competition

Competition Vol 22, No. 2
Fall 2013

The Journal of the Antitrust and Unfair Competition Law Section of the State Bar of California

Chair's Column
Cheryl Lee Johnson

Editor's Column
Thomas N. Dahdouh

THE CALIFORNIA DIFFERENCE: WHY CALIFORNIA LAW *REALLY* MATTERS

A Symposium

INDIRECT PURCHASER STANDING UNDER CALIFORNIA ANTITRUST LAW AND FEDERAL ANTITRUST LAW
PLAINTIFF PERSPECTIVE: By Christopher Micheletti
DEFENSE PERSPECTIVE: By David Kiernan and Lin W. Kahn

PROVING WRONGFUL PURPOSE UNDER THE UNFAIR PRACTICES ACT: PLAINTIFF AND DEFENSE PERSPECTIVES
By Ara Jabagchourian and David Meyer

UNFAIR AND DECEPTIVE PRACTICES: A COMPARISON OF THE FTC ACT& CALIFORNIA'S UCL
By Lenore Albert and Michael Thurman

MERGER ENFORCEMENT
By Robert B. McNary and Marisa E. Adelson

MASK FOR THE GUILTY AND SHIELD FOR THE INNOCENT: THE PRIVILEGE AGAINST SELF-INCRIMINATION IN FEDERAL AND CALIFORNIA ANTITRUST CASES
By Dylan Ballard

VERTICAL PRICE-FIXING: WHY CALIFORNIA'S PER SE RULE AGAINST RESALE PRICE MAINTENANCE IS ACTUALLY GOOD FOR BUSINESSES AND CONSUMERS:
PLAINTIFF PERSPECTIVE By David W. Kesselman and Trevor V. Stockinger

RESALE PRICE MAINTENANCE AFTER LEEGIN: DEFENSE PERSPECTIVE
By John R. Foote and Ernest N. Reddick

ARTICLES

RHETORIC VS. REALITY: AN ASSESSMENT OF TRENDS IN CIVIL NON-MERGER ANTITRUST ENFORCEMENT COMPARING THE BUSH AND OBAMA ADMINISTRATIONS
By D. Bruce Hoffman

ENSURING ACCESS TO AFFORDABLE MEDICATION: THE SUPREME COURT'S OPINION IN *F.T.C. V. ACTAVIS, INC.*: PLAINTIFF PERSPECTIVE
By Ralph B. Kalfayan and Vic A. Merjanian

***FTC V. ACTAVIS:* ANTITRUST LITIGATION OVER "REVERSE-PAYMENT" PHARMACEUTICAL PATENT SETTLEMENTS**
By Stuart N. Senator and Rohit K. Singla

UNFAIR AND DECEPTIVE PRACTICES: A COMPARISON OF THE FTC ACT AND CALIFORNIA'S UCL

By Lenore Albert and Michael Thurma★

The Federal Trade Commission ("FTC") has the authority to prosecute claims of unfair and deceptive practices under Section 5 of the Federal Trade Commission Act ("Section 5"). California has a similar Unfair Competition Law ("UCL") where both the government and private parties can pursue claims of unlawful, unfair and deceptive practices. This statutory framework was codified in California Business & Professions Code § 17200 et seq.[1]

There are similarities and some material differences between these two statutory frameworks. The goal of this article is to compare and contrast these similarities and differences.

I. Unfair and Deceptive Practices Under Section 5

The Magna Carta of the FTC's authority over unfair and deceptive acts or practices is Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(1). This federal law declares "unfair or deceptive acts or practices in or affecting commerce" are unlawful. Section 45(2) goes on to provide that "[t]he Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from . . . unfair or deceptive acts or practices in or affecting commerce."

Armed only with this elegantly simple directive, the FTC has developed a comprehensive body of case law supplying working definitions to these once-vague notions of "unfairness" and "deception," and enabling the agency to tailor a wide range of enforcement approaches to the ever-changing scope of industries and technologies with which it has been confronted over the past hundred years.

Contrary to the UCL's broad, reaching definition of "unlawfulness," which is actionable as an independent violation, Congress focused the prohibitions on "unfairness" and "deception."

II. "Deception" Under Section 5

Section 5's prohibition of "deception" is relatively straight-forward, rooted in well-understood principles associated with the law of fraud, yet accompanied by several built-in

---

★ Lenore Albert, Esq. of Law Offices of Lenore Albert, and Michael Thurman, Esq. of Loeb and Loeb.

1 Deceptive advertising is included in Cal. Bus. & Prof. Code § 17200 claims. Additionally, California has a separate provision for false advertising under Cal. Bus. & Prof. Code § 17500 which is outside the scope of this article.

shortcuts designed to assist the regulator's efforts to protect the public.[2] The FTC's "Policy Statement on Deception" ("Deception Statement")[3] summarizes that, "the Commission will find deception if there is a representation, omission or practice that is ***likely to mislead*** the consumer acting reasonably in the circumstances, ***to the consumer's detriment.*"** In other words, the FTC must establish that: "1) there is a representation, omission or practice that is likely to mislead the consumer; 2) the consumer is acting reasonably under the circumstances; and 3) the representation, omission or practice is material."[4]

On first impression, it should be noted that the deception standard is broader than traditional notions of fraud, expansive enough to include "practices" in addition to "representations" and "omissions." The FTC has utilized this authority to go after misleading practices that do not fit garden-variety frauds involving misrepresentations and omissions. For example, in 2012, the agency used this authority to prohibit browsers that "sniff" consumers' web-viewing histories and then deliver targeted advertising.[5]

III. "Unfairness" Under Section 5

In the first several decades after the agency's authority was expanded by Congress to include the prohibition of "unfair" acts or practices, the FTC made no distinction between deception and unfairness cases.[6] However, in 1964, the agency first specifically referenced unfairness as a partial basis for its issuance of the Cigarette Rule. In the Rule's Statement of Basis and Purpose, the agency outlined the elements that characterized the FTC's initial definition of "unfairness," including an act or practice that "1) offends public policy; 2) is immoral, unethical, oppressive, or unscrupulous; and 3) causes substantial injury to consumers."[7]

In 1980, following the issuance of several administrative rulings grounded on the agency's "unfairness" authority, the FTC refined the standard in its Policy Statement on Unfairness,[8] narrowing the requirements to acts or practices that 1) cause substantial injury to consumers; 2) are not outweighed by countervailing benefits to consumers

---

2 The traditional elements of fraud include: "(1) a knowingly false representation by the defendant; (2) an intent to deceive or induce reliance; (3) justifiable reliance by the plaintiff; and (4) resulting damages." *Serv. by Medallion, Inc. v. Clorox Co.*, 44 Cal. App. 4th 1807, 1816 (1996). Obvious differences between the common law standard of fraud and the FTC's standard for deception include "falsity" versus "likely to mislead" and "causes harm" versus "to the consumer's detriment." The FTC's Policy Statement on Deception and subsequent case law enforcing deception cases make clear that these differences are not insignificant.

