California's Unfair Competition Law and Consumers Legal Remedies Act **2020 Annual Overview**

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Our clients include, among others, commercial and consumer banks, residential lenders, student lending companies, automobile finance companies, credit card issuers, payment processors, investment banks, e-commerce companies, telecommunications companies and insurance companies. We have litigated virtually all aspects of the financial services business, including matters regarding lending and servicing, retail banking, unfair practices, insolvency and federal and state regulatory compliance.

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OVERVIEW OF DEVELOPMENTS[1]

In California, class action lawyers wield two powerful tools: the Unfair Competition Law, California Business and Professions Code sections 17200–17209 ("UCL"); and the Consumers Legal Remedies Act, California Civil Code sections 1750–1784 ("CLRA"). The UCL forbids "unlawful, unfair or fraudulent" conduct in connection with virtually any type of business activity.[2] With its sweeping liability standards and broad equitable remedies, the UCL is the weapon of choice for plaintiffs' lawyers. 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, which explicitly prohibits 24 separate business acts and practices, provides for streamlined class certification and dispositive motion proceedings.

Decisions from California and federal courts in 2019 provided important direction under the UCL and CLRA in the areas of arbitration, Article III standing and statutory standing, the time to bring a class action to trial and the limits on classwide financial relief under the UCL and CLRA, the standards for "unfairness" under the UCL and other issues.

First, the California Supreme Court's 2017 decision in McGill v. Citibank, N.A.[5] continues to cast a long shadow over the enforceability of **arbitration** provisions in California. In McGill, the Court ruled that a provision in an arbitration agreement precluding an arbitrator from awarding public injunctive relief under the UCL and CLRA—specifically, injunctive relief having the "'primary purpose and effect of' prohibiting unlawful acts that threaten future injury to the general public"[6]—is unenforceable under California public policy.

Analyzing the rule announced in McGill, the Ninth Circuit held in Blair v. Rent-A-Center, Inc.,[7] that the Federal Arbitration Act[8] does not preempt the McGill rule because the rule is a "generally applicable contract defense" that does not impermissibly interfere with arbitration.[9] The Ninth Circuit further stated, in a footnote and without any analysis, that the injunctive relief plaintiff sought in Blair was "public" injunctive relief as defined in McGill because plaintiff sought "to enjoin future violations of California's consumer protection statutes, [which was]

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1 The research in this Overview is current through February 2019. The purpose of the Overview is to provide information and perspective. We sometimes reference unpublished and/or noncitable opinions to demonstrate reasoning, illustrate trends, etc. The authors thank Stroock associates Gaganjyot K. Sandhu and Jihyuk Song and paralegal Andrew Aquino for their invaluable assistance with this year's Overview.

2 Cal. Bus. & Prof. Code § 17200. The UCL also expressly prohibits "unfair, deceptive, untrue or misleading advertising" and incorporates California's False Advertising Law, Cal. Bus. & Prof. Code § 17500 et seq. ("FAL"). See id. Because the standards for liability under the UCL and FAL are similar, and the remedies are co-extensive, claims under the FAL are typically pleaded as UCL claims.

3 Cal. Civ. Code §§ 1770(a) (stating prohibited practices), 1761 (definitions).

4 See Cal. Civ. Code § 1780(a).

5 2 Cal. 5th 945 (2017).

6 Id. at 955.

7 928 F.3d 819 (9th Cir. 2019).

8 9 U.S.C. §§ 1-16 (the "FAA").

9 Blair, 928 F.3d at 827-29.

relief oriented to and for the benefit of the general public."[10] The Ninth Circuit concurrently issued unpublished opinions in two companion cases, reaching the same result.[11] Ultimately, this issue might reach the Supreme Court.

With FAA preemption at least seemingly off the table, defendants in a number of cases have argued—with some success—that McGill is factually distinguishable and does not preclude enforcement of an arbitration agreement where the relief sought is not the type of "public" injunctive relief at issue in McGill, but rather "private" relief even when sought on behalf of a putative class. In an important decision, the California Court of Appeal recently endorsed this approach in Clifford v. Quest Software, Inc.,[12] where the appellate court held that an injunction requiring defendant to comply with wage and hour laws was not "public" relief because such relief primarily would benefit plaintiff and individuals similarly situated to plaintiff rather than the general public.[13] Federal district courts in California have continued to reach conflicting results depending on the facts of the particular case, with some courts broadly applying McGill,[14] and others taking a more narrow approach.[15] At least one court declined to reach the issue where the agreement at issue authorized the arbitrator to award public injunctive relief.[16]

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[10] Id. at 831 n.3.

[11] See McArdle v. AT&T Mobility LLC, 772 F. App'x 575, 575 (9th Cir. 2019) (affirming district court's denial of defendant's motion to compel arbitration for the reasons set forth in Blair), *pet. for cert. filed* (Feb. 27, 2020); Tillage v. Comcast Corp., 772 F. App'x 569, 569 (9th Cir. 2019) (affirming district court's denial of defendant's motion to compel arbitration for the reasons set forth in Blair), *pet. for cert. filed* (Feb. 27, 2020).

[12] 38 Cal. App. 5th 745 (2019), *review denied* (Nov. 13, 2019).

[13] See id. (citing McGill, 2 Cal. 5th at 955).

[14] See Delisle v. Speedy Cash, No. 3:18-CV-2042-GPC-RBB, 2019 WL 2423090, at *8 (S.D. Cal. June 10, 2019) (denying motion to compel arbitration of UCL and CLRA claims seeking to enjoin defendant's practice of charging allegedly excessive interest rates and to require defendant to provide corrective advertising and notice to the public), *appeal filed*, No. 19-55794 (9th Cir. July 10, 2019); Eiess v. USAA Fed. Sav. Bank, No. 19-cv-00108-EMC, 2019 WL 3997463, at *11, *13 (N.D. Cal. Aug. 23, 2019) (granting motion to compel arbitration to the extent plaintiff sought monetary relief or a determination of liability under the UCL and CLRA but denying motion to the extent plaintiff sought public injunctive relief in the form of an order requiring defendant to amend its deposit agreement to better reflect its practice of charging multiple NSF fees); Fernandez v. Bridgecrest Credit Co., LLC, No. EDCV 19-877-MWF-SHK, 2019 WL 7842449, at *6 (C.D. Cal. Oct. 29, 2019) (finding that plaintiff sought public injunctive relief based, in part, on the "unique relationship between consumers and car loan lenders").

[15] See Sponheim v. Citibank, N.A., No. SACV19264JVSADSX, 2019 WL 2498938, at *1, *4-5 (C.D. Cal. June 10, 2019) (holding that UCL claims seeking an "order on behalf of the general public enjoining [defendant] from continuing to misrepresent its [fee] policies in its publicly available documents and marketing materials" was arbitrable under McGill because plaintiff was "seek[ing] public injunctive relief as a mere incidental benefit to his primary aim of gaining compensation for injury for himself and others similarly situated"); Colopy v. Uber Techs. Inc., No. 19-CV-06462-EMC, 2019 WL 6841218, at *2 (N.D. Cal. Dec. 16, 2019) (analyzing claims and determining plaintiff sought private, not public, injunctive relief under McGill); Magana v. DoorDash, Inc., 343 F. Supp. 3d 891, 901 (N.D. Cal. 2018) ("[P]laintiff's argument makes clear that the injunctive relief he seeks would be entirely opposite of what McGill requires—any benefit to the public would be derivate of and ancillary to the benefit to [defendant's] employees . . . . Therefore, [plaintiff] does not assert a claim for public injunctive relief under state law." (emphasis in original)); McGovern v. U.S. Bank N.A., No. 18-CV-1794-CAB-LL, 2019 WL 329537, at *9 (S.D. Cal. Jan. 25, 2019) (finding that any benefit to the general public would be only

Second, district courts in California addressed issues related to **Article III standing and statutory standing** under the UCL and CLRA. In Bass v. Facebook, Inc.,[17] the district court found, on an issue of first impression in the Ninth Circuit, that a plaintiff's loss of time spent "sorting through" around thirty "phishing" emails received as a result of a data breach was sufficient to establish Article III standing.[18] However, the court found that plaintiff failed to establish standing under the UCL or CLRA. Specifically, plaintiff failed to plausibly allege either that there was a market for his stolen personal information and his ability to participate in that market was impaired or that plaintiff intended to sell his personal information and the value of the information had been devalued by the breach.[19] By contrast, in Cappello v. Walmart Inc.,[20] plaintiffs brought a putative class action against Walmart for disclosing customers' identities and video media purchases to Facebook without the customers' consent. Finding that plaintiffs had plausibly alleged a violation of Facebook's own privacy policy, the district court concluded that plaintiffs had adequately alleged both economic loss and causation under a "benefit of the bargain" theory and therefore had standing under the UCL.[21]

Third, in a potentially important decision related to the **time to bring a UCL class action to trial**, the California Court of Appeal strictly enforced California's statutory time limits. In Rel v. Pacific Bell Mobile Services,[22] the trial court dismissed a proposed UCL class action because plaintiff failed to bring the action to trial within five years, as required under Code of Civil Procedure section 583.310. In prior proceedings, the trial court had sustained a demurrer to plaintiff's class allegations without leave and later granted a motion to strike plaintiff's class allegations, and plaintiff had successfully appealed in each instance under California's "death knell" doctrine, which allows an immediate appeal from an order denying class certification. Plaintiff contended that the "death knell" orders were tantamount to trials, thus satisfying section 583.310's five-year rule and also qualifying for the three-year extension under section 583.320(a)(3) for new trials following appeal. Addressing each as an issue of first impression, the Court of Appeal rejected plaintiff's arguments, strictly enforced the requirement to timely bring cases—including class actions—to trial as set forth in sections 583.310 and 583.320, and affirmed the dismissal.[23]

Fourth, in an interesting decision extending **the limits of class damages** under the CLRA, the Ninth Circuit in Nguyen v. Nissan N. Am., Inc.,[24] reversed the district court's class certification denial in a case alleging that defendant concealed known defects in vehicle clutch

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incidental because the general public had not and would not be subject to any of the allegedly improper fees that constituted plaintiff's injury).

[16] See Hunter v. Kaiser Found. Health Plan, Inc., No. 19-CV-01053-WHO, 2020 WL 264330, at *13 (N.D. Cal. Jan. 17, 2020) (granting defendant's motion to compel arbitration and declining to reach issue of whether plaintiff actually sought "public" injunctive relief because arbitration agreement did not preclude arbitrator from awarding public injunctive relief).

[17] 394 F. Supp. 3d 1024 (N.D. Cal. 2019).

[18] Id. at 1035 (citing Dieffenbach v. Barnes & Noble, Inc., 887 F.3d 826, 828 (7th Cir. 2018)).

[19] See id. at 1040.

[20] 394 F. Supp. 3d 1015, 1017 (N.D. Cal. 2019).

[21] Id. at 1023.

[22] 33 Cal. App. 5th 882 (2019).

[23] See id. at 888-92.

[24] 932 F.3d 811 (9th Cir. 2019).

assemblies. The Ninth Circuit approved plaintiff's proposed "benefit of the bargain" damages, which sought to recover the difference in value between the non-defective vehicles defendant promised and the defective vehicles that were actually delivered (i.e., essentially the cost to replace the defective part with a non-defective part), regardless of whether the faulty clutch caused any actual performance issues for a particular class member.[25] Class-action defendants are likely to see the Ninth Circuit endorse the approach in other class actions based not only on product defects but also any claims alleging misrepresentations concerning a defendant's products or services. By contrast, the California Court of Appeal in Esparza v. Safeway, Inc.[26] granted summary judgment to defendant in a case alleging that defendant failed to pay premium wages. The certified class's theory of restitution under the UCL was based on the value of a statutory guarantee to pay such wages rather than the amount of any actual accrued unpaid wages, as the latter theory would likely have raised individual issues precluding certification. At the summary judgment stage, the court rejected plaintiff's novel theory that the value of the statutory guarantee could be based on the penalty for a violation of the statute, which was fatal to the class's claims.[27]

Fifth, in two cases of topical interest, federal courts rejected pleading challenges by broadly applying **standards for "unfairness" under the UCL**. In Colgate v. JUUL Labs, Inc.,[28] plaintiffs asserted various claims against a manufacturer of electronic nicotine delivery systems, including under the UCL based on defendant's alleged intentional advertising to minors. Largely relying on a depublished California Court of Appeal opinion addressing the targeting of minors in cigarette advertising,[29] the district court held that plaintiffs stated a claim for unfair business practices under both the "Sperry test"[30] and the "tethering test" because a public policy against marketing e-cigarettes to minors was "tethered" to public policies expressed in statutes prohibiting the sale of e-cigarettes to minors.[31] In a relatively rare case of a UCL claim brought by a competitor, Diva Limousine, Ltd. v. Uber Technologies, Inc.,[32] the district court denied defendant's motion to dismiss plaintiff's UCL claim under the unfair prong because defendant's alleged policy of misclassifying drivers as independent contractors rather than employees violated "the policy or spirit" of federal antitrust laws.[33]

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[25] See id. at 818-22.

[26] 36 Cal. App. 5th 42 (2019).

[27] See id. at 55.

[28] 402 F. Supp. 3d 728 (N.D. Cal. 2019).

[29] Mangini v. R.J. Reynolds Tobacco Co., 21 Cal. Rptr. 2d 232 (Cal. Ct. App. 1993), *review granted and opinion superseded*, 859 P.2d 672 (Cal. 1993), *aff'd*, 7 Cal. 4th 1057 (1994), *overruling recognized by* Colgate, 402 F. Supp. 3d 728.

[30] See F.T.C. v. Sperry & Hutchinson Co., 405 U.S. 233, 244 n.5 (1972) (noting that a practice may be "unfair" under the Federal Trade Commission Act where the practice: (1) "offends public policy as it has been established by statutes, the common law, or otherwise"; (2) "is immoral, unethical, oppressive, or unscrupulous"; or (3) "causes substantial injury to consumers (or competitors or other businessmen)").

[31] See 402 F. Supp. 3d at 760.

[32] 392 F. Supp. 3d 1074 (N.D. Cal. 2019)

[33] See id. at 1090-91 (quoting Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 187 (1999)).

Other important cases involved the terms of a CLRA corrective offer,[34] the scope of goods and services subject to the CLRA,[35] limits on standing to seek injunctive relief based on future purchases,[36] federal preemption,[37] deceptive labeling[38] and the need to plead actual knowledge of product defects.[39]

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[34] See Valdez v. Seidner-Miller, Inc., 33 Cal. App. 5th 600, 615 (2019) (holding that a corrective offer under the CLRA cannot require the consumer to release either CLRA claims for injunctive relief or non-CLRA claims), *review denied* (June 26, 2019).

[35] See Barkan v. Health Net of Cal., Inc., No. CV 18-6691-MWF (ASX), 2019 WL 1771653, at *6 (C.D. Cal. Feb. 7, 2019) (granting defendant's motion to dismiss CLRA claim because insurance contracts are not "goods" and "ancillary services that insurers provide" are not "services" under the CLRA); Holt v. Noble House Hotels & Resort, Ltd, 370 F. Supp. 3d 1158, 1166-67 (S.D. Cal. Feb. 28, 2019) (finding, on an issue of first impression under California law, that restaurant menus were not "advertisements" under the CLRA).

[36] See Loomis v. Slendertone Distribution, Inc., No. 3:19-cv-854-MMA (KSC), 2019 WL 5790136, at *26 (S.D. Cal. Nov. 6, 2019) (finding plaintiff lacked standing to seek injunctive relief under the UCL where she alleged only that she "would consider" buying another electrical muscle stimulation device from defendant without specifying the particular product).

[37] See Dachauer v. NBTY, Inc., 913 F.3d 844, 849 (9th Cir. 2019) (holding that most of plaintiff's claims under the UCL and CLRA challenging labels on dietary supplements were preempted because plaintiff sought to impose "structure/function" labeling requirements under California law that differed from applicable federal requirements); Winebarger v. Pa. Higher Educ. Assistance Agency, 411 F. Supp. 3d 1070, 1089 (C.D. Cal. 2019) (finding plaintiff's UCL and CLRA claims based on loan provider's failure to provide accurate information were disclosure claims preempted by 20 U.S.C. § 1098g) (citing Chae v. SLM Corp., 593 F.3d 936, 938, 943 (9th Cir. 2010) (finding that UCL and CLRA claims alleging that student loan servicer improperly assessed interest charges were barred by preemption under the Higher Education Act)); Beasley v. Lucky Stores, Inc., 400 F. Supp. 3d 942, 951 (N.D. Cal. 2019) (finding plaintiff's UCL claim challenging the sale of non-dairy creamer containing partially hydrogenated oil (PHO) was preempted by the federal Consolidated Appropriations Act for 2016, which provided that "no PHOs . . . shall be deemed unsafe . . . [or] adulterated" under the Federal Food, Drug, and Cosmetic Act until the compliance date of June 18, 2018); Beasley v. Conagra Brands, Inc., 374 F. Supp. 3d 869, 878 (N.D. Cal. 2019) (same); Kroessler v. CVS Health Corp., 387 F. Supp. 3d 1064, 1071 (S.D. Cal. 2019) (finding plaintiff's UCL and CLRA claims against CVS for falsely labeling its glucosamine supplements as "joint strengthening" was preempted because it would impose liability based on a "structure/function" requirement allowed by federal law), *appeal filed*, No. 19-55671 (9th Cir. 2019).

[38] See Beckman v. Ariz. Canning Co., LLC, No. 3:16-cv-02792-JAH-BLM, 2019 WL 4277393, at *8-*12 (S.D. Cal. Sep. 9, 2019) (denying motion to dismiss UCL and CLRA claims arising from allegedly deceptive product label on excessively watery canned pinto beans, even though product label truthfully listed water as primary ingredient, because picture on can label appeared nothing like the actual contents); Kamal v. Eden Creamery, LLC, No. 18-cv-01298-BAS-AGS, 2019 WL 2617041, at *8-*9, *12-*14 (S.D. Cal. June 26, 2019) (denying motion to dismiss UCL, FAL and CLRA claims against ice cream manufacturer and manufacturer's founder and CEO based on allegedly underfilled containers of ice cream, finding that plaintiff plausibly alleged the containers were underfilled by the manufacturer and rejecting, at the pleading stage, defendants' argument that underfilling resulted from melting and freezing after manufacture).

[39] See Sciacca v. Apple, Inc., 362 F. Supp. 3d 787, 800 (N.D. Cal. 2019) (granting defendant's motion to dismiss because online complaints on Apple's website and Apple's decision to extend the warranty on a previous model were insufficient to establish that defendant had knowledge that its smartphone watches' screens were defective); Enea v. Mercedes-Benz USA, LLC, No. 18-CV-02792-HSG, 2019 WL 402315, at *7 (N.D. Cal. Jan. 31, 2019) (dismissing plaintiff's CLRA claim against car manufacturer, which alleged that some of the manufacturer's cars were equipped with defective sunroofs, because

As reflected in the foregoing cases, courts continue to struggle with important questions arising under the UCL and CLRA (including, once again, fallout from the McGill decision), and there is a lot to watch for in 2020.

plaintiff failed to sufficiently allege that manufacturer had knowledge of the defects, affirmatively misrepresented the sunroofs or actively omitted material facts).

TABLE OF CONTENTS

Page

THE UNFAIR COMPETITION LAW

I. THE STRUCTURE OF THE UCL

A. Conduct That Constitutes "Unfair Competition"

"Unfair competition" is defined in the UCL[40] as any one of the following wrongs: (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.[41] These definitions are disjunctive, and each of the wrongs operates independently from the others.[42] "In other words, a practice is prohibited as 'unfair' or ['fraudulent'] even if not 'unlawful' and vice versa."[43]

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."[44] The "cleansing power" provided to a court by the UCL can pose a formidable challenge to defendants.[45]

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[40] 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 Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

[41] 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) (unpublished) (finding that dismissal of UCL claim does not require dismissal of section 17500 claim, which consists of distinct elements).

[42] See Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180 (1999); see also Lepton Labs, LLC v. Walker, 55 F. Supp. 3d 1230, 1242 (C.D. Cal. 2014) (holding that complaint need not specify which prong a UCL claim is brought under).

[43] State Farm Fire & Cas. Co. v. Super. Ct., 45 Cal. App. 4th 1093, 1102 (1996), *abrogated on other grounds by* Cel-Tech, 20 Cal. 4th 163.

[44] Comm. On Children's Television, Inc. v. Gen. Foods Corp., 35 Cal. 3d 197, 210 (1983), *superseded by statute on other grounds, as recognized in* Branick v. Downey Sav. & Loan Ass'n, 39 Cal. 4th 235 (2006).

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

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 presented, 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.[46] However, the UCL seemingly does not apply to securities transactions.[47]

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.[48] Rather, it applies to any "person,"[49] as defined under the UCL. Governmental entities do not fall within this definition and cannot be sued under the UCL.[50] Furthermore, the law is not settled on whether the UCL applies to claims brought on theories of indirect liability,

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[46] 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).

[47] 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, LLC, 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); Betz v. Trainer Wortham & Co., Inc., 829 F. Supp. 2d 860, 866 (N.D. Cal. 2011) ("No court, however, has allowed Section 17200 claims to proceed where, as here, the predicate acts are securities transactions."). But see Rose v. Bank of Am., N.A., 57 Cal. 4th 390, 399 n.8 (2013) (questioning "the scope and merits" of the holding in Bowen); S.F. 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.") (emphasis in original).

[48] But see discussion infra pp. 42-45 ("Primary Jurisdiction"; "Judicial Abstention In Matters Of Economic Policy"; "The 'Safe Harbor' Defense").

[49] 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).

[50] See, e.g., Townsend v. California, No. CVF10-0470LJOSKO, 2010 WL 1644740, at *10-11 (E.D. Cal. Apr. 21, 2010) (finding the state of California and the California Highway Patrol were not persons under the UCL); 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); Bay Area Consortium for Quality Health Care v. Alameda Cty., No. A148430, 2018 WL 2126559, at *9 (Cal. Ct. App. May 9, 2018) (unpublished) (holding Alameda County was not a "person" that could be sued under the UCL).

such as vicarious or aiding and abetting liability, agency, or franchisor liability.[51] In Daniels v. Select Portfolio Servicing, Inc.,[52] the court allowed appellants—borrowers under a deed of trust—to amend their UCL claims against several principals based on the alleged conduct of an agent, reasoning that the trustee of the securitized trust that owned the loan could potentially be liable under an agency theory for the fraudulent misrepresentations of a loan servicer.

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."[53] However, the ability of corporate plaintiffs to bring UCL claims may be limited under certain circumstances. 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.[54] 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 contract," and that prosecution of a UCL claim could "deprive [other companies

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[51] 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, 15 (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), *abrogated on other grounds as recognized by* Fabian Perez Art Publ'g LLC v. Las Brujas Inc., No. CV15-1847-DMG(PLAx), 2015 WL 11430871, at *4 (C.D. Cal. Mar 27, 2015); 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); People v. JTH Tax, Inc., 212 Cal. App. 4th 1219, 1242, 1247 (2013) (holding that franchisor can be liable for franchisee's false advertising under normal agency principles and disapproving Emery and Toomey; "We find no error in the court's conclusion that, '[e]ven if Liberty's franchisees are not its agents for all purposes, they are its agents at a minimum for purposes of advertising.'"); People ex rel. Harris v. Sarpas, 225 Cal. App. 4th 1539, 1562 (2014) (holding that corporate owners could be liable under the UCL where owners and corporation operated as a single enterprise).

[52] 246 Cal. App. 4th 1150, 1188 (2016).

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

[54] 152 Cal. App. 4th 115, 131 (2007).

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.[55]

The California Courts of Appeal also have renewed the UCL's effectiveness in competitor actions. In Law Offices of Mathew Higbee v. Expungement Assistance Services,[56] the Court of Appeal analyzed "the reach of the UCL in the commercial context following the enactment of Proposition 64." There, plaintiff alleged that defendant used personnel not licensed by the state bar to provide legal services for expungement of criminal records, a service that competed with plaintiff's law practice, deprived it of market share and forced it to incur expenses to compete. Plaintiff alleged that the provision of legal services by other than California lawyers violated the UCL. Defendant claimed plaintiff suffered no injury cognizable under the UCL because he did not transact business with defendant.

The court held that, "having alleged that he had been forced to pay increased advertising costs and to reduce his prices for services in order to compete, and that he had lost business and the value of his law practice had diminished, [plaintiff] succeeded in alleging at least an identifiable trifle of injury as necessary for standing under the UCL."[57] The court rejected the argument that, under Proposition 64, "a plaintiff must have had business dealings with the defendant in order to have standing under the UCL."[58] Even without "direct business dealings," plaintiff's allegation that "he suffered losses in revenue and asset value and was required to pay increased advertising costs specifically because of the unlawful business practices of [defendant]" was potentially a sufficient "allegation of causation" at the demurrer stage.[59] However, the court was careful to limit its holding to business competitor lawsuits, and not the consumer context, holding only that "a business competitor who adequately alleges that he or she has suffered injury in fact and lost money or property as a result of the defendant's unfair competition is not necessarily precluded from maintaining a UCL lawsuit against the defendant just because he or she has not engaged in direct business dealings with the defendant."[60]

E. Proposition 64 And The UCL Standing Requirement

When Proposition 64 became effective on November 3, 2004,[61] it imposed two significant restrictions which apply only to actions filed by private individuals or entities.[62]

First, amended section 17204 states the standing requirement:

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55 Id. at 135 (citing Rosenbluth Int'l, Inc. v. Super. Ct., 101 Cal. App. 4th 1073, 1079 (2002)); see also Pierry, Inc. v. Thirty-One Gifts, LLC, No. 17-CV-03074-LB, 2018 WL 1684409, at *11 (N.D. Cal. Apr. 5, 2018) (dismissing UCL claim between two "relatively sophisticated" business entities given that there was no harm to the public at large or to consumers generally).

56 214 Cal. App. 4th 544, 552 (2013).

57 Id. at 561.

58 Id. at 563-64.

59 Id. at 564.

60 Id. at 565.

61 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.").

62 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.

> Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction . . . by a 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 the unfair competition.*

(Old language stricken, new language in italics.)[63] 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.[64] These actions were brought without regard to any procedural standard, or notice of due process requirements.[65] 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:

> 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.*

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

> Actions for injunction 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.)

[64] 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), *superseded by statute on other grounds, as recognized in* Arias v. Super. Ct., 46 Cal. 4th 969 (2009); 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.").

[65] 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), *superseded by statute on other grounds, as recognized in* Arias, 46 Cal. 4th 969; 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).

(New language in italics.) California Code of Civil Procedure section 382 authorizes class litigation.[66] 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.[67]

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 v. Pfizer, Inc.,[68] retail pharmacies brought UCL claims against pharmaceutical companies for alleged price fixing. 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.[69] The California Supreme Court rejected this position, making 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."[70] "The doctrine of mitigation . . . is a limitation on liability for damages, not a basis for extinguishing standing."[71] In short, looking at the language and intent of section 17204, the Court found that plaintiffs need not prove "compensable loss at the outset" in order to have standing.[72]

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.'"[73]

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.[74]

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66 See Brinker Rest. Corp. v. Super. Ct., 53 Cal. 4th 1004, 1021 (2012).

67 See id.; see also In re Tobacco II Cases, 46 Cal. 4th 298, 318 (2009) ("Tobacco II"); Fireside Bank v. Super. Ct., 40 Cal. 4th 1069, 1089 (2007).

68 49 Cal. 4th 758, 764 (2010).

69 Id. at 765.

70 Id. at 789.

71 Id. (citing Pool v. City of Oakland, 42 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.")).

72 Id.

73 Id. at 790 (quoting Tobacco II, 46 Cal. 4th at 319).

74 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).

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

In Kwikset Corp. v. Superior Court,[75] plaintiffs alleged that defendant violated the UCL and the 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. 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, which was usable and not defective.

The California Supreme 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."[76] The Court then observed, "Proposition 64 accomplishes its goals in relatively few words."[77] Less than two dozen are at issue here: standing under the UCL extends to "a person who has suffered injury in fact and has lost money or property as a result of the unfair competition."[78]

Against this background, the Court found that "the plain language of these clauses suggests a simple test."[79] A UCL plaintiff must: "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim."[80]

With respect to injury in fact, the Court emphasized that "[t]he 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*.'"[81] 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."'"[82] "'Particularized' in this context means simply that 'the injury must affect the plaintiff in a personal and individual way.'"[83] 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

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75 51 Cal. 4th 310, 317 (2011).

76 Id.

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

78 Id. at 322 (quoting Cal. Bus. & Prof. Code § 17204).

79 Id.

80 Id. (emphasis in original).

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

82 Id. at 322-23 (alteration marks omitted) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

83 Id. at 323 (quoting Lujan, 504 U.S. at 560 n.1).

> 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.[84]

The Court also noted that "lost money or property—economic injury—is itself a classic form of injury in fact."[85] The Court then went on to "offer a further observation concerning the order in which the elements of standing are best considered":

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[84] Id. (citation omitted).

