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Two Recent Class Action Decisions Further Develop Pleading Requirements Under California's Unfair Competition Law

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Introduction and Background

Historically, California's Unfair Competition Law[1] (UCL) authorized any person acting for the interests of the general public to sue for relief notwithstanding any lack of injury or damages. Proposition 64, approved by voters in the November 2, 2004 General Election, amended the UCL to provide that a private person has standing to bring a UCL action only if he or she "has suffered injury in fact and has lost money or property as a result of the unfair competition."[2] Generally, under the UCL, a plaintiff can pursue a claim if they were injured by the defendant's conduct that was either: (1) fraudulent; (2) unlawful; or (3) unfair.[3]

In *Tobacco II*, the California Supreme Court held that post-Proposition 64, the "fraud" prong of the UCL had a standing requirement, which had to be met by a putative class representative only.[4] The standing requirement would be met if the class representative could show, among other things, reliance and injury resulting from the alleged fraud.

Two putative class action cases recently decided on the same day by the California Court of Appeal, Fourth Appellate District – *Hale v. Sharp Healthcare* [5] and *Durell v. Sharp Healthcare* [6] – significantly impact claims for violations of the UCL and further develop the UCL's pleading requirements in consumer class actions. First, the decisions emphasize the critical importance of pleading specific facts to show reliance on alleged misrepresentations. Indeed, even though *Hale* and *Durell* involved the same defendant (and defense counsel)[7] and very similar factual scenarios and legal issues, the court reached opposite results in the two cases based on what the putative class representative plaintiffs pleaded. Second, the Court of Appeal extended the California Supreme Court's decision in *Tobacco II* to the "unlawful" prong of the UCL in cases where the predicate unlawfulness is misrepresentation or deception. Finally, the court extended the reach of an earlier California Supreme Court case, *Cel-Tech*,[8] to limit in the consumer context what can be considered an "unfair" business practice in violation of the UCL.

The Hale *and* Durell *Decisions*

The Court of Appeal held that the plaintiff in *Hale* could proceed with her UCL claim past the pleading stage.[9] *Hale* was a putative class action against Sharp Healthcare and Sharp Grossmont Hospital (collectively, Sharp) for violation of the UCL, in addition to various other claims. Ms. Hale alleged that Sharp had deceptively and unfairly charged her and other uninsured patients for medical services. She alleged that the fees substantially exceeded those that Sharp accepted from patients covered by Medicare or private insurance. At the time Ms. Hale was admitted to the hospital, she was uninsured. She was required to sign a form obligating herself to pay the hospital "in accordance with the regular rates and terms of the hospital." Ms. Hale's bill for her one-day stay at the hospital, which included medical treatment, central services, lab work, medication, emergency hospital care, and CT scans, was $14,447.65.[10] Notably, Ms. Hale pleaded that she was "expecting" that the fees she would be charged would be "regular rates."[11]

The plaintiff in *Durell* was not as fortunate. The same day the Court of Appeal gave the green light to Ms. Hale's claims, the court upheld the dismissal of all of Mr. Durell's claims without leave to amend, including his UCL claim.[12] Like *Hale*, *Durell* was a putative class action against Sharp Healthcare and Sharp Grossmont Hospital, with largely the same causes of action as *Hale*. Mr. Durell's allegations were nearly identical to those in *Hale* – he claimed Sharp engaged in deceptive and unfair practices by billing uninsured patients full standardized rates, while significantly discounting rates for insured patients or those on Medicare. Mr. Durell was taken to the emergency room at Sharp and treated five times between October 2000 and May 2005. During these visits, he was treated for a severe asthma condition and for severe foot pain. Mr. Durell was uninsured during each of these visits. Like Ms. Hale, Mr. Durell was required to sign a form obligating him to pay usual and customary rates for services. Sharp's bills to Mr. Durell, consisting of differing amounts billed from 2000 to 2005, totaled $21,088.12 for the five visits.[13]

In both cases, the court applied the California Supreme Court decision of *Tobacco II* to accept or reject the UCL causes of action.[14]

Pleading Reliance Matters and, Post-Proposition 64, a Plaintiff Must Have Standing, in the Form of Reliance on an Alleged Misrepresentation, to Assert a UCL Violation Under the "Unlawful" Prong

The differing outcomes of *Hale* and *Durell* arise directly from the court's application of *Tobacco II* to the operative pleadings. In *Hale*, the Court of Appeal found that the putative class representative had adequately pleaded reliance to the extent any claims of "fraud" were involved, as required post- *Tobacco II*. The court also extended the *Tobacco II* holding to add an actual reliance requirement to the "unlawful" prong, where the predicate unlawful conduct is misrepresentation.

