

Step toe

California's Unfair Competition Law and Consumers Legal Remedies Act **2023 Annual Overview**

MARCH 2023



A NEW CHAPTER

We are pleased to have recently joined Steptoe & Johnson LLP, allowing us to expand our representation of companies in the full range of compliance, regulatory and litigation matters, while still maintaining our focus on financial services. We and our new Steptoe colleagues have achieved prominence in the defense and settlement of the class actions routinely brought against consumer-facing companies, including financial services companies. Over the years, our litigators have defended and settled, including through innovative settlement structures, hundreds of actions addressing a wide range of class action-related issues. We have argued multiple times to the California Supreme Court on issues of critical concern in connection with the defense of class actions and routinely appear before federal and state appellate courts around the country. In 2023, we already have achieved significant successes before the Ninth and Eleventh Circuits and well as the California Courts of Appeal.

We continue to represent a wide range of financial services clients including, among others, commercial and consumer banks, residential lenders, automobile finance companies, credit card issuers, payment processors, investment banks, e-commerce companies, telecommunications companies and insurance companies. We continue to litigate all aspects of the financial services business, including matters regarding lending and servicing, retail banking, unfair practices, insolvency and federal and state regulatory compliance. Our Steptoe colleagues enhance our depth as to these clients and subject matters.

We also have extensive experience in representing financial institutions, as well as their officers, directors, and employees, in administrative and judicial enforcement actions brought by the various state and federal regulators, including state attorneys general, the Federal Trade Commission, the Department of Justice, the Consumer Financial Protection Bureau, the Federal Reserve Board, the Financial Industry Regulatory Authority, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the U.S. Securities and Exchange Commission. Drawing on our unique resources, we also have played a central role in numerous multistate investigations.

Our depth and breadth of experience offer specialized knowledge regarding, and sensitivity to, the legal and business issues faced by our clients, as well as the ability and commitment to handle matters efficiently and in a results-oriented fashion.

Warm regards,

Julia B. Strickland

Stephen J. Newman

Christopher Fredrich

Andrew Owens

OVERVIEW OF DEVELOPMENTS

In California, plaintiffs' lawyers and state and local prosecutors wield two powerful tools: the Unfair Competition Law (UCL)¹ and the Consumers Legal Remedies Act (CLRA).² The UCL forbids "unlawful, unfair or fraudulent" conduct in connection with virtually any type of business activity.³ With its sweeping liability standards and broad equitable remedies, the UCL is often the weapon of choice for plaintiffs' lawyers and is almost uniformly invoked by prosecutors in consumer cases. The CLRA is more defined in structure, but no less potent. The CLRA applies to any "consumer" transaction involving the "sale or lease of goods or services"⁴ and authorizes recovery of actual, statutory and punitive damages.⁵ The CLRA, which explicitly prohibits twenty-four separate business acts and practices, provides for streamlined class certification and dispositive motion proceedings.

The past year saw significant developments in a diverse range of areas. UCL cases examined public prosecutor UCL claims, application of the UCL to creative products and the statute of limitations for certain UCL cases in federal court. CLRA exposure was expanded with new availability for attorneys' fee claims in certain kinds of cases, and with rejection of certain defense arguments to limit damages. At the same time, case law confirmed that the CLRA covers a narrower range of economic activity than the UCL, with additional caselaw holding that claims involving cryptocurrency are actionable under the CLRA. The CLRA's availability to challenge certain hospital charges also was narrowed. The arbitrability of claims for public injunctive relief under both the UCL and CLRA remains an unsettled question, with new U.S. Supreme Court authority potentially affecting arguments for arbitrability of claims for public injunctive relief. Finally, the California Supreme Court recently granted review in a case that will test whether administrative exhaustion requirements apply to certain UCL claims.

Public prosecutors have exceptional power under the UCL, with the ability to seek sweeping injunctive relief, restitution for injured consumers and civil penalties of up to \$2,500 per violation. Recent authority expands prosecutors' practical ability to pursue UCL claims by authorizing them to hire private, contingent fee attorneys to pursue these claims on behalf of the public.⁶ Because even small governmental bodies may seek relief and collect very large civil penalties based on state-wide activity,⁷ this decision may result in increased litigation from the most unexpected corners of the State, as prosecutions need not be funded from budgets that normally are constrained by local tax revenues. Prosecutors' ability to serve pre-suit civil investigative demands also was expanded with an opinion holding that federal banking law does not preempt such demands when targeted at a bank's service provider.⁸ The United States Supreme Court also recently declined to review a California Court of Appeal ruling that rejected a Due Process challenge to the UCL's civil penalties

¹ Cal. Bus. & Prof. Code § 17200 *et seq.*

² Cal. Civ. Code §§ 1750-1784.

³ Cal. Bus. & Prof. Code § 17200. The UCL also expressly prohibits "unfair, deceptive, untrue or misleading advertising" and incorporates California's False Advertising Law, Cal. Bus. & Prof. Code § 17500 *et seq.* ("FAL"). *See id.* Because the standards for liability under the UCL and FAL are similar, and the remedies are co-extensive, in private litigation FAL violations often are pleaded as predicate acts in support of a UCL claim.

⁴ Cal. Civ. Code §§ 1770(a) (stating prohibited practices), 1761 (definitions).

⁵ *See* Cal. Civ. Code § 1780(a).

⁶ *People ex rel. City of San Diego v. Experian Data Corp.*, 77 Cal. App. 5th 1006, 1016 (2022).

⁷ *See Abbott Labs. v. Super. Ct.*, 9 Cal. 5th 642 (2020).

⁸ *People v. Alorica, Inc.*, 77 Cal. App. 5th 60 (2022).

regime, and this decision also can be expected to embolden prosecutors to pursue penalties claims aggressively.⁹

In *People v. Purdue Pharma L.P.*,¹⁰ county and city prosecutors asserted claims against manufacturers and distributors of prescription opioid medication, arguing that defendants' sales and marketing activity exacerbated addiction, thereby constituting a public nuisance, false advertising and unfair business practices under the UCL. At trial, all claims were rejected based on the government's inability to prove that any specific marketing statement was false or deceptive, and because another statute, the Pain Patient's Bill of Rights, recognized that pain-relief medication has medical utility. The trial court determined that because patients have a right under California law to receive prescription pain medication when medically necessary, the sale of such medication can not be deemed unfair simply based on evidence of increased sales volumes coinciding with increased levels of addiction. The trial court also found that because the medical appropriateness of opioid pain medication was the subject of legitimate scientific debate, marketing statements encouraging physicians to prescribe the medication could not be challenged as misleading where no factually false statement was identified. The trial court denied the government's motion to set aside and vacate the judgment in February 2022.¹¹ If this outcome is upheld on appeal, it could mark a significant restriction on public prosecutors' ability to use UCL litigation to achieve social policy goals. Meanwhile, a federal court reached a different conclusion under the principles of common law nuisance, finding that a chain pharmacy could be held responsible for the opioid epidemic in San Francisco.¹²

The California Supreme Court narrowed potential First Amendment defenses to UCL and CLRA claims in *Serova v. Sony Music Entertainment*.¹³ The case involved sales of music that had supposedly been performed by Michael Jackson before he died. The publisher was unaware that they were counterfeit and (before the fraud was uncovered) engaged in the public debate over the authenticity of the works. Despite the case's being settled while proceedings in the California Supreme Court were pending, the court nonetheless issued a decision holding that the publisher could not avoid liability on free speech grounds: "We recognize artistic works such as albums, in some instances, enjoy robust First Amendment protections, but that does not turn all marketing of such works into noncommercial speech."¹⁴

Plaintiffs pursuing UCL claims in federal court now face a shorter statute of limitations for claims predicated on the violation of some other law. The Ninth Circuit announced that federal courts should not follow the longstanding state-court rule that a UCL unlawfulness claim may be brought within four years of the violation, even if the underlying statute has a shorter limitations period. In federal court, the shorter period applies to such a claim.¹⁵

⁹ See *People v. Johnson & Johnson*, 77 Cal. App. 5th 295 (2022), *cert. denied*, (2023).

¹⁰ No. 30201400725287CUBTCX, 2021 WL 5227329 (Cal. Super. (Orange Cnty.) Nov. 01, 2021).

¹¹ *People v. Purdue Pharma L.P.*, No. 30201400725287CUBTCX, 2022 WL 1216459, at *1 (Cal. Super. Feb. 03, 2022). An appeal is pending but is presently stayed due to the bankruptcy of another defendant in the case. See *People v. Johnson & Johnson*, No. D080091 (Cal. Ct. App. 4th Dist. Div.)

¹² No. 18-cv-07591-CRB, 2022 U.S. Dist. LEXIS 142962 (N.D. Cal. August 10, 2022).

¹³ 13 Cal. 5th 859 (2022).

¹⁴ *Id.* at 867.

¹⁵ *Guzman v. Polaris Indus., Inc.*, 49 F.4th 1308 (9th Cir. 2022).

Although the case is fully briefed, the California Supreme Court still has not yet set oral argument in *California Medical Association v. Aetna Health of California, Inc.*¹⁶ The California Supreme Court is reviewing a decision of the Court of Appeal to reject a claim that a health insurer violated the UCL by restricting physicians' ability to use out-of-network facilities. The Court of Appeal held that the allegedly unfair practice of interfering with the physicians' ability to make independent medical judgments did not impair any property right. Therefore, no loss of specific money or property could be tied to any allegedly unfair practice, and accordingly there was no standing to pursue a UCL claim.¹⁷ The ultimate decision potentially could substantially broaden the definition of what qualifies as a deprivation of property sufficient to confer UCL standing.

Resolving a split of authority, the California Supreme Court held that a Federal Trade Commission rule limiting recovery against assignees of retail installment contracts (often used to finance vehicles and other consumer durable goods) does not limit a consumer's ability to recover attorneys' fees under the CLRA from the entity that financed the purchase of allegedly shoddy goods.¹⁸ The California Supreme Court also let stand a large damages award in a case under the CLRA involving the sale of a vehicle, with no offset for the customer's extensive period of time when he was able to drive the vehicle.¹⁹

Case authority continues to hold that because (with just a few exceptions) the CLRA only regulates transactions for the purchase or lease of consumer goods or services, and does not regulate transactions for money or credit, cryptocurrency remains unregulated by the CLRA.²⁰

Although medical services are "services" within the meaning of the CLRA, because health care is so highly regulated, recent authority dramatically limits the practical availability of the CLRA in this area. A series of cases have attempted to use the CLRA to challenge hospital emergency rooms' typical practice of not posting or otherwise making available lists of emergency room charges.²¹ These cases have all resulted in defense outcomes, and the California Supreme Court has declined to review them and rejected calls for depublication. Hospital charges are highly regulated and heavily scrutinized already, and courts expressed concern that if an emergency room were to post a list of the maximum possible charges that might be incurred, patients might be discouraged from seeking care and might suffer severe adverse health consequences. Accordingly, the CLRA could not be used to attempt to impose such a duty.

With regard to arbitration, the California Supreme Court's 2017 decision in *McGill v. Citibank, N.A.*²² continues to have a significant impact in UCL and CLRA cases, by providing a vehicle for plaintiffs to seek to avoid individual arbitration by alleging claims for so-called "public injunctive relief." In 2022, the U.S. Supreme Court held in *Viking River Cruises, Inc. v. Moriana*,²³ that claims under

¹⁶ No. S269212, *review granted* (Cal. July 28, 2021).

¹⁷ 63 Cal. App. 5th 660, 664 (2021) (emphasis added).

¹⁸ *Pulliam v. HNL Automotive, Inc.*, 13 Cal. 5th 127 (2022), *cert. denied sub nom. TDBank v. Pulliam*, No. 22-288 (U.S. Jan. 9, 2023) (emphasis added).

¹⁹ *Anderson v. Ford Motor Co.*, 74 Cal. App. 5th 946, *review denied* (2022)

²⁰ *See Suski v. Marden-Kane, Inc.*, No. 21-CV-04539-SK, 2022 WL 3974259 (N.D. Cal. Aug. 31, 2022).

²¹ *See Saini v. Sutter Health*, 80 Cal. App. 5th 1054, 1061 (2022); *Torres v. Adventist Health Sys./W.*, 77 Cal. App. 5th 500, *review denied* (2022); *Gray v. Dignity Health*, 70 Cal. App. 5th 225, 245 (2021), *review denied* (2022).

²² 2 Cal. 5th 945, 956-57 (2017).

²³ 142 S. Ct. 1906 (2022).

California's Private Attorneys General Act are arbitrable.²⁴ The reasoning of the opinion suggested that the Supreme Court might be willing to examine whether public injunctive relief claims asserted under *McGill* likewise are arbitrable. However, initial rulings from the lower courts suggest that the *McGill* rule remains unshaken by *Viking River*.²⁵

A recent grant of review by the Supreme Court pertaining to exhaustion of administrative remedies calls into question a popular method of funding environmental improvements like solar panels or other energy-saving technology.²⁶ Under so-called Property Assessed Clean Energy (PACE) programs, the cost of improvements is advanced by a local government entity, which is then repaid via property tax assessments. In *Morgan v. Ygrene Energy Fund*, homeowners complain that they were duped into agreeing to encumber their properties for more than \$100,000 of overpriced improvements, at excessive interest rates.²⁷ The Court of Appeal rejected their effort to file UCL unfairness claims against private lenders and other participants in PACE programs, finding that plaintiffs must first seek administrative relief from the local taxing authority responsible for assessing the taxes to repay the PACE funding.²⁸ If *Morgan* is reversed, the decision could potentially threaten the viability of programs that currently fund millions of dollars' worth of environmental improvements throughout California, by undermining lenders' confidence in their ability to be repaid. It remains to be seen, however, if the California Supreme Court ultimately rules, as the defendant in the case agreed to a settlement with the Federal Trade Commission and the California Attorney General to provide relief to homeowners who allegedly were victims of unfair trade practices, and that settlement may moot the California Supreme Court proceedings.²⁹

As in prior years, litigation under the UCL and the CLRA remained vigorous. We expect that 2023 will continue to show high levels of activity in this area of the law.³⁰

²⁴ *Id.* at 1911.

²⁵ *McBurnie v. Acceptance Now, LLC*, No. 3:21-CV-01429-JD, 2022 WL 17342195, at *4-5 (N.D. Cal. Nov. 30, 2022), *appeal docketed*, No. 22-16868 (9th Cir. Dec. 6, 2022); *MacClelland v. Cellco P'ship*, No. 21-CV-08592-EMC, 2022 WL 2390997, at *9 (N.D. Cal. July 1, 2022) ("nothing in *Viking River* overrules or undermines *McGill*'s core holding that an arbitration agreement cannot prohibit a party from seeking public injunctive relief in any forum."); *Vaughn v. Tesla, Inc.*, No. A164053, 2023 WL 29132, at *1 (Cal. Ct. App. Jan. 4, 2023) (finding that *Viking River* does not preempt *McGill*).

²⁶ *Morgan v. Ygrene Energy Fund, Inc.*, 84 Cal. App. 5th 1002 (2022), *review granted*, No. S277628, (Cal. Feb. 22, 2023).

²⁷ *Id.* at 1007.

²⁸ *Id.* at 1014-1015.

²⁹ See <https://www.ftc.gov/news-events/news/press-releases/2022/10/ftc-california-act-stop-ygrene-energy-fund-deceiving-consumers-about-pace-financing-placing-liens> (Oct. 28, 2022).

³⁰ The research in this Overview is current through March 2, 2023. The purpose of the Overview is to provide information and perspective. We sometimes reference unpublished and/or non-citable opinions to demonstrate reasoning, illustrate trends, etc. The authors thank associates Alina Gatto, Rebecca Mandel, Brianna Bauer and Nadia Zivkov for their assistance with this year's Overview.

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THE UNFAIR COMPETITION LAW

I. THE STRUCTURE OF THE UCL

A. Conduct That Constitutes “Unfair Competition”

“Unfair competition” is defined in the UCL³¹ as any one of the following wrongs: (1) an “unlawful” business act or practice; (2) an “unfair” business act or practice; (3) a “fraudulent” business act or practice; (4) “unfair, deceptive, untrue or misleading advertising”; and (5) any act prohibited by sections 17500 through 17577.5.³² These definitions are disjunctive, and each of the wrongs operates independently from the others.³³ “In other words, a practice is prohibited as ‘unfair’ or [‘fraudulent’] even if not ‘unlawful’ and vice versa.”³⁴

The UCL’s reach is imposing: “The Legislature apparently intended to permit courts to enjoin ongoing wrongful business conduct in whatever context such activity might occur.”³⁵ The “cleansing power” provided to a court by the UCL can pose a formidable challenge to defendants.³⁶

³¹ The full text of section 17200 reads as follows:

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

³² Unless specified in the complaint, the UCL does not necessarily include violations of section 17500 *et seq.* See *People ex rel. Lockyer v. Brar*, 134 Cal. App. 4th 659, 666-67 (2005) (seeking to enjoin attorney from bringing “shakedown” UCL claims against small businesses). The court explained:

We cannot agree with the Attorney General that “*et seq.*” is elastic enough to stretch all the way to section 17500. Section 17200 begins part 2 of division 7 of the Business and Professions Code, and deals with unfair competition, while section 17500 begins part 3 of the same code and deals with representations to the public. The Legislature evidently thought that false advertising was sufficiently distinct from unfair competition so as not to be lumped even in the same part of a division. Nor does the body of the complaint contain any references to section 17500 or the false advertising law. The complaint thus did not give fair warning that [defendant] was subject to being enjoined from filing false advertising suits under section 17500 as well as unfair competition suits under section 17200.

Id.; see also *Densmore v. Manzarek*, Nos. B186036, B186037, B188708, 2008 WL 2209993, at *27 (Cal. Ct. App. May 29, 2008) (unpublished) (finding that dismissal of UCL claim does not require dismissal of section 17500 claim, which consists of distinct elements).

³³ See *Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999); see also *Lepton Labs, LLC v. Walker*, 55 F. Supp. 3d 1230, 1242 (C.D. Cal. 2014) (holding that complaint need not specify which prong a UCL claim is brought under).

³⁴ *State Farm Fire & Cas. Co. v. Super. Ct.*, 45 Cal. App. 4th 1093, 1102 (1996), *abrogated on other grounds by Cel-Tech*, 20 Cal. 4th 163.

³⁵ *Comm. On Children’s Television, Inc. v. Gen. Foods Corp.*, 35 Cal. 3d 197, 210 (1983), *superseded by statute on other grounds, as recognized in Branick v. Downey Sav. & Loan Ass’n*, 39 Cal. 4th 235 (2006).

³⁶ *Fletcher v. Sec. Pac. Nat’l Bank*, 23 Cal. 3d 442, 449 (1979).

B. What Constitutes a Business Act or Practice?

The first three “wrongs” in the UCL require proof of a “business act or practice.” Although no reported case explicitly defines the term “business” under the UCL, if the issue were presented, courts may well construe the term broadly, as they otherwise have construed the UCL. With respect to the terms “act” and “practice,” the UCL has been interpreted to encompass most business conduct.³⁷ Even a one-time act has been deemed sufficient to allege a UCL claim.³⁸ However, the UCL seemingly does not apply to securities transactions.³⁹ Additionally, claims for trade secret misappropriation under California Uniform Trade Secrets Act (CUTSA)⁴⁰ supersede all overlapping tort and UCL claims, such that a UCL claim usually may not be asserted in a trade secret misappropriation case.⁴¹

C. Who May Be Sued Under the UCL?

Unlike some other states’ unfair and deceptive practices statutes, the UCL does not expressly exempt from coverage any specific industries, such as those that are highly regulated.⁴² Rather, it applies to any “person,”⁴³ as defined under the UCL. Governmental entities do not fall within this

³⁷ See *Planned Parenthood Fed’n v. Ctr. for Med. Progress*, No. 16-cv-00236, 2020 WL 2065700, at *10-11 (N.D. Cal. Apr. 29, 2020) (holding that business activity is subject to UCL even where business is operated for political rather than commercial purposes).

³⁸ See, e.g., *Allied Grape Growers v. Bronco Wine Co.*, 203 Cal. App. 3d 432, 452 (1988) (determining that defendant’s conduct relating to a single contract constituted a “practice” under the UCL).

³⁹ See *Bowen v. Ziasun Techs., Inc.*, 116 Cal. App. 4th 777, 787-90 (2004). Noting that no published decision in California has addressed this issue, the Court of Appeal in *Bowen* analogized the UCL to the Federal Trade Commission Act (the “FTCA”). The court reasoned that the Federal Trade Commission (“FTC”) historically has not viewed the FTCA as affecting securities transactions. The court further observed that federal courts, as well as 15 other states, have concluded that consumer protection statutes like the UCL do not apply to securities transactions. See also *Feitelberg v. Credit Suisse First Boston, LLC*, 134 Cal. App. 4th 997, 1009 (2005) (citing *Bowen*); *Strigliabotti v. Franklin Res., Inc.*, No. C 04-00883, 2005 WL 645529, at *10 (N.D. Cal. Mar. 7, 2005) (concluding that the UCL could be used to challenge an alleged scheme to overcharge investors in the management of securities since *Bowen* does not encompass all situations where securities are somehow implicated but not purchased or sold); *Betz v. Trainer Wortham & Co., Inc.*, 829 F. Supp. 2d 860, 866 (N.D. Cal. 2011) (“No court, however, has allowed Section 17200 claims to proceed where, as here, the predicate acts are securities transactions.”). But see *Rose v. Bank of Am., N.A.*, 57 Cal. 4th 390, 399 n.8 (2013) (questioning “the scope and merits” of the holding in *Bowen*); *S.F. Residence Club, Inc. v. Amado*, 773 F. Supp. 2d 822, 834 (N.D. Cal. 2011) (“It appears that federal cases refusing to apply *Bowen* to the UCL all involved claims that did not target a securities transaction. These courts refused to rely on *Bowen* to foreclose any UCL claim, merely because the case involved securities in a general sense.”) (emphasis in original).

⁴⁰ Cal. Civ. Code § 3426 *et seq.*

⁴¹ *Albert’s Organics, Inc. v. Holzman*, 445 F. Supp. 3d 463, 474-75 (N.D. Cal. 2020).

⁴² But see discussion *infra* pp. 52-56 (“Primary Jurisdiction”; “Judicial Abstention In Matters Of Economic Policy”; “The ‘Safe Harbor’ Defense”).

⁴³ Cal. Bus. & Prof. Code § 17201. See, e.g., *Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal. 4th 26, 46-47 (1998) (holding that the California Insurance Code did not preclude UCL action against title insurers based on an alleged conspiracy not to issue title insurance); *Wells v. One2One Learning Found.*, 39 Cal. 4th 1164, 1199-1204 (2006) (finding that charter schools, their operators and districts were “persons” as defined by section 17201); *Frazier Nuts, Inc. v. Am. Ag Credit*, 141 Cal. App. 4th 1263, 1283-84 (2006) (finding that a production credit association, federally chartered by the Farm Credit Administration, was not a public entity and, therefore, was subject to suit under the UCL).

definition and cannot be sued under the UCL.⁴⁴ Furthermore, the law is not settled on whether the UCL applies to claims brought on theories of indirect liability, such as vicarious or aiding and abetting liability, agency, or franchisor liability.⁴⁵ In *Daniels v. Select Portfolio Servicing, Inc.*,⁴⁶ the court allowed appellants—borrowers under a deed of trust—to amend their UCL claims against several principals based on the alleged conduct of an agent, reasoning that the trustee of the securitized trust that owned the loan could potentially be liable under an agency theory for the fraudulent misrepresentations of a loan servicer.

D. Who May Sue Under the UCL?

The UCL expressly permits claims to be brought by any “person,” which it defines to include “natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons.”⁴⁷ However, the ability of corporate plaintiffs to bring UCL claims may be limited under certain circumstances. In *Linear Technology Corp. v. Applied Materials, Inc.*, plaintiff attempted to bring an unfair and deceptive UCL claim against three manufacturers of semiconductor manufacturing equipment arising out of a third-party claim that the equipment infringed patents

⁴⁴ See, e.g., *Townsend v. California*, No. CVF10-0470, 2010 WL 1644740, at *10-11 (E.D. Cal. Apr. 21, 2010) (finding the state of California and the California Highway Patrol were not persons under the UCL); *People for the Ethical Treatment of Animals, Inc. v. Cal. Milk Producers Advisory Bd.*, 125 Cal. App. 4th 871, 875 (2005) (holding that California Milk Advisory Board was not a “person” that could be sued under the UCL); *Bay Area Consortium for Quality Health Care v. Alameda Cty.*, No. A148430, 2018 WL 2126559, at *9 (Cal. Ct. App. May 9, 2018) (unpublished) (holding Alameda County was not a “person” that could be sued under the UCL).

⁴⁵ See *Emery v. Visa Int’l Serv. Ass’n*, 95 Cal. App. 4th 952, 960 (2002) (“The concept of vicarious liability has no application to actions brought under [the UCL]. . . . A defendant’s liability must be based on his personal ‘participation in the unlawful practices’ and ‘unbridled control’ over the practices that are found to violate section 17200 or 17500.”) (quoting *People v. Toomey*, 157 Cal. App. 3d 1, 15 (1984)); accord *Rogers v. Cal. State Mortg. Co. Inc.*, No. CV F 09-2107, 2010 WL 144861, at *13 (E.D. Cal. Jan. 11, 2010) (“An ‘unfair practices claim under section 17200 cannot be predicated on vicarious liability.’”) (quoting *Emery*, 95 Cal. App. 4th at 960); *In re Jamster Mktg. Litig.*, No. 05CV0819, 2009 WL 1456632, at *8 (S.D. Cal. May 22, 2009); *Rodriguez v. Litton Loan Servicing LP*, No. 09-cv-00029, 2009 WL 1326339, at *5-6 (E.D. Cal. May 12, 2009); *Nichols v. Greenpoint Mortg. Funding, Inc.*, No. SA CV 08-750, 2008 WL 3891126, at *3-4 (C.D. Cal. Aug. 19, 2008). But see *Schulz v. Neovi Data Corp.*, 152 Cal. App. 4th 86, 93-96 (2007) (distinguishing *Emery* and reversing order sustaining demurrer to UCL claim based on aiding and abetting theory on ground that defendants were alleged to have directly contracted with operator of illegal lottery and had direct stakes in the venture); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1187 (C.D. Cal. 2002) (distinguishing *Emery* and granting preliminary injunction against Internet company based on its activities in supervising access to adult online services), *abrogated on other grounds as recognized by Fabian Perez Art Publ’g LLC v. Las Brujas Inc.*, No. CV15-1847, 2015 WL 11430871, at *4 (C.D. Cal. Mar 27, 2015); *Chetal v. Am. Home Mortg.*, No. C 09-02727, 2009 WL 2612312, at *4 (N.D. Cal. Aug. 24, 2009) (noting that an aiding and abetting theory is available under the UCL); *Plascencia v. Lending 1st Mortg.*, 583 F. Supp. 2d 1090, 1098 (N.D. Cal. 2008) (allowing claims to proceed on aiding and abetting theory); *People v. JTH Tax, Inc.*, 212 Cal. App. 4th 1219, 1242, 1247 (2013) (holding that franchisor can be liable for franchisee’s false advertising under normal agency principles and disapproving *Emery* and *Toomey*; “We find no error in the court’s conclusion that, [e]ven if Liberty’s franchisees are not its agents for all purposes, they are its agents at a minimum for purposes of advertising.”); *People ex rel. Harris v. Sarpas*, 225 Cal. App. 4th 1539, 1562 (2014) (holding that corporate owners could be liable under the UCL where owners and corporation operated as a single enterprise).

⁴⁶ 246 Cal. App. 4th 1150, 1188 (2016).

⁴⁷ Cal. Bus. & Prof. Code §§ 17201, 17204.

held by the third party.⁴⁸ The trial court sustained a demurrer to the UCL claim and the Court of Appeal affirmed, reasoning that the UCL claim was “based on contracts not involving either the public in general or individual consumers who are parties to the contract,” and that prosecution of a UCL claim could “deprive [other companies that had purchased the same equipment] of the individual opportunity to seek remedies far more extensive than those available under the UCL,” in violation of due process.⁴⁹

The California Courts of Appeal also have renewed the UCL’s effectiveness in competitor actions. In *Law Offices of Mathew Higbee v. Expungement Assistance Services*,⁵⁰ the Court of Appeal analyzed “the reach of the UCL in the commercial context following the enactment of Proposition 64.” There, plaintiff alleged that defendant used personnel not licensed by the state bar to provide legal services for expungement of criminal records, a service that competed with plaintiff’s law practice, deprived it of market share and forced it to incur expenses to compete. Plaintiff alleged that the provision of legal services by other than California lawyers violated the UCL. Defendant claimed plaintiff suffered no injury cognizable under the UCL because he did not transact business with defendant.

The court held that, “having alleged that he had been forced to pay increased advertising costs and to reduce his prices for services in order to compete, and that he had lost business and the value of his law practice had diminished, [plaintiff] succeeded in alleging at least an identifiable trifle of injury as necessary for standing under the UCL.”⁵¹ The court rejected the argument that, under Proposition 64, “a plaintiff must have had business dealings with the defendant in order to have standing under the UCL.”⁵² Even without “direct business dealings,” plaintiff’s allegation that “he suffered losses in revenue and asset value and was required to pay increased advertising costs specifically because of the unlawful business practices of [defendant]” was potentially a sufficient “allegation of causation” at the demurrer stage.⁵³ However, the court was careful to limit its holding to business competitor lawsuits, and not the consumer context, holding only that “a business competitor who adequately alleges that he or she has suffered injury in fact and lost money or property as a result of the defendant’s unfair competition is not necessarily precluded from maintaining a UCL lawsuit against the defendant just because he or she has not engaged in direct business dealings with the defendant.”⁵⁴

⁴⁸ 152 Cal.App.4th 115, 131 (2007).

⁴⁹ *Id.* at 135 (citing *Rosenbluth Int’l, Inc. v. Super. Ct.*, 101 Cal. App. 4th 1073, 1079 (2002)); *see also Pierry, Inc. v. Thirty-One Gifts, LLC*, No. 17-CV-03074, 2018 WL 1684409, at *11 (N.D. Cal. Apr. 5, 2018) (dismissing UCL claim between two “relatively sophisticated” business entities given that there was no harm to the public at large or to consumers generally); *HSM Holdings, LLC v. Mantu I.M. Mobile Ltd.*, No. 20-CV-00967 (LJL), 2021 WL 918556 (S.D.N.Y. Mar. 10, 2021) (dismissing UCL claim and finding a contract between two “sophisticated” businesses did not give rise to action that would protect the public); *Open Text, Inc. v. Northwell Health, Inc.*, No. 2:19-CV-09216-SB-AS, 2021 WL 1235254 (C.D. Cal. Feb. 19, 2021) (finding that two “large, sophisticated” corporations could “not turn to the UCL to remedy” a contractual dispute).

⁵⁰ 214 Cal. App. 4th 544, 552 (2013). *But see Lee v. Luxottica Retail N. Am., Inc.*, 65 Cal. App. 5th 793, 803 (2021) (finding that expected but not yet earned future income was not recoverable even when it is characterized as “lost market share”).

⁵¹ *Id.* at 561.

⁵² *Id.* at 563-64.

⁵³ *Id.* at 564.

⁵⁴ *Id.* at 565.

E. Proposition 64 and the UCL Standing Requirement

When Proposition 64 became effective on November 3, 2004,⁵⁵ it imposed two significant restrictions which apply only to actions filed by private individuals or entities.⁵⁶

First, amended section 17204 states the standing requirement:

Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction . . . by a 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 the unfair competition.*

(Old language stricken, new language in italics.)⁵⁷ The UCL previously granted broad standing to “any person,” allowing the filing of “representative,” “private attorney general” or “general public” actions by plaintiffs who had no dealings with the defendants or the transactions at issue.⁵⁸ These actions

⁵⁵ See Cal. Const., art. II, § 10(a) (“An initiative statute or referendum approved by a majority of votes cast thereon takes effect the fifth day after the Secretary of State files the statement of the vote for the election at which the measure is voted on.”).

⁵⁶ In addition, Proposition 64 placed certain restrictions on the use of monetary penalties recovered by public enforcement officials—i.e., those penalties must be used in the enforcement of consumer protection laws. This change in the law will not impact private UCL actions, where monetary penalties are not available.

⁵⁷ Proposition 64 also amended California Business & Professions Code section 17535 (governing the relief available in FAL lawsuits) to impose the same standing and class action standards as those contained in the revised section 17204, as follows:

Actions for injunction under this section may be prosecuted . . . 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 a violation of this chapter. Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of this section and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.*

(Old language stricken, new language in italics.)

⁵⁸ See *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 561 (1998) (holding that a for-profit corporation could bring a UCL representative action on behalf of the general public), *superseded by statute on other grounds, as recognized in Arias v. Super. Ct.*, 46 Cal. 4th 969 (2009); *Mass. Mut. Life Ins. Co. v. Super. Ct.*, 97 Cal. App. 4th 1282, 1288 (2002) (“California courts have repeatedly held that relief under the UCL is available without individualized proof of deception, reliance and injury.”); *Scilex Pharms. Inc. v. Sanofi-Aventis U.S. LLC*, No. 21-CV-01280-JST, 2021 WL 3417590, at *6 (N.D. Cal. Aug. 5, 2021) (holding that a non-consumer plaintiff can allege a false advertising claim without having to show reliance); *City of Long Beach v. Total Gas & Power N. Am., Inc.*, 465 F. Supp. 3d 416, 449-50 (S.D.N.Y. 2020) (holding that municipality lacked standing under UCL to challenge alleged manipulation in natural gas futures market that indirectly caused the municipality to pay more for natural gas, because municipality never transacted directly with alleged manipulator or in the particular local market where the manipulation supposedly occurred), *affd.*, No. 20-2020-CV, 2021 WL 5754295 (2d Cir. Dec. 3, 2021); *Morizur v. Seaworld Parks & Ent., Inc.*, No. 15-cv-2172, 2020 WL 6044043 at *8 (N.D. Cal. Oct. 13, 2020) (rejecting, at trial, plaintiff’s UCL claim against Sea World based on lack of credibility of plaintiff’s evidence that she would not have bought a Shamu plush toy, but for Sea World’s alleged misstatement about its treatment of killer whales; “reliance is an essential element of a plaintiff’s statutory standing to sue under the UCL, FAL and CLRA”).

were brought without regard to any procedural standard, or notice of due process requirements.⁵⁹ Many such actions were frivolous and abusive.

Second, as a result of Proposition 64, the UCL requires that private cases involving aggregated claims comport with California’s class action standards. Amended section 17203 provides:

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 or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. *Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of section 17204 and complies with Code of Civil Procedure section 382, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.*

(New language in italics.) California Code of Civil Procedure section 382 authorizes class litigation.⁶⁰ Section 382 does not itself set forth the specific requirements necessary to maintain a class action, and California courts therefore have interpreted section 382 to impose the requirements that usually apply in other state and federal courts—commonality, typicality, adequacy of representation and superiority.⁶¹

1. The Impact of *Clayworth* and *Kwikset* on the Standing Requirement

a. *Clayworth*: The Availability of a Remedy Is Irrelevant to the Standing Analysis

In *Clayworth v. Pfizer, Inc.*,⁶² retail pharmacies brought UCL claims against pharmaceutical companies for alleged price fixing. Defendants challenged the plaintiffs’ standing, arguing that they did not suffer a loss of money or property because they passed on the overcharges to customers. According to defendants, plaintiffs had no remedy to pursue.⁶³ The California Supreme Court rejected this position, making clear that the issues of standing and remedies are separate: “That a party may ultimately be unable to prove a right to damages (or, here, restitution) does not demonstrate that it

⁵⁹ See *Kraus v. Trinity Mgmt. Servs., Inc.*, 23 Cal. 4th 116, 126 n.10 (2000) (discussing, among other things, these actions and the unique, attendant due process concerns), *superseded by statute on other grounds, as recognized in Arias*, 46 Cal. 4th 969; see also *Bronco Wine Co. v. Frank A. Logoluso Farms*, 214 Cal. App. 3d 699, 715-21 (1989) (reversing the trial court’s restitution order based on certain due process considerations potentially affecting non-parties). *But see Rincon Band of Luiseno Mission Indians etc. v. Flynt*, 70 Cal. App. 5th 1059, 1090 (2021), *review filed* (Dec. 6, 2021) (finding there was no standing for Native American tribe, as Tribe was not a public prosecutor nor a “person” as defined in the UCL).

⁶⁰ See *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1021 (2012).

⁶¹ See *id.*; see also *In re Tobacco II Cases*, 46 Cal. 4th 298, 318 (2009) (“*Tobacco II*”); *Fireside Bank v. Super. Ct.*, 40 Cal. 4th 1069, 1089 (2007).

⁶² 49 Cal. 4th 758, 764 (2010).

⁶³ *Id.* at 765.

lacks standing to argue for its entitlement to them.”⁶⁴ “The doctrine of mitigation . . . is a limitation on liability for damages, not a basis for extinguishing standing.”⁶⁵ In short, looking at the language and intent of section 17204, the Court found that plaintiffs need not prove “compensable loss at the outset” in order to have standing.⁶⁶

In connection with this conclusion, the Court also explicitly held that a UCL plaintiff seeking only injunctive relief can have standing. The Court noted that “[s]ection 17203 makes injunctive relief ‘the primary form of relief available under the UCL,’ while restitution is merely ‘ancillary.’”⁶⁷

Accordingly, under *Clayworth*, a plaintiff’s right to seek injunctive relief is not dependent on the ability to seek restitution. Likewise, the availability of a remedy is not relevant to standing.⁶⁸

b. Kwikset: Plaintiff Must Suffer an “Economic Injury” That is “Caused By” a UCL Violation

In *Kwikset Corp. v. Superior Court*,⁶⁹ plaintiffs alleged that defendant violated the UCL and the FAL when it marketed and sold locksets labeled “Made in U.S.A.” when, in fact, the locksets contained parts from, or were partly manufactured, abroad. Plaintiffs alleged that they purchased the locksets based on the labeling and would not have done so if they were not so labeled. According to defendant, plaintiffs lacked standing because, in essence, they received the benefit of the product, which was usable and not defective.

The California Supreme Court commenced its discussion by stating,

Proposition 64 should be read in light of its apparent purposes, i.e., to eliminate standing for those who have not engaged in any business dealings with would-be defendants and thereby strip such unaffected parties of the ability to file “shakedown lawsuits,” while preserving for actual victims of deception and other acts of unfair competition the ability to sue and enjoin such practices.⁷⁰

The Court then observed, “Proposition 64 accomplishes its goals in relatively few words.”⁷¹ Less than two dozen are at issue here: standing under the UCL extends to “a person who has suffered injury in fact and has lost money or property as a result of the unfair competition.”⁷²

⁶⁴ *Id.* at 789.

⁶⁵ *Id.* (citing *Pool v. City of Oakland*, 42 Cal. 3d 1051, 1066 (1986) (“The rule of [mitigation of damages] comes into play after a legal wrong has occurred, but while some damages may still be averted.”)).

⁶⁶ *Id.*

⁶⁷ *Id.* at 790 (quoting *Tobacco II*, 46 Cal. 4th at 319).

⁶⁸ *Id.*; see also *Finelite, Inc. v. Ledalite Architectural Prods.*, No. C-10-1276, 2010 WL 3385027, at *2 (N.D. Cal. Aug. 26, 2010) (stating the right to seek injunctive relief under the UCL is not dependent on the right to seek restitution).

⁶⁹ 51 Cal. 4th 310, 317 (2011).

⁷⁰ *Id.*

⁷¹ *Id.* at 321 (quoting *Californians for Disability Rights v. Mervyn’s, LLC*, 39 Cal. 4th 223, 228 (2006)).

⁷² *Id.* at 322 (quoting Cal. Bus. & Prof. Code § 17204).

Against this background, the Court found that “the plain language of these clauses suggests a simple test.”⁷³ A UCL plaintiff must: “(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim.”⁷⁴

With respect to injury in fact, the Court emphasized that

[t]he text of Proposition 64 establishes expressly that in selecting this phrase the drafters and voters intended to incorporate the established federal meaning. The initiative declares: It is the intent of the California voters in enacting this act to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been *injured in fact under the standing requirements of the United States Constitution*.”⁷⁵

The Court explained, “Under federal law, injury in fact is an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.”⁷⁶ “Particularized’ in this context means simply that ‘the injury must affect the plaintiff in a personal and individual way.’”⁷⁷ Accordingly, with respect to standing under the UCL, the Court held:

There are innumerable ways in which economic injury from unfair competition may be shown. A plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary. Neither the text of Proposition 64 nor the ballot arguments in support of it purport to define or limit the concept of “lost money or property,” nor can or need we supply an exhaustive list of the ways in which unfair competition may cause economic harm.⁷⁸

⁷³ *Id.*

⁷⁴ *Id.* (emphasis in original).

⁷⁵ *Id.* (emphasis in original and citation omitted) (quoting Prop. 64, § 1, subd. (e) and citing *Buckland v. Threshold Enters., Ltd.*, 155 Cal. App. 4th 798, 814 (2007)).

⁷⁶ *Id.* at 322-23 (cleaned up) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

⁷⁷ *Id.* at 323 (quoting *Lujan*, 504 U.S. at 560 n.1).

⁷⁸ *Id.* (citation omitted).

The Court also noted that “lost money or property—economic injury—is itself a classic form of injury in fact.”⁷⁹

⁷⁹ *Id.*; see also *Johnson v. Nationstar Mortg., LLC*, No. 17-CV-03676, 2018 WL 807370, at *7 (N.D. Cal. Feb. 9, 2018) (observing a split among district courts and finding that the economic harm flowing from a default on a mortgage is “caused by the borrower’s default, and not the alleged unlawful acts”); *Gallano v. Burlington Coat Factory of California, LLC*, 67 Cal. App. 5th 953 964 (2021) (stating that money spent defending against debt collection efforts considered an economic injury); *Beltz v. Wells Fargo Home Mort.*, No. 15-cv-01731, 2017 WL 7 84910, at *13 (E.D. Cal. March 1, 2017) (“[D]amage to credit is considered loss of money or property for the purposes of the UCL.”); *Holistic Supplements, L.L.C. v. Stark*, 61 Cal. App. 5th 530, 275 Cal. Rptr. 3d 791 (2021) (finding that Business Tax Registration Certificate qualifies as lost “property”); *Meyerv. Capital All. Grp.*, No. 15-CV-2405, 2017 WL 5138316, at *3-4 (S.D. Cal. Nov. 6, 2017) (stating that plaintiffs’ loss of ink and paper due to the receipt of “junk” faxes, advertising defendants’ loan products, were insufficient injuries to satisfy the economic loss requirement necessary to confer standing under the UCL); *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 811 (N.D. Cal. 2011) (noting that “several courts have held that the unauthorized release of ‘personal information’ does not constitute a loss of money or property for purposes of establishing standing under the UCL,” but holding that plaintiffs sufficiently alleged a loss of money or property based on potential unpaid compensation where Facebook used plaintiffs’ Facebook profiles to endorse third-party products and services); *In re Anthem, Inc. Data Breach Litig.*, 162 F. Supp. 3d 953, 985 (N.D. Cal. 2016) (allegations that defendants did not adequately protect plaintiffs’ personal data as promised, thus causing benefit of bargain damages, represent economic injury sufficient to satisfy UCL standing in the data breach context); *Arroyo v. TP-Link USA Corp.*, No. 14-CV-04999, 2015 WL 5698752, at *4 (N.D. Cal. Sept. 29, 2015) (dismissing claims with respect to products that plaintiff did not purchase or whose marketing material he did not view); *Boorstein v. CBS Interactive, Inc.*, 222 Cal. App. 4th 456 (2013) (agreeing that plaintiff lacked standing to bring UCL unlawfulness claim, due to failure to satisfy conditions set forth in predicate statute); *Turcios v. Carma Labs, Inc.*, 296 F.R.D. 638, 644 (C.D. Cal. 2014) (finding that plaintiff lacked standing to assert CLRA claim and UCL claim based on violation of Fair Packaging and Labeling Act because “[p]laintiff has not presented any evidence that his alleged economic injury occurred as a result of” purchasing Chapstick that he would have bought regardless of label); *Backhaut v. Apple, Inc.*, 74 F. Supp. 3d 1033, 1049 (N.D. Cal. 2014) (plaintiff cannot establish economic injury caused by an alleged omission of information where information about alleged defect was previously published in an Internet news article); *Friends of the Earth v. Sanderson Farms, Inc.*, 992 F.3d 939 944 (9th Cir. 2021) (diverting resources to combat alleged false advertising by poultry company not sufficient to justify organizational standing); *Svenson v. Google Inc.*, 65 F. Supp. 3d 717, 730 (N.D. Cal. 2014) (finding that plaintiff lacks UCL standing because plaintiff failed to “allege[] any facts showing that Defendants’ business practice—disclosing users’ Contact Information to third-party App vendors—changed her economic position at all”); *Two Jinn, Inc. v. Gov’t Payment Serv., Inc.*, 233 Cal. App. 4th 1321, 1334-35 (2015) (pre-litigation investigation expenses cannot be used to establish economic injury under the UCL). *But see Animal Legal Def. Fund v. LT Napa Partners LLC*, 234 Cal. App. 4th 1270, 1280-82 (2015) (holding that the expenditure of resources to investigate defendant’s alleged wrongdoing was different from the pre-litigation expenses discussed in *Two Jinn, Inc.*, and could establish economic injury under the UCL because the expenses were incurred prior to and independent of the litigation); *Hodsdon v. Mars, Inc.*, 162 F. Supp. 3d 1016, 1022 (N.D. Cal. 2016) (“California law permits litigants to pursue claims under the UCL, CLRA, and FAL if they show that the deceptive practice caused pecuniary loss.”), *aff’d*, No. 16-15444 (9th Cir. June 4, 2018); *Performance Prod. Co. v. Virus Int’l, Inc.*, No. G058667, 2021 WL 480913, at *1, *6 (Cal. Ct. App. Feb. 10, 2021) (affirming summary judgment against plaintiff because no evidence was presented that any consumer would have purchased from plaintiff rather than defendant as a result of defendant’s alleged cheating on tariffs, or that even if such misconduct was established, it caused him some financial harm under the UCL) (unpublished); *Robinson v. U-Haul Co. of Cal.*, 4 Cal. App. 5th 304, 317 (2016) (economic injury requirement satisfied for UCL claim for malicious prosecution when plaintiff incurred court costs and attorneys’ fees in defense against malicious prosecution); *Rojas-Lozano v. Google, Inc.*, 159 F. Supp. 3d 1101, 1120 (N.D. Cal. 2016) (finding that plaintiff did not

The Court then went on to “offer a further observation concerning the order in which the elements of standing are best considered”:

Because, as noted, economic injury is itself a form of injury in fact, proof of lost money or property will largely overlap with proof of injury in fact. If a party has alleged or proven a personal, individualized loss of money or property in any nontrivial amount, he or she has also alleged or proven injury in fact. Because the lost money or property requirement is more difficult to satisfy than that of injury in fact, for courts to first consider whether lost money or property has been sufficiently alleged or proven will often make sense. If it has not been, standing is absent and the inquiry is complete. If it has been, the same allegations or proof that suffice to establish economic injury will generally show injury in fact as well, and thus it will again often be the case that no further inquiry is needed.⁸⁰

Kwikset therefore not only states the test for evaluating the issue of injury sufficient to confer standing, it sets the order of the analysis.⁸¹

suffer economic injury because she failed to allege that she would have changed her behavior if she had known that transcribing part of a reCAPTCHA would facilitate Google’s profit earning); *Galang v. Wells Fargo Bank, N.A.*, No. 16-CV-03468, 2017 WL 1210021, at *6 (N.D. Cal. Apr. 3, 2017) (holding that plaintiff had standing to bring UCL claim challenging foreclosure because injury in fact can be established once foreclosure proceedings are initiated and not completed); *Amer v. Wells Fargo Bank N.A.*, No. 17-cv-03872, 2017 WL 4865564, at *12 (N.D. Cal. Oct. 27, 2017) (finding that impending foreclosure might potentially be a type of cognizable injury under the UCL); *Fernandez v. Progressive Mgmt. Sys.*, 2022 WL 2541272, at *4 (S.D. Cal. July 7, 2022) (finding that impact to credit is an economic injury where there is loss of money or property).

⁸⁰ *Kwikset*, 51 Cal. 4th at 325 (citation omitted).

⁸¹ See also *Henderson v. Gruma Corp.*, No. CV 10-04173, 2011 WL 1362188, at *4 (C.D. Cal. Apr. 11, 2011) (finding that purchase of guacamole dip constitutes a “nontrivial” injury and concluding otherwise would prohibit a majority of product-based actions, thereby “thwart[ing] the purposes of California’s consumer protection statutes”); *Allergan, Inc. v. Athena Cosmetics, Inc.*, 640 F.3d 1377, 1382 (Fed. Cir. 2011) (finding that plaintiff sufficiently alleged an economic injury where defendant manufactured, marketed and/or sold products without a prescription, federal or state approval and proper labeling and, as a result, plaintiff “lost sales, revenue, market share, and asset value”); *Glen Oaks Ests. Homeowners Ass’n v. Re/Max Premier Props., Inc.*, 203 Cal. App. 4th 913, 919-22 (2012) (finding that homeowners’ association had suffered “injury in fact” and “lost money or property” for, among other things, investigative costs associated with repairing and replacing damaged property); *Lueras v. BAC Home Loans Servicing, LP*, 221 Cal. App. 4th 49, 832 (2013) (holding that the allegation that plaintiff’s “home was sold at a foreclosure sale is sufficient to satisfy the economic injury prong of the standing requirement of section 17204” and granting plaintiff leave to amend to allege a “causal connection” between defendant’s “allegedly unlawful, unfair, or fraudulent conduct and Lueras’s economic injury”); *Sarun v. Dignity Health*, 232 Cal. App. 4th 1159, 1167-70 (2014), modified, *Moran v. Prime Healthcare Mgmt., Inc.*, 3 Cal. App. 5th 1131 (2016) (paying portion of hospital bill, and receipt of an invoice showing a balance due, established injury in fact and loss of money or property, even though hospital offered patient an opportunity to apply for a discounted billing rate and patient failed to do so); *In re Adobe Sys., Inc. Privacy Litig.*, 66 F. Supp. 3d 1197 1224 (N.D. Cal. 2014) (finding that plaintiffs’ allegations that they relied on Adobe’s claims that personal data would be protected sufficient to establish UCL standing). In an unpublished case, the California Court of Appeal held that a brief, temporary detention of funds, for example, in connection with a billing error that is corrected promptly, does not constitute a sufficient deprivation of money or property to create UCL standing. *Carter v. Farmers Ins. Grp.*, No. B297020, 2020 WL 4034682 (Cal. Ct. App. 2d Dist. July 17, 2020) (unpublished). To allow standing in such circumstances would improperly “create UCL liability to any retailer that accidentally double charges a customer, even if

Authority applying *Kwikset* adds that a defendant’s allegedly improper use and monetization of consumer data (the plaintiff’s “personal content and information”) does not create UCL standing, because consumers have no “vested interest in any money earned” from the use of their data.⁸² Other authority has restricted claims of economic injury under the UCL where a plaintiff’s claims are based on the suspension or closure of social media accounts.⁸³

The California Supreme Court is additionally considering whether interference with a physician’s independent professional judgment constitutes violation of a property right. In *California Medical Association v. Aetna Health of California Inc.*,⁸⁴ the California Medical Association (CMA) sued Aetna under the UCL, seeking an injunction to enjoin Aetna from preventing its member physicians from using out-of-network facilities and providers. The CMA alleged that that Aetna unlawfully interfered with its member physician’s exercise of independent medical judgment and treatment in violation of various California statutes, including the UCL. The Court of Appeal affirmed the trial court’s ruling that CMA failed to show direct injury or loss of money or property, as required by the UCL, and thus lacked standing.⁸⁵ On July 28, 2021, the California Supreme Court granted review.⁸⁶

c. The Causation Requirement: “As a Result of”

Courts have interpreted the phrase “as a result of” to mean “caused by.”⁸⁷ The “causal connection is broken when a complaining party would suffer the same harm whether or not a defendant complied with the law.”⁸⁸ Further, allegations must indicate how an injury resulted from

the retailer were to refund the money immediately.” *Id.* at *6. *See also Aoki v. Gilbert*, No. 11-CV-02797, 2020 WL 6741693, at *24-25 (Nov. 17, 2020); *Hart v. TWC Prod. & Tech. LLC*, 526 F. Supp. 3d 592, 603 (N.D. Cal. 2021) (finding that consumers do not have a property interest in their geolocation data such that its alleged misuse constitutes deprivation of property within the meaning of the UCL); *Cobos v. Robinhood Fin. LLC*, No. 221CV00843VAPMRWX, 2021 WL 1035123, at *3 (C.D. Cal. Feb. 10, 2021) (finding loss of ability to purchase stock shares in the future does not constitute deprivation of property under the UCL).

⁸² *In re Google Assistant Priv. Litig.*, 457 F. Supp. 3d 797, 840 (N.D. Cal. 2020).

⁸³ *Murphy*, 60 Cal. App. 5th at 39-40 (finding no economic injury where a social media company suspended, and later banned, the account of a user who had been posting controversial content the company considered violative of its rules against hateful conduct. The court found the website’s terms of service stated the user had no “property interest in [the] [social media] account or...followers, but only in the content” created by the user, and that plaintiff pleading “generally that she relief[d] on Twitter for her livelihood” did not establish “any actual loss of income or financial support”).

⁸⁴ 63 Cal. App. 5th 660, 664 (2021).

⁸⁵ *Id.* at 666-69.

⁸⁶ No. S269212.

⁸⁷ *See, e.g., Kwikset*, 51 Cal. 4th at 326; *Lorenzo v. Qualcomm Inc.*, 603 F. Supp. 2d 1291, 1303 (S.D. Cal. 2009) (citing *Hall v. Time, Inc.*, 158 Cal. App. 4th 847, 855 (2008)).

⁸⁸ *Troyk v. Farmers Grp., Inc.*, 171 Cal. App. 4th 1305, 1349 (2009); *see also Allergan*, 640 F.3d at 1383 (“While a direct business dealing is certainly one way in which a plaintiff could be harmed, the California courts have also recognized claims under the UCL where a direct business dealing was lacking.”); *Hahn v. Select Portfolio Servicing, Inc.*, 424 F. Supp. 3d 614, 635 (N.D. Cal. 2020) (granting summary judgment to mortgage servicer on UCL claim based on alleged unfairness during review of loan modification request because plaintiffs presented “no evidence suggesting that they had the ability to cure their default, or otherwise would have been approved for a loan modification” even if their application had been processed properly).

the unfair competition.⁸⁹ As explained below with respect to *Tobacco II*, however, in the context of claims based on fraudulent conduct, the phrase does not impose a “tort causation requirement,” which would require a showing of actual reliance on specific misstatements.⁹⁰

Some courts have interpreted “caused by” broadly. For example, in *Veera v. Banana Republic, LLC*, the court held that if a consumer is “influenced by the momentum to buy” to proceed with a purchase despite learning of false advertising as to the price before consummating the transaction, then that is sufficient to create a question as to whether they suffered economic injury “caused by”

⁸⁹ *Cappello v. Walmart Inc.*, 394 F. Supp. 3d 1015, 2013 (N.D. Cal. 2019) (finding that plaintiffs had plausibly alleged a violation of company’s own privacy policy, had adequately alleged both economic loss and causation under a “benefit of the bargain” theory and had standing under the UCL); *Townsend v. Wells Fargo Bank, N.A.*, No. 18-cv-07382, 2019 WL 4145464, at *4 (N.D. Cal. Aug. 30, 2019) (finding plaintiffs failed to establish standing under the UCL because they did not establish a causal connection between Wells Fargo’s reporting to credit bureaus and plaintiffs’ diminished credit rating where reporting occurred after plaintiffs declared bankruptcy), *aff’d*, 831 F. App’x 338 (2020); *Brownfield v. Bayer Corp.*, No. 09-cv-00444, 2009 WL 1953035, at *4 (E.D. Cal. July 6, 2009) (finding “conclusory” allegations did not confer standing); *Klein v. Avis Rent a Car Sys. Inc.*, No. CV 08-0659, 2009 WL 151521, at *4 (C.D. Cal. Jan. 21, 2009) (stating that on claim for imposition of excessive insurance premium, plaintiff did not allege “that [Defendants’] conduct caused him to pay more than he would have had Defendants been licensed [by the California Insurance Commissioner]”); *Lorenzo*, 603 F. Supp. 2d at 1304 (plaintiff did not allege that he would not have purchased a cell phone or related service had he been aware of defendant’s misrepresentations); *McGough v. Wells Fargo Bank, N.A.*, No. C12-0050, 2012 WL 5199411, at *6 (N.D. Cal. Oct. 22, 2012) (finding that alleged unlawful conduct did not cause foreclosure; instead, plaintiff’s default caused foreclosure); *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1355, 1363 (2010) (holding that the “as a result” analysis in *Tobacco II* applies to unlawful claims based on misrepresentations and deception; causation in a UCL action should “hinge on the nature of the alleged wrongdoing rather than the specific prong of the UCL the consumer invokes”); *see also Kane v. Chobani, Inc.*, 973 F. Supp. 2d 1120, 1134, 1129 (N.D. Cal. 2014) (reiterating that reliance is a required element in claims premised on misrepresentation and deception brought under the unlawful prong of the UCL), *order vacated on other grounds by Kane v. Chobani, LLC*, 645 F. App’x 593, 594 (9th Cir. 2016); *Orcilla v. Big Sur, Inc.*, 244 Cal. App. 4th 982, 1013 (2016) (standing sufficiently pled by allegations of unconscionable mortgage loan agreements, because plaintiffs would not have lost their loan security had defendants not enforced the allegedly unconscionable loan agreements through foreclosure proceedings); *Rivas v. Wells Fargo Bank, N.A.*, No. 16-cv-01473, 2016 WL 8730674, at *9-10 (E.D. Cal. 2016) (finding plaintiff had standing to sue under the UCL because plaintiff alleged that he incurred foreclosure fees and costs in connection with defendant’s allegedly unlawful and unfair foreclosure practices, and that defendant’s alleged foreclosure violations caused plaintiff to stop making payments and contributed to his inability to secure a modification); *Ivanoff v. Bank of Am., N.A.*, 9 Cal. App. 5th 719 (2017) (concluding that plaintiff established standing through allegations that she paid money to the bank and received billings for increased monthly loan payments in excess of what she would have owed had it not been for the bank’s unlawful business practices); *Bishop v. 7-Eleven, Inc.*, 651 F. App’x 657, 658 (9th Cir. 2016) (reversing district court’s dismissal for lack of standing because plaintiff adequately alleged that he relied on defendant’s misrepresentation, without which he would not otherwise have purchased defendant’s product, even though the only alleged misconduct was a failure to include disclosures required under the Food Labeling Laws); *Turner v. Apple, Inc.*, 2022 WL 445755, at *4 (N.D. Cal. Feb. 14, 2022) (holding that plaintiff did not have standing to pursue UCL and CLRA claims because plaintiff did not rely on any misstatement or omission from Apple when deciding to purchase his iPhone).

⁹⁰ *Tobacco II*, 46 Cal. 4th at 325, 327. *Contra Cholakyan v. Mercedes-Benz USA, LLC*, 796 F. Supp. 2d 1220, 1229 (C.D. Cal. 2011) (finding that where UCL claim was based on allegedly misleading communications, “California courts require evidence of reliance before they will find that causation and ‘injury in fact’ have been proved.”).

the false advertising.⁹¹ The court described this as a type of “bait and switch” in which the consumer relies on the deceptive advertising price (40% off) when choosing the item to be purchased and becomes so “invested in the decision to buy” that he or she continues with the transaction “despite his or her better judgment.”⁹² Notably, there was a dissent in *Veera* which challenged whether the plaintiff could show reliance, given that she knew the 40% discount representation was false before she purchased: “I see the majority’s ‘momentum to buy’ theory as both a departure from well-settled principles regarding reliance in ordinary fraud actions and as a dilution of the Prop. 64 requirement that the plaintiff suffer economic injury as a result of the defendant’s improper conduct.”⁹³ Similarly, in *Hansen v. Newegg.com Americas, Inc.*,⁹⁴ the court held that plaintiff’s alleged reliance on advertisements containing false or inflated “list” prices was sufficient to establish standing under the UCL, FAL and CLRA.⁹⁵

d. UCL Standing and Federal Courts

After *Kwikset*, in any given case, one must consider whether a plaintiff can meet both Article III and UCL standing requirements for purposes of litigating in federal court. As noted by the California Supreme Court in *Kwikset*, “because economic injury is but one among many types of injury in fact, the Proposition 64 requirement that injury be economic renders standing under section 17204 substantially narrower than federal standing under [Article III], which may be predicated on a broader range of injuries.”⁹⁶ Accordingly, a plaintiff could have Article III standing but lack UCL

⁹¹ 6 Cal. App. 5th 907, 921-22 (2016) (finding that plaintiffs raised a triable issue of fact as to standing and causation when they were “lured” into a store by signs proclaiming a 40% off sale, but, after learning at the register that the sale did not apply to every item in the store, chose to purchase certain items at full price).

⁹² *Id.* at 921.

⁹³ *Id.* at 926 (Bigelow, P.J., dissenting).

⁹⁴ 25 Cal. App. 5th 714 (2018).

⁹⁵ *Id.* at 727.

⁹⁶ *Kwikset*, 51 Cal. 4th at 324 (citing *Troyk*, 171 Cal. App. 4th at 1348 n.31 (“We note [the] UCL’s standing requirements appear to be more stringent than the federal standing requirements. Whereas a federal plaintiff’s ‘injury in fact’ may be intangible and need not involve lost money or property, Proposition 64, in effect, added a requirement that a UCL plaintiff’s ‘injury in fact’ specifically involve ‘lost money or property.’”)); see also *Ingalls v. Spotify USA, Inc.*, No. C16-03533, 2017 WL 3021037, at *4 (N.D. Cal. July 17, 2017) (observing that when a claim is based on California state law, rather than on misrepresentation, “but for” causation applies); *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098, 1107 (9th Cir. 2013) (holding that “when a consumer purchases merchandise on the basis of false price information, and when the consumer alleges that he would not have made the purchase but for the misrepresentation, he has standing to sue under the UCL and FAL because he has suffered an economic injury” and rejecting defense that plaintiff would have purchased product anyway); *Jue v. Costco Wholesale Corp.*, No. C10-00033, 2010 WL 889284, at *5 (N.D. Cal. Mar. 11, 2010) (finding that complaint that failed to show that defendant’s alleged failure to provide its employees “suitable seating” was linked to plaintiffs’ loss of compensation, or any other money or property, the court found the named plaintiff lacked standing under Article III and the UCL); *Two Jinn, Inc. v. Gov’t Payment Serv., Inc.*, No. 09CV2701, 2010 WL 1329077, at *2 (S.D. Cal. Apr. 1, 2010) (alleging loss of potential customers was “mere conjecture” and, thus, insufficient for standing under Article III, which requires an injury in fact to be “concrete and particularized and []actual or imminent”); *Callahan v. Ancestry.com Inc.*, No. 20-CV-08437-LB, 2021 WL 783524 (N.D. Cal. Mar. 1, 2021) (finding no standing under Article III in case where plaintiffs alleged defendant website profited off of the use of their image because plaintiffs could not demonstrate any “commercial interest” of their own was impinged by the website’s use of those images); *Chase v. Hobby Lobby Stores, Inc.*, No. 17-cv-00881, 2017 WL 4358146 (S.D. Cal. Oct. 2, 2017) (finding that plaintiff in deceptive pricing class

standing, depending on the facts at issue.⁹⁷ Conversely, a plaintiff who has suffered an injury in fact (and thus has UCL standing) could lack Article III standing to seek injunctive relief in federal court if the plaintiff has no intention of buying the challenged product again.⁹⁸

In *Davidson v. Kimberly-Clark Corp.*,⁹⁹ the Ninth Circuit resolved whether a “previously deceived consumer who brings a false advertising claim can allege that her inability to rely on the advertising in the future is an injury sufficient to grant her Article III standing to seek injunctive relief.” In *Davidson*, plaintiff alleged that she had purchased defendant’s wipes, and paid a premium, because they were advertised and labeled to be “flushable”; she believed that “flushable” meant

action brought under the UCL and CLRA had standing to challenge pricing scheme not only with respect to the specific two items purchased, but for all items to which defendant applied the alleged deceptive pricing scheme); *Azimpour v. Sears, Roebuck & Co.*, No. 15-CV-2798, 2017 WL 1496255, at *5 (S.D. Cal. Apr. 26, 2017) (rejecting argument that plaintiff who purchased a single pillow lacked standing to bring claims relating to pricing of other items not purchased, reasoning that “[t]his case is not about a pillow—it is about a price tag. Plaintiff’s allegations are based on Defendant’s allegedly deceptive pricing scheme which uniformly applies to and affects all products.”); *Ning Xianhua v. Oath Holdings, Inc.*, 536 F. Supp. 3d 535 (N.D. Cal. 2021) (holding that illicit disclosure of pro-democracy emails by email web service to regime that subsequently found and tortured the email sender was sufficient injury to establish Article III standing in a UCL case).