[85] Id.; see also Johnson v. Nationstar Mortg., LLC, No. 3:17-CV-03676-WHO, 2018 WL 807370, at *7 (N.D. Cal. Feb. 9, 2018) (observing a split among district courts and finding that the economic harm flowing from a default on a mortgage is "caused by the borrower's default, and not the alleged unlawful acts"); Beltz v. Wells Fargo Home Mort., No. 2:15-cv-01731-TLN-CKD, 2017 WL 784910, at *13 (E.D. Cal. March 1, 2017) ("[D]amage to credit is considered loss of money or property for the purposes of the UCL."); Meyer v. Capital All. Grp., No. 15-CV-2405-WVG, 2017 WL 5138316, at *3-4 (S.D. Cal. Nov. 6, 2017) (plaintiffs' loss of ink and paper due to the receipt of "junk" faxes, advertising defendants' loan products, were insufficient injuries to satisfy the economic loss requirement necessary to confer standing under the UCL); Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 811 (N.D. Cal. 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); In re Anthem, Inc. Data Breach Litig., 162 F. Supp. 3d 953, 985 (N.D. Cal. 2016) (allegations that defendants did not adequately protect plaintiffs' personal data as promised, thus causing benefit of bargain damages, represent economic injury sufficient to satisfy UCL standing in the data breach context); Arroyo v. TP-Link USA Corp., No. 5:14-CV-04999-EJD, 2015 WL 5698752, at *4 (N.D. Cal. Sept. 29, 2015) (dismissing claims with respect to products that plaintiff did not purchase or whose marketing material he did not view); Boorstein v. CBS Interactive, Inc., 222 Cal. App. 4th 456 (2013) (plaintiff's failure to satisfy conditions to bring claim under predicate statute underlying UCL unlawful claim barred standing under UCL); Turcios v. Carma Labs., Inc., 296 F.R.D. 638, 644 (C.D. Cal. 2014) (plaintiff lacked standing to assert CLRA claim and UCL claim based on violation of Fair Packaging and Labeling Act because "[p]laintiff has not presented any evidence that his alleged economic injury occurred as a result of" purchasing chapstick that he would have bought regardless of label); Thompson v. Auto. Club of S. Cal., 217 Cal. App. 4th 719, 732 (2013) (denying class certification of CLRA and UCL claims alleging overcharges in connection with renewal of auto club memberships where plaintiff renewed membership despite knowledge of shorter term), *disapproved on other grounds by* Noel v. Thrifty Payless, Inc., 7 Cal. 5th 955 (2019); Backhaut v. Apple, Inc., 74 F. Supp. 3d 1033, 1049 (N.D. Cal. 2014) (plaintiff cannot establish economic injury caused by an alleged omission of information where information about alleged defect was previously published in an internet news article); Svenson v. Google Inc., 65 F. Supp. 3d 717, 730 (N.D. Cal. 2014) (plaintiff lacks UCL standing because plaintiff failed to "allege[] any facts showing that Defendants' business practice—disclosing users' Contact Information to third-party App vendors—changed her economic position at all"); Two Jinn, Inc. v. Gov't Payment Serv., Inc., 233 Cal. App. 4th 1321, 1334-35 (2015) (pre-litigation investigation expenses cannot be used to establish economic injury under the UCL). But see Animal Legal Def. Fund v. LT Napa Partners LLC, 234 Cal. App. 4th 1270, 1280-82 (2015), *review denied*, No. A139625 (Cal. June 10, 2015) (holding that the expenditure of resources to investigate defendant's alleged wrongdoing was different from the pre-litigation expenses discussed in Two Jinn, Inc., and could establish economic injury under the UCL because the expenses were

> 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 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.[86]

Kwikset therefore not only states the test for evaluating the issue of injury sufficient to confer standing, it sets the order of the analysis.[87]

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incurred prior to and independent of the litigation); Hodsdon v. Mars, Inc., 162 F. Supp. 3d 1016, 1022 (N.D. Cal. 2016), *aff'd*, No. 16-15444 (9th Cir. June 4, 2018) ("California law permits litigants to pursue claims under the UCL, CLRA, and FAL if they show that the deceptive practice caused pecuniary loss."); Robinson v. U–Haul Co. of Cal., 4 Cal. App. 5th 304, 317 (2016) (economic injury requirement satisfied for UCL claim for malicious prosecution when plaintiff incurred court costs and attorneys' fees in defense against malicious prosecution); Rojas-Lozano v. Google, Inc., 159 F. Supp. 3d 1101, 1120 (N.D. Cal. 2016) (plaintiff did not suffer economic injury because she failed to allege that she would have changed her behavior if she had known that transcribing part of a reCAPTCHA would facilitate Google's profit earning); Galang v. Wells Fargo Bank, N.A., No. 16-CV-03468-HSG, 2017 WL 1210021, at *6 (N.D. Cal. Apr. 3, 2017) (holding that plaintiff had standing to bring UCL claim challenging foreclosure because injury in fact can be established once foreclosure proceedings are initiated and not completed); Amer v. Wells Fargo Bank N.A., No. 17-cv-03872-JCS, 2017 WL 4865564, at *12 (N.D. Cal. Oct. 27, 2017) (finding that impending foreclosure might potentially be a type of cognizable injury under the UCL).

86 Kwikset, 51 Cal. 4th at 325.

87 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 a 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 economic 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"); Glen Oaks Estates Homeowners Ass'n v. Re/Max Premier Props., Inc., 203 Cal. App. 4th 913, 919-22 (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); Lueras v. BAC Home Loans Servicing, LP, 221 Cal. App. 4th 49, 82 (2013) (holding allegation that plaintiff's "home was sold at a foreclosure sale is sufficient to satisfy the economic injury prong of the standing requirement of section 17204" and granting plaintiff leave to amend to allege a "causal connection" between defendant's "allegedly unlawful, unfair, or fraudulent conduct and Lueras's economic injury"); Sarun v. Dignity Health, 232 Cal. App. 4th 1159, 1167-70 (2014), *modified*, Moran v. Prime Healthcare Mgmt., Inc., 3 Cal. App. 5th 1131 (2016) (patient's partial payment of hospital bill, and receipt of an invoice showing a balance due, established injury in fact and loss of money or property, even though hospital offered patient an opportunity to apply for a discounted billing rate and patient failed to do so); In re Adobe Sys., Inc. Privacy Litig., 66 F. Supp. 3d 1197 (N.D. Cal. 2014) (plaintiffs' allegations that they relied on Adobe's claims that personal data would be protected sufficient to establish UCL standing).

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

Courts have interpreted the phrase "as a result of" to mean "caused by."[88] The "causal connection is broken when a complaining party would suffer the same harm whether or not a defendant complied with the law."[89] Further, allegations must indicate how an injury resulted from the unfair competition.[90] But, as explained below with respect to Tobacco II, in the context

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[88] 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)).

[89] Troyk v. Farmers Grp., Inc., 171 Cal. App. 4th 1305, 1349 (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.").

[90] See Cappello v. Walmart Inc., 394 F. Supp. 3d 1015, 1023 (N.D. Cal. 2019) (finding that plaintiffs had plausibly alleged a violation of company's own privacy policy, had adequately alleged both economic loss and causation under a "benefit of the bargain" theory and had standing under the UCL); Townsend v. Wells Fargo Bank, N.A., No. 18-cv-07382-NC, 2019 WL 4145464, at *4 (N.D. Cal. Aug. 30, 2019) (finding plaintiffs failed to establish standing under the UCL because they did not establish a causal connection between Wells Fargo's reporting to credit bureaus and plaintiffs' diminished credit rating where reporting occurred after plaintiffs declared bankruptcy), *appeal filed*, No. 19-16919 (9th Cir. 2019); 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., No. CV 08-0659 AHM (VBKx), 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); McGough v. Wells Fargo Bank, N.A., No. C12-0050 TEH, 2012 WL 5199411, at *6 (N.D. Cal. Oct. 22, 2012) (finding that alleged unlawful conduct did not cause foreclosure; instead, plaintiff's default caused foreclosure); Durell v. Sharp Healthcare, 183 Cal. App. 4th 1350, 1355, 1363 (2010) (holding that the "as a result" analysis 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"); see also Kane v. Chobani, Inc., 973 F. Supp. 2d 1120, 1134, 1129 (N.D. Cal. 2014) (reiterating that reliance is a required element in claims premised on misrepresentation and deception brought under the unlawful prong of the UCL), *order vacated on other grounds by* Kane v. Chobani, LLC, 645 F. App'x 593, 594 (9th Cir. 2016); Orcilla v. Big Sur, Inc., 244 Cal. App. 4th 982, 1013 (2016) (UCL standing causation prong sufficiently pleaded by allegations of unconscionable mortgage loan agreements, because plaintiffs would not have lost their loan security had defendants not enforced the allegedly unconscionable loan agreements through foreclosure proceedings); Rivas v. Wells Fargo Bank, N.A., No. 16-cv-01473-LJO-JLT, 2016 WL 8730674, at *9-10 (E.D. Cal. 2016) (finding plaintiff had standing to sue under the UCL because plaintiff alleged that he incurred foreclosure fees and costs in connection with defendant's allegedly unlawful and unfair foreclosure practices, and that defendant's alleged foreclosure violations caused plaintiff to stop making payments and contributed to his inability to secure a modification); Ivanoff v. Bank of Am., N.A., 9 Cal. App. 5th 719 (2017) (plaintiff established standing through allegations that she paid money to the bank and received billings for increased monthly loan payments in excess of what she would have owed had it not been for the bank's unlawful business practices); Bishop v. 7-Eleven, Inc., 651 F. App'x 657, 658 (9th Cir. 2016) (reversing district court's dismissal for lack of standing because plaintiff adequately alleged that he relied on defendant's misrepresentation, without which he would not otherwise have purchased defendant's product, even though the only alleged misconduct was a failure to include disclosures required under the Food Labeling Laws).

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.[91]

Some courts have interpreted "caused by" broadly. For example, in Veera v. Banana Republic, LLC, the court held that if a consumer is "influenced by the momentum to buy" to proceed with a purchase despite learning of false advertising as to the price before consummating the transaction, then that is sufficient to create a question as to whether they suffered economic injury "caused by" the false advertising.[92] The court described this as a type of "bait and switch" in which the consumer relies on the deceptive advertising price (40% off) when choosing the item to be purchased and becomes so "invested in the decision to buy" that he or she continues with the transaction "despite his or her better judgment."[93] Notably, there was a dissent in Veera which challenged whether the plaintiff could show reliance, given that she knew the 40% discount representation was false before she purchased: "I see the majority's 'momentum to buy' theory as both a departure from well-settled principles regarding reliance in ordinary fraud actions and as a dilution of the Prop. 64 requirement that the plaintiff suffer economic injury as a result of the defendant's improper conduct."[94] Similarly, in Hanson v. Newegg.com Americas, Inc.,[95] the court held that plaintiff's alleged reliance on advertisements containing false or inflated "list" prices was sufficient to establish standing under the UCL, FAL and CLRA.[96]

d. UCL Standing And Federal Courts

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 California Supreme 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."[97] Accordingly, a plaintiff could have Article III

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[91] 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").

[92] 6 Cal. App. 5th 907, 921-22 (2016) (finding that plaintiffs raised a triable issue of fact as to standing and causation when they were "lured" into a store by signs proclaiming a 40% off sale, but, after learning at the register that the sale did not apply to every item in the store, chose to purchase certain items at full price).

[93] Id. at 921.

[94] Id. at 926 (Bigelow, P.J., dissenting).

[95] 25 Cal. App. 5th 714 (2018).

[96] Id. at 727.

[97] 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 Ingalls v. Spotify USA, Inc., No. C 16-03533 WHA, 2017 WL 3021037, at *4 (N.D. Cal. July 17, 2017) (observing that when a claim is based on California state law, rather than on misrepresentation, "but for" causation applies); Hinojos v. Kohl's Corp., 718 F.3d 1098, 1107 (9th Cir. 2013) (holding that "when a consumer purchases merchandise on the basis of false price information, and when the consumer alleges that he would not have made the purchase but for the misrepresentation, he has standing to sue under the UCL and FAL because he has suffered an

standing, but lack UCL standing, depending on the facts at issue.[98] Conversely, a plaintiff who has suffered an injury in fact (and thus has UCL standing) could lack Article III standing to seek injunctive relief in federal court if the plaintiff has no intention of buying the challenged product again.[99]

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economic injury" and rejecting defense that plaintiff would have purchased product anyway); 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, the 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 *2 (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"); Chase v. Hobby Lobby Stores, Inc., No. 17-cv-00881-GPC-BLM, 2017 WL 4358146 (S.D. Cal. Oct. 2, 2017) (finding that plaintiff in deceptive pricing class action brought under the UCL and CLRA had standing to challenge pricing scheme not only with respect to the specific two items purchased, but for all items to which defendant applied the alleged deceptive pricing scheme); Azimpour v. Sears, Roebuck & Co., No. 15-CV-2798 JLS (WVG), 2017 WL 1496255, at *5 (S.D. Cal. Apr. 26, 2017) (rejecting argument that plaintiff who purchased a single pillow lacked standing to bring claims relating to pricing of other items not purchased, reasoning that "[t]his case is not about a pillow—it is about a price tag. Plaintiff's allegations are based on Defendant's allegedly deceptive pricing scheme which uniformly applies to and affects all products.").

[98] See Bass v. Facebook, Inc., 394 F. Supp. 3d 1024, 1040 (N.D. Cal. 2019) (finding, on an issue of first impression in the Ninth Circuit, that a plaintiff's loss of time spent "sorting through" around thirty "phishing" emails received as a result of a data breach was sufficient to establish Article III standing, but that plaintiff failed to establish standing under the UCL or CLRA because plaintiff failed to show either (1) that there was a market for his stolen personal information and his ability to participate in that market was impaired or (2) that plaintiff intended to sell his personal information and the value of the information had been devalued by the breach); Mosley v. Wells Fargo Bank NA, No. 17-CV-05064-JSC, 2017 WL 5478628, at *7 (N.D. Cal. Nov. 15, 2017) (holding that violation of Homeowner's Bill of Rights may be sufficient to confer Article III constitutional standing but insufficient to confer UCL standing when the plaintiff fails to allege the loss of money or property); Van Patten v. Vertical Fitness Grp. LLC, 847 F.3d 1037, 1048-49 (9th Cir. 2017) (affirming order granting summary judgment in defendant's favor on UCL claim because plaintiff could not prove that the receipt of unsolicited text messages caused an economic injury since plaintiff paid for an unlimited text messaging plan).

[99] See, e.g., Lanovaz v. Twinings N. Am., Inc., 726 F. App'x 590, 591 (9th Cir. 2018) (finding plaintiff's allegation that she would "consider buying" a company's products in the future insufficient to establish Article III standing); Peacock v. 21st Amendment Brewery Cafe, LLC, No. 17-CV-01918-JST, 2018 WL 452153, at *9 (N.D. Cal. Jan. 17, 2018) (plaintiff failed to plead sufficient facts to show an actual or imminent threat of a recurring harm to necessitate an injunction under the UCL and CLRA because plaintiff did not allege that he had any intent to purchase defendant's product in the future); Opperman v. Path, Inc., 84 F. Supp. 3d 962, 987 (N.D. Cal. 2015) (plaintiff lacks standing to seek injunctive relief if he has not alleged a real or immediate threat that he will be wronged again). But see Le v. Kohls Dep't Stores, Inc., 160 F. Supp. 3d 1096, 1110 (E.D. Wis. 2016) (plaintiff had Article III standing to pursue injunctive relief against defendant's alleged "company-wide, pervasive, and continuous false advertising campaign," despite plaintiff's general awareness of the misleading price advertising, because otherwise no plaintiff could ever seek injunctive relief under the UCL) (internal quotation marks omitted); Tracton v. Viva Labs, Inc., No. 16-cv-2772-BTM-KSC, 2017 WL 4125053, at *4 (S.D. Cal. Sept. 18, 2017) (plaintiff had standing to pursue injunctive relief because plaintiff alleged that she would purchase the defendant's product again in the future, thereby establishing a real and immediate threat of continued harm, at least at the pleading stage).

In Davidson v. Kimberly-Clark Corp.,[100] the Ninth Circuit resolved whether a "previously deceived consumer who brings a false advertising claim can allege that her inability to rely on the advertising in the future is an injury sufficient to grant her Article III standing to seek injunctive relief." In Davidson, plaintiff alleged that she had purchased defendant's wipes, and paid a premium, because they were advertised and labeled to be "flushable"; she believed that "flushable" meant "suitable for flushing," in that the wipes would not damage pipes or sewage systems.[101] After purchasing the product, plaintiff noticed that the wipes did not break down in the toilet like typical flushable products, and her further research into the issue indicated that flushable wipes had been known to cause damage to home plumbing and municipal sewer systems.[102] Plaintiff did not purchase the "flushable" wipes again but alleged that she desired to purchase "truly flushable" wipes in the future "if it were possible to determine prior to purchase if the wipes were suitable to be flushed."[103]

The Ninth Circuit reversed the district court's order granting defendant's motion to dismiss with prejudice, finding that plaintiff "properly alleged that she faces a threat of imminent or actual harm by not being able to rely on Kimberly-Clark's labels in the future, and that this harm is sufficient to confer standing to seek injunctive relief."[104] The Ninth Circuit rejected the reasoning of several district courts that plaintiffs with knowledge of a defendant's alleged misrepresentations lack standing to seek injunctive relief under the CLRA and UCL.[105] Instead, the Ninth Circuit adopted the reasoning of district courts holding that a plaintiff faces an actual and imminent threat of future injury where the plaintiff may be unable to rely on the defendant's representations in the future, or because the plaintiff may again purchase the mislabeled product.[106] The Ninth Circuit explained that "a previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase, because the consumer may suffer an 'actual and imminent, not conjectural or hypothetical' threat of future harm."[107] The Ninth Circuit further analyzed,[108] more specifically, why plaintiff met the standing requirements for prospective injunctive relief, detailing how

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[100] 873 F.3d 1103 (9th Cir. 2017), *amended and superseded on denial of reh'g en banc by* Davidson v. Kimberly-Clark Corp., 889 F.3d 956 (9th Cir. 2018).

[101] Davidson, 889 F.3d at 961-62.

[102] Id. at 962.

[103] Id.

[104] Id. at 967.

[105] Id. at 967-68.

[106] Id. at 969-70; see also Safransky v. Fossil Grp., Inc., No. 17cv1865-MMA, 2018 WL 1726620, at *7 (S.D. Cal. Apr. 9, 2018).

[107] Davidson, 889 F.3d at 969 (citation omitted).

[108] In its original opinion, the Ninth Circuit further reasoned that a contrary holding would "effectively gut" the UCL and CLRA by allowing defendants to defeat claims for injunctive relief by removing cases from state court and then moving to dismiss for failure to meet Article III's standing requirements. See Davidson, 873 F.3d at 1115. The Ninth Circuit subsequently amended its opinion and denied plaintiff's petition for rehearing en banc. In its amended opinion, the Ninth Circuit omitted its anti-removal rationale.

plaintiff sufficiently alleged a concrete and particularized injury, a threat of repeated injury and redressability.[109]

Some courts have applied Davidson broadly,[110] while others have read the decision more narrowly.[111] As a recent example of the former, in Luong v. Subaru of America, Inc.,[112] plaintiffs brought a putative class action challenging allegedly defective windshields found in particular vehicle models. Defendants argued that plaintiffs' claim for injunctive relief under the UCL should be dismissed because plaintiffs failed to allege an imminent or actual threat of future harm under Davidson, which, according to defendants, would require an allegation that plaintiffs intended to purchase another of the defective vehicle models.[113] The district court disagreed, finding that plaintiffs sufficiently alleged imminent future harm by contending that they continued to own their vehicles and had an interest in being provided non-defective replacement windshields, as well as an extended vehicle warranty.[114]

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.[115] 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.

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[109] See Davidson, 889 F.3d at 971-72; see, e.g., Shank v. Presidio Brands, Inc., No. 17-cv-00232-DMR, 2018 WL 1948830, at *5 (N.D. Cal. Apr. 25, 2018) (denying defendant's motion to dismiss the class action complaint in reliance on Davidson, finding plaintiffs had standing to seek injunctive relief because they alleged they could not trust defendant's claims about their products in the future) Kutza v. Williams-Sonoma, Inc., No. 18-cv-03534-RS, 2018 WL 5886611, *4 (N.D. Cal. Nov. 9, 2018) (same).

[110] See, e.g., Lejbm v. Transnational Foods, Inc., No. 17-CV-1317-CAB-MDD, 2018 WL 1258256, at *6 (S.D. Cal. Mar. 12, 2018) (finding plaintiff had standing to seek injunctive relief under the UCL, FAL and CLRA where she alleged she "would like to, and intends to, continue purchasing the Product in the future").

[111] See, e.g., Loomis v. Slendertone Distribution, Inc., No. 3:19-cv-854-MMA (KSC), 2019 WL 5790136, at *26 (S.D. Cal. Nov. 6, 2019) (finding plaintiff lacked standing to seek injunctive relief under the UCL where she alleged only that she "would consider" buying another electrical muscle stimulation device from defendant without specifying the particular product, distinguishing Davidson); Tryan v. Ulthera, Inc., No. 2:17-cv-02036-MCE-CMK, 2018 WL 3955980, at *9-10 (E.D. Cal. Aug. 17, 2018) (distinguishing Davidson and finding that where plaintiffs never plausibly alleged they would ever use defendant's product again, standing to seek injunctive relief was absent); Bruton v. Gerber Prods. Co., No. 12-CV-02412-LHK, 2018 WL 1009257 (N.D. Cal. Feb. 13, 2018) (distinguishing Davidson where defendant stopped making the misleading statements and there was no actual or imminent threat of future harm); Circle Click Media, LLC v. Regus Mgmt. Grp., LLC, 743 F. App'x 883, 884 (9th Cir. 2018) (holding that because plaintiffs failed to allege that they intended to do any business with defendants in the future, they failed to demonstrate that they were likely to suffer future injury as required to establish Article III standing).

[112] No. 17-cv-03160-YGR, 2018 WL 2047646 (N.D. Cal. May 2, 2018).

[113] Id. at *6.

[114] Id.

[115] 46 Cal. 4th at 308-09.

On review, the California Supreme Court's majority opinion, 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.[116] The Court also 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."[117] 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.[118] 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.[119]

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."[120] 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.[121] 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

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[116] Id. at 314-16.

[117] Id. at 317.

[118] Id. at 320-21.

[119] Id. at 324.

[120] Id. at 325.

[121] Id. at 326-28. See In re NJOY, Inc. Consumer Class Action Litig., 120 F. Supp. 3d 1050 (C.D. Cal. 2015) (holding that named plaintiff could establish standing due to defendant's failure to warn of the risks associated with certain ingredients in electronic cigarettes but could not establish standing for failure to disclose the names of those harmful ingredients because plaintiff had admitted that even if the names of the ingredients were disclosed he still would have purchased the defendant's e-cigarettes); Tracton, 2017 WL 4125053, at *3 (S.D. Cal. Sept. 18, 2017) (finding that since the complaint did not allege that plaintiff relied on misrepresentations made on defendant's website, plaintiff did not have standing to proceed on those claims); Michel v. United States, No. 16CV277-GPC(AGS), 2017 WL 4922831, at *19 (S.D. Cal. Oct. 31, 2017) (holding that plaintiff lacked standing to sue the manufacturer of a narcotics field test that produced a false positive result for methamphetamine because plaintiff needed to "demonstrate her own reliance on the alleged misrepresentations or omissions, rather than the reliance of third parties," and here she neither purchased the product in question nor did she see any advertising for it); Major v. Ocean Spray Cranberries, Inc., No. 5:12-cv-03067-EJD, 2015 WL 859491 (N.D. Cal. Feb. 26, 2015) (denying class certification for a deceptive advertising claim because the named plaintiff admitted that she did not detrimentally rely on the defendant's advertisement of "no sugar added" as indicating its products were "low calorie," which is the deceptive practice contemplated by 21 C.F.R. § 101.6(c)(2) under which she sought to have the class certified).

> 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.[122]

In some circumstances, an omission may be considered material for purposes of establishing a claim under the FAL. If the defendant "made a statement, but omitted information that undercuts the veracity of the statement," then the plaintiff may bring an FAL claim.[123] However, if the defendant "did not make any statement at all about a subject," then the plaintiff cannot claim that an omission was a material misrepresentation made under the FAL.[124]

b. Distinguishing The Individual Reliance vs. Reasonable Consumer Standards In Evaluating UCL And CLRA Claims

It is worth noting that the "reasonable consumer" standard applied for UCL class certification purposes, "unlike the individual reliance requirement . . . is not a standing requirement."[125] The "reasonable consumer standard" is used in determining what constitutes a "material misrepresentation" in a class action context.[126] In this respect, courts avoid subjective

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[122] Tobacco II, 46 Cal. 4th at 326-27 (internal quotation marks, alteration marks and citations omitted); see also Berger v. Home Depot USA, Inc., 741 F.3d 1061, 1067 (9th Cir. 2014) (finding that plaintiff could not represent class as to time periods in which he did not have standing); *abrogated on other grounds by* Microsoft Corp. v. Baker, 137 S. Ct. 1702 (2017); 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); In re FCA US LLC Monostable Elec. Gearshift Litig., 280 F. Supp. 3d 975, 1001 (E.D. Mich. 2017) (observing that actual reliance may be presumed because the alleged product defect—the propensity of a vehicle to accelerate suddenly and dangerously out of control—was material); Opperman, 84 F. Supp. 3d at 978 (holding "[i]f a plaintiff sufficiently alleges exposure to a long-term advertising campaign as set forth in Tobacco II, she need not plead specific reliance on an individual representation," and setting forth a six-factor test to prove a Tobacco II type ad campaign); In re ConAgra Foods, Inc., 90 F. Supp. 3d 919, 987 (C.D. Cal. 2015) (finding an inference of class-wide reliance appropriate for plaintiffs' California UCL and CLRA claims for purchase of cooking oils labeled "100% Natural" that were allegedly made with genetically modified organisms). But see Haskins v. Symantec Corp., 654 F. App'x 338, 339 (9th Cir. 2016) (Tobacco II's exception to the individual reliance requirement of UCL standing does not extend to "misrepresentations [that] were not part of an extensive and long-term advertising campaign like the decades-long campaign engaging in saturation advertising targeting adolescents in Tobacco II."); Goonewardene v. ADP, LLC, 5 Cal. App. 5th 154, 184 (2016) (allegations of misleading statements were insufficient to plead reliance when plaintiff did not allege that she actually saw the statements or that they influenced her conduct), *review granted*, 388 P.3d 818 (Cal. 2017), *rev'd and remanded on other grounds by* 6 Cal. 5th 817 (2019).

[123] Hodsdon, 162 F. Supp. 3d at 1023.

[124] Id.

[125] Reid v. Johnson & Johnson, 780 F.3d 952, 958 (9th Cir. 2015) (district court erred when it evaluated consumer standing requirement under a "reasonable consumer standard").

[126] Dei Rossi v. Whirlpool Corp., No. 2:12-CV-00125-TLN, 2015 WL 1932484, at *7 (E.D. Cal. Apr. 28, 2015); see also Yumul v. Smart Balance, Inc., 733 F. Supp. 2d 1117, 1125 (C.D. Cal. 2010) ("California

inquiries into each class member's experience with the product. Instead, they focus on a defendant's representations about the product through a single, objective "reasonable consumer" standard.[127] Under this standard, "a misrepresentation [is] material ... if a reasonable [person] would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question."[128] The fact that some consumers may have purchased the product for other reasons does not defeat a finding that the product was marketed with a material misrepresentation, which establishes an injury.[129]

c. 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, especially when an issue of commonality arises. For instance, in Webb v. Carter's, Inc.,[130] the United States District Court for the Central District of California held that, in federal court, all class members must have Article III standing. 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.[131] 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."[132] "Tobacco II therefore does not persuade the [c]ourt that a class action can proceed even where class members lack Article III standing."[133] 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.[134]

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courts have held that reasonable reliance is not an element of claims under the UCL, FAL, and CLRA.").

[127] Dei Rossi, 2015 WL 1932484, at *7.

[128] See Bruno v. Quten Research Inst., LLC, 280 F.R.D. 524, 535 (C.D. Cal. 2011) (quoting Tobacco II, 46 Cal. 4th at 312) (internal quotation marks omitted).

[129] Dei Rossi, 2015 WL 1932484, at *7 (holding defendant's nationwide marketing campaign and prominent display of the energy star logo on all its appliances created a presumption of material reliance by the class upon those representations). But see Jones v. ConAgra Foods, Inc., No. C 12-06133 CRB, 2014 WL 2702726, at *15 (N.D. Cal. June 13, 2014) (denying class certification where expert offered no objective criteria, such as survey data, to show that defendant's "all natural" label would be material to a reasonable person).

[130] 272 F.R.D. 489, 497 (C.D. Cal. 2011).

[131] Id. at 498.

[132] Id. at 497-98 (emphasis in original).

[133] Id. at 498.

[134] Id. at 498, 500; see also In re NJOY, Inc. Consumer Class Action Litig., 120 F. Supp. 3d at 1050 (holding that named plaintiff could not establish standing to pursue UCL claim based on defendant's failure to disclose the names of harmful ingredients in electronic cigarettes because the named plaintiff had admitted that even if the names of the ingredients were disclosed he still would have purchased the e-cigarettes. He thus could not establish pecuniary loss attributable to his reliance on the defendant's misrepresentation in failing to disclose the names of the harmful ingredients).

When the Ninth Circuit addressed the issue in Stearns v. Ticketmaster Corp.,[135] however, it held that class certification under Rule 23 does not require proof that all unnamed class members have standing under Article III. Plaintiffs alleged that they were induced by the website presentations and practices of Ticketmaster and a rewards program provider, Entertainment Publications, Inc. ("EPI"), to purchase EPI's services when they intended to purchase tickets only from Ticketmaster.[136] The district court denied plaintiffs' motion for class certification on their UCL claims, finding that "individualized proof of reliance and causation would be required."[137] 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."[138] It 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.'"[139] The Ninth Circuit 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 . . . .'"[140]

Further, in Mazza v. American Honda Motor Co., Inc.,[141] the Ninth Circuit rejected defendant's argument that, because Tobacco II focuses only on the standing of the 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. 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").[142] 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.[143] The district court granted the plaintiffs' motion for class certification.[144]

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.[145] 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 limited scale of Honda's advertising campaign.[146]

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[135] 655 F.3d 1013, 1020-21 (9th Cir. 2011), *abrogated on other grounds as recognized by* Green v. Fed. Express Corp., 614 F. App'x 905 (9th Cir. 2015).

[136] Id. at 1017.

[137] Id. at 1020.

[138] Id.

[139] Id.

[140] Id. at 1021 (quoting Bates v. United Parcel Serv., Inc., 511 F.3d 974, 985 (9th Cir. 2007)).

[141] 666 F.3d 581, 594-95 (9th Cir. 2012).

[142] Id. at 585.

[143] Id.

[144] Id. at 587.

[145] Id. at 585, 588.

