Kralowec Law

July 1, 2013

VIA HAND DELIVERY

Honorable Chief Justice and Associate Justices of the
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: **Request for Depublication of Opinion:**
The Las Canoas Co. v. Kramer, 216 Cal.App.4th 96 (May 7, 2013)
Case Nos. S211651, B238729

Dear Honorable Justices:

Pursuant to Rule of Court 8.1125, Consumer Attorneys of California ("CAOC") respectfully requests depublication of the Court of Appeal's opinion in *The Las Canoas Cos. v. Kramer*, 216 Cal.App.4th 96 (May 7, 2013), Nos. S211651, D057138. A copy of the opinion is enclosed. This depublication request is timely filed within 30 days after the opinion became final. *See* Rule of Court 8.1125(a)(4).

Statement of Interest

Founded in 1962, CAOC is a voluntary non-profit membership organization of over 3,000 consumer attorneys practicing in California. Its members predominantly represent individuals subjected to consumer fraud, unlawful employment practices, personal injuries and insurance bad faith. CAOC's members have taken a leading role in advancing and protecting the rights of consumers, employees and injured victims in both the courts and in the Legislature. This has often occurred through litigation invoking California's Unfair Competition Law (Cal. Business & Professions Code §§ 17200 et seq.) ("UCL").

CAOC has a substantive interest in upholding the public policies underlying the UCL for the benefit of the consumers and workers whom its members represent. CAOC has participated as amicus curiae in significant cases involving interpretation of the UCL, including *Kwikset Corp. v. Superior Court (Benson)*, 51 Cal.4th 310 (2011); *Clayworth v. Pfizer, Inc.*, 49 Cal.4th 758 (2010); *In re Tobacco II Cases*, 46 Cal.4th 298 (2009); and *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal.4th 223 (2006).

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The *Las Canoas* Opinion Should be Depublished Because it Improperly Expands this Court's *Cel-Tech* Safe Harbor Doctrine

In *Las Canoas*, the Court of Appeal misconstrued the UCL by creating a "safe harbor" for a statutory violation where none exists in the underlying statute.

The UCL prohibits "'anything that can properly be called a business practice and that at the same time is forbidden by law.'" *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1266 (1992); *see also Kwikset*, 51 Cal.4th at 320. The UCL's "unlawful" prong "borrows" violations of other laws, "treats them as unlawful practices," and makes them "independently actionable." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 180 (1999).

Virtually any law can form the predicate of an "unlawful" prong violation under the UCL. *Law Offices of Mathew Higbee v. Expungement Assistance Servs.*, 214 Cal.App.4th 544, 554 (2013). However, "[i]f the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination. When specific legislation provides a 'safe harbor,' plaintiffs may not use the general unfair competition law to assault that harbor." *Cel-Tech*, 20 Cal.4th at 182. On the other hand, a UCL claim is not precluded "merely because some other statute on the subject does not, itself, *provide for the action* or prohibit the challenged conduct." *Id.* at 182-83 (emphasis added); *see also Kasky v. Nike, Inc.*, 27 Cal.4th 939, 950 (2002) (private plaintiff may bring UCL action even when "'the conduct alleged to constitute unfair competition violates a statute for the direct enforcement of which there is no private right of action.'" (quoting *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal.4th 553, 565 (1998))).

In *Las Canoas*, the plaintiff brought a UCL "unlawful" prong claim asserting that the defendant violated Code of Civil Procedure section 2025.570, subd. (a), which requires court reporting firms to charge "reasonable" rates for copies of deposition transcripts. *Las Canoas*, slip op. at 2; *see* Code Civ. Proc. §2025.570, subd. (a).[1] The trial court sustained the demurrer without leave to amend, and the Court of Appeal affirmed, holding that the sole remedy against court reporters who violate this statutory mandate is a motion in the action in which the deposition was originally taken. *Las Canoas*, slip op. at 4.

The Court of Appeal's analysis, which is very short, did not consider the basis for the plaintiff's lawsuit, which was the UCL's "unlawful" prong. *See id.*, slip op. at 3-4. The UCL is mentioned nowhere in the opinion's analysis, nor are any of this Court's decisions construing the UCL, such as *Cel-Tech*, *Kasky*, or *Stop Youth Addiction*.