⁹⁷ See *Bass v. Facebook, Inc.*, 394 F. Supp. 3d at 1040 (finding, on an issue of first impression in the Ninth Circuit, that a plaintiff’s loss of time spent “sorting through” around thirty “phishing” emails received as a result of a data breach was sufficient to establish Article III standing, but that plaintiff failed to establish standing under the UCL or CLRA because plaintiff failed to show either (1) that there was a market for his stolen personal information and his ability to participate in that market was impaired or (2) that plaintiff intended to sell his personal information and the value of the information had been devalued by the breach); *Mosley v. Wells Fargo Bank NA*, No. 17-CV-05064, 2017 WL 5478628, at *7 (N.D. Cal. Nov. 15, 2017) (holding that violation of Homeowner’s Bill of Rights may be sufficient to confer Article III constitutional standing but insufficient to confer UCL standing when the plaintiff fails to allege the loss of money or property); *Van Patten v. Vertical Fitness Grp. LLC*, 847 F.3d 1037, 1048-49 (9th Cir. 2017) (affirming order granting summary judgment in defendant’s favor on UCL claim because plaintiff could not prove that the receipt of unsolicited text messages caused an economic injury since plaintiff paid for an unlimited text messaging plan).

⁹⁸ See, e.g., *Lanovaz v. Twinings N. Am., Inc.*, 726 F. App’x 590, 591 (9th Cir. 2018) (finding plaintiff’s allegation that she would “consider buying” a company’s products in the future insufficient to establish Article III standing); *Wicker v. Walmart, Inc.*, 533 F. Supp. 3d 944, 948 (C.D. Cal. 2021) (finding that fear of COVID-19 was “not enough to establish a credible and individualized threat of future harm.”); *Peacock v. 21st Amend. Brewery Cafe, LLC*, No. 17-CV-01918, 2018 WL 452153, at *9 (N.D. Cal. Jan. 17, 2018) (plaintiff failed to plead sufficient facts to show an actual or imminent threat of a recurring harm to necessitate an injunction under the UCL and CLRA because plaintiff did not allege that he had any intent to purchase defendant’s product in the future); *Opperman v. Path, Inc.*, 84 F. Supp. 3d 962, 987 (N.D. Cal. 2015) (plaintiff lacks standing to seek injunctive relief if he has not alleged a real or immediate threat that he will be wronged again). But see *Le v. Kohls Dep’t Stores, Inc.*, 160 F. Supp. 3d 1096, 1110 (E.D. Wis. 2016) (finding that plaintiff had Article III standing to pursue injunctive relief against defendant’s alleged “company-wide, pervasive, and continuous false advertising campaign,” despite plaintiff’s general awareness of the misleading price advertising, because otherwise no plaintiff could ever seek injunctive relief under the UCL) (internal quotation marks omitted); *Tracton v. Viva Labs, Inc.*, No. 16-cv-2772, 2017 WL 4125053, at *4 (S.D. Cal. Sept. 18, 2017) (holding that plaintiff had standing to pursue injunctive relief because plaintiff alleged that she would purchase the defendant’s product again in the future, thereby establishing a real and immediate threat of continued harm, at least at the pleading stage).

⁹⁹ 873 F.3d 1103 (9th Cir. 2017), amended and superseded on denial of reh’g en banc by *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956 (9th Cir. 2018).

“suitable for flushing,” in that the wipes would not damage pipes or sewage systems.¹⁰⁰ After purchasing the product, plaintiff noticed that the wipes did not break down in the toilet like typical flushable products, and her further research into the issue indicated that flushable wipes had been known to cause damage to home plumbing and municipal sewer systems.¹⁰¹ Plaintiff did not purchase the “flushable” wipes again but alleged that she desired to purchase “truly flushable” wipes in the future “if it were possible to determine prior to purchase if the wipes were suitable to be flushed.”¹⁰²

The Ninth Circuit reversed the district court’s order granting defendant’s motion to dismiss with prejudice, finding that plaintiff “properly alleged that she faces a threat of imminent or actual harm by not being able to rely on Kimberly-Clark’s labels in the future, and that this harm is sufficient to confer standing to seek injunctive relief.”¹⁰³ The Ninth Circuit rejected the reasoning of several district courts that plaintiffs with knowledge of a defendant’s alleged misrepresentations lack standing to seek injunctive relief under the CLRA and UCL.¹⁰⁴ Instead, the Ninth Circuit adopted the reasoning of district courts holding that a plaintiff faces an actual and imminent threat of future injury where the plaintiff may be unable to rely on the defendant’s representations in the future, or because the plaintiff may again purchase the mislabeled product.¹⁰⁵ The Ninth Circuit explained that “a previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase, because the consumer may suffer an ‘actual and imminent, not conjectural or hypothetical’ threat of future harm.”¹⁰⁶ The Ninth Circuit further analyzed,¹⁰⁷ more specifically, why plaintiff met the standing requirements for prospective injunctive relief, detailing how plaintiff sufficiently alleged a concrete and particularized injury, a threat of repeated injury and redressability.¹⁰⁸

¹⁰⁰ *Davidson*, 889 F.3d at 961-62.

¹⁰¹ *Id.* at 962.

¹⁰² *Id.*

¹⁰³ *Id.* at 967.

¹⁰⁴ *Id.* at 967-68.

¹⁰⁵ *Id.* at 969-70; *see also Safransky v. Fossil Grp., Inc.*, No. 17cv1865, 2018 WL 1726620, at *7 (S.D. Cal. Apr. 9, 2018).

¹⁰⁶ *Davidson*, 889 F.3d at 969 (citation omitted).

¹⁰⁷ In its original opinion, the Ninth Circuit further reasoned that a contrary holding would “effectively gut” the UCL and CLRA by allowing defendants to defeat claims for injunctive relief by removing cases from state court and then moving to dismiss for failure to meet Article III’s standing requirements. *See Davidson*, 873 F.3d at 1115. The Ninth Circuit subsequently amended its opinion and denied plaintiff’s petition for rehearing en banc. In its amended opinion, the Ninth Circuit omitted its anti-removal rationale.

¹⁰⁸ *See Davidson*, 889 F.3d at 971-72; *see, e.g., Shank v. Presidio Brands, Inc.*, No. 17-cv-00232, 2018 WL 1948830, at *5 (N.D. Cal. Apr. 25, 2018) (denying defendant’s motion to dismiss the class action complaint in reliance on *Davidson*, finding plaintiffs had standing to seek injunctive relief because they alleged they could not trust defendant’s claims about their products in the future) *Kutza v. Williams-Sonoma, Inc.*, No. 18-cv-03534, 2018 WL 5886611, *4 (N.D. Cal. Nov. 9, 2018) (same).

Some courts have applied *Davidson* broadly,¹⁰⁹ while others have read the decision more narrowly.¹¹⁰ As an example of the former, in *Luong v. Subaru of America, Inc.*,¹¹¹ plaintiffs brought a putative class action challenging allegedly defective windshields found in particular vehicle models. Defendants argued that plaintiffs' claim for injunctive relief under the UCL should be dismissed because plaintiffs failed to allege an imminent or actual threat of future harm under *Davidson*, which, according to defendants, would require an allegation that plaintiffs intended to purchase another of the defective vehicle models.¹¹² The district court disagreed, finding that plaintiffs sufficiently alleged imminent future harm by contending that they continued to own their vehicles and had an interest in being provided non-defective replacement windshields, as well as an extended vehicle warranty.¹¹³

2. Tobacco II and the Standing Requirement

a. The Decision in Tobacco II

In *Tobacco II*, plaintiffs based their UCL claims on the allegation that the defendant tobacco companies had engaged in 40 years of deceptive advertising regarding the health effects of cigarette smoking.¹¹⁴ After Proposition 64 was enacted, defendants successfully moved to decertify the class, arguing that plaintiffs could not establish that each class member spent money to purchase cigarettes as a result of particular cigarette advertisements.

On review, the California Supreme Court's majority opinion, relying principally on the plain language of Proposition 64, concluded that only the named plaintiff must have standing to bring a UCL claim on behalf of a class.¹¹⁵ The Court also concluded that the ballot materials suggested that the initiative was intended only to prevent "shakedown" lawsuits against small businesses, not to "curb the broad remedial purpose of the UCL or the use of class actions to effect that purpose."¹¹⁶

¹⁰⁹ See, e.g., *Lejbm v. Transnational Foods, Inc.*, No. 17-CV-1317, 2018 WL 1258256, at *6 (S.D. Cal. Mar. 12, 2018) (finding plaintiff had standing to seek injunctive relief under the UCL, FAL and CLRA where she alleged she "would like to, and intends to, continue purchasing the Product in the future").

¹¹⁰ See, e.g., *Loomis v. Slendertone Distrib.*, No. 3:19-cv-854-MMA, 2019 WL 5790136, at *26 (finding plaintiff lacked standing to seek injunctive relief under the UCL where she alleged only that she "would consider" buying another electrical muscle stimulation device from defendant without specifying the particular product, distinguishing *Davidson*); *Tryan v. Ulthera, Inc.*, No. 17-cv-02036, 2018 WL 3955980, at *9-10 (E.D. Cal. Aug. 17, 2018) (distinguishing *Davidson* and finding that where plaintiffs never plausibly alleged they would ever use defendant's product again, standing to seek injunctive relief was absent); *Bruton v. Gerber Prods. Co.*, No. 12-CV-02412, 2018 WL 1009257 (N.D. Cal. Feb. 13, 2018) (distinguishing *Davidson* where defendant stopped making the misleading statements and there was no actual or imminent threat of future harm); *Circle Click Media, LLC v. Regus Mgmt. Grp., LLC*, 743 F. App'x 883, 884 (9th Cir. 2018) (holding that because plaintiffs failed to allege that they intended to do any business with defendants in the future, they failed to demonstrate that they were likely to suffer future injury as required to establish Article III standing); *Sinatro v. Barilla Am., Inc.*, No. 22-CV-03460-DMR, 2022 WL 10128276, at *10 (N.D. Cal. Oct. 17, 2022) (finding that since plaintiffs had now become aware of the location of where the products are manufactured, plaintiffs cannot allege to be misled by the representation in future).

¹¹¹ No. 17-cv-03160, 2018 WL 2047646 (N.D. Cal. May 2, 2018).

¹¹² *Id.* at *6.

¹¹³ *Id.*

¹¹⁴ 46 Cal. 4th at 308-09.

¹¹⁵ *Id.* at 314-16.

¹¹⁶ *Id.* at 317.

More importantly, though, the majority rejected the argument that all class members must have the same injury as the named plaintiff in order for a UCL class to be certified, reasoning that Proposition 64 did not undermine prior cases holding that individualized proof of deception, reliance or injury is not required in UCL cases.¹¹⁷ In doing so, the Court emphasized that the UCL is designed to protect the public from fraud and other unlawful conduct, and that “the focus of the statute is on the defendant’s conduct” rather than injury to class members.¹¹⁸

Further, addressing what named plaintiffs must plead and prove under the UCL in false advertising cases, as referenced above, the Court rejected the suggestion that Proposition 64’s “as a result of” language “introduced a tort causation element into UCL actions.”¹¹⁹ Instead, in order for class representatives to establish standing, they must allege “actual reliance,” but within the framework of existing law under, and the traditional broad scope of, the UCL.¹²⁰ Therefore, the Court stated:

While a plaintiff must show that the misrepresentation was an immediate cause of the injury-producing conduct, the plaintiff need not demonstrate it was the only cause. It is not necessary that the plaintiff’s reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor influencing his conduct. It is enough that the representation has played a substantial part, and so had been a substantial factor, in influencing his decision. Moreover, a presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material. A misrepresentation is judged to be “material” if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question, and as such materiality is generally a question of fact unless the fact misrepresented is so obviously

¹¹⁷ *Id.* at 320-21.

¹¹⁸ *Id.* at 324.

¹¹⁹ *Id.* at 325.

¹²⁰ *Id.* at 326-28. *See In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050 (C.D. Cal. 2015) (holding that named plaintiff could establish standing due to defendant’s failure to warn of the risks associated with certain ingredients in electronic cigarettes but could not establish standing for failure to disclose the names of those harmful ingredients because plaintiff had admitted that even if the names of the ingredients were disclosed he still would have purchased the defendant’s e-cigarettes); *Tracton*, 2017 WL 4125053, at *3 (S.D. Cal. Sept. 18, 2017) (finding that since the complaint did not allege that plaintiff relied on misrepresentations made on defendant’s website, plaintiff did not have standing to proceed on those claims); *Michel v. United States*, No. 16CV277, 2017 WL 4922831, at *19 (S.D. Cal. Oct. 31, 2017) (holding that plaintiff lacked standing to sue the manufacturer of a narcotics field test that produced a false positive result for methamphetamine because the plaintiff needed to “demonstrate her own reliance on the alleged misrepresentations or omissions, rather than the reliance of third parties,” and here she neither purchased the product in question nor did she see any advertising for it); *Major v. Ocean Spray Cranberries, Inc.*, No. 12-cv-03067, 2015 WL 859491 at *6 (N.D. Cal. Feb. 26, 2015) (denying class certification for a deceptive advertising claim because the named plaintiff admitted that she did not detrimentally rely on the defendant’s advertisement of “no sugar added” as indicating its products were “low calorie,” which is the deceptive practice contemplated by 21 C.F.R. § 101.6(c)(2) under which she sought to have the class certified).

unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.¹²¹

In some circumstances, an omission may be considered material for purposes of establishing a claim under the FAL. If the defendant “made a statement, but omitted information that undercuts the veracity of the statement,” then the plaintiff may bring an FAL claim.¹²² However, if the defendant “did not make any statement at all about a subject,” then the plaintiff cannot claim that an omission was a material misrepresentation made under the FAL.¹²³

b. Distinguishing the Individual Reliance vs. Reasonable Consumer Standards in Evaluating UCL and CLRA Claims

It is worth noting that the “reasonable consumer” standard applied for UCL class certification purposes, “unlike the individual reliance requirement . . . is not a standing requirement.”¹²⁴ The “reasonable consumer standard” is used in determining what constitutes a “material misrepresentation” in a class action context.¹²⁵ In this respect, courts avoid subjective inquiries into each class member’s experience with the product. Instead, they focus on a defendant’s

¹²¹ *Tobacco II*, 46 Cal. 4th at 326-27 (internal quotation marks, alteration marks and citations omitted); see also *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1067 (9th Cir. 2014) (finding that plaintiff could not represent class as to time periods in which he did not have standing); *abrogated on other grounds by Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017); *Hale v. Sharp Healthcare*, 183 Cal. App. 4th 1373, 1381-82 (2010) (concluding that *Tobacco II*’s reliance requirement was applicable under the “unlawful” prong of the UCL where the underlying conduct was alleged misrepresentation); *In re FCA US LLC Monostable Elec. Gearshift Litig.*, 280 F. Supp. 3d 975, 1001 (E.D. Mich. 2017) (observing that actual reliance may be presumed because the alleged product defect—the propensity of a vehicle to accelerate suddenly and dangerously out of control—was material); *Opperman*, 84 F. Supp. 3d at 978 (holding “[i]f a plaintiff sufficiently alleges exposure to a long-term advertising campaign as set forth in *Tobacco II*, she need not plead specific reliance on an individual representation,” and setting forth a six-factor test to prove a *Tobacco II* type ad campaign); *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 987 (C.D. Cal. 2015) (finding an inference of class-wide reliance appropriate for plaintiffs’ California UCL and CLRA claims for purchase of cooking oils labeled “100% Natural” that were allegedly made with genetically modified organisms). *But see Haskins v. Symantec Corp.*, 654 F. App’x 338, 339 (9th Cir. 2016) (stating that *Tobacco II*’s exception to the individual reliance requirement of UCL standing does not extend to “misrepresentations [that] were not part of an extensive and long-term advertising campaign like the decades-long campaign engaging in saturation advertising targeting adolescents in *Tobacco II*”); *Gutierrez v. Johnson & Johnson Consumer Inc.*, No. 19-CV-1345 TWR (AGS), 2021 WL 822721 at *1 (S.D. Cal. Jan. 22, 2021) (finding that conclusory statements of being exposed to marketing materials “for decades” insufficient to confer standing under *Tobacco II*); *Goonewardene v. ADP, LLC*, 5 Cal. App. 5th 154, 184 (2016) (alleging only misleading statements was insufficient to plead reliance when plaintiff did not allege that she actually saw the statements or that they influenced her conduct), review granted, 388 P.3d 818 (Cal. 2017), *rev’d and remanded on other grounds* by 6 Cal. 5th 817 (2019).

¹²² *Hodsdon*, 162 F. Supp. 3d at 1023.

¹²³ *Id.*

¹²⁴ *Reid v. Johnson & Johnson*, 780 F.3d 952, 958 (9th Cir. 2015) (rejecting a district court decision to evaluate consumer standing requirement under a “reasonable consumer standard”).

¹²⁵ *Dei Rossi v. Whirlpool Corp.*, No. 12-CV-00125, 2015 WL 1932484, at *7 (E.D. Cal. Apr. 28, 2015); see also *In Re: Macbook Keyboard Litig.*, No. 5:18-CV-02813-EJD, 2021 WL 1250378 at *13 (N.D. Cal. Apr. 5, 2021); see also *Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1117, 1125 (C.D. Cal. 2010) (“California courts have held that reasonable reliance is not an element of claims under the UCL, FAL, and CLRA.”).

representations about the product through a single, objective “reasonable consumer” standard.¹²⁶ Under this standard, “a misrepresentation [is] material ... if a reasonable [person] would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.”¹²⁷ The fact that some consumers may have purchased the product for other reasons does not defeat a finding that the product was marketed with a material misrepresentation, which establishes an injury.¹²⁸

c. **Tobacco II, Article III Standing and Commonality in Class Actions**

Following *Tobacco II*, tension has developed between UCL and Article III standing requirements in class actions, especially when an issue of commonality arises. For instance, in *Webb v. Carter’s, Inc.*,¹²⁹ the United States District Court for the Central District of California held that, in federal court, all class members must have Article III standing. The plaintiffs in *Webb* brought claims under the UCL and CLRA, alleging that they lost the benefit of their bargain by purchasing a defective product—children’s clothing that purportedly contained toxic chemicals that could cause adverse skin reactions.¹³⁰ Finding that *Tobacco II* “does not establish that absent class members in a federal class action need not have Article III standing,” the court stated that “[*Tobacco II*] did not, and could not, hold that uninjured parties could be class members in a class action brought in federal court, despite their lack of Article III standing.”¹³¹ “*Tobacco II* therefore does not persuade the [c]ourt that a class action can proceed even where class members lack Article III standing.”¹³² Accordingly, because the majority of the children who wore the clothing at issue suffered no adverse effects, the court found that the proposed class members suffered no cognizable injury supporting standing and denied plaintiffs’ motion for class certification.¹³³

When the Ninth Circuit addressed the issue in *Stearns v. Ticketmaster Corp.*,¹³⁴ however, it held that class certification under Rule 23 does not require proof that all unnamed class members have standing under Article III. Plaintiffs alleged that they were induced by the website presentations

¹²⁶ *Dei Rossi*, 2015 WL 1932484, at *7.

¹²⁷ *See Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524, 535 (C.D. Cal. 2011) (quoting *Tobacco II*, 46 Cal. 4th at 312) (internal quotation marks omitted).

¹²⁸ *Dei Rossi*, 2015 WL 1932484, at *7 (holding defendant’s nationwide marketing campaign and prominent display of the energy star logo on all its appliances created a presumption of material reliance by the class upon those representations). *But see Jones v. ConAgra Foods, Inc.*, No. C 12-06133, 2014 WL 2702726, at *15 (N.D. Cal. June 13, 2014) (denying class certification where expert offered no objective criteria, such as survey data, to show that defendant’s “all natural” label would be material to a reasonable person).

¹²⁹ 272 F.R.D. 489, 497 (C.D. Cal. 2011).

¹³⁰ *Id.* at 498.

¹³¹ *Id.* at 497-98 (emphasis in original).

¹³² *Id.* at 498.

¹³³ *Id.* at 498, 500; *see also In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d at 1050 (holding that named plaintiff could not establish standing to pursue UCL claim based on defendant’s failure to disclose the names of harmful ingredients in electronic cigarettes because the named plaintiff had admitted that even if the names of the ingredients were disclosed he still would have purchased the e-cigarettes. He thus could not establish pecuniary loss attributable to his reliance on the defendant’s misrepresentation in failing to disclose the names of the harmful ingredients).

¹³⁴ 655 F.3d 1013, 1020-21 (9th Cir. 2011), *abrogated on other grounds as recognized by Green v. Fed. Express Corp.*, 614 F. App’x 905, 908 (9th Cir. 2015).

and practices of Ticketmaster and a rewards program provider, Entertainment Publications, Inc. (EPI), to purchase EPI's services when they intended to purchase tickets only from Ticketmaster.¹³⁵ The district court denied plaintiffs' motion for class certification on their UCL claims, finding that "individualized proof of reliance and causation would be required."¹³⁶ The Ninth Circuit reversed, stating that, "[u]nfortunately, the district court did not have the benefit of [*Tobacco II*], when it ruled, and that case makes all the difference in the world."¹³⁷ It noted that "[*Tobacco II*] decidedly did not change the California rule 'that relief under the UCL is available without individualized proof of deception, reliance and injury.'"¹³⁸ The Ninth Circuit further expressed that "our law keys on the representative party, not all of the class members, and has done so for many years" and reaffirmed that, "[i]n a class action, standing is satisfied if at least one named plaintiff meets the requirements. . . . Thus, we consider only whether at least one named plaintiff satisfies the standing requirements"¹³⁹

Further, in *Mazza v. American Honda Motor Co., Inc.*,¹⁴⁰ the Ninth Circuit rejected defendant's argument that, because *Tobacco II* focuses only on the standing of the named plaintiff, a proposed class might well fail Article III's test—i.e., some unnamed class members might not have suffered an injury in fact. In *Mazza*, plaintiffs represented a nationwide class composed of all consumers who had purchased or leased Honda's Acura RL vehicles equipped with a Collision Mitigation Braking System (CMBS).¹⁴¹ Plaintiffs alleged that Honda's advertisements misrepresented the characteristics of the CMBS and omitted material information about the CMBS's limitations, in violation of the UCL, the CLRA and the FAL.¹⁴² The district court granted the plaintiffs' motion for class certification.¹⁴³ The Ninth Circuit granted Honda's interlocutory appeal and vacated the certification order, finding that the district court erred in concluding that common issues of law and fact predominated.¹⁴⁴ Specifically, the Ninth Circuit held that individualized reliance issues precluded certification because each class member could not be presumed to have relied on the alleged misleading advertising given the limited scale of Honda's advertising campaign.¹⁴⁵

Recently, however, the Ninth Circuit retreated from *Mazza's* broader statements about the composition of the class. In *Olean Wholesale Grocery Cooperative v. Bumble Bee Foods, LLC*, the Ninth Circuit held that only one plaintiff in a class needs to satisfy the Article III requirement for standing in cases seeking injunctive or other equitable relief, overruling *Mazza* to the extent it suggested to the contrary.¹⁴⁶ Moreover, the Ninth Circuit's comments in *Olean* also strongly suggests that even where a UCL plaintiff seeks to certify a restitution class in federal court under Federal Rule of Civil

¹³⁵ *Id.* at 1017.

¹³⁶ *Id.* at 1020.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 1021 (quoting *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007)).

¹⁴⁰ 666 F.3d 581, 594-95 (9th Cir. 2012).

¹⁴¹ *Id.* at 585.

¹⁴² *Id.*

¹⁴³ *Id.* at 587.

¹⁴⁴ *Id.* at 585, 588.

¹⁴⁵ *Id.* at 585, 595-96.

¹⁴⁶ *Olean Wholesale Grocery Cooperative v. Bumble Bee Foods, LLC* 31 F.4th 651, n.32 (9th Cir. 2022).

Procedure 23(b)(3), at the class certification stage it is not necessary for the plaintiff to establish that every class member ultimately will have a right to restitution.¹⁴⁷

On the other hand, in *Opperman v. Path, Inc.*,¹⁴⁸ a district court held that the plaintiffs' allegation of a *Tobacco II*-like advertising campaign was sufficient to survive defendant's motion to dismiss. In *Opperman*, plaintiffs represented a putative class composed of consumers that owned one or more of three Apple products at issue (the iPhone, iPad, and/or iPod touch) during the class period.¹⁴⁹ Plaintiffs alleged that Apple engaged in a *Tobacco II*-like advertising campaign, whereby it "consciously and continuously misrepresented its iDevices as secure, and that the personal information contained on iDevices—including, specifically, address books — could not be taken without owners' consent."¹⁵⁰ Defendant Apple moved to dismiss plaintiffs' UCL and CLRA claims for failure to prove either reliance, or that the alleged misrepresentations had "been part of an extensive and long-term advertising campaign" under *Tobacco II*.¹⁵¹ The district court denied defendant's motion to dismiss, holding that plaintiffs had sufficiently alleged a *Tobacco II* advertising campaign.¹⁵² Moreover, in *Walker v. Life Insurance Co.*,¹⁵³ the Ninth Circuit affirmed the district court's decision to narrow plaintiffs' proposed class definition (to avoid problems of providing class-wide reliance) rather than denying class certification outright.

In reaching this conclusion, the district court applied *Tobacco II*'s six-factor test.¹⁵⁴ In order to plead an advertising campaign in accordance with *Tobacco II*, the following factors must be met: (1) plaintiffs must allege "[the individual named plaintiffs] actually saw or heard the defendant's advertising campaign," (2) "the advertising campaign must be sufficiently lengthy in duration, and widespread in dissemination, that it would be unrealistic to require the plaintiff to plead each misrepresentation she saw and relied upon," (3) "the plaintiff must describe in the complaint, and preferably attach to it, a representative sample of the advertisements at issue so as to adequately notify the defendant of the precise nature of the misrepresentation claim...," (4) "the plaintiff must allege, and the court must evaluate, the degree to which the alleged misrepresentations contained within the advertising campaign are similar to each other," (5) "each plaintiff must plead with particularity and separately, when and how they were exposed to the advertising campaign, so as to ensure the advertisements were representations consumers were likely to have viewed, rather than representations that were isolated or more narrowly disseminated," and (6) "the court must be able to determine when a plaintiff made his or her purchase or otherwise relied on defendant's advertising campaign, so as to determine which portion of that campaign is relevant."¹⁵⁵

Having considered these six factors, the district court held that plaintiffs' allegations, taken as a whole, were sufficient to survive a motion to dismiss.¹⁵⁶

¹⁴⁷ *Id.*

¹⁴⁸ 84 F. Supp. 3d at 962.

¹⁴⁹ *Id.* at 971.

¹⁵⁰ *Id.* (internal quotation marks omitted).

¹⁵¹ *Id.* at 976 (internal quotation marks omitted).

¹⁵² *Id.* at 982-83.

¹⁵³ 953 F.3d 624, 634 (9th Cir. 2020).

¹⁵⁴ *Id.* at 976-77.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 983.

The court then went on to address Article III standing to seek injunctive relief.¹⁵⁷ It held that plaintiffs were unable to allege a real or immediate threat that they would be wronged again, as required to prove injury in fact to satisfy the Article III standing requirement.¹⁵⁸ Specifically, the court noted that “it is clear that a Plaintiff seeking injunctive relief must allege at least a willingness to consider purchasing the product at issue in the future.”¹⁵⁹ Because the plaintiffs in *Opperman* failed to make any such allegation, the court held that they lacked standing to seek injunctive relief.

Both *Mazza* and *Opperman* demonstrate how the issues of standing and commonality have become intertwined. Other courts have engaged in similar reasoning. For instance, in *Cohen v. DirectTV, Inc.*,¹⁶⁰ the Court of Appeal noted: “*Tobacco II* held that, for purposes of standing in context of the class certification issue in a ‘false advertising’ case involving the UCL, the class members need not be assessed for the element of reliance. Or, in other words, class certification may not be defeated on the ground of lack of standing upon a showing that class members did not rely on false advertising.” But the court also stated that there is “no language in *Tobacco II* which suggests . . . that the . . . Court intended . . . to dispatch with an examination of commonality when addressing a motion for class certification.”¹⁶¹ Accordingly, the court stated that, when examining commonality, a “proper criterion for . . . consideration” is whether the UCL claim would involve “factual questions associated with [proposed class members’] reliance” on allegedly false representations.¹⁶² Referencing *Tobacco II*, and affirming denial of class certification, the court emphasized that “we do not understand the UCL to authorize an award for injunctive relief and/or restitution on behalf of a consumer who was never exposed in any way to an allegedly wrongful business practice.”¹⁶³

Similarly, in *Avritt v. Reliastar Life Insurance Co.*,¹⁶⁴ the Eighth Circuit, affirming the district court’s denial of class certification, noted that “it is not clear that the California Supreme Court’s discussion of standing in *Tobacco II* was meant to have any bearing on whether a plaintiff can satisfy the class certification requirement that common questions of law or fact predominate.” The Eighth Circuit went on to find that, despite the uncertainty of UCL jurisprudence, “there is reason to doubt that the holding in *Tobacco II* goes as far as . . . eliminating any need to show that unnamed class members relied on any misrepresentations or were actually injured.”¹⁶⁵

¹⁵⁷ *Id.* at 987.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 988.

¹⁶⁰ 178 Cal. App. 4th 966, 981 (2009) (emphasis in original).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 980; see also *Campion v. Old Republic Home Prot. Co., Inc.*, 272 F.R.D. 517, 539-41 (S.D. Cal. 2011) (likening the case to *Cohen*, but denying plaintiff’s motion for class certification because plaintiff failed to demonstrate that the requirements of Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3) were satisfied); *Greenwood v. Compucredit Corp.*, No. 08-04878, 2010 WL 4807095, at *4-5 (N.D. Cal. Nov. 19, 2010) (distinguishing *Cohen*, the court approved a narrower class, including only California residents who actually received alleged deceptive advertising; also, noting that, on UCL fraud claims, “material misrepresentation results in a presumption, or at least an inference, of individualized reliance”). In April 2010, the California Supreme Court declined to resolve this split in rulings over *Tobacco II*’s impact on class certification issues. See *Weinstat v. Dentsply Int’l, Inc.*, 180 Cal. App. 4th 1213, 1218, 1224 (2010).

¹⁶⁴ 615 F.3d 1023, 1033 (8th Cir. 2010).

¹⁶⁵ *Id.* at 1034.

California courts have established other limitations for purposes of standing in the class action context for non-purchased products under the UCL. For example, to prevail on such claims, plaintiffs must detail why the products are substantially similar to those actually purchased.¹⁶⁶ In *Astiana*, the court found sufficient similarity where the plaintiffs challenged the same kind of food product (i.e., ice cream) as well as the same labels for all of the products — i.e., “All Natural Flavors” for the Dreyer’s/Edy’s products and “All Natural Ice Cream” for the Haagen-Dazs products. There, the court found that though the ice creams may ultimately have had different ingredients, plaintiffs were not prohibited from bringing their claims because they challenged the same basic mislabeling practice across different product flavors.¹⁶⁷ Similarly, in *Anderson v. Jamba Juice Co.*, the court held that the plaintiff, who purchased several flavors of at-home smoothie kits labeled “All Natural,” had standing to bring claims on behalf of purchasers of other flavors because the products were sufficiently similar and because the “same alleged misrepresentation was on all of the smoothie kit[s] regardless of flavor . . .”¹⁶⁸ Finally, in a non-UCL case, the Court of Appeal recently ruled that, unless there is express statutory language to the contrary, a plaintiff cannot sue (individually or on behalf of a class) unless he or she has a “beneficial interest” in the outcome by reason of having sustained injury-in-fact.¹⁶⁹

II. LIABILITY UNDER THE UCL

A. Claims for “Unlawful” Conduct

1. The Liability Standard

Put simply, a practice is “unlawful” if it violates a law other than the UCL. The UCL “‘borrows’ violations of other laws and treats these violations, when committed pursuant to business activity, as unlawful practices independently actionable under [the UCL].”¹⁷⁰ “Unlawful” claims have been predicated on numerous laws and regulations existing at various levels of government, including:

¹⁶⁶ See, e.g., *Miller v. Ghirardelli Chocolate Co.*, 912 F. Supp. 2d 861, 869 (N.D. Cal. 2012); *Stephenson v. Neutrogena*, No. 12-cv-00426, 2012 U.S. Dist. LEXIS 105099, at *3 (N.D. Cal. July 27, 2012) (dismissing claims based on products not purchased because the purchased products were not “similar enough to the unpurchased products such that an individualized factual inquiry was not needed for each product”); *Astiana v. Dreyer’s Grand Ice Cream, Inc.*, No. C-11-2910, 2012 WL 2990766, at *11 (N.D. Cal. July 20, 2012) (noting that in most reasoned opinions, “the critical inquiry seems to be whether there is sufficient similarity between the products purchased and not purchased”); *Anderson v. Jamba Juice Co.*, 888 F. Supp. 2d 1000, 1005-06 (N.D. Cal. 2012) (relying on *Astiana* for the same proposition); *Arroyo*, 2015 WL 5698752, at *4 (dismissing plaintiff’s UCL and CLRA claims because plaintiff conceded he never viewed the non-purchased products’ marketing materials and failed to plead how non-purchased products were substantially similar to those models purchased).

¹⁶⁷ 2012 WL 2990766, at *13.

¹⁶⁸ 888 F. Supp. 2d at 1006.

¹⁶⁹ *Limon v. Circle K Stores Inc.*, 84 Cal. App. 5th 671, review denied (2022).

¹⁷⁰ *Farmers Ins. Exch. v. Super. Ct.*, 2 Cal. 4th 377, 383 (1992); *Clerkin v. MyLife.com, Inc.*, No. C 11-00527, 2011 WL 3607496, at *6 (N.D. Cal. Aug. 16, 2011) (“Violation of almost any federal, state or local law may serve as the basis for a UCL claim.”).

federal statutes;¹⁷¹ federal regulations;¹⁷² state statutes;¹⁷³ state regulations;¹⁷⁴ local ordinances;¹⁷⁵ prior case law;¹⁷⁶ standards of professional conduct;¹⁷⁷ and common law doctrines.¹⁷⁸ To plead a UCL claim based on an “unlawful” practice, a plaintiff must allege facts sufficient to show a violation of the

¹⁷¹ See, e.g., *Ballard v. Equifax Check Servs., Inc.*, 158 F. Supp. 2d 1163, 1176 (E.D. Cal. 2001) (violating federal Fair Debt Collection Practices Act constituted unlawful practice); *Sw. Marine, Inc. v. Triple A Mach. Shop, Inc.*, 720 F. Supp. 805, 808 (N.D. Cal. 1989) (violating federal environmental laws constituted unlawful practice).

¹⁷² See *Sw. Marine*, 720 F. Supp. at 807-08 (violating Navy procurement regulation constituted unlawful practice).

¹⁷³ See, e.g., *Ingalls*, 2017 WL 3021037, at *2 (bringing suit for alleged violations of California’s Automatic Renewal Law); *Sisemore v. Master Fin., Inc.*, 151 Cal. App. 4th 1386, 1426 (2007) (Unruh Civil Rights Act); *Quelimane*, 19 Cal. 4th at 42-43 (Cartwright Act); *Hewlett v. Squaw Valley Ski Corp.*, 54 Cal. App. 4th 499, 520-25 (1997) (Forest Practices Act), *superseded by statute, as recognized in J.F. Shea Constr., Inc. v. Cty. of Siskiyou*, No. CO62117, 2010 WL 438368, at *9 (Cal. Ct. App. Feb. 9, 2010) (unpublished); *Podolsky v. First Healthcare Corp.*, 50 Cal. App. 4th 632, 649 (1996) (CLRA); *People ex rel. Van de Kamp v. Cappuccio, Inc.*, 204 Cal. App. 3d 750, 759 (1988) (breaching Fish & Game Code sufficient predicate for unlawful practice); *Stop Youth Addiction*, 17 Cal. 4th at 573 (violating Penal Code prohibition of cigarette sales to minors constituted sufficient unlawful practice); *Reilly v. Apple, Inc.*, No. 21-xc-04601-EMC, 2022 WL 1215305 at *3 (N.D. Cal. Apr. 25, 2022) (dismissing UCL claim for alleged violation of California’s fraudulent inducement statute for failure to allege fraud with particularity); see also *Mansner v. Sierra Foothills Pub. Util. Dist.*, No. CV-F-08-1250, 2008 WL 5114619, at *7 (E.D. Cal. Dec. 4, 2008) (California Labor Code); *Lu v. Hawaiian Gardens Casino, Inc.*, 170 Cal. App. 4th 466, 482-83 (2009) (same), *aff’d*, 50 Cal. 4th 592 (2010); *accord Blue Cross of Cal., Inc. v. Super. Ct.*, 180 Cal. App. 4th 1237, 1254 (2009) (“When a statute [] grants enforcement authority to a particular government agency [] and does not grant it to anyone else, a local law enforcement official (a district attorney or a city attorney) can still pursue UCL claims based on conduct made unlawful by the statute.”). *But see Martinez v. Welk Grp., Inc.*, No. 09 CV 2883, 2011 WL 90313, at *11 (S.D. Cal. Jan. 11, 2011) (finding that plaintiff could not assert an unlawful claim based upon violations of the Toxic Mold Protection Act; plaintiff could not allege how defendant violated the Act when no mold standards had yet been adopted); *People v. Persolve, LLC*, 218 Cal. App. 4th 1267, 1274, 1276-77 (2013) (holding that an “‘unlawful’ business practice cause of action” based on violations of the FDCPA and Rosenthal Act “can be prosecuted under an exception to the litigation privilege” because when “the ‘borrowed’ statute is more specific than the litigation privilege and the two are irreconcilable, unfair competition law claims based on conduct specifically prohibited by the borrowed statute are excepted from the litigation privilege”); *Fuller v. First Franklin Fin. Corp.*, 216 Cal. App. 4th 955, 968 (2013) (permitting imposition of vicarious liability where plaintiff alleged that defendant “acted pursuant to a business plan under which it obtained overvalued appraisals to make loans to otherwise unqualified borrowers in order to maximize the volume of loans available for sale to investors who would bear the resulting high risk of foreclosure (along with the borrowers)” and paid an “undisclosed kickback” to its agent for securing loans); *Gonzales v. CarMax Auto Superstores, LLC*, 840 F.3d 644, 654 (9th Cir. 2016) (granting summary judgment to plaintiff on his CLRA and UCL claims based on defendant dealer’s violation of California Vehicle Code requiring car dealers to provide consumers with completed inspection reports prior to selling a certified vehicle); *Elgindy v. AGA Serv. Co.*, No. 20-CV-06304-JST, 2021 WL 1176535 at *16 (N.D. Cal. Mar. 29, 2021) (denying motion to dismiss where plaintiff alleged defendant “bundled” fees that violated the Insurance Code with its legitimate services and did not disclose the inclusion of those fees). *Petconnect Rescue, Inc. v. Salinas*, No. 20-CV-00527-H-DEB, 2021 WL 5178647, at *5 (S.D. Cal. 2021) (finding that plaintiff sufficiently alleged unlawful claim where defendant purportedly sold rescue dogs in violation of California Health and Safety Code section 122345.5(a)).

¹⁷⁴ See, e.g., *People v. McKale*, 25 Cal. 3d 626, 635 (1979) (determining that violation of mobile home park regulations was unlawful); *People v. Casa Blanca Convalescent Homes, Inc.*, 159 Cal. App. 3d 509, 528-30 (1984) (stating that violation of nursing home regulations could serve as predicate unlawful conduct), *abrogated on other grounds by Cel-Tech*, 20 Cal. 4th at 185.

underlying law and, given Proposition 64’s standing requirement, should be required to allege facts demonstrating the resulting harm.¹⁷⁹

Historically, courts have imposed some limitations on the broad “borrowing” of underlying law that is permitted on unlawful claims.¹⁸⁰ However, the California Supreme Court issued a pair of

¹⁷⁵ See, e.g., *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy*, 4 Cal. App. 4th 963, 967 (1992) (lacking compliance with county ordinance regulating the sale of raw milk products was unlawful); *People v. Thomas Shelton Powers, M.D., Inc.*, 2 Cal. App. 4th 330, 334, 336 (1992) (ignoring city subdivision code was unlawful), *abrogated by Kraus*, 23 Cal. 4th 116.

¹⁷⁶ See, e.g., *Bondanza v. Peninsula Hosp. & Med. Ctr.*, 23 Cal. 3d 260, 266–68 (1979) (holding surcharge on delinquent account was “unlawful” in that it violated rule adopted by court in earlier case); *AmeriPOD LLC v. Davis REED Constr. Inc.*, No. 17-cv-00747, 2017 WL 2959351, at *6–7 (S.D. Cal. July 11, 2017) (holding intentional interference with contract can form the basis of a UCL claim under 9th Circuit case law).

¹⁷⁷ See, e.g., *People ex rel. Herrera v. Stender*, 212 Cal. App. 4th 614, 632 (2012) (transgressing rules of professional conduct governing attorneys may serve as a predicate for UCL “unlawful” action); *Saunders v. Super. Ct.*, 27 Cal. App. 4th 832, 839–41 (1994) (licensing statute governing certified shorthand reporters may serve as predicate for UCL “unlawful” action).

¹⁷⁸ See, e.g., *Cortez v. Glob. Ground Support, LLC*, No. 09-4138, 2009 WL 4282076, at *3–4 (N.D. Cal. Nov. 25, 2009) (following decisions stating that common law torts can provide basis for UCL claim); *House of Lebanon Org., Inc. v. House of Pac. Relations Int’l Cottages, Inc.*, No. 17-cv-00232, 2017 WL 2380121, at *4 (S.D. Cal. June 1, 2017) (holding that breach of contract, being a violation of California common law, is sufficient “to sustain a claim under the unlawful prong of the UCL”); *Nestle USA, Inc. v. Crest Foods, Inc.*, No. LACV1607519, 2017 WL 3267665, at *20 (C.D. Cal. July 28, 2017) (permitting “unlawful” claim based on the common law of breach of implied covenant of good faith and fair dealing); *Moran*, 3 Cal. App. 5th at 1142–43 (permitting “unlawful” claim based on common law unconscionability for allegedly excessive contract pricing for hospital services). *But see Pneuma Int’l, Inc. v. Yong Kwon Cho*, No. A151536, 2019 WL 3313607, at *8–9 (Cal. Ct. App. July 24, 2019) (unpublished) (holding that tort of trespass to chattels, which allows recovery for minor interferences with possession of personal property not amounting to conversion, could not serve as the predicate for a UCL “unlawful” violation); *Stearns v. Select Comfort Retail Corp.*, 763 F. Supp. 2d 1128, 1150 (N.D. Cal. 2010) (explaining that negligence and product liability claims, and common law claims, may not constitute predicate acts); *Shroyer v. New Cingular Wireless Servs.*, 622 F.3d 1035, 1044 (9th Cir. 2010) (stating that the unlawful prong of the UCL requires a business practice to be “forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made” and, thus, a common law violation, such as breach of contract, is insufficient); *Prostar Wireless Grp., LLC v. Domino’s Pizza, Inc.*, No. 16-CV-05399, 2017 WL 67075, at *6 (N.D. Cal. Jan. 6, 2017) (citing *Shroyer* and holding that alleged breach of fiduciary duty insufficient to state claim under “unlawful” prong of UCL); *S. Cal. Inst. of Law v. TCS Educ. Sys.*, No. CV 10-8026, 2011 WL 1296602, at *11 (C.D. Cal. Apr. 5, 2011) (finding a breach of contract claim alone insufficient to state an “unlawful” claim because a “breach of contract claim ‘may only form the basis of a section 17200 claim if the breach itself is ‘unlawful, unfair, or fraudulent’”) (quoting *Spring Design, Inc. v. Barnesandnoble.com, LLC*, No. C 09-5185, 2010 WL 5422556, at *9 (N.D. Cal. Dec. 27, 2010)); *Shusha, Inc. v. Century-Nat’l Ins. Co.*, 303 Cal. Rptr. 3d 100, 114 (2022) (violation of a cause of action for breach of the covenant of good faith and fair dealing can provide basis for UCL claim).

¹⁷⁹ See *McKale*, 25 Cal. 3d at 635 (“Without supporting facts demonstrating the illegality of a rule or regulation, an allegation that it is in violation of a specific statute is purely conclusionary and insufficient to withstand demurrer.”).

¹⁸⁰ See *Hartless v. Clorox Co.*, No. 06CV2705, 2007 WL 3245260, at *4 (S.D. Cal. Nov. 2, 2007) (dismissing UCL claim seeking to enforce Federal Insecticide, Fungicide, and Rodenticide Act because statute expressly precludes private actions); *Rose v. Bank of Am., N.A.*, 200 Cal. App. 4th 1441, 1447 (2011) (holding that the UCL could not be used to redress violations of the Truth in Savings Act (“TISA”) because Congress’ repeal of the statutory right of consumers to enforce TISA bars all

decisions in 2013 making clear that federal and state statutes that have no private right of action can nonetheless serve as a basis for a UCL “unlawful” violation.

In *Rose v. Bank of America, N.A.*,¹⁸¹ plaintiffs alleged a claim under the “unlawful” prong of the UCL based on alleged violations of TISA, a statute that Congress had amended to remove any private right of action, but left a section permitting states to maintain laws that are consistent with TISA. The California Supreme Court allowed the claim to stand, reasoning that:

Plaintiffs are not suing to enforce TISA, nor do they seek damages for TISA violations. Instead, they pursue the equitable remedies of restitution and injunctive relief, invoking the UCL’s restraints against unfair competition. Doing so is entirely consistent with the congressional intent reflected in the terms and history of TISA. Congress expressly left the door open for the operation of state laws that hold banks to standards equivalent to those of TISA.¹⁸²

The Court further reasoned that “[t]o forestall an action under the [UCL], another provision must actually ‘bar’ the action or clearly permit the conduct.”¹⁸³

The same day that it issued *Rose*, the California Supreme Court also handed down its opinion in *Zhang v. Superior Court*.¹⁸⁴ In *Zhang*, the Court held that plaintiffs may sue insurers under the UCL based on violations of state insurance laws even though the insurance code precludes a private right of action. Plaintiffs had alleged “causes of action for false advertising and insurance bad faith,” which the Court reasoned “provide grounds for a UCL claim independent from” the Insurance Code sections that otherwise bar private claims.¹⁸⁵ The Court held that while private actions under the insurance code section at issue are barred, “when insurers engage in conduct that violates both the [Insurance Code section] and obligations imposed by other statutes or the common law, a UCL action may lie.”¹⁸⁶

Notwithstanding the decisions in *Rose* and *Zhang*, however, the Northern District of California held in *Newton v. American Debt Services, Inc.*¹⁸⁷ that the violation of an FDIC consent order cannot form the basis of a UCL claim for “unlawful” or “unfair” conduct. The court emphasized that the FDIC

private actions; the UCL cannot be used to “plead around” this bar), *rev’d*, 57 Cal. 4th 390 (2013). *But see Stop Youth Addiction*, 17 Cal. 4th at 563-66 (UCL action not barred simply because it was predicated upon a statute that does not expressly provide a private right of action); *AICCO, Inc. v. Ins. Co. of N. Am.*, 90 Cal. App. 4th 579, 597 (2001) (plaintiffs allowed to plead around the bar to private causes of action under California’s Unfair Insurance Practices Act (“UIPA”) by recasting as UCL action); *Hangarter v. Paul Revere Life Ins. Co.*, 236 F. Supp. 2d 1069, 1103-06 (N.D. Cal. 2002) (rejecting defendants’ argument that plaintiff should not be permitted to use UCL claims as an end run around the prohibition of private rights of action under the UIPA and reasoning that predicate statute must actually bar the action or clearly permit the conduct), *aff’d in part and rev’d in part on other grounds sub nom. Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998 (9th Cir. 2004); *Mansner*, 2008 WL 5114619, at *7; *Hawaiian Gardens Casino*, 170 Cal. App. 4th at 477 (allowing claim based on California Labor Code provisions that did not provide for a private right of action).

¹⁸¹ 57 Cal. 4th at 393.

¹⁸² *Id.* at 397.

¹⁸³ *Id.* at 398.

¹⁸⁴ *Zhang v. Super. Ct. (Cal. Capital Ins. Co.)*, 57 Cal. 4th 364 (2013).

¹⁸⁵ *Id.* at 369.

¹⁸⁶ *Id.* at 384.

¹⁸⁷ 75 F. Supp. 3d 1048 (N.D. Cal. 2014).

entered its consent order pursuant to 12 U.S.C. § 1818, which precludes a court from “affect[ing] by injunction or otherwise the issuance or enforcement of any notice or order [issued under this section], or to review, modify, suspend, terminate, or set aside such notice or order.”¹⁸⁸ The court determined that allowing a plaintiff “to ‘borrow’ the FDIC Order as predicate authority for a UCL violation, and thereby . . . litigate her claims that [the defendant] acted unlawfully by contravening that Order, it most certainly would ‘affect . . . enforcement’ of the Order.”¹⁸⁹ Potentially limiting the scope of its ruling, however, the court noted, “What [12 U.S.C. § 1818] bars is enforcement of an FDIC cease and desist order itself (as distinct from the substantive regulatory law being enforced).”¹⁹⁰

2. Defenses Specific to Unlawful Claims

a. Defense to Underlying Violation

An affirmative defense to a violation of the underlying law is also a defense to the attendant unlawful claim.¹⁹¹ Similarly, a defendant’s full compliance with the underlying law is a defense to an unlawful claim.¹⁹² As discussed below, however, a statute of limitations defense to the underlying claim will not defeat a UCL unlawful claim. Furthermore, at least some equitable defenses have been held *not* to apply to unlawful claims.¹⁹³

¹⁸⁸ *Id.* at 1058.

¹⁸⁹ *Id.* at 1059.

¹⁹⁰ *Id.*

¹⁹¹ *See Hobby Indus. Ass’n of Am., Inc. v. Younger*, 101 Cal. App. 3d 358, 372 (1980); *see also Aquino v. Credit Control Servs.*, 4 F. Supp. 2d 927, 930 (N.D. Cal. 1998) (dismissing UCL action where plaintiff failed to “set forth any factual allegations that the defendant’s approach violated any state or federal provisions”); *Metro Publ’g, Ltd. v. San Jose Mercury News, Inc.*, 861 F. Supp. 870, 881 (N.D. Cal. 1994) (dismissing UCL claim after underlying trademark infringement and dilution claims were dismissed); *Fabozzi v. StubHub, Inc.*, No. C-11-4385, 2012 WL 506330, at *5 (N.D. Cal. Feb. 15, 2012) (plaintiff’s claim, based on defendant’s failure to disclose, was defeated where the underlying statute did not contain a disclosure obligation and, thus, was not breached); *In re Bayer Phillip Colon Health Probiotics Sales Pracs. Litig.*, No. 11-03017, 2017 WL 1395483 (D.N.J. Apr. 18, 2017) (dismissing UCL claim based upon allegations of fraudulent advertising due to plaintiff’s lack of evidence showing the actual falsity of the advertisements); *Dr. Seuss Enters., L.P. v. Comicmix LLC*, 300 F. Supp. 3d 1073 (S.D. Cal. 2017) (denying motion to dismiss UCL claims in copyright and trademark action because defendant failed to prove each element of nominative fair use defense).

¹⁹² *See McCann v. Lucky Money, Inc.*, 129 Cal. App. 4th 1382, 1397-98 (2005) (holding that California law did not require money transmitters to disclose wholesale rate of exchange; disclosure of retail rate was sufficient); *Blank v. Kirwan*, 39 Cal. 3d 311, 329 (1985); *Millare v. Bank of Am.*, No. CV-21-8398, 2022 WL 1434109 (C.D. Cal. Apr. 1, 2022) (dismissing UCL claim based on an alleged “unfair” failure to monitor elder’s bank account activity, because banks do not have a duty to supervise account activity under California law); *Hawkins v. Kellogg Co.*, 224 F. Supp. 3d 1002, 1012-13 (S.D. Cal. 2016) (dismissing UCL claim because defendant’s use of partially hydrogenated oil (PHO) was permitted until June 2018 per FDA regulation and subsequent congressional ratification, and thus not a violation of the federal laws predicating the UCL claim). *But see Casa Blanca Convalescent Homes*, 159 Cal. App. 3d at 530-31 (stating that defendant’s substantial compliance with the underlying law is not a defense).

¹⁹³ *See, e.g., Ticconi v. Blue Shield of Cal. Life & Health Ins. Co.*, 160 Cal. App. 4th 528, 544-45 (2008) (reversing order denying certification of UCL claim on ground that unclean hands and fraud defenses did not apply to unlawful claim and therefore did not create individual issues).

b. Change in Underlying Law

A defense may arise by virtue of a change in the underlying law or repeal of the underlying law before the plaintiff obtains final judgment on an unlawful claim.¹⁹⁴

B. Claims for “Unfair” Conduct

1. The Liability Standard

The “unfair” prong has been interpreted to allow courts maximum discretion to address improper business practices,¹⁹⁵ and no certain definition of “unfairness” in the consumer context has yet been formulated.¹⁹⁶ In the past, courts frequently used one of two tests. The first involved “an examination of [the practice’s] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer.”¹⁹⁷ In brief, “the court must weigh the utility of the defendant’s conduct against the gravity of the harm to the alleged victim”¹⁹⁸ In the second, courts adopted language from FTC guidelines, which define “unfair” conduct with reference to section 5 of the FTCA.¹⁹⁹ Under this test, a business act is “unfair” when it “offends an established

¹⁹⁴ See *Governing Bd. of Rialto Unified Sch. Dist. v. Mann*, 18 Cal. 3d 819, 829 (1977) (recognizing California’s general rule that “a cause of action or remedy dependent on a statute falls with a repeal of the statute”); *Californians For Disability Rights*, 39 Cal. 4th at 233 (finding that Proposition 64 applied to then-pending actions).

¹⁹⁵ See *Candelore v. Tinder, Inc.*, 19 Cal. App. 5th 1138, 1155 (2018) (holding that alleged age discrimination in violation of California’s Unruh Civil Rights Act violated both the “unlawful” and “unfair” prongs of the UCL); *Smith v. Chase Mortg. Credit Grp.*, 653 F. Supp. 2d 1035, 1045-46 (E.D. Cal. 2009) (concluding that defendant’s alleged violation of internal policy provides basis for unfairness claim); see, e.g., *Motors, Inc. v. Times Mirror Co.*, 102 Cal. App. 3d 735, 740 (1980).

¹⁹⁶ See *Mui Ho v. Toyota Motor Corp.*, 931 F. Supp. 2d 987, 1000 n.5 (N.D. Cal. 2013) (“California courts and the legislature have not specified which of several possible ‘unfairness’ standards is the proper one.”); *Ferrington v. McAfee, Inc.*, No. 10-CV-01455, 2010 WL 3910169, at *11 (N.D. Cal. Oct. 5, 2010) (“California law is currently unsettled with regard to the correct standard to apply to consumer suits alleging claims under the unfair prong of the UCL”); *Doe One v. CVS Pharmacy, Inc.*, 348 F. Supp. 3d 967, at 990-91 (N.D. Cal. 2018) (acknowledging that the law remains unsettled and finding plaintiff failed to state a claim under either test).

¹⁹⁷ *Motors*, 102 Cal. App. 3d at 740.

¹⁹⁸ *State Farm Fire & Cas. Co.*, 45 Cal. App. 4th at 1104 (citations omitted); see also *Hutchinson v. AT&T Internet Servs., Inc.*, No. CV07-3674, 2009 WL 1726344, at *8 (C.D. Cal. May 5, 2009) (applying the test); *In re Anthem, Inc. Data Breach Litig.*, 162 F. Supp. 3d at 990 (applying balancing test and allowing UCL claim under unfair prong for data breach claims because of “California’s public policy of protecting customer data,” notwithstanding defendants’ contention that plaintiffs failed to allege that the data breach was immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers) (quoting *In re Adobe Sys., Inc. Privacy Litig.*, 66 F. Supp. 3d at 1227).

¹⁹⁹ See *Colgate v. JUUL Labs, Inc.*, 402 F. Supp. 3d at 760 (holding that plaintiffs stated a claim for unfair business practices under both the *Sperry* test and the “tethering test” because a public policy against marketing e-cigarettes to minors was “tethered” to public policies expressed in statutes prohibiting the sale of e-cigarettes to minors); *Hutchinson*, 2009 WL 1726344, at *8 (noting that California courts have adopted the FTC guidelines established in *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. at 244). But see *Vasic v. PatentHealth, L.L.C.*, 171 F. Supp. 3d at 1043 (“[T]he Ninth Circuit has rejected the use of the FTC test in the consumer context’ because it focuses on ‘anti-consumer conduct’ as opposed to ‘anti-competitive conduct.’”) (quoting *Backus v. Gen. Mills, Inc.*, 122 F. Supp. 3d 909, 929 (N.D. Cal. 2015)).

public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.”²⁰⁰

Over the years, many courts have criticized these definitions of “unfairness” as vague and amorphous.²⁰¹ Indeed, in *Cel-Tech Communications, Inc. v. L.A. Cellular Telephone Co.*,²⁰² the California Supreme Court rejected the definitions in the context of a non-consumer claim, and criticized their use in consumer cases, as well. In so doing, the Court sympathized with “the need for California businesses to know, to a reasonable certainty, what conduct California law prohibits and what it permits.”²⁰³ The Court then articulated a “more precise test” for determining what is “unfair” in litigation involving competitors, drawing from principles of federal law pursuant to section 5 of the FTCA.²⁰⁴ However, the Court did not articulate a test applicable to the consumer context.

The various criticisms of the consumer definitions, including by the California Supreme Court in *Cel-Tech*, seemingly have spurred the Court of Appeal to attempt to remedy the situation. As an initial matter, 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

²⁰⁰ See *Cnty. Assisting Recovery, Inc. v. Aegis Sec. Ins. Co.*, 92 Cal. App. 4th 886, 894 (2001); *Podolsky*, 50 Cal. App. 4th at 647; *State Farm Fire & Cas. Co.*, 45 Cal. App. 4th at 1104; see also *Bardin v. DaimlerChrysler Corp.*, 136 Cal. App. 4th 1255, 1270 (2006); *Jolley v. Chase Home Fin., LLC*, 213 Cal. App. 4th 872, 907-08 (2013) (“[W]hile dual tracking may not have been forbidden by statute at the time, the new legislation and its legislative history may still contribute to its being considered ‘unfair’ for purposes of the UCL.”); *Hodsdon*, 162 F. Supp. 3d at 1027 (“Granting that the labor practices at issue are immoral, there remains an important distinction between them and the actual harm for which [plaintiff] seeks to recover, . . . [Defendant’s] failure to disclose information it had no duty to disclose in the first place is not substantially injurious, immoral, or unethical.”).

²⁰¹ E.g., *In re EpiPen Litig.*, No. 17-MD-2785, 2020 WL 1873989, at *55 (D. Kan. Feb. 27, 2020) (noting “internal dissonance about the test courts should use”).

²⁰² 20 Cal. 4th at 185 (“We believe these definitions are too amorphous and provide too little guidance to courts and businesses.”).

²⁰³ *Id.* (“An undefined standard of what is ‘unfair’ fails to give businesses adequate guidelines as to what conduct may be challenged and thus enjoined and may sanction arbitrary or unpredictable decisions about what is fair or unfair.”).

²⁰⁴ Specifically, the Court adopted the following test for “unfair” business practices involving competitors: “When a plaintiff who claims to have suffered injury from a direct competitor’s ‘unfair’ act or practice invokes section 17200, 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.” *Id.* at 187. In addition, the Court stated that “[o]ur notice of federal law under section 5 means only that federal cases interpreting the prohibition against ‘unfair methods of competition’ may assist us in determining whether a particular challenged act or practice is unfair under the test we adopt.” *Id.* at 186 n.11; see also *Rimini Street, Inc. v. Oracle Int’l Corp.*, 473 F. Supp. 3d 1158 (D. Nev. 2020) (granting summary judgment to UCL defendant in competitor vs. competitor case on grounds that plaintiff failed to proffer evidence that the defendant’s “conduct was motivated by an anti-competitive purpose”; defendant’s evidence was that its conduct was lawfully intended to prevent copyright infringement).

provisions.”²⁰⁵ Moreover, in *In re Firearm Cases*,²⁰⁶ the Court of Appeal, First District, held that in order to prove “unfairness,” the plaintiff must establish some causal link between the defendant’s business practice and the alleged harm to the public. Further, in *Camacho v. Automobile Club of Southern California*,²⁰⁷ the Court of Appeal, Second District, articulated a very precise test. Relying again on the language of and policy considerations underlying section 5 of the FTCA, the court concluded that the elements of “unfair” conduct are: “(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.”²⁰⁸

In a 2020 decision, the Ninth Circuit recapitulated the various standards for determining unfairness as follows: “Under the UCL’s unfairness prong, courts consider either: (1) whether the challenged conduct is tethered to any underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an antitrust law, or violates the policy or spirit of an antitrust law, (2) whether the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers, or (3) whether the practice’s impact on the victim outweighs the reasons, justifications and motives of the alleged wrongdoer.”²⁰⁹

²⁰⁵ *Gregory v. Albertson’s, Inc.*, 104 Cal. App. 4th 845, 854 (2002) (stating that *Cel-Tech* “may signal a narrower interpretation of the prohibition of unfair acts or practices in all unfair competition actions and provides reason for caution in relying on the broad language in earlier decisions that the court found to be ‘too amorphous’” and requiring that UCL “unfair” claims based on public policy be tethered to specific constitutional, statutory or regulatory provisions); *Scripps Clinic v. Super. Ct.*, 108 Cal. App. 4th 917, 939 (2003) (applying “unfair” definition proposed in *Gregory*); *Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 1166-67 (2000) (applying *Cel-Tech* to a consumer case by referencing a legislatively declared policy as the basis for unfairness); *Kimmins v. Fagan & Fagan*, No. DO47599, 2006 WL 3445513, at *7 (Cal. Ct. App. Nov. 30, 2006) (unpublished) (same); cf. *Simila v. Am. Sterling Bank*, No. 09-CV-781, 2010 WL 3988171, at *6 (S.D. Cal. Oct. 12, 2010) (noting split between courts as to whether UCL requirement that claims of “unfairness” be “tethered” to underlying law applies to consumers, but applying “tethering” test and dismissing UCL claim); *Reilly v. Apple, Inc.*, No. 21-xc-04601-EMC, 2022 WL 1215305 at *6-8 (same); *Sanchez v. Bear Stearns Residential Mortg. Corp.*, No. 09-CV-2056, 2010 WL 1911154, at *7 (S.D. Cal. May 11, 2010) (finding, in line with *Cel-Tech*, that allegations of unfair conduct under the UCL must be “tethered” to violation of an underlying law); *Hodsdon*, 162 F. Supp. 3d at 1027 (invoking a general public policy against child and forced labor without referencing specific statutes, regulations, or constitutional provisions is insufficient); *Goonewardene*, 5 Cal. App. 5th at 188 (labor and wage orders identified by plaintiff in support of her UCL claims were insufficient to allege reliance because they did not apply to defendant). *But see Shvarts v. Budget Grp., Inc.*, 81 Cal. App. 4th 1153, 1158 (2000) (citing *Cel-Tech* but applying previous test for determining whether conduct is “unfair”); *Progressive W. Ins. Co. v. Super. Ct.*, 135 Cal. App. 4th 263, 286 (2005) (“[W]e believe section 17200’s ‘unfair’ prong should be read more broadly in consumer cases because consumers are more vulnerable to unfair business practices than businesses and without the necessary resources to protect themselves from sharp practices.”).