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

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.'"[147] 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.[148] Honda's advertising campaign thus "[fell] short of the 'extensive and long-term [fraudulent] advertising campaign'" examined in Tobacco II.[149] 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."[150]

On the other hand, in Opperman v. Path, Inc.,[151] a district court held that the plaintiffs' allegation of a Tobacco II-like advertising campaign was sufficient to survive defendant's motion to dismiss. In Opperman, plaintiffs represented a putative class composed of consumers that owned one or more of three Apple products at issue (the iPhone, iPad, and/or iPod touch) during the class period.[152] Plaintiffs alleged that Apple engaged in a Tobacco II-like advertising campaign, whereby it "consciously and continuously misrepresented its iDevices as secure, and that the personal information contained on iDevices—including, specifically, address books—could not be taken without owners' consent."[153] Defendant Apple moved to dismiss plaintiffs' UCL and CLRA claims for failure to prove either reliance, or that the alleged misrepresentations had "been part of an extensive and long-term advertising campaign" under Tobacco II.[154] The district court denied defendant's motion to dismiss, holding that plaintiffs had sufficiently alleged a Tobacco II advertising campaign.[155]

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147 Id. at 595-96.

148 Id. at 586-87.

149 Id. at 596. But see Dei Rossi, 2015 WL 1932484, at *7 (holding that for purposes of class certification, defendant's nationwide marketing campaign and prominent display of the energy star logo on all its appliances created a presumption of material reliance by the class).

150 Mazza, 666 F.3d at 595-96; see also In re NJOY, Inc. Consumer Class Action Litig., 120 F. Supp. 3d at 1109 (denying class certification on the basis of misrepresentations in advertising because the defendant's electronic cigarette advertising campaign was not "sufficiently substantial or pervasive to give rise to a presumption that all class members were exposed to the advertisements"); Ehret v. Uber Techs., Inc., 148 F. Supp. 3d 884, 895-901 (N.D. Cal. 2015) (certifying the narrow class of customers that received defendant's targeted email promotion containing the alleged misrepresentation, but not the broader class that only visited defendant's website or blog, which contained an abundance of information in addition to the alleged misrepresentation, because there was "no evidence that it was 'highly likely' all members of the proposed class saw the allegedly misleading statements made in the advertisements.").

151 84 F. Supp. 3d at 962.

152 Id. at 971.

153 Id. (internal quotation marks omitted).

154 Id. at 976 (internal quotation marks omitted).

155 Id. at 982-83.

In reaching this conclusion, the district court applied Tobacco II's six-factor test.[156] In order to plead an advertising campaign in accordance with Tobacco II, the following factors must be met: (1) plaintiffs must allege "[the individual named plaintiffs] actually saw or heard the defendant's advertising campaign," (2) "the advertising campaign must be sufficiently lengthy in duration, and widespread in dissemination, that it would be unrealistic to require the plaintiff to plead each misrepresentation she saw and relied upon," (3) "the plaintiff must describe in the complaint, and preferably attach to it, a representative sample of the advertisements at issue so as to adequately notify the defendant of the precise nature of the misrepresentation claim...," (4) "the plaintiff must allege, and the court must evaluate, the degree to which the alleged misrepresentations contained within the advertising campaign are similar to each other," (5) "each plaintiff must plead with particularity and separately, when and how they were exposed to the advertising campaign, so as to ensure the advertisements were representations consumers were likely to have viewed, rather than representations that were isolated or more narrowly disseminated," and (6) "the court must be able to determine when a plaintiff made his or her purchase or otherwise relied on defendant's advertising campaign, so as to determine which portion of that campaign is relevant."[157]

Having considered these six factors, the district court held that plaintiffs' allegations, taken as a whole, were sufficient to survive a motion to dismiss.[158]

The court then went on to address Article III standing to seek injunctive relief.[159] It held that plaintiffs were unable to allege a real or immediate threat that they would be wronged again, as required to prove injury in fact to satisfy the Article III standing requirement.[160] Specifically, the court noted that "it is clear that a Plaintiff seeking injunctive relief must allege at least a willingness to consider purchasing the product at issue in the future."[161] Because the plaintiffs in Opperman failed to make any such allegation, the court held that they lacked standing to seek injunctive relief.

Both Mazza and Opperman demonstrate how the issues of standing and commonality have become intertwined. Other courts have engaged in similar reasoning. For instance, in Cohen v. DIRECTV, Inc.,[162] the Court of Appeal 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." 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."[163] 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']

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156 Id. at 976-77.

157 Id.

158 Id. at 983.

159 Id. at 987.

160 Id.

161 Id. at 988.

162 178 Cal. App. 4th 966, 981 (2009) (emphasis in original).

163 Id.

reliance" on allegedly false representations.[164] 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."[165]

Similarly, in Avritt v. Reliastar Life Insurance Co.,[166] the Eighth Circuit, 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." The Eighth Circuit 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."[167]

California courts have established other limitations for purposes of standing in the class action context for non-purchased products under the UCL. For example, to prevail on such claims, plaintiffs must detail why the products are substantially similar to those actually purchased.[168] In Astiana, the court found sufficient similarity where the plaintiffs challenged the same kind of food product (i.e., ice cream) as well as the same labels for all of the products—i.e., "All Natural Flavors" for the Dreyer's/Edy's products and "All Natural Ice Cream" for the Haagen-Dazs products. There, the court found that though the ice creams may ultimately have had different ingredients, plaintiffs were not prohibited from bringing their claims because they challenged the same basic mislabeling practice across different product flavors.[169] Similarly, in Anderson v. Jamba Juice Co., the court held that the plaintiff, who purchased several flavors of at-home smoothie kits labeled "All Natural," had standing to bring claims on behalf of

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[164] Id.

[165] Id. at 980; see also Campion v. Old Republic Home Prot. Co., Inc., 272 F.R.D. 517, 539-41 (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).

[166] 615 F.3d 1023, 1033 (8th Cir. 2010).

[167] Id. at 1034.

[168] See, e.g., Miller v. Ghirardelli Chocolate Co., 912 F. Supp. 2d 861, 869 (N.D. Cal. 2012); Stephenson v. Neutrogena, No. 12-cv-00426 PJH, 2012 U.S. Dist. LEXIS 105099, at *3 (N.D. Cal. July 27, 2012) (dismissing claims based on products not purchased because the purchased products were not "similar enough to the unpurchased products such that an individualized factual inquiry was not needed for each product"); Astiana v. Dreyer's Grand Ice Cream, Inc., No. C-11-2910 EMC, 2012 WL 2990766, at *11 (N.D. Cal. July 20, 2012) (noting that in most reasoned opinions, "the critical inquiry seems to be whether there is sufficient similarity between the products purchased and not purchased"); Anderson v. Jamba Juice Co., 888 F. Supp. 2d 1000, 1005-06 (N.D. Cal. 2012) (relying on Astiana for the same proposition); Arroyo, 2015 WL 5698752, at *4 (dismissing plaintiff's UCL and CLRA claims because plaintiff conceded he never viewed the non-purchased products' marketing materials and failed to plead how non-purchased products were substantially similar to those models purchased).

[169] 2012 WL 2990766, at *13.

purchasers of other flavors because the products were sufficiently similar and because the "same alleged misrepresentation was on all of the smoothie kit[s] regardless of flavor . . . ."[170]

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]."[171] "Unlawful" claims have been predicated on numerous laws and regulations existing at various levels of government, including: federal statutes;[172] federal regulations;[173] state statutes;[174] state

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[170] 888 F. Supp. 2d at 1006.

[171] 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.").

[172] 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).

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

[174] See, e.g., Ingalls, 2017 WL 3021037, at *2 (bringing suit for alleged violations of California's Automatic Renewal Law); Sisemore v. Master Fin., Inc., 151 Cal. App. 4th 1386, 1426 (2007) (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, as recognized in* J.F. Shea Constr., Inc. v. Cty. of Siskiyou, No. C062117, 2010 WL 438368, at *9 (Cal. Ct. App. Feb. 9, 2010) (unpublished); 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 Pub. Util. 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); accord Blue Cross of Cal., Inc. v. Super. Ct., 180 Cal. App. 4th 1237, 1254 (2009) ("When a statute [] grants enforcement authority to a particular government agency [] and does not grant it to anyone else, a local law enforcement official (a district attorney or a city attorney) can still pursue UCL claims based on conduct made unlawful by the statute."). But see Martinez v. Welk Grp., 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); People v. Persolve, LLC, 218 Cal. App. 4th 1267, 1274, 1276-77 (2013) (holding that an "'unlawful' business practice cause of action" based on violations of the FDCPA and Rosenthal Act "can be prosecuted under an exception to the litigation privilege" because when "the 'borrowed' statute is more specific than the litigation privilege and the two are irreconcilable, unfair competition law claims based on conduct specifically prohibited by the borrowed statute are excepted from the litigation privilege"); Fuller v. First Franklin Fin. Corp., 216 Cal. App. 4th 955, 968 (2013) (permitting imposition of vicarious liability where plaintiff alleged that defendant "acted pursuant to a business plan under which it obtained overvalued appraisals to make loans to otherwise unqualified borrowers in order to maximize the volume of loans available for sale to investors who would bear the resulting high risk of foreclosure (along with the borrowers)" and paid an "undisclosed kickback" to its agent for securing loans); Gonzales v. CarMax Auto Superstores, LLC, 840 F.3d 644, 654 (9th Cir. 2016) (granting summary judgment to plaintiff on his CLRA and UCL claims based on defendant dealer's violation of California Vehicle Code requiring car dealers to provide consumers with completed inspection reports prior to selling a certified vehicle).

regulations;[175] local ordinances;[176] prior case law;[177] standards of professional conduct;[178] and common law doctrines.[179] To plead a UCL claim based on an "unlawful" practice, a plaintiff must allege facts 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.[180]

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[175] 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), *abrogated on other grounds by* Cel-Tech, 20 Cal. 4th at 185.

[176] 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, 23 Cal. 4th 116.

[177] 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); AmeriPOD LLC v. DavisREED Constr. Inc., No. 3:17-cv-00747-H-WVG, 2017 WL 2959351, at *6-7 (S.D. Cal. July 11, 2017) (holding intentional interference with contract can form the basis of a UCL claim under 9th Circuit case law).

[178] See, e.g., People ex rel. Herrera v. Stender, 212 Cal. App. 4th 614, 632 (2012) (rules of professional conduct governing attorneys may serve as a predicate for UCL "unlawful" action); 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).

[179] See, e.g., Cortez v. Glob. 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); House of Lebanon Org., Inc. v. House of Pac. Relations Int'l Cottages, Inc., No. 3:17-cv-00232-L-BGS, 2017 WL 2380121, at *4 (S.D. Cal. June 1, 2017) (holding that breach of contract, being a violation of California common law, is sufficient "to sustain a claim under the unlawful prong of the UCL"); Nestle USA, Inc. v. Crest Foods, Inc., No. LACV1607519JAKAFMX, 2017 WL 3267665, at *20 (C.D. Cal. July 28, 2017) (permitting "unlawful" claim based on the common law of breach of implied covenant of good faith and fair dealing); Moran, 3 Cal. App. 5th at 1142-43 (permitting "unlawful" claim based on common law unconscionability for allegedly excessive contract pricing for hospital services). But see Pneuma Int'l, Inc. v. Yong Kwon Cho, No. A151536, 2019 WL 3313607, at *8-*9 (Cal. Ct. App. July 24, 2019) (unpublished) (holding that tort of trespass to chattels, which allows recovery for minor interferences with possession of personal property not amounting to conversion, could not serve as the predicate for a UCL "unlawful" violation); 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., 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); Prostar Wireless Grp., LLC v. Domino's Pizza, Inc., No. 3:16-CV-05399-WHO, 2017 WL 67075, at *6 (N.D. Cal. Jan. 6, 2017) (citing Shroyer and holding that alleged breach of fiduciary duty insufficient to state claim under "unlawful" prong of UCL); 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 claim 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) (quotation omitted)).

[180] See 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.").

Historically, courts have imposed some limitations on the broad "borrowing" of underlying law that is permitted on unlawful claims.[181] However, the California Supreme Court issued a pair of decisions in 2013 making clear that federal and state statutes that have no private right of action can nonetheless serve as a basis for a UCL "unlawful" violation.

In Rose v. Bank America, N.A.,[182] plaintiffs alleged a claim under the "unlawful" prong of the UCL based on alleged violations of TISA, a statute that Congress had amended to remove any private right of action, but left a section permitting states to maintain laws that are consistent with TISA. The California Supreme Court allowed the claim to stand, reasoning that:

> Plaintiffs are not suing to enforce TISA, nor do they seek damages for TISA violations. Instead, they pursue the equitable remedies of restitution and injunctive relief, invoking the UCL's restraints against unfair competition. Doing so is entirely consistent with the congressional intent reflected in the terms and history of TISA. Congress expressly left the door open for the operation of state laws that hold banks to standards equivalent to those of TISA.[183]

The Court further reasoned that "[t]o forestall an action under the [UCL], another provision must actually 'bar' the action or clearly permit the conduct."[184]

The same day that it issued Rose, the California Supreme Court also handed down its opinion in Zhang v. Superior Court.[185] In Zhang, the Court held that plaintiffs may sue insurers under the UCL based on violations of state insurance laws even though the insurance code precludes a private right of action. Plaintiffs had alleged "causes of action for false advertising and insurance bad faith," which the Court reasoned "provide grounds for a UCL claim independent from" the Insurance Code sections that otherwise bar private claims.[186] The Court held that while private actions under the insurance code section at issue are barred, "when

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[181] 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., N.A., 200 Cal. App. 4th 1441, 1447 (2011) (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), *rev'd*, 57 Cal. 4th 390 (2013). 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 in part and rev'd in part on other grounds sub nom*. Hangarter v. Provident Life & Accident Ins. Co., 373 F.3d 998 (9th Cir. 2004); 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).

[182] 57 Cal. 4th at 393.

[183] Id. at 397.

[184] Id. at 398.

[185] Zhang v. Super. Ct. (Cal. Capital Ins. Co.), 57 Cal. 4th 364 (2013).

[186] Id. at 369.

insurers engage in conduct that violates both the [Insurance Code section] and obligations imposed by other statutes or the common law, a UCL action may lie."[187]

Notwithstanding the decisions in Rose and Zhang, however, the Northern District of California held in Newton v. American Debt Services, Inc.[188] that the violation of an FDIC consent order cannot form the basis of a UCL claim for "unlawful" or "unfair" conduct. The court emphasized that the FDIC entered its consent order pursuant to 12 U.S.C. § 1818, which precludes a court from "affect[ing] by injunction or otherwise the issuance or enforcement of any notice or order [issued under this section], or to review, modify, suspend, terminate, or set aside such notice or order."[189] The court determined that allowing a plaintiff "to 'borrow' the FDIC Order as predicate authority for a UCL violation, and thereby . . . litigate her claims that [the defendant] acted unlawfully by contravening that Order, it most certainly would 'affect . . . enforcement' of the Order."[190] Potentially limiting the scope of its ruling, however, the court noted, "What [12 U.S.C. § 1818] bars is enforcement of an FDIC cease and desist order itself (as distinct from the substantive regulatory law being enforced)."[191]

2. Defenses Specific To Unlawful Claims

a. Defense To Underlying Violation

An affirmative defense to a violation of the underlying law is also a defense to the attendant unlawful claim.[192] Similarly, a defendant's full compliance with the underlying law is a defense to an unlawful claim.[193] As discussed below, however, a statute of limitations defense

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[187] Id. at 384.

[188] 75 F. Supp. 3d 1048 (N.D. Cal. 2014).

[189] Id. at 1058.

[190] Id. at 1059.

[191] Id.

[192] 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); In re Bayer Phillip Colon Health Probiotics Sales Practices Litig., No. 11-03017, 2017 WL 1395483 (D.N.J. Apr. 18, 2017) (dismissing UCL claim based upon allegations of fraudulent advertising due to plaintiff's lack of evidence showing the actual falsity of the advertisements), *appeal filed*, No. 17-2123 (3d Cir. May 18, 2017); Dr. Seuss Enters., L.P. v. Comicmix LLC, 300 F. Supp. 3d 1073 (S.D. Cal. 2017) (denying motion to dismiss UCL claims in copyright and trademark action because defendant failed to prove each element of nominative fair use defense).

[193] 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); Hawkins v. Kellogg Co., 224 F. Supp. 3d 1002, 1012-13 (S.D. Cal. 2016) (dismissing UCL claim because defendant's use of partially hydrogenated oil (PHO) was permitted until June 2018 per FDA regulation and subsequent congressional ratification, and thus not a violation of the federal laws predicating the UCL claim), *appeal filed*, No. 17-55035 (9th Cir. Jan. 6, 2017). 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).

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.[194]

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.[195]

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,[196] and no certain definition of "unfairness" in the consumer context has yet been formulated.[197] In the past, courts frequently used one of two tests. The first "involves an examination of [the practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer."[198] In brief, "the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim . . . ."[199] In the second, courts adopted language from FTC guidelines, which define "unfair" conduct with reference to section 5 of the FTCA.[200] Under this test, a business act is

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[194] 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).

[195] 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"); Californians For Disability Rights, 39 Cal. 4th at 233 (finding that Proposition 64 applied to then-pending actions).

[196] See Candelore v. Tinder, Inc., 19 Cal. App. 5th 1138, 1155 (2018) (holding that alleged age discrimination in violation of California's Unruh Civil Rights Act violated both the "unlawful" and "unfair" prongs of the UCL); Smith v. Chase Mortg. Credit Grp., 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); see, e.g., Motors, Inc. v. Times Mirror Co., 102 Cal. App. 3d 735, 740 (1980).

[197] See Mui Ho v. Toyota Motor Corp., 931 F. Supp. 2d 987, 1000 n.5 (N.D. Cal. 2013) ("California courts and the legislature have not specified which of several possible 'unfairness' standards is the proper one."); 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"); Doe One v. CVS Pharmacy, Inc., No. 18-cv-01031-EMC, 2018 WL 6574191, at *12-13 (N.D. Cal. Dec. 12, 2018) (acknowledging that the law remains unsettled and finding plaintiff failed to state a claim under either test).

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

[199] State Farm Fire & Cas. Co., 45 Cal. App. 4th at 1104 (citations omitted); 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); In re Anthem, Inc. Data Breach Litig., 162 F. Supp. 3d at 990 (applying balancing test and allowing UCL claim under unfair prong for data breach claims because of "California's public policy of protecting customer data," notwithstanding defendants' contention that plaintiffs failed to allege that the data breach was immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers) (quoting In re Adobe Sys., Inc. Privacy Litig., 66 F. Supp. 3d at 1227).

[200] See Colgate v. JUUL Labs, Inc., 402 F. Supp. 3d 728, 760 (N.D. Cal. 2019) (holding that plaintiffs stated a claim for unfair business practices under both the Sperry test and the "tethering test" because a public policy against marketing e-cigarettes to minors was "tethered" to public policies expressed in statutes prohibiting the sale of e-cigarettes to minors); Hutchinson, 2009 WL 1726344, at *8 (noting that California courts have adopted the FTC guidelines established in F.T.C. v. Sperry & Hutchinson

"unfair" when it "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."[201]

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.,[202] the California Supreme Court rejected the definitions in the context of a non-consumer claim, and criticized their use in consumer cases, as well. 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."[203] 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.[204] However, the Court did not articulate a test applicable to the consumer context.

The various criticisms of the consumer definitions, including by the California Supreme Court in Cel-Tech, seemingly have spurred the Court 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."[205] Moreover, in In re Firearm Cases,[206] the Court of Appeal,

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Co., 405 U.S. 233, 244 (1972)). But see Vasic v. PatentHealth, L.L.C., 171 F. Supp. 3d 1034, 1043 (S.D. Cal. 2016) ("'[T]he Ninth Circuit has rejected the use of the FTC test in the consumer context' because it focuses on 'anti-consumer conduct' as opposed to 'anti-competitive conduct.'") (quoting Backus v. Gen. Mills, Inc., 122 F. Supp. 3d 909, 929 (N.D. Cal. 2015).

[201] See Cmty. Assisting Recovery, Inc. v. Aegis Sec. Ins. Co., 92 Cal. App. 4th 886, 894 (2001); Podolsky, 50 Cal. App. 4th at 647; State Farm Fire & Cas. Co., 45 Cal. App. 4th at 1104; see also Bardin v. DaimlerChrysler Corp., 136 Cal. App. 4th 1255, 1270 (2006); Jolley v. Chase Home Fin., LLC, 213 Cal. App. 4th 872, 907-08 (2013) ("[W]hile dual tracking may not have been forbidden by statute at the time, the new legislation and its legislative history may still contribute to its being considered 'unfair' for purposes of the UCL."); Hodsdon, 162 F. Supp. 3d at 1027 ("Granting that the labor practices at issue are immoral, there remains an important distinction between them and the actual harm for which [plaintiff] seeks to recover, ... [Defendant's] failure to disclose information it had no duty to disclose in the first place is not substantially injurious, immoral, or unethical.").

[202] 20 Cal. 4th at 185 ("We believe these definitions are too amorphous and provide too little guidance to courts and businesses.").

[203] 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.").

[204] 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.

[205] 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

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. Further, in Camacho v. Automobile Club of Southern California,[207] 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) the 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."[208]

Given the various tests articulated by the Court 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.[209]

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) (unpublished) (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 WL 1911154, 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); Hodsdon, 162 F. Supp. 3d at 1027 (invoking a general public policy against child and forced labor without referencing specific statutes, regulations, or constitutional provisions is insufficient); Goonewardene, 5 Cal. App. 5th at 188 (labor and wage orders identified by plaintiff in support of her UCL claims were insufficient to allege reliance because they did not apply to defendant). But see Shvarts v. Budget Grp., 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.").

[206] 126 Cal. App. 4th 959, 981 (2005).

[207] 142 Cal. App. 4th 1394, 1403 (2006).

[208] See Berenblat v. Apple, Inc., No. 08-4969 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).

[209] See 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"; courts faced with consumer lawsuits have the option to either apply Cel-Tech or Camacho but the approaches are not mutually exclusive because "adopting one standard does not necessitate rejection of the other"); Moran, 3 Cal. App. 5th at 1147-48 (2016) (discussing without resolving the split authority on the proper formulation of unfairness in consumer actions, but permitting an unfairness claim based on common law unconscionability); In re Qualcomm Litig., No. 17-cv-00108-GPC-MDD, 2017 WL 5985598, at *6-11 (S.D. Cal. Nov. 8, 2017) (recognizing "California law is unsettled with regard to the correct standard to apply to non-competitor consumer suits" and analyzing claim under all three "primary consumer tests," i.e., the "tethering test," "balancing test" and "FTC test"); see also Oskoui v. J.P. Morgan Chase Bank, N.A., 851 F.3d 851, 856-57 (9th Cir. 2017) (finding that plaintiff alleged "viable" claim under UCL for a "fraudulent and an unfair" business practice based on allegations that defendant accepted payments from plaintiff pursuant to a loan modification plan while simultaneously continuing with

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.,[210] plaintiffs challenged as unfair the defendant's practice of passing on the actual cost of conducting property inspections to delinquent mortgage borrowers. The trial court granted summary judgment in favor of defendant, which was affirmed. The Court of Appeal 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.[211] Similarly, in Bickoff v. Wells Fargo Bank N.A.,[212] it was not unfair for a bank to foreclose on an overdue construction loan where it had never guaranteed permanent financing. In Harris v. Wells Fargo Bank N.A.,[213] it was not unfair for a bank to record a notice of default against secured real property at the same time as the borrower was preparing, but had not completed, a borrower's loan modification application. In Abramson v. Marriott Ownership Resorts, Inc., the court recognized that while the definition of "unfair" conduct has been in flux in California courts, the test articulated in Camacho is a "better" test to determine whether a plaintiff has met the heightened pleading standard.[214]

b. Business Justification

A defendant may use the reasons, justifications and motives underlying the challenged business practice to show that it is not "unfair."[215] For example, a defendant may claim that the

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foreclosure proceedings and knowing plaintiff would not be eligible for modification in any event). But see McMahon v. JPMorgan Chase Bank, N.A., No. 2:16-CV-1459-JAM-KJN, 2017 WL 2363690, at *5 (E.D. Cal. May 31, 2017) (dismissing "unfair" claim based on defendant's alleged failure to respond to plaintiff's loan modification application because, unlike in Oskoui, there were no allegations that plaintiff made payments on a modification plan or that defendant proceeded with foreclosure).

[210] 98 Cal. App. 4th 1158, 1173 (2002).

[211] Id. at 1176 ("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); Circle Click Media LLC v. Regus Mgmt. Grp. LLC, No. 12-04000 SC, 2013 WL 57861, at *8 (N.D. Cal. Jan. 3, 2013) (finding that late-fee provision in contract was not unfair because plaintiff could not establish that injury was substantial or that plaintiff could not have avoided alleged injury). But see Bretches v. OneWest Bank, No. B238686, 2012 WL 6616478, at *10 (Cal. Ct. App. Dec. 19, 2012) (unpublished) (finding that a systematic breach of standard consumer contracts can constitute an unfair business practice under the UCL).

[212] No. 14CV1065 BEN (WVG), 2016 WL 3280439, at *15-16 (S.D. Cal. June 14, 2016), *aff'd*, 705 F. App'x 616 (9th Cir. 2017).

[213] No. 516CV00645CASKKx, 2016 WL 3410161, at *4 (C.D. Cal. June 15, 2016), *vacated on other grounds*, No. EDCV 16-645 JGB (KKx), 2016 WL 11486587 (C.D. Cal. July 14, 2016) (vacating prior opinion following recusal of prior assigned judge under 28 U.S.C. § 455).

[214] 155 F. Supp. 3d 1056 (C.D. Cal. 2016).

[215] See Motors, Inc., 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), *abrogated on other grounds by* Cortez v. Purolator Air Filtration Prods. Co., 23 Cal. 4th 163 (2000); Levitt v. Yelp! Inc., 765 F.3d 1123, 1136-37 (9th Cir. 2014) (finding defendant's alleged attempts to extort small business to purchase advertising

challenged conduct is an essential part of its business operations or that it is acting consistent with industry practice for an important reason.[216]

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."[217] Derived from cases addressing the 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.[218] 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."[219]

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

A defense exists where the business practice at issue is expressly authorized by statute.[220] However, "the Legislature's mere failure to prohibit an activity does not prevent a court from finding it unfair."[221]

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on internet site not unfair because plaintiffs had not pleaded facts sufficient to support an inference of extortion).

[216] See Walker, 98 Cal. App. 4th at 1175; 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; 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). But see S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861 (1999) (finding a similar method to calculate interest in an ongoing business relationship between sophisticated businesses did not violate the UCL).

[217] In re Sony Grand WEGA KDF-E A10/A20 Series Rear Projection HDTV TV Litig., 758 F. Supp. 2d 1077, 1101 (S.D. Cal. 2010) (citing Dean Witter Reynolds, Inc. v. Super. Ct., 211 Cal. App. 3d 758, 768 (1989)) (applying the alternative source defense to a UCL claim based on unconscionability).

[218] See, e.g., Shadoan v. World Sav. & Loan Ass'n, 219 Cal. App. 3d 97, 103, 106 (1990) (holding prepayment penalty on a home loan to be invalid basis for 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).

[219] See, e.g., Olsen v. Breeze, Inc., 48 Cal. App. 4th 608, 628-29 (1996) (affirming summary adjudication against plaintiff on 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).

[220] 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, "courts may not use the [UCL] to

C. Claims For "Fraudulent" Conduct

1. The Liability Standard

As noted above, in Tobacco II, the California Supreme 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).[222] Rather, under those decisions, a plaintiff must show only that members of the public were likely to be deceived.[223]

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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 the Truth in Lending Act ("TILA")); Suzuki v. Hitachi Glob. 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 (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 United States v. Colgate & Co., 250 U.S. 300 (1919), could not be deemed "unfair" as a matter of law); Alaei v. Rockstar, Inc. 224 F. Supp. 3d 992, 1001 (S.D. Cal. 2016) (citing Cel-Tech and dismissing UCL claim where plaintiff seeks to "use the UCL to attack conduct which the legislature has thoughtfully considered and deemed lawful").

[221] Cel-Tech, 20 Cal. 4th at 184; see Ebner v. Fresh, Inc., 838 F.3d 958 (9th Cir. 2016) (safe harbor doctrine barred claim that an accurate net weight statement for lip balm was deceptive, but did not bar separate omission claim regarding product accessibility because omitting supplemental statements on cosmetic labels was not affirmatively permitted by statute); McCoy v. Nestle USA, Inc., 173 F. Supp. 3d 954, 972 (N.D. Cal. 2016), *aff'd*, No. 16-15794 (9th Cir. July 10, 2018); Motors, Inc., 102 Cal. App. 3d at 741; see also Thompson v. Am. Tow Serv., No. A114373, 2007 WL 3045195, at *4 (Cal. Ct. App. Oct. 19, 2007) (unpublished) (holding that a municipal ordinance cannot establish safe harbor under the UCL); Ramirez v. Balboa Thrift & Loan, 215 Cal. App. 4th 765, 774, 77-78, 780-81 (2013) (reversing denial of class certification because defendant was not entitled to assert the Rees-Levering Act's safe harbor that it properly denied reinstatement of defaulted auto loans as a basis for opposing certification); Rojas v. Platinum Auto Grp., Inc., 212 Cal. App. 4th 997, 1005 (2013) (reversing demurrer because plaintiff "need not have suffered actual damage from Platinum's violation of the [Rees-Levering Act's] disclosure requirements" where alleged disclosure violations were "trivial").

