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United States Commercial Law Seminar

Masaryk University

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***Lecture Four: State Law Business Torts: Unfair  
competition; interference with contract; interference with  
prospective economic advantage***

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# Readings

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1. *In re Tobacco II Cases*, 46 Cal.4th 298 (2009)
2. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1150 (2003)
3. *Linear Technology Corp. v. Applied Materials, Inc.*, 152 Cal. App.4th 115 (2007)

# Elements of Claim for Unfair Competition

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A claim for unfair competition under UCL [*Bus. & Prof. Code 17200*] requires proof that defendant engaged in

- A "business" act or practice
- Consisting of either:
  - An "unlawful" act or practice;
  - A "fraudulent" act or practice;
  - An "unfair" act or practice; or
  - Unfair or false advertising
- Plaintiff must have suffered injury in fact resulting in loss of money or property

# Unfair Competition Law: Key Issues

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- ❑ Limited to consumer cases?
- ❑ Unlawful element: only violations of
  - Statutes
  - Regulations
  - Other written law
- ❑ Equitable remedy – available if plaintiff has adequate remedy at law?
- ❑ Class actions: must entire class have suffered loss of money or property?

# Purpose of UCL

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- ❑ Consumer class actions and representative UCL actions serve important roles in the enforcement of consumers' rights.
- ❑ [They] make it economically feasible to sue when individual claims are too small to justify the expense of litigation, and thereby encourage attorneys to undertake private enforcement actions.
- ❑ Through the UCL a plaintiff may obtain restitution and/or injunctive relief against unfair or unlawful practices in order to protect the public and restore to the parties in interest money or property taken by means of unfair competition.
- ❑ These actions supplement the efforts of law enforcement and regulatory agencies.

*In re Tobacco II Cases*, 46 Cal.4th 298 (2009)

# *Tobacco II case*

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- “The complaint before us alleges that the tobacco industry defendants violated the UCL by conducting a decades-long campaign of deceptive advertising and misleading statements about
  - the addictive nature of nicotine and
  - the relationship between tobacco use and disease.”

# Proposition 64

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- ❑ Adopted by voters in 2004
- ❑ Intended to limit scope of UCL statute:
  - use by unscrupulous lawyers who exploited the generous standing requirement of the UCL to file “shakedown” suits to extort money from small businesses.
  - “Attorneys formed a front ‘watchdog’ or ‘consumer’ organization. They scoured public records on the Internet for what [were] often ridiculously minor violations of some regulation or law by a small business, and sued that business [through] the front organization
  - Since even frivolous lawsuits can have economic nuisance value, the attorneys then contacted the business ... and pointed out that a quick settlement (usually around a few thousand dollars) would be in the business's long-term interest.”
- ❑ Provides: “Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204”
  - i.e., a “person who has **suffered injury in fact** and has **lost money or property** as a result of [the] unfair competition.” 7

# *Tobacco II* case: questions presented

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On review, we address two questions:

- First, who in a UCL class action must comply with Proposition 64's standing requirements, the class representatives or all unnamed class members, in order for the class action to proceed?
  - We conclude that standing requirements are applicable only to the class representatives, and not all absent class members.



# *Tobacco II* case: questions presented

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- Second, what is the causation requirement for purposes of establishing standing under the UCL?
  - We conclude that a class representative proceeding on a claim of misrepresentation as the basis of his or her UCL action must demonstrate actual reliance on the allegedly deceptive or misleading statements, in accordance with well-settled principles regarding the element of reliance in ordinary fraud actions.

# UCL Claim: *Alvarez v. GE Money Bank*

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- ❑ Allegation: unfair to give credit cards to consumers without disclosing over limit fee
- ❑ Defense: fee was expressly disclosed in application
- ❑ Question: are consumer disclosures enforceable?
  - What if it is buried in a long document that few consumers read?

# Unconscionability Issue

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- **Procedural unconscionability – 2 elements**
  - **Oppression**: “inequality of bargaining power ... resulting in no real negotiation and an absence of meaningful choice”
  - **Surprise**: “involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms.” (*A&M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486)
- **Substantive unconscionability**
  - A contractual term is only substantively unconscionable if it is “so one-sided as to shock the conscience, or imposes harsh or oppressive terms.” (*Morris v. Redwood Empire Bancorp* (2005) 128 Cal. App. 4th 1305, 1322)

# Allen v. Verizon California

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- ❑ Claim: Verizon violated UCL by selling Caller ID services representing that it would provide all available names
  - In fact, Verizon chose not to purchase names from a handful of databases
- ❑ Applied only to land lines
- ❑ Allen sought to represent class of all California purchasers of Caller ID
- ❑ Defenses to class certification:
  - Many customers not affected at all
  - Others affected so seldom it was not material
  - Impractical to determine extent of impact on class members – requires individualized inquiry