²⁰⁶ 126 Cal. App. 4th 959, 981 (2005).

²⁰⁷ 142 Cal. App. 4th 1394, 1403 (2006).

²⁰⁸ *See Berenblat v. Apple, Inc.*, No. 08-4969, 2009 WL 2591366, at *5 (N.D. Cal. Aug. 21, 2009) (finding no unfairness under the UCL where a product operated properly during its express warranty period); *Housepian v. Apple, Inc.*, No. 08-5788, 2009 WL 5069144, at *4 (N.D. Cal. Dec. 17, 2009) (same).

²⁰⁹ *Doe v. CVS Pharm., Inc.*, 982 F.3d 1204, 1214-15 (9th Cir. 2020) (internal citations and quotations omitted).

Given the various tests articulated by the Court of Appeal, the California Supreme Court or the Legislature may ultimately determine what the test should be. At this point, it is an open issue for both courts and litigants as to which test will govern an “unfairness” claim.²¹⁰

2. Defenses to Claims of “Unfairness”

a. Conduct Is Not “Unfair”

The principal defense is straightforward: The conduct is not unfair pursuant to the test that the court chooses to apply. For example, in *Walker v. Countrywide Home Loans, Inc.*,²¹¹ plaintiffs challenged as unfair the defendant’s practice of passing on the actual cost of conducting property inspections to delinquent mortgage borrowers. The trial court granted summary judgment in favor of defendant, which was affirmed. The Court of Appeal reasoned that defendant’s practice of passing on the actual cost of property inspection fees was not “unfair” as a matter of law because the small cost of the inspections (at most, \$12) was insignificant when compared to their utility—protecting the real estate securing the loan.²¹² Similarly, in *Bickoff v. Wells Fargo Bank N.A.*,²¹³ it was not unfair for a bank to foreclose on an overdue construction loan where it had never guaranteed permanent

²¹⁰ See *Lozano v. AT&T Wireless Servs. Inc.*, 504 F.3d 718, 735, 736 (9th Cir. 2007) (“California’s unfair competition law, as it applies to consumer suits, is currently in flux”; courts faced with consumer lawsuits have the option to either apply *Cel-Tech* or *Camacho* but the approaches are not mutually exclusive because “adopting one standard does not necessitate rejection of the other”); *Moran*, 3 Cal. App. 5th at 1147-48 (2016) (discussing without resolving the split authority on the proper formulation of unfairness in consumer actions, but permitting an unfairness claim based on common law unconscionability); *In re Qualcomm Litig.*, No. 17-cv-00108, 2017 WL 5985598, at *6-11 (S.D. Cal. Nov. 8, 2017) (recognizing “California law is unsettled with regard to the correct standard to apply to non-competitor consumer suits” and analyzing claim under all three “primary consumer tests,” i.e., the “tethering test,” “balancing test” and “FTC test”); see also *Oskoui v. J.P. Morgan Chase Bank, N.A.*, 851 F.3d 851, 856-57 (9th Cir. 2017) (finding that plaintiff alleged a “viable” claim under UCL for a “fraudulent and an unfair” business practice based on allegations that defendant accepted payments from plaintiff pursuant to a loan modification plan while simultaneously continuing with foreclosure proceedings and knowing plaintiff would not be eligible for modification in any event). *But see McMahon v. JPMorgan Chase Bank, N.A.*, No. 16-CV-1459, 2017 WL 2363690, at *5 (E.D. Cal. May 31, 2017) (dismissing an “unfair” claim based on defendant’s alleged failure to respond to plaintiff’s loan modification application because, unlike in *Oskoui*, there were no allegations that plaintiff made payments on a modification plan or that defendant proceeded with foreclosure).

²¹¹ 98 Cal. App. 4th 1158, 1173 (2002).

²¹² *Id.* at 1176 (“There is nothing ‘unethical’ about passing a reasonable cost of protecting the security to a defaulting borrower.”); see also *Hutchinson*, 2009 WL 1726344, at *8 (concluding that an early termination fee served legitimate interests and, thus, was not unfair); *Circle Click Media LLC v. Regus Mgmt. Grp. LLC*, No. 12-04000, 2013 WL 57861, at *8 (N.D. Cal. Jan. 3, 2013) (finding that late-fee provision in contract was not unfair because plaintiff could not establish that injury was substantial or that plaintiff could not have avoided alleged injury); *Lopez v. Bank of Am., N.A.*, 505 F.Supp.3d 961, at 976-77 (N.D. Cal. 2020) (finding that defendant’s policy to pay agent fees pursuant to a compensation agreement was not unfair because there was no established policy it was offending and it was not causing any consumer injury). *But see Bretches v. One West Bank*, No. B238686, 2012 WL 6616478, at *10 (Cal. Ct. App. Dec. 19, 2012) (unpublished) (finding that a systematic breach of standard consumer contracts can constitute an unfair business practice under the UCL).

²¹³ No. 14CV1065, 2016 WL 3280439, at *15-16 (S.D. Cal. June 14, 2016), *aff’d*, 705 F. App’x 616 (9th Cir. 2017).

financing. In *Harris v. Wells Fargo Bank N.A.*,²¹⁴ it was not unfair for a bank to record a notice of default against secured real property at the same time as the borrower was preparing, but had not completed, a borrower's loan modification application. In *Abramson v. Marriott Ownership Resorts, Inc.*, the court recognized that while the definition of "unfair" conduct has been in flux in California courts, the test articulated in *Camacho* is a "better" test to determine whether a plaintiff has met the heightened pleading standard.²¹⁵

b. Business Justification

A defendant may use the reasons, justifications and motives underlying the challenged business practice to show that it is not "unfair."²¹⁶ For example, a defendant may claim that the challenged conduct is an essential part of its business operations or that it is acting consistent with industry practice for an important reason.²¹⁷

c. Alternative Source Defense

A defendant may defeat a claim of unfairness by showing that the consumer had a "reasonably available alternative source[] of supply."²¹⁸ Derived from cases addressing the doctrine of unconscionability, this defense arises from the notion that a business practice is not "unfair" if the same service or product, without the allegedly offensive term, is available either from the defendant or from the defendant's competitors.²¹⁹ Similarly, where the plaintiff had a "choice" in performing

²¹⁴ No. 516CV00645, 2016 WL 3410161, at *4 (C.D. Cal. June 15, 2016), *vacated on other grounds*, No. EDCV 16-645, 2016 WL 11486587 (C.D. Cal. July 14, 2016) (vacating prior opinion following recusal of prior assigned judge under 28 U.S.C. § 455).

²¹⁵ 155 F. Supp. 3d 1056 (C.D. Cal. 2016).

²¹⁶ See *Motors, Inc.*, 102 Cal. App. 3d at 740; *Californians for Population Stabilization v. Hewlett-Packard Co.*, 58 Cal. App. 4th 273, 286 (1997) (in action challenging liquidated damages provisions in defendants' employment contracts with non-U.S. citizens, finding no unfair business practice given the nature of the industry and certain immigration laws), *abrogated on other grounds by Cortez v. Purolator Air Filtration Prod. Co.*, 23 Cal. 4th 163 (2000); *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1136-37 (9th Cir. 2014) (finding defendant's alleged attempts to extort a small business to purchase advertising on Internet site not unfair because plaintiffs had not pleaded facts sufficient to support an inference of extortion).

²¹⁷ See *Walker*, 98 Cal. App. 4th at 1175; *Kunert v. Mission Fin. Servs. Corp.*, 110 Cal. App. 4th 242, 265 (2003) (finding that the "unfair" prong of the UCL was not intended to eliminate retailers' profits in action challenging payment of a dealer reserve); *Byars v. SCME Mortg. Bankers, Inc.*, 109 Cal. App. 4th 1134, 1149 (2003) (holding that a lender's payment of a yield spread premium ("YSP") to a broker did not violate the UCL on various grounds, including because YSPs are "widespread and commonly used as a method to compensate mortgage brokers for services provided to borrowers and the lender"). Nonetheless, compliance with industry practice in and of itself, without a link to a justifiable business concern, probably is not a defense; *Chern v. Bank of Am.*, 15 Cal. 3d 866, 876 (1976) (stating that lender's calculation of "per annum" interest rate based on 360-day year could violate the UCL, notwithstanding that such practice was "customary" in the banking community). *But see S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th 861 (1999) (finding a similar method to calculate interest in an ongoing business relationship between sophisticated businesses did not violate the UCL).

²¹⁸ *In re Sony Grand WEGA KDF-EA10/A20 Series Rear Projection HDTV TV Litig.*, 758 F. Supp. 2d 1077, 1101 (S.D. Cal. 2010) (citing *Dean Witter Reynolds, Inc. v. Super. Ct.*, 211 Cal. App. 3d 758, 768 (1989)) (applying the alternative source defense to a UCL claim based on unconscionability).

²¹⁹ See, e.g., *Shadoan v. World Sav. & Loan Ass'n*, 219 Cal. App. 3d 97, 103, 106 (1990) (holding prepayment penalties on a home loan to be invalid basis for UCL claim where defendant had

some act, such as entering into an obligation, a defendant may argue that the challenged conduct is not “unfair.”²²⁰

d. “Safe Harbor” Defense – Conduct Explicitly Authorized By Law

A defense exists where the business practice at issue is expressly authorized by statute.²²¹ Examples of the successful assertion of the “authorized by law” defense are rare, however, because “the Legislature’s mere failure to prohibit an activity does not prevent a court from finding it unfair.”²²²

simultaneously offered other similar products without the disputed term); *Dean Witter*, 211 Cal.App. 3d at 772 (holding that, because defendants’ competitors were not charging an IRA close-out fee, plaintiff had a meaningful choice and, therefore, such fees were not unconscionable); *accord Cal. Grocers Ass’n v. Bank of Am.*, 22 Cal. App. 4th 205, 209 (1994) (holding that a \$3 NSF fee charged to retailers was not unconscionable because the fee was at the low end of the scale when compared to the fees charged by other institutions).

²²⁰ See, e.g., *Olsen v. Breeze, Inc.*, 48 Cal. App. 4th 608, 628-29 (1996) (affirming summary adjudication against plaintiff on UCL claim involving alleged “unfair” contractual releases relating to ski bindings since consumers had a choice in the matter—they did not have to ski).

²²¹ See *Cel-Tech*, 20 Cal. 4th at 183 (“Acts that the Legislature has determined to be lawful may not form the basis for an action under the unfair competition law.”); *Alvarez v. Chevron Corp.*, 656 F.3d 925, 933 (9th Cir. 2011) (applying California’s safe harbor doctrine, “courts may not use the [UCL] to condemn actions the Legislature permits,” and affirming dismissal of UCL claim because gasoline dispensing design was certified by the California Department of Food and Agriculture’s Division of Measurement Standards, and therefore permitted by law); *Lopez v. Nissan N. Am., Inc.*, 201 Cal. App. 4th 572, 576-79 (2011) (plaintiffs contended that defendants violated the UCL by designing vehicle odometers that allegedly over-registered mileage by two percent; the court affirmed dismissal on grounds that Cal. Bus. & Prof. Code § 12500 provides a tolerance of plus or minus four percent); *Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114, 1122 (9th Cir. 2009) (finding that safe harbor applied when credit card issuer complied with disclosure provisions of the Truth in Lending Act (“TILA”)); *Suzuki v. Hitachi Glob. Storage Techs., Inc.*, No. C 06-07289, 2007 WL 2070263, at *3 (N.D. Cal. July 17, 2007) (same); *Lazar v. Hertz Corp.*, 69 Cal. App. 4th 1494, 1505 (1999) (“A business practice cannot be unfair if it is permitted by law.”) (citation omitted); *Hobby Indus. Ass’n of Am.*, 101 Cal. App. 3d at 369-70 (dismissing UCL action against wholesalers and retailers for sale of certain prohibited packages because the statute prohibiting such packages explicitly exempted wholesalers and retailers); *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375 (2001) (holding that conduct permissible under doctrine enunciated in *United States v. Colgate & Co.*, 250 U.S. 300 (1919), could not be deemed “unfair” as a matter of law); *Alaei v. Rockstar, Inc.*, 224 F. Supp. 3d 992, 1001 (S.D. Cal. 2016) (citing *Cel-Tech* and dismissing UCL claim where plaintiff seeks to “use the UCL to attack conduct which the legislature has thoughtfully considered and deemed lawful”).

²²² *Cel-Tech*, 20 Cal. 4th at 184; see *Ebner v. Fresh, Inc.*, 838 F.3d 958 (9th Cir. 2016) (safe harbor doctrine barred claim that an accurate net weight statement for lip balm was deceptive, but did not bar separate omission claim regarding product accessibility because omitting supplemental statements on cosmetic labels was not affirmatively permitted by statute); *McCoy v. Nestle USA, Inc.*, 173 F. Supp. 3d 954, 972 (N.D. Cal. 2016), *aff’d*, No. 16-15794 (9th Cir. July 10, 2018); *Motors, Inc.*, 102 Cal. App. 3d at 741; see also *Thompson v. Am. Tow Serv.*, No. A114373, 2007 WL 3045195, at *4 (Cal. Ct. App. Oct. 19, 2007) (unpublished) (holding that a municipal ordinance cannot establish safe harbor under the UCL); *Ramirez v. Balboa Thrift & Loan*, 215 Cal. App. 4th 765, 774, 776-78, 780-81 (2013) (reversing denial of class certification because defendant was not entitled to assert the Rees-Levering Act’s safe harbor that it properly denied reinstatement of defaulted auto loans as a basis for opposing certification); *Rojas v. Platinum Auto Grp., Inc.*, 212 Cal. App. 4th 997, 1005 (2013) (reversing demurrer because plaintiff “need not have suffered actual damage from Platinum’s

The defense was asserted successfully at trial in UCL litigation pursued by public prosecutors against sellers and distributors of opioid medication. The prosecutors' claim was rejected in large part because the Pain Patients Bill of Rights, provided, among other things, that "a physician who uses opiate therapy to relieve severe chronic intractable pain may prescribe a dosage deemed medically necessary to relieve the patient's pain."²²³ The court found that the government failed to prove that the opioid medication introduced into the stream of commerce was not sold for purposes unrelated to medical necessity. The court also found that the opioid sales were not inconsistent with federal law governing the sale of controlled substances, and that California law expressly protected patients' right to have opioid medication prescribed to relieve chronic pain. Accordingly, the sales could not be challenged on grounds of unfairness.²²⁴

C. Claims for "Fraudulent" Conduct

1. The Liability Standard

As noted above, in *Tobacco II*, the California Supreme Court reaffirmed the line of decisions stating that UCL claims premised on fraudulent conduct do not require proof of intent, reliance or damages (setting aside the issue of standing for named plaintiffs).²²⁵ Rather, under those decisions, a plaintiff must show only that members of the public were likely to be deceived.²²⁶

violation of the [Rees-Levering Act's] disclosure requirements" where alleged disclosure violations were "trivial").

²²³ *People v. Purdue Pharma L.P.*, No. 30201400725287CUBTCX, 2021 WL 5227329, at *6 (Cal. Super. (Orange Cnty.) Nov. 01, 2021) (quoting Cal. Health & Safety Code § 124961(d)).

²²⁴ *See id.* at *8 ("[T]he highly regrettable but foreseeable adverse downstream consequences are not unreasonable [They are] the entirely foreseeable consequence of the continued approval of opioids by both the Federal government and the California Legislature.").

²²⁵ *Tobacco II*, 46 Cal. 4th at 320-21.

²²⁶ *See, e.g., Mass. Mut. Life Ins. Co.*, 97 Cal. App. 4th at 1288; *Chapman v. Skype Inc.*, 220 Cal. App. 4th 217, 227-30 (2013) (holding that "consumers are likely to believe that Skype's 'Unlimited US & Canada' [] calling plan offers unlimited calling within the United States and Canada for a fixed monthly fee and that they will fail to notice the disclosure to the contrary in the fair usage policy" and reversing summary judgment because "whether a reasonable consumer is likely to be deceived by the representation that the calling plan is 'Unlimited' is a question of fact"); *West v. JPMorgan Chase Bank, N.A.*, 214 Cal. App. 4th 780, 806 (2013) (finding complaint stated claims for "unfair or fraudulent practices" where plaintiff alleged that bank's temporary loan modification program did not comply with federal law, and that the bank made misrepresentations regarding borrower's right to challenge the bank's calculations and pending foreclosure sales, and wrongfully conducted a foreclosure sale when the borrower was in compliance with her temporary loan modification); *Glaski v. Bank of Am., N.A.*, 218 Cal. App. 4th 1079, 1101 (2013) (allegations of wrongful foreclosure were sufficient to state a UCL claim); *Rufini v. CitiMortgage, Inc.*, 227 Cal. App. 4th 299, 311 (2014) (same); *Doe v. Roblox*, No. 3:21-cv-03943-WHO, 2022 WL 1459568 (N.D. Cal. May 9, 2022) (holding that Plaintiff adequately alleged fraud under the UCL and that reasonable consumers can be misled by conduct, not just verbal or written statements, where Defendant's metaverse allegedly enticed minors to purchase virtual goods that might later be deleted after being purchased). *But see Korolshteyn v. Costco Wholesale Corp.*, No. 15-CV-709, 2017 WL 3622226, at *5 (S.D. Cal. Aug. 23, 2017) (granting summary judgment for defendant in false advertising and labeling case, observing that in false advertising cases "a common thread . . . is that when a defendant presents scientific studies supporting its advertising claim, a plaintiff must do more than present its own studies that do not support the advertising claim, thereby demonstrating that evidence is equivocal" to show that "all reasonable scientists do not agree," no jury conclusion "would change either of these facts"), *aff'd in part, rev'd in part and remanded on other grounds* by 755 F. App'x 725 (9th Cir. 2019); *Arias v.*

In *Lavie v. Procter & Gamble Co.*,²²⁷ the Court of Appeal held that trial courts faced with fraudulent or false advertising claims must apply an “ordinary consumer acting reasonably under the circumstances” standard, rather than a “least sophisticated consumer” standard. In *Lavie*, a consumer who had an ulcer that started to bleed after ingestion of Aleve pain reliever sued defendant for stating in television commercials that Aleve was gentler to the stomach lining than aspirin. Following a bench trial, the trial court ruled in favor of defendant, holding that the statements were true and not likely to deceive reasonable consumers. The Court of Appeal affirmed, reasoning that California and federal courts had never applied a “least sophisticated consumer” standard absent evidence that an advertisement targeted particularly vulnerable customers.²²⁸ “A representation does not become false and deceptive merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed.”²²⁹ The court warned, however, that, “[w]here the advertising or practice is targeted to a particular group or type of consumers, either more sophisticated or less sophisticated than the ordinary consumer, the question whether it is misleading to the public will be viewed from the vantage point of members of the targeted group, not others to whom it is not primarily directed.”²³⁰

Select Portfolio Servicing Inc., No. 17-CV-01130, 2017 WL 6447890, *8 (E.D. Cal. Dec. 18, 2017) (noting that allegations of fraudulent acts or conduct must state with particularity the circumstances allegedly constituting fraud, including descriptions of facts such as “the time, place, persons, statements and explanations of why allegedly misleading statements are misleading”). Compare *Equinox Hotel Mgmt., Inc. v. Equinox Holdings, Inc.*, No. 17-CV-06393, 2018 WL 659105, at *14 (N.D. Cal. Feb. 1, 2018) (where competitor asserted trademark infringement claims, the court recognized a split of authority amongst district courts as to whether competitors must allege actual reliance under “fraud” prong of UCL and adopted “majority approach” requiring plaintiff-competitor to plead its own “actual reliance,” as opposed to reliance of third parties, i.e., customers or potential customers, on defendant’s mark) with *Lona’s Lil Eats, LLC v. DoorDash, Inc.*, No. 20-CV-06703, 2021 WL 151978, at *1 (N.D. Cal. Jan. 18, 2021) (acknowledging the split in authority but determining “that false advertising and misrepresentation claims between competitors” were “fundamentally different from false advertising claims brought by consumers” because competitors don’t generally purchase each other’s products but instead assess “the loss of sales and market share” that result from the deception. As a result, “non-consumer plaintiff[s] can allege false advertising claims under the UCL . . . without alleging [their] own reliance[] as long as the plaintiff has alleged a sufficient causal connection [between the deceptive act and the plaintiff’s economic injury]”) (citing *Allergan USA, Inc. v. Imprimis Pharm., Inc.*, No. SA CV 17-1551, 2017 WL 10526121, at *13 (C.D. Cal. Nov. 14, 2017)); *Hodges v. King’s Hawaiian Bakery W., Inc.*, No. 21-CV-04541-PJH, 2021 WL 5178826 (N.D. Cal. 2021) (dismissing UCL, CLRA, and FAL claims alleging that defendant’s packaging and marketing of its sweet rolls was misleading because the “mere use of a geographic reference, including a reference to the company’s historical origin, does not convey a representation about a product’s current origin to reasonable consumer”).

²²⁷ 105 Cal. App. 4th 496, 512 (2003).

²²⁸ *Id.* at 504.

²²⁹ *Id.* at 507 (internal quotations and citation omitted).

²³⁰ *Id.* at 512; see also *Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1360 (2003) (confirming the reasonable consumer standard applied in *Lavie*); *Patricia A. Murray Dental Corp. v. Dentsply Int’l, Inc.*, 19 Cal. App. 5th 258, 275 (2018) (holding that evidence was insufficient to demonstrate that the directions accompanying an ultrasonic scaler for use in oral surgery were misleading because dentists acting reasonably would not have been misled by the directions); *In re OnStar Contract Litig.*, 278 F.R.D. 352, 378 (E.D. Mich. 2011) (where putative class members received different disclosures from different sources and disclosures changed over time, the court found it “impossible” to apply a reasonable consumer standard as to reliance class-wide). *But see People v. Cole*, 113 Cal. App. 4th 955, 980 (2003) (reasoning that, even under a reasonable consumer standard, a reasonable consumer may be “unwary or trusting,” “need not be exceptionally acute and

In *Becerra v. Dr Pepper/Seven Up, Inc.*,²³¹ plaintiffs could not sufficiently allege that reasonable consumers would understand the word “diet” in a soda’s name to promise weight loss or healthy weight management. Plaintiff contended that the word “diet” contained an “implicit promise [] that, because Diet Dr Pepper does not contain sugar or calories, it will assist in weight loss, or at least healthy weight management.”²³² The Ninth Circuit affirmed the district court’s motion to dismiss, finding that, when viewing the term in its proper context as a soft drink, the word diet is a “relative claim about the caloric content of that soft drink compared to the same brand’s ‘regular’ (full-caloric) option,” and therefore no reasonable consumer would come to plaintiffs’ asserted conclusion that the product would assist in weight loss.²³³

In contrast, in *Hill v. Roll International Corp.*,²³⁴ plaintiffs alleged that they purchased Fiji bottled water based on an understanding that a green drop depicted on the bottles meant that Fiji bottled water was an environmentally conscious product and endorsed by an environmental organization. However, applying the reasonable consumer standard as outlined in *Lavie*, as well as analyzing examples contained in an FTC guide, the Court of Appeal held that “no reasonable consumer would be misled to think that [a] green drop on Fiji water represents a third party organization’s endorsement or that Fiji water is environmentally superior to that of the competition.”²³⁵ The court did note, however, that “in these days of inevitable and readily available Internet criticism and suspicion of virtually any corporate enterprise, . . . a reasonable consumer also does not include one who is overly suspicious.”²³⁶

The Ninth Circuit clarified in *Hodsdon v. Mars, Inc.*²³⁷ that an allegedly fraudulent omission regarding a non-physical defect has to relate to the “central functionality” of the product for the omission to be actionable under the UCL, FAL or CLRA.²³⁸ In *Hodsdon*, plaintiff claimed that defendant’s failure to disclose, on its products’ labels, the involvement of child or slave labor in the products’ supply chain was fraudulent, unfair and unlawful in violation of the UCL. The Ninth Circuit dismissed plaintiff’s claims, given that there was no physical or safety defect involved and plaintiff failed to sufficiently plead how the omitted information related to the “central functionality” of the products.²³⁹

sophisticated” and that “courts simply recognize that the general public is more gullible than the sophisticated buyer”)(internal quotations and citations omitted), *affd.*, 38 Cal. 4th 964 (2006).

²³¹ 945 F.3d 1225 (9th Cir. 2019).

²³² *Id.* at 1129.

²³³ *Id.*

²³⁴ 195 Cal. App. 4th 1295, 1298 (2011).

²³⁵ *Id.* at 1301.

²³⁶ *Id.* at 1304.

²³⁷ 891 F.3d 857 (9th Cir. 2018).

²³⁸ *See id.* at 859-60; *Beyer v. Symantec Corp.*, 333 F. Supp. 3d 966, 979-80 (N.D. Cal. 2018) (finding that a software defect is a physical defect that relates to the central functionality of the software, unlike the use of child labor in chocolate production in *Hodsdon*); *Ponzio v. Mercedes-Benz USA, LLC*, 447 F. Supp. 3d 194, 247 (D.N.J. 2020) (holding that in a UCL case based upon a failure to disclose, the plaintiff must allege an omission pertaining to either a safety defect or to a central function of the product).

²³⁹ *Hodsdon*, 891 F.3d at 865.

The California Court of Appeal broadly interpreted “deceptive” business practices in *Brady v. Bayer Corp.*²⁴⁰ In that case, the Court of Appeal held that plaintiff sufficiently alleged a claim under the UCL and CLRA, reasoning that the “One-A-Day” vitamin brand misled the public by actually requiring consumption of two of its vitamin “gummies” per day, given the company’s longstanding history, the effect of its brand name on a reasonable consumer and (in particular) the fact that the serving size was written in fine print on the back label.²⁴¹ The Court of Appeal canvassed relevant case law and discussed four themes for misleading-label claims: (1) common sense, (2) literal truth/literal falsity, (3) the front-back dichotomy and (4) brand names misleading in themselves. The court found that plaintiff’s claim could proceed beyond the pleading stage under each of the four theories.²⁴²

In *People v. Purdue Pharma L.P.*, the Orange County Superior Court recently rejected, after a trial on the merits, a claim brought by public prosecutors against manufacturers and sellers of opioid medication on the theory that the defendants’ marketing materials were deceptive. The court found that no specific false statement was identified pertaining to the medical characteristics of the drug or of the potential risk of addiction, and viewed within its overall context, the marketing material presented by the government was not false or misleading.²⁴³ Further, the government could not claim that the defendants’ marketing statements were misleading simply because they tended to result in increased prescription writing, because the medical appropriateness of opioid pain medication was the subject of legitimate scientific debate, and because the government failed to prove that increased prescription volume was not medically justified.²⁴⁴

Accordingly, *Purdue* demonstrates that while state courts interpret the UCL to have an expansive reach, where there are legitimate scientific questions over a particular product, liability will be difficult to establish.

2. Defenses Specific to Fraudulent Claims

a. Conduct Not “Likely to Mislead”

The principal defense to a claim of fraudulent conduct is proof that the challenged business act or practice is not “likely to mislead” an ordinary consumer and thus has not resulted in any actual injury.²⁴⁵ The analysis often is fact-specific, and statements that are literally true may still be unlawful

²⁴⁰ 26 Cal. App. 5th 1156, 1159 (2018).

²⁴¹ *See id.* at 1172 (“You cannot take away in the back fine print what you gave on the front in large conspicuous print. The ingredient list must confirm the expectations raised on the front, not contradict them.”). *But see Eidmann v. Walgreen Co.*, 522 F. Supp. 3d 634 (N.D. Cal. 2021), *appeal dismissed*, No. 21-15659, 2021 WL 4785889 (9th Cir. May 17, 2021) (identical ingredients in medicine marketed for infants and medicine for children, respectively, did not constitute an omission under the UCL because the manufacturer never stated the ingredients were different and merely changed the label marketing).

²⁴² *See id.* at 1172-73.

²⁴³ No. 30201400725287CUBTCX, 2021 WL 5227329, at *4 (Cal. Super. Nov. 01, 2021) (unpublished).

²⁴⁴ *Id.*

²⁴⁵ *See Cheslow v. Ghiradelli Chocolate Co.*, 445 F. Supp. 3d 8, 20 (N.D. Cal. 2020) (rejecting claim that product packaging was misleading because “where the actual ingredients are disclosed, a plaintiff may not ignore the ingredient list” and because the packaging contained no affirmative misstatements that contradicted the specific disclosures made on the ingredient list); *Charbonnet v. Omni Hotels*, No. 20-cv-1777, 2020 WL 7385828, at *5 (S.D. Cal. Dec. 16, 2020) (rejecting claim that

if they are likely to mislead the public.²⁴⁶ Conversely, statements that arguably were literally false might not be misleading if the plaintiff fails to present evidence that a reasonable consumer actually would be misled by the statement.²⁴⁷ Proof might be offered in the form of testimony from experts or randomly selected members of the class represented in the action, and/or consumer surveys. Substantial disclosure of the central challenged practices often is central to defeating a UCL “fraudulent” claim. Where a disputed contractual term is at issue, courts have held that clear, unambiguous language will defeat a fraudulent claim as a matter of law.²⁴⁸

b. “Puffing” Defense

If the claim involves an alleged false representation in connection with a sale of goods, the defendant may argue that the statement was mere “puffing”—sales talk that no reasonable person would rely upon or mistake as a factual claim. For example, in *Consumer Advocates v. Echostar Satellite Corp.*,²⁴⁹ the Court of Appeal applied a “puffing” defense in holding that certain statements were not actionable under the UCL. The statements at issue consisted of advertisements that defendant’s system provided “crystal clear digital” video or “CD quality” audio. The court reasoned that such statements were not “factual representations,” but rather, were “boasts, all-but-meaningless superlatives, . . . a claim which no reasonable consumer would take as anything more

hotel engaged in an unfair and deceptive “drip pricing” scheme by advertising the basic room rate, without taxes and fees, because the ultimate total cost of booking a room was clearly disclosed before the consumer approved the room reservation; as a matter of law, a reasonable consumer would not have been misled by the price advertising); *Chong v. Nestle Waters North America, Inc.*, No. CV 19-10901, 2020 WL 7690175, at *8 (C.D. Cal. Nov. 30, 2020) (finding that a plaintiff cannot assert that a label of the product is misleading when the details of the product are clearly and conspicuously disclosed elsewhere on the product packaging); *Moore v. Trader Joe’s Co.*, 4 F.4th 874 (9th Cir. 2021) (no misleading advertising where stated ingredients “simply confirms what the front label... accurately conveys”); *But see Bush v. Rust-Oleum Corp.*, No. 20-cv-03268, 2021 WL 24842, at *5 (N.D. Cal. Jan. 4, 2021) (holding that a label could potentially be misleading if relevant information is on the label on the back of the product).

²⁴⁶ See *Fitzhenry-Russel v. Keurig Dr. Pepper, Inc.*, 345 F. Supp. 3d 1111, 1115 (N.D. Cal. 2018). *But see Shaeffer v. Califia Farms, LLC*, 44 Cal. App. 5th 1125, 1139 (2020) (literally true statements are not actionable if a “series of inferential leaps” is necessary to reach the potentially deceptive meaning).

²⁴⁷ See *Tran v. Sioux Honey Ass’n Coop.*, 471 F. Supp. 3d 1019 (C.D. Cal. 2020) (motion for summary judgment granted in favor of honey producer; plaintiff had claimed that statements that the honey was “Pure” and “100% Pure” were literally false because the honey contained trace amounts of agricultural chemicals due to bees gathering nectar from plants in areas treated with chemicals; no evidence was presented that a reasonable consumer would assume that “pure” honey lacked even trace amounts of chemicals from ambient environment).

²⁴⁸ See *Bickoff*, 2016 WL 3280439, at *15 (finding that the “public would not be likely to be deceived into thinking permanent financing was guaranteed” because Wells Fargo provided “many statements of limitation and condition” that referenced permanent financing and the absence of permanent financing in the agreement); *Van Ness v. Blue Cross of Cal.*, 87 Cal. App. 4th 364, 376 (2001) (affirming summary judgment in favor of defendant where the language in the health insurance policy and related materials clearly stated the terms of coverage, notwithstanding plaintiff’s assertion that he was misled); *Shvarts*, 81 Cal. App. 4th at 1160 (per-gallon price for fuel was not deceptive, given full disclosure of charge on rental car contract). *But see Mullins v. Premier Nutrition Corp.*, 178 F. Supp. 3d 867, 891-92 (N.D. Cal. 2016) (rejecting argument that disclaimer on back of Joint Juice product would disabuse all reasonable customers of allegedly fraudulent advertising claims that the product relieved osteoarthritis).

²⁴⁹ 113 Cal. App. 4th at 1361-62.

weighty than an advertising slogan.”²⁵⁰ Similarly, a court has held that social media companies who attract users by promoting their commitment to free speech and expression cannot be sued under the UCL because such lofty promises were unlikely to deceive members of the general public into believing they could post content without any form of moderation from the company.²⁵¹ It is worth noting that while courts permit sellers to “puff” their products, the question of whether a seller’s representation regarding a product is factually specific and materially relied upon by a consumer in making a purchase is still one courts defer to the trier of fact.²⁵²

²⁵⁰ *Id.* at 1361 n.3 (“The statements are akin to ‘mere puffing,’ which under long-standing law cannot support liability in tort.”) (quoting *Hauter v. Zogarts*, 14 Cal. 3d 104, 111 (1975)); see also *Stickrath v. Globalstar, Inc.*, 527 F. Supp. 2d 992, 1003 (N.D. Cal. 2007) (dismissing UCL and CLRA claims because generalized statements were “mere puffery”); *Long v. Hewlett-Packard Co.*, No. C 06-02816, 2007 WL 2994812, at *7 (N.D. Cal. July 27, 2007) (same); *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1399-403 (E.D. Cal. 1994) (dismissing most statements in Publisher’s Clearinghouse Sweepstakes solicitations as “puffing” because no reasonable consumer could believe them to be true); *Edmundson v. Procter & Gamble Co.*, 537 F. App’x 708, 709 (9th Cir. 2013) (dismissing UCL and CLRA claims because statements were “non-actionable puffery” that was “general, subjective, and cannot be tested”); *Nilon v. Nat.-Immunogenics Corp.*, No. 12cv00930, 2013 WL 5462288, at *2 (S.D. Cal. Sept. 30, 2013) (denying motion for class certification without prejudice because UCL and CLRA claims cannot proceed based on lack of substantiation by scientific evidence of supplement’s efficacy); *Ivie v. Kraft Foods Glob., Inc.*, 961 F. Supp. 2d 1033 (N.D. Cal. 2013) (granting in part and denying in part motion to dismiss allegations under UCL of mislabeled and unlawful branding regarding natural and health benefit claims on packages, and denying preemption based on FDA regulations); *Cheramié v. HBB, LLC*, 545 F. App’x 626 (9th Cir. 2013) (affirming dismissal of CLRA claims based on alleged mislabeling of presence of melatonin in product because no reasonable consumer would be misled by package’s clear labeling); *Rasmussen v. Apple Inc.*, 27 F. Supp.3d 1027, 1043 (N.D. Cal. 2014) (statements regarding high quality of product did not constitute actionable “misrepresentations about specific or absolute characteristics”); *Romoff v. Gen. Motors LLC*, 574 F. Supp. 3d 782, 788 (S.D. Cal. 2021) (dismissing UCL claim concerning seller’s undisclosed profit in “destination charge” to deliver vehicle to dealer since reasonable consumers “would not be surprised to learn that the price of goods often includes profit to the seller”), *aff’d*, No. 22-55170, 2023 WL 1097258 (9th Cir. Jan. 30, 2023).

²⁵¹ *Twitter*, 60 Cal. App. 5th at 40-41 (finding that “Twitter’s general declarations of commitment to free speech principles cannot support a fraud claim” as “no reasonable person” would find such “proclamations” as indicative that Twitter “would not take any action to self-regulate content on its platform”).

²⁵² See, e.g., *Rutledge v. Hewlett-Packard Co.*, 238 Cal. App. 4th 1164, 1176 (2015) (holding plaintiff’s allegations that she purchased her notebook based on an HP advertisement regarding its notebook screens created a triable issue of material fact as to the nature of defendant’s representation and whether the advertisement triggered a duty to disclose the product’s screen defect).

D. General Defenses to UCL Actions

1. Constitutional Challenges

The UCL has survived numerous constitutional challenges based on vagueness²⁵³ and due process.²⁵⁴ Although the defense bar has long hoped that the California Supreme Court would address due process considerations, as yet it has declined to do so. Proposition 64, in imposing a standing requirement and requiring compliance with class standards on aggregated claims, may further insulate the UCL from constitutional challenge.

In *People v. Johnson & Johnson*,²⁵⁵ the Court of Appeal rejected a Due Process challenge to the UCL's penalty regime. In *Johnson & Johnson*, defendant manufactured and marketed pelvic mesh products intended to treat stress urinary incontinence and pelvic organ prolapse.²⁵⁶ In 2016, the Attorney General filed an enforcement action against defendant alleging it violated the UCL and FAL in disseminating deceptive advertisements of its pelvic mesh products.²⁵⁷ The trial court found that defendant committed hundreds of thousands of UCL and FAL violations, and issued a civil penalty of \$344 million.²⁵⁸ On appeal, defendant claimed that it did not receive fair notice that (i) its conduct was punishable and (ii) the potential severity of the civil penalty award.²⁵⁹ More specifically, defendant argued that the trial court improperly interpreted the UCL and FAL to require defendant to "warn consumers of all risks associated with its products regardless of consumers' existing knowledge of consideration."²⁶⁰ However, the Court of Appeal found that defendant had fair notice on both counts.²⁶¹ First, with respect to fair notice that defendant's conduct was punishable, the Court of Appeal reasoned that the Attorney General gave defendant

²⁵³ See, e.g., *People ex rel. Mosk v. Nat'l Research Co.*, 201 Cal. App. 2d 765, 772 (1962) (holding that former California Civil Code section 3369, the UCL's predecessor, was not void due to uncertainty and/or vagueness since "[a] statute designed to protect the public good must be upheld unless its nullity clearly, positively and unmistakably appears"); cf. *People v. Super. Ct. (Caswell)*, 46 Cal. 3d 381, 389 (1988) (stating that, to avoid a vagueness challenge, "a statute must be sufficiently definite to provide adequate notice of the conduct proscribed. '[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'") (citations omitted).

²⁵⁴ See, e.g., *Thomas Shelton Powers, M.D.*, 2 Cal. App. 4th at 343-44 (rejecting a due process challenge to the court's power to order restitution and/or disgorgement of profits under the UCL where there was no cognizable victim); *AT&T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1113-14 (9th Cir. 2013) (reversing district court's holding that "Due Process Clause will permit the application of California law in a price-fixing case only when a plaintiff purchased the price-fixed goods in California" and holding that "anticompetitive conduct by a defendant within a state that is related to a plaintiff's alleged injuries and is not 'slight and casual' [] establishes a 'significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'") (footnote and citation omitted); *American Bankers Management Co. v. Heryford*, 885 F.3d 629, 631 (9th Cir. 2018) (district attorney's retention of private counsel to pursue civil penalties under the UCL did not violate due process).

²⁵⁵ 77 Cal. App. 5th 295 (2022), *cert. denied*, (2023).

²⁵⁶ *Id.* at 306.

²⁵⁷ *Id.* at 310.

²⁵⁸ *Id.* at 305.

²⁵⁹ *Id.* at 358.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 359.

direct notice when investigating defendant in 2012 concerning the above-discussed conduct. Second, defendant had notice of the severity of the civil penalty award because defendant was on notice that each violation under the UCL and FAL is \$2,500, and defendant knew it disseminated thousands of letters to the public.²⁶² In 2023, the United States Supreme Court denied the defendant's petition for certiorari, strongly suggesting that future Due Process challenges on notice grounds also will be unsuccessful.

2. First Amendment Defense

In *Kasky v. Nike, Inc.*,²⁶³ the California Supreme Court addressed whether a defendant's statements made in the course of a public relations campaign were constitutionally protected from suit under the UCL. In response to adverse publicity regarding its overseas labor practices, Nike issued various statements, including in press releases and letters sent to newspaper editors, university presidents and athletic directors.²⁶⁴ Plaintiff alleged that Nike's comments were false and misleading under the UCL.²⁶⁵ The trial court sustained a demurrer without leave to amend, holding that Nike's statements constituted non-commercial speech and were therefore absolutely immune from liability under the UCL. The Court of Appeal affirmed.

The California Supreme Court reversed, concluding that Nike's statements constituted commercial speech subject only to limited protections, which therefore could be the basis of a UCL claim.²⁶⁶ The Court found that the statements were not fully protected by the First Amendment because they did not deal with important issues of public concern.²⁶⁷ Also, applying a three-part analysis, the Court reasoned that commercial speech arises from: (a) a commercial speaker; (b) an intent to address a commercial audience; and (c) factual representations of a commercial nature.²⁶⁸

Although the United States Supreme Court initially granted certiorari, it subsequently dismissed certiorari as improvidently granted.²⁶⁹ *Nike* therefore remains good law. Courts have recently considered the scope of *Kasky*. In *Serova v. Sony Music Entertainment*,²⁷⁰ a purchaser of music supposedly recorded by Michael Jackson before his death filed a putative class action against Sony, claiming that Sony violated the UCL and CLRA because the packaging and marketing of the album misrepresented to consumers that Jackson performed all of the tracks on the album, when in fact, he did not. Sony argued that its marketing statements should be considered non-commercial speech because their veracity was unknown and thus part of the discourse on an issue of public interest, and further, that the marketing statements themselves were inextricably intertwined with the

²⁶² *Id.*

²⁶³ 27 Cal. 4th 939, 948 (2002). Previously, in *Blatty v. N.Y. Times Co.*, 42 Cal. 3d 1033, 1044-45 (1986), the California Supreme Court held that a UCL claim could not be pursued based on the defendant's allegedly improper failure to include a novel on its bestseller list because the editorial decision determining the composition of the list was free speech protected by the First Amendment to the United States Constitution.

²⁶⁴ *Kasky*, 27 Cal. 4th at 948.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 970.

²⁶⁷ *Id.* at 962, 964-65.

²⁶⁸ *Id.* at 963-64.

²⁶⁹ *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003).

²⁷⁰ 13 Cal. 5th 859 (2022).

constitutionally protected music it promoted and thus immune from liability under California's consumer protection laws.

The Court of Appeal ruled that Sony's statements were non-commercial speech protected by the First Amendment because there was no evidence Sony actually knew of the fabrication at the time it made its statements about the music's authenticity, and that to hold the company liable based on statements made when it had a good-faith belief in the music's authenticity would violate the company's First Amendment right to take a position on the public controversy. The Court also ruled that the company still had a First Amendment right to participate freely in the debate over authenticity even though it stood to profit from the music.²⁷¹

However, the California Supreme Court rejected the Court of Appeal's ruling, holding that Sony's initial statements to the public did amount to commercial speech.²⁷² In doing so, the Court reasoned Sony's lack of knowledge of the authenticity of the album was not relevant in determining whether the statements were commercial speech.²⁷³ Instead, the Court held that the statements were commercial speech because the statements promoted the album for sale, and the audience of the statements comprised potential purchasers of the album. Moreover, the Court reasoned that, even if commercial speech relates to a public controversy, such speech is not wholly immune from regulation.²⁷⁴ The Court also dismissed Sony's arguments that its marketing statements were inextricably intertwined with the album's protected content because Sony was not required to make any statement whatsoever about the authenticity of the new Jackson songs when promoting the album.²⁷⁵

Moreover, in *Woulfe et al v. Universal City Studios LLC et al*,²⁷⁶ consumers who rented digital copies of the movie *Yesterday* sued Universal Studios on the grounds that the movie trailer for *Yesterday* falsely portrayed actress Ana de Armas as being in the movie. According to plaintiffs, the trailer, which included scenes with de Armas that were cut from the released version of the film, constituted false advertising and a violation of the UCL and CLRA. Like in *Serova*, Universal moved to strike plaintiffs' consumer protection law claims, arguing that they did not apply because the scenes depicted in the trailer were inextricably intertwined with protected content—the movie itself. The United States District Court for the Central District of California rejected the film studio's First Amendment defense and held that its trailer amounted to false commercial speech since the trailer was intended to encourage consumers to purchase or rent *Yesterday*. Because Universal had sufficient interest in the commercial success of the movie, the trailer was deemed commercial speech subject to regulation.²⁷⁷

Independent of the First Amendment, the federal Communications Decency Act (CDA) protects those who maintain platforms for distribution of content over the Internet from liability for decisions to post or remove content created by others.²⁷⁸ The CDA thus bars UCL claims asserting

²⁷¹ See 257 Cal. Rptr. 3d at 419-21 (2020).

²⁷² *Serova v. Sony Music Ent.*, 13 Cal. 5th 859, 876 (2022).

²⁷³ *Id.* at 868.

²⁷⁴ *Id.* at 875-76.

²⁷⁵ *Id.* at 882.

²⁷⁶ No. 2:22-cv-00459-SVW-AGR, 2022 U.S. Dist. LEXIS 235602 (C.D. Cal. 2022).

²⁷⁷ *Id.* at *50.

²⁷⁸ 47 U.S.C. § 230(c).

that such decision-making is an unfair practice.²⁷⁹ However, the full scope of CDA immunity remains uncertain.²⁸⁰

3. Statute of Limitations

The statute of limitations for UCL actions is “four years after the cause of action accrued.”²⁸¹ The doctrine of equitable tolling based on fraudulent concealment has been applied to UCL claims.²⁸² In 2013, the California Supreme Court held in *Aryeh v. Canon Bus. Solutions, Inc.*²⁸³ that common law accrual doctrines are applicable to causes of action under the UCL.

There are two accrual doctrines: the *continuing violation* doctrine and the *continuous accrual* doctrine. The *continuing violation* doctrine extends the time to file a lawsuit when plaintiff’s injury allegedly is caused by a series of small and related harms, making it difficult to determine when the actionable injury accrued. This doctrine may allow plaintiff to recover for earlier harm, even if the violations began years before the limitations period. By contrast, the *continuous accrual* doctrine extends the time to file a lawsuit when plaintiff allegedly is injured by a recurring or similar event and the injury caused by each event is sufficient to constitute the basis of its own independent lawsuit. This doctrine may save the claim from a time bar, but limits plaintiff’s damages to those suffered during the limitations period. In *Aryeh*, the Court applied the *continuous accrual* doctrine to a UCL claim and suggested that this doctrine may apply to many types of UCL cases going forward. The courts are still evaluating the impact of *Aryeh* on claims that may previously have been found to be time-barred.²⁸⁴

²⁷⁹ *Enhanced Athlete, Inc. v. Google LLC*, 479 F. Supp.3d 824, (N.D. Cal. 2020); *Ripple Labs Inc. v. YouTube LLC*, No. 20-cv-02747, 2020 WL 6822891, at *6 (N.D. Cal. Nov. 20, 2020); *YZ Prods., Inc. v. Redbubble, Inc.*, No. 20-cv-06615, 2021 WL 2633552 (N.D. Cal. June 24, 2021).

²⁸⁰ *See Turo Inc. v. City of Los Angeles*, No. 218CV06055, 2020 WL 3422262, at *8-9 (C.D. Cal. June 19, 2020) (refusing to apply CDA immunity to provider of peer-to-peer vehicle-sharing platform, because primary goal of the litigation was to regulate conduct, rather than speech; platform’s operations were preliminarily enjoined because by “facilitating ‘unlicensed bookings’” that were causing excessive airport traffic), *rev’d on other grounds*, 847 Fed.Appx. 442 (9th Cir. 2021). Action at the United States Supreme Court level likewise may affect the applicability of the CDA to UCL claims. *See Gonzalez v. Google, LLC*, 2 F.4th 871 (9th Cir. 2021) (applying CDA broadly to federal statutory claim), *cert. granted*, No. 21-1333 (2022).

²⁸¹ Cal. Bus. & Prof. Code § 17208.

²⁸² *See Snapp & Assocs. Ins. Servs., Inc. v. Robertson*, 96 Cal. App. 4th 884, 891-92 (2002) (holding that equitable tolling was not appropriate where plaintiff was on notice of the defendant’s alleged wrongful conduct), *disapproved on other grounds by Aryeh v. Canon Bus. Sols., Inc.*, 55 Cal. 4th 1185, 1193 (2013). *But see Cortez v. New Century Mortg. Corp.*, No. C 11-1019, 2012 WL 368647, at *8 (N.D. Cal. Feb. 3, 2012) (stating plaintiff could proceed with UCL action based on lender’s alleged failure to disclose material terms of loan if she could establish equitable tolling).

²⁸³ 55 Cal. 4th at 1185.

²⁸⁴ *See, e.g., Hameed v. IHOP Franchising LLC*, 520 Fed. Appx. 520, 522 (9th Cir. 2013) (concluding that continuous accrual theory did not permit time-barred UCL claim to proceed because plaintiff did not allege a recurring wrongful act but that contract terms were unfair); *Plumlee v. Pfizer, Inc.*, No. 13-cv-00414, 2014 WL 695024, at *8 (N.D. Cal. Feb. 21, 2014) (granting judgment on pleadings with leave to amend where plaintiff failed to meet “burden of pleading the time and manner of discovery, or of pleading facts that show her diligence” because plaintiff’s allegations provided “no basis for the Court to conclude she was unable to discover such facts earlier despite reasonable diligence”); *Allen v. Similasan Corp.*, No. 12-cv-0376, 2013 WL 5436648, at *6 (S.D. Cal. Sept. 27, 2013) (granting leave to amend as to tolling of UCL claim where court found “no reason this doctrine should not apply, as

A plaintiff also may use the UCL in state court (but not federal court) to obtain a longer statute of limitations than would apply to a law giving rise to a claim for “unlawful” conduct. In *Cortez v. Purolator Air Filtration Products Co.*,²⁸⁵ the California Supreme Court held that the UCL’s four-year statute of limitations applied, rather than the three-year statute of limitations under the provisions of the Labor Code that formed the basis of the claim. The Court simply concluded that “any UCL cause of action is subject to the four-year period of limitations created by that section.”²⁸⁶ A recent Ninth

the Plaintiffs made discrete purchases of different products over many years”); *Crown Chevrolet v. Gen. Motors, LLC*, No. 13-cv-01362, 2014 WL 246500, at *2-3 (N.D. Cal. Jan. 22, 2014) (“As the underlying cause of action is a RICO violation, the accrual rule of injury discovery that applies to the RICO claim also applies to the UCL claim” which was barred because “[i]f its injury is the alleged forced sale [] then its claim accrued in October 2008. If its injury is the breach of its side agreement . . . then its claim accrued at the time of the first breach in November 2008.”); *Ortega v. Nat. Balance Inc.*, No. CV 13-05942, 2013 WL 6596792, at *5 (C.D. Cal. Dec. 16, 2013) (finding that “[p]laintiffs sufficiently pled delayed discovery as to their own claims” and “pled generalized allegations consistent with the elements of the delayed discovery rule” and rejecting assertion that allegations were too conclusory); *Irving v. Lennar Corp.*, No. 12-cv-0290, 2013 WL 4900402, at *10 (E.D. Cal. Sept. 11, 2013) (applying *Aryeh* and granting leave to amend where “plaintiffs have not adequately alleged what caused them to suspect they were injured and the cause of the injury”); *Tarsha v. Bank of Am., N.A.*, No. 11-CV-928, 2013 WL 1316682, at *10 (S.D. Cal. Mar. 29, 2013) (finding allegations failed to invoke discovery rule even if *Aryeh* applied); *Wilson v. Household Fin. Corp.*, No. CIV S-12-1413, 2013 WL 1310589, at *10 (E.D. Cal. Mar. 28, 2013) (applying *Aryeh* but holding certain UCL claims barred where “plaintiffs had copies of the documents relating to their loan but did not examine them until 2011 That plaintiffs may not have been prudent in their business dealings does not show they may rely on the delayed discovery rule.”); *Gerawan Farming, Inc. v. Rehrig Pac. Co.*, No. 11-cv-01273, 2013 WL 1414637, at *14 (E.D. Cal. Apr. 8, 2013) (holding that “a trier of fact could reasonably conclude that Plaintiff had no reason to suspect prior to August 2008 that Defendant was selling the Second Generation Harvest Tote. If that is the case, the statute of limitations period began to run only in August 2008, thereby making Plaintiff’s action timely.”); *Asare-Antwi v. Wells Fargo Bank, N.A.*, 855 Fed.Appx. 370, 372 (9th Cir. 2021) (intentional misrepresentation and UCL claims were untimely under a theory of continuous tolling because plaintiff had constructive notice and defendant’s denial of loan modifications and financial accounting were discrete, independently actionable alleged wrongs).

²⁸⁵ 23 Cal. 4th at 179.

²⁸⁶ *Id.*; see also *Beaver v. Tarsadia Hotels*, 816 F.3d 1170, 1178 (9th Cir. Mar. 10, 2016) (rejecting a preemption argument and finding that plaintiff’s claims were not time-barred because the UCL’s “more generous four-year statute of limitations” governed rather than the underlying Interstate Land Sales Full Disclosure Act (ILSA)). *But see Camillo v. Wash. Mut. Bank, F.A.*, No. 09-CV-1548, 2009 WL 3614793, at *6 (E.D. Cal. Oct. 27, 2009) (plaintiff cannot avoid an absolute bar to relief, i.e., the statute of limitations, by characterizing the claim as one for unfair competition); *Yeager v. Bowlin*, No. CIV.2:08-102, 2010 WL 95242, at *17 (E.D. Cal. Jan. 6, 2010) (the UCL is subject to the single publication rule, which provides that no person shall have more than one claim for damages for invasion of privacy, and the limitations period commences upon the first distribution of the publication to the public); *Jordan v. Paul Fin., LLC*, 745 F. Supp. 2d 1084, 1098 (N.D. Cal. 2010) (explaining that, to the extent plaintiffs sought to plead around TILA’s one-year statute of limitations by using the UCL, the claim was preempted by TILA); *Arias v. Capital One, N.A.*, No. C 10-1123, 2011 WL 835610, at *7 (N.D. Cal. Mar. 4, 2011) (holding that plaintiffs’ UCL claim was not viable because underlying TILA claims were time-barred); *Kohl v. Am. Home Shield Corp.*, No. 11-cv-0700, 2011 WL 3739506, at *4 (S.D. Cal. Aug. 24, 2011) (where plaintiff’s UCL claim depended entirely on the application of Real Estate Settlement Procedures Act (“RESPA”), the court concluded that RESPA’s one-year statute of limitations applied to plaintiff’s UCL claim); *Robinson v. Open Top Sightseeing S. F., LLC*, No. 14-cv-00852, 2017 WL 2265464, at *5 (N.D. Cal. May 24, 2017) (finding four-year statute of limitations applies to UCL claims regardless of whether the predicate “unlawful” violation has a shorter statute of limitations and regardless of whether the predicate violation is based on federal or state law); *Taylor v. Bosco Credit LLC*, 840 Fed.Appx. 125, 127 (9th Cir. 2020) (holding

Circuit decision, however, holds that in federal court a UCL unlawfulness claim may not be pursued beyond the limitations period prescribed in the predicate statute; in other words, the limitations period is not automatically extended to four years.²⁸⁷ The Ninth Circuit reasoned that because the UCL is equitable, no relief is available if the plaintiff had an adequate remedy at law. Because the plaintiff could have sued directly under the predicate statute before the limitations period expired, such remedy existed and the UCL claim (based solely on the predicate statute) could not be pursued post-expiration based on the UCL's longer statute of limitations.²⁸⁸

4. Contractual Choice-of-Law or Forum-Selection Provisions

Businesses often include contractual choice-of-law or forum-selection provisions in their consumer contracts. Courts sometimes enforce such provisions in consumer agreements,²⁸⁹ and defense counsel should remain alert as to whether a matter involves a provision that may provide the basis for a defense to a UCL claim.²⁹⁰

5. Preventing the “End Run”

Defendants sometimes can argue that a UCL plaintiff may be attempting to “end run” a restriction associated with some other law. Such an “end run” may provide a defense to the UCL claim.²⁹¹ Conversely, one court rejected an attempt to plead a breach of contract claim based on the

that UCL unlawfulness claim based on alleged TILA violation was time-barred where the federal statute of limitations had expired, and that to the extent a UCL unfairness claim is based on the underlying unlawfulness claim, is also barred).

²⁸⁷ *Guzman v. Polaris Industries Inc.*, 49 F.4th 1308 (9th Cir. 2022).

²⁸⁸ *Id.* at 1312.

²⁸⁹ *See Net2Phone, Inc. v. Super. Ct.*, 109 Cal. App. 4th 583, 585 (2003) (enforcing provisions in private attorney general action). *But see Am. Online, Inc. v. Super. Ct.*, 90 Cal. App. 4th 1, 15 (2001) (refusing to enforce choice-of-forum provision in consumer agreement); *GMAC Com. Fin. LLC v. Super. Ct.*, No. B166070, 2003 WL 21398319, at *4-5 (Cal. Ct. App. June 18, 2003) (unpublished) (refusing to enforce forum-selection provision on public policy grounds); *Aral v. Earthlink, Inc.*, 134 Cal. App. 4th 544, 562 (2005) (striking forum-selection clause as unreasonable in putative class action to redress de minimis claims), *abrogated on other grounds by AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (hereinafter referred to as “Concepcion”); *see also Cessna Fin. Corp. v. Jetsuite, Inc.*, 437 F. Supp. 3d 914, 925-26 (D. Kan. 2020) (dismissing UCL claim based on contractual choice of law, subject to possible reinstatement of claim if plaintiff can prove fraud in the inducement, which potentially could render the entire contract, including the choice-of-law provision, subject to rescission).

²⁹⁰ The California tests for the enforceability and scope of choice-of-law provisions in consumer agreements are discussed in *Wash. Mut. Bank, FA v. Super. Ct. (Briseno)*, 24 Cal. 4th 906, 916-17 (2001), and *Nedlloyd Lines B.V. v. Super. Ct.*, 3 Cal. 4th 459, 466 (1992); *see also MediMatch, Inc. v. Lucent Techs. Inc.*, 120 F. Supp. 2d 842, 861-62 (N.D. Cal. 2000) (holding that UCL action could not proceed where contract provided for New Jersey law); *Abat v. Chase Bank USA, N.A.*, 738 F. Supp. 2d 1093, 1094-96 (C.D. Cal. 2010) (holding that UCL claim barred by choice of law clause that selected Delaware law); *Carson v. Nat'l Collegiate Student Loan Tr. 2004-2*, No. 20-4055-JWB, 2021 WL 963276, at *6 (D. Kan. Mar. 15, 2021) (holding that UCL and California debt collection statutes did not apply to promissory notes despite containing California choice-of-law provision because the claims were tort claims, and not based on the notes themselves).

²⁹¹ *See NEO4J, Inc. v. Graph Found., Inc.*, No. 5:19-cv-6226, 2020 WL 6700480, at *7 (N.D. Cal. Nov. 13, 2020) (holding that because the federal Internal Revenue Code almost never authorizes a private right of action, a charitable organization may not be sued under the UCL on the theory that the organization is operating in violation of law granting it non-profit status, 26 U.S.C. § 501(c)(3)); *Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156, 1161 (9th Cir. 2016) (finding that

theory that compliance with applicable statutes, including the UCL and CLRA, is an implied term of every contract.²⁹²

6. Federal Preemption

Federally regulated businesses frequently invoke federal preemption in defending UCL actions, and the case law is extensive. For example, many courts have addressed the application of preemption with respect to banking laws.²⁹³ However, a party that provides services to a federally

plaintiff was prohibited from “bootstrap[ping]” an unfair-competition claim using a failed breach-of-contract claim, because “[p]ermitt[ing] such recovery would completely destroy the principle that a third party cannot sue on a contract to which he or she is merely an incidental beneficiary” (quoting *Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal. App. 4th 1544, 1553 (2007); *Blatty*, 42 Cal. 3d at 1044-45 (UCL claim cannot be brought where plaintiff would be unable to sue for defamation because of First Amendment hurdles); *Carr v. Asset Acceptance, LLC*, No. CV F 11-0890, 2011 WL 3568338, at *9 (E.D. Cal. Aug. 12, 2011) (citing *Rubin v. Green*, 4 Cal. 4th 1187, 1204 (1993) (litigation privilege bars claim under the UCL)), *rejected on other grounds by Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828 (9th Cir. 2018); *see also Cel-Tech*, 20 Cal. 4th at 184 (confirming the rule set forth in previous decisions that no UCL action will lie where either: (a) the claim expressly is barred by some other law; or (b) the challenged conduct expressly is allowed by some other law, such as, for example, a “safe harbor” provision); *Moradi-Shalal v. Fireman’s Fund Ins. Cos.*, 46 Cal. 3d 287, 292, 313 (1988) (no private right of action exists under California Insurance Code section 790.03 and, therefore, third-party claimants cannot file UCL suit based on alleged violations of that statute); *Daly v. Viacom, Inc.*, 238 F. Supp. 2d 1118, 1126 (N.D. Cal. 2002) (dismissing UCL claim where plaintiff stated no other claim and reasoning that “[t]he ‘breadth’ of [section] 17200, however, ‘does not give a plaintiff license to plead around the absolute bars to relief contained in other possible causes of action by recasting those causes of action as ones for unfair competition’”) (quoting *Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1203 (9th Cir. 2001)). *See also Intel Corp. v. Fortress Inv. Grp. LLC*, 511 F. Supp. 3d 1006, 1030 (N.D. Cal. 2021) (rejecting use of UCL to challenge defendant’s allegedly improper acquisition and use of a patent portfolio against plaintiff; plaintiff may not avoid substantive limitations on antitrust claim by arguing that permitted conduct is unfair under the UCL or by arguing that a violation of section 5 of the Federal Trade Commission Act serves as a predicate for a UCL unlawfulness claim); *Am. Video Duplicating, Inc. v. City Nat’l Bank*, No. 20-cv-04036, 2020 WL 6882735, at *4-6 (Nov. 20, 2020) (addressing when the lack of a private right of action under federal law likewise bars a UCL claim). *But see Wash. Mut. Bank, FA v. Super. Ct. (Brown)*, 75 Cal. App. 4th 773, 787 (1999) (UCL action was not preempted by RESPA, which does not allow private right of action for supposed disclosure violations).

²⁹² *See Bergerv. Home Depot U.S.A., Inc.*, 476 F. Supp. 2d 1174, 1176-77 (C.D. Cal. 2007).

