

Speaker 1: [inaudible]

Speaker 2: And welcome to the California unfair competition defense podcast. I'm Lisa Simonetta and my co-host is Gregory Nylan. In this episode, we will delve into standing on claims under the unfair competition law or UCL, the false advertising law or FAO and the consumer's legal [00:00:30] remedies act or CLRA. And we also will discuss some new decisions. Greg, maybe we should start with the evolution of standing on claims under the UCL and FAO.

Speaker 3: Absolutely until proposition 64 became effective on November 3rd, 2004 plaintiffs who were completely unaffected by a practice that allegedly violated the UCL or FAL to bring claims on behalf of themselves and punitive members of a quote non-class class close quote, [00:01:00] the plaintiff could seek relief on behalf of the general public as a private attorney general and did not have to comply with the class action certification procedures set forth in California code of civil procedure. Section 3 82.

Speaker 2: Those certainly were the battle days. For instance, claims were routinely brought by for-profit corporations as in stop youth addiction versus lucky stores, Inc. And plaintiff's lawyers simply trolling for claims. There was a flood of litigation, which courts described as shakedown lawsuits [00:01:30] under the UCL and FAL, but proposition 64 changed the landscape in two important ways. First it amended business and professions code section 17, 2 0 4 to require plaintiffs to plead and prove an injury in fact, and lost money or property as a result of an alleged violation. Second it amended business and professions code section 17, 203. So that plaintiff's most seek to certify class under CCP, section 3 82, except to the extent [00:02:00] that public injunctive relief is sought under Miguel versus Citibank. That is a very current unique issue that we will discuss in a future episode. And also note that proposition 64 applies only to private litigants. The amendments do not impact claims brought by the attorney general district attorney county council, city attorney, or a city prosecutor on behalf of the general public. However, for the most part, standing in class requisites now are central issues and private plaintiff UCL, FAL [00:02:30] claims. Greg, how did the California state courts deal with the amendment regarding standing?

Speaker 3: Well over the course of time, the California Supreme court issued three critical decisions on proposition 64 and standing first in clay worth versus Pfizer. The court took up the tension between the availability of a remedy and standing in clay worth pharmacies brought UCL claims against pharmaceutical companies for alleged price fixing the defendant companies [00:03:00] argued lack of standing because the pharmacies had passed on the alleged overcharges to consumers. In other words, the pharmacies themselves had not quote, lost money or property close quote, and thus had no remedy to pursue the court rejected. This passed on defense, noting that standing and remedy are separate issues. The court found that plaintiff did not have to show a quote compensable loss at the outset close quote to establish standing. And in any event, the plaintiff could seek injunctive relief, even if [00:03:30] not entitled to restitution.

Speaker 2: Second in Kwikset corp versus superior court, the California Supreme court looked at the type of injury that confers standing plaintiffs brought claims under the UCL and FAO

alleging that defendants marketed lock sets as quote made in USA, close quote were certain parts were in fact manufactured overseas. According to plaintiffs, they would not have purchased the lock sets if they had known this. And defendants argued lack of standing because Alexa were not defective or unusable [00:04:00] is emanating. The plain words of proposition 64, the court found that a plaintiff from us, quote one, establish a loss or deprivation of money or property sufficient to qualify as injury. In fact, that is economic injury that's emphasized. And to show that that economic injury was the result of that is caused by again, emphasize the unfair practice or false advertising. That is the government of the claim. The court also [00:04:30] noted that an underlying objective of proposition 64 is to prohibit counsel from filing lawsuits on behalf of clients that had not been quote injured.

Speaker 2: In fact, under the standing requirements of the United States constitution, those claims the court then offered examples of innumerable ways, which a plaintiff can show economic injury, number one, surrender, and a transaction more or acquire in a transaction less than he or she otherwise would have. Number two, I have a present or future property interest diminished, [00:05:00] number three, be deprived of money or property to which he or she has a cognizable claim or an before you required to enter into a transaction costing money or property that would otherwise have been unnecessary. We will get into some examples of cases finding injury, in fact, on both sides of the coin in a future episode. And when twist on this is the benefit of the bargain defense. Some courts have thrown out claims where plaintiffs got what they paid for, but only if the alleged misrepresentations were not material to plaintiff's [00:05:30] purchasing decisions, we will have a future. So also about other nuances regarding this requirement, such as whether loss of data or privacy concerning personal information satisfies the requirement, or whether so-called moral rights would suffice

