Greg Nylen (00:12):

Greetings all and welcome to the Unfair Competition Defense podcast. I'm Greg Nylen and my co-host is Lisa Simonetti. In this episode we continue our overview of the Consumer Legal Remedies Act or CLRA, specifically we will discuss the enumerated wrongs and drill down into those that are frequently litigated, and we will cover some procedural quirks. We'll also note a few new decisions, so Lisa what is prohibited under the CLRA

Lisa Simonetti (00:39):

Well, Greg unlike the UCL with its broad and vague liability standards, the CLRA prohibits 24 types of conduct in connection with the sale or lease of goods or services to any consumer. This makes the CLRA more similar to other states UDAP statutes. The prohibited conduct is found in California civil code section 1770(a). Let's go through the list and then circle back to certain provisions for the deeper discussion, and I'll kick us off.

Lisa Simonetti (01:05):

So the CLRA prohibits passing off goods or services as those of another, misrepresenting the source, sponsorship, approval or certification of goods or services, misrepresenting the affiliation, connection, or association with or certification by another using deceptive representations or designations of geographic origin with respect to goods or services, 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 sponsorship approval status affiliation or connection that he or she does not have. Representing that goods are original or new, if they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used, or secondhand.

Greg Nylen (01:56):

Also 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're not. Disparaging the goods, services or business of another by a false or misleading representation of fact, advertising goods or services with intent not to sell them as advertised, advertising goods or services with intent not to supply reasonably expectable demand, unless the advertisement discloses a limitation of quantity. Advertising furniture without clearly indicating that it is unassembled, if that is so, 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.

Lisa Simonetti (02:42):

Okay, that puts us at the halfway point, making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reduction, representing that a transaction confers or involves rights, remedies or obligations, which it does not have or involve, or that are prohibited by law. Representing that a part replacement or repair service is needed when it is not, representing that the subject of a transaction has been supplied in accordance with the previous representation when it has not. Representing that the consumer will receive a rebate, discount or other economic benefit, if earning the benefit is contingent on a subsequent event. Misrepresent the authority of a salesperson, representative or agent to negotiate the terms of a transaction.

Greg Nylen (03:29):

Continuing on we have inserting an unconscionable provision in a contract, advertising that a product is being offered at a specific price plus a percentage unless A, the total price is set forth and B, the price plus a specific percentage of that price represents a markup from either the seller's costs or the wholesale price of that product. Selling releasing goods in violation of chapter four of title 1.7, which deals with gray market goods. As defined these are consumer goods bearing a trademark, and normally accompanied by an express written warranty valid in the US, which are imported through channels other than the manufacturer's US distributor, and do not have a valid express written warranty and sending unsolicited prerecorded messages without consent.

Lisa Simonetti (04:17):

Okay. And rounding out the list we have for forbidding a solicitation made at the primary residents of a senior citizen for a loan encumbering that residence for the purpose of paying for home improvements in where the transaction is part of a pattern or practice in violation of the Federal Home Ownership Equity Protection Act, and prohibiting mortgage brokers and lenders directly or indirectly to use a home improvement contractor to negotiate the terms of any loan that is secured, whether in whole, or in part by the residents of the borrower. And that is used to finance a home improvement contract or any portion thereof.

Greg Nylen (04:53):

That's the full list of bad behavior under the CLRA and now let's look at where plaintiff's focus in cases involving the statute. First is section 1770 (a)(4) using deceptive representations or designations of geographic origin with respect to goods or services, for instance of product advertised as made in the USA, which is primarily assembled in the United States, but consists of parts made in other countries or containing such parts violated the CLRA.

Greg Nylen (05:24):

Section 1770(a)(14), representing that a transaction confers or involves rights, remedies or obligations that it does not, or that are prohibited by law is definitely on the plaintiff's radar. This section also allows consumers to seek to invalidate written contracts, courts have construed 1770(a)(14) to include "oral misrepresentations or promises concerning the rights, remedies or obligations under a written contract." And as a result, courts have held that the parole evidence doctrine cannot be used as a defense, plaintiffs cannot be prevented from attempting to prove the claim, which is based on oral statements.

