30-33 and notes 182-191 ("Primary Jurisdiction"; "Judicial Abstention In Matters Of Economic Policy"; "The 'Safe Harbor' Defense").

[17] Cal. Bus. & Prof. Code § 17201. See, e.g., Quelimane Co. v. Stewart Title Guar. Co., 19 Cal. 4th 26, 46-47 (1998) (holding that the California Insurance Code did not preclude UCL action against title insurers based on an alleged conspiracy not to issue title insurance); Wells v. One2One Learning Found., 39 Cal. 4th 1164, 1199-1204 (2006) (charter schools, their operators and districts were "persons" as defined by section 17201); Frazier Nuts, Inc. v. Am. AG Credit, 141 Cal. App. 4th 1263, 1283-84 (2006) (finding that a production credit association, federally chartered by the Farm Credit Administration, was not a public entity and, therefore, was subject to suit under the UCL).

[18] See, e.g., People for the Ethical Treatment of Animals, Inc. v. Cal. Milk Producers Advisory Bd., 125 Cal. App. 4th 871, 875 (2005) (holding that California Milk Advisory Board was not a "person" that could be sued under the UCL); Janis v. Cal. State Lottery Comm'n, 68 Cal. App. 4th 824, 831 (1998) (holding that state lottery commission, a government entity, was not a "person" that could be sued under the UCL).

on whether the UCL applies to claims brought on theories of indirect liability, such as vicarious or aiding and abetting liability.[19]

D. Who May Sue Under The UCL?

The UCL expressly permits claims to be brought by any "person," which it defines to include "natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons."[20] The ability of corporate plaintiffs to bring UCL claims may be limited under certain circumstances, however. In Linear Technology Corp. v. Applied Materials, Inc., plaintiff attempted to bring an unfair and deceptive UCL claim against three manufacturers of semiconductor manufacturing equipment arising out of a third-party claim that the equipment infringed patents held by the third party.[21] The trial court sustained a demurrer to the UCL claim and the Court of Appeal affirmed, reasoning that the UCL claim was "based on contracts not involving either the public in general or individual consumers who are parties to the contracts," and that prosecution of a UCL claim could "deprive [other companies that had purchased the same equipment] of the individual opportunity to seek remedies far more extensive than those available under the UCL," in violation of due process.[22]

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[19] See Emery v. Visa Int'l Serv. Ass'n, 95 Cal. App. 4th 952, 960 (2002) ("'The concept of vicarious liability has no application to actions brought under [the UCL].' . . . A defendant's liability must be based on his personal 'participation in the unlawful practices' and 'unbridled control' over the practices that are found to violate section 17200 or 17500.") (quoting People v. Toomey, 157 Cal. App. 3d 1, 14 (1984)); accord Rogers v. Cal State Mortg. Co. Inc., No. CV F 09-2107 LJO DLB, 2010 WL 144861, at *13 (E.D. Cal. Jan. 11, 2010) ("An 'unfair practices claim under section 17200 cannot be predicated on vicarious liability.'") (quoting Emery, 95 Cal. App. 4th at 960); In re Jamster Mktg. Litig., No. 05cv0819 JM(CAB), 2009 WL 1456632, at *8 (S.D. Cal. May 22, 2009); Rodriguez v. Litton Loan Servicing LP, No. 2:09-cv-00029-MCE-DAD, 2009 WL 1326339, at *5-6 (E.D. Cal. May 12, 2009); Nichols v. Greenpoint Mortg. Funding, Inc., No. SA CV 08-750 DOC (MLGx), 2008 WL 3891126, at *3-4 (C.D. Cal. Aug. 19, 2008). But see Schulz v. Neovi Data Corp., 152 Cal. App. 4th 86, 93-96 (2007) (distinguishing Emery and reversing order sustaining demurrer to UCL claim based on aiding and abetting theory on ground that defendants were alleged to have directly contracted with operator of illegal lottery and had direct stakes in the venture); Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1187 (C.D. Cal. 2002) (distinguishing Emery and granting preliminary injunction against internet company based on its activities in supervising access to adult online services); Chetal v. Am. Home Mortg., No. C 09-02727 CRB, 2009 WL 2612312, at *4 (N.D. Cal. Aug. 24, 2009) (noting that an aiding and abetting theory is available under the UCL); Plascencia v. Lending 1st Mortg., 583 F. Supp. 2d 1090, 1098 (N.D. Cal. 2008) (allowing claims to proceed on aiding and abetting theory).

[20] Cal. Bus. & Prof. Code §§ 17201, 17204.

[21] 152 Cal. App. 4th 115, 131 (2007).

[22] Id. at 135 (citing Rosenbluth Int'l, Inc. v. Super. Ct., 101 Cal. App. 4th 1073, 1077-79 (2002)).

E. Proposition 64 And The UCL Standing Requirement

Proposition 64 became effective on November 3, 2004.[23] It imposed two significant restrictions, which apply only to actions filed by private individuals or entities.[24] First, amended section 17204 states the standing requirement:

> Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction . . . by any person ~~acting for the interests of itself, its members or the general public~~ *who has suffered injury in fact and has lost money or property as a result of such unfair competition.*

(Old language stricken, new language in italics.)[25] The UCL previously granted broad standing to "any person," allowing the filing of "representative," "private attorney general" or "general public" actions by plaintiffs who had no dealings with the defendants or the transactions at issue.[26] These actions were brought without regard to any procedural standard, or notice or due process requirements.[27] Many such actions were frivolous and abusive.

Second, as a result of Proposition 64, the UCL requires that private cases involving aggregated claims comport with California's class-action standards. Amended section 17203 provides:

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[23] See Cal. Const. art. II, § 10(a) ("An initiative statute or referendum approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise.").

[24] In addition, Proposition 64 placed certain restrictions on the use of monetary penalties recovered by public enforcement officials – i.e., those penalties must be used in the enforcement of consumer protection laws. This change in the law will not impact private UCL actions, where monetary penalties are not available.

[25] Proposition 64 also amended California Business & Professions Code section 17535 (governing the relief available in false advertising lawsuits) to impose the same standing and class-action standards as those contained in the revised section 17204, as follows:

> Actions for injunctive relief under this section may be prosecuted . . . by any person ~~acting for the interests of itself, its members or the general public~~ *who has suffered injury in fact and has lost money or property as a result of a violation of this chapter. Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of this section and complies with section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.*

(Old language stricken, new language in italics.)

[26] See Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal. 4th 553, 561 (1998) (holding that a for-profit corporation could bring a UCL representative action on behalf of the general public); Mass. Mut. Life Ins. Co. v. Super. Ct., 97 Cal. App. 4th 1282, 1288 (2002) ("California courts have repeatedly held that relief under the UCL is available without individualized proof of deception, reliance and injury.").

[27] See Kraus v. Trinity Mgmt. Servs., Inc., 23 Cal. 4th 116, 126 n.10 (2000) (discussing, among other things, these actions and the unique, attendant due process concerns); see also Bronco Wine Co. v. Frank A. Logoluso Farms, 214 Cal. App. 3d 699, 715-21 (1989) (reversing the trial court's restitution order based on certain due process considerations potentially affecting non-parties).

> Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. *Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of section 17204 and complies with Code of Civil Procedure section 382, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.*

(New language in italics.) California Code of Civil Procedure section 382 authorizes class litigation.[28] Section 382 does not itself set forth the specific requirements necessary to maintain a class action, and California courts therefore have interpreted section 382 to impose the requirements that usually apply in other state and federal courts – commonality, typicality, adequacy of representation and superiority.[29]

1. The Impact Of Clayworth And Kwikset On The Standing Requirement

a. Clayworth: The Availability Of A Remedy Is Irrelevant To The Standing Analysis.

In Clayworth, retail pharmacies brought UCL claims against pharmaceutical companies for alleged price fixing.[30] Defendants challenged the plaintiffs' standing, arguing that they did not suffer a loss of money or property because they passed on the overcharges to customers. According to defendants, plaintiffs had no remedy to pursue.[31] The Court rejected this position, and made clear that the issues of standing and remedies are separate: "That a party may ultimately be unable to prove a right to damages (or, here, restitution) does not demonstrate that it lacks standing to argue for its entitlement to them."[32] "The doctrine of mitigation . . . is a limitation on liability for damages, not a basis for extinguishing standing."[33] In short, looking at the

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[28] See Linder v. Thrifty Oil Co., 23 Cal. 4th 429, 435 (2000).

[29] See id.; see also In re Tobacco II Cases, 46 Cal. 4th 298, 318 (2009) ("Tobacco II"); Richmond v. Dart Indus., Inc., 29 Cal. 3d 462, 470 (1981); City of San Jose v. Super. Ct., 12 Cal. 3d 447, 454 (1974).

[30] 49 Cal. 4th at 764.

[31] Id. at 765.

[32] Id. at 789.

[33] Id. (citing Pool v. City of Oakland, 62 Cal. 3d 1051, 1066 (1986) ("'The rule of [mitigation of damages] comes into play after a legal wrong has occurred, but while some damages may still be averted'")).

language and intent of section 17204, the Court found that plaintiffs need not prove "compensable loss at the outset" in order to have standing.[34]

In connection with this conclusion, the Court also explicitly held that a UCL plaintiff seeking only injunctive relief can have standing. The Court noted that "[s]ection 17203 makes injunctive relief 'the primary form of relief available under the UCL,' while restitution is merely 'ancillary.'"[35]

Accordingly, under Clayworth, a plaintiff's right to seek injunctive relief is not dependent on the ability to seek restitution. Likewise, the availability of a remedy is not relevant to standing.[36]

b. Kwikset: Plaintiff Must Suffer An "Economic Injury" That Is "Caused By" A UCL Violation.

In Kwikset, plaintiffs alleged that defendant violated the UCL and the False Advertising Law ("FAL") when it marketed and sold locksets labeled "Made in U.S.A.," when, in fact, the locksets contained parts from or were partly manufactured abroad.[37] Plaintiffs alleged that they purchased the locksets based on the labeling and would not have done so if they were not so labeled. According to defendant, plaintiffs lacked standing because, in essence, they received the benefit of the product; it was useable and not defective.

The Court commenced its discussion by stating, "Proposition 64 should be read in light of its apparent purposes, i.e., to eliminate standing for those who have not engaged in any business dealings with would-be defendants and thereby strip such unaffected parties of the ability to file 'shakedown lawsuits,' while preserving for actual victims of deception and other acts of unfair competition the ability to sue and enjoin such practices."[38] The Court then observed, "Proposition 64 accomplishes its goals in relatively few words."[39] Less than two dozen are at issue here: under the UCL, standing extends to "a person who has suffered injury in fact and has lost money or property as a result of the unfair competition."[40]

Against this background, the Court found that "the plain language of these clauses suggests a simple test."[41] 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

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[34] Id. at 789.

[35] Id. at 790 (quoting Tobacco II, 46 Cal. 4th at 319).

[36] Id. See also Finelite, Inc. v. Ledalite Architectural Prods., No. C-10-1276 MMC, 2010 WL 3385027, at *2 (N.D. Cal. Aug. 26, 2010) (the right to seek injunctive relief under the UCL is not dependent on the right to seek restitution, the two are wholly independent remedies).

[37] 51 Cal. 4th at 317.

[38] Id.

[39] Id. at 321 (quoting Californians for Disability Rights v. Mervyn's, LLC, 39 Cal. 4th 223, 228 (2006)).

[40] Id. at 321 (quoting Cal. Bus. & Prof. Code § 17204).

[41] Id. at 322.

was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim."[42]

With respect to injury in fact, the Court emphasized that "the text of Proposition 64 establishes expressly that in selecting this phrase the drafters and voters intended to incorporate the established federal meaning. The initiative declares: 'It is the intent of the California voters in enacting this act to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been *injured in fact under the standing requirements of the United States Constitution*.'"[43] The Court explained that, "[u]nder federal law, injury 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.'"[44] "'Particularized' in this context means simply that 'the injury must affect the plaintiff in a personal and individual way.'"[45] Accordingly, with respect to standing under the UCL, the Court held:

> There are innumerable ways in which economic injury from unfair competition may be shown. A plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary. Neither the text of Proposition 64 nor the ballot arguments in support of it purport to define or limit the concept of "lost money or property," nor can or need we supply an exhaustive list of the ways in which unfair competition may cause economic harm.[46]

The Court also noted that "lost money or property – economic injury – is itself a classic form of injury in fact."[47] The Court then went on to "offer a further observation concerning the order in which the elements of standing are best considered":[48]

> Because, as noted, economic injury is itself a form of injury in fact, proof of lost money or property will largely overlap with proof of injury in fact. If a party has

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[42] Id. (emphasis in original).

[43] Id. (emphasis in original and citation omitted) (quoting Prop. 64, § 1, subd. (e) and citing Buckland v. Threshold Enter., Ltd., 155 Cal. App. 4th 798, 814 (2007)).

[44] Id. at 322-23 (alteration marks omitted) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

[45] Id. at 323 (quoting Lujan, 504 U.S. at 560 n.1).

[46] Id. (citation omitted).

[47] Id.; see also Fraley v. Facebook, Inc., No. 11-CV-01726-LHK, 2011 WL 6303898, at *19-20 (N.D. Cal. Dec. 16, 2011) (noting that "several courts have held that the unauthorized release of 'personal information' does not constitute a loss of money or property for purposes of establishing standing under the UCL," but holding that plaintiffs sufficiently alleged a loss of money or property based on potential unpaid compensation where Facebook used plaintiffs' Facebook profiles to endorse third-party products and services).

[48] Kwikset, 51 Cal. 4th at 325.

> alleged or proven a personal, individualized loss of money or property in any nontrivial amount, he or she has also alleged or proven injury in fact. Because the lost money or property requirement is more difficult to satisfy than that of injury in fact, for courts to first consider whether lost money or property has been sufficiently alleged or proven will often make sense. If it has not been, standing is absent and the inquiry is complete. If it has been, the same allegations or proof that suffice to establish economic injury will generally show injury in fact as well, and thus it will again often be the case that no further inquiry is needed.[49]

Kwikset therefore not only states the test for evaluating the issue of injury sufficient to confer standing, it sets the order of the analysis.[50]

c. The Causation Requirement: "As A Result Of"

Courts have interpreted the phrase "as a result of" to mean "caused by."[51] The "causal connection is broken when a complaining party would suffer the same harm whether or not a defendant complied with the law."[52] Further, allegations must indicate how an injury resulted from the unfair competition.[53] But, as explained below with respect to Tobacco II, in the

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[49] Id. (citations omitted).

[50] See also Henderson v. Gruma Corp., No. CV 10-04173 AHM (AJWx), 2011 WL 1362188, at *4 (C.D. Cal. Apr. 11, 2011) (finding that purchase of guacamole dip constitutes a "nontrivial" injury and concluding otherwise would prohibit majority of product-based actions, thereby "thwart[ing] the purposes of California's consumer protection statutes"); Allergan, Inc. v. Athena Cosmetics, Inc., 640 F.3d 1377, 1382 (Fed. Cir. 2011) (finding that plaintiff sufficiently alleged an economy injury where defendant manufactured, marketed and/or sold products without a prescription, federal or state approval and proper labeling and, as a result, plaintiff "lost sales, revenue, market share, and asset value"); Degelmann v. Advanced Med. Optics, Inc., 659 F.3d 835, 840 (9th Cir. 2011) (finding that, under Kwikset, the "district court's reasoning – that class members would have bought other contact lens solution, and therefore suffered no economic harm – conceived of injury in fact too narrowly"); Glen Oaks Estates Homeowners Ass'n v. Re/Max Premier Properties, No. B229946, 2012 WL 579876, at *4-5 (Cal. Ct. App. Feb. 23, 2012) (finding that homeowners' association had suffered "injury in fact" and "lost money or property" for, among other things, investigative costs associated with repairing and replacing damaged property).

[51] See, e.g., Kwikset, 51 Cal. 4th at 326; Lorenzo v. Qualcomm Inc., 603 F. Supp. 2d 1291, 1303 (S.D. Cal. 2009) (citing Hall v. Time, Inc., 158 Cal. App. 4th 847, 855 (2008)).

[52] Troyk v. Farmers Group, Inc., 171 Cal. App. 4th 1305, 1348-49 (2009); see also Allergan, 640 F.3d at 1383 ("While a direct business dealing is certainly one way in which a plaintiff could be harmed, the California courts have also recognized claims under the UCL where a direct business dealing was lacking.").

[53] Brownfield v. Bayer Corp., No. 2:09-cv-00444-JAM-GGH, 2009 WL 1953035, at *4 (E.D. Cal. July 6, 2009) (finding "conclusory" allegations did not confer standing); Klein v. Avis Rent a Car Sys. Inc., Nos. CV 08-0659 AHM (VBKx), et al., 2009 WL 151521, at *4 (C.D. Cal. Jan. 21, 2009) (on claim for imposition of excessive insurance premium, plaintiff did not allege "that [defendants'] conduct caused him to pay more than he would have had Defendants been licensed [by the California Insurance Commissioner]"); Lorenzo, 603 F. Supp. 2d at 1304 (plaintiff did not allege that he would not have purchased a cell phone or related service had he been aware of defendant's misrepresentations); Durell v. Sharp Healthcare, 183 Cal. App. 4th 1350, 1355, 1363 (2010) (holding that the "as a result" analysis

context of claims based on fraudulent conduct, the phrase does not impose a "tort causation requirement," which would require a showing of actual reliance on specific misstatements.[54]

d. UCL Standing And Federal Court

After Kwikset, in any given case, one must consider whether a plaintiff can meet both Article III and UCL standing requirements for purposes of litigating in federal court. As noted by the Court in Kwikset, "because economic injury is but one among many types of injury in fact, the Proposition 64 requirement that injury be economic renders standing under section 17204 substantially narrower than federal standing under [Article III], which may be predicated on a broader range of injuries."[55] Accordingly, a plaintiff could have Article III standing, but lack UCL standing, depending on the facts at issue.

2. Tobacco II And The Standing Requirement

a. The Decision In Tobacco II

In Tobacco II, plaintiffs based their UCL claims on the allegation that the defendant tobacco companies had engaged in 40 years of deceptive advertising regarding the health effects of cigarette smoking.[56] After Proposition 64 was enacted, defendants successfully moved to decertify the class, arguing that plaintiffs could not establish that each class member spent money to purchase cigarettes as a result of particular cigarette advertisements.

On review, the California Supreme Court's majority opinion (written by Justice Moreno), relying principally on the plain language of Proposition 64, concluded that only the named plaintiff must have standing to bring a UCL claim on behalf of a class.[57] The Court also

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in Tobacco II applies to unlawful claims based on misrepresentations and deception; causation in a UCL action should "hinge on the nature of the alleged wrongdoing rather than the specific prong of the UCL the consumer invokes").

[54] Tobacco II, 46 Cal. 4th at 325, 327. Contra Cholakyan v. Mercedes-Benz USA, LLC, 796 F. Supp. 2d 1220, 1229 (C.D. Cal. 2011) (where UCL claim was based on allegedly misleading communications, "California courts require evidence of reliance before they will find that causation and 'injury in fact' have been proved").

[55] Kwikset, 51 Cal. 4th at 324 (citing Troyk, 171 Cal. App. 4th at 1348 n.31 ("We note [the] UCL's standing requirements appear to be more stringent than the federal standing requirements. Whereas a federal plaintiff's 'injury in fact' may be intangible and need not involve lost money or property, Proposition 64, in effect, added a requirement that a UCL plaintiff's 'injury in fact' specifically involve 'lost money or property.'")); see also Jue v. Costco Wholesale Corp., No. C 10-00033 WHA, 2010 WL 889284, at *5 (N.D. Cal. Mar. 11, 2010) (where complaint failed to show that defendant's alleged failure to provide its employees "suitable seating" was linked to plaintiffs' loss of compensation, or any other money or property, court found the named plaintiff lacked standing under Article III and the UCL); Two Jinn, Inc. v. Gov't Payment Serv., Inc., No. 09CV2701 JLS (BLM), 2010 WL 1329077, at *3 (S.D. Cal. Apr. 1, 2010) (where plaintiff alleged that it lost potential customers, court found plaintiff's injury to be "mere conjecture" and, thus, insufficient for standing under Article III, which requires an injury in fact to be "concrete and particularized and []actual or imminent").

[56] 46 Cal. 4th at 308-9.

[57] Id. at 314-16.

concluded that the ballot materials suggested that the initiative was intended only to prevent "shakedown" lawsuits against small businesses, not to "curb the broad remedial purpose of the UCL or the use of class actions to effect that purpose."[58] More importantly, though, the majority rejected the argument that all class members must have the same injury as the named plaintiff in order for a UCL class to be certified, reasoning that Proposition 64 did not undermine prior cases holding that individualized proof of deception, reliance or injury is not required in UCL cases.[59] In doing so, the Court emphasized that the UCL is designed to protect the public from fraud and other unlawful conduct, and that "the focus of the statute is on the defendant's conduct" rather than injury to class members.[60]

Further, addressing what named plaintiffs must plead and prove under the UCL in false advertising cases, as referenced above, the Court rejected the suggestion that Proposition 64's "as a result of" language "introduced a tort causation element into UCL actions."[61] Instead, in order for class representatives to establish standing, they must allege "actual reliance," but within the framework of existing law under, and the traditional broad scope of, the UCL.[62] Therefore, the Court stated:

> While a plaintiff must show that the misrepresentation was an immediate cause of the injury-producing conduct, the plaintiff need not demonstrate it was the only cause. It is not necessary that the plaintiff's reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor influencing his conduct. It is enough that the representation has played a substantial part, and so had been a substantial factor, in influencing his decision. Moreover, a presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material. A misrepresentation is judged to be "material" if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question, and as such materiality is generally a question of fact unless the fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.[63]

b. Tobacco II, Article III Standing And Commonality In Class Actions

Following Tobacco II, tension has developed between UCL and Article III standing requirements in class actions, and especially when an issue of commonality arises. For instance, in

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[58] Id. at 317.

[59] Id. at 320-21.

[60] Id. at 324.

[61] Id. at 325-26.

[62] Id. at 326-28.

[63] Id. at 326-27 (internal quotation marks, alteration marks and citations omitted); see also Hale v. Sharp Heathcare, 183 Cal. App. 4th 1373, 1381-82 (2010) (concluding that Tobacco II's reliance requirement was applicable under the "unlawful" prong of the UCL where the underlying conduct was alleged misrepresentation).

Webb v. Carter's, Inc., the Central District of California held that, in federal court, all class members must have Article III standing.[64] The plaintiffs in Webb brought claims under the UCL and CLRA, alleging that they lost the benefit of their bargain by purchasing a defective product – children's clothing that purportedly contained toxic chemicals that could cause adverse skin reactions.[65] Finding that Tobacco II "does not establish that absent class members in a federal class action need not have Article III standing," the court stated that "[Tobacco II] did not, and could not, hold that uninjured parties could be class members in a class action brought in *federal* court, despite their lack of Article III standing."[66] "Tobacco II therefore does not persuade the [c]ourt that a class action can proceed even where class members lack Article III standing."[67] Accordingly, because the majority of the children who wore the clothing at issue suffered no adverse effects, the court found that the proposed class members suffered no cognizable injury supporting standing and denied plaintiffs' motion for class certification.[68]

The Ninth Circuit has now addressed the issue, however. In Stearns v. Ticketmaster Corp., the Ninth Circuit held that class certification under Rule 23 does not require proof that all unnamed class members have standing under Article III.[69] Plaintiffs alleged that they were induced by the website presentations and practices of Ticketmaster and Entertainment Publications, Inc. ("EPI"), an entertainment rewards program provider, to purchase EPI's services when they only intended to purchase tickets from Ticketmaster.[70] The district court denied plaintiffs' motion for class certification on their UCL claims, finding that "individualized proof of reliance and causation would be required."[71] The Ninth Circuit reversed, stating that, "[u]nfortunately, the district court did not have the benefit of [Tobacco II] . . . when it ruled, and that case makes all the difference in the world."[72] The court noted that "[Tobacco II] decidedly did not change the California rule 'that relief under the UCL is available without individualized proof of deception, reliance and injury.'"[73] The court further expressed that "our law keys on the representative party, not all of the class members, and has done so for many years" and reaffirmed that, "'[i]n a class action, standing is satisfied if at least one named plaintiff meets the requirements. . . . Thus, we consider only whether at least one named plaintiff satisfies the standing requirements . . . .'"[74]

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[64] 272 F.R.D. 489, 497 (C.D. Cal. 2011).

[65] Id. at 498.

[66] Id. at 497, 498 (emphasis in original).

[67] Id. at 498.

[68] Id. at 498, 500.

[69] 655 F.3d 1013, 1020-21 (9th Cir. 2011), petition for cert. filed, Feb. 8, 2012 (No. 11-983).

[70] Id. at 1017.

[71] Id. at 1020.

[72] Id.

[73] Id.

[74] Id. at 1021 (quoting Bates v. United Parcel Serv., Inc., 511 F.3d 974, 985 (9th Cir. 2007)). The defendants in Stearns have sought the United States Supreme Court's review of two issues: (1) whether, in federal court, all members of a putative class – not just the named plaintiff – must have

Further, in Mazza v. American Honda Motor Company, Inc., the Ninth Circuit rejected defendant's argument that, because Tobacco II focuses only on the standing of named plaintiff, a proposed class might well fail Article III's test – i.e., some unnamed class members might not have suffered an injury in fact.[75] In Mazza, plaintiffs represented a nationwide class composed of all consumers who had purchased or leased Honda's Acura RL vehicles equipped with a Collision Mitigation Braking System ("CMBS").[76] The plaintiffs alleged that Honda's advertisements misrepresented the characteristics of the CMBS and omitted material information about the CMBS's limitations, in violation of the UCL, the CLRA and the FAL.[77] The district court granted the plaintiffs' motion for class certification.[78]

The Ninth Circuit granted Honda's interlocutory appeal and vacated the certification order, finding that the district court erred in concluding that common issues of law and fact predominated.[79] Specifically, the Ninth Circuit held that individualized reliance issues precluded certification because each class member could not be presumed to have relied on the alleged misleading advertising given the scale of Honda's advertising campaign.[80]

In explaining its conclusion, the Ninth Circuit stated: "[I]t is likely that many class members were never exposed to the allegedly misleading advertisements, insofar as advertising of the [CMBS] was very limited" and "[a] presumption of reliance does not arise when class members were exposed to quite disparate information from various representatives of the defendant."[81] Unlike the advertising campaign at issue in Tobacco II, which continued for many years and delivered a consistent message, Honda's advertising took place over one year in the form of TV commercials and magazine advertisements. Honda later advertised through product brochures and video kiosks at Acura dealerships and a website designed for Acura owners.[82] Honda's advertising campaign thus "[fell] short of the 'extensive and long-term [fraudulent] advertising campaign'" examined in Tobacco II.[83] Accordingly, the Ninth Circuit concluded that, absent a Tobacco II-like advertising campaign, "the relevant class must be defined in such a way as to include only members who were exposed to advertising that is alleged to be materially misleading."[84]

Article III standing to sue; and (2) whether the Ninth Circuit erred in choosing to follow a state's rule of standing, rather than Article III. See Petition for Writ of Certiorari at i, Ticketmaster v. Stearns, No. 11-983 (U.S. Feb. 8, 2012).

[75] 666 F.3d 581, 594-95 (9th Cir. 2012).

[76] Id. at 585.

[77] Id.

[78] Id. at 587.

[79] Id. at 585, 588.

[80] Id. at 585, 595-96.

[81] Id. at 596.

[82] Id. at 586-87.

[83] Id. at 595-96.

[84] Id.

Mazza demonstrates how the issues of standing and commonality have become intertwined. Other courts have engaged in similar reasoning. For instance, in Cohen v. DIRECTV, Inc., the court noted: "Tobacco II held that, *for purposes of standing* in context of the class certification issue in a 'false advertising' case involving the UCL, the class members need not be assessed for the element of reliance. Or, in other words, class certification may not be defeated *on the ground of lack of standing* upon a showing that class members did not rely on false advertising."[85] But the court also stated that there is "no language in Tobacco II which suggests . . . that the . . . Court intended . . . to dispatch with an examination of commonality when addressing a motion for class certification."[86] Accordingly, the court stated that, when examining "commonality," a "proper criterion for . . . consideration" is whether the UCL claim would involve "factual questions associated with [proposed class members'] reliance" on allegedly false representations.[87] Referencing Tobacco II, and affirming denial of class certification, the court emphasized that "we do not understand the UCL to authorize an award for injunctive relief and/or restitution on behalf of a consumer who was never exposed in any way to an allegedly wrongful business practice."[88]

Similarly, in Avritt v. Reliastar Life Insurance Company, the Eighth Circuit Court of Appeals, affirming the district court's denial of class certification, noted that "it is not clear that the California Supreme Court's discussion of standing in Tobacco II was meant to have any bearing on whether a plaintiff can satisfy the class certification requirement that common questions of law or fact predominate."[89] The court went on to find that, despite the uncertainty of UCL jurisprudence, "there is reason to doubt that the holding in Tobacco II goes as far as . . . eliminating any need to show that unnamed class members relied on any misrepresentations or were actually injured."[90]

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[85] Cohen v. DIRECTV, Inc., 178 Cal. App. 4th 966, 981 (2009), rev. denied, Feb. 10, 2010 (emphasis in original).

[86] Id.

[87] Id.

[88] Id. at 980; see also Campion v. Old Republic Home Protection Co., Inc., 272 F.R.D. 517, 539-541 (S.D. Cal. 2011) (likening the case to Cohen, but denying plaintiff's motion for class certification because plaintiff failed to demonstrate that the requirements of Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3) were satisfied); Greenwood v. Compucredit Corp., No. 08-04878 CW, 2010 WL 4807095, at *4-5 (N.D. Cal. Nov. 19, 2010) (distinguishing Cohen, the court approved a narrower class, including only California residents who actually received alleged deceptive advertising; also, noting that, on UCL fraud claims, "material misrepresentation results in a presumption, or at least an inference, of individualized reliance"). In April 2010, the California Supreme Court declined to resolve this split in rulings over Tobacco II's impact on class certification issues. See Weinstat v. Dentsply Int'l, Inc., 180 Cal. App. 4th 1213, 1218, 1224 (2010), rev. denied, Apr. 14, 2010.

[89] 615 F.3d 1023, 1033, 1035 (8th Cir. 2010), reh'g denied, Oct. 5, 2010.

[90] Id. at 1034.

II. LIABILITY UNDER THE UCL

A. Claims For "Unlawful" Conduct

1. The Liability Standard

Put simply, a practice is "unlawful" if it violates a law other than the UCL. The UCL "'borrows' violations of other laws and treats these violations, when committed pursuant to business activity, as unlawful practices independently actionable under [the UCL]."[91] "Unlawful" claims have been predicated on numerous laws and regulations existing at various levels of government, including: federal statutes;[92] federal regulations;[93] state statutes;[94] state regulations;[95] local ordinances;[96] prior case law;[97] standards of professional conduct[98] and common law doctrines.[99] To plead a UCL claim based on an "unlawful" practice, a plaintiff must allege facts

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[91] Farmers Ins. Exch. v. Super. Ct., 2 Cal. 4th 377, 383 (1992); Clerkin v. MyLife.com, Inc., No. C 11–00527 CW, 2011 WL 3607496, at *6 (N.D. Cal. Aug. 16, 2011) ("Violation of almost any federal, state or local law may serve as the basis for a UCL claim.").

[92] See, e.g., Ballard v. Equifax Check Servs., Inc., 158 F. Supp. 2d 1163, 1176 (E.D. Cal. 2001) (federal Fair Debt Collection Practices Act); Sw. Marine, Inc. v. Triple A Mach. Shop, Inc., 720 F. Supp. 805, 808 (N.D. Cal. 1989) (federal environmental laws).

[93] See Sw. Marine, 720 F. Supp. at 807-08 (Navy procurement regulation).

[94] See, e.g., Midpeninsula Citizens for Fair Housing v. Westwood Investors, 221 Cal. App. 3d 1377, 1390, 1393 (1990) (Unruh Civil Rights Act); Quelimane, 19 Cal. 4th at 42-43 (Cartwright Act); Hewlett v. Squaw Valley Ski Corp., 54 Cal. App. 4th 499, 520-25 (1997) (Forest Practices Act), superseded by statute; Podolsky v. First Healthcare Corp., 50 Cal. App. 4th 632, 649 (1996) (CLRA); People ex rel. Van de Kamp v. Cappuccio, Inc., 204 Cal. App. 3d 750, 759 (1988) (Fish & Game Code); Stop Youth Addiction, 17 Cal. 4th at 573 (Penal Code prohibition of cigarette sales to minors); see also Mansner v. Sierra Foothills Public Utility Dist., No. CV-F-08-1250 LJO SMS, 2008 WL 5114619, at *7 (E.D. Cal. Dec. 4, 2008) (California Labor Code); Lu v. Hawaiian Gardens Casino, Inc., 170 Cal. App. 4th 466, 482-83 (2009) (same), aff'd, 50 Cal. 4th 592 (2010). But see Martinez v. Welk Group, Inc., No. 09 CV 2883 MMA (WMc), 2011 WL 90313, at *11 (S.D. Cal. Jan. 11, 2011) (finding that plaintiff could not assert an unlawful claim based upon violations of the Toxic Mold Protection Act; plaintiff could not allege how defendant violated the Act when no mold standards had yet been adopted), aff'd, 50 Cal. 4th 592 (2010).

