

Lisa Simonetti ([00:13](#)):

Greetings all and welcome to the California Unfair Competition defense podcast. I'm Lisa Simonetti and my co-host is Greg Nylén. In this episode, we will provide the first part of an overview of the Consumer's Legal Remedies Act, or CLRA. As mentioned during some prior podcasts, the CLRA is structured very differently from the Unfair Competition Law, or UCL, and the False Advertising Law or FAL. And we also will discuss some new decisions. So Greg, what is the purpose of the CLRA?

Gregory Nylén ([00:41](#)):

As one court put it, the Consumer's Legal Remedies Act and acted in 1970, established a non exclusive statutory remedy for unfair methods of competition, and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result, or which results and the sale release of goods or services to any can consumer. The self-declared purposes of the CLRA are to protect consumers against unfair and deceptive business practices, and to provide efficient and economical procedures to secure such protection. That's California civil code section 1760. Put another way, and instated by a court of appeal, the CLRA is a legislative embodiment of a desire to protect California consumers and furthers a strong public policy of the state.

Lisa Simonetti ([01:28](#)):

This does sound similar to the underlying objectives of the UCL and FAL. But unlike the UCL, where any person may bring a claim, only agreed consumers have standing to sue under the CLRA. The CLRA provides these consumers with a private right of action for unfair methods of competition, and unfair or deceptive acts or practices in connection with a transaction intended to result, or that results in the sale or lease of goods or services. While these concepts are seemingly straightforward, there can be questions of coverage in mixed use transactions. And on its face, the CLRA is not limited to California residents and transactions, however based on current case law, the CLRA should not apply to conduct that emanates from California, but affects non-California residents outside of California. Also, while there are several somewhat open ended prongs of liability under the UCL, specifically the unfair, unlawful, fraudulent in false advertising prongs, the CLRA prohibits a laundry list of 24 specifically defined business acts or practices, which we will talk about in a later episode. Regardless, the legislature intended courts to construe the CLRA in its list of wrongs liberally. In addition, within the context of the wrongs, the CLRA applies to both actions and material or omissions by a defendant.

Gregory Nylén ([02:46](#)):

Under the CLRA, a consumer is an individual who seeks or acquires by a purchase or lease, any goods or services for personal, family or household purposes. Courts strictly enforce this provision. Individuals who lease or purchase goods or services for business purposes cannot proceed under the CLRA. Further, a consumer must have purchased the good or service or have been assigned the purchaser's rights, simply obtaining possession of a good is insufficient. This definition of consumer has been applied in some interesting ways. For example, in Barry versus American express publishing Inc., the court of appeal relied on the legislative history of the CLRA in holding that a statute does not apply to the issues of a credit card. The legislature deleted users of money as credit from a definition of the term consumer in an early draft to the bill. Based in part on this deletion, the Barry court concluded that neither the express text of the CLRA, nor its legislative history supports the notion that credit transactions separate and apart from any sale or lease of goods or services are covered under the act. The California Supreme court denied review in Barry.

Lisa Simonetti ([03:58](#)):

So now let's turn to the damages that are available. Unlike the UCL, which provides only for recovery of restitutionary discouragement, statutory damages for government entities and injunctive relief, the CLRA allows for the recovery of damages, punitive damages, statutory damages in certain cases, such as involving the elderly, and attorney's fees. To state a claim for an alleged violation of the CLRA section 1780a requires allegations of actual damages caused by the conduct at issue. And it states, any consumer who suffers any damage as a result of the use or employment by any person of a method, act or practice declared to be unlawful by section 1770 may bring an action against that person to recover. So courts have held that relief under the CLRA is specifically limited to those who suffer damage, making causation a necessary element of proof.

Lisa Simonetti ([04:49](#)):

In Meyer versus Sprint Spectrum L.P. issued in 2009, the California Supreme court evaluated what constitutes the element of damage. The court of appeal affirmed a trial court ruling sustaining a demur to a complaint, challenging various provisions in a contract as illegal and or unconscionable. The trial court found that because none of these provisions actually had been invoked, plaintiffs could not establish causation or damages under the CLRA. At the California Supreme court, plaintiffs argued that the very presence of unconscionable terms within a consumer contract in violation of section 1770 subdivision, a14 and 19, constitutes a form of damage within the meaning of section 1780a. The court disagreed, finding that in order to bring a sale or a action, not only must a consumer be exposed to an unlawful practice, but some kind of damage must result. The court also noted that the damage requirement extends to actions under the CLRA for injunctive relief .

Gregory Nylén ([05:46](#)):

What constitutes the sale or lease of goods or services? Based on the plain language of the statute and legislative history, the legislator intended to limit the CLRA to traditional purchases of consumer goods and related services. But given that the CLRA is to be construed liberally, plaintiffs argue that it may apply in many types of consumer transactions, except for expressly exempted from coverage. However, courts have held that certain consumer transactions are not covered by the CLRA. The reasoning is that the transactions do not evolve goods or services as defined by the CLRA.

Gregory Nylén ([06:24](#)):

The California Supreme court, for example, found in Fairbanks versus Superior Court, that insurance is not a good or a service. In Fairbanks, plaintiff's alleged that defendants deceptively marketed and administered life insurance policies. The court found that life insurance is not a tangible chattel and thus not a good. Meanwhile, the court held life insurance is not a service, a contractual obligation to pay money under a life insurance policy is not work or labor, nor is it related to the sale or repair of any tangible chattel. Further, the court determined that services related to the maintenance, value, use, redemption, resale, or repayment of the intangible item I.E. the insurance, do not bring the intangible chattel within the CLRA scope. The court reasoned that doing so would defeat the apparent legislative intent in limiting the definition of goods to include only tangible chattels. Since Fairbanks, trial courts have applied its reasoning to other areas such as apartment leases and mortgage loans.