3 Appended to *Cliffdale Associates*, Inc., 103 F.T.C. 110, 174 (1984).

4 ABA Section of Antitrust Law, FTC Practice and Procedure Manual (2007).

5 *See In the Matter of Epic Marketplace, Inc.*, F.T.C. Docket No. C-4389 (2012). In Epic, the FTC alleged both that the company's statements in its privacy policy as well as its failure to fully disclose the manner in which the browser functioned were false and misleading, constituting deceptive acts and practices.

6 ABA, p. 26.

7 *Id.*

8 Appended to *Int'l Harvester Co.*, 104 F.T.C. 949, 1070 (1984). *See* 15 U.S.C. § 45(n).

or competition; and 3) are not reasonably avoidable by consumers.[9] This standard was subsequently codified in 1994, when Congress added subsection (n) to Section 5.[10]

Despite these refinements, the agency has continued to struggle with the application of its unfairness authority. Since its codification, the doctrine has been relied upon in several enforcement actions, including a 1986 action against a company that breached pest extermination agreements with consumers, unilaterally raising its rates without contractual authority.[11] However, the agency initiated relatively few enforcement actions outlining the parameters of its unfairness authority towards the latter end of the last century.[12]

More recently, in 2013 the FTC initiated a civil enforcement action against a hotel chain that was the subject of numerous cyber-attacks over an extended period.[13] The FTC alleged both that the hotelier failed to comply with representations in its Privacy Policy that it would take reasonable steps to protect its customers' personally-identifiable information, and on the grounds that the company's failure to take reasonable measures to protect its customers' data constituted "unfair" conduct. The hotel company has challenged these allegations, including the FTC's unfairness claims, and a motion to dismiss is currently pending before the district court in New Jersey.

IV. California's Unfair Competition Law

California Business & Professions Code § 17200 ("UCL") was enacted in 1977. It was derived from former California Civil Code § 3370 that was enacted in 1949.

Unlike the FTC, California's unfair competition law has three separate prongs. The UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."[14]

Under this law, a practice can be prohibited as unfair or deceptive even if not unlawful, and vice versa.[15] "Because Cal. Bus. & Prof. Code § 17200 is written in the disjunctive, it establishes three varieties of unfair competition — acts or practices which are unlawful, or unfair, or fraudulent."[16]

On August 1, 2013 the California Supreme Court in *Zhang v The Superior Court of San Bernardino County* explained "an action under the UCL is not an all-purpose substitute for a tort or contract action. Instead, the act provides an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices."[17]

---

9 *Id.*

10 Pub. L. No. 103-312, 108 Stat. 1695 (1994).

11 ABA, p.28.

12 ABA, p.29, n.108.

13 *FTC v. Wyndham Worldwide Corp.*, No. 13-CV-1887 (D.N.J.).

14 Cal. Bus. & Prof. Code § 17200.

15 *Cel-Tech Comm'ns, Inc. v. L.A. Cellular Tel.* Co., 20 Cal. 4th 163 (1999).

16 *West v. JPMorgan Chase Bank*, 214 Cal. App. 4th 780 (2013).

17 *Zhang v Superior Court of San Bernardino County*, _ Cal. 4th _ (2013).

V. Unlawful Business Practices Under the UCL

An *unlawful* business practice can be "anything that can properly be called a business practice and that at the same time is forbidden by law."[18]

This prong of the unfair competition law allows a plaintiff to enforce a broad array of state and federal statutes, including consumer-protection statutes[19]; antidiscrimination statutes[20]; criminal statutes[21]; and environmental statutes.[22]

The 1992 Amendment to §17203 made clear that the law expressly reaches prior — and hence discontinued — acts of unfair competition in addition to continuing conduct.[23]

In *Zhang v Superior Court of San Bernardino County*, the California Supreme Court affirmed that the Legislature's failure to create a right of action under a statute is insufficient as a ground to preclude suit under the unlawful prong of the UCL.[24]

As explained in *McKell v Washington Mutual, Inc.*,[25] "[b]y extending to business acts or practices which are "unlawful," "the UCL permits violations of other laws to be treated as unfair competition that is independently actionable. [Citation.] Even if the violation of another law does not create a private right of action, if the violation constitutes unfair competition, it is actionable."[26]

Furthermore, there is no preemption issue if the state statute which was violated was created to enforce a federal regulation.[27]

VI. Unfair Business Practice Under the UCL

This issue transcends the unlawful prong. On August 1, 2013 the California Supreme Court also considered the issue of whether a private right of action was required in order to pursue a UCL claim under the "unfairness" prong.[28] In *Rose*, a class action was filed alleging violation of the federal Truth in Savings Act ("TISA"). Congress had previously provided a private right of action under that regulation, but then later revised that statute which took it away. The California Supreme Court held that the plaintiffs could still

---

18 *Summit Tech., Inc. v. High-Line Med. Instruments Co.*, 933 F. Supp. 918 (C.D. Cal. 1966).

19 *Walker v. Countrywide Home Loans, Inc.*, 98 Cal. App. 4th 1158 (2002); Cal. Civ. Code § 2954.4.

20 *Reese v. Wal-Mart Stores, Inc.*, 73 Cal. App. 4th 1225 (1999), Unruh Civil Rights Act; Cal. Civ. Code §§ 51-51.4.

21 *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553 (1998); Cal. Penal Code § 308.

22 *Hewlett v. Squaw Valley Ski Corp.*, 54 Cal. App. 4th 499 (1997); Cal. Pub. Res. Code § 4511.

23 *Klein v Earth Elements, Inc.*, 59 Cal. App 4th 965, 969 (1997).

24 *Zhang,* _ Cal. 4th _ (2013).

25 *McKell*, 142 Cal. App. 4th 1457 (2006).

26 *Id. at* 1474-75 (2006); *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 949-50 (2002). *See Cel-Tech Comm'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th at p. 180.

27 *McKell*, 142 Cal. App. 4th at 1485.

28 *Rose v Bank of America, N.A.*, _ Cal. 4th _ (2013).

pursue their claims for violations of TISA under the UCL on the grounds that "Congress has also made it plain that state laws consistent with the federal statute are not superseded."

The California Supreme Court stated that it did not matter if the issue was framed as one of preemption since Congress had left the savings clause intact.

The UCL has a broader standard than the FTC when determining whether the business act or practice is unfair.

