



# Class actions and the Consumers Legal Remedies Act

## *Understanding the special provisions of Civil Code section 1770*

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This article summarizes specific provisions of the Consumers Legal Remedies Act (CLRA) along with recent case law interpreting those provisions. Generally speaking, the CLRA is a statutory scheme designed to “protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.” (Cal. Civ. Code, § 1760.) The CLRA contains 24 specific subdivisions prohibiting a wide range of conduct, ranging from using deceptive representations of geographic origin in connection with goods or services to inserting an unconscionable provision in a contract. The CLRA was originally passed by the California State Legislature in 1970 and has proven to be an effective tool for consumers.

### **Selected proscribed actions/ recent case law**

#### • *Blue Sky Natural Beverage Company*

Pursuant to Section 1770, subdivision (a)(4), of the CLRA, it is unlawful for an individual to use deceptive representations or designations of geographic origin in connection with goods or services. (Cal. Civ. Code, § 1770, subd. (a)(4).) In *Chavez v. Blue Sky Natural Beverage Co.*, the plaintiff alleged that the company “Blue Sky Natural Beverage Co.” misrepresented the origins of their beverage company, thereby violating the CLRA. (*Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 368 (N.D. Cal. 2010) (granting motion for class certification).) Though the labels on the beverages read, “SANTA FE, NEW MEXICO” or “SANTA FE, NM,” there was not a company named “Blue Sky Natural Beverage Co.” which was operating or manufacturing

beverages in Santa Fe, New Mexico, at the time the beverages were being produced for sale. (*Chavez, supra*, 268 F.R.D. at 368.) Additionally, the plaintiff alleged that he relied on the defendant’s misrepresentations and consequently lost the full value of the price he paid for the beverages since he would not have paid that price had he been aware of the true geographic origin of the products. (*Ibid.*)

Blue Sky argued that a class should not be certified because it was unascertainable, and that each class member’s claims of individualized reliance on the misrepresentations of the product must be proven. (*Id.* at 375.) The court rejected the argument and held that the consumer’s claims for violation of the CLRA “do not require individualized showing of reliance” as “reliance on the alleged misrepresentations may be inferred as to the entire class if the named plaintiff can show that material misrepresentations were made to the class members.” (*Id.* at 376.) Thus, the plaintiff was therefore able to certify a class under the CLRA by showing that the misrepresentation was the cause of the class members’ harm. (*Ibid.*)

#### • *Allegations against Chevron*

Pursuant to Section 1770, subdivision (a)(5), of the CLRA, it is unlawful for an individual to represent that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval status, affiliation, or connection which he or she does not have. (Cal. Civ. Code, § 1770, subd. (a)(5).) In *Klein v. Chevron U.S.A., Inc.*, consumers brought a class action against Chevron alleging that Chevron effectively bought gasoline at one temperature, yet sold it at another, resulting in customers receiving less gas than that which they paid for. (*Klein v. Chevron U.S.A., Inc.* (2012) 202

Cal.App.4th 1342, 1348) (reversing the trial court’s order granting Chevron’s motion for judgment on the pleadings.) Additionally, the plaintiffs alleged that the company paid an unfairly low tax rate on account of the temperature difference, and further that consumers were unable to make fair price comparisons between retailers. (*Ibid.*) Chevron convinced the trial court that the claims against it should be dismissed and the plaintiffs appealed. (*Id.* at 1349.) The State’s Second Appellate District ruled that the plaintiffs adequately alleged violations under the CLRA, noting that the plaintiff’s allegation “that Chevron’s failure to disclose the effect of temperature on motor fuel is deceptive because it advertises the price of its product in what consumers understand to be standardized units (gallons)” was “sufficient to state a CLRA claim predicated on a material omission.” (*Id.* at 1383.)

