

Speaker 1 ([00:13](#)):

[inaudible]

Speaker 2 ([00:13](#)):

First episode of the California unfair competition defense podcast, I'm Lisa Simonetti and my co-host is Greg Nylen between us. We have decades, in fact, more than a half century of experience in defending claims under business and professions code section 17, 2000 and is the unfair competition law or UCL as well as business and professions code section 17, 500 referred to as the false advertising law or FAL and the Consumer's Legal Remedies act or CLRA through this podcast, we will initially provide a high-level overview and background on these laws. And then in subsequent shows released every three weeks. We will drill down on specific substantive issues, key developments and defense strategies. Greg, why is it important to stay current in this area?

Speaker 3 ([01:02](#)):

Lisa, these laws provide plaintiff's lawyers with powerful tools and especially in class litigation. In fact, these are some of the broadest unfair competition statutes in the country. Also, California has a huge economy and these statutes apply to companies located in California and companies located elsewhere, but doing business with California residents, which means virtually every company for these reasons, one or more of this triumvirate of statute seems to rear its ugly head and just about every putative consumer class action filed these days.

Speaker 2 ([01:34](#)):

All of that is true, Greg and the volume of litigation under these laws is, and always has been very significant. So let's begin with the framework of the three statutes. That will be the focus of our podcast, the UCL forbids unlawful, unfair, or fraudulent conduct with respect to virtually any kind of business activity. We will dive into the unlawful prong in a few minutes, but unfairness has been construed to permit courts to exercise significant discretion in addressing allegedly improper business practices. In fact, although the UCL has been vigorously litigated for many years, no settled test for unfairness exists. One frequently applied test looks at the impact of a business practice on an alleged victim, balanced against the reasons justifications and motives of the alleged wrongdoer and other bars from section five of the federal trade commission act, turning on whether a practice offends an established policy or as immoral, an ethical, oppressive, unscrupulous, or substantially injurious to consumers and still another considers whether a claim based on public policy is tethered to specific constitutional statutory or regulatory provisions. Meanwhile, fraudulent conduct is distinct from the tort of fraud. A plaintiff need only show that members of the public were likely to be deceived by a challenge practice. There is no requirement of proving intent.

Speaker 3 ([03:00](#)):

The second statute is California's false advertising law or FAL, which again is codified at business and professions code section 17 500, instead of having several prongs of liability, the FAL focuses on false advertising and is somewhat analogous to section 23 a of the Lanham act. The UCL also incorporates the FAL as if having a separate statute isn't enough, but the liability standard is similar claims under the UCL and FAL are subject to broad, equitable remedies, which a court has discretion to fashion the available monetary relief as restitution measured by the return of money obtained through an improper practice as compared to the value received, a court can also impose an injunctive relief and in an enforcement

action brought by a government agency, statutory penalties are available in an amount up to \$2,500 per violation.

Speaker 2 ([03:53](#)):

The third and final statute is the consumer's legal remedies actor. CLRA the structure of the CLRA is quite different from the UCL and FAL. The CLRA provides a private right of action for consumers with respect to unfair competition and unfair or deceptive practices in a transaction intended to result or that results in the sale or lease of goods or services. The definition of consumer is strictly applied. It is an individual who seeks requires buy purchase or lease any goods or services for personal family or household purposes. The CLRA contains a specific enumerated list of wrongs and causation and damage are required elements. We will have a future show about the list, but for now suffice it to say that these forbidden practices include things like misrepresenting, the source of goods and services, representing reconditioned goods as new representing a repair is needed when it is not offering rebates that have hidden conditions and misrepresenting the authority of a sales person to close a deal among many others. Greg, how does the CLRA differ from the UCL or FAL

Speaker 3 ([05:02](#)):

In many important ways. First, the CLRA provides for remedies that plaintiffs cannot obtain under the other statutes, such as monetary damages, statutory damages, punitive damages and attorney's fees. The CLRA is also different because its scope is limited to the list of horrors. We discussed the UCL and FAL are open-ended in contrast, allowing plaintiffs to dream up new violations. The CLRA also has a pre-filing notice requirement that is absent from the UCL N F L. This requirement was originally intended to allow defendants a reasonable opportunity to remedy alleged violations before their lives were made miserable with claims for damages, as we will discuss. In another episode, this requirement has largely been gutted by the courts. In addition, the CLRA has an express prohibition on motions for summary judgment in putative class actions. But as we will in future, you can still bring what is called a no Maritz motion under the CLRA, which in some ways is easier than filing a motion for summary judgment under California law. There are some other differences, but, but those are the highlights for now.

Speaker 2 ([06:10](#)):

Okay. So in the next show, we will discuss the unfair and fraudulent prongs of the UCL. This week's focus is the unlawful prong. The unlawful prong is unique among unfair competition laws in many other States because it allows plaintiffs to borrow a violation of another law to state violation of the UCL. In other words, it turns a violation of another law into a violation of the UCL. And you might wonder why someone would want to Sue under this prong rather than the underlying law itself. And for plaintiffs, there may be several strategic reasons. First courts have held that a claim under the unlawful prong, maybe tied to an underlying statutory violation, even if that statute does not provide for a private right of action. So in that sense, the unlawful prong of the UCL provides a way to recover under statutes that otherwise would preclude recovery. Second, the UCL provides remedies such as restitutionary discouragement and injunctive relief that are often not available under the statutes for me, the basis of an unlawful claim. Third, the UCL has standing requirements that may be more favorable to plaintiffs than those available under the underlying statute. Finally, the UCL has a four year statute of limitations, which may be longer than the limitations period for the underlying statute.

