

Speaker 1: [inaudible]

Speaker 2: Hi and welcome to the California unfair competition defense podcast. I am Greg Nylan and my co-host is Lisa Simonetti. In this episode, we will provide an overview and background on the unfair and fraudulent prawns of California business and professions code section 17, 200, [00:00:30] also known as the unfair competition law or UCL. And we will also discuss some new decisions involving UCL. Lisa, can you get us started on the unfair prong?

Speaker 3: I think Greg, the unfair prong has been interpreted to allow court's discretion to address improper business practices as discussed in the last episode, even though the UCO has been litigated for decades, no settled definition of unfairness exists in the consumer context in the past courts generally use one of two tests. First, a court would look [00:01:00] at the practices impact on its alleged victim, balanced against the reasons justifications and motives of the alleged wrongdoer. In other words, the court would weigh the utility of the defendant's conduct against the gravity of the harm. The alleged victim in the second test courts adopted language from FTC guidelines, which defined unfair conduct with reference to section five of the FTC act under this test, a business act as unfair native Fens and established public policy, or when the practices a moral and ethical [00:01:30] oppressive, unscrupulous, or substantially injurious to consumers.

Speaker 2: But over the years, courts criticized these definitions as too vague and amorphous indeed the California Supreme court rejected them in the context of non-consumer claims and found them inadequate for purposes of consumer cases. The court noted quote the need for California businesses to know to a reasonable certainty, what conduct California law prohibits and what it permits close, quote, who would've thought

Speaker 3: [00:02:00] That's right, but these various criticisms have resonated, especially in the California court of appeal, which has attempted to address the issue as an initial matter, relying on the California Supreme court's reasoning. Certain courts have confirmed that where a claim of unfairness is predicated on public policy, such public policy must be tethered to specific constitutional statutory or regulatory provisions. Meanwhile, other courts have found that the plaintiff must establish some causal link between the defendant's business practice [00:02:30] and the alleged harm to the public. And finally, other courts have adopted a more precise test arising from the language of and policy considerations, underlying section five of the FTC act under that test, the consumer injury must be substantial. The injury must not be outweighed by any countervailing benefits to consumers or competition, and it must be an injury that consumers themselves could not reasonably have avoided. So Greg, how does this play out in real life,

Speaker 2: Depending on where a case [00:03:00] is filed, the court might apply all three tests. A good recent example is Allen versus HYLAND's, H Y L a N D apostrophe S Inc. The decision from the central district of California issued on February 23rd, 2021. This case was on remand from the ninth circuit based on conclusions of law. Following the trial of certified claims, uh, the defendant was a seller of homeopathic remedies and plaintiff challenged the packaging with respect to claims of efficacy. [00:03:30] The court noted

the unsettled definitions of unfair apply to all three tests and found for the defense on the unfairness claim.

Speaker 3: Yes, I agree. Alan sums up the analysis under existing law. Very well. I note that there also are defenses, affirmative defenses to unfairness claims. For example, the conduct is not unfair business justification, alternative source and safe Harbor. We will discuss these as illustrative decisions are issued. So

Speaker 2: Moving on with our continued overview of [00:04:00] the various prongs of liability under the UCL, the next prong of liability that we're going to talk about is the fraudulent Prong. This is different from the claim from common law fraud. For example, see, enter intent or damage are not required. Although loss of money or property is required, which in some ways is more restrictive than a common law fraud claim. And we will discuss the loss of money or property requirements. In our next episode regarding standing the key test under the fraudulent prong is whether consumers are likely [00:04:30] to be deceived by the particular statements, that issue that formed the basis of the claim. And this is similar to aspects of the likelihood of confusion standard for trademark infringement under the Lanham act. In fact cases involving claims under the fraudulent prong of the UCL have referred to the two tests as quote substantially congruent close quote.

Speaker 2: This test is also similar to the standard for false advertising under section 43, a of the Lanham act. And it is somewhat similar to [00:05:00] the likelihood of deception tests under section five of the FTC act. Although there are aspects of the section five plan that do not apply in UCL cases. And we will also talk more in a later podcast about the relationship of section five to the ECL, as well as the false advertising prong of the UCL. Yes, there is another Prague and business and professions code section 17 500 California's false advertising law, which shares some similarities in the story.

