

The UCL and You: Recent Developments in California's Unfair Competition Law and Their Effect on Healthcare Providers and Payors

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INTRODUCTION

To paraphrase Mark Twain, reports of the death of California's Unfair Competition Law (the "UCL") have been greatly exaggerated. The UCL, Business and Professions Code § 17200 *et seq.*, remains a predominant vehicle for California plaintiffs who seek to enforce marginal or nebulous consumer rights, including against healthcare providers. California voters imposed new and formidable standing limitations on UCL claims when they approved Proposition 64 in the November 2004 election. But these important procedural roadblocks to certain UCL actions and claims did not narrow the substantive reach of the UCL. UCL claims still abound in the California courts. For example, just as this article was going to press, a Court of Appeal in Los Angeles issued a major ruling dismissing UCL claims against nursing homes for alleged short-staffing, in violation of a statewide nursing-hours-per-patient-day statute. The court looked past Proposition 64 issues, and held that the trial court properly abstained and dismissed the action, because the Department of Health Services has plenary

regulatory and enforcement authority under the statute.¹ Healthcare providers, health plans, and medical groups, among other institutional defendants, still remain primary targets for UCL lawsuits.

The UCL provides a private cause of action to redress business practices that are allegedly "unlawful, unfair, or fraudulent." Settled UCL case law confirms that these are exceedingly broad and amorphous grounds for liability – because, as the California Supreme Court has noted, "it would be impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited . . . , since unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery."² Thus, the UCL does not list any particular acts that are prohibited, but instead allows plaintiffs to "borrow" alleged violations of other laws – state or federal, statutory, regulatory, or common law – to create UCL "unlawful" business practice claims.

Historically, no segment of California business was safe from the reach of UCL lawsuits. Until late 2004, anyone could bring private UCL actions, even plaintiffs who had not suffered any injury, had no connection whatever to

the businesses they sued, and had no direct knowledge of the conduct they alleged was illegal, unfair, or fraudulent. In traditional legal parlance, even plaintiffs who lacked standing could sue under the UCL. The UCL, before Proposition 64, was not what most law professors had in mind when lecturing on the baseline requirements for proper lawsuits. As one non-California lawyer put it after learning about the old UCL: "Do y'all have gravity out there?"³

Moreover, under the old version of the UCL, any plaintiff could sue on behalf of the entire "general public" of the State of California, without showing a single one of the factors required to certify a class in virtually every other representative context. The UCL offered broad injunctive relief to stop challenged practices, restitution of money obtained by unfair practices (but not payment of damages), and attorneys' fees to prevailing plaintiffs via California Code of Civil Procedure Section 1021.5, in certain instances where UCL plaintiffs achieved a significant public benefit. The potential availability of attorneys' fees made the UCL very attractive to plaintiffs – whether injured or not – and perhaps even more attractive to plaintiffs' counsel.

¹ *Alvarado v. Selma Convalescent Hosp.*, *supra*.

² *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Company*, 20 Cal. 4th 163, 181 (1999) (quoting *People ex rel. Mosk v. National Research Co. of Cal.*, 201 Cal. App. 2d 765, 772 (1962)).

³ John H. Sullivan, *Call It Gonzo Law – The Unfair Competition Statute covers any claim, if it's presented with a straight face*, Los Angeles Daily Journal, California Law Business (January 10, 2000).

Some order was restored and the chaos in California courts was reduced in November 2004, when the voters enacted Proposition 64, with a near 70% approval vote.⁴ Proposition 64 amended the UCL in important ways that reined in runaway lawsuits by imposing ordinary standing principles on private UCL plaintiffs. Since Proposition 64 became effective, a private (*i.e.*, non-governmental) plaintiff can prosecute a UCL suit only if that plaintiff has suffered actual injury and lost money or property as a result of the defendant's conduct.⁵ Recent cases indicate that the definition of "lost money or property" will provide fodder for pleading-stage litigation battles to determine whether particular plaintiffs can pursue UCL claims.

In addition to imposing the "lost money or property" limitation on UCL standing, Proposition 64 also put an end to dubious representative actions on behalf of the general public. After Proposition 64, the UCL requires that representative ac-

tions meet the requirements of class actions under Code of Civil Procedure Section 382.⁶

Thus, Proposition 64's standing and class action requirements ended *unrestrained* use of the UCL, but Proposition 64 did not end UCL litigation. The UCL remains a fixture of California litigation in many settings, the health industry among them.

Healthcare providers and health plans are intensely regulated by an array of federal and state laws and corresponding administrative entities with varying degrees of rulemaking, oversight, adjudication, and enforcement authority, as well as by judicial decisions. Providers and plans also are directly in the sights of patient-rights groups that monitor perceived violations of these many detailed laws and standards. Any alleged variance from one of these standards can form the basis for a UCL claim, and thus the very complexity of the regulatory scheme makes healthcare business practices particularly likely targets

for UCL suits. In addition, patients in the healthcare system are regarded as vulnerable to practices that may be "unfair," even if they are not "unlawful."

