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## CALIFORNIA UNFAIR COMPETITION LAW UNDER SECTION 17200 AFTER PROPOSITION 64

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## OVERVIEW



### Section 17200 California's Unfair Competition Law

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- Very broad consumer protection statute
- Originally enacted in 1933 as one of many “Little FTC Acts” enacted in many states
- Broadened in 1976 (by adding restitution remedy)
- Reformed in 2004 by passage of Prop 64



## Section 17200 California's Unfair Competition Law

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- Prohibits any **unlawful, unfair or fraudulent** business act or practice and unfair, deceptive, untrue or misleading advertising
- Though UCL has broad scope, it only has limited remedies
  - Civil penalties (public prosecutor only)
  - Injunctive relief
  - Restitution



## Remedies Not Available Under UCL

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- Damages
- Punitive Damages
- Attorneys fees (but fees may be available under other statutes such as CCP § 1021.5)



## What Made 17200 Different From Other Business Torts (Before Prop 64)

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- Plaintiff could bring an action on behalf of a group of persons without complying with the class action requirements
- Plaintiff could bring an action without having been damaged (no injury in fact requirement, no requirement of damages)
- Very broad, and vaguely defined, scope of prohibited conduct (“unlawful, unfair or fraudulent”)



## Which of these unique characteristics of the UCL survives Prop 64

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**NO LONGER THE LAW !!!**

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### OSTENSIBLY, STILL THE LAW (more on this later)

- Very broad, and vaguely defined, scope of prohibited conduct (“unlawful, unfair or fraudulent”)



## After Prop 64, Class Action Rules Apply

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- New language added to Section 17203:

“Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 [requiring economic injury] and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought [by public prosecutors].”



## After Prop 64, Class Action Rules Apply

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- Applicability of class action requirements will now require that, in all representative UCL cases:
  - Representative plaintiffs adequately represent the interests of the class
  - Predominant common questions of law or fact
  - Notice to all affected class members
  - Court approval of all settlements



## After Prop 64, Economic injury required

- Amended language of 17204:

“Actions for any relief pursuant to this chapter shall be prosecuted . . . by [a public prosecutor] or by any person ~~acting for the interests of itself, its members or the general public~~ who has suffered injury in fact and has lost money or property *as a result of* such unfair competition.”



## After Prop 64, Economic injury required

- Statutory amendment has 3 separate components
  - Injury in fact
    - Article III standing
  - Lost money or property
    - *i.e.*, economic injury
  - *As a result of* such unfair competition
    - Causation requirement; possible unforeseen consequences to scope of substantive liability



## Prop 64 Applies To Already Pending Cases

- Proposition 64 was passed on November 2, 2004
- For 2 years, the “hot issue” in Prop 64 litigation was whether the statutory amendments was to be applied to cases already pending as of the effective date
- Within 4 months of Prop 64’s passage, there were 5 published Court of Appeal decisions, at least 2 unpublished Court of Appeal decisions and 42 trial court orders on the issue of retroactivity  
(Source: <http://www.uclpractitioner.com>)



## Prop 64 Applies To Already Pending Cases

- *Californians for Disability Rights v. Mervyn’s*, 39 Cal.4th 223 (July 24, 2006)
  - If a law changes legal consequences of past conduct by imposing new or different liabilities, the law’s application would be “retroactive”
  - Here, to apply Prop 64’s standing provisions to pending cases would not be “retroactive” because “the measure left entirely unchanged the substantive rules governing business and competitive conduct”
  - Nothing a business might lawfully do before Prop 64 is unlawful now, and nothing earlier forbidden is now permitted





## Prop 64 Applies To Already Pending Cases

- *Branick v. Downey Savings & Loan Assn*,  
39 Cal.4th 235 (July 24, 2006)
  - There is nothing inherent in Prop 64 that would prevent application of ordinary rules to allow a new plaintiff with standing to be substituted into case
  - Substitution of plaintiff should not be allowed if it would cause defendant to answer a wholly different legal liability or obligation from that originally stated



# LIABILITY



## The Three Prongs For UCL Liability

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Section 17200 proscribes acts that are:

- Unlawful
- Unfair
- Fraudulent

The statute is written in the disjunctive; only one of these 3 prongs need be proven.