Speaker 3: Finally, in, in re tobacco two cases, the court considered the causation element quote as a result of close quote, unfair competition, the claims and tobacco to arose from extensive different advertising campaigns spanning 40 years [00:06:00] with respect to health risks from smoking following proposition 64 defendants had de-certified the class arguing the plaintiffs could not tie cigarette purchases to particular advertisements. The court rejected this result, finding that only the name plaintiff must have standing to represent a class. The court also declined to find that all class members must have suffered the same injury, relying on cases, holding the individualized proof of deception, reliance or injury is not required on UCL claims. [00:06:30] Rather a quote tort causation element close quote does not apply within the context of the UCL. A plaintiff must show that a quote misrepresentation was an immediate cause of injury, but may not be the only cause the representation must have been a substantial factor, but if it was highly material, a presumption of reliance it arise. However, the bottom line is tobacco two stands for the proposition that reliance is required in most false advertising cases. [00:07:00] This means that if a plaintiff did not view and rely on defendant's alleged false advertising in a particular case that plaintiff lack standing to Sue our VCL

Speaker 2: That's right, Greg. And those are the principle decisions, but there are additional complexities. For instance, if the claim is brought under the unlawful prong of the UCL plaintiffs may have standing to Sue assuming they can meet proposition 60 fours

requirements, even if the underlying statute does not provide for a private right of action, but a split of authority exists as to whether this [00:07:30] is true. If the underlying statute best exclusive authority in a particular state agency for enforcement of that law, meanwhile, competitor cases present unique issues as noted earlier regarding Kwikset. The fact that a competitor may not be able to show entitlement to restitution and not defeat standing to Sue under the UCL. However, this rule does not apply to a competitor defendant's customers. For example, a plaintiff may not bootstrap reliance based on the allegation that defendant's customers were misled by purported false advertising. [00:08:00] So Greg, how does all of this compare to analysis of standing under the CLRA?

Speaker 3: Well, the CLRA is subject to traditional standing requirements and it is much more straightforward. The plaintiff must be a quote consumer, what was defined as quote, an individual who seeks a requires by purchase or lease any goods or services for personal family or household purposes, close quote, and the consumer must have purchased the goods for services at issue. So the statute is [00:08:30] limited to claims by consumers, but there are some procedural quirks. I noticed lender under civil code section 1782, a must be served by the plaintiffs to have standing to seek damages and courts have taken a much more liberal view of this requirement in recent years that the plaintiff must also file an affidavit under section 1780 D of the civil code stating that the action is filed in quote, the proper place for trial of action, post quote, which [00:09:00] is defined as quote the county in which the person against whom it is brought resides has his or her principal place of business, or is doing business or in the county where the transaction or any substantial portion thereof occurred post. But most courts have dismissed claims under the CLRA for lack of standing, if this requirement is not met. So

Speaker 2: At this point, let's look at the additional considerations presented by litigation in federal court. Article three of the United States constitution limits the power of federal courts to deciding cases and controversies [00:09:30] accordingly. The article three standing requirement has three elements. First, the plaintiff must show in injury. In fact, second, that injury is fairly traceable to defendant's conduct. And third, it is likely that the injury will be addressed by a favorable outcome in the litigation. The injury must be concrete and particularized in actual or imminent. That is not speculative or hypothetical. After quick set of plaintiff must meet both article three and UCL standing requirements in order to litigate in federal [00:10:00] court as the California Supreme court observed in Kwikset quote because economic injury is, but one among many types of injury. In fact, the proposition 64 requirement that injury be economic render standing under section 17, 2 0 4 substantially narrower than federal standing under article three, which may be predicated on a broader range of injuries. Those quotes, depending on the facts, in a particular case, then a plaintiff could have article three standing, but lack UCL standing, or a plaintiff who suffered an injury. In fact, [00:10:30] for purposes of the UCL could lack article three, standing to seek injunctive relief in federal court. If he or she would not be impacted by the challenge practice in the future.

