Greg Nylen: Greetings all, and welcome to the California Unfair Competition Defense Podcast. I am Greg Nylen and my co-host is Lisa Simonetti.

In this episode, we will discuss the remedies available on private claims brought under California Business and Professions Code Section 17200 [00:00:30] known as the Unfair Competition Law or UCL, and California Business and Professions Code Section 17500 known as the False Advertising Law or FAL. We'll also discuss some new decisions. Lisa, what remedies are available under the UCL and FAL?

Lisa Simonetti: Greg, for private plaintiffs the remedies are restitution, not damages and injunctive relief. Civil penalties may also be recovered by particular law enforcement officials and we will cover that in the future episode. [00:01:00] But for private plaintiffs Section 17203 of the UCL allows courts to make, "Such orders, or judgements as may be necessary to prevent the use, or employment by any person of any practice, which constitutes unfair competition as defined in this chapter, or as may be necessary to restore to any person any money, or property which may have been acquired by means of such unfair competition."

Section 17535 of the [00:01:30] FAL provides for a similar relief relating to false advertising. Notably the scope of restitution relief is broad. The intent is to restore the status quo as much as possible. Also, restitution like other remedies under the UCL, is cumulative to other remedies under the law, both within the chapter and thus the FAL, and under other statutes. For instance, a plaintiff could recover restitution under the UCL along with damages and punitive damages under the Consumers Legal Remedies [00:02:00] Act, or CLRA. And we will talk more about the CLRA in our next few shows. But Greg, are there any limitations on restitution awards under the UCL and FAL?

Greg Nylen: Yes. But first and foremost, the California Supreme Court has held that restitution is not mandatory. A trial court has discretion to award restitution even on an unlawful claim under the UCL, which creates strict liability. Also an important line of cases holds that restitution is not available if adequate [00:02:30] monetary relief is available on other claims, such as under the CLRA. And previously awarded penalties and awards against the same defendant must be offset under due process limitations.

With respect to scope and limits on restitution, courts will not order defendants to discourage all benefits they may have conceivably earned as a result of alleged unfair business practices. Rather this California Supreme Court set forth limits on the scope of restitutionary discouragement under the UCL [00:03:00] in Cortez versus Purolator Air Products, an overtime wage case. In that case, the court confirmed that restitution is limited to what defendant wrongfully obtained from plaintiff, although the court ultimately concluded that plaintiff was entitled to restitution of unpaid overtime wages, because there was required to restore the status quo ante between the parties by giving the

plaintiff the unpaid overtime wages plaintiff was entitled to receive under the law and that defendant was not [00:03:30] entitled to retain.

This raises an interesting issue that manufacturers often face when their goods are sold at retail. Specifically, those cases in which a manufacturer doesn't receive the money from the claimants, but instead from the retailer. There are cases holding that's irrelevant and restitution is still available, but how far does that principle go? What about the situation where a manufacturer sells its inventory before the consumer sale is even made, and receives payment before the consumer pays a dime. [00:04:00] Or consider the sublease situation where the sublessee deals with the consumer and the sublessor receives rent, is restitution available in that circumstance? These are interesting questions indeed.

Lisa Simonetti: That is certainly true. And the California Supreme Court subsequently clarified the restitution is limited to money, or property that defendant took from plaintiff, or put differently in which plaintiff has a, "Vested ownership interest." In other words, restitution is based on the fair market price, meaning value [00:04:30] paid, value received. It looks at both a willing seller and willing buyer. The purchaser, can't just say, "I would've paid X dollars and so restitution is the difference between sales price and X dollars." The court must evaluate what the consumer actually received.

This also arises in cases involving omissions. In addition, appellate courts have looked at whether a restitution award may include other amounts such as, profits from money, or property taken by way of unfair competition. The courts generally will not allow it, although [00:05:00] the decision on Juarez versus Arcadia Financial Limited arguably goes the other way.