# UCL Claim Against JBC

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- ❑ JBC sells 100% carbon fiber bikes (road and mountain)
- ❑ 10% of bikes are made in China
- ❑ Chinese subsidiary starts using some aluminum in chainstays in 2009
- ❑ U.S. parent learns of this in 2011 and issues recall notice – 20,000 bikes affected
- ❑ Bob Rider, a California resident who owns a JBC bike, sues under 17200 alleging fraud
  - Rider seeks to represent all people who bought any JBC frame after 2009
  - He also seeks, in the alternative, to represent all people who bought a Chinese frame after 2009

# Rider v. JBC: Key Questions

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- ❑ Does Rider have standing at all?
- ❑ Can Rider sue on behalf of all purchasers since 2009?
  - Or only those who bought Chinese frames?
- ❑ Should JBC fight the suit?
  - Estimated cost: \$1.5 to 2 million
  - Disruption of business
  - Reputational impact
  - Probability of winning
  - Settlement options and challenges

# Rider v. JBC:

## Plaintiff's Settlement Demand

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- ❑ Replace all Chinese-made frames at distributor or through mail (20,000 x \$1,000 = \$20 million)
- ❑ Cover all mailing costs if mailed
- ❑ Reimburse rental costs of up to \$200 per biker
- ❑ Agree to inspections of Chinese facility by independent party up to twice per year
- ❑ Stipulate to injunction against using aluminum or other materials in any CF bike for five years
- ❑ Mail notice to all class members (20,000 people at cost of \$2 each = \$40,000)
- ❑ Pay Rider a \$10,000 award
- ❑ Pay each owner of Chinese frame \$500 (\$10 million)
- ❑ Pay plaintiff's attorneys fees of \$2 million

# What do we do about China?

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- ❑ They paid a bribe that caused us a big problem (\$32 million)
- ❑ Now they caused a 17200 suit
- ❑ Options:
  - Shut them down?
  - Replace executives and country manager?
  - Fire everyone involved?
  - Sell off the operation?
    - ❑ Low price if sell now
    - ❑ Higher price if reform operations then sell
  - Other options?



# Elements of Claim for Interference with Contract

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- A claim for intentional interference with prospective economic advantage requires proof that
  - Plaintiff had a valid contract with a third party
  - Defendant knew about the contract's existence
  - Defendant's conduct was intended to interfere with the contract
  - Defendant in fact interfered with the contractual relationship
  - Plaintiff suffered actual injury
- Negligent interference may also be actionable

**Hypothetical for discussion only –  
not a real fact pattern!**

# JBC v. Trek

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- JBC's largest US distributor is Helens Bikes
  - 42 stores in 12 states
  - Helens sells 40,000 JBC bikes each year
- Trek offers Helens 5% price discount if >50% of bikes sold are Trek bikes
  - To make 50%, Helens must sell no more than 10,000 JBC bikes per year
- In 2010, Helens sales go from 40,000 to 9,000
  - JBC loses \$2000 per bike:  $\times 31,000 = \$6$  million
  - Future losses projected at \$26 million
    - over five years
    - discounted to present value
  - Total claim: \$32 million

**Hypothetical for discussion only –  
not a real fact pattern!**

# JBC v. Trek: Strategic Considerations

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- Should we sue:
  - Helens
  - Trek
- Risks:
  - Likely cost of suit: \$2-3 million
    - Possible contingency case
    - Costs higher if Trek buries us with discovery
  - Disruption of business
  - Possible trade secret cross claims (Anna)
- Pre-suit demand?
- Probability of prevailing = 60%

# Elements of Claim for Interference with Prospective Economic Advantage

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- A claim for intentional interference with prospective economic advantage requires proof that
  - Plaintiff had an economic relationship with a probability of future economic benefit;
  - Defendant knew about plaintiff's economic relationship;
  - Defendant's conduct was substantially certain to interfere with plaintiff's relationship;
  - Defendant's conduct was independently unlawful;
  - Defendant disrupted plaintiff's relationship;
  - Plaintiff suffered actual injury

*Blank v. Kirwan (1985) 39 Cal.3d 311, 330, 216 Cal. Rptr. 718*

# JBC v. Gallardo Bike Co.

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- ❑ JBC has entered into negotiations with Kenyan government to sell 25,000 bikes over three years
- ❑ Value of deal = \$50 million ( $\$2,000 \times 25,000$ )
- ❑ Gallardo, an Italian manufacturer, is competing for deal
  - Gallardo's Kenya country manager pays \$1 million in bribes to Kenyan officials
  - Gallardo announces contract to sell 25,000 Gallardo bikes
  - Kenya advises JBC that it has awarded contract to Gallardo
- ❑ Impact on JBC
  - Lost profits of \$50 million
  - Lost foothold in Africa (other deals): \$250 million?

# JBC v. Gallardo Bike Co: Key Issues

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- Should we pursue complaints with:
  - Kenya government officials
  - U.S. embassy/State Department
  - Czech embassy
- Possible referral to law enforcement agencies
  - In Italy
  - In Kenya
  - In U.S. (what if Gallardo sells American Depositary Receipts on a U.S. security exchange?)
- Should we sue Gallardo?
  - Where can suit be brought?
  - Whose law applies?