Speaker 3 ([07:25](#)):

So the next important question is what laws may be invoked on a unlawful claim. The answer is a whole lot. The courts now allow unlawful prong claims for a violation of laws that often have nothing to do with unfair competition. Even though the section is titled the quote unfair competition law close quote, for example, on the state law level courts have held that unlawful prong claims may be tied to violations of consumer protection statutes, including the FAL or the CLRA other statutes that are fair game include the Cartwright act California's most important antitrust statute, the Unruh civil rights act California's anti-discrimination statute California's version of the uniform trade secrets act, a slew of employment, environmental insurance franchise, and other statutes regulating professions, such as attorneys, healthcare providers, and accountants and environmental statutes. Interestingly, a claim under the unlawful prong may even be tied to a criminal statute and as noted, even if that statute does not provide for a private right of action,

Speaker 2 ([08:31](#)):

And also be aware that this isn't limited to state statutes courts have held that claims under the UCL unlawful prong, maybe tied to regulations, local zoning ordinances and building codes and health and safety ordinances. So for example, you could theoretically turn his ski resorts decision to build out a new area that wasn't zoned for development into a claim under the UCL or a restaurant chains, failure to comply with health and safety and other courts have held that claims may be tied to establish court precedent as set forth in published opinions, as well as even trial court orders, such as a TRO. This allows plaintiffs to pursue a civil claim under the UCL for violation of a court order. In addition to a claim before the court for violation of the order itself. However, whether a claim under the UCL unlawful prong may be tied to a violation of common law is a more nuanced issue in case you were wondering if there were any limits to what courts might allow. For example, some state courts have allowed a claim under the unlawful prong of the UCL arising from an alleged breach of contract interference with contractual relations or other common law claims. Meanwhile, other courts have held that asserting a contractual, right? You do not actually have, or including an unlawful provision in a contract conform the basis of an unlawful claim,

Speaker 3 ([09:45](#)):

But it's worth noting that at least in some federal courts applying federal law, there have been very recent decisions throwing out unlawful prong claims that are tied to breach of contract. The theory employed by these cases is that contractual obligations are voluntarily undertaken by parties to an agreement not imposed by state or federal law. Therefore, the argument goes in these cases, there is no legal violation to which an unlawful prong claim may be tethered. Federal statutes and regulations can also form the basis of unlawful prong claims and cases have applied this rule in all sorts of contexts, including cases involving federal privacy laws, immigration statutes, securities laws, every Stripe of intellectual property statute, including the copyright act Lanham act and trademark counterfeiting act among many other examples. Even an infringement of rights under the United States constitution can be tethered to an unlawful prong claim. One heavily litigated area regarding the unlawful prong and federal law is the FTC act. The UCL and the FTC act are like first cousins and federal courts have held that decisions under section five of the FTC act are persuasive and applying to UCL. We will spend a good chunk of a future episode in this area. Make sure you get your ticket for that one online before they sell out.

Speaker 2 ([11:06](#)):

So you may be asking yourself whether there are any defenses to an unlawful prong claim or whether it is a strict liability or per se liability claim. The primary way you can defend against these claims is to show that plaintiff has not pled or proven the elements of the underlying violation of the statute regulation rule ordinance, et cetera. In other words, the claim to stands or falls with the underlying violation as a result. This is the first issue you look at when assessing an unlawful claim. You may also find grounds for a defense. If the plaintiff is trying to borrow a violation of the laws of another state, we will discuss extraterritorial application of the UCL in another show, but it does not apply to out-of-state plaintiffs who were not injured by unlawful conduct occurring in California, nor does the UCL apply to injury producing conduct that occurs outside of California. This is putting aside questions of personal jurisdiction over claims by out of state residents over out of state defendants under the United States Supreme court's decision in Bristol Myers Squibb versus superior court. That's also an issue for another day as will be defenses relating to doctrines of abstention and preemption.

Speaker 3 ([12:12](#)):

So to sum up all is not lost. If your client is faced with an unlawful prong violation, take a close, look at the underlying law, then work your way into some of the other issues we have mentioned. Thank you for your time. We hope this was useful. And since I am a UCLA film school graduate, I'm going to add at the very end of these podcasts, something I hope you will find fun to lighten things up a little bit, a two-sentence review of a film. I really think you should consider watching and that you may not have heard about for this inaugural episode. I recommend Paris, Texas in 1984, film directed by the great Win Wenders and set mostly in LA. It stars Harry Dean Stanton, Dean Stockwell, and Natasha Kinsky and a fantastic child actor and is in one of the most powerful films about the bond between family you will ever see as a 97% fresh rating on rotten tomatoes and on his own Amazon prime, go check it out and catch you next time. Thanks for that, Greg. I'll give it a look. And if you like what you hear on our podcasts, give us five stars and a nice review on Apple podcasts. That helps a lot. Also you can email us with any questions at ucdefense@gtlaw.com and follow us on Twitter or check us on Facebook and LinkedIn

Speaker 1 ([13:20](#)):

Until next time.