²⁹³ *Compare Lopez v. World Sav. & Loan Ass’n*, 105 Cal. App. 4th 729, 742 (2003) (holding that UCL claim based on federal savings association’s practice of assessing a \$10 fax fee for payoff demand statements was preempted by federal law, specifically the Home Owners’ Loan Act (“HOLA”) with 12 C.F.R. § 560.2, promulgated by the Office of Thrift Supervision (“OTS”)); *Wash. Mut. Bank v. Super. Ct. (Guilford)*, 95 Cal. App. 4th 606, 610 (2002) (holding that UCL claim based on savings and loan association’s practice of charging one day’s preclosing interest was barred by OTS preemption); *Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1008 (9th Cir. 2008) (holding that OTS preemption barred plaintiffs’ UCL and section 17500 claims challenging defendant’s interest rate lock-in fee and challenging defendant’s disclosure of consumers’ rescission rights under TILA); *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032, 1038 (9th Cir. 2008) (holding that National Bank Act (the “NBA”) preempted UCL as to disclosures associated with credit card account convenience checks); *Kilgore v. KeyBank*, 712 F. Supp. 2d 939, 958 (N.D. Cal. 2010) (finding that plaintiffs’ state law claims, including UCL claims, are preempted by the NBA because they would “significantly impair” defendant’s exercise of its “enumerated or incidental” powers under the NBA), *vacated on other grounds by* 718 F.3d 1052 (9th Cir. 2013); *Gutierrez v. Wells Fargo Bank, NA*, 704 F.3d 712, 723-25 (9th Cir. 2012) (holding that NBA preempted UCL to the extent “unfair” prong prohibited defendant’s overdraft fee practice of posting checking transactions from “high-to-low”); *Martinez v. Wells Fargo*

regulated bank may not assert preemption in response to a public prosecutor’s civil investigative demand, even if the bank might have the right to assert “visitorial powers” preemption under the National Bank Act.²⁹⁴

Courts have also addressed preemption with respect to environmental laws,²⁹⁵ bankruptcy laws²⁹⁶ and immigration laws.²⁹⁷

Bank, N.A., No. C-06-03327, 2007 WL 963965, at *6-8 (N.D. Cal. Mar. 30, 2007) (NBA preempted UCL as to fees for mortgage loan settlement services); *Newbeck v. Wash. Mut. Bank*, No. C 09-1599, 2010 WL 291821, at *4 (N.D. Cal. Jan. 19, 2010) (finding that HOLA preempts the UCL on claims alleging that defendants failed to disclose the nature of the interest rate on the loan and the potential for negative amortization); *Grant v. Aurora Loan Servs., Inc.*, 736 F. Supp. 2d 1257, 1275 (C.D. Cal. 2010) (plaintiff’s UCL claim relating to the “processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages” was preempted by HOLA and regulations promulgated thereunder by OTS); *Chae v. SLM Corp.*, 593 F.3d 936, 938, 943 (9th Cir. 2010) (UCL and CLRA claims alleging that student loan servicer improperly assessed interest charges were barred by preemption under the Higher Education Act); *Winebarger v. Pa. Higher Educ. Assistance Agency*, 411 F. Supp. 3d 1070, 1089 (C.D. Cal. 2019) (finding plaintiff’s UCL and CLRA claims based on loan provider’s failure to provide accurate information were disclosure claims preempted by 20 U.S.C. § 1098g) (citing *Chae*); *Robinson v. Bank of Am., NA*, 525 Fed.Appx. 580 (9th Cir. 2013) (National Bank Act preempted account holder’s claims under California law arising out of alleged nondisclosures relating to \$1.50 account fee), with *Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185, 1194-97 (9th Cir. 2018) (UCL claims predicated on violations of California’s Escrow Interest Law were not preempted by NBA); *McShannock v. JPMorgan Chase Bank N.A.*, 976 F.3d 881, 895 (9th Cir. 2020) (finding California’s Escrow Interest Law was preempted by HOLA with respect to plaintiffs’ loans, which had been acquired by a national bank); *Reyes v. Premier Home Funding, Inc.*, 640 F. Supp. 2d 1147, 1155-56 (N.D. Cal. 2009) (UCL claims predicated on violations of the California Translation Act were not barred by HOLA); *Hood v. Santa Barbara Bank & Tr.*, 143 Cal. App. 4th 526, 548 (2006) (on claims related to refund anticipation loans, the NBA did not preempt the UCL or the CLRA, among other state laws); *Smith v. Wells Fargo Bank, N.A.*, 135 Cal. App. 4th 1463, 1484 (2005) (UCL claim challenging notice of change in checking account overdraft fees was not barred by preemption under TISA and corresponding OCC regulations); *Gibson v. World Sav. & Loan Ass’n*, 103 Cal. App. 4th 1291, 1294 (2002) (UCL claim challenging federal savings association’s practice of passing through to its borrowers premiums for forced order insurance was not subject to OTS preemption); *Black v. Fin. Freedom Senior Funding Corp.*, 92 Cal. App. 4th 917, 936-38 (2001) (UCL claim challenging marketing of reverse mortgage transactions was not barred by preemption under numerous federal banking laws); *Wash. Mut. Bank v. Super. Ct. (Brown)*, 75 Cal. App. 4th 773, 787 (1999) (UCL not preempted by RESPA); *People ex rel. Sepulveda v. Highland Fed. Sav. & Loan*, 14 Cal. App. 4th 1692, 1708 (1993) (12 C.F.R. § 545.2, promulgated under the HOLA, did not preempt the UCL); *Gutierrez*, 704 F.3d at 725-28 (claims for misleading misrepresentations under UCL fraudulent prong not preempted by NBA).

²⁹⁴ *People v. Alorica, Inc.*, 77 Cal. App. 5th 60 (2022) (debt collector on accounts originated and owned by national bank must still respond to investigative subpoena seeking information about potential UCL violation; third party may not invoke bank’s visitorial powers preemption defense).

²⁹⁵ *See, e.g., Nathan Kimmel, Inc. v. Dow Elanco*, 64 F. Supp. 2d 939, 944 (C.D. Cal. 1999) (holding that the Federal Insecticide, Fungicide, and Rodenticide Act preempted the UCL), *aff’d*, 275 F.3d 1199 (9th Cir. 2002).

²⁹⁶ *See, e.g., Rogers v. NationsCredit Fin. Servs. Corp.*, 233 B.R. 98, 109-10 (N.D. Cal. 1999) (holding that the UCL was preempted by bankruptcy statutes).

²⁹⁷ *See, e.g., Diaz v. Kay-Dix Ranch*, 9 Cal. App. 3d 588, 599 (1970) (recognizing federal preemption in area of immigration and holding that California courts should abstain from intervening by way of a UCL claim).

There also has been extensive preemption litigation in the context of product safety laws,²⁹⁸ as well as food safety laws and product labeling laws.²⁹⁹

²⁹⁸ See, e.g., *Churchill Vill., L.L.C. v. Gen. Elec. Co.*, 169 F. Supp. 2d 1119, 1127-28 (N.D. Cal. 2000) (holding that, where Consumer Product Safety Commission had not promulgated highly particularized product safety standards and had promulgated none directly addressing unfair business practices and false advertising, the federal Consumer Protection Safety Act did not preempt plaintiffs' claims under UCL and section 17500).

²⁹⁹ Compare *Kroessler v. CVS Health Corp.*, 977 F.3d 803, 813-14 (9th Cir. 2020) (claims may be asserted under UCL to the extent the theory of liability is consistent with federal law governing dietary supplements), with *Dachauer v. NBTY, Inc.*, 913 F.3d 844, 849 (9th Cir. 2019) (holding that most of plaintiff's claims under the UCL and CLRA challenging labels on dietary supplements were preempted because plaintiff sought to impose "structure/function" labeling requirements under California law that differed from applicable federal requirements). See also *Greenberg v. Target Corp.*, 985 F.3d 650 (9th Cir. 2021) (affirming that Federal Food, Drug, and Cosmetic Act ("FDCA") preempts UCL and CLRA claims arising from qualifying "structure/function" labeling claims); *Beasley v. Lucky Stores, Inc.*, 400 F. Supp. 3d 942, 952 (N.D. Cal. 2019) (finding plaintiff's UCL claim challenging the sale of non-dairy creamer containing partially hydrogenated oil (PHO) was preempted by the federal Consolidated Appropriations Act for 2016, which provided that "no PHOs . . . shall be deemed unsafe . . . [or] adulterated" under the Federal Food, Drug, and Cosmetic Act until the compliance date of June 18, 2018); *Forsher v. J.M. Smucker Co.*, No. 5:19-cv-00194, 2020 WL 1531160 (N.D. Ohio Mar. 31, 2020) (UCL and CLRA could not be used to compel disclosure that product contained sugar from genetically modified beets, as federal law expressly made such disclosure optional); *Beasley v. Conagra Brands, Inc.*, 374 F. Supp. 3d 869, 878 (N.D. Cal. 2019) (same); *Reid*, 780 F.3d at 965-68 (holding the Food and Drug Administration's ("FDA") regulations pertaining to nutrient content labeling did not preempt plaintiff's UCL and CLRA claims for manufacturer's "No Trans Fat" misrepresentation on the label of its vegetable oil spread); *Hawkins v. Kroger Co.*, 906 F.3d 763, 767 (9th Cir. 2018) (citing *Reid* and holding that FDA regulations requiring nutrition facts panel for product containing less than 0.5 grams of trans fat to state product contained 0 grams of fat did not preempt claim based on statement elsewhere on product label that product had no trans fat); *Durnford v. Musclepharm Corp.*, 907 F.3d 595, 598 (9th Cir. 2018) (holding that Food, Drug, and Cosmetic Act did not preempt claims that product label falsely suggested that product's protein content was based on genuine protein rather than non-protein substitutes); *Backus v. Nestlé USA, Inc.*, 167 F. Supp. 3d 1068, 1074 (N.D. Cal. 2016), (plaintiff's claim which sought to prohibit use of PHOs in all food immediately was preempted because it would prevent the FDA from fulfilling its objectives and conflict with Congress's decision not to deem PHOs unsafe pending a 2018 compliance date), *abrogated on other grounds as recognized by Beasley*, 400 F. Supp. 3d 942; *Fisher v. Monster Beverage Corp.*, 656 Fed.Appx. 819, 823 (9th Cir. 2016) (plaintiff's claims regarding the amount of caffeine in Monster Drinks were preempted because they would require ingredient labeling obligations beyond what federal law requires); *In re Fontem US, Inc.*, No. SACV 15-01026, 2016 WL 6520142, at *6 (C.D. Cal. Nov. 1, 2016) (UCL labeling claims expressly preempted by FDA rule defining e-cigarettes as "tobacco products," which placed e-cigarettes within the scope of the labeling requirements of the Family Smoking and Tobacco Control Act ("TCA"), and its express preemption clause; however, UCL Proposition 65 warning claims are not preempted because compliance with Proposition 65 warning requirements can be accomplished via point-of-sale notices or advertising and therefore these claims are not captured by the scope of the TCA's labeling requirements or express preemption clause); *Hawkins*, 224 F. Supp. 3d at 1011-13 (UCL claim for plaintiff's alleged injury from repeatedly ingesting partially hydrogenated oil in defendant's cookies preempted by conflict with FDA determination for industry phase out of partially hydrogenated oil at a future compliance date, and at odds with legislative purpose of the future compliance date to prevent economic disruption from lawsuits against food producers using partially hydrogenated oil in the meantime).

Similarly, preemption has been litigated with respect to federal transportation laws,³⁰⁰ labor laws,³⁰¹ copyright laws,³⁰² energy laws,³⁰³ postal laws,³⁰⁴ communications laws,³⁰⁵ drug labeling

³⁰⁰ See, e.g., *Blackwell v. SkyWest Airlines, Inc.*, No. 06cv0307, 2008 WL 5103195, at *15-18, 20 (S.D. Cal. Dec. 3, 2008) (the ADA preempted the UCL and state wage and hour laws); *People v. Super. Ct. (Cal Cartage Transp. Express, LLC)*, 57 Cal. App. 5th 619 (2020) (Federal Aviation Administration Authorization Act preempted Los Angeles City Attorney’s UCL claim seeking to enforce California worker classification rules); *Ellenburg v. PODS Ents., LLC*, 473 F. Supp. 3d 1095 (E.D. Cal. 2020) (Federal Aviation Administration Authorization Act preempted UCL and CLRA claims against holder of federal interstate motor carrier license, even though litigation involved wholly intrastate transport, because the defendant was not involved in the loading or unloading of household goods); *Dugan v. FedEx Corp.*, No. CV 02-1234, 2002 WL 31305208, at *3 (C.D. Cal. Sept. 27, 2002) (the federal Airline Deregulation Act (“ADA”) preempted the UCL and other state law as to air carrier’s policy regarding limitation on losses and damaged goods); *People ex rel. Harris v. Delta Air Lines, Inc.*, 247 Cal. App. 4th 884, 906 (2016) (the federal ADA preempted a UCL action for enforcement of California’s Online Privacy Protection Act’s privacy policy requirements for an airline’s consumer mobile application because the requirements “effectively interfere with the airline’s selection and design of its mobile application, a marketing mechanism appropriate to the furnishing of air transportation service, for which state enforcement has been held to be expressly preempted by the ADA.”) (citations and internal quotation marks omitted); *People ex rel. Harris v. Pac Anchor Transp., Inc.*, 59 Cal. 4th 772, 783 (2014) (the Federal Aviation Administration Authorization Act did not preempt UCL claim that truck drivers were misclassified as independent contractors rather than employees because the act “does not preempt generally applicable employment laws that affect prices, routes, and services”).

³⁰¹ See, e.g., *Holliman v. Kaiser Found. Health Plan*, No. C-06-0755 SC, 2006 WL 662430, at *3-4 (N.D. Cal. Mar. 14, 2006) (Fair Labor Standards Act does not preempt UCL claims because statutory language grants jurisdiction to both federal and state courts); *Bloom v. Universal City Studios, Inc.*, 734 F. Supp. 1553, 1560 (C.D. Cal. 1990) (Labor Management Relations Act preempted UCL with respect to interpretation of a collective bargaining agreement); *Providence v. Valley Clerks Tr. Fund*, 509 F. Supp. 388, 392 (E.D. Cal. 1981) (ERISA preempted UCL because application of state regulatory laws may alter controls established for benefit plans by ERISA); *Rodriguez v. RWA Trucking Co., Inc.*, 238 Cal. App. 4th 1375, 1409 (2013) (holding that “where a cause of action is based on allegations of unlawful violations of the state’s labor laws, there is no reason to find preemption merely because the pleading raised these issues under the UCL, rather than directly under the provisions of the Labor Code alleged to have been violated”) (depublished by grant of review).

³⁰² See, e.g., *Ferrarini v. Irgit*, No. 19 CIV. 0096, 2020 WL 122987 (S.D.N.Y. Jan. 9, 2020), *affd.*, No. 21-597-cv, 2022 WL 1738725 (2d Cir. May 31, 2022), *cert. denied*, No. 22-397, 2023 WL 124061 (U.S. Jan. 9, 2023) (Copyright Act preempts UCL claim where the alleged act of unfair conduct was identical to the asserted copyright violation; even where the copyright claim was allowed to proceed, the UCL claim is barred); *Media.net Advert. FZ-LLC v. NetSeer, Inc.*, 156 F. Supp. 3d 1052, 1069-70 (N.D. Cal. 2016) (UCL claim held preempted by Copyright Act); *Inspection Mgmt. Sys., Inc. v. Open Door Inspections, Inc.*, No. 209-cv-00023, 2009 WL 2030937, at *6 (E.D. Cal. July 9, 2009) (same); *Fractional Villas, Inc. v. Tahoe Clubhouse*, No. 08cv1396, 2009 WL 160932, at *5-6 (S.D. Cal. Jan. 22, 2009) (same); see also *Wimer v. Reach Out Worldwide, Inc.*, No. CV 17-1917, 2017 WL 5635461 (C.D. Cal. July 13, 2017) (holding that conversion of camera on which stolen pictures were held was sufficient for a UCL claim to avoid preemption by federal copyright law).

³⁰³ See, e.g., *Wholesale Elec. Antitrust Cases I & II*, 147 Cal. App. 4th 1293, 1316 (2007) (UCL claim preempted by Federal Power Act).

³⁰⁴ See, e.g., *Flamingo Indus. (USA) Ltd. v. U.S. Postal Serv.*, 302 F.3d 985, 996 (9th Cir. 2002) (dismissing UCL claim against United States Postal Service based on federal preemption), *rev’d on other grounds*, 540 U.S. 736 (2004).

³⁰⁵ See, e.g., *TPS Utilicom Servs., Inc. v. AT&T Corp.*, 223 F. Supp. 2d 1089, 1108 (C.D. Cal. 2002) (holding that UCL claim was preempted by Federal Communications Act); *Cohen v. Apple Inc.*, 46 F.4th 1012, 1029 (9th Cir. 2022) (same).

laws,³⁰⁶ cosmetics labeling laws,³⁰⁷ gasoline labeling laws,³⁰⁸ securities laws,³⁰⁹ credit reporting laws³¹⁰ and healthcare laws.³¹¹

³⁰⁶ See, e.g., *Kanter v. Warner-Lambert Co.*, 99 Cal. App. 4th 780, 797 (2002) (holding that state law, including the UCL, was preempted by Food and Drug Administration Modernization Act). *But see Consumer Justice Ctr. v. Olympian Labs, Inc.*, 99 Cal. App. 4th 1056, 1058 (2002) (holding that the UCL was not preempted by FTCA, Federal Food, Drug, and Cosmetic Act and Dietary Supplement Health and Education Act); *Chavez v. Blue Sky Nat. Beverage Co.*, 268 F.R.D. 365, 368 (N.D. Cal. 2010), *reconsideration denied*, No. C 06-6609, 2010 WL 5538682 (N.D. Cal. Nov. 22, 2010) (granting plaintiff's motion for summary judgment on defendant's affirmative defense of preemption by Food, Drug and Cosmetic Act); *Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10-4387, 2011 WL 2111796, at *10 (N.D. Cal. May 26, 2011) (Nutrition Label and Education Act (the "NLEA") did not preempt UCL claims where the requirements plaintiffs sought to impose by their UCL action were not identical to those required by the NLEA); *Quesada v. Herb Thyme Farms, Inc.*, 62 Cal. 4th 298 (2015) (federal regulatory regime for certifying organic growers did not preempt UCL and CLRA claim alleging that herb grower illegally marketed its herbs as organic); *Hendricks v. StarKist Co.*, 30 F. Supp. 3d 917 (N.D. Cal. 2014) (Food, Drug, and Cosmetic Act did not preempt plaintiff's claim that defendant underfilled canned tuna).

³⁰⁷ See, e.g., *Eckler v. Neutrogena Corp.*, 238 Cal. App. 4th 433 (2015) (holding that the Food, Drug, and Cosmetic Act's grant of authority to the Food and Drug Administration to regulate sunscreen labeling preempted claims brought under the UCL and CLRA); *Webb v. Trader Joe's Co.*, 999 F.3d 1196 (9th Cir. 2021) (holding that UCL claims regarding the percentage of water retention on chicken labeling was preempted by federal law as to state law claims imposing requirements above and beyond the Poultry Products Inspection Act).

³⁰⁸ See, e.g., *VP Racing Fuels, Inc. v. Gen. Petroleum Corp.*, 673 F. Supp. 2d 1073, 1079-82 (E.D. Cal. 2009) (concluding that Petroleum Marketing Practices Act does not preempt UCL claim).

³⁰⁹ See, e.g., *Roskind v. Morgan Stanley Dean Witter & Co.*, 80 Cal. App. 4th 345, 352 (2000) (federal securities laws do not preempt the UCL on claim alleging that brokerage firm breached its fiduciary duty to customers by failing to execute stock orders in a fair and timely manner).

³¹⁰ See, e.g., *El-Aheidab v. Citibank (S.D.), N.A.*, No. C-11-5359, 2012 WL 506473, at *5 (N.D. Cal. Feb. 15, 2012) (holding that a UCL claim is preempted when predicated on violations of the federal Fair Credit Reporting Act ("FCRA")); *Molina v. Synchrony Bank/Walmart*, No. EDCV 17-1464, 2018 WL 2721903, at *4 (C.D. Cal. Apr. 17, 2018) (agreeing that FCRA preempts California's UCL as applied to furnishers of credit information). *But see Alborzian v. JPMorgan Chase Bank, N.A.*, 235 Cal. App. 4th 29, 39 (2015) (holding plaintiffs' claims regarding bank's deceptive efforts to collect an unenforceable loan were not preempted by the Fair Credit Reporting Act because that act preempts only state laws that impose "a requirement or prohibition . . . relating to the responsibilities of persons who furnish information to consumer reporting agencies").

³¹¹ See, e.g., *Roberts v. United Healthcare Servs., Inc.*, 2 Cal. App. 5th 132, 137 (2016). In *Roberts*, the California Court of Appeal held that UCL claims for misrepresentation in a medical insurer's marketing materials were expressly and impliedly preempted by the Medicare Advantage preemption clause of the Medicare Act, 42 U.S.C. § 1395w-26(b)(3), following the Ninth Circuit in *Do Sung Uhm v. Humana, Inc.*, 620 F.3d 1134, 1148-57 (9th Cir. 2010). *Id.* at 137-38. Notably, the Court split from two other California Court of Appeal rulings, both of which construed the Medicare Advantage preemption clause more narrowly. *Id.* at 144-47; *cf. Cotton v. StarCare Med. Grp., Inc.*, 183 Cal. App. 4th 437, 447-54 (2010); *Yarick v. PacifiCare of Cal.*, 179 Cal. App. 4th 1158, 1165-67 (2009). A split in the California Court of Appeal districts makes this issue ripe for review by the California Supreme Court.

A preemption defense, however, is always subject to a court’s interpretation of congressional intent with respect to the federal law at issue, and state courts often are reluctant to rule that state law will not apply to the claims of the state’s citizens.³¹²

Notably, in *Solus Industrial Innovations, LLC v. Superior Court*,³¹³ the California Supreme Court held that the federal Occupational Safety and Health Act of 1970 (OSHA) did not preempt the district attorney’s UCL claims seeking penalties against an employer for alleged violations of California’s workplace safety standards. In finding that neither field nor obstacle preemption barred the UCL claims, the Court found that California’s workplace safety plan had been approved under OSHA, the claims involved state standards approved by the Secretary of Labor and Congress had explicitly recognized the continuing applicability of state law in the field.³¹⁴ The Court also found that express preemption did not apply because OSHA did not reflect clear Congressional intent to preempt state law.³¹⁵

In addition, some Courts of Appeal have held that UCL claims based on systematic contract breaches are not defeated by federal preemption.³¹⁶ In *Gibson v. World Savings and Loan Association*,³¹⁷ plaintiffs brought a UCL action challenging a federal savings association’s practice of assessing premiums for forced order insurance. Rejecting defendant’s preemption argument, which was based on federal banking law, the Court of Appeal reasoned that plaintiffs’ UCL claims were not aimed at regulating defendant’s lending practices, but rather, were predicated on “contractual duties” arising from *borrowers’* deeds of trust.³¹⁸ The court’s reasoning in *Gibson*—that UCL unfairness claims can be predicated on “contractual obligations”—appears to conflict with other California authorities stating that the UCL “is not an all-purpose substitute for a tort or contract action.”³¹⁹ Nevertheless, in *Smith v. Wells Fargo Bank, N.A.*,³²⁰ the Court of Appeal similarly concluded that the UCL was not preempted by the Truth in Savings Act with respect to contractual notice requirements.³²¹

³¹² See, e.g., *People ex rel. Renne v. Servantes*, 86 Cal. App. 4th 1081, 1087-96 (2001) (refusing to follow Ninth Circuit and rejecting preemption defense based on the Federal Aviation Administration Authorization Act). Although proceeding in federal court increases the chance that a preemption defense might succeed, it is not always successful there either.

³¹³ 4 Cal. 5th 316, 345-52 (2018).

³¹⁴ *Id.* at 46-50.

³¹⁵ *Id.* at 51.

³¹⁶ See *Smith*, 135 Cal. App. 4th at 1483 (“it appears that a systematic breach of certain types of contracts (e.g., breaches of standard consumer or producer contracts involved in a class action) can constitute an unfair business practice under the UCL”); *Branick v. Downey Sav. & Loan Ass’n*, 24 Cal. Rptr. 3d 406, 413 (2005), *aff’d*, 39 Cal. 4th 235 (2006).

³¹⁷ 103 Cal. App. 4th at 1302-04.

³¹⁸ *Id.* at 1301 (“Those [UCL] claims are predicated on the duties of a contracting party to comply with its contractual obligations.”). It should be noted that plaintiffs in *Gibson* had dismissed their claim for breach of contract, opting to proceed only under the UCL. *Id.* at 1294.

³¹⁹ *Cortez*, 23 Cal. 4th at 173; see also *Altman v. PNC Mortg.*, 850 F. Supp. 2d 1057, 1077 (E.D. Cal. 2012) (stating that the “unfairness” prong of the UCL “does not give the courts a general license to review the fairness of contracts”).

³²⁰ 135 Cal. App. 4th at 1476-84.

³²¹ See also *McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457, 1488 (2006) (finding that preemption did not bar UCL claims based on alleged fraudulent conduct and violations of an underlying federal statute).

Moreover, state trial courts do not permit third parties to invoke a visitorial powers preemption defense even if the third party is in a partnership with a national bank.³²² In *People v. Alorica*, the Riverside County District Attorney’s Office subpoenaed a debt collection company to investigate the debt collection company’s compliance with the Rosenthal Fair Debt Collection Practices Act and Telephone Consumer Protection Act since its records constitute the “books or records of national banks.”³²³ The debt collection company argued that certain requests in the subpoena were invalid since it amounted to an impermissible “visitation” under the National Bank Act.³²⁴ However, the trial court rejected this argument since the debt collection agency was not a national bank nor did the information sought originate from a national bank.³²⁵

7. Primary Jurisdiction

When a UCL action arises in a regulated area, such as insurance, a defendant might advance the defense of primary jurisdiction. In connection with that defense, it must be shown that an administrative procedure already is in place to address issues of widespread importance and/or consumer complaints. A successful defense based on primary jurisdiction suspends judicial proceedings until the appropriate administrative body can review the underlying claim.³²⁶ Alternatively, a court may dismiss the case without prejudice to refile after the agency takes final

³²² *People v. Alorica, Inc.*, 77 Cal. App. 5th 60, 67-69 (2022).

³²³ *Id.* at 62-63, 67.

³²⁴ *Id.* at 67.

³²⁵ *Id.* at 68-69.

³²⁶ *See, e.g., Farmers Ins.*, 2 Cal. 4th at 394 (applying primary jurisdiction and staying a UCL government enforcement action pending review by the California Insurance Commissioner); *Wise v. Pac. Gas & Elec. Co.*, 77 Cal. App. 4th 287, 299-300 (1999) (applying the primary jurisdiction doctrine to stay a UCL action); *accord Samura v. Kaiser Found. Health Plan, Inc.*, 17 Cal. App. 4th 1284, 1299 (1993) (holding that a UCL action was barred where the Legislature had expressly entrusted an administrative body with exclusive regulatory powers over the underlying statute). *But see Cundiff v. GTE Cal. Inc.*, 101 Cal. App. 4th 1395, 1412 (2002) (rejecting primary jurisdiction defense in UCL action); *AICCO*, 90 Cal. App. 4th at 594-95 (rejecting defense to UCL claim based on doctrine of primary jurisdiction because there were no pending or proposed administrative proceedings focused on the corporate structure at issue in the action).

A doctrine similar to primary jurisdiction is exhaustion of administrative remedies. Differentiating between the two, the United States Supreme Court has explained:

“Exhaustion” applies where a claim is cognizable in the first instance by an administrative agency alone: judicial interference is withheld until the administrative process has run its course. “Primary Jurisdiction,” on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

Farmers Ins., 2 Cal. 4th at 390 (quoting *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63-64 (1956)). Because a claim for violation of the UCL will be “originally cognizable in the courts,” only the primary jurisdiction doctrine appears applicable in most actions. *See id.* at 391. It should be noted that, regardless of whether primary jurisdiction might apply, administrative review may not be controlling. *See People v. Damon*, 51 Cal. App. 4th 958, 972 (1996) (holding that an administrative proceeding did not preclude a subsequent UCL case in court where a UCL remedy could not have been sought through the administrative proceeding).

action on the relevant issue.³²⁷ As explained in *Farmers Insurance Exchange v. Superior Court*,³²⁸ “the primary jurisdiction doctrine advances two related policies: it enhances court decision making and efficiency by allowing courts to take advantage of administrative expertise, and it helps assure uniform application of regulatory laws.”³²⁹

A related doctrine forbids UCL litigation when the gravamen of the claim would require a court to examine the fairness of the tax system or make binding determinations as to tax law.³³⁰ However, the California Supreme Court’s decision to grant review in *Morgan v. Ygrene Energy Fund, Inc.*,³³¹ suggests that it may be willing to allow UCL claims in certain cases when tax issues are implicated. *Morgan* involves a government program that funds environmental improvements through future property tax assessments. The Court of Appeal held that the private parties who financed the work cannot be sued under the UCL if the homeowner has not yet exhausted administrative remedies with the taxing authority.

³²⁷ *Rosas v. Hi-Tech Pharmaceuticals*, No. CV 20-00433, 2020 WL 5361878 (C.D. Cal. July 29, 2020).

³²⁸ 2 Cal. 4th at 391.

³²⁹ *Id.*; see also *Colette v. CV Scis., Inc.*, No. 19-cv-10227, 2020 WL 2739861 (C.D. Cal. May 22, 2020) (entering primary jurisdiction stay pending Federal Food and Drug Administration assessment of how best to regulate cannabis and cannabis derived projects, despite present federal illegality of marijuana); *Tryon v. DSB Enters., Inc.*, No. D045656, 2006 WL 234728, at *4 (Cal. Ct. App. Feb. 1, 2006) (unpublished) (concluding that individual citizens could not enforce the Alcoholic Beverage Control Act through private UCL actions because the state constitution and the act itself granted exclusive enforcement power to the Department of Alcoholic Beverage Control); *Shamsian v. Dep’t of Conservation*, 136 Cal. App. 4th 621, 642 (2006) (stating that “[f]or the court at this point to issue restitution and disgorgement 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.”).

³³⁰ See *Loeffler v. Target Corp.*, 58 Cal. 4th 1081, 1129 (2014) (allowing plaintiffs’ claim that Target had collected excessive sales taxes to go forward would result in “a proceeding that would produce a binding interpretation of tax law, but in which a party considered by the Legislature to be necessary, . . . the [State Board of Equalization], would be absent,” and would also risk future “inconsistent determinations” of whether a particular transaction is subject to the sales tax).

³³¹ 84 Cal. App. 5th 1002, review granted, No. S277628 (Feb. 22, 2023).

8. Judicial Abstention in Matters of Economic Policy

A number of courts have held that UCL actions should not proceed when they require trial courts to engage in “microeconomic management.”³³² In applying this defense, courts have emphasized that “[j]udicial intervention in complex areas of economic policy is inappropriate.”³³³

Indeed, in the dissenting opinion in *Stop Youth Addiction*, Justice Brown noted:

³³² See, e.g., *Desert Healthcare Dist. v. PacifiCare, FHP, Inc.*, 94 Cal. App. 4th 781, 794-95 (2001) (dismissing UCL claim challenging defendant healthcare provider’s capitation agreement with an intermediary because assessing appropriate levels of capitation and industry oversight—i.e., determining economic policy—is primarily a legislative and not a judicial function”), *disapproved on other grounds by Centinela Freeman Emergency Med. Assocs. v. Health Net of Cal., Inc.*, 1 Cal. 5th 994 (2016); *Crusader Ins. Co. v. Scottsdale Ins. Co.*, 54 Cal. App. 4th 121, 138 (1997) (holding that plaintiff’s claim under the UCL, in essence, challenged whether the Department of Insurance properly regulated certain insurance providers; since “[i]nstitutional systems are . . . in place to deal with [plaintiff’s allegations,] . . . [t]here is no need or justification for the courts to interfere with the Legislature’s efforts to mold and implement public policy in this area”); *Wolfe v. State Farm Fire & Cas. Ins. Co.*, 46 Cal. App. 4th 554, 562 (1996) (holding that the trial court properly sustained a demurrer without leave to amend on a UCL claim where plaintiffs brought suit against certain insurance companies based on their refusal to issue homeowners and earthquake insurance); *Cal. Grocers Ass’n*, 22 Cal. App. 4th at 218 (reversing trial court’s judgment under the UCL, which enjoined a bank from imposing certain service charges, because the “case implicates a question of economic policy: whether service fees charged by banks are too high and should be regulated”—and emphasizing that “[j]udicial review of one service fee charged by one bank is an entirely inappropriate method of overseeing bank service fees”); *Samura*, 17 Cal. App. 4th at 1301-02 (reversing the trial court’s entry of an injunction under the UCL because “the courts cannot assume general regulatory powers over health maintenance organizations [relating to service agreement provisions] through the guise of enforcing” the UCL, and holding that such regulatory powers are entrusted by the Legislature to the Department of Corporations); *Beasley v. Wells Fargo Bank*, 235 Cal. App. 3d 1383, 1391 (1991) (noting the trial court’s determination to rule in favor of a bank on a UCL claim involving the assessment of credit card late fees because, “as a matter of policy, [] this Court [is not] well suited to regulating retail bank pricing via injunction on an ongoing basis”); see also *Lazar*, 69 Cal. App. 4th at 1509 (holding that a cause of action for violation of the Unruh Act could not be maintained where plaintiff challenged a car rental company’s surcharge because “this case concerns a question of economic policy—that is, whether the surcharge is too high and should be regulated. . . . It is the Legislature’s function, not ours, to determine the wisdom of economic policy.”) (citations omitted). But see *AICCO*, 90 Cal. App. 4th at 593 (rejecting defendant’s argument that the trial court properly abstained from deciding the action because, by doing so, it would “engage in ‘impermissible microeconomic regulation of the business of insurance’”); *Arce v. Kaiser Found. Health Plan, Inc.*, 181 Cal. App. 4th 471, 502 (2010) (where member brought putative class action for alleged denial of coverage for mental health care services, trial court erred in applying the doctrine of judicial abstention because the UCL claim did not require the court “to make individualized determinations of medical necessity, to evaluate complex issues of economic policy, or to decide matters within the exclusive jurisdiction of the [Department of Managed Health Care]”); *Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1369 (2012) (application of the doctrine requires an alternative means of resolving issues raised in plaintiff’s complaint).

³³³ *Wolfe*, 46 Cal. App. 4th at 562; accord *Abarado v. Selma Convalescent Hosp.*, 153 Cal. App. 4th 1292, 1303-04 (2007) (“Adjudicating this class action controversy would require the trial court to assume general regulatory powers over the health care industry through the guise of enforcing the UCL, a task for which the courts are not well-equipped.”); *Desert Healthcare Dist.*, 94 Cal. App. 4th at 795 (“Where a UCL action would drag a court of equity into an area of complex economic policy, equitable abstention is appropriate.”).

Although California courts have not yet developed the doctrine fully, the fundamentals of an equitable jurisprudence of abstention in litigation brought under the UCL exists under both the California Constitution (art. III, § 3) and case law. As [numerous California decisions] show, the Courts of Appeal have done an admirable job of reining in the UCL’s potential for adverse regulatory effects by declining to grant relief in appropriate cases.³³⁴

The judicial abstention defense is based on the notion that, where a challenged business practice arises in the context of a regulated industry and the practice has not been prohibited, the courts should not do what the Legislature or a responsible agency has left undone.³³⁵ However, if pursuit of a UCL claim is consistent with the overall goal of the legislation, courts will not abstain.³³⁶

For example, the California Supreme Court rejected applying the doctrine of judicial abstention in a case involving allegedly “unconscionable” conduct. In *De La Torre v. CashCall, Inc.*,³³⁷ low-income borrowers brought a putative class action in federal court, alleging that a California lender’s interest rates violated the “unlawful” prong of the UCL by being unconscionably high in violation of section 22302 of the Financial Code (generally prohibiting “unconscionable” consumer loans). The district court granted defendant’s motion for summary judgment, finding the court could not provide a remedy for plaintiffs without intruding into economic policy because it would have to make a determination as to “the point at which CashCall’s interest rates crossed the line into unconscionability.”³³⁸ Plaintiffs appealed, and the Ninth Circuit certified the question to the California Supreme Court to determine whether an interest rate on consumer loans of \$2500 or more (California’s Finance Lenders Law imposes express interest-rate caps on consumer loans of less than \$2500, but no express caps on loans of \$2500 or more) rendered the loans unconscionable.³³⁹ The Supreme Court concluded that plaintiffs stated a cause of action under the UCL based on their allegation that interest rates on loans of \$2500 or more were unconscionable under section 22302.³⁴⁰ The Court reasoned that, “[a]lthough courts must proceed with caution in this area, the possibility that an interest rate is unconscionable in a particular context is not so different relative to any other

³³⁴ *Stop Youth Addiction*, 17 Cal. 4th at 596-97 (Brown, J., dissenting) (footnote omitted); *see also Quelimane*, 19 Cal. 4th at 63 (Brown, J., dissenting) (“It is not simply that a single superior court judge hearing a single UCL case is a poor choice to resolve a myriad of complicated fact and policy issues tied to the economics, risks, cost and availability of [certain] insurance. It is that given the scope of its administrative authority and depth of regulatory experience, the Department of Insurance is likely to prove better at the job.”). *But see Villanueva v. Fid. Nat’l Title Co.*, 11 Cal. 5th 104 (2021) (finding that *Quelimane* did not provide blanket immunity from suit solely because the Legislature had acted in the area, and that it was incumbent on defendants invoking *Quelimane* to prove their actions met specific “statutory prerequisites” for immunity).

³³⁵ *See Uber Techs. Pricing Cases*, 46 Cal. App. 5th 963 (2020) (even though California Public Utilities Commission had not yet regulated rideshare pricing, that it had statutory authority to do so meant that industry pricing could not be challenged in court by way of litigation under the UCL or the Unfair Practices Act).

³³⁶ *See Villanueva*, 11 Cal. 5th at 133-34.

³³⁷ 5 Cal. 5th 966 (2018).

³³⁸ *Id.* at 974-75 (quoting *De La Torre v. CashCall, Inc.*, 56 F. Supp. 3d 1105, 1109-1110 (N.D. Cal. 2014), *vacated on other grounds*, 904 F.3d 866 (9th Cir. 2018)).

³³⁹ *Id.* at 975.

³⁴⁰ *Id.* at 981.

kind of potential contractual defect that it justifies concluding that courts lack power or responsibility to address unconscionable interest rates.”³⁴¹

9. The “Safe Harbor” Defense

As noted above, in the context of an unfairness claim, the California Supreme Court confirmed in *Cel-Tech* that “[a]cts that the Legislature has determined to be lawful may not form the basis for an action under the [UCL]”³⁴² Because “[c]ourts may not simply impose their own notions of the day as to what is fair or unfair” and “[s]pecific legislation may limit the judiciary’s power to declare conduct unfair,” the Court concluded that “courts may not use the [UCL] to condemn actions the Legislature permits.”³⁴³ Other California decisions have dismissed UCL claims for unlawful and fraudulent conduct on these same “safe harbor” grounds—i.e., where the business practice forming the basis of the claim has been explicitly approved, or exempted from prosecution, by the Legislature.³⁴⁴ However, courts are cautioned against “creating safe harbors in the absence of

³⁴¹ *Id.* at 993-994.

³⁴² *Cel-Tech*, 20 Cal. 4th at 183.

³⁴³ *Id.* at 182, 184. As discussed above, however, the decision in *Cel-Tech* was based on a dispute between two competitors and, therefore, may be distinguishable in the context of consumer transactions. *Id.* *But see Schnall*, 78 Cal. App. 4th at 1166-67 (applying *Cel-Tech* standard in a consumer action).

³⁴⁴ *See, e.g., Dinan v. Sandisk LLC*, No. 18-cv-05420, 2020 WL 364277, at *10-11 (N.D. Cal. Jan. 22, 2020) (holding that Legislature’s approval of National Institute of Standards and Technology units of weights and measure precluded UCL claim asserting that the term “gigabyte” was deceptive because the product offered only one billion bytes of storage (the decimal measure of “gigabyte”), rather than a larger amount of storage, 1,073,741,824 bytes, as calculated by reference to the binary measure, which plaintiff alleged was the expected standard among users), *aff’d*, 844 F. App’x. 978 (9th Cir. 2021); *Alaei*, 224 F. Supp. 3d at 1001 (finding that the safe harbor for both the UCL and the CLRA exists both when the Legislature has specifically permitted certain conduct and when the Legislature “considered” a situation and decided “no action should lie”); *Ochs v. PacificCare of Cal.*, 115 Cal. App. 4th 782, 793 (2004) (holding that “safe harbor” defense precluded UCL claim in action challenging health care service plan’s obligation to pay for emergency services); *Byars*, 109 Cal. App. 4th at 1148 (holding that a lender’s payment of a YSP to a broker did not violate the UCL because the payment of such a premium had been deemed lawful under federal law); *Swanson v. St. John’s Reg’l Med. Ctr.*, 97 Cal. App. 4th 245, 248 (2002) (holding that defendant’s filing of liens pursuant to Hospital Lien Act precluded UCL action as a matter of law because “[i]t is settled that a business practice does not violate the UCL if it is permitted by law”), *disapproved on other grounds by Parnell v. Adventist Health Sys./W.*, 35 Cal. 4th 595 (2005); *Smith v. State Farm Mut. Auto. Ins. Co.*, 93 Cal. App. 4th 700, 704 (2001) (holding that defendant insurers’ compliance with California Insurance Code section 11580.2 precluded UCL claim); *Hobby Indus. Ass’n of Am.*, 101 Cal. App. 3d at 370 (“Although the Supreme Court has construed the orbit of the unfair competition statutes expansively, it cannot be said that this embracing purview also encompasses business practices which the Legislature has expressly declared to be lawful in other legislation.”) (citations omitted). *But see Aron v. U-Haul Co. of Cal.*, 143 Cal. App. 4th 796, 803-04 (2006) (on claims for failure to reimburse customers where vehicle is returned with more fuel than initially provided, refusing to find “implied safe harbors” insulating defendant from liability); *Moran*, 3 Cal. App. 5th at 1140 (safe harbor defense applies to patient plaintiff’s discriminatory pricing claim because Bus. & Prof. Code §§ 16770 and 17042 allow hospitals to variably charge insured and non-insured patients, but the safe harbor defense does not apply to UCL claims for exorbitant pricing because the Hospital Fair Pricing Act, Health & Saf. Code § 127400 *et seq.*, only requires a licensed hospital to establish and give notice of a schedule of fees, but does not permit charging excessive rates); No. 30201400725287CUBICX, 2021 WL 5227329 (activity encouraged by the Pain Patient’s Bill of Rights could not be challenged as unfair under the UCL).

‘specific legislation.’”³⁴⁵ Defendants may raise a “safe harbor” defense based upon case law as well.³⁴⁶ Moreover, the California Supreme Court has held that the “safe harbor” defense applies retrospectively—i.e., following a change in the law authorizing the conduct at issue.³⁴⁷

10. No Extraterritorial Application

Section 17203 currently states that anyone “who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction.” Although the section formerly was limited to unfair competition “*within this state*,” the Legislature deleted these words in 1992.³⁴⁸ This amendment could be construed as clarifying the Legislature’s intent that the power of the California courts to remedy business practices under the UCL is coextensive with the reach of due process. In other words, as long as the “minimum contacts” test of personal jurisdiction is met, a California court may enjoin a defendant’s business practice. In fact, the Courts of Appeal have held that an out-of-state defendant may be held liable under the UCL where the conduct at issue adversely affected California residents.³⁴⁹

Similarly, a plaintiff’s non-residency in California is not enough to preclude application of California consumer protection laws. In California, there is a two-step process to determine whether the CLRA, the UCL (and the FAL) can apply to interstate plaintiffs.³⁵⁰ First, the plaintiff must demonstrate that the application of California law comports with due process.³⁵¹ Second, the onus then shifts to the defendant to show that foreign law, rather than California law, should apply to these claims.³⁵² As to the first prong, the court in *Arroyo* explained that courts “must consider (1) where the defendant does business, (2) whether the defendant’s principal offices are located in California,

³⁴⁵ *Hodsdon*, 162 F. Supp. 3d at 1029 (quoting *Cel-Tech*, 20 Cal. 4th at 163).

³⁴⁶ *See, e.g., Chavez*, 93 Cal. App. 4th at 375 (holding that defendant’s conduct was permissible under the Colgate doctrine and, therefore, not “unlawful” or “unfair” under the UCL).

³⁴⁷ *Olszewski v. Scripps Health*, 30 Cal. 4th 798, 829 (2003) (“[R]etroactive application of a decision disapproving prior authority on which a person may reasonably rely in determining what conduct will subject the person to penalties, denies due process.”) (citation omitted).

³⁴⁸ By contrast, section 17500 contains language that could be interpreted to limit the statute’s extraterritorial application. Section 17500 prohibits false or misleading statements made “before the public in this state” and “from this state before the public in any state.” Cal. Bus. & Prof. Code § 17500.

³⁴⁹ *See G.P.P., Inc. v. Guardian Prot. Prods., Inc.*, No. 15-CV-00321, 2017 WL 220305, at *30 (E.D. Cal. Jan. 18, 2017) (holding that plaintiff was not applying its UCL claim extraterritorially because the franchise agreements at issue were made in California by at least one California corporation, and therefore, there was “a sufficient nexus between California and the franchise law violations that form the basis of [plaintiff’s] Section 17200 claim”), *rev’d and remanded on other grounds*, 788 F. App’x 452 (9th Cir. 2019); *Yu v. Signet Bank/Va.*, 69 Cal. App. 4th 1377, 1391 (1999) (holding that plaintiffs could sue Virginia bank under the UCL for acts that allegedly occurred in Virginia since, “[i]n the absence of any federal preemption, a defendant who is subject to jurisdiction in California and who engages in out-of-state conduct that injures a California resident may be held liable for such conduct in a California court”); *Application Grp., Inc. v. Hunter Grp., Inc.*, 61 Cal. App. 4th 881, 908 (1998) (affirming trial court’s decision that out-of-state employer’s use of unlawful non-compete clause violated the UCL).

³⁵⁰ *Mazza*, 666 F.3d at 589-95.

³⁵¹ *See id.; Arroyo v. TP-Link*, No. 14-cv-04999, 2015 WL 5698752, at *3 (N.D. Cal. Sep. 29, 2015) (explaining that this inquiry involves establishing “sufficient contacts between the alleged misconduct and the state”) (internal quotation marks omitted).

³⁵² *Mazza*, 666 F.3d at 590.

(3) where the potential class members are located, and (4) the location from which the advertising and promotional literature decisions were made.”³⁵³

The decision in *Norwest Mortgage, Inc. v. Superior Court*,³⁵⁴ however, limits the extraterritorial application of the UCL.³⁵⁵ Addressing the issue in the context of nationwide class certification, the Court of Appeal held that the UCL could not be used to regulate conduct unconnected to California.³⁵⁶ Specifically, the court held that the UCL would not apply to claims of class members residing outside of California for conduct occurring outside of California by a company headquartered outside of California.³⁵⁷ *Norwest* was extended in *Aghaji v. Bank of America, N.A.*, where the Court of Appeal determined that the non-California plaintiffs could not assert UCL claims without alleging that the harm they suffered emanated from California.³⁵⁸

Courts also have considered the effect of choice-of-law provisions under the above *Norwest* rule. In *Ice Cream Distributors of Evansville, LLC v. Dreyer’s Grand Ice Cream, Inc.*,³⁵⁹ plaintiff alleged that defendant violated the UCL when employees outside of California made fraudulent statements at the direction of employees in California, which resulted in termination of plaintiff’s business relationships with several regional ice cream distributors and convenience stores. Plaintiff argued that it was permitted to bring a UCL claim for out-of-state conduct pursuant to the choice-of-law provision in the underlying distribution agreement with defendant. Under that provision, the

³⁵³ *Arroyo*, 2015 WL 5698752, at *3 (citing *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883, 917 (C.D. Cal. 2011)).

³⁵⁴ 72 Cal. App. 4th 214 (1999).

³⁵⁵ See *Tidenberg v. Bidz.com, Inc.*, No. CV 08-5553, 2009 WL 605249, at *4 (C.D. Cal. Mar. 4, 2009) (following *Norwest* and noting that, while defendant’s principal place of business is in California, that fact alone does not permit application of the UCL to the claims of nonresident plaintiffs; plaintiff did not allege that defendant, operator of a web business, actually engaged in misleading conduct in California); see also *Standfacts Credit Servs. v. Experian Info. Sols., Inc.*, 405 F. Supp. 2d 1141, 1147-48 (C.D. Cal. 2005) (following *Norwest* and dismissing UCL claim brought by non-resident plaintiffs), *aff’d*, 294 F. App’x 271 (9th Cir. 2008); *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1206-09 (2011) (citing *Norwest* and holding that the UCL did not apply to claims of nonresident plaintiffs of failure to pay overtime where work was performed outside of California but employer was a California company). But see *Ehret v. Uber Techs., Inc.*, 68 F. Supp. 3d 1121, 1132 (N.D. Cal. 2014) (finding sufficient nexus with California where alleged misrepresentations were developed in California and contained on websites and an application that were maintained in California and billing and payment of services went through servers located in California); see also *Aton Ctr., Inc. v. CareFirst of Maryland, Inc.*, No. CV DKC 20-3170, 2021 WL 1856622, at *12-*13 (D. Md. May 10, 2021) (denying leave to amend complaint to state UCL claim due to futility, because while the injury was felt in California, there was no evidence the underlying unlawful conduct was committed there).

³⁵⁶ *Norwest*, 72 Cal. App. 4th at 222-24; *Evolution Fast Food Gen. P’ship v. HVFG, LLC*, No. 15 CIV. 6624, 2017 WL 4516821, at *6 (S.D.N.Y. Sept. 27, 2017) (holding non-California plaintiff “may not predicate its California UCL claims on a violation” of New York law); see also *Sajfr v. BBG Commc’ns, Inc.*, No. 10cv2341, 2012 WL 398991, at *4 (S.D. Cal. Jan 10, 2012) (UCL does not apply to conduct occurring “wholly” outside California in international locations).

³⁵⁷ *Norwest*, 72 Cal. App. 4th at 225-27 (noting that such application would be arbitrary and unfair and, therefore, violative of due process) (relying on *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)); cf. *Estrella v. Freedom Fin. Network, LLC*, No. C 09-03156, 2010 WL 2231790, at *7 (N.D. Cal. June 2, 2010) (where defendant’s alleged conduct occurred in California, court held that California law applies to out-of-state defendants).

³⁵⁸ 247 Cal. App. 4th 1110 (2016).

³⁵⁹ No. 09-5815, 2010 WL 3619884, at *2 (N.D. Cal. Sept. 10, 2010), *aff’d*, 487 F. App’x 362 (9th Cir. 2012).

agreement would be “governed by and construed in accordance with the laws of the State of California without regard to any contrary conflicts of law principles.”³⁶⁰ The district court rejected plaintiff’s argument, finding that the provision did not provide for extra-territorial application of the UCL, but instead addressed under what law the agreement would be construed.³⁶¹ The court therefore dismissed plaintiff’s UCL claim because the alleged fraudulent statements still were made outside of California and plaintiff was a limited liability corporation based in Kentucky. As stated by the court, the UCL does not extend to “actions occurring outside of California that injure non-residents.”³⁶² The court additionally noted that plaintiff’s allegation that defendant’s employees outside of California made false statements at the direction of two California-based employees was bare and insufficient to suggest that the falsehoods were “prepared in and emanated from” California, which would have been sufficient to allege liability under the UCL.³⁶³

In contrast, the Court of Appeal in *Schlesinger v. Superior Court*³⁶⁴ found that contractual choice-of-law and forum-selection provisions are relevant to the *Norwest* analysis. Plaintiffs in *Schlesinger* alleged that Ticketmaster violated the UCL by: (1) deceiving customers into believing that fees charged on its website were pass-through costs, instead of sources of profit for Ticketmaster; and (2) making a processing charge mandatory and not allowing its customers to use an alternative delivery system. Plaintiffs also alleged violations of the FAL and CLRA.³⁶⁵ Under the choice-of-law provision in Ticketmaster’s online purchase agreement, a customer agreed that disputes under the purchase agreement would “be governed by the laws of the State of California without regard to its conflict of law provisions and you consent to personal jurisdiction, and agree to bring all actions, exclusively in state and federal courts located in Los Angeles County, California.”³⁶⁶ Ticketmaster argued that the UCL does not apply to out-of-state residents, but the court found no express geographic restriction in the UCL.³⁶⁷ Also, unlike the defendant in *Norwest*, Ticketmaster’s headquarters and principal place of business is in California and, more importantly, Ticketmaster required its customers to agree to the application of California law.³⁶⁸ Accordingly, the Court of Appeal issued an order directing the Superior Court to vacate its order denying certification of a nationwide class and instead enter a new order granting plaintiffs’ motion to certify a nationwide class as to the first UCL and FAL claims.

The lack of geographical restrictions under the UCL also implicate considerations when determining whether to certify a nationwide class under California’s consumer protection laws. Generally, a court will consider whether California has “significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class, contacts creating state interests, in order to ensure that the choice of [forum] is not arbitrary or unfair.”³⁶⁹ In this regard, courts consider a variety of factors in determining whether California has sufficient contact to the

³⁶⁰ *Id.* at *8.

³⁶¹ *Id.*

³⁶² *Id.* (quoting *Standfacts Credit Servs.*, 405 F. Supp. 2d 1141, 1148 (C.D. Cal. 2005)).

³⁶³ *Id.* (citing *Wershba v. Apple Comput., Inc.*, 91 Cal. App. 4th 224, 241-44 (2001)).

³⁶⁴ No. B224880, 2010 WL 3398844, at *7-8 (Cal. Ct. App. Aug. 31, 2010) (unpublished).

³⁶⁵ *Id.* at *2.

³⁶⁶ *Id.*

³⁶⁷ *Id.* at *7.

³⁶⁸ *Id.* at *6.

³⁶⁹ *See Rutledge*, 238 Cal. App. 4th at 1186 (internal quotation marks omitted).

asserted claims.³⁷⁰ Upon a determination that California has sufficient contacts to the claims of the nationwide class, the burden shifts to the defendant to demonstrate that the interests of the other state’s laws are greater than California’s.³⁷¹

Another issue courts face with respect to the extraterritorial application of the UCL is whether district attorneys may bring public prosecutor actions seeking to obtain relief outside of the counties in which they have jurisdiction. Until recently, it was unclear whether a local prosecutor could collect penalties based on activity occurring within the State of California but outside his or her particular city or county. This issue was resolved definitively in *Abbott Laboratories v. Superior Court*,³⁷² with the California Supreme Court ruling that local prosecutors could seek state-wide relief, including an injunction, a restitution order and civil penalties. Because a significant portion of penalty collections are kept by the city or county in which the prosecution is brought, many business groups had expressed concern about a rule that would incentivize local prosecutors to file state-wide cases for budgetary reasons. The California Supreme Court brushed off these concerns as merely hypothetical, and noted that the Attorney General still retains the “prerogative to intervene or take control of a civil enforcement action that, in the Attorney General’s view, does not adequately serve the public interest,” and so in an appropriate case could protect a defendant from a too-aggressive prosecution by a local official.³⁷³ Resolution of this issue is important as it may have implications for state-wide injunctive relief claims, as well as settlements in cases where plaintiffs purport to sue on behalf of all California residents.

E. Insurance Coverage for UCL Actions

Although the availability of coverage depends upon the terms and conditions of the relevant policy and the circumstances of each case, a UCL claim generally falls outside the scope of coverage or, in some cases, may be expressly excluded.³⁷⁴ In *Bank of the West v. Superior Court*,³⁷⁵ the California Supreme Court held that there was no coverage under a standard comprehensive general liability

³⁷⁰ See *id.* (holding California contacts were sufficiently linked to nationwide class claims where defendant created a national advertising campaign by a California agency; defendant’s contracts with manufacturer of computers were governed under California law; defendant designated California service provider for computer repairs; and defendant’s witnesses were located in California); *Wershba*, 91 Cal. App. 4th at 242 (holding application of California law for settlement purposes appropriate when defendant is a California corporation; has its principle place of business in California; has brochures promising free technical support for products that were made and distributed from California; and the policy to terminate the technical support at issue in the case was made at defendant’s headquarters in California).

³⁷¹ *Rutledge*, 238 Cal. App. 4th at 1188 (explaining the trial court improperly placed the burden on appellant class members “to persuasively articulate why California has a special obligation that would fairly call for it to assume the burden of adjudicating a nationwide class action”).

³⁷² 9 Cal. 5th 642 (2020).

³⁷³ *Id.* at 659.

³⁷⁴ Many policies include express exclusions for willful or fraudulent acts. Because intent is not an element of a UCL claim, even if based on an alleged “fraudulent” business practice, such an exclusion would not appear to be applicable.

³⁷⁵ 2 Cal. 4th at 1254, 1258. Specifically, the Court held that there was no coverage for the UCL action as a claim for damages because of “Advertising Injury.” *Id.* The Court reasoned, among other things, that: (1) “damages” were not available under the UCL—only restitution and injunctive relief were available; and (2) “unfair competition,” as used in the insurance policy, referred only to the common law tort of unfair competition and did not include a statutory violation of the UCL. *Id.* at 1261-73, 1277.

(CGL) insurance policy for a settling UCL defendant. Since *Bank of the West*, other courts likewise have determined that UCL claims are not covered under most standard CGL policies.³⁷⁶

Further, in *Adir International, LLC v. Starr Indemnity & Liability Co.*,³⁷⁷ the Ninth Circuit Court of Appeals rejected a constitutional challenge to California Insurance Code section 533.5, which prohibits insurance companies from paying legal defense fees for UCL and other consumer protection claims brought by government officials.

III. REMEDIES UNDER THE UCL

No damages of any kind are recoverable under the UCL.³⁷⁸ Instead, the UCL provides for injunctive relief, restitution and civil penalties. Injunctive relief and restitution are available in both private-party and government actions.³⁷⁹ Civil penalties are available only in government enforcement actions.³⁸⁰ As with the substantive provisions of the UCL, the remedial provisions have been liberally construed to give courts broad powers to fashion creative awards of injunctive or restitutionary relief.³⁸¹ The remedies available under the UCL are cumulative to other remedies, regardless of whether those remedies arise under the UCL or other law.³⁸²

³⁷⁶ See, e.g., *Cort v. St. Paul Fire & Marine Ins. Cos., Inc.*, 311 F.3d 979, 987 (9th Cir. 2002) (holding that general liability insurance policy that covered payment of damages and certain associated fees did not provide coverage for UCL cause of action); *Upland Anesthesia Med. Grp. v. Doctors' Co.*, 100 Cal. App. 4th 1137, 1144 (2002) (holding that insurance policy exclusion for intentional acts precluded insurance defense or coverage for UCL claim); *Am. Cyanamid Co. v. Am. Home Assurance Co.*, 30 Cal. App. 4th 969, 976 (1994); *Chatton v. Nat'l Union Fire Ins. Co.*, 10 Cal. App. 4th 846, 863 (1992). But see *Cont'l Cas. Co. v. AWP USA Inc.*, No. 3:19CV661, 2021 WL 1225968, at *20 (E.D. Va. Mar. 31, 2021) (finding that UCL claim might be covered due to contradictory policy language).

³⁷⁷ 994 F.3d 1032 (9th Cir. 2021), cert. denied, 142 S. Ct. 861 (2022).

³⁷⁸ *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144 (2003); *Forty Niner Truck Plaza, Inc. v. Shank*, No. CIV. S-11-860, 2011 WL 4386299, at *2 (E.D. Cal. Sept. 20, 2011) (“A claim under [the UCL] is ‘equitable in nature; damages cannot be recovered’”).

³⁷⁹ See Cal. Bus. & Prof. Code § 17203.

³⁸⁰ See Cal. Bus. & Prof. Code § 17206.

³⁸¹ See *Fletcher*, 23 Cal. 3d at 449 (noting that principles of equity, combined with express statutory language, arms “the trial court with the cleansing power to order restitution to effect complete justice”); *Barquis v. Merchs. Collection Ass'n*, 7 Cal. 3d 94, 111 (1972) (explaining that the Legislature’s intent was “to permit tribunals to enjoin ongoing wrongful business conduct in whatever context such activity might occur”).

³⁸² See Cal. Bus. & Prof. Code § 17205 (“Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state.”); see also *Wildin v. FCA US LLC*, No. 17cv-02594, 2018 WL 3032986, at *6-7 (S.D. Cal. June 19, 2018) (declining to dismiss UCL claim at pleading stage where defendant argued there were alternative legal remedies, reasoning that dismissal would not save substantial resources and that the appropriate form of relief should not be decided at the pleading stage). But see *Nelson v. Pearson Ford Co.*, 186 Cal. App. 4th 983, 1018 (2010) (rescission is not available under the UCL), disapproved on other grounds by *Raceway Ford Cases*, 2 Cal. 5th 161 (2016).

A. Restitution Under the UCL

1. The Proper Scope of Restitution Awards

The California Supreme Court has considered the proper scope of restitution awards in various contexts.³⁸³ The developments in this area probably can be best understood by starting with *Korea Supply Co. v. Lockheed Martin Corp.*³⁸⁴

As stated in *Korea Supply*, “[t]he object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest.”³⁸⁵ A UCL order for restitution is one “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.”³⁸⁶ Therefore, in order for an award of restitution to be appropriate against a defendant in any UCL action, that defendant must hold funds in which plaintiff has an ownership interest.

Post-*Korea Supply* cases expand on this conclusion. One illustrative case is *Inline, Inc. v. Apace Moving Systems, Inc.*³⁸⁷ There, plaintiff sued a storage company, Apace Moving Systems, alleging that when Apace auctioned the stored property of plaintiff’s predecessor, Production Resources, Inc. (PRI), to satisfy outstanding storage charges, Apace did so in a commercially unreasonable manner. At the auction, Apace obtained only \$20 for the entire contents of PRI’s storage lot. Plaintiff subsequently purchased the auctioned lot from the buyer for \$100,000. Plaintiff sued Apace, claiming, among other things, that Apace’s violation of the statutory commercial reasonableness standard in auctioning the property constituted a violation of the UCL. Plaintiff sought as “restitution” the \$100,000 that it paid to the buyer of the PRI storage lot, who had paid only \$20 for the lot. The trial court found that Apace’s auction was not held in a commercially reasonable manner and awarded plaintiff \$20 as restitution under the UCL.

Plaintiff appealed the amount of the restitution award. The Court of Appeal affirmed, rejecting plaintiff’s argument that the restitution remedy required Apace to reimburse plaintiff for the \$100,000 paid to the third-party buyer to retrieve the property. The court reasoned that plaintiff sought more from Apace than the “return [of] something [it] wrongfully received”; it sought compensation “for injury suffered as a result of [defendant’s] conduct.”³⁸⁸ In other words, plaintiff sought damages, which are not available under section 17203.³⁸⁹ The court explained that “[t]he only nonpunitive monetary relief available under [the UCL] is the disgorgement of money that has been wrongfully obtained or, in the language of the statute, an order ‘restor[ing] . . . money . . . which may

³⁸³ See *Kraus*, 23 Cal. 4th at 116; *Cortez*, 23 Cal. 4th at 177-78; *Korea Supply*, 29 Cal. 4th at 1142-43; *Clark v. Super. Ct.*, 50 Cal. 4th 605, 611, 614-15 (2010) (finding that claims under the UCL are not subject to the punitive device of trebling because restitution is not a punitive remedy). It should be noted that, in *Kraus*, the Court devoted substantial discussion to the availability of restitution in private attorney general actions. Following Proposition 64’s prohibition on such actions, that discussion is moot.