Greg Nylen: In all cases, restitution must be supported by substantial evidence, under Engle Tobacco II and its progeny. Plaintiffs have to prove a loss, whether it's a premium they paid, but for a particular representation, or omission, or something else. So you can't get a full refund for your million dollar yacht because defendant said a countertop and one of the heads was made out of marble, and it was actually Corian, [00:05:30] for example. There are interesting exceptions to this rule however, as where the sale itself was unlawful such as in the in race steroid home run products cases, or where the product has sold is valueless. The proverbial snake oil, or quack medical products, for example. Another important limitation is that restitution discouragement under the UCL and FAL cannot be a disguise claim for damages. The scope of relief is limited to restoring the status quo ante [00:06:00] thus plaintiffs can't recover for example, for lost business opportunities, or an insurer cannot recover monies paid out to ensure parties due to defendants purported unfair business practices. There are many defenses to restitution of course, which will be the subject of a further episode.

Lisa Simonetti: Okay. So let's turn to the other important remedy injunctive relief. The UCL confers broad discretion on the court to fashion injunctive relief. An issuance of injunctions under the UCL turns [00:06:30] on fact intensive inquiry. For example, a court could require prospective disclosures to cure allegedly false advertising, or substantive changes to existing business practices. Courts also entertained further considerations such as whether an injunction might be a prior restraint on speech in violation of the first amendment. Lack sufficient connection to the conduct at issue, particularly when a plaintiff has already purchased an allegedly defective, or dangerous product, or would not actually impact the challenge conduct such as, [00:07:00] circumstances in which plaintiff was aware of alleged misrepresentations about a product and thus would not purchase it again. This brings to mind the Ninth Circuit Davidson v. Kimberly-Clark decision, as well as subsequent cases, wrestling with what it means to plausibly allege that a consumer will purchase a product again in the future. That is a significant issue which we also will discuss in a future episode.

Further, courts have denied injunctive relief under the UCL when plaintiff has an adequate remedy at law and when an injunction involves economic policy, [00:07:30] which could lead to continuous judicial regulation of a company, or business sector. And importantly in 2017, the California Supreme Court address the distinction between the two types of injunctive relief available under the UCL and FAL, public and private injunctive relief. In McGill versus Citibank, the court noted that under prior decisions, "Public injunctive relief is relief that has the primary purpose and effect of prohibiting unlawful acts that threatened the future injury [00:08:00] to the general public. Relief that has the primary purpose, or effect of redressing where preventing injury to an individual plaintiff, or to a group of individuals similarly, situated to the plaintiff does not constitute public injunctive relief."

The court found the Proposition 64 did not eliminate the ability of private plaintiffs to seek public injunctive relief. So long as a plaintiff has standing after Proposition 64 meaning, "Suffered injury in fact and has lost money, [00:08:30] or property as a result of," the alleged violation that plaintiff can seek injunctive relief that would impact other individuals. The court also did not find in Proposition 64, any "Intent to link, or restrict," a private plaintiff's ability to seek public injunctive relief to only the class action context. This means that a plaintiff can file an individual UCL, or CLRA case and seek broad public injunctive relief on behalf of the general public, putting [00:09:00] fees at issue under Civil Code Section 1021.5 without ever having to satisfy their requirements for class certification. Finally, the court rejected the contention that permitting claims for public injunctive relief in litigation runs a foul of their Federal Arbitration Act.

Greg Nylen: Tonight's circuit's recent decision in DiCarlo versus Moneylion, Inc. issued February 19th, 2021 illustrates these principles. Plaintiff brought proposed class action claims against [00:09:30] a smartphone app financial services provider under the UCL, FAL and CLRA challenging the terms for allowing cancellation of a banking membership agreement. The membership agreement included an

arbitration clause waiving the right to bring a class action, serve as a private attorney general, or join claims of other customers. The district court granted defendant's motion to compel arbitration. On appeal, plaintiff argued that the arbitration clause violated the McGill rule. " [00:10:00] A person cannot contractually waive the right to seek public injunctive relief." However, the Ninth Circuit rejected the argument noting that the arbitration provision allowed an arbitrator, "To award all remedies available in an individual lawsuit," including injunctive relief. The Ninth Circuit then noted that public injunctive relief is available under the UCL, FAL and CLRA which could be sought in an individual bilateral arbitration.

[00:10:30] Notably a defense based on FAA preemption also is not available. The Ninth Circuit ruled in Blair versus Rent-A-Center, Inc that the FAA does not preempt McGill, and to this point, the United States Supreme Court has declined to take up the issue. So for the time being courts will continue to ply McGill into further refine the meaning of public versus private injunctive relief on a factual basis.