As a result, it is not surprising that virtually every aspect of the healthcare system – including marketing, pricing, contracting, delivery, billing, and reimbursement, to name a few – has been the subject of one or more UCL actions.⁷ Under the UCL, any agency survey finding, any alleged deficiency, any disputed charge, any negative event that a patient or family member allegedly experienced at the hands of a healthcare provider, health plan, or medical group is a potential unlawful, unfair, or fraudulent business practice.

To provide even more fodder, California's tendency to be at the forefront in adopting new laws creates more opportunities for UCL claims. As one example, alleged violations of California's minimum nurse staffing laws, in conjunction with the State's nursing shortage, have generated

⁴ The problem of unchecked UCL litigation – in particular, "shakedown" schemes in which law firms filed dozens (or in some instances, hundreds) of UCL lawsuits accusing small businesses of *de minimis* regulatory violations and then demanding monetary settlements – which led to the passage of Proposition 64, is summarized in a recent California Supreme Court decision, *Angelucci v. Century Supper Club*, 41 Cal. 4th 160, 178 n.10 (2007) (discussing concerns for the "explosion of assertedly unwarranted or unduly burdensome individual lawsuits brought by professional plaintiffs and bounty-hunting attorneys against business establishments").

⁵ Bus. & Prof. Code § 17204.

⁶ Bus. & Prof. Code § 17203. Proposition 64 did not affect UCL actions brought by public prosecutors, who may still pursue actions on behalf of the public and need not meet class action standards. The UCL also provides different remedies, including statutory civil penalties, in cases brought by public prosecutors.

⁷ See, e.g., *Olszewski v. Scripps Health*, 30 Cal. 4th 798 (2003) (alleging that the defendant healthcare provider violated the UCL by asserting liens against the personal injury recoveries of Medi-Cal beneficiary patients to whom defendant had provided emergency medical services); *McCall v. PacifiCare of California, Inc.*, 25 Cal. 4th 412 (2001) (alleging that the defendant violated the UCL by refusing to authorize payment for particular medical services under a Medicare managed care plan); *Congress of California Seniors v. Catholic Healthcare West*, 87 Cal.App.4th 491 (2002) (alleging that defendant violated the UCL by submitting improper cost reports for Medicare and Medi-Cal reimbursement); *Desert Healthcare District v. PacifiCare, FHP, Inc.*, 94 Cal. App. 4th 781 (2001) (alleging that the health plan defendant violated the UCL by transferring excessive financial risk without adequate oversight and thus abusing a capitated payment arrangement); *People v. Duz-Mor Diagnostic Laboratory, Inc.*, 68 Cal. App. 4th 654 (2001) (alleging that the defendant lab violated the UCL through its pricing, billing, and commission policies); *Podolsky v. First Healthcare Corporation*, 50 Cal. App. 4th 632 (1996) (alleging that the defendant nursing home operator's admission agreement and procedures violated the UCL); *Samura v. Kaiser Foundation Health Plan, Inc.*, 17 Cal. App. 4th 1284 (1993) (UCL claims alleging that the defendant health plan violated various provisions of the Knox-Keene Act, Cal. Health & Safety Code § 1340, *et seq.*, and thereby violated the UCL); *Solorzano v. Superior Ct. (Family Health Plan, Inc.)*, 10 Cal. App. 4th 1135 (1992) (alleging that Medicare health plan's methods of soliciting subscribers violated the UCL); *People v. Casa Blanca Convalescent Homes, Inc.*, 159 Cal. App. 3d 509 (1984) (alleging that the nursing home defendant violated the UCL by failing to provide adequate care and facilities to its residents).

dozens of UCL cases alleging that facilities have engaged in illegal understaffing.⁸

UCL jurisprudence is constantly evolving. This article summarizes the major recent developments and trends in UCL law. For the most part, these changes signal a judicial effort to restrict the statute's overuse, consistent with the voter sentiment evidenced by Proposition 64's passage. This is a positive trend for California businesses that are potential UCL defendants, including the health-care providers, health plans, and medical groups that frequently have found themselves targets of plaintiffs' attorneys. The Proposition 64 developments of 2006, as well as other limitations of the previously overbroad UCL, do evidence a decrease in the multitude of UCL suits that have dogged hospitals, nursing homes, medical groups, and health plans for years.

Courts Interpret Proposition 64's Restrictions on UCL Standing.

Although Proposition 64 was passed in late 2004, it was not until 2006 that the California Supreme Court decided whether the UCL amendments applied to cases filed before the voters approved Proposition 64. As 2006 began, the most talked-about UCL issue was whether the Supreme Court would hold that UCL actions pending at the time of Proposition 64's passage were subject to its new standing limitations.

