



California Supreme Court Decides Critical Private-Right-Of-Action Issues Under Business and Professions Code Section 17200

By *Scott M. Pearson and Joseph A. Escarez*

Late last week, the California Supreme Court decided two important cases concerning a plaintiff's ability to sue under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.* ("UCL"), when there is no private right of action under the statute regulating the conduct at issue. In both cases, the Court made clear that UCL "unlawful" claims are prohibited when the legislature specifically intended to preclude a private right of action. However, plaintiffs still can proceed under the UCL if (a) the underlying statute is federal and has a savings clause allowing states to adopt more restrictive laws, or (b) the UCL claim is based on "unfair" or "fraudulent" rather than "unlawful" conduct.

The UCL prohibits three types of business practices, those that are "unlawful," "unfair" or "fraudulent." While it has long been clear that "unlawful" claims may be brought based on violations of statutes that have no private cause of action, there was a split of authority on whether those claims are available when Congress or the Legislature specifically intended to preclude private enforcement of the underlying statute. In *Rose v. Bank of America, N.A.*, No. S199074 (Aug. 1, 2013), and *Zhang v. Superior Court*, No. S178542 (Aug. 1, 2013), the California Supreme Court answered that question favorably for defendants, but held in favor of the plaintiffs based on exceptions to the general rule.

In *Rose*, the defendant bank argued that Congress's repeal of a private right of action under the federal Truth in Savings Act, 12 U.S.C. § 4301, *et seq.* ("TISA"), precluded an "unlawful" claim under the UCL. While acknowledging that Congress may preclude certain UCL claims, the Court found there was no Congressional intent to do so in this instance, as it did not repeal TISA's savings clause. The savings clause expressly permits states to enforce laws regulating the same subject matter provided they are not inconsistent, and the Court found the UCL to be such a law.

Zhang involved a state insurance statute that the Legislature specifically intended to be enforced only by the Insurance Commissioner. While the Court expressly noted that an "unlawful" claim may not be brought based on such a statute, it held that plaintiff's claims could proceed because they were brought under the "unfair" and "fraudulent" prongs of the UCL, which are unaffected by whether or not there is a private right of action under a statute regulating the same conduct.

Scott M. Pearson is a partner and co-chair and *Joseph A. Escarez* is an associate in Seyfarth's Consumer Financial Services Litigation practice group. If you would like further information, please contact your Seyfarth attorney, Scott M. Pearson at spearson@seyfarth.com or Joseph A. Escarez at jescarez@seyfarth.com.

www.seyfarth.com

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