#### • *Allegations against Fiji*

In *Hill v. Roll International Corp.*, plaintiffs alleged that a green drop symbol on Fiji bottles falsely represented that the water was environmentally superior to other waters, as well as endorsed by an environmental organization, consequently violating the CLRA. (*Hill v. Roll Int’l Corp.* (2011) 195 Cal.App.4th 1295, 1298 (affirming the trial court ruling that Hill’s amended complaint failed to state a cause of action and dismissing the complaint).) Though the court acknowledged that the plaintiff was misled to believe that the green drop symbol on Fiji bottles was a marker that implicitly indicated approval by a third-party organization, and also gave the impression that the product was environmentally superior to competitors’ bottled water, the court held that the consumer’s beliefs did not satisfy the reasonable consumer standard. (*Hill, supra*, 195 Cal.App.4th at 1304.) The court noted that the reasonable consumer



standard, which is applied to the CLRA, “does not include one who is overly suspicious,” and in the case at bar the green drop bore no name or recognized logo of any group, much less a third-party organization. (*Ibid.*)

#### •Allegations against Apple

In *In re iPhone Application Litigation*, a nationwide class of plaintiffs (who are users of Apple products, including the iPhone, iPad and iPod Touch) have brought suit against Apple alleging Apple devices enable mobile advertising companies to collect users’ personal data at any time that free applications are downloaded, without user consent or knowledge. (*In re iPhone Application Litigation*, 2012 WL 2126351, at \*1 (denying defendant’s motion to dismiss CLRA claims).) Moreover, the plaintiffs claim that Apple has stored geolocation data on users’ iDevices for Apple’s own benefit, at a cost to consumers, and further that Apple continued to collect users’ geolocation data even when users actually switched their “Location Services” setting to “off.” (*Id.* at \*23.) Accordingly, the plaintiffs argue they ultimately overpaid for the products since Apple failed to clearly articulate how the applications would use their personal information. (*Ibid.*)

Apple argued that the plaintiffs’ CLRA claim should be dismissed for three reasons: “(1) Plaintiffs have not alleged any facts establishing that Plaintiffs sustained any actual damage, (2) Plaintiffs’ claim is based on the downloading of software, which is not covered by the CLRA, and (3) the CLRA applies only to the purchase or lease of goods or services, and Plaintiffs’ claim is based on the downloading of free apps.” (*Ibid.*) On June 12, 2012, a federal judge ruled against Apple, holding that at the pleading stage, “Plaintiffs have sufficiently alleged that they are consumers under the CLRA, and their allegations relate to the purchase of goods.” (*In re iPhone Application Litigation*, 2012 WL 2126351, at \*23.) In arriving at this conclusion, the judge explained that “the gravamen of the CLRA claim of the Geolocation Class is not that free apps

downloaded by Plaintiffs were deficient, but rather that the iPhones (a ‘good’ covered by the CLRA) purchased by the class members did not perform as promised based on a specific functionality of the device.” (*Ibid.*) Moreover, the court reasoned that the “Plaintiffs’ CLRA claim on behalf of the iDevice class is also premised on Plaintiffs’ purchase of the iDevices themselves, and not exclusively on the downloading of free apps.” (*Ibid.*) Thus, the court concluded that the plaintiffs may pursue claims against Apple Inc. under both the CLRA and the Unfair Competition Law to allege that Apple caused them to overpay for their devices. (*Ibid.*)

#### Inserting an unconscionable provision in the contract

##### •Allegations against Comcast

Pursuant to section 1770, subdivision (a)(19), of the CLRA, it is unlawful for a person engaged in a transaction that is supposed to result in the sale or lease of goods to insert an unconscionable provision in the contract. (Cal. Civ. Code, § 1770, subd. (a)(19).) In *Belton v. Comcast Cable Holdings, LLC*, cable subscribers brought an action against Comcast challenging the provider’s practice of offering music service only as part of a basic tier cable package including television service. (*Belton v. Comcast Cable Holdings, LLC* (2007) 151 Cal.App.4th 1224, 1229 (affirming an order to dismiss a cause of action under the CLRA).) In order for a provision in a contract to be deemed unconscionable under the CLRA, the court noted that it must be both procedurally and substantively unconscionable. (*Id.* at 1245.) The court described procedural unconscionability as encompassing both the factors of oppression and surprise, explaining that oppression “arises from an inequality of bargaining power which results in no real negotiation and ‘an absence of meaningful choice’” and 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.” (*Belton, supra*, 151 Cal.App.4th at 1245.) The substantive element of unconscionability, on the other hand, “focuses on the actual terms of the agreement and evaluates whether they create ‘overly harsh’ or ‘one-sided’ results as to ‘shock the conscience.’” (*Ibid.*)