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

[223] See, e.g., Mass. Mut. Life Ins. Co., 97 Cal. App. 4th at 1288; Chapman v. Skype Inc., 220 Cal. App. 4th 217, 227-30 (2013) (holding that "consumers are likely to believe that Skype's 'Unlimited US & Canada' [] calling plan offers unlimited calling within the United States and Canada for a fixed monthly fee and that they will fail to notice the disclosure to the contrary in the fair usage policy" and reversing summary judgment because "whether a reasonable consumer is likely to be deceived by the representation that the calling plan is 'Unlimited' is a question of fact"); West v. JPMorgan Chase Bank, N.A., 214 Cal. App. 4th 780, 806 (2013) (finding complaint stated claims for "unfair or fraudulent practices" where plaintiff alleged that bank's temporary loan modification program did not comply with federal law, and that bank made misrepresentations regarding borrower's right to challenge bank's calculations and pending foreclosure sales, and wrongfully conducted a foreclosure sale when the borrower was in compliance with her temporary loan modification); Glaski v. Bank of

In Lavie v. Procter & Gamble Co.,[224] 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. 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 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.[225] "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."[226] 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."[227]

Am., N.A., 218 Cal. App. 4th 1079, 1101 (2013) (allegations of wrongful foreclosure were sufficient to state a UCL claim); Rufini v. CitiMortgage, Inc., 227 Cal. App. 4th 299, 311 (2014) (same). But see Korolshteyn v. Costco Wholesale Corp., No. 3:15-CV-709-CAB-RBB, 2017 WL 3622226, at *5 (S.D. Cal. Aug. 23, 2017) (granting summary judgment for defense in false advertising and labeling case, observing that in false advertising cases "a common thread . . . is that when a defendant presents scientific studies supporting its advertising claim, a plaintiff must do more than present its own studies that do not support the advertising claim, thereby demonstrating that evidence is equivocal" to show that "all reasonable scientists do not agree," no jury conclusion "would change either of these facts"), *aff'd in part, rev'd in part and remanded on other grounds by* 755 F. App'x 725 (9th Cir. 2019); Equinox Hotel Mgmt., Inc. v. Equinox Holdings, Inc., No. 17-CV-06393-YGR, 2018 WL 659105, at *14 (N.D. Cal. Feb. 1, 2018) (where competitor asserted trademark infringement claims, court recognized split of authority amongst district courts as to whether competitors must allege actual reliance under "fraud" prong of UCL and adopted "majority approach" requiring plaintiff-competitor to plead its own "actual reliance" as opposed to reliance of third-parties, i.e., customers or potential customers, on defendant's mark); Arias v. Select Portfolio Servicing Inc., No. 1:17–CV–01130–DAD–SAB, 2017 WL 6447890, *8 (E.D. Cal. Dec. 18, 2017) (noting that allegations of fraudulent acts or conduct must state with particularity the circumstances allegedly constituting fraud, including descriptions of facts such as "the time, place, persons, statements and explanations of why allegedly misleading statements are misleading").

[224] 105 Cal. App. 4th 496, 512 (2003).

[225] Id. at 504.

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

[227] 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); Patricia A. Murray Dental Corp. v. Dentsply Int'l, Inc., 19 Cal. App. 5th 258, 275 (2018) (holding that evidence was insufficient to demonstrate that the directions accompanying an ultrasonic scaler for use in oral surgery were misleading because dentists acting reasonably would not have been misled by the directions); In re OnStar Contract Litig., 278 F.R.D. 352, 378 (E.D. Mich. 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), *appeal filed*, No. 12-101 (6th Cir. Jan. 3, 2012). 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

In contrast, in Hill v. Roll International Corp.,[228] 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. However, applying the reasonable consumer standard as outlined in Lavie, as well as analyzing examples contained in an FTC guide, the Court of Appeal 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."[229] The court did note, however, 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."[230]

The Ninth Circuit clarified in Hodsdon v. Mars, Inc.[231] that an allegedly fraudulent omission regarding a non-physical defect has to relate to the "central functionality" of the product for the omission to be actionable under the UCL, FAL or CLRA.[232] In Hodsdon, plaintiff claimed that defendant's failure to disclose, on its products' labels, the involvement of child or slave labor in the products' supply chain was fraudulent, unfair and unlawful in violation of the UCL. The Ninth Circuit dismissed plaintiff's claims, given that there was no physical or safety defect involved and plaintiff failed to sufficiently plead how the omitted information related to the "central functionality" of the products.[233]

The California Court of Appeal broadly interpreted "deceptive" business practices in Brady v. Bayer Corp.[234] In that case, the Court of Appeal held that plaintiff sufficiently alleged a claim under the UCL and CLRA, reasoning that the "One-A-Day" vitamin brand misled the public by actually requiring consumption of two of its vitamin "gummies" per day, given the company's longstanding history, the effect of its brand name on a reasonable consumer and (in particular) the fact that the serving size was written in fine print on the back label.[235] The Court of Appeal canvassed relevant case law and discussed four themes for misleading-label claims: (1) common sense, (2) literal truth/literal falsity, (3) the front-back dichotomy and (4) brand names misleading in themselves. The court found that plaintiff's claim could proceed beyond the pleading stage under each of the four theories.[236]

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public is more gullible than the sophisticated buyer") (internal quotations and citations omitted), *aff'd*, 38 Cal. 4th 964 (2006).

[228] 195 Cal. App. 4th 1295, 1298 (2011).

[229] Id. at 1301.

[230] Id. at 1304.

[231] 891 F.3d 857 (9th Cir. 2018).

[232] See id. at 859-60; Beyer v. Symantec Corp., 333 F. Supp. 3d 966, 979-80 (N.D. Cal. 2018) (finding that a software defect is a physical defect that relates to the central functionality of the software, unlike the use of child labor in chocolate production in Hodsdon).

[233] Hodsdon, 891 F.3d at 865.

[234] 26 Cal. App. 5th 1156, 1159 (2018).

[235] See id. at 1172 ("You cannot take away in the back fine print what you gave on the front in large conspicuous print. The ingredient list must *confirm* the expectations raised on the front, not contradict them.") (Emphasis in original).

[236] See id. at 1172-73.

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, and statements that are literally true may still be unlawful if they are likely to mislead the public.[237] 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 have held that clear, unambiguous language will defeat a fraudulent claim as a matter of law.[238]

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.,[239] the Court of Appeal applied a "puffing" defense in holding that certain statements were not actionable under the UCL. 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."[240] It is worth noting that while

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[237] See Fitzhenry-Russel v. Keurig Dr. Pepper, Inc., No. 17-cv-00564-NC, 2018 WL 5795755, *2 (N.D. Cal. Nov. 2, 2018).

[238] See Bickoff, 2016 WL 3280439, at *15 (finding that the "public would not be likely to be deceived into thinking permanent financing was guaranteed" because Wells Fargo provided "many statements of limitation and condition" that referenced permanent financing and the absence of permanent financing in the agreement); 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). But see Mullins v. Premier Nutrition Corp., 178 F. Supp. 3d 867, 891-92 (N.D. Cal. 2016) (rejecting argument that disclaimer on back of Joint Juice product would disabuse all reasonable customers of allegedly fraudulent advertising claims that the product relieved osteoarthritis).

[239] 113 Cal. App. 4th at 1361-62.

[240] 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); Edmundson v. Procter & Gamble Co., 537 F. App'x 708, 709 (9th Cir. 2013) (dismissing UCL and CLRA claims because statements were "non-actionable puffery" that was "general, subjective, and cannot be tested"); Nilon v. Nat.-Immunogenics Corp., No. 3:12cv00930-LAB (BGS), 2013 WL 5462288, at *2 (S.D. Cal. Sept. 30, 2013) (denying motion for class certification without prejudice because UCL and CLRA claims cannot proceed based on lack of substantiation by scientific evidence of supplement's efficacy); Ivie v. Kraft Foods Glob., Inc., 961 F. Supp. 2d 1033 (N.D. Cal. 2013) (granting

courts permit sellers to "puff" their products, the question of whether a seller's representation regarding a product is factually specific and materially relied upon by a consumer in making a purchase is still one courts defer to the trier of fact.[241]

D. General Defenses To UCL Actions

1. Constitutional Challenges

The UCL has survived numerous constitutional challenges based on vagueness[242] and due process.[243] Although the defense bar has long hoped that the California Supreme Court would address due process considerations, as yet it has 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.,[244] the California Supreme Court addressed whether a defendant's statements made in the course of a public relations campaign were constitutionally protected

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in part and denying in part motion to dismiss allegations under UCL of mislabeled and unlawful branding regarding natural and health benefit claims on packages, and denying preemption based on FDA regulations); Cheramie v. HBB, LLC, 545 F. App'x 626 (9th Cir. 2013) (affirming dismissal of CLRA claims based on alleged mislabeling of presence of melatonin in product because no reasonable consumer would be misled by package's clear labeling); Rasmussen v. Apple Inc., 27 F. Supp. 3d 1027, 1043 (N.D. Cal. 2014) (statements regarding high quality of product did not constitute actionable "misrepresentations about specific or absolute characteristics").

[241] See, e.g., Rutledge v. Hewlett-Packard Co., 238 Cal. App. 4th 1164, 1176 (2015) (holding plaintiff's allegations that she purchased her notebook based on an HP advertisement regarding its notebook screens created a triable issue of material fact as to the nature of defendant's representation and whether the advertisement triggered a duty to disclose the product's screen defect).

[242] See, e.g., People ex rel. Mosk v. Nat'l Research Co., 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 of law.'") (citation omitted).

[243] 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); AT&T Mobility LLC v. AU Optronics Corp., 707 F.3d 1106, 1113-14 (9th Cir. 2013) (reversing district court's holding that "Due Process Clause will permit the application of California law in a price-fixing case only when a plaintiff purchased the price-fixed goods in California" and holding that "anticompetitive conduct by a defendant within a state that is related to a plaintiff's alleged injuries and is not 'slight and casual' [] establishes a 'significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'") (footnote and citation omitted).

[244] 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 defendant's failure to include a novel on its bestseller list fit within the free speech protections afforded by the First Amendment to the United States Constitution. Despite the Court's holding that the best seller list was not "commercial speech," it nevertheless determined that plaintiff's UCL claim was defeated. Id. at 1048 n.3.

from suit under the UCL. 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.[245] Plaintiff alleged that Nike's comments were false and misleading under the UCL.[246] 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.[247] 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.[248] 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.[249]

Although the United States Supreme Court initially granted certiorari, it subsequently dismissed certiorari as improvidently granted.[250] 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."[251] The doctrine of equitable tolling based on fraudulent concealment has been applied to UCL claims.[252] California's trial courts have been in conflict, however, as to whether the "discovery rule" applies to UCL claims,[253] as have been the federal courts.[254] In 2013, the

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

[246] Id.

[247] Id. at 970.

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

[249] Id. at 963-64.

[250] Nike, Inc. v. Kasky, 539 U.S. 654 (2003).

[251] Cal. Bus. & Prof. Code § 17208.

[252] 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), *disapproved on other grounds by* Aryeh v. Canon Bus. Sols., Inc., 55 Cal. 4th 1185, 1193 (2013). 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).

[253] 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 plaintiff knew of its accrual, unless [the] plaintiff can successfully invoke the equitable tolling doctrine.") (citation omitted), and Rambus Inc. v. Samsung Elecs. Co. Ltd., No. 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).

California Supreme Court held in Aryeh v. Canon Bus. Solutions, Inc.[255] that common law accrual doctrines are applicable to causes of action under the UCL.

There are two accrual doctrines: the continuing violation doctrine and the continuous accrual doctrine. The continuing violation doctrine extends the time to file a lawsuit when plaintiff's injury allegedly is caused by a series of small and related harms, making it difficult to determine when the actionable injury accrued. This doctrine may allow plaintiff to recover for earlier harm, even if the violations began years before the limitations period. By contrast, the continuous accrual doctrine extends the time to file a lawsuit when plaintiff allegedly is injured by a recurring or similar event and the injury caused by each event is sufficient to constitute the basis of its own independent lawsuit. This doctrine may save the claim from a time bar, but limits plaintiff's damages to those suffered during the limitations period. In Aryeh, the Court applied the continuous accrual doctrine to a UCL claim and suggested that this doctrine may apply to many types of UCL cases going forward. The courts are still evaluating the impact of Aryeh on claims that may previously have been found to be time-barred.[256]

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[254] 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., 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).

[255] 55 Cal. 4th at 1185.

[256] See, e.g., Hameed v. IHOP Franchising LLC, 520 F. App'x 520, 522 (9th Cir. 2013) (concluding that continuous accrual theory did not permit time-barred UCL claim to proceed because plaintiff did not allege a recurring wrongful act but that contract terms were unfair); Plumlee v. Pfizer, Inc., No. 13-CV-00414-LHK, 2014 WL 695024, at *8 (N.D. Cal. Feb. 21, 2014) (granting judgment on pleadings with leave to amend where plaintiff failed to meet "burden of pleading the time and manner of discovery, or of pleading facts that show her diligence" because plaintiff's allegations provided "no basis for the Court to conclude she was unable to discover such facts earlier despite reasonable diligence"); Allen v. Similasan Corp., No. 12CV0376-BTM-WMC, 2013 WL 5436648, at *6 (S.D. Cal. Sept. 27, 2013) (granting leave to amend as to tolling of UCL claim where court found "no reason this doctrine should not apply, as the Plaintiffs made discrete purchases of different products over many years"); Crown Chevrolet v. Gen. Motors, LLC, No. 13-CV-01362-TEH, 2014 WL 246500, at *2-3 (N.D. Cal. Jan. 22, 2014) ("As the underlying cause of action is a RICO violation, the accrual rule of injury discovery that applies to the RICO claim also applies to the UCL claim" which was barred because "[i]f its injury is the alleged forced sale [] then its claim accrued in October 2008. If its injury is the breach of its side agreement . . . then its claim accrued at the time of the first breach in November 2008."); Ortega v. Nat. Balance Inc., No. CV 13-05942 ABC EX, 2013 WL 6596792, at *5 (C.D. Cal. Dec. 16, 2013) (finding that "[p]laintiffs sufficiently pled delayed discovery as to their own claims" and "pled generalized allegations consistent with the elements of the delayed discovery rule" and rejecting assertion that allegations were too conclusory); Irving v. Lennar Corp., No. 2:12-CV-0290 KJM EFB, 2013 WL 4900402, at *10 (E.D. Cal. Sept. 11, 2013) (applying Aryeh and granting leave to amend where "plaintiffs have not adequately alleged what caused them to suspect they were injured and the cause of the injury"); Tarsha v. Bank of Am., N.A., No. 11-CV-928 W MDD, 2013 WL 1316682, at *10 (S.D. Cal. Mar. 29, 2013) (finding allegations failed to invoke discovery rule even if Aryeh applied); Wilson v. Household Fin. Corp., No. CIV S-12-1413 KJM AC, 2013 WL 1310589, at *10 (E.D. Cal. Mar. 28, 2013) (applying Aryeh but holding certain UCL claims barred where "plaintiffs had copies of the documents relating to their loan but did not examine them until 2011 . . . . That plaintiffs may not have been prudent in their business dealings does not show they may rely on the delayed discovery rule."); Gerawan Farming, Inc. v. Rehrig Pac. Co., No. 1:11-CV-01273 LJO, 2013 WL 1414637, at *14 (E.D. Cal. Apr. 8, 2013) (holding that "a trier of fact could reasonably conclude that Plaintiff had no reason to suspect prior to August 2008 that Defendant was selling the Second Generation Harvest Tote. If that is

A plaintiff also 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.,[257] the California Supreme Court held that the UCL's 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."[258]

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,[259] and 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.[260]

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the case, the statute of limitations period began to run only in August 2008, thereby making Plaintiff's action timely.").

[257] 23 Cal. 4th at 179.

[258] Id.; see also Beaver v. Tarsadia Hotels, 816 F.3d 1170, 1178 (9th Cir. Mar. 10, 2016) (rejecting a preemption argument and finding that plaintiff's claims were not time-barred because the UCL's "more generous four-year statute of limitations" governed rather than the underlying Interstate Land Sales Full Disclosure Act (ILSA)). 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); Robinson v. Open Top Sightseeing S. F., LLC, No. 14-cv-00852-PJH, 2017 WL 2265464, at *5 (N.D. Cal. May 24, 2017) (finding four-year statute of limitations applies to UCL claims regardless of whether the predicate "unlawful" violation has a shorter statute of limitations and regardless of whether the predicate violation is based on federal or state law).

[259] 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) (unpublished) (refusing 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), *abrogated on other grounds by* AT&T Mobility v. Concepcion, 563 U.S. 333 (2011) (hereinafter referred to as "Concepcion").

[260] The California tests for the enforceability and scope of choice-of-law provisions in consumer agreements are discussed in Wash. 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); Abat v. Chase Bank USA, N.A., 738 F. Supp. 2d 1093, 1094-96 (C.D. Cal. 2010).

5. Preventing The "End Run"

Defendants sometimes can argue that a UCL plaintiff 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.[261] 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.[262]

6. Federal Preemption

Federally regulated businesses frequently invoke federal preemption in defending UCL actions, and the case law is extensive. For example, many courts have addressed the application of preemption with respect to banking laws.[263] Courts have also addressed preemption with

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[261] See Caltex Plastics, Inc. v. Lockheed Martin Corp., 824 F.3d 1156, 1161 (9th Cir. 2016) (finding that plaintiff was prohibited from "bootstrap[ping]" an unfair-competition claim using a failed breach-of-contract claim, because "[p]ermitting 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") (quoting Berryman v. Merit Prop. Mgmt., Inc., 152 Cal. App. 4th 1544, 1553 (2007); 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); Carr v. Asset Acceptance, LLC, No. CV F 11-0890 LJO GSA, 2011 WL 3568338, at * 9 (E.D. Cal. Aug. 12, 2011) (citing Rubin v. Green, 4 Cal. 4th 1187, 1204 (1993) (litigation privilege bars claim under the UCL)), *rejected on other grounds by* Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress, 890 F.3d 828 (9th Cir. 2018); 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).

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

[263] Compare 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 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), *vacated on other grounds by* 718 F.3d 1052 (9th Cir. 2013); Gutierrez v. Wells Fargo Bank, NA, 704 F.3d 712, 723-25 (9th Cir. 2012) (holding that NBA preempted UCL to the extent "unfair" prong prohibited defendant's overdraft fee practice of posting checking transactions from "high-to-low"); Martinez v. Wells Fargo Bank, N.A., No. C-06-

respect to environmental laws,[264] bankruptcy laws,[265] immigration laws,[266] consumer protection laws,[267] food safety laws and product labeling laws,[268] transportation laws,[269] labor laws,[270]

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); Newbeck v. Wash. Mut. Bank, No. C 09-1599 CW, 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) (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 (9th Cir. 2010) (UCL and CLRA claims alleging that student loan servicer improperly assessed interest charges were barred by preemption under the Higher Education Act); Winebarger v. Pa. Higher Educ. Assistance Agency, 411 F. Supp. 3d 1070, 1089 (C.D. Cal. 2019) (finding plaintiff's UCL and CLRA claims based on loan provider's failure to provide accurate information were disclosure claims preempted by 20 U.S.C. § 1098g) (citing Chae); Robinson v. Bank of Am., NA, 525 F. App'x 580 (9th Cir. 2013) (National Bank Act preempted account holder's claims under California law arising out of alleged nondisclosures relating to $1.50 account fee), with Lusnak v. Bank of Am., N.A., 883 F.3d 1185, 1194-97 (9th Cir. 2018) (UCL claims predicated on violations of California's Escrow Interest Law were not preempted by NBA); McShannock v. JP Morgan Chase Bank N.A., No. 18-cv-01873-EMC, 2018 WL 6439128, at *9 (N.D. Cal. Dec. 7, 2018) (finding California's Escrow Interest Law was not preempted by HOLA with respect to plaintiffs' loans, which had been acquired by a national bank; also addressing intra-circuit split on whether HOLA continued to apply to loans acquired by a non-savings bank); Reyes v. Premier Home Funding, Inc., 640 F. Supp. 2d 1147, 1155-56 (N.D. Cal. 2009) (UCL claims predicated on violations of the California Translation Act were not barred by HOLA); Hood v. Santa Barbara Bank & Tr., 143 Cal. App. 4th 526, 548 (2006) (on claims related to refund anticipation loans, the NBA did not preempt the UCL or the CLRA, among other state laws); Smith v. Wells Fargo Bank, N.A., 135 Cal. App. 4th 1463, 1484 (2005) (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) (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) (UCL claim challenging marketing of reverse mortgage transactions was not barred by preemption under numerous federal banking laws); Wash. Mut. Bank (Brown), 75 Cal. App. 4th at 787 (UCL not preempted by RESPA); People ex rel. Sepulveda v. Highland Fed. Sav. & Loan, 14 Cal. App. 4th 1692, 1708 (1993) (12 C.F.R. § 545.2, promulgated under the HOLA, did not preempt the UCL); Gutierrez, 704 F.3d at 725-28 (claims for misleading misrepresentations under UCL fraudulent prong not preempted by NBA).

[264] 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).

[265] 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).

[266] 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).

[267] See, e.g., Churchill Vill., L.L.C. 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).

[268] See Dachauer v. NBTY, Inc., 913 F.3d 844, 849 (9th Cir. 2019) (holding that most of plaintiff's claims under the UCL and CLRA challenging labels on dietary supplements were preempted because plaintiff

sought to impose "structure/function" labeling requirements under California law that differed from applicable federal requirements); Beasley v. Lucky Stores, Inc., 400 F. Supp. 3d 942, 951 (N.D. Cal. 2019) (finding plaintiff's UCL claim challenging the sale of non-dairy creamer containing partially hydrogenated oil (PHO) was preempted by the federal Consolidated Appropriations Act for 2016, which provided that "no PHOs . . . shall be deemed unsafe . . . [or] adulterated" under the Federal Food, Drug, and Cosmetic Act until the compliance date of June 18, 2018); Beasley v. Conagra Brands, Inc., 374 F. Supp. 3d 869, 878 (N.D. Cal. 2019) (same); Kroessler v. CVS Health Corp., 387 F. Supp. 3d 1064, 1071 (S.D. Cal. 2019) (finding plaintiff's UCL and CLRA claims against CVS for falsely labeling its glucosamine supplements as "joint strengthening" was preempted because it would impose liability based on a "structure/function" requirement allowed by federal law), *appeal filed*, No. 19-55671 (9th Cir. 2019); Reid, 780 F.3d at 965-68 (holding the Food and Drug Administration's ("FDA") regulations pertaining to nutrient content labeling did not preempt plaintiff's UCL and CLRA claims for manufacturer's "No Trans Fat" misrepresentation on the label of its vegetable oil spread); Hawkins v. Kroger Co., 906 F.3d 763, 767 (9th Cir. 2018) (citing Reid and holding that FDA regulations requiring nutrition facts panel for product containing less than 0.5 grams of trans fat to state product contained 0 grams of fat did not preempt claim based on statement elsewhere on product label that product had no trans fat); Durnford v. Musclepharm Corp., 907 F.3d 595, 598 (9th Cir. 2018) (holding that Food, Drug, and Cosmetic Act did not preempt claims that product label falsely suggested that product's protein content was based on genuine protein rather than non-protein substitutes); see also Backus v. Nestlé USA, Inc., 167 F. Supp. 3d 1068, 1074 (N.D. Cal. 2016), (plaintiff's claim which sought to prohibit use of PHOs in all food immediately was preempted because it would prevent the FDA from fulfilling its objectives and conflict with Congress's decision not to deem PHOs unsafe pending a 2018 compliance date), *abrogated on other grounds as recognized by* Beasley, 400 F. Supp. 3d 942; Fisher v. Monster Beverage Corp., 656 F. App'x 819, 823 (9th Cir. 2016) (plaintiff's claims regarding the amount of caffeine in Monster Drinks were preempted because they would require ingredient labeling obligations beyond what federal law requires); In re Fontem US, Inc., No. SACV1501026JVSRAOx, 2016 WL 6520142, at *6 (C.D. Cal. Nov. 1, 2016) (UCL labeling claims expressly preempted by FDA rule defining e-cigarettes as "tobacco products," which placed e-cigarettes within the scope of the labeling requirements of the Family Smoking and Tobacco Control Act ("TCA"), and its express preemption clause; however, UCL Proposition 65 warning claims are not preempted because compliance with Proposition 65 warning requirements can be accomplished via point-of-sale notices or advertising and therefore these claims are not captured by the scope of the TCA's labeling requirements or express preemption clause); Hawkins, 224 F. Supp. 3d 1002, at 1011-13 (UCL claim for plaintiff's alleged injury from repeatedly ingesting partially hydrogenated oil in defendant's cookies preempted by conflict with FDA determination for industry phase out of partially hydrogenated oil at a future compliance date, and at odds with legislative purpose of the future compliance date to prevent economic disruption from lawsuits against food producers using partially hydrogenated oil in the meantime).

[269] See, e.g., Dugan v. FedEx Corp., No. CV 02-1234-JFW (FMOX), 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); People ex rel. Harris v. Pac Anchor Transp., Inc., 59 Cal. 4th 772, 783 (2014) (the Federal Aviation Administration Authorization Act did not preempt UCL claim that truck drivers were misclassified as independent contractors rather than employees because the act "does not preempt generally applicable employment laws that affect prices, routes, and services"), *cert. denied*, 135 S. Ct. 1400 (2015); People ex rel. Harris v. Delta Air Lines, Inc., 247 Cal. App. 4th 884, 906 (2016) (the federal ADA preempted a UCL action for enforcement of California's Online Privacy Protection Act's privacy policy requirements for an airline's consumer mobile application because the requirements "effectively interfere with the airline's selection and design of its mobile application, a marketing mechanism appropriate to the furnishing of air transportation service, for which state enforcement has been held to be expressly preempted by the ADA.") (citations and internal quotation marks omitted).

copyright laws,[271] energy laws,[272] postal laws,[273] communications laws,[274] drug labeling laws,[275] cosmetics labeling laws,[276] gasoline labeling laws,[277] securities laws,[278] credit reporting laws[279] and healthcare laws.[280]

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[270] 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); Provience v. Valley Clerks Tr. 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); Rodriguez v. RWA Trucking Co., Inc., 238 Cal. App. 4th 1375, 1409 (2013) (holding that "where a cause of action is based on allegations of unlawful violations of the state's labor laws, there is no reason to find preemption merely because the pleading raised these issues under the UCL, rather than directly under the provisions of the Labor Code alleged to have been violated") (depublished by grant of review).

[271] See, e.g., Media.net Advert. FZ-LLC v. NetSeer, Inc., 156 F. Supp. 3d 1052, 1069-70 (N.D. Cal. 2016) (Copyright Act preempted UCL claim); 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) (same); Fractional Villas, Inc. v. Tahoe Clubhouse, No. 08cv1396-IEG-POR, 2009 WL 160932, at *5-6 (S.D. Cal. Jan. 22, 2009) (same); see also Wimer v. Reach Out Worldwide, Inc., No. CV 17-1917-RSWL-ASx, 2017 WL 5635461 (C.D. Cal. July 13, 2017) (holding that conversion of camera on which stolen pictures were held was sufficient for a UCL claim to avoid preemption by federal copyright law).

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

[273] 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 (2004).

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

[275] 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 Health and Education Act); Chavez v. Blue Sky Nat. 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); Quesada v. Herb Thyme Farms, Inc., 62 Cal. 4th 298 (2015) (federal regulatory regime for certifying organic growers did not preempt UCL and CLRA claim alleging that herb grower illegally marketed its herbs as organic); Hendricks v. StarKist Co., 30 F. Supp. 3d 917 (N.D. Cal. 2014) (Food, Drug, and Cosmetic Act did not preempt plaintiff's claim that defendant underfilled canned tuna).

[276] See, e.g., Eckler v. Neutrogena Corp., 238 Cal. App. 4th 433 (2015) (holding that the Food, Drug, and Cosmetic Act's grant of authority to the Food and Drug Administration to regulate sunscreen labeling preempted claims brought under the UCL and CLRA), *review denied*, No. S228429 (Cal. Oct. 21, 2015).

[277] 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).

A preemption defense, however, is always subject to a court's interpretation of congressional intent with respect to the federal law at issue,[281] and often a state court is reluctant to find that state law will not apply to the claims of the state's citizens.[282]

Notably, in Solus Industrial Innovations, LLC v. Superior Court,[283] the California Supreme Court held that the federal Occupational Safety and Health Act of 1970 ("OSHA") did not preempt the district attorney's UCL claims seeking penalties against an employer for alleged violations of California's workplace safety standards. In finding that neither field nor obstacle preemption barred the UCL claims, the Court found that California's workplace safety plan had been approved under OHSA, the claims involved state standards approved by the Secretary of Labor and Congress had explicitly recognized the continuing applicability of state law in the field.[284] The Court also found that express preemption did not apply because OHSA did not reflect clear Congressional intent to preempt state law.[285]

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[278] 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 failing to execute stock orders in a fair and timely manner).

[279] 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")); Molina v. Synchrony Bank/Walmart, No. EDCV 17-1464 JGB (JEMx), 2018 WL 2721903, at *4 (C.D. Cal. Apr. 17, 2018) (agreeing that FCRA preempts California's UCL as applied to furnishers of credit information). But see Alborzian v. JPMorgan Chase Bank, N.A., 235 Cal. App. 4th 29, 39 (2015) (holding plaintiffs' claims regarding bank's deceptive efforts to collect an unenforceable loan were not preempted by the Fair Credit Reporting Act because that act preempts only state laws that impose "a requirement or prohibition . . . relating to the responsibilities of persons who furnish information to consumer reporting agencies").

[280] See, e.g., Roberts v. United Healthcare Servs., Inc., 2 Cal. App. 5th 132, 137 (2016). In Roberts, the California Court of Appeal held that UCL claims for misrepresentation in a medical insurer's marketing materials were expressly and impliedly preempted by the Medicare Advantage preemption clause of the Medicare Act, 42 U.S.C. § 1395w-26(b)(3), following the Ninth Circuit in Do Sung Uhm v. Humana, Inc., 620 F.3d 1134, 1148-57 (9th Cir. 2010). Id. at 137-38. Notably, the Court split from two other California Court of Appeal rulings, both of which construed the Medicare Advantage preemption clause more narrowly. Id. at 144-47; cf. Cotton v. StarCare Med. Grp., Inc., 183 Cal. App. 4th 437, 447-54 (2010); Yarick v. PacifiCare of Cal., 179 Cal. App. 4th 1158, 1165-67 (2009). A split in the California Court of Appeal districts makes this issue ripe for review by the California Supreme Court.

[281] For example, in Reid, the Ninth Circuit held a Food and Drug Administration letter discussing its intentions about enforcing requirements for health claims about plant stanol esters did not have a preemptive effect on plaintiff's UCL and CLRA claims because the letter did not indicate it was made with lawmaking pretense in mind. See Reid, 780 F.3d at 965. Specifically, the letter was couched in "tentative and non-committal terms" and the letter did not authorize any health claims that conflicted with the FDA's existing plant stanol esters rule. Finally, the letter did not include any notice or comment about any preemptive effect the letter carried. Id.

[282] 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.

[283] 4 Cal. 5th 316, 345-52 (2018).

[284] Id. at 46-50.

[285] Id. at 51.