[95] See, e.g., People v. McKale, 25 Cal. 3d 626, 635 (1979) (mobile home park regulations); People v. Casa Blanca Convalescent Homes, Inc., 159 Cal. App. 3d 509, 528-30 (1984) (nursing home regulations).

[96] See, e.g., Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy, 4 Cal. App. 4th 963, 967 (1992) (county ordinance regulating the sale of raw milk products); People v. Thomas Shelton Powers, M.D., Inc., 2 Cal. App. 4th 330, 334, 336 (1992) (city subdivision code), abrogated by Kraus v. Trinity Mgmt. Servs., Inc., 23 Cal. 4th 116 (2000).

[97] See, e.g., Bondanza v. Peninsula Hosp. & Med. Ctr., 23 Cal. 3d 260, 266-68 (1979) (holding surcharge on delinquent account was "unlawful" in that it violated rule adopted by court in earlier case).

[98] See, e.g., Saunders v. Super. Ct., 27 Cal. App. 4th 832, 839-41 (1994) (state licensing statute governing certified shorthand reporters may serve as predicate for UCL "unlawful" action).

[99] See, e.g., Cortez v. Global Ground Support, LLC, No. 09-4138 SC, 2009 WL 4282076, at *3-4 (N.D. Cal. Nov. 25, 2009) (following decisions stating that common law torts can provide basis for UCL claim); Gabana Gulf Distrib., Ltd. v. GAP Int'l Sales, Inc., No. C 06-02584 CRB, 2008 WL111223, at

sufficient to show a violation of the underlying law and, given Proposition 64's standing requirement, should be required to allege facts demonstrating the resulting harm.[100]

Notwithstanding the broad "borrowing" of underlying law that is permitted on unlawful claims, courts have imposed some limitations. For instance, although the UCL can be used to challenge violations of a statute that has no private right of action, it arguably cannot be used to enforce a statute "where private rights of action to enforce a statute have been expressly barred by Congress."[101]

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*10 (N.D. Cal. Jan. 9, 2008) (permitting unlawful claim based on the common law of breach of implied covenant of good faith and fair dealing). But see Stearns v. Select Comfort Retail Corp., 763 F. Supp. 2d 1128, 1150 (N.D. Cal. 2010) (explaining that negligence and product liability claims, and common law claims, may not constitute predicate acts); Shroyer v. New Cingular Wireless Servs., Inc., 622 F.3d 1035, 1044 (9th Cir. 2010) (stating that the unlawful prong of the UCL requires a business practice to be "forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made" and, thus, a common law violation, such as breach of contract, is insufficient); S. Cal. Inst. of Law v. TCS Educ. Sys., No. CV 10-8026 PSG (AJWx), 2011 WL 1296602, at *11 (C.D. Cal. Apr. 5, 2011) (finding a breach of contract claim alone insufficient to state an unlawful claim because a "breach of contract claim 'may only form the basis of a section 17200 claims if the breach itself is "unlawful, unfair, or fraudulent") (citing Spring Design, Inc. v. Barnesandnoble.com, LLC, No. C 09-5185 JW, 2010 WL 5422556, at *9 (N.D. Cal. Dec. 27, 2010)).

[100] McKale, 25 Cal. 3d at 635 ("Without supporting facts demonstrating the illegality of a rule or regulation, an allegation that it is in violation of a specific statute is purely conclusionary and insufficient to withstand demurrer.").

[101] See Hartless v. Clorox Co., No. 06CV2705 JAH(CAB), 2007 WL 3245260, at *4 (S.D. Cal. Nov. 2, 2007) (dismissing UCL claim seeking to enforce Federal Insecticide, Fungicide, and Rodenticide Act because statute expressly precludes private actions); Rose v. Bank of Am., 200 Cal. App. 4th 1441, 1445-46 (2011), rev. granted, Mar. 14, 2012 (holding that the UCL could not be used to redress violations of the Truth in Savings Act ("TISA") because Congress' repeal of the statutory right of consumers to enforce TISA bars all private actions; the UCL cannot be used to "plead around" this bar). But see Stop Youth Addiction, 17 Cal. 4th at 563-66 (UCL action not barred simply because it was predicated upon a statute that does not expressly provide a private right of action); AICCO, Inc. v. Ins. Co. of N. Am., 90 Cal. App. 4th 579, 597 (2001) (plaintiffs allowed to plead around the bar to private causes of action under California's Unfair Insurance Practices Act ("UIPA") by recasting as UCL action); Hangarter v. Paul Revere Life Ins. Co., 236 F. Supp. 2d 1069, 1103-06 (N.D. Cal. 2002) (rejecting defendants' argument that plaintiff should not be permitted to use UCL claims as an end run around the prohibition of private rights of action under the UIPA and reasoning that predicate statute must actually bar the action or clearly permit the conduct), aff'd sub nom., Hangarter v. Provident Life & Accident Ins. Co., 373 F.3d 998 (9th Cir. 2004); see also Mansner, 2008 WL 5114619, at *7; Hawaiian Gardens Casino, 170 Cal. App. 4th at 477 (allowing claim based on California Labor Code provisions that did not provide for a private right of action).

2. Defenses Specific To Unlawful Claims

a. Defense To Underlying Violation

An affirmative defense to a violation of the underlying law also is a defense to the attendant unlawful claim.[102] Similarly, a defendant's full compliance with the underlying law is a defense to an unlawful claim.[103] As discussed below, however, a statute of limitations defense to the underlying claim will not defeat a UCL unlawful claim. Furthermore, at least some equitable defenses have been held not to apply to unlawful claims.[104]

b. Change In Underlying Law

A defense may arise by virtue of a change in the underlying law or repeal of the underlying law before the plaintiff obtains final judgment on an unlawful claim.[105]

B. Claims For "Unfair" Conduct

1. The Liability Standard

The "unfair" prong has been interpreted to allow courts maximum discretion to address improper business practices,[106] and no certain definition of "unfairness" in the consumer context yet has been formulated.[107] In the past, courts frequently used one of two tests. The first

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[102] See Hobby Indus. Ass'n of Am., Inc. v. Younger, 101 Cal. App. 3d 358, 372 (1980); see also Aquino v. Credit Control Servs., 4 F. Supp. 2d 927, 930 (N.D. Cal. 1998) (dismissing UCL action where plaintiff failed to "set forth any factual allegations that the defendant's approach violated any state or federal provisions"); Metro Publ'g, Ltd. v. San Jose Mercury News, Inc., 861 F. Supp. 870, 881 (N.D. Cal. 1994) (dismissing UCL claim after underlying trademark infringement and dilution claims were dismissed); Fabozzi v. StubHub, Inc., No. C–11–4385 EMC, 2012 WL 506330, at *5 (N.D. Cal. Feb. 15, 2012) (plaintiff's claim, based on defendant's failure to disclose, was defeated where the underlying statute did not contain a disclosure obligation and, thus, was not breached).

[103] See McCann v. Lucky Money, Inc., 129 Cal. App. 4th 1382, 1397-98 (2005) (holding that California law did not require money transmitters to disclose wholesale rate of exchange; disclosure of retail rate was sufficient); Blank v. Kirwan, 39 Cal. 3d 311, 329 (1985). But see Casa Blanca Convalescent Homes, 159 Cal. App. 3d at 530-31 (stating that defendant's substantial compliance with the underlying law is not a defense).

[104] See, e.g., Ticconi v. Blue Shield of Cal. Life & Health Ins. Co., 160 Cal. App. 4th 528, 544-45 (2008) (reversing order denying certification of UCL claim on ground that unclean hands and fraud defenses did not apply to unlawful claim and therefore did not create individual issues).

[105] See Governing Bd. of Rialto Unified Sch. Dist. v. Mann, 18 Cal. 3d 819, 829 (1977) (recognizing California's general rule that "a cause of action or remedy dependent on a statute falls with a repeal of the statute").

[106] See Motors, Inc. v. Times Mirror Co., 102 Cal. App. 3d 735, 740 (1980); see, e.g., Smith v. Chase Mortg. Credit Group, 653 F. Supp. 2d 1035, 1045-46 (E.D. Cal. 2009) (concluding that defendant's alleged violation of internal policy provides basis for unfairness claim).

[107] See Davis v. Ford Motor Credit Co., 179 Cal. App. 4th 581, 592-95 (2009) (noting that the test for unfairness remains unsettled); Ferrington v. McAfee, Inc., No. 10-CV-01455-LHK, 2010 WL 3910169, at *11 (N.D. Cal. Oct. 5, 2010) ("California law is currently unsettled with regard to the correct standard to apply to consumer suits alleging claims under the unfair prong of the UCL.").

"involves an examination of [the practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer."[108] In brief, "the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim . . ."[109] In the second, courts adopted language from FTC guidelines, which define "unfair" conduct with reference to section 5 of the FTCA.[110] Under this test, a business act is "unfair" when it "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."[111]

Over the years, many courts have criticized these definitions of "unfairness" as vague and amorphous. Indeed, in Cel-Tech Communications, Inc. v. L.A. Cellular Telephone Co., the California Supreme Court rejected the definitions in the context of a non-consumer claim, and criticized their use in consumer cases, as well.[112] In so doing, the Court sympathized with "the need for California businesses to know, to a reasonable certainty, what conduct California law prohibits and what it permits."[113] The Court then articulated a "more precise test" for determining what is "unfair" in litigation involving competitors, drawing from principles of federal law pursuant to section 5 of the FTCA.[114] However, the Court did not articulate a test applicable to the consumer context.

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[108] Motors, 102 Cal. App. 3d at 740.

[109] State Farm Fire & Cas. Co. v. Super. Ct., 45 Cal. App. 4th 1093, 1103-04 (1996) (citations omitted), disapproved by Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 185 (1999); see also Hutchinson v. AT&T Internet Servs., Inc., No. CV07-3674 SVW (JCx), 2009 WL 1726344, at *8 (C.D. Cal. May 5, 2009) (applying the test).

[110] See Hutchinson, 2009 WL 1726344, at *8 (noting that California courts have adopted the FTC guidelines established in FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972)).

[111] See Cmty. Assisting Recovery, Inc. v. Aegis Sec. Ins. Co., 92 Cal. App. 4th 886, 894 (2001); Podolsky, 50 Cal. App. 4th at 647 (citations omitted); State Farm, 45 Cal. App. 4th at 1104; see also Bardin v. DaimlerChrysler Corp., 136 Cal. App. 4th 1255, 1270 (2006).

[112] 20 Cal. 4th at 185 ("We believe these definitions are too amorphous and provide too little guidance to courts and businesses.").

[113] Id. ("An undefined standard of what is 'unfair' fails to give businesses adequate guidelines as to what conduct may be challenged and thus enjoined and may sanction arbitrary or unpredictable decisions about what is fair or unfair.").

[114] Specifically, the Court adopted the following test for "unfair" business practices involving competitors:

> When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes section 17200, the word "unfair" in that section means 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.

Id. at 187. In addition, the Court stated that "[o]ur notice of federal law under section 5 means only that federal cases interpreting the prohibition against 'unfair methods of competition' may assist us in determining whether a particular challenged act or practice is unfair under the test we adopt." Id. at 186 n.11.

The various criticisms of the consumer definitions, including by the Court in Cel-Tech, seemingly have spurred the Courts of Appeal to attempt to remedy the situation. As an initial matter, certain courts have confirmed that, where a claim of unfairness is predicated on public policy, such public policy must be "'tethered' to specific constitutional, statutory or regulatory provisions."[115] Moreover, in In re Firearm Cases, the Court of Appeal (First District) held that, in order to prove "unfairness," the plaintiff must establish some causal link between the defendant's business practice and the alleged harm to the public.[116] Further, in Camacho v. Automobile Club of Southern California, the Court of Appeal (Second District) articulated a very precise test. Relying, again, on the language of, and policy considerations underlying section 5 of the FTCA, the court concluded that the elements of "unfair" conduct are: "(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."[117]

Given the various tests articulated by the Courts of Appeal, the California Supreme Court or the Legislature may ultimately determine what the test should be. At this point, it is an open issue for both courts and litigants as to which articulated test will govern an "unfairness" claim.[118]

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[115] Gregory v. Albertson's, Inc., 104 Cal. App. 4th 845, 854 (2002) (stating that Cel-Tech "may signal a narrower interpretation of the prohibition of unfair acts or practices in all unfair competition actions and provides reason for caution in relying on the broad language in earlier decisions that the court found to be 'too amorphous'" and requiring that UCL "unfair" claims based on public policy be tethered to specific constitutional, statutory or regulatory provisions); Scripps Clinic v. Super. Ct., 108 Cal. App. 4th 917, 939 (2003) (applying "unfair" definition proposed in Gregory); Schnall v. Hertz Corp., 78 Cal. App. 4th 1144, 1166-67 (2000) (applying Cel-Tech to a consumer case by referencing a legislatively declared policy as the basis for unfairness); Kimmins v. Fagan & Fagan, No. D047599, 2006 WL 3445513, at *7 (Cal. Ct. App. Nov. 30, 2006) (same). Cf. Simila v. Am. Sterling Bank, No. 09-CV-781 JLS (CAB), 2010 WL 3988171, at *6 (S.D. Cal. Oct. 12, 2010) (noting split between courts as to whether UCL requirement that claims of "unfairness" be "tethered" to underlying law applies to consumers, but applying "tethering" test and dismissing UCL claim); Sanchez v. Bear Stearns Residential Mortg. Corp., No. 09-CV-2056 JLS (CAB), 2010 WL1911154, at *7 (S.D. Cal. May 11, 2010) (finding, in line with Cel-Tech, that allegations of unfair conduct under the UCL must be "tethered" to violation of an underlying law). But see Shvarts v. Budget Group Inc., 81 Cal. App. 4th 1153, 1158 (2000) (citing Cel-Tech but applying previous test for determining whether conduct is "unfair"); Progressive W. Ins. Co. v. Super. Ct., 135 Cal. App. 4th 263, 286 (2005) ("[W]e believe section 17200's 'unfair' prong should be read more broadly in consumer cases because consumers are more vulnerable to unfair business practices than businesses and without the necessary resources to protect themselves from sharp practices.").

[116] 126 Cal. App. 4th 959, 981 (2005) (citation omitted).

[117] 142 Cal. App. 4th 1394, 1403 (2006); see also Berenblat v. Apple, Inc., Nos. 08-4969 JF (PVT), 09-1649 JF (PVT), 2009 WL 2591366, at *5 (N.D. Cal. Aug. 21, 2009) (finding no unfairness under the UCL where a product operated properly during its express warranty period); Hovsepian v. Apple, Inc., No. 08-5788 JF (PVT), 2009 WL 5069144, at *4 (N.D. Cal. Dec. 17, 2009) (same).

[118] Lozano v. AT & T Wireless Servs., Inc., 504 F.3d 718, 735, 736 (9th Cir. 2007) ("California's unfair competition law, as it applies to consumer suits, is currently in flux."; finding that courts faced with consumer lawsuits have the option to either apply Cel-Tech or Camacho but that the approaches are

2. Defenses To Claims Of "Unfairness"

a. Conduct Is Not "Unfair"

The principal defense is straightforward: The conduct is not unfair pursuant to the test that the court chooses to apply. For example, in Walker v. Countrywide Home Loans, Inc., plaintiffs brought an unfairness claim challenging defendant's practice of passing on the actual cost of conducting property inspections to delinquent mortgage borrowers.[119] The trial court granted summary judgment in favor of defendant, which was affirmed. The court reasoned that defendant's practice of passing on the actual cost of property inspection fees was not "unfair" as a matter of law because the small cost of the inspections (at most, $12) was insignificant when compared to their utility – protecting the real estate securing the loan.[120]

b. Business Justification

A defendant may use the reasons, justifications and motives underlying the challenged business practice to show that it is not "unfair."[121] For example, a defendant may claim that the challenged conduct is an essential part of its business operations or that it is acting consistent with industry practice for an important reason.[122]

c. Alternative Source Defense

A defendant may defeat a claim of unfairness by showing that the consumer had a "reasonably available alternative source[] of supply."[123] Derived from cases addressing the

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not "mutually exclusive" because "adopting one standard does not necessitate the rejection of the other").

[119] 98 Cal. App. 4th 1158, 1173 (2002).

[120] Id. at 1175-78 ("There is nothing 'unethical' about passing a reasonable cost of protecting the security to a defaulting borrower."); see also Hutchinson, 2009 WL 1726344, at *8 (concluding that an early termination fee served legitimate interests and, thus, was not unfair).

[121] See Motors, 102 Cal. App. 3d at 740; Californians for Population Stabilization v. Hewlett-Packard Co., 58 Cal. App. 4th 273, 286 (1997) (in action challenging liquidated damages provisions in defendants' employment contracts with non-U.S. citizens, finding no unfair business practice given the nature of the industry and certain immigration laws).

[122] See Walker, 98 Cal. App. 4th at 1175 (discussed above); Kunert v. Mission Fin. Servs. Corp., 110 Cal. App. 4th 242, 265 (2003) (finding that the "unfair" prong of the UCL was not intended to eliminate retailers' profits in action challenging payment of a dealer reserve); Byars v. SCME Mortg. Bankers, Inc., 109 Cal. App. 4th 1134, 1149 (2003) (holding that a lender's payment of a yield spread premium ("YSP") to a broker did not violate the UCL on various grounds, including because YSPs are "widespread and commonly used as a method to compensate mortgage brokers for services provided to borrowers and the lender"). Nonetheless, compliance with industry practice in and of itself, without a link to a justifiable business concern, probably is not a defense. See Chern v. Bank of Am., 15 Cal. 3d 866, 876 (1976) (stating that lender's calculation of "per annum" interest rate based on 360-day year could violate the UCL, notwithstanding that such practice was "customary" in the banking community).

[123] Dean Witter Reynolds, Inc. v. Super. Ct., 211 Cal. App. 3d 758, 772 (1989) (applying the alternative source defense to a UCL claim based on unconscionability).

doctrine of unconscionability, this defense arises from the notion that a business practice is not "unfair" if the same service or product, without the allegedly offensive term, is available either from the defendant or from the defendant's competitors.[124] Similarly, where the plaintiff had a "choice" in performing some act, such as entering into an obligation, a defendant may argue that the challenged conduct is not "unfair."[125]

d. "Safe Harbor" Defense – Conduct Explicitly Authorized By Law

A defense exists where the business practice at issue expressly is authorized by statute.[126] However, the legislature's mere "failure to prohibit" the challenged conduct is not alone sufficient to bar a UCL unfairness claim.[127]

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[124] See, e.g., Shadoan v. World Sav. & Loan Ass'n, 219 Cal. App. 3d 97, 103, 106 (1990) (holding a prepayment penalty on a home loan to be an invalid basis for a UCL claim where defendant had simultaneously offered other similar products without the disputed term); Dean Witter, 211 Cal. App. 3d at 772 (holding that, because defendants' competitors were not charging an IRA close-out fee, plaintiff had a meaningful choice and, therefore, such fees were not unconscionable); accord Cal. Grocers Ass'n v. Bank of Am., 22 Cal. App. 4th 205, 209 (1994) (holding that a $3 NSF fee charged to retailers was not unconscionable because the fee was at the low end of the scale when compared to the fees charged by other institutions).

[125] See, e.g., Olsen v. Breeze, Inc., 48 Cal. App. 4th 608, 628-29 (1996) (affirming summary adjudication against plaintiff on a UCL claim involving alleged "unfair" contractual releases relating to ski bindings since consumers had a choice in the matter – they did not have to ski).

[126] See Cel-Tech, 20 Cal. 4th at 183 ("Acts that the Legislature has determined to be lawful may not form the basis for an action under the unfair competition law."); Alvarez v. Chevron Corp., 656 F.3d 925, 933 (9th Cir. 2011) (applying California's safe harbor doctrine, where "courts may not use the [UCL] to condemn actions the Legislature permits," and affirming dismissal of UCL claim because gasoline dispensing design was certified by the California Department of Food and Agriculture's Division of Measurement Standards, and therefore permitted by law); Lopez v. Nissan N. Am., Inc., 201 Cal. App. 4th 572, 576-79 (2011) (plaintiffs contended that defendants violated the UCL by designing vehicle odometers that allegedly over-registered mileage by two percent; the court affirmed dismissal on grounds that Cal. Bus. & Prof. Code § 12500 provides a tolerance of plus or minus four percent); Hauk v. JP Morgan Chase Bank USA, 552 F.3d 1114, 1122 (9th Cir. 2009) (finding that safe harbor applied when credit card issuer complied with disclosure provisions of TILA); Suzuki v. Hitachi Global Storage Techs., Inc., No. C 06-07289 MHP, 2007 WL 2070263, at *3 (N.D. Cal. July 17, 2007) (same); Lazar v. Hertz Corp., 69 Cal. App. 4th 1494, 1505-06 (1999) ("A business practice cannot be unfair if it is permitted by law.") (citation omitted); Hobby Indus. Ass'n of Am., 101 Cal. App. 3d at 369-70 (dismissing UCL action against wholesalers and retailers for sale of certain prohibited packages because the statute prohibiting such packages explicitly exempted wholesalers and retailers); Chavez v. Whirlpool Corp., 93 Cal. App. 4th 363, 375 (2001) (holding that conduct permissible under doctrine enunciated in U.S. v. Colgate & Co., 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992 (1919), could not be deemed "unfair" as a matter of law).

[127] See Cel-Tech, 20 Cal. 4th at 184 (finding that "the Legislature's mere failure to prohibit an activity does not prevent a court from finding it unfair"); Motors, 102 Cal. App. 3d at 741; see also Thompson v. Am. Tow Serv., Nos. A114373, A116154, 2007 WL 3045195, at *4 (Cal. Ct. App. Oct. 19, 2007) (holding that municipal ordinance cannot establish safe harbor under the UCL).

C. Claims For "Fraudulent" Conduct

1. The Liability Standard

As noted above, in Tobacco II, the Court reaffirmed the line of decisions stating that UCL claims premised on fraudulent conduct do not require proof of intent, reliance or damages (setting aside the issue of standing for named plaintiffs).[128] Rather, under those decisions, a plaintiff must show only that members of the public were likely to be deceived.[129]

In Lavie v. Procter & Gamble Co., the Court of Appeal held that trial courts faced with fraudulent or false advertising claims must apply an "ordinary consumer acting reasonably under the circumstances" standard, rather than a "least sophisticated consumer" standard.[130] In Lavie, a consumer who had an ulcer that started to bleed after ingestion of Aleve pain reliever sued defendant for stating in television commercials that Aleve was gentler to the stomach lining than aspirin. Following a bench trial, the trial court ruled in favor of defendant, holding that the statements made were true and not likely to deceive reasonable consumers. The Court of Appeal affirmed, reasoning that California and federal courts had never applied a "least sophisticated consumer" standard absent evidence that an advertisement targeted particularly vulnerable customers.[131] "A representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed."[132] The court warned, however, that, "[w]here the advertising or practice is targeted to a particular group or type of consumers, either more sophisticated or less sophisticated than the ordinary consumer, the question whether it is misleading to the public will be viewed from the vantage point of members of the targeted group, not others to whom it is not primarily directed."[133]

In contrast, in Hill v. Roll International Corp., plaintiffs alleged that they purchased Fiji bottled water based on an understanding that a green drop depicted on the bottles meant that Fiji bottled water was an environmentally conscious product and endorsed by an environmental organization.[134] However, applying the reasonable consumer standard as outlined in Lavie, as

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[128] Tobacco II, 46 Cal. 4th at 320-21.

[129] See, e.g., Mass. Mut. Life Ins. Co., 97 Cal. App. 4th at 1288.

[130] 105 Cal. App. 4th 496, 512 (2003).

[131] Id. at 504.

[132] Id. at 507 (internal quotations and citation omitted).

[133] Id. at 512; see also Consumer Advocates v. Echostar Satellite Corp., 113 Cal. App. 4th 1351, 1360 (2003) (confirming the reasonable consumer standard applied in Lavie). But see People v. Cole, 113 Cal. App. 4th 955, 980 (2003) (reasoning that, even under a reasonable consumer standard, a reasonable consumer may be "unwary or trusting," "need not be exceptionally acute and sophisticated" and that "courts simply recognize that the general public is more gullible than the sophisticated buyer") (internal quotations and citations omitted), aff'd, 38 Cal. 4th 964 (2006); see also In re Onstar Contract Litig., No. 2:07-MDL-01867, 2011 WL 6337793, at *35 (E.D. Mich. Dec. 19, 2011) (where putative class members received different disclosures from different sources and disclosures changed over time, court found it "impossible" to apply a reasonable consumer standard as to reliance class-wide).

[134] 195 Cal. App. 4th 1295, 1298 (2011).

well as analyzing examples contained in an FTC guide, the court held that "no reasonable consumer would be misled to think that [a] green drop on Fiji water represents a third party organization's endorsement or that Fiji water is environmentally superior to that of the competition."[135] Further, the court noted that "in these days of inevitable and readily available Internet criticism and suspicion of virtually any corporate enterprise, a reasonable consumer also does not include one who is overly suspicious."[136]

2. Defenses Specific To Fraudulent Claims

a. Conduct Not "Likely To Mislead"

The principal defense to a claim of fraudulent conduct is proof that the challenged business act or practice is not "likely to mislead" an ordinary consumer and thus, has not resulted in any actual injury. The analysis often is fact-specific.[137] Proof might be offered in the form of testimony from experts or randomly selected members of the class represented in the action, and/or consumer surveys. Substantial disclosure of the central challenged practices often is central to defeating a UCL "fraudulent" claim.

Where a disputed contractual term is at issue, courts particularly have held that clear, unambiguous language will defeat a fraudulent claim as a matter of law.[138]

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[135] Id. at 1301, 1302-04.

[136] Id. at 1304.

[137] See, e.g., Sugawara v. Pepsico, Inc., No. 2:08-cv-01335-MCE-JFM, 2009 WL 1439115, at *2-3 (E.D. Cal. May 21, 2009) (dismissing UCL and CLRA claims where a "reasonable consumer" would not be deceived into believing that a cereal actually contained a fruit called a "crunchberry"); Kunert, 110 Cal. App. 4th at 264-65 (holding that payment of dealer reserve in automobile finance contracts was not fraudulent since it was not required to be disclosed and no "reasonable person" would believe that the financing rate in the contract with the dealer is the same rate at which a lender would make a direct loan); Emery, 95 Cal. App. 4th at 960 (holding that VISA could not be liable for fraudulent conduct under the UCL where merchants utilized VISA's logos; use of the logos did not constitute representation by VISA that its merchants' statements were true and/or not misleading); Berryman v. Merit Prop. Mgmt., Inc., 152 Cal. App. 4th 1544, 1556-57 (2007) (concluding that defendant had no duty to disclose financial status and "the failure to do so does not support a claim under the fraudulent prong of the UCL") (citing Daugherty v. Am. Honda Motor Co., Inc., 144 Cal. App. 4th 824, 838 (2006)); Tietsworth v. Sears, Roebuck & Co., No. 5:09-CV-00288, 2009 WL 3320486, at *8 (N.D. Cal. Oct. 13, 2009) (concluding that a mere failure to disclose a latent defect does not constitute a fraudulent business practice as, without a duty to disclose, it is not likely that such a failure would deceive anyone).

[138] See Van Ness v. Blue Cross of Cal., 87 Cal. App. 4th 364, 376 (2001) (affirming summary judgment in favor of defendant where the language in the health insurance policy and related materials clearly stated the terms of coverage, notwithstanding plaintiff's assertion that he was misled); Shvarts, 81 Cal. App. 4th at 1160 (per-gallon price for fuel was not deceptive, given full disclosure of charge on rental car contract).

b. "Puffing" Defense

If the claim involves an alleged false representation in connection with a sale of goods, the defendant may argue that the statement was mere "puffing" – sales talk that no reasonable person would rely upon or mistake as a factual claim. For example, in Consumer Advocates v. Echostar Satellite Corp., the Court of Appeal applied a "puffing" defense in holding that certain statements were not actionable under the UCL.[139] The statements at issue consisted of advertisements that defendant's system provided "crystal clear digital" video or "CD quality" audio. The court reasoned that such statements were not "factual representations," but rather, were "boasts, all-but-meaningless superlatives, . . . a claim which no reasonable consumer would take as anything more weighty than an advertising slogan."[140]

D. General Defenses To UCL Actions

1. Constitutional Challenges

The UCL has survived numerous constitutional challenges based on vagueness[141] and due process.[142] Although the defense bar has hoped on occasion that the California Supreme Court would address due process considerations, it has as yet declined to do so. Proposition 64, in imposing a standing requirement and requiring compliance with class standards on aggregated claims, may further insulate the UCL from constitutional challenge.

2. First Amendment Defense

In Kasky v. Nike, Inc., the California Supreme Court addressed whether a defendant's statements made in the course of a public relations campaign were constitutionally protected from

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[139] 113 Cal. App. 4th at 1361-62.

[140] Id. at 1361 n.3 ("The statements are akin to 'mere puffing,' which under long-standing law cannot support liability in tort.") (quoting Hauter v. Zogarts, 14 Cal. 3d 104, 111 (1975)); see also Stickrath v. Globalstar, Inc., 527 F. Supp. 2d 992, 1003 (N.D. Cal. 2007) (dismissing UCL and CLRA claims because generalized statements were "mere puffery"); Long v. Hewlett-Packard Co., No. C 06-02816 JW, 2007 WL 2994812, at *7 (N.D. Cal. July 27, 2007) (same); Haskell v. Time, Inc., 857 F. Supp. 1392, 1399-403 (E.D. Cal. 1994) (dismissing most statements in Publisher's Clearinghouse Sweepstakes solicitations as "puffing" because no reasonable consumer could believe them to be true).

[141] See, e.g., People ex rel. Mosk v. Nat'l Research Co. of Cal., 201 Cal. App. 2d 765, 772 (1962) (holding that former California Civil Code section 3369, the UCL's predecessor, was not void due to uncertainty and/or vagueness since "[a] statute designed to protect the public good must be upheld unless its nullity clearly, positively and unmistakably appears"); cf. People v. Super. Ct. (Caswell), 46 Cal. 3d 381, 389 (1988) (stating that, to avoid a vagueness challenge, "a statute must be sufficiently definite to provide adequate notice of the conduct proscribed. '[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process.'") (citation omitted).

[142] See, e.g., Thomas Shelton Powers, M.D., 2 Cal. App. 4th at 343-44 (rejecting a due process challenge to the court's power to order restitution and/or disgorgement of profits under the UCL where there was no cognizable victim).

suit under the UCL.[143] In response to adverse publicity regarding its overseas labor practices, Nike issued various statements, including in press releases and letters sent to newspaper editors, university presidents and athletic directors.[144] Plaintiff alleged that Nike's comments were false and misleading under the UCL.[145] The trial court sustained a demurrer without leave to amend, holding that Nike's statements constituted non-commercial speech and were therefore absolutely immune from liability under the UCL. The Court of Appeal affirmed.

The California Supreme Court reversed, concluding that Nike's statements constituted commercial speech subject only to limited protections, which therefore could be the basis of a UCL claim.[146] The Court found that the statements were not fully protected by the First Amendment because they did not deal with important issues of public concern.[147] Also, applying a three-part analysis, the Court reasoned that commercial speech arises from: (a) a commercial speaker; (b) an intent to address a commercial audience; and (c) factual representations of a commercial nature.[148]

Although the United States Supreme Court initially granted certiorari, it subsequently dismissed certiorari as improvidently granted.[149] Nike therefore remains good law.

3. Statute Of Limitations

The statute of limitations for UCL actions is "four years after the cause of action accrued."[150] The doctrine of equitable tolling based on fraudulent concealment has been applied to UCL claims.[151] California's trial courts have been in conflict, however, as to whether the "discovery rule" applies to UCL claims,[152] as have been the federal courts.[153] The California

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[143] 27 Cal. 4th 939, 948 (2002). Previously, in Blatty v. N.Y. Times Co., 42 Cal. 3d 1033, 1044-45 (1986), the California Supreme Court held that the failure of the New York Times to include a novel on its bestseller list fit within the free speech protections afforded by the First Amendment to the United States Constitution, no matter "'the label given the stated cause of action . . . .'" Id. at 1042 (citation omitted). Holding that the best seller list was not "commercial speech," the Court determined that plaintiff's UCL claim was defeated. Id. at 1048.

[144] Kasky, 27 Cal. 4th at 948.

[145] Id.

[146] Id. at 970.

[147] Id. at 962, 964-65.

[148] Id. at 963-64.

[149] Nike, Inc. v. Kasky, 539 U.S. 654, 123 S. Ct. 2554, 156 L. Ed. 2d 580 (2003).

[150] Cal. Bus. & Prof. Code § 17208.

[151] See Snapp & Assocs. Ins. Servs., Inc. v. Robertson, 96 Cal. App. 4th 884, 891-92 (2002) (holding that equitable tolling was not appropriate where plaintiff was on notice of the defendant's alleged wrongful conduct). But see Cortez v. New Century Mortg. Corp., No. C 11–1019 CW, 2012 WL 368647, at *8 (N.D. Cal. Feb. 3, 2012) (stating plaintiff could proceed with UCL action based on lender's alleged failure to disclose material terms of loan if she could establish equitable tolling).