Speaker 3: Okay. So let's talk for a minute about [00:05:30] deceptiveness. What does it mean? Whether consumers are likely to be deceived deceptive. This is measured by the audience to whom advertising or other statements are addressed. This can be the general public. If the product is marketed to consumers at large, or it can be a more narrowly defined audience and consists primarily of people in a particular industry or profession, but in either case the alleged deception is measured by the close unquote reasonable consumer standard, not the least sophisticated consumer standard. Again, [00:06:00] this is very similar to parts of the test for determining likelihood, confusion and trademark law. Also, fortunately for defendants courts may find as a threshold matter than an allegedly deceptive statement is not reasonably susceptible to plaintiffs' interpretation. This means that if the plaintiff is urging a particularly unreasonable interpretation of statements, and for example, advertising or packaging, you can ask the court to take an initial pass on a dimmer or a motion to dismiss.

Speaker 3: One of the key cases on this issue is [00:06:30] Bissera versus Dr. Pepper 7up Inc 9 45, third, 1225 ninth circuit 2019 in Besera the ninth circuit held as a matter of law that reasonable consumers would not be misled into believing that diet soda meant that the product would help with weight loss. The court held that the standard of liability quote,

whether members of the public are likely to be deceived requires more than a mere possibility that defendant's label might conceivably be misunderstood by some few consumers [00:07:00] viewing it in an unreasonable matter close quote. The court noted that quote rather the reasonable consumer standard requires a probability that a significant portion of the general consuming public or of targeted consumers acting reasonably in the circumstances could be misled, close quote, and significantly. The court also held that consumer surveys can't change this result if objectively a reasonable consumer would not interpret a statement as plaintiff urges

Speaker 2: Another defense to a claim under the fraudulent [00:07:30] prong that you can employ at the pleading stage is that the statements at issue are mere puffery. What is porphyry? You may ask Merriam Webster defines it as exaggerated commendation, especially for promotional purposes. In other words, puffer is hype for a sales talk, the sort of language, no reasonable consumer would mistake. For fact, examples of statements courts have held to constitute puffery are that one's product is better than the competition. That a car is the best manufactured [00:08:00] car in the world. Uh, the terms, reliability, durability, proven quality and performance, more innovative than the competition and the like you can also attack claims under the fraudulent prong. If they don't involve an affirmative statement by defendant. For example, courts have thrown out claims that consumers were deceived into believing that sugar in the raw contains unprocessed or unrefined sugar, because the words unprocessed and unrefined do not appear on the packaging [00:08:30] and issue. Another example is the claim that crackers were misrepresented as being composed primarily of fresh vegetables when the packaging made no such representation, either pictorially or through words.

Speaker 3: But on the other hand, there's descriptions of specific or absolute characteristics of a product can potentially be actionable. For example, statements that a product complies with specific safety standards when it in fact does not. So bottom line is you need to make an initial analysis of whether the packaging or advertising at issue in a case you are [00:09:00] defending can be interpreted as making affirmative statements of fact in a matter that is likely to deceive reasonable consumers. Also, if you are defending a case in federal court, it is important to note that some courts in the ninth circuit have imposed what is arguably a materiality requirement specifically, the allegedly misleading statements must influence a purchasing decision. In other words, the plaintiff must plead and prove that a specific purported representation caused them to buy the product in question and

Speaker 2: [00:09:30] On a related note in whether you are in federal or state court, a number of decisions held that the plaintiff must have actually seen the advertising at issue to state a claim under the fraudulent prong. So in your initial investigation for your client, you should determine if you can demonstrate either as a pleading matter or on a motion for summary judgment, that plaintiff did not see a statement because it was provided in the context that did not involve them. For example, the statement was on a display in a particular brick and mortar location. [00:10:00] They admittedly did not visit or conversely the statement was made online when they admittedly did not view or visit the website at issue containing the statement. And if they did view the statement online, check your client's terms of use for arbitration provisions or disclaimers that may

significantly impact your defense of the case. Other federal cases have imposed a requirement for fraudulent prong claims that the allegedly deceptive statements must be pled with the specificity required for pleading fraud under federal rule of civil procedure [00:10:30] nine B. So if you are in federal court, you can attack the complaint. If it doesn't adequately alleged the who, what, where, and when the, for particular alleged misrepresentation with the requisite, particularity there's lots of potential fodder in this area at the early pleading stages of the case.