Ultimately, the court held that the cable service provider’s requirement that subscribers purchase a basic tier package in order to receive music service did not “shock the conscience,” particularly as there were alternative sources of music available that were carried by the cable service provider’s FM music service, and subscribers had the ability to access music through broadcasting programming, compact disc, the internet, or satellite service. (*Id.* at 1246.) Moreover, the court reasoned that procedural unconscionability was not at issue since alternative sources for music were available, thereby providing plaintiffs with a meaningful choice. (*Id.* at 1245.)

##### •Allegations against U-Haul

In *Aron v. U-Haul Co. of California*, customers brought a class-action complaint against U-Haul of California, a truck rental company, alleging that its refueling charges and practices violated the CLRA. (*Aron v. U-Haul Co. of Cal.* (2006) 143 Cal.App.4th 796, 800 (order affirming dismissal of plaintiff’s claims of unconscionability under (a)(19).)

Within their allegations, the plaintiffs specifically challenged U-Haul’s established practice of requiring customers to return trucks with an equal amount of fuel as that which they had at the time of rental. (*Aron, supra*, 143 Cal.App.4th at 800.) The plaintiffs contend that this practice leads to many customers returning trucks with excess fuel for which they were not reimbursed since the level of the fuel gauge is the exclusive means of measurement. (*Id.* at 801.) Ultimately, the court held that the customers’ claims must fail since the terms of the refueling policy were clearly disclosed in the rental contract and the consumers had a meaningful choice to rent a truck from another company. (*Id.* at 809.) Additionally, the



fueling fees imposed by the company did not “shock the conscience” as a matter of law, so substantive unconscionability was not an issue. (*Ibid.*)

### Remedies, including attorney’s fees

#### •Civil Code section 1780(a)-(c)

Under the CLRA, litigants may recover or obtain any of the following: (1) actual damages (statutory minimum for an award of damages in a class action shall not be less than \$1,000); (2) an order enjoining the methods, acts, or practices; (3) restitution of property; (4) punitive damages; or (5) any other relief that the court deems proper. (Cal. Civ. Code, § 1780, subd. (a)(1-5).) If the plaintiff is over 65 or disabled, statutory penalties are also available up to the amount of \$5,000. (Cal. Civ. Code, § 1780, subd. (b).) Additionally, pursuant to section 1780(c), treble damages may be awarded when the defendant has been found by a preponderance of the evidence to have engaged in charging unreasonable fees to assist an applicant or recipient in securing public social services. (Cal. Civ. Code, § 1780, subd. (c).)

#### •Attorney’s fees

Pursuant to section 1780, subdivision (e), of the CLRA, “The court shall award court costs and attorney’s fees to a prevailing plaintiff in litigation filed pursuant to this section.” (Cal. Civ. Code, § 1780, subd. (e).) As it is well recognized that limiting a fee award to an amount which would be less than that incurred in prosecuting such a case “would impede the legislative purpose underlying section 1780,” awarding plaintiffs reasonable attorney’s fees thereby allows consumers to pursue actions where the compensatory damages may be relatively modest (*Hayward v. Ventura Volvo* (2003) 108 Cal.App.4th 509, 516.) It is important to note that the CLRA also provides for prevailing defendants to recover reasonable attorney’s fees “upon a finding by the court that the plaintiff’s prosecution of the action was not in good faith.” (Cal. Civ. Code, § 1780, subd. (e).)