California currently has a split of authority as to which test applies under the unfair prong. There are currently three tests California courts use to determine if the conduct alleged was unfair. The existence of three tests were recently recognized by the California Supreme Court in *Rose v Bank of America,* but the court did not have the chance to consider the issue because it was not fully briefed.[29]

The first test mirrors the FTC. Under the three-pronged FTC Section 5 test, a plaintiff must allege: (1) a substantial consumer injury; (2) that the injury outweighs any countervailing benefits to consumers or competition; and (3) that the injury could not reasonably have been avoided.[30]

The second test applied by California Courts, will find an "unfair" business practice occurs when the practice "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."[31]

The third test was stated in *West v. JPMorgan Chase Bank, N.A*.[32] The California Court of Appeal pointed out "[a]n unfair business practice [could also] mean[] the public policy which is a predicate to the action [that] must be tethered to specific constitutional, statutory or regulatory provisions."

The California Supreme Court in *Rose*,[33] merely mentioned the existence of the three tests, but has yet to affirm which test should be followed in California or whether a court should consider all three tests before preventing a suit for unfair business practices.

The unfair prong drills down to the policy supporting a given statute or regulation and asks whether that business practice or act offends that policy.

A current hot issue bouncing around the courts is the unfair business practice of financial institutions foreclosing on homeowners in California. In 2009, the Obama administration instituted the Making Home Affordable program (HAMP). This is a government program that gave financial incentives to financial institutions to modify loans of homeowner's in distress. It was later discovered that the financial institutions used the program giving the illusory promise of modification to the homeowner in order to solicit payments under the

---

29 *Id.* at n.9; *see also Rubio v. Capital One Bank*, 613 F.3d 1195, 1204-05 (9th Cir. 2010); *Lozano v. AT&T Wireless Servs.*, 504 F.3d 718, 736 (9th Cir. 2007).

30 *Camacho v. Auto. Club of S. Cal.*, 142 Cal. App. 4th 1394, 1403 (2006).

31 *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 886-87 (1999).

32 *West*, 214 Cal. App. 4th 780 (2013).

33 *Rose*, _ Cal 4th _ (2013).

Temporary Payment Plans (TPPs) then would foreclose without ever modifying the loan under HAMP. When the homeowner would take the financial institution to court for breach, wrongful foreclosure and UCL violations, the financial institution defended on the grounds that the TPP was not a contract and there was no private right of action under HAMP. This went on for years where the trial courts sided with the financial institutions in California state and federal courts. Finally, in *West* the court found JP Morgan Chase Bank, N.A. engaged in the unfair and fraudulent business practice of "making TPPs that did not comply with HAMP guidelines and the United States Treasury directives; . . . made misrepresentations about pending foreclosure sales; and wrongfully had trustee's sales conducted when the borrower was in compliance with a TPP."[34]

VII. Fraudulent Business Practice Under the UCL

The third prong of potential liability under the UCL is a fraudulent business act or practice.

Similar to the FTC's definition of "deception," a fraudulent business practice is defined as one where "members of the public are likely to be deceived."[35]

The pleading requirements under the fraudulent prong are different depending on whether the plaintiff is in state court or federal court.

In California courts, a fraudulent business practice does not need to be particularly pled. California's fraudulent business practice prong is akin to the FTC's deception prong and does not require the complainant to prove scienter, reliance or causation.[36] Both also have similar standards in measuring whether a consumer would likely be deceived.

When pleading under the fraudulent prong in California state courts, the court will find that the claim states a cause of action "unless [the court] can say as a matter of law that contrary to the complaint's allegations, members of the public were *not* likely to be deceived or misled by [the defendant's alleged conduct]."[37]

The same action sitting in federal court, however, is required to be pled with specificity as required under Rule 9(b).[38]

VIII. Pleading Standards Under Section 5

There is a split of authority among the federal courts regarding whether the particularity requirements of Rule 9(b) of the Federal Rules of Civil Procedure apply to pleadings in

---

34 *Id*. at 806.

35 *Schnall v. Hertz Corp.,* 78 Cal. App. 4th 1144, 1167 (2000).

36 *See Stearns v. Ticketmaster Corp.*, 655 F.3d 1013 (9th Cir. 2011); *Anunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133 (C.D. Cal. 2005); *In re Paxil Litig.*, 218 F.R.D. 242 (C.D. Cal. 2003) transferred 296 F. Supp. 2d 1374 (JPML 2003); *cf. Janda v. T-Mobile, USA, Inc.*, 2008 U.S. Dist. LEXIS 93399 (N.D. Cal. 2008).

37 *Morgan v. AT&T Wireless Servs., Inc.,* 177 Cal. App. 4th 1235, 1257 (2009); *see also, Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1381 (2012).

38 *Kearns v. Ford Motor Co.*, 567 F.3d 1120 (9th Cir. 2009); *In re Actimmune Mktg. Litig.*, 614 F. Supp. 2d 1037, 2009 U.S. Dist. LEXIS 36133 (N.D. Cal. 2009).

actions enforcing Section 5 claims. The Tenth Circuit and district courts in the Second, Third and Eleventh Circuits have held that the heightened Rule 9(b) pleading standards used in federal actions based on fraud are not applicable to Section 5 actions, generally because such actions do not require allegations or proof of scienter, reliance or causation.[39] On the other hand, starting with *FTC v. Lights of America., Inc.*,[40] several Ninth Circuit lower courts have held that Section 5 actions involving deception claims merit the application of the heightened pleading requirements, similar to those that have been applied by California courts in UCL actions.[41] In *Lights*, a Southern California District Court held that FTC's allegations of deceptive labeling on LED light bulb packages "sounded in fraud," requiring the agency to meet the more stringent pleading requirements of Rule 9(b).