Despite these added "reliance" pleading requirements under the UCL for unlawful and fraudulent actions, the *Hale* court found that the Plaintiff's Second Amended Complaint (SAC) adequately pleaded a UCL claim. In particular, as noted above, the SAC stated that "at the time of the signing of the contract, [Plaintiff] was *expecting* to be charged 'regular rates.'"[15] The *Hale* court found that use of the word

"expecting" was sufficient when read in the context of the complaint – essentially, a substitute for reliance – and there was no reason to amend the complaint simply to change the term to "relying."[16]

On appeal, *Durell*, with facts similar to those in *Hale*, likewise involved the "unlawful" and "unfair" prongs of the UCL. The Court of Appeal held that the reliance requirement of *Tobacco II* applied to the "unlawful" prong of the UCL, as the court had held in *Hale*. However, in this case, the complaint did not adequately allege that Mr. Durell had relied on representations in seeking or accepting services. Unlike Ms. Hale, Mr. Durell failed to plead that he relied on any alleged misrepresentation or had any expectation of paying a regular rate.

The court further remarked that the complaint "does not allege Mr. Durell ever visited Sharp's Web site or even that he ever read the Agreement for Services."[17] For this reason, the lower court's demurrer was sustained as to the "unlawful" prong of the UCL.[18] No leave to amend was granted because, as the court pointed out, Mr. Durell had already amended or attempted to amend his complaint on numerous occasions and, even in briefing in the Court of Appeal, "[Mr. Durell] does not claim he can in good faith amend the complaint to allege actual reliance for purposes of the UCL and [Consumer Legal Remedies Act] claims."[19]

The Court Applies Cel-Tech *to the "Unfair" Prong of the UCL, Clarifying the Test for Unfairness in a Consumer Action*

The *Durell* court also analyzed the "unfair" prong of the UCL. Mr. Durell alleged that Sharp's conduct "violat[ed] public policy, and [was] 'immoral, unethical, oppressive, and unscrupulous.'"[20] The court discussed and cited to *Cel-Tech* and other case law supporting its view that these allegations only repeated previously considered and rejected tests for "unfairness," which were too vague and amorphous. The court reiterated that, for an action to be "unfair" within the meaning of the UCL, even in the consumer context, the action must be "'tethered' to specific constitutional, statutory or regulatory provisions" or "threaten[] an incipient violation of an antitrust law, or violate[] the policy or spirit" of an antitrust law.[21] Because Mr. Durell's allegations as to "unfairness" did not meet this standard, his UCL cause of action failed on the "unfairness" prong. The court did not, and had no need to, reach the "reliance" aspect of the UCL as to the "unfairness" prong after concluding that Mr. Durell's pleading was facially defective.[22]

Conclusion

Through these companion decisions, the California Court of Appeal has extended the reliance/causation requirement to the "unlawful" prong of the UCL, where the predicate unlawfulness is based on misrepresentation or deception. In addition, where reliance is required, it must be specifically pleaded. Clearly, at a minimum, Mr. Durell needed to plead that he relied or was "expecting" to be charged regular rates, as Hale alleged when she signed the agreement with Sharp for services. However, even on demurrer, the court's opinions suggest that a plaintiff's "reliance" may need to be facially reasonable, such as allegations that the plaintiff was misled by visiting the defendant's website or reading the defendant's service agreement. Moreover, by applying *Cel-Tech* in *Durell*, the court reiterated the limitations of what can constitute

an "unfair" business practice. Accordingly, *Hale* and *Durell* further develop and refine the pleading requirements under the UCL in consumer class actions, but these cases will no doubt not be the final word as courts in California continue to apply and interpret Prop-64 and the *Tobacco II* decision.

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[1] The UCL allows a claimant to pursue injunctive relief against a business for any "unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising…" Cal. Bus. & Prof. Code § 17200.

[2] Cal. Bus. & Prof. Code § 17204; *Hale v. Sharp Healthcare*, 108 Cal. Rptr. 3d 669, 676 (2010); *Durell v. Sharp Healthcare*, 108 Cal. Rptr. 3d 682, 690–691 (2010).

[3] *See, supra*, note 1.

[4] *In re Tobacco II Cases*, 93 Cal. Rptr. 3d 559, 579–583 (2009).

[5] *Hale*, 108 Cal. Rptr. 3d 669 (2010).

[6] *Durell*, 108 Cal.Rptr. 3d 682 (2010).

[7] As the decisions note, Higgs, Fletcher & Mack, LLP represents Defendant and Respondent Sharp Healthcare.

[8] *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 83 Cal. Rptr. 2d 548 (1999).

[9] *Hale*, 108 Cal. Rptr. 3d at 673.

[10] *Hale*, 108 Cal. Rptr. 3d at 672–674.

[11] *Id.* at 679.

[12] *Durell*, 108 Cal.Rptr. 3d at 687–688.

[13] *Id.* at 687–689.

[14] *Tobacco II*, 93 Cal. Rptr. 3d 559 (2009).

[15] *Hale*, 108 Cal. Rptr. 3d at 679.

[16] *Id*.

[17] *Durell*, 108 Cal. Rptr. 3d at 694.

[18] *Id.* at 690–694.

[19] *See id.* at 700. While not stating it explicitly, perhaps the Court was also considering that Durell's pleading of an "expectation" allegation in good faith would be significantly harder following his second, third, fourth, and fifth visits to the same hospital, after receiving a series of bills from Sharp.

[20] *Id.* at 696.

[21] *Id.*

[22] *Id.* at 694–696.