In addition, some Courts of Appeal have held that UCL claims based on systematic contract breaches are not defeated by federal preemption.[286] In Gibson v. World Savings and Loan Ass'n,[287] plaintiffs brought a UCL action challenging a federal savings association's practice of assessing premiums for forced order insurance. Rejecting defendant's preemption argument, which was based on federal banking law, the Court of Appeal 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.[288] 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."[289] Nevertheless, in Smith v. Wells Fargo Bank, N.A.,[290] the Court of Appeal similarly concluded that the UCL was not preempted by TISA with respect to contractual notice requirements.[291]

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.[292] As explained in Farmers Insurance Exchange v. Superior Court,[293] "the primary

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[286] 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*, 39 Cal. 4th 235.

[287] 103 Cal. App. 4th at 1302-04.

[288] 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.

[289] Cortez, 23 Cal. 4th at 173; see also Altman v. PNC Mortg., 850 F. Supp. 2d 1057, 1077 (E.D. Cal. 2012) (stating that the "unfairness" prong of the UCL "does not give the courts a general license to review the fairness of contracts").

[290] 135 Cal. App. 4th at 1476-84.

[291] 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).

[292] 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

jurisdiction doctrine advances two related policies: it enhances court decision-making and efficiency by allowing courts to take advantage of administrative expertise, and it helps assure uniform application of regulatory laws."[294]

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."[295] In applying this defense, courts have

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> 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 United States v. W. Pac. R.R. Co., 352 U.S. 59, 63-64 (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).

[293] 2 Cal. 4th at 391.

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

[295] 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"), *disapproved on other grounds by* Centinela Freeman Emergency Med. Assocs. v. Health Net of Cal., Inc., 1 Cal. 5th 994 (2016); 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, 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 because, "as a matter of policy, [] this Court [is not] well suited to regulating retail bank

emphasized that "[j]udicial intervention in complex areas of economic policy is inappropriate."[296] 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.[297]

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.

Notably, the California Supreme Court rejected applying the doctrine of judicial abstention in a case involving allegedly "unconscionable" conduct. In De La Torre v. CashCall, Inc.,[298] low-income borrowers brought a putative class action in federal court, alleging that a California lender's interest rates violated the "unlawful" prong of the UCL by being unconscionably high in violation of section 22302 of the Financial Code (generally prohibiting

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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.") (citations omitted). 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) (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).

[296] Wolfe, 46 Cal. App. 4th at 562; accord Loeffler v. Target Corp., 58 Cal. 4th 1081, 1129 (2014) (allowing plaintiffs' claim that Target had collected excessive sales taxes to go forward would result in "a proceeding that would produce a binding interpretation of tax law, but in which a party considered by the Legislature to be necessary, . . . the [State Board of Equalization], would be absent," and would also risk future "inconsistent determinations" of whether a particular transaction is subject to the sales tax); Alvarado v. Selma Convalescent Hosp., 153 Cal. App. 4th 1292, 1303-04 (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.").

[297] 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.").

[298] 5 Cal. 5th 966 (2018).

"unconscionable" consumer loans). The district court granted defendant's motion for summary judgment, finding the court could not provide a remedy for plaintiffs without intruding into economic policy because it would have to make a determination as to "the point at which CashCall's interest rates crossed the line into unconscionability."[299] Plaintiffs appealed, and the Ninth Circuit certified the question to the California Supreme Court to determine whether an interest rate on consumer loans of $2500 or more (California's Finance Lenders Law imposes express interest-rate caps on consumer loans of less than $2500, but no express caps on loans of $2500 or more) rendered the loans unconscionable.[300] The Supreme Court concluded that plaintiffs stated a cause of action under the UCL based on their allegation that interest rates on loans of $2500 or more were unconscionable under section 22302.[301] The Court reasoned that, "[a]lthough courts must proceed with caution in this area, the possibility that an interest rate is unconscionable in a particular context is not so different relative to any other kind of potential contractual defect that it justifies concluding that courts lack power or responsibility to address unconscionable interest rates."[302]

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] . . . ."[303] 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."[304] 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.[305] However, courts are cautioned

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[299] Id. at 974-75 (quoting De La Torre v. CashCall, Inc., 56 F. Supp. 3d 1105, 1109-1110 (N.D. Cal. 2014), *vacated and remanded on other grounds by* 904 F.3d 866).

[300] Id. at 975.

[301] Id. at 981.

[302] Id. at 993-994.

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

[304] 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. Id. But see Schnall, 78 Cal. App. 4th at 1166-67 (applying Cel-Tech standard in a consumer action).

[305] See, e.g., Alaei, 224 F. Supp. 3d at 1001 (finding that the safe harbor for both the UCL and the CLRA exists both when the Legislature has specifically permitted certain conduct and when the Legislature "considered" a situation and decided "no action should lie"); 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 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 because "[i]t is settled that a business practice does not violate the UCL if it is permitted by law"), *disapproved on other grounds by* Parnell v. Adventist Health Sys./W., 35 Cal. 4th 595 (2005); 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), *overruled on other grounds by* Parnell, 35 Cal. 4th at 595; 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

against "creating safe harbors in the absence of 'specific legislation.'"[306] Defendants may raise a "safe harbor" defense based upon case law as well.[307] Moreover, the California Supreme Court has held that the "safe harbor" defense applies retrospectively—i.e., following a change in the law authorizing the conduct at issue.[308]

III. REMEDIES UNDER THE UCL

No damages of any kind are recoverable under the UCL.[309] Instead, the UCL provides for injunctive relief, restitution and civil penalties. Injunctive relief and restitution are available in both private-party and government actions.[310] Civil penalties are available only in government enforcement actions.[311] 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.[312] The remedies available under the UCL are cumulative to other remedies, regardless of whether those remedies arise under the UCL or other law.[313]

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business practices which the Legislature has expressly declared to be lawful in other legislation.") (citations omitted). But see Aron v. U–Haul Co. of Cal., 143 Cal. App. 4th 796, 803-04 (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); Moran, 3 Cal. App. 5th at 1140 (safe harbor defense applies to patient plaintiff's discriminatory pricing claim because Bus. & Prof. Code §§ 16770 and 17042 allow hospitals to variably charge insured and non-insured patients, but the safe harbor defense does not apply to UCL claims for exorbitant pricing because the Hospital Fair Pricing Act, Health & Saf. Code § 127400 et seq., only requires a licensed hospital to establish and give notice of a schedule of fees, but does not permit charging excessive rates).

[306] Hodsdon, 162 F. Supp. 3d at 1029 (quoting Cel-Tech, 20 Cal. 4th at 163).

[307] 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).

[308] Olszewski v. Scripps Health, 30 Cal. 4th 798, 829 (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).

[309] 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 . . . .'").

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

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

[312] 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 ongoing wrongful business conduct in whatever context such activity might occur").

[313] See Cal. Bus. & Prof. Code § 17205 ("Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state."); see also Wildin v. FCA US LLC, No. 3:17cv-02594-GPC-MDD, 2018 WL 3032986, at *6-7 (S.D. Cal. June 19, 2018) (declining to dismiss UCL claim at pleading stage where defendant argued there were alternative legal remedies, reasoning that dismissal would not save substantial resources and that the appropriate form of relief should not be decided at the pleading stage). But see Nelson v. Pearson Ford Co., 186 Cal. App. 4th 983, 1018 (2010) (rescission is not available under the UCL), *disapproved on other grounds by* Raceway Ford Cases, 2 Cal. 5th 161 (2016).

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.[314] The developments in this area probably can be best understood by starting with Korea Supply Co. v. Lockheed Martin Corp.[315]

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."[316] 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."[317] 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.[318] 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."[319] In other words, plaintiff sought damages, which are not available under section 17203.[320] 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

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[314] 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 private attorney general actions. Following Proposition 64's prohibition on such actions, that discussion is moot.

[315] 29 Cal. 4th at 1149.

[316] Id.

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

[318] 125 Cal. App. 4th 895 (2005).

[319] Id. at 903.

[320] See id.

competition.'"[321] The court emphasized that "section 17203 is not 'an all-purpose substitute for a tort or contract action.'"[322] 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."[323]

Two Court of Appeal decisions, Madrid v. Perot Systems Corp.[324] and Feitelberg v. Credit Suisse First Boston, LLC,[325] 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

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[321] Id. (quoting Bank of the W. v. Super. Ct., 2 Cal. 4th 1254, 1266 (1992)); see also Marsh v. Zaazoom Sols., LLC, No. C-11-05226-YGR, 2012 WL 952226, at *14 (N.D. Cal. Mar. 20, 2012) (granting motion to dismiss as to bank defendant where relationship arose out of general deposit because bank had no ownership interest in money and therefore could not be held liable for restitution of monies allegedly taken by other defendants).

[322] Inline, 125 Cal. App. 4th at 904 (quoting Cortez, 23 Cal. 4th at 173).

[323] Id. at 905 (emphasis added) (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 Moss v. Infinity Ins. Co., 197 F. Supp. 3d 1191, 1203 (N.D. Cal. 2016) (dismissing plaintiff's UCL claim because the primary remedy sought, damages in the form of payment of policy benefits, was "entirely inconsistent" with the permitted UCL remedy of restitution); 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, 750-51 (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), *overruling on other grounds recognized by* Caputo v. Prada USA Corp., No. CV 12-3244 FMO (RZX), 2014 WL 12567143 (C.D. Cal. Feb. 6, 2014); 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), *review denied* (July 19, 2006). But see Murphy v. Kenneth Cole Prods., Inc., 40 Cal. 4th 1094, 1119 (2007) (holding that California Labor Code section 226.7 payments are a wage); 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). 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).

[324] 130 Cal. App. 4th 440 (2005).

[325] 134 Cal. App. 4th at 997.

in excess 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."[326]

One case, however, arguably reached the opposite conclusion. In Juarez v. Arcadia Financial, Ltd.,[327] plaintiffs brought a UCL class action based on alleged violations of the Rees-Levering Motor Vehicle Sales & Finance Act. 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.[328] 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."[329] 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."[330] 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."[331] 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."[332] 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,[333] 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. 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.[334] The Court of Appeal

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[326] See Madrid, 130 Cal. App. 4th at 460; Feitelberg, 134 Cal. App. 4th at 1015-20; see also Colgan v. Leatherman Tool Grp., 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"); In re Facebook, Inc., PPC Advert. Litig., 282 F.R.D. 446, 461 (2012) (denying class certification where plaintiffs could not establish entitlement to restitution "for all members of the class in a single adjudication"); Del Monte Fresh Pineapple Cases, No. A126638, 2012 WL 734115, at *8 (Cal. Ct. App. Mar. 7, 2012) (unpublished) (affirming denial of class certification where plaintiffs could not "establish that [defendant]'s profits 'can be traced directly to the ill-gotten funds' acquired from putative class members").

[327] 152 Cal. App. 4th 889, 894 (2007).

[328] Id. at 912.

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

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

[331] Id.

[332] Id. at 917.

[333] 154 Cal. App. 4th 1491, 1494-95 (2007).

[334] Id. at 1495.

reversed, 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."[335]

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.[336] 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.[337] The California Supreme Court has proposed several specific "fluid recovery" procedures, including: price rollback;[338] general escheat;[339] earmarked escheat;[340] and the establishment of an equitable trust fund.[341] 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.[342]

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[335] 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); see also Sarpas, 225 Cal. App. 4th at 1562 (limiting restitution to sums paid directly to defendants "would allow UCL and [false advertising] violators to escape restitution by structuring their schemes to avoid receiving direct payment from their victims").

[336] See, e.g., State 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.

[337] "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.

[338] 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.

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

[340] 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.

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

[342] See, e.g., Slayton v. Citibank (S.D.), N.A., No. A113891, 2007 WL 731432, at *4-5 (Cal. Ct. App. Mar. 12, 2007) (unpublished) (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.[343] Relying on this doctrine, the Court of Appeal in Day v. AT&T Corp.[344] 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.[345] Similarly, in Walker v. Allstate Indemnity Co.,[346] 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. 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.[347] Courts around the country have applied the filed rate doctrine in various regulatory contexts, including telecommunications and utilities.[348]

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[343] 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."); AT&T v. Cent. Office Tel. Co., 524 U.S. 214, 222 (1998) (recognizing the filed rate doctrine's purpose of preventing discriminatory pricing).

[344] 63 Cal. App. 4th at 335.

[345] The court, however, did hold that plaintiffs still could seek injunctive relief under the UCL. See id. In Spielholz v. Super. Ct., 86 Cal. App. 4th 1366, 1369 (2001), 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.

[346] 77 Cal. App. 4th 750, 759 (2000).

[347] 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).

[348] 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."[349] "[I]t does not require a trial judge [to] make a finding of ability to pay before ordering restitution," however.[350]

c. Restitution As A Disguised Damages Claim

A plaintiff should not be allowed to seek damages in the "disguise" of UCL restitution,[351] but the distinction between damages and restitution sometimes is difficult to discern.[352] In Cortez, for instance, the California Supreme Court awarded unpaid wages as restitution to a group of workers.[353] 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.[354]

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[355] that restitutionary backpay was not available under the UCL. 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

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

[350] Id.

[351] See Inline, 125 Cal. App. 4th at 898; 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 Grp., 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 ground 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).

[352] 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.").

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

[354] 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); Espejo v. Copley Press, Inc.,13 Cal. App. 5th 329 (2017) (allowing recovery of wrongfully withheld reimbursement of employee business expenses, as well as award of prejudgment interest on employees' wages, under the UCL); Batze v. Safeway, Inc., 10 Cal. App. 5th 440, 445 n.2 (2017) (allowing recovery of unpaid overtime wages over a four-year period based on a UCL claim); Mauia v. Petrochem Insulation, Inc., No. 18-cv-01815-MEJ, 2018 WL 4076269, at *7 (N.D. Cal. Aug. 27, 2018) (holding that plaintiff can maintain a UCL claim seeking unpaid wages as restitution given that the unpaid pages belonged to plaintiff).

[355] 122 Cal. App. 4th 339 (2004).

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.[356]

d. Measure Of Restitution

In In re Tobacco Cases II,[357] the California Court of Appeal specifically held that nonrestitutionary disgorgement (a full refund) is not an available remedy under the UCL where the plaintiff derives a benefit from the product received from the defendant.[358] The class sought restitution for monies paid for "light" cigarettes they claimed the defendant misleadingly advertised as "less unhealthful" than full-flavored cigarettes.[359] In denying the prayer for restitution, the court noted that restitutionary awards under the UCL must be supported by substantial evidence.[360] There was no dispute that class members had derived a benefit from the "light" cigarettes they had received, but the class could not put forth credible evidence showing the amount of monetary value derived from the "light" cigarettes by class members, and thus, calculating the amount of restitution owed was not within the trial court's discretion.[361] Moreover, the court specifically noted that restitution is not an available remedy in the UCL context "for the exclusive purpose of deterrence."[362]

B. Civil Penalties In Government Enforcement Actions

As noted above, civil penalties are available under the UCL only in government enforcement actions.[363] Government agencies, including the California Attorney General, city attorneys and district attorneys, increasingly are using the UCL's civil penalty provision in such actions.

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[356] 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), *disapproved on other grounds by* ZB, N.A. v. Super. Ct., 8 Cal. 5th 175 (2019); Dep't of Fair Emp't. & Hous. v. Lucent Techs., 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).

[357] 240 Cal. App. 4th 779 (2015), *review denied*, No. S23046 (Cal. Dec. 9, 2015).

[358] Id. at 800 (quoting Madrid v. Perot Sys. Corp., 130 Cal. App 4th 440 (2005)).

[359] Id. at 784.

[360] Id. at 792.

[361] Id. at 802; see also In re NJOY, Inc. Consumer Class Action Litig., 120 F. Supp. 3d at 1121 (holding that plaintiff class could not adequately demonstrate measure of restitution because their expert's methodology for calculating restitution, which was based on asking consumers what amount they would have paid for a safer product and finding an average, was "entirely subjective and lack[ed] any market-based component"); Jones v. ConAgra Foods, Inc., No. C 12-06133 CRB, 2014 WL 2702726, at *20 (N.D. Cal. June 13, 2014) (denying class certification because expert witness's methodology of comparing defendant's product to a comparator product and calculating restitution based on the price difference was "deeply flawed" because it could not be "assume[d] that the entire price difference between the [products] [was] attributable to the alleged misstatements").

[362] In re Tobacco Cases II, 240 Cal. App. 4th at 801.

[363] 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).

Penalty liability can be substantial.[364] The UCL provides that civil penalties shall be assessed in an amount not to exceed $2,500 for each violation.[365] 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.[366] In construing the phrase "for each violation," courts may apply a per-victim calculation[367] or a per-act calculation.[368]

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.[369] 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 the misconduct, [2] the number of violations, [3] the persistence of the misconduct, [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."[370] Given these broad, discretionary factors, it is difficult to predict the amount of civil penalties that a court might assess in a particular case.[371]

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[364] 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 & Cty. of S.F. 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).

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

[366] See People v. Orange Cty. Charitable Servs., 73 Cal. App. 4th 1054, 1071 (1999); First Fed. Credit Corp., 104 Cal. App. 4th at 728 ("The duty to impose a penalty for each violation is mandatory.").

[367] See People v. Super. Ct. (Jayhill Corp.), 9 Cal. 3d 283, 288 (1973); Toomey, 157 Cal. App. 3d at 23; Casa Blanca Convalescent Homes, 159 Cal. App. 3d at 534-35.

[368] People ex rel. Kennedy 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.

[369] See People v. Custom Craft Carpets, Inc., 159 Cal. App. 3d 676, 686 (1984) ("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) (unpublished) (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), *review denied* (Sept. 1, 2010).

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

[371] 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 & Cty. of S.F. 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

In People v. JTH Tax, Inc.,[372] the Court of Appeal affirmed the imposition of $774,399 in civil penalties pursuant to the UCL and FAL for illegal advertising in six categories of ads. The court found reasonable the trial court's: (1) determinations that "the ads at issue were likely to deceive or confuse" because the "mandatory disclaimers" were "in a very small font, appear within a mass of other text, and are on screen for just a second," and thus were "plainly designed to be overlooked by consumers" and "patently and deliberately illegible"; (2) imposition of "a significantly lower penalty than would have resulted if it applied the viewership estimates provided by the People" because the television ads at issue "aired a total of 1,829 times" and thus the court could have "imposed penalties of over $9 million, but only imposed penalties of $715,344"; (3) imposition of penalties for "certain illegal, [defendant]-approved Pennysaver advertisements that were mailed to homes" where the penalty was based on "calculation that less than one percent of the publications circulated were viewed"; and (4) injunction requiring the defendant to educate its personnel and control its franchisees.[373]

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.[374] 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."[375] Therefore, overall, it is fair to say that the issuance of a UCL injunction is highly case-specific.

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)).

[372] 212 Cal. App. 4th at 1249.

[373] Id. at 1253-59.

[374] 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 company was found liable for false advertising); see also U–Haul Co., 4 Cal. App. 5th 304 (granting injunction of "broad public interest" against defendant franchisor). 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); In re Fluidmaster, Inc., 149 F. Supp. 3d 940, 958-59 (N.D. Ill. 2016) (dismissing UCL claim seeking prospective injunctive relief for lack of standing because the relief sought—prohibiting defendant from marketing and selling its allegedly defective product and requiring defendant to notify consumers of the alleged product defects—was disconnected from and would not remedy injury of the named plaintiff, who had already purchased and installed the allegedly defective product); Strumlauf v. Starbucks Corp., 192 F. Supp. 3d 1025 (N.D. Cal. 2016) (dismissing claim for injunctive relief because plaintiffs could not allege a threat of repeated injury now that they were aware of Starbucks' alleged misrepresentation of under filling its lattes).

[375] Consumer Advocates v. DaimlerChrysler Corp., No. G029811, 2005 WL 327053, at *10-16 (Cal. Ct. App. Jan. 31, 2005) (unpublished); see also Rhynes v. Stryker Corp., No. 10-5619 SC, 2011 WL

However, in 2017, the California Supreme Court more clearly defined the distinction between two varieties of injunctive relief available under the UCL—"public" injunctive relief and "private" injunctive relief. In McGill v. Citibank, N.A.,[376] the Court summarized its earlier decisions on the subject and held "public injunctive relief under the UCL, the CLRA, and the false advertising law is relief that has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public. Relief that has the primary purpose or effect of redressing or preventing injury to an individual plaintiff—or to a group of individuals similarly situated to the plaintiff—does not constitute public injunctive relief."[377] Courts have since used this framework to closely examine the character of relief sought to determine whether a waiver of such "public" relief in an arbitration agreement falls within the scope of McGill.[378]

Notably, the California Supreme Court also confirmed that Proposition 64 did not eliminate the ability of *private* plaintiffs to seek *public* injunctive relief under the UCL and FAL.[379] Rather, if a private individual has standing (i.e., has "suffered injury in fact and has lost money or property as a result of" the violation) to file a private action, then that individual can request public injunctive relief in connection with that action.[380] The Court reasoned that nothing in the ballot materials for Proposition 64 suggested that voters, by stating "'that only the California Attorney General and local public officials be authorized to file and prosecute actions *on behalf of the general public*,' . . . meant to preclude individuals who meet the standing requirements for bringing a private action from requesting such relief."[381] Similarly, notwithstanding that Proposition 64 now requires private cases involving aggregated claims to comport with California's class-action standards, nothing in Proposition 64, according to the Court, suggests any "intent to link or restrict" a private individual's ability to seek "public" injunctive relief to the class action context.[382] Imposing such a requirement would, in the Court's view, "largely eliminate the ability of a private plaintiff to pursue such relief."[383]

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.[384] The Court observed that reduction of a restitution award probably would be unusual, particularly where unlawful

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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).

376 2 Cal. 5th 945 (2017).

377 Id. at 955 (internal quotation marks and citation omitted).

378 See section IV.A., below.

379 See McGill, 2 Cal. 5th at 959.

380 Id.

381 Id. (emphasis added and citations omitted).

382 Id. at 960.

383 Id.

384 23 Cal. 4th at 180 ("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).

conduct was proven.[385] 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 Fireside Bank Cases,[386] the Court of Appeal found that the UCL does not preclude application of *res judicata* or collateral estoppel as a defense. 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.[387] 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 "[r]estitution 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.[388] 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 debtor 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.[389]

The Court of Appeal rejected the debtor's argument, holding that "[g]iving 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."[390] 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.[391]

Principles of *res judicata* also limit the scope of relief available to public agencies that may bring enforcement actions following a class-action settlement. In California v. IntelliGender, LLC,[392] the Ninth Circuit Court of Appeals held that public officials cannot obtain a duplicate recovery in the form of restitution under the UCL to individuals who previously participated in a class action settlement, even if the officials contended that monetary relief provided to class members was not sufficient. The court emphasized that "[a]llowing the State's claims for restitution to go forward in state court would undermine this central guarantee of our legal system and undercut [the Class Action Fairness Act]'s purpose of increasing the fairness and consistency of class action settlements."[393] The court did note, however, that the private

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

[386] 187 Cal. App. 4th 1120, 1131 (2010).

[387] Id. at 1123.

[388] Id. at 1124.

[389] Id. at 1128.

[390] Id. at 1130.

[391] Id. at 1131.

[392] 771 F.3d 1169 (9th Cir. 2014).

[393] Id. at 1181.

settlement did not preclude the state from acting in its "sovereign capacity" to seek injunctive relief.[394]

F. Attorneys' Fees Under The UCL

Attorneys' fees are not recoverable under the UCL.[395] This is true even when a plaintiff prevails on an "unlawful" UCL claim and the underlying law allows for recovery of attorneys' fees.[396] A successful UCL plaintiff may, however, seek attorneys' fees pursuant to California Code of Civil Procedure section 1021.5, but there is no corresponding right for a successful defendant to do so.[397]

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 stake in the outcome of a case.[398] Also, the decisions construing section 1021.5 demonstrate that awards of attorneys' fees turn upon the unique facts presented.[399]

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[394] Id. at 1177.

[395] See Shadoan, 219 Cal. App. 3d at 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.").

[396] See Cel-Tech, 20 Cal. 4th at 179 ("Plaintiffs may not receive . . . attorney fees."); Hadjavi v. CVS Pharmacy, Inc., No. CV 10-04886 SJO RCX, 2010 WL 7695383, at *4 (C.D. Cal. Sept. 22, 2010) (citing Cel-Tech, 20 Cal. 4th at 179) (striking plaintiff's claim for attorneys' fees).

[397] 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 defendant had no right to attorneys' fees; it is settled law that the UCL does not provide for an award of attorneys' fees), *aff'd in part and rev'd in part on other grounds*, 53 Cal. 4th 1244, 1249 (2012).

[398] See In re Conservatorship of Whitley, 50 Cal. 4th 1206, 1211 (2010) ("[T]he purpose of section 1021.5 is not to compensate with attorney fees only those litigants who have altruistic or lofty motives, but rather all litigants and attorneys who step forward to engage in public interest litigation when there are insufficient financial incentives to justify the litigation in economic terms."); 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), *disapproved on other grounds by* Williams v. Super. Ct., 3 Cal. 5th 531 (2017).

[399] 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).

For example, in Baxter v. Salutary Sportsclubs, Inc.,[400] the Court of Appeal affirmed denial of an award of attorneys' fees to a successful UCL plaintiff. Plaintiff, purportedly acting as a 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* [sic] change in the defendant's contracts that did not result in a significant benefit to the public."[401] The Court of Appeal affirmed.[402]

Plaintiffs' counsel regularly seek fees when a defendant has changed its practices, arguing that their lawsuit precipitated the change. In Graham v. DaimlerChrysler Corp.,[403] the California Supreme Court held that attorneys' fees could be awarded where a lawsuit serves as a "catalyst" to the defendant's changed behavior. 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.[404] In Graham, plaintiffs filed a breach-of-warranty claim against DaimlerChrysler, challenging its admitted mismarketing 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. After the trial court dismissed the action, 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 California Supreme Court upheld application of the catalyst theory, finding it to be consistent with the purposes of section 1021.5.[405] Notably, the Court declined to follow Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health & Human Resources,[406] in which the United States Supreme Court rejected the catalyst theory under federal law. The Court also was not persuaded by DaimlerChrysler's policy argument that awards under the catalyst theory would require complex causal determinations and encourage nuisance suits.[407]

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[400] 122 Cal. App. 4th 941, 948 (2004).

[401] Id. at 944.

[402] Id. at 946.

[403] 34 Cal. 4th 553, 576-77 (2004).

[404] Id. at 560-61.

[405] Id. at 566.

[406] 532 U.S. 598 (2001).

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

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.[408]

1. The Lodestar Approach

California courts adopt the lodestar approach as "the primary method" for establishing a "reasonable" amount of attorneys' fees.[409] Under the lodestar approach, the court calculates attorneys' fees based upon reasonable time spent and hourly compensation for each attorney.[410]

The primacy of the lodestar method in California was established in Serrano v. Priest.[411] 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.[412]

Affirming application of the lodestar method pursuant to its holding in Serrano, the California Supreme Court in Press v. Lucky Stores, Inc.[413] rejected attorneys' fees awarded by a trial court pursuant to 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

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[408] Wershba v. Apple Comput., Inc., 91 Cal. App. 4th 224, 254 (2001), *disapproved on other grounds by* Hernandez v. Restoration Hardware, Inc., 4 Cal. 5th 260 (2018); Nat. 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) (unpublished) (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 Nat. 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"), *disapproved on other grounds by* Hernandez, 4 Cal. 5th 260.

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

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

[411] 20 Cal. 3d 25, 49 (1977).

[412] Id. at 49 n.23.

[413] 34 Cal. 3d 311 (1983).

is so '[f]undamental' to calculating the amount of the award, the exercise of that discretion must be based on the lodestar adjustment method."[414] 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 attorney 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 rational relationship to the skill, time and effort expended by plaintiffs' attorneys on this litigation.[415]

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.[416] 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.[417] The trial court awarded attorneys' fees of $985,000 and costs of $10,691 based upon the common fund method.[418] 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 questionable validity in California" and "even if it is valid, the true value of the fund must be easily calculated."[419] 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

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[414] Id. at 321-22.

[415] 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. 15, 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").

[416] 48 Cal. App. 4th 1794 (1996).

[417] Id. at 1804.

[418] Id. at 1800.

[419] Id. at 1809.

> redemption period expires. This is not the type of settlement that lends itself to the common fund approach.[420]

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.'"[421] 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.[422] 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.[423] 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."[424]

In Lealao,[425] the Court of Appeal 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 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.[426]

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.[427] 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.[428]

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[420] 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").

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

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

[423] Robbins v. Alibrandi, 127 Cal. App. 4th 438, 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).

[424] Hammond v. Agran, 99 Cal. App. 4th 115, 135 (2002), *disapproved on other grounds by* In re Conservatorship of Whitley, 50 Cal. 4th 1206.

[425] 82 Cal. App. 4th at 26.

[426] Id. at 49-50.

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

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

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.[429] 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,[430] and remanded the matter to trial court for reconsideration of a reasonable fee.[431] 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.[432] 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.[433] Third, the 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."[434]

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 or property itself or directly from the other parties enjoying the benefit.'"[435] Under the common fund method, "the activities of the party awarded fees have resulted in the preservation or recovery of a certain or easily calculable sum of money - out of which sum or 'fund' the fees are to be paid."[436] 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)."[437] Nevertheless, it has been held that "direct payment of attorney fees by defendants should not be a barrier to

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

[430] 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.

[431] See id. at 49-53.

[432] Id. at 50.

[433] Id. at 53.

[434] Id. at 45 (emphasis in original).

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

[436] Id.; see, e.g., Schiller v. David's Bridal, Inc., No. 1:10-CV-00616-AWI, 2012 WL 2117001, at *15 (E.D. Cal. June 11, 2012) ("[T]he structure of the parties' Settlement Agreement creates a Maximum Settlement Amount that constitutes a common fund out of which reasonable attorneys' fees will be paid.").

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

the use of the percentage of the benefit analysis."[438] 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."[439]

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.[440] In cases where courts have adopted the percentage or common fund method, the "benchmark" for fees is twenty-five percent, "which may be raised or lowered under appropriate circumstances."[441] 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."[442] In cases filed in or removed to federal court, use of the common fund theory may be limited by the United States Supreme Court's opinion in Perdue v. Kenny A.,[443] which calls for application of the lodestar method, without any multiplier, in many circumstances.