*Cel-Tech Communications v. Los Angeles Cellular Telephone*, 20 Cal.4th 163, 180 (1999)



## The “Unlawful” Prong

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- Anything forbidden by law
- Borrows violations of other laws, including state, federal, local, regulatory, civil, criminal, ethical canons
- Even if there is no private right of action (*Stop Youth Addiction* case)



## The “Unfair” Prong (competitor cases)

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- “[C]onduct 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.”
- “[F]inding of unfairness to competitors under section 17200 [must] be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition”

*Cel-Tech Communications v. Los Angeles Cellular Telephone*,  
20 Cal.4th 163 (1999)



## The “Unfair” Prong (consumer cases)

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- Intentionally broad
- No definitive definition in consumer cases by California Supreme Court; *Cel-Tech* expressly left open questions of whether its definition of “unfair” should be applied in consumer cases
- Can be anything that offends an established public policy or is immoral, unethical or substantially injurious to consumers



## The “Unfair” Prong (consumer cases)

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One example of “unfair” used in a consumer case is modeled after Section 5 of the FTC Act :

- the consumer injury must be substantial;
- injury must not be outweighed by any countervailing benefits to consumers or competition; and
- must be an injury that consumers themselves could not reasonably have avoided

*Camacho v. Auto Club of S. Calif*, 142 Cal.App.4th 1394 (2006)



## The “Fraudulent” Prong (before Prop 64)

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- Much broader than common law fraud
- All you needed to show was that members of the public were “likely to be deceived”
- Did not require:
  - Actual deception
  - Reliance
  - Damages
- Prop 64 has put much of this into doubt  
(more on this later)



## Section 17500 – False Advertising

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A sister statute, Section 17500, makes it a violation of the Unfair Competition Law to make any statement in connection with the sale of goods or services that are “unfair, deceptive, untrue or misleading advertising”



## Section 17500 – False Advertising

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- Plaintiff must show statements in advertising are untrue or misleading, and defendants knew or should have known that the statements were untrue or misleading
- Section 17500 prohibits both negligent and intentional dissemination of misleading advertising”



# REMEDIES



## Civil Penalties

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- May only be sought by public prosecutors (Attorney General, DA's, City Attorneys)
- Amount of civil penalties limited to \$2,500 per violation
- Can only be one "violation" per "victim"
- Can be as many people as who have read the advertisement (*People v. Superior Court (Olson)*) or, for targeted solicitations, the number sent (*People v. Morse*)



## Remedies Available to Private Litigants Under the UCL

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Section 17203 provides that any person who engages, has engaged, or proposes to engage in unfair competition may:

- “be enjoined in any court of competent jurisdiction”
- “The court may make such orders . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.”



## Remedies Available to Private Litigants Under the UCL

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Similarly, Section 17535 authorizes courts to “make such orders or judgments . . . which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice in this chapter declared to be unlawful.”





## Restitution is not Damages

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Courts will not award a claim for damages that is disguised as a claim for restitution



## What is Restitution?

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An order for restitution is an order “compelling a UCL defendant to **return money** obtained through an unfair business practice to those persons in interest **from whom the property was taken**, that is, to persons who had an ownership interest in the property or those claiming through that person.”

*Kraus v. Trinity Management Services*,  
23 Cal.4th 116, 126-127 (2000)



## Restitution / Disgorgement

- Until 2003, there had been some confusion in the case law with respect to the remedy of restitution and disgorgement under the UCL
- The big question has been whether **nonrestitutionary disgorgement** of profits is available to plaintiffs under the UCL
- The answer appears to be “no”



## Korea Supply (Cal.Sup.Ct. 2003)

- Disgorgement of profits that is not restitutionary in nature is not an available remedy in an individual action under the UCL
- an individual may recover profits unfairly obtained **to the extent** that these profits represent monies given to the defendant or benefits in which plaintiff has an **ownership interest**

*Korea Supply Co. v. Lockheed Martin Corp.*,  
29 Cal.4th 1134, 1149 (2003)



## Restitution comes in different flavors

- **“Money Taken” Restitution** (requires defendants to return money or property they acquired from plaintiffs)
- **“Vested Interest” Restitution** (allows plaintiffs to recover money or property, like unpaid wages, in which they have a vested interest”)
- **Restitutionary Disgorgement of Profits** (plaintiffs arguably may have an ownership interest in any profits defendant may have gained through interest or earning on the plaintiffs’ money)

Thank you to Kimberly Kralowec for this analytic framework. *See, Kralowec, Three Evolving Facets of UCL Restitution* (Forum, Consumer Attorneys of Calif., Nov. 2007)



## How Much Restitution Do You Get?

- Goal of UCL is to make victims whole by restoring money or property acquired from them through acts of unfair competition (*Korea Supply*)
- Amount of restitution is largely within court’s discretion
- May range from “gross revenues” to “net profits”



## How Much Restitution Do You Get?

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- *Park v. Cytodyne Technologies*, San Diego County Superior Court, 2003 WL 21283814 (2003) (confidential settlement after trial; defendant filed bankruptcy)
  - \$12.5 million restitution order arising out of false advertising for dietary supplement
  - Court ordered restitution of gross revenues, less only the cost of goods sold
  - Did not allow reduction for \$5 million cost of running the advertising, because to allow such a deduction for “false advertising” would be inequitable