In July 2006, the Supreme Court issued its eagerly anticipated opinion in *Californians for Disability Rights v. Mervyn's*,

LLC ("Mervyn's").⁹ The Court held squarely that Proposition 64 *does* apply to all UCL cases filed before its passage. Thus, to pursue any UCL claim, whenever filed, a private plaintiff must meet specific standing requirements, *i.e.*, the plaintiff must have "suffered injury in fact and ha[ve] lost money or property as a result" of the defendant's alleged conduct.¹⁰

The statute does not define loss of money or property, and recent cases suggest this issue will be litigated in the early stages of UCL lawsuits as defendants challenge plaintiffs' UCL standing. In *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 151 Cal. App. 4th 688 (2007), the court indicated that mere "paper" losses – in that case, diminution in the value of the company's assets and decline in its market capitalization – are sufficient loss of money or property to confer standing under Proposition 64's requirements. In *Daro v. Superior Court*, ___ Cal. App. 4th ___ (June 6, 2007), the court held that tenants facing lawful eviction under the Ellis Act had no standing to sue under the UCL, because the owners' plans to sell the property afterward – which the plaintiff tenants claimed would violate the Subdivision Lands Act – did not constitute a loss of the tenants' money or property.

And in two companion federal district court cases, *Walker v. USAA Casualty Insurance Company*, 474 F. Supp. 2d 1168 (E.D. Cal. 2007), and *Walker v. Geico General Insurance Company*, 2007 WL 499660 (E.D. Cal., February 12, 2007), the court held that the plaintiff auto

body shop owner lacked UCL standing because he did not have a vested property interest in above-market rates he had proposed (in written estimates) to charge the defendant auto insurers for auto repair work. No work had been performed or even awarded at the time of the estimates, and the insurers had negotiated lower prices with the plaintiff's competitors, so they declined to pay his proposed rates. Because the plaintiff's claimed interest was at best contingent, he had lost no money or property within the meaning of the UCL, and he had no standing.

Although the issue of what constitutes UCL-cognizable loss of money or property will continue to be litigated in many cases, the Supreme Court's major decision in *Mervyn's* nevertheless ensured prompt impact of the voter-approved UCL standing reforms embodied in Proposition 64. *Mervyn's* effectively eviscerated many existing lawsuits, even some that previously had gone to final judgment at the trial court level but were pending on appeal.

On the same day that the Court decided *Mervyn's*, it decided a related issue in the companion case of *Branick v. Downey Savings and Loan Association ("Branick")*¹¹: whether a pending UCL case in which the plaintiff was stripped of standing by Proposition 64 could be amended to substitute a new plaintiff with standing, whose claims would then relate back to the initial action for statute of limitations purposes. The Court held that such an amendment could and should be allowed, in the sole discretion of

⁸ See, e.g., *Skilled Healthcare Group v. Superior Court (Humboldt County)*, First District Court of Appeal Docket No. A117971 (writ petition denied June 6, 2007), http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=1&doc_id=677128&doc_no=A117971&search=party&start=1&query_partyLastNameOrOrg=Skilled%20Healthcare; *Foundation Aiding the Elderly v. Covenant Care*, First District Court of Appeal Docket No. A107734 (dismissed by stipulation, January 27, 2005), http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=1&doc_id=677128&doc_no=A117971&search=party&start=1&query_partyLastNameOrOrg=Skilled%20Healthcare; *Kindred Healthcare, Inc. v. Superior Court (Foundation Aiding the Elderly)* (dismissed as moot per consent judgment, March 4, 2005), http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=1&doc_id=59136&doc_no=A107245&search=party&start=1&query_partyLastNameOrOrg=Foundation%20Aiding%20the%20Elderly.

⁹ 39 Cal. 4th 223 (July 24, 2006).

¹⁰ *Id.* at 228 (quoting Bus. & Prof. Code § 17204).

¹¹ 39 Cal. 4th 235 (July 24, 2006).

the trial judge, if the proposed new plaintiff were shown to have Proposition 64 standing. However, the Court was careful to note that the proposed amendment could not state facts that would impose a new or different legal obligation on the defendant.¹²

Branick's liberal approach to allowing plaintiffs to correct their post-Proposition 64 standing deficiencies tempers somewhat the effect of the Court's *Meroy'n's* decision. However, many pre-Proposition 64 UCL claims involved no actual harm at all, to anyone. Such claims cannot be revived under *Branick*.

Courts Impose Hurdles on Plaintiffs' Fraud-Based UCL Claims.