[152] Compare Snapp, 96 Cal. App. 4th at 891 ("The 'discovery rule,' which delays accrual of certain causes of action until the plaintiff has actual or constructive knowledge of facts giving rise to the claim, does not apply to unfair competition actions." Thus, the statute begins to run "irrespective of whether

Supreme Court has decided to hear Aryeh v. Canon Business Solutions, Inc., which should address the discovery rule, as well as the doctrines of continuing violation and continuous accrual.[154]

A plaintiff may use the UCL to obtain a longer statute of limitations than would apply to a law giving rise to a claim for "unlawful" conduct. In Cortez v. Purolator Air Filtration Products Co., the California Supreme Court held that the UCL's longer four-year statute of limitations applied rather than the three-year statute of limitations under the provisions of the Labor Code that formed the basis of the claim. The Court simply concluded that "any UCL cause of action is subject to the four-year period of limitations created by that section."[155]

4. Contractual Choice-Of-Law Or Forum-Selection Provisions

Businesses often include contractual choice-of-law or forum-selection provisions in their consumer contracts. Courts sometimes enforce such provisions in consumer agreements,[156] and

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plaintiff knew of its accrual, unless [the] plaintiff can successfully invoke the equitable tolling doctrine.") (citation omitted), and Rambus Inc. v. Samsung Elecs. Co., Nos. C-05-02298 RMW, C-05-00334 RMW, 2007 WL 39374, at *3 (N.D. Cal. Jan. 4, 2007) (holding that discovery rule does not apply to UCL claims), with Broberg v. Guardian Life Ins. Co. of Am., 171 Cal. App. 4th 912, 920-21 (2009) (noting that courts disagree as to whether the discovery rule applies); Mass. Mut. Life Ins. Co., 97 Cal. App. 4th at 1295 (noting that the statute of limitations for the UCL "will probably run from the time a reasonable person would have discovered the basis for a claim"); Glue-Fold, Inc. v. Slautterback Corp., 82 Cal. App. 4th 1018, 1030 (2000) (inferring that the discovery rule applies to UCL claims).

[153] See Perez v. Nidek Co. Ltd., 657 F. Supp. 2d 1156, 1166 (S.D. Cal. 2009) (noting the lack of guidance in the California decisions); Saaremets v. Whirlpool Corp., Civ. No. S-09-2337 FCD/EFB, 2010 U.S. Dist. LEXIS 26165, at *14 (E.D. Cal. Mar. 18, 2010) (noting a split in authority among California courts, but concluding that the discovery rule did not apply to plaintiff's UCL claim).

[154] See Aryeh v. Canon Bus. Solutions, Inc., 116 Cal. Rptr. 3d 881 (2010). The matter is fully briefed, but no hearing date has been set as of the publication of this Overview.

[155] 23 Cal. 4th 163, 178-79 (2000). But see Camillo v. Wash. Mut. Bank, F.A., No. 1:09-CV-1548 AWI SMS, 2009 WL 3614793, at *6 (E.D. Cal. Oct. 27, 2009) (plaintiff cannot avoid an absolute bar to relief, i.e., the statute of limitations, by characterizing the claim as one for unfair competition); Yeager v. Bowlin, No. CIV 2:08-102 WBS JFM, 2010 WL 95242, at *17 (E.D. Cal. Jan. 6, 2010) (the UCL is subject to the single publication rule, which provides that no person shall have more than one claim for damages for invasion of privacy, and the limitations period commences upon the first distribution of the publication to the public); Jordan v. Paul Fin., LLC, 745 F. Supp. 2d 1084, 1098 (N.D. Cal. 2010) (explaining that, to the extent plaintiffs sought to plead around TILA's one-year statute of limitations by using the UCL, the claim was preempted by TILA); Arias v. Capital One, N.A., No. C 10-1123 MHP, 2011 WL 835610, at *7 (N.D. Cal. Mar. 4, 2011) (holding that plaintiffs' UCL claim was not viable because underlying TILA claims were time-barred); Kohl v. Am. Home Shield Corp., No. 11cv0700 JM (NLS), 2011 WL 3739506, at *4 (S.D. Cal. Aug. 24, 2011) (where plaintiff's UCL claim depended entirely on the application of Real Estate Settlement Procedures Act ("RESPA"), the court concluded that RESPA's one-year statute of limitations applied to plaintiff's UCL claim).

[156] See Net2Phone, Inc. v. Super. Ct., 109 Cal. App. 4th 583, 585 (2003) (enforcing provisions in private attorney general action). But see Am. Online, Inc. v. Super. Ct., 90 Cal. App. 4th 1, 15 (2001) (refusing to enforce choice-of-forum provision in consumer agreement); GMAC Commercial Fin. LLC v. Super. Ct., No. B166070, 2003 WL 21398319, at *4-5 (Cal. Ct. App. June 18, 2003) (refusing

defense counsel should remain alert as to whether a matter involves a provision that may provide the basis for a defense to a UCL claim.[157]

5. Preventing The "End Run"

Defendants sometimes can argue that a UCL plaintiff actually may be attempting to "end run" a restriction associated with some other law. Such an "end run" may provide a defense to the UCL claim.[158] Conversely, one court rejected an attempt to plead a breach of contract claim based on the theory that compliance with applicable statutes, including the UCL and CLRA, is an implied term of every contract.[159]

6. Federal Preemption

Federally regulated businesses frequently invoke federal preemption in defending UCL actions, and the case law is extensive. For example, courts many times have addressed the

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to enforce forum-selection provision on public policy grounds); Aral v. Earthlink, Inc., 134 Cal. App. 4th 544, 562 (2005) (striking forum-selection clause as unreasonable in putative class action to redress de minimis claims).

[157] The California tests for the enforceability and scope of choice-of-law provisions in consumer agreements are discussed in Washington Mut. Bank, FA v. Super. Ct. (Briseno), 24 Cal. 4th 906, 916-17 (2001), and Nedlloyd Lines B.V. v. Super. Ct., 3 Cal. 4th 459, 466 (1992). See also MediMatch, Inc. v. Lucent Techs. Inc, 120 F. Supp. 2d 842, 861-62 (N.D. Cal. 2000) (holding that UCL action could not proceed where contract provided for New Jersey law); Feld v. Am. Express Co., No. 09-7202, slip op., at 5 (N.D. Cal. Jan. 25, 2010) (holding that UCL does not constitute a viable cause of action where contract provided for Utah choice of law); Abat v. Chase Bank USA, N.A., 738 F. Supp. 2d 1093, 1094-96 (C.D. Cal. 2010).

[158] See Blatty, 42 Cal. 3d at 1044-45 (UCL claim cannot be brought where plaintiff would be unable to sue for defamation because of First Amendment hurdles); Rubin v. Green, 4 Cal. 4th 1187, 1204 (1993) (plaintiff cannot plead around the litigation privilege by using the UCL to re-label the nature of the action); Berryman, 152 Cal. App. 4th at 1553 ("[P]laintiffs cannot use the contracts to bootstrap liability under other theories, such as the UCL, CLRA or common law theories such as negligence. Permitting such recovery would completely destroy the principle that a third party cannot sue on a contract to which he or she is merely an incidental beneficiary."); see also Cel-Tech, 20 Cal. 4th at 184 (confirming the rule set forth in previous decisions that no UCL action will lie where either: (a) the claim expressly is barred by some other law; or (b) the challenged conduct expressly is allowed by some other law, such as, for example, a "safe harbor" provision); Moradi-Shalal v. Fireman's Fund Ins. Cos., 46 Cal. 3d 287, 292, 313 (1988) (no private right of action exists under California Insurance Code section 790.03 and, therefore, third-party claimants cannot file UCL suit based on alleged violations of that statute); Daly v. Viacom, Inc., 238 F. Supp. 2d 1118, 1126 (N.D. Cal. 2002) (dismissing UCL claim where plaintiff stated no other claim and reasoning that "[t]he 'breadth' of [section] 17200, however, 'does not give a plaintiff license to plead around the absolute bars to relief contained in other possible causes of action by recasting those causes of action as ones for unfair competition'") (quoting Glenn K. Jackson Inc. v. Roe, 273 F.3d 1192, 1203 (9th Cir. 2001)). But see Wash. Mut. Bank, FA v. Super. Ct. (Brown), 75 Cal. App. 4th 773, 787 (1999) (UCL action was not preempted by RESPA, which does not allow private right of action for supposed disclosure violations).

[159] See Berger v. Home Depot U.S.A., Inc., 476 F. Supp. 2d 1174, 1176-77 (C.D. Cal. 2007).

application of preemption with respect to banking laws.[160] Courts have also addressed

[160] Compare Smiley v. Citibank (S.D.) N.A., 11 Cal. 4th 138, 164 (1995) (holding that federal banking laws preempted California law as to allegedly excessive late fees on credit cards), aff'd, 517 U.S. 735, 744, 116 S. Ct. 1730, 135 L. Ed. 2d 25 (1996); Lopez v. World Sav. & Loan Ass'n, 105 Cal. App. 4th 729, 742 (2003) (holding that UCL claim based on federal savings association's practice of assessing a $10 fax fee for payoff demand statements was preempted by federal law, specifically the Home Owners' Loan Act ("HOLA") and 12 C.F.R. § 560.2, promulgated by the Office of Thrift Supervision ("OTS")); Wash. Mut. Bank, FA v. Super. Ct. (Guilford), 95 Cal. App. 4th 606, 610 (2002) (holding that UCL claim based on savings and loan association's practice of charging one day's preclosing interest was barred by OTS preemption); Silvas v. E*Trade Mortg. Corp., 514 F.3d 1001, 1008 (9th Cir. 2008) (holding that OTS preemption barred plaintiffs' UCL and section 17500 claims challenging defendant's interest rate lock-in fee and challenging defendant's disclosure of consumers' rescission rights under TILA); Rose v. Chase Bank USA, N.A., 513 F.3d 1032, 1038 (9th Cir. 2008) (holding that National Bank Act (the "NBA") preempted UCL as to disclosures associated with credit card account convenience checks); Kilgore v. KeyBank, 712 F. Supp. 2d 939, 958 (N.D. Cal. 2010) (finding that plaintiffs' state law claims, including UCL claims, are preempted by the NBA because they would "significantly impair" defendant's exercise of its "enumerated or incidental" powers under the NBA); Montgomery v. Bank of Am. Corp., 515 F. Supp. 2d 1106, 1111-14 (C.D. Cal. 2007) (holding that NBA preemption defeated UCL and CLRA claims challenging amounts and disclosure of non-sufficient funds and overdraft fees); Martinez v. Wells Fargo Bank, N.A., No. C-06-03327 RMW, 2007 WL 963965, at *6-8 (N.D. Cal. Mar. 30, 2007) (NBA preempted UCL as to fees for mortgage loan settlement services); Curcio v. Wachovia Mortg. Corp., No. 09-CV-1498-IEG (NLS), 2009 WL 3320499, at *6 (S.D. Cal. Oct. 14, 2009) (holding that claims, premised upon allegations regarding lending obligations, including "terms of credit; disclosure; and processing, origination, and servicing of mortgages," were barred by HOLA and OTS regulations) (citations omitted); Newbeck v. Wash. Mut. Bank, No. C 09-1599, 2010 WL 291821, at *4 (N.D. Cal. Jan. 19, 2010) (finding that HOLA preempts the UCL on claims alleging that defendants failed to disclose the nature of the interest rate on the loan and the potential for negative amortization); Grant v. Aurora Loan Servs., Inc., 736 F. Supp. 2d 1257, 1275(C.D. Cal. 2010) (concluding that plaintiff's UCL claim relating to the "processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages" was preempted by HOLA and regulations promulgated thereunder by OTS); Chae v. SLM Corp., 593 F.3d 936, 938, 943 (2010) (holding that UCL and CLRA claims alleging that student loan servicer improperly assessed interest charges were barred by preemption under the Higher Education Act), cert. denied, 131 S. Ct. 458, 178 L. Ed. 2d 287 (2010), with Reyes v. Premier Home Funding, Inc., 640 F. Supp. 2d 1147, 1155-56 (N.D. Cal. 2009) (holding that UCL claims predicated on violations of the California Translation Act were not barred by HOLA); Hood v. Santa Barbara Bank & Trust, 143 Cal. App. 4th 526, 548 (2006) (on claims related to refund anticipation loans, finding that the NBA did not preempt the UCL and the CLRA, among other state laws); Smith v. Wells Fargo Bank, N.A., 135 Cal. App. 4th 1463, 1484 (2005) (holding that UCL claim challenging notice of change in checking account overdraft fees was not barred by preemption under TISA and corresponding OCC regulations); Gibson v. World Sav. & Loan Ass'n, 103 Cal. App. 4th 1291, 1294 (2002) (holding that UCL claim challenging federal savings association's practice of passing through to its borrowers premiums for forced order insurance was not subject to OTS preemption); Black v. Fin. Freedom Senior Funding Corp., 92 Cal. App. 4th 917, 936-38 (2001) (holding that UCL claim challenging marketing of reverse mortgage transactions was not barred by preemption under numerous federal banking laws); Wash. Mut. Bank, FA (Brown), 75 Cal. App. 4th at 787 (holding that the UCL was not preempted by RESPA); People v. Highland Fed. Sav. & Loan, 14 Cal. App. 4th 1692, 1708 (1993) (holding that 12 C.F.R. § 545.2, promulgated under the HOLA, did not preempt the UCL).

preemption with respect to environmental laws;[161] bankruptcy laws;[162] immigration laws;[163] consumer protection laws;[164] transportation laws;[165] labor laws;[166] copyright laws;[167] energy laws;[168] postal laws;[169] communications laws;[170] drug and labeling laws;[171] gasoline labeling laws;[172] securities laws,[173] and credit reporting laws.[174]

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[161] See, e.g., Nathan Kimmel, Inc. v. DowElanco, 64 F. Supp. 2d 939, 944 (C.D. Cal. 1999) (holding that the Federal Insecticide, Fungicide, and Rodenticide Act preempted the UCL), aff'd, 275 F.3d 1199 (9th Cir. 2002).

[162] See, e.g., Rogers v. NationsCredit Fin. Servs. Corp., 233 B.R. 98, 109-10 (N.D. Cal. 1999) (holding that the UCL was preempted by bankruptcy statutes).

[163] See, e.g., Diaz v. Kay-Dix Ranch, 9 Cal. App. 3d 588, 599 (1970) (recognizing federal preemption in area of immigration and holding that California courts should abstain from intervening by way of a UCL claim).

[164] See, e.g., Churchill Village, LLC v. Gen. Elec. Co., 169 F. Supp. 2d 1119, 1127-28 (N.D. Cal. 2000) (holding that, where Consumer Product Safety Commission had not promulgated highly particularized product safety standards and had promulgated none directly addressing unfair business practices and false advertising, the federal Consumer Protection Safety Act did not preempt plaintiffs' claims under UCL and section 17500).

[165] See, e.g., Dugan v. FedEx Corp., No. CV 02-1234-JFWFMOX, 2002 WL 31305208, at *3 (C.D. Cal. Sept. 27, 2002) (the federal Airline Deregulation Act ("ADA") preempted the UCL and other state law as to air carrier's policy regarding limitation on losses and damaged goods); Blackwell v. Skywest Airlines, Inc., No. 06cv0307 DMS (AJB), 2008 WL 5103195, at *15-18, 20 (S.D. Cal. Dec. 3, 2008) (the ADA preempted the UCL and state wage and hour laws).

[166] See, e.g., Holliman v. Kaiser Found. Health Plan, No. C-06-0755 SC, 2006 WL 662430, at *3-4 (N.D. Cal. Mar. 14, 2006) (Fair Labor Standards Act does not preempt UCL claims because statutory language grants jurisdiction to both federal and state courts); Bloom v. Universal City Studios, Inc., 734 F. Supp. 1553, 1560 (C.D. Cal. 1990) (Labor Management Relations Act preempted UCL with respect to interpretation of a collective bargaining agreement), aff'd, 933 F.2d 1013 (9th Cir. 1991); Provience v. Valley Clerks Trust Fund, 509 F. Supp. 388, 392 (E.D. Cal. 1981) (ERISA preempted UCL because application of state regulatory laws may alter controls established for benefit plans by ERISA).

[167] See, e.g., Inspection Mgmt. Sys., Inc. v. Open Door Inspections, Inc., No. 2:09-cv-00023-MCE-GGH, 2009 WL 2030937, at *6 (E.D. Cal. July 9, 2009) (finding Copyright Act preempted UCL claim); Fractional Villas, Inc. v. Tahoe Clubhouse, No. 08cv1396-IEG-POR, 2009 WL 160932, at *5-6 (S.D. Cal. Jan. 22, 2009) (same).

[168] See, e.g., In re Wholesale Elec. Anti-Trust Cases I & II, 147 Cal. App. 4th 1293, 1316 (2007) (UCL claim preempted by Federal Power Act).

[169] See, e.g., Flamingo Indus. (USA) Ltd. v. U.S. Postal Serv., 302 F.3d 985, 996 (9th Cir. 2002) (dismissing UCL claim against United States Postal Service based on federal preemption), rev'd on other grounds, 540 U.S. 736, 124 S. Ct. 1321, 158 L. Ed. 2d 19 (2004).

[170] See, e.g., TPS Utilicom Servs. v. AT&T Corp., 223 F. Supp. 2d 1089, 1108 (C.D. Cal. 2002) (holding that UCL claim was preempted by Federal Communications Act).

[171] See, e.g., Kanter v. Warner-Lambert Co., 99 Cal. App. 4th 780, 797 (2002) (holding that state law, including the UCL, was preempted by Food and Drug Administration Modernization Act). But see Consumer Justice Ctr. v. Olympian Labs, Inc., 99 Cal. App. 4th 1056, 1058 (2002) (holding that the UCL was not preempted by FTCA, Federal Food, Drug, and Cosmetic Act and Dietary Supplement

A preemption defense, however, always is subject to a court's interpretation of congressional intent with respect to the federal law at issue, and often a state court is reluctant to find that state law will not apply to the claims of the state's citizens.[175]

In addition, some Courts of Appeal have held that UCL claims based on systematic contract breaches are not defeated by federal preemption.[176] In Gibson v. World Savings and Loan Association, plaintiffs brought a UCL action challenging a federal savings association's practice of assessing premiums for forced order insurance.[177] Rejecting defendant's preemption argument, which was based on federal banking law, the court reasoned that plaintiffs' UCL claims were not aimed at regulating defendant's lending practices, but rather, were predicated on "contractual duties" arising from borrowers' deeds of trust.[178] The court's reasoning in Gibson – that UCL unfairness claims can be predicated on "contractual obligations" – appears to conflict with other California authorities stating that the UCL "is not an all-purpose substitute for a tort or contract action."[179] Nevertheless, in Smith v. Wells Fargo Bank, N.A., the Court of Appeal

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Health and Education Act); Chavez v. Blue Sky Natural Beverage Co., 268 F.R.D. 365, 368 (N.D. Cal. 2010), reconsideration denied, No. C 06-6609 VRW, 2010 WL 5538682 (N.D. Cal. Nov. 22, 2010) (granting plaintiff's motion for summary judgment on defendant's affirmative defense of preemption by Food, Drug and Cosmetic Act); Astiana v. Ben & Jerry's Homemade, Inc., No. C 10–4387 PJH, 2011 WL 2111796, at *10 (N.D. Cal. May 26, 2011) (Nutrition Label and Education Act (the "NLEA") did not preempt UCL claims where the requirements plaintiffs sought to impose by their UCL action were not identical to those required by the NLEA).

[172] See, e.g., VP Racing Fuels, Inc. v. Gen. Petroleum Corp., 673 F. Supp. 2d 1073, 1079-82 (E.D. Cal. 2009) (concluding that Petroleum Marketing Practices Act does not preempt UCL claim).

[173] See, e.g., Roskind v. Morgan Stanley Dean Witter & Co., 80 Cal. App. 4th 345, 352 (2000) (federal securities laws do not preempt the UCL on claim alleging that brokerage firm breached its fiduciary duty to customers by not executing stock orders in a fair and timely manner).

[174] See, e.g., El-Aheidab v. Citibank (S.D.), N.A., No. C–11–5359 EMC, 2012 WL 506473, at *5 (N.D. Cal. Feb. 15, 2012) (holding that a UCL claim is preempted when predicated on violations of the federal Fair Credit Reporting Act ("FCRA")).

[175] See, e.g., People ex rel. Renne v. Servantes, 86 Cal. App. 4th 1081, 1087-96 (2001) (refusing to follow Ninth Circuit and rejecting preemption defense based on the Federal Aviation Administration Authorization Act). Proceeding in federal court increases the chance that a preemption defense might succeed although federal courts, of course, sometimes reject the defense.

[176] See Smith, 135 Cal. App. 4th at 1483 ("it appears that a systematic breach of certain types of contracts (e.g., breaches of standard consumer or producer contracts involved in a class action) can constitute an unfair business practice under the UCL"); Branick v. Downey Sav. & Loan Ass'n, 24 Cal. Rptr. 3d 406, 413 (2005), aff'd, 46 Cal. Rptr. 3d 66 (2006).

[177] 103 Cal. App. 4th at 1302-04.

[178] Id. at 1301 ("Those [UCL] claims are predicated on the duties of a contracting party to comply with its contractual obligations."). It should be noted that plaintiffs in Gibson had dismissed their claim for breach of contract, opting to proceed only under the UCL. Id. at 1294.

[179] Cortez, 23 Cal. 4th at 173; see also Altman v. PNC Mortg., No. CV F 11–1807 LJO MJS, 2012 WL 174966, at *13 (E.D. Cal. Jan. 20, 2012) (stating that the "unfairness" prong of the UCL "does not give the courts a general license to review the fairness of contracts").

similarly concluded that the UCL was not preempted by TISA with respect to contractual notice requirements.[180]

7. Primary Jurisdiction

When a UCL action arises in a regulated area, such as insurance, a defendant might advance the defense of primary jurisdiction. In connection with that defense, it must be shown that an administrative procedure already is in place to address issues of widespread importance and/or consumer complaints. A successful defense based on primary jurisdiction suspends judicial proceedings until the appropriate administrative body can review the underlying claim.[181] As explained in Farmers Insurance Exchange v. Superior Court, "[t]he primary jurisdiction doctrine advances two related policies: it enhances court decisionmaking and efficiency by allowing courts to take advantage of administrative expertise, and it helps assure uniform application of regulatory laws."[182]

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[180] 135 Cal. App. 4th at 1476-84; see also McKell v. Wash. Mut., Inc., 142 Cal. App. 4th 1457, 1488 (2006) (finding that preemption did not bar UCL claims based on alleged fraudulent conduct and violations of an underlying federal statute).

[181] See, e.g., Farmers Ins., 2 Cal. 4th at 394 (applying primary jurisdiction and staying a UCL government enforcement action pending review by the California Insurance Commissioner); Wise v. Pac. Gas & Elec. Co., 77 Cal. App. 4th 287, 299-300 (1999) (applying the primary jurisdiction doctrine to stay a UCL action); accord Samura v. Kaiser Found. Health Plan, Inc., 17 Cal. App. 4th 1284, 1299 (1993) (holding that a UCL action was barred where the Legislature had expressly entrusted an administrative body with exclusive regulatory powers over the underlying statute). But see Cundiff v. GTE Cal. Inc., 101 Cal. App. 4th 1395, 1412 (2002) (rejecting primary jurisdiction defense in UCL action); AICCO, 90 Cal. App. 4th at 594-95 (rejecting defense to UCL claim based on doctrine of primary jurisdiction because there were no pending or proposed administrative proceedings focused on the corporate structure at issue in the action).

A doctrine similar to primary jurisdiction is exhaustion of administrative remedies. Differentiating between the two, the United States Supreme Court has explained:

> "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary Jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

Farmers Ins., 2 Cal. 4th at 390 (quoting U.S. v. W. Pac. R.R. Co., 352 U.S. 59, 63-64, 77 S. Ct. 161, 1 L. Ed. 2d 126 (1956)). Because a claim for violation of the UCL will be "originally cognizable in the courts," only the primary jurisdiction doctrine appears applicable in most actions. See id. at 391. It should be noted that, regardless of whether primary jurisdiction might apply, administrative review may not be controlling. See People v. Damon, 51 Cal. App. 4th 958, 972 (1996) (holding that there was no res judicata effect of an administrative proceeding where a UCL remedy could not be sought through that proceeding).

[182] Farmers Ins., 2 Cal. 4th at 391; see also Tryon v. DSB Enters., Inc., No. D045656, 2006 WL 234728, at *4 (Cal. Ct. App. Feb. 1, 2006) (concluding that individual citizens could not enforce the Alcoholic Beverage Control Act through private UCL actions because the state constitution and the Act itself

8. Judicial Abstention In Matters Of Economic Policy

A number of courts have held that UCL actions should not proceed when they require trial courts to engage in "microeconomic management."[183] In applying this defense, courts have

granted exclusive enforcement power to the Department of Alcoholic Beverage Control); Shamsian v. Dep't of Conservation, 136 Cal. App. 4th 621, 642 (2006) (stating that "[f]or the court at this point to issue restitution and disgorgement orders against the corporate defendants would interfere with the department's administration of the act and regulation of beverage container recycling and potentially risk throwing the entire complex economic arrangement out of balance").

[183] See, e.g., Desert Healthcare Dist. v. PacifiCare, FHP, Inc., 94 Cal. App. 4th 781, 794-95 (2001) (dismissing UCL claim challenging defendant healthcare provider's capitation agreement with an intermediary because assessing appropriate levels of capitation and industry oversight – i.e., determining economic policy – "is primarily a legislative and not a judicial function"); Crusader Ins. Co. v. Scottsdale Ins. Co., 54 Cal. App. 4th 121, 138 (1997) (holding that plaintiff's claim under the UCL, in essence, challenged whether the Department of Insurance properly regulated certain insurance providers; since "[i]nstitutional systems are . . . in place to deal with [plaintiff's allegations,] . . . [t]here is no need or justification for the courts to interfere with the Legislature's efforts to mold and implement public policy in this area"); Wolfe v. State Farm Fire & Cas. Ins. Co., 46 Cal. App. 4th 554, 562 (1996) (holding that the trial court properly sustained a demurrer without leave to amend on a UCL claim where plaintiffs brought suit against certain insurance companies based on their refusal to issue homeowners and earthquake insurance); Cal. Grocers Ass'n, 22 Cal. App. 4th at 218 (reversing trial court's judgment under the UCL, which enjoined a bank from imposing certain service charges, because the "case implicates a question of economic policy – whether service fees charged by banks are too high and should be regulated" – and emphasizing that "[j]udicial review of one service fee charged by one bank is an entirely inappropriate method of overseeing bank service fees"); Samura, 17 Cal. App. 4th at 1301-02 (reversing the trial court's entry of an injunction under the UCL because "the courts cannot assume general regulatory powers over health maintenance organizations [relating to service agreement provisions] through the guise of enforcing" the UCL, and holding that such regulatory powers are entrusted by the Legislature to the Department of Corporations); Beasley v. Wells Fargo Bank, N.A., 235 Cal. App. 3d 1383, 1391 (1991) (noting the trial court's determination to rule in favor of a bank on a UCL claim involving the assessment of credit card late fees since, "as a matter of policy, [] this Court [is not] well suited to regulating retail bank pricing via injunction on an ongoing basis"); see also Lazar, 69 Cal. App. 4th at 1509 (holding that a cause of action for violation of the Unruh Act could not be maintained where plaintiff challenged a car rental company's surcharge because "this case concerns a question of economic policy – that is, whether the surcharge is too high and should be regulated. . . . It is the Legislature's function, not ours, to determine the wisdom of economic policy."). But see AICCO, 90 Cal. App. 4th at 593 (rejecting defendant's argument that the trial court properly abstained from deciding the action because, by doing so, it would "engage in 'impermissible microeconomic regulation of the business of insurance'"); Arce v. Kaiser Found. Health Plan, Inc., 181 Cal. App. 4th 471, 502 (2010), rev. denied, Apr. 28, 2010 (where member brought putative class action for alleged denial of coverage for mental health care services, trial court erred in applying the doctrine of judicial abstention because the UCL claim did not require the court "to make individualized determinations of medical necessity, to evaluate complex issues of economic policy, or to decide matters within the exclusive jurisdiction of the [Department of Managed Health Care]"); Klein v. Chevron U.S.A., Inc., 202 Cal. App. 4th 1342, 1369 (2012) (application of the doctrine requires an alternative means of resolving issues raised in plaintiff's complaint).

emphasized that "[j]udicial intervention in complex areas of economic policy is inappropriate."[184] Indeed, in the dissenting opinion in Stop Youth Addiction, Justice Brown noted:

> Although California courts have not yet developed the doctrine fully, the fundamentals of an equitable jurisprudence of abstention in litigation brought under the UCL exists under both the California Constitution (Art. III, § 3) and case law. As [numerous California decisions] show, the Courts of Appeal have done an admirable job of reining in the UCL's potential for adverse regulatory effects by declining to grant relief in appropriate cases.[185]

The judicial abstention defense is based on the notion that, where a challenged business practice arises in the context of a regulated industry, and the practice has not been prohibited, the courts should not do what the Legislature or a responsible agency has left undone.

9. The "Safe Harbor" Defense

As noted above, in the context of an unfairness claim, the California Supreme Court confirmed in Cel-Tech that "[a]cts that the Legislature has determined to be lawful may not form the basis for an action under the [UCL] . . . ."[186] Because "[c]ourts may not simply impose their own notions of the day as to what is fair or unfair" and "[s]pecific legislation may limit the judiciary's power to declare conduct unfair," the Court concluded that "courts may not use the [UCL] to condemn actions the Legislature permits."[187] Other California decisions have dismissed UCL claims for unlawful and fraudulent conduct on these same "safe harbor" grounds – i.e., where the business practice forming the basis of the claim has been explicitly approved, or exempted from prosecution, by the Legislature.[188] Defendants may raise a "safe harbor" defense

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[184] Wolfe, 46 Cal. App. 4th at 562; accord Alvarado v. Selma Convalescent Hosp., 153 Cal. App. 4th 1292, 1298-304 (2007) ("Adjudicating this class action controversy would require the trial court to assume general regulatory powers over the health care industry through the guise of enforcing the UCL, a task for which the courts are not well-equipped."); Desert Healthcare Dist., 94 Cal. App. 4th at 795 ("Where a UCL action would drag a court of equity into an area of complex economic policy, equitable abstention is appropriate.").

[185] Stop Youth Addiction, 17 Cal. 4th at 596-97 (Brown, J., dissenting) (footnote omitted); see also Quelimane, 19 Cal. 4th at 63 (Brown, J., dissenting) ("It is not simply that a single superior court judge hearing a single UCL case is a poor choice to resolve a myriad of complicated fact and policy issues tied to the economics, risks, cost and availability of [certain] insurance. It is that given the scope of its administrative authority and depth of regulatory experience, the Department of Insurance is likely to prove better at the job.").

[186] Cel-Tech, 20 Cal. 4th at 183.

[187] Id. at 182, 184. As discussed above, however, the decision in Cel-Tech was based on a dispute between two competitors and, therefore, may be distinguishable in the context of consumer transactions. But see Schnall, 78 Cal. App. 4th at 1166-67 (applying Cel-Tech standard in a consumer action).

[188] See, e.g., Ochs v. PacifiCare of Cal., 115 Cal. App. 4th 782, 793 (2004) (holding that "safe harbor" defense precluded UCL claim in action challenging health care service plan's obligation to pay for emergency services); Byars, 109 Cal. App. 4th at 1148 (holding that a lender's payment of a YSP to a broker did not violate the UCL because the payment of such a premium had been deemed lawful

based upon case law as well.[189] Moreover, the Court found in Olszewski v. Scripps Health that the "safe harbor" defense applies retrospectively – i.e., following a change in the law authorizing the conduct at issue.[190]

III. REMEDIES UNDER THE UCL

No damages of any kind are recoverable under the UCL.[191] Instead, the UCL provides for injunctive relief, restitution and civil penalties. Injunctive relief and restitution are available in both private-party and government actions.[192] Civil penalties are available only in government enforcement actions.[193] As with the substantive provisions of the UCL, the remedial provisions have been liberally construed to give courts broad powers to fashion creative awards of injunctive or restitutionary relief.[194] The remedies available under the UCL are cumulative to other remedies, regardless of whether those remedies arise under the UCL or other law.[195]

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under federal law); Swanson v. St. John's Reg'l Med. Ctr., 97 Cal. App. 4th 245, 248 (2002) (holding that defendant's filing of liens pursuant to Hospital Lien Act precluded UCL action as a matter of law; "[i]t is settled that a business practice does not violate the UCL if it is permitted by law"); Smith v. State Farm Mut. Auto. Ins. Co., 93 Cal. App. 4th 700, 704 (2001) (holding that defendant insurers' compliance with California Insurance Code section 11580.2 precluded UCL claim); Hobby Indus. Ass'n of Am., 101 Cal. App. 3d at 370 ("Although the Supreme Court has construed the orbit of the unfair competition statutes expansively, it cannot be said that this embracing purview also encompasses business practices which the Legislature has expressly declared to be lawful in other legislation.") (citations omitted); Aron v. U-Haul Co. of Cal., 143 Cal. App. 4th 796, 803-4 (2006) (on claims for failure to reimburse customers where vehicle is returned with more fuel than initially provided, refusing to find "implied safe harbor" insulating defendant from liability).

[189] See, e.g., Chavez, 93 Cal. App. 4th at 375 (holding that defendant's conduct was permissible under the Colgate doctrine and, therefore, not "unlawful" or "unfair" under the UCL).

[190] 30 Cal. 4th 798, 827-30 (2003) ("[R]etroactive application of a decision disapproving prior authority on which a person may reasonably rely in determining what conduct will subject the person to penalties, denies due process.") (citation omitted).