Lisa Simonetti (06:03):

Yes, those are popular. And then moving on to section 1770(a)(17), representing that the consumer will receive a rebate, discount or other benefit that is contingent on another event. This frequently involves bait and switch rebate offers. A seller cannot advertise a rebate or discount, but conceal conditions to be satisfied to receive that rebate or discount. This could be something like an obligation to make a subsequent purchase of another product to qualify or to buy a related product within a certain timeframe.

Lisa Simonetti (06:34):

And then there's section 1770(a)(19), inserting an unconscionable provision in a contract. This is another favorite for the plaintiffs. This section codifies the defense of unconscionability, but also provides an affirmative right to relief for consumers who are allegedly injured by an unconscionable contract

provision. Under this section courts draw upon the doctrine of unconscionability as stated in California civil code section 1670.5 and general principles of California law.

Lisa Simonetti (07:03):

The lack of a meaningful choice often is important in the analysis, this section has been used to challenge many types of contract provisions, including class action waivers and arbitration agreements. However, courts generally find that the provision must have been actually invoked against a consumer to support a claim for violation of the CLRA. So now reg... Let's turn to the procedural quirks.

Greg Nylen (07:24):

Sure. So first the CLRA contains a specific venue provision. The CLRA provides that "an action maybe commenced in the county in which the person against to whom it is brought resides has his or her principle place of business, or is doing business or in the county where the transaction or any substantial portion thereof occurred." But this does, "not override the general rule that a defendant is entitled to have an action tried in the county of his or her residence."

Greg Nylen (07:52):

Section 1780(d) requires that the plaintiff file an affidavit with his or her complaint, attesting to the facts that established venue, failure to do so must result in dismissal. Also the CLRA permits motions for a, "no merit," or "no defense," determination. In class actions under the CLRA, motions for summary judgment under the California code of civil procedure are not permitted, but the CLRA allows a party upon 10 days notice to make a motion for a determination that, "the action is without merit, or there is no defense to the action."

Greg Nylen (08:29):

But courts have concluded that the procedural requirements for a no merit or no defense determination, except for timing, basically track those for summary judgment.

Lisa Simonetti (08:37):

That is all true. And the CLRA also contains specific class certification standards and procedures. In enacting these provisions, the legislature was guided by federal rule of civil procedure 23(a) in the California Supreme court's 1967 opinion in Daar versus Yellow Cab Company, which one commentator characterized as, "signaling the advent of the large consumer class action in California."

Lisa Simonetti (09:01):

So California civil code section 1781(b) provides the court shall permit the suit to be maintained as a class action, if number one, it is impractical to bring all members of the class before the court. Number two, the questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members.

Lisa Simonetti (09:21):

Number three, the claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class. And number four, the representative plaintiffs will fairly and adequately represent the interest of the class. Courts have no discretion to deny certification, if these factors are satisfied.

And this standard differs a bit from the requirements stated in California code of civil procedure, section 382, which applies to non-CLRA claims.

Lisa Simonetti (09:46):

As explained by one court of appeal, unlike a plaintiff proceeding under section 382, a plaintiff moving to certify class under the CLRA is not required to show that substantial benefit will result to the litigants in the court. Thus, unlike section 382, "the CLRA does not require that a plaintiff show a probability that each class member will come forward, improve his separate claim to a portion of the recovery." This takes into account that the CLRA encourages class actions when individual recovery might be quite small.

Lisa Simonetti (10:17):

However, in practice courts often apply the same class action procedures to CLRA claims as to claim subject to section 382 and rule 23. Meanwhile, as to procedure section 1781(c) requires notice in a hearing before any class certification determination, the CLRA also express asleep permits class notice through publication, if individual notice is unreasonably expensive or not feasible. But individual notification may never the less be required if damages are particularly substantial in a given case. And notably under the CLRA either party may be forced to bear the cost of class notice. So okay Greg, now let's turn to the new case corner.