With the closely-watched issue of Proposition 64's application to pending cases effectively put to bed, other issues surged to the forefront of UCL litigation later in 2006. As of this writing, all eyes are on the issue of whether Proposition 64's standing requirements mean that any plaintiff claiming fraudulent activity under the UCL (or false advertising under the related statute, Business & Professions Code Section 17500 *et seq.*) must prove that he or she actually relied to his or her detriment on the defendant's allegedly fraudulent representations – since reliance generally is an essential element of any fraud claim. This issue is teed up before the California Supreme Court, which has granted review of the recent appellate decision, *Pfizer Inc. v. Superior Court (Galfano)*.¹³

The *Pfizer* plaintiffs pled UCL fraud claims based on the defendant's alleged misrepresentations about the dental hygiene benefits of Listerine mouthwash. The appellate court

held that under the post-Proposition 64 UCL, (1) every member of a UCL plaintiff class must separately have suffered injury as a result of the defendant's conduct; and (2) each plaintiff must have relied to his or her detriment on the defendant's representations. In contrast to other courts that had recently considered the issue, the *Pfizer* court rejected the plaintiffs' invocation of the standard applicable in pre-Proposition 64 fraud or false advertising cases, under which a plaintiff needed to allege only that the challenged representations were "likely to deceive" the public. Since no one had to be harmed under the old UCL, it was not necessary to allege that anyone relied on the defendants' representations and was hurt as a result. Now that actual harm is a prerequisite to suing under the UCL, it would appear that mere likelihood of deception is no longer a sufficient allegation.

If the California Supreme Court affirms *Pfizer* and holds that reliance is a necessary element of a post-Proposition 64 UCL fraud or false advertising claim, this will pose significant pleading and proof hurdles for UCL fraud and false advertising plaintiffs. In that event, healthcare providers, health plans, and medical groups may have cause to rejoice. Many of them have been targeted with UCL and/or false advertising claims, alleging that various provider reimbursement and survey forms, and other operational documents, constitute public representations of compliance with applicable laws (such as nurse staffing laws or quality-of-care regulations). The distinct possibility that no private UCL plaintiff would have relied upon such documents did not stop or otherwise deter the filing of these actions. Decades of unchecked UCL litigation

may be the source of such litigation bravado. The Supreme Court's forthcoming decision in *Pfizer* will bear directly upon the pursuit of such claims, whether pending or new.

The California Supreme Court declined the opportunity to consider another aspect of UCL fraud claims, when in February 2007 it denied a petition for review of the decision in *Daugherty v. American Honda Motor Co.*¹⁴ The *Daugherty* court held that, if a defendant had no affirmative duty to disclose information, then there could be no UCL violation based on an alleged failure to disclose. The plaintiff had filed a class action lawsuit alleging that a car manufacturer breached warranties and violated consumer protection laws by not disclosing an engine defect in certain Honda models, which over time might result in engine malfunctions. In affirming the dismissal of all claims, including a UCL fraud claim, the court rejected the argument that the non-disclosure was "likely to deceive," since there was no affirmative duty to disclose the defect in the first place.

The *Daugherty* court noted the *Pfizer* court's holding that "likely to deceive" was no longer the standard, and also that *Pfizer* is on review before the California Supreme Court. Further, the consumers in *Daugherty* had no expectation or assumption about the continued functioning of the engine after the warranty had expired, so non-disclosure of the defect was not even "likely to deceive."

These decisions indicate that the prevailing trend in the appellate courts, at least for now, appears to be toward narrowing UCL plaintiffs' pursuit of fraud-based claims.

¹² *Id.* at 243.

¹³ 45 Cal. Rptr. 3d 840 (July 11, 2006), *review granted*, 51 Cal. Rptr. 3d 707 (Nov. 1, 2006), No. S145775.

¹⁴ 144 Cal. App. 4th 824 (Nov. 8, 2006), *review denied* (Feb. 7, 2007).

The Courts Are Weighing Proposition 64's Effects on Class Actions.

The implications of a reliance requirement for UCL fraud and false advertising claims go beyond the effect of such a requirement on proof of individual claims. The California Supreme Court also has granted review in *In re Tobacco II Cases*,¹⁵ where an appellate court affirmed the decertification of a UCL class that had been certified pre-Proposition 64. The case involved a group of related fraud actions. The appellate court held that because each individual class member must prove reliance and causation based on the defendants' allegedly false and misleading statements about the health risks of smoking, individual issues predominated, and therefore class treatment was inappropriate. This case, too, could be particularly significant for healthcare providers, health plans, and medical groups, because whether an individual plaintiff suffered harm in a healthcare case often will depend upon that plaintiff's unique combination of conditions, symptoms, and treatments.

That principle was articulated and illustrated in *Akkerman v. Mecta Corporation*, ___ Cal. App. 4th ___ (June 27, 2007), where the appellate court affirmed the trial court's denial of the plaintiff's motion for UCL class certification in a false advertising action against the manufacturer of an electro-convulsive therapy machine. The plaintiff claimed he had suffered permanent memory loss following treatment with the defendant's machine, and sought to certify a class of "all members of the public who have received shock treatment from Mecta devices after September of 1997." He also sought to recover restitution for

the costs of treatment paid by class members, insurers, and government agencies. The appellate court agreed with the trial court that the plaintiff had failed to define a class adequately. Not all patients treated with Mecta equipment necessarily were deceived or harmed; further, because the proposed class members did not pay Mecta for their treatments (rather, they or their insurers paid their providers), there was nothing for Mecta to "restore" to them.