³⁸⁴ 29 Cal. 4th at 1149.

³⁸⁵ *Id.* at 1136-37.

³⁸⁶ *Id.* at 1144-45 (quoting *Kraus*, 23 Cal. 4th at 126-27).

³⁸⁷ 125 Cal. App. 4th 895 (2005).

³⁸⁸ *Id.* at 903.

³⁸⁹ See *id.*

have been acquired by means of . . . unfair competition.”³⁹⁰ The court emphasized that “section 17203 is not ‘an all-purpose substitute for a tort or contract action.’”³⁹¹ Rather, remedies under section 17203 are equitable and “designed to afford specific relief by requiring disgorgement of the *particular property or money taken* by an unfair business practice, rather than damages compensation.”³⁹²

Two Court of Appeal decisions, *Madrid v. Perot Systems Corp.*³⁹³ and *Feitelberg v. Credit Suisse First Boston, LLC*,³⁹⁴ further address this issue, specifically considering whether non-restitutionary disgorgement of profits is available in any UCL action, including a class action. In other words, can a

³⁹⁰ *Id.* (quoting *Bank of the West v. Super. Ct.*, 2 Cal. 4th 1254, 1266 (1992)); *see also Marsh v. Zaazoom Sols., LLC*, No. C-11-05226, 2012 WL 952226, at *14 (N.D. Cal. Mar. 20, 2012) (granting motion to dismiss as to bank defendant where relationship arose out of general deposit because bank had no ownership interest in money and therefore could not be held liable for restitution of monies allegedly taken by other defendants).

³⁹¹ *Inline*, 125 Cal. App. 4th at 904 (quoting *Cortez*, 23 Cal. 4th at 173).

³⁹² *Id.* at 905 (emphasis added) (citing *AIU Ins. Co. v. Super. Ct.*, 51 Cal. 3d 807, 835 (1990) (recognizing that restitutionary remedies return to plaintiff “the very thing to which he was entitled,” while damages provide compensation for loss in the form of a money recovery) (emphasis added)); *see also Moss v. Infinity Ins. Co.*, 197 F. Supp. 3d 1191, 1203 (N.D. Cal. 2016) (dismissing plaintiff’s UCL claim because the primary remedy sought, damages in the form of payment of policy benefits, was “entirely inconsistent” with the permitted UCL remedy of restitution); *Cox v. Elec. Data Sys. Corp.*, No. C-08-03927, 2009 WL 3833899, at *12-13 (N.D. Cal. Nov. 16, 2009) (granting defendant’s motion for summary judgment on UCL claim where plaintiff sought wages that were never earned and therefore never owed); *Pineda v. Bank of Am., N.A.*, 50 Cal. 4th 1389, 1401 (2010) (statutory penalties do not “restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest”; unlike unpaid wages, which are triggered by an employee’s actions, penalties are designed to encourage employers to pay on time); *Reid v. Google, Inc.*, 66 Cal. Rptr. 3d 744, 750-51 (2007) (affirming order striking prayer for restitution in UCL action based on allegedly discriminatory hiring practices where plaintiff sought return of unvested stock options held at time of termination), *aff’d*, 50 Cal. 4th 512 (2010); *Pulido v. Coca-Cola Enters., Inc.*, No. EDCV06-406, 2006 WL 1699328, at *8 (C.D. Cal. May 25, 2006) (rejecting claims for restitution based on violations of California Labor Code section 226.7, which requires employers to pay employees for breaks that are not taken, and finding that the amounts were in the nature of a penalty, not restitution), *overruling on other grounds recognized by Caputo v. Prada USA Corp.*, No. CV 12-3244, 2014 WL 12567143 (C.D. Cal. Feb. 6, 2014); *Wayne v. BP Oil Supply Co.*, No. B180025, 2006 WL 766712, at *5 (Cal. Ct. App. Mar. 27, 2006) (rejecting claims for restitution based on defendant’s alleged manipulation of crude oil prices so as to create higher prices for gasoline, reasoning that plaintiff had not sufficiently alleged an “ownership interest” in the money he sought to recover). *But see Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal. 4th 1094, 1119 (2007) (holding that California Labor Code section 226.7 payments are a wage); *Wofford v. Apple Inc.*, No. 11-CV-0034, 2011 WL 5445054, at *3 (S.D. Cal. Nov. 9, 2011) (“loss of use and loss of value” of plaintiff’s iPhones were not recoverable as restitution because they provide no corresponding gain to defendant and injunctive relief was inappropriate because defendant remedied the software defect). *But see Doe v. D.M. Camp & Sons*, No. CIV-F-05-1417, 2009 WL 921442, at *13 (E.D. Cal. Mar. 31, 2009) (reaching result contrary to *Pulido*, above); *Troyk*, 171 Cal. App. 4th at 1339-42 (holding that, although class members did not pay service charges to an insurer and its attorney-in-fact directly, the trial court could have inferred that said defendants received a benefit from payments being made to a subsidiary billing agent based on the three companies acting as a single enterprise; accordingly, the insurer and its attorney-in-fact could both be liable for restitution under the UCL); *Ngu v. City Bail Bonds*, 71 Cal. App. 5th 644, 652 (2021) (affirming claim for restitution in action against bail bond company, where court found the bond company unlawfully coerced and induced plaintiff to post bond for an employee), *reh’g denied* (Dec. 2, 2021).

³⁹³ 130 Cal. App. 4th 440 (2005).

³⁹⁴ 134 Cal. App. 4th at 997.

UCL plaintiff alleging a class action seek disgorgement of monies in excess of or unrelated to what he or she paid or gave to the defendant, such as investment profits or costs savings made by the defendant? Both *Madrid* and *Feitelberg* answer “no.”³⁹⁵

One case, however, arguably reached the opposite conclusion. In *Juarez v. Arcadia Financial, Ltd.*,³⁹⁶ plaintiffs brought a UCL class action based on alleged violations of the Rees-Levering Motor Vehicle Sales & Finance Act. After defendant refused to provide discovery regarding any profits defendant had earned on funds collected from class members, plaintiff moved to compel, claiming that the information was relevant to restitution.³⁹⁷ Reversing the trial court’s order denying the motion, the Court of Appeal maintained that *Korea Supply* “concluded that ‘restitutionary disgorgement’ is available under the UCL.”³⁹⁸ In support of this conclusion, the court quoted *Korea Supply’s* statements that restitution under the UCL “is not limited only to the return of money or property that was once in the possession of [the plaintiff],” and “is broad enough to allow a plaintiff to recover money or property in which he or she has a vested interest.”³⁹⁹ It further reasoned that “the plaintiffs arguably have an ownership interest in any profits Arcadia may have gained through interest or earnings on the plaintiffs’ money that Arcadia wrongfully held.”⁴⁰⁰ Moreover, the court distinguished *Feitelberg*, *Madrid* and several other cases holding that there is no right to restitutionary disgorgement on the ground that plaintiffs in those cases “had not lost to the defendant any vested interest in money or property.”⁴⁰¹ In essence, the court’s view was that, provided there is a reasonable nexus between profits and what was taken by the defendant, equity allows the plaintiff to recover not only what was taken, but also any profits generated from what was taken.

While restitution is limited to money or property in which the plaintiff had an ownership interest, the plaintiff need not have provided the money or property directly to the defendant.⁴⁰² In

³⁹⁵ See *Madrid*, 130 Cal. App. 4th at 460; *Feitelberg*, 134 Cal. App. 4th at 1015-20; see also *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 700 (2006) (reversing restitution award as based on insufficient evidence of the amounts required “to restore purchasers to the status quo ante”); *Starr-Gordon v. Mass. Mut. Life Ins. Co.*, No. CIV.S-03-68, 2006 WL 3218778, at *7 (E.D. Cal. Nov. 7, 2006) (“there is no genuine dispute that non-restitutionary disgorgement is not an available remedy under the UCL”); *In re Facebook, Inc., PPC Advert. Litig.*, 282 F.R.D. 446, 461 (2012), *aff’d*, 588 F. App’x 733 (9th Cir. 2014) (denying class certification where plaintiffs could not establish entitlement to restitution “for all members of the class in a single adjudication”); *Del Monte Fresh Pineapple Cases*, No. A126638, 2012 WL 734115, at *8 (Cal. Ct. App. Mar. 7, 2012) (unpublished) (affirming denial of class certification where plaintiffs could not “establish that [defendant]’s profits ‘can be traced directly to the ill-gotten funds’ acquired from putative class members”).

³⁹⁶ 152 Cal. App. 4th 889, 894 (2007).

³⁹⁷ *Id.* at 912.

³⁹⁸ *Id.* at 914-15 (emphasis added).

³⁹⁹ *Id.* at 915 (quoting *Korea Supply*, 29 Cal. 4th at 1149 (citing *Cortez*, 23 Cal. 4th at 178)).

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.* at 917.

⁴⁰² See *San Francisco v. Purdue Pharma L.P.*, 491 F. Supp. 3d 610, 695 (N.D. Cal. 2020) (public prosecution of opioid distributors, seeking “restitution for the income, profits, and other benefits [Defendants] allegedly obtained from San Francisco residents”; court held that complaint stated a proper restitution claim, despite distributors’ not selling directly to residents but rather to pharmacists, based on theory that distributors indirectly profited from their failure to maintain adequate controls to prevent ultimate resale into the illegal market). *But see People v. Purdue Pharma L.P.*, No. 30201400725287CUBTCX, 2021 WL 5227329, at *11, *20 (Cal. Super. Orange Cnty. Nov. 01, 2021) (rejecting similar claim after trial on the merits).

Shersher v. Superior Court,⁴⁰³ plaintiff brought a UCL action against Microsoft, alleging that the packaging for certain Microsoft wireless routers, adapters and other products sold through retailers misrepresented the capabilities of the products. Microsoft successfully moved to strike plaintiff’s prayer for restitution, arguing that *Korea Supply* prevents plaintiffs from seeking to recover money or property they did not pay *directly* to the defendant.⁴⁰⁴ The Court of Appeal reversed, stating that *Korea Supply* was not “intended to preclude consumers from seeking the return of money they paid for a product that turned out to be not as represented. Rather, the holding of *Korea Supply* on the issue of restitution is that the remedy the plaintiff seeks must be truly ‘restitutionary in nature’—that is, it must represent the return of money or property the defendant acquired through its unfair practices.”⁴⁰⁵

2. “Fluid Recovery” in UCL Class Actions

Where a class action judgment awards restitution and there are unidentifiable recipients, the doctrine of “fluid recovery” may be used to distribute any unpaid funds.⁴⁰⁶ Pursuant to this doctrine, a court might order a defendant to disgorge the amount that cannot be paid directly to class members for distribution through a claims process or to the “next best” use, meaning to produce benefits for as many class members as possible.⁴⁰⁷ The California Supreme Court has proposed several specific “fluid recovery” procedures, including: price rollback;⁴⁰⁸ general escheat;⁴⁰⁹ earmarked escheat;⁴¹⁰ and the establishment of an equitable trust fund.⁴¹¹ In class action settlements where individual recoveries by class members in a settlement would be small and the cost of distributing settlement

⁴⁰³ 154 Cal. App. 4th 1491, 1494-95 (2007).

⁴⁰⁴ *Id.* at 1495.

⁴⁰⁵ *Id.* at 1498; *accord Hartless*, 2007 WL 3245260, at *7-8 (denying motion to dismiss UCL claim where challenged products were not purchased directly from defendant); *see also Sarpas*, 225 Cal. App. 4th at 1562 (limiting restitution to sums paid directly to defendants “would allow UCL and [false advertising] violators to escape restitution by structuring their schemes to avoid receiving direct payment from their victims”).

⁴⁰⁶ *See, e.g., State v. Levi Strauss & Co.*, 41 Cal. 3d 460, 464 (1986) (holding that proof of individual injury is not required for recovery in consumer class actions and discussing the “largely uncharted area of fluid recovery”); *People v. Thomas Shelton Powers, M.D.*, 2 Cal. App. 4th at 330; *People ex rel. Smith v. Parkmerced Co.*, 198 Cal. App. 3d 683, 689 (1988) (determining that unclaimed funds of restitution award should go to a tenant’s rights organization to the extent that victimized former tenants could not be located), *abrogated by Kraus*, 23 Cal. 4th at 116.

⁴⁰⁷ “Fluid recovery” is borrowed from the doctrine of “*cy pres*”—a concept developed in the law of charitable trusts—which provides that, if a particular interest cannot go to an intended purpose, it will be put to its next best use.

⁴⁰⁸ Under the price rollback method, the defendant distributes the unclaimed funds throughout the market by lowering prices in the product or service area where the wrongful conduct occurred. *See Levi Strauss*, 41 Cal. 3d at 473.

⁴⁰⁹ Under the general escheat approach, the unclaimed portion of the award is paid over to a general government fund. *See id.* at 475.

⁴¹⁰ Under the earmarked escheat method, the uncollected funds are distributed to an appropriate government organization for use on projects that potentially could benefit non-collecting class members. *See id.* at 474.

⁴¹¹ Here, the Court appoints a board of directors to administer recovery in the best interests of the represented parties. *See id.* at 476.

monies is high relative to the individual recoveries, payment of the settlement monies to charity is an appropriate *cypres* remedy.⁴¹²

3. Defenses to Restitution Claims

a. The Filed Rate Doctrine

Under the “filed rate doctrine,” defendants that charge consumers certain rates for their products or services, which rates are required by law to be filed with and approved by a designated regulatory body, are insulated from lawsuits challenging those rates and from court orders having the effect of imposing rates other than the filed rates.⁴¹³ Relying on this doctrine, the Court of Appeal in *Day v. AT&T Corp.*⁴¹⁴ held that plaintiffs were precluded from seeking any monetary recovery under the UCL based on defendant’s rounding up of telephone charges on prepaid phone cards because the rates for such charges were disclosed and approved in publicly filed rates.⁴¹⁵ Similarly, in *Walker v. Allstate Indemnity Co.*,⁴¹⁶ the Court of Appeal held that plaintiffs could not seek restitution under the UCL from certain insurance companies based on allegations that their rates were excessive. The court reasoned that no civil challenge could be brought to recoup insurance premiums charged pursuant to rates approved by the state’s insurance department.⁴¹⁷ Courts around the country have applied the filed rate doctrine in various regulatory contexts, including telecommunications and utilities.⁴¹⁸

⁴¹² See, e.g., *Slayton v. Citibank (S.D.), N.A.*, No. A113891, 2007 WL 731432, at *4-5 (Cal. Ct. App. Mar. 12, 2007) (unpublished) (affirming approval of UCL class action settlement providing for payment of settlement monies to charity where each class member’s individual recovery would have been less than \$1.50 before costs of mailing checks).

⁴¹³ See *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994) (“Simply stated, the [filed rate] doctrine holds that any ‘filed rate’—that is, one approved by the governing regulatory agency—is per se reasonable and unassailable in judicial proceedings brought by ratepayers.”); *Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 335 (1998) (“It has been said that the doctrine furthers two legitimate goals: [1] nondiscriminatory rate setting and [2] agency autonomy in rate setting without court interference.”) *AT&T v. Cent. Office Tel. Co.*, 524 U.S. 214, 222 (1998) (recognizing the filed rate doctrine’s purpose of preventing discriminatory pricing).

⁴¹⁴ 63 Cal. App. 4th at 335.

⁴¹⁵ The court, however, did hold that plaintiffs still could seek injunctive relief under the UCL. See *id.* In *Spielholz v. Super. Ct.*, 86 Cal. App. 4th 1366, 1369 (2001), the court rejected the filed rate doctrine in a UCL action where plaintiff alleged that defendant’s advertising of a “seamless calling area” was misleading and deceptive.

⁴¹⁶ 77 Cal. App. 4th 750, 758-760 (2000).

⁴¹⁷ *Id.* at 760; see *id.* at 756 (“[U]nder the statutory [insurance] scheme enacted by the voters, the charging of an approved rate cannot be deemed ‘illegal’ or ‘unfair’ for purposes of the [UCL] or, indeed, tortious.”); see also *In re Wholesale Elec. Anti-Trust Cases I & II*, 147 Cal. App. 4th at 1316 (holding that filed rate doctrine barred UCL claim challenging alleged anticompetitive activity in the wholesale electricity market); *Gallivan v. AT&T Corp.*, 124 Cal. App. 4th 1377, 1385 (2004) (holding that filed rate doctrine barred plaintiff’s state law claims for monetary relief); *Duggal v. G.E. Cap. Commc’ns Servs., Inc.*, 81 Cal. App. 4th 81, 87 (2000) (holding that filed rate doctrine barred plaintiff’s state law claims).

⁴¹⁸ See, e.g., *Jader v. Principal Mut. Life Ins. Co.*, 975 F.2d 525, 527 (8th Cir. 1992) (applying the doctrine to bar state law claims pursuant to an insurance regulatory scheme); *Wegoland*, 27 F.3d at 20 (stating that the “Supreme Court has ruled that the filed rate doctrine acts to bar state causes of action” and “that the rationales underlying the filed rate doctrine apply equally strongly to regulation by state agencies”). But see *Villanueva*, 11 Cal. 5th at 133 (declining to apply the filed rate doctrine based on the facts presented); *Spielholz*, 86 Cal. App. 4th at 1377 (rejecting filed rate doctrine in a UCL action because allegations were directed at false advertising, not the defendant’s rates).

Courts have also extended the reasoning of the filed rate doctrine to protect hospitals from lawsuits if the hospitals comply with regulatory rate disclosure requirements under state and federal law.⁴¹⁹

b. Ability to Pay

At least one California court has determined that the Equal Protection Clause “requires a court to grant a hearing on a defendant’s ability to pay restitution.”⁴²⁰ “[I]t does not require a trial judge [to] make a finding of ability to pay before ordering restitution,” however.⁴²¹

c. Restitution as a Disguised Damages Claim

A plaintiff should not be allowed to seek damages in the “disguise” of UCL restitution,⁴²² but the distinction between damages and restitution sometimes is difficult to discern.⁴²³ In *Cortez*, for instance, the California Supreme Court awarded unpaid wages as restitution to a group of workers.⁴²⁴ The Court reasoned that, because the defendant improperly “acquired” its employees’ money, meaning that the workers had earned the money and the employer failed to pay it, the trial court could order the defendant to pay the wages as a form of restitution.⁴²⁵

⁴¹⁹ See *Gray v. Dignity Health*, 70 Cal. App. 5th 225, 240-41 (2021) (finding that plaintiff failed to allege UCL claim because hospital complied with specific rate disclosure requirements under California and federal law), *review denied* (2022).

⁴²⁰ *People v. Warnes*, 10 Cal. App. 4th Supp. 35, 40 (1992) (involving a criminal prosecution under section 17500).

⁴²¹ *Id.*

⁴²² See *Inline*, 125 Cal. App. 4th at 898; *Vikco Ins. Servs., Inc. v. Ohio Indem. Co.*, 70 Cal. App. 4th 55, 68 (1999) (holding plaintiff could not maintain UCL claim because California Insurance Code section 769 does not create a private right to sue for damages, either directly or by indirect operation of the UCL); *Seibels Bruce Grp., Inc. v. R.J. Reynolds Tobacco Co.*, No. C-99-0593, 1999 WL 760527, at *7 (N.D. Cal. Sept. 21, 1999) (rejecting plaintiff’s UCL claim on the ground that the remedy sought by plaintiff “is ‘none other than an alternative measure of legal damages’”) (citations omitted); *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 757-58 (N.D. Cal. 1993) (dismissing a UCL claim based on the rule that damages cannot be obtained under the UCL); see also *Golden Eye Media USA, Inc. v. Trolley Bags UK Ltd.*, 525 F. Supp. 3d 1145, 1255 (S.D. Cal. 2021) (“Where a plaintiff pursuing a UCL claim essentially seeks damages rather than the return of money in which the plaintiff has an identifiable interest, allowing the plaintiff to recover such relief under the UCL would convert the UCL to ‘an all-purpose substitute for a tort . . . action, something the Legislature never intended.’”) (quoting *Nat’l Rural Telecommunications Co-op. v. DirecTV, Inc.*, 319 F. Supp. 2d 1059, 1082 (C.D. Cal. 2003)). But see *Clark*, 50 Cal. 4th at 611, 614-15 (finding that trebling of restitution award is not proper; California Civil Code section 3345 authorizes trebling of penalties, and restitution is not a penalty).

⁴²³ See *Inline*, 125 Cal. App. 4th at 903 (“The distinction between damages and restitution can seem elusive . . . , but our Supreme Court has drawn a clear line between the two concepts in the context of section 17203 and the UCL.”).

⁴²⁴ *Cortez*, 23 Cal. 4th at 177-78.

⁴²⁵ *Id.*; see also *McCollum v. XCare.net, Inc.*, 212 F. Supp. 2d 1142, 1154 (N.D. Cal. 2002) (allowing plaintiff to proceed with UCL claim to recover “commissions” owed under employment contract); *Espejo v. Copley Press, Inc.*, 13 Cal. App. 5th 329 (2017) (allowing recovery of wrongfully withheld reimbursement of employee business expenses, as well as award of prejudgment interest on employees’ wages, under the UCL); *Batze v. Safeway, Inc.*, 10 Cal. App. 5th 440, 445 n.2 (2017) (allowing recovery of unpaid overtime wages over a four-year period based on a UCL claim); *Mauia v. Petrochem Insulation, Inc.*, No. 18-cv-01815, 2018 WL 4076269, at *7 (N.D. Cal. Aug. 27, 2018)

In contrast, in a series of class actions brought by writers against the television industry, the Court of Appeal held in *Alch v. Superior Court*⁴²⁶ that restitutionary backpay was not available under the UCL. In *Alch*, plaintiffs sought an injunction under the UCL compelling defendants to pay restitution in the form of the wages they would have earned absent the alleged age discrimination and also in hopes that an injunction would deter future discrimination. Affirming denial of the restitution request, the court noted that restitution is available only if a defendant wrongfully acquires funds or property in which a plaintiff has an ownership or vested interest, and that the UCL does not provide courts with the equitable power to award any form of monetary relief that they believe might generally deter unfair competition.⁴²⁷

d. Adequate Remedy at Law

Traditionally, equitable remedies (including restitution) may not be awarded when the plaintiff has an adequate remedy at law. In *Sonner v. Premier Nutrition Corp. (Sonner I)*,⁴²⁸ the Ninth Circuit held that this rule applies in federal cases where UCL claims are pursued under the court's diversity jurisdiction. Without deciding whether the California Legislature abrogated the traditional rule, the Ninth Circuit held that the scope of federal courts' equitable powers is a wholly federal issue, and accordingly the traditional rule applies.⁴²⁹ Recently, the Ninth Circuit expanded *Sonner I* in *Guzman v. Polaris Industries, Inc.*, finding that "equitable relief must be withheld when an equivalent legal claim would have been available but for a time bar."⁴³⁰ "In other words, [plaintiff] cannot have neglected his opportunity to pursue his ... claim [under another statute] ... and then be rewarded for that neglect with the opportunity to pursue his equitable UCL claim in federal court."⁴³¹ This is a significant development, as the UCL no longer automatically extends California statute of limitations to four years in federal court.⁴³²

(holding that plaintiff can maintain a UCL claim seeking unpaid wages as restitution given that the unpaid wages belonged to plaintiff).

⁴²⁶ 122 Cal. App. 4th 339 (2004).

⁴²⁷ *Id.* at 403-08; see also *Bradstreet v. Wong*, 161 Cal. App. 4th 1440, 1460 (2008) (earned wages payable under the Labor Code can be awarded as restitution), *disapproved on other grounds by ZB, N.A. v. Super. Ct.*, 8 Cal. 5th 175 (2019); *Dep't of Fair Emp't. & Hous. v. Lucent Techs., Inc.*, No. C 07-3747, 2008 WL 5157710, at *22 (N.D. Cal. Dec. 8, 2008), *aff'd*, 642 F.3d 728 (9th Cir. 2011) (plaintiff could not obtain restitution of wages that he would have earned if he had remained employed).

⁴²⁸ 971 F.3d 834 (9th Cir. 2020).

⁴²⁹ *Id.* at 842; see also *Hyunh v. Quora, Inc.*, 508 F. Supp. 3d 633, 662 (N.D. Cal. 2020) (applying *Sonner I* to reject UCL claim in data breach case seeking an injunction mandating improved data security practices in the future and additional disclosure about what data was affected by the breach; plaintiff's damages claim provided an adequate remedy at law). *But see Francis v. Gen. Motors, LLC*, 504 F. Supp. 3d 659, 692 (2020) (holding that UCL and CLRA claims initially may be pleaded in the alternative, despite rule against pursuing UCL claim in federal court when the plaintiff has an adequate remedy at law); *Seviour-Iloff v. LaPaille*, 80 Cal. App. 5th 427, 440-41 (2022) (finding that the trial court did not abuse its discretion in denying relief to plaintiffs under the UCL because there are adequate remedies for the plaintiffs under the Labor Code); *Sonner v. Premier Nutrition Corp.*, 49 F.4th 1300, 1305 (9th Cir. 2022) (*Sonner II*) (confirming that *Sonner I* concerned a "threshold jurisdictional question" about the Ninth Circuit's characterization of choice-of-law analysis between California and federal law on claims for equitable remedies).

⁴³⁰ 49 F.4th 1308, 1312 (9th Cir. 2022).

⁴³¹ *Id.*

⁴³² *Id.* at 1314.

e. Measure of Restitution

In *In re Tobacco Cases II*,⁴³³ the California Court of Appeal specifically held that non-restitutionary disgorgement (a full refund) is not an available remedy under the UCL where the plaintiff derives a benefit from the product received from the defendant.⁴³⁴ The class sought restitution for monies paid for “light” cigarettes they claimed the defendant misleadingly advertised as “less unhealthful” than full-flavored cigarettes.⁴³⁵ In denying the prayer for restitution, the court noted that restitutionary awards under the UCL must be supported by substantial evidence.⁴³⁶ There was no dispute that class members had derived a benefit from the “light” cigarettes they had received, but the class could not put forth credible evidence showing the amount of monetary value derived from the “light” cigarettes by class members, and thus, calculating the amount of restitution owed was not within the trial court’s discretion.⁴³⁷ Moreover, the court specifically noted that restitution is not an available remedy in the UCL context “for the exclusive purpose of deterrence.”⁴³⁸

B. Civil Penalties in Government Enforcement Actions

As noted above, civil penalties are available under the UCL only in government enforcement actions.⁴³⁹ Government agencies, including the California Attorney General, city attorneys and district attorneys, increasingly are using the UCL’s civil penalty provision in such actions.

Penalty liability can be substantial.⁴⁴⁰ The UCL provides that civil penalties *shall* be assessed in an amount not to exceed \$2,500 for each violation.⁴⁴¹ If a government agency proves a violation of

⁴³³ 240 Cal. App. 4th 779 (2015).

⁴³⁴ *Id.* at 800.

⁴³⁵ *In re Tobacco Cases II* at 784.

⁴³⁶ *Id.* at 792.

⁴³⁷ *Id.* at 802; *see also In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d at 1121 (holding that plaintiff class could not adequately demonstrate measure of restitution because their expert’s methodology for calculating restitution, which was based on asking consumers what amount they would have paid for a safer product and finding an average, was “entirely subjective and lack[ed] any market-based component”); *Jones v. ConAgra Foods, Inc.*, No. C 12-06133, 2014 WL 2702726, at *20 (N.D. Cal. June 13, 2014) (denying class certification because expert witness’s methodology of comparing defendant’s product to a comparator product and calculating restitution based on the price difference was “deeply flawed” because it could not be “assume[d] that the entire price difference between the [products] [was] attributable to the alleged misstatements”).

⁴³⁸ *In re Tobacco Cases II*, 240 Cal. App. 4th at 801.

⁴³⁹ *Payne v. Nat’l Collection Sys., Inc.*, 91 Cal. App. 4th 1037, 1039-47 (2001) (discussing differences between actions under the UCL brought by public prosecutors and by private parties); Cal. Bus. & Prof. Code § 17206 (providing that public prosecutors may obtain civil penalties of up to \$2,500 per violation).

⁴⁴⁰ *See, e.g., People ex rel. Bill Lockyer v. Fremont Life Ins. Co.*, 104 Cal. App. 4th 508, 513 (2002) (imposing over \$2.5 million in civil penalties under sections 17200 and 17500); *People v. First Fed. Credit Corp.*, 104 Cal. App. 4th 721, 728 (2002) (imposing \$200,000 in civil penalties); *see also City & Cty. of S.F. v. PG&E Corp.*, 433 F.3d 1115, 1125-27 (9th Cir. 2006) (holding that attorney general action seeking injunctive relief, \$500 million in civil penalties and restitution was an exercise of the state’s police or regulatory power, which cannot be removed to the bankruptcy court).

⁴⁴¹ *See* Cal. Bus. & Prof. Code § 17206.

the UCL in an enforcement action, it is error for the court not to impose penalties in some amount.⁴⁴² In construing the phrase “for each violation,” courts may apply a per-victim calculation⁴⁴³ or a per-act calculation.⁴⁴⁴

In *People ex rel. City of San Diego v. Experian Data Corp.*, the Court of Appeal held that contingency fee agreements between a city and private law firms do not violate Cal. Bus. & Prof. Code § 17206, which requires all collected penalties to be paid to the city treasurer and used for the enforcement of consumer protection law.⁴⁴⁵ The Court held that these agreements allow the City to use the civil penalties received to cover the payment of the private firms, which is for the purpose of enforcing consumer protection laws.⁴⁴⁶ Furthermore, the Court held that even if this fee arrangement did violate the UCL, it would not necessarily mandate the disqualification of private firms.⁴⁴⁷

A court has broad discretion in setting a penalty amount in a given case; it is not automatically set at \$2,500 per victim or per act.⁴⁴⁸ In determining the amount of the penalty, a court must consider “any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: [1] the nature and seriousness of the misconduct, [2] the number of violations, [3] the persistence of the misconduct, [4] the length of time over which the misconduct occurred, [5] the willfulness of the defendant’s misconduct, and [6] the defendant’s assets, liabilities, and net worth.”⁴⁴⁹ Given these broad, discretionary factors, it is difficult to predict the amount of civil penalties that a court might assess in a particular case.⁴⁵⁰

⁴⁴² See *People v. Orange Cty. Charitable Servs.*, 73 Cal. App. 4th 1054, 1071 (1999); *First Fed. Credit Corp.*, 104 Cal. App. 4th at 728 (“The duty to impose a penalty for each violation is mandatory.”).

⁴⁴³ See *People v. Super. Ct. (Jayhill Corp.)*, 9 Cal. 3d 283, 288 (1973); *Toomey*, 157 Cal. App. 3d at 23; *Casa Blanca Convalescent Homes*, 159 Cal. App. 3d at 534-35.

⁴⁴⁴ *People ex rel. Kennedy v. Beaumont Inv., Ltd.*, 111 Cal. App. 4th 102, 119 (2003) (finding that long-term leases obtained by mobile home park owners were unlawful and calculating the number of UCL violations based on the number of times each defendant forced a tenant to accept a long-term lease, as well as every time each defendant collected monthly rent in violation of the underlying city ordinance, for a total of more than 14,000 UCL violations). The Court of Appeal noted that *Jayhill Corp.* did not establish a rule for determining the number of violations on a “per victim” basis in all situations, but rather, determination of the number of violations should be made on a case-by-case basis.

⁴⁴⁵ 77 Cal. App. 5th 1006, 1016 (2022).

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.*

⁴⁴⁸ See *Nationwide Biweekly Admin. v. Super. Ct.*, 9 Cal. 5th at 326 (“qualitative evaluation” of multiple factors is required to determine the proper penalty); *People v. Custom Craft Carpets, Inc.*, 159 Cal. App. 3d 676, 686 (1984) (“The amount of each penalty . . . lies within the court’s discretion.”); *City of Santa Rosa v. Patel*, No. A122151, 2010 WL 2060097, at *5 (Cal. Ct. App. May 25, 2010) (unpublished) (trial court properly awarded statutory penalties at a daily rate of \$1,500 per violation for nine months and totaling \$409,500; the amount was “conservatively” calculated and could have been \$2,500 per violation).

⁴⁴⁹ Cal. Bus. & Prof. Code § 17206(b); see *First Fed. Credit Corp.*, 104 Cal. App. 4th at 728.

⁴⁵⁰ See, e.g., *First Fed. Credit Corp.*, 104 Cal. App. 4th at 728 (assessing \$500 UCL penalty per violation); *Fremont Life Ins. Co.*, 104 Cal. App. 4th at 513 (imposing \$210 UCL penalty per violation, plus a \$210 per violation enhancement as to victims who were senior citizens, based on what the trial court found to be “serious” and “harmful” misconduct); *City & Cty. of S.F. v. Sainez*, 77 Cal. App. 4th 1302, 1306-08 (2000) (assessing \$100 penalty on each of 53 violations of the housing code); *Casa Blanca Convalescent Homes*, 159 Cal. App. 3d at 534-35 (\$167,500 penalty affirmed based on 67 violations

In *People v. JTH Tax, Inc.*,⁴⁵¹ the Court of Appeal affirmed the imposition of \$774,399 in civil penalties pursuant to the UCL and FAL for illegal advertising in six categories of ads. The court found reasonable the trial court's: (1) determinations that "the ads at issue were likely to deceive or confuse" because the "mandatory disclaimers" were "in a very small font, appear within a mass of other text, and are on screen for just a second," and thus were "plainly designed to be overlooked by consumers" and "patently and deliberately illegible"; (2) imposition of "a significantly lower penalty than would have resulted if it applied the viewership estimates provided by the People" because the television ads at issue "aired a total of 1,829 times" and thus the court could have "imposed penalties of over \$9 million, but only imposed penalties of \$715,344"; (3) imposition of penalties for "certain illegal, [defendant]-approved Pennysaver advertisements that were mailed to homes" where the penalty was based on "calculation that less than one percent of the publications circulated were viewed"; and (4) injunction requiring the defendant to educate its personnel and control its franchisees.⁴⁵²

In government actions, a defendant's ability to take discovery may be hampered by the official information and deliberative process privileges which, respectively, restrict discovery of material obtained by government officials through a promise of confidentiality, and which limit inquiry into governmental actors' reasons for taking official action.⁴⁵³

C. Injunctions Under the UCL

Public prosecutors have broad power to seek injunctive relief under the UCL in principle, and in appropriate cases can obtain a preliminary injunction without evidence of harm to any specific individual.⁴⁵⁴ Little guidance exists as to the proper scope of injunctive relief under the UCL in private cases. For example, on the one hand, a court exercised its injunctive power to require a ten-year mandatory disclosure in the form of a warning on the defendant's future products.⁴⁵⁵ On the other,

(\$2,500 per violation)); *People v. Dollar Rent-A-Car Sys., Inc.*, 211 Cal. App. 3d 119, 132 (1989) (\$100,000 penalty where company used over 500,000 misleading contracts and submitted 1,500 false repair invoices (no "per violation" penalty determined)); *Thomas Shelton Powers, M.D.*, 2 Cal. App. 4th at 339-44 (imposing maximum \$17,500 penalty for 7 violations (\$2,500 per violation)); *People v. Morse*, 21 Cal. App. 4th 259, 272 (1993) (affirming \$400,000 in civil penalties for 4 million violations of false advertising statute (10 cents per violation)).

⁴⁵¹ 212 Cal. App. 4th at 1249.

⁴⁵² *Id.* at 1253-59.

⁴⁵³ *See Bd. of Registered Nursing v. Super. Ct. of Orange Cty.*, 59 Cal. App. 5th 1011, 1039-1040 (2021), *reh'g denied* (Feb. 3, 2021), *review denied* (Apr. 21, 2021).

⁴⁵⁴ *People ex rel. Gascon v. HomeAdvisor, Inc.*, 49 Cal. App. 5th 1073, 1088 (2020).

⁴⁵⁵ *See Consumers Union*, 4 Cal. App. 4th at 972-74 (requiring a warning to be placed on all of dairy company's advertisements and products for the next ten years because the company was found liable for false advertising); *see also U-Haul Co.*, 4 Cal. App. 5th 304 (granting injunction of "broad public interest" against defendant franchisor). *But see Isuzu Motors Ltd. v. Consumers Union of U.S., Inc.*, 12 F. Supp. 2d 1035, 1048-49 (C.D. Cal. 1998) (granting motion to dismiss a UCL claim on the grounds that the injunction sought constituted a prior restraint in violation of the First Amendment); *Nelson*, 186 Cal. App. 4th at 1018 (explaining that rescission and restitution are distinct remedies and rescission is an equitable remedy intended to restore both parties to their former positions; finding no authority allowing rescission in a UCL action); *In re Fluidmaster, Inc.*, 149 F. Supp. 3d 940, 958-59 (N.D. Ill. 2016) (dismissing UCL claim seeking prospective injunctive relief for lack of standing because the relief sought—prohibiting defendant from marketing and selling its allegedly defective product and requiring defendant to notify consumers of the alleged product defects—was disconnected from and would not remedy injury of the named plaintiff, who had already purchased and installed the allegedly defective product); *Strumlauf v. Starbucks Corp.*, 192 F. Supp. 3d 1025

an injunction requiring defendant to have appropriate policies and procedures to ensure that defendant and its dealers “promptly” complied with the “replacement or restitution” remedy contained in the Song-Beverly Warranty Act was improper because: (1) injunctive relief under the UCL should be withheld where there is an adequate remedy at law; and (2) a court of equity “should not intervene under the guise of the UCL when injunctive relief implicates matters of complex economic policy, where the injunction would lead to a multiplicity of enforcement actions, and/or result in ongoing judicial supervision of an industry.”⁴⁵⁶ Therefore, overall, it is fair to say that the issuance of a UCL injunction is highly case-specific.

However, in 2017, the California Supreme Court more clearly defined the distinction between two varieties of injunctive relief available under the UCL—“public” injunctive relief and “private” injunctive relief. In *McGill v. Citibank, N.A.*,⁴⁵⁷ the Court summarized its earlier decisions on the subject and held “public injunctive relief under the UCL, the CLRA, and the false advertising law is relief that has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public. Relief that has the primary purpose or effect of redressing or preventing injury to an individual plaintiff—or to a group of individuals similarly situated to the plaintiff—does not constitute public injunctive relief.”⁴⁵⁸ Courts have since used this framework to closely examine the character of relief sought to determine whether a waiver of such “public” relief in an arbitration agreement falls within the scope of *McGill*.⁴⁵⁹

Notably, the California Supreme Court also confirmed that Proposition 64 did not eliminate the ability of *private* plaintiffs to seek *public* injunctive relief under the UCL and FAL.⁴⁶⁰ Rather, if a private individual has standing (i.e., has “suffered injury in fact and has lost money or property as a result of” the violation) to file a private action, then that individual can request public injunctive relief in connection with that action.⁴⁶¹ The Court reasoned that nothing in the ballot materials for Proposition 64 suggested that voters, by stating “‘that only the California Attorney General and local public officials be authorized to file and prosecute actions *on behalf of the general public*,’ . . . meant to preclude individuals who meet the standing requirements for bringing a private action from requesting such relief.”⁴⁶² Similarly, notwithstanding that Proposition 64 now requires private cases involving aggregated claims to comport with California’s class action standards, nothing in Proposition 64, according to the Court, suggests any “intent to link or restrict” a private individual’s

(N.D. Cal. 2016) (dismissing claim for injunctive relief because plaintiffs could not allege a threat of repeated injury now that they were aware of Starbucks’ alleged misrepresentation of under filling its lattes); *Turner v. Apple, Inc.*, No. 5:20-cv-07495, 2022 WL 445755, at *4 (N.D. Cal. Feb. 14, 2022) (finding injunctive relief appropriate where Apple’s voluntary cessation of iOS 13, which allegedly appropriated consumer’s cellular data without disclosing such practices to consumers, was insufficient to prevent future harm).

⁴⁵⁶ *Consumer Advocates v. DaimlerChrysler Corp.*, No. G029811, 2005 WL 327053, at *10-16 (Cal. Ct. App. Jan. 31, 2005) (unpublished); see also *Rhynes v. Stryker Corp.*, No. 10-5619, 2011 WL 2149095, at *4 (N.D. Cal. May 31, 2011) (“Where the claims pleaded by a plaintiff may entitle her to an adequate remedy at law, equitable relief is unavailable.”).

⁴⁵⁷ 2 Cal. 5th 945 (2017).

⁴⁵⁸ *Id.* at 955 (internal quotation marks and citation omitted).

⁴⁵⁹ *But see* discussion *infra* pp. 77-89 (“Arbitration of UCL Claims”).

⁴⁶⁰ See *McGill*, 2 Cal. 5th at 959.

⁴⁶¹ *Id.*

⁴⁶² *Id.* (emphasis added and citations omitted).

ability to seek “public” injunctive relief to the class action context.⁴⁶³ Imposing such a requirement would, in the Court’s view, “largely eliminate the ability of a private plaintiff to pursue such relief.”⁴⁶⁴

D. Equitable Defenses to UCL Remedies

In *Cortez*, the California Supreme Court held that because UCL claims are claims in equity, trial courts may take into account equitable defenses and “considerations,” including laches, good faith, waiver and estoppel, in fashioning UCL remedies.⁴⁶⁵ The Court observed that reduction of a restitution award probably would be unusual, particularly where unlawful conduct was proven.⁴⁶⁶ Nonetheless, a defendant might decrease its exposure for restitution, or limit the scope of an injunction, based on equitable considerations.

E. Res Judicata Under the UCL

In *Fireside Bank Cases*,⁴⁶⁷ the Court of Appeal found that the UCL does not preclude application of *res judicata* or collateral estoppel as a defense. In *Fireside*, the creditor sued the debtor to collect on a deficiency balance following the sale of repossessed property. The debtor filed a cross-complaint alleging that the creditor served a defective redemption notice that overstated the amount due, in violation of the Rees-Levering Motor Vehicle Sales and Finance Act, and that, by proceeding to collect on the balance, the creditor committed an unlawful business practice in violation of the UCL.⁴⁶⁸ The debtor’s cross-complaint was certified as a class action. The class claims suggested that the creditor had already obtained judgments against some of the class members and sought relief that included “[r]estitution or damages paid to class members based on all money they paid on invalid deficiency judgments obtained,” as well as injunctive relief vacating the judgments.⁴⁶⁹ The creditor filed motions to strike the allegations seeking to unwind its previously obtained judgments on the basis of *res judicata* and collateral estoppel. The debtor argued that the UCL does not expressly declare *res judicata* or collateral estoppel as a limitation on a court’s remedial power under the UCL.⁴⁷⁰

The Court of Appeal rejected the debtor’s argument, holding that “[g]iving a prior judgment its normal effect in a UCL action does not ‘imply’ an ‘exception’ to the act or fashion a ‘safe harbor’ from it. It simply recognizes a defense that is available to every civil defendant when the facts support

⁴⁶³ *Id.* at 960.

⁴⁶⁴ *Id.*

⁴⁶⁵ 23 Cal. 4th at 180 (“A court cannot properly exercise an equitable power without consideration of the equities on both sides of a dispute.”); *Pac. Coin Mgmt. v. BR Telephony Partners*, No. B165217, 2006 WL 290569, at *18 (Cal. Ct. App. Feb. 8, 2006) (accepting laches as valid equitable defense to deny UCL claim for restitution); *ILC Trademark Corp. v. Aviator Nation, Inc.*, No. 17-CV-07975, 2020 WL 6886436, at *12 (Nov. 24, 2020) (accepting the equitable defense of laches to deny injunctive relief), *appeal filed*, No. 21-55012 (9th Cir. Jan. 6, 2021).

⁴⁶⁶ *Cortez*, 23 Cal. 4th at 182.

⁴⁶⁷ 187 Cal. App. 4th 1120, 1131 (2010).

⁴⁶⁸ *Id.* at 1123.

⁴⁶⁹ *Id.* at 1124.

⁴⁷⁰ *Id.* at 1128.

it.”⁴⁷¹ Thus, since the creditor obtained judgments against the affected class members, the judgments may provide a defense to any claims those members might bring against it.⁴⁷²

Principles of *res judicata* also limit the scope of relief available to public agencies that may bring enforcement actions following a class action settlement. In *California v. IntelliGender, LLC*,⁴⁷³ the Ninth Circuit Court of Appeals held that public officials cannot obtain a duplicate recovery in the form of restitution under the UCL to individuals who previously participated in a class action settlement, even if the officials contended that monetary relief provided to class members was not sufficient. The court emphasized that “[a]llowing the State’s claims for restitution to go forward in state court would undermine this central guarantee of our legal system and undercut [the Class Action Fairness Act]’s purpose of increasing the fairness and consistency of class action settlements.”⁴⁷⁴ The court did note, however, that the private settlement did not preclude the state from acting in its “sovereign capacity” to seek injunctive relief.⁴⁷⁵

F. Attorneys’ Fees Under the UCL

Attorneys’ fees are not recoverable under the UCL.⁴⁷⁶ This is true even when a plaintiff prevails on an “unlawful” UCL claim and the underlying law allows for recovery of attorneys’ fees.⁴⁷⁷ A successful UCL plaintiff may, however, seek attorneys’ fees pursuant to California Code of Civil Procedure section 1021.5, but there is no corresponding right for a successful defendant to do so.⁴⁷⁸

Under section 1021.5, a plaintiff may recover attorneys’ fees if: (1) the lawsuit “has resulted in the enforcement of an important right affecting the public interest”; (2) “a significant benefit” is “conferred on the general public or a large class of persons”; (3) “the necessity and financial burden of private enforcement . . . are such as to make the award appropriate”; and (4) the fees “should not in the interest of justice be paid out of the recovery, if any.” Courts uniformly have recognized that an attorneys’ fees award is inappropriate when the applicant has a large economic stake in the outcome

⁴⁷¹ *Id.* at 1130.

⁴⁷² *Id.* at 1131.

⁴⁷³ 771 F.3d 1169 (9th Cir. 2014).

⁴⁷⁴ *Id.* at 1181.

⁴⁷⁵ *Id.* at 1177.

⁴⁷⁶ *See Shadoan*, 219 Cal. App. 3d at 108 n.7 (“The Business and Professions Code does not provide for an award of attorney fees for an action brought pursuant to section 17203, and there is nothing in the statutory scheme from which such a right could be implied.”).

⁴⁷⁷ *See Cel-Tech*, 20 Cal. 4th at 179 (“Plaintiffs may not receive . . . attorney fees.”); *Hadjavi v. CVS Pharmacy, Inc.*, No. CV 10-04886, 2010 WL 7695383, at *4 (C.D. Cal. Sept. 22, 2010) (citing *Cel-Tech*, 20 Cal. 4th at 179) (striking plaintiff’s claim for attorneys’ fees).

⁴⁷⁸ *See Walker*, 98 Cal. App. 4th at 1179-81 (holding that prevailing defendant did not have the right to seek attorneys’ fees in UCL action). In addition, although a prevailing defendant may have the right to seek attorneys’ fees on other grounds, such as a contract at issue in the action, trial courts have the discretion to apportion or deny such fees where the action principally was to enjoin an unfair business practice. *See id.*; *see also Kirby v. Immoos Fire Prot., Inc.*, 186 Cal. App. 4th 1361 (2010) (holding that defendant had no right to attorneys’ fees; it is settled law that the UCL does not provide for an award of attorneys’ fees), *aff’d in part and rev’d in part on other grounds*, 53 Cal. 4th 1244, 1249 (2012).

of a case.⁴⁷⁹ Also, the decisions construing section 1021.5 demonstrate that awards of attorneys' fees turn upon the unique facts presented.⁴⁸⁰

For example, in *Baxter v. Salutory Sportsclubs, Inc.*,⁴⁸¹ the Court of Appeal affirmed denial of an award of attorneys' fees to a successful UCL plaintiff. Plaintiff, purportedly acting as a private attorney general (prior to Proposition 64's enactment), sued the owner of several health clubs, alleging, among other things, that defendant's health club contracts did not comply with certain California statutory requirements. Although defendant maintained that the contracts were compliant, it modified them after suit was filed to conform precisely with the statutory requirements. Following a bench trial, the court ruled that defendant's contracts had not been compliant prior to the modifications. The court ordered defendant to provide notice to its customers with non-conforming contracts, among other things, but found no evidence that any person actually had been harmed. As a result, the trial court denied plaintiff's motion for attorneys' fees under section 1021.5, reasoning that "[t]he relief granted plaintiff was a *de minimus* [sic] change in the defendant's contracts that did not result in a significant benefit to the public."⁴⁸² The Court of Appeal affirmed.⁴⁸³

Plaintiffs' counsel regularly seek fees when a defendant has changed its practices, arguing that their lawsuit precipitated the change. In *Graham v. DaimlerChrysler Corp.*,⁴⁸⁴ the California Supreme Court held that attorneys' fees could be awarded where a lawsuit serves as a "catalyst" to the defendant's changed behavior. The Court concluded that such awards are proper where: (1) the plaintiff's lawsuit serves as a catalyst to the changed behavior; (2) the lawsuit has merit; and (3) the plaintiff engaged in a reasonable attempt to settle the dispute prior to litigation.⁴⁸⁵ In *Graham*, plaintiffs filed a breach-of-warranty claim against DaimlerChrysler, challenging its admitted mismarketing of the towing capacity of its 1998 and 1999 Dakota R/T trucks. Although DaimlerChrysler established a response team to address the problem and to take corrective steps, plaintiffs filed suit. After the trial court dismissed the action, the parties spent more than a year litigating plaintiffs' entitlement to attorneys' fees. The trial court ultimately determined that the lawsuit had been a "catalyst" in causing DaimlerChrysler's corrective conduct and awarded

⁴⁷⁹ See *In re Conservatorship of Whitley*, 50 Cal. 4th 1206, 1211 (2010) ("[T]he purpose of section 1021.5 is not to compensate with attorney fees only those litigants who have altruistic or lofty motives, but rather all litigants and attorneys who step forward to engage in public interest litigation when there are insufficient financial incentives to justify the litigation in economic terms."); *Save Open Space Santa Monica Mountains v. Super. Ct.*, 84 Cal. App. 4th 235, 253-54 (2000) (UCL defendant is entitled to limited discovery on subject of whether public interest organization litigated private attorney general action primarily for the benefit of non-litigants), *disapproved on other grounds by Williams v. Super. Ct.*, 3 Cal. 5th 531 (2017).

⁴⁸⁰ Compare *Cal. Licensed Foresters Ass'n v. State Bd. of Forestry*, 30 Cal. App. 4th 562, 570 (1994) (narrowly construing the third prong of section 1021.5 and stating that attorneys' fees are awarded only if a significant public benefit is made "through litigation pursued by one whose personal stake is insufficient to otherwise encourage the action"), and *Olsen*, 48 Cal. App. 4th at 628-29 (refusing to award attorneys' fees even though defendants had changed their business practices), with *Hewlett*, 54 Cal. App. 4th at 543-46 (granting an award of attorneys' fees pursuant to section 1021.5).

⁴⁸¹ 122 Cal. App. 4th 941, 948 (2004).

⁴⁸² *Id.* at 944.

⁴⁸³ *Id.* at 946.

⁴⁸⁴ 34 Cal. 4th 553, 576-77 (2004).

⁴⁸⁵ *Id.* at 560-61.

attorneys' fees. In certain circumstances, a pre-litigation demand can be deemed a sufficient catalyst to changed behavior as to merit a fee.⁴⁸⁶

In a 4-to-3 decision, the California Supreme Court upheld application of the catalyst theory, finding it to be consistent with the purposes of section 1021.5.⁴⁸⁷ Notably, the Court declined to follow *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health & Human Resources*,⁴⁸⁸ in which the United States Supreme Court rejected the catalyst theory under federal law. The Court also was not persuaded by *DaimlerChrysler's* policy argument that awards under the catalyst theory would require complex causal determinations and encourage nuisance suits.⁴⁸⁹

In a UCL class action, attorneys' fees may be calculated pursuant to traditional principles governing fees for class counsel, including the lodestar and multiplier or "common fund" approaches, as applicable.⁴⁹⁰

1. The Lodestar Approach

California courts adopt the lodestar approach as "the primary method" for establishing a "reasonable" amount of attorneys' fees.⁴⁹¹ Under the lodestar approach, the court calculates attorneys' fees based upon reasonable time spent and hourly compensation for each attorney.⁴⁹²

The primacy of the lodestar method in California was established in *Serrano v. Priest*.⁴⁹³ The California Supreme Court explained:

The starting point of every fee award, once it is recognized that the court's role in equity is to provide just compensation for the attorney, must be a calculation of the attorney's services in terms of the time he has expended on the case. Anchoring the

⁴⁸⁶ *Skinner v. Ken's Foods, Inc.*, 53 Cal. App. 5th 938, 948 (2020).

⁴⁸⁷ *Id.* at 566.

⁴⁸⁸ 532 U.S. 598 (2001).

⁴⁸⁹ *Graham*, 34 Cal. 4th at 573.

⁴⁹⁰ *Wershba v. Apple Comput., Inc.*, 91 Cal. App. 4th at 254, *disapproved on other grounds by Hernandez v. Restoration Hardware, Inc.*, 4 Cal. 5th 260 (2018); *Nat. Gas Anti-Trust Cases I, II, III & IV*, Nos. 4221, 4224, 4226, 4228, 2006 WL 5377849, at *3 (Cal. Super. Ct. Dec. 11, 2006) ("Both California state and federal courts recognize two methods for evaluating the fairness and reasonableness of attorneys' fees in class action settlements resulting in the creation of a common fund for the distribution to class members: (1) the percentage-of-the-benefit method; or (2) the lodestar method plus multiplier method."); *Lamb v. Wells Fargo Bank, N.A.*, Nos. A108354, A108355, 2006 WL 925490, at *8 (Cal. Ct. App. Apr. 11, 2006) (unpublished) (finding that trial court's conclusion based on "independent review of the court file, his first-hand knowledge of the case, his personal experience, and the supplemental information provided by counsel, that class counsel had appropriately demonstrated the lodestar amount . . . was entirely appropriate"); *see also Consumer Cause, Inc. v. Mrs. Gooch's Nat. Food Mkts., Inc.*, 127 Cal. App. 4th 387, 397 (2005) ("The substantial benefit doctrine is an extension of the common fund doctrine. It applies when no common fund has been created, but a concrete and significant benefit, although nonmonetary in nature, has nonetheless been conferred on an ascertainable class."), *disapproved on other grounds by Hernandez*, 4 Cal. 5th 260.

⁴⁹¹ *Thayer v. Wells Fargo Bank*, 92 Cal. App. 4th 819, 833 (2001); *accord Krumme v. Mercury Ins. Co.*, 123 Cal. App. 4th 924, 947 (2004).

⁴⁹² *Rebney v. Wells Fargo Bank, N.A.*, 232 Cal. App. 3d 1344, 1347 (1991).

⁴⁹³ 20 Cal. 3d 25, 49 (1977).

analysis to this concept is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts.⁴⁹⁴

Affirming application of the lodestar method pursuant to its holding in *Serrano*, the California Supreme Court in *Press v. Lucky Stores, Inc.*⁴⁹⁵ rejected attorneys' fees awarded by a trial court pursuant to section 1021.5, concluding that the trial court had abused its discretion in not applying the lodestar method. The Court indicated that, "[w]hen a party is entitled to attorney fees under section 1021.5, the amount of the award is determined according to the guidelines set forth by this court in [*Serrano*]" and, "since determination of the lodestar figures is so '[f]undamental' to calculating the amount of the award, the exercise of that discretion must be based on the lodestar adjustment method."⁴⁹⁶ The Court continued:

[W]hile a trial court has discretion to determine the proper amount of an award, the resulting fee must still bear some reasonable relationship to the lodestar figure and to the purpose of the private attorney general doctrine. If there is no reasonable connection between the lodestar figure and the fee ultimately awarded, the fee does not conform to the objectives established in [*Serrano*], and may not be upheld.

...

The lodestar adjustment method of calculating attorney fees set forth in [*Serrano*] is designed expressly for the purposes of maintaining objectivity. In failing to apply these guidelines, the trial court awarded an amount which had no rational relationship to the skill, time and effort expended by plaintiffs' attorneys on this litigation.⁴⁹⁷

At a minimum, the lodestar method must be applied in cases where there is no ascertainable common fund from which a percentage can be drawn. *Dunk v. Ford Motor Co.*⁴⁹⁸ is illustrative. In *Dunk*, the settlement provided that coupons worth \$400 each for purchases of Ford vehicles would be available to a class of over 65,000, for a total potential value of over \$26 million.⁴⁹⁹ The trial court awarded attorneys' fees of \$985,000 and costs of \$10,691 based upon the common fund method.⁵⁰⁰ The Court of Appeal remanded the issue of attorneys' fees finding that the "award of attorney fees

⁴⁹⁴ *Id.* at 49 n.23.

⁴⁹⁵ 34 Cal. 3d 311 (1983).

⁴⁹⁶ *Id.* at 321-22.

⁴⁹⁷ *Id.* at 324. In *Press*, plaintiffs sought to circulate petitions regarding an oil profits initiative on the premises of several privately owned shopping centers; among the locations was an area in Santa Monica in front of defendant's store. *Id.* at 316. Plaintiffs successfully challenged defendant's refusal to allow the circulation of petitions. *Id.* Plaintiffs submitted a lodestar figure of \$13,960 with a request to apply a multiplier of 1.5 for a total of \$20,940 in attorneys' fees. *Id.* at 322-23. The trial court awarded \$112.98 in attorneys' fees after multiplying the requested amount by a ratio of 3,000/556,000, the ratio of petition signatures obtained at the Santa Monica store to the number obtained statewide. *Id.* at 323; see also *Perez v. Safety-Kleen Sys., Inc.*, No. C 05-5338, 2010 WL 934100, at *8 (N.D. Cal. Mar. 15, 2010), *aff'd*, 448 F. App'x 707 (9th Cir. 2011) (stating that the degree of plaintiffs' success in relation to the goals of the lawsuit as a whole indicated that plaintiffs' suggested lodestar amount stretched the parameters of what should be considered "reasonable").

⁴⁹⁸ 48 Cal. App. 4th 1794 (1996).

⁴⁹⁹ *Id.* at 1804.

⁵⁰⁰ *Id.* at 1800.

based on a percentage of a ‘common fund’ recovery is of questionable validity in California” and “even if it is valid, the true value of the fund must be easily calculated.”⁵⁰¹ The court explained:

Later cases have cast doubt on the use of the percentage method to determine attorney fees in California class actions. Even if the method is permissible, it should only be used where the amount was a “certain or easily calculable sum of money.” Although the ultimate settlement value to the plaintiffs could be as high as \$26 million, the true value cannot be ascertained until the one-year coupon redemption period expires. This is not the type of settlement that lends itself to the common fund approach.⁵⁰²

Under the lodestar approach, the “base amount produced by multiplying hours spent on the case by a reasonable hourly rate ‘may then be increased or reduced by application of a “multiplier” after the trial court has considered other factors concerning the lawsuit.”⁵⁰³ Relevant factors in calculating the multiplier may include: (a) the novelty and difficulty of the questions involved, and the skill displayed in presenting them; (b) the extent to which the nature of the litigation precluded other employment by the attorneys; and (c) the contingent nature of the fee award.⁵⁰⁴ The factors taken into account must not be duplicative. For example, if a court takes into account the skill and experience of the attorneys and the nature of the work involved in calculating the reasonable hourly rate, it cannot also use those factors to enhance or apply a multiplier to the award.⁵⁰⁵ Moreover, the “factors which a trial court may consider are not fixed” and “our state has a relatively ‘permissive attitude’ as to the elements that go into what will ultimately make up the multiplier.”⁵⁰⁶

In *Lealao*,⁵⁰⁷ the Court of Appeal recognized “results obtained” as an additional factor in determining a multiplier, thereby allowing the attorneys’ fees award to be cross-checked against the class recovery. The court stated:

[I]n cases in which the value of the class recovery can be monetized with a reasonable degree of certainty and it is not otherwise inappropriate, a trial court has discretion to adjust the basic lodestar through the application of a positive or negative multiplier where necessary to ensure that the fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation.⁵⁰⁸

⁵⁰¹ *Id.* at 1809.

⁵⁰² *Id.* (citations omitted); see also *Ramos v. Countrywide Home Loans, Inc.*, 82 Cal. App. 4th 615, 628 (2000) (finding the common fund exception inapplicable where “plaintiffs’ efforts have not created an identifiable fund of money out of which attorney fees are sought”).

⁵⁰³ *Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 40 (2000) (citation omitted).

⁵⁰⁴ *Serrano*, 20 Cal. 3d at 48; *Cundiff v. Verizon Cal., Inc.*, 167 Cal. App. 4th 718, 724 (2008).

⁵⁰⁵ *Robbins v. Alibrandi*, 127 Cal. App. 4th 438, 456 (2005) (finding “record so devoid of evidence supporting a substantial multiplier that the trial court’s use of multipliers from 2.5 to 3.0 to enhance the lodestar was an abuse of discretion” and finding skill, expertise and contingent nature and risk of litigation did not justify multiplier); see also *Flannery v. Cal. Highway Patrol*, 61 Cal. App. 4th 629, 647 (1998).

⁵⁰⁶ *Hammond v. Agran*, 99 Cal. App. 4th 115, 135 (2002), disapproved on other grounds by *In re Conservatorship of Whitley*, 50 Cal. 4th 1206 (2010).

⁵⁰⁷ 82 Cal. App. 4th at 26.

⁵⁰⁸ *Lealao*, 82 Cal. App. 4th at 49-50.

If a court considers allowing a multiplier based on the “results obtained,” less weight should be given to the size of recovery where the recovery is large due primarily to the size of the class.⁵⁰⁹ While the court may “cross-check” the lodestar against the value of the class recovery, the award must still be “anchored” in the time spent by the attorneys.⁵¹⁰

For instance, in *Lealao*, class counsel sought approximately \$1.76 million in attorneys’ fees based upon the amount of \$7.35 million in claims that had been submitted under the claims-made settlement. Defendants were potentially exposed for \$14.8 million — i.e., if every member of the class filed a valid claim.⁵¹¹ The Court of Appeal held that the trial court’s award of attorneys’ fees in the amount of \$425,000, which was based solely on the hours expended by counsel, could be enhanced based on the percentage-of-the-benefit method, even though there was no conventional common fund,⁵¹² and remanded the matter to trial court for reconsideration of a reasonable fee.⁵¹³ The Court of Appeal justified its conclusion in several ways. *First*, the total initial exposure of \$14.8 million, and the actual value of the valid claims of \$7.35 million, were both undisputed.⁵¹⁴ *Second*, because the average recovery of class members was over \$2,000, the total settlement value was due in significant measure to the individual recoveries, and not just the size of the class.⁵¹⁵ *Third*, the court found that *Dunk* did not limit utilization of class recovery to cross-check a lodestar because *Dunk* did not “address the question whether an award anchored in a lodestar calculation could be adjusted to reflect the amount of a *monetizable* recovery.”⁵¹⁶

2. The Common Fund Doctrine

The common fund doctrine is “grounded in ‘the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys’ fees, from the fund or property itself or directly from the other parties enjoying the benefit.’”⁵¹⁷ Under the common fund method, “the activities of the party awarded fees have resulted in the preservation or recovery of a certain or easily calculable sum of money - out of which sum or ‘fund’ the fees are to be paid.”⁵¹⁸ Once the fund is established, attorneys’ fees are calculated as a reasonable percentage of the common fund.

“Because the common fund doctrine ‘rest[s] squarely on the principle of avoiding unjust enrichment,’ attorney fees awarded under this doctrine are not assessed directly against the losing party (fee shifting), but come out of the fund established by the litigation, so that the beneficiaries of

⁵⁰⁹ *Id.* at 49; *see also In re Vitamin Cases*, 110 Cal. App. 4th 1041, 1060 (2003).

