Court Offers Guidance as to Requirements for Alleging Harm to Establish UCL Standing

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The California Court of Appeal, in *Nelson v. Pearson Ford Co.*, issued a lengthy 50-page opinion on July 15 addressing numerous issues, including violations of the Automobile Sales Finance Act ("ASFA"), the Unfair Competition Law ("UCL"), the Consumer Legal Remedies Act ("CLRA"), class treatment and the right to recover fees in class actions.

Most poignant for insurers were the portions of the opinion addressing the UCL claim, and more specifically, the named plaintiff's standing to pursue his UCL claim.

Reginald Nelson ("Plaintiff") decided to purchase a used vehicle from Pearson Ford ("Pearson") and executed a sales contract to that effect. Because, at the time of purchase, Plaintiff lacked auto insurance, an insurance broker was summoned to the dealership and sold Plaintiff an auto policy. A premium of $250 was added to the vehicle's price.

One week after the parties had completed the agreement, Pearson had additional paperwork for Plaintiff to sign. The new paperwork rescinded the original contract and entered the parties into a new agreement. The parties backdated the second contract to the date they signed the original contract. As a result of changing interest rates between the time the first and second contracts were entered, the backdating resulted in Plaintiff having to pay an additional $27 finance charge. The second contract disclosed the total finance charge, but the additional $27 was not separately itemized. Additionally, the second contract improperly added the $250 insurance premium to the cash price of the vehicle, which caused Plaintiff to pay $30 in additional sales tax and financing charges on the insurance premium.

Plaintiff later filed a class action complaint seeking to establish two distinct classes (both of which would ultimately be certified): (1) a class regarding the backdating of financing agreements (the "backdating class"); and (2) the improper inclusion of the price of insurance into the price of the vehicle (the "insurance class").

Following a bench trial, the court found Pearson had violated the UCL with regard to the backdating class, granting injunctive relief and setting restitution in the amount of $50 per class member.

For the insurance class, the court found that Pearson violated the ASFA and the UCL by failing to disclose the cost of insurance and adding the insurance cost to the cash price of the car. It also enjoined Pearson from adding the price of insurance to the cash price of a vehicle in the future. Following the entry of judgment, Pearson appealed on numerous grounds.

A majority of the Court of Appeal opinion focuses on whether the Pearson violated various provisions of the ASFA. After concluding that it had, the court turned to the UCL.

Most notably, the Court addressed whether Plaintiff possessed Proposition 64 standing to sue under the UCL.

After the 2004 amendment of the UCL by Proposition 64, a private person has standing to sue only if he or she "'has suffered injury in fact and has lost money or property *as a result of* [such] unfair competition.'" (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 305 (*Tobacco II*), citing Bus. & Prof. Code, § 17204, italics added.)

On appeal, Pearson argued that Plaintiff did not suffer an injury "as a result of" its unfair competition under the UCL. More specifically, Pearson argued that Plaintiff was required to show that he would not have purchased the car had he been aware of (1) the additional interest and financing fees; and (2) the lumping of the insurance cost into the sales price of the vehicle. In support of this argument, Pearson cited *Troyk v. Farmers Group, Inc.*, 171 Cal.App.4th 1305 (2009).

In *Troyk*, an insured filed a class action against his automobile insurer alleging the insurer violated the UCL by requiring him to pay a service charge for payment of his automobile insurance policy premium and, because the service charge was not stated in his policy, the insurer violated Insurance Code section 381, subdivision (f), requiring that this be done. (*Troyk*, *supra*, 171 Cal.App.4th at p. 1314.)

Although the *Troyk* court found that the insurer had violated the Insurance Code as alleged, it concluded that causation under the UCL did not exist because plaintiff did not show that had the insurer disclosed the monthly service charges in the policy documents as required by the Insurance Code, he would not have paid them. Significantly, the lack of disclosure of proper charges, not illegal charges, violated the UCL in *Troyk*.

Pearson's argument was, essentially, that Plaintiff would have purchased the car even if he was aware he was paying the extra $57 dollars that was obfuscated by the signing of the second contract – therefore any subversion was harmless.

The Court of Appeal disagreed with Pearson's argument that there was no standing because Plaintiff suffered no injury "as a result of" its unfair competition." More specifically, the Court held:

The failure of Pearson Ford to comply with the ASFA caused Nelson to suffer an injury and lose money as to both classes because he paid pre-consummation interest (the backdating class), and paid sales tax and financing charges on the insurance premium (the insurance class). Unlike *Troyk*, these illegal charges violated the UCL and Pearson Ford improperly collected additional funds from Nelson. ***UCL causation exists because Nelson would not have paid pre-consummation interest, or sales tax and financing charges on the insurance premium had Pearson Ford complied with the ASFA.*** Because Nelson had standing to pursue claims under the UCL, we reject Pearson Ford's argument that the judgment in favor of both classes should be vacated to the extent it grants relief under the UCL.

- Slip op. at 34 (emphasis added).

In short, the court held that UCL causation existed because Plaintiff would not have paid the additional fees and costs had Pearson complied with the ASFA. The court found this holding

consistent with the *Tobacco II* footnote explaining that "the concept of reliance" will have "no application" in many UCL cases. *In re Tobacco II Cases*, 46 Cal.4th 298, 325 n.17 (2009).

The above discussion provides some illumination as to what is required of a Plaintiff when alleging harm in the situation where an unlawful act underlies the imposition of a charge or fee.

According to the court, the plaintiff need not plead that the product or service wouldn't have been purchased had the truth been disclosed; rather, it is enough to plead that money was spent on the product or service and that the amount charged included some unlawful component that would not have been charged had the law been followed.

The parties also disputed on appeal the trial court's award of attorney's fees and costs. In particular, the trial court denied Pearson's request to recover its attorney's fees and costs under Code Civ. Proc. §998 on the ground that Pearson's lump-sum offer to settle both class claims and Plaintiff's individual claims was invalid. For more on that aspect, please see our firm's Litigation Management and Attorney Fee Analysis Blog.