### Class certification

#### •Class-action certification requirements

Pursuant to section 1781 of the CLRA, any consumer may bring an action on behalf of himself, as well as any other consumer who is similarly damaged under section 1780 for class certification, if the following criteria are met: “(1) It is impracticable to bring all members of the class before the court; (2) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members; (3) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class; and (4) The representative plaintiffs will fairly and adequately protect the interests of the class.” (Cal. Civ. Code, § 1781.) Superiority is not a listed criteria. The only difference between a CLRA class action and a non-CLRA class action is that “a plaintiff moving to certify a class under the CLRA is not required to show that substantial benefit will result to the litigants and the court.” (*Corbett v. Superior Court* (2002) 101 Cal.App.4th 649, 670, fn. 9.) Thus, “the CLRA does not require that a plaintiff show a probability that each class member will come forward and prove his or her separate claim to a portion of the recovery.” (*Ibid.*)

#### Thirty-day notice requirement for damages

Pursuant to section 1782, subdivision (a), of the CLRA, at least 30 days prior to the commencement of an action for damages, the consumer shall “(1) Notify the person alleged to have employed or committed methods, acts, or practices declared unlawful by Section 1770 of the particular alleged violations of Sections 1770” and “(2) Demand that the person correct, repair, replace, or otherwise rectify the goods or services alleged to be in violation of Section 1770.” (Cal. Civ. Code, § 1782, subd. (a)(1-2).) A consumer may bring an action for injunctive relief, however, without giving notice to the defendant. (Cal. Civ. Code, § 1782, subd.

(d).) Additionally, under section 1782(d), a consumer who brings an action for injunctive relief may later amend her complaint to include a request for damages once a suit has been filed and following 30 days after notice has been given. (Cal. Civ. Code, § 1782, subd. (d).)

### Trends

#### •Requirements for design defect allegations

In *Wilson v. Hewlett-Packard Co.*, the plaintiff, who was the owner of a Hewlett-Packard (HP) laptop that became defective, alleged that HP misrepresented and concealed a common and uniform design defect with the power jacks. (*Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1139 (2012).) The Ninth Circuit Court of Appeals ultimately affirmed a district court decision to dismiss the case against HP holding that plaintiffs who allege that a manufacturer has concealed a design defect must also allege that the design defect caused an unreasonable safety hazard. (*Id.* at 1143.) Furthermore, the court held that the plaintiff’s conclusory allegations that the manufacturer “became familiar with” or was “on notice” of a manufacturing defect did not sufficiently assert that the manufacturer knew of the alleged defect at the time of the sale. (*Id.* at 1147.)

Despite the holding in *Wilson*, it is important to note that certain California case authority supports a recognition of a CLRA claim where a manufacturer has concealed a material fact independent of safety concerns. (*Falk v. Gen. Motors Corp.*, 496 F.Supp.2d 1088, 1094 (N.D. Cal. 2007).) In such cases, however, the safety considerations were discussed in the court’s finding that certain non-disclosed information was material. (*Oestreicher v. Alienware Corp.*, 544 F.Supp.2d 964, 971 (N.D. Cal. 2008).) Moreover, the *Wilson* opinion justifies their holding by citing to *O’Shea v. Epson Am., Inc.* which notes that “[a]lthough California courts are split on this issue, the weight of authority suggests that the duty to disclose is limited to safety issues.” (*Wilson*, 668 F.3d at 1141 (quoting *O’Shea v. Epson Am., Inc.*, 2011 WL 3299936, at \*7-9).)