Greg Nylen (10:59):

Well, this week we have two cases we thought were worth sharing. First, a case called Venus Yamasaki versus Zicam LLC from October of 2021 in the Northern district of California. In this case, plaintiff filed a punitive class action alleging that defendant engaged in false advertising in violation of the UCL, FAL and CLRA by marketing its product as, "clinically proven to shorten cold."

Greg Nylen (11:25):

What's interesting about this case is that defendant contended that plaintiff lacked article three standing regarding products she did not actually purchase. The court noted that there was no controlling authority for whether plaintiffs have standing in such circumstances but noted that most district courts have held that the plaintiff has standing to sue if the products they did buy are substantially similar to those they did not.

Greg Nylen (11:47):

The court noted that substantial similarity may be found or the products are physically similar. The differences between the products are immaterial because the legal claim and injury to the customer are the same. And both the products and the legal claims and injury are similar. The court found that plaintiff did not establish substantial similarity because the products at issue have different formulas.

Greg Nylen (12:08):

Plaintiff's claims are premised on the efficacy of the products, active ingredients and plaintiff did not purchase defendant's products that contained zinc, but rather only those that have different active ingredients.

Lisa Simonetti (12:18):

The second case we wanted to discuss is Young versus CRE Inc, also out of the Northern district of California from October, 2021. In this case, plaintiff brought a punitive class action based on the allegation that defendant falsely represented that its LED bulbs would be long lasting and result in energy savings in violation of the UCL, FAL and CLRA.

Lisa Simonetti (12:39):

The reason we recommend taking a look at this case is that it is not a motion to dismiss case. Rather, the court granted defendant's motion for summary judgment because plaintiff could not offer admissible evidence that he relied on defendant's alleged misrepresentation. The decision is therefore a good case study for evidence required to show actual reliance for a claim under the fraudulent prong of the UCL at summary judgment, as opposed to the pleading stage.

Lisa Simonetti (13:04):

The court discusses plaintiff's specific deposition testimony at length, noting for example that while plaintiff testified that he relied on defendant's "package" when purchasing the LED bulbs, when asked the follow-up question as to what on the package caused him to buy defendant's products rather than other company's products, he testified quote, "I don't remember the specifics. They either lasted longer or their warranty was better or I don't remember the specifics."

Lisa Simonetti (13:31):

There are many other examples of deposition testimony in the decision and it's a good guide for questions to ask when deposing a plaintiff in this type of case.

Greg Nylen (13:39):

And now for my film review, I'm sure many of you are fans of Wes Anderson's more well known films like Rushmore or the The Royal Tenenbaums or a Life Aquatic. But my favorite is his first feature based on a short film he made called Bottle Rocket and this film launched Anderson's career, as well as Owen Wilson's, who's gone on to great fame. The plot centers around Owen Wilson's character Dignan who rescues his friend Anthony played by Owen's brother in real life, Luke Wilson from a voluntary psychiatric unit where Anthony suffers for self-described exhaustion.

Greg Nylen (14:10):

Dignan has an elaborate escape plan and has developed a 75-year plan for life to pull off several heists and then meet up with Mr. Henry played by James Caan to further their criminal career. But what I love about this movie is that Dignan is both goofy and insane, and his infectious personality wins over Anthony anyway, who should know better.

Greg Nylen (14:28):

It's an absolutely hilarious film in a really unique way and all I will say is that maybe you want to buy a yellow jumpsuit. And the final botched caper scene is one of the funniest, highest sequences I've ever seen. Martin Scorsese later named this film one of his top 10 favorite movies of the 1990s and I think you'll like it too.

Lisa Simonetti (14:45):

That sounds great Greg, Wes Anderson is my absolute favorite, but I have not seen that one. Everyone, you can email questions to ucdefense@gtlaw.com. Thank you for joining us.