Speaker 3: That is for sure. And another area regarding the fraudulent prong that we will deal with in future episodes are cases involving omissions, as opposed to affirmative statements. There are complex issues in these cases, turning on whether [00:11:00] there is a duty to disclose and a related issue involves cases concerning statements by implication, which we also will deal with in a future episode, why didn't, how duties to disclose may arise and how such claims can be defended will also be covered.

Speaker 2: Finally, with respect to the fraudulent prong, uh, consumer surveys can still come into play. If plaintiff's claim passes the threshold a bit objective tests we discussed earlier in such a case, consider hiring a survey expert and make sure you get a copy of Sherry [00:11:30] Diamond's reference guide on survey evidence, which is available online for free. What a concept, which is a chapter of the reference manual on scientific evidence, third edition. This is the Bible on all things survey and covers all of the key issues. You will need to know cold in this area. If you're working with a survey expert, or if you're working with a survey expert who is attacking another prepared by another expert, we will devote a future episode to the use of survey evidence in UCL cases [00:12:00] and how to attack surveys as well. And hopefully have a guest speaker who is a survey expert, join us in our discussion. Now let's go to the new case corner, a new segment that will carry on in future episodes, where we discuss recent decisions and trends.

Speaker 3: Okay, so we have a current example of the safe Harbor defense mentioned earlier. The case is diamond vs SanDisk, LLC, 2021, USF Lexus, 37 16 ninth circuit, February 10th, 2021. [00:12:30] This is affirming summary judgment in favor of defendant, a seller of flash memory products on claims under the UCL FAL N CLRA plaintiff's alleged that defendant violated the statutes by using gigabyte or quote GB on product packaging to mean 1 billion bytes, which is the decimal definition. When plaintiffs assumed that defendant meant a different definition. The binary definition, the ninth circuit found that the district court properly applied the safe Harbor doctrine, California and federal statutes [00:13:00] permit the use of the metric system as published by the national Institute of standards and technology in commerce, its publications instruct that the metric prefix giga and the symbol G mean 1 billion, which corresponds to the decimal definition of gigabyte. Thus plaintiff's claims failed based on the safe Harbor

Speaker 2: And a current example of the preemption defense in the context of the fraudulent and false advertising prongs of the UCL. It can be found in lining L E I N I N [00:13:30] G versus foster poultry farms, Inc 2021 Cal app Lexis 1 54, February 23rd, 2021, the case affirmed summary judgment in favor of defendant and national poultry producer on claims under the UCL, as well as negatives and misrepresentation breach of warranty and breach of the implied warranty of merchantability plaintiff alleged that defendant

foster farms use of the American humane certified logo on its labels was deceptive and misleading because her [00:14:00] objectively reasonable in quotes understanding of the certification was that the chickens used by foster farms were afforded a comfortable existence in a quick and painless death close quote. When in fact that allegedly was not true, the court of appeal held that plaintiff's misleading. Labeling claim was barred by the express preemption clause of the poultry and poultry products inspection act also known as the PPIA 21, USC 4 51, et sec, the farms labels, including [00:14:30] the certified logo were pre-approved by the food safety and inspection service in accordance with the PPIA.

Speaker 2: The court found that because the labels were pre-approved by the FSI S the federal government had determined that the labels which include American humane certification were not misleading to the PPIA. If plaintiff were to prevail on tort claims that the labels were nonetheless misleading, California courts would be imposing an additional requirement to those imposed by the PPI. [00:15:00] And finally, as I mentioned in the previous broadcast, I'm a UCLA film school grad go Bruins. And to add some fun to this, I will recommend a film. You may not have seen to add to your streaming queue since so many people are spending so much time on Netflix. These days, last time it was Paris, Texas. And this time it is the Lonestar John sale's 1996 film starring Chris Cooper as a sheriff and the Texas border town of Fronterra who finds an old skull in the desert that leads him to trace the murder of sheriff. Charlie Wade played by Chris [00:15:30] Christofferson, who was amazing in the film 40 years earlier. His investigation leads him towards his father and brings up all tensions in the town. As he rekindles a relationship with his high school, sweetheart. It's one of the best films of the 1990s and perhaps the great John sale's most approachable film streaming on Amazon prime iTunes, and many other platforms. Make sure you choose the 1996 lone star. There are other films by the same name.

Speaker 3: So Greg Paris, Texas truly was great. I really enjoyed it. So quiet and slow and about [00:16:00] loss. And then in the end is not really. So I look forward to lone star. Thank you for that. And everyone, thanks for joining us. And you can email us with questions at ucdefense@gtlaw.com until next time be well.