

CMBA  
LEGAL NEWS

presented by the CMBA Legal Services Committee

CMBA PROVIDES FORUM  
TO DISCUSS LEGISLATIVE,  
REGULATORY, QA ISSUES**Susan (DeMars) Milazzo**, EXECUTIVE DIRECTOR, CALIFORNIA MORTGAGE BANKERS ASSOCIATION

Dodd-Frank has consumed so much of the mortgage industry's attention and rightfully so, that some leaders aren't staying on top of the changes being proposed at the state levels. In

California, for example, we had legislation proposed earlier this year that would have created a \$20,000 tax on any lender who processed a foreclosure in our state. This legislation was not successful, due in large part to the industry partnership of lobbying efforts, but it is a stark reminder that major issues are percolating outside of Washington, D.C.

On Monday, December 5th CMBA will be holding our annual Legislative, Regulatory, QA & Compliance Conference at the Westin South Coast Plaza. Chaired by Michael Pfeifer of Pfeifer & DeLaMora (and a member of CMBA's Board of Directors), this event is a must for anyone interested in the legal and regulatory aspect of California residential lending. A few years back this event seemed to only be of interest to Compliance Officers and attorneys but in recent years we've seen quite a bit of participation from company owners and managers. Small wonder why that trend has shifted. Considering the rapid pace at which regulatory demands are changing both at a federal and state level, we are all challenged to stay abreast. CMBA is fortunate to have a wealth of legal expertise within

our membership to help shape this event into one of the most informative and interactive conferences available in the industry. Our topics have included updates on trends in litigation, an update on federal and California state legislative and regulatory changes, the latest fraud schemes against lenders, TILA updates, steps for quality assurance/quality control, and new developments with the Nationwide Mortgage Licensing System just to name a few. Our goal is to focus on the major issues that keep mortgage bankers "up at night" and offer insight from several different viewpoints (i.e. legislative, regulatory, litigation, etc.) Last year we had a record number of attendees and we're expecting to exceed that this year. I hope that you will consider this event to stay ahead of pace on these topics and start the New Year with some fresh ideas. We have sponsorship opportunities available on our website as well. If you are a CMBA member and are interested in submitting a topic for consideration at this conference, please send that to my attention at [susan@cmba.com](mailto:susan@cmba.com). I look forward to seeing you at our event this year.

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# THE INCREASING UNFAIRNESS OF THE UNFAIR COMPETITION LAW IN CALIFORNIA

**M. Elizabeth Holt**, SEVERSON & WERSON, P.C.



The California Business and Professions Code forbids "any unlawful, unfair or fraudulent business act or practice."<sup>1</sup> This sounds simple enough, but these nine words, known colloquially as the "unfair competition law" or "UCL," are the tip of a very large and unwieldy iceberg in our state. The statute applies to any business in California—from the mom-and-pop fruit stands of Yuba County to the mighty multi-national

corporations of Silicon Valley.<sup>2</sup> And the UCL carries a hefty four-year statute of limitations—more than enough time for key documents to be lost, employees to move on, and witnesses' memories to fade.<sup>3</sup>

Unsurprisingly, the statute has precipitated a shower of consumer litigation in the past few decades. In today's troubled economic times, lawsuits challenging the legality of mortgage loan origination practices and routine foreclosure proceedings have become increasingly common, and it is rare indeed for such lawsuits to fail to include the UCL among their causes of action. A basic understanding of how this

complex law works can therefore be useful to mortgage lenders who are regularly faced with lawsuits from erstwhile borrowers.

## UNLAWFULNESS

Of the UCL's three branches, the "unlawful" prong is, in many ways, the most straightforward. If a business breaks a law—any law—there is a potential for exposure to UCL liability, because the UCL "borrows" violations of other statutes and makes them independently actionable.<sup>4</sup> From a defendant's

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7. See Estrella, 2011 WL 2633643, at \*2, \*4.
8. Id. at \*4.
9. Id. at \*5 (citing Discover Bank and Shroyer v. New Cingular Wireless Servs., Inc. 498 F.3d 976, 981-83 (9th Cir. 2007)).
10. Estrella, 2011 WL 2633643, at \*4-5 (citing Fisher, 791 F.2d at 694-97).
11. See, e.g., Swift v. Zynga Game Network, Inc., No. C-09-5443 EDL, 2011 WL 3419499, at \*8-10 (N.D. Cal. Aug. 4, 2011); Bryant v. Serv. Corp.

Int'l, No. C 08-01190SI, 2011 WL 2709643, at \*4-5 (N.D. Cal. Jul. 12, 2011); In re Cal. Title Ins. Antitrust Litig., No. 08-01341 JSW, 2011 WL 2566449, at \*2-3 (N.D. Cal. Jun. 27, 2011); Quevedo v. Macy's, Inc., — F. Supp. 2d —, 2011 WL 3135052, at \*4-5, \*7 (C.D. Cal. Jun. 16, 2011); see also Morse v. ServiceMaster Global Holdings Inc., No. C 10-00628SI, 2011 WL 3203919, at \*2-3 (N.D. Cal. Jul. 27, 2011) (relying upon "evidence that plaintiffs would likely have attempted to arbitrate their claims on a classwide

basis had defendants moved to compel arbitration before Concepcion").