[191] Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1144 (2003); Forty Niner Truck Plaza, Inc. v. Shank, No. Civ. S-11-860 FCD, 2011 WL 4386299, at *2 (E.D. Cal. Sept. 20, 2011) ("A claim under [the UCL] is 'equitable in nature; damages cannot be recovered . . . .'").

[192] See Cal. Bus. & Prof. Code § 17203.

[193] See Cal. Bus. & Prof. Code § 17206.

[194] See Fletcher, 23 Cal. 3d at 449 (noting that principles of equity, combined with express statutory language, arms "the trial court with the cleansing power to order restitution to effect complete justice"); Barquis v. Merchs. Collection Ass'n, 7 Cal. 3d 94, 111 (1972) (explaining that the Legislature's intent was "to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur").

[195] See Cal. Bus. & Prof. Code § 17205 ("Unless otherwise expressly provided, the remedies or penalties provided by the chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state."). But see Nelson v. Pearson Ford Co., 186 Cal. App. 4th 983, 1018 (2010) (rescission is not available under the UCL).

A. Restitution Under The UCL

1. The Proper Scope Of Restitution Awards

The California Supreme Court has considered the proper scope of restitution awards in various contexts.[196] The developments in this area probably best can be understood by starting with Korea Supply Co. v. Lockheed Martin Corp.[197]

As stated in Korea Supply, "[t]he object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest."[198] A UCL order for restitution is one "compelling a UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property or those claiming through that person."[199] Therefore, in order for an award of restitution to be appropriate against a defendant in any UCL action, that defendant must hold funds in which plaintiff has an ownership interest.

Post-Korea Supply cases expand on this conclusion. One illustrative case is Inline, Inc. v. Apace Moving Systems, Inc.[200] There, plaintiff sued a storage company, Apace Moving Systems, alleging that, when Apace auctioned the stored property of plaintiff's predecessor, Production Resources, Inc. ("PRI"), to satisfy outstanding storage charges, Apace did so in a commercially unreasonable manner. At the auction, Apace obtained only $20 for the entire contents of PRI's storage lot. Plaintiff subsequently purchased the auctioned lot from the buyer for $100,000. Plaintiff sued Apace, claiming, among other things, that Apace's violation of the statutory commercial reasonableness standard in auctioning the property constituted a violation of the UCL. Plaintiff sought as "restitution" the $100,000 that it paid to the buyer of the PRI storage lot, who had paid only $20 for the lot. The trial court found that Apace's auction was not held in a commercially reasonable manner and awarded Inline $20 as restitution under the UCL.

Plaintiff appealed the amount of the restitution award. The Court of Appeal affirmed, rejecting plaintiff's argument that the restitution remedy required Apace to reimburse plaintiff for the $100,000 paid to the third-party buyer to retrieve the property. The court reasoned that plaintiff sought more from Apace than the "'return [of] something [it] wrongfully received'"; it sought compensation "for injury suffered as a result of [defendant's] conduct."[201] In other words,

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[196] See Kraus, 23 Cal. 4th at 116; Cortez, 23 Cal. 4th at 177-78; Korea Supply, 29 Cal. 4th at 1142-43; Clark v. Super. Ct., 50 Cal. 4th 605, 611, 614-15 (2010) (finding that claims under the UCL are not subject to the punitive device of trebling because restitution is not a punitive remedy). It should be noted that, in Kraus, the Court devoted substantial discussion to the availability of restitution in general public, private attorney general actions. Following Proposition 64's prohibition on such actions, that discussion is moot.

[197] 29 Cal. 4th at 1149.

[198] Id.

[199] Id. at 1144-45 (quoting Kraus, 23 Cal. 4th at 126-27).

[200] 125 Cal. App. 4th 895 (2005).

[201] Id. at 903.

plaintiff sought damages, which are not available under section 17203.[202] The court explained that "[t]he only nonpunitive monetary relief available under [the UCL] is the disgorgement of money that has been wrongfully obtained or, in the language of the statute, an order 'restor[ing]. . . money . . . which may have been acquired by means of . . . unfair competition.'"[203] The court emphasized that "section 17203 is not 'an all-purpose substitute for a tort or contract action.'"[204] Rather, remedies under section 17203 are equitable and "designed to afford specific relief by requiring disgorgement of the particular property or money taken by an unfair business practice, rather than damages compensation."[205]

Two Court of Appeal decisions, Madrid v. Perot Systems Corp.[206] and Feitelberg v. Credit Suisse First Boston, LLC,[207] further address this issue, specifically considering whether nonrestitutionary disgorgement of profits is available in any UCL action, including a class action. In other words, can a UCL plaintiff alleging a class action seek disgorgement of monies in excess

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[202] See id.

[203] Id. (quoting Bank of the W. v. Super. Ct., 2 Cal. 4th 1254, 1266 (1992)).

[204] Id. at 904 (quoting Cortez, 23 Cal. 4th at 173).

[205] Id. at 905 (citing AIU Ins. Co. v. Super. Ct., 51 Cal. 3d 807, 835 (1990) (recognizing that restitutionary remedies return to plaintiff "the very thing to which he was entitled," while damages provide compensation for loss in the form of a money recovery)) (emphasis added); see also Cox v. Elec. Data Sys. Corp., No. C-08-03927 WHA, 2009 WL 3833899, at *12-13 (N.D. Cal. Nov. 16, 2009) (granting defendant's motion for summary judgment on UCL claim where plaintiff sought wages that were never earned and therefore never owed); Pineda v. Bank of Am., N.A., 50 Cal. 4th 1389, 1401 (2010) (statutory penalties do not "restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest"; unlike unpaid wages, which are triggered by an employee's actions, penalties are designed to encourage employers to pay on time); Reid v. Google, Inc., 66 Cal. Rptr. 3d 744, 751-52 (2007) (affirming order striking prayer for restitution in UCL action based on allegedly discriminatory hiring practices where plaintiff sought return of unvested stock options held at time of termination), aff'd, 50 Cal. 4th 512 (2010); Pulido v. Coca-Cola Enters., Inc., No. EDCV06-406VAP(OPX), 2006 WL 1699328, at *8 (C.D. Cal. May 25, 2006) (rejecting claims for restitution based on violations of California Labor Code section 226.7, which requires employers to pay employees for breaks that are not taken, and finding that the amounts were in the nature of a penalty, not restitution); Wayne v. BP Oil Supply Co., No. B180025, 2006 WL 766712, at *5 (Cal. Ct. App. Mar. 27, 2006) (rejecting claims for restitution based on defendant's alleged manipulation of crude oil prices so as to create higher prices for gasoline, reasoning that plaintiff had not sufficiently alleged an "ownership interest" in the money he sought to recover). But see Doe v. D.M. Camp & Sons, No. CIV-F-05-1417 AWI SMS, 2009 WL 921442, at *13 (E.D. Cal. Mar. 31, 2009) (reaching result contrary to Pulido, above); Troyk, 171 Cal. App. 4th at 1339-42 (holding that, although class members did not pay service charges to an insurer and its attorney-in-fact directly, the trial court could have inferred that said defendants received a benefit from payments being made to a subsidiary billing agent based on the three companies acting as a single enterprise; accordingly, the insurer and its attorney-in-fact could both be liable for restitution under the UCL); Wofford v. Apple Inc., No. 11-CV-0034 AJB NLS, 2011 WL 5445054, at *3 (S.D. Cal. Nov. 9, 2011) ("loss of use and loss of value" of plaintiff's iPhones were not recoverable as restitution because they provide no corresponding gain to defendant and injunctive relief was inappropriate because defendant remedied the software defect).

[206] 130 Cal. App. 4th 440 (2005).

[207] 134 Cal. App. 4th 997 (2005).

of or unrelated to what he or she paid or gave to the defendant, such as investment profits or costs savings made by the defendant? Both Madrid and Feitelberg answer "no."[208]

One case, however, arguably reached the opposite conclusion. In Juarez v. Arcadia Financial, Ltd., plaintiffs brought a UCL class action based on alleged violations of the Rees-Levering Automobile Sales Finance Act.[209] After defendant refused to provide discovery regarding any profits defendant had earned on funds collected from class members, plaintiff moved to compel, claiming that the information was relevant to restitution.[210] Reversing the trial court's order denying the motion, the Court of Appeal maintained that Korea Supply "concluded that 'restitutionary disgorgement' is available under the UCL."[211] In support of this conclusion, the court quoted Korea Supply's statements that restitution under the UCL "is not limited only to the return of money or property that was once in the possession of [the plaintiff]," and "is broad enough to allow a plaintiff to recover money or property in which he or she has a vested interest."[212] It further reasoned that "the plaintiffs arguably have an ownership interest in any profits Arcadia may have gained through interest or earnings on the plaintiffs' money that Arcadia wrongfully held."[213] Moreover, the court distinguished Feitelberg, Madrid and several other cases holding that there is no right to restitutionary disgorgement on the ground that plaintiffs in those cases "had not lost to the defendant any vested interest in money or property."[214] In essence, the court's view was that, provided there is a reasonable nexus between profits and what was taken by the defendant, equity allows the plaintiff to recover not only what was taken, but also any profits generated from what was taken.

While restitution is limited to money or property in which the plaintiff had an ownership interest, the plaintiff need not have provided the money or property directly to the defendant. In Shersher v. Superior Court, plaintiff brought a UCL action against Microsoft alleging that the packaging for certain Microsoft wireless routers, adapters and other products sold through retailers misrepresented the capabilities of the products.[215] Microsoft successfully moved to strike plaintiff's prayer for restitution, arguing that Korea Supply prevents plaintiffs from seeking to recover money or property they did not pay directly to the defendant.[216] The Court of Appeal reversed,

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[208] See Madrid, 130 Cal. App. 4th at 460; Feitelberg, 134 Cal. App. 4th at 1015-1020; see also Colgan v. Leatherman Tool Group, Inc., 135 Cal. App. 4th 663, 700 (2006) (reversing restitution award as based on insufficient evidence of the amounts required "to restore purchasers to the status quo ante"); Starr-Gordon v. Mass. Mut. Life Ins. Co., No. CIV. S-03-68 LKK/GGH, 2006 WL 3218778, at *7 (E.D. Cal. Nov. 7, 2006) ("there is no genuine dispute that non-restitutionary disgorgement is not an available remedy under the UCL").

[209] 152 Cal. App. 4th 889, 894 (2007).

[210] Id. at 912.

[211] Id. at 914-15 (emphasis added).

[212] Id. at 915 (quoting Korea Supply, 29 Cal. 4th at 1149 (citing Cortez, 23 Cal. 4th at 178)).

[213] Id.

[214] Id. at 916-17.

[215] 154 Cal. App. 4th 1491, 1494-95 (2007).

[216] Id. at 1495.

stating that Korea Supply was not "intended to preclude consumers from seeking the return of money they paid for a product that turned out to be not as represented. Rather, the holding of Korea Supply on the issue of restitution is that the remedy the plaintiff seeks must be truly 'restitutionary in nature' – that is, it must represent the return of money or property the defendant acquired through its unfair practices."[217]

2. "Fluid Recovery" In UCL Class Actions

Where a class-action judgment awards restitution and there are unidentifiable recipients, the doctrine of "fluid recovery" may be used to distribute any unpaid funds.[218] Pursuant to this doctrine, a court might order a defendant to disgorge the amount that cannot be paid directly to class members for distribution through a claims process or to the "next best" use, meaning to produce benefits for as many class members as possible.[219] The California Supreme Court has proposed several specific "fluid recovery" procedures, including: price rollback;[220] general escheat;[221] earmarked escheat;[222] and the establishment of an equitable trust fund.[223] In class action settlements where individual recoveries by class members in a settlement would be small and the cost of distributing settlement monies is high relative to the individual recoveries, payment of the settlement monies to charity is an appropriate cy pres remedy.[224]

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[217] Id. at 1498; accord Hartless, 2007 WL 3245260, at *7-8 (denying motion to dismiss UCL claim where challenged products were not purchased directly from defendant).

[218] See, e.g., State of Cal. v. Levi Strauss & Co., 41 Cal. 3d 460, 464 (1986) (holding that proof of individual injury is not required for recovery in consumer class actions and discussing the "largely uncharted area of fluid recovery"); Thomas Shelton Powers, M.D., 2 Cal. App. 4th at 330; People ex rel. Smith v. Parkmerced Co., 198 Cal. App. 3d 683, 689 (1988) (determining that unclaimed funds of restitution award should go to a tenant's rights organization to the extent that victimized former tenants could not be located), abrogated by Kraus, 23 Cal. 4th at 116.

[219] "Fluid recovery" is borrowed from the doctrine of "cy pres" – a concept developed in the law of charitable trusts – which provides that, if a particular interest cannot go to an intended purpose, it will be put to its next best use.

[220] Under the price rollback method, the defendant distributes the unclaimed funds throughout the market by lowering prices in the product or service area where the wrongful conduct occurred. See Levi Strauss, 41 Cal. 3d at 473.

[221] Under the general escheat approach, the unclaimed portion of the award is paid over to a general government fund. See id. at 475.

[222] Under the earmarked escheat method, the uncollected funds are distributed to an appropriate government organization for use on projects that potentially could benefit non-collecting class members. See id. at 474.

[223] Here, the court appoints a board of directors to administer recovery in the best interests of the represented parties. See id. at 476.

[224] See, e.g., Slayton v. Citibank (S.D.), N.A., Nos. A113891, et al., 2007 WL 731432, at *4-5 (Cal. Ct. App. Mar. 12, 2007) (affirming approval of UCL class action settlement providing for payment of settlement monies to charity where each class member's individual recovery would have been less than $1.50 before costs of mailing checks).

3. Defenses To Restitution Claims

a. The Filed Rate Doctrine

Under the "filed rate doctrine," defendants that charge consumers certain rates for their products or services, which rates are required by law to be filed with and approved by a designated regulatory body, are insulated from lawsuits challenging those rates and from court orders having the effect of imposing rates other than the filed rates.[225] Relying on this doctrine, the Court of Appeal in Day v. AT&T Corp. held that plaintiffs were precluded from seeking any monetary recovery under the UCL based on defendant's rounding up of telephone charges on prepaid phone cards because the rates for such charges were disclosed and approved in publicly filed rates.[226] Similarly, in Walker v. Allstate Indemnity Co., the Court of Appeal held that plaintiffs could not seek restitution under the UCL from certain insurance companies based on allegations that their rates were excessive.[227] The court reasoned that no civil challenge could be brought to recoup insurance premiums charged pursuant to rates approved by the state's insurance department.[228] Courts around the country have applied the filed rate doctrine in various regulatory contexts, including telecommunications and utilities.[229]

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[225] See Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 18 (2d Cir. 1994) ("Simply stated, the [filed rate] doctrine holds that any 'filed rate' – that is, one approved by the governing regulatory agency – is per se reasonable and unassailable in judicial proceedings brought by ratepayers."); Day v. AT&T Corp., 63 Cal. App. 4th 325, 335 (1998) ("It has been said that the doctrine furthers two legitimate goals: [1] nondiscriminatory rate setting and [2] agency autonomy in rate setting without court interference."); Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 222, 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998) (recognizing the filed rate doctrine's purpose of preventing discriminatory pricing).

[226] 63 Cal. App. 4th at 335. The court, however, did hold that plaintiffs still could seek injunctive relief under the UCL. See id. In Spielholz v. Superior Court, the court rejected the filed rate doctrine in a UCL action where plaintiff alleged that defendant's advertising of a "seamless calling area" was misleading and deceptive. 86 Cal. App. 4th 1366, 1369 (2001).

[227] 77 Cal. App. 4th 750, 759 (2000).

[228] Id. at 760; see id. at 756 ("[U]nder the statutory [insurance] scheme enacted by the voters, the charging of an approved rate cannot be deemed 'illegal' or 'unfair' for purposes of the [UCL] or, indeed, tortious."); see also In re Wholesale Elec. Anti-Trust Cases I & II, 147 Cal. App. 4th at 1316 (holding that filed rate doctrine barred UCL claim challenging alleged anticompetitive activity in the wholesale electricity market); Gallivan v. AT&T Corp., 124 Cal. App. 4th 1377, 1385 (2004) (holding that filed rate doctrine barred plaintiff's state law claims for monetary relief); Duggal v. G.E. Capital Commc'ns Servs., Inc., 81 Cal. App. 4th 81, 87 (2000) (holding that filed rate doctrine barred plaintiff's state law claims).

[229] See, e.g., Jader v. Principal Mut. Life Ins. Co., 975 F.2d 525, 527 (8th Cir. 1992) (applying the doctrine to bar state law claims pursuant to an insurance regulatory scheme); Wegoland, 27 F.3d at 20 (stating that the "Supreme Court has ruled that the filed rate doctrine acts to bar state causes of action" and "that the rationales underlying the filed rate doctrine apply equally strongly to regulation by state agencies"). But see Spielholz, 86 Cal. App. 4th at 1377 (rejecting filed rate doctrine in a UCL action because allegations were directed at false advertising, not the defendant's rates).

b. Ability To Pay

At least one California court has determined that the equal protection clause "requires a court to grant a hearing on a defendant's ability to pay restitution."[230] "[I]t does not require a trial judge [to] make a finding of ability to pay before ordering restitution," however.[231]

c. Restitution As A Disguised Damages Claim

A plaintiff should not be allowed to seek damages in the "disguise" of UCL restitution,[232] but the distinction between damages and restitution sometimes is difficult to discern.[233] In Cortez, for instance, the California Supreme Court awarded unpaid wages as restitution to a group of workers.[234] The Court reasoned that, because the defendant improperly "acquired" its employees' money, meaning that the workers had earned the money and the employer failed to pay it, the trial court could order the defendant to pay the wages as a form of restitution.[235] In contrast, in a series of class actions brought by writers against the television industry, the Court of Appeal held in Alch v. Superior Court that restitutionary backpay was not available under the UCL.[236] In Alch, plaintiffs sought an injunction under the UCL compelling defendants to pay restitution in the form of the wages they would have earned absent the alleged age discrimination and also in hopes that an injunction would deter future discrimination. Affirming denial of the restitution request, the court noted that restitution is available only if a defendant wrongfully acquires funds or property in which a plaintiff has an ownership or vested interest, and that the UCL does not provide courts with the equitable power to award any form of monetary relief that they believe might generally deter unfair competition.[237]

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[230] People v. Warnes, 10 Cal. App. 4th Supp. 35, 40 (1992) (involving a criminal prosecution under section 17500).

[231] Id.

[232] See Inline, 125 Cal. App. 4th at 898 (discussed above); Vikco Ins. Servs., Inc. v. Ohio Indem. Co., 70 Cal. App. 4th 55, 68 (1999) (holding plaintiff could not maintain UCL claim because California Insurance Code section 769 does not create a private right to sue for damages, either directly or by indirect operation of the UCL); Seibels Bruce Group, Inc. v. R.J. Reynolds Tobacco Co., No. C-99-0593 MHP, 1999 WL 760527, at *7 (N.D. Cal. Sept. 21, 1999) (rejecting plaintiff's UCL claim on the grounds that the remedy sought by plaintiff "is 'none other than an alternative measure of legal damages'") (citations omitted); Baugh v. CBS, Inc., 828 F. Supp. 745, 757-58 (N.D. Cal. 1993) (dismissing a UCL claim based on the rule that damages cannot be obtained under the UCL). But see Clark, 50 Cal. 4th at 611, 614-15 (finding that trebling of restitution award is not proper; California Civil Code section 3345 authorizes trebling of penalties, and restitution is not a penalty).

[233] See Inline, 125 Cal. App. 4th at 903 ("The distinction between damages and restitution can seem elusive . . . , but our Supreme Court has drawn a clear line between the two concepts in the context of section 17203 and the UCL.").

[234] Cortez, 23 Cal. 4th at 177-78.

[235] Id.; see also McCollum v. Xcare.net, Inc., 212 F. Supp. 2d 1142, 1154 (N.D. Cal. 2002) (allowing plaintiff to proceed with UCL claim to recover "commissions" owed under employment contract).

[236] 122 Cal. App. 4th 339 (2004).

[237] Id. at 403-08; see also Bradstreet v. Wong, 161 Cal. App. 4th 1440, 1460 (2008) (earned wages payable under the Labor Code can be awarded as restitution); Dep't of Fair Empl. & Hous. v. Lucent Techs.,

B. Civil Penalties In Government Enforcement Actions

As noted above, civil penalties are available under the UCL only in government enforcement actions.[238] Government agencies, including the California Attorney General, city attorneys and the California Department of Corporations, increasingly are using the UCL's civil penalty provision in such actions.

Penalty liability can be substantial.[239] The UCL provides that civil penalties shall be assessed in an amount not to exceed $2,500 for each violation.[240] If a government agency proves a violation of the UCL in an enforcement action, it is error for the court not to impose penalties in some amount.[241] In construing the phrase "for each violation," courts may apply a per-victim calculation[242] or a per-act calculation.[243]

A court has broad discretion in setting a penalty amount in a given case; it is not automatically set at $2,500 per victim or per act.[244] In determining the amount of the penalty, a court must consider "any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: [1] the nature and seriousness of

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Inc., No. C 07-3747 PJH, 2008 WL 5157710, at *22 (N.D. Cal. Dec. 8, 2008) (plaintiff could not obtain restitution of wages that he would have earned if he had remained employed).

[238] Payne v. Nat'l Collection Sys., Inc., 91 Cal. App. 4th 1037, 1039-47 (2001) (discussing differences between actions under the UCL brought by public prosecutors and by private parties); Cal. Bus. & Prof. Code § 17206 (providing that public prosecutors may obtain civil penalties of up to $2,500 per violation).

[239] See, e.g., People ex rel. Bill Lockyer v. Fremont Life Ins. Co., 104 Cal. App. 4th 508, 513 (2002) (imposing over $2.5 million in civil penalties under sections 17200 and 17500); People v. First Fed. Credit Corp., 104 Cal. App. 4th 721, 728 (2002) (imposing $200,000 in civil penalties); see also City & Cnty. of San Francisco v. PG&E Corp., 433 F.3d 1115, 1125-27 (9th Cir. 2006) (holding that attorney general action seeking injunctive relief, $500 million in civil penalties and restitution was an exercise of the state's police or regulatory power, which cannot be removed to the bankruptcy court).

[240] See Cal. Bus. & Prof. Code § 17206.

[241] See First Fed. Credit Corp., 104 Cal. App. 4th at 728; People v. Custom Craft Carpets, Inc., 159 Cal. App. 3d 676, 686 (1984).

[242] See People v. Super. Ct. (Jayhill Corp.), 9 Cal. 3d 283, 289 (1973); Toomey, 157 Cal. App. 3d at 23; Casa Blanca Convalescent Homes, 159 Cal. App. 3d at 534-35.

[243] People v. Beaumont Inv., Ltd., 111 Cal. App. 4th 102, 119 (2003) (finding that long-term leases obtained by mobile home park owners were unlawful and calculating the number of UCL violations based on the number of times each defendant forced a tenant to accept a long-term lease, as well as every time each defendant collected monthly rent in violation of the underlying city ordinance, for a total of more than 14,000 UCL violations). The Court of Appeal noted that Jayhill Corp. did not establish a rule for determining the number of violations on a "per victim" basis in all situations, but rather, determination of the number of violations should be made on a case-by-case basis.

[244] See Custom Craft Carpets, 159 Cal. App. 3d at 686 ("The amount of each penalty . . . lies within the court's discretion."); City of Santa Rosa v. Patel, No. A122151, 2010 WL 2060097, at *5 (Cal. Ct. App. May 25, 2010) (trial court properly awarded statutory penalties at a daily rate of $1,500 per violation for nine months and totaling $409,500; the amount was "conservatively" calculated and could have been $2,500 per violation), rev. denied, Sept. 1, 2010.

the misconduct, [2] the number of violations, [3] the persistence of the conduct, [4] the length of time over which the misconduct occurred, [5] the willfulness of the defendant's misconduct, and [6] the defendant's assets, liabilities, and net worth."[245] Given these broad, discretionary factors, it is difficult to predict the amount of civil penalties that a court might assess in a particular case.[246]

C. Injunctions Under The UCL

Little guidance exists as to the proper scope of injunctive relief under the UCL. For example, on the one hand, a court exercised its injunctive power to require a ten-year mandatory disclosure in the form of a warning on the defendant's future products.[247] On the other, an injunction requiring defendant to have appropriate policies and procedures to ensure that defendant and its dealers "promptly" complied with the "replacement or restitution" remedy contained in the Song-Beverly Warranty Act was improper because: (1) injunctive relief under the UCL should be withheld where there is an adequate remedy at law; and (2) a court of equity "should not intervene under the guise of the UCL when injunctive relief implicates matters of complex economic policy, where the injunction would lead to a multiplicity of enforcement actions, and/or result in ongoing judicial supervision of an industry."[248] Therefore, overall, it is fair to say that the issuance of a UCL injunction is highly case-specific.

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[245] Cal. Bus. & Prof. Code § 17206(b); see First Fed. Credit Corp., 104 Cal. App. 4th at 728.

[246] See, e.g., First Fed. Credit Corp., 104 Cal. App. 4th at 728 (assessing $500 UCL penalty per violation); Fremont Life Ins. Co., 104 Cal. App. 4th at 513 (imposing $210 UCL penalty per violation, plus a $210 per violation enhancement as to victims who were senior citizens, based on what the trial court found to be "serious" and "harmful" misconduct); City & Cnty. of San Francisco v. Sainez, 77 Cal. App. 4th 1302, 1306-08 (2000) (assessing $100 penalty on each of 53 violations of the housing code); Casa Blanca Convalescent Homes, 159 Cal. App. 3d at 534-35 ($167,500 penalty affirmed based on 67 violations ($2,500 per violation)); People v. Dollar Rent-A-Car Sys., Inc., 211 Cal. App. 3d 119, 132 (1989) ($100,000 penalty affirmed where company used over 500,000 misleading contracts and submitted 1,500 false repair invoices (no "per violation" penalty determined)); Thomas Shelton Powers, M.D., 2 Cal. App. 4th at 339-44 (imposing maximum $17,500 penalty for 7 violations ($2,500 per violation)); People v. Morse, 21 Cal. App. 4th 259, 272 (1993) (affirming $400,000 in civil penalties for 4 million violations of false advertising statute (10 cents per violation)).

[247] See Consumers Union, 4 Cal. App. 4th at 972-74 (requiring a warning to be placed on all of dairy company's advertisements and products for the next ten years because the dairy was found liable for false advertising). But see Isuzu Motors Ltd. v. Consumers Union of U.S., Inc., 12 F. Supp. 2d 1035, 1048-49 (C.D. Cal. 1998) (granting motion to dismiss a UCL claim on the grounds that the injunction sought constituted a prior restraint in violation of the First Amendment); Nelson, 186 Cal. App. 4th at 1018 (explaining that rescission and restitution are distinct remedies and rescission is an equitable remedy intended to restore both parties to their former positions; finding no authority allowing rescission in a UCL action).

[248] Consumer Advocates v. DaimlerChrysler Corp., No. G029811, 2005 WL 327053, at *10-16 (Cal. Ct. App. Jan. 31, 2005); see also Rhynes v. Stryker Corp., No. 10-5619 SC, 2011 WL 2149095, at *4 (N.D. Cal. May 31, 2011) ("Where the claims pleaded by a plaintiff *may* entitle her to an adequate remedy at law, equitable relief is unavailable.") (emphasis in original).

D. Equitable Defenses To UCL Remedies

In Cortez, the California Supreme Court held that, because UCL claims are claims in equity, trial courts may take into account equitable defenses and "considerations," including laches, good faith, waiver and estoppel, in fashioning UCL remedies.[249] The Court observed that reduction of a restitution award probably would be unusual, particularly where unlawful conduct was proven.[250] Nonetheless, a defendant might decrease its exposure for restitution, or limit the scope of an injunction, based on equitable considerations.

E. Res Judicata Under The UCL

In In re Fireside Bank Cases, the Court of Appeal found that the UCL does not preclude application of res judicata or collateral estoppel as a defense.[251] In Fireside, the creditor sued the debtor to collect on a deficiency balance following the sale of repossessed property. The debtor filed a cross-complaint alleging that the creditor served a defective redemption notice that overstated the amount due, in violation of the Rees-Levering Motor Vehicle Sales and Finance Act, and that, by proceeding to collect on the balance, the creditor committed an unlawful business practice in violation of the UCL.[252] The debtor's cross-complaint was certified as a class action. The class claims suggested that the creditor had already obtained judgments against some of the class members and sought relief that included "restitution and damages paid to class members based on all money they paid on invalid deficiency judgments obtained," as well as injunctive relief vacating the judgments.[253] The creditor filed motions to strike the allegations seeking to unwind its previously obtained judgments on the basis of res judicata and collateral estoppel. The debtors argued that the UCL does not expressly declare res judicata or collateral estoppel as a limitation on a court's remedial power under the UCL.[254]

The Court of Appeal rejected the debtors' argument, holding that "giving a prior judgment its normal effect in a UCL action does not 'imply' an 'exception' to the act or fashion a 'safe harbor' from it. It simply recognizes a defense that is available to every civil defendant when the facts support it."[255] Thus, since the creditor obtained judgments against the affected class members, the judgments may provide a defense to any claims those members might bring against it.[256]

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[249] 23 Cal. 4th at 179-80 ("A court cannot properly exercise an equitable power without consideration of the equities on both sides of a dispute."); Pac. Coin Mgmt. v. BR Telephony Partners, No. B165217, 2006 WL 290569, at *18 (Cal. Ct. App. Feb. 8, 2006) (accepting laches as valid equitable defense to deny UCL claim for restitution).

[250] Cortez, 23 Cal. 4th at 182.

[251] 187 Cal. App. 4th 1120, 1131 (2010), rev. denied, Dec. 1, 2010.

[252] Id. at 1123.

[253] Id. at 1124.

[254] Id. at 1128.

[255] Id. at 1130.

[256] Id. at 1131.

F. Attorneys' Fees Under The UCL

Attorneys' fees are not recoverable under the UCL.[257] This is true even when a plaintiff prevails on an "unlawful" UCL claim and the underlying law allows for recovery of attorneys' fees.[258] A successful UCL plaintiff may, however, seek attorneys' fees pursuant to California Civil Procedure Code section 1021.5, but there is no corresponding right for a successful defendant to do so.[259]

Under section 1021.5, a plaintiff may recover attorneys' fees if: (1) the lawsuit "has resulted in the enforcement of an important right affecting the public interest"; (2) "a significant benefit" is "conferred on the general public or a large class of persons"; (3) "the necessity and financial burden of private enforcement . . . are such as to make the award appropriate"; and (4) the fees "should not in the interest of justice be paid out of the recovery, if any." Courts uniformly have recognized that an attorneys' fees award is inappropriate when the applicant has a large economic or non-economic stake in the outcome of a case.[260] Also, the decisions construing section 1021.5 demonstrate that awards of attorneys' fees turn upon the unique facts presented.[261]

For example, in Baxter v. Salutary Sportsclubs, Inc., the Court of Appeal affirmed denial of an award of attorneys' fees to a successful UCL plaintiff.[262] Plaintiff, purportedly acting as a

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[257] See Shadoan, 219 Cal. App. 3d at 103, 108 n.7 ("The Business and Professions Code does not provide for an award of attorney fees for an action brought pursuant to section 17203, and there is nothing in the statutory scheme from which such a right could be implied.").

[258] See Manahan v. Hayward Dodge, Inc., No. A115051, 2007 WL 1556085, at *3-4 (Cal. Ct. App. May 30, 2007) (reversing award of attorneys' fees where plaintiff prevailed on UCL claim based on violation of Rees-Levering Automobile Sales Finance Act, which allows recovery of attorneys' fees, but did not prevail on separate Rees-Levering claim).

[259] See Walker, 98 Cal. App. 4th at 1179-81 (holding that prevailing defendant did not have the right to seek attorneys' fees in UCL action). In addition, although a prevailing defendant may have the right to seek attorneys' fees on other grounds, such as a contract at issue in the action, trial courts have the discretion to apportion or deny such fees where the action principally was to enjoin an unfair business practice. See id.; see also Kirby v. Immoos Fire Prot., Inc., 186 Cal. App. 4th 1361 (2010) (holding that the defendant had no right to attorneys' fees; it is settled law that the UCL does not provide for an award of attorney's fees), rev. granted, 242 P.3d 104 (Cal. 2010).

[260] See Williams v. San Francisco Bd. of Permit Appeals, 74 Cal. App. 4th 961, 966-67 (1999), overruled in part by In re Conservatorship of Whitley, 50 Cal. 4th 1206 (2010); Save Open Space Santa Monica Mountains v. Super. Ct., 84 Cal. App. 4th 235, 253-54 (2000) (UCL defendant is entitled to limited discovery on subject of whether public interest organization litigated private attorney general action primarily for the benefit of non-litigants).

[261] Compare Cal. Licensed Foresters Ass'n v. State Bd. of Forestry, 30 Cal. App. 4th 562, 570 (1994) (narrowly construing the third prong of section 1021.5 and stating that attorneys' fees are awarded only if a significant public benefit is made "through litigation pursued by one whose personal stake is insufficient to otherwise encourage the action"), and Olsen, 48 Cal. App. 4th at 628-29 (refusing to award attorneys' fees even though defendants had changed their business practices), with Hewlett, 54 Cal. App. 4th at 543-46 (granting an award of attorneys' fees pursuant to section 1021.5).