IX. The Reasonable Consumer Standard Under Section 5

The Federal Trade Commission articulated the "reasonable consumer" standard as the basis for determining whether a claim is deceptive in the Deception Statement: "[t]o be deceptive the representation, omission or practice must be likely to mislead reasonable consumers under the circumstances." Relying on prior administrative case rulings,[42] the agency stated that deception claims (including those involving omissions) must be evaluated from the point-of-view of "how reasonable consumers are likely to respond." The agency also made it clear that, "[a] company is not liable for every interpretation or action by a consumer. . . . An advertiser cannot be charged with liability with respect to every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feeble-minded."[43] Finally, where claims are directed to certain groups or audiences other than the general population, the "reasonable consumer" approach evaluates the claim from the perspective of a reasonable member of that group.[44]

---

39 *See FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1204 n.7 (10th Cir. 2005) (noting in dicta that "[a] § 5 claim simply is not a claim of fraud as that term is commonly understood or as contemplated by Rule 9(b) . . . . Unlike the elements of common law fraud, the FTC need not prove scienter, reliance, or injury to establish a § 5 violation" (collecting cases what does this mean?)); *FTC v. Sterling Precious Metals, LLC,* 2013 U.S. Dist. LEXIS 20879, 2013-1 Trade Cas. (CCH) P78,272 (S.D. Fla. Feb. 14, 2013) (following *Freecom Commc'ns* and *Consumer Health*); *FTC v. Consumer Health Benefits Ass'n,* 2012 U.S. Dist. LEXIS 72161, 2012 WL 1890242 (E.D.N.Y. May 21, 2012) (although the 2nd Cir. has not yet addressed the issue, the law of the case was that the action did not "sound in fraud" and therefore Rule 9(b) did not apply); *FTC v. Med. Billers Network, Inc.*, 543 F. Supp. 2d 283, 314 (S.D.N.Y. 2008) (expressing doubt in dicta as to the applicability of Rule 9(b) to claim alleging violation of TSR); and *see generally*, 2-9 James W. Moore, Moore's Federal Practice, § 9.03[e] (3d ed. 1997) (discussing split in authority).

40 *Lights*, 760 F. Supp. 2d 848 (C.D. Cal. 2010).

41 *See FTC v. Cantkier*, 767 F. Supp. 2d 147 (D.D.C. 2011).

42 *See* Deception Statement (citing *Warner-Lambert*, 86 F.T.C. 1398, 1415 n.4 (1975), *aff'd*, 562 F.2d 749 (D.C. Cir. 1977), *cert denied*, 435 U.S. 950 (1978); *Am. Home Prods.*, 98 F.T.C. 136 (1981), *aff'd* 695 F.2d 681 (3d Cir. 1982); *Bristol-Myers*, D. 8917 (July 5, 1983), appeal docketed, No. 83-4167 (2nd Cir. Sept. 12, 1983); *Sterling Drug, Inc.*, D. 8919 (July 5,1983), appeal docketed, No. 83-7700 (9th Cir. Sept. 14, 1983) [102 F.T.C. 395 (1983)]).

43 *Id*. (citing *Heinz W. Kirchner*, 63 F.T.C. 1282, 1290 (1963)).

44 *Id*. (referencing *Bates v. Arizona*, 433 U.S. 350, 383 n.37 (1977)).

While a deception claim can certainly be based on a false statement or material omission,[45] "the representation need not be literally misleading for such a finding."[46] Set against the relatively difficult requirement of proving actual "falsity" in fraud cases, the "likely to mislead" standard allows a significantly lower level of conduct to be included as a FTC deception violation.

Moreover, the development of the FTC's "prior substantiation" rule effectively eliminated the requirement that a statement even be untrue in order to be determined to be "deceptive." Through a series of administrative and judicial cases, the FTC has developed the requirement "that advertisers and agencies [must] have a reasonable basis for advertising claims before they are disseminated."[47] This view was announced by the FTC in 1984 in its Policy Statement Regarding Advertising Substantiation, broadcasting its position that advertising substantiation is a "legal requirement."[48]

The FTC has continued to develop the prior substantiation doctrine, most recently in a series of administrative actions relating to health and wellness claims. In *POM Wonderful*,[49] the FTC imposed upon an advertiser the requirement of completing two double-blinded randomized and controlled human clinical trials before making similar claims in the future, which was found to have made partially-substantiated claims about the health benefits of its juices.[50]

X. The Reasonable Consumer Standard Under the UCL

Like the FTC test, the test under Business and Professions Code § 17200 is whether a ““reasonable consumer” would have been misled.[51]

An advertisement's potentially deceptive effect is measured by the audience to which it is addressed.[52] The reasonable consumer standard is based on the group of consumers targeted by the business practice or act and is not focused on the act itself.[53]

For example, the act of a bank advertising an interest rate based on 360 days has been found to be a fraudulent act against a group of consumers.[54] However, the same type of advertising was found not to be a fraudulent act, when the interest rate was advertised to a group of auto dealerships.[55]

---

45 *Id.*

46 ABA, p.23.

47 *See* FTC Policy Statement Regarding Advertising Substantiation, appended to *Thompson Med. Co.*, 104 F.T.C. 648, 839 (1994), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. den.*, 479 U.S. 1086 (1987).

48 *Id.*

49 *In the Matter of POM Wonderful LLC*, FTC File No. 082-3122, Docket No. 9344 (Jan. 16, 2013).

50 *POM* Order, Jan. 10, 2013.

51 *Quelimane Co. v. Stewart Title Guaranty Co.* 19 Cal. 4th 26, 55 (1998).

52 *Comm. on Children's TV, Inc. v. Gen. Foods Corp.*, 35 Cal. 3d 197, 214 (1983).

53 *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir. 2008).

54 *Chern v. Bank of Am.*, 15 Cal.3d 866, 876 (1976).

55 *South Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th 861 (1999).

The reason for the different result is that "[t]he standard applied in UCL and false advertising cases is that of the ordinary consumer acting reasonably under the circumstances. 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."[56]

Consequently, it is important to define the group and determine what a reasonable consumer or competitor would do or perceive within that group when determining whether or not the business act or practice was likely to mislead the group.

XI. Injury-in-Fact Under Section 5

Whether the FTC proceeds based on claims of unfairness or deception, it must demonstrate consumer injury in order to prevail on a claimed violation of Section 5. As discussed previously, "substantial consumer injury" is an essential element of an unfairness claim. Similarly, even though consumer injury can be presumed in a deception case without the need for a showing of harm if a claim or omission is material, the agency must still be able to identify harm to consumers. Such harm can consist, alternatively, of a substantial impact to a smaller number of individual consumers or, alternatively, relatively small impacts on many individuals so as to cause substantial harm.[57]

XII. Injury-in-Fact Under the UCL

California Proposition 64 which required private attorneys to represent clients who had "injury-in-fact" in order to plead a UCL claim. Injury in fact is a term of art equated to standing in federal courts. California adopted this federal rule in UCL claims in 2004.[58] Consequently, the practitioner should focus on post 2004 case law when analyzing standing and injury-in-fact.

Injury-in-fact was recently outlined by the California Supreme Court in *Kwikset Corp. v Sup. Court.*[59]

The California Supreme Court reaffirmed "economic injury from unfair competition may be shown: a plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary."[60]

---

56 *See Comm. on Children's TV, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 197 Cal. Rptr. 783, 673 P.2d 660; *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 510 (2003).