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 v. Concepcion,[444] McGill v. Citibank, N.A., and now Blair v. Rent-A-Center, Inc.,[445] the issue is of critical importance.

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

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

[440] 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.

[441] 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 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%.); 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%."); In re Cal. Indirect Purchases, No. 960886, 1998 WL 1031494, at *9 (Cal. Super. Ct. Oct. 22, 1998) (awarding 30% of the settlement fund). But see In re Infospace, Inc., 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").

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

[443] 559 U.S. 542 (2010).

[444] 563 U.S. 333.

[445] 928 F.3d 819 (9th Cir. 2019).

1. The Decision In Concepcion

Plaintiffs in Concepcion asserted UCL, CLRA and FAL claims, alleging that AT&T engaged in false advertising and fraud by advertising "free" phones but charging sales tax.[446] The district court held, and the Ninth Circuit affirmed, that the class-action waiver in the arbitration agreement between plaintiffs and AT&T rendered the agreement unconscionable and, therefore, unenforceable under the rule established by the California Supreme Court in Discover Bank v. Superior Court.[447]

In Discover Bank, the California Supreme Court held that class-action waivers may be unconscionable under California law: "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 . . . ."[448] 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.'"[449] 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 effectively have no redress."[450] The Ninth Circuit affirmed, specifically endorsing the district court's analysis of Discover Bank.[451]

The United States Supreme Court reversed and abrogated Discover Bank and its progeny. The Court held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with" the Federal Arbitration Act (the "FAA").[452] The 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 "the revocation of any contract"—such as fraud, duress or unconscionability—under Section 2 of the FAA (the "savings clause").[453] However, in articulating a doctrine of "purposes and objectives" preemption, the United States Supreme Court held that "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,"[454] a court must determine whether the state law rule "stand[s] as an obstacle to the

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[446] 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.* Concepcion, 563 U.S. 333; see also Concepcion, 563 U.S. at 336.

[447] 36 Cal. 4th 148 (2005), *abrogated by* Concepcion, 563 U.S. at 336-38.

[448] Id. at 162-63.

[449] Laster, 2008 WL 5216255, at *9 (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 citations omitted).

[450] Id.

[451] Concepcion, 563 U.S. at 338.

[452] Id. at 344.

[453] Id. at 339, 341.

[454] Id. at 341.

accomplishment of the FAA's objectives," which are principally to "ensur[e] that private arbitration agreements are enforced according to their terms."[455]

According to the United States Supreme Court, because the Discover Bank rule "allows any party to a consumer contract to demand [classwide arbitration] ex post . . . it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, [and therefore it] is preempted by the FAA."

2. Arbitrability Of UCL Claims Pre-Concepcion

In two pre-Concepcion decisions, the California Supreme Court had held that while claims for monetary relief under the UCL and CLRA are arbitrable, claims for public injunctive relief are not. In Broughton v. Cigna Healthplans,[456] the California Supreme Court held that public injunctive relief claims under the CLRA are inarbitrable because certain limitations on an arbitrator's ability to oversee enforcement of a public injunction create an inherent conflict between arbitration and the underlying purpose of public injunctive relief. Then, in Cruz v. PacifiCare Health Systems, Inc.,[457] the California Supreme Court confirmed that UCL claims for injunctive relief are not arbitrable, but that UCL claims for restitution are. Although the California Supreme Court limited its holding in Cruz on the injunctive relief claim to "the circumstances of the . . . case," it did not specify the "circumstances" critical to its decision.[458] 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.[459]

3. Arbitrability Of Claims Post-Concepcion

In McGill, the California Supreme Court originally granted review to consider whether, following Concepcion, the Broughton/Cruz rule is preempted by the FAA and no longer valid.[460] However, because the arbitration agreement did not require the claims for public injunctive relief to be *arbitrated*, and instead purported "to waive McGill's right to seek public injunctive relief *in any forum*," the Court did not consider the continued "vitality" of Broughton/Cruz rule.[461] As further discussed below, the Court ultimately found the arbitration agreement to be invalid and unenforceable under California law, but not based on the Broughton/Cruz rule.[462]

Because the Court did not address the rule in Broughton and Cruz in McGill, there remains a disagreement between California and federal courts as to the continued viability of the rule. Prior to McGill, the majority of federal district courts to consider whether injunctive relief

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[455] Id. at 343-44.

[456] 21 Cal. 4th 1066, 1079-84 (1999).

[457] 30 Cal. 4th 303, 311-15, 317-20 (2003).

[458] 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 and decided on other grounds*, 2012 WL 834784 (Mar. 12, 2012) (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).

[459] 30 Cal. 4th at 317.

[460] McGill, 2 Cal. 5th at 956.

[461] Id. (emphasis in original).

[462] Id.

claims are arbitrable after Concepcion agreed that the rule in Broughton/Cruz no longer applies.[463] For example, in Kaltwasser v. AT&T Mobility LLC,[464] the Northern District of California reasoned that "Discover Bank itself was based upon public policy rationales intertwined with the generally applicable doctrine of unconscionability." Discover Bank "invoked Cal. Civ. Code § 1668, which provides that '[a]ll 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.'"[465] Discover Bank thus was abrogated because it "applied the unconscionability doctrine 'in a fashion that disfavors arbitration.'"[466] 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."[467]

The Ninth Circuit also has confirmed the reasoning of these district court opinions, concluding that Concepcion forecloses application of the Broughton/Cruz rule. In Ferguson v. Corinthian Colleges, Inc.,[468] the Ninth Circuit reversed the ruling by the district court 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.[469] In reversing the district court, the Ninth Circuit expressly held that "the Broughton-Cruz rule is preempted by the Federal Arbitration Act."[470] Interestingly, the opinion in Ferguson came after the Ninth Circuit vacated its prior opinion in

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[463] 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, 823 F. Supp. 2d 1015, 1024 (N.D. Cal. 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., 836 F. Supp. 2d 994, 1006 (N.D. Cal. 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 [Concepcion]"); 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 Comput. Prods. Litig., No. SACV 10-1563-JST, 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).

[464] 812 F. Supp. 2d at 1050.

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

[466] Id. (citation omitted).

[467] 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 Concepcion compels preemption of such a rule, notwithstanding "public policy arguments thought to be persuasive in California") (citation omitted).

[468] 733 F.3d 928 (9th Cir. 2013).

[469] The now overturned district court opinion is at Ferguson v. Corinthian Colls., 823 F. Supp. 2d 1025 (C.D. Cal. 2011); see also Lombardi v. DIRECTV, Inc., 546 F. App'x 715, 716 (9th Cir. 2013) (reversing denial of arbitration following Ferguson and reasoning that "'effective vindication' exception to the FAA does not extend to state statutes, including the UCL and the CLRA. [] That customers have to arbitrate their claims for injunctive relief against DirecTV whereas DirecTV is unlikely to seek injunctive relief from its customers does not make the arbitration agreement unconscionable.").

[470] Ferguson, 733 F.3d at 930.

Kilgore v. Keybank, N.A.[471] that had roundly criticized Broughton/Cruz and, instead, issued a substantially narrower en banc opinion not taking a position on the viability of that rule, but compelling arbitration on the grounds that Broughton did not apply to the facts of Kilgore. The Ninth Circuit stated: "Defendants' alleged statutory violations have, by Plaintiffs' own admission, already ceased, where the class affected by the alleged practices is small, and . . . there is no real prospective benefit to the public at large from the relief sought."[472]

The United States Supreme Court has also enforced arbitration agreements in the UCL and CLRA contexts with its decision in DIRECTV, Inc. v. Imburgia.[473] In Imburgia v. DIRECTV, Inc.,[474] the California Court of Appeal held that a class-action waiver included as part of an arbitration agreement in a consumer contract remained unenforceable under California law despite the holding in Concepcion. The United States Supreme Court reversed this decision and held that the FAA preempts the portions of California law the Court of Appeal relied on in deciding the arbitration agreement was unenforceable.[475] Specifically, the Court found that the Court of Appeal erroneously concluded that the parties were free to refer to California law absent federal-preemption because the contract was entered into prior to the decision in Concepcion.[476] Thus, the Court found that the Court of Appeal's interpretation of California law was also preempted, and therefore remanded the case with an order to enforce the arbitration provision.[477]

California courts have also changed course, with numerous opinions now holding that the Broughton/Cruz rule is preempted by the FAA, in certain contexts. For example, in Iskanian v. CLS Transportation Los Angeles, LLC,[478] the California Supreme Court held that a challenge to a class-action waiver contained in an employment arbitration agreement was preempted by the FAA, consistent with the reasoning in Concepcion.[479] In so holding, the California Supreme Court abrogated its prior contrary opinion in Gentry v. Superior Court.[480] Affirming a Court of Appeal decision compelling arbitration, the California Supreme Court emphasized that "Concepcion holds that even if a class waiver is exculpatory in a particular case, it is nonetheless preempted by the FAA."[481] As discussed in more detail below, the Court in Iskanian nevertheless refused to compel arbitration of a claim brought under California's Private Attorney General Act, a statute limited to employment claims.

In Sanchez v. Valencia Holding Co., LLC,[482] plaintiff asserted class claims against a car dealer, alleging violations of the UCL, CLRA and other California statutes arising from plaintiff's

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[471] 673 F.3d 947, 957 (9th Cir. 2012).

[472] Kilgore v. KeyBank, N.A., 718 F.3d 1052, 1061 (9th Cir. 2013).

[473] 136 S. Ct. 463, 464 (2015).

[474] 225 Cal. App. 4th 338 (2014).

[475] DIRECTV, Inc., 136 S. Ct. at 464.

[476] Id.

[477] Id.

[478] 59 Cal. 4th 348 (2014), *cert. denied*, 135 S. Ct. 1155 (2015).

[479] 563 U.S. at 333.

[480] 42 Cal. 4th 443 (2007), *abrogated on other grounds as recognized by* OTO, L.L.C. v. Kho, 8 Cal. 5th 111 (2019).

[481] Iskanian, 59 Cal. 4th at 364.

[482] 61 Cal. 4th 899 (2015).

purchase of a vehicle. The dealer moved to compel arbitration pursuant to an agreement contained in its form retail installment sales contract. The dealer raised the argument that Broughton and Cruz were "implicitly overruled" by Concepcion. The Court of Appeal did not address that argument, however, finding that Concepcion "is inapplicable where, as here, we are not addressing the enforceability of a class action waiver or a judicially imposed procedure that is inconsistent with the arbitration provision and the purposes" of the FAA.[483] The court affirmed the denial of the motion to compel arbitration 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."[484] 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."[485] Ultimately, even if the FAA did preempt Broughton's holding, "the court's observations about arbitral injunctions under the CLRA remain accurate."[486]

The California Supreme Court reversed and remanded.[487] Like the Court of Appeal, the Supreme Court declined to address the continued viability of Broughton and Cruz.[488] Unlike the Court of Appeal, however, the Supreme Court held that the arbitration provision was not unconscionable.[489] The Court noted that the "potentially far-reaching nature of an injunctive relief remedy... is sufficiently apparent here to justify the extra protection" of arbitral review of injunctive relief.[490] Further, the Court noted that because arbitration is intended as an alternative to litigation, and the validity of an arbitration provision could only be viewed in the context of rights and remedies otherwise available to the parties, the fact that a *self-help remedy*, such as repossession, fell outside of the arbitration provision did not render the provision unconscionable.[491] Thus, the arbitration provision was not unconscionable.[492]

Perhaps most importantly, the California Supreme Court addressed the enforceability of the class-action waiver contained in the parties' arbitration provision.[493] The Court held that in light of Concepcion, the FAA preempts the trial court's invalidation of the class waiver on unconscionability grounds.[494] Specifically, the Court held that "imposition of class action arbitration... interferes 'with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.'"[495]

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[483] Sanchez v. Valencia Holding Co., LLC, 135 Cal. Rptr. 3d 19, 219 (2011).

[484] Id. at 39.

[485] Id..

[486] Id. at 40 n.6.

[487] Sanchez, 61 Cal. 4th at 924.

[488] Id. at 917.

[489] Id. at 913-22.

[490] Id. at 917.

[491] Id. at 922.

[492] Id. at 913-22.

[493] Id. at 923.

[494] Id. at 923-24.

[495] Id. at 923 (quoting Concepcion, 563 U.S. at 344).

In one of the rare post-Concepcion cases limiting arbitration, the California Supreme Court's decision in McGill held that claims for public injunctive relief under the UCL and CLRA cannot be compelled to arbitration on an individual basis if the arbitration agreement purports to limit the arbitrator's ability to order relief on behalf of the general public.[496] As discussed above, the Court originally granted review to address the continued "vitality" of the Broughton/Cruz rule; however, the Court deferred deciding the issue and instead addressed whether the arbitration agreement "is valid and enforceable insofar as it purports to waive McGill's right to seek public injunctive relief *in any forum*."[497] After re-affirming its prior broad construction of public injunctive relief (as set out in Broughton and Cruz) as any relief having the "'primary purpose and effect of' prohibiting unlawful acts that threaten future injury to the general public," the Court held that enforcing the waiver of the right to seek public injunctive relief under the UCL and CLRA in any forum "would seriously compromise the public purposes the statutes were intended to serve" and thus the agreement was "invalid and unenforceable under California law."[498]

The California Supreme Court also rejected Citibank's primary argument that the arbitration agreement remained enforceable under the FAA because the FAA requires enforcement of arbitration agreements as written and that a court could not avoid the FAA by "applying state-law rules of contract interpretation to limit the scope of an agreement to arbitrate."[499] The Court disagreed, holding that the FAA did not save the arbitration agreement because the contract defense at issue—"a law established for a public reason cannot be contravened by a private agreement" (as set forth in California Civil Code section 3513)—is a generally applicable contract defense and, therefore, is within the "savings clause" of section 2 of the FAA.[500] The Court further reasoned that, under the United States Supreme Court's decision in American Express v. Italian Colors Restaurant,[501] an arbitration provision will not be enforced if it precludes the plaintiff from seeking federal statutory remedies, and that this exception also applies to *state* statutory remedies because limiting the exception to federal statutes would supposedly be "inconsistent" with other United States Supreme Court authority.[502] Finally, the California Supreme Court concluded that its decision also did not run afoul of FAA preemption (or Concepcion) because invalidating a waiver of public injunctive relief would "not . . . interfere with any of arbitration's attributes."[503]

In Blair v. Rent-A-Center, Inc.,[504] the Ninth Circuit held that the FAA does not preempt the McGill rule because the rule is a "generally applicable contract defense" that does not impermissibly interfere with arbitration.[505] The Ninth Circuit further stated, in a footnote and

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[496] McGill, 2 Cal. 5th at 956.

[497] Id. (emphasis in original).

[498] Id. at 961.

[499] Id.

[500] Id. at 961-62.

[501] 570 U.S. 228 (2013) (holding that the FAA does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery).

[502] McGill, 2 Cal. 5th at 963-64 (citing Preston v. Ferrer, 552 U.S. 346, 359 (2008)).

[503] Id. at 966.

[504] 928 F.3d 819.

[505] Blair, 928 F.3d at 827-29.

without any analysis, that the injunctive relief sought by plaintiff in Blair was "public" injunctive relief as defined in McGill because plaintiff sought "to enjoin future violations of California's consumer protection statutes, [which was] relief oriented to and for the benefit of the general public."[506] The Ninth Circuit concurrently issued unpublished opinions in two companion cases, reaching the same result; petitions for certiorari in those cases are pending.[507]

Defendants in a number of cases have argued—with some success—that McGill is factually distinguishable and does not preclude enforcement of an arbitration agreement where the relief sought is not the type of "public" injunctive relief at issue in McGill, but rather "private" relief even when sought on behalf of a putative class. In an important decision, the California Court of Appeal recently endorsed this approach in Clifford v. Quest Software, Inc.[508] In Clifford, plaintiff asserted various wage and hour claims against his employer, and defendant moved to compel arbitration.[509] The trial court granted the motion except with respect to plaintiff's UCL claim, which the trial court found to be inarbitrable under the California Supreme Court's Broughton/Cruz rule.[510] On appeal, plaintiff contended that his UCL claim was not subject to arbitration because he sought "public" relief in the form of restitution and disgorgement for "other current and former employees, competitors, and the general public," as well as an injunction against defendant's allegedly unlawful labor practices.[511] The Court of Appeal rejected plaintiff's argument, reasoning that restitution and disgorgement were not "injunctive" relief, and an injunction requiring defendant to comply with wage and hour laws was not "public" relief because such relief would primarily benefit plaintiff and individuals similarly situated to plaintiff rather than the general public.[512]

Federal district courts in California have reached conflicting results depending on the facts of the particular case, with some courts broadly applying McGill,[513] and others taking a

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[506] Id. at 831 n.3.

[507] See McArdle v. AT&T Mobility LLC, 772 F. App'x 575, 575 (9th Cir. 2019) (affirming district court's denial of defendant's motion to compel arbitration for the reasons set forth in Blair), *pet. for cert. filed* (Feb. 27, 2020); Tillage v. Comcast Corp., 772 F. App'x 569, 569 (9th Cir. 2019) (affirming district court's denial of defendant's motion to compel arbitration for the reasons set forth in Blair), *pet. for cert. filed* (Feb. 27, 2020).

[508] 38 Cal. App. 5th 745 (2019), *review denied* (Nov. 13, 2019).

[509] See id. at 748.

[510] Id. at 750.

[511] Id. at 754-55.

[512] See id. (citing McGill, 2 Cal. 5th at 955).

[513] See Delisle v. Speedy Cash, No. 3:18-CV-2042-GPC-RBB, 2019 WL 2423090, at *8 (S.D. Cal. June 10, 2019) (denying motion to compel arbitration of UCL and CLRA claims seeking to enjoin defendant's practice of charging allegedly excessive interest rates and to require defendant to provide corrective advertising and notice to the public), *appeal filed*, No. 19-55794 (9th Cir. July 10, 2019); Eiess v. USAA Fed. Sav. Bank, No. 19-cv-00108-EMC, 2019 WL 3997463, at *11, *13 (N.D. Cal. Aug. 23, 2019) (granting motion to compel arbitration to the extent plaintiff sought monetary relief or a determination of liability under the UCL and CLRA but denying motion to the extent plaintiff sought public injunctive relief in the form of an order requiring defendant to amend its deposit agreement to better reflect its practice of charging multiple NSF fees); Fernandez v. Bridgecrest Credit Co., LLC, No. EDCV 19-877-MWF-SHK, 2019 WL 7842449, at *6 (C.D. Cal. Oct. 29, 2019) (finding that plaintiff sought public injunctive relief based, in part, on the "unique relationship between consumers and car loan lenders").

more narrow approach.[514] Other courts have distinguished McGill by concluding that the specific arbitration agreement at issue either does not purport to waive the right to public injunctive relief or requires the arbitrator, not the court, to decide the issue.[515]

Johnson v. JP Morgan Chase Bank, N.A.,[516] is instructive. In Johnson, the court concluded that plaintiffs' prayer for injunctive relief in a putative class action based on breach of contract did not constitute "public injunctive relief" under McGill. In rejecting plaintiffs' argument that their claims for public injunctive relief were inarbitrable under McGill, the district court analyzed the "entirety" of the relief requested, focused on the fact that plaintiffs' claims were all based on purported breaches of contract and observed that only former customers were included in the proposed classes.[517] The court concluded that "the relief Plaintiffs seeks is not designed to prevent future harm to the public at large, but is primarily intended to redress prior injury to a specific group of putative plaintiffs who have checking

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[514] See Sponheim v. Citibank, N.A., No. SACV19264JVSADSX, 2019 WL 2498938, at *1,*4-5 (C.D. Cal. June 10, 2019) (holding that UCL claims seeking an "order on behalf of the general public enjoining [defendant] from continuing to misrepresent its [fee] policies in its publicly available documents and marketing materials" was arbitrable under McGill because plaintiff was "seek[ing] public injunctive relief as a mere incidental benefit to his primary aim of gaining compensation for injury for himself and others similarly situated"); Colopy v. Uber Techs. Inc., No. 19-CV-06462-EMC, 2019 WL 6841218, at *2 (N.D. Cal. Dec. 16, 2019) (analyzing claims and determining plaintiff sought private, not public, injunctive relief under McGill); Magana v. DoorDash, Inc., 343 F. Supp. 3d 891, 901 (N.D. Cal. 2018) ("[P]laintiff's argument makes clear that the injunctive relief he seeks would be entirely opposite of what McGill requires—any benefit to the public would be derivate of and ancillary to the benefit to [defendant's] employees . . . . Therefore, [plaintiff] does not assert a claim for public injunctive relief under state law." (emphasis in original)); McGovern v. U.S. Bank N.A., No. 18-CV-1794-CAB-LL, 2019 WL 329537, at *9 (S.D. Cal. Jan. 25, 2019) (finding that any benefit to the general public would be only incidental because the general public had not and would not be subject to any of the allegedly improper fees that constituted plaintiff's injury); Kim v. Tinder, Inc., No. CV 18-03093 JFW (AS), 2018 WL 6694923, at *3 (C.D. Cal. July 12, 2018); Croucier v. Credit One Bank, N.A., No. 18cv20 MMA (JMA), 2018 WL 2836889, at *4-5 (S.D. Cal. June 11, 2018); Rappley v. Portfolio Recovery Assocs., LLC, No. EDCV17108JGBSPX, 2017 WL 3835259, at *6 (C.D. Cal. Aug. 24, 2017); Wright v. Sirius XM Radio Inc., No. SACV1601688JVSJCGX, 2017 WL 4676580, at *9 (C.D. Cal. June 1, 2017).

[515] See, e.g., Hunter v. Kaiser Found. Health Plan, Inc., No. 19-CV-01053-WHO, 2020 WL 264330, at *13 (N.D. Cal. Jan. 17, 2020) (granting defendant's motion to compel arbitration and declining to reach issue of whether plaintiff actually sought "public" injunctive relief because arbitration agreement did not preclude arbitrator from awarding public injunctive relief); Aanderud v. Super. Ct., 13 Cal. App. 5th 880, 897 (2017) (finding delegation clause in arbitration agreement requires arbitrator to decide in the first instance whether arbitration agreement amounts to waiver of right to seek public injunction in any forum, and if so, the effect on enforceability of the arbitration agreement as a whole); Kikano v. Uber Techs., Inc., No. CV 17-509-GW(JEMX), 2017 WL 5642309 (C.D. Cal. Nov. 6, 2017) (same); Sharp Corp. v. Hisense USA Corp., No. 17-CV-03341-YGR, 2017 WL 6017897, at *4 (N.D. Cal. Dec. 5, 2017) (granting motion to compel arbitration where arbitration agreement provided that all claims, even those for public injunctive relief, were to be decided by arbitrator, and accordingly did not stand as a waiver of those claims); Garcia v. Kakish, No. 1:17-CV-00374-JLT, 2017 WL 4325777, at *2 (E.D. Cal. Sept. 29, 2017) (distinguishing McGill and finding that in the absence of a stipulation that the arbitration provision barred or waived right to seek public injunctive relief, a provision that provided "[a]ny claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action" could not be read as waiving the right to seek public injunctive relief).

[516] 2018 WL 4726042 (C.D. Cal. Sept. 18, 2018).

[517] Id. at *7.

accounts with [defendant] and have incurred overdraft and insufficient funds fees under a narrow set of circumstances."[518]

Even prior to McGill, some California cases already had carved out exceptions to the enforceability of arbitration provisions. In Brown v. Ralphs Grocery Co.,[519] the Court of Appeal 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." 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."[520] The court held that PAGA (which is specific to employment claims) 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."[521]

The plaintiff in Iskanian, discussed above, also brought his claims in a representative capacity under PAGA. The California Supreme Court did not compel arbitration of his PAGA claims, holding that the rule providing the right to bring a representative action under PAGA cannot be waived, remains valid even after Concepcion and does not frustrate the FAA's objectives. Rather, "the FAA aims to ensure an efficient forum for the resolution of private disputes, whereas a PAGA action is a dispute between an employer and the [California] Labor and Workforce Development Agency."[522]

Additionally, in Sonic-Calabasas A, Inc. v. Moreno,[523] the California Supreme Court restated its view that the FAA, as construed in Concepcion, does not preempt generally applicable state-law rules regarding whether a contract is unconscionable. Notwithstanding its opinion in Ferguson v. Corinthian Colleges, the Ninth Circuit appeared to agree, based on its rulings in a matter involving the enforceability of an arbitration clause in an employment agreement.[524]

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[518] Id. at *8.

[519] 197 Cal. App. 4th 489, 501 (2011).

[520] Id. (citation omitted).

[521] Id. at 502.

[522] Iskanian, 59 Cal. 4th at 384.

[523] 57 Cal. 4th 1109, 1169-70 (2013), *cert. denied*, 134 S. Ct. 2724 (2014); see also Martinez v. Ready Pac Produce, Inc., No. B279225, 2018 WL 6064948, at *5 (Cal. Ct. App. Nov. 20, 2018) (reversing trial court's finding that employer's arbitration agreement was unconscionable, finding that it was not substantively unconscionable because class-action waivers in arbitration agreements are generally enforceable) , *review denied* (Jan. 30, 2019); Vera v. US Bankcard Services, Inc., No. B283187, 2018 WL 618586, *8-12 (Cal. Ct. App. Jan. 30, 2018) (affirming trial court's finding that arbitration provision in company's terms of service that required all controversies to be arbitrated in Georgia according to Georgia law was both procedurally and substantively unconscionable), *review denied* (May 9, 2018).

[524] See Chavarria v. Ralphs Grocery Co., 733 F.3d 916, 927 (9th Cir. 2013) ("Federal law favoring arbitration is not a license to tilt the arbitration process in favor of the party with more bargaining power. California law regarding unconscionable contracts, as applied in this case, is not unfavorable towards arbitration, but instead reflects a generally applicable policy against abuses of bargaining power. The FAA does not preempt its invalidation of Ralphs' arbitration policy.").

Going forward, McGill and Blair will certainly factor heavily in the ongoing battle regarding the enforceability of arbitration agreements in California. Ultimately, however, the United States Supreme Court may have to decide the issue of whether California law in this regard is preempted by the FAA.

B. No Right To Jury Trial

There is no right to a jury trial in a private action under the UCL.[525] However, in Nationwide Biweekly Administration, Inc. v. Superior Court,[526] the Court of Appeal granted Nationwide's request for writ relief in a UCL claim brought by the Department of Business Oversight and directed that the trial court grant a jury trial on the issue of liability, reasoning that the "*gist*" of an action by the government was legal rather than equitable.[527] Nevertheless, the court held that the amount of any statutory penalties and whether any equitable relief was appropriate were reserved for the trial court.[528] In September 2018, the California Supreme Court granted review[529] to answer, among other things, whether there is a right to a jury trial in a representative action brought by the government seeking civil penalties under the UCL.

C. Filing A Pleading Challenge To A UCL Claim

Although demurrers and motions to dismiss rarely dispose of UCL claims,[530] they sometimes are sustained based on legal defenses or obvious defects in the pleading.[531] With

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[525] 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).

[526] 24 Cal. App. 5th 438, 442 (2018).

[527] Id. at 472.

[528] Id. at 488.

[529] Nationwide Biweekly Admin. v. S.C. (People), 426 P.3d 302 (Cal. 2018).

[530] See, e.g., Motors, Inc., 102 Cal. App. 3d at 741-42 (stating that a UCL complaint usually should be construed to withstand demurrer); Mullins, 178 F. Supp. 3d at 891-92 (denying defendant's motion to dismiss because the issue of whether a reasonable consumer is likely to be deceived is best reserved for the jury); 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."). But see Berryman, 152 Cal. App. 4th at 1556 ("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.").

[531] 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., No. C049337, 2007 WL 2687587, at *2 (Cal. Ct. App. Sept. 14, 2007) (unpublished) (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

respect to specificity of pleading, no special standard applies in state court under the UCL. For example, in Quelimane Co., Inc. v. Stewart Title Guaranty Co.,[532] the California Supreme Court refused to hold UCL plaintiffs to the pleading standard for fraud. 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.[533]

D. Special "Anti-SLAPP" Motions

California's "anti-SLAPP" statute[534] 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."[535] In the consumer protection

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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).

[532] 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).

[533] 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); Hobby Lobby Stores, 2017 WL 4358146 (dismissing deceptive pricing claims brought under the UCL and CLRA for failure to plead with sufficient particularity how advertisements could be misleading to a reasonable consumer); Grimm v. APN Inc., No. 817CV00356JVSJCG, 2017 WL 6398148, at *6 (C.D. Cal. Aug. 31, 2017) (when any prong or aspect of a UCL or CLRA claim is grounded in fraud, the entire claim must be pled with particularity, including the other prongs or aspects).

[534] 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 Enters. v. Consumer Cause, Inc., 29 Cal. 4th 53, 68 n.5 (2002); see also 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); Twentieth Century Fox Film Corp. v. Netflix, Inc., No. B280607, 2018 WL 3198560, at *6 (Cal. Ct. App. June 29, 2018) (unpublished) (affirming trial court's denial of anti-SLAPP motion, holding the enforcement of allegedly unfair fixed-term employment contracts did not constitute protected prelitigation petitioning activity).

[535] 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 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 JaM Cellars, Inc. v. Vintage Wine Estates, Inc., No. 17-01133-CRB, 2017 WL 2535864, at *4 (N.D. Cal. June 12, 2017) (observing that, in a trademark suit, plaintiff met its minimal burden of proof by alleging defendant's continued use of its trademark); Cross v. Facebook, Inc., 14 Cal. App. 5th 190 (2017) (granting an anti-SLAPP motion to strike a UCL claim arising from an alleged violation of the right of publicity because plaintiff failed to identify defendant's commercial use); Yu v. Signet

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);[536] or (2) brought against a defendant engaged in the business of selling or leasing goods and services (subject to certain conditions).[537]

E. Class Certification Of UCL Claims

A major battleground in UCL litigation is class certification. For example, in Pulaski & Middleman, LLC v. Google, Inc.,[538] the Ninth Circuit reaffirmed that "damage calculations alone [with respect to restitution] cannot defeat certification" of a UCL class claim.[539] This case concerned a class of advertisers who claimed that Google's pricing scheme for advertisements was deceptive because it charged them premium prices for their ads to appear on certain websites, when in reality they did not. The trial court denied certification on grounds that individual issues would predominate in calculating the amount of restitution owed to each class member based on their particular ad and expected target site.[540] In reversing the trial court's decision, the court held that a reasonable consumer standard could be used in calculating the damages amount, and Google's own pricing scheme supplied a reliable method for calculating the amount received over the benefit derived; thus, individual issues did not predominate.[541]

Likewise, in Safeway, Inc. v. Superior Court of Los Angeles County,[542] the court held that damage calculations would not defeat class certification. There, employees asserted a putative class action against its employer alleging violation of the UCL in failure to pay premium wages for missed meal breaks.[543] The court found restitution was capable of being determined classwide, based on the parties' proposed "market value approach," whereby the court could examine time punch cards for violations of the meal break requirement and pay accordingly.[544]

Courts have similarly rejected challenges to class certification based on arguments that individualized issues exist as to whether or not the putative class members each have suffered an injury-in-fact sufficient to confer Article III standing. As discussed above, the California Supreme Court's majority opinion in Tobacco II concluded that only the named plaintiff must

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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"), *disapproved on other grounds by* Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism, 4 Cal. 5th 637 (2018).