[262] 122 Cal. App. 4th 941, 948 (2004).

private attorney general (prior to Proposition 64's enactment), sued the owner of several health clubs, alleging, among other things, that defendant's health club contracts did not comply with certain California statutory requirements. Although defendant maintained that the contracts were compliant, it modified them after suit was filed to conform precisely with the statutory requirements. Following a bench trial, the court ruled that defendant's contracts had not been compliant prior to the modifications. The court ordered defendant to provide notice to its customers with non-conforming contracts, among other things, but found no evidence that any person actually had been harmed. As a result, the trial court denied plaintiff's motion for attorneys' fees under section 1021.5, reasoning that "[t]he relief granted plaintiff was a de minimus change in the defendant's contracts that did not result in a significant benefit to the public."[263] The Court of Appeal affirmed.[264]

Plaintiffs' counsel regularly seek fees when a defendant has changed its practices, arguing that their lawsuit precipitated the change. In Graham v. DaimlerChrysler Corp., the California Supreme Court held that attorneys' fees could be awarded where a lawsuit serves as a "catalyst" to the defendant's changed behavior.[265] The Court concluded that such awards are proper where: (1) the plaintiff's lawsuit serves as a catalyst to the changed behavior; (2) the lawsuit has merit; and (3) the plaintiff engaged in a reasonable attempt to settle the dispute prior to litigation.[266] In Graham, plaintiffs filed a breach-of-warranty claim against DaimlerChrysler, challenging its admitted mis-marketing of the towing capacity of its 1998 and 1999 Dakota R/T trucks. Although DaimlerChrysler established a response team to address the problem and to take corrective steps, plaintiffs filed suit. The trial court dismissed the action, but the parties spent more than a year litigating plaintiffs' entitlement to attorneys' fees. The trial court ultimately determined that the lawsuit had been a "catalyst" in causing DaimlerChrysler's corrective conduct, and awarded attorneys' fees.

In a 4-to-3 decision, the Court in Graham upheld application of the catalyst theory, finding it to be consistent with the purposes of section 1021.5.[267] Notably, the Court declined to follow Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, in which the United States Supreme Court rejected the catalyst theory under federal law.[268] The Court also was not persuaded by DaimlerChrysler's policy argument that

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[263] Id. at 942-44.

[264] Id. at 946.

[265] 34 Cal. 4th 553, 576-77 (2004).

[266] Id. at 560-61.

[267] Id. at 566.

[268] 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001). But see Wildlands CPR v. U.S. Forest Serv., 558 F. Supp. 2d 1096, 1098 (D. Mont. 2008) (under certain statutes, "[i]t is no longer necessary to show that the material alteration of the parties' positions has the 'necessary judicial imprimatur.' It is enough to point to the existence of a consent decree or to a voluntary or unilateral change in the agency's position").

awards under the catalyst theory would require complex causal determinations and encourage nuisance suits.[269]

In a UCL class action, attorneys' fees may be calculated pursuant to traditional principles governing fees for class counsel, including the lodestar and multiplier or "common fund" approaches, as applicable.[270]

1. The Lodestar Approach

California courts adopt the lodestar approach as "the primary method" for establishing a "reasonable" amount of attorneys' fees.[271] Under the lodestar approach, the court calculates attorneys' fees based upon reasonable time spent and hourly compensation for each attorney.[272]

The primacy of the lodestar method in California was established in Serrano v. Priest.[273] The California Supreme Court explained:

> The starting point of every fee award, once it is recognized that the court's role in equity is to provide just compensation for the attorney, must be a calculation of the attorney's services in terms of the time he has expended on the case. Anchoring the analysis to this concept is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts.[274]

Affirming application of the lodestar method pursuant to its holding in Serrano, the Court in Press v. Lucky Stores, Inc.[275] rejected attorneys' fees awarded by a trial court pursuant to

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[269] Graham, 34 Cal. 4th at 573.

[270] Wershba v. Apple Computer, Inc., 91 Cal. App. 4th 224, 254 (2001); Natural Gas Anti-Trust Cases I, II, III & IV, Nos. 4221, 4224, 4226, 4228, 2006 WL 5377849, at *3 (Cal. Super. Ct. Dec. 11, 2006) ("Both California state and federal courts recognize two methods for evaluating the fairness and reasonableness of attorneys' fees in class action settlements resulting in the creation of a common fund for the distribution to class members: (1) the percentage-of-the-benefit method; or (2) the lodestar method plus multiplier method."); Lamb v. Wells Fargo Bank, N.A., Nos. A108354, A108355, 2006 WL 925490, at *8 (Cal. Ct. App. Apr. 11, 2006) (finding that trial court's conclusion based on "independent review of the court file, his first-hand knowledge of the case, his personal experience, and the supplemental information provided by counsel, that class counsel had appropriately demonstrated the lodestar amount . . . was entirely appropriate"); see also Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Mkts., Inc., 127 Cal. App. 4th 387, 397 (2005) ("The substantial benefit doctrine is an extension of the common fund doctrine. It applies when no common fund has been created, but a concrete and significant benefit, although nonmonetary in nature, has nonetheless been conferred on an ascertainable class.").

[271] Thayer v. Wells Fargo Bank, N.A., 92 Cal. App. 4th 819, 833 (2001); accord Krumme v. Mercury Ins. Co., 123 Cal. App. 4th 924, 947 (2004).

[272] Rebney v. Wells Fargo Bank, 232 Cal. App. 3d 1344, 1347 (1991).

[273] 20 Cal. 3d 25, 49 (1977).

[274] Id. at 49 n.23.

[275] 34 Cal. 3d 311 (1983).

section 1021.5, concluding that the trial court had abused its discretion in not applying the lodestar method. The Court indicated that, "[w]hen a party is entitled to attorney fees under section 1021.5, the amount of the award is determined according to the guidelines set forth by this court in [Serrano]" and, "since determination of the lodestar figures is so 'fundamental' to calculating the amount of the award, the exercise of that discretion must be based on the lodestar adjustment method."[276] The Court continued:

> [W]hile a trial court has discretion to determine the proper amount of an award, the resulting fee must still bear some reasonable relationship to the lodestar figure and to the purpose of the private attorney general doctrine. If there is no reasonable connection between the lodestar figure and the fee ultimately awarded, the fee does not conform to the objectives established in [Serrano], and may not be upheld.
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> The lodestar adjustment method of calculating attorneys' fees set forth in [Serrano] is designed expressly for the purposes of maintaining objectivity. In failing to apply these guidelines, the trial court awarded an amount which had no relationship to the skill, time and effort expended by plaintiffs' attorneys on this litigation.[277]

At a minimum, the lodestar method must be applied in cases where there is no ascertainable common fund from which a percentage can be drawn. Dunk v. Ford Motor Co.[278] is illustrative. In Dunk, the settlement provided that coupons worth $400 each for purchases of Ford vehicles would be available to a class of over 65,000, for a total potential value of over $26 million.[279] The trial court awarded attorneys' fees of $985,000 and costs of $10,691 based upon the common fund method.[280] The Court of Appeal remanded the issue of attorneys' fees finding that the "award of attorney fees, based on a percentage of a 'common fund' recovery is of

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[276] Id. at 321-22.

[277] Id. at 324. In Press, plaintiffs sought to circulate petitions regarding an oil profits initiative on the premises of several privately owned shopping centers; among the locations was an area in Santa Monica in front of defendant's store. Id. at 316. Plaintiffs successfully challenged defendant's refusal to allow the circulation of petitions. Id. Plaintiffs submitted a lodestar figure of $13,960 with a request to apply a multiplier of 1.5 for a total of $20,940 in attorneys' fees. Id. at 322-23. The trial court awarded $112.98 in attorneys' fees after multiplying the requested amount by a ratio of 3,000/556,000, the ratio of petition signatures obtained at the Santa Monica store to the number obtained statewide. Id. at 323. See also Perez v. Safety-Kleen Sys., Inc., No. C 05-5338 PJH, 2010 WL 934100, at *8 (N.D. Cal. Mar. 5, 2010) (stating that the degree of plaintiffs' success in relation to the goals of the lawsuit as a whole indicated that plaintiffs' suggested lodestar amount stretched the parameters of what should be considered "reasonable").

[278] 48 Cal. App. 4th 1794 (1996).

[279] Id. at 1804.

[280] Id. at 1800.

questionable validity in California" and "even if it is valid, the true value of the fund must be easily calculated."[281] The court explained:

> Later cases have cast doubt on the use of the percentage method to determine attorney fees in California class actions. Even if the method is permissible, it should only be used where the amount was a "certain or easily calculable sum of money." Although the ultimate settlement value to the plaintiffs could be as high as $26 million, the true value cannot be ascertained until the one-year coupon redemption period expires. This is not the type of settlement that lends itself to the common fund approach.[282]

Under the lodestar approach, the "base amount produced by multiplying hours spent on the case by a reasonable hourly rate 'may then be increased or reduced by application of a 'multiplier' after the trial court has considered other factors concerning the lawsuit.'"[283] Relevant factors in calculating the multiplier may include: (a) the novelty and difficulty of the questions involved, and the skill displayed in presenting them; (b) the extent to which the nature of the litigation precluded other employment by the attorneys; and (c) the contingent nature of the fee award.[284] The factors taken into account must not be duplicative. For example, if a court takes into account the skill and experience of the attorneys and the nature of the work involved in calculating the reasonable hourly rate, it cannot also use those factors to enhance or apply a multiplier to the award.[285] Moreover, the "factors which a trial court may consider are not fixed" and "our state has a relatively 'permissive attitude' as to the elements that go into what will ultimately make up the multiplier."[286]

In Lealao,[287] the court recognized "results obtained" as an additional factor in determining a multiplier, thereby allowing the attorneys' fees award to be cross-checked against the class recovery. The court stated:

> [I]n cases in which the value of the class recovery can be monetized with a reasonable degree of certainty and it is not otherwise inappropriate, a trial court has

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[281] Id. at 1809.

[282] Id. (citations omitted); see also Ramos v. Countrywide Home Loans, Inc., 82 Cal. App. 4th 615, 628 (2000) (finding the common fund exception inapplicable where "plaintiffs' efforts have not created an identifiable fund of money out of which attorney fees are sought").

[283] Lealao v. Beneficial Cal., Inc., 82 Cal. App. 4th 19, 40 (2000) (citation omitted).

[284] Serrano, 20 Cal. 3d at 48; Cundiff v. Verizon Cal., Inc., 167 Cal. App. 4th 718, 724 (2008).

[285] Robbins v. Alibrandi, 127 Cal. App. 4th 438, 454, 456 (2005) (finding "record so devoid of evidence supporting a substantial multiplier that the trial court's use of multipliers from 2.5 to 3.0 to enhance the lodestar was an abuse of discretion" and finding skill, expertise and contingent nature and risk of litigation did not justify multiplier); see also Flannery v. Cal. Highway Patrol, 61 Cal. App. 4th 629, 647 (1998).

[286] Hammond v. Agran, 99 Cal. App. 4th 115, 135 (2002), overruled in part by Conservatorship of Whitley, 50 Cal. 4th 1206.

[287] 82 Cal. App. 4th at 26.

> discretion to adjust the basic lodestar through the application of a positive or negative multiplier where necessary to ensure that the fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation.[288]

Where a court in determining a multiplier considers the "results obtained," less weight should be given to the size of recovery where the recovery is large due primarily to the size of the class.[289] While the court may "cross-check" the lodestar against the value of the class recovery, the award must still be "anchored" in the time spent by the attorneys.[290]

For instance, in Lealao, class counsel sought approximately $1.76 million in attorneys' fees based upon the amount of $7.35 million in claims that had been submitted under the claims-made settlement. Defendants were potentially exposed for $14.8 million – i.e., if every member of the class filed a valid claim.[291] The Court of Appeal held that the trial court's award of attorneys' fees in the amount of $425,000, which was based solely on the hours expended by counsel, could be enhanced based on the percentage-of-the-benefit method, even though there was no conventional common fund,[292] and remanded the matter to trial court for reconsideration of a reasonable fee.[293] The Court of Appeal justified its conclusion in several ways. First, the total initial exposure of $14.8 million, and the actual value of the valid claims of $7.35 million, were both undisputed.[294] Second, because the average recovery of class members was over $2,000, the total settlement value was due in significant measure to the individual recoveries, and not just the size of the class.[295] Third, the Lealao court found that Dunk did not limit utilization of class recovery to cross-check a lodestar because Dunk did not "address the question whether an award anchored in a lodestar calculation could be adjusted to reflect the amount of a monetizable recovery."[296]

2. The Common Fund Doctrine

The common fund doctrine is "grounded in 'the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund of property itself or directly from the other parties enjoying the benefit.'"[297] Under the common fund method, "the activities of the party awarded fees have resulted in the preservation or recovery of a

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[288] Id. at 49-50.

[289] Id. at 49; see also In re Vitamin Cases, 110 Cal. App. 4th 1041, 1060 (2003).

[290] Lealao, 82 Cal. App. 4th at 45-46; see also Ramos, 82 Cal. App. 4th at 628.

[291] Lealao, 82 Cal. App. 4th at 23.

[292] Despite the fact that the court recognized there was no traditional common fund, the court stated that, in this particular case, the "monetary value of the benefit to the class is much less speculative than that of some traditional common funds." Id. at 50.

[293] See id. at 49-53.

[294] Id. at 50.

[295] Id. at 53.

[296] Id. at 45.

[297] Serrano, 20 Cal. 3d at 35.

certain or easily calculable sum of money out of which sum or 'fund' the fees are to be paid."[298] Once the fund is established, attorneys' fees are calculated as a reasonable percentage of the common fund.

"Because the common fund doctrine 'rest[s] squarely on the principle of avoiding unjust enrichment', attorney fees awarded under this doctrine are not assessed directly against the losing party (fee shifting), but come out of the fund established by the litigation, so that the beneficiaries of the litigation, not the defendant, bear this cost (fee spreading)."[299] Nevertheless, it has been held that "direct payment of attorney fees by defendants should not be a barrier to the use of the percentage of the benefit analysis."[300] This is based upon the view that an "award to the class and the agreement on attorney fees represent a package deal. Even if the fees are paid directly to the attorneys, those fees are still best viewed as an aspect of the class' recovery."[301]

The California Supreme Court explained that attorneys are only entitled to a fee award based on a common fund theory where an identifiable fund is established out of which the attorneys seek to recover their fees.[302] In cases where courts have adopted the percentage or common fund method, the "benchmark" for fees is twenty-five per cent, "which may be raised or lowered under appropriate circumstances."[303] Moreover, it has been recognized that, "when the fund is extraordinarily large, the application of a normal range of fee awards may result in a fee that is unreasonably large for the benefits conferred."[304] In cases filed in or removed to federal

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[298] Id. See, e.g., In re Cal. Indirect Purchaser X-Ray Film Antitrust Litig., No. 960886, 1998 WL 1031494, at *8 (Cal. Super. Ct. Oct. 22, 1998) ("paradigmatic common cash fund" where class counsel provided a certain and easily calculable sum of $3,754,500 in an escrow account available in common to the members of the class).

[299] Lealao, 82 Cal. App. 4th at 27 (citations omitted).

[300] Johnston v. Comerica Mortg. Corp., 83 F.3d 241, 246 (8th Cir. 1996); see also Lealao, 82 Cal. App. 4th at 39.

[301] Lealao, 82 Cal. App. 4th at 33.

[302] Serrano, 20 Cal. 3d at 37-38 ("We hold that here, where plaintiffs' efforts have not effected the creation or preservation of an identifiable 'fund' of money out of which they seek to recover their attorneys fees, the 'common fund' exception is inapplicable."); Cundiff, 167 Cal. App. 4th at 724-25.

[303] Zucker v. Occidental Petroleum Corp., 968 F. Supp. 1396, 1400 n.2 (C.D. Cal. 1997); Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990) (same); see also X-Ray, 1998 WL 1031494, at *9 (awarding 30% of the settlement fund); In re Activision Sec. Litig., 723 F. Supp. 1373, 1378 (N.D. Cal. 1989) ("[I]n class action common fund cases the better practice is to set a percentage fee and that, absent extraordinary circumstances that suggest reasons to lower or increase the percentage, the rate should be set at 30%."); Camden I Condo. Ass'n, Inc. v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991) ("The majority of common fund fee awards fall between 20% to 30% of the fund," with an upper limit of 50%). But see In re Infospace, Inc. Secs. Litig., 330 F. Supp. 2d 1203, 1206, 1210 (W.D. Wash. 2004) (recognizing that the "Ninth Circuit has established 25 percent of a settlement fund as a 'benchmark' award for attorneys' fees in common fund cases" but reasoning "[t]here is nothing inherently reasonable about a 25 percent recovery, and the courts applying this method have failed to explain the basis for the idea that a benchmark fee of 25 percent is logical or reasonable").

[304] In re Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 350 (N.D. Ga. 1993).

court, use of the common fund theory may be limited by the United States Supreme Court's opinion in Perdue v. Kenny A. ex rel. Winn, which calls for application of the lodestar method, without any multiplier, in many circumstances.[305]

IV. PROCEDURAL ASPECTS OF THE UCL

A. Arbitration Of UCL Claims

Because many businesses include arbitration provisions in their customer agreements, the enforceability of such provisions has always been an important subject in UCL jurisprudence. Following AT&T Mobility, however, the issue has become critical.

1. The Decision In AT&T Mobility

Plaintiffs in AT&T Mobility asserted UCL, CLRA and FAL claims, alleging that AT&T engaged in false advertising and fraud by charging sales tax on phones it advertised as free.[306] The district court held, and the Ninth Circuit affirmed, that the arbitration agreement between plaintiffs and AT&T (which included a class action waiver) was unconscionable (and, therefore, unenforceable) under the rule established by the California Supreme Court in Discover Bank v. Superior Court ("Discover Bank").[307]

In Discover Bank, the California Supreme Court held that class action waivers may be unconscionable under California law under certain circumstances – when the waiver is "found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money . . . ."[308] In denying AT&T's motion to compel arbitration, the district court noted that the Discover Bank rule provides "redress to individuals whose recovery 'would be insufficient to justify bringing a separate action.'"[309] Thus, according to the district court, the "net effect" of the class action waiver and the presence of "small amounts of damages" was that "customers would not bother to pursue individual litigation or arbitration, and if precluded from participation in classwide litigation or arbitration, would

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[305] See Perdue v. Kenny A. ex rel. Winn, 130 S. Ct. 1662, 1667-69, 176 L. Ed. 2d 494 (2010).

[306] See Laster v. T-Mobile USA, Inc., No. 05CV1167 DMS (AJB), 2008 WL 5216255, at *1-5 (S.D. Cal. Aug. 11, 2008), aff'd sub nom., Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009), rev'd sub nom., AT&T Mobility, 131 S. Ct. 1740; see also AT&T Mobility, 131 S. Ct. at 1744.

[307] AT&T Mobility, 131 S. Ct. at 1744-45.

[308] Discover Bank v. Super. Ct., 36 Cal. 4th 148, 162-63 (2005), abrogated by, AT&T Mobility, 131 S. Ct. 1740.

[309] Laster, 2008 WL 5216255, at *10 (citing Discover Bank, 36 Cal. 4th at 156); id. (noting that the "presence of predictably small amounts of damages (or individual gain) invokes the concern of Discover Bank that without class litigation or arbitration, individuals have no 'method of obtaining redress for claims which would otherwise be too small to warrant individual litigation'") (internal quotations and citations omitted).

effectively have no redress."[310] The Ninth Circuit affirmed, specifically endorsing the district court's analysis of Discover Bank.[311]

The Supreme Court reversed and abrogated Discover Bank and its progeny. The Supreme Court held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[312] The Supreme Court noted that the FAA was enacted in response to "widespread judicial hostility to arbitration agreements" and requires arbitration agreements to be enforced unless grounds exist for revoking the contract – such as fraud, duress or unconscionability – under Section 2 of the FAA (the "savings clause").[313] However, the Supreme Court held that "nothing in [the savings clause] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." Thus, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."[314] The inquiry is more complex "when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration."[315] There, a court must determine whether the state law rule "stand[s] as an obstacle to the accomplishment of the FAA's objectives," which are principally to "ensure that private arbitration agreements are enforced according to their terms."[316]

According to the Supreme Court, the Discover Bank rule "interferes with arbitration" because, "[a]lthough the rule does not require classwide arbitration, it allows any party to a consumer contract to demand it *ex post*."[317] The Supreme Court concluded: "Because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, California's Discover Bank rule is preempted by the FAA."[318]

2. Arbitrability Of UCL Claims Pre-AT&T Mobility

In two pre-AT&T Mobility decisions, the California Supreme Court held that claims for monetary relief under the UCL and CLRA are arbitrable, but claims for injunctive relief are not. In Broughton v. Cigna Healthplans of California, the California Supreme Court held that public injunctive relief claims under the CLRA are inarbitrable because of an inherent conflict between arbitration and the underlying purpose of injunctive relief.[319] Thereafter, several California

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[310] Id.

[311] AT&T Mobility, 131 S. Ct. at 1745.

[312] Id. at 1748.

[313] Id.

[314] Id. at 1747-48.

[315] Id.

[316] Id. at 1748.

[317] Id. at 1750; see also id. at 1751 (noting that "class arbitration, to the extent it is manufactured by Discover Bank rather than consensual, is inconsistent with the FAA").

[318] Id. at 1753 (internal quotations and citations omitted).

[319] 21 Cal. 4th 1066, 1079-84 (1999).

appellate courts extended Broughton to hold that claims for injunctive relief under the UCL also were inarbitrable.

Then, in Cruz v. PacifiCare Health Systems, Inc., the California Supreme Court confirmed that UCL claims for injunctive relief are not arbitrable, but that UCL claims for restitution are arbitrable.[320] Although the Court limited its holding on the injunctive relief claim to "the circumstances of the . . . case," it did not specify the "circumstances" critical to its decision.[321] The Court distinguished only between UCL injunctive claims brought in commercial disputes and CLRA injunctive claims brought in consumer disputes.[322] With respect to UCL monetary claims for restitution, the Court reasoned that such claims are similar to damages claims under the CLRA, which it held in Broughton to be arbitrable and to not require substantial judicial supervision.[323]

3. Arbitrability Of Claims Post-AT&T Mobility

The majority of district courts to consider whether injunctive relief claims are arbitrable after AT&T Mobility agree that the rule in Broughton/Cruz no longer applies.[324] For example,

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[320] 30 Cal. 4th 303, 311-15, 317-20 (2003).

[321] Id. at 307. But see Smith v. Americredit Fin. Servs., Inc., No. 09cv1076 DMS (BLM), 2009 WL 4895280, at *8 (S.D. Cal. Dec. 11, 2009), remanded to No. 09-57016, 2011 WL 6170545 (9th Cir. Dec. 13, 2011) (interpreting Cruz to hold that claims for injunctive relief are not arbitrable if "designed to prevent further harm to the public at large"; court found plaintiff's class claims were not exempt from arbitration because they were not intended to benefit a particularly large group).

[322] See Cruz, 30 Cal. 4th at 315-17.

[323] Id. at 317.

[324] See Blau v. AT&T Mobility, No. C 11-00541 CRB, 2012 WL 10546, at *6-7 (N.D. Cal. Jan. 3, 2012) (rejecting argument that claims for public injunctive relief under the CLRA and UCL are not arbitrable); Hendricks v. AT & T Mobility, LLC, No. C 11-00409 CRB, 2011 WL 5104421, at *7-8 (N.D. Cal. Oct. 26, 2011) (same); Khan v. Orkin Exterminating Co., Inc., No. C 10-02156 SBA, 2011 WL 4853365, at *3 (N.D. Cal. Oct. 13, 2011) (enforcing arbitration agreement and holding that the "FAA preempts the CLRA's class action waiver"); Meyer v. T-Mobile USA, Inc., No. C 10-05858 CRB, 2011 WL 4434810, at *9 (N.D. Cal. Sept. 23, 2011) (holding that Broughton/Cruz reflect "state court application of public policy to prohibit an entire category of claims" and "such a prohibition does not survive [AT&T Mobility]"); Kaltwasser v. AT & T Mobility LLC, 812 F. Supp. 2d 1042, 1051 (N.D. Cal. 2011) ("Cruz and Broughton, even more patently than Discover Bank, apply public policy contract principles to disfavor and indeed prohibit arbitration of entire categories of claims."); Nelson v. AT & T Mobility LLC, No. C10–4802 TEH, 2011 WL 3651153, *2-4 (N.D. Cal. Aug. 18, 2011) (the FAA preempts the holdings of Broughton/Cruz because they amount to "state law[s] prohibit[ing] outright the arbitration of a particular type of claim"); In re Gateway LX6810 Computer Prods. Litig., No. SACV 10–1563–JST (JEMx), 2011 WL 3099862, at *3 (C.D. Cal. July 21, 2011) (same); In re Apple & AT & T iPad Unlimited Data Plan Litig., No. C10–2553 RMW, 2011 WL 2886407, at *4 (N.D. Cal. July 19, 2011) (same); Quevedo v. Macy's, Inc., 798 F. Supp. 2d 1122, 1141-42 (C.D. Cal. June 16, 2011) (compelling arbitration of claims under California's Private Attorney General Act); Arellano v. T-Mobile USA, Inc., No. C10–5663 WHA, 2011 WL 1842712, at *1-2 (N.D. Cal. May 16, 2011) (same); Zarandi v. Alliance Data Sys. Corp., No. CV 10–8309 DSF (JCGx), 2011 WL 1827228, at *2 (C.D. Cal. May 9, 2011) (same).

in Kaltwasser v. AT&T Mobility LLC, the Northern District of California reasoned that "Discover Bank itself was based upon public policy rationales intertwined with the generally applicable doctrine of unconscionability."[325] Discover Bank "invoked Cal. Civ. Code § 1668, which provides that 'All contracts which have for their object . . . to exempt anyone from responsibility for his own . . . violation of law, whether willful or negligent, are against the policy of the law.'"[326] Discover Bank thus was abrogated because it "applied the unconscionability doctrine 'in a fashion that disfavors arbitration.'"[327] Accordingly, with respect to injunctive relief, the court concluded that "Cruz and Broughton, even more patently than Discover Bank, apply public policy contract principles to disfavor and indeed prohibit arbitration of entire categories of claims."[328]

At least two district courts, however, reached the opposite conclusion – In re DirecTV Early Cancellation Fee Marketing & Sales Practices Litigation[329] and Ferguson v. Corinthian Colleges.[330] In In re DirecTV, the court upheld the Broughton/Cruz rule, finding that the holdings in those cases "are not inconsistent with [AT&T Mobility]" and do not represent an "outright" prohibition of arbitration of a particular claim because the rule applies only to injunctive relief claims "brought on behalf of the general public."[331]

Similarly, in Ferguson, the court held that the "California Legislature's decision to allow citizens to bring injunctive relief claims . . . *on behalf of the public*" was not preempted by the FAA.[332] The court agreed with the reasoning in Broughton that state-enacted laws, the purposes of which are incompatible with enforcement of an arbitration agreement, avoid FAA preemption as long as "the primary purpose of an injunctive relief action under the [statute] is to protect the public."[333] As a result, "[b]ecause [p]laintiffs' injunctive relief claims seek to enforce a public right, there is an inherent conflict with sending these claims to an arbitrator."[334]

Recent decisions by the Ninth Circuit, however, make clear that AT&T Mobility forecloses application of the Broughton/Cruz rule, at least in federal court. In Kilgore v. Keybank, N.A., the Ninth Circuit held that "the Broughton-Cruz rule does not survive [AT&T Mobility] because the rule 'prohibits outright the arbitration of a particular type of claim' – claims

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[325] Kaltwasser, 812 F. Supp. 2d at 1050.

[326] Id. at 1051 (citation omitted).

[327] Id. (citation omitted).

[328] Id.; see also Nelson, 2011 WL 3651153, at *2 (describing Broughton/Cruz rule as a "blanket ban[]" on arbitration of injunctive relief claims and holding that AT&T Mobility compels preemption of such a rule, notwithstanding "public policy arguments thought to be persuasive in California").

[329] 810 F. Supp. 2d 1060 (C.D. Cal. 2011).

[330] Nos. SACV 11-0127 DOC, SACV 11-0259 DOC, 2011 WL 4852339 (C.D. Cal. Oct. 6, 2011).

[331] 810 F. Supp. 2d at 1072, 1073.

[332] Ferguson, 2011 WL 4852339, at *7.

[333] Id., at *9.

[334] Id.

for broad public injunctive relief."[335] Notably, the Ninth Circuit stated that it was "not blind to the concerns engendered" by its ruling, including that it "reduce[s] the effectiveness of state laws like the UCL" and "run[s] contrary to a state's decision that arbitration is not as conducive to broad injunctive relief claims as the judicial forum."[336] Nevertheless, "[t]hese concerns," the Ninth Circuit found, "cannot justify departing from the appropriate preemption analysis" set forth in AT&T Mobility.[337]

Indeed, in Kilgore, the Ninth Circuit expressly rejected the preemption analysis applied in Ferguson and In re DirecTV for two reasons: (1) "it improperly gives weight to state public policy rationales to contravene the parties' choice to arbitrate" – something that AT&T Mobility expressly rejected in "holding that state law 'cannot require a procedure that is inconsistent with the FAA, *even if it is desirable for unrelated reasons*'"[338]; and (2) it "mistakenly regards the motivation of state legislators as relevant to determining whether federal law preempts their legislation."[339] This is problematic because the "very nature of federal preemption *requires* that state law bend to conflicting federal law – no matter the purpose of the state law."[340] Thus, it is "not possible for a state legislature to avoid preemption simply because it intends to do so."[341] "In the end," according to the Ninth Circuit, "[t]he FAA is 'the supreme law of the land,' and that law renders arbitration agreements enforceable so long as the savings clause is not implicated."[342] While Broughton/Cruz may be based on a "sound public policy judgment of the California legislature," AT&T Mobility confirms that "state public policy cannot trump the FAA when that policy prohibits the arbitration of a 'particular type of claim.'"[343]

While the viability of the Broughton/Cruz rule in federal court is doubtful, the viability of the rule in state court remains open to further litigation. In Sanchez v. Valencia Holding Co., LLC, plaintiff asserted class claims against a car dealer, alleging violations of the UCL, CLRA and other California statutes arising from plaintiff's purchase of a vehicle. The dealer moved to compel arbitration pursuant to an arbitration agreement contained in its form retail installment sales contract.[344] The dealer raised the argument that Broughton and Cruz were "implicitly overruled" by AT&T Mobility. The court did not address the argument, however, finding that AT&T Mobility "is inapplicable where, as here, we are not addressing the enforceability of a class action waiver or a judicially imposed procedure that conflicts with the arbitration provision and the purposes" of the FAA.[345] The court affirmed the denial of the motion to compel arbitration

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[335] Nos. 09–16703, 10–15934, 2012 WL 718344, at *10 (9th Cir. Mar. 7, 2012).

[336] Id.

[337] Id.

[338] Id. (citing AT&T Mobility, 131 S. Ct. at 1753) (emphasis in original).

[339] Id., at *11.

[340] Id., at *12 (emphasis in original).

[341] Id.

[342] Id., at *13 (citation omitted).

[343] Id.

[344] 201 Cal. App. 4th 74, 75-76 (2011), rev. granted, Mar. 21, 2012.

[345] Id. at 88.

after concluding that the provision itself was unconscionable because, among other things, the requirement that the buyer seek injunctive relief from the arbitrator, while exempting from arbitration repossession claims by the car dealer, "is inconsistent with the CLRA."[346] Relying heavily on the reasoning in Broughton, the court also found an "inherent conflict" between arbitration and the purpose of injunctive relief under the CLRA – "to remedy a public wrong."[347] Ultimately, even if the FAA did preempt Broughton's holding, "the court's observations about arbitral injunctions under the CLRA remain accurate."[348]

Similarly, in Brown v. Ralphs Grocery Co., the court addressed the arbitrability of a claim under California's Private Attorney General Act ("PAGA"), the purpose of which "is not to recover damages or restitution, but to create a means of 'deputizing' citizens as private attorneys general to enforce the Labor Code."[349] Citing Broughton and Cruz, the court found that the "relief [under PAGA] is in large part 'for the benefit of the general public rather than the party bringing the action', just as the claims for public injunctive relief in Broughton and Cruz."[350] The court held that PAGA did not conflict with the FAA because, if it did, PAGA's primary benefit of "enforc[ing] state labor laws would, in large part, be nullified."[351]

B. No Right To Jury Trial

There is no right to a jury trial under the UCL.[352]

C. Filing A Pleading Challenge To A UCL Claim

Although demurrers and motions to dismiss rarely dispose of UCL claims,[353] they sometimes are sustained based on legal defenses or obvious defects in the pleading.[354] With

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[346] Id. at 101.

[347] Id. at 101-2.

[348] Id. at 102 n. 6.

[349] 197 Cal. App. 4th 489, 501 (2011).

[350] Id. (citation omitted).

[351] Id. at 502.

[352] See, e.g., Hodge v. Super. Ct., 145 Cal. App. 4th 278, 284-85 (2006) (claim for violation of the UCL is equitable in nature; thus, no right to a jury trial exists).