57 *See EMC Corp. v. Norand Corp.*, 89 F.3d 807, 811 (Fed. Cir. 1996); *Nat'l Rifle Ass'n of Am. Magaw,* 132 F.3d 272, 280 (6th Cir. 1997).

58 *Buckland v. Threshold Enters., Ltd.*, 155 Cal. App. 4th 798, 814 (2007).

59 *Kwikset,* 51 Cal 4th 310, 323 (2011).

60 *Id.*

This merely means that there has been "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not "conjectural" or "hypothetical."[61]

This concept frequently overlaps with standing. Proof of standing, which is discussed *infra*, can evidence injury in fact.

XIII. Standing Under Section 5

Unlike the broad standing provisions that are found in the UCL, Section 5 limits the parties that may prosecute or defend actions under the FTC Act to the Department of Justice and, generally, the Federal Trade Commission.[62] However, the FTC typically must first provide notice to the Attorney General of all actions in which it will represent itself, and the Department of Justice may choose to intervene as a party in any action that it does not prosecute on behalf of the FTC.[63] In addition, the FTC must be represented by the Attorney General in any civil action seeking the recovery of civil penalties for violation of a rule or order, arising under statutes other than the Section 5, and in connection with any criminal actions.[64]

Section 5 does not provide any private right of action for plaintiffs, and the courts have refused to imply any such rights for consumers.[65] However, many states have adopted "Little FTC Acts" that provide parallel or even more robust enforcement powers than the Section 5,[66] and all of these state consumer protection acts include private rights of action.[67]

XIV. Standing Under the UCL

Unlike Section 5, private parties, in addition to public prosecutors, have standing to sue under California Business & Professions Code §§ 17200 and 17500.[68]

---

61 *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992).

62 Section 16 (15 U.S.C. § 56) grants the FTC exclusive authority to represent itself in civil actions based on the Section 5 to: 1) obtain injunctive relief under Section 13; 2) obtain consumer redress under Section 19; 3) obtain judicial review of an FTC-issued rule or cease-and-desist order; 4) obtain enforcement of subpoenas and orders to file special reports; and 5) obtain enforcement of civil investigative demands. In all cases, the FTC must submit prior notice of to the Attorney General?, which may elect to intervene as a party in such actions or appeals. Section 16(a)(2) (15 U.S.C. § 56). For any other actions involving the Section 5, the FTC must notify the Attorney General? and then wait 45 days (or less, if earlier action is required to preserve the action) to determine whether the Department of Justice will handle the representation. If the AG? does not accept the representation on a timely basis, the FTC may defend itself in such actions. Section 16(a)(1) (15 U.S.C. § 56).

63 Federal Trade Commission Operating Manual, Ch. 13, p. 1-2.

64 *Id.* at 2 and 7.

65 *See, e.g., Holloway v. Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973).

66 Butler and Wright, "Are State Consumer Protections Acts Really Little-FTC Acts," April 27, 2010, Draft, p.10 (http://www.law.gmu.edu/assets/files/publications/working_papers/1045AreStateConsumerProtectionActs.pdf).

67 *Id.*

68 Cal. Bus. & Prof. Code §§ 17204 and 17535.

As stated *supra*, there does not need to be a private right of action to sue contained in the underlying statute in order to sue under the UCL.

For those statutes that do provide a private right of action, there is nothing that would prohibit a plaintiff from suing under *both* statutes so long as they have standing to do so. Additionally, standing under the UCL can be broader than the underlying statute. The distinction in suing under the UCL as opposed to suing directly on the underlying statute is illustrated in *Consumers Union of U.S., Inc. v Fisher Development Inc.*[69] This was a discrimination case based on age and family status against a Homeowners Owners Association and Developer. The Court found that the individuals could sue under both the Unruh Act and the UCL. The association itself, on the other hand, could not sue under the Unruh Act because it was not an "aggrieved" person. Nevertheless, the association had standing to sue under the UCL.

Consumers are not the only type of private party that may bring suit. Competitors also have standing to bring a private lawsuit.[70] Moreover, competitors can sue exclusively for injunctive relief to prohibit continued business practices or acts and does not need to prove it is first entitled to restitution.

In order to have standing to pursue a UCL claim, the private party must have suffered a monetary or property loss. In essence, they must have suffered from some type of economic injury. The injury, however, does not have to be substantial in order to have standing. In fact, the UCL cause of action is commonly used in consumer class actions where a consumer has been "nickeled-and-dimed" which would make pursuing an individual private claim too costly. The *Kwickset* court confirmed that only an "identifiable trifle" of economic injury is required.[71]

Although the UCL allows consumers and competitors to sue under the UCL in addition to government agencies, the UCL's reach is not unlimited. For example, it cannot be used to avoid the rule prohibiting third party lawsuits against insurance companies.[72]

Insurance issues are driven by rules of preemption, too. In *Charles J. Vacanti, M.D., Inc. v. State Compensation Insurance Fund*, the California Supreme Court noted that individual claims against an insurance company for bad faith delay tactics on liens could not be pled as an UCL claim on the grounds such claims were preempted. However, to the extent RICO and Cartwright Act type claims were pled based on allegations of conspiracy by multiple insurers, those claims based on conspiracy properly fell within the UCL claim. The court noted that the distinction was based on the ground the insurer, as a co-conspirator had no right to the insurance claim of a consumer insured by another insurance company.[73]

On August 1, 2013 the California Supreme Court made the distinction clear as between first party insurers bringing actions under the UCL and third parties who

---

69 *Consumers Union*, 208 Cal. App. 3d 1433 (1989).

70 *POM Wonderful LLC v Ocean Spray Cranberries, Inc.*, 642 F. Supp. 2d 1112 (C.D. Cal. 2009).

71 *Kwikset*, 51 Cal. 4th at 323.

72 *Safeco Ins. Co. v Sup. Ct.*, 216 Cal. App. 3d 1491, 1493-95 (1990).

73 *Vincent*, 24 Cal. 4th 800 (2001).

attempted to avoid the bar on direct third party claims against an insurer by brining an action under the UCL. In Zhang, the Court held that the UIPA could support a violation of the UCL on the grounds "Moradi-Shalal does not preclude first party UCL actions based on grounds independent from section 790.03, even when the insurer's conduct also violations section 790.03."[74]

XV. Relief Available Under Section 5

Section 5 provides two separate statutory sources of relief for enforcing violations of Section 5 and the other rules that are administered by the FTC. Section 13[75] provides injunctive relief for false advertising and for violations of Section 5. Section 19[76] provides a panoply of remedies for violations of FTC trade regulation rules and administrative cease-and-desist orders.