⁵¹⁰ *Lealao*, 82 Cal. App. 4th at 45-46; *see also Ramos*, 82 Cal. App. 4th at 628.

⁵¹¹ *Lealao*, 82 Cal. App. 4th at 23.

⁵¹² Despite the fact that the court recognized there was no traditional common fund, the court stated that, in this particular case, the “monetary value of the benefit to the class is much less speculative than that of some traditional common funds.” *Id.* at 50.

⁵¹³ *See id.* at 49-53.

⁵¹⁴ *Id.* at 50.

⁵¹⁵ *Id.* at 53.

⁵¹⁶ *Id.* at 45 (emphasis in original).

⁵¹⁷ *Serrano*, 20 Cal. 3d at 35.

⁵¹⁸ *Id.*; *see, e.g., Schiller v. David’s Bridal, Inc.*, No. 10-CV-00616, 2012 WL 2117001, at *15 (E. D. Cal. June 11, 2012) (“[T]he structure of the parties’ Settlement Agreement creates a Maximum Settlement Amount that constitutes a common fund out of which reasonable attorneys’ fees will be paid.”).

the litigation, not the defendant, bear this cost (fee spreading).⁵¹⁹ Nevertheless, it has been held that “direct payment of attorney fees by defendants should not be a barrier to the use of the percentage of the benefit analysis.”⁵²⁰ This is based upon the view that an “award to the class and the agreement on attorney fees represent a package deal. Even if the fees are paid directly to the attorneys, those fees are still best viewed as an aspect of the class’ recovery.”⁵²¹

The California Supreme Court explained that attorneys are only entitled to a fee award based on a common fund theory where an identifiable fund is established out of which the attorneys seek to recover their fees.⁵²² In cases where courts have adopted the percentage or common fund method, the “benchmark” for fees is twenty-five percent, “which may be raised or lowered under appropriate circumstances.”⁵²³ Moreover, it has been recognized that “when the fund is extraordinarily large, the application of a normal range of fee awards may result in a fee that is unreasonably large for the benefits conferred.”⁵²⁴ In cases filed in or removed to federal court, use of the common fund theory may be limited by the United States Supreme Court’s opinion in *Perdue v. Kenny A. ex rel. Winn*,⁵²⁵ which calls for application of the lodestar method, without any multiplier, in many circumstances.

IV. PROCEDURAL ASPECTS OF THE UCL

A. Arbitration of UCL Claims

Because many businesses include arbitration provisions in their customer agreements, the enforceability of such provisions has always been an important subject in UCL jurisprudence.

⁵¹⁹ *Lealao*, 82 Cal. App. 4th at 27 (citations omitted).

⁵²⁰ *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996); *see also Lealao*, 82 Cal. App. 4th at 39.

⁵²¹ *Lealao*, 82 Cal. App. 4th at 33.

⁵²² *Serrano*, 20 Cal. 3d at 37-38 (“We hold that here, where plaintiffs’ efforts have not effected the creation or preservation of an identifiable ‘fund’ of money out of which they seek to recover their attorneys’ fees, the ‘common fund’ exception is inapplicable.”); *Cundiff*, 167 Cal. App. 4th at 724-25.

⁵²³ *Zucker v. Occidental Petroleum Corp.*, 968 F. Supp. 1396, 1400 n.2 (C.D. Cal. 1997), *aff’d*, 192 F.3d 1323 (9th Cir. 1999); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (same); *see also Camden I Condo. Ass’n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) (“The majority of common fund fee awards fall between 20% to 30% of the fund,” with an upper limit of 50%.); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1378 (N.D. Cal. 1989) (“[I]n class action common fund cases the better practice is to set a percentage fee and that, absent extraordinary circumstances that suggest reasons to lower or increase the percentage, the rate should be set at 30%.”); *In re Cal. Indirect Purchases*, No. 960886, 1998 WL 1031494, at *9 (Cal. Super. Ct. Oct. 22, 1998) (awarding 30% of the settlement fund). *But see In re Infospace, Inc.*, 330 F. Supp. 2d 1203, 1206, 1210 (W.D. Wash. 2004) (recognizing that the “Ninth Circuit has established 25 percent of a settlement fund as a ‘benchmark’ award for attorneys’ fees in common fund cases” but reasoning “[t]here is nothing inherently reasonable about a 25 percent recovery, and the courts applying this method have failed to explain the basis for the idea that a benchmark fee of 25 percent is logical or reasonable”).

⁵²⁴ *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 350 (N.D. Ga. 1993).

⁵²⁵ 559 U.S. 542 (2010).

Following *AT&T Mobility v. Concepcion*,⁵²⁶ *McGill v. Citibank, N.A.*,⁵²⁷ and now *Blair v. Rent-A-Center, Inc.*,⁵²⁸ the issue is of critical importance.

1. The Decision in *Concepcion*

Plaintiffs in *Concepcion* asserted UCL, CLRA and FAL claims, alleging that AT&T engaged in false advertising and fraud by advertising “free” phones but charging sales tax.⁵²⁹ The district court held, and the Ninth Circuit affirmed, that the class action waiver in the arbitration agreement between plaintiffs and AT&T rendered the agreement unconscionable and, therefore, unenforceable under the rule established by the California Supreme Court in *Discover Bank v. Superior Court*.⁵³⁰

In *Discover Bank*, the California Supreme Court held that class action waivers may be unconscionable under California law: “in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money . . .”⁵³¹ In denying AT&T’s motion to compel arbitration, the district court noted that the *Discover Bank* rule provides “redress to individuals whose recovery ‘would be insufficient to justify bringing a separate action.’”⁵³² Thus, according to the district court, the “net effect” of the class action waiver, and the presence of “small amounts of damages,” was that “customers would not bother to pursue individual litigation or arbitration, and if precluded from participation in class-wide litigation or arbitration, would effectively have no redress.”⁵³³ The Ninth Circuit affirmed, specifically endorsing the district court’s analysis of *Discover Bank*.⁵³⁴

The United States Supreme Court reversed and abrogated *Discover Bank* and its progeny. The Court held that “[r]equiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with” the Federal Arbitration Act (the “FAA”).⁵³⁵ The Court noted that the FAA was enacted in response to “widespread judicial hostility to arbitration agreements” and requires arbitration agreements to be enforced unless grounds exist for “the revocation of any contract”—such as fraud, duress or unconscionability—under Section 2 of the FAA (the “savings clause”).⁵³⁶ However, in articulating a doctrine of “purposes and objectives” preemption, the United States Supreme Court held that “when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been

⁵²⁶ 563 U.S. 333 (2011).

⁵²⁷ 2 Cal. 5th 945 (2017).

⁵²⁸ 928 F.3d 819 (9th Cir. 2019).

⁵²⁹ *Concepcion*, 563 U.S. at 336-337.

⁵³⁰ 36 Cal. 4th 148 (2005), *abrogated by Concepcion*, 563 U.S. at 336-38.

⁵³¹ *Id.* at 162-63.

⁵³² *Laster*, 2008 WL 5216255, at *9 (citing *Discover Bank*, 36 Cal. 4th at 156); *id.* at *10 (noting that the “presence of predictably small amounts of damages (or individual gain) invokes the concern of *Discover Bank* that without class litigation or arbitration, individuals have no ‘method of obtaining redress for claims which would otherwise be too small to warrant individual litigation’”) (internal citations omitted).

⁵³³ *Id.*

⁵³⁴ *Concepcion*, 563 U.S. at 338.

⁵³⁵ *Id.* at 344.

⁵³⁶ *Id.* at 339, 341.

applied in a fashion that disfavors arbitration,”⁵³⁷ a court must determine whether the state law rule “stand[s] as an obstacle to the accomplishment of the FAA’s objectives,” which are principally to “ensur[e] that private arbitration agreements are enforced according to their terms.”⁵³⁸

According to the United States Supreme Court, because the *Discover Bank* rule “allows any party to a consumer contract to demand [class-wide arbitration] *ex post* . . . it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, [and therefore it] is pre-empted by the FAA.”⁵³⁹

2. Arbitrability of UCL Claims Pre-*Concepcion*

In two pre-*Concepcion* decisions, the California Supreme Court had held that while claims for monetary relief under the UCL and CLRA are arbitrable, claims for public injunctive relief are not. In *Broughton v. Cigna Healthplans*,⁵⁴⁰ the California Supreme Court held that public injunctive relief claims under the CLRA are inarbitrable because certain limitations on an arbitrator’s ability to oversee enforcement of a public injunction create an inherent conflict between arbitration and the underlying purpose of public injunctive relief. Then, in *Cruz v. PacifiCare Health Systems, Inc.*,⁵⁴¹ the California Supreme Court confirmed that UCL claims for public injunctive relief are not arbitrable, but that UCL claims for restitution are. Although the California Supreme Court limited its holding in *Cruz* on the injunctive relief claim to “the circumstances of the . . . case,” it did not specify the “circumstances” critical to its decision.⁵⁴² With respect to UCL monetary claims for restitution, the Court reasoned that such claims are similar to damages claims under the CLRA, which it held in *Broughton* to be arbitrable and to not require substantial judicial supervision.⁵⁴³

3. Arbitrability of Claims Post-*Concepcion*

In *McGill*, the California Supreme Court originally granted review to consider whether, following *Concepcion*, the *Broughton/Cruz* rule is preempted by the FAA and no longer valid.⁵⁴⁴ However, because the arbitration agreement did not require the claims for public injunctive relief to be *arbitrated*, and instead purported “to waive McGill’s right to seek public injunctive relief *in any forum*,” the Court did not consider the continued “vitality” of the *Broughton/Cruz* rule.⁵⁴⁵ As further discussed below, the Court ultimately found the arbitration agreement to be invalid and unenforceable under California law, but not based on the *Broughton/Cruz* rule.⁵⁴⁶

⁵³⁷ *Id.* at 341.

⁵³⁸ *Id.* at 343-44.

⁵³⁹ *Id.* at 346, 352.

⁵⁴⁰ 21 Cal. 4th 1066, 1079-84 (1999).

⁵⁴¹ 30 Cal. 4th 303, 311-15, 317-20 (2003).

⁵⁴² *Id.* at 307. *But see Smith v. Americredit Fin. Servs., Inc.*, No. 09cv1076, 2009 WL 4895280, at *8 (S.D. Cal. Dec. 11, 2009), *remanded and decided on other grounds*, 2012 WL 834784 (Mar. 12, 2012) (interpreting *Cruz* to hold that claims for injunctive relief are not arbitrable if “designed to prevent further harm to the public at large”; court found plaintiff’s class claims were not exempt from arbitration because they were not intended to benefit a particularly large group).

⁵⁴³ 30 Cal. 4th at 317-18.

⁵⁴⁴ *McGill*, 2 Cal. 5th at 956.

⁵⁴⁵ *Id.* (emphasis in original).

⁵⁴⁶ *Id.*

Because the Court did not address the rule in *Broughton* and *Cruz* in *McGill*, there remains a disagreement between California and federal courts as to the continued viability of the rule. Prior to *McGill*, the majority of federal district courts considered whether public injunctive relief claims are arbitrable after *Concepcion* agreed that the rule in *Broughton/Cruz* no longer applies.⁵⁴⁷ For example, in *Kaltwasser v. AT&T Mobility LLC*,⁵⁴⁸ the Northern District of California reasoned that “*Discover Bank* itself was based upon public policy rationales intertwined with the generally applicable doctrine of unconscionability.” *Discover Bank* “invoked Cal. Civ. Code § 1668, which provides that ‘[a]ll contracts which have for their object . . . to exempt anyone from responsibility for his own . . . violation of law, whether willful or negligent, are against the policy of the law.’”⁵⁴⁹ *Discover Bank* thus was abrogated because it “applied the unconscionability doctrine ‘in a fashion that disfavors arbitration.’”⁵⁵⁰ Accordingly, with respect to injunctive relief, the court concluded that “*Cruz* and *Broughton*, even more patently than *Discover Bank*, apply public policy contract principles to disfavor and indeed prohibit arbitration of entire categories of claims.”⁵⁵¹

The Ninth Circuit also has confirmed the reasoning of these district court opinions, concluding that *Concepcion* forecloses application of the *Broughton/Cruz* rule. In *Ferguson v. Corinthian Colleges, Inc.*,⁵⁵² the Ninth Circuit reversed the ruling by the district court that the “California Legislature’s decision to allow citizens to bring injunctive relief claims . . . on behalf of the public” was not preempted by the FAA.⁵⁵³ In reversing the district court, the Ninth Circuit expressly

⁵⁴⁷ See *Blau v. AT&T Mobility*, No. C 11-00541, 2012 WL 10546, at *6-7 (N.D. Cal. Jan. 3, 2012) (rejecting argument that claims for public injunctive relief under the CLRA and UCL are not arbitrable); *Hendricks v. AT&T Mobility, LLC*, 823 F. Supp. 2d 1015, 1024 (N.D. Cal. 2011) (same); *Khan v. Orkin Exterminating Co.*, No. C 10-02156, 2011 WL 4853365, at *3 (N.D. Cal. Oct. 13, 2011) (enforcing arbitration agreement and holding that the “FAA preempts the CLRA’s class action waiver”); *Meyer v. T-Mobile USA Inc.*, 836 F. Supp. 2d 994, 1006 (N.D. Cal. 2011) (holding that *Broughton/Cruz* reflects “state court application of public policy to prohibit an entire category of claims” and “such a prohibition does not survive *Concepcion*”); *Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp. 2d 1042, 1051 (N.D. Cal. 2011) (“*Cruz* and *Broughton*, even more patently than *Discover Bank*, apply public policy contract principles to disfavor and indeed prohibit arbitration of entire categories of claims.”); *Nelson v. AT&T Mobility LLC*, No. C10-4802, 2011 WL 3651153, *2-4 (N.D. Cal. Aug. 18, 2011) (the FAA preempts the holdings of *Broughton/Cruz* because they amount to “state law[s] prohibit[ing] outright the arbitration of a particular type of claim”); *In re Gateway LX6810 Comput. Prods. Litig.*, No. SACV 10-1563, 2011 WL 3099862, at *3 (C.D. Cal. July 21, 2011) (same); *In re Apple & AT&T iPad Unlimited Data Plan Litig.*, No. C10-2553, 2011 WL 2886407, at *4 (N.D. Cal. July 19, 2011) (same).

⁵⁴⁸ 812 F. Supp. 2d at 1050.

⁵⁴⁹ *Id.* at 1051 (citation omitted).

⁵⁵⁰ *Id.* (citation omitted).

⁵⁵¹ *Id.*; see also *Nelson*, 2011 WL 3651153, at *2 (describing *Broughton/Cruz* rule as a “blanket ban[]” on arbitration of injunctive relief claims and holding that *Concepcion* compels preemption of such a rule, notwithstanding “public policy arguments thought to be persuasive in California”) (citation omitted).

⁵⁵² 733 F.3d 928 (9th Cir. 2013).

⁵⁵³ The now overturned district court opinion is at *Ferguson v. Corinthian Colls.*, 823 F. Supp. 2d 1025 (C.D. Cal. 2011); see also *Lombardi v. DirecTV, Inc.*, 546 F. App’x 715, 716 (9th Cir. 2013) (reversing denial of arbitration following *Ferguson* and reasoning that the “‘effective vindication’ exception to the FAA does not extend to state statutes, including the UCL and the CLRA. [] That customers have to arbitrate their claims for injunctive relief against DirecTV whereas DirecTV is unlikely to seek injunctive relief from its customers does not make the arbitration agreement unconscionable.”).

held that “the *Broughton-Cruz* rule is preempted by the Federal Arbitration Act.”⁵⁵⁴ Interestingly, the opinion in *Ferguson* came after the Ninth Circuit vacated its prior opinion in *Kilgore v. Keybank, N.A.*⁵⁵⁵ that had roundly criticized *Broughton/Cruz* and, instead, issued a substantially narrower en banc opinion not taking a position on the viability of that rule, but compelling arbitration on the grounds that *Broughton* did not apply to the facts of *Kilgore*. The Ninth Circuit stated: “Defendants’ alleged statutory violations have, by Plaintiffs’ own admission, already ceased, where the class affected by the alleged practices is small, and . . . there is no real prospective benefit to the public at large from the relief sought.”⁵⁵⁶

4. Preemption and Valid Arbitration Clauses

The United States Supreme Court also enforced arbitration agreements in the UCL and CLRA contexts in *DirecTV, Inc. v. Imburgia*.⁵⁵⁷ In *Imburgia v. DirecTV, Inc.*,⁵⁵⁸ the California Court of Appeal held that a class action waiver included as part of an arbitration agreement in a consumer contract remained unenforceable under California law despite the holding in *Concepcion*. The United States Supreme Court reversed this decision and held that the FAA preempts the portions of California law the Court of Appeal relied on in deciding the arbitration agreement was unenforceable.⁵⁵⁹ Specifically, the Court found that the Court of Appeal erroneously concluded that the parties were free to refer to California law absent federal preemption because the contract was entered into prior to the decision in *Concepcion*.⁵⁶⁰ Thus, the Court found that the Court of Appeal’s interpretation of California law was also preempted, and therefore remanded the case with an order to enforce the arbitration provision.⁵⁶¹

California courts have also changed course, with numerous opinions now holding that the *Broughton/Cruz* rule is preempted by the FAA, in certain contexts. For example, *Sanchez v. Valencia Holding Co., LLC*,⁵⁶² involved alleged class claims against a car dealer arising from plaintiff’s purchase of a vehicle. The dealer moved to compel arbitration pursuant to an agreement contained in its form retail installment sales contract. The dealer raised the argument that *Broughton* and *Cruz* were “implicitly overruled” by *Concepcion*.⁵⁶³ The Court of Appeal did not address that argument, however, finding that *Concepcion* “is inapplicable where, as here, we are not addressing the enforceability of a class action waiver or a judicially imposed procedure that is inconsistent with the arbitration provision and the purposes” of the FAA.⁵⁶⁴ The court affirmed the denial of the motion to compel arbitration after concluding that the provision itself was unconscionable because, among other things, the requirement that the buyer seek injunctive relief from the arbitrator, while exempting

⁵⁵⁴ *Ferguson*, 733 F.3d at 930.

⁵⁵⁵ 673 F.3d 947, 957 (9th Cir. 2012).

⁵⁵⁶ *Kilgore v. KeyBank, N.A.*, 718 F.3d 1052, 1061 (9th Cir. 2013).

⁵⁵⁷ 577 U.S. 47, 47-48 (2015).

⁵⁵⁸ 225 Cal. App. 4th 338 (2014).

⁵⁵⁹ *DirecTV, Inc.*, 577 U.S. at 47-48.

⁵⁶⁰ *Id.*

⁵⁶¹ *Id.*

⁵⁶² 61 Cal. 4th 899 (2015).

⁵⁶³ *Sanchez v. Valencia Holding Co., LLC*, 135 Cal. Rptr. 3d 19, 36n.5 (Ct. App. 2011), review granted and opinion superseded, 272 P.3d 976 (Cal. 2012), and rev’d, 61 Cal. 4th 899 (2015).

⁵⁶⁴ 135 Cal. Rptr. 3d at 29.

from arbitration repossession claims by the car dealer, “is inconsistent with the CLRA.”⁵⁶⁵ Relying heavily on the reasoning in *Broughton*, the court also found an “inherent conflict” between arbitration and the purpose of injunctive relief under the CLRA— “to remedy a public wrong.”⁵⁶⁶ Ultimately, even if the FAA did preempt *Broughton’s* holding, “the court’s observations about arbitral injunctions under the CLRA remain accurate.”⁵⁶⁷

The California Supreme Court reversed and remanded.⁵⁶⁸ Like the Court of Appeal, the Supreme Court declined to address the continued viability of *Broughton* and *Cruz*.⁵⁶⁹ Unlike the Court of Appeal, however, the Supreme Court held that the arbitration provision was not unconscionable.⁵⁷⁰ The Court noted that the “potentially far-reaching nature of an injunctive relief remedy ... is sufficiently apparent here to justify the extra protection” of arbitral review of injunctive relief.⁵⁷¹ Further, the Court noted that because arbitration is intended as an alternative to litigation, and the validity of an arbitration provision could only be viewed in the context of rights and remedies otherwise available to the parties, the fact that a *self-help remedy*, such as repossession, fell outside of the arbitration provision did not render the provision unconscionable.⁵⁷² Thus, the arbitration provision was not unconscionable.⁵⁷³ Perhaps most importantly, the California Supreme Court addressed the enforceability of the class action waiver contained in the parties’ arbitration provision.⁵⁷⁴ The Court held that in light of *Concepcion*, the FAA preempts the trial court’s invalidation of the class waiver on unconscionability grounds.⁵⁷⁵ Specifically, the Court held that “imposition of class action arbitration ... interferes ‘with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.’”⁵⁷⁶

As discussed above, in one of the rare post-*Concepcion* cases limiting arbitration, the California Supreme Court’s decision in *McGill* held that claims for public injunctive relief under the UCL and CLRA cannot be compelled to arbitration on an individual basis if the arbitration agreement purports to limit the arbitrator’s ability to order relief on behalf of the general public.⁵⁷⁷ The Court originally granted review to address the continued “vitality” of the *Broughton/Cruz* rule; however, the Court deferred deciding the issue and instead addressed whether the arbitration agreement “is valid and enforceable insofar as it purports to waive McGill’s right to seek public injunctive relief *in any forum*.”⁵⁷⁸ After re-affirming its prior broad construction of public injunctive relief (as set out in *Broughton* and *Cruz*) as any relief having the “primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public,” the Court held that enforcing the waiver of the right to seek public injunctive relief under the UCL and CLRA in any forum “would seriously

⁵⁶⁵ *Id.* at 39.

⁵⁶⁶ *Id.* at 39-40.

⁵⁶⁷ *Id.* at 40 n.6.

⁵⁶⁸ *Sanchez v. Valencia Holding Co., LLC*, 61 Cal. 4th 899, 924 (2015).

⁵⁶⁹ *Id.* at 917.

⁵⁷⁰ *Id.* at 913-22.

⁵⁷¹ *Id.* at 917.

⁵⁷² *Id.* at 922.

⁵⁷³ *Id.* at 913-22.

⁵⁷⁴ *Id.* at 923.

⁵⁷⁵ *Id.* at 923-24.e.

⁵⁷⁶ *Id.* at 923 (quoting *Concepcion*, 563 U.S. at 344).

⁵⁷⁷ *McGill*, 2 Cal. 5th at 956.

⁵⁷⁸ *Id.* (emphasis in original).

compromise the public purposes the statutes were intended to serve” and thus the agreement was “invalid and unenforceable under California law.”⁵⁷⁹

The *McGill* court also rejected Citibank’s primary argument that the arbitration agreement remained enforceable under the FAA because the FAA requires enforcement of arbitration agreements as written and that a court could not avoid the FAA by “applying state-law rules of contract interpretation to limit the scope of an agreement to arbitrate.”⁵⁸⁰ The Court disagreed, holding that the FAA did not save the arbitration agreement because the contract defense at issue—“a law established for a public reason cannot be contravened by a private agreement” (as set forth in California Civil Code section 3513)—is a generally applicable contract defense and, therefore, is within the “savings clause” of section 2 of the FAA.⁵⁸¹ The Court further reasoned that, under the United States Supreme Court’s decision in *American Express Co. v. Italian Colors Restaurant*,⁵⁸² an arbitration provision will not be enforced if it precludes the plaintiff from seeking federal statutory remedies, and that this exception also applies to *state* statutory remedies because limiting the exception to federal statutes would supposedly be “inconsistent” with other United States Supreme Court authority.⁵⁸³ Finally, the California Supreme Court concluded that its decision also did not run afoul of FAA preemption (or *Concepcion*) because invalidating a waiver of public injunctive relief would “not . . . interfere with any of arbitration’s attributes.”⁵⁸⁴

In *Blair v. Rent-A-Center, Inc.*,⁵⁸⁵ the Ninth Circuit held that the FAA does not preempt the *McGill* rule because the rule is a “generally applicable contract defense” that does not impermissibly interfere with arbitration.⁵⁸⁶ The Ninth Circuit further stated, in a footnote and without any analysis, that the injunctive relief sought by plaintiff in *Blair* was “public” injunctive relief as defined in *McGill* because plaintiff sought “to enjoin future violations of California’s consumer protection statutes, [which was] relief oriented to and for the benefit of the general public.”⁵⁸⁷ The defendant in *Blair* settled the case after the Ninth Circuit ruling, and did not seek certiorari in the Supreme Court. The defendants in two unpublished Ninth Circuit cases issued at the same time as *Blair*, and reaching the same legal result, did seek certiorari, but the Supreme Court denied review.⁵⁸⁸ Accordingly, it is unlikely that the Supreme Court will overturn the *McGill* rule on the grounds that it is preempted by the FAA.

Defendants in a number of cases have argued—with some success—that *McGill* is factually distinguishable and does not preclude enforcement of an arbitration agreement where the relief

⁵⁷⁹ *Id.* at 961.

⁵⁸⁰ *Id.*

⁵⁸¹ *Id.* at 961-62.

⁵⁸² 570 U.S. 228 (2013) (holding that the FAA does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff’s cost of individually arbitrating a federal statutory claim exceeds the potential recovery).

⁵⁸³ *McGill*, 2 Cal. 5th at 963-64 (citing *Preston v. Ferrer*, 552 U.S. 346, 359 (2008)).

⁵⁸⁴ *Id.* at 966.

⁵⁸⁵ 928 F.3d 819 (9th Cir. 2019).

⁵⁸⁶ *Id.* 928 F.3d at 827-29.

⁵⁸⁷ *Id.* at 831 n.3.

⁵⁸⁸ See *McArdle v. AT&T Mobility LLC*, 772 F. App’x 575 (9th Cir. 2019), cert. denied (2020); *Tillage v. Comcast Corp.*, 772 F. App’x 569 (9th Cir. 2019), cert. denied (2020). But see *Swanson v. H&R Block, Inc.*, 475 F. Supp. 3d 967, 977-979 (W.D. Mo. 2020) (declining to follow *Blair* and holding that the *McGill* rule is preempted by the FAA).

sought is not the type of “public” injunctive relief at issue in *McGill*, but rather “private” relief even when sought on behalf of a putative class. In an important decision, the California Court of Appeal endorsed this approach in *Clifford v. Quest Software, Inc.*⁵⁸⁹ In *Clifford*, plaintiff asserted various wage and hour claims against his employer, and defendant moved to compel arbitration.⁵⁹⁰ The trial court granted the motion except with respect to plaintiff’s UCL claim, which the trial court found to be inarbitrable under the California Supreme Court’s *Broughton/Cruz* rule.⁵⁹¹ On appeal, plaintiff contended that his UCL claim was not subject to arbitration because he sought “public” relief in the form of restitution and disgorgement for “other current and former employees, competitors, and the general public,” as well as an injunction against defendant’s allegedly unlawful labor practices.⁵⁹² The Court of Appeal rejected plaintiff’s argument, reasoning that restitution and disgorgement were not “injunctive” relief, and an injunction requiring defendant to comply with wage and hour laws was not “public” relief because such relief would primarily benefit plaintiff and individuals similarly situated to plaintiff rather than the general public.⁵⁹³

Nonetheless, courts have reached conflicting results depending on the facts of the particular case, with some courts broadly applying *McGill*,⁵⁹⁴ and others taking a more narrow approach.⁵⁹⁵

⁵⁸⁹ 38 Cal. App. 5th 745 (2019).

⁵⁹⁰ *See id.* at 748.

⁵⁹¹ *Id.* at 749.

⁵⁹² *Id.* at 754-55.

⁵⁹³ *See id.* (citing *McGill*, 2 Cal. 5th at 955); accord *Torrecillas v. Fitness Int’l, LLC*, 52 Cal. App. 5th 485, 500 (2020) (UCL claim based on non-payment of wages would benefit only the plaintiff and a small number of similarly situated employees, rather than “the public at large,” and thus does not qualify as a claim for public injunctive relief); *Capriole v. Uber Techs., Inc.*, 7 F.4th 854, 869-870 (9th Cir. 2021) (finding that injunctive relief request by rideshare drivers entitling them to protections under state wage laws did not qualify as public injunctive relief because the benefit of access to overtime and minimum wage laws would primarily benefit the plaintiffs and other rideshare drivers – thus the *McGill* rule would not control even if California law applied). *But see Maldonado v. Fast Auto Loans, Inc.*, 60 Cal. App. 5th 710, 713, 720-722 (2021) (lawsuit seeking to limit lender’s “exorbitant” interest rates in violation of California consumer protection laws benefited the public writ large, and provided only “incidental” benefit to plaintiff, and thus the arbitration provision was struck down under *McGill*), *review denied* (Apr. 28, 2021); *Lag Shot LLC v. Facebook, Inc.*, 545 F. Supp. 3d 770, 784-85 (N.D. Cal. 2021) (finding that a UCL claim brought on behalf of “all individuals and businesses to whom Facebook markets its platform for advertising, which includes both current and [prospective] direct advertisers, third-party marketing services, and marketing service clientele” sufficiently broad to classify the requested injunctive relief as “public”).

⁵⁹⁴ *See Eiess v. USAA Fed. Sav. Bank*, 404 F. Supp. 3d 1240, 1261 (N.D. Cal. 2019) (granting motion to compel arbitration to the extent plaintiff sought monetary relief or a determination of liability under the UCL and CLRA, but denying motion to the extent plaintiff sought public injunctive relief in the form of an order requiring defendant to amend its deposit agreement to better reflect its practice of charging multiple NSF fees); *Fernandez v. Bridgecrest Credit Co., LLC*, No. EDCV 19-877, 2019 WL 7842449, at *6 (C.D. Cal. Oct. 29, 2019), *rev’d and remanded*, No. 19-56378, 2022 WL 898593 (9th Cir. Mar. 28, 2022) (finding that plaintiff sought public injunctive relief based, in part, on the “unique relationship between consumers and car loan lenders”).

⁵⁹⁵ *See Ajzenman v. Off. of Comm’r of Baseball*, No. CV203643, 2020 WL 6037140, at *7-8 (C.D. Cal. Sept. 14, 2020) (UCL and CLRA claims predicated on loss of ability to use baseball tickets during the 2020 season due to coronavirus were pursued only on behalf of “a limited group of people,” and hence did not seek public injunctive relief); *Sponheim v. Citibank, N.A.*, No. SACV19264, 2019 WL 2498938, at *1, *4-5 (C.D. Cal. June 10, 2019) (holding that UCL claims seeking an “order on behalf of the general public enjoining [defendant] from continuing to misrepresent its [fee] policies in its

Johnson v. JP Morgan Chase Bank, N.A.,⁵⁹⁶ is instructive. In *Johnson*, the court concluded that plaintiffs' prayer for injunctive relief in a putative class action based on breach of contract did not constitute "public injunctive relief" under *McGill*. In rejecting plaintiffs' argument that their claims for public injunctive relief were inarbitrable under *McGill*, the district court analyzed the "entirety" of the relief requested, focused on the fact that plaintiffs' claims were all based on purported breaches of contract and observed that only former customers were included in the proposed classes.⁵⁹⁷ The court concluded that "the relief Plaintiffs seeks is not designed to prevent future harm to the public at large, but is primarily intended to redress prior injury to a specific group of putative plaintiffs who have checking accounts with [defendant] and have incurred overdraft and insufficient funds fees under a narrow set of circumstances."⁵⁹⁸

Other courts have distinguished *McGill* by concluding that the specific arbitration agreement at issue either does not purport to waive the right to public injunctive relief or requires the arbitrator, not the court, to decide the issue.⁵⁹⁹ *McGill* also has been held not to apply in cases where the parties'

publicly available documents and marketing materials" was arbitrable under *McGill* because plaintiff was "seek[ing] public injunctive relief as a mere incidental benefit to his primary aim of gaining compensation for injury for himself and others similarly situated"); *Colopy v. Uber Techs. Inc.*, No. 19-CV-06462, 2019 WL 6841218, at *2 (N.D. Cal. Dec. 16, 2019) (analyzing claims and determining plaintiff sought private, not public, injunctive relief under *McGill*); *Magana v. DoorDash, Inc.*, 343 F. Supp. 3d 891, 901 (N.D. Cal. 2018) ("[P]laintiff's argument makes clear that the injunctive relief he seeks would be entirely opposite of what *McGill* requires—any benefit to the public would be derivative of and ancillary to the benefit to [defendant's] employees. . . . Therefore, [plaintiff] does not assert a claim for public injunctive relief under state law." (emphasis in original)); *McGovern v. U.S. Bank N.A.*, 362 F. Supp. 3d 850 (S.D. Cal. 2019) (finding that any benefit to the general public would be only incidental because the general public had not and would not be subject to any of the allegedly improper fees that constituted plaintiff's injury); *Kim v. Tinder, Inc.*, No. CV 18-03093, 2018 WL 6694923, at *3 (C.D. Cal. July 12, 2018); *Croucier v. Credit One Bank, N.A.*, No. 18cv20, 2018 WL 2836889, at *4-5 (S.D. Cal. June 11, 2018); *Rappley v. Portfolio Recovery Assocs., LLC*, No. EDCV 17108, 2017 WL 3835259, at *6 (C.D. Cal. Aug. 24, 2017); *Wright v. Sirius XM Radio Inc.*, No. SACV1601688, 2017 WL 4676580, at *9 (C.D. Cal. June 1, 2017). *But see Mejia v. DACM Inc.*, 54 Cal. App. 5th 691, 702-704 (2020) (UCL and CLRA claims seeking to enjoin advertising of financing by one used motorcycle dealership were held to seek public injunctive relief, because the advertisements were distributed broadly, despite defendant's claim that the population of potential customers was small and localized; distinguishing *Clifford*).

⁵⁹⁶ *Johnson v. JP Morgan Chase Bank, N.A.*, No. EDCV 172477, 2018 WL 4726042 (C.D. Cal. Sept. 18, 2018).

⁵⁹⁷ *Id.* at *7.

⁵⁹⁸ *Id.* at *8.

⁵⁹⁹ *DiCarlo*, 988 F.3d at 1153 (holding that public injunctive relief is available in individual arbitration because arbitration by a single plaintiff "could theoretically result in an injunction that broadly affects others."); *Saperstein v. Thomas P. Gohagan & Co.*, 476 F. Supp. 3d 965, 977-978 (N.D. Cal. 2020) (granting motion to compel arbitration because *McGill* does not apply when the arbitration agreement does not expressly forbid the arbitrator from awarding public injunctive relief); *see also Marselian v. Wells Fargo & Co.*, 514 F. Supp.3d 1166, 1176-77 (N.D. Cal. Jan. 20, 2021) (granting motion to compel arbitration where the original arbitration agreement required the parties to arbitrate "disputes" about the "meaning, application, and enforcement" of the agreement, including issues surrounding plaintiff's ability to seek public injunctive relief and the applicability of the *McGill* rule).

contract selected non-California law,⁶⁰⁰ or where plaintiffs allege only federal antitrust law violations.⁶⁰¹

Where the plaintiff asserts a public injunctive relief claim, which is not arbitrable per *McGill*, but also asserts claims that are arbitrable because the arbitration agreement is otherwise valid (and does not purport to bar the plaintiff from obtaining public injunctive relief), then the court may stay the claim for public injunctive relief pending full arbitration of the other claims, and may enforce a class action waiver as to those other claims.⁶⁰²

A 2020 decision by the Ninth Circuit may make it harder as a practical matter for defendants to defend against claims for public injunctive relief. In *Stover v. Experian Holdings, Inc.*,⁶⁰³ the Ninth Circuit held that although the plaintiff had the right to litigate claims for public injunctive relief, she did not sustain a legally sufficient injury-in-fact to permit her to pursue such a claim in federal court.⁶⁰⁴ Thus, her pleading a public injunctive relief claim did not permit her to avoid arbitration of her other claims. Although this outcome was, as a technical matter, a victory for the defendant (the order compelling arbitration was affirmed), the reasoning appeared to leave open the possibility that the case could be refiled in state court, seeking only public injunctive relief, because state courts apply looser standing requirements than do federal courts. Such a case probably could not be removed to federal court, and the defendant might then have to defend the public injunctive relief case in a less favorable forum. Plaintiffs facing removal of public injunctive relief cases to federal court can be expected to rely on *Stover* when seeking remand.⁶⁰⁵

Additionally, in *Sonic-Calabasas A, Inc. v. Moreno*,⁶⁰⁶ the California Supreme Court restated its view that the FAA, as construed in *Concepcion*, does not preempt generally applicable state-law rules regarding whether a contract is unconscionable. Notwithstanding its opinion in *Ferguson v. Corinthian Colleges*, the Ninth Circuit appeared to agree, based on its rulings in a matter involving the enforceability of an arbitration clause in an employment agreement.⁶⁰⁷

⁶⁰⁰ *Anderson v. Amazon.com, Inc.*, 478 F. Supp. 3d 683, 696 (M.D. Tenn. 2020).

⁶⁰¹ *California Crane Sch., Inc. v. Google LLC*, No. 21-CV-10001-HSG, 2022 WL 3348425, at *4 (N.D. Cal. Aug. 12, 2022) (*McGill* did not apply in consumer arbitration action against technology company since consumers only pled federal antitrust claims).

⁶⁰² *Nguyen v. Tesla, Inc.*, No. 19-cv-01422, 2020 WL 2114937, at *6 (C.D. Cal. Apr. 6, 2020).

⁶⁰³ 978 F. 3d 1082 (9th Cir. 2020).

⁶⁰⁴ *Id.*; see also *McGee v. S-L Snacks Nat'l*, 982 F.3d 700, 710 (9th Cir. 2020).

⁶⁰⁵ Some federal courts already were remanding UCL public injunctive relief claims on this basis even before the Ninth Circuit decided *Stover*. *E.g.*, *Rogers v. Lyft, Inc.*, 452 F. Supp. 3d 904, 919-20 (N.D. Cal. 2020), *aff'd*, No. 20-15689, 2022 WL 474166 (9th Cir. Feb. 16, 2022).

⁶⁰⁶ 57 Cal. 4th 1109, 1169-70 (2013); see also *Del Rosario Martinez v. Ready Pac Produce, Inc.*, No. B279225, 2018 WL 6064948, at *5 (Cal. Ct. App. Nov. 20, 2018) (unpublished) (reversing trial court's finding that employer's arbitration agreement was unconscionable, finding that it was not substantively unconscionable because class action waivers in arbitration agreements are generally enforceable); *Vera v. US Bankcard Servs., Inc.*, No. B283187, 2018 WL 618586, *8-12 (Cal. Ct. App. Jan. 30, 2018) (affirming trial court's finding that arbitration provision in company's terms of service that required all controversies to be arbitrated in Georgia according to Georgia law was both procedurally and substantively unconscionable).

⁶⁰⁷ See *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 927 (9th Cir. 2013) ("Federal law favoring arbitration is not a license to tilt the arbitration process in favor of the party with more bargaining power. California law regarding unconscionable contracts, as applied in this case, is not unfavorable

Courts have also recently addressed FAA preemption in the context of California’s Private Attorneys General Act (PAGA). Prior to the enactment of PAGA, California’s Labor and Workplace Development Agency (LWDA) had the sole authority to bring enforcement actions for civil penalties against employers for violations of California’s Labor Code.⁶⁰⁸ Since the California Legislature believed the LWDA did not have sufficient resources to ensure employers’ compliance with California’s Labor Codes, the California Legislature enacted PAGA.⁶⁰⁹ PAGA authorizes any “aggrieved employee” to act as a private attorney general in initiating an action against a former employer “on behalf of himself or herself and other current or former employees” to seek civil penalties under the California Labor Code.⁶¹⁰ In *Viking River Cruises, Inc. v. Moriana*,⁶¹¹ a former employee filed a PAGA action against Viking River Cruises on behalf of other Viking employees as well as in an individual capacity as an aggrieved employee herself.⁶¹² Viking River Cruises sought to compel arbitration of the former employee’s individual PAGA claim pursuant to the severability clause in her arbitration agreement.⁶¹³ The trial court denied the motion.⁶¹⁴ The California Court of Appeal affirmed, reasoning that prior California precedent held that PAGA actions “cannot be split into arbitrable individual claims and nonarbitrable representative claims” and thus no PAGA action could be compelled into arbitration at all.⁶¹⁵ In other words, because the representative portion of the claim is inarbitrable, and because PAGA forbade claim splitting, the entire PAGA claim was inarbitrable.⁶¹⁶

The United States Supreme Court rejected this analysis on FAA preemption grounds in *Viking River Cruises, Inc. v. Moriana*.⁶¹⁷ According to the Supreme Court, because the individual portion of the PAGA claim was clearly arbitrable under FAA jurisprudence, PAGA’s prohibition of claim splitting meant that the representative portion of the claim could not be pursued in any forum.⁶¹⁸ California cannot adopt a claim-splitting rule that undermines the FAA’s clear direction that arbitrable claims be arbitrated, even if the consequence is the plaintiff’s loss of ability to pursue representative claims.⁶¹⁹

towards arbitration, but instead reflects a generally applicable policy against abuses of bargaining power. The FAA does not preempt its invalidation of Ralphs’ arbitration policy.”).

⁶⁰⁸ *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1913, *reh’g denied*, 143 S. Ct. 60 (2022).

⁶⁰⁹ *Id.* at 1913-14.

⁶¹⁰ *Id.* (internal quotes omitted) (quoting Cal. Lab. Code Ann. § 2699(a)).

⁶¹¹ *Id.* at 124.

⁶¹² *Id.* at 1911.

⁶¹³ *Moriana v. Viking River Cruises, Inc.*, No. B297327, 2020 WL 5584508, at *2 (Cal. Ct. App. Sept. 18, 2020), *rev’d and remanded*, 142 S. Ct. 1906 (2022).

⁶¹⁴ *Id.* at *1-2.

⁶¹⁵ *Id.* (citing *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), and *Correia v. NB Baker Elec., Inc.*, 32 Cal. App. 5th 602, 624-25 (2019)). *Iskanian* and *Correia* likely are no longer good law (absent legislative amendment to PAGA) by reason of *Viking River Cruises, Inc. v. Moriana*, ___ U.S. ___, 142 S. Ct. 1906, 213 L. Ed. 2d 179 (2022).

⁶¹⁶ *Id.* (citing *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), and *Correia v. NB Baker Elec., Inc.*, 32 Cal. App. 5th 602, 624-25 (2019)). *Iskanian* and *Correia* likely are no longer good law (absent legislative amendment to PAGA) by reason of *Viking River Cruises, Inc. v. Moriana*, ___ U.S. ___, 142 S. Ct. 1906, 213 L. Ed. 2d 179 (2022).

⁶¹⁷ 142 S. Ct. 1906 at 1911.

⁶¹⁸ *Id.* at 1924-25.

⁶¹⁹ *Id.* at 1924.

The Court further reasoned that PAGA “provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate [statutory] proceeding.”⁶²⁰ Therefore, the plaintiff lacked statutory standing to pursue the representative PAGA claim.⁶²¹ In a concurring opinion, Justice Sotomayor stated that if the California Legislature amended PAGA to permit claim splitting, then the representative portion of the claim could be pursued in court and would not be preempted by the FAA.⁶²²

Since *Viking River*, the United States District Court for the Northern District of California determined that *Viking River*’s holding does not extend to CLRA and UCL claims.⁶²³ In *McBurnie v. Acceptance Now, LLC*, consumers brought an action on behalf of themselves and a putative class alleging CLRA and UCL violations against a rent-to-own business for excessive fees.⁶²⁴ The district court reasoned that the dilemma involved in *Viking River* concerning PAGA claims is not present or related to CLRA claims involving *McGill*.⁶²⁵ Moreover, *Viking River* did not abrogate *Blair*, and confirmed *Blair* still remains controlling law.⁶²⁶ Other courts similarly follow *McBurnie* in concluding that *Viking River* does not undermine *McGill*.⁶²⁷

5. State Courts and Federal Courts Begin Diverging Significantly When It Comes to Defining “Public Injunctive Relief”

In *DiCarlo v. MoneyLion, Inc.*, the Ninth Circuit considered whether an agreement providing for individual arbitration precluded public injunctive relief in arbitration.⁶²⁸ The agreement explicitly authorized the arbitrator to award injunctive relief, however, it limited relief to what was “available in an individual lawsuit.”⁶²⁹ Plaintiff sought to avoid arbitration and invoked the *McGill* rule.⁶³⁰ However, in this instance, the court found *McGill* inapplicable. Rather, the Ninth Circuit held that public injunctive relief was still available in arbitration, because a remedy such as public injunctive relief, which can potentially protect many people could still be granted through a claim brought by one person, and thus did not violate the *McGill* rule.⁶³¹ Ultimately, the court found that a claim by a single plaintiff “could theoretically result in an injunction that broadly affects others.”⁶³² Thus, parties

⁶²⁰ *Id.* at 1925.

⁶²¹ *Id.* at 1925.

⁶²² *Id.* at 1925-26.

⁶²³ *McBurnie v. Acceptance Now, LLC*, No. 3:21-CV-01429-JD, 2022 WL 17342195, at *4-5 (N.D. Cal. Nov. 30, 2022).

⁶²⁴ *Id.* at *1.

⁶²⁵ *Id.* at *4.

⁶²⁶ *Id.* at *4-5.

⁶²⁷ *MacClelland v. Cellco P’ship*, No. 21-CV-08592-EMC, 2022 WL 2390997, at *9 (N.D. Cal. July 1, 2022) (“nothing in *Viking River* overrules or undermining’s *McGill*’s core holding that an arbitration agreement cannot prohibit a party from seeking public injunctive relief in any forum.”); No. A164053, 2023 WL 29132, at *1 (Cal. Ct. App. Jan. 4, 2023) (finding that *Viking River* does not preempt *McGill*).

⁶²⁸ 988 F.3d 1148, 1153 (9th Cir. 2021).

⁶²⁹ *Id.*

⁶³⁰ *Id.*

⁶³¹ *Id.* at 1153-54.

⁶³² *Id.* at 1154.

seeking to avoid arbitration via public injunctive relief will likely find such escape routes foreclosed moving forward.⁶³³

What constitutes “public injunctive relief” has come to mean significantly different things in California state court as opposed to the federal courts. At the state court level, there were two significant state court decisions defining “public injunctive relief.” The first, *Mejia v. DACM Inc.*,⁶³⁴ concerned the allegedly improper notices associated with the financing of a motorcycle. The plaintiff, who had bought a motorcycle from the defendant, sought an injunction requesting the defendant cease selling motor vehicles until it could provide proper disclosures as to financing.⁶³⁵ In assessing the defendant’s motion to compel arbitration, the appellate court agreed that the plaintiff had properly sought “public injunctive relief” and that the defendant’s arbitration clause ran afoul of the *McGill* rule.⁶³⁶

Similarly, in *Maldonado v. Fast Auto Loans, Inc.*,⁶³⁷ a customer brought an action against a lender alleging that the lender charged unconscionable interest rates on auto title loans. Plaintiff sought an injunction to enjoin defendant from continuing to charge excessive interest rates.⁶³⁸ Based in part on *Mejia*, the appellate court held that plaintiff’s request constituted a request for “public injunctive relief” under *McGill* and denied enforcement of defendant’s arbitration agreement.⁶³⁹

In contrast, the Ninth Circuit has narrowed the definition of “public injunctive relief,” and has done so while explicitly rejecting the California appellate court analysis. In *Hodges v. Comcast Cable Commc’ns, LLC*, the plaintiff brought a putative class action challenging a cable provider’s privacy and data collection practices.⁶⁴⁰ However, the Ninth Circuit held that “when the injunctive relief being sought is for the benefit of a discrete class of persons, or would require consideration of the private rights and obligations of individual non-parties,” it is not “public” injunctive relief within the meaning of *McGill*.⁶⁴¹ Accordingly, the plaintiff could be required to arbitrate the claims. The Ninth Circuit also

⁶³³ See also *Andre v. U.S. Bank*, No. CV204854CBMPJWX, 2021 WL 3598737, at *5 (C.D. Cal. May 20, 2021) (upholding an arbitration clause where the court determined no Article III standing existed, and thus the *McGill* rule did not bar arbitration of Plaintiff’s claims); *Brown v. Madison Reed, Inc.*, No. 21-CV-01233-WHO, 2021 WL 3861457, at *9 (N.D. Cal. Aug. 30, 2021) (plaintiff could not escape arbitration clause where severance of non-violative provisions within an arbitration clause that ran afoul of the *McGill* rule “was warranted . . . because ‘California courts prefer to sever provisions rather than hold an entire agreement unenforceable[,]’ and the provision at issue was not integral to the remaining terms and . . . severable . . . in light of the strong public policy favoring arbitration.”); accord *Ramirez v. Elec. Arts Inc.*, No. 20-CV-05672-BLF, 2021 WL 843184, at *4 (N.D. Cal. Mar. 5, 2021) (validity of arbitration agreement that potentially barred public injunctive relief was threshold arbitrability issue that should be decided by arbitrator). The California Supreme Court granted review in 2020 in a case that would have examined whether courts should attempt to save arbitration agreements by severing unconscionable provisions (rather than striking down the arbitration agreement entirely), but dismissed review in 2021 when the parties settled. See *Conyer v. Hula Media Servs., LLC*, 272 Cal. Rptr. 3d 812 (Cal. 2020), *dismissed*, 276 Cal. Rptr. 3d 208 (Cal. 2021).

⁶³⁴ 54 Cal. App. 5th 691 (2020), *review denied* (Dec. 23, 2020).

⁶³⁵ *Id.*

⁶³⁶ *Id.* at 703-704.

⁶³⁷ 60 Cal. App. 5th 710 (2021), *cert. denied*, 142 S. Ct. 708 (2021).

⁶³⁸ *Id.* at 720-721.

⁶³⁹ *Id.*

⁶⁴⁰ 21 F.4th 535 (9th Cir. 2021).

⁶⁴¹ *Id.* at 543.

specifically rejected the analysis offered by *Mejia* and *Maldonado* – which had previously found that injunctive relief aimed at “discrete” but large populations of customers could be considered public injunctive relief.⁶⁴² Thus, there presently is a significant split in authority of the definition of public injunctive relief, with the Ninth Circuit calling the California Court of Appeal’s approach to be “such a patent misreading of California law that we do not think it would be followed by the California Supreme Court.”⁶⁴³

The Ninth Circuit affirmed its post-*Hodges* narrowing of the *McGill* rule in *Cottrell v. AT&T Inc.*, where it once again held that a plaintiff seeking injunctive relief on behalf of similarly situated customers of a cell phone company was only seeking “private” injunctive relief.⁶⁴⁴

Despite the Ninth Circuit’s narrow interpretation of *McGill*, the federal Northern District of California recently held in *MacClelland v. Cellco Partnership*⁶⁴⁵ that customers seeking to enjoin a cellphone company from falsely advertising the pricing of certain wireless service plans was a “paradigmatic example” of “public” injunctive relief. The district court reasoned that because the cellphone company’s advertisements are disseminated to the public at large, enjoining future misleading statements would deliver a public benefit. Accordingly, they would constitute public injunctive relief under *McGill* and claims for such relief could not be compelled to arbitration, the court concluded.⁶⁴⁶

B. Pleading Issues

Although demurrers and motions to dismiss rarely dispose of UCL claims,⁶⁴⁷ they sometimes are sustained based on legal defenses or obvious defects in the pleading.⁶⁴⁸ With respect to specificity

⁶⁴² *Id.* at 544-45.

⁶⁴³ *Id.* at 544.

⁶⁴⁴ *Cottrell v. AT&T Inc.*, No. 20-16162, 2021 WL 4963246, at *2 (9th Cir. Oct. 26, 2021).

⁶⁴⁵ Case No. 21-cv-08592-EMC, 2022 WL 2390997, at *9-10 (N.D. Cal. Jul. 1, 2022), *appeal docketed*, No. 22-16020 (9th Cir. Jul. 13, 2022).

⁶⁴⁶ *Id.*

⁶⁴⁷ *See, e.g., Alborzi v. Univ. of S. Cal.*, 55 Cal. App. 5th 155, 184 (2020) (“Particularized fact pleading is not required for a UCL claim.”); *Motors, Inc.*, 102 Cal. App. 3d at 741-42 (stating that a UCL complaint usually should be construed to withstand demurrer); *Mullins*, 178 F. Supp. 3d at 891-92 (denying defendant’s motion to dismiss because the issue of whether a reasonable consumer is likely to be deceived is best reserved for the finder of facts); *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (“California courts, however, have recognized that whether a business practice is deceptive will usually be a question of fact not appropriate for decision on demurrer.”). *But see Berryman*, 152 Cal. App. 4th at 1556 (“We do not take the statement in *Motors, Inc.* to mean that a special rule applies to demurrers in cases under the UCL. It simply reflects the general rule that questions of fact—such as whether the utility of the defendant’s conduct outweighed the gravity of the harm—cannot be decided on demurrer. If, however, as here, the facts as pled would not state a claim even if they were true, the demurrer may be sustained.”).

⁶⁴⁸ *See, e.g., Cryoport Sys. v. CNA Ins. Cos.*, 149 Cal. App. 4th 627, 632-34 (2007) (affirming order sustaining demurrer based on lack of standing under Proposition 64); *Young Am. Corp. v. Super. Ct.*, No. CO49337, 2007 WL 2687587, at *2 (Cal. Ct. App. Sept. 14, 2007) (unpublished) (reversing denial of motion for judgment on the pleadings where plaintiff failed to allege facts establishing standing); *McCann*, 129 Cal. App. 4th at 1398 (demurrer upheld on appeal in action where plaintiff unsuccessfully alleged that money transmitter had duty to disclose wholesale exchange rate in addition to retail exchange rate); *Gregory*, 104 Cal. App. 4th at 857 (affirming trial court’s sustaining of demurrer where plaintiff’s underlying theory of “unfairness” was not sufficient as a matter of law);

of pleading, no special standard applies in state court under the UCL. For example, in *Quelimane Co., Inc. v. Stewart Title Guaranty Co.*,⁶⁴⁹ the California Supreme Court refused to hold UCL plaintiffs to the pleading standard for fraud. The Court noted that fraud is the only exception to the well-settled rule that pleading specific facts is not required to state a cause of action and, therefore, a plaintiff pleading a UCL cause of action should not be held to a higher standard. In federal court, however, Federal Rule of Civil Procedure 9(b) requires UCL claims “grounded in fraud” to be pleaded with particularity.⁶⁵⁰

Pursuant to California Code of Civil Procedure section 446(a), certain government complaints must be verified “unless an admission of the truth of the complaint might subject the party to a criminal prosecution.”⁶⁵¹ If the complaint is verified, the answer must be verified,⁶⁵² and the “denial of the allegations shall be made positively or according to the information and belief of the defendant[.]”⁶⁵³ Thus, where a complaint is not verified, a general denial is sufficient. In *Paul Blanco’s Good Car Co. Auto Group v. Superior Court of Alameda County*,⁶⁵⁴ a government complaint was filed against several corporations for unfair practices in violation of the UCL. The defendants filed a general denial, which the plaintiff argued was not allowed in response to a government complaint.⁶⁵⁵ The court concluded that the corporate defendants’ filing of an unverified response was allowed under the plain language of section 446(a), as well as by judicial precedent, statutory history and

Searle v. Wyndham Int’l, Inc., 102 Cal. App. 4th 1327, 1330 (2002) (affirming trial court’s sustaining of demurrer where hotel’s practice of paying “service charge” to its employees was neither “unfair” nor “fraudulent”); *Shvarts*, 81 Cal. App. 4th at 1158-60 (sustaining demurrer to UCL complaint without leave to amend on grounds that per-gallon fuel price could not be “unfair,” given Civil Code section allowing for charge, and could not have been likely to deceive, given full disclosure of charge on rental car contract); *Lazar*, 69 Cal. App. 4th at 1505-06 (sustaining defendant’s demurrer to UCL claim because the challenged business practice was approved and authorized by the Legislature); *Wolfe*, 46 Cal. App. 4th at 568 (sustaining demurrer to a UCL claim challenging insurance companies’ alleged “unfair” practice of failing to offer earthquake insurance because the issue was a matter within the legislative domain).

⁶⁴⁹ 19 Cal. 4th at 46-47 (holding that plaintiffs stated a cause of action for an “unlawful” business practice under the UCL by pleading facts establishing a violation of the Cartwright Act).

⁶⁵⁰ See *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102-05 (9th Cir. 2003) (Rule 9(b) applies to state claims “grounded in fraud” even if elements of fraud need not be established to state a claim; allegations of fraudulent conduct need to be pleaded with particularity); *Aerojet Rocketdyne, Inc. v. Global Aerospace, Inc.*, No. 17-cv-01515, 2020 WL 3893395, at *8 (E.D. Cal. July 10, 2020) (defendant’s motion for judgment on the pleadings granted as to UCL unfairness claim due to plaintiff’s failure to plead with specificity as required by Rule 9(b)); *In re Samsung Galaxy Smartphone Litig.*, No. 16-cv-6391, 2020 WL 7664461, at *6, *12 (N.D. Cal. Dec. 24, 2020) (pleading not sufficient where allegation was only that the purchased product had features similar to a different product that had been recalled as defective, where the purchased product had not failed or otherwise showed signs of the same defect); *Hobby Lobby Stores*, 2017 WL 4358146 (dismissing deceptive pricing claims brought under the UCL and CLRA for failure to plead with sufficient particularity how advertisements could be misleading to a reasonable consumer); *Grimm v. APN Inc.*, No. 17-cv-00356, 2017 WL 6398148, at *6 (C.D. Cal. Aug. 31, 2017) (when any prong or aspect of a UCL or CLRA claim is grounded in fraud, the entire claim must be pled with particularity, including the other prongs or aspects). *But see Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007, 1019-20 (9th Cir. 2020) (Rule 9(b) standard can be relaxed when defendant has greater knowledge of underlying facts than plaintiff).

⁶⁵¹ Cal. Civ. Proc. Code § 446(a).

⁶⁵² *Id.*

⁶⁵³ *Id.* at § 431.30(d).

⁶⁵⁴ 56 Cal. App. 5th 86 (2020).

⁶⁵⁵ *Id.* at 182.

public policy, because the complaint gave rise to potential criminal liability whereby in verifying their answers, the corporations, as a party, might subject themselves to criminal prosecution.⁶⁵⁶

C. Special “Anti-SLAPP” Motions

California’s “anti-SLAPP” statute⁶⁵⁷ authorizes the filing of a special motion to strike against causes of action arising out of conduct “in furtherance of the person’s right of petition or free speech under the United States or California Constitution.”⁶⁵⁸ In the consumer protection context, however, California Code of Civil Procedure section 425.17 places critical restrictions on the use of the “anti-SLAPP” statute. Section 425.17 prohibits anti-SLAPP motions in actions: (1) brought “solely” in the public interest (subject to certain conditions);⁶⁵⁹ or (2) brought against a defendant engaged in the business of selling or leasing goods and services (subject to certain conditions).⁶⁶⁰

⁶⁵⁶ *Id.* at 179-180.

⁶⁵⁷ Cal. Civ. Proc. Code § 425.16. A “SLAPP” suit (“Strategic Lawsuits Against Public Participation”) is a “meritless suit filed primarily to chill the defendant’s exercise of First Amendment rights.” *Wilcox v. Super. Ct.*, 27 Cal. App. 4th 809, 815 n.2 (1994), *overruled in part by Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 68 n.5 (2002); *see also Kashian v. Harriman*, 98 Cal. App. 4th 892, 925-26 (2002) (granting “anti-SLAPP” motion to strike in suit where businessman sued attorney for violation of the UCL and defamation); *DuPont Merck Pharm. Co. v. Super. Ct.*, 78 Cal. App. 4th 562, 568-69 (2000) (vacating trial court’s denial of anti-SLAPP motion to strike where defendant pharmaceutical company’s activities arose out of free speech rights and remanding for further determination); *Twentieth Century Fox Film Corp. v. Netflix, Inc.*, No. B280607, 2018 WL 3198560, at *6 (Cal. Ct. App. June 29, 2018) (unpublished) (affirming trial court’s denial of anti-SLAPP motion, holding the enforcement of allegedly unfair fixed-term employment contracts did not constitute protected prelitigation petitioning activity).

⁶⁵⁸ Cal. Civ. Proc. Code § 425.16(b)(1). To succeed on such a motion, a defendant must first establish that the action “alleges acts in furtherance of defendant’s right of petition or free speech in connection with a public issue.” *DuPont Merck Pharm. Co.*, 78 Cal. App. 4th at 565; *see also Gallimore v. State Farm Fire & Cas. Ins. Co.*, 102 Cal. App. 4th 1388, 1395-1400 (2002) (holding that anti-SLAPP statute did not apply in UCL action challenging insurer’s claims handling practices because action was not premised entirely on insurer’s reports to the California Department of Insurance). Once this first test is satisfied, the burden shifts to plaintiff to establish that there is “a probability” of prevailing on the claim. *See JaM Cellars, Inc. v. Vintage Wine Estates, Inc.*, No. 17-01133, 2017 WL 2535864, at *4 (N.D. Cal. June 12, 2017) (observing that, in a trademark suit, plaintiff met its minimal burden of proof by alleging defendant’s continued use of its trademark); *Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190 (2017) (granting an anti-SLAPP motion to strike a UCL claim arising from an alleged violation of the right of publicity because plaintiff failed to identify defendant’s commercial use); *Yu v. Signet Bank/Va.*, 103 Cal. App. 4th 298, 317 (2002) (affirming trial court’s denial of anti-SLAPP motion to strike and stating that “a plaintiff’s burden as to the second prong of the anti-SLAPP test is akin to that of a party opposing a motion for summary judgment”), *disapproved on other grounds by Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism*, 4 Cal. 5th 637 (2018); *Muddy Waters, LLC v. Superior Ct.*, 62 Cal. App. 5th 905 (2021) (reversing order denying special motion to strike on anti-SLAPP grounds because plaintiff aluminum products distributor could not establish any actual injury, and thus could not establish standing under the UCL), *reh’g denied* (Apr. 23, 2021), *review denied* (July 21, 2021).

⁶⁵⁹ Cal. Civ. Proc. Code § 425.17(b).

⁶⁶⁰ Cal. Civ. Proc. Code § 425.17(c). *But see Muddy Waters*, 62 Cal. App. 5th at 919. The trial court denied defendant’s special motion to strike based on the commercial speech exception of § 425.17(c). Exercising discretion to review denial of an anti-SLAPP motion, the Court of Appeal found that the trial court erred in its conclusion that the reports in question were not protected speech for the purposes of § 425.16(e).

In *Citizens of Humanity, LLC v. Hass*,⁶⁶¹ a defendant who had prevailed in litigation under the UCL and CLRA filed a malicious prosecution lawsuit against the UCL/CLRA plaintiff. The malicious prosecution claim survived an anti-SLAPP motion based on evidence that the UCL/CLRA plaintiff was “a ‘shill’ who, with her brother-in-law [one of her attorneys in the case], participates in a cottage-industry of contrived ‘Made in the U.S.A.’ labeling lawsuits” as part of “a scheme to misuse the court system for their own financial gain.”⁶⁶² In *Serova v. Sony Music Entertainment*,⁶⁶³ the California Supreme Court further restricted the circumstances when an anti-SLAPP motion can be filed in a UCL or CLRA case. A claim that a false statement was made to induce the sale of a product – even an artistic product like music – cannot be challenged via an anti-SLAPP motion unless the statement itself has independent non-commercial artistic or expressive value under the First Amendment.⁶⁶⁴

D. Class Certification of UCL Claims

A major battleground in UCL litigation is class certification. For example, in *Pulaski & Middleman, LLC v. Google, Inc.*,⁶⁶⁵ the Ninth Circuit reaffirmed that “damage calculations alone [with respect to restitution] cannot defeat certification” of a UCL class claim.⁶⁶⁶ This case concerned a class of advertisers who claimed that Google’s pricing scheme for advertisements was deceptive because it charged them premium prices for their ads to appear on certain websites, when in reality they did not appear on the websites. The trial court denied certification on grounds that individual issues would predominate in calculating the amount of restitution owed to each class member based on their particular ad and expected target site.⁶⁶⁷ In reversing the trial court’s decision, the court held that a reasonable consumer standard could be used in calculating the damages amount, and Google’s own pricing scheme supplied a reliable method for calculating the amount received over the benefit derived; thus, individual issues did not predominate.⁶⁶⁸

Likewise, in *Safeway, Inc. v. Superior Court of Los Angeles County*,⁶⁶⁹ the court held that damage calculations would not defeat class certification. There, employees asserted a putative class action against its employer alleging violation of the UCL in failure to pay premium wages for missed meal breaks.⁶⁷⁰ The court found restitution was capable of being determined class-wide, based on the

⁶⁶¹ 46 Cal. App. 5th 589 (2020).