The plaintiff in *Akkerman* also failed to establish the necessary "community of interest" element of "typicality." For a host of reasons enumerated by the court of appeal, individual issues would predominate over common ones: for example, (1) the cost of the therapy varies for each patient; (2) the reasonableness and necessity of treatment could vary for each case and would require expert testimony; (3) evidence from non-party payers would be essential to determining restitution, adding burden and complexity; (4) each class member would need to prove reliance on Mecta's allegedly deceptive materials and causation, individually; and (5) each patient had a doctor with an independent duty to explain the risks of the procedure, thus requiring a determination of what each patient was told and how he or she reacted. The *Akkerman* decision should help healthcare provider and payer defendants in UCL cases explain why class treatment is virtually never appropriate in cases involving medical treatment.

Courts May Abstain From Adjudicating UCL Claims That Require Interpretation or Supervision of Intricate Regulatory Schemes.

Healthcare providers, health plans, and medical groups often are targeted in UCL actions based on asserted regulatory violations. Providers and plans are easy marks for such actions, because they are subject to multi-layered, multi-agency, statutory and regulatory schemes that plaintiffs' lawyers creatively try to use as the basis for claims of unlawful, unfair, or even fraudulent business practices. However, a number of courts have rejected UCL claims based on alleged regulatory violations – involving, for example, Medicare, Medi-Cal, or California Health & Safety Code requirements for health facilities and plans – because enforcement in those areas is best left entrusted to the agencies charged with promulgating and enforcing the regulations, and is not appropriately the subject of varying judicial interpretations of what is "unlawful" or "unfair."

Several cases over the past few years illustrate courts' reluctance to adjudicate UCL claims in the complex healthcare arena. For example, in *Congress of California Seniors v. Catholic Healthcare West*,¹⁶ the court affirmed the trial court's dismissal on abstention grounds of UCL claims alleging the defendant's improper submission of Medi-Cal cost reports. According to the appellate opinion, no court should "venture into such a minefield."¹⁷ Similarly, in *Desert Healthcare District v. PacifiCare, FHP, Inc.*,¹⁸ the court held that it was inappropriate to adjudicate a UCL claim alleging unfair healthcare capitation practices. "The instant case is a perfect example of when a court of equity should abstain Such an inquiry would pull the court deep into the thicket of the health care finance industry, an economic arena that courts are ill-equipped to

¹⁵ 46 Cal. Rptr. 3d 235 (Aug. 15, 2006), review granted, 51 Cal. Rptr. 3d 707 (Nov. 1, 2006), No. S147345. Further action in the *Pfizer* case, *supra*, has been deferred pending disposition of a related issue in the *In re Tobacco II Cases*.

¹⁶ 87 Cal. App. 4th 491 (2002).

¹⁷ *Id.* at 509.

¹⁸ 94 Cal. App. 4th 781 (2001).

meddle in.”¹⁹ Any healthcare business faced with a UCL suit should consider arguing for judicial abstention at the pleading stage. In *California Medical Association, Inc. v. Aetna U.S. Healthcare of California, Inc.*, the court similarly observed that courts should not use the UCL to review the fairness of contracts in the context of plan/intermediary contracts contemplated by the Knox-Keene Act.²⁰

The abstention doctrine has been applied broadly in a variety of other regulated industries, and those decisions further bolster the legal authority upon which healthcare entities may rely in arguing that a particular trial court should abstain in a particular case. In a 2006 case in a non-healthcare context, *Shamsian v. Department of Conservation*, the court affirmed the trial court’s dismissal of a UCL claim based on judicial abstention.²¹ The UCL plaintiff sought to charge beer companies with violations of a section of the Public Resources Code pertaining to recycling opportunities, which were the subject of regulation by the Department of Conservation.

The *Shamsian* court held it was entirely appropriate for the trial court to abstain and decline the plaintiff’s request to adjudicate a UCL claim in that context. According to the court:

[The] complex statutory arrangement of requirements and incentives involving participants in the beverage container recycling scheme . . . [should] be administered and enforced by the department consistent with the Legislature’s goals. For the court at this point to issue restitution and dis-

gorgement orders against the corporate defendants would interfere with the department’s administration of the act and regulation of beverage container recycling and potentially risk throwing the entire complex economic arrangement out of balance.²²

Although *Shamsian* involves a different industry, it reaffirms the viability of the abstention principles that apply at least equally to the multi-layered regulatory schemes governing the healthcare industry.

