



Consumer Attorneys of California College of Trial Arts  
and the  
Capitol City Trial Lawyers Association

Annual Tahoe Ski Seminar  
March 28, 2008, Stateline, NV

# Update on Section 17200

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# Overview of the UCL

Unfair Competition Law (“UCL”) (Business & Professions Code §§17200 *et seq.*)

- Prohibits “unfair competition” (§17200)
- Defined as “any **unlawful, unfair or fraudulent** business act or practice” (in the disjunctive)
- Strict liability statute
- “Any person” can be liable (§17203)

# The UCL's Three "Prongs"

## The "Unlawful" Prong

- "Borrows" violations of other laws and makes them independently actionable
  - *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 180 (1999)
- "Borrowed" law may be "civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made"
  - *South Bay Chevrolet v. General Motors Acceptance Corp.*, 72 Cal.App.4th 861, 880 (1999)

# The UCL's Three "Prongs"

## The "Unfair" Prong

- Two formulations of "unfair":
  - Pre-Cel-Tech formulation: Conduct is "unfair" if its potential harm outweighs its benefits or if it is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *State Farm Fire & Cas. Co. v. Superior Court*, 45 Cal.App.4th 1093, 1103-04 (1996)
  - Post-Cel-Tech formulation: Conduct is "unfair" if it "threatens an incipient violation of ... law, or violates the policy or spirit of [the] laws because its effects are comparable to or the same as a violation of the law." *Cel-Tech*, 20 Cal.4th at 187
- Post-*Cel-Tech* formulation applies to competitor actions
- Whether the post-*Cel-Tech* formulation also applies to consumer actions is unresolved. 20 Cal.4th at 187 n.12

# The UCL's Three "Prongs"

## The "Fraudulent" Prong

- Conduct "likely to deceive" consumers
  - *Bank of the West v. Superior Court*, 4 Cal.4th 1254, (1992)
- "Reasonable consumer" standard applies
  - *Lavie v. Procter & Gamble Co.*, 105 Cal.App.4th 496, 511 (2003)
- Did this definition of "fraudulent" conduct survive Prop. 64?

# UCL Remedies

## Injunctive Relief

- “Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction.” (§17203)
  - May trial courts to require defendants to remedy the past effects of their wrongful conduct, in addition to halting their future misdeeds?
  - “While an injunction against future violations might have some deterrent effect, it is only a partial remedy since it does not correct the consequences of past conduct.” *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy*, 4 Cal.App.4th 963, 966 (1992).

# UCL Remedies

## Restitution

- “The court may make such orders ... 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.” (§17203)
- Courts may “compel[] 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.**” *Kraus v. Trinity Management Services, Inc.*, 23 Cal.4th 116, 126-27 (2000) (emphasis added).

# UCL Remedies

## Three Types of UCL Restitution

- “Money taken” restitution
  - *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134 (2003)
  - *Shersher v. Superior Court*, 154 Cal.App.4th 1491 (2007)
- “Vested interest” restitution
  - *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal.4th 163 (2000) (earned but unpaid wages)
  - *Lozano v. AT&T Wireless Services, Inc.*, 504 F.3d 718 (9th Cir. 2007) (property interests created by contract)
- Restitutionary disgorgement of profits
  - *Juarez v. Arcadia Financial, Ltd.*, 152 Cal.App.4th 889 (2007)



# Proposition 64 (passed Nov. 2004)

Two main changes:

- Standing: UCL claim may be brought by “any person who has suffered injury in fact and has *lost money or property as a result of* the unfair competition.” (§17204 (emphasis added))
- Class Certification: “Any person may pursue representative claims or relief on behalf of others only if the claimant ... *complies with Section 382 of the Code of Civil Procedure.*” (§17203)

# Proposition 64 (passed Nov. 2004)

- Prop. 64 applies to cases pending on its date of passage
  - *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal.4th 223 (2006)
- Did Prop. 64 substantively amend the UCL?
  - Proposition 64 did not impose “new or different liabilities” and “*left entirely unchanged the substantive rules governing business and competitive conduct.*” *Mervyn's*, 39 Cal.4th at 232.

# Proposition 64

Nonetheless, appellate courts have held:

- Prop. 64’s “lost money or property” language eliminated the “likely to deceive” standard for fraudulent conduct
- Prop. 64’s “as a result of” language created new *reliance* and *causation* elements
- The California Supreme Court has granted review in cases raising these questions:
  - *In re Tobacco II Cases*, no. S147345
  - *Pfizer v. Superior Court (Galfano)*, no. S145775

# UCL Resources

- William L. Stern, *Bus. & Prof. C. §17200 Law and Practice* (The Rutter Group)
- Kimberly A. Kralowec, *The UCL Practitioner* (<http://www.uclpractitioner.com>)
- *California Antitrust and Unfair Competition Law* (3d ed. 2003) (State Bar of California, Antitrust and Unfair Competition Law Section) (volume 2 focuses on the UCL)



# Thank You

Presentation available online at:

<http://www.I7200blog.com/seminars/I7200Update03-28-08.pdf>

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