## POST-PROPOSITION 64 ISSUES BEING DEBATED IN THE COURTS



### Injury in Fact

- Definition: pre and post Prop. 64 definition the same  
“an invasion of a legally protected interest that is  
‘(a) concrete and particularized, and (b) actual or  
imminent, not conjectural or hypothetical.’”  
*Associated Builders & Contractors v. San Francisco  
Airports Com.*, 21 Cal.4th 352, 362 (1999);  
*Buckland v. Threshold Enterprises, Ltd.*,  
155 Cal.App.4th 798, 814 (2007)



## Injury in Fact

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- *Schulz v. Neovi Data Corp.*,  
152 Cal.App.4th 86 (2007):  

“Plaintiff should be entitled to show that he or she has suffered injury in fact and a loss of money or property, or should be given the opportunity to amend to show it, if possible.”



## Injury in Fact – May Now Need Reliance

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Class Plaintiff May Have to Show an  
Element of Reliance to Demonstrate  
Standing Under Section 17204

*O'Brien v. Camisasca Automotive Manufacturing, Inc.*  
161 Cal.App.4th 388, 400 (2008)

*Laster v. T-Mobile United States, Inc.*,  
407 F. Supp.2d 1181 (S.D.Cal. 2005)



## UCL Standing Found

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- *Aron v. U-Haul Co. of California*,  
143 Cal.App.4th 796, 802-803 (2006)
- *Monarch Plumbing Co. v. Ranger Ins. Co.*,  
2006 U.S. Dist. Lexis 68850 (E.D. Cal., 2006)
- *Witriol v. LexisNexis Group*,  
2006 U.S. Dist. Lexis 2667 (N.D. Cal. 2006)



## UCL Standing Found (continued)

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- *Southern Cal. Housing v. Los Feliz Towers Homeow.*  
426 F. Supp. 2d 1061, 1069 (C.D. Cal. 2005)
- *Huntingdon Life Sciences, Inc. v. Stop Huntingdon  
Animal Cruelty USA, Inc.*,  
129 Cal.App.4th 1228, 1240, 1262 (2005)



## No UCL Standing Found

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- *Buckland v. Threshold Enterprises, Ltd.*,  
155 Cal.App.4th 798 (2007)
- *Hall v. Time Inc.*,  
158 Cal.App.4th 847, 853 (2008)
- *Cattie v. Wal-Mart Stores, Inc.*,  
504 F.Supp.2d 939, 945 (S.D. Cal. 2007)



## Do Class Members Have To Have Standing/Must They Have Relied?

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- *In re Tobacco Cases II*,  
142 Cal.App.4th 891 (2006), review granted,  
depublished 51 Cal.Rptr.3d 707, 146 P.3d 1250  
(2006)
- *Pfizer Inc. v. Superior Court*,  
141 Cal.App.4th 290 (2006), review granted,  
depublished 2006 Cal. LEXIS 13327  
(Nov. 1, 2006)





## Do Class Members Have To Have Standing/Must They Have Relied?

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- *McAdams v. Monier, Inc.*,  
151 Cal.App.4th 667 (2007), review granted,  
depublished 2007 Cal. LEXIS 10072  
(Sept. 19, 2007)
- *Anunziato v. eMachines, Inc.*,  
402 F.Supp.2d 1133 (C.D. Cal. 2005)
- *Gonzalez v. P&G Co.*,  
247 F.R.D. 616 (S.D. Cal. 2007)



## Can A Plaintiff Assign Its Right to Serve As A Class Representative?

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- *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*,  
148 Cal.App.4th 39 (2007), review granted,  
161 P.3d 1 (2007)



## SPEAKER BIOGRAPHIES

**Larry Steinberg** is a shareholder of Buchalter Nemer and is a member of the firm's Litigation Practice Group. His complex business litigation practice includes, among others, representation of clients in the entertainment industry, private equity and venture capital firms, advertising agencies and advertisers, real estate developers, and industrial manufacturing and distribution companies. Mr. Steinberg has successfully litigated matters involving unfair competition, intellectual property rights, false advertising, agreements for the purchase and sale of businesses, theft of trade secrets, the California Talent Agencies Act and the right of publicity. Mr. Steinberg has handled numerous class actions involving California's Unfair Competition Law, Section 17200, has written and lectured widely in this area, and has served as an expert witness and consultant. He is active in bar related and civic organizations, currently serves as an officer of the Los Angeles Copyright Society, and has served as president of Public Counsel, the largest *pro bono* public interest firm in the country. Mr. Steinberg graduated *magna cum laude* from Yale College, and earned his law degree at Harvard Law School.

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