[353] See, e.g., Motors, 102 Cal. App. 3d at 741-42 (stating that a UCL complaint usually should be construed to withstand demurrer); Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008) ("California courts, however, have recognized that whether a business practice is deceptive will usually be a question of fact not appropriate for decision on demurrer."); Cairns v. Franklin Mint Co., 24 F. Supp. 2d 1013, 1037 (C.D. Cal. 1998) (stating that "[w]hether consumers have been or will be misled is a factual question that cannot be resolved on a motion to dismiss"). But see Berryman, 152 Cal. App. 4th at 1555-56 ("We do not take the statement in Motors, Inc. to mean that a special rule applies to demurrers in cases under the UCL. It simply reflects the general rule that questions of fact – such as whether the utility of the defendant's conduct outweighed the gravity of the harm – cannot be decided on demurrer. If, however, as here, the facts as pled would not state a claim even if they were true, the demurrer may be sustained.").

[354] See, e.g., Cryoport Sys. v. CNA Ins. Cos., 149 Cal. App. 4th 627, 632-34 (2007) (affirming order sustaining demurrer based on lack of standing under Proposition 64); Young Am. Corp. v. Super. Ct.,

respect to specificity of pleading, no special standard applies in state court under the UCL. For example, in Quelimane Company, Inc. v. Stewart Title Guaranty Co., the California Supreme Court refused to hold UCL plaintiffs to the pleading standard for fraud.[355] The Court noted that fraud is the only exception to the well-settled rule that pleading specific facts is not required to state a cause of action and, therefore, a plaintiff pleading a UCL cause of action should not be held to a higher standard. In federal court, however, Federal Rule of Civil Procedure 9(b) requires UCL claims "grounded in fraud" to be pleaded with particularity.[356]

D. Special "Anti-SLAPP" Motions

California's "anti-SLAPP" statute[357] authorizes the filing of a special motion to strike against causes of action arising out of conduct "in furtherance of the person's right of petition or free speech under the United States or California Constitution."[358] In the consumer protection

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No. C049337, 2007 WL 2687587, at *2 (Cal. Ct. App. Sept. 14, 2007) (reversing denial of motion for judgment on the pleadings where plaintiff failed to allege facts establishing standing); McCann, 129 Cal. App. 4th at 1398 (demurrer upheld on appeal in action where plaintiff unsuccessfully alleged that money transmitter had duty to disclose wholesale exchange rate in addition to retail exchange rate); Gregory, 104 Cal. App. 4th at 857 (affirming trial court's sustaining of demurrer where plaintiff's underlying theory of "unfairness" was not sufficient as a matter of law); Searle v. Wyndham Int'l, Inc., 102 Cal. App. 4th 1327, 1330 (2002) (affirming trial court's sustaining of demurrer where hotel's practice of paying "service charge" to its employees was neither "unfair" nor "fraudulent"); Shvarts, 81 Cal. App. 4th at 1158-60 (sustaining demurrer to UCL complaint without leave to amend on grounds that per-gallon fuel price could not be "unfair," given Civil Code section allowing for charge, and could not have been likely to deceive, given full disclosure of charge on rental car contract); Lazar, 69 Cal. App. 4th at 1505-06 (sustaining defendant's demurrer to UCL claim because the challenged business practice was approved and authorized by the Legislature); Wolfe, 46 Cal. App. 4th at 568 (sustaining demurrer to a UCL claim challenging insurance companies' alleged "unfair" practice of failing to offer earthquake insurance because the issue was a matter within the legislative domain); Khoury v. Maly's of Cal., Inc., 14 Cal. App. 4th 612, 619-20 (1993) (sustaining demurrer without leave to amend where plaintiff, despite three attempts, neither identified the specific section of law allegedly violated nor pleaded with any reasonable particularity the facts supporting the underlying violations).

[355] 19 Cal. 4th at 46-47 (holding that plaintiffs stated a cause of action for an "unlawful" business practice under the UCL by pleading facts establishing a violation of the Cartwright Act).

[356] See Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1102-05 (9th Cir. 2003) (Rule 9(b) applies to state claims "grounded in fraud" even if elements of fraud need not be established to state a claim; allegations of fraudulent conduct need be pleaded with particularity).

[357] Cal. Civ. Proc. Code § 425.16. A "SLAPP" suit ("Strategic Lawsuits Against Public Participation") is a "meritless suit filed primarily to chill the defendant's exercise of First Amendment rights." Wilcox v. Super. Ct., 27 Cal. App. 4th 809, 815 n.2 (1994), overruled in part by Equilon Enter. v. Consumer Cause, Inc., 29 Cal. 4th 53, 68 n.5 (2002). Kashian v. Harriman, 98 Cal. App. 4th 892, 925-26 (2002) (granting "anti-SLAPP" motion to strike in suit where businessman sued attorney for violation of the UCL and defamation); DuPont Merck Pharm. Co. v. Super. Ct., 78 Cal. App. 4th 562, 568-69 (2000) (vacating trial court's denial of anti-SLAPP motion to strike where defendant pharmaceutical company's activities arose out of free speech rights and remanding for further determination).

[358] Cal. Civ. Proc. Code § 425.16(b)(1). To succeed on such a motion, a defendant must first establish that the action "alleges acts in furtherance of defendant's right of petition or free speech in connection

context, however, California Code of Civil Procedure section 425.17 places critical restrictions on the use of the "anti-SLAPP" statute. Section 425.17 prohibits anti-SLAPP motions in actions: (1) brought solely in the public interest (subject to certain conditions);[359] or (2) brought against a defendant engaged in the business of selling or leasing goods and services (subject to certain conditions).[360]

E. Summary Judgment Under The UCL

"Although the issue of whether a practice is deceptive or unfair is generally a question for the trier of fact," UCL claims can be disposed of by summary judgment when the facts are undisputed.[361] As one California court reasoned, the issue of "whether a practice is unfair under the [UCL]" is a question of law because "[i]nterpretation and application of statutes is a question of law, subject to [the courts'] independent review."[362] Nonetheless, because UCL legal issues can be fact-intensive, motions for summary judgment succeed most often when focused on legal defenses or the absence of any factual support for a claim.[363]

F. Removal Of UCL Actions

Federal court is an attractive forum for many UCL defendants, especially in class actions. Federal courts generally are more willing to dispose of frivolous UCL claims at the pleading or pre-trial stages, and often are more receptive to preemption arguments.[364] As discussed below,

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with a public issue." DuPont Merck Pharm. Co., 78 Cal. App. 4th at 565; see also Gallimore v. State Farm Fire & Cas. Ins. Co., 102 Cal. App. 4th 1388, 1395-1400 (2002) (holding that anti-SLAPP statute did not apply in UCL action challenging insurer's claims handling practices because action was not premised entirely on insurer's reports to the California Department of Insurance). Once this first test is satisfied, the burden shifts to plaintiff to establish that there is "a probability" of prevailing on the claim. See Wilcox, 27 Cal. App. 4th at 823; Yu v. Signet Bank/Va., 103 Cal. App. 4th 298, 317 (2002) (affirming trial court's denial of anti-SLAPP motion to strike and stating that "a plaintiff's burden as to the second prong of the anti-SLAPP test is akin to that of a party opposing a motion for summary judgment").

[359] Cal. Civ. Proc. Code § 425.17(b).

[360] Cal. Civ. Proc. Code § 425.17(c).

[361] See Puentes v. Wells Fargo Home Mortg., Inc., 160 Cal. App. 4th 638, 645 n.5 (2008) (lender's practice of calculating interest on a monthly rather than daily basis was not "unfair" as a matter of law) (citing Linear Tech. Corp. v. Applied Materials, Inc., 152 Cal. App. 4th 115, 134-35 & n.9 (2007)); Motors, 102 Cal. App. 3d at 740 (stating that, if "the utility of the conduct clearly justifies the practice, no more than a simple motion for summary judgment would be called for").

[362] People v. Duz-Mor Diagnostic Lab., Inc., 68 Cal. App. 4th 654, 660 (1998) (affirming the trial court's judgment that a laboratory did not violate the UCL by offering discounts to physicians' private-pay patients or utilizing an "unbundled" billing system, but finding that commissions paid for marketing services were unlawful and, thus, in violation of the UCL).

[363] See, e.g., Paduano v. Am. Honda Motor Co., 169 Cal. App. 4th 1453, 1470-74 (2009) (finding that plaintiff had no UCL claim based on miles-per-gallon claims made consistent with preemptive federal law, but denying summary judgment on that claim because plaintiff also challenged other advertising statements outside the scope of federal preemption).

[364] See, e.g., Herman v. Salomon Smith Barney, Inc., 266 F. Supp. 2d 1208, 1210-13 (S.D. Cal. 2003) (dismissing UCL action where plaintiff had no standing to assert claim in federal court and refusing to

the Class Action Fairness Act of 2005 ("CAFA") allows more UCL class actions to be removed to federal court.[365] In non-class cases, traditional removal analysis based on diversity will apply because UCL plaintiffs now must possess standing. Removal on federal question grounds in a non-class case remains difficult, however, even where federal law forms the basis of an "unlawful" claim.[366]

1. Removal Based On CAFA

CAFA applies to many multi-state class actions filed on or after the date of enactment, February 18, 2005. Previously, a federal court would have diversity jurisdiction over a class action only if there was: (a) "complete diversity" of citizenship between named plaintiffs and defendants; and (b) satisfaction of the $75,000 amount-in-controversy requirement by all named plaintiffs.[367] Thus, by naming one plaintiff from the same state as the defendant or one defendant from the forum state, the alleged class could avoid removal. The supposed class also could avoid removal by alleging that individual claims totaled less than $75,000, even if the aggregated amount in controversy of all plaintiffs' claims totaled in the millions of dollars.

Under CAFA, individual class plaintiffs' claims must, in the aggregate, exceed $5 million.[368] Moreover, only minimal diversity between plaintiffs and defendants need be established.[369] Depending on the circumstances, CAFA may confer jurisdiction on a federal court

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remand); Feitelberg v. Merrill Lynch & Co., 234 F. Supp. 2d 1043, 1053 (N.D. Cal. 2002) (dismissing UCL action based on securities transactions), aff'd, 353 F.3d 765 (9th Cir. 2003).

[365] Pub. L. 109-2, § 1(a), 119 Stat. 4 (Feb. 18, 2005), codified in scattered sections of 28 U.S.C.

[366] See, e.g., Klussman v. Cross-Country Bank, No. C-01-4228-SC, 2002 WL 1000184, at *2-6 (N.D. Cal. May 15, 2002) (removal held improper where plaintiff's UCL claim was based on violation of FCRA because the alleged FCRA violation was not a necessary element of UCL claim – plaintiff could assert a UCL claim without the FCRA violation); As You Sow v. Sherwin Williams Co., No. C-93-3577-VRW, 1993 WL 560086, at *2-3 (N.D. Cal. Dec. 21, 1993) (holding that UCL case could not be removed because plaintiff lacked standing); Mangini v. R.J. Reynolds Tobacco Co., 793 F. Supp. 925, 929 (N.D. Cal. 1992) (reasoning that UCL claim premised on violations of federal law could not be removed because underlying federal law conferred no private right of action); Boyle v. MTV Networks, Inc., 766 F. Supp. 809, 817-18 (N.D. Cal. 1991) (noting that a UCL claim could not be removed where it would result in lack of standing); People of State of Cal. v. Beltz Travel Serv., Inc., 379 F. Supp. 948, 950 (N.D. Cal. 1974) (stating that standing is subject to federal requirements following removal of a UCL action to federal court).

[367] See, e.g., Gibson v. Chrysler Corp., 261 F.3d 927, 938 (9th Cir. 2001). The rule regarding individual amounts in controversy was also altered, without regard to the passage of CAFA, in Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005) (holding that supplemental jurisdiction can be asserted over non-$75,000 claims so long as one plaintiff satisfies the amount in controversy requirement).

[368] 28 U.S.C. § 1332(d)(2), (6).

[369] Moreover, whereas previously unincorporated associations were considered citizens of every state in which their constituents were citizens, under CAFA unincorporated associations are considered citizens only of (1) the state where they have their principal place of business and (2) the state in which they are organized. 28 U.S.C. § 1332(d)(10).

where "any member of a class of plaintiffs is a citizen of a [s]tate different from any defendant."[370] Whether a federal court ultimately exercises jurisdiction, however, is determined according to a further set of rules. Essentially, jurisdiction is either mandatory, discretionary or precluded.

Jurisdiction is mandatory if there are 100 or more members in the class, one-third or fewer of those class members are citizens of the forum and none of the exceptions in CAFA apply (for example, securities fraud and derivative lawsuits are not governed by CAFA).[371] Given this, most nationwide, non-securities fraud, non-derivative actions will proceed in federal court.

Jurisdiction is discretionary if more than one-third but fewer than two-thirds of the class members are citizens of the forum state, and the "primary" defendants also are citizens of the forum state.[372] In that event, the court must consider: (a) whether the claims asserted involve matters of national or interstate interest; (b) whether the claims asserted will be governed by the laws of the state where the action originally was filed or the laws of other states; (c) whether the class action has been pled to avoid federal jurisdiction; (d) whether the state forum has a distinct nexus with the class, the defendants or the alleged harm; (e) whether the number of class members who are citizens of the forum state is substantially larger than the number from any other state; and (f) whether any class action asserting similar claims has been filed in the prior three years.[373]

A federal court must decline jurisdiction if: (a) more than two-thirds of the class members are citizens of the forum state; and (b) either (i) all of the primary defendants are citizens of the forum state[374] or (ii) at least one defendant from whom significant relief is sought is a resident of the forum state and (a) the defendant's conduct forms a significant basis of the claims; (b) the principal alleged injuries resulting from the conduct of all defendants occurred in the forum state; and (c) no similar class action has been filed against any of the defendants in the prior three years.[375]

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[370] 28 U.S.C. § 1332(d)(2)(A). In a similar manner, CAFA applies where minimal diversity of citizenship exists because a plaintiff or defendant is a foreign state or a citizen of a foreign state. 28 U.S.C. § 1332(2)(B), (C).

[371] 28 U.S.C. § 1332(d)(2), (3), (4), (5), (9). Section 1332, subsection (d)(9), excludes class actions that "solely" involve claims under the Securities Act of 1933, the Securities Exchange Act of 1934 and claims involving corporate governance under state laws. Thus, to the extent that federal and related state securities claims may already be heard by federal courts, while derivative actions must be heard by state courts, CAFA effects no changes. Actions involving states and government officials also are excluded from the Act. 28 U.S.C. § 1332(d)(5)(A).

[372] 28 U.S.C. § 1332(d)(3).

[373] 28 U.S.C. § 1332(d)(3)(A)-(F).

[374] 28 U.S.C. § 1332(d)(4)(A). This sometimes is referred to as the "home state controversy" exception to CAFA jurisdiction.

[375] 28 U.S.C. § 1332(d)(4)(B). This sometimes is referred to as the "local controversy" exception to CAFA jurisdiction.

In conjunction with the changes in the federal courts' diversity jurisdiction, the procedures for removal also were relaxed. For instance, in an ordinary diversity action, a defendant seeking to remove an action to federal court cannot do so unless all defendants consent.[376] CAFA eliminated this requirement, expressly providing that class actions may be "removed by any defendant without the consent of all defendants."[377]

This Overview touches upon only the highlights of CAFA. CAFA is a complex statute that presents many open issues.

2. Removal Based On Federal Question

Notwithstanding that a plaintiff asserts a UCL claim based entirely on a question of federal law, a federal court probably will not allow removal because the federal law is merely an "element" of plaintiff's state law claim.[378] Although one district court allowed removal where a UCL claim was predicated on questions of federal antitrust law,[379] the decision seemingly is anomalous.[380] In addition, where the action involves securities claims, removal may be appropriate.[381] Generally, however, removal based on federal question jurisdiction is unsuccessful.

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[376] See, e.g., United Computer Sys., Inc. v. AT&T Corp., 298 F.3d 756, 762 (9th Cir. 2002).

[377] 28 U.S.C. § 1453(b).

[378] See Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 817, 106 S. Ct. 3229, 92 L. Ed. 2d 650 (1986) (holding that, because federal question jurisdiction only lies when a plaintiff's claim "arises under" federal law, defendant could not remove case to federal court where plaintiff merely alleged violation of a federal statute as an element of a state cause of action and federal statute itself provided no private right of action); Lippitt v. Raymond James Fin. Servs., Inc., 340 F.3d 1033, 1042-43 (9th Cir. 2003); Klussman, 2002 WL 1000184, at *2-6 (holding that FCRA violation was not a necessary element of plaintiff's UCL claim and that defense based on federal preemption was not sufficient to warrant removal); Pickern v. Stanton's Rest. & Woodsman Room, No. C 01-2112 SI, 2002 WL 143817 (N.D. Cal. Jan. 29, 2002) (finding no federal court jurisdiction where violation of federal Americans with Disabilities Act was alleged as predicate law for violation of the UCL); Mangini, 793 F. Supp. at 929 (relying on Merrell Dow, 478 U.S. at 808, in holding that UCL action allegedly preempted by federal law did not "arise under" federal law so as to create an appropriate "federal question" for removal purposes); Jimenez v. Bank of Am. Home Loans Servicing LP, No. CV 11–09464 MMM (JCx), 2012 WL 353777, at *2 (C.D. Cal. Feb 2, 2012) (stating that a claim will not present a substantial question of federal law merely because a federal question is an "ingredient" of the claim). But see Cal. ex rel. Lockyer v. Mirant Corp., Nos. C-02-1787-VRW, et al., 2002 WL 1897669 (N.D. Cal. Aug. 6, 2002) (denying motions to remand in numerous cases challenging power companies' post de-regulation conduct where plaintiff's UCL claim primarily was based on questions of federal law).

[379] See Nat'l Credit Reporting Ass'n v. Experian Info. Solutions, No. C04-01661 WHA, 2004 WL 1888769, at *5 (N.D. Cal. July 21, 2004).

[380] See, e.g., Cortazar v. Wells Fargo & Co., No. C 04-894 JSW, 2004 WL 1774219, at *4 (N.D. Cal. Aug. 9, 2004) (holding that UCL claim predicated on alleged violations of several federal laws could not be removed on federal question grounds).

[381] See, e.g., Feitelberg, 234 F. Supp. 2d at 1048-49, 1053 (holding that UCL action based on securities transactions was removable under Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. §§

G. Extraterritorial Application Of The UCL

Section 17203 currently states that anyone "who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction." The section formerly was limited to unfair competition "within this state"; in 1992, the Legislature deleted the words "within this state."[382] This amendment could be construed as clarifying the Legislature's intent that the power of the California courts to remedy business practices under the UCL is coextensive with the reach of due process. In other words, as long as the "minimum contacts" test of personal jurisdiction is met, a California court may enjoin a defendant's business practice. In fact, Courts of Appeal have held that an out-of-state defendant may be held liable under the UCL where the conduct at issue adversely affected California residents.[383]

The decision in Norwest Mortgage, Inc. v. Superior Court, however, limits the extraterritorial application of the UCL.[384] Addressing the issue in the context of nationwide class certification, the Court of Appeal held that the UCL could not be used to regulate conduct unconnected to California.[385] Specifically, the court held that the UCL would not apply to claims of class members residing outside of California for conduct occurring outside of California by a company headquartered outside of California.[386]

77p & 78bb(f) ("SLUSA"), which bars filing certain kinds of securities class actions in state court; court held that, while SLUSA only applies to actions seeking "damages," which are not available under the UCL, that term should be interpreted broadly to encompass claims for restitution and disgorgement under the UCL).

[382] By contrast, section 17500 contains language that could be interpreted to limit the statute's extraterritorial application. Section 17500 prohibits false or misleading statements made "before the public in this state" and "from this state before the public in any state." Cal. Bus. & Prof. Code § 17500.

[383] See Yu v. Signet Bank/Va., 69 Cal. App. 4th 1377, 1391 (1999) (holding that plaintiffs could sue Virginia bank under the UCL for acts that allegedly occurred in Virginia since, "[i]n the absence of any federal preemption, a defendant who is subject to jurisdiction in California and who engages in out-of-state conduct that injures a California resident may be held liable for such conduct in a California court"); Application Group, Inc. v. Hunter Group, Inc., 61 Cal. App. 4th 881, 908 (1998) (affirming trial court's decision that out-of-state employer's use of unlawful non-compete clause violated the UCL).

[384] 72 Cal. App. 4th 214 (1999); see also Tidenberg v. Bidz.com, Inc., No. CV 08-5553 PSG (FMOx), 2009 WL 605249, at *4 (C.D. Cal. Mar. 4, 2009) (following Norwest and noting that, while defendant's principal place of business is in California, that fact alone does not permit application of the UCL to the claims of nonresident plaintiffs; plaintiff did not allege that defendant, operator of a web business, actually engaged in misleading conduct in California); Standfacts Credit Servs., Inc. v. Experian Info. Solutions, Inc., 405 F. Supp. 2d 1141, 1147-48 (C.D. Cal. 2005), aff'd, 294 Fed. Appx. 271 (9th Cir. 2008) (following Norwest and dismissing UCL claim brought by non-resident plaintiffs).

[385] Norwest, 72 Cal. App. 4th at 222-24; see also Sajfr v. BBG Commc'ns, Inc., No. 10cv2341 AJB (NLS), 2012 WL 398991, at *4 (S.D. Cal. Jan 10, 2012) (UCL does not apply to conduct occurring "wholly" outside California in international locations).

[386] Norwest, 72 Cal. App. 4th at 225-27 (noting that such application would be arbitrary and unfair and, therefore, violative of due process) (relying on Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S.

Murphy v. DirecTV, Inc. affirms the holding in Norwest, and makes clear that "non-residents may be allowed to allege violations of California law, even against non-resident defendants, when the conduct which allegedly gives rise to liability occurs in California."[387] Referencing In re Mattel, Inc., where plaintiffs were found to have adequately alleged that Mattel's conduct occurred in or had strong connections to California (because Mattel's alleged misrepresentations likely came from its corporate headquarters in California), the court in Murphy determined that plaintiffs' allegations were insufficient to state claims by non-California plaintiffs.[388] Best Buy, a Virginia limited partnership with its principal place of business in Minnesota, as alleged by plaintiffs, had a relationship to California only because it is registered to do business in California and an "electronic communication system" was established between Best Buy and DirecTV.[389] Thus, plaintiffs failed to assert any allegations that Best Buy "prepared, approved or committed any harm" to plaintiffs arising in California.[390] Accordingly, the court found that plaintiffs failed to show that Best Buy had sufficient contact with California.[391]

Courts also have considered the effect of choice-of-law provisions under the Norwest rule. In Ice Cream Distributors of Evansville, LLC v. Dreyer's Grand Ice Cream, Inc., plaintiff alleged that defendant violated the UCL when employees outside of California made fraudulent statements at the direction of employees in California, which resulted in termination of plaintiff's business relationships with several regional ice cream distributors and convenience stores.[392] Plaintiff argued that it was permitted to bring a UCL claim for out-of-state conduct pursuant to the choice-of-law provision in the underlying distribution agreement with defendant. Under that provision, the agreement would be "governed by and construed in accordance with the law of the State of California without regard to any contrary conflicts of law principles."[393] The court rejected plaintiff's argument, finding that the provision did not provide for extra-territorial application of the UCL, but, instead, addressed under what law the agreement would be construed.[394] The court therefore dismissed plaintiff's UCL claim because the alleged fraudulent statements still were made outside of California and plaintiff was a limited liability corporation based in Kentucky. As stated by the court, the UCL does not extend to "actions occurring outside of California that injure non-residents."[395] The court additionally noted that plaintiff's allegation that defendant's employees outside of California made false statements at the direction of two California-based employees was bare and insufficient to suggest that the falsehoods were

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Ct. 2965, 86 L. Ed. 2d 628 (1985)). Cf. Estrella v. Freedom Fin. Network, LLC, No. C 09-03156 SI, 2010 WL 2231790, at *7 (N.D. Cal. June 2, 2010) (where defendant's alleged conduct occurred in California, court held that California law applies to out-of-state defendants).

[387] No. 2:07-cv-06465-JHN, 2011 WL 3325891, at *2 (C.D. Cal. Feb. 11, 2011).

[388] Id., at *2-3.

[389] Id.

[390] Id.

[391] Id., at *1.

[392] No. 09-5815 CW, 2010 WL 3619884, at *2 (N.D. Cal. Sept. 10, 2010).

[393] Id., at *8.

[394] Id.

[395] Id. (quoting Standfacts Credit Servs., 405 F. Supp. 2d at 1148).

"prepared in and emanated from" California, which would have been sufficient to allege liability under the UCL.[396]

In contrast, the court in Schlesinger v. Superior Court found that contractual choice-of-law and forum-selection provisions are relevant to the Norwest analysis.[397] Plaintiffs in Schlesinger alleged that Ticketmaster violated the UCL by: (1) deceiving customers into believing that fees charged on its website were pass-through costs, instead of sources of profit for Ticketmaster; and (2) by making a processing charge mandatory and not allowing its customers to use an alternative delivery system. Plaintiffs also alleged violations of the FAL and CLRA.[398] Under the choice-of-law provision in Ticketmaster's online purchase agreement, a customer agreed that disputes under the purchase agreement would "be governed by the law of the State of California without regard to its conflict of law provisions and you consent to personal jurisdiction, and agree to bring all actions, exclusively in state and federal courts located in Los Angeles County, California."[399]

Plaintiffs based their request for certification of a nationwide class under the California choice-of-law provision included in the purchase agreement used on Ticketmaster's website.

Ticketmaster argued that the UCL does not apply to out-of-state residents, but the court found no express geographic restriction in the UCL.[400] Also, unlike the defendant in Norwest, Ticketmaster's headquarters and principal place of business is in California and, more importantly, Ticketmaster required its customers to agree to the application of California law.[401] Accordingly, the court issued an order directing the superior court to vacate its order denying certification of a nationwide class and instead enter a new order granting plaintiffs' motion to certify a nationwide class as to the first UCL claim and the FAL claim.

H. Notice To The Attorney General's Office Of Appellate Matters

Section 17209 requires that, where a proceeding involving the UCL is commenced in California's appellate courts, the party commencing such proceeding shall provide notice to the California Attorney General and to the district attorney of the county in which the action originally was filed.[402]

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[396] Id. (citing Wershba, 91 Cal. App. 4th at 241-44 (2001)).

[397] No. B224880, 2010 WL 3398844, at *7-8 (Cal. Ct. App. Aug. 31, 2010).

[398] Id., at *2.

[399] Id.

[400] Id., at *7.

[401] Id., at *6.

[402] Section 17209 provides:

> If a violation of [the UCL] is alleged or the application or construction of [the UCL] is in issue in any proceeding in the Supreme Court of California, a state court of appeal, or the appellate department of a superior court, the person who commenced that proceeding shall serve notice thereof, including a copy of the person's brief, on the Attorney General, directed to the Consumer Law section, and on the district attorney of the county in which the lower court

I. Insurance Coverage For UCL Actions

Although the availability of coverage depends upon the terms and conditions of the relevant policy and the circumstances of each case, a UCL claim generally falls outside the scope of coverage or, in some cases, may be expressly excluded.[403] In Bank of the West v. Superior Court, the California Supreme Court held that there was no coverage under a standard comprehensive general liability ("CGL") insurance policy for a settling UCL defendant.[404] Since Bank of the West, other courts likewise have determined that UCL claims are not covered under most standard CGL policies.[405]

THE CONSUMERS LEGAL REMEDIES ACT

I. THE STRUCTURE OF THE CLRA

A. Purpose Of The CLRA

"The CLRA was enacted in an attempt to alleviate social and economic problems stemming from deceptive business practices . . . ."[406] As stated by the Court of Appeal, "the CLRA is a legislative embodiment of a desire to protect California consumers and furthers a strong public policy of this state."[407] To achieve that end, the CLRA proscribes 24 specified business acts or practices. The Legislature intended that courts construe the CLRA liberally to

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action or proceeding was originally filed. The notice, including the brief or petition and brief, shall be served within three days after commencement of the appellate proceeding, provided that the time may be extended by the Chief Justice or presiding justice or judge for good cause shown. No judgment or relief, temporary or permanent, shall be granted until proof of service of this notice is filed with the court.

See also Soldate v. Fidelity Nat'l Fin., Inc., 62 Cal. App. 4th 1069, 1076 (1998) (stating that "[f]ailure to comply with section 17209 will preclude appellate relief in the appropriate case"); Californians for Population Stabilization, 58 Cal. App. 4th at 284 (determining that section 17209 "is not jurisdictional" in nature).

[403] Many policies include express exclusions for willful or fraudulent acts. Because intent is not an element of a UCL claim, even if based on an alleged "fraudulent" business practice, such an exclusion would not appear to be applicable.

[404] 2 Cal. 4th at 1258. Specifically, the Court held that there was no coverage for the UCL action as a claim for damages because of "Advertising Injury." Id. The Court reasoned, among other things, that: (1) "damages" were not available under the UCL – only restitution and injunctive relief were available; and (2) "unfair competition," as used in the insurance policy, referred only to the common law tort of unfair competition and did not include a statutory violation of the UCL. Id. at 1261-73, 1277.

[405] See, e.g., Upland Anesthesia Med. Group v. Doctors' Co., 100 Cal. App. 4th 1137, 1144 (2002) (holding that insurance policy exclusion for intentional acts precluded insurance defense or coverage for UCL claim); Am. Cyanamid Co. v. Am. Home Assurance Co., 30 Cal. App. 4th 969, 976 (1994); Chatton v. Nat'l Union Fire Ins. Co., 10 Cal. App. 4th 846, 863 (1992).

[406] Broughton, 21 Cal. 4th at 1077.

[407] Am. Online, 90 Cal. App. 4th at 14-15.

"protect consumers against unfair and deceptive business practices and provide efficient and economical procedures to secure such protection."[408]

B. Coverage Of The CLRA

The CLRA provides "consumers" with a private right of action for "unfair methods of competition" and "unfair or deceptive acts or practices" in connection with "a transaction intended to result or which results in the sale or lease of goods or services."[409] Although not expressly limited to California residents and transactions, California courts have indicated that the CLRA does not apply to conduct that affects non-California residents and occurs entirely outside California.[410]

1. Who Is A "Consumer"?

The CLRA defines a "consumer" as "an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes."[411] Courts strictly enforce this provision and do not allow individuals who lease or purchase goods or services for business purposes to proceed under the CLRA.[412] Moreover, a "consumer" must have purchased the good or service, or have been assigned the purchaser's rights. One who obtains mere possession of a good is insufficient.[413] Even plaintiffs pursuing CLRA claims solely for injunctive

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[408] Cal. Civ. Code § 1760. However, CLRA claims filed in federal courts are subject to more stringent federal procedural standards. See In re Gen. Motors Corp., No. MDL 04-1600, 2005 WL 1924333, at *3 (W.D. Okla. Aug. 8, 2005) (holding that, where conduct complained of is grounded in fraud, CLRA claims must satisfy Rule 9(b)'s heightened pleading standard) (citing Vess, 317 F.3d at 1103-05 (state law claims are subject to Rule 9(b)'s heightened pleading standards when grounded in fraud)).

[409] Cal. Civ. Code §§ 1770(a), 1780(a); Reveles v. Toyota by the Bay, 57 Cal. App. 4th 1139, 1154 (1997); Nagel v. Twin Labs., Inc., 109 Cal. App. 4th 39, 51-52 (2003) ("Under the CLRA, a defendant may be liable for deceptive practices in the sale of goods or services to consumers."); see also Tietsworth v. Sears, Roebuck & Co., No. C 09-00288, 2009 WL 1363548, at *4 (N.D. Cal. May 14, 2009) (CLRA claims may be based on fraudulent omissions if the omissions are contrary to representations made by the defendant, or are omissions of fact that the defendant was obliged to disclose).

[410] See, e.g., Wagh v. Metris Direct, Inc., No. A103161, 2005 WL 1253940, at *9 (Cal. Ct. App. May 27, 2005) (citing Norwest, 72 Cal. App. 4th at 225-27, and indicating that CLRA claim could not be maintained by non-residents of California based on conduct occurring outside California).

[411] Cal. Civ. Code § 1761(d).

[412] See, e.g., Lazar v. Hertz Corp., 143 Cal. App. 3d 128, 141-42 (1983) (individual who rented car for business purposes conceded that he did not constitute a "consumer" under CLRA); Cal. Grocers Ass'n, Inc., 22 Cal. App. 4th at 217 (CLRA inapplicable because trade association was not a consumer of "services for personal, family, or household purposes"); Ting v. AT&T, 319 F.3d 1126, 1148 (9th Cir. 2003) (CLRA inapplicable to commercial or government contracts, or to contracts formed by nonprofit organizations and other non-commercial groups) (citing Cal. Grocers Ass'n, 22 Cal. App. 4th at 217).