In fact, UCL abstention in the healthcare context was the central issue in *Alvarado v. Selma Convalescent Hospital*, one of dozens of cases filed statewide that have attempted to use the UCL to enforce minimum nurse staffing standards, which the Department of Health Services was required by the Legislature to promulgate as regulations, but failed to do.²³ While many of these nurse staffing cases have survived demurrers seeking dismissal on abstention and other grounds, the trial court in *Alvarado* acknowledged that DHS is uniquely qualified to examine, enforce, and monitor skilled nursing facilities’ compliance with nurse staffing standards, and that California trial courts, in contrast, lack the expertise and the monitoring capability required to analyze and permanently enforce nurse staffing standards (which the court would have to do if it granted permanent injunctive relief). The Court of Appeal in *Alvarado* affirmed the trial court’s application of equitable abstention principles to the nurse staffing issue.²⁴

We affirm the trial court order sustaining a demurrer without leave to

amend. The trial court did not abuse its discretion by abstaining from adjudicating this lawsuit. Adjudicating the alleged controversy would have required the trial court to become involved in complex health care matters concerning the staffing of skilled nursing and intermediate care facilities and assume regulatory functions of the Department of Health Services (DHS). In addition, granting and enforcing the requested relief would place an unnecessary burden on the trial court given the power of DHS to monitor and enforce compliance with [the nurse staffing statute].²⁵

Thus, the abstention doctrine, like the UCL itself, remains alive and well – indeed, the Second District even revitalized some abstention decisions that had not been cited in years – and healthcare providers can argue that application of the doctrine is particularly appropriate in the healthcare context.

Courts Continue Their Efforts to Define What Is “Unfair” Conduct in Consumer Cases.

The courts’ definition of what is “unfair” is another evolving UCL litigation issue. Thus far, UCL “unfairness” depends on who the parties are. Consumer plaintiffs have (with some exception) had an easier time stating UCL unfairness claims than have business plaintiffs that sue their competitors. In *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Company*, the California Supreme Court articulated a standard for defining unfair conduct alleged by a defendant’s business competitor.²⁶ The Court held that such “unfair” conduct must be “teth-

¹⁹ *Id.* at 795-96.

²⁰ 94 Cal. App. 4th 151, 169-70 (2001).

²¹ 136 Cal. App. 4th 621 (Feb. 7, 2006), *review denied* (June 14, 2006).

²² *Id.* at 642.

²³ No. B184533, argued and submitted before the Second District, Division 3 on February 15, 2007.

²⁴ The authors of this article are counsel for the skilled nursing home defendants in *Alvarado*.

²⁵ *Alvarado v. Selma Convalescent Hosp.*, *supra*, 2007 WL 2193676 at *1.

²⁶ 20 Cal. 4th 163 (1999).

ered to some legislatively declared policy or proof of some actual or threatened impact on competition.”²⁷ Therefore, the *Cel-Tech* Court adopted the following test:

When a plaintiff who claims to have suffered injury from a direct competitor’s ‘unfair’ act or practice invokes [the UCL], the word ‘unfair’ in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.²⁸

The *Cel-Tech* opinion noted that its discussion was limited to the competitor context and did not relate to consumer cases.²⁹

Thus, in consumer UCL cases, the definition of unfair is unsettled. Several years ago, in *Olszewski v. Scripps Health, supra*, a healthcare case, the Court confirmed that the “safe harbor” principle it articulated in *Cel-Tech* does apply in consumer cases: that is, a defendant’s conduct cannot be found “unfair” under the UCL if it was expressly permitted by the Legislature at the time it occurred.³⁰ Virtually all other aspects of what con-

stitutes unfairness to consumers remain in doubt. Courts both before and after *Cel-Tech* have grappled with how to formulate a definition of unfairness that fits the consumer context, with conflicting results – making this issue ripe for eventual Supreme Court review.

Last year, one California appellate court in *Bardin v. DaimlerChrysler Corp.*³¹ considered the “two lines of appellate opinions”: one that defined conduct unfair to consumers as that which is “immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers and requires the court to weigh the gravity of the harm to the alleged victim”;³² and the other, a variant of the *Cel-Tech* standard, which required the claim to be “tethered to specific constitutional, statutory, or regulatory provisions.”³³ While the *Bardin* court determined that the conduct alleged in that case – an automobile manufacturer’s alleged failure to disclose the composition and failure rate of exhaust manifolds – was not “unfair” under either standard (and thus the court had no need to pick one or the other), the court “respectfully suggest[ed] that our Legislature and Supreme Court clarify the definition of ‘unfair’ in consumer actions under the UCL.”³⁴

Later in the year, in *Camacho v. Automobile Club of Southern California*, another court attempted to halt this “widening divide” in the appellate interpretation of what is “unfair” in UCL consumer cases. The *Camacho* court solicited additional briefing on the question, and decided that the appropriate standard to apply in consumer cases was derived from the factors that define unfair conduct for the purposes of Section 5 of the Federal Trade Commission Act: “(1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided.”³⁵

In reaching this conclusion, the *Camacho* court opined that the California Supreme Court in *Cel-Tech* had overruled other definitions used in prior appellate decisions, even though the Supreme Court did not extend its own articulated definition to the consumer context. Thus, the *Camacho* court rejected the argument that the *Cel-Tech* standard applies in consumer cases as well as competitor cases, because “‘tethering’ a finding of unfairness to ‘specific constitutional, statutory or regulatory provisions’

²⁷ *Id.* at 186.