XVI. Section 13(b)

Since the early 1980's, Section 13(b) has been the FTC's primary enforcement tool for enforcing Section 5 violations. The agency uses Section 13(b) to obtain *ex parte* asset freezes, appoint receivers to take control of target businesses, bar defendants from continuing to participate in certain industries and obtain significant monetary relief, often without the need for a trial.

Yet the language of Section 13(b) betrays the power and reach that has been accorded it by the courts. Section 13(b) provides that whenever the FTC has reason to believe that a party is violating or about to violate an FTC law and that the public interest would be served by restraining the violation until a final order can be obtained against the conduct, the FTC can seek a temporary restraining order or preliminary injunction to halt the illegal conduct.[77] Section 13(b) goes on to state that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction."[78]

Relying on U.S. Supreme Court precedents from 1946 and 1960,[79] this language has been interpreted by most of the federal circuits that have considered it to authorize the FTC not only to obtain preliminary and permanent injunctive relief, but also equitable monetary remedies, including restitution and/or disgorgement.[80] As a result of these interpretations, the FTC has essentially abandoned its traditional administrative enforcement process, which

---

74 *Zhang*, _ Cal. 4th _ (2013).

75 15 U.S.C. § 53.

76 15 U.S.C. § 57.

77 *See* Section 13(b).

78 *Id.*

79 *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946); *Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288 (1960).

80 *See, e.g., FTC v. Bronson Partners, LLC*, 654 F.3d 359, 366 (2d Cir. 2011); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1 (1st Cir. 2010); *FTC v. Freecom Comm'ns., Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468 (11th Cir. 1996); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314 (8th Cir. 1991); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571 (7th Cir. 1989).

required the agency to first obtain a cease-and-desist order before filing it with a federal court to obtain compliance, in consumer protection cases.[81]

Besides directing the cessation of FTC Act violations, courts have granted ancillary relief including asset freezes, consumer redress (characterized as restitution and/or disgorgement of profits), notification of injured consumers, appointment of a receiver, and the imposition of an accounting.[82]

XVII. Section 19(b)

Section 19 provides remedies for false advertising violations and for violations of FTC trade regulatory rules and cease-and-desist orders. Section 19(b) gives authority "to grant such relief as the court finds necessary to redress injury to consumers . . . resulting from the rule violation or the unfair or deceptive act or practice." The breadth of the relief that is available is extensive, including but not limited to "rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice."[83] The only apparent limitation on the remedies that may be obtained under Section 19(b) is that the statute expressly prohibits the imposition of exemplary or punitive damages.[84]

XVIII. Relief Available Under the UCL

The UCL allows both private parties and the attorney general to bring claims of unfair competition violations. They are not entitled to the same relief, however.

Private parties are entitled to equitable relief which includes injunctive relief and restitution. However, entitlement to restitution is not a requirement to find standing.[85] Moreover, the party is not allowed to treble the UCL award, even if the party has sought and obtained a treble award directly under the statute that was violated, itself.[86]

The government, on the other hand, can pursue injunctive orders plus penalties.[87]

---

81 Advocates have argued in a number of cases that the language of Section 13(b) does not authorize the award of monetary relief or, for that matter, any relief beyond a temporary restraining order, preliminary injunction or permanent injunction "to halt" the allegedly violative conduct, as is expressly provided by the statute. *See, e.g., FTC v. Bronson Partners, LLC*, 654 F.3d 359, 2011 U.S. App. LEXIS 17203, 2011-2 Trade Cas. (CCH) P77,574 (2d Cir. 2011); FTC v. Ross, 897 F. Supp. 2d 369, 2012 U.S. Dist. LEXIS 136429, 2012-2 Trade Cas. (CCH) P78,076, 2012 WL 4356791 (D. Md. 2012); *FTC v. Swish Mktg.*, 2010 U.S. Dist. LEXIS 15016, 2010-1 Trade Cas. (CCH) P76,918, 2010 WL 653486 (N.D. Cal. Feb. 22, 2010).

82 Peter C. Ward, Federal Trade Commission: Law, Practice and Procedure. New York: Law Journal Seminars-Press (2013) Chap. 14, section 14.04[4], n.47.

83 *Id.*

84 *Id.*

85 *Cortez v Purolater Air Filtration Prods.*, 23 Cal. 4th 163 (2000); *see also, Pineda v. Bank of Am., N.A.*, 50 Cal. 4th 1389 (2010).

86 *Clark v. Sup. Ct.*, 50 Cal 4th 605 (2010).

87 *People v. First Fed. Credit Corp.*, 104 Cal App 4th 721 (2002).

XIX. Statute of Limitations Under Section 5

As discussed in the remedies section above, Section 13(b) and Section 19 provide the relevant remedies available in consumer protection actions against Section 5 violators.

Section 13(b) allows the FTC to initiate equitable actions seeking injunctive relief "to halt" alleged violations of Section 5(b) of the FTC Act.[88] Since a 13(b) action is an equitable action, there is no applicable limitations period. However, the traditional limitations on the court's equitable authority apply to restrain actions that cannot in good conscience be maintained by the court. As such, defenses such as laches[89] and estoppel[90] have been allowed in FTC civil enforcement actions where the defendants seeks to challenge the timeliness of the government's claims, especially where the defendant can demonstrate prejudice as a result of the delay or detrimental reliance based on positions taken by the government.[91]

---

88 The legislative intent behind the Section 13(b) amendments was discussed in the Senate Report on the Federal Trade Improvement Act, P.L. 93-637: "The purpose of section 210 is to permit the Commission **to bring an immediate halt** to unfair or deceptive acts or practices when to do so would be in the public interest. At the present time such practices might continue for several years until agency action is completed. Victimization of American consumers should not be so shielded. Section 210 authorizes the granting of a temporary restraining order or a preliminary injunction without bond pending the issuance of a complaint by the Commission under section 5, and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final within the meaning of section 5." S. Rep. 93-151, 30-31 (emphasis added).

89 "The traditional rule is that the doctrine of laches is not available against the government in a suit by it to enforce a public right or protect a public interest." *FTC v. Hang-Ups Art Enter., Inc.*, No. 95-CV-0027 RMT (JGx), 1995 WL 914179, at *4 (C.D. Cal. Sept. 27, 1995) quoting *United States v. Ruby Co.*, 588 F.2d 697, 705 n.10 (9th Cir. 1978). However, "it may be that this rule is subject to evolution as was the traditional rule that equitable estoppel would not lie against the government." *Id.* As the *Hang-Ups* court held, "the facts of the case should decide whether there has been affirmative misconduct by the government such that laches might apply." *Id.* S*ee also United States v. Am. Elec. Power Serv. Corp.*, 218 F. Supp. 2d 931 (S.D. Ohio 2002) (allowing defense of laches against the government when it seeks injunctive relief); *Levin-Richmond Terminal Corp. v. Int'l Longshoremen's & Warehousemen's Union, Local 10*, 751 F. Supp. 1373, 1377 (N.D. Cal. 1990) (denying motion to strike laches affirmative defense). As such, parties seeking to establish a laches defense must be able to demonstrate some form of affirmative misconduct on the part of the government.