Instead, the Court of Appeal relied on the fact that an earlier decision, *Serrano*, held that under Code of Civil Procedure section 128(a)(5), the trial court may review a court reporter's rates under its "inherent authority to control the conduct of ministerial officers in pending actions

[1] This provision states that "a copy of the transcript of the deposition testimony made by, or at the direction of, any party, … if still in the possession of the deposition officer, shall be made available by the deposition officer to any person requesting a copy, on payment of a reasonable charge set by the deposition officer." Code Civ. Proc. §2025.570, subd. (a).

in order to protect the administration of justice." Slip op. at 3 (citing Code Civ. Proc. §128, subd. (a)(5); *Serrano v. Stefan Merli Plastering Co., Inc.*, 162 Cal.App.4th 1014, 1020 (2008)).

That is certainly true, but it does not eliminate the UCL as an alternate theory that can be asserted against court reporting firms who charge unreasonable rates, in violation of section 202.570, subd. (a). Nothing in section 128(a)(5), or in section 2025.570, subd. (a), creates a safe harbor for UCL claims of the kind this Court recognized in *Cel-Tech*. In fact, the parties could have invoked the UCL in *Serrano* itself. That they chose not to do so, and that the Court of Appeal in *Serrano* therefore ruled based on an alternative source of the court's authority, does not diminish the UCL claim brought in *Las Canoas*.

This Court has long held that a UCL action may proceed regardless of whether the underlying statute carries a private right of action. *Kasky*, 27 Cal.4th at 950; *Stop Youth Addiction*, 17 Cal.4th at 565; *see also Cel-Tech*, 20 Cal.4th at 182-83 (UCL claim may proceed even if "some other statute" addresses the subject matter and "does not, itself, provide for the action"). The fact that a litigant can file a motion in the trial court for an order compelling a court reporter to comply with the requirements of section 2025.570, subd. (a) does not preclude a UCL action against a court reporting firm for violating those requirements, nor does it bar a UCL action seeking to enjoin a court reporting firm from engaging in repeated violations.

That would be true only if section 2025.570(a), or some other statute, "actually 'bar[red]' the action or clearly permit[ted] the conduct." *Cel-Tech*, 20 Cal.4th at 183. There is no statute that does, and *Las Canoas* opinion cited none.

The *Las Canoas* opinion could be misused as a precedent because it improperly expands the Court's "safe harbor" doctrine beyond the boundaries set forth in *Cel-Tech*. It develops a judicially-created statutory immunity that the Legislature chose not to create in section 2025.570, subd. (a), or in any other statute. The opinion may be cited in other cases outside the context of court reporter fees, and may lead to erosion of *Cel-Tech* there. The opinion should be depublished.

Conclusion

For all of these reasons, the Court is respectfully asked to enter an order depublishing the Court of Appeal's opinion in *Las Canoas*.

Respectfully submitted,

Kimberly A. Kralowec
State Bar No. 163158

Enclosure

cc: See attached proof of service

PROOF OF SERVICE

I, the undersigned, hereby declare under penalty of perjury that the following is true and correct:

I am a citizen of the United States; am over the age of 18 years; am employed by THE KRALOWEC LAW GROUP, located at 188 The Embarcadero, Suite 800, San Francisco, California 94105, whose principal attorney is a member of the State Bar of California and of the Bar of each Federal District Court within California; am not a party to the within action; and that I caused to be served a true and correct copy of the following documents in the manner indicated below:

1. REQUEST FOR DEPUBLICATION OF OPINION FILED MAY 7, 2013; and
2. PROOF OF SERVICE.

☑ **By Mail**: I placed a true copy of each document listed above in a sealed envelope addressed to each person listed below on this date. I then deposited that same envelope with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that upon motion of a party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit.

California Court of Appeal,
2nd District, Division 6

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2nd District, Division 6
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Executed July 1, 2013 at San Francisco, California.

Gary M. Gray