²⁸ *Id.* at 187.

²⁹ *Id.* at 187 n. 12 (“Nothing we say relates to actions by consumers or by competitors alleging other kinds of violations of the unfair competition law such as ‘fraudulent’ or ‘unlawful’ business practices or ‘unfair, deceptive, untrue or misleading advertising.’”).

³⁰ *Olszewski*, 30 Cal. 4th at 827-829.

³¹ 136 Cal. App. 4th 1255 (Feb. 23, 2006).

³² *Id.* at 1260.

³³ *Id.* at 1261.

³⁴ *Id.* at 1260-61.

³⁵ 142 Cal. App. 4th 1394, 1403 (Sept. 14, 2006). *See also* *People v. Casa Blanca, supra*, 159 Cal. App. 3d at 530 (noting that the factors considered by the Federal Trade Commission in determining whether an otherwise lawful practice is unfair include: “(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise . . . ; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)”) (quoting *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972)). *Samura v. Kaiser, supra*, 17 Cal. App. 4th at 1299, n.5 (“the term [i.e., “unfairness”] does not give the courts a general license to review the fairness of contracts but rather has been used to enjoin deceptive or sharp practices”).

does not comport with the broad scope of section 17200.”³⁶

More specifically, the notion of applying the competitor test in consumer cases was unacceptable to the *Camacho* court because “in the context of consumer cases, ‘tethering’ to positive law undercuts the ability of the courts to deal with new situations, and new abuses.”³⁷ Further, in consumer cases, the range of unfair conduct “is so varied that it is not possible to achieve a consensus which of these laws and regulations might apply to define an unfair practice.”³⁸

This judicial effort to define what a plaintiff must prove to support a UCL claim based on “unfairness” is welcome, as “unfairness” is the most nebulous and malleable of the UCL prongs – and subject to the most abuse. In an industry as complex and beleaguered as healthcare, substantial risks exist that consumer plaintiffs will attempt to use the “unfairness” prong of the UCL to mount attacks in court on prevalent healthcare financial arrangements such as capitation, or established operational practices such as issuance of “charge masters.”

Courts Confront the Preemption of State Law UCL Claims by Federal Law.

Another issue that figured prominently in 2006 UCL jurisprudence was preemption of state UCL claims by federal laws. *In re Farm Raised Salmon Cases*³⁹ and *WFS Financial, Inc. v. Superior Court (De La Cruz)*⁴⁰ address related issues, and the Supreme Court granted review in both cases, although the *WFS* matter subsequently was settled.⁴¹ The appellate court’s decision in *Farm Raised Salmon* held that a UCL claim is preempted where it seeks to enforce a violation of a federal law that itself is enforceable only by the government.

A different appellate court held in *WFS Financial* that a UCL claim is preempted where it seeks to enforce a violation of a state law that is preempted by federal law. Thus, in their appellate postures, both cases restrained use of the UCL in situations implicating federal law.

The plaintiffs in *Farm Raised Salmon* sued grocery stores based on their alleged sales of artificially colored fish without disclosure of this fact, in violation of the Federal Food, Drug, and Cosmetic Act (“FDCA”). The appellate court affirmed the trial court’s decision

that the FDCA required any enforcement action to be brought by and in the name of the United States, and thus impliedly preempted a private UCL claim based on alleged FDCA violations. The court observed that whether the plaintiff sought to enforce the federal law directly or indirectly was not the relevant question. Rather, the key issue was “whether the defendants’ conduct upon which the plaintiffs’ claims rest involves violations of the [FDCA] that the plaintiffs will necessarily have to prove in order to recover under their state law claims.”⁴²

In *WFS Financial*, the UCL plaintiff alleged that a federal savings bank gave insufficient notice of intent to dispose of vehicles that it repossessed under auto loans assigned to the bank. The plaintiff claimed this violated a state statute, the Rees-Levering Automobile Sales Finance Act.⁴³ However, the state law was itself preempted by the federal Home Owners’ Loan Act and related regulations,⁴⁴ which made “abundantly manifest and clear the congressional intent to expressly preempt state law in the area of lending regulation of federal savings associations.” The state statute “is very much directed at the lending operations of companies providing automobile financing, including *WFS*, specifically

³⁶ *Camacho*, 142 Cal. App. 4th at 1402.