90 There is no *per se* prohibition against maintaining an estoppel defense against the government. In short, the government may be estopped even when acting in its sovereign capacity. *Watkins v. U.S. Army*, 875 F.2d 699, 707, n.11 (9th Cir. 1989) (estoppel may be applied against the government in no fewer than eight circuits); *Johnson v. Williford*, 682 F.2d 868 (9th Cir. 1982); *Yates v. U.S. Soc. Sec. Admin.*, 1979 U.S. Dist. LEXIS 13768 (E.D. Cal. March 14, 1979); *United States v. Ruby*, 588 F.2d 697 (9th Cir. 1978), *cert. denied, Ruby Co. v. United States*, 442 U.S. 917 (1979); *Cal. Pac. Bank v. Small Bus. Admin.*, 557 F.2d 218 (9th Cir. 1977); *United States v. Wharton*, 514 F.2d 406 (9th Cir. 1975); *United States v. Lazy FC Ranch*, 481 F.2d 985 (9th Cir. 1973). As the Ninth Circuit has twice succinctly stated: "The claim of the government to an immunity from estoppel is in fact a claim to exemption from the requirements of morals and justice." *Ruby*, 588 F.2d at 702 (quoting, *United States v. Georgia-Pacific Co.*, 412 F.2d 92 (9th Cir. 1970)). Moreover, "[e]quitable estoppel principles are applicable to actions arising under federal law." *Levin-Richmond*, 751 F. Supp. at 1377 (denying motion to strike estoppel affirmative defense).

91 *FTC v eDebitPay, LLC*, 2011 U.S. Dist. LEXIS 15750 (C.D. Cal. February 3, 2011) affirmed 695 F.3d 939 (9th Cir. 2012).

As discussed above, Section 19 of Section 5[92] provides extensive remedies that may be sought when the FTC can establish a violation of an FTC trade rule or cease-and-desist order. Such an action must be brought within three years after the date of the rule violation, or the later of three years after the date of the conduct that was the subject of the cease-and-desist order or one year after the issuance of the cease-and-desist order.

XX. Statute of Limitations under the UCL

California Business & Professions Code §17208 contains a four year statute of limitations. That limitation period, however, may be tolled under certain circumstances. A claim does not accrue until the claim is "'complete with all of its elements'—those elements being wrongdoing, harm, and causation".[93] Consequently, if the business practice is ongoing, then the statute of limitation is measured from the last act and continues to toll the statute of limitations of period.

If a statute exists with a shorter statute of limitation, it does not limit a UCL claim filed past that bar date, so long as it is filed within the statutory time period of a UCL claim.[94]

Furthermore, delayed discovery and other tolling provisions can apply to a UCL claim. However, the delayed discovery rule or other tolling provisions will not apply equally from one UCL case to the next. As recently explained by the California Supreme Court in *Aryeh v Cannon Business Solutions, Inc.*, "[t]hat a cause of action is labeled a UCL claim is not dispositive; instead, 'the nature of the right sued upon' and the circumstances attending its invocation control the point of accrual. The common law last element accrual rule is the default."[95]

Unlike the FTC Act, California will not judicially sanction the defendant engaging in an act declared by statute to be void or against public policy by allowing equitable defenses such as laches, or unclean hands.[96] These defenses are not recognized under the UCL.

XXI. Right to Jury Trial under Section 5 and the UCL

Both Section 5 and the UCL are considered equitable claims and as such, do not provide for a jury trial.[97]

XXII. Organizations Exempt from Prosecution Under Section 5

Banks, savings and loan institutions,[98] and "federal credit unions,"[99] which are subject to regulations issued by the Federal Reserve Board, the Office of Thrift Supervision, and

---

92 15 U.S.C. § 57(b).

93 *Pooshs v. Philip Morris USA, Inc.*, 51 Cal.4th 788, 797 (2011).

94 *Cortez v Purolater Air Filtration Prods.*, 23 Cal. 4th 163 (2000).

95 *Aryeh v. Canon Bus. Solutions, Inc.*, 55 Cal. 4th 1185, 1196 (2013) (citation omitted).

96 *Ticconi v. Blue Shield of Cal. Life & Health Ins. Co.*, 160 Cal. App. 4th 528, 543 (2008); *Cortez*, 23 Cal. 4th at 179.

97 *Hodge v. Superior Court,* 145 Cal. App. 4th 278, 284 (2006).

98 Section 18(f)(3) (15 U.S.C. §57a(f)(3)).

99 Section 18(f)(4) (15 U.S.C. § 57a(f)(4)).

the National Credit Union Administration Board, respectively cannot be prosecuted under the Section 5.[100] The authority for enforcement derives from section 8 of the Federal Deposit Insurance Act,[101] for banks and savings and loans, and sections 120 and 206 of the Federal Credit Union Act, for Federal credit unions.[102]

However, when the act or practice constitutes "servicing" of a loan, in contrast to lending activities, the FTC can prosecute claims for unfair and deceptive acts. The recent 2012 $25 billion settlement amongst federal and state agencies against the largest banks for servicing violations is a testament to the FTC's power to act.[103]

Although the insurance industry is not specifically included in the list of exceptions in Section 5, the McCarran- Ferguson Act[104] generally leaves the regulation of the business of insurance to the individual states. Furthermore, pursuant to section 2(b) of the McCarran-Ferguson Act, no federal law will invalidate, impair, or supersede state regulation "unless such Act specifically relates to the business of insurance."[105]

XXIII. Arbitration of UCL Claims

Finally, the United States Supreme Court recently held that the Federal Arbitration Act could apply to consumer class action lawsuits brought under the UCL in *AT&T Mobility v. Concepcion*.[106]

Arbitration clauses found in adhesive contracts have been revived with a new life in the Ninth Circuit as a result. This has led to a struggle in the lower courts, especially where injunctive relief is the primary goal of a consumer class action lawsuit under the UCL.

In theory, *Concepcion* would have the district court refer the case out to obtain an arbitration award then request the district court to interpret, supervise and enforce the injunctive provisions of that award made by someone else in a UCL case. To deal with that impractical result of interpreting an order of another decision maker, some courts have ruled that the arbitration clause is unenforceable on the grounds the primary relief being sought is injunctive.