Lisa Simonetti ([07:24](#)):

That's right. And along these lines, the CLRA also does contain some exemptions. For instance, it does not apply to the sale of real property, including the sale or construction of residential housing in

commercial or industrial buildings. Further, the CLRA contains an anti-waiver provision. Section 1751 provides that any waiver by a consumer of the provisions of the CLRA is contrary to public policy and shall be unenforceable and void. Courts have interpreted this provision to prohibit form selection clauses and choice of law provisions. Further, in Sanchez versus Valencia Holding Company, LLC, the California Supreme court resolved a split in authority among courts of appeal regarding preemption of the CLRA's anti-waiver provision by the Federal Arbitration Act. The court held that in light of the United States Supreme court decision at AT&T Mobility, LLC versus Concepcion. The CLRA's anti-waiver provision is preempted insofar as a Barr's class waivers and arbitration agreements covered by the FAA. But the CLRA anti-waiver provision does not prohibit waiver of non CLRA claims. Now Greg let's turn to the new case corner, what do you have for us?

Gregory Nylan ([08:33](#)):

The case I wanted to talk about is called Vinluan. That's V, I, N, L, U, A, N, dash Jularbal, J, U, L, A, R, B, A, L, versus Red Bubble, Inc. out of the Eastern district of California. This case is particularly interesting to me because I've done a lot of anti-counterfeiting work and it involves that subject matter, as well as some interesting standing issues relating to claims under the UCL and CLRA. In that case, the plaintiff bought a couple of sweatshirts from the defendant, one with the United Nations symbol, and one with the word 'Dadalorian', an apparent play on the Mandalorian Star Wars Universe series. Plaintiff believed both items were counterfeit, and saw an injunction, preventing defendant from selling any counterfeit items.

Gregory Nylan ([09:17](#)):

Defendant argued that plaintiff did not have article three standing to bring claims under the UCL or CLRA, because she swore under oath that she would never knowingly support defendant because of her belief that items defendant sold counterfeit. The court however found that because plaintiffs stated she would make further from defendant in the future, if she could be assured the products were not counterfeits, she shepherded a threat of future harm of being unable to rely on the products authenticity, and so will not purchase the product although she would like to.

Gregory Nylan ([09:49](#)):

With respect to standing under the UCLA and CLRA, defendant argued the plaintiff lacks standing because she had not demonstrated that the items she purchased were in fact, counterfeit. Plaintiff argued that she showed economic injury as she explained she paid more for the sweatshirt than she would have if she had known it was counterfeit. The court punted on this issue at the early stage of the litigation however, and refused to address the issue. Nonetheless, with respect to plaintiff's claim for injunctive relief, the court found it was mandatory on nature because it sought to enjoin defendant from selling any counterfeit items, not just the one plaintiff purchased, which would require defendant to review and police the 51 million items that sold online. The court found this placed a heavier burden on plaintiff to demonstrate injunctive relief than was warranted. And ultimately the court found that plaintiff was not entitled to injunctive relief because she didn't offer any evidence that the items she purchased were counterfeit and thus was not likely to succeed on the merits of her claims.

Lisa Simonetti ([10:44](#)):

Okay. I have Adams versus Barone, an unpublished decision from the United States District court for the district of New Jersey filed on May 31st, 2021. The case involved in allegedly fraudulent scheme, where

defendants advertised free samples of beauty products, but consumers were later charged as subscription fee.

Lisa Simonetti ([11:02](#)):

Plaintiff ordered two free samples from defendant's website, as well as a third item that cost \$15, all of which she received. But a few weeks later plaintiff's credit card was billed \$92 and some change and the charge was described as a recurring card purchase. Plaintiff contact the defendant and was informed by a representative that when she purchased the product, she agreed to pay the subscription cost if she kept them. The representative then offered plaintiff a refund if she returned the products which plaintiff refused to do.

Lisa Simonetti ([11:30](#)):

Plaintiff sued for violation of the UCL among other things. Defendant moved to dismiss pursuant to rule 12B one, the federal rules of civil procedure for lack of subject matter jurisdiction. Defendant argued that based on the pre-litigation offer of a refund, made in the ordinary course of business, there was no actual case or controversy as required by article three of the constitution and thus, the case was moot. The district court agreed and rejected plaintiff's reliance on decisions that dealt with settlement offers or offers of judgment made during litigation, including the United States Supreme court's decision in Campbell-Ewald Company versus Gomez in 2016. So companies involved in product marketing and sales should bear this type of argument in mind when handling customer complaints.

Gregory Nylan ([12:16](#)):

And now to this episode's film recommendation. Today, I'm going to go a little more recent than in prior reviews and recommend the 2016 film Patterson starring Adam Driver. This gem is written and directed by Jim Jarmusch, one of my favorite directors. It's a really interesting film and a great one to watch if you want to see Driver go beyond his role in the Star Wars franchise, and really get a sense of his amazing range. In this film, Driver plays a bus driver in Patterson, New Jersey who follows the exact same precise routine every day in his job, but while following this routine, he observes passengers and others around him and picks up on pieces of their conversations about their lives. And then what's really cool is he then writes amazing, beautiful poetry based on what he hears and shares it with his wife who's a huge fan of his otherwise secret gift and the way the poetry is displayed on screen, when it is read is truly magical. Words really don't do the film justice and it's amazing and quality, it will make you feel really good. So I highly recommend it. And there's a reason it has a 96% rating on Rotten Tomatoes.

Lisa Simonetti ([13:16](#)):

That sounds amazing, Greg and thank you. Next time we will discuss a 24 prohibited acts under the CLRA and frequently litigated provisions along with some procedural quirks. Everyone, you can email questions to UC defense gtlaw.com. Thank you for joining us.