⁶⁶² *Id.* at 600 (internal quotation marks omitted).

⁶⁶³ 13 Cal. 5th 859, 879-880 (2022).

⁶⁶⁴ *See id.* at 882 (“Serova is not suing because [the album] *Michael’s* artistic expression has spilled over into promotional advertising, but because she believes Sony falsely advertised the lead vocalist.”).

⁶⁶⁵ 802 F.3d 979 (9th Cir. 2015).

⁶⁶⁶ *Id.* at 986 (quoting *Yokoyama v. Midland Nat’l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010)).

⁶⁶⁷ *Id.* at 982.

⁶⁶⁸ Moreover, the court identified a temporal element for the restitution calculation to be applied on remand, noting that the correct measure is “the difference between what was paid and what a reasonable consumer would have paid *at the time of purchase* without the fraudulent or omitted information. *Id.* at 989 (emphasis added). *But cf. Anderson v. Ford Motor Co.*, 74 Cal. App. 5th 946, 290 Cal. Rptr. 3d 89 (2022) (finder of fact may determine that reasonable value at time of purchase was zero).

⁶⁶⁹ 238 Cal. App. 4th 1138, 1148 (2015).

⁶⁷⁰ *Id.* at 1144.

parties' proposed "market value approach," whereby the court could examine time punch cards for violations of the meal break requirement and pay accordingly.⁶⁷¹

Courts have similarly rejected challenges to class certification based on arguments that individualized issues exist as to whether or not the putative class members each have suffered an injury-in-fact sufficient to confer Article III standing. As discussed above, the California Supreme Court's majority opinion in *Tobacco II* concluded that only the named plaintiff must have Article III standing to bring a UCL claim on behalf of a class.⁶⁷² Following that decision, other courts have refused to deny certification on the sole basis that a putative class may contain members that have failed to suffer an injury in fact.⁶⁷³

On the other hand, California courts have recognized that "*Tobacco II* does not allow a consumer who was never exposed to an alleged false or misleading advertising . . . campaign to recover damages under California's UCL."⁶⁷⁴ Specifically, courts have vacated class certification orders where a showing of reliance cannot be inferred by a defendant's advertising scheme.⁶⁷⁵ In this regard, the attack on class certification is related less to Article III standing, than it is to standing necessary to assert a claim under the UCL. In *Mazza*, for instance, the court reasoned that plaintiffs sufficiently established "injury in fact" to confer Article III standing by alleging they paid more for a product because of defendant's deceptive conduct.⁶⁷⁶ Nevertheless, the court vacated the class certification order, holding a presumption of reliance under the UCL could not be maintained because Honda's advertising campaign was "very limited."⁶⁷⁷

Similarly, in *Cohen*, the district court affirmed the trial court's denial of class certification based on its finding that individual issues predominated for purposes of the UCL because the class would include subscribers who never saw the misleading advertisements or representations before deciding to make a purchase.⁶⁷⁸ Even in *Stearns*, the court referenced in dicta that its holding was not

⁶⁷¹ *Id.* at 1163.

⁶⁷² *Tobacco II*, 46 Cal. 4th at 314-16.

⁶⁷³ *See, e.g., Stearns*, 655 F.3d at 1020-21 (reversing district court's denial of certification on the basis that class certification under Rule 23 does not require proof that all unnamed class members have standing under Article III).

⁶⁷⁴ *Mazza*, 666 F.3d at 596 (internal quotation marks omitted) (citing *Pfizer Inc. v. Super. Ct.*, 182 Cal. App. 4th 622, 632 (2010); *Davis-Miller v. Auto. Club of S. Cal.*, 201 Cal. App. 4th 106, 124-50 (2011)).

⁶⁷⁵ *Mazza*, 666 F.3d at 594-95 (vacating certification order because each class member could not be presumed to have relied on the alleged misleading advertising given the limited scale of the defendant's advertising campaign, thus individual issues predominated); *see also Brazil v. Dole Packaged Foods, LLC*, 660 F. App'x 531 (9th Cir. 2016) (affirming trial court's decertification of class because plaintiff failed to provide proof that damages were common to the class); *In re NJOY Consumer Class Action Litig.*, 120 F. Supp. 3d at 1109 (denying class certification on the basis of misrepresentations in advertising because the defendant's electronic cigarette advertising campaign was not "sufficiently substantial or pervasive to give rise to a presumption that all class members were exposed to the advertisements").

⁶⁷⁶ *Mazza*, 666 F.3d at 595.

⁶⁷⁷ *Id.* at 596 ("Honda's product brochures and TV commercials fall short of the 'extensive and long-term [fraudulent] advertising campaign' at issue in *Tobacco II* A presumption of reliance does not arise when class members 'were exposed to quite disparate information from various representatives of the defendant.'").

⁶⁷⁸ *Cohen*, 178 Cal. App. 4th at 980 ("[W]e do not understand the UCL to authorize an award for injunctive relief and/or restitution on behalf of a consumer who was never exposed in any way to an allegedly wrongful business practice."); *see also Downey v. Public Storage, Inc.*, 44 Cal. App. 5th

indicative of finding “predominance... in every California UCL case... [Rather,] it might well be that there [is] no cohesion among the members because they were exposed to quite disparate information from various representatives of the defendant.”⁶⁷⁹

In cases involving proposed nationwide classes, some federal courts have been reluctant to certify California UCL subclasses on the grounds that managing the case with a large number of state-specific subclasses poses insurmountable administrative challenges.⁶⁸⁰

However, in *Noel v. Thrifty Payless, Inc.*,⁶⁸¹ the California Supreme Court held that class certification may not be denied simply because, at the time of class certification, the plaintiff failed to present evidence of how class members might be identified and given individualized notice of the proceedings. So long as the class definition is framed objectively, in a manner that makes “the ultimate identification of class members possible” the proposed class satisfies the ascertainability requirement.⁶⁸²

E. Summary Judgment Under the UCL

“Although the issue of whether a practice is deceptive or unfair is generally a question for the trier of fact,” UCL claims can be disposed of by summary judgment when the facts are undisputed.⁶⁸³ As one California court reasoned, the issue of “whether a practice is unfair under the [UCL]” is a question of law because “[i]nterpretation and application of statutes is a question of law, subject to [the courts’] independent review.”⁶⁸⁴ Nonetheless, because UCL legal issues can be fact-intensive, motions for summary judgment succeed most often when focused on legal defenses or the absence of any factual support for a claim.⁶⁸⁵

1103, 1117 (2020) (affirming denial of class certification based on evidence that many members of the proposed claim never were exposed to the allegedly deceptive advertisement).

⁶⁷⁹ *Stearns*, 655 F.3d at 1020.

⁶⁸⁰ *E.g.*, *In re EpiPen*, 2020 WL 1873989, at *57.

⁶⁸¹ 7 Cal. 5th 955 (2019).

⁶⁸² *Id.* at 980; *see also Owino v. CoreCivic, Inc.* 2022 WL 1815825 at *8-9 (2022) (finding that a consumer class in a UCL suit did not need to be narrowed at the class certification stage even if there are statute of limitations issues that will later require a narrowing of the class).

⁶⁸³ *Puentes v. Wells Fargo Home Mortg., Inc.*, 160 Cal. App. 4th 638, 645 n.5 (2008) (citing *Linear Tech. Corp.*, 152 Cal. App. 4th at 134-35 n.9) (lender’s practice of calculating interest on a monthly rather than daily basis was not “unfair” as a matter of law); *see also Stathakos*, 2017 WL 1957063 (granting in part defendant’s motion for summary judgment because plaintiffs could not show actual reliance on allegedly deceptive price tags on garments at defendant’s store, which plaintiffs purchased after filing the complaint, since plaintiff knew, after filing their complaint, of the alleged misleading practices); *Motors, Inc.*, 102 Cal. App. 3d at 740 (stating that, if “the utility of the conduct clearly justifies the practice, no more than a simple motion for summary judgment would be called for”).

⁶⁸⁴ *People v. Duz-Mor Diagnostic Lab., Inc.*, 68 Cal. App. 4th 654, 660 (1998) (affirming the trial court’s judgment that a laboratory did not violate the UCL by offering discounts to physicians’ private-pay patients or utilizing an “unbundled” billing system, but finding that commissions paid for marketing services were unlawful and, thus, in violation of the UCL).

⁶⁸⁵ *See, e.g., Williams v. Wells Fargo Bank, N.A.*, No. 13-cv-03387, 2017 WL 1374693 (N.D. Cal. Apr. 14, 2017) (granting defendant’s motion for summary judgment of a UCL claim brought using the same facts underlying a breach of contract claim); *Paduano v. Am. Honda Motor Co. Inc.*, 169 Cal. App. 4th 1453, 1470-74 (2009) (finding that plaintiff had no UCL claim based on miles-per-gallon claims made consistent with preemptive federal law, but denying summary judgment on that claim because

F. No Right to Jury Trial

There is no right to a jury trial in UCL cases.⁶⁸⁶ In *Nationwide Biweekly Administration, Inc. v. Superior Court*,⁶⁸⁷ the California Supreme Court rejected arguments that a defendant had a right to a jury in cases where the government sought civil penalties. Because the UCL creates an equitable, rather than legal claim, trial of the claim is to the court, not a jury.⁶⁸⁸ However, when a federal lawsuit involves both a legal claim tried to a jury and a UCL claim, the jury's express or implied factual determinations must be accepted by the judge as true when resolving the UCL claim.⁶⁸⁹

G. Notice to the Attorney General's Office of Appellate Matters

California Business & Professions Code section 17209 requires that, where a proceeding involving the UCL is commenced in California's appellate courts, the party commencing the proceeding shall provide notice to the California Attorney General and to the district attorney of the county in which the action originally was filed.⁶⁹⁰

plaintiff also challenged other advertising statements outside the scope of federal preemption); *Glob. Ventu Holding B.V. v. ZeetoGroup, LLC*, No. 19CV1018 DMS (DEB), 2021 WL 2012271, at *5 (S.D. Cal. May 20, 2021) (denying plaintiff's motion for summary judgment on UCL claim because a genuine issue of material fact existed as to the "fraudulent" prong and whether a reasonable consumer was likely to be deceived, and because it was unalleged that the parties were competitors, it could not meet relevant pleading standards as to the "unfair" prong of the UCL); *Guzman v. Polaris Indus Inc.*, No. 819CV01543FLAKESX, 2021 WL 2021454, at *6, *10-*11 (C.D. Cal. May 12, 2021) (granting defendant's motion for summary judgment as to plaintiffs who could not prove reliance and denying injunctive relief as to plaintiffs who could not show that they were likely to be wronged again in a similar way). *But see Roley v. Google LLC*, No. 18-CV-07537-BLF, 2021 WL 1091917, at *8 (N.D. Cal. Mar. 22, 2021) (finding justifiable reliance prong of UCL a question of fact, and thus summary judgment improper).

⁶⁸⁶ See, e.g., *Hodge v. Super. Ct.*, 145 Cal. App. 4th 278, 284-85 (2006) (claim for violation of the UCL is equitable in nature; thus, no right to a jury trial exists).

⁶⁸⁷ 9 Cal. 5th 279.

⁶⁸⁸ *Id.* at 331-33. However, the California Supreme Court only examined whether a right to jury trial existed under the California Constitution. The defendant in *Nationwide Biweekly* did not properly preserve the question whether the Seventh Amendment to the Federal Constitution gave a defendant in a civil penalty case a right to insist on a jury trial. No. A150264, 2020 WL 3969328 (Cal. Ct. App. July 14, 2020) (unpublished).

⁶⁸⁹ *Planned Parenthood*, 2020 WL 2065700, at *10.

⁶⁹⁰ Section 17209 provides:

If a violation of [the UCL] is alleged or the application or construction of [the UCL] is in issue in any proceeding in the Supreme Court of California, a state court of appeal, or the appellate division of a superior court, each person filing any brief or petition with the court in that proceeding shall serve, within three days of filing with the court, a copy of that brief or petition on the Attorney General, directed to the attention of the Consumer Law Section at a service address designated on the Attorney General's official Web site for service of papers under this section or, if no service address is designated, at the Attorney General's office in San Francisco, California, and on the district attorney of the county in which the lower court action or proceeding was originally filed. Upon the Attorney General's or district attorney's request, each person who has filed any other document, including all or a portion of the appellate record, with the court in addition to a brief or petition shall provide a copy of that document without charge to the Attorney General or the district attorney within five days of the request. The time for service may be extended by the Chief

H. Removal of UCL Actions

Federal court is an attractive forum for many UCL defendants, especially in class actions. Federal courts generally are more willing to dispose of weak UCL claims at the pleading or pre-trial stages, and often are more receptive to preemption arguments.⁶⁹¹ As discussed below, the Class Action Fairness Act of 2005 (CAFA) allows many UCL class actions to be removed to federal court.⁶⁹² In non-class cases, traditional removal analysis based on diversity will apply because UCL plaintiffs now must possess standing. Removal on federal question grounds in a non-class case remains difficult, however, even where federal law forms the basis of an “unlawful” claim.⁶⁹³

1. Removal Based on CAFA

CAFA applies to many multistate class actions filed on or after the date of enactment, February 18, 2005. Previously, a federal court would have diversity jurisdiction over a class action only if there was: (a) “complete diversity” of citizenship between named plaintiffs and defendants; and (b) satisfaction of the amount-in-controversy requirement by all named plaintiffs, i.e., claims for each in excess of \$75,000.⁶⁹⁴ Thus, by naming one plaintiff from the same state as the defendant, or one defendant from the forum state, the alleged class could avoid removal. The supposed class also could avoid removal by alleging that each plaintiff’s claims did not exceed \$75,000 in total, even if the aggregated amount in controversy of all plaintiffs’ claims totaled in the millions of dollars. CAFA has greatly expanded the ability to remove cases to federal court.

Justice or presiding justice or judge for good cause shown. No judgment or relief, temporary or permanent, shall be granted or opinion issued until proof of service of the brief or petition on the Attorney General and district attorney is filed with the court.

See also Soldate v. Fid. Nat’l Fin., Inc., 62 Cal. App. 4th 1069, 1076 (1998) (stating that “[f]ailure to comply with section 17209 will preclude appellate relief in the appropriate case”); *Californians for Population Stabilization*, 58 Cal. App. 4th at 274, 284 (determining that section 17209 “is not jurisdictional” in nature).

⁶⁹¹ *See, e.g., Herman v. Salomon Smith Barney, Inc.*, 266 F. Supp. 2d 1208, 1210-13 (S.D. Cal. 2003) (dismissing UCL action where plaintiff had no standing to assert claim in federal court and refusing to remand); *Feitelberg v. Merrill Lynch & Co. Inc.*, 234 F. Supp. 2d 1043, 1053 (N.D. Cal. 2002) (dismissing UCL action based on securities transactions), *aff’d*, 353 F.3d 765 (9th Cir. 2003).

⁶⁹² Pub. L. 109-2, § 1(a), 119 Stat. 4 (Feb. 18, 2005), codified in scattered sections of 28 U.S.C.

⁶⁹³ *See, e.g., Perez v. Nidek Co. Ltd.*, 657 F. Supp. 2d 1156, 1161 (S.D. Cal. 2009), *aff’d*, 711 F.3d 1109 (9th Cir. 2013) (“[F]ederal question jurisdiction is not created by the fact that Plaintiffs’ state law claims under the CLRA and UCL hinge upon alleged violations of the [federal] FDCA and its regulations.”); *Klussman v. Cross-Country Bank*, No. C-01-4228, 2002 WL 1000184, at *2-6 (N.D. Cal. May 15, 2002) (removal held improper where plaintiff’s UCL claim was based on violation of FCRA because the alleged FCRA violation was not a necessary element of UCL claim - plaintiff could assert a UCL claim without the FCRA violation); *Hope Med. Enters., Inc. v. Fagron Compounding Servs., LLC*, No. 219CV07748CASPLAX, 2021 WL 753566 (C.D. Cal. Jan. 25, 2021) (finding no preemption where plaintiff brought claims that were only “parallel” to a federal statute).

⁶⁹⁴ *See, e.g., Gibson v. Chrysler Corp.*, 261 F.3d 927, 938 (9th Cir. 2001). The rule regarding individual amounts in controversy was also altered, without regard to the passage of CAFA in *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) (holding that supplemental jurisdiction can be asserted over claims that do not exceed \$75,000 so long as one plaintiff satisfies the amount in controversy requirement).

Under CAFA, individual class plaintiffs' claims must, in the aggregate, exceed \$5 million.⁶⁹⁵ Moreover, only minimal diversity between plaintiffs and defendants need be established.⁶⁹⁶ Depending on the circumstances, CAFA may confer jurisdiction on a federal court where "any member of a class of plaintiffs is a citizen of a [s]tate different from any defendant."⁶⁹⁷ Whether a federal court ultimately exercises jurisdiction, however, is determined according to a further set of rules. Essentially, jurisdiction is either mandatory, discretionary or precluded.

Jurisdiction is mandatory if there are 100 or more members in the class, one-third or fewer of those class members are citizens of the forum and none of the exceptions in CAFA apply (for example, securities fraud and derivative lawsuits are not governed by CAFA).⁶⁹⁸ Given this, most nationwide, non-securities fraud, non-derivative class actions will proceed in federal court.

Jurisdiction is discretionary if more than one-third, but fewer than two-thirds, of the class members are citizens of the forum state and the "primary" defendants also are citizens of the forum state.⁶⁹⁹ In that event, the court must consider: (a) whether the claims asserted involve matters of national or interstate interest; (b) whether the claims asserted will be governed by the laws of the state where the action originally was filed or the laws of other states; (c) whether the class action has been pled to avoid federal jurisdiction; (d) whether the forum state has a distinct nexus with the class, the defendants or the alleged harm; (e) whether the number of class members who are citizens of the forum state is substantially larger than the number from any other state; and (f) whether any class action asserting similar claims has been filed in the prior three years.⁷⁰⁰

A federal court must decline jurisdiction if: (a) more than two-thirds of the class members are citizens of the forum state; and (b) either (i) all of the primary defendants are citizens of the forum state⁷⁰¹ or (ii) at least one defendant from whom significant relief is sought is a resident of the forum state and (1) the defendant's conduct forms a significant basis of the claims, (2) the principal alleged injuries resulting from the conduct of all defendants occurred in the forum state and (3) no similar class action has been filed against any of the defendants in the prior three years.⁷⁰²

⁶⁹⁵ 28 U.S.C. § 1332(d)(2), (6).

⁶⁹⁶ Moreover, whereas previously unincorporated associations were considered citizens of every state in which their constituents were citizens, under CAFA, unincorporated associations are considered citizens only of (1) the state where they have their principal place of business and (2) the state in which they are organized. 28 U.S.C. § 1332(d)(10).

⁶⁹⁷ 28 U.S.C. § 1332(d)(2)(A). In a similar manner, CAFA applies where minimal diversity of citizenship exists because a plaintiff or defendant is a foreign state or a citizen of a foreign state. 28 U.S.C. § 1332(d)(2)(B), (C).

⁶⁹⁸ 28 U.S.C. § 1332(d)(2), (3), (4), (5), (9). Section 1332, subsection (d)(9), excludes class actions that "solely" involve claims under the Securities Act of 1933, the Securities Exchange Act of 1934 and claims involving corporate governance under state laws. Thus, to the extent that federal and related state securities claims may already be heard by federal courts, while derivative actions must be heard by state courts, CAFA effects no changes. Actions involving states and government officials also are excluded from the Act. 28 U.S.C. § 1332(d)(5)(A).

⁶⁹⁹ 28 U.S.C. § 1332(d)(3).

⁷⁰⁰ 28 U.S.C. § 1332(d)(3)(A)-(F).

⁷⁰¹ 28 U.S.C. § 1332(d)(4)(A). This sometimes is referred to as the "home state controversy" exception to CAFA jurisdiction.

⁷⁰² 28 U.S.C. § 1332(d)(4)(B). This sometimes is referred to as the "local controversy" exception to CAFA jurisdiction.

In conjunction with the changes in the federal courts' diversity jurisdiction, the procedures for removal also were relaxed. For instance, in an ordinary diversity action, a defendant seeking to remove an action to federal court cannot do so unless all defendants consent.⁷⁰³ CAFA eliminated this requirement, expressly providing that class actions may be "removed by any defendant without the consent of all defendants."⁷⁰⁴

This summary touches upon only the highlights of CAFA. CAFA is a complex statute that presents many open issues.

2. Removal Based on Federal Question

Notwithstanding that a plaintiff asserts a UCL claim based entirely on a question of federal law, a federal court probably will not allow removal because the federal law is merely an "element" of plaintiff's state law claim.⁷⁰⁵ Although one district court allowed removal where a UCL claim was predicated on questions of federal antitrust law,⁷⁰⁶ the decision seemingly is anomalous.⁷⁰⁷ In addition, where the action involves securities claims, removal may be appropriate.⁷⁰⁸ Generally, however, removal based on federal question jurisdiction is unsuccessful.

⁷⁰³ See, e.g., *United Comput. Sys., Inc. v. AT&T Corp.*, 298 F.3d 756, 762 (9th Cir. 2002).

⁷⁰⁴ 28 U.S.C. § 1453(b).

⁷⁰⁵ See, e.g., *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 817 (1986) (holding that, because federal question jurisdiction only lies when a plaintiff's claim "arises under" federal law, defendant could not remove case to federal court where plaintiff merely alleged violation of a federal statute as an element of a state cause of action and federal statute itself provided no private right of action); *Lippitt v. Raymond James Fin. Servs., Inc.*, 340 F.3d 1033, 1042-43 (9th Cir. 2003); *Jimenez v. Bank of Am. Home Loans Servicing LP*, No. CV 11-09464, 2012 WL 353777, at *2 (C.D. Cal. Feb 2, 2012) (stating that a claim will not present a substantial question of federal law merely because a federal question is an "ingredient" of the claim); *Klussman*, 2002 WL 1000184, at *2-6 (holding that FCRA violation was not a necessary element of plaintiff's UCL claim and that defense based on federal preemption was not sufficient to warrant removal); *Pickern v. Stanton's Rest. & Woodsman Room*, No. C 01-2112, 2002 WL 143817 (N.D. Cal. Jan. 29, 2002) (finding no federal court jurisdiction where violation of federal Americans with Disabilities Act was alleged as predicate law for violation of the UCL); *Mangini v. R.J. Reynolds Tobacco Co.*, 793 F. Supp. 925, 929 (N.D. Cal. 1992) (relying on *Merrell Dow*, 478 U.S. at 808, in holding that UCL action allegedly preempted by federal law did not "arise under" federal law so as to create an appropriate "federal question" for removal purposes). *But see Cal. ex rel. Lockyer v. Mirant Corp.*, No. C-02-1787, 2002 WL 1897669 (N.D. Cal. Aug. 6, 2002), *aff'd sub nom. California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831 (9th Cir. 2004), *opinion amended on denial of reh'g*, 387 F.3d 966 (9th Cir. 2004), and *aff'd sub nom. California ex rel. Lockyer v. Dynegy, Inc.*, 387 F.3d 966 (9th Cir. 2004) (denying motions to remand in numerous cases challenging power companies' post de-regulation conduct where plaintiff's UCL claim primarily was based on questions of federal law).

⁷⁰⁶ See *Nat'l Credit Reporting Ass'n v. Experian Info. Sols., Inc.*, No. C04-01661, 2004 WL 1888769, at *5 (N.D. Cal. July 21, 2004).

⁷⁰⁷ See, e.g., *California v. H&R Block, Inc.*, No. 19CV04933, 2020 WL 703692 (C.D. Cal. Feb. 11, 2020) (rejecting argument that federal question jurisdiction was created by need to examine contract between defendant and Internal Revenue Service to determine whether UCL violation occurred); *Cortazar v. Wells Fargo & Co.*, No. C 04-894, 2004 WL 1774219, at *4 (N.D. Cal. Aug. 9, 2004) (holding that UCL claim predicated on alleged violations of several federal laws could not be removed on federal question grounds).

⁷⁰⁸ See, e.g., *Merrill Lynch & Co.*, 234 F. Supp. 2d at 1048-49, 1053 (holding that UCL action based on securities transactions was removable under Securities Litigation Uniform Standards Act of 1998, 15

THE CONSUMERS LEGAL REMEDIES ACT

I. THE STRUCTURE OF THE CLRA

A. Purpose of the CLRA

“The CLRA was enacted in an attempt to alleviate social and economic problems stemming from deceptive business practices”⁷⁰⁹ As stated by the Court of Appeal, “the [CLRA] is a legislative embodiment of a desire to protect California consumers and furthers a strong public policy of this state.”⁷¹⁰ To achieve that end, the CLRA proscribes 24 specified business acts or practices. The Legislature intended that courts construe the CLRA liberally to “protect consumers against unfair and deceptive business practices and provide efficient and economical procedures to secure such protection.”⁷¹¹

B. Coverage of the CLRA

The CLRA provides “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.”⁷¹² The CLRA applies to both actions and material omissions by a defendant.⁷¹³ Although not expressly limited to California residents and

U.S.C. §§ 77p & 7 8bb(f) (“SLUSA”), which bars filing certain kinds of securities class actions in state court; the court held that, while SLUSA only applies to actions seeking “damages,” which are not available under the UCL, that term should be interpreted broadly to encompass claims for restitution and disgorgement under the UCL).

⁷⁰⁹ *Broughton*, 21 Cal. 4th at 1077.

⁷¹⁰ *America Online, Inc. v. Superior Court*, 90 Cal. App. 4th 1, 14-15 (2001).

⁷¹¹ Cal. Civ. Code § 1760. However, CLRA claims filed in federal courts are subject to more stringent federal procedural standards. *See Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1025 (N.D. Cal. 2012) (holding that, where conduct complained of is grounded in fraud, CLRA claims must satisfy Rule 9(b)’s heightened pleading standard) (citing *Vess*, 317 F.3d at 1103-06 (state law claims are subject to Rule 9(b)’s heightened pleading standards when grounded in fraud)).

⁷¹² Cal. Civ. Code §§ 1770(a), 1780(a); *Reveles v. Toyota by the Bay*, 57 Cal. App. 4th 1139, 1154 (1997), *disapproved on other grounds by Gavaldon v. DaimlerChrysler Corp.*, 32 Cal. 4th 1246 (2004); *Nagel v. Twin Labs, Inc.*, 109 Cal. App. 4th 39, 51 (2003) (“Under the CLRA, a defendant may be liable for deceptive practices in the sale of goods or services to consumers.”); *see also In re Apple In-App Purchase Litig.*, 855 F. Supp. 2d 1030, 1038 (N.D. Cal. 2012) (“Conduct that is ‘likely to mislead a reasonable consumer’ violates the CLRA.”).

⁷¹³ *See, e.g., Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1141-42 (9th Cir. 2012) (CLRA claims may be based on fraudulent omissions if the omissions are contrary to representations made by the defendant, or are omissions of fact that the defendant was obliged to disclose) (citing *Daugherty v. Am. Honda Motor Co., Inc.*, 144 Cal. App. 4th 824, 835 (2006)); *Rutledge*, 238 Cal. App. 4th at 1173 (“[I]n order to be deceived, members of the public must have had an expectation or an assumption about the materials used in the product.”) (internal quotations and citation omitted); *Romoff v. General Motors LLC*, 574 F. Supp. 3d 782, 789 (S.D. Cal. 2021) (dismissing CLRA claim concerning seller’s undisclosed profit in a so-called “destination charge,” on the grounds that the fact that the seller profited from the “destination charge” is not material to a reasonable consumer’s decision whether to purchase the goods), *aff’d*, No. 22-55170, 2023 WL 1097258 (9th Cir. Jan. 30, 2023). *But see Hodsdon*, 162 F. Supp. 3d at 1026 (“In light of *Wilson* and overwhelming authority, manufacturers are duty-bound to disclose only information about a product’s safety risks and product defects. The duty to disclose does not extend to situations . . . where information may persuade a consumer to make different purchasing decisions.”).

transactions, California courts have indicated that the CLRA does not apply to conduct that affects non-California residents and occurs entirely outside California.⁷¹⁴

1. Who Is a “Consumer”?

The CLRA defines a “consumer” as “an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes.”⁷¹⁵ Courts strictly enforce this provision and do not allow individuals who lease or purchase goods or services for business purposes to proceed under the CLRA.⁷¹⁶ Moreover, a “consumer” must have purchased the good or service, or have been assigned the purchaser’s rights. One who obtains mere possession of a good is insufficient.⁷¹⁷ Even plaintiffs pursuing CLRA claims solely for injunctive relief must satisfy traditional standing requirements to be considered a “consumer.”⁷¹⁸ Thus, a plaintiff’s failure to establish that he falls within the CLRA’s definition of a “consumer” generally defeats his ability to represent a class.⁷¹⁹

⁷¹⁴ See, e.g., *In re Toyota Motor Corp.*, 785 F. Supp. 2d at 917-18 (dismissing CLRA claims and holding that CLRA “cannot provide relief for non-California residents who cannot allege a sufficient connection to California.”).

⁷¹⁵ Cal. Civ. Code § 1761(d).

⁷¹⁶ See, e.g., *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003) (CLRA inapplicable to commercial or government contracts, or to contracts formed by nonprofit organizations and other non-commercial groups) (citing *Cal. Grocers Ass’n*, 22 Cal. App. 4th at 217); *Frezza v. Google Inc.*, No. 12-CV-00237, 2012 WL 5877587 (N.D. Cal. Nov. 20, 2012) (dismissing CLRA claim where plaintiff had enrolled in service for business purpose); *Zepeda v. PayPal, Inc.*, 777 F. Supp. 2d 1215, 1221 (N.D. Cal. 2011) (finding individuals who primarily used website to sell goods or services did not constitute “consumers” under the CLRA).

⁷¹⁷ See *Bristow v. Lycoming Engines*, No. CIV S-06-1947, 2007 WL 1752602, at *5 (E.D. Cal. June 15, 2007) (denying certification of CLRA subclass where title to plane with defective crankshaft was held by plaintiff’s corporation); *Schauer v. Mandarin Gems of Cal., Inc.*, 125 Cal. App. 4th 949, 960 (2005) (plaintiff lacked standing to assert CLRA claim because she did not acquire the good as a result of her own purchase—it was a gift—she was not a “consumer” under section 1761(d)); *Morris v. Farmers Ins. Exch.*, No. B188081, 2006 WL 3823522, at *6 (Cal. Ct. App. Dec. 28, 2006) (unpublished) (plaintiff lacked standing to assert CLRA claim because he could not allege the existence of a “transaction” between him and defendant under section 1761(e)); *Balsam v. Trancos, Inc.*, 203 Cal. App. 4th 1083, 1107 (2002) (rejecting plaintiff’s argument that he was a “consumer” under the CLRA by receiving unsolicited emails). *But see Von Grabe v. Sprint PCS*, 312 F. Supp. 2d 1285, 1302-03 (S.D. Cal. 2003) (where plaintiff alleged purchase through retail channels and communications with company’s customer service representatives, he possessed standing to sue as a “consumer” under the CLRA but not as a competitor of defendant under the Lanham Act).

⁷¹⁸ See *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 966 (S.D. Cal. 2012) (dismissing CLRA claim seeking injunctive relief for failure to properly allege standing); see also *In re Fluidmaster, Inc.*, 149 F. Supp. 3d at 958-59 (dismissing CLRA claim seeking prospective injunctive relief for lack of standing because the relief sought would not remedy the named plaintiff’s injury).

⁷¹⁹ See *Lazar v. Hertz Corp.*, 143 Cal. App. 3d 128, 142 (1983) (because plaintiff was not a “member of the consumer class,” he could not maintain a CLRA class action). *But see Schneider v. Vennard*, 183 Cal. App. 3d 1340, 1347 (1986) (“[W]hile class actions brought under section 382 are not governed exclusively by the procedures outlined in section 1781, these procedures may provide guidance in such actions.”).

2. Damages and Causation Are Required Elements

To state a cause of action for an alleged violation of the CLRA, section 1780(a) requires allegations of actual damages caused by the conduct at issue: “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[.]”⁷²⁰ “Relief under the CLRA is specifically limited to those who suffer damage, making causation a necessary element of proof.”⁷²¹ Moreover, the alleged violation of the CLRA must take place prior to the sale at issue in order to be the basis for a claim.⁷²²

In *Meyer v. Sprint Spectrum L.P.*,⁷²³ the California Supreme Court confirmed this rule and elaborated on what constitutes “damage” sufficient to state a claim under the CLRA. The Court of Appeal in *Meyer* affirmed a trial court ruling sustaining a demurrer to a complaint challenging arbitration and other provisions in a contract as illegal and/or unconscionable. The trial court reasoned that none of these provisions actually had been invoked against plaintiffs, so plaintiffs could not establish causation or damages under the CLRA, thus defeating the claim. On appeal to the California Supreme Court, plaintiffs principally argued that “the very presence of unconscionable terms within a consumer contract, in violation of section 1770, subdivision (a)(14) and (19),

⁷²⁰ Cal. Civ. Code § 1780(a) (emphasis added).

⁷²¹ *Wilens v. TD Waterhouse Grp., Inc.*, 120 Cal. App. 4th 746, 754 (2003); *accord True v. Am. Honda Motor Co.*, 520 F. Supp. 2d 1175, 1182 (C.D. Cal. 2007) (“With respect to Plaintiff’s CLRA claim for false advertising, California law clearly holds that causation, in the form of reliance, likewise is an essential element of such claims.”) (citing numerous cases); *Buckland*, 155 Cal. App. 4th at 811 (“[A]ctual reliance is an element of a CLRA claim sounding in fraud.”); *Mass. Mut. Life Ins. Co.*, 97 Cal. App. 4th at 1292 (“[T]his limitation on relief requires that plaintiffs in a CLRA action show not only that a defendant’s conduct was deceptive but that the deception caused them harm.”); *Cholakyan*, 796 F. Supp. 2d at 1228 (standing for plaintiff asserting misrepresentation claim under the CLRA requires, in addition to establishing actual injury as a result of defendant’s alleged conduct, that plaintiff relied on a material misrepresentation); *Perez v. Nidek Co., Ltd.*, 711 F.3d 1109, 1114 (9th Cir. 2013) (holding plaintiff did not state CLRA claim for injunctive relief because there was no ongoing conduct to enjoin and declining to reach preemption ground on which district court dismissed); *Janney v. Gen. Mills*, 944 F. Supp. 2d 806, 817-18 (N.D. Cal. 2013) (denying motion to dismiss CLRA (and UCL/FAL) claims on ground that plaintiffs sufficiently alleged misrepresentations regarding whether granola bars were “natural”); *Epstein v. JPMorgan Chase & Co.*, No. 13 Civ. 4744, 2014 WL 1133567 (S.D.N.Y. Mar. 21, 2014) (plaintiff who received refund of allegedly improperly charged interest prior to filing suit had not suffered actual injury and lacked standing to sue individually or on behalf of a putative class under the CLRA); *Brooks v. CarMax Auto Superstores Cal., LLC*, 246 Cal. App. 4th 973 (2016), *ordered not to be officially published* (Aug. 10, 2016) (plaintiff lacked standing to sue absent actual injury; mere violation of Cal. Veh. Code Section 11713.18 did not satisfy or dispense with the “actual injury” requirement under the CLRA and UCL); *Rojas-Lozano*, 159 F. Supp. 3d at 1114-15 (failing to allege damages because “Google’s profit is not Plaintiff’s damage”); *Luna v. Atrium Med. Corp.*, 561 F. Supp. 3d 62, 69-70 (D.N.H. 2021) (holding that a manufacturer’s duty to warn regarding the risk associated with a product, in the context of medical devices, runs to a patient’s treating physician under the “learned intermediary” rule, rather than directly to the patient).

⁷²² *Moore v. Apple, Inc.*, 73 F. Supp. 3d 1191, 1201 (N.D. Cal. 2014) (representations made after sale cannot be the basis of a CLRA claim); *see also Durkee v. Ford Motor Co.*, No. C 14-0617, 2014 WL 4352184, at *3 (N.D. Cal. Sept. 2, 2014) (“[A] CLRA claim cannot be based on events following a sales transaction.”); *Hensley-Maclean v. Safeway, Inc.*, No. CV 11-02130, 2014 WL 1364906, at *6 (N.D. Cal. Apr. 7, 2014) (“for purposes of the CLRA, the relevant representations and omissions are those during transactions leading up to a sale”).

⁷²³ 45 Cal. 4th 634 (2009).

constitutes a form of damage within the meaning of section 1780(a),” and thus, confers standing under the CLRA.⁷²⁴ The Court rejected this argument, affirming the trial court’s reasoning that plaintiffs could not establish damages without defendant actually enforcing the allegedly unconscionable provisions. The Court concluded that “in order to bring a CLRA action, not only must a consumer be exposed to an unlawful practice, but some kind of damage must result.”⁷²⁵ Notably, the Court held that the requirement that consumers must have suffered damage also extends to actions under the CLRA for injunctive relief.⁷²⁶

The Court, however, broadly interpreted the phrase “any damages,” concluding that it is not limited to pecuniary damages, but also can include transaction and opportunity costs, such as attorneys’ fees in connection with the challenged practice or loss of an opportunity to do business elsewhere.⁷²⁷ Accordingly, the Court found that California’s Legislature had “set a low but nonetheless palpable threshold of damage.”⁷²⁸ Thus, California courts have recognized that “damage” under the CLRA is not synonymous with “actual damages,” and may encompass “harms other than pecuniary damages.”⁷²⁹ The Ninth Circuit has similarly taken a broad view of “damages” under the CLRA.⁷³⁰

⁷²⁴ *Id.* at 641.

⁷²⁵ *Id.*

⁷²⁶ *Id.* at 646.

⁷²⁷ *Id.* at 642-44.

⁷²⁸ *Id.* at 646; *see also Polo v. Innoventions Intl, LLC*, 833 F.3d 1193, 1198 (9th Cir. 2016) (district court must remand to state court instead of dismissing the case because a California court could have found standing under CLRA for allegations that plaintiff would not have purchased defendant’s product that was marketed as diabetes treatment on the same terms had she known the true facts, despite the district court’s undisputed factual findings that plaintiff did not have diabetes and that plaintiff discontinued taking diabetes medication at least five months before purchasing defendant’s product); *see also Boone v. S & F Mgmt. Co., Inc.*, No. GO40426, 2009 WL 3049309, at *2 (Cal. Ct. App. Sept. 24, 2009) (unpublished) (explaining that, in order to bring a CLRA action, a consumer must be exposed to an improper practice, and some form of harm must result).

⁷²⁹ *Lengen v. Gen. Mills, Inc.*, 185 F. Supp. 3d 1213, 1221-22 (E.D. Cal. 2016) (rejecting defendant’s claim that it had already provided for damages sought by plaintiffs, even though it had provided for a full refund for all those persons affected by the contaminated Cheerios products, because plaintiffs sought more than a “mere refund”; they also sought “compensatory, exemplary, punitive and statutory penalties and damages”); *Doe 1 v. AOL, LLC*, 719 F. Supp. 2d 1102, 1111 (N.D. Cal. 2010) (quoting *Steroid Hormone Prod. Cases*, 181 Cal. App. 4th 145, 156 (2010)).

⁷³⁰ *See, e.g., Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 818-22 (9th Cir. 2019) (reversing denial of class certification in case alleging that defendant concealed known defects in vehicle clutch assemblies, approving plaintiff’s proposed “benefit of the bargain” damages, which sought to recover the difference in value between the non-defective vehicles promised by defendant and the defective vehicles that were actually delivered (i.e., essentially the cost to replace the defective part with a non-defective part), regardless of whether the faulty clutch caused any actual performance issues). *But see Rojas v. Bosch Solar Energy Corp.*, 443 F. Supp. 3d 1060, 1081-82 (N.D. Cal. 2020) (no standing to assert CLRA claim based on allegedly unfair terms in product warranty where manufacturer has not yet sought to enforce the allegedly unfair term).

3. What Constitutes the “Sale or Lease of Goods or Services”?

Based on the plain language of the statute, the Legislature arguably intended to limit the CLRA to traditional purchases of consumer goods and related services,⁷³¹ and legislative history supports this conclusion.⁷³² Nonetheless, given that the CLRA is to be construed “liberally,”⁷³³ plaintiffs argue that it applies in nearly every type of consumer transaction, except where expressly exempted from coverage. For example, in *Ladore v. Sony Computer Entertainment America, LLC*,⁷³⁴ the Northern District of California found that videogame software is a “good” as that term is defined in the CLRA. In so holding, the court emphasized that the plaintiff “did not simply buy or download (arguably) ‘intangible’ software, or otherwise play an online game” but instead “went to a brick-and-mortar store . . . where he paid for and received a tangible product,” specifically the “game disc.”⁷³⁵

Nevertheless, a growing body of case law now holds that certain consumer transactions, not expressly exempted from the CLRA, do not fall within the purview of the CLRA — i.e., are not “goods” or “services” as defined by the CLRA.⁷³⁶ Most notably, the California Supreme Court found in *Fairbanks v. Superior Court* that insurance is not a “good” or a “service” as defined by the CLRA.⁷³⁷ In

⁷³¹ See, e.g., Cal. Civ. Code § 1770(a) (“Transaction[s] intended to result or that result[] in the sale or lease of goods or services to any consumer”); Cal. Civ. Code § 1761(a) (“tangible chattels bought or leased for use primarily for personal, family, or household purposes”); Cal. Civ. Code § 1761(b) (“including services furnished in connection with the sale or repair of goods”). A “transaction” under the CLRA is defined as “an agreement between a consumer and another person, whether or not the agreement is a contract enforceable by action, and includes the making of, and the performance pursuant to, that agreement.” Cal. Civ. Code § 1761(e); see also *Nordberg v. Trilegiant Corp.*, 445 F. Supp. 2d 1082, 1095-97 (N.D. Cal. 2006) (rejecting defendant’s contention that, because defendant automatically enrolled plaintiffs in discount programs, plaintiffs did not “seek” the services of defendant and, therefore, were not “consumers” under the CLRA, but accepting argument that there was no “transaction”).

⁷³² See Assemb. J., Sept. 23, 1970, p. 8465-66 (in a Report Relative to Assemb. Bill No. 292, the Assembly Judiciary Committee Members detailed a non-exhaustive list of unfair business practices, which focused on purchases of goods and services, such as the sale of tires, perfume and automobiles).

⁷³³ See Cal. Civ. Code § 1760; *Shin v. BMW of N. Am.*, No. CV 09-00398, 2009 WL 2163509, at *3 (C.D. Cal. July 16, 2009) (on claim of omission of material fact under the CLRA, finding that “transaction” is broadly defined as an agreement between a consumer and any other person, whether or not the agreement is a contract enforceable by action, and includes the making of, and the performance pursuant to, that agreement).

⁷³⁴ 75 F. Supp. 3d 1065, 1073 (N.D. Cal. 2014).

⁷³⁵ *Id.*; see also *Haskins v. Symantec Corp.*, No. 13-cv-1834, 2013 WL 6234610, at *9 (N.D. Cal. Dec. 2, 2013) (software disc is a tangible good because “[a] consumer can purchase [it] in a store, pick it up in her hands, and carry it home.”), *aff’d*, 654 F. App’x. at 338.

⁷³⁶ See *Cornu v. Norton Cmty. Apartments, L.P.*, No. B207802, 2009 WL 1961013, at *6 (Cal. Ct. App. July 9, 2009) (unpublished) (concluding that apartment leases are not “goods” as defined by the CLRA because an apartment is real property, not a tangible chattel); *Maraziti v. Fid. Nat’l Title Co.*, No. E045812, 2009 WL 3067074, at *6-7 (Cal. Ct. App. Sept. 25, 2009) (unpublished) (defendant, a trustee in foreclosure, did not perform “services” apart from those necessary to accomplish the foreclosure; further, foreclosure proceedings are not “transactions” within the purview of the CLRA); *I.B. ex rel. Fife v. Facebook, Inc.*, 905 F. Supp. 2d 989, 1008 (N.D. Cal. 2012) (finding that plaintiff lacked standing because “Facebook Credits, ‘separate and apart from a specific purchase or lease of a good or service,’ are not covered by the CLRA”); *Holt v. Noble House Hotels & Resort, Ltd.*, 370 F. Supp. 3d 1158, 1166-67 (S.D. Cal. 2019) (finding, on an issue of first impression under California law, that restaurant menus were not “advertisements” under the CLRA).

⁷³⁷ 46 Cal. 4th 56, 61 (2009).

Fairbanks, plaintiffs alleged that Farmers Group, Inc. and Farmers New World Life Insurance Company deceptively marketed and administered their life insurance policies in violation of the CLRA.⁷³⁸ The Court found that life insurance is not a “tangible chattel,” and therefore, not a “good.”⁷³⁹ In holding that life insurance is not a “service” under the CLRA, the Court reasoned that 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.”⁷⁴⁰

The Court also concluded that the ancillary services that insurers provide, such as “services related to the maintenance, value, use, redemption, resale, or repayment of the intangible item,” do not bring the intangible chattel within the coverage of the CLRA.⁷⁴¹ The Court reasoned that doing so “would defeat the apparent legislative intent in limiting the definition of ‘goods’ to include only ‘tangible chattels.’”⁷⁴² Since *Fairbanks*, trial courts have applied its reasoning to other areas, such as apartment leases⁷⁴³ and mortgage loans.⁷⁴⁴

The Court of Appeal in *Berry v. American Express Publishing, Inc.*⁷⁴⁵ similarly relied on the CLRA’s legislative history in holding that the CLRA does not apply to the issuance of a credit card. When it enacted the CLRA, the Legislature deleted users of “money” and “credit” from a definition of

⁷³⁸ *Id.* at 59.

⁷³⁹ *Id.* at 61.

⁷⁴⁰ *Id.*; see also *Consumer Sols. REO, LLC v. Hillery*, 658 F. Supp. 2d 1002, 1016-17 (N.D. Cal. 2009) (discussing *Fairbanks* and emphasizing that loans are intangible goods and that ancillary services provided in the sale of intangible goods do not bring these goods within the coverage of the CLRA); *Barkan v. Health Net of Cal., Inc.*, No. CV 18-6691, 2019 WL 1771653, at *6 (C.D. Cal. Feb. 7, 2019) (granting defendant’s motion to dismiss CLRA claim because insurance contracts are not “goods” and “ancillary services that insurers provide” are not “services” under the CLRA).

⁷⁴¹ *Fairbanks*, 46 Cal. 4th at 65; see also *McKell*, 142 Cal. App. 4th at 1465, 1488 (sustaining demurrer to CLRA claim challenging mortgage lender’s alleged practice of charging borrowers fees for underwriting, tax services and wire transfers in excess of the lender’s actual costs on grounds that the CLRA did not apply because the transactions involved sales of real property, not goods or services); *Berryman*, 152 Cal. App. 4th at 1558 (sustaining demurrer to CLRA claim challenging fees charged for document and transfer fees on the ground that the “transaction does not involve the ‘sale or lease of goods or services to any consumer’ as contemplated by the CLRA”); *Sanders v. Choice Mfg. Co., Inc.*, No. 11-3725, 2011 WL 6002639, at *6 (N.D. Cal. Nov. 30, 2011) (“[A]n insurer’s 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” and therefore does not qualify as a good or a service under the CLRA.).

⁷⁴² *Fairbanks*, 46 Cal. 4th at 65.

⁷⁴³ *Cornu*, 2009 WL 1961013, at *6 (citing *Fairbanks* and concluding that apartment leases are not “goods,” as defined by the CLRA; an apartment is real property, not a tangible chattel).

⁷⁴⁴ *Alborzian*, 235 Cal. App. 4th at 40 (citing *Fairbanks* and concluding a mortgage loan is not a “good” or “service” as defined by the CLRA; a loan is not a “good” because it is not “tangible chattel,” nor is it a “service” because it is not “work, labor, or services . . . furnished in connection with the sale or repair of goods”); *Capital All. Grp.*, 2017 WL 5138316, at *7 (holding that advertising and marketing of loans are ancillary services outside the scope of the CLRA); *Becker v. Wells Fargo Bank, N.A., Inc.*, No. 10-cv-02799, 2011 WL 1103439, at *13 (E.D. Cal. Mar. 22, 2011) (holding that the CLRA did not encompass plaintiff’s claims arising from his attempted loan modification, on the grounds that “loans are intangible goods” and “ancillary services provided in the sale of intangible goods do not bring these goods within the coverage of the CLRA”).

⁷⁴⁵ 147 Cal. App. 4th 224, 233 (2007) (affirming order sustaining demurrer to CLRA claim seeking to enjoin enforcement of credit card arbitration provision).

the term “consumer” in an early draft of the bill.⁷⁴⁶ Based in part on this deletion, the *Berry* 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.”⁷⁴⁷ The California Supreme Court denied review in *Berry*, and several courts have followed it.⁷⁴⁸

The United States District Court for the Northern District of California similarly held that cryptocurrency is not a “good” under the CLRA.⁷⁴⁹ In *Suski v. Marden-Kane, Inc.*,⁷⁵⁰ plaintiff brought a class action alleging that Coinbase, a cryptocurrency exchange company, and its administrator Marden-Kane carried out a scheme to “cheat consumers” during a sweepstakes by allegedly misleading customers to believe that they must purchase cryptocurrency to enter the sweepstakes.⁷⁵¹ Defendants Coinbase and Marden-Kane moved to dismiss plaintiff’s CLRA claim.⁷⁵² The district court found for Defendant Coinbase and Marden-Kane and dismissed plaintiff’s CLRA claim, holding that plaintiff failed to state a claim under the CLRA because cryptocurrency is not a “good” under the CLRA.⁷⁵³ In holding so, the district court relied on *Fairbanks* in reasoning that, like other financial products, cryptocurrency is an intangible asset and therefore is not a “good” under the CLRA.⁷⁵⁴

⁷⁴⁶ *Id.* at 230 (“Early drafts of section 1761, subdivision (d), defined ‘Consumer’ as ‘an individual who seeks or acquires, by purchase or lease, any goods, services, *money*, or *credit* for personal, family or household purposes.’ (Assem. Bill No. 292 (1970 Reg. Sess.) as introduced Jan. 21, 1970, italics added.) But the Legislature removed the references to ‘money’ and ‘credit,’ before CLRA’s enactment, and they do not appear in the current version.”).

⁷⁴⁷ *Berry*, 147 Cal. App. 4th at 233.

⁷⁴⁸ *See, e.g., Lloyd v. Navy Fed. Credit Union*, No. 17-cv-1280, 2018 WL 1757609, at *19 (S.D. Cal. Apr. 12, 2018) (following *Berry* and holding that the CLRA does not apply to debit card or overdraft claims that are separate and apart from the sale or lease of goods or services); *O’Donovan v. CashCall, Inc.*, No. C 08-03174, 2009 WL 1833990, at *5 (N.D. Cal. June 24, 2009) (following *Berry* and dismissing CLRA claim challenging practice allowing defendant to make preauthorized electronic debits for loan payments from debtor’s bank account); *Ball v. FleetBoston Fin. Corp.*, 164 Cal. App. 4th 794, 798-99 (2008) (following *Berry* and affirming denial of leave to amend complaint to add CLRA claim alleging that class action waiver in credit card agreement was unconscionable); *In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 966 (N.D. Cal. 2007), *aff’d*, 741 F.3d 1022 (9th Cir. 2014) (following *Berry* and dismissing CLRA claim challenging allegedly excessive late fees and overlimit fees); *Van Slyke v. Capital One Bank*, 503 F. Supp. 2d 1353, 1358-59 (N.D. Cal. 2007) (following *Berry* and dismissing CLRA claim challenging credit card arbitration provision and disclosures regarding various fees and “penalties”); *Augustine v. FIA Card Servs., N.A.*, 485 F. Supp. 2d 1172, 1175 (E.D. Cal. 2007) (following *Berry* and dismissing CLRA claim challenging practice of retroactively increasing credit card interest rates).

⁷⁴⁹ *Suski v. Marden-Kane, Inc.*, No. 21-CV-04539-SK, 2022 WL 3974259 (N.D. Cal. Aug. 31, 2022). In a related matter, *Coinbase, Inc. v. Bielski*, 143 S. Ct. 521 (2022), the Supreme Court granted certiorari to hear a petition brought by cryptocurrency exchange Coinbase that could resolve a 6-3 circuit split on whether litigation should automatically be stayed pending a party’s appeal of an order denying a motion to compel arbitration.

⁷⁵⁰ No. 21-CV-04539-SK, 2022 WL 3974259 (N.D. Cal. Aug. 31, 2022).

⁷⁵¹ *Id.* at *1.

⁷⁵² *Id.*

⁷⁵³ *Id.* at *7-8.

⁷⁵⁴ *Id.*

Some courts also have drawn a distinction between tangible goods and incorporeal rights in determining what is a “good” or “service.”⁷⁵⁵

4. Exemptions

The CLRA does not apply to the sale of real property, including the sale or construction of residential housing and commercial or industrial buildings.⁷⁵⁶ Those in the business of advertising also are outside the reach of the CLRA, provided that such persons do not have knowledge of any deceptive methods, acts or practices.⁷⁵⁷ In addition, the CLRA is probably unavailable in actions against a governmental entity.⁷⁵⁸

II. LIABILITY UNDER THE CLRA – SECTION 1770(a)

A. Prohibited Acts

Section 1770 states the CLRA’s prohibitions. They are as follows:⁷⁵⁹

⁷⁵⁵ See, e.g., *Doe v. Epic Games, Inc.*, 435 F. Supp. 3d 1024, 1045-46 (N.D. Cal. 2020) (virtual currency which may be used to purchase virtual goods inside the game “Fortnite” is *not* a “good or service” subject to the CLRA) (emphasis added); *Wofford*, 2011 WL 5445054, at *2 (dismissing plaintiffs’ claim that defendants violated the CLRA by fraudulently inducing them to download harmful software on grounds that software is not a tangible good or service under the CLRA because it is not “tangible chattels,” and it is not a service because it does “not fit into the narrow definition of ‘service’ provided in Civil Code § 1761(b)"); *In re iPhone Application Litig.*, No. 11-MD-02250, 2011 WL 4403963, at *10 (N.D. Cal. Sept. 20, 2011) (“[A]ll of Plaintiffs’ allegations against [Defendant] appear to be about software. . . . Software is neither a ‘good’ nor a ‘service’ within the meaning of the CLRA.”); *Sproul v. Oakland Raiders*, Nos. A104542, A106658, 2005 WL 1941388, at *1 (Cal. Ct. App. Aug. 15, 2005) (unpublished) (holding that “personal seat licenses,” which entitled plaintiffs to purchase season tickets to home and post-season games, were not tangible chattels and, therefore, were not covered by the CLRA); *Boling v. Trendwest Resorts, Inc.*, No. G034203, 2005 WL 1186519, at *4 (Cal. Ct. App. May 19, 2005) (holding that vacation property timeshares, which were intangible “incorporeal rights in real property,” were not “goods” under the CLRA) (unpublished) (citing *Navistar Int’l Transp. Corp. v. State Bd. of Equalization*, 8 Cal. 4th 868, 875 (1994) (intangible property “is generally defined as property that is a ‘right’ rather than a physical object” but “[t]angible property is that which is visible and corporeal, having substance”); *Standard Oil Co. of Cal. v. State Bd. of Equalization*, 232 Cal. App. 2d 91, 96 (1965) (observing that a “portion of the gross receipts representing the transfer of the leases (a chattel real) was not taxable because, although personal property, it was not tangible personalty”); *Rojas-Lozano*, 159 F. Supp. 3d at 1116 (holding that Google’s reCAPTCHA software—“a one-time use software program used as a gate-keeper to Internet sites”—was neither a good nor a service). *But see In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 313 F. Supp. 3d 1113, 1142 (N.D. Cal. 2018) (holding that email is a “service” under the CLRA because of the continual upkeep and updates required to manage and provide the email systems).

⁷⁵⁶ See Cal. Civ. Code § 1754; *McKell*, 142 Cal. App. 4th at 1488 (confirming that the CLRA does not apply to “the sale of real property”).

⁷⁵⁷ See Cal. Civ. Code § 1755 (“Nothing in this title shall apply to the owners or employees of any advertising medium, including, but not limited to, newspapers, magazines, broadcast stations, billboards and transit ads, by whom any advertisement in violation of this title is published or disseminated.”).

⁷⁵⁸ See *Carboneau v. State*, No. CO41893, 2003 WL 21810924, at *3 (Cal. Ct. App. Aug. 7, 2003) (unpublished) (holding that nothing in the CLRA defeats governmental immunity).

⁷⁵⁹ Cal. Civ. Code §§ 1770(a)(1)-(23) and 28(b)(1).

1. Passing off goods or services as those of another.
2. Misrepresenting the source, sponsorship, approval or certification of goods or services.
3. Misrepresenting the affiliation, connection or association with, or certification by, another.⁷⁶⁰
4. Using deceptive representations or designations of geographic origin in connection with goods or services.⁷⁶¹
5. Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or qualities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he or she does not have.⁷⁶²
6. Representing that goods are original or new if they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used or secondhand.
7. Using packaging for a good that tends to mislead about the actual quantity or size of the good.⁷⁶³

⁷⁶⁰ See *Petconnect Rescue, Inc. v. Salinas*, No. 20-CV-00527-H-DEB, 2021 WL 5178647, at *6 (S.D. Cal. Nov. 8, 2021) (“Plaintiffs allege[d] sufficient facts to state a [CLRA] claim that the Moving Defendants engaged in a fraudulent scheme to sell non-rescue dogs as rescue dogs under the ‘Pet Connect Rescue’ name.”).

⁷⁶¹ In *Colgan*, a product advertised as “made in the USA,” which was primarily assembled in the United States, but consisted of parts made in other countries, violated the CLRA. 135 Cal. App. 4th at 677. The Court of Appeal confirmed that “[t]he standards for determining whether a representation is misleading under the False Advertising Law apply equally to claims under the CLRA. Conduct that is ‘likely to mislead a reasonable consumer’ thus violates the CLRA.” *Id.* at 680 (quoting *Nagel*, 109 Cal. App. 4th at 54) (citation omitted). *But see Govea v. Gruma Corp.*, No. CV 20-8585-MWF (JCX), 2021 WL 1557748, at *5 (C.D. Cal. Mar. 1, 2021) (finding that “[t]he mere fact that [tortilla packaging] includes words in Spanish, including the vague and meaningless phrase ‘a piece of Mexico,’ is insufficient” to mislead the reasonable consumer to believe tortillas were made in Mexico); *King’s Hawaiian Bakery*, 2021 WL 5178826 (mere geographic reference to the company’s place of origin does not mislead the reasonable consumer).

⁷⁶² Courts typically interpret subsections (a)(5), (7) and (9) as proscribing “both fraudulent omissions and fraudulent affirmative misrepresentations.” *See, e.g., Gray v. BMW of N. Am., LLC*, 22 F. Supp. 3d 373, 384 (D.N.J. 2014) (plaintiffs’ allegation that defendant failed to disclose defect in convertible top stated a claim under the CLRA); *Herron v. Best Buy Co. Inc.*, 924 F. Supp. 2d 1161, 1169 (E.D. Cal. 2013). *But see Gutierrez v. Carmax Auto Superstores Cal.*, 19 Cal. App. 5th 1234, 1260 (2018) (although plaintiff was able to state a CLRA claim due to the damages plaintiff suffered from a defective car, the court found that there is no independent duty for automobile retailers to disclose safety concerns); *Kowalsky v. Hewlett-Packard Co.*, 771 F. Supp. 2d 1156, 1163 (N.D. Cal. 2011) (same as the standard for deceptive practices under the fraudulent prong of the UCL, “a representation will not violate the CLRA if the defendant did not know, or have reason to know, of the facts that rendered the representation misleading at the time it was made”).

⁷⁶³ These cases are generally referred to as “slack fill” cases. Slack fill is generally defined as “the difference between the actual capacity of a container and the volume of product contained therein,” and can be considered misleading when the packaging implies there is more product than is actually present. *See Cal. Bus. & Prof. Code* § 12606; *Ebner v. Fresh, Inc.*, 838 F.3d 958 (9th Cir. 2016). *Compare Bush v. Mondelez Int’l, Inc.*, No. 16-CV-02460-RS, 2016 WL 5886886 (N.D. Cal. Oct. 7,

8. Representing that goods or services are of a particular standard, quality or grade or that goods are of a particular style or model, if they are not.⁷⁶⁴
9. Disparaging the goods, services or business of another by false or misleading representation of fact.⁷⁶⁵
10. Advertising goods or services with intent not to sell them as advertised.⁷⁶⁶
11. Advertising goods or services with intent not to supply reasonably expectable demand, unless the advertisement discloses a limitation of quantity.

2016) (reasonable consumer would not be misled by packaging that specifically states how many cookies were in a package) *with Krause-Pettai v. Unilever United States, Inc.*, No. 20CV1672 DMS (BLM), 2021 WL 1597931, at *4 (S.D. Cal. Apr. 23, 2021) (deodorant packaging that only listed net weight provided no useful information on the “amount of deodorant inside the package” and thus could mislead a reasonable consumer).

⁷⁶⁴ *But see Parrish v. Volkswagen Grp. of Am. Inc.*, 463 F. Supp. 3d 1043, 1057-58 (C.D. Cal. 2020) (holding that selling a product without disclosing a known defect may violate CLRA); *Beshwate v. BMW of N. Am. LLC*, No. 17-cv-00417, 2017 WL 6344451, at *11, *13 (E.D. Cal. Dec. 12, 2017) (finding that general statements about the reliability and high quality of a vehicle are mere puffery and not actionable, but the buyer made sufficient allegations to state a claim that the seller had misrepresented that the vehicle had passed inspection and was certified when seller never provided buyer with an inspection report); *Rubenstein v. The Gap, Inc.*, 14 Cal. App. 5th 870, 881 (2017) (dismissing CLRA claim because plaintiff failed to allege any affirmative misrepresentation by Gap regarding the quality of its factory store products and finding no duty by Gap to disclose difference in quality between factory store and traditional store products); *Simpson v. The Kroger Corp.*, 219 Cal. App. 4th 1352 (2013) (finding no reasonable consumer would be misled by package labeling to believe product was pure butter rather than butter and oil); *Myers v. Starbucks Corp.*, 536 F. Supp. 3d 657 (C.D. Cal. 2021) (allowing CLRA and UCL claim for false advertising that cocoa in coffee drinks was “ethically sourced” to proceed where plaintiff sufficiently pled generalized, industry-wide labor issues).

⁷⁶⁵ This provision requires proof of an affirmatively disparaging statement about the competitor’s product, and does not apply to statements that merely praise the defendant’s own products. *Shaeffer*, 44 Cal. App. 5th at 1139.