On June 20, 2013, however, the United States Supreme Court decided *American Express v. Italian Colors Restaurant* and held that contractual waivers of class arbitration are enforceable even where parties would have no incentive to pursue their claims on an individual basis.[107] This decision has important implications for class actions and antitrust law and is likely to cause potential parties to arbitration waivers to reevaluate their position in light of the apparent iron clad enforceability of such waivers.

---

100 *See* 15 U.S.C. § 57a(f).

101 12 U.S.C. § 1818.

102 15 U.S.C. §§ 57a(f)(2)-(4).

103 *United States v. Bank of Am. Corp.*, No. 12-0361 (D.C. Apr. 04, 2012).

104 15 U.S.C. § 1011 *et seq.*

105 15 U.S.C. § 1012(b).

106 *Concepcion*, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011).

107 *Italian Colors*, 133 S. Ct. 2304; 2013 U.S. LEXIS 4700 (2013).

The impact of these arbitration decisions could quell many legitimate consumer class action lawsuits that would be too costly to maintain as a private action and shift the burden to the California Attorney General, U.S. Department of Justice, and the Federal Trade Commission for primary enforcement.

On July 30, 2013 the Ninth Circuit recently considered the U.S. Supreme Court decision of *Concepcion* in the case of *Murphy v DirecTV, Inc.*[108] In that case, plaintiffs filed a UCL action against Best Buy stores which advertised the sale of DirecTV products. It alleges the use of the word "sale" was deceptive on the grounds the consumers were in fact purchasing leases from DirecTV. The consumer lease with DirecTV contained an arbitration clause. The Ninth Circuit affirmed the district court's order mandating arbitration between the consumers and DirecTV but reversed the mandate of arbitration with Best Buy Stores on the grounds Best Buy Stores was not a party to the contract containing the arbitration clause.

The California Supreme Court has accepted a handful of cases with arbitration clauses at play under the UCL for review. Some commentators have stated that unlike, the United States Supreme Court, California courts have a long history of reasons for carving exceptions to mandatory arbitration provisions based on experience with the effects of arbitration on the parties and barriers to lawsuits or legitimate relief. These cases are definitely cases to watch to see how the California Supreme Court will merge California precedent with recent cases such as *Concepcion* and *Italian Colors*.[109]

XXIV. Conclusion

The Federal Trade Commission has the authority to prosecute claims of unfair and deceptive practices under Section 5 of the Federal Trade Commission. Deceptive practices that sound in fraud are generally required to be pled with the same specificity as required under Fed. R. Civ. Proc. 9(b) in the Ninth Circuit. Although the who, what, where, when and how are required, the focus is placed on whether the representation would likely mislead the reasonable consumer under the circumstances. A violation of Section 5 is not brought by the consumer, however, it is only brought by the U.S. Attorney General or the Federal Trade Commission. The U.S. Attorney General, or more commonly, the Federal Trade Commission will initially apply for an ex parte order to freeze the businesses assets, bar the business from continuing to participate in certain acts and then proceed to obtain monetary relief and a permanent injunction through trial. Since the action is based in equity, there is no right to a jury trial and the matter is customarily tried to the bench if a settlement has not been reached. The statute of limitations within which to bring the action is within one year after a cease and desist order has been issued and breached, or within three years after the violation occurred.

---

108 *Murphy v DirecTV, Inc.*, _ F. 3d. _ (9th Cir. 2013)

109 One could argue that California has had more experience on the bench as to the effects of arbitration on employment and consumer claims than the U.S. Supreme Court and has carved out exceptions based on that experience. No one knows how the California Supreme Court is going to react to the recent decisions coming out of the U.S. Supreme Court. The California Supreme Court has granted review on this issue in several cases to watch: *Vasquez v. Greene Motors*, 2013 Cal. LEXIS 5485 (Cal., June 26, 2013); *Compton v. Sup. Ct.*, 2013 Cal. LEXIS 4787 (Cal., June 12, 2013); *Natalini v Import Motors, Inc.*, 2013 Cal. LEXIS 3995 (Cal., May 1, 2013); and *Flores v West Covina Auto Group, LLC*, 2013 Cal. LEXIS 3026 (Cal., Apr. 10, 2013).

California allows the California Attorney General, consumers and competitors to bring similar claims under California Business & Profession Code § 17200 et seq. which is commonly known as California's unfair competition law. There are five different types of acts or practices prohibited under the UCL: (1) unlawful business practices or acts; (2) unfair business practices or acts; (3) fraudulent business practices or acts; (4) unfair, deceptive, untrue or misleading advertising; and (5) any act prohibited under §§ 17500-17577.5. This article was limited to the first three types of acts or practices. There are three tests being employed by California courts in determining whether or not an act is considered unfair. Thus far, the California Supreme Court has not visited the issue on which test should be followed in California or if all three should be used before barring a UCL action. Consequently, the practitioner should employ all three tests when briefing the issue. Like the FTC, California also uses a reasonable consumer test when determining whether a practice or act is fraudulent. However, that prong does not need to be pled with specificity in California courts. The UCL allows private parties to obtain restitution and injunctive relief. The California Attorney General can also seek penalties. The statute of limitations to bring a UCL claim is four years from the last violation alleged. When the violation cannot be discovered within that time frame, the statute is tolled using the last element accrual rule. Moreover, certain affirmative defenses such as unclean hands or laches are not allowed. Like the FTC, there is no right to a jury trial, and the party has a right to obtain preliminary and permanent injunctive relief.

The FTC exempts banks, savings and loans institutions, and federal credit unions from prosecution under Section 5. However, the FTC can prosecute these institutions to the extent the activity concerns servicing a loan, in contrast to lending activities.

Insurance companies are also exempt from being pursued under the FTC. The FTC refrains from prosecution on the grounds insurance regulation is a state issue. The California courts will allow UCL claims against insurance companies to proceed so long as it is not being used to avoid the rule prohibiting third party lawsuits against insurance companies. Thus, this area of law should be reviewed carefully before proceeding against the insurance company with a UCL claim.

Finally, with the shift in application of mandatory arbitration clauses found in many consumer and employment contracts, government enforcement through the FTC and UCL will become more important. There is no right of a defendant to force arbitration if prosecuted under Section 5. However, a defendant can force arbitration of a UCL claim. How the California Supreme Court is going to weigh in on this issue remains to be seen, as they have accepted petitions on several recent cases currently facing this issue. A long term consequence of enforcing arbitration clauses in consumer lawsuits could eventually shift the cases from the desk of the private practitioner to the government to prosecute on the grounds the private practitioner would not be able to obtain as much consumer relief in arbitration that could be obtained by the FTC or it would simply not be cost effective when weighing the risks versus the benefits.