[413] See Schauer v. Mandarin Gems of Cal., Inc., 125 Cal. App. 4th 949, 960 (2005) (plaintiff lacked standing to assert CLRA claim because she did not acquire the good as a result of her own purchase – it was a gift – she was not a "consumer" under section 1761(d)); Morris II v. Farmers Ins. Exch., No. B188081, 2006 WL 3823522, at *6 (Cal. Ct. App. Dec. 28, 2006) (plaintiff lacked standing to assert CLRA claim because he could not allege the existence of a "transaction" between him and defendant

relief must satisfy traditional standing requirements to be considered a "consumer."[414] Thus, a plaintiff's failure to establish that he falls within the CLRA's definition of "consumer" generally defeats his ability to represent a class.[415]

2. Damages And Causation Are Required Elements.

To state a cause of action for an alleged violation of the CLRA, section 1780(a) requires allegations of actual damages caused by the conduct at issue:

> Any consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by section 1770 may bring an action against that person to recover[.][416]

"Relief under the CLRA is specifically limited to those who suffer damage, making causation a necessary element of proof."[417]

In Meyer v. Sprint Spectrum L.P., the California Supreme Court confirmed this rule and elaborated on what constitutes "damage" sufficient to state a claim under the CLRA.[418] The Court of Appeal in Meyer affirmed a trial court ruling sustaining a demurrer to a complaint challenging arbitration and other provisions in a contract as illegal and/or unconscionable.[419] The trial court had reasoned that none of these provisions actually had been invoked against plaintiffs,

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under section 1761(e)); Bristow v. Lycoming Engines, No. CIV. S-06-1947 LKK/GGH, 2007 WL 1752602, at *5 (E.D. Cal. June 15, 2007) (denying certification of CLRA subclass where title to plane with defective crankshaft was held by plaintiff's corporation). But see Von Grabe v. Sprint PCS, 312 F. Supp. 2d 1285, 1302, 1303 (S.D. Cal. 2003) (where plaintiff alleged purchase through retail channels and communications with company's customer service representatives, he possessed standing to sue as a "consumer" under the CLRA but not as a competitor of defendant under the Lanham Act).

[414] See Caro v. Procter & Gamble Co., 18 Cal. App. 4th 644, 665 (1993); Wilens v. TD Waterhouse Grp., Inc., 120 Cal. App. 4th 746, 755 (2003).

[415] See Lazar, 143 Cal. App. 3d at 142 (because plaintiff was not a "member of the consumer class," he could not maintain a CLRA class action). But see Schneider v. Vennard, 183 Cal. App. 3d 1340, 1346-47 (1986) ("[W]hile class actions brought under section 382 are not governed exclusively by the procedures outlined in section 1781, these procedures may provide guidance in such actions.").

[416] Cal. Civ. Code § 1780(a) (emphasis added).

[417] Wilens, 120 Cal. App. 4th at 754; accord True v. Am. Honda Motor Co., 520 F. Supp. 2d 1175, 1182 (C.D. Cal. 2007) ("With respect to Plaintiff's CLRA claim for false advertising, California law clearly holds that causation, in the form of reliance, likewise is an essential element of such claims.") (citing numerous cases); Buckland, 155 Cal. App. 4th at 811 ("actual reliance is an element of a CLRA claim sounding in fraud"); Mass. Mut. Life Ins. Co., 97 Cal. App. 4th at 1292 ("this limitation on relief requires that plaintiffs in a CLRA action show not only that a defendant's conduct was deceptive but that the deception caused them harm"); Cholakyan, 796 F. Supp. 2d at 1228 (standing for plaintiff asserting misrepresentation claim under the CLRA requires, in addition to establishing actual injury as a result of defendant's alleged conduct, that plaintiff relied on a material misrepresentation).

[418] 45 Cal. 4th 634, 640-46 (2009).

[419] 59 Cal. Rptr. 3d 309, 317-20 (2007), aff'd, 45 Cal. 4th 634 (2009).

so plaintiffs could not establish causation or damages under the CLRA, thus defeating the claim.[420]

On appeal to the California Supreme Court, plaintiffs principally argued that "the very presence of unconscionable terms within a consumer contract, in violation of section 1770, subdivision (a)(14) and (19), constitutes a form of damage within the meaning of section 1780(a)," and thus, confers standing under the CLRA.[421] The Court rejected this argument, affirming the trial court's reasoning that plaintiffs could not establish damages without defendant actually enforcing the allegedly unconscionable provisions.[422] The Court concluded that, "in order to bring a CLRA action, not only must a consumer be exposed to an unlawful practice, but some kind of damage must result."[423] Notably, the Court additionally held that the requirement that the consumers have suffered damage extends as well to actions under the CLRA for injunctive relief.[424]

The Court, however, broadly interpreted the phrase "any damages," concluding that "any damages" is not limited to pecuniary damages, but also can include transaction and opportunity costs, such as attorneys' fees in connection with the challenged practice or loss of an opportunity to do business elsewhere.[425] Accordingly, the Court found that California's Legislature had "set a low but nonetheless palpable threshold of damage."[426] Thus, California courts have recognized that "damage" under the CLRA is not synonymous with "actual damages," and may encompass "harms other than pecuniary damages."[427]

3. What Constitutes The "Sale Or Lease Of Goods Or Services"?

Until recently, there were few published cases addressing this issue.[428] Based on the plain language, the Legislature arguably intended to limit the CLRA to traditional purchases of

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[420] Id.

[421] Meyer, 45 Cal. 4th at 641.

[422] Id.

[423] Id.

[424] Id. at 646.

[425] Id. at 642-44.

[426] Id. at 646; see, e.g., Boone v. S & F Mgmt. Co., Inc., No. 07CC01402, 2009 WL 3049309, at *2 (Cal. Ct. App. Sept. 24, 2009) (explaining that, in order to bring a CLRA action, a consumer must be exposed to an improper practice, and some form of harm must result).

[427] Doe 1 v. AOL LLC, 719 F. Supp. 2d 1102, 1111 (2010) (quoting In re Steroid Hormone Prod. Cases, 181 Cal. App. 4th 145, 156 (2010)).

[428] A "transaction" under the CLRA is defined as "an agreement between a consumer and any other person, whether or not the agreement is a contract enforceable by action, and includes the making of, and the performance pursuant to, that agreement." Cal. Civ. Code § 1761(e); see also Nordberg v. Trilegiant Corp., 445 F. Supp. 2d 1082, 1095-97 (N.D. Cal. 2006) (rejecting defendant's contention that, because defendant automatically enrolled plaintiffs in discount programs, plaintiffs did not "seek" the services of defendant and, therefore, were not "consumers" under the CLRA, but accepting argument that there was no "transaction").

consumer goods and related services,[429] and legislative history supports this conclusion.[430] Nonetheless, given that the CLRA is to be construed "liberally,"[431] plaintiffs argue that it applies in nearly every type of consumer transaction, except where expressly exempted from coverage.

Nevertheless, a growing body of case law now holds that certain consumer transactions, not expressly exempted from the CLRA, do not fall within the purview of the CLRA – i.e., are not "goods" or "services" as defined by the CLRA.[432] Most notably, on April 20, 2009, the California Supreme Court found, in Fairbanks v. Superior Court, that insurance is not a "good" or a "service" as defined by the CLRA.[433] In Fairbanks, plaintiffs alleged that Farmers Group, Inc. and Farmers New World Life Insurance Company deceptively marketed and administered their life insurance policies in violation of the CLRA.[434] The Court found that life insurance is not a "tangible chattel," and therefore, not a "good."[435] In holding that life insurance is not a "service" under the CLRA, the Court reasoned that a "contractual obligation to pay money under a life insurance policy is not work or labor, nor is it related to the sale or repair of any tangible chattel."[436]

The Court also concluded that the ancillary services that insurers provide, such as "services related to the maintenance, value, use, redemption, resale, or repayment of the intangible item,"

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[429] See, e.g., Cal. Civ. Code § 1770(a) ("transaction[s] intended to result or which results in the sale or lease of goods or services to any consumer"); Cal. Civ. Code § 1761(a) ("tangible chattels bought or leased for use primarily for personal, family, or household purposes"); Cal. Civ. Code § 1761(b) ("including services furnished in connection with the sale or repair of goods"); see also A.B. 292, Reg. Sess. (Ca. 1970) (statement of James A. Hayes, Chairman, Assembly Judiciary Comm.) (the CLRA "is meant to provide consumers with remedies against merchants employing various deceptive practices").

[430] See Assembly Journal, Sept. 23, 1970, p. 8465-66 (in a Report Relative to Assembly Bill No. 292, the Assembly Judiciary Committee Members detailed a non-exhaustive list of unfair business practices, which focused on purchases of goods and services, such as the sale of tires, perfume and automobiles).

[431] See Cal. Civ. Code § 1760; Shin v. BMW of N. Am., No. CV 09-00398 AHM, 2009 WL 2163509, at *3 (C.D. Cal. July 16, 2009) (on claim of omission of material fact under the CLRA, finding that "transaction" is broadly defined as an agreement between a consumer and any other person, whether or not the agreement is a contract enforceable by action, and includes the making of, and the performance pursuant to, that agreement).

[432] See Cornu v. Norton Cmty. Apartments, L.P., No. B207802, 2009 WL 1961013, at *6 (Cal. Ct. App. July 9, 2009) (concluding that apartment leases are not "goods" as defined by the CLRA because an apartment is real property, not a tangible chattel); Maraziti v. Fid. Nat'l Title Co., No. E045812, 2009 WL 3067074, at *6-7 (Cal. Ct. App. Sept. 25, 2009) (defendant, a trustee in foreclosure, did not perform "services" apart from those necessary to accomplish the foreclosure; further, foreclosure proceedings are not "transactions" within the purview of the CLRA).

[433] 46 Cal. 4th 56, 61 (2009).

[434] Id. at 59.

[435] Id. at 61.

[436] Id.; see also Consumer Solutions REO, LLC v. Hillery, 658 F. Supp. 2d 1002, 1016-17 (N.D. Cal. 2009) (discussing Fairbanks and emphasizing that loans are intangible goods and that ancillary services provided in the sale of intangible goods do not bring these goods within the coverage of the CLRA).

do not bring the intangible chattel within the coverage of the CLRA.[437] The Court reasoned that doing so "would defeat the apparent legislative intent in limiting the definition of 'goods' to include only 'tangible chattels.'"[438] Since Fairbanks, trial courts have applied its reasoning to other areas, such as apartment leases.[439]

The Court of Appeal in Berry v. American Express Publishing, Inc., similarly relied on the CLRA's legislative history in holding that the CLRA does not apply to the issuance of a credit card.[440] When it enacted the CLRA, the Legislature deleted users of "money" and "credit" from a definition of the term "consumer" in an early draft of the bill.[441] Based in part on this deletion, the Berry court concluded that "neither the express text of [the] CLRA nor its legislative history supports the notion that credit transactions separate and apart from any sale or

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[437] Fairbanks, 46 Cal. 4th at 65; see also McKell, 142 Cal. App. 4th at 1465, 1488 (affirming order sustaining demurrer to CLRA claim challenging mortgage lender's alleged practice of charging borrowers fees for underwriting, tax services and wire transfers in excess of the lender's actual costs on grounds that the CLRA did not apply because the transactions involved sales of real property, not goods or services); Berryman, 152 Cal. App. 4th at 1558 (affirming order sustaining demurrer to CLRA claim challenging fees charged for document and transfer fees on the ground that the "transaction does not involve the 'sale or lease of goods or services to any consumer' as contemplated by the CLRA").

[438] Fairbanks, 46 Cal. 4th at 65.

[439] Cornu, 2009 WL 1961013, at *6 (citing Fairbanks and concluding that apartment leases are not "goods," as defined by the CLRA; an apartment is real property, not a tangible chattel); Becker v. Wells Fargo Bank, N.A., No. 2:10-cv-02799 LKK, 2011 WL 1103439, at *13-14 (E.D. Cal. Mar. 22, 2011) (holding that the CLRA did not encompass plaintiff's claims arising from his attempted loan modification, on the grounds that "loans are intangible goods" and "ancillary services provided in the sale of intangible goods do not bring these goods within the coverage of the CLRA"); Sanders v. Choice Mfg. Co., Inc., No. 11-3725 SC, 2011 WL 6002639, at *6 (N.D. Cal. Nov. 30, 2011) ("[A]n insurer's contractual obligation to pay money under a life insurance policy is not work or labor, nor is it related to the sale or repair of any tangible chattel" and therefore does not qualify as a good or a service under the CLRA).

[440] 147 Cal. App. 4th 224, 233 (2007) (affirming order sustaining demurrer to CLRA claim seeking to enjoin enforcement of credit card arbitration provision).

[441] See A.B. 292, 1970 Reg. Sess. (Cal. 1970) (Section 1761(e) reads: "'Consumer' means an individual who seeks or acquires, by purchase or lease, any goods, services, money, or credit for personal, family or household purposes."); id. (section 1780 afforded a remedy to any "consumer who obtains credit, or purchases or leases, or agrees to purchase or lease, goods or services primarily for personal, family or household purposes"). Additionally, the CLRA included a second section, section 1771, that set forth "deceptive practices." Section 1771 made unlawful an act or practice that was either "oppressive or otherwise unconscionable in any respect" or failed "to comply with the Unruh Act . . . Rees-Levering Motor Vehicle Sales and Finance Act . . . Federal Trade Commission Act . . . Consumer Credit Protection Act . . . or any other consumer protection statute of this state or the federal government." The Legislature deleted section 1771 over concerns that its scope was too broad and "would have provided a double penalty, for example, to persons found to have violated the Unruh Act or federal 'truth-in-lending' act, both of which carry their own penalties. Hence, it was thought unnecessary in light of the purposes for which the Consumers Legal Remedies Act was introduced." James S. Reed, *Legislating for the Consumer: An Insider's Analysis of the Consumers Legal Remedies Act*, 2 PAC. L.J. 1, 11 (1971).

lease of goods or services are covered under the act."[442] The California Supreme Court denied review in Berry, and several courts have followed it.[443] Prior to Fairbanks, some courts criticized Berry or otherwise read the term "consumer transactions" broadly.[444] Whether these cases retain viability in the post-Fairbanks world remains to be seen.

Some courts also have drawn a distinction between tangible goods and incorporeal rights in determining what is a "good" or "service."[445]

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[442] Berry, 147 Cal. App. 4th at 233.

[443] See, e.g., O'Donovan v. CashCall, Inc., No. C 08-03174 MEJ, 2009 WL 1833990, at *5 (N.D. Cal. June 24, 2009) (following Berry and dismissing CLRA claim challenging practice allowing defendant to make preauthorized electronic debits for loan payments from debtor's bank account); Ball v. FleetBoston Fin. Corp., 164 Cal. App. 4th 794, 798-99 (2008) (following Berry and affirming denial of leave to amend complaint to add CLRA claim alleging that class action waiver in credit card agreement was unconscionable); In re Late Fee & Over-Limit Litig., 528 F. Supp. 2d 953, 966 (N.D. Cal. 2007) (following Berry and dismissing CLRA claim challenging allegedly excessive late fees and overlimit fees); Van Slyke v. Capital One Bank, 503 F. Supp. 2d 1353, 1358-59 (N.D. Cal. 2007) (following Berry and dismissing CLRA claim challenging credit card arbitration provision and disclosures regarding various fees and "penalties"); Augustine v. FIA Card Servs., N.A., 485 F. Supp. 2d 1172, 1175 (E.D. Cal. 2007) (following Berry and dismissing CLRA claim challenging practice of retroactively increasing credit card interest rates).

[444] See, e.g., Knox v. Ameriquest Mortg. Co., No. C 05 00240 SC, 2005 WL 1910927, at *4 (N.D. Cal. Aug. 10, 2005) (rejecting argument that the CLRA did not apply to mortgage transactions and finding that California courts "generally find financial transactions to be subject to the CLRA") (citing Corbett v. Hayward Dodge, Inc., 119 Cal. App. 4th 915 (2004) (interest rate on car loan), and Kagan v. Gibraltar Sav. and Loan Ass'n, 35 Cal. 3d 582 (1984) (management fees on IRAs) (dictum)); Hernandez v. Hilltop Fin. Mortg., Inc., 622 F. Supp. 2d 842, 849-51 (N.D. Cal. 2007) (denying motion to dismiss CLRA claim challenging use of English documents for mortgage loan where negotiations were conducted entirely in Spanish); Jefferson v. Chase Home Fin. LLC, No. C06-6510 TEH, 2007 WL 1302984, at *2-3 (N.D. Cal. May 3, 2007) (denying motion for judgment on the pleadings as to CLRA claim on theory that mortgage loan is a financial "service"); In re Ameriquest Mortg. Co. Mortg. Lending Practices Litig., No. 05-CV-7097, 2007 WL 1202544, at *5-6 (N.D. Ill. Apr. 23, 2007) (denying motion to dismiss CLRA claim on ground that services associated with residential mortgages may be covered by the CLRA).

[445] See, e.g., Wofford v. Apple Inc., No. 11-CV-0034 AJB NLS, 2011 WL 5445054, at *2 (S.D. Cal. Nov. 9, 2011) (dismissing plaintiffs' claim that defendants violated the CLRA by fraudulently inducing them to download harmful software, on the grounds, among others, that software is not a tangible good or service under the CLRA; it is not a good because it is not "tangible chattel" and it is not a service because it does "not fit into the narrow definition of 'service' provided in Civil Code § 1761(b)"); In re iPhone Application Litig., No. 11-MD-02250-LHK, 2011 WL 4403963, at *10 (N.D. Cal. Sept. 20, 2011) ("all of Plaintiff's allegations against [Defendant] appear to be about software . . . . Software is neither a 'good' nor a 'service' within the meaning of the CLRA."); Sproul v. Oakland Raiders, Nos. A104542, A106658, 2005 WL 1941388, at *1 (Cal. Ct. App. Aug. 15, 2005) (holding that "personal seat licenses," which entitled plaintiffs to purchase season tickets to home and post-season games, were not tangible chattels and, therefore, were not covered by the CLRA); Boling v. Trendwest Resorts, Inc., No. G034203, 2005 WL 1186519, at *4 (Cal. Ct. App. May 19, 2005) (holding that vacation property timeshares, which were intangible "incorporeal rights in real property," were not "goods"

4. Exemptions

The CLRA does not apply to the sale of real property, including construction, sale or construction and sale of residential housing or commercial or industrial buildings.[446] Those in the business of advertising also are outside the reach of the CLRA, provided that such persons do not have knowledge of any deceptive methods, acts or practices.[447] In addition, the CLRA is probably unavailable in actions against a governmental entity.[448]

II. LIABILITY UNDER THE CLRA – SECTION 1770(a)

A. Prohibited Acts

Section 1770 states the CLRA's prohibitions. They are as follows:[449]

1. Passing off goods or services as those of another.
2. Misrepresenting the source, sponsorship, approval or certification of goods or services.
3. Misrepresenting the affiliation, connection or association with, or certification by, another.
4. Using deceptive representations or designations of geographic origin in connection with goods or services.[450]
5. Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or qualities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he or she does not have.[451]

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under the CLRA) (citing Navistar Int'l Transp. Corp. v. State Bd. of Equalization, 8 Cal. 4th 868, 875 (1994) (intangible property "is generally defined as property that is a 'right' rather than a physical object" but "[t]angible property is that which is visible and corporeal, having substance"), and Standard Oil Co. of Cal. v. State Bd. of Equalization, 232 Cal. App. 2d 91, 96 (1965) (the "portion of the gross receipts representing the transfer of the leases (a chattel real) was not taxable because, although personal property, it was not tangible personalty")).

[446] See Cal. Civ. Code § 1754; McKell, 142 Cal. App. 4th at 1488 (confirming that the CLRA does not apply to "the sale of real property").

[447] See Cal. Civ. Code § 1755 ("Nothing in this title shall apply to the owners or employees of any advertising medium, including, but not limited to, newspapers, magazines, broadcast stations, billboards and transit ads, by whom any advertisement in violation of this title is published or disseminated.").

[448] See Carboneau v. State of Cal., No. C041893, 2003 WL 21810924, at *3 (Cal. Ct. App. Aug. 7, 2003) (holding that nothing in the CLRA defeats governmental immunity).

[449] Cal. Civ. Code § 1770(a)(1)-(23) and (b)(1).

[450] In Colgan, a product advertised as "[M]ade in the USA," which was primarily assembled in the United States, but consisted of parts made in other countries, violated the CLRA. 135 Cal. App. 4th at 677. The Court of Appeal confirmed that "[t]he standards for determining whether a representation is misleading under the false advertising law apply equally to claims under the CLRA . . . . Conduct that is 'likely to mislead a reasonable consumer' thus violates the CLRA." Id. at 680 (quoting Nagel, 109 Cal. App. 4th at 54).

[451] But see Kowalsky, 771 F. Supp. 2d at 1162-63 (same as the standard for deceptive practices under the fraudulent prong of the UCL, "a representation will not violate the CLRA if the defendant did not

6. Representing that goods are original or new if they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used or secondhand.

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 not.

8. Disparaging the goods, services or business of another by false or misleading representation of fact.

9. Advertising goods or services with intent not to sell them as advertised.[452]

10. Advertising goods or services with intent not to supply reasonably expectable demand, unless the advertisement discloses a limitation of quantity.

11. Advertising furniture without clearly indicating that it is unassembled if that is the case.

12. Advertising the price of unassembled furniture without clearly indicating the assembled price of that furniture if the same furniture is available assembled from the seller.

13. Making false or misleading statements of fact concerning reasons for, existence of or amounts of price reduction.

14. Representing that a transaction confers or involves rights, remedies or obligations which it does not have or involve, or which are prohibited by law.

15. Representing that a part, replacement or repair service is needed when it is not.

16. Representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not.

17. Representing that the consumer will receive a rebate, discount or other economic benefit, if earning the benefit is contingent on an event to occur after the transaction.

18. Misrepresenting the authority of a salesperson, representative or agent to negotiate the final terms of a transaction.

19. Inserting an unconscionable provision in a contract.

20. Advertising that a product is being offered at a specific price plus a percentage of that price unless: (a) the total price is set forth in the advertisement; and (b) the specific price plus a specific percentage of that price represents a markup from the seller's costs or from the wholesale price of the product.[453]

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know, or have reason to know, of the facts that rendered the representation misleading at the time it was made").

[452] Again, the test that courts apply to this provision is similar to that for the UCL – whether the advertisement is likely to deceive or mislead a reasonable consumer. See Echostar Satellite Corp., 113 Cal. App. 4th at 1360 (finding that the reasonable consumer standard applies to the CLRA as it does to the UCL); see also Verdiner v. Pep Boys, No. B165747, 2004 WL 1146705, at *6, 7 (Cal. Ct. App. May 24, 2004) (reversing dismissal of CLRA claim without leave to amend where plaintiff alleged that defendant misled consumers by advertising labor charges as "hourly" when labor was charged using estimated repair times regardless of actual time spent).

[453] See Peralta v. Hilton Hotels Corp., No. D039510, 2003 WL 996217, at *8 (Cal. Ct. App. Mar. 11, 2003) (where room service included prices for individual menu items in addition to disclosed service charges and taxes, it did not offend section 1770(a)(20), which plainly indicates that it was intended to

21. Selling or leasing goods in violation of Chapter 4 . . . of Title 7 (concerning "Grey Market Goods").

22. Disseminating unsolicited prerecorded messages without consent.[454]

23. The home solicitation, as defined in subdivision (h) of section 1761, of a consumer who is a senior citizen where a loan is made encumbering the primary residence of that consumer for the purposes of paying for home improvements and where the transaction is part of a pattern or practice in violation of either subsection (h) or (i) of section 1639 of Title 15 of the United States Code or subsection (e) of section 226.32 of Title 12 of the Code of Federal Regulations.[455]

24. Prohibiting mortgage brokers and lenders, "directly or indirectly, to use a home improvement contractor to negotiate the terms of any loan that is secured, whether in whole or in part, by the residence of the borrower and which is used to finance a home improvement contract or any portion thereof."

B. Frequently Litigated Prohibitions

1. Section 1770(a)(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

Section 1770(a)(14) provides consumers with a basis to invalidate contracts. Courts have construed section 1770(a)(14) to include "oral misrepresentations or promises concerning the rights, remedies or obligations under a written contract."[456] Thus, the Legislature "intended to repudiate any purported bar or defense based on the parol evidence doctrine."[457]

2. Section 1770(a)(17) – Representing That The Consumer Will Receive A Rebate, Discount Or Other Economic Benefit That Is Actually Contingent On Another Event

Section 1770(a)(17) "prohibits bait-and-switch rebate offers that cannot be performed before or at the time of purchase . . . ."[458] In enacting section 1770(a)(17), "the Legislature

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apply to situations where consumers may be "unduly confused about the price of a certain product by misleading shelf tags, displays and media advertising").

[454] Cal. Civ. Code § 1770(a)(22)(A). This section does not apply to persons with an established relationship, collection calls or calls generated by the request of the consumer. Cal. Civ. Code § 1770(a)(22)(B).

[455] See Home Ownership Equity Protection Act, 15 U.S.C. § 1639 et seq.

[456] "By its very language, [section 1770(a)(14)] contemplates the existence of collateral oral promises, representations or agreements which may be inconsistent with the rights, remedies, or obligations set out in the written contract . . . ." Wang v. Massey Chevrolet, 97 Cal. App. 4th 856, 870 (2002) (holding that parol evidence rule cannot bar a CLRA claim based on section 1770(a)(14) because to do so would make a practice unlawful and simultaneously prevent a plaintiff from proving such; moreover, to allow defendant to assert a parol evidence or ratification defense to a section 1770(a)(14) claim would violate the CLRA's anti-waiver provision).

[457] Id.

[458] Pollard v. Ericsson, Inc., 125 Cal. App. 4th 214, 219-21 (2004) (holding that telephone company that offered rebate only to cellular telephone purchasers who activated wireless service did not violate section 1770(a)(17) of the CLRA).

intended to prohibit merchants from advertising a rebate or discount when they conceal from consumers the conditions to be satisfied to receive the rebate or discount."[459] For example, the Legislature intended to prevent making an advertised discount contingent upon purchasing an additional, more expensive or higher quality product than the product advertised at the discounted price.[460] The Court of Appeal has emphasized that the Legislature intended to prevent concealment and deception, and not to prohibit rebates altogether, reasoning that the Legislature regulated rebates in another, specific statute, and had not done so under the CLRA. Thus, according to the court, by addressing and expressly authorizing the conduct in a separate statute, the Legislature demonstrated that it only intended to require accurate advertising of rebates through the CLRA.[461]

3. Section 1770(a)(19) – Inserting An Unconscionable Provision In The Contract

Section 1770(a)(19) is a widely used provision of the CLRA. Significantly, this subdivision does not merely codify the defense of unconscionability, but supplies an affirmative right to relief for consumers who allegedly are injured by an unconscionable contract provision.[462] Section 1770(a)(19) requires courts to draw upon the doctrine of unconscionability, as stated in California Civil Code section 1670.5[463] and general principles of California law.[464]

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[459] Kramer v. Intuit Inc., 121 Cal. App. 4th 574, 580 (2004) (citing Assembly Comm. on Judiciary, Rep. on A.B. 292, Reg. Sess. (Cal. 1970) 4 Assembly J. 8466). In Kramer, the Court of Appeal concluded that the plaintiff did not allege that the rebate offer was misleading or deceptive. Hence, an offer that advertised a $30 discount when two types of software were purchased did not contravene the Legislature's intent in enacting section 1770(a)(17). The court reasoned that the rebate program at issue did not necessarily require a subsequent purchase, because the consumer could either purchase both products simultaneously or purchase one before the other in addition to purchasing the secondary product within 30 days of the product on which the discount was offered. Id. at 581. Because these two other options existed, the rebate offer's language did not require a "subsequent" purchase and thus did not violate section 1770(a)(17). Id. Given the legislative intent to avoid concealment cited by the court, it is interesting that the court focused on whether the rebate program violated the express language of section 1770(a)(17) – whether the earning of the rebate was contingent on an event to occur subsequent to the consummation of the transaction – rather than the fact that the rebate requirement was conspicuously disclosed on the product packaging.

[460] Id.

[461] Id. ("The legislative intent of preventing concealment or deception by nondisclosure is further bolstered by the subsequent enactment of another statute addressing rebates.").

[462] Truta v. Avis Rent A Car Sys., Inc., 193 Cal. App. 3d 802, 818 (1987) ("Contrary to defendants' assertion that unconscionability serves only as a defense to the enforcement of a contract or contract clause, it is readily perceived that the Legislature has provided a damage and injunctive remedy to consumers injured by unfair business practices arising from a contract provision deemed unlawful by reason of its unconscionable nature."); accord Cal. Grocers Ass'n, Inc., 22 Cal. App. 4th at 217 (the CLRA provides an affirmative statutory cause of action for unconscionability).

[463] The test under section 1670.5 is "'whether, in the light of the general background and the needs of the particular case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract . . . . The principle is one of the prevention of

These claims are fact-specific. For example, in Freeman v. Wal-Mart Stores, Inc., the Court of Appeal affirmed dismissal of a CLRA claim in which plaintiff alleged that a non-usage fee on a gift card – which defendant renamed a "shopping card" with the ability to add value – was unconscionable in violation of section 1770(a)(19).[465] The court held that plaintiff could have avoided the fee, which was disclosed on the back of the card and in an accompanying disclosure, by using the card. Moreover, the contract was not one of adhesion because defendant did not present plaintiff with a take it or leave it proposition. Plaintiff could have simply declined to purchase a shopping card and paid for purchases through other means.[466]

Also, relying primarily on the California Supreme Court's decision in Discover Bank,[467] some plaintiffs have filed claims under section 1770(a)(19) based on the inclusion of class-action waivers in arbitration agreements. As discussed above, the California Supreme Court held in Meyer v. Sprint Spectrum L.P. that a party to a contract containing allegedly unconscionable provisions may not challenge them under the CLRA unless the defendant has at least threatened to enforce those provisions, since the plaintiff cannot establish causation or damages absent

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oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.'" Freeman v. Wal-Mart Stores, Inc., 111 Cal. App. 4th 660, 669-70 (2003) (quoting Legislative Comm. Cmt., Assembly, 1979 Addition).

[464] In California, the unconscionability doctrine "'has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.'" A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d 473, 486 (1982) (citation omitted); accord Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 113-14 (2000). "Put another way, . . . unconscionability presents a 'procedural' and a 'substantive' aspect." Dean Witter, 211 Cal. App. 3d at 767; accord Woodside Homes of Cal., Inc. v. Super. Ct., 107 Cal. App. 4th 723, 727 (2003). The procedural element includes (a) "oppression," referring to an "inequality of bargaining power resulting in no real negotiation and the absence of meaningful choice," and (b) "surprise," where the purportedly offensive "terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms." Dean Witter, 211 Cal. App. 3d at 767; see also Woodside Homes, 107 Cal. App. 4th at 727 ("The former takes into consideration the parties' relative bargaining strength and the extent to which a provision is 'hidden'or unexpected . . . .").

[465] 111 Cal. App. 4th at 668.

[466] Id. at 669-70; see also Olsen, 48 Cal. App. 4th at 621-22; Lynch v. Commercial Union Ins. Co., No. A094846, 2001 WL 1660035, at *6 (Cal. Ct. App. Dec. 28, 2001) (trip cancellation insurance excluding third parties' pre-existing medical conditions as reason for cancellation did not violate section 1770(a)(19) because the policy's exclusion was conspicuous and unambiguous and policy permitted plaintiff to cancel and obtain a refund if policy terms did not satisfy him).

[467] 36 Cal. 4th at 161 (noting that, under California law, class-action waivers in arbitration agreements may be unconscionable in certain circumstances). But see Discover Bank v. Super. Ct., 134 Cal. App. 4th 886, 893, 898 (2005) (holding that, pursuant to choice-of-law provision, class-action waiver was enforceable under Delaware law); Lux v. Good Guys, Inc., No. SACV 05-300 CJC ANX, 2005 WL 1713421, at *1-3 (C.D. Cal. July 11, 2005) (form credit card agreement that required consumer to arbitrate claims pursuant to Nevada law was not procedurally unconscionable); Provencher v. Dell, Inc., 409 F. Supp. 2d 1196, 1203, 1205-06 (C.D. Cal. 2006) (class-action waiver upheld under Texas law pursuant to form agreement's choice-of-law provision).

attempts at enforcement.[468] Challenges to arbitration provisions under the CLRA also might be unsuccessful on other grounds, such as based on choice-of-law or preemption under the FAA,[469] but no published authority has directly addressed these issues.

C. The Anti-Waiver Provision – Section 1751 Of The CLRA

Section 1751 provides that "[a]ny waiver by a consumer of the provisions of [the CLRA] is contrary to public policy and shall be unenforceable and void." Courts have interpreted this provision to prohibit, for example, forum-selection clauses contained in consumer contracts.[470] The section also has been utilized by plaintiffs in arguing against the enforcement of class-action waivers in arbitration agreements,[471] as well as the enforcement of choice-of-law provisions.[472] Indeed, California courts have refused to enforce contract provisions that require consumers to litigate in a "far location" because California has a "materially greater interest" than the proposed forum state in ensuring that "its citizens have a viable forum in which to recover minor amounts of money."[473] The anti-waiver provision may have a broad reach, and factors into plaintiffs' counsel's increased reliance on the CLRA.

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[468] 45 Cal. 4th at 643.

[469] See, e.g., Vannier v. Gateway Cos., No. B179663, 2006 WL 121962, at *2, 3-4, 6 (Cal. Ct. App. Jan. 18, 2006) (rejecting claim that computer company's service contract included unconscionable arbitration provision in violation of section 1770(a)(19) because the FAA preempted an affirmative cause of action for violation of the CLRA and because South Dakota law applied) (relying on Ting, 319 F.3d 1126 (holding that section 1751's anti-waiver provision was preempted and did not void arbitration agreement's class action ban and two-year limitations period because CLRA is a statute of limited applicability)). In Ting, the Ninth Circuit reasoned that, while the defense of unconscionability is a generally applicable contract defense that is not preempted by the FAA, see id., 319 F.3d at 1150 n.15, "the CLRA applies only to noncommercial contracts and only to consumer contracts . . . . Because the CLRA applies to such a limited set of transactions, we conclude that it is not a law of 'general applicability.'" Id. at 1148 (citations omitted).