Speaker 3: This issue often arises with respect to false advertising allegations. And if you're interested in checking out a case that came down recently about this checkout Davidson versus Kimberly Clark in the ninth circuit also Spokio versus Robbins impacts article

three standing analysis in Spokio the United States [00:11:00] Supreme court held that an allegation of a violation of a federal statute without a showing of some concrete harm does not confer standing court subsequently applying Spokio have verified that one when a statute enacts, a quote bear procedural close quote protection, plaintiff must plead and prove concrete harm. But two, when a statutory provision identifies a substantive, right? That is a fringe upon violation. Plaintiff need not make a showing further harm. [00:11:30] Campbell vs. Facebook Inc is a good illustration of the analysis in the context of alleged violation of statutes, creating privacy rights, such as the electronic communications privacy act and the California invasion of privacy act along with UCL claims. Meanwhile, under Sonner versus premiere nutrition corporation, where plaintiff seeks equitable remedies under the FAL or CLRA, but fails to show that a legal remedy is unavailable, the claims will be dismissed. And

Speaker 2: [00:12:00] As we finish up with standing, at least for now, we note that defendants have to be careful to avoid the removal trap. We will address this in a future episode, but defendant would not want to remove and then move for dismissal based on lack of standing. This would result in mandatory remand and also potentially sanctions. So now let's go to the new case corner in a deer international versus Starr indemnity and liability company issued on April 15th, 2021, the ninth circuit of firm's summary judgment in favor [00:12:30] of an insurance carrier. The California attorney general had sued the defendant retail chain operator for violations of state consumer protection laws, including the UCL and FAL defendant ask the carrier to pay legal fees. The carrier agreed that the ag warn the California insurance code section 5, 3, 3 0.5 B forbids providing coverage in certain consumer actions brought by the state, the carrier then reversed the coverage commitment and defendant challenged the section as violating its due process, right to retain [00:13:00] counsel. And I'd started confirmed the district court's reasoning section 5 33 0.5 B only impacted the payment of fees through insurance defendant could otherwise obtain and communicate with counsel

Speaker 3: Two cases that I wanted to talk about, uh, include first the case called open text versus a Northwell health. That's a 2 0 2 1 United States district Lexus 6 7 7 5 1. It came down to the central district of California on February 19th, 2021. [00:13:30] This case is interesting because it evolved what the court described as a squabble over the use of software licensed under a contract between two corporate entities that were not competitors, but rather in a license or licensee relationship. And the dispute was about the, uh, what constituted a node in the software license and whether the defendant was using too many nodes under their license and the court cited, uh, a growing line of cases, which [00:14:00] holds that where a UCL action is based on contracts, not involving either the public in general or individual consumers or parties to the contract. A corporate plaintiff quote may not rely on the UCL for the relief.

Speaker 3: It seeks close quote. Uh, so the case, um, throughout the complaint, uh, recognizing that, uh, this line of authority quote, essentially withdrawals UCL standing from non-competitor corporate plaintiffs seeking to bring a UCL action based [00:14:30] on contracts, not involving the public or individual consumers close quote. The second case I wanted to mention is in part, because I used to own a brewery and I would do our own label approvals before the U S treasury departments, alcohol and tobacco tax and trade

bureau, which is also known as the TTB. This case is Angiano Anheuser, Busch InBev, worldwide, and that's 2021, us district Lexus 6 6 9 1 4. I came down in the central district of California [00:15:00] on April 5th, 2021. And in that case, plaintiff alleged that the defendants beer packaging and beer labeling, um, did not provide correct information about the, the fact that it contains some alcohol, even though it was labeled as non-alcoholic, um, and the court throughout the proof, the case on the, uh, under the safe Harbor provision for the UCL claims because the defendant had [00:15:30] applied for label approval and obtained it from the TGB and the TTB requires breweries and wineries and, uh, distilleries to include various specific information on their labels and down to the fonts and the location of everything and the warnings and you name it.

Speaker 3: And all of that had been included. And therefore the defendant was able to rely on the CFR provision. In addition, the court also noted if importantly, that the TTB regulates labels not packaging. [00:16:00] And so the fact that you had to pull a bottle of the beer out of the package to see the information about the alcohol level and all the required texts, uh, was irrelevant to its analysis. And now to have a little fun to these podcasts, my one minute film recommendation as a youth UCLA film school grad go Bruins. Last episode, I recommended, uh, John Sayles film, lone star. And this week I recommend paper moon. This 1973 gem was directed [00:16:30] by a Peter Bogdanovich, a fantastic director and stars. Tatum O'Neal has the nine-year-old daughter of a character played by her real life. Father Ryan O'Neil set on the depression. The film was shot in glorious, black and white, and follows the escapades of the ICAN artist's father. When he's forced to take his daughter to relatives in Missouri, after the death of her mother. And I got to say, Tatum is an incredible and hilarious child actress, and she steals every single scene. It's very funny and highly entertaining and streams on Amazon prime, YouTube, [00:17:00] apple, TV, and other places.

Speaker 2: Thank you, Greg. I have not seen that for a long time. Everyone. Thanks for joining us. And you can email questions to UCdefense@gtlaw.com until next time.