12. F. Supp. 2d —, 2011 WL 3135052 (C.D. Cal. Jun. 16, 2011).
13. Id. at \*4.
14. Id.

## UNFAIR COMPETITION LAW CONTINUED FROM PAGE 5

standpoint, this has a bright side: if there is no underlying violation of law, there is no UCL liability.<sup>5</sup> End of story. A business facing a UCL claim based on the unlawfulness prong can often get the claim thrown out in the initial stages of the lawsuit simply by arguing that the plaintiff has failed to list enough facts in his complaint to show a violation of any other law.

### FRAUD

A second branch of the UCL is fraud. But there's fraud, and then there's UCL fraud. Unlike the average fraud claim, a fraudulent business act under the UCL does not have to involve actual falsity.<sup>6</sup> All the consumer has to show is that "the public is likely to be deceived" by the challenged business act or practice.<sup>7</sup>

There are a few mitigating factors which serve to lessen the burden that this prong of the statute places on businesses. Most importantly, because fraud is such an easy term to toss around, would-be plaintiffs have to meet a higher threshold in their complaints—at least in federal court.<sup>8</sup> They have to be specific about the "who, what, when, where, and how" of the alleged fraud.<sup>9</sup> A complaint that simply claims that "my lender misled me," without more detail, is not going to survive the initial stages of the lawsuit. Many UCL claims under the fraud prong can be successfully attacked on this basis.

### UNFAIRNESS

The final prong of the UCL is unfairness. Unfortunately, California's intermediate appellate courts are currently locked in a battle over what "unfair" means in the context of consumer UCL suits and have offered at least three versions. Since the various Courts of Appeal are free to disagree but may not overrule one another,<sup>10</sup> it remains unclear which definition of "unfair" is applicable in any given circumstances.

Each of the three definitions has its own complex set of nuances, but briefly, they are as follows. First, some courts have argued that a business act or practice is not "unfair" under the UCL unless it violates a public policy that is "tethered" to some other law.<sup>11</sup>

A second line of cases offers a two-step test for what "unfairness" means. First, the reviewing court must ask whether the challenged business practice is "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers."<sup>12</sup> Second, the court must "weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim."<sup>13</sup>

A third line of cases presents yet another complex test: the court who is reviewing the business practice for unfairness must ask whether: (1) the consumer's injury is substantial; (2) the injury outweighs any countervailing benefits; and (3) the consumer himself could have reasonably avoided the injury.<sup>14</sup>

Obviously, this prong of the UCL is a mess. It is hard to overstate the amount of uncertainty it creates for businesses. And any successful defense against a lawsuit based on UCL unfairness must necessarily involve a complex analysis of all three definitions.

### CONCLUSION

Until the state Supreme Court or the state legislature steps in to clear things up, businesses—including lenders—who are facing UCL claims must be prepared to contend not only with the statute's three branches, but also with three competing sub-definitions within the final prong. Ironically, the current status quo is quite unfair for everyone.



1. Cal. Bus. & Prof. Code § 17200.
2. The California Supreme Court has often proclaimed that the UCL is designed to be "sweeping, embrac-

ing anything that can properly be called a business practice." Cel-Tech Commc'ns v. Los Angeles Cellular Tel. Co., 20 Cal.4th 163, 180 (1999); Rubin v. Green, 4 Cal.4th 1187, 1200 (1993); Barquis v. Merchants Collection Ass'n, 7 Cal.3d 94, 113 (1972).

3. Cal. Bus. & Prof. Code § 17208.
4. State Farm Fire & Casualty Co. v. Superior Court, 45 Cal. App. 4th 1093, 1103 (1996).
5. Ingels v. Westwood One Broadcasting Servs., Inc., 129 Cal. App. 4th 1050, 1060 (2005).
6. McKell v. Washington Mutual, Inc., 142 Cal. App. 4th 1457, 1471 (2006).
7. Pastoria v. Nationwide Ins., 112 Cal. App. 4th 1490, 1498 (2003).
8. This is not necessarily true in state court. Morgan v. AT&T Wireless Servs., Inc., 177 Cal. App. 4th 1235, 1256 (2009).
9. Fed. R. Civ. P. 9(b); Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (2009).
10. In re Eli F., 212 Cal. App. 3d 228, 234-35 (1989).
11. Drum v. San Fernando Valley Bar Ass'n, 182 Cal. App. 4th 247, 256 (2010).
12. Id. at 257.
13. Id.
14. Id.