[470] Am. Online, 90 Cal. App. 4th at 15 (Virginia forum selection clause, accompanied by Virginia choice-of-law provision, "would necessitate a waiver of the statutory remedies of the CLRA, in violation of that law's antiwaiver provision (Civ. Code, § 1751) and California public policy.").

[471] The Ninth Circuit has concluded, however, that the CLRA, including the anti-waiver provision, is preempted by the FAA in the context of arbitration agreements. See Ting, 319 F.3d at 1152.

[472] See, e.g., Doe 1 v. AOL LLC, 552 F.3d 1077, 1083-84 (9th Cir. 2009); Am. Online, 90 Cal. App. 4th at 15.

[473] Aral, 134 Cal. App. 4th at 564. But see Net2Phone, 109 Cal. App. 4th at 590 (enforcing New Jersey forum selection clause where it was not shown that requiring non-injured consumers to litigate in New Jersey would deprive them of adequate protection).

D. Defenses To CLRA Claims

1. Statute Of Limitations

CLRA claims are subject to a three-year statute of limitations.[474] Courts have held that the statute runs from the time that a reasonable person would have discovered the basis for a claim.[475]

2. Notice And Cure Process

At least 30 days before a plaintiff may assert a cause of action for damages under the CLRA, the plaintiff must notify the prospective defendant(s) of the alleged violations and demand that they be corrected.[476] The notice must be in writing, delivered by certified or registered mail, return receipt requested, and it must provide sufficient detail to allow the violations to be addressed by the defendant.[477] Courts will often dismiss a CLRA damages claim for failure to comply strictly with these requirements.[478] As one court explained:

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[474] Cal. Civ. Code § 1783.

[475] See Mass. Mut. Life Ins. Co., 97 Cal. App. 4th at 1295.

[476] Cal. Civ. Code § 1782(a) ("Thirty days or more prior to the commencement of an action for damages pursuant to this title, the consumer shall do the following: (1) Notify the person alleged to have employed or committed methods, acts, or practices declared unlawful by Section 1770 of the particular alleged violations of Section 1770. (2) Demand that the person correct, repair, replace, or otherwise rectify the goods or services alleged to be in violation of Section 1770."); see also Laster v. T-Mobile USA, Inc., 407 F. Supp. 2d 1181, 1195 (S.D. Cal. 2005) (invalidating plaintiff's CLRA claims because he failed to comply with the 30-day notice requirement under the statute), aff'd sub nom., Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009), rev'd sub nom., AT&T Mobility, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011).

[477] See Cal. Civ. Code § 1782(a); Roybal v. Equifax, No. 2:05-cv-01207-MCE-KJM, 2008 WL 4532447, at *10-11 (E.D. Cal. Oct. 9, 2008) (letter complaining of false derogatory credit report entries was insufficient because it did not specify which entries were false or why they were inaccurate); Von Grabe, 312 F. Supp. 2d at 1304 (dismissing with prejudice plaintiff's CLRA claim because notice letter failed to identify any specific violations); cf. Gutierrez v. PCH Roulette, Inc., Nos. H024243, H024680, 2003 WL 22422431, at *4, 5 (Cal. Ct. App. Oct. 24, 2003) (although six-page demand letter did not describe every detail of the challenged transactions, it described plaintiffs' problems with defendant and invoked CLRA and therefore constituted sufficient notice to defendant). But see Morgan v. AT&T Wireless Servs., Inc., 177 Cal. App. 4th 1235, 1260-61 (2009) (finding requirement satisfied by filing of earlier complaints).

[478] See, e.g., Cattie v. Wal-Mart Stores, Inc., 504 F. Supp. 2d 939, 950 (S.D. Cal. 2007) (denying leave to amend to comply with notice requirements after plaintiff claimed damages without giving required notice, reasoning that statutory purpose of facilitating settlement would be undermined if amendment were permitted); Galindo v. Financo Fin., Inc., No. C 07-03991 WHA, 2008 WL 4452344, at *5 (N.D. Cal. Oct. 3, 2008) (dismissing plaintiffs' CLRA claim for failing to give notice but without prejudice, calling dismissal of CLRA claim with prejudice for failing to satisfy pre-litigation requirements "draconian"); Kandel v. Brother Int'l Corp., No. CV 08-1040, slip op. at 5-6 (C.D. Cal. May 12, 2009) (holding that sending notice to defendant's agent for service of process was insufficient under section 1782); Keilholtz v. Super. Fireplace Co., No. C 08-00836 CW, 2009 WL 839076, at *2 (N.D. Cal. Mar. 30, 2009) (concluding that compliance with notice requirement in prior state-wide

> The purpose of the notice requirement of section 1782 is to give the manufacturer or vendor sufficient notice of alleged defects to permit appropriate corrections or replacements. The notice requirement commences the running of certain time constraints upon the manufacturer or vendor within which to comply with the corrective provisions. The clear intent of the [CLRA] is to provide and facilitate precomplaint settlements of consumer actions wherever possible and to establish a limited period during which such settlement may be accomplished. This clear purpose may only be accomplished by a literal application of the notice provisions.[479]

If proper notice is provided, the defendant then has 30 days in which to correct the alleged violations. If the defendant undertakes appropriate corrective action, or agrees to do so, no action for damages will lie under the CLRA.[480] A defendant may avoid maintenance of a class

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class action, including same alleged CLRA violations, was not sufficient notice); Keilholtz v. Lennox Hearth Prods. Inc., No. C 08-00836, 2009 WL 2905960, at *3 (N.D. Cal. Sept. 8, 2009) (noting that pre-litigation notice requirement must be literally applied and strictly construed); Laster, 407 F. Supp. 2d at 1196 (rejecting plaintiff's argument that inadvertent disregard of the notice requirement should be excused); Von Grabe, 312 F. Supp. 2d at 1304 (dismissing CLRA claim with prejudice because notice letter was not sent timely or using required mail service); Doe 1, 719 F. Supp. 2d at 1110 (declining to dismiss plaintiff's claim with prejudice because doing so would not meet purpose of notice requirement; stating that claim should be dismissed until plaintiff complies with notice requirements); Waller v. Hewlett-Packard Co., No. 11cv0454-LAB (RBB), 2011 WL 6325972, at *5 (S.D. Cal. Dec. 16, 2011) (plaintiff failed to comply with CLRA notice requirements where plaintiff filed original complaint seeking damages, then gave statutory notice and filed first amended complaint seeking only injunctive relief, and subsequently filed second amended complaint (operative complaint) seeking damages; plaintiff had statutory obligation to provide notice before filing original complaint). Contra Morgan, 177 Cal. App. 4th at 1259 (finding requirement satisfied by filing of earlier complaints); Sanchez v. Wal-Mart Stores, Inc., No. S-06-cv-2573 DFL KJM, 2007 WL 1345706, at *3 (E.D. Cal. May 8, 2007) (finding notice given by a different member of putative class nearly a year before case was filed satisfied notice requirement); Shein v. Canon U.S.A., Inc., No. CV 08-07323 CAS (Ex), 2009 WL 3109721, at *4-7 (C.D. Cal. Sept. 22, 2009) (concluding that plaintiffs complied with notice requirement by sending demand letter to defendant's headquarters); see also Janda v. T-Mobile USA, Inc., 378 Fed. Appx. 705, 708-9 (9th Cir. 2010) (stating that "there is a split in authority on whether the CLRA requires strict compliance with its notice provision"); Whelan v. BDR Thermea, No. C-11-02146 EDL, 2011 WL 6182329, at *6-7 (N.D. Cal. Dec. 13, 2011) (denying defendant's motion to dismiss plaintiff's claim for failure to comply with CLRA notice requirements, where, although plaintiff filed original complaint seeking damages without giving notice, plaintiff subsequently gave notice and, after defendants responded, filed an amended complaint; the issue of notice was moot because the "proper remedy" for plaintiff's filing a complaint for damages before sending notice would have been leave to amend).

[479] Outboard Marine Corp. v. Super. Ct., 52 Cal. App. 3d 30, 40-41 (1975) (footnote omitted).

[480] Cal. Civ. Code § 1782(b) ("no action for damages may be maintained under Section 1780 if an appropriate correction, repair, replacement, or other remedy is given, or agreed to be given within a reasonable time, to the consumer within 30 days after receipt of the notice"); see also Kagan, 35 Cal. 3d at 590 ("If, within this 30-day period, the prospective defendant corrects the alleged wrongs, or indicates that it will make such corrections within a reasonable time, no cause of action for damages will lie.").

action for damages based on the notice and cure process if: (a) all consumers similarly situated have been identified; (b) all consumers so identified have been notified that upon their request the defendant shall take the appropriate corrective action; (c) the corrective action has been, or in a reasonable time shall be, taken; and (d) the defendant has ceased from engaging in, or within a reasonable time will cease to engage in, the challenged conduct.[481] By its terms, the CLRA does not permit a defendant to contest notice of alleged violations. It must either cure or the action for damages may proceed.[482]

In most instances, a plaintiff will file a complaint for injunctive relief, and then provide notice that he intends to amend to include damages claims. If the defendant does not cure within the 30-day time period, plaintiff may so amend.[483]

A defendant's efforts to take corrective action pursuant to section 1782 are deemed an offer to compromise and, thus, are inadmissible pursuant to California Evidence Code section 1152.[484] Furthermore, attempts to comply with a demand for corrective action are not to be construed as admissions of engaging in an act or practice declared unlawful by section 1770.[485] However, evidence of compliance or attempts to comply with a demand for corrective action may be introduced by a defendant for the purpose of establishing good faith or compliance with the CLRA.[486]

Upon receiving notice under the CLRA, a defendant may not avoid a potential CLRA class action by "picking off" the named plaintiff by resolving his or her own claim. The California Supreme Court resolved this issue in Kagan v. Gibraltar Savings & Loan Association. Specifically, the Court evaluated whether a consumer who provides a prospective defendant with notice of a class grievance under the CLRA, and informally obtains individual relief, subsequently may commence a class action for damages.[487] The Court held that, under these circumstances, the defendant has not destroyed the named plaintiff's adequacy as a class representative.[488] The Court emphasized that one goal of the CLRA is to enable plaintiffs to prosecute class actions.[489] In fact, the Legislature's explicit "intent was to make certain that a person can commence a class

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[481] Cal. Civ. Code § 1782(c).

[482] There is a split of authority on the issue of whether a claim for restitution under the CLRA is a claim for "damages" for these purposes. Compare Kennedy v. Natural Balance Pet Foods, Inc., No. 07-CV-1082 H(RBB), 2007 WL 2300746, at *3 (S.D. Cal. Aug. 8, 2007) (holding notice not required to seek restitution under the CLRA), with Laster, 2008 WL 5216255, at *17 (holding that failure to give required notice precludes action for restitution under CLRA based on rules of statutory construction).

[483] Cal. Civ. Code § 1782(d).

[484] Cal. Civ. Code § 1782(e).

[485] Id.

[486] Id.

[487] Kagan, 35 Cal. 3d at 587.

[488] See id. at 595 ("We now hold only that [defendant's] exemption of plaintiff from [the alleged CLRA violation] does not render her unfit per se to represent the class.").

[489] See id. at 593 ("settlement with the named plaintiffs will not preclude them from further prosecuting the action on behalf of the remaining members of the class").

action 30 days after he has made a demand on behalf of the class even if the merchant has offered to settle his particular claim in accordance with section 1782(b)."[490]

3. Bona Fide Error

Section 1784 provides that "[n]o award of damages may be given in any action . . . if the person alleged to have employed or committed such method, act or practice (a) proves that such violation was not intentional and resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid any such error and (b) makes an appropriate correction, repair or replacement or other remedy of the goods and services . . . ."[491] This corrective action must occur within 30 days following notice to the defendant of the alleged violation.

4. Safe Harbor

Courts have also applied the safe harbor for UCL claims similar to that outlined in Cel-Tech to CLRA claims.[492]

5. Alternative Choice Of Goods And Services

The doctrine of unconscionability generally has been recognized to involve an absence of a meaningful choice on the part of the "weaker" party to a contract.[493] Thus, although the decisions are split, the availability of alternative goods or services in the market may provide a defense to an "unconscionable contract provision" claim pursuant to section 1770(a)(19).[494]

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[490] Id. (citing James S. Reed, *Legislating For The Consumer: An Insider's Analysis Of The Consumers Legal Remedies Act*, 2 PAC. L.J. 1, 19 (1971)).

[491] Cal. Civ. Code § 1784.

[492] See Alvarez, 656 F.3d at 933-34 (finding that "[t]he California regulatory framework creates specific requirements for retail gasoline dispensing that may not be trumped by the general prohibitions of the CLRA" and that, as a result, defendants were entitled to safe harbor from plaintiffs' CLRA claims) (alterations omitted); Lopez, 201 Cal. App. 4th at 576-79 (plaintiffs contended that defendants violated the CLRA by designing vehicle odometers that allegedly over-registered mileage; court dismissed claims on grounds that a separate statute provides a "safe harbor" for use of odometers that register actual mileage within a certain percentage range).

[493] For example, in Dean Witter, the Court of Appeal concluded that the trial court should have denied class certification because plaintiff, who asserted unconscionability claims, "could have gone to a competing financial service and opened an IRA free of the offending provisions." 211 Cal. App. 3d at 766-67. The court reasoned that the "existence of a 'meaningful choice' to do business elsewhere" defeated a claim that a contract provision was "oppressive" and therefore procedurally unconscionable. Id. at 768. The court further held that the "oppression" factor is possibly defeated if the complaining party has a meaningful choice of reasonably available alternative sources for the desired goods or services that do not include the allegedly unconscionable terms.

[494] Compare Wayne v. Staples, Inc., 135 Cal. App. 4th 466, 482 (2006) (defendant's charge to customers of 100% markup on excess value insurance for shipped merchandise was not unconscionable and hence not unlawful under the CLRA because customers had meaningful choices and could ship packages without purchasing insurance coverage, obtain excess coverage from other carriers or ship packages from other retail shipping outlets); Schnall, 78 Cal. App. 4th at 1161 n.9 (discussed above); and Shvarts, 81 Cal. App. 4th at 1160 (same), with Shroyer v. New Cingular Wireless Servs., 498 F.3d 976, 985-86

6. Federal Preemption

As with the UCL, the defense of federal preemption may defeat a CLRA claim depending upon the federal statute at issue and the circumstances of the transaction.[495]

7. Disclosure

In misrepresentation cases under the CLRA, express disclosure of the allegedly misrepresented or nondisclosed practice provides a defense.[496]

8. Arbitration

The issues presented by arbitration are discussed in Section IV.A., infra.

III. REMEDIES UNDER THE CLRA

A. Legal And Equitable Relief

The CLRA provides for actual damages (with a $1,000 minimum in class actions), injunctive relief, restitution and punitive damages.[497] The CLRA allows for an additional statutory award of up to $5,000 to senior citizens or disabled persons (as defined in section 1761) where the trier of fact finds that: (1) "the consumer has suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct"; (2) one or more of the factors set forth in California Civil Code section 3345(b) is present; and (3) "an additional award is appropriate."[498] This additional remedy also is available in class actions.[499] Where damages are

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(9th Cir. 2007) (discussing split of authority and holding that meaningful choice as to service providers does not defeat procedural unconscionability).

[495] See, e.g., Roberts v. N. Am. Van Lines, Inc., 394 F. Supp. 2d 1174, 1177, 1180 (N.D. Cal. 2004) (federal Carmack Act, which regulates interstate shipment of goods and motor carrier liability, preempted CLRA claims regarding interstate moving company's "bait and switch" scheme because extensive federal regulations demonstrated Congress's intent to occupy the field). But see Smith, 135 Cal. App. 4th at 1482, 1484 (holding that NBA did not preempt CLRA claim against national bank); Hood, 143 Cal. App. 4th 526 (same).

[496] See, e.g., Augustine, 485 F. Supp. 2d at 1174-75 (affirming dismissal of CLRA claim challenging retroactive increase in interest rates upon default where credit card agreement expressly disclosed the consequences of default).

[497] Cal. Civ. Code § 1780 ("Any consumer who suffers any damage . . . may bring an action . . . 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.").

[498] Cal. Civ. Code § 1780(b)(1). The factors in Civil Code section 3345(b) include: (1) "whether the defendant knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons"; (2) whether the defendant's conduct caused the "loss or encumbrance of a primary residence, principal employment, or source of income; substantial loss of property set aside for retirement, or for personal or family care and maintenance; or substantial loss of payments received under a pension or retirement plan or a government benefits program, or assets essential to the health or welfare of the senior citizen or disabled person"; or (3) whether the plaintiffs "are substantially more vulnerable than other members of the public to the defendant's conduct because of age, poor health or

proven, the court may order a fluid recovery procedure to distribute the proceeds.[500] Section 1752 provides that the remedies available under the CLRA are not exclusive and are available in addition to "other procedures or remedies for any violation or conduct provided for in any other law."[501]

B. Attorneys' Fees

The CLRA allows a prevailing plaintiff to recover court costs and attorneys' fees as a matter of right.[502] Because the CLRA itself does not define "prevailing plaintiff," courts draw upon the general definition of "prevailing party" with respect to plaintiffs in California Code of Civil Procedure section 1032.[503] Courts thus hold that, where a plaintiff obtains a "net monetary recovery" on a CLRA claim, he is entitled to recover attorneys' fees.[504] The CLRA's language is mandatory: A court must award costs and fees to a prevailing plaintiff. A prevailing defendant, in contrast, is entitled to reasonable attorneys' fees only if it can establish that the plaintiff's CLRA claim was frivolous.[505] Where a CLRA claim for injunctive relief for a group of persons is

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infirmity, impaired understanding, restricted mobility, or disability, and actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct."

[499] Cal. Civ. Code § 1780(b)(2).

[500] See Corbett v. Super. Ct., 101 Cal. App. 4th 649, 677 (2002) (noting that the Legislature has allowed disgorgement into a fluid recovery fund in class actions and in consumer actions under the CLRA) (citing Kraus, 23 Cal. 4th at 137).

[501] Cal. Civ. Code § 1752; accord Vasquez v. Super. Ct., 4 Cal. 3d 800, 818 (1971).

[502] Cal. Civ. Code § 1780(e) ("The court shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to [the CLRA].").

[503] "'Prevailing party' includes the party with a net monetary recovery . . . ." Cal. Civ. Proc. Code § 1032(a)(4). Moreover, to obtain an attorneys' fees award as a "prevailing party," a plaintiff must prevail on a CLRA cause of action, and not a different cause of action alleged in the same lawsuit. Bennett v. Cal. Custom Coach, Inc., 234 Cal. App. 3d 333, 339 (1991) (where plaintiff prevailed only on claim for money had and received, award of costs did not include attorneys' fees "since recovery of attorney's fees was contingent on plaintiff prevailing on a different cause of action, i.e., his claim under the [CLRA]").

[504] See Reveles, 57 Cal. App. 4th at 1154; Graciano v. Robinson Ford Sales, Inc., 144 Cal. App. 4th 140, 149-54 (2006) (plaintiff was "prevailing party" entitled to attorneys' fees under the CLRA where she succeeded on CLRA claims; remaining non-CLRA claims were relevant only to the amount of fees and whether court could apportion fees); see also Kim v. Euromotors West/The Auto Gallery, 149 Cal. App. 4th 170, 178-79, 181 (2007) (pre-trial settlement does not prevent plaintiff from seeking attorneys' fees under the CLRA absent enforceable agreement to the contrary).

[505] "A court . . . may award reasonable attorney fees to a prevailing defendant if the court finds the plaintiff's prosecution of that action was not made in good faith." Matson Constr., Inc. v. Miller, No. A102564, 2005 WL 1663521, at *26 (Cal. Ct. App. July 18, 2005) (citing Cal. Civ. Code § 1780(d)) (although the court rejected plaintiffs' statutory cause of action, the court did not find that plaintiffs had pursued their action in bad faith and thus defendant was not entitled to recover attorneys' fees under the CLRA). But see Cardenas v. Gaither Group, Inc., No. H022579, 2002 WL 863597, at *4 (Cal. Ct. App. May 6, 2002) (section 1780(d)'s provision that "prevailing plaintiff" is entitled to recover attorneys' fees and costs was subject to Code of Civil Procedure section 1033(a), which grants the court discretion to deny attorneys' fees and costs where the plaintiff sues in a court of unlimited jurisdiction

successfully brought, a plaintiff might also seek attorneys' fees under California Civil Procedure Code section 1021.5 (see UCL discussion above).

IV. PROCEDURAL ASPECTS OF THE CLRA

A. Venue

The CLRA provides that "[a]n action under subdivision (a) or (b) may be commenced in the county in which the person against whom it is brought resides, has his or her principal place of business, or is doing business, or in the county where the transaction or any substantial portion thereof occurred."[506] The CLRA's venue provisions, however, do "not override the general rule [that] a defendant is entitled to have an action tried in the county of his or her residence."[507] Section 1780(c) requires that the plaintiff file an affidavit with his or her complaint stating facts that establish venue where the action is filed.[508] Upon motion by the court or a party, a court must dismiss an action where the plaintiff fails to file the required affidavit.[509]

B. Motions For "No Merit" Or "No Defense" Determination

In class actions under the CLRA, motions for summary judgment pursuant to California Code of Civil Procedure section 437c are not allowed.[510] Rather, the CLRA allows a party, upon ten days' notice, to make a motion to determine whether "[t]he action is without merit or there is no defense to the action."[511] Courts nonetheless have concluded that the procedural

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and recovers a judgment of less than $25,000; thus court possessed discretion to deny attorneys' fees and costs where CLRA plaintiff recovered less than $25,000 in unlimited civil action following a five day jury trial in which plaintiff prevailed on only one cause of action out of ten).

[506] Cal. Civ. Code § 1780(d).

[507] Gallin v. Super. Ct., 230 Cal. App. 3d 541, 543, 545 (1991) (venue was improper where no corporate defendant maintained its principal place of business, single consumer transaction occurred, and at least some of the individual defendants did not reside because, in part, "rights protected by the [CLRA] do not rise to the level of a civil right" that warranted venue where the transaction had occurred).

[508] Cal. Civ. Code § 1780(c).

[509] Id.; Allen v. DaimlerChrysler Motors Corp., No. A105864, 2005 WL 318753, at *3-4 & n.4 (Cal. Ct. App. Feb. 10, 2005) (although a plaintiff alleges multiple causes of action besides the CLRA, the general venue statute does not excuse section 1780(c)'s requirement that the plaintiff file an affidavit that venue is proper; it is likely that the Legislature intended that neither a court nor a party may waive this provision, and the plaintiff's failure to file an affidavit of venue mandates dismissal).

[510] Cal. Civ. Code § 1781(c) ("A motion based upon [Code of Civil Procedure section 437(c), for summary judgment] shall not be granted in any action commenced as a class action pursuant to [1781(a)].").

[511] Cal. Civ. Code § 1781(c)(3) ("If notice of the time and place of the hearing is served upon the other parties at least 10 days prior thereto, the court shall hold a hearing . . . to determine if any of the following apply to the action: . . . (3) The action is without merit or there is no defense to the action.").

requirements for a "no merit" or "no defense" determination, except for the timing requirements, mirror those for a motion for summary judgment or summary adjudication.[512]

Moreover, most courts have held that a plaintiff is not required to controvert a no-merit motion in order to certify a class. Stated differently, a defendant may not take the position that plaintiff is required to show, at the class certification stage, that his or her CLRA claim has merit in order to obtain class certification.[513] This, however, is not to say that a defendant is prohibited from filing a no-merit motion to be heard prior to or concurrently with a plaintiff's motion to certify a class.[514]

C. Class Action Rules

The CLRA specifies unique class certification standards and procedures which must be applied to CLRA claims.[515] In enacting these unique rules, the Legislature was guided by Federal

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[512] See, e.g., Olsen, 48 Cal. App. 4th at 624; Echostar Satellite Corp., 113 Cal. App. 4th at 1359 (affirming trial court's no-merits determination even though "the trial court chose to deem the dismissal as one after summary judgment rather than one after a no-merit determination," but that there is "no meaningful distinction in the choice"); see also Leonhardt v. AT&T Co., No. A103610, 2005 WL 240428, at *7 (Cal. Ct. App. Jan. 21, 2005) ("If the motion is originally denominated as one for summary judgment . . ., it can be treated as a motion to determine that the action is without merit.") (internal quotations and citations omitted); Smith, 135 Cal. App. 4th at 1474-75 (reviewing both motion for summary judgment and motion for no-merits determination under a summary judgment standard) (citing Kagan, 35 Cal. 3d at 589 and Echostar Satellite Corp., 113 Cal. App. 4th at 1359-62).

[513] See Linder, 23 Cal. 4th at 438 ("Nowhere does the CLRA purport to require a showing of potential success on the merits of the suit before certification may be ordered. Although trial courts are authorized, upon a properly noticed motion, to determine that '[t]he action is without merit or there is no defense' thereto ([section 1781(c)(3)]), that procedure appears independent of the procedure for certification (see [section 1781(c)(1)]).") (footnote omitted.) Another interpretation of section 1781(c), however, is that, in order to certify a CLRA class action, a court must address all four points enumerated under section 1781(c), including that the action has merit, or that it is not without merit. However, this is not how the majority of courts, including the California Supreme Court in Linder, have construed section 1781(c).

[514] See, e.g., Leonhardt, 2005 WL 240428, at *10 ("Once [the trial court] determined that the CLRA claim could not be maintained, it clearly did not have to determine whether a class could be certified to pursue the nonmeritorious claim."); Bacon v. Sasaki, No. B158908, 2003 WL 23096504, at *5 (Cal. Ct. App. Dec. 31, 2003) ("Postponement of class action treatment until a determination of liability has been made should not prejudice potential class members. If the named plaintiffs lose, the potential class members will not be bound by the judgment, and if the plaintiffs win, potential class members still will be able to opt out of the litigation if they desire."). Courts prefer, however, for a summary judgment motion or other merits determination to follow a ruling on class certification and notice to the class. See Fireside Bank v. Super. Ct., 40 Cal. 4th 1069, 1074 (2007) ("A largely settled feature of state and federal procedure is that trial courts in class action proceedings should decide whether a class is proper and, if so, order class notice before ruling on the substantive merits of the action. The virtue of this sequence is that it promotes judicial efficiency, by postponing merits rulings until such time as all parties may be bound, and fairness, by ensuring that parties bear equally the benefits and burdens of favorable and unfavorable merits rulings.") (citations omitted), rev. denied, Dec. 1, 2010.

[515] See Cal. Civ. Code § 1781.

Rule of Civil Procedure 23(a), which sets forth federal class action standards, and the California Supreme Court's opinion in Daar v. Yellow Cab Co.[516] The standards for certifying a CLRA claim for class treatment are set forth in California Civil Code section 1781(b), which provides:

> The court shall permit the suit to be maintained on behalf of all members of the represented class if all of the following conditions exist:
>
> (1) It is impracticable to bring all members of the class before the court;
>
> (2) the questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members;
>
> (3) the claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class; and
>
> (4) the representative plaintiffs will fairly and adequately represent the interests of the class.

Courts have no discretion to deny class certification if these factors are satisfied.[517]

While similar in many respects, the standards for certification under section 1781 are not identical to those used for other California class actions authorized by California Code of Civil Procedure section 382. For example, "[u]nlike a plaintiff proceeding under [section 382], a plaintiff moving to certify a class under the CLRA is not required to show that a substantial benefit will result to the litigants and the court. Thus, unlike [section 382], the CLRA does not require that a plaintiff show a probability that each class member will come forward and prove his separate claim to a portion of the recovery."[518] The CLRA permits and, indeed, encourages class actions when individual recovery might be minimal.[519]

Particularly after Meyer, defeating certification of CLRA claims may turn on identifying non-common issues. The CLRA requires "damage as a result of" the challenged practice, which impacts commonality. In addition, the requirement may impact adequacy and typicality. For

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[516] 67 Cal. 2d 695 (1967). See David E. Roberts, *Review of Selected 1970 California Legislation*, 2 PAC. L.J. 343, 346 (1971); James S. Reed, *Legislating for the Consumer: An Insider's Analysis of the Consumers Legal Remedies Act*, 2 PAC. L.J. 1, 13-14 (1971) (because the conditions precedent to maintenance of a class action under section 1781 are "almost identical" to those contained in Federal Rule of Civil Procedure 23(a), "[t]he federal experience would, therefore, seem to be good authority in construing the California statute").

[517] See Dean Witter, 211 Cal. App. 3d at 765 (citing Hogya v. Super. Ct., 75 Cal. App. 3d 122, 138-40 (1977)).

[518] Mass. Mut. Life Ins. Co., 97 Cal. App. 4th at 1287 n.1 (citing Hogya, 75 Cal. App. 3d at 134-35).

[519] See Hogya, 75 Cal. App. 3d at 138 (noting that section 1780(a)(1)'s authorization for class awards as low as $300 (now $1,000) "implies some consumer class actions might go forward even though the individual claims of class members would be minimal" and that section 1781(a)'s language regarding "other" relief contemplates class actions where no damages are sought).

instance, in Wilens v. TD Waterhouse Group, Inc., the Court of Appeal found that class treatment was inappropriate because it could not be presumed that each class member was harmed by an allegedly unconscionable provision in customer agreements.[520] As the court explained, "[r]elief under the CLRA is specifically limited to those who suffer damage, making causation a necessary element of proof . . . . [Plaintiff] argues that differences in calculating damages are not a proper basis for the denial of class certification. But the individual issues here go beyond mere calculation; they involve each class member's entitlement to damages."[521] Accordingly, since the insertion of an unconscionable provision did not by itself cause damage, the court denied class certification.[522]

However, certification of a CLRA claim may be granted without demonstrating that all unnamed class members relied on alleged material misrepresentations. For instance, in In re Steroid Hormone Product Cases, the named plaintiff alleged that defendant sold over-the-counter products containing anabolic steroids without requiring a prescription and without notifying customers that the products contained a controlled substance in violation of the UCL and CLRA.[523] The trial court denied class certification on the grounds that individualized inquiries would be required into whether the illegality of the substance would be material to each purchaser and whether the defendant's alleged conduct caused injury to each purchaser.[524] The Court of Appeal found that the trial court incorrectly denied certification. Although "both the named plaintiff and unnamed class members must have suffered some damage caused by a practice deemed unlawful under [the CLRA]" to obtain relief, the court stated that so long as the named plaintiff can show that "'material misrepresentations were made to the class members, at least an inference of reliance [i.e. causation/injury] would arise as to the entire class.'"[525]

Although courts in practice often apply the same class action procedures to CLRA claims that they use under section 382 and Federal Rule of Civil Procedure 23, the CLRA sets forth its own requirements. Section 1781(c) requires notice and a hearing before any class certification

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[520] 120 Cal. App. 4th at 754-56.

[521] Id.

[522] Several unpublished decisions contain a similar analysis. See Leonhardt, 2005 WL 240428, at *9 (holding that "[t]his case does not lend itself to the presumption that each class member suffered damage by the mere insertion of an arbitration clause in the notice" and "since [plaintiff] cannot establish any damage, her CLRA claim must fail"); Harris v. HSN LP, No. G036938, 2007 WL 61068, at *4 (Cal. Ct. App. Jan. 10, 2007) (denying class certification of CLRA claim where it could not be presumed that all potential class members were damaged by virtue of the purported violation); Stern v. Getz, Krycler & Jakubovits, No. B173640, 2005 WL 647356, at *3-4 (Cal. Ct. App. Mar. 22, 2005) (because plaintiffs suffered no actual damage or any pecuniary loss based on defendants' conduct, plaintiffs' CLRA claim failed).

[523] 181 Cal. App. 4th 145, 149 (2010), rev. denied, Apr. 14, 2010.

[524] Id. at 153.

[525] Id. at 156, 157 (quoting Mass. Mut. Life Ins. Co., 97 Cal. App. 4th at 1292-93).

determination.[526] The CLRA expressly permits class notice via publication if personal notification is unreasonably expensive or if all members cannot be personally notified.[527] This includes notice pursuant to Government Code section 6064, which requires once-a-week publication for four successive weeks.[528] Individual notification may nevertheless be required when damages are substantial. The CLRA also specifically provides that either party may be forced to bear the cost of class notice.[529] The class notice must include certain elements, including the right to opt out.[530]

[526] See Stern v. Super. Ct., 105 Cal. App. 4th 223, 233 (2003) (trial court improperly ruled that action was not a class action nine days after plaintiff filed amended complaint particularly because section 1781(c) requires ten days' notice and a hearing before the court determines whether a class may be certified).

[527] See Cal. Civ. Code § 1781(d) ("The party required to serve notice may, with the consent of the court, if personal notification is unreasonably expensive or it appears that all members of the class cannot be notified personally, give notice as prescribed herein by publication in accordance with Section 6064 of the Government Code in a newspaper of general circulation in the county in which the transaction occurred.").

[528] Cal. Gov't Code § 6064. The period of notice under this section commences with the first day of publication and terminates at the end of the twenty-eighth day, including the first day. Id.

[529] See Cal. Civ. Code § 1781(d) ("the court may direct either party to notify each member of the class of the action"). While one early case questioned the constitutionality of requiring a defendant essentially to finance a lawsuit against it, see Cartt v. Super. Ct., 50 Cal. App. 3d 960, 974-75 (1975), this issue has not been raised in subsequent CLRA cases.

[530] See Cal. Civ. Code § 1781(e)(1)-(3).