⁷⁶⁶ Again, the test that courts apply to this provision is similar to that for the UCL—whether the advertisement is likely to deceive or mislead a reasonable consumer. *See Echostar Satellite Corp.*, 113 Cal. App. 4th at 1360 (finding that the reasonable consumer standard applies to the CLRA as it does to the UCL); *see also Chapman*, 220 Cal. App. 4th at 230 (reversing order granting demurrer because “whether a reasonable consumer is likely to be deceived by the representation that the calling plan is ‘Unlimited’ is a question of fact”); *Verdiner v. Pep Boys*, No. B165747, 2004 WL 1146705, at *6-7 (Cal. Ct. App. May 24, 2004) (unpublished) (reversing dismissal of CLRA claim without leave to amend where plaintiff alleged that defendant misled consumers by advertising labor charges as “hourly” when labor was charged using estimated repair times regardless of actual time spent); *Yordy v. Plimus, Inc.*, No. C12-0229, 2013 WL 5832225 (N.D. Cal. Oct. 29, 2013) (denying class certification where plaintiff failed to show common questions existed regarding defendant’s involvement in allegedly misleading marketing scheme); *Perez*, 711 F.3d at 1114 (holding that plaintiff did not state CLRA claim for injunctive relief based on alleged unapproved use of surgical laser because there was no ongoing conduct to enjoin); *Rasmussen*, 27 F. Supp. 3d at 1039-43 (“puffery” defense applies to claims brought under CLRA); *Lorentzen v. Kroger Co.*, 532 F. Supp. 3d 901, 910–11 (C.D. Cal. 2021) (holding that a reasonable consumer is likely to be deceived by allegedly deceptive front packaging label even where there is qualifying language regarding various consumer preferences for usage of the product).

12. Advertising furniture without clearly indicating that it is unassembled if that is the case.
13. Advertising the price of unassembled furniture without clearly indicating the assembled price of that furniture if the same furniture is available assembled from the seller.
14. Making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reduction.
15. Representing that a transaction confers or involves rights, remedies or obligations which it does not have or involve, or that are prohibited by law.
16. Representing that a part, replacement, or repair service is needed when it is not.
17. Representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not.
18. Representing that the consumer will receive a rebate, discount or other economic benefit, if earning the benefit is contingent on an event to occur after the transaction.
19. Misrepresenting the authority of a salesperson, representative, or agent to negotiate the final terms of a transaction.
20. Inserting an unconscionable provision in a contract.
21. Advertising that a product is being offered at a specific price plus a percentage of that price unless: (A) the total price is set forth in the advertisement; and (B) the specific price plus a specific percentage of that price represents a markup from the seller's costs or from the wholesale price of the product.⁷⁶⁷
22. Selling or leasing goods in violation of Chapter 4 of Title 1.7 (concerning "Grey Market Goods").
23. Disseminating unsolicited prerecorded messages without consent.⁷⁶⁸
24. The home solicitation, as defined in subdivision (h) of section 1761, of a consumer who is a senior citizen where a loan is made encumbering the primary residence of that consumer for the purposes of paying for home improvements and where the transaction is part of a pattern or practice in violation of either subsection (h) or (i) of

⁷⁶⁷ See *Peralta v. Hilton Hotels Corp.*, No. D039510, 2003 WL 996217, at *8 (Cal. Ct. App. Mar. 11, 2003) (unpublished) (where room service included prices for individual menu items in addition to disclosed service charges and taxes, it did not offend section 1770(a)(20), which plainly indicates that it was intended to apply to situations where consumers may be "unduly confused about the price of a certain product by misleading shelf tags, displays, and media advertising").

⁷⁶⁸ Cal. Civ. Code § 1770(a)(22)(A). This section does not apply to persons with an established relationship, collection calls or calls generated at the request of the consumer. Cal. Civ. Code § 1770(a)(22)(B); see also *United States v. Dish Network LLC*, 256 F. Supp. 3d 810, 956-57 (C.D. Ill. 2017) (partially accepting established business relationship defense), *vacated in part on other grounds*, 954 F.3d 970 (7th Cir. 2020).

Section 1639 of Title 15 of the United States Code or paragraphs (1), (2), and (4) of subdivision (a) of Section 226.34 of Title 12 of the Code of Federal Regulations.⁷⁶⁹

25. Prohibiting mortgage brokers and lenders, “directly or indirectly, to use a home improvement contractor to negotiate the terms of any loan that is secured, whether in whole or in part, by the residence of the borrower and that is used to finance a home improvement contract or any portion” thereof.

B. Frequently Litigated Prohibitions

1. Section 1770(a)(14) – Representing That a Transaction Confers or Involves Rights, Remedies or Obligations That it Does Not Have or Involve, or That Are Prohibited by Law

Section 1770(a)(14) provides consumers with a basis to invalidate contracts. Courts have construed section 1770(a)(14) to include “oral misrepresentations or promises concerning the rights, remedies or obligations under a written contract.”⁷⁷⁰ Thus, the Legislature “intended to repudiate any purported bar or defense based on the parol evidence doctrine.”⁷⁷¹ In recent years, plaintiffs have brought CLRA claims under Section 1770(a)(14) challenging fees charged for emergency hospital room services.⁷⁷² However, California courts have uniformly rejected these claims.⁷⁷³ For example, in *Gray v. Dignity Health*, the court found that a hospital’s failure to disclose its billing for certain treatment prior to providing medical services did not establish a violation under CLRA section 1770(a)(14).⁷⁷⁴ The court in *Saini v. Sutter Health*⁷⁷⁵ expressly followed *Gray v. Dignity Health* and found that the CLRA does not require hospitals to disclose emergency room fees by posting additional signage in its emergency rooms because its placement of the fees on its website satisfied California and federal fee disclosure requirements.⁷⁷⁶ The California Supreme Court denied

⁷⁶⁹ See Home Ownership Equity Protection Act, 15 U.S.C. § 1639 *et seq.*

⁷⁷⁰ “By its very language, [section 1770(a)(14)] contemplates the existence of collateral oral promises, representations or agreements which may be inconsistent with the rights, remedies, or obligations set out in a written contract . . .” *Wang v. Massey Chevrolet*, 97 Cal. App. 4th 856, 857 (2002) (holding that parol evidence rule cannot bar a CLRA claim based on section 1770(a)(14) because to do so would make a practice unlawful and simultaneously prevent a plaintiff from proving such; moreover, to allow defendant to assert a parol evidence or ratification defense to a section 1770(a)(14) claim would violate the CLRA’s anti-waiver provision).

⁷⁷¹ *Id.* at 870.

⁷⁷² *Saini v. Sutter Health*, 80 Cal. App. 5th 1054, 1061 (2022); *Torres v. Adventist Health Sys./W.*, 77 Cal. App. 5th 500, *review denied* (2022); *Gray v. Dignity Health*, 70 Cal. App. 5th 225, 245 (2021), *review denied* (Jan. 26, 2022).

⁷⁷³ The Gray and Saini courts also rejected a liability theory asserted under 1770(a)(5), which prohibits “[r]epresenting that good or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have.” *Gray v. Dignity Health*, 70 Cal. App. 5th 225, 243-45 (2021) (internal citations omitted) (hospital did not owe duty to disclose ER Charges prior to providing medical services under Section 1770(a)(5)); *Saini v. Sutter Health*, 80 Cal. App. 5th 1054, 1061-63 (2022) (hospital did not owe duty to disclose EMS fees prior to providing medical services under Section 1770(a)(5)).

⁷⁷⁴ 70 Cal. App. 5th 225, 245 (2021).

⁷⁷⁵ 80 Cal. App. 5th 1054 (2022).

⁷⁷⁶ *Id.* at 1061.

review and denied a republication request. In *Torres v. Adventist Health System/West*,⁷⁷⁷ a patient being treated in an emergency room was charged an EMS fee in addition to charges for individual items of service and treatment he received. The Court of Appeal held that the patient adequately alleged a lack of reasonable access to the material fact of the EMS fee since the hospital's chargemaster contained codes and "highly abbreviated" descriptions of services that would be meaningless to consumers.⁷⁷⁸ However, the court ultimately concluded that the patient did not meet the particularity requirement for stating a claim for active concealment under the CLRA, and expressly stated that its reasoning should not be seen as inconsistent with *Gray v. Dignity Health*.⁷⁷⁹

2. Section 1770(a)(17) – Representing That the Consumer Will Receive a Rebate, Discount or Other Economic Benefit That Is Actually Contingent on Another Event

Section 1770(a)(17) "prohibits bait-and-switch rebate offers that cannot be performed before or at the time of purchase . . ." ⁷⁸⁰ In enacting section 1770(a)(17), "the Legislature intended to prohibit merchants from advertising a rebate or discount when they conceal from consumers the conditions to be satisfied to receive the rebate or discount."⁷⁸¹ For example, the Legislature intended to prevent making an advertised discount contingent upon purchasing an additional, more expensive or higher quality product than the product advertised at the discounted price.⁷⁸² The Court of Appeal has emphasized that the Legislature intended to prevent concealment and deception, and not to prohibit rebates altogether, reasoning that the Legislature regulated rebates in another, specific statute, and had not done so under the CLRA. Thus, according to the court, by addressing and expressly authorizing the conduct in a separate statute, the Legislature demonstrated that it only intended to require accurate advertising of rebates through the CLRA.⁷⁸³

⁷⁷⁷ 77 Cal. App. 5th 500 (2022).

⁷⁷⁸ *Id.* at 512.

⁷⁷⁹ *Id.* at 513.

⁷⁸⁰ *Pollard v. Ericsson, Inc.*, 125 Cal. App. 4th 214, 221 (2004) (holding that telephone company that offered rebate only to cellular telephone purchasers who activated wireless service did not violate section 1770(a)(17) of the CLRA).

⁷⁸¹ *Kramer v. Intuit Inc.*, 121 Cal. App. 4th 574, 580 (2004) (citing Assemb. Com. on Judiciary, Rep. on Assemb. Bill No. 292 (Sept. 30, 1970) 4 Assemb. J. (1970 Reg. Sess.) p. 8466). In *Kramer*, the Court of Appeal concluded that the plaintiff did not allege that the rebate offer was misleading or deceptive. Hence, an offer that advertised a \$30 discount when two types of software were purchased did not contravene the Legislature's intent in enacting section 1770(a)(17). The court reasoned that the rebate program at issue did not necessarily require a subsequent purchase because the consumer could either purchase both products simultaneously or purchase one before the other in addition to purchasing the secondary product within 30 days of the product on which the discount was offered. *Id.* at 581. Because these two other options existed, the rebate offer's language did not require a "subsequent" purchase and thus did not violate section 1770(a)(17). *Id.* Given the legislative intent to avoid concealment cited by the court, it is interesting that the court focused on whether the rebate program violated the express language of section 1770(a)(17)—whether the earning of the rebate was contingent on an event to occur *subsequent* to the consummation of the transaction—rather than the fact that the rebate requirement was conspicuously disclosed on the product packaging.

⁷⁸² *Id.*

⁷⁸³ *Id.* at 580 ("The legislative intent of preventing concealment or deception by nondisclosure is further bolstered by the subsequent enactment of another statute addressing rebates.").

3. Section 1770(a)(19) – Inserting an Unconscionable Provision in the Contract

Section 1770(a)(19) is a widely used provision of the CLRA. Significantly, this subdivision does not merely codify the defense of unconscionability, but supplies an affirmative right to relief for consumers who allegedly are injured by an unconscionable contract provision.⁷⁸⁴ Section 1770(a)(19) requires courts to draw upon the doctrine of unconscionability, as stated in California Civil Code section 1670.5⁷⁸⁵ and general principles of California law.⁷⁸⁶

These claims are fact-specific. For example, in *Freeman v. Wal-Mart Stores, Inc.*,⁷⁸⁷ the Court of Appeal affirmed dismissal of a CLRA claim in which plaintiff alleged that a non-usage fee on a gift card—which defendant renamed a “shopping card” with the ability to add value— was unconscionable in violation of section 1770(a)(19). The court held that plaintiff could have avoided the fee, which was disclosed on the back of the card and in an accompanying disclosure, by using the card. Moreover, the contract was not one of adhesion because defendant did not present plaintiff with a take it or leave it proposition. Plaintiff could have simply declined to purchase a shopping card and paid for purchases through other means.⁷⁸⁸

⁷⁸⁴ *Manantan v. Nat'l City Mortg.*, No. C-11-00216, 2011 WL 3267706, at *6 (N.D. Cal. July 28, 2011) (noting that the CLRA “does create an affirmative cause of action for unconscionability”); *Cal. Grocers Ass'n*, 22 Cal. App. 4th at 217 (the CLRA provides an affirmative statutory cause of action for unconscionability).

⁷⁸⁵ The test under section 1670.5 is:

[W]hether, in the light of the general background and the needs of the particular case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.

Freeman v. Wal-Mart Stores, Inc., 111 Cal. App. 4th 660, 669-70 (2003) (quoting Legislative Comm. Comment, Assemb., 1979 Addition).

⁷⁸⁶ In California, the unconscionability doctrine “has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 486 (1982) (citation omitted); accord *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 113-14 (2000). “Put another way, . . . unconscionability presents a ‘procedural’ and a ‘substantive’ aspect.” *Dean Witter*, 211 Cal. App. 3d at 767; accord *Woodside Homes of Cal., Inc. v. Super. Ct.*, 107 Cal. App. 4th 723, 727 (2003). The procedural element includes (a) “oppression,” referring to an “inequality of bargaining power resulting in no real negotiation and the absence of meaningful choice,” and (b) “surprise,” where the purportedly offensive “terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms.” *Dean Witter*, 211 Cal. App. 3d at 767; see also *Woodside Homes*, 107 Cal. App. 4th at 727 (“The former takes into consideration the parties’ relative bargaining strength and the extent to which a provision is ‘hidden’ or unexpected . . .”).

⁷⁸⁷ 111 Cal. App. 4th at 668.

⁷⁸⁸ *Id.* at 669-70; see also *Olsen*, 48 Cal. App. 4th at 621-22; *Lynch v. Com. Union Ins. Co.*, No. A094846, 2001 WL 1660035, at *6 (Cal. Ct. App. Dec. 28, 2001) (unpublished) (trip cancellation insurance excluding third parties’ pre-existing medical conditions as reason for cancellation did not violate section 1770(a)(19) because the policy’s exclusion was conspicuous and unambiguous and policy permitted plaintiff to cancel and obtain a refund if policy terms did not satisfy him).

Relying primarily on the California Supreme Court’s decision in *Discover Bank*,⁷⁸⁹ some plaintiffs have filed claims under section 1770(a)(19) based on the inclusion of class action waivers in arbitration agreements. As discussed above, the California Supreme Court held in *Meyer v. Sprint Spectrum L.P.* that a party to a contract containing allegedly unconscionable provisions may not challenge them under the CLRA unless the defendant has at least threatened to enforce those provisions, since the plaintiff cannot establish causation or damages absent attempts at enforcement.⁷⁹⁰ Challenges to arbitration provisions under the CLRA also might be unsuccessful on other grounds, such as based on choice-of-law or preemption under the FAA,⁷⁹¹ but no published authority has directly addressed these issues.

C. The Anti-Waiver Provision – Section 1751

Section 1751 provides that “[a]ny 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, for example, forum-selection clauses contained in consumer contracts.⁷⁹² The section also has been utilized by plaintiffs in arguing against the enforcement of class action waivers in arbitration agreements,⁷⁹³ as well as the enforcement of choice-of-law provisions.⁷⁹⁴ Indeed, California courts have refused to enforce contract provisions that require consumers to litigate in a “far location” because California has a “materially greater interest” than the proposed forum state in ensuring that

⁷⁸⁹ 36 Cal. 4th at 161 (noting that, under California law, class action waivers in arbitration agreements may be unconscionable in certain circumstances).

⁷⁹⁰ 45 Cal. 4th at 643.

⁷⁹¹ See, e.g., *Vannier v. Gateway Cos., Inc.*, No. B179663, 2006 WL 121962, at *2-6 (Cal. Ct. App. Jan. 18, 2006) (unpublished) (rejecting claim that computer company’s service contract included unconscionable arbitration provision in violation of section 1770(a)(19) because the FAA preempted an affirmative cause of action for violation of the CLRA and because South Dakota law applied) (relying on *Ting*, 319 F.3d at 1150 n.15 (holding that section 1751’s anti-waiver provision was preempted and did not void arbitration agreement’s class action ban and two-year limitations period because CLRA is a statute of limited applicability)). In *Ting*, the Ninth Circuit reasoned that while the defense of unconscionability is a generally applicable contract defense that is not preempted by the FAA, “the CLRA applies only to noncommercial contracts and only to consumer contracts Because the CLRA applies to such a limited set of transactions, we conclude that it is not a law of ‘general applicability.’” *Id.* at 1148 (citations omitted); accord *Discover Bank v. Super. Ct.*, 134 Cal. App. 4th 886, 892-93 (2005) (holding that, pursuant to choice-of-law provision, class action waiver was enforceable under Delaware law); *Lux v. Good Guys*, No. SACV 05-300, 2005 WL 1713421, at *1-3 (C.D. Cal. July 11, 2005) (form credit card agreement that required consumer to arbitrate claims pursuant to Nevada law was not procedurally unconscionable); *Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1205-06 (C.D. Cal. 2006) (class action waiver upheld under Texas law pursuant to form agreement’s choice-of-law provision).

⁷⁹² *Am. Online, Inc.*, 90 Cal. App. 4th at 15 (the Virginia forum selection clause accompanied by Virginia choice-of-law provision “would necessitate a waiver of the statutory remedies of the CLRA, in violation of that law’s antiwaiver provision (Civ. Code, § 1751) and California public policy.”).

⁷⁹³ The Ninth Circuit has concluded, however, that the CLRA, including the anti-waiver provision, is preempted by the FAA in the context of arbitration agreements. See *Ting*, 319 F.3d at 1152; *Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1228, 1234 (9th Cir. 2013) (affirming order compelling arbitration as to party to arbitration agreement based on Concepcion but reversing as to non-signatory to agreement).

⁷⁹⁴ See, e.g., *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1083-84 (9th Cir. 2009); *Am. Online, Inc.*, 90 Cal. App. 4th at 15.

“its citizens have a viable forum in which to recover minor amounts of money.”⁷⁹⁵ The CLRA anti-waiver provision does not, however, prohibit waiver of non-CLRA claims.⁷⁹⁶ Even with this limitation, the anti-waiver provision may have a broad reach, and factors into plaintiffs’ counsel’s increased reliance on the CLRA.

In *Sanchez*,⁷⁹⁷ the California Supreme Court resolved a split in authority among Courts of Appeal regarding preemption of the CLRA’s anti-waiver provision by the FAA. As discussed above, the court held that in light of *Concepcion*, “the CLRA’s anti-waiver provision is preempted insofar as it bars class waivers in arbitration agreements covered by the FAA.”⁷⁹⁸

D. Defenses to CLRA Claims

1. Statute of Limitations

CLRA claims are subject to a three-year statute of limitations.⁷⁹⁹ Courts have held that the statute runs from the time that a reasonable person would have discovered the basis for a claim.⁸⁰⁰

2. Notice and Cure Process

At least 30 days before a plaintiff may assert a cause of action for damages under the CLRA, the plaintiff must notify the prospective defendant(s) of the alleged violations and demand that they be corrected.⁸⁰¹ The notice must be in writing, delivered by certified or registered mail, return receipt requested and it must provide sufficient detail to allow the violations to be addressed by the

⁷⁹⁵ *Aral*, 134 Cal. App. 4th at 564. *But see Net2Phone*, 109 Cal. App. 4th at 590 (enforcing New Jersey forum selection clause where it was not shown that requiring non-injured consumers to litigate in New Jersey would deprive them of adequate protection).

⁷⁹⁶ *Benson v. S. Cal. Auto Sales, Inc.*, 239 Cal. App. 4th 1198, 1209-10 (2015).

⁷⁹⁷ 61 Cal. 4th at 899.

⁷⁹⁸ *Id.* at 924.

⁷⁹⁹ Cal. Civ. Code § 1783.

⁸⁰⁰ *See Mass. Mut. Life Ins. Co.*, 97 Cal. App. 4th at 1295.

⁸⁰¹ Cal. Civ. Code § 1782(a) (“Thirty days or more prior to the commencement of an action for damages pursuant to this title, the consumer shall do the following: (1) Notify the person alleged to have employed or committed methods, acts, or practices declared unlawful by Section 1770 of the particular alleged violations of Section 1770 [; and] (2) Demand that the person correct, repair, replace, or otherwise rectify the goods or services alleged to be in violation of Section 1770.”). *See also Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1195 (S.D. Cal. 2005) (invalidating plaintiff’s CLRA claims because he failed to comply with the 30-day notice requirement under the statute), *rev’d on other grounds sub nom. AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

defendant.⁸⁰² Courts will often dismiss a CLRA damages claim for failure to comply strictly with these requirements.⁸⁰³ As one court explained:

⁸⁰² See Cal. Civ. Code § 1782(a); *Peacock*, 2018 WL 452153, at *8 (holding that plaintiff's notice was inadequate because it failed to identify a specific provision of the statute that defendant allegedly violated); *Roybal v. Equifax*, No. 05-cv-01207, 2008 WL 4532447, at *10-11 (E.D. Cal. Oct. 9, 2008) (letter complaining of false derogatory credit report entries was insufficient because it did not specify which entries were false or why they were inaccurate); *Von Grabe*, 312 F. Supp. 2d at 1304 (dismissing with prejudice plaintiff's CLRA claim because notice letter failed to identify any specific violations); cf. *Gutierrez v. PCH Roulette, Inc.*, Nos. HO24243, HO24680, 2003 WL 22422431, at *4-5 (Cal. Ct. App. Oct. 24, 2003) (unpublished) (although six-page demand letter did not describe every detail of the challenged transactions, it described plaintiffs' problems with defendant and invoked CLRA, and therefore constituted sufficient notice to defendant). But see *Morgan v. A T&T Wireless Servs., Inc.*, 177 Cal. App. 4th 1235, 1260-61 (2009) (finding requirement satisfied by filing of earlier complaints).

⁸⁰³ See, e.g., *Peacock*, 2018 WL 452153, at *8 (observing that, although plaintiff discussed the dispute with defendant over the phone, plaintiff failed to meet the notice requirement of the CLRA because plaintiff never provided defendant a written notice 30 days prior to filing the complaint); *Frenzel v. AliphCom*, 76 F. Supp. 3d 999, 1016 (N.D. Cal. 2014) (holding that "a plaintiff must provide notice regarding each particular product on which his CLRA damages claims are based, even where the products qualify as substantially similar"); *Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp. 2d 939, 950 (S.D. Cal. 2007) (denying leave to amend to comply with notice requirements after plaintiff claimed damages without giving required notice, reasoning that statutory purpose of facilitating settlement would be undermined if amendment were permitted); *Galindo v. Financo Fin., Inc.*, No. C07-03991, 2008 WL 4452344, at *5 (N.D. Cal. Oct. 3, 2008) (dismissing plaintiffs' CLRA claim for failing to give notice but without prejudice, calling dismissal of CLRA claim with prejudice for failing to satisfy pre-litigation requirements "draconian"); *Keilholtz v. Super. Fireplace Co.*, No. C08-00836, 2009 WL 839076, at *2 (N.D. Cal. Mar. 30, 2009) (concluding that compliance with notice requirement in prior state-wide class action, including same alleged CLRA violations, was not sufficient notice); *Keilholtz v. Lennox Hearth Prods. Inc.*, No. C08-00836, 2009 WL 2905960, at *3 (N.D. Cal. Sept. 8, 2009) (noting that pre-litigation notice requirement must be literally applied and strictly construed); *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d at 1196 (rejecting plaintiff's argument that inadvertent disregard of the notice requirement should be excused); *Von Grabe*, 312 F. Supp. 2d at 1304 (dismissing CLRA claim with prejudice because notice letter was not sent timely or using required mail service); *Doe 1*, 719 F. Supp. 2d at 1110 (declining to dismiss plaintiff's claim with prejudice because doing so would not meet purpose of notice requirement; stating that claim should be dismissed until plaintiff complies with notice requirements); *Waller v. Hewlett-Packard Co.*, No. 11cv0454, 2011 WL 6325972, at *5 (S.D. Cal. Dec. 16, 2011) (concluding that plaintiff failed to comply with CLRA notice requirements where plaintiff filed original complaint seeking damages, then gave statutory notice and filed first amended complaint seeking only injunctive relief, and subsequently filed second amended complaint (operative complaint) seeking damages; plaintiff had statutory obligation to provide notice before filing original complaint). *Contra Morgan*, 177 Cal. App. 4th at 1259 (finding requirement satisfied by filing of earlier complaints); *Sanchez v. Wal-Mart Stores, Inc.*, No. CIVS-06-cv-2573, 2007 WL 1345706, at *3 (E.D. Cal. May 8, 2007) (finding notice given by a different member of putative class nearly a year before case was filed satisfied notice requirement); *Shein v. Canon U.S.A., Inc.*, No. CV 08-07323, 2009 WL 3109721, at *4-7 (C.D. Cal. Sept. 22, 2009) (concluding that plaintiffs complied with notice requirement by sending demand letter to defendant's headquarters); see also *Janda v. T-Mobile USA, Inc.*, 378 F. App'x 705, 708-09 (9th Cir. 2010) (stating that "there is a split in authority on whether the CLRA requires strict compliance with its notice provision"); *Whelan v. BDR Thermea*, No. C-11-02146 EDL, 2011 WL 6182329, at *6-7 (N.D. Cal. Dec. 13, 2011) (denying defendant's motion to dismiss for failure to comply with CLRA notice requirements, where, although plaintiff filed original complaint seeking damages without giving notice, plaintiff subsequently gave notice and, after defendants responded, filed an amended complaint; the issue of notice was moot because the "proper remedy" for plaintiff's filing a complaint for damages before sending notice would have been leave to amend); *Williams v. Yamaha Motor*,

The purpose of the notice requirement of section 1782 is to give the manufacturer or vendor sufficient notice of alleged defects to permit appropriate corrections or replacements. The notice requirement commences the running of certain time constraints upon the manufacturer or vendor within which to comply with the corrective provisions. The clear intent of the [CLRA] is to provide and facilitate precomplaint settlements of consumer actions wherever possible and to establish a limited period during which such settlement may be accomplished. This clear purpose may only be accomplished by a literal application of the notice provisions.⁸⁰⁴

If proper notice is provided, the defendant then has 30 days in which to correct the alleged violations. If the defendant gives or “agrees to give within a reasonable time” appropriate restitution, then the consumer may not maintain a claim for any damages “if the defendant appropriately remediates the harms alleged in the notice.”⁸⁰⁵ A defendant may avoid maintenance of a class action for damages based on the notice and cure process if: (a) all consumers similarly situated have been identified; (b) all consumers so identified have been notified that upon their request the defendant shall take the appropriate corrective action; (c) the corrective action has been, or in a reasonable time shall be, taken; and (d) the defendant has ceased from engaging in, or within a reasonable time will cease to engage in, the challenged conduct.⁸⁰⁶ By its terms, the CLRA does not permit a defendant to contest notice of alleged violations. It must either cure or the action for damages may proceed.⁸⁰⁷ Notably, a defendant’s agreement to take corrective action may not require the consumer to release either CLRA claims for injunctive relief or non-CLRA claims.⁸⁰⁸

The consumer need not provide 30 days’ notice for a lawsuit that seeks only injunctive relief, however.⁸⁰⁹ In most instances, a plaintiff will file a complaint for injunctive relief, and then provide notice that he intends to amend to include damages claims. If the defendant does not cure within the 30-day time period, plaintiff may so amend.⁸¹⁰

A defendant’s efforts to take corrective action pursuant to section 1782 are deemed an offer to compromise and, thus, are inadmissible pursuant to California Evidence Code section 1152.⁸¹¹

851 F.3d 1015 (9th Cir. 2017) (addressing to what degree consumer complaints are sufficient to give a defendant actual notice of defects for purposes of a CLRA claim).

⁸⁰⁴ *Outboard Marine Corp. v. Super. Ct.*, 52 Cal. App. 3d 30, 40-41 (1975) (footnote omitted).

⁸⁰⁵ *Breen v. Pruter*, 679 F. App’x 713, 724 (10th Cir. 2017) (citing Cal. Civ. Code § 1782(b)) (“[N]o action for damages may be maintained under Section 1780 if an appropriate correction, repair, replacement, or other remedy is given, or agreed to be given within a reasonable time, to the consumer within 30 days after receipt of the notice.”); see also *Kagan v. Gibraltar Savings & Loan Association*, 35 Cal. 3d 582, 590 (1984) (“If, within this 30-day period, the prospective defendant corrects the alleged wrongs, or indicates that it will make such corrections within a reasonable time, no cause of action for damages will lie.”).

⁸⁰⁶ Cal. Civ. Code § 1782(c).

⁸⁰⁷ There is a split of authority on the issue of whether a claim for restitution under the CLRA is a claim for “damages” for these purposes. Compare *Kennedy v. Nat. Balance Pet Foods, Inc.*, No. 07-CV-1082, 2007 WL 2300746, at *3 (S.D. Cal. Aug. 8, 2007) (holding notice not required to seek restitution under the CLRA), with *Laster*, 2008 WL 5216255, at *17 (holding that failure to give required notice precludes action for restitution under CLRA based on rules of statutory construction).

⁸⁰⁸ *Valdez v. Seidner-Miller, Inc.*, 33 Cal. App. 5th 600, 615 (2019).

⁸⁰⁹ *Breen*, 679 F. App’x at 717-18 (citing Cal. Civ. Code § 1782(b)).

⁸¹⁰ Cal. Civ. Code § 1782(d).

⁸¹¹ Cal. Civ. Code § 1782(e).

Furthermore, attempts to comply with a demand for corrective action are not to be construed as admissions of engaging in an act or practice declared unlawful by section 1770.⁸¹² However, evidence of compliance or attempts to comply with a demand for corrective action may be introduced by a defendant for the purpose of establishing good faith or compliance with the CLRA.⁸¹³

Upon receiving notice under the CLRA, a defendant may not avoid a potential CLRA class action by “picking off” the named plaintiff by resolving only his or her own claim. The California Supreme Court resolved this issue in *Kagan v. Gibraltar Savings & Loan Association*.⁸¹⁴ Specifically, the Court evaluated whether a consumer who provides a prospective defendant with notice of a class grievance under the CLRA, and informally obtains individual relief, subsequently may commence a class action for damages.⁸¹⁵ The Court held that, under these circumstances, the defendant has not destroyed the named plaintiff’s adequacy as a class representative.⁸¹⁶ The Court emphasized that one goal of the CLRA is to enable plaintiffs to prosecute class actions.⁸¹⁷ In fact, the Legislature’s explicit intent was “to make certain that a person can commence a class action 30 days after he has made a demand on behalf of the class even if the merchant has offered to settle his particular claim in accordance with section 1782(b).”⁸¹⁸ However, federal courts may not apply the *Kagan* rule, because a defendant’s full tender to the plaintiff of all of the plaintiff’s individual damages could deprive the plaintiff of standing to pursue a class case in federal court.⁸¹⁹

3. Bona Fide Error

Section 1784 provides that:

No award of damages may be given in any action . . . if the person alleged to have employed or committed such method, act or practice (a) proves that such violation was not intentional and resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid any such error and (b) makes an appropriate correction, repair or replacement or other remedy of the goods and services⁸²⁰

This corrective action must occur within 30 days following notice to the defendant of the alleged violation. One court expanded the availability of this defense to include a reproduction offer made in connection with a class settlement, noting that an “appropriate correction” need not provide full

⁸¹² *Id.*

⁸¹³ *Id.*

⁸¹⁴ 35 Cal. 3d at 587.

⁸¹⁵ *Id.*

⁸¹⁶ *See id.* at 595 (“We now hold only that [defendant’s] exemption of plaintiff from [the alleged CLRA violation] does not render her unfit *per se* to represent the class.” (emphasis added)).

⁸¹⁷ *See id.* at 593 (“[S]ettlement with the named plaintiffs will not preclude them from further prosecuting the action on behalf of the remaining members of the class.”).

⁸¹⁸ *Id.* at 594 (citing James S. Reed, *Legislating For The Consumer: An Insider’s Analysis Of The Consumers Legal Remedies Act*, 2 PAC. L.J. 1, 19 (1971)).

⁸¹⁹ *See Harris v. PFI W. Stores, Inc.*, No. SACV192521, 2020 WL 3965022 (C.D. Cal. Apr. 9, 2020) (dismissing damages claim but allowing injunctive relief claim to proceed).

⁸²⁰ Cal. Civ. Code § 1784.

compensation for the plaintiff's alleged loss, and may require the plaintiff to waive non-CLRA claims as a condition of accepting the proposed correction.⁸²¹

4. Safe Harbor

Courts have also applied the safe harbor for UCL claims similar to that outlined in *Cel-Tech* to CLRA claims.⁸²²

5. Alternative Choice of Goods and Services

The doctrine of unconscionability generally has been recognized to involve an absence of a meaningful choice on the part of the “weaker” party to a contract. Thus, although the decisions are split, the availability of alternative goods or services in the market may provide a defense to an “unconscionable contract provision” claim pursuant to section 1770(a)(19). For example, in *Dean Witter*,⁸²³ the Court of Appeal concluded that the trial court should have denied class certification because Plaintiff, who asserted unconscionability claims, “could have gone to a competing financial service and opened an IRA free of the offending provisions.” The court reasoned that the “existence of a ‘meaningful choice’ to do business elsewhere” defeated a claim that a contract provision was “oppressive” and therefore procedurally unconscionable.⁸²⁴ The court further held that the “oppression” factor is possibly defeated if the complaining party has a meaningful choice of reasonably available alternative sources for the desired goods or services that do not include the allegedly unconscionable terms.⁸²⁵ However, case law in California state courts is mixed, and the Ninth Circuit has expressly rejected the “market alternative” defense.⁸²⁶

⁸²¹ *In re Volkswagen “Clean Diesel” Litig.*, 445 F. Supp. 3d 535, 546-48 (N.D. Cal. 2020).

⁸²² *See Dinan*, 2020 WL 364277, at *10-11 (federal weight and measure standards held to create a safe harbor); *Alvarez*, 656 F.3d at 934 (finding that “[t]he California regulatory framework creates specific requirements [for retail gasoline dispensing] that may not be trumped by the general prohibitions of the CLRA” and that, as a result, defendants were entitled to safe harbor from plaintiffs’ CLRA claims) (alterations omitted); *Lopez*, 201 Cal. App. 4th at 576-79 (plaintiffs contended that defendants violated the CLRA by designing vehicle odometers that allegedly over-registered mileage; court dismissed claims on grounds that a separate statute provides a “safe harbor” for use of odometers that register actual mileage within a certain percentage range); *Loeffler*, 58 Cal. 4th at 1127 (finding claim barred “[w]hether alleged under the UCL or the CLRA”).

⁸²³ 211 Cal. App. 3d at 766.

⁸²⁴ *Id.* at 766, 768.

⁸²⁵ *See id.*

⁸²⁶ *Compare Wayne v. Staples, Inc.*, 135 Cal. App. 4th 466, 482 (2006) (finding that defendant’s charge to customers of 100% markup on excess value insurance for shipped merchandise was not unconscionable and hence not unlawful under the CLRA because customers had meaningful choices and could ship packages without purchasing insurance coverage, obtain excess coverage from other carriers, or ship packages from other retail shipping outlets); *In re iPhone Application Litig.*, 2011 WL 4403963, at *8 (“[T]he availability of alternative sources from which to obtain the desired service defeats any claim of oppression, because the consumer has a meaningful choice.”) (quoting *Belton v. Comcast Cable Holdings, LLC*, 151 Cal. App. 4th 1224, 1245 (2007)); *Schnall*, 78 Cal. App. 4th at 1161 n.9 (discussed above); and *Shvarts*, 81 Cal. App. 4th at 1160 (same), with *Shroyer v. New Cingular Wireless Servs.*, 498 F.3d 976, 985-86 (9th Cir. 2007) (discussing split of authority and holding that meaningful choice as to service providers does not defeat procedural unconscionability).

6. Federal Preemption

As with the UCL, the defense of federal preemption may defeat a CLRA claim depending upon the federal statute at issue and the circumstances of the transaction.⁸²⁷

7. Disclosure

In misrepresentation cases under the CLRA, express disclosure of the allegedly misrepresented or nondisclosed practice provides a defense.⁸²⁸

8. Arbitration

The issues presented by arbitration are addressed in Section IV.A. of the UCL discussion above.

III. REMEDIES UNDER THE CLRA

A. Legal and Equitable Relief

The CLRA provides for actual damages (with a \$1,000 minimum in class actions), injunctive relief, restitution and punitive damages.⁸²⁹ The CLRA allows for an additional statutory award of up to \$5,000 to senior citizens or disabled persons (as defined in section 1761) where the trier of fact finds that: (1) “the consumer has suffered substantial physical, emotional, or economic damage resulting from the defendant’s conduct”; (2) one or more of the factors set forth in California Civil

⁸²⁷ See, e.g., *Ellenburg*, 473 F. Supp. 3d at 1105 (CLRA claim preempted by Federal Aviation Administration Authorization Act); *Roberts v. N. Am. Van Lines, Inc.*, 394 F. Supp. 2d 1174, 1184 (N.D. Cal. 2004) (holding that the federal Carmack Act, which regulates interstate shipment of goods and motor carrier liability, preempted CLRA claims regarding interstate moving company’s “bait and switch” scheme because extensive federal regulations demonstrated Congress’s intent to occupy the field); see also *In re Fontem US, Inc.*, 2016 WL 6520142, at *6 (CLRA labeling claims expressly preempted by FDA rule defining e-cigarettes as “tobacco products,” which placed e-cigarettes within the scope of the labeling requirements of the TCA, and its express preemption clause); *Greenberg v. Target Corp.*, 985 F. 3d 650, 655 (9th Cir. 2021) (Federal Food, Drug and Cosmetic Act (FDCA) held to preempt plaintiff’s CLRA claims about a misleading biotin statement under a “structure/function” theory, given that the statement was truthful and the label contained appropriate disclosures and did not claim to treat diseases). But see *Kroessler*, 977 F.3d at 812-13 (FDCA held not to preempt CLRA claims alleging that scientific studies “directly refute” defendant’s statements made in advertising); *Smith*, 135 Cal. App. 4th at 1482, 1484 (holding that NBA did not preempt CLRA claim against national bank); *Hood*, 143 Cal. App. 4th 526 (same); *DeVries v. Experian Information Solutions, Inc.*, No. 16-cv-02953, 2018 WL 1426602, at *4 (C.D. Cal. Mar. 22, 2018) (finding request for injunctive relief was not preempted by the FCRA).

⁸²⁸ See, e.g., *Augustine*, 485 F. Supp. 2d at 1174-75 (affirming dismissal of CLRA claim challenging retroactive increase in interest rates upon default where credit card agreement expressly disclosed the consequences of default).

⁸²⁹ Cal. Civ. Code § 1780 (“Any consumer who suffers any damage . . . may bring an action . . . to recover or obtain any of the following: (1) Actual damages, but in no case shall the total award of damages in a class action be less than one thousand dollars (\$1,000). (2) An order enjoining the methods, acts, or practices. (3) Restitution of property. (4) Punitive damages. (5) Any other relief that the court deems proper.”). However, injunctive relief and restitution are not available in CLRA cases in federal court when the plaintiff has an adequate remedy at law. *Sonner*, 971 F.3d at 844.

Code section 3345(b) is present; and (3) “an additional award is appropriate.”⁸³⁰ This additional remedy is also available in class actions.⁸³¹ Where damages are proven, the court may order a fluid recovery procedure to distribute the proceeds.⁸³² Section 1752 provides that the remedies available under the CLRA are not exclusive and are available in addition to “other procedures or remedies for any violation or conduct provided for in any other law.”⁸³³

When calculating CLRA damages, the finder of fact must deduct the true value at the time of purchase from the amount paid for the product.⁸³⁴ However, the finder of fact may determine the true value to be zero (thereby awarding the plaintiff the full purchase price as damages) based on the nature and seriousness of the alleged misrepresentation.⁸³⁵ The finder of fact may make a zero-true-value determination even if the purchaser actually used the product for a substantial period of time after purchase.⁸³⁶ For instance, in *Anderson v. Ford*, a consumer brought an action against a truck manufacturer under the CLRA seeking compensation for the alleged low quality of the car that she purchased.⁸³⁷ The Court of Appeal found that the value of the car purchased by the consumer was limited to the price that it could be sold in an open market if its defects were known at the time of sale.⁸³⁸ As such, since the car was considered a “lemon car,” there was substantial justification that the value of the car at the time of purchase was zero, and therefore the jury’s compensatory damages award was appropriate.⁸³⁹

B. Attorneys’ Fees

The CLRA allows a prevailing plaintiff to recover court costs and attorneys’ fees as a matter of right.⁸⁴⁰ Because the CLRA itself does not define “prevailing plaintiff,” courts draw upon the general definition of “prevailing party” with respect to plaintiffs in California Code of Civil Procedure section

⁸³⁰ Cal. Civ. Code § 1780(b)(1). The factors in Civil Code section 3345(b) include: (1) “[w]hether the defendant knew or should have known that his or her conduct was directed to one or more senior citizens, disabled persons or veterans”; (2) whether the defendant’s conduct caused the “loss or encumbrance of a primary residence, principal employment, or source of income; substantial loss of property set aside for retirement, or for personal or family care and maintenance; or substantial loss of payments received under a pension or retirement plan or a government benefits program, or assets essential to the health or welfare of the senior citizen, disabled person, or veteran”; or (3) whether the plaintiffs “are substantially more vulnerable than other members of the public to the defendant’s conduct because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and actually suffered substantial physical, emotional, or economic damage resulting from the defendant’s conduct.”

⁸³¹ Cal. Civ. Code § 1780(b)(2).

⁸³² See *Corbett v. Super. Ct.*, 101 Cal. App. 4th 649, 677 (2002) (noting that the Legislature has allowed disgorgement into a fluid recovery fund in class actions and in consumer actions under the CLRA) (citing *Kraus*, 23 Cal. 4th at 137).

⁸³³ Cal. Civ. Code § 1752; accord *Vasquez v. Super. Ct.*, 4 Cal. 3d 800, 818 (1971).

⁸³⁴ *Anderson v. Ford Motor Co.*, 74 Cal. App. 5th 946 (2022).

⁸³⁵ *Id.* at 961.

⁸³⁶ *Id.*

⁸³⁷ 74 Cal. App. 5th 946, 949 (2022).

⁸³⁸ *Id.* at 961.

⁸³⁹ *Id.*

⁸⁴⁰ Cal. Civ. Code § 1780(e) (“The court shall award court costs and attorney’s fees to a prevailing plaintiff in litigation filed pursuant to [the CLRA].”).

1032.⁸⁴¹ Courts have held that, where a plaintiff obtains a “net monetary recovery” on a CLRA claim, he is entitled to recover attorneys’ fees.⁸⁴² The CLRA’s language is mandatory, and a court must award costs and fees to a prevailing plaintiff. At least one California court has clarified, however, that attorneys’ fees are not available where a suit for damages cannot be maintained under the CLRA because a merchant offered an appropriate cure in response to plaintiff’s notice.⁸⁴³ A prevailing defendant, in contrast, is entitled to reasonable attorneys’ fees only if it can establish that the plaintiff’s CLRA claim was not made in good faith.⁸⁴⁴

Federal law under certain circumstances may limit recovery of attorneys’ fees. The Federal Trade Commission’s holder in due course rule (Holder Rule) provides that when a contract to finance the sale of household goods or services is assigned, the consumer may assert against the assignees any payment defenses that would be good against the original seller.⁸⁴⁵ The Holder Rule also states that the assignee’s affirmative liability to the consumer cannot exceed amounts actually paid by the consumer under the contract. In May 2019, the FTC confirmed that the Holder Rule bars consumer claims for attorneys’ fees if recovery of such fees would require the lender to pay more than would otherwise be allowed under the rule.⁸⁴⁶ Subsequently, the California Legislature enacted Civil Code section 1459.5 which, among other things, purported to allow a consumer to recover attorneys’ fees under the CLRA despite the FTC’s statement to the contrary. In *Pulliam v. HNL Automotive*, the Court

⁸⁴¹ “Prevailing party includes the party with a net monetary recovery” Cal. Civ. Proc. Code § 1032(a)(4). Moreover, to obtain an attorneys’ fees award as a “prevailing party,” a plaintiff must prevail on a CLRA cause of action, and not a different cause of action alleged in the same lawsuit. *Bennett v. Cal. Custom Coach, Inc.*, 234 Cal. App. 3d 333, 339 (1991) (where plaintiff prevailed only on claim for money had and received, award of costs did not include attorneys’ fees “since recovery of attorney’s fees was contingent on plaintiff prevailing on a different cause of action, i.e., his claim under the [CLRA]”).

⁸⁴² See *Revels*, 57 Cal. App. 4th at 1154; *Graciano v. Robinson Ford Sales, Inc.*, 144 Cal. App. 4th 140, 149-54 (2006) (plaintiff was the “prevailing party” entitled to attorneys’ fees under the CLRA where she succeeded on CLRA claims; remaining non-CLRA claims were relevant only to the amount of fees and whether court could apportion fees); see also *Kim v. Euromotors West/The Auto Gallery*, 149 Cal. App. 4th 170, 178-79 (2007) (pre-trial settlement does not prevent plaintiff from seeking attorneys’ fees under the CLRA absent enforceable agreement to the contrary).

⁸⁴³ *Benson*, 239 Cal. App. 4th at 1212 (“Attorney fees are not recoverable in actions for damages under the CLRA unless the response to the notice letter is not an appropriate one or no response is forthcoming within the statutory time period.”).

⁸⁴⁴ “A court . . . may award reasonable attorney fees to a prevailing defendant if the court finds the plaintiff’s prosecution of that action was not made in good faith.” *Matson Constr., Inc. v. Miller*, No. A102564, 2005 WL 1663521, at *26 (Cal. Ct. App. July 18, 2005) (unpublished) (citing Cal. Civ. Code § 1780(e)) (although the court rejected plaintiffs’ statutory cause of action, the court did not find that plaintiffs had pursued their action in bad faith and thus defendant was not entitled to recover attorneys’ fees under the CLRA). But see *Cardenas v. Gaither Grp., Inc.*, No. HO22579, 2002 WL 863597, at *4 (Cal. Ct. App. May 6, 2002) (unpublished) (section 1780(e)’s provision that “prevailing plaintiff” is entitled to recover attorneys’ fees and costs was subject to Code of Civil Procedure section 1033(a), which grants the court discretion to deny attorneys’ fees and costs where the plaintiff sues in a court of unlimited jurisdiction and recovers a judgment of less than \$25,000; thus court possessed discretion to deny attorneys’ fees and costs where CLRA plaintiff recovered less than \$25,000 in unlimited civil action following a five day jury trial in which plaintiff prevailed on only one cause of action out of ten).

⁸⁴⁵ See 16 C.F.R. § 433.2.

⁸⁴⁶ See 84 Fed. Reg. 18711, 18713 (May 2, 2019).

of Appeal held that no deference to the FTC's interpretation of the Holder Rule was warranted.⁸⁴⁷ The California Supreme Court affirmed the judgment of the Court of Appeal and held that the Federal Trade Commission's Holder Rule does not limit the award of attorneys' fees.⁸⁴⁸ The United States Supreme Court denied certiorari on January 9, 2023.⁸⁴⁹

Where a CLRA claim for injunctive relief for a group of persons is successfully brought, a plaintiff might also seek attorneys' fees under California Code of Civil Procedure section 1021.5. Moreover, a plaintiff's rejection of a defendant's CLRA offer of correction does not bar the plaintiff from recovering attorneys' fees where the plaintiff seeks only injunctive relief because the CLRA's notice and correction requirements apply only to an action for damages.⁸⁵⁰

IV. PROCEDURAL ASPECTS OF THE CLRA

A. Venue

The CLRA provides that “[a]n action . . . may be commenced in the county in which the person against whom it is brought resides, has his or her principal place of business, or is doing business, or in the county where the transaction or any substantial portion thereof occurred.”⁸⁵¹ The CLRA's venue provisions, however, do “not override the general rule [that] a defendant is entitled to have an action tried in the county of his or her residence.”⁸⁵² Section 1780(d) requires that the plaintiff file an affidavit with his or her complaint stating facts that establish venue where the action is filed.⁸⁵³ Upon motion by the court or a party, a court must dismiss an action where the plaintiff fails to file the required affidavit.⁸⁵⁴

B. Motions for “No Merit” or “No Defense” Determination

In class actions under the CLRA, motions for summary judgment pursuant to California Code of Civil Procedure section 437c are not allowed.⁸⁵⁵ Rather, the CLRA allows a party, upon ten days'

⁸⁴⁷ *Pulliam v. HNL Auto. Inc.*, 60 Cal. App. 5th 396, 422 (2021), *cert. denied sub nom. TDBank, N.A. v. Pulliam*, No. 22-288, 2023 WL 124042 (U.S. Jan. 9, 2023).

⁸⁴⁸ 13 Cal. 5th 127 (2022).

⁸⁴⁹ *TD Bank, N.A. v. Pulliam*, 143 S. Ct. 566, 567 (2023).

⁸⁵⁰ *Gonzales v. CarMax Auto Superstores, LLC*, 845 F.3d 916, 918 (9th Cir. 2017) (citing *Meyer*, 45 Cal. 4th at 635).

⁸⁵¹ Cal. Civ. Code § 1780(d).

⁸⁵² *Gallin v. Super. Ct.*, 230 Cal. App. 3d 541, 543, 545 (1991) (venue was improper where no corporate defendant maintained its principal place of business, single consumer transaction occurred, and at least some of the individual defendants did not reside because, in part, “rights protected by the [CLRA] do not rise to the level of a civil right” that warranted venue where the transaction had occurred).

⁸⁵³ Cal. Civ. Code § 1780(d).

⁸⁵⁴ *Id.*; *Allen v. DaimlerChrysler Motors Corp.*, No. A105864, 2005 WL 318753, at *3-4 & n.4 (Cal. Ct. App. Feb. 10, 2005) (unpublished) (although a plaintiff alleges multiple causes of action besides the CLRA, the general venue statute does not excuse section 1780(d)'s requirement that the plaintiff file an affidavit that venue is proper; it is likely that the Legislature intended that neither a court nor a party may waive this provision, and the plaintiff's failure to file an affidavit of venue mandates dismissal).

⁸⁵⁵ Cal. Civ. Code § 1781(c) (“A motion based upon [Code of Civil Procedure section 437(c), for summary judgment] shall not be granted in any action commenced as a class action pursuant to [1781(a)].”).

notice, to make a motion to determine whether “[t]he action is without merit or there is no defense to the action.”⁸⁵⁶ Courts nonetheless have concluded that the procedural requirements for a “no merit” or “no defense” determination, except for the timing requirements, mirror those for a motion for summary judgment or summary adjudication.⁸⁵⁷

Moreover, most courts have held that a plaintiff is not required to controvert a no-merit motion in order to certify a class. Stated differently, a defendant may not take the position that plaintiff is required to show, at the class certification stage, that his or her CLRA claim has merit in order to obtain class certification.⁸⁵⁸ This is not to say, however, that a defendant is prohibited from filing a no-merit motion to be heard prior to, or concurrently with, the plaintiff’s motion to certify a class.⁸⁵⁹

⁸⁵⁶ Cal. Civ. Code § 1781(c) (“If notice of the time and place of the hearing is served upon the other parties at least 10 days prior thereto, the court shall hold a hearing . . . to determine if any of the following apply to the action: . . . (3) The action is without merit or there is no defense to the action.”).

⁸⁵⁷ See, e.g., *Olsen*, 48 Cal. App. 4th at 624; *Echostar Satellite Corp.*, 113 Cal. App. 4th at 1359 (affirming trial court’s no-merits determination even though “the trial court chose to deem the dismissal as one after summary judgment rather than one after a no-merit determination,” but that there is “no meaningful distinction in the choice”); see also *Leonhardt v. AT&T Co.*, No. A103610, 2005 WL 240428, at *7 (Cal. Ct. App. Jan. 21, 2005) (unpublished) (internal citations omitted) (“If the motion is originally denominated [as] one for summary judgment . . . , it can be treated as a motion to determine that the action is without merit.”); *Smith*, 135 Cal. App. 4th at 1474-75 (citing *Kagan*, 35 Cal. 3d at 589, and *Echostar Satellite Corp.*, 113 Cal. App. 4th at 1359-62) (reviewing both motion for summary judgment and motion for no-merits determination under a summary judgment standard).

⁸⁵⁸ See *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 438 (2000) (“Nowhere does the CLRA purport to require a showing of potential success on the merits of the suit before certification may be ordered. Although trial courts are authorized, upon a properly noticed motion, to determine that ‘[t]he action is without merit or there is no defense’ thereto . . . , that procedure appears independent of the procedure for certification”) (footnote omitted). Another interpretation of section 1781(c) is that, in order to certify a CLRA class action, a court must address all four points enumerated under section 1781(c), including that the action has merit, or that it is not without merit. However, this is not how the majority of courts, including the California Supreme Court in *Linder*, have construed section 1781(c).

⁸⁵⁹ See, e.g., *Leonhardt*, 2005 WL 240428, at *10 (“Once [the trial court] determined that the CLRA claim could not be maintained, it clearly did not have to determine whether a class could be certified to pursue the nonmeritorious claim.”); *Bacon v. Sasaki*, No. B158908, 2003 WL 23096504, at *5 (Cal. Ct. App. Dec. 31, 2003) (unpublished) (“Postponement of class action treatment until a determination of liability has been made should not prejudice potential class members. If the named plaintiffs lose, the potential class members will not be bound by the judgment, and if the plaintiffs win, potential class members still will be able to opt out of the litigation if they desire.”).

Courts prefer, however, for a summary judgment motion or other merits determination to follow a ruling on class certification and notice to the class. See *Fireside Bank*, 40 Cal. 4th at 1074 (“A largely settled feature of state and federal procedure is that trial courts in class action proceedings should decide whether a class is proper and, if so, order class notice before ruling on the substantive merits of the action. The virtue of this sequence is that it promotes judicial efficiency, by postponing merits rulings until such time as all parties may be bound, and fairness, by ensuring that parties bear equally the benefits and burdens of favorable and unfavorable merits rulings.”) (citations omitted); *Miller v. Bank of Am., N.A.*, 213 Cal. App. 4th 1, 9 (2013) (affirming denial of class certification where plaintiff “failed to show that any means exist to identify a class of bank customers who had been subjected to unlawful setoffs”).

C. Class Action Rules

The CLRA specifies unique class certification standards and procedures which must be applied to CLRA claims.⁸⁶⁰ In enacting these unique rules, the Legislature was guided by Federal Rule of Civil Procedure 23(a), which sets forth federal class action standards, and the California Supreme Court's opinion in *Daar v. Yellow Cab Co.*⁸⁶¹ The standards for certifying a CLRA claim for class treatment are set forth in California Civil Code section 1781(b), which provides:

The court shall permit the suit to be maintained on behalf of all members of the represented class if all of the following conditions exist:

- (1) It is impracticable to bring all members of the class before the court;
- (2) the questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members;
- (3) the claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class; and
- (4) the representative plaintiffs will fairly and adequately protect the interests of the class.

Courts have no discretion to deny class certification if these factors are satisfied.⁸⁶²

While similar in many respects, the standards for certification under section 1781 are not identical to those used for other California class actions authorized by California Code of Civil Procedure section 382. For example,

[u]nlike a plaintiff proceeding under [section 382], a plaintiff moving to certify a class under the CLRA is not required to show that substantial benefit will result to the litigants and the court. Thus, unlike [section 382], the CLRA does not require that a plaintiff show a probability that each class member will come forward and prove his separate claim to a portion of the recovery.⁸⁶³

⁸⁶⁰ See Cal. Civ. Code § 1781.

⁸⁶¹ 67 Cal. 2d 695 (1967); See David E. Roberts, Review of Selected 1970 California Legislation, 2 PAC. L.J. 343, 346 (1971); James S. Reed, Legislating for the Consumer: An Insider's Analysis of the Consumers Legal Remedies Act, 2 PAC. L.J. 1, 13-14 (1971) (because the conditions precedent to maintenance of a class action under section 1781 are "almost identical" to those contained in Federal Rule of Civil Procedure 23(a), "[t]he federal experience would, therefore, seem to be good authority in construing the California statute").

⁸⁶² See *Dean Witter*, 211 Cal. App. 3d at 765 n.2 (citing *Hogy v. Super. Ct.*, 75 Cal. App. 3d 122, 138-40 (1977)).

⁸⁶³ *Mass. Mut. Life Ins. Co.*, 97 Cal. App. 4th at 1287 n.1 (citing *Hogy*, 75 Cal. App. 3d at 134-35); see also *Apple, Inc. v. Super. Ct.*, 19 Cal. App. 5th 1101, 1126 n.2 (2018) ("The distinction between a CLRA and non-CLRA class action is that a non-CLRA class action plaintiff must also establish that pursuit of the class action will result in substantial benefit to the litigants and the court, while a CLRA class action plaintiff need not do so") (quoting *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 128 n.12 (2009)).

The CLRA permits and, indeed, encourages class actions when individual recovery might be minimal.⁸⁶⁴

Although courts in practice often apply the same class action procedures to CLRA claims that they use under section 382 and Federal Rule of Civil Procedure 23, the CLRA sets forth its own requirements. Section 1781(c) requires notice and a hearing before any class certification determination.⁸⁶⁵ The CLRA expressly permits class notice via publication if personal notification is unreasonably expensive or if all members cannot be personally notified.⁸⁶⁶ This includes notice pursuant to Government Code section 6064, which requires once-a-week publication for four successive weeks.⁸⁶⁷ Individual notification may nevertheless be required when damages are substantial. The CLRA also specifically provides that either party may be forced to bear the cost of class notice.⁸⁶⁸ The class notice must include certain elements, including the right to opt out.⁸⁶⁹

Particularly after *Meyer*, defeating certification of CLRA claims may turn on identifying non-common issues. The CLRA requires “damage as a result of” the challenged practice, which potentially could provide grounds for a challenge to typicality, commonality or predominance.⁸⁷⁰ For instance, in *Wilens v. TD Waterhouse Grp., Inc.*,⁸⁷¹ the Court of Appeal found that class treatment was inappropriate because it could not be presumed that each class member was harmed by an allegedly unconscionable provision in customer agreements. The court explained:

⁸⁶⁴ See *Hogya*, 75 Cal. App. 3d at 138 (noting that section 1780(a)(1)’s authorization for class awards as low as \$300 (now \$1,000) “implies some consumer class actions might go forward even though the individual claims of class members would be minimal” and that section 1781(a)’s language regarding “other” relief contemplates class actions where no damages are sought).

⁸⁶⁵ See *Stern v. Super. Ct.*, 105 Cal. App. 4th 223, 233 (2003) (where the trial court improperly ruled that action was not a class action nine days after plaintiff filed amended complaint particularly because section 1781(c) requires ten days’ notice and a hearing before the court determines whether a class may be certified).

⁸⁶⁶ See Cal. Civ. Code § 1781(d) (“The party required to serve notice may, with the consent of the court, if personal notification is unreasonably expensive or it appears that all members of the class cannot be notified personally, give notice as prescribed herein by publication in accordance with Section 6064 of the Government Code in a newspaper of general circulation in the county in which the transaction occurred.”).

⁸⁶⁷ Cal. Gov’t Code § 6064. The period of notice under this section commences with the first day of publication and terminates at the end of the twenty-eighth day, including the first day. *Id.*; cf. *Choi v. Mario Badescu Skin Care, Inc.*, 248 Cal. App. 4th 292 (2016) (section 1781(d) of the Civil Code, which incorporates section 6064 of the Government Code, applies when a court certifies a class for adjudication, but section 1781(f) governs notice of a proposed class action settlement).

⁸⁶⁸ See Cal. Civ. Code § 1781(d) (“[T]he court may direct either party to notify each member of the class of the action.”). One early case questioned the constitutionality of requiring a defendant essentially to finance a lawsuit against it. See *Cartt v. Super. Ct.*, 50 Cal. App. 3d 960, 974-75 (1975).

⁸⁶⁹ See Cal. Civ. Code § 1781(e)(1)-(3).

⁸⁷⁰ See *Johannessohn v. Polaris Indus., Inc.*, 450 F. Supp. 3d 931, 955-56 (D. Minn. 2020), *affd*, 9 F.4th 981 (8th Cir. 2021) (denying class certification for lack of commonality, due to plaintiff’s failure to prove class-wide reliance on defendant’s alleged failure to disclose alleged mechanical problems with product); *Racies v. Quincy Bioscience, LLC*, No. 15-cv-00292, 2020 WL 2113852 (N.D. Cal. May 4, 2020) (decertifying CLRA class after trial based on the named plaintiff’s failure to offer class-wide evidence that class members in general were exposed to and relied on the same allegedly misleading advertising seen by the named plaintiff; evidentiary failure found to defeat the elements of typicality and predominance).

⁸⁷¹ 120 Cal. App. 4th at 754-56.

Relief under the CLRA is specifically limited to those who suffer damage, making causation a necessary element of proof [Plaintiff] argues that differences in calculating damages are not a proper basis for the denial of class certification. But the individual issues here go beyond mere calculation; they involve each class member's *entitlement* to damages.⁸⁷²

Accordingly, because the insertion of an unconscionable provision did not by itself cause damage, the court denied class certification.⁸⁷³

However, certification of a CLRA claim may be granted without demonstrating that all unnamed class members relied on alleged material misrepresentations. For instance, in *In re Steroid Hormone Product Cases*,⁸⁷⁴ the named plaintiff alleged that the defendant sold over-the-counter products containing anabolic steroids without requiring a prescription and without notifying customers that the products contained a controlled substance. The trial court denied class certification on the grounds that individualized inquiries would be required into whether the illegality of the substance would be material to each purchaser and whether the defendant's alleged conduct caused injury to each purchaser.⁸⁷⁵ The Court of Appeal found that the trial court incorrectly denied certification. Although "both the named plaintiff and unnamed class members must have suffered some damage caused by a practice deemed unlawful under [the CLRA]" to obtain relief, the court stated that so long as the named plaintiff can show that "material misrepresentations were made to the class members, at least an inference of reliance [i.e., causation/injury] would arise as to the entire class."⁸⁷⁶

⁸⁷² *Id.* at 756 (emphasis in original).

⁸⁷³ Several unpublished decisions contain a similar analysis. See *Leonhardt*, 2005 WL 240428, at *9 (holding that "[t]his case does not lend itself to the presumption that each class member suffered damage by the mere insertion of an arbitration clause in the notice" and "since [plaintiff] cannot establish any damage, her CLRA claim must fail"); *Harris v. HSNLP*, No. G036938, 2007 WL 61068, at *4 (Cal. Ct. App. Jan. 10, 2007) (unpublished) (denying class certification of CLRA claim where it could not be presumed that all potential class members were damaged by virtue of the purported violation); *Stern v. Getz, Kryder & Jakobovits*, No. B173640, 2005 WL 647356, at *3-4 (Cal. Ct. App. Mar. 22, 2005) (unpublished) (because plaintiffs suffered no actual damage or any pecuniary loss based on defendants' conduct, plaintiffs' CLRA claim failed).

⁸⁷⁴ 181 Cal. App. 4th at 149.

⁸⁷⁵ *Id.* at 153.

⁸⁷⁶ *Id.* at 156, 157 (quoting *Mass. Mut. Life Ins. Co.*, 97 Cal. App. 4th at 1292-93); see also *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d at 987 (finding an inference of class-wide reliance appropriate for plaintiffs' California CLRA claims for purchase of cooking oils labeled "100% Natural" that were allegedly made with genetically modified organisms).