Lisa Simonetti: So what is the takeaway on injunctive relief? From a defense perspective, it is important [00:11:00] to always consider the potential for injunctive relief in your case, given the broad and discretionary standards that apply in McGill a prayer for injunctive relief could present significant risk depending on the facts. And now let's go to the new case corner. I'll kick that off, Greg. Courts continue to consider plaintiff's allegations regarding consumer surveys in support of unfair competition claims.

In Clark v. Westbury natural issued April 22nd, 2021. Plaintiff's alleges that a label describing [00:11:30] vanilla soy milk would cause reasonable consumers to conclude that the flavor came exclusively from the vanilla bean plant. Plaintiff started a survey where 49.6% of respondents believe this, but the Northern District of California, granted defendant's motion to dismiss and rejected the survey allegations. The court found that the survey questions were flawed, they required respondents to take a position on what the label conveyed about origin of the flavor. Nothing was not an option.

Meanwhile, in Govea [00:12:00] versus Gruma Corp, issued March 1, 2021 plaintiffs purchased tortillas at stores in California. Plaintiffs alleged that based on the brand name Guerrero and some Spanish phrases on the packaging which translated, for instance, to quality and freshness, they reasonably believe that tortillas were made in Mexico, but they were not. The Central District of California found that viewing the packaging as a whole, it was, "Simply not plausible," that a significant portion of the public acting reasonably [00:12:30] could be misled. Nevertheless, the court allowed plaintiffs leave to amend in hopes of developing survey allegations, consistent with Shalikar versus Asahi Beer USA, Inc. In which 85% of a representative sample of adults believe that because Asahi means, morning sun in Japanese and the label contained Japanese characters, the beer is made in Japan.

Greg Nylen: In Stewart versus Cakes, plaintiffs alleged that defendants pancake and waffle mixed packages contained nonfunctional, [00:13:00] slack fill, or space that resulted from settling in the packaging process. Plaintiffs alleged that defendant packaged its product in a way that would conceal how much product is actually in the package. And that defendant made misleading labels and advertises products as having no preservatives, being free of additives, non-GMO, healthy and protein packed. Citing Schertzer, the district court for the Southern District of California, first throughout claims under the laws [00:13:30] of states where plaintiffs do not reside, or did not purchase the products at issue. Then things got a bit more interesting, the court dismissed plaintiff's claim for injunctive relief for lack of article three standing, because they did not show a likelihood of further harm after their initial purchases.

Specifically, the court held that the exaggerated size of defendant's packaging can be checked easily by the plaintiffs and, "In the future, plaintiffs can crosscheck their previous disappointing purchases by examining the undisputed net [00:14:00] weight on the face of defendant's product and the serving size and cylindrical cups and servings per container on the nutrition facts label." If there is a change in the weight, or quantity within the same size box plaintiffs will be able to determine whether the box to mix ratio continues to be exaggerated. So in other words, plaintiffs had to exercise common sense in future. The court held the plaintiffs face similar hurdles with respect to defendant's products as having no preservatives, as well as being free of artificial [00:14:30] additives, or being protein packed as, "Plaintiffs can check the nutrition facts, or ingredient labeling to assess if the products contain preservatives, artificial additives," et cetera. The court denied defendant's motion to dismiss regarding plaintiff's theory of non-GMO marketing statements, as that was not something plaintiff could easily check before making future purchases.

And now my one minute movie review, last episode, it was Paper Moon and this time I'll recommend The Conversation. [00:15:00] Francis Ford Coppola is 1974, psychological thriller, starring a fantastic Gene Hackman is a paranoid electronic surveillance expert. He gets hired by his clients aide Harrison Ford, of all people before Star Wars days to tail a couple played by Frederick Forrest later cast by Coppola as Chef in Apocalypse Now, and Cindy Williams of Laverne and Shirley fame. If this film is full of twists and turns, you won't see coming and plays on sound design and some really groundbreaking ways that become part of the plot. I was blown away by this [00:15:30] film when I saw it in film school and I hope you'll like it too. It has a 96% rating on Rotten Tomatoes for a reason and is streaming on Amazon Prime, Showtime, Hulu and a bunch of other platforms. Check it out.

Lisa Simonetti: Thank you Greg for that. And everyone, thanks for joining us. You could email us questions at ucdefense@gtlaw.com, until next time.