LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
FRIDAY, FEBRUARY 26, 2021

PERSPECTIVE

# California's UCL and CLRA: Open issues for 2021 and beyond

By Stephen J. Newman

California's Unfair Competition Law, Business and Professions Code Section 17200 et seq., and Consumers Legal Remedies Act, Civil Code Section 1750 et seq., remain the most litigated consumer protection statutes in the state, and perhaps the nation. The coming year will likely resolve important open questions regarding the interpretation and application of these two important laws. Critical issues affecting multiple industries include the enforceability of individual arbitration agreements when claims for public injunctive relief are alleged; the circumstances under which First Amendment free speech protections provide defenses to UCL and CLRA claims; and the degree to which state courts will honor federal preemption defenses.

Regarding arbitrability, the California Supreme Court holds that claims for "public injunctive relief" under the UCL or CLRA cannot be waived in a pre-dispute arbitration provision, and moreover, an agreement that attempts to waive such claims potentially renders the arbitration agreement unenforceable. *See McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017). Subsequently, courts have differed as to whether a claim seeks "public" injunctive relief, or merely asserts private interests on behalf of a discrete population. For example, a claim against a small used motorcycle dealership was considered to be public because, hypothetically, its advertising could reach a broad population, even though the actual number of purchasers potentially affected by the advertising was very limited. *Meija v. DACM Inc.*, 54 Cal. App. 5th 691 (2020). By contrast, employment-related claims were held not to seek "public" injunctive relief because the set of employees was finite and knowable. *Torrecillas v. Fitness Int'l, LLC*, 52 Cal. App. 5th 485 (2020). Similarly, UCL and CLRA claims brought on behalf of purchasers of baseball tickets seeking relief based on their failure to receive full value due to coronavirus restrictions on professional sports were held not to be claims for "public" injunctive relief despite the large numbers of ticketholders (probably much larger than the number of motorcycle purchasers at issue in *Meija*). *See Ajzenman v. Office of the Commissioner*, CV203643 (C.D. Cal. Sept. 14, 2020).

Ultimately, the California Supreme Court may need to provide a workable definition of "public" injunctive relief, because existing case law does not presently supply a uniform analytical standard. The issue is important because claims for private injunctive relief indisputably can be compelled to individual arbitration, and the outcome of a motion to compel arbitration often turns on whether the complaint is deemed to seek public or private relief.

**Ultimately, the California Supreme Court may need to provide a workable definition of 'public' injunctive relief, because existing case law does not presently supply a uniform analytical standard.**

A related issue is whether an arbitration agreement that purports to limit public injunctive relief in violation of *McGill* nonetheless can be upheld by severing the offending provision, and reforming the agreement to permit an arbitrator to award public injunctive relief. The California Supreme Court granted review on a related question in *Conyer v. Hula Media Services, Inc.*, S264821. *Conyer* involves an employment agreement that unlawfully required employees to bear an excessive amount of arbitration fees and costs. The Supreme Court granted review to consider whether the agreement can be reformed to shift those fees and costs to the employer and still compel arbitration of the claim, or whether the inclusion of the offending fee provision renders the entire agreement to arbitrate unenforceable. However *Conyer* is decided will likely affect how motions to compel arbitration UCL and CLRA claims are analyzed.

In another important UCL and CLRA case, the California Supreme Court is considering the interplay between false advertising law and free speech. In *Serova v. Sony Music Entertainment*, S260736, the court granted review to assess whether a defendant can escape liability under the UCL and CLRA by arguing that its statements were not advertising, but rather were contribution to debate on a matter of public concern. The case involves sales of music supposedly created by the late Michael Jackson. When the authenticity of the work was questioned, the record label weighed in on the authenticity debate, arguing that the work was genuine. At the time, the label had a good-faith belief in the genuineness of the work. The Supreme Court is expected to address whether, if the music is actually shown to be inauthentic, the label can be held liable based on its contributions to the public debate, due to its commercial interest in music sales, or whether the First Amendment protects it from suit.

The California Supreme Court also may need to step in to address a split of authority among three Court of Appeal panels on a question of federal preemption. A prevailing plaintiff in a CLRA case may recover attorney fees. However, a federal regulation limits recovery in cases brought against a party who finances the sale of consumer goods. *See* 16 C.F.R. Section 433.2 (financing party's total liability cannot exceed the amount financed). This regulation was construed in 2013 to limit both the substantive recovery as well as any attorney fees award that might be obtained pursuant to the CLRA. *See Lafferty v. Wells Fargo Bank*, 213 Cal. App. 4th 545, 563 (3d Dist. 2013). Moreover, in 2019, the Federal Trade Commission confirmed this interpretation of the regulation. *See* Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 84 Fed. Reg. 18711, 18713 (May 2, 2019). Despite this, the California Legislature enacted legislation, Civil Code Section 1459.5, purporting to overrule these interpretations and allow attorney fees recovery even if the creditor's ultimate liability would exceed the amount financed. In 2020, the 1st District Court of Appeal held that original *Lafferty* interpretation was correct, that the FTC's guidance controlled, and that the California statute is preempted by federal law. *Spikener v. Ally Financial, Inc.*, 50 Cal. App. 5th 151 (Cal. Ct. App. 1st Dist. 2020). However, just a few weeks ago, the 2nd District Court of Appeal reached the opposite conclusion, ruling that the FTC guidance did not have the force of law, and that the California legislation is valid and permits increased fee recovery. *Pulliam v. HNL Automotive Inc.*, B293435 (Cal. Ct. App. 2d Dist. Jan. 29, 2021). The clear split in authority among Courts of Appeal makes eventual California Supreme Court review highly likely. Review also may have implications beyond the specific issue for federal preemption generally, the authority of federal agencies to preempt state law and the processes agencies must follow if they seek to preempt state law.

As always, the UCL and CLRA continue to present complex jurisprudential issues. The California Supreme Court ideally will provide suitable guidance for consumers and businesses, and for the judges and lawyers who must address disputes that arise under these statutes. ■

**Stephen J. Newman** *is a partner at Stroock & Stroock & Lavan LLP.*