## Standing requirements

In *Meyer v. Sprint Spectrum L.P.*, the plaintiffs brought a class action against Sprint alleging that the remedial provisions within their cellular phone customer service contracts were unconscionable and illegal under the CLRA. (*Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 638.) The California Supreme Court held that the CLRA requires a plaintiff to allege that he/she has suffered “some damage” as a result of a purported unlawful practice in order to have standing to sue, and therefore the plaintiffs’ claims in the case at bar must fail. (*Id.* at 641.) In their holding, the court explained that the mere presence of an allegedly unconscionable provision within a consumer contract could not, by itself, suffice to confer CLRA standing – some damage must be experienced by the consumer. (*Ibid.*) Moreover, the court noted that the legislature, in drafting the act, “set a low but nonetheless palpable threshold of damage, and did not want the costs of a lawsuit to be incurred when no damage could yet be demonstrated.” (*Id.* at 646.)

## Insurance practices/financial services

### •Life insurance is not a good or service

In *Fairbanks v. Superior Court*, plaintiffs who had purchased insurance policies from Farmers alleged that Farmers engaged in numerous deceptive and unfair practices under the CLRA in connection with the marketing of their policies. (*Fairbanks v. Superior Court* (2009) 46 Cal.4th 56, 60.) The California Supreme Court ultimately held that life insurance is neither a “good” nor a “service” within the meaning of the CLRA, and thus the plaintiffs’ claims must fail. (*Id.* at 61.) The court noted that, “Because life insurance is not a ‘tangible chattel,’ it is not a ‘good’ as that term is defined in the Consumers Legal Remedies Act.” (*Ibid.*) Additionally, the court stated that life insurance is not a service since “An

insurer’s contractual obligation to pay money under a life insurance policy is not work or labor, nor is it related to the sale or repair of any tangible chattel.” (*Ibid.*)

### •Extension of credit is excluded under the CLRA

In *Berry v. American Express Publishing*, the plaintiff, who was an American Express cardholder, alleged that American Express violated section 1770, subdivision (a) of the CLRA by including an unconscionable arbitration provision in their agreement with cardholders. (*Berry v. Am. Express Publ’g* (2007) 147 Cal.App.4th 224, 226.) The Fourth District Court of Appeal ultimately held that credit transactions which are separate and apart from the sale or lease of goods or services are not covered by the CLRA. (*Id.* at 233.) In arriving at this conclusion, the court highlighted the fact that “The extension of credit is not a tangible chattel” since a credit card “has no intrinsic value and exists only as indicia of the credit extended to the card holder.” (*Id.* at 229.) Additionally, the court explained that while early drafts of the CLRA included references to “money” and “credit” within the definition of a consumer, the fact that the legislature eventually deleted those terms signifies that the provision should not be stretched to include extensions of credit that are unrelated to the purchase of a specific good or service. (*Berry, supra*, 147 Cal.App.4th at 230.)

## Impact litigation under the CLRA

### •Allegations against nursing homes

In the case *Vinnie Lavender v. Skilled Healthcare Group, Inc.*, the CLRA proved to be a successful tool in obtaining justice on behalf of thousands harmed by understaffed nursing homes in California. (*CAOC 2011 Award Recipients*, CONSUMER ATTORNEYS OF CALIFORNIA, <https://www.caoc.org/index.cfm?pg=11AwardRecipients>.) *Vinnie Lavender* was filed on behalf of 32,000 residents, former residents, and family members of residents of

22 California nursing facilities, which were owned by Skilled Healthcare Group, in response to a large number of wrongful death and severe-injury claims linked to inadequate staffing. (*Ibid.*) In this suit, the plaintiffs alleged that Skilled Healthcare Group routinely failed to meet the minimum staffing requirements that are enunciated in the California Health and Safety Code, and sought damages for up to the maximum allowed under the CLRA. (*Ibid.*) The trial lasted seven months, and the jury ended up awarding damages close to \$677 million, including \$58 million for a violation of the CLRA. (*Ibid.*) *Vinnie Lavender* was the first class action that was tried to a verdict that involved the understaffing of nursing homes, and at the time was the largest verdict ever in a case against a nursing-home chain. (*Ibid.*)

## Conclusion

The CLRA is an effective tool in the battle to protect consumer rights. However, cases brought under the CLRA must be for sharp practices which are offensive to juries. Otherwise, the effectiveness of the CLRA will be eroded over time.



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