³⁷ *Id.* at 1403.

³⁸ *Id.*

³⁹ 48 Cal. Rptr. 3d 449 (Aug. 31, 2006), *review granted*, 53 Cal. Rptr. 3d 43 (Dec. 13, 2006), No. S147171.

⁴⁰ 44 Cal. Rptr. 3d 561 (June 15, 2006), *review granted*, 49 Cal. Rptr. 3d 656 (Sept. 20, 2006), No. S145304.

⁴¹ By order dated January 3, 2007, following the parties’ settlement, the Supreme Court transferred the matter back to the Court of Appeal to dismiss the writ it had issued, so that the superior court then could consider the fairness of the class settlement proposal. 53 Cal. Rptr. 3d 801 (Jan. 3, 2007).

⁴² 48 Cal. Rptr. 3d at 456.

⁴³ Civil Code § 2983.2.

⁴⁴ 12 U.S.C. § 1461 *et seq.*

conditioning their exercise of their security rights.” Because the state statute itself was preempted by federal law, the UCL could not be used to address the alleged violation of the statute.⁴⁵

In contrast, two other recent decisions declined to find the UCL preempted by federal banking law. The *Smith v. Wells Fargo Bank, N.A.*⁴⁶ court held that a UCL claim based on an alleged violation of federal banking disclosure regulations was not preempted by federal banking law. In *Smith*, the federal regulation at issue specifically noted that it did not preempt state claims if the claims did not impose limits on the federal disclosure requirements. In this case, the UCL claim merely sought to enforce the federal law, not to limit it.

Similarly, *McKell v. Washington Mutual, Inc.*⁴⁷ held that a UCL claim was not preempted where it sought to enforce federal law and general state-law business duties (e.g., a bank’s duty not to misrepresent its services). There, the plaintiffs challenged a bank’s practice of overcharging home mortgagors for underwriting services, without disclosing the practice, in violation of federal banking law. The court held that the UCL claim was not preempted: “[P]laintiffs are not attempting to employ the UCL to enforce a state law purporting to regulate the lending activities of a federal savings association Rather, they are using it to enforce federal law governing the operation of federal savings associations.”⁴⁸

In the healthcare context, however, in at least one case, a similar argument – that the plaintiffs were simply attempting to enforce federal law – was not sufficient to withstand a demurrer


on preemption grounds, and the court held the UCL claim was preempted. In the 2002 *Congress of California Seniors v. Catholic Healthcare West* decision, *supra*, both the trial court and the appellate court recognized that allowing the plaintiffs to proceed with their UCL claims – which challenged the defendant hospital system’s Medicare cost reports – would require the court to regulate in a “pervasive and complex” field that Congress intended to occupy fully with federal law.⁴⁹ After examining the Medicare reimbursement scheme, the court concluded that “no state court ought to venture into such a minefield.”⁵⁰ Unlike garden-variety deception claims against institutions that just happen to be federally regulated, UCL claims about Medicare cost reports and reimbursement could not possibly be adjudicated by a state court without interfering with the all-encompassing federal regulatory scheme.

A very recent case appears to depart from prior decisions regarding the UCL’s application to claims pertaining to federal securities laws, and thus illustrates that even supposedly settled areas of UCL jurisprudence are flexible. In *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 151 Cal. App. 4th 688 (2007), the court rejected the argument that the UCL did not reach “securities transactions” in a case alleging that the defendants’ unfair business practices led to damage to the value of plaintiff’s stock. Instead, the court recognized a distinction for UCL preemption purposes between acts alleged to have deceived people with regard to their transactions in securities, and acts alleged to have intentionally affected a plaintiff’s stock price. The latter, the court held, was the proper subject of a UCL action, notwithstand-

ing that the former category of acts has been held in other cases to be outside the reach of the UCL.

The differing outcomes in these UCL preemption cases reflect the continuing struggle to coordinate federal and state laws, and to define the appropriate scope of the UCL.

CONCLUSION

The UCL remains a work in progress, and every year brings at least a handful of significant decisions that refine its application, scope, and remedies. Recent trends have constricted the statute in ways that should provide meaningful respite to California’s healthcare industry, which has been beleaguered by such claims (as well as a variety of other daunting challenges). Nevertheless, the UCL remains a powerful tool for plaintiffs, and requires defendants to mount aggressive defenses. 

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⁴⁵ 44 Cal. Rptr. 3d at 569.

⁴⁶ 135 Cal. App. 4th 1463 (Dec. 29, 2005), modified on denial of rehearing (Jan. 26, 2006), review denied (April 26, 2006).

⁴⁷ 142 Cal. App. 4th 1457 (Sept. 18, 2006).

⁴⁸ *Id.* at 1485.

⁴⁹ 87 Cal. App. 4th at 509.

⁵⁰ *Id.*