536 Cal. Civ. Proc. Code § 425.17(b).

537 Cal. Civ. Proc. Code § 425.17(c).

538 802 F.3d 979 (9th Cir. 2015).

539 Id. at 986 (quoting Yokoyama v. Midland Nat'l Life Ins. Co., 594 F.3d 1087, 1094 (9th. Cir. 2010)).

540 Id. at 982.

541 Moreover, the court identified a temporal element for the restitution calculation to be applied on remand, noting that the correct measure is "the difference between what was paid and what a reasonable consumer would have paid at the time of purchase without the fraudulent or omitted information. Id. at 989 (emphasis added).

542 238 Cal. App. 4th 1138, 1148 (2015).

543 Id. at 1144.

544 Id. at 1163.

have Article III standing to bring a UCL claim on behalf of a class.[545] Following that decision, other courts have refused to deny certification on the sole basis that a putative class may contain members that have failed to suffer an injury in fact.[546]

On the other hand, California courts have recognized that "Tobacco II does not allow a consumer who was never exposed to an alleged false or misleading advertising . . . campaign to recover damages under California's UCL."[547] Specifically, courts have vacated class certification orders where a showing of reliance cannot be inferred by a defendant's advertising scheme.[548] In this regard, the attack on class certification is related less to Article III standing, than it is to standing necessary to assert a claim under the UCL. In Mazza, for instance, the court reasoned that plaintiffs sufficiently established "injury in fact" to confer Article III standing by alleging they paid more for a product because of defendant's deceptive conduct.[549] Nevertheless, the court vacated the class certification order, holding a presumption of reliance under the UCL could not be maintained because Honda's advertising campaign was "very limited."[550]

Similarly, in Cohen, the district court affirmed the trial court's denial of class certification based on its finding that individual issues predominated for purposes of the UCL because the class would include subscribers who never saw the misleading advertisements or representations before deciding to make a purchase.[551] Even in Stearns, the court referenced in dicta that its holding was not indicative of finding "predominance . . . in every California UCL case . . . . [Rather,] it might well be that there [is] no cohesion among the members because they were exposed to quite disparate information from various representatives of the defendant."[552]

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[545] Tobacco II, 46 Cal. 4th at 314-16.

[546] See, e.g., Stearns, 655 F.3d at 1020-21 (reversing district court's denial of certification on the basis that class certification under Rule 23 does not require proof that all unnamed class members have standing under Article III).

[547] Mazza, 666 F.3d at 596 (internal quotation marks omitted) (citing Pfizer Inc. v. Super. Ct., 182 Cal. App. 4th 622, 632 (2010); Davis-Miller v. Auto. Club of S. Cal., 201 Cal. App. 4th 106, 124-50 (2011)).

[548] Mazza, 666 F.3d at 594-95 (vacating certification order because each class member could not be presumed to have relied on the alleged misleading advertising given the limited scale of the defendant's advertising campaign, thus individual issue predominated); see also Brazil v. Dole Packaged Foods, LLC, 660 F. App'x 531 (9th Cir. 2016) (affirming trial court's decertification of class because plaintiff failed to provide proof that damages were common to the class); In re NJOY Consumer Class Action Litig., 120 F. Supp. 3d at 1109 (denying class certification on the basis of misrepresentations in advertising because the defendant's electronic cigarette advertising campaign was not "sufficiently substantial or pervasive to give rise to a presumption that all class members were exposed to the advertisements").

[549] Mazza, 666 F.3d at 595.

[550] Id. at 596 ("Honda's product brochures and TV commercials fall short of the 'extensive and long-term [fraudulent] advertising campaign' at issue in *Tobacco II* . . . . A presumption of reliance does not arise when class members 'were exposed to quite disparate information from various representatives of the defendant.'").

[551] Cohen, 178 Cal. App. 4th at 980 ("[W]e 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.")

[552] Stearns, 655 F.3d at 1020.

In Noel v. Thrifty Payless, Inc.,[553] defendant was successful in defeating class certification of UCL and CLRA claims by showing that there was no ascertainable class. In Noel, plaintiff, who purchased an inflatable swimming pool that was allegedly much smaller than the pool pictured on the box, brought putative class claims against the seller, alleging violations of the UCL and CLRA. Plaintiff alleged that the seller deceptively advertised the size of the pool to consumers in its California retail stores.[554] Plaintiff alleged he decided to purchase the pool based on the photograph on the pool's packaging, depicting a group of three adults and two children in the pool.[555] However, once he inflated the pool, plaintiff noticed the pool was "materially smaller" and could only hold one adult and four small children.[556] The trial court denied plaintiff's motion for class certification because, among other things, plaintiff failed to satisfy the ascertainability requirement for class certification, finding that plaintiff "presented 'no evidence' to establish 'what method or methods will be utilized to identify the class members,'" notwithstanding that defendant's records showed more than 20,000 pools sold during the class period.[557]

On appeal, plaintiff asserted that the trial court erred by applying the ascertainability standard set forth in Sotelo v. Media News Grp., Inc.,[558] which requires, among other things, that the court consider whether there is a *means* of identifying class members, as opposed to the standard in Estrada v. FedEx Ground Package Sys., Inc., which plaintiff argued requires only that he identify a "group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself as having a right to recover based on the description."[559] In affirming the trial court's application of Sotelo, the court reasoned:

> We think it inappropriate to pigeonhole either test for use only in a specific category of subject matters. Instead, the utility of one test or the other should turn on how the parties have framed the issues in an individual case based on their pleadings, briefs, and evidence in the class certification proceedings. When the defendant claims the class definition is overinclusive or ambiguously worded, the Estrada test may provide the best analytical framework. When the defendant's opposition to certification is based on inability to ascertain the identity of class members due to a lack of records, the three-part test used in Sotelo may better serve.[560]

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[553] 17 Cal. App. 5th 1315 (2017), *rev'd on other grounds by* 7 Cal. 5th 955 (2019).

[554] Id. at 1321-22.

[555] Id.

[556] The court noted that the "photographs in the record and the briefs show a marked difference in the size between the pool as set up by [plaintiff] and the photo on the box." Id. at 1322.

[557] Id. at 1323-28.

[558] Id. at 1326 (citing Sotelo v. MediaNews Grp., Inc., 207 Cal. App. 4th 639, 648 (2012) (courts determine the existence of an ascertainable class using three factors: (1) class definition, (2) class size, and (3) means of identifying class members), *disapproved on other grounds by* Noel, 7 Cal. 5th 955 (2019)).

[559] Id. (citing Estrada v. FedEx Ground Package Sys., Inc., 154 Cal. App. 4th 1, 14 (2007) ("The class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself as having a right to recover based on the description.") (emphasis omitted)).

[560] Id. at 1329.

Because defendant's challenge to class certification did not turn on the proposed class definition, but rather on the lack of records from which to identify class members, the appropriate test was that under Sotelo, and not Estrada.[561] The court also noted that the tests in Sotelo and Estrada "are not incompatible" and "are often cited side-by-side in the same opinion."[562] On February 28, 2018, the California Supreme Court granted review.

F. 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.[563] 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."[564] 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.[565]

G. 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.[566] As discussed below, the Class Action Fairness Act of 2005 ("CAFA") allows many UCL class actions to be removed to federal court.[567] 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

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[561] Id. at 1328-29.

[562] Id. at 1329.

[563] Puentes v. Wells Fargo Home Mortg., Inc., 160 Cal. App. 4th 638, 645 n.5 (2008) (citing Linear Tech. Corp., 152 Cal. App. 4th at 134-35 n.9) (lender's practice of calculating interest on a monthly rather than daily basis was not "unfair" as a matter of law); see also Stathakos, 2017 WL 1957063 (granting in part defendant's motion for summary judgment because plaintiffs could not show actual reliance on allegedly deceptive price tags on garments at defendant's store, which plaintiffs purchased *after* filing the complaint, since plaintiff knew, after filing their complaint, of the alleged misleading practices); Motors, Inc., 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").

[564] 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).

[565] See, e.g., Williams v. Wells Fargo Bank, N.A., No. 5:13-cv-03387-EJD, 2017 WL 1374693 (N.D. Cal. Apr. 14, 2017) (granting defendant's motion for summary judgment of a UCL claim brought using the same facts underlying a breach of contract claim); Paduano v. Am. Honda Motor Co. Inc., 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).

[566] 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 remand); Feitelberg v. Merrill Lynch & Co. Inc., 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).

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

non-class case remains difficult, however, even where federal law forms the basis of an "unlawful" claim.[568]

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 amount-in-controversy requirement by all named plaintiffs, i.e., claims for each in excess of $75,000.[569] 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 each plaintiff's claims did not exceed $75,000 in total, even if the aggregated amount in controversy of all plaintiffs' claims totaled in the millions of dollars. CAFA has greatly expanded the ability to remove cases to federal court.

Under CAFA, individual class plaintiffs' claims must, in the aggregate, exceed $5 million.[570] Moreover, only minimal diversity between plaintiffs and defendants need be established.[571] Depending on the circumstances, CAFA may confer jurisdiction on a federal court where "any member of a class of plaintiffs is a citizen of a [s]tate different from any defendant."[572] 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).[573] Given this, most nationwide, non-securities fraud, non-derivative class actions will proceed in federal court.

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[568] See, e.g., Nidek Co. Ltd., 657 F. Supp. 2d at 1161 ("[F]ederal question jurisdiction is not created by the fact that Plaintiffs' state law claims under the CLRA and UCL hinge upon alleged violations of the FDCA and its regulations."); 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).

[569] 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 (2005) (holding that supplemental jurisdiction can be asserted over claims that do not exceed $75,000 so long as one plaintiff satisfies the amount in controversy requirement).

[570] 28 U.S.C. § 1332(d)(2), (6).

[571] 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).

[572] 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).

[573] 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

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.[574] 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 forum state 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.[575]

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[576] or (ii) at least one defendant from whom significant relief is sought is a resident of the forum state and (1) the defendant's conduct forms a significant basis of the claims, (2) the principal alleged injuries resulting from the conduct of all defendants occurred in the forum state and (3) no similar class action has been filed against any of the defendants in the prior three years.[577]

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.[578] CAFA eliminated this requirement, expressly providing that class actions may be "removed by any defendant without the consent of all defendants."[579]

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.[580] Although one district court allowed removal where a

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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).

[574] 28 U.S.C. § 1332(d)(3).

[575] 28 U.S.C. § 1332(d)(3)(A)-(F).

[576] 28 U.S.C. § 1332(d)(4)(A). This sometimes is referred to as the "home state controversy" exception to CAFA jurisdiction.

[577] 28 U.S.C. § 1332(d)(4)(B). This sometimes is referred to as the "local controversy" exception to CAFA jurisdiction.

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

[579] 28 U.S.C. § 1453(b).

[580] See, e.g., Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 817 (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

UCL claim was predicated on questions of federal antitrust law,[581] the decision seemingly is anomalous.[582] In addition, where the action involves securities claims, removal may be appropriate.[583] Generally, however, removal based on federal question jurisdiction is unsuccessful.

H. 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." Although the section formerly was limited to unfair competition "within this state," the Legislature deleted these words in 1992.[584] 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, the 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.[585]

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v. Raymond James Fin. Servs., Inc., 340 F.3d 1033, 1042-43 (9th Cir. 2003); 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); 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 v. R.J. Reynolds Tobacco Co., 793 F. Supp. 925, 929 (N.D. Cal. 1992) (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). But see Cal. ex rel. Lockyer v. Mirant Corp., No. C-02-1787-VRW, 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).

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

[582] 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).

[583] See, e.g., Merrill Lynch & Co., 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. §§ 77p & 78bb(f) ("SLUSA"), which bars filing certain kinds of securities class actions in state court; the 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).

[584] 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.

[585] See G.P.P., Inc. v. Guardian Prot. Prods., Inc., No. 1:15-CV-00321-SKO, 2017 WL 220305, at *30 (E.D. Cal. Jan. 18, 2017) (holding that plaintiff was not applying its UCL claim extraterritorially because the franchise agreements at issue were made in California by at least one California corporation, and therefore, there was "a sufficient nexus between California and the franchise law violations that form the basis of [plaintiff's] Section 17200 claim"), *rev'd and remanded on other grounds by* 788 F. App'x 452 (9th Cir. 2019); Yu v. Signet Bank/Va., 69 Cal. App. 4th 1377, 1391 (1999) (holding that plaintiffs

Similarly, a plaintiff's non-residency in California is not enough to preclude application of California consumer protection laws. In California, there is a two-step process to determine whether the CLRA, the UCL (and the FAL) can apply to interstate plaintiffs.[586] First, the plaintiff must demonstrate that the application of California law comports with due process.[587] Second, the onus then shifts to the defendant to show that foreign law, rather than California law, should apply to these claims.[588] As to the first prong, the court in Arroyo explained that courts "must consider (1) where the defendant does business, (2) whether the defendant's principal offices are located in California, (3) where the potential class members are located, and (4) the location from which the advertising and promotional literature decisions were made."[589]

The decision in Norwest Mortgage, Inc. v. Superior Court,[590] however, limits the extraterritorial application of the UCL.[591] 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.[592] 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.[593] Norwest was extended in Aghaji v. Bank of

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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 Grp., Inc. v. Hunter Grp., 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).

586 Mazza, 666 F.3d at 589-95.

587 See Id.; Arroyo, 2015 WL 5698752, at *3 (explaining that this inquiry involves establishing "sufficient contacts between the alleged misconduct and the state") (internal quotation marks omitted).

588 Mazza, 666 F.3d at 590.

589 Arroyo, 2015 WL 5698752, at *3 (citing In re Toyota Motor Corp., 785 F. Supp. 2d 883, 917 (C.D. Cal. 2011)).

590 72 Cal. App. 4th 214 (1999).

591 See 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); see also Standfacts Credit Servs. v. Experian Info. Sols., Inc., 405 F. Supp. 2d 1141, 1147-48 (C.D. Cal. 2005), *aff'd*, 294 F. App'x 271 (9th Cir. 2008) (following Norwest and dismissing UCL claim brought by non-resident plaintiffs); Sullivan v. Oracle Corp., 51 Cal. 4th 1191, 1206-09 (2011) (citing Norwest and holding that the UCL did not apply to claims of nonresident plaintiffs of failure to pay overtime where work was performed outside of California but employer was a California company). But see Ehret v. Uber Techs., Inc., 68 F. Supp. 3d 1121, 1132 (N.D. Cal. 2014) (finding sufficient nexus with California where alleged misrepresentations were developed in California and contained on websites and an application that were maintained in California and billing and payment of services went through servers located in California).

592 Norwest, 72 Cal. App. 4th at 222-24; Evolution Fast Food Gen. P'ship v. HVFG, LLC, No. 15 CIV. 6624 (DAB), 2017 WL 4516821, at *6 (S.D.N.Y. Sept. 27, 2017) (holding non-California plaintiff "may not predicate its California UCL claims on a violation" of New York law); 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).

593 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 (1985));

America, N.A., where the Court of Appeal determined that the non-California plaintiffs could not assert UCL claims without alleging that the harm they suffered emanated from California.[594]

Courts also have considered the effect of choice-of-law provisions under the above Norwest rule. In Ice Cream Distributors of Evansville, LLC v. Dreyer's Grand Ice Cream, Inc.,[595] 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. 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 laws of the State of California without regard to any contrary conflicts of law principles."[596] The district 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.[597] 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."[598] 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 "prepared in and emanated from" California, which would have been sufficient to allege liability under the UCL.[599]

In contrast, the Court of Appeal in Schlesinger v. Superior Court[600] found that contractual choice-of-law and forum-selection provisions are relevant to the Norwest analysis. 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) 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.[601] 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 laws 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."[602] Ticketmaster argued that the UCL does not apply

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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).

[594] 247 Cal. App. 4th 1110 (2016).

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

[596] Id. at *8.

[597] Id.

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

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

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

[601] Id. at *2.

[602] Id.

to out-of-state residents, but the court found no express geographic restriction in the UCL.[603] 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.[604] Accordingly, the Court of Appeal 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 and FAL claims.

The lack of geographical restrictions under the UCL also implicate considerations when determining whether to certify a nationwide class under California's consumer protection laws. Generally, a court will consider whether California has "significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class, contacts creating state interests, in order to ensure that the choice of [forum] is not arbitrary or unfair."[605] In this regard, courts consider a variety of factors in determining whether California has sufficient contact to the asserted claims.[606] Upon a determination that California has sufficient contacts to the claims of the nationwide class, the burden shifts to the defendant to demonstrate that the interests of the other state's laws are greater than California's.[607]

Another issue courts face with respect to the extraterritorial application of the UCL is whether district attorneys may bring public prosecutor actions seeking to obtain relief outside of the counties in which they have jurisdiction. In an important case, the Court of Appeal recently limited the scope of UCL claims brought by county district attorneys, although the California Supreme Court has granted review. In Abbott Laboratories v. Superior Court,[608] the Orange County District Attorney brought an action against several pharmaceutical manufacturers for allegedly scheming to keep generic versions of prescription drugs off the market, seeking civil penalties and restitution, as well as injunctive relief, on a state-wide basis.[609] The Court of Appeal held that a county district attorney may not recover statewide monetary relief (i.e., either civil penalties or restitution) under the UCL, but is instead limited to seeking such relief within the district attorneys' own territorial jurisdiction.[610] In August 2018, the California Supreme

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[603] Id. at *7.

[604] Id. at *6.

[605] See Rutledge, 238 Cal. App. 4th at 1186 (internal quotation marks omitted).

[606] See id. (holding California contacts were sufficiently linked to nationwide class claims where defendant created a national advertising campaign by a California agency; defendant's contracts with manufacturer of computers were governed under California law; defendant designated California service provider for computer repairs; and defendant's witnesses were located in California); Wershba, 91 Cal. App. 4th at 242 (holding application of California law for settlement purposes appropriate when defendant is a California corporation; has its principle place of business in California; has brochures promising free technical support for products that were made and distributed from California; and the policy to terminate the technical support at issue in the case was made at defendant's headquarters in California).

[607] Rutledge, 238 Cal. App. 4th at 1188 (explaining the trial court improperly placed the burden on appellant class members "to persuasively articulate why California has a special obligation that would fairly call for it to assume the burden of adjudicating a nationwide class action").

[608] 24 Cal. App. 5th 1 (2018).

[609] Id. at 9.

[610] Id. at 30.

Court granted review.[611] Resolution of this issue is important as it may have implications for state-wide injunctive relief claims, as well as settlements in cases where plaintiffs purport to sue on behalf of all California residents.

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

California Business & Professions Code section 17209 requires that, where a proceeding involving the UCL is commenced in California's appellate courts, the party commencing the proceeding shall provide notice to the California Attorney General and to the district attorney of the county in which the action originally was filed.[612]

J. 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.[613] In Bank of the West v. Superior Court,[614] the California Supreme Court held that there was no coverage under a standard comprehensive general liability ("CGL") insurance policy for a settling UCL defendant. Since

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[611] Abbott Laboratories v. S.C., 424 P.3d 268 (Cal. 2018).

[612] 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 division of a superior court, each person filing any brief or petition with the court in that proceeding shall serve, within three days of filing with the court, a copy of that brief or petition on the Attorney General, directed to the attention of the Consumer Law Section at a service address designated on the Attorney General's official Web site for service of papers under this section or, if no service address is designated, at the Attorney General's office in San Francisco, California, and on the district attorney of the county in which the lower court action or proceeding was originally filed. Upon the Attorney General's or district attorney's request, each person who has filed any other document, including all or a portion of the appellate record, with the court in addition to a brief or petition shall provide a copy of that document without charge to the Attorney General or the district attorney within five days of the request. The time for service 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 or opinion issued until proof of service of the brief or petition on the Attorney General and district attorney is filed with the court.

See also Soldate v. Fid. 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 273, 284 (determining that section 17209 "is not jurisdictional" in nature).

[613] 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.

[614] Bank of the W., 2 Cal. 4th at 1254, 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.

Bank of the West, other courts likewise have determined that UCL claims are not covered under most standard CGL policies.[615]

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 . . . ."[616] 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."[617] To achieve that end, the CLRA proscribes 24 specified business acts or practices. The Legislature intended that courts construe the CLRA liberally to "protect consumers against unfair and deceptive business practices and provide efficient and economical procedures to secure such protection."[618]

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 that results in the sale or lease of goods or services."[619] The CLRA applies to both actions and material omissions by a defendant.[620] Although not expressly limited to

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[615] See, e.g., Cort v. St. Paul Fire & Marine Ins. Cos., Inc., 311 F.3d 979, 987 (9th Cir. 2002) (holding that general liability insurance policy that covered payment of damages and certain associated fees did not provide coverage for UCL cause of action); Upland Anesthesia Med. Grp. 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).

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

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

[618] Cal. Civ. Code § 1760. However, CLRA claims filed in federal courts are subject to more stringent federal procedural standards. See Cullen v. Netflix, Inc., 880 F. Supp. 2d 1017, 1025 (N.D. Cal. 2012) (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 1103-06 (state law claims are subject to Rule 9(b)'s heightened pleading standards when grounded in fraud)).

[619] Cal. Civ. Code §§ 1770(a), 1780(a); Reveles v. Toyota by the Bay, 57 Cal. App. 4th 1139, 1154 (1997), *disapproved on other grounds by* Gavaldon v. DaimlerChrysler Corp., 32 Cal. 4th 1246 (2004); Nagel v. Twin Labs., Inc., 109 Cal. App. 4th 39, 51 (2003) ("Under the CLRA, a defendant may be liable for deceptive practices in the sale of goods or services to consumers."); see also In re Apple In-App Purchase Litig., 855 F. Supp. 2d 1030, 1038 (N.D. Cal. 2012) ("Conduct that is 'likely to mislead a reasonable consumer' violates the CLRA.").

[620] See, e.g., Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1141-42 (9th Cir. 2012) (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) (citing Daugherty v. Am. Honda Motor Co., Inc., 144 Cal. App. 4th 824, 835 (2006)); Rutledge, 238 Cal. App. 4th at 1173 ("[I]n order to be deceived, members of the public must have had an expectation or an assumption about the materials used in the product.") (internal quotations and citation omitted). But see Hodsdon, 162 F. Supp. 3d at 1026 ("In light of Wilson and overwhelming authority, manufacturers are duty-bound to disclose only information about a product's safety risks and product defects. The duty to disclose does not extend to situations . . . where information may persuade a consumer to make different purchasing decisions.").

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.[621]

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."[622] 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.[623] 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.[624] Even plaintiffs pursuing CLRA claims solely for injunctive relief must satisfy traditional standing requirements to be considered a "consumer."[625] Thus, a plaintiff's failure to establish that he falls within the CLRA's definition of a "consumer" generally defeats his ability to represent a class.[626]

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[621] See, e.g., In re Toyota Motor Corp., 785 F. Supp. 2d at 917-18 (dismissing CLRA claims and holding that CLRA "cannot provide relief for non-California residents who cannot allege a sufficient connection to California").

[622] Cal. Civ. Code § 1761(d).

[623] See, e.g., 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); Frezza v. Google Inc., No. 12-CV-00237-RMW, 2012 WL 5877587 (N.D. Cal. Nov. 20, 2012) (dismissing CLRA claim where plaintiff had enrolled in service for business purpose); Zepeda v. PayPal, Inc., 777 F. Supp. 2d 1215, 1221 (N.D. Cal. 2011) (finding individuals who primarily used website to sell goods or services did not constitute "consumers" under the CLRA).

[624] See 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); 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 v. Farmers Ins. Exch., No. B188081, 2006 WL 3823522, at *6 (Cal. Ct. App. Dec. 28, 2006) (unpublished) (plaintiff lacked standing to assert CLRA claim because he could not allege the existence of a "transaction" between him and defendant under section 1761(e)). But see Von Grabe v. Sprint PCS, 312 F. Supp. 2d 1285, 1302-03 (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).

[625] See In re Sony Gaming Networks & Customer Data Sec. Breach Litig., 903 F. Supp. 2d 942, 966 (S.D. Cal. 2012) (dismissing CLRA claim seeking injunctive relief for failure to properly allege standing); see also In re Fluidmaster, Inc., 149 F. Supp. 3d at 958-59 (dismissing CLRA claim seeking prospective injunctive relief for lack of standing because the relief sought would not remedy the named plaintiff's injury).

[626] See Lazar v. Hertz Corp., 143 Cal. App. 3d 128, 142 (1983) (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, 1347 (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.").

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[.]" [627]"Relief under the CLRA is specifically limited to those who suffer damage, making causation a necessary element of proof."[628] Moreover, the alleged violation of the CLRA must take place prior to the sale at issue in order to be the basis for a claim.[629]

In Meyer v. Sprint Spectrum L.P.,[630] the California Supreme Court confirmed this rule and elaborated on what constitutes "damage" sufficient to state a claim under the CLRA. 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. The trial court reasoned that none of these provisions actually had been invoked against plaintiffs, so plaintiffs could not establish causation or damages under the CLRA, thus defeating the claim. 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.[631] The Court rejected this argument, affirming the trial

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

[628] Wilens v. TD Waterhouse Grp., Inc., 120 Cal. App. 4th 746, 754 (2003); 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 ("[A]ctual reliance is an element of a CLRA claim sounding in fraud."); Mass. Mut. Life Ins. Co., 97 Cal. App. 4th at 1292 ("[T]his 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); Perez v. Nidek Co., Ltd., 711 F.3d 1109, 1114 (9th Cir. 2013) (holding plaintiff did not state CLRA claim for injunctive relief because there was no ongoing conduct to enjoin and declining to reach preemption ground on which district court dismissed); Janney v. Gen. Mills, 944 F. Supp. 2d 806, 817-18 (N.D. Cal. 2013) (denying motion to dismiss CLRA (and UCL/FAL) claims on ground that plaintiffs sufficiently alleged misrepresentations regarding whether granola bars were "natural"); Epstein v. JPMorgan Chase & Co., No. 13 Civ. 4744 (KPF), 2014 WL 1133567 (S.D.N.Y. Mar. 21, 2014) (plaintiff who received refund of allegedly improperly charged interest prior to filing suit had not suffered actual injury and lacked standing to sue individually or on behalf of a putative class under the CLRA); Brooks v. CarMax Auto Superstores Cal., LLC, 246 Cal. App. 4th 973 (2016), *ordered not to be officially published* (Aug. 10, 2016) (plaintiff lacked standing to sue absent actual injury; mere violation of Cal. Veh. Code Section 11713.18 did not satisfy or dispense with the "actual injury" requirement under the CLRA and UCL); Rojas-Lozano, 159 F. Supp. 3d at 1114-15 (failing to allege damages because "Google's profit is not Plaintiff's damage").

[629] Moore v. Apple, Inc., 73 F. Supp. 3d 1191, 1201 (N.D. Cal. 2014) (representations made after sale cannot be the basis of a CLRA claim); see also Durkee v. Ford Motor Co., No. C 14-0617 PJH, 2014 WL 4352184, at *3 (N.D. Cal. Sept. 2, 2014) ("[A] CLRA claim cannot be based on events following a sales transaction."); Hensley-Maclean v. Safeway, Inc., No. CV 11-02130 RS, 2014 WL 1364906, at *6 (N.D. Cal. Apr. 7, 2014) ("[T]he CLRA only applies to representation and omissions that occur during pre-sale transactions.").

[630] 45 Cal. 4th 634 (2009).

[631] Id. at 641.

court's reasoning that plaintiffs could not establish damages without defendant actually enforcing the allegedly unconscionable provisions. 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."[632] Notably, the Court held that the requirement that consumers must have suffered damage also extends to actions under the CLRA for injunctive relief.[633]

The Court, however, broadly interpreted the phrase "any damages," concluding that it 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.[634] Accordingly, the Court found that California's Legislature had "set a low but nonetheless palpable threshold of damage."[635] Thus, California courts have recognized that "damage" under the CLRA is not synonymous with "actual damages," and may encompass "harms other than pecuniary damages."[636] The Ninth Circuit has similarly taken a broad view of "damages" under the CLRA.[637]

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

Until recently, there were few published cases addressing this issue.[638] Based on the plain language of the statute, the Legislature arguably intended to limit the CLRA to traditional

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[632] Id.

[633] Id. at 646.

[634] Id. at 642-44.

[635] Id. at 646; see also Polo v. Innoventions Int'l, LLC, 833 F.3d 1193, 1198 (9th Cir. 2016) (district court must remand to state court instead of dismissing the case because a California court could have found standing under CLRA for allegations that plaintiff would not have purchased defendant's product that was marketed as diabetes treatment on the same terms had she known the true facts, despite the district court's undisputed factual findings that plaintiff did not have diabetes and that plaintiff discontinued taking diabetes medication at least five months before purchasing defendant's product); see also Boone v. S & F Mgmt. Co., Inc., No. G040426, 2009 WL 3049309, at *2 (Cal. Ct. App. Sept. 24, 2009) (unpublished) (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).

[636] Lengen v. Gen. Mills, Inc., 185 F. Supp. 3d 1213, 1221-22 (E.D. Cal. 2016) (rejecting defendant's claim that it had already provided for damages sought by plaintiffs, even though it had provided for a full refund for all those persons affected by the contaminated Cheerios products, because plaintiffs sought more than a "mere refund"; they also sought "compensatory, exemplary, punitive and statutory penalties and damages"); Doe 1 v. AOL, LLC, 719 F. Supp. 2d 1102, 1111 (N.D. Cal. 2010) (quoting In re Steroid Hormone Prod. Cases, 181 Cal. App. 4th 145, 156 (2010)).

[637] See, e.g., Nguyen v. Nissan N. Am., Inc., 932 F.3d 811, 818-22 (9th Cir. 2019) (reversing denial of class certification in case alleging that defendant concealed known defects in vehicle clutch assemblies, approving plaintiff's proposed "benefit of the bargain" damages, which sought to recover the difference in value between the non-defective vehicles promised by defendant and the defective vehicles that were actually delivered (i.e., essentially the cost to replace the defective part with a non-defective part), regardless of whether the faulty clutch caused any actual performance issues).

[638] A "transaction" under the CLRA is defined as "an agreement between a consumer and another 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").

purchases of consumer goods and related services,[639] and legislative history supports this conclusion.[640] Nonetheless, given that the CLRA is to be construed "liberally,"[641] plaintiffs argue that it applies in nearly every type of consumer transaction, except where expressly exempted from coverage. For example, in Ladore v. Sony Computer Entertainment America, LLC,[642] the Northern District of California found that videogame software is a "good" as that term is defined in the CLRA. In so holding, the court emphasized that the plaintiff "did not simply buy or download (arguably) 'intangible' software, or otherwise play an online game" but instead "went to a brick-and-mortar store . . . where he paid for and received a tangible product," specifically the "game disc."[643]

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.[644] Most notably, the California Supreme Court found in Fairbanks v. Superior Court that insurance is not a "good" or a "service" as defined by the CLRA.[645] 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.[646] The Court found that life insurance is not a "tangible chattel," and therefore, not a "good."[647] In holding that life insurance is not a "service" under

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[639] See, e.g., Cal. Civ. Code § 1770(a) ("transaction[s] intended to result or that result[] 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").

[640] See Assemb. J., Sept. 23, 1970, p. 8465-66 (in a Report Relative to Assemb. 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).

[641] See Cal. Civ. Code § 1760; Shin v. BMW of N. Am., No. CV 09-00398 AHM (AJW), 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).

[642] 75 F. Supp. 3d 1065, 1073 (N.D. Cal. 2014).

[643] Id.; see also Haskins v. Symantec Corp., No. 13-cv-1834-JST, 2013 WL 6234610, at *9 (N.D. Cal. Dec. 2, 2013) (software disc is a tangible good because "[a] consumer can purchase [it] in a store, pick it up in her hands, and carry it home."), *aff'd*, 654 F. App'x. at 338.

[644] See Cornu v. Norton Cmty. Apartments, L.P., No. B207802, 2009 WL 1961013, at *6 (Cal. Ct. App. July 9, 2009) (unpublished) (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) (unpublished) (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); I.B. ex rel. Fife v. Facebook, Inc., 905 F. Supp. 2d 989, 1008 (N.D. Cal. 2012) (finding that plaintiff lacked standing because "Facebook Credits, 'separate and apart from a specific purchase or lease of a good or service,' are not covered by the CLRA"); Holt v. Noble House Hotels & Resort, Ltd, 370 F. Supp. 3d 1158, 1166-67 (S.D. Cal. Feb. 28, 2019) (finding, on an issue of first impression under California law, that restaurant menus were not "advertisements" under the CLRA).

[645] 46 Cal. 4th 56, 61 (2009).

[646] Id. at 59.

[647] Id. at 61.

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."[648]

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," do not bring the intangible chattel within the coverage of the CLRA.[649] The Court reasoned that doing so "would defeat the apparent legislative intent in limiting the definition of 'goods' to include only 'tangible chattels.'"[650] Since Fairbanks, trial courts have applied its reasoning to other areas, such as apartment leases[651] and mortgage loans.[652]

The Court of Appeal in Berry v. American Express Publishing, Inc.[653] similarly relied on the CLRA's legislative history in holding that the CLRA does not apply to the issuance of a credit card. 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.[654] Based in part on this deletion, the Berry court concluded that "neither the express text of [the] CLRA nor its legislative history

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[648] Id.; see also Consumer Sols. 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); Barkan v. Health Net of Cal., Inc., No. CV 18-6691-MWF (ASX), 2019 WL 1771653, at *6 (C.D. Cal. Feb. 7, 2019) (granting defendant's motion to dismiss CLRA claim because insurance contracts are not "goods" and "ancillary services that insurers provide" are not "services" under the CLRA).

[649] Fairbanks, 46 Cal. 4th at 65; see also McKell, 142 Cal. App. 4th at 1465, 1488 (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 (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"); 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.).

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

[651] 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).

[652] Alborzian, 235 Cal. App. 4th at 40 (citing Fairbanks and concluding a mortgage loan is not a "good" or "service" as defined by the CLRA; a loan is not a "good" because it is not "tangible chattel," nor is it a "service" because it is not "work, labor, or services . . . furnished in connection with the sale or repair of goods"); Capital All. Grp., 2017 WL 5138316, at *7 (holding that advertising and marketing of loans are ancillary services outside the scope of the CLRA); Becker v. Wells Fargo Bank, N.A., Inc., No. 2:10-cv-02799 LKK, 2011 WL 1103439, at *13 (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").

[653] 147 Cal. App. 4th 224, 233 (2007) (affirming order sustaining demurrer to CLRA claim seeking to enjoin enforcement of credit card arbitration provision).

[654] Id. at 230 ("Early drafts of section 1761, subdivision (d), defined 'Consumer' as 'an individual who seeks or acquires, by purchase or lease, any goods, services, *money*, or *credit* for personal, family or household purposes.' (Assemb. Bill No. 292 (1970 Reg. Sess.) as introduced Jan. 21, 1970, italics added.) But the Legislature removed the references to 'money' and 'credit,' before CLRA's enactment, and they do not appear in the current version.").

supports the notion that credit transactions separate and apart from any sale or lease of goods or services are covered under the act."[655] The California Supreme Court denied review in Berry, and several courts have followed it.[656] Prior to Fairbanks, some courts criticized Berry or otherwise read the term "consumer transactions" broadly.[657] 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."[658]

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

[656] See, e.g., Lloyd v. Navy Fed. Credit Union, No. 17-cv-1280-BAS-RBB, 2018 WL 1757609, at *19 (following Berry and holding that the CLRA does not apply to debit card or overdraft claims that are separate and apart from the sale or lease of goods or services); 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 Fee 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).

[657] 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. & Loan Ass'n, 35 Cal. 3d 582 (1984) (management fees on IRAs), *disapproved by* Meyer v. Sprint Spectrum L.P., 45 Cal.4th 634 (2009) (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), *declined to follow by* Andrews v. Chevy Chase Bank, 545 F.3d 570 (7th Cir. 2008) (denying motion to dismiss CLRA claim on ground that services associated with residential mortgages may be covered by the CLRA).

[658] See, e.g., Wofford, 2011 WL 5445054, at *2 (dismissing plaintiffs' claim that defendants violated the CLRA by fraudulently inducing them to download harmful software on grounds that software is not a tangible good or service under the CLRA because it is not "tangible chattels," 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) ("[A]ll of Plaintiffs' 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) (unpublished) (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" under the CLRA) (unpublished) (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

4. Exemptions

The CLRA does not apply to the sale of real property, including the sale or construction of residential housing, and commercial or industrial buildings.[659] 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.[660] In addition, the CLRA is probably unavailable in actions against a governmental entity.[661]

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

A. Prohibited Acts

Section 1770 states the CLRA's prohibitions. They are as follows:[662]

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.[663]

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

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'right' rather than a physical object" but "[t]angible property is that which is visible and corporeal, having substance"); Standard Oil Co. of Cal. v. State Bd. of Equalization, 232 Cal. App. 2d 91, 96 (1965) (observing that a "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"); Rojas-Lozano, 159 F. Supp. 3d at 1116 (holding that Google's reCAPTCHA software—"a one-time use software program used as a gate-keeper to Internet sites"—was neither a good nor a service). But see In re Yahoo! Inc. Customer Data Sec. Breach Litig., 313 F. Supp. 3d. 1113, 1142 (N.D. Cal. 2018) (holding that email is a "service" under the CLRA because of the continual upkeep and updates required to manage and provide the email systems).

[659] 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").

[660] 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.").

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

[662] Cal. Civ. Code § 1770(a)(1)-(23) and 27(b)(1).

[663] In Colgan, a product advertised as "made 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) (citation omitted).

sponsorship, approval, status, affiliation or connection that he or she does not have.[664]

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.[665]

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.[666]

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.

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[664] Courts typically interpret subsections (a)(5), (7) and (9) as proscribing "both fraudulent omissions and fraudulent affirmative misrepresentations." See, e.g., Gray v. BMW of N. Am., LLC, 22 F. Supp. 3d 373, 384 (D.N.J. 2014) (plaintiffs' allegation that defendant failed to disclose defect in convertible top stated a claim under the CLRA); Herron v. Best Buy Co. Inc., 924 F. Supp. 2d 1161, 1169 (E.D. Cal. 2013). But see Gutierrez v. Carmax Auto Superstores Cal., 19 Cal. App. 5th 1234, 1260 (2018) (although plaintiff was able to state a CLRA claim due to the damages plaintiff suffered from a defective car, the court found that there is no independent duty for automobile retailers to disclose safety concerns); Kowalsky v. Hewlett-Packard Co., 771 F. Supp. 2d 1156, 1163 (N.D. Cal. 2011) (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 know, or have reason to know, of the facts that rendered the representation misleading at the time it was made").

[665] See Simpson v. Kroger Corp., 219 Cal. App. 4th 1352 (2013) (finding no reasonable consumer would be misled by package labeling to believe product was pure butter rather than butter and oil); Beshwate v. BMW of N. Am. LLC, No. 1:17–cv–00417–SAB, 2017 WL 6344451, at *11, *13 (E.D. Cal. Dec. 12, 2017) (finding that general statements about the reliability and high quality of a vehicle are mere puffery and not actionable, but the buyer made sufficient allegations to state a claim that the seller had misrepresented that the vehicle had passed inspection and was certified when seller never provided buyer with an inspection report); Rubenstein v. The Gap, Inc., 14 Cal. App. 5th 870, 881 (2017) (dismissing CLRA claim because plaintiff failed to allege any affirmative misrepresentation by Gap regarding the quality of its factory store products and finding no duty by Gap to disclose difference in quality between factory store and traditional store products).

[666] 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 Chapman, 220 Cal. App. 4th at 230 (reversing order granting demurrer because "whether a reasonable consumer is likely to be deceived by the representation that the calling plan is 'Unlimited' is a question of fact"); Verdiner v. Pep Boys, No. B165747, 2004 WL 1146705, at *6, 7 (Cal. Ct. App. May 24, 2004) (unpublished) (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); Yordy v. Plimus, Inc., No. C12-0229 TEH, 2013 WL 5832225 (N.D. Cal. Oct. 29, 2013) (denying class certification where plaintiff failed to show common questions existed regarding defendant's involvement in allegedly misleading marketing scheme); Perez, 711 F.3d at 1114 (holding that plaintiff did not state CLRA claim for injunctive relief based on alleged unapproved use of surgical laser because there was no ongoing conduct to enjoin); Rasmussen, 27 F. Supp. 3d at 1039-43 ("puffery" defense applies to claims brought under CLRA).

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 that 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.[667]

21. Selling or leasing goods in violation of Chapter 4 of Title 1.7 (concerning "Grey Market Goods").

22. Disseminating unsolicited prerecorded messages without consent.[668]

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 paragraphs (1), (2), and (4) of subdivision (a) of Section 226.34 of Title 12 of the Code of Federal Regulations.[669]

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,

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

[668] Cal. Civ. Code § 1770(a)(22)(A). This section does not apply to persons with an established relationship, collection calls or calls generated at the request of the consumer. Cal. Civ. Code § 1770(a)(22)(B); see also United States v. Dish Network LLC, 256 F. Supp. 3d 810, 956-57 (C.D. Ill. 2017) (upholding affirmative defense to CLRA claim based on established business relationship defense).

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

whether in whole or in part, by the residence of the borrower and that 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."[670] Thus, the Legislature "intended to repudiate any purported bar or defense based on the parol evidence doctrine."[671]

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 . . . ."[672] In enacting section 1770(a)(17), "the Legislature 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."[673] 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.[674] The Court of Appeal has emphasized that the Legislature intended to prevent concealment and deception, and not to prohibit rebates altogether, reasoning that the

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[670] "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 a written contract . . . ." Wang v. Massey Chevrolet, 97 Cal. App. 4th 856, 857 (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).

[671] Id. at 870.

[672] Pollard v. Ericsson, Inc., 125 Cal. App. 4th 214, 221 (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).

[673] Kramer v. Intuit Inc., 121 Cal. App. 4th 574, 580 (2004) (citing Assemb. Com. on Judiciary, Rep. on Assemb. Bill No. 292 (Sept. 30, 1970) 4 Assemb. J. (1970 Reg. Sess.) p. 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.

[674] Id.

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.[675]

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.[676] Section 1770(a)(19) requires courts to draw upon the doctrine of unconscionability, as stated in California Civil Code section 1670.5[677] and general principles of California law.[678]

These claims are fact-specific. For example, in Freeman v. Wal-Mart Stores, Inc.,[679] 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). 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

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[675] Id. at 580 ("The legislative intent of preventing concealment or deception by nondisclosure is further bolstered by the subsequent enactment of another statute addressing rebates.").

[676] Manantan v. Nat'l City Mortg., No. C-11-00216 CW, 2011 WL 3267706, at *6 (N.D. Cal. July 28, 2011) (noting that the CLRA "does create an affirmative cause of action for unconscionability"); Cal. Grocers Ass'n, 22 Cal. App. 4th at 217 (the CLRA provides an affirmative statutory cause of action for unconscionability).

[677] The test under section 1670.5 is:

> [W]hether, 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 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. Comment, Assemb., 1979 Addition).

[678] 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 . . . .").

[679] 111 Cal. App. 4th at 668.

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.[680]

Relying primarily on the California Supreme Court's decision in Discover Bank,[681] 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 attempts at enforcement.[682] 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,[683] but no published authority has directly addressed these issues.

C. The Anti-Waiver Provision – Section 1751

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.[684] The section also has been utilized by plaintiffs in arguing against the enforcement of class-action waivers in arbitration agreements,[685] as well as the enforcement of choice-of-law provisions.[686]

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[680] 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) (unpublished) (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).

[681] 36 Cal. 4th at 161 (noting that, under California law, class-action waivers in arbitration agreements may be unconscionable in certain circumstances).

[682] 45 Cal. 4th at 643.

[683] See, e.g., Vannier v. Gateway Cos., Inc., No. B179663, 2006 WL 121962, at *2-6 (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 at 1150 n.15 (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, "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); accord Discover Bank v. Super. Ct., 134 Cal. App. 4th 886, 892-93 (2005) (holding that, pursuant to choice-of-law provision, class-action waiver was enforceable under Delaware law); Lux v. Good Guys, 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, 1205-06 (C.D. Cal. 2006) (class-action waiver upheld under Texas law pursuant to form agreement's choice-of-law provision).

[684] 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.").

[685] 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; Murphy v.

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."[687] The CLRA anti-waiver provision does not, however, prohibit waiver of non-CLRA claims.[688] Even with this limitation, the anti-waiver provision may have a broad reach, and factors into plaintiffs' counsel's increased reliance on the CLRA.

In Sanchez,[689] the California Supreme Court resolved a split in authority among Courts of Appeal regarding preemption of the CLRA's anti-waiver provision by the FAA. As discussed above, the court held that in light of Concepcion, "the CLRA's anti-waiver provision is preempted insofar as it bars class waivers in arbitration agreements covered by the FAA."[690]

D. Defenses To CLRA Claims

1. Statute Of Limitations

CLRA claims are subject to a three-year statute of limitations.[691] Courts have held that the statute runs from the time that a reasonable person would have discovered the basis for a claim.[692]

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.[693] The notice must be in writing, delivered by certified or registered mail, return receipt requested and it must provide sufficient detail to allow the

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DirecTV, Inc., 724 F.3d 1218, 1228, 1234 (9th Cir. 2013) (affirming order compelling arbitration as to party to arbitration agreement based on Concepcion but reversing as to non-signatory to agreement).

[686] 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.

[687] 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).

[688] Benson v. S. Cal. Auto Sales, Inc., 239 Cal. App. 4th 1198, 1209-10 (2015), *review denied*, No. S229790 (Cal. Nov. 24, 2015).

[689] 61 Cal. 4th at 899.

[690] Id. at 924.

[691] Cal. Civ. Code § 1783.

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

[693] 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 [; and] (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.* Concepcion, 563 U.S. 333.

violations to be addressed by the defendant.[694] Courts will often dismiss a CLRA damages claim for failure to comply strictly with these requirements.[695] As one court explained:

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[694] See Cal. Civ. Code § 1782(a); Peacock, 2018 WL 452153, at *8 (holding that plaintiff's notice was inadequate because it failed to identify a specific provision of the statute that defendant allegedly violated); 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) (unpublished) (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).

[695] See, e.g., Peacock, 2018 WL 452153, at *8 (observing that, although plaintiff discussed the dispute with defendant over the phone, plaintiff failed to meet the notice requirement of the CLRA because plaintiff never provided defendant a written notice 30 days prior to filing the complaint); Frenzel v. AliphCom, 76 F. Supp. 3d 999, 1016 (N.D. Cal. 2014) (holding that "a plaintiff must provide notice regarding each particular product on which his CLRA damages claims are based, even where the products qualify as substantially similar"); 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"); 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 class action, including same alleged CLRA violations, was not sufficient notice); Keilholtz v. Lennox Hearth Prods. Inc., No. C 08-00836 CW, 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 v. T-Mobile USA, Inc., 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) (concluding that 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. CIVS-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 F. App'x 705, 708-09 (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 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

> 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.[696]

If proper notice is provided, the defendant then has 30 days in which to correct the alleged violations. If the defendant gives or "agrees to give within a reasonable time" appropriate restitution, then the consumer may not maintain a claim for any damages "if the defendant appropriately remediates the harms alleged in the notice."[697] A defendant may avoid maintenance of a class 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.[698] 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.[699] Notably, a defendant's agreement to take corrective action may not require the consumer to release either CLRA claims for injunctive relief or non-CLRA claims.[700]

The consumer need not provide 30 days' notice for a lawsuit that seeks only injunctive relief, however.[701] 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.[702]

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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).

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

697 Breen v. Pruter, 679 F. App'x 713, 724 (10th Cir. 2017) (citing Cal. Civ. Code § 1782(b)) ("[N]o 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.").

698 Cal. Civ. Code § 1782(c).

699 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. Nat. 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).

700 Valdez v. Seidner-Miller, Inc., 33 Cal. App. 5th 600, 615 (2019), *review denied* (June 26, 2019).

701 Breen, 679 F. App'x at 717 (citing Cal. Civ. Code § 1782(b)).

702 Cal. Civ. Code § 1782(d).

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.[703] 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.[704] 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.[705]

Upon receiving notice under the CLRA, a defendant may not avoid a potential CLRA class action by "picking off" the named plaintiff by resolving only his or her own claim. The California Supreme Court resolved this issue in Kagan v. Gibraltar Savings & Loan Association.[706] 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.[707] The Court held that, under these circumstances, the defendant has not destroyed the named plaintiff's adequacy as a class representative.[708] The Court emphasized that one goal of the CLRA is to enable plaintiffs to prosecute class actions.[709] In fact, the Legislature's explicit intent was "to make certain that a person can commence a 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)."[710]

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 . . . .[711]

This corrective action must occur within 30 days following notice to the defendant of the alleged violation.

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[703] Cal. Civ. Code § 1782(e).

[704] Id.

[705] Id.

[706] 35 Cal. 3d at 587.

[707] Id.

[708] 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.").

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

[710] 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)).

[711] Cal. Civ. Code § 1784.

4. Safe Harbor

Courts have also applied the safe harbor for UCL claims similar to that outlined in Cel-Tech to CLRA claims.[712]

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. 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). For example, in Dean Witter,[713] 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." 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.[714] 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.[715] However, case law in California state courts is mixed, and the Ninth Circuit has expressly rejected the "market alternative" defense.[716]

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.[717]

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[712] See Alvarez, 656 F.3d at 934 (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); Loeffler, 58 Cal. 4th at 1127 (finding claim barred "[w]hether alleged under the UCL or the CLRA").

[713] 211 Cal. App. 3d at 766.

[714] Id. at 768.

[715] See id.

[716] Compare Wayne v. Staples, Inc., 135 Cal. App. 4th 466, 482 (2006) (finding that 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); In re iPhone Application Litig., 2011 WL 4403963, at *8 ("[T]he availability of alternative sources from which to obtain the desired service defeats any claim of oppression, because the consumer has a meaningful choice.") (quoting Belton v. Comcast Cable Holdings, LLC, 151 Cal. App. 4th 1224, 1245 (2007)); 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 (9th Cir. 2007) (discussing split of authority and holding that meaningful choice as to service providers does not defeat procedural unconscionability).

[717] See, e.g., Roberts v. N. Am. Van Lines, Inc., 394 F. Supp. 2d 1174, 1184 (N.D. Cal. 2004) (holding that the federal Carmack Act, which regulates interstate shipment of goods and motor carrier liability,

7. Disclosure

In misrepresentation cases under the CLRA, express disclosure of the allegedly misrepresented or nondisclosed practice provides a defense.[718]

8. Arbitration

The issues presented by arbitration are addressed in Section IV.A. of the UCL discussion above.

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.[719] 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."[720] This additional remedy is also available in class actions.[721] Where damages are proven, the court may order a fluid recovery procedure to distribute the proceeds.[722] Section

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preempted CLRA claims regarding interstate moving company's "bait and switch" scheme because extensive federal regulations demonstrated Congress's intent to occupy the field); see also In re Fontem US, Inc., 2016 WL 6520142, at *6 (CLRA labeling claims expressly preempted by FDA rule defining e-cigarettes as "tobacco products," which placed e-cigarettes within the scope of the labeling requirements of the TCA, and its express preemption clause). 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); DeVries, 2018 WL 1426602, at *4 (finding request for injunctive relief was not preempted by the FCRA).

[718] 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).

[719] 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.").

[720] Cal. Civ. Code § 1780(b)(1). The factors in Civil Code section 3345(b) include: (1) "[w]hether 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 infirmity, impaired understanding, restricted mobility, or disability, and actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct."

[721] Cal. Civ. Code § 1780(b)(2).

[722] 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).

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."[723]

B. Attorneys' Fees

The CLRA allows a prevailing plaintiff to recover court costs and attorneys' fees as a matter of right.[724] 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.[725] Courts have held that, where a plaintiff obtains a "net monetary recovery" on a CLRA claim, he is entitled to recover attorneys' fees.[726] The CLRA's language is mandatory, and a court must award costs and fees to a prevailing plaintiff. At least one California court has clarified, however, that attorneys' fees are not available where a suit for damages cannot be maintained under the CLRA because a merchant offered an appropriate cure in response to plaintiff's notice.[727] A prevailing defendant, in contrast, is entitled to reasonable attorneys' fees only if it can establish that the plaintiff's CLRA claim was not made in good faith.[728] Where a CLRA claim for injunctive relief for a group of persons is successfully brought, a plaintiff might also seek attorneys' fees under California Code of Civil Procedure section 1021.5. Moreover, a plaintiff's rejection of a defendant's CLRA offer of correction does not bar

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

[724] 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].").

[725] "'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]").

[726] See Reveles, 57 Cal. App. 4th at 1154; Graciano v. Robinson Ford Sales, Inc., 144 Cal. App. 4th 140, 149-54 (2006) (plaintiff was the "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 (2007) (pre-trial settlement does not prevent plaintiff from seeking attorneys' fees under the CLRA absent enforceable agreement to the contrary).

[727] Benson, 239 Cal. App. 4th at 1212 ("Attorney fees are not recoverable in actions for damages under the CLRA unless the response to the notice letter is not an appropriate one or no response is forthcoming within the statutory time period.").

[728] "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) (unpublished) (citing Cal. Civ. Code § 1780(e)) (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 Grp., Inc., No. H022579, 2002 WL 863597, at *4 (Cal. Ct. App. May 6, 2002) (unpublished) (section 1780(e)'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 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).

the plaintiff from recovering attorneys' fees where the plaintiff seeks only injunctive relief because the CLRA's notice and correction requirements apply only to an action for damages.[729]

IV. PROCEDURAL ASPECTS OF THE CLRA

A. Venue

The CLRA provides that "[a]n action . . . 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."[730] 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."[731] Section 1780(d) requires that the plaintiff file an affidavit with his or her complaint stating facts that establish venue where the action is filed.[732] Upon motion by the court or a party, a court must dismiss an action where the plaintiff fails to file the required affidavit.[733]

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.[734] 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."[735] Courts nonetheless have concluded that the procedural 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.[736]

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[729] Gonzales v. CarMax Auto Superstores, LLC, 845 F.3d 916, 918 (9th Cir. 2017) (citing Meyer, 45 Cal. 4th at 635).

[730] Cal. Civ. Code § 1780(d).

[731] 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).

[732] Cal. Civ. Code § 1780(c).

[733] Id.; Allen v. DaimlerChrysler Motors Corp., No. A105864, 2005 WL 318753, at *3-4 & n.4 (Cal. Ct. App. Feb. 10, 2005) (unpublished) (although a plaintiff alleges multiple causes of action besides the CLRA, the general venue statute does not excuse section 1780(d)'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).

[734] 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)].").

[735] Cal. Civ. Code § 1781(c) ("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.").

[736] 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) (unpublished) (internal citations omitted) ("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."); Smith, 135 Cal. App. 4th at 1474-75 (citing Kagan, 35 Cal. 3d at 589,

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.[737] This is not to say, however, that a defendant is prohibited from filing a no-merit motion to be heard prior to, or concurrently with, the plaintiff's motion to certify a class.[738]

C. Class Action Rules

The CLRA specifies unique class certification standards and procedures which must be applied to CLRA claims.[739] In enacting these unique rules, the Legislature was guided by Federal 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.[740] The standards for certifying a CLRA claim for class treatment are set forth in California Civil Code section 1781(b), which provides:

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and Echostar Satellite Corp., 113 Cal. App. 4th at 1359-62) (reviewing both motion for summary judgment and motion for no-merits determination under a summary judgment standard).

[737] See Linder v. Thrifty Oil Co., 23 Cal. 4th 429, 438 (2000) ("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 . . . , that procedure appears independent of the procedure for certification . . . .") (footnote omitted). Another interpretation of section 1781(c) 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).

[738] 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) (unpublished) ("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, 40 Cal. 4th at 1074 ("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); Miller v. Bank of Am., N.A., 213 Cal. App. 4th 1, 9 (2013) (affirming denial of class certification where plaintiff "failed to show that any means exist to identify a class of bank customers who had been subjected to unlawful setoffs").

[739] See Cal. Civ. Code § 1781.

[740] 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").

> 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:
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> (1) It is impracticable to bring all members of the class before the court;
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> (2) the questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members;
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> (3) the claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class; and
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> (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.[741]

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 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.[742]

The CLRA permits and, indeed, encourages class actions when individual recovery might be minimal.[743]

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 determination.[744] The CLRA expressly permits class notice via publication if personal

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[741] See Dean Witter, 211 Cal. App. 3d at 765 n.2 (citing Hogya v. Super. Ct., 75 Cal. App. 3d 122, 138-40 (1977)).

[742] Mass. Mut. Life Ins. Co., 97 Cal. App. 4th at 1287 n.1 (citing Hogya, 75 Cal. App. 3d at 134-35); see also, Apple, Inc. v. Super. Ct., 19 Cal. App. 5th 1101, 1126 n.2 (2018) ("The distinction between a CLRA and non-CLRA class action is that a non-CLRA class action plaintiff must also establish that pursuit of the class action will result in substantial benefit to the litigants and the court, while a CLRA class action plaintiff need not do so") (quoting In re Vioxx Class Cases, 180 Cal. App. 4th 116, 128 n.12 (2009)).

[743] 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).

[744] See Stern v. Super. Ct., 105 Cal. App. 4th 223, 233 (2003) (where the 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).

notification is unreasonably expensive or if all members cannot be personally notified.[745] This includes notice pursuant to Government Code section 6064, which requires once-a-week publication for four successive weeks.[746] 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.[747] The class notice must include certain elements, including the right to opt out.[748]

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.[749] In addition, the requirement may impact adequacy and typicality. For instance, in Wilens v. TD Waterhouse Grp., Inc.,[750] 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. The court explained:

> Relief 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.[751]

Accordingly, because the insertion of an unconscionable provision did not by itself cause damage, the court denied class certification.[752]

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[745] 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.").

[746] 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.; cf. Choi v. Mario Bodescu Skin Care, Inc., 248 Cal. App. 4th 292 (2016) (section 1781(d) of the Civil Code, which incorporates section 6064 of the Government Code, applies when a court certifies a class for adjudication, but section 1781(f) governs notice of a proposed class action settlement).

[747] See Cal. Civ. Code § 1781(d) ("[T]he 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.

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

[749] See Noel, 17 Cal. App. 5th at 1334–35 (denying class certification of plaintiff's CLRA claim, individual issues remained pertaining to causation because there was insufficient evidence to show that all class members relied on the same misleading photo (instead of the dimensions on the box) when purchasing the inflatable pool in question).

[750] 120 Cal. App. 4th at 754-56.

[751] Id. (emphasis in original).

[752] 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) (unpublished) (denying class certification of CLRA claim where it

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,[753] the named plaintiff alleged that the defendant sold over-the-counter products containing anabolic steroids without requiring a prescription and without notifying customers that the products contained a controlled substance. 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.[754] 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."[755]

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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) (unpublished) (because plaintiffs suffered no actual damage or any pecuniary loss based on defendants' conduct, plaintiffs' CLRA claim failed).

[753] 181 Cal. App. 4th at 149.

[754] Id. at 153.

[755] Id. at 156, 157 (quoting Mass. Mut. Life Ins. Co., 97 Cal. App. 4th at 1292-93); see also In re ConAgra Foods, Inc., 90 F. Supp. 3d at 987 (finding an inference of class-wide reliance appropriate for plaintiffs' California CLRA claims for purchase of cooking oils labeled "100% Natural" that were allegedly made with genetically modified organisms).