

# California's New Definition of Unfair Competition

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A recent decision by the California Supreme Court has redefined unfair competition under Business and Professions Code Section 17200 - California's unfair competition law. Section 17200 defines unfair competition to include "any unlawful, unfair or fraudulent business act or practice." The meanings of "unlawful" or "fraudulent" acts or practices have been clear, but the reference to "unfair" practices has offered seemingly limitless vistas to plaintiffs lawyers and has spawned much litigation.

In *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Company*,<sup>1</sup> the Supreme Court has crafted an entirely new definition of "unfair" competition under Section 17200. Unfair acts or practices now means "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition."<sup>2</sup> In a ruling of perhaps lesser import, the Court also held that to violate Sections 17043 and 17044 of California's Unfair Practices Act, which prohibit below-cost sales and loss leaders, "a company must act with the purpose, i.e., the desire, of injuring competitors or destroying competition."<sup>3</sup>

In *Cel-Tech*, plaintiff Cel-Tech and other sellers of cellular telephones challenged defendant L.A. Cellular's practice of selling telephones to its new subscribers at below cost. Although L.A. Cellular lost money on the sale of telephones, it made up these losses with its increased sales of cellular services. L.A. Cellular's objective was to compete more successfully with Air Touch Cellular in the sale of cellular service. The unintended consequence of these below-cost telephone sales was to injure plaintiffs, who could not compete with L.A. Cellular in the sale of telephones. Plaintiffs charged that L.A. Cellular's conduct constituted below-cost sales and loss leaders in violation of the Unfair Practices Act. Plaintiffs also charged that this conduct constituted unfair competition.

The trial court entered judgment in favor of L.A. Cellular, ruling that there was no violation of the Unfair Practices Act because L.A. Cellular intended to compete with Air Touch, not to harm plaintiffs. Having concluded that the conduct was not actionable under the Unfair Practices Act, the trial court concluded that the Section 17200 claim must also necessarily fail. The Court of Appeal affirmed the trial court's judgment as to the Unfair Practices Act claims, but reversed the judgment as to the Section 17200 claim. The Court of Appeal reasoned that conduct should not be immune from liability under Section 17200 unless the Legislature has expressly declared the conduct to be lawful in other legislation.

The Supreme Court agreed with the Court of Appeal's conclusions and affirmed its judgment. As did the Court of Appeal, the Supreme Court drew a clear distinction between conduct the legislature has not made unlawful and conduct it has made lawful. Where legislation expressly

permits certain conduct - a legislatively created "safe harbor" - that conduct is not actionable under the unfair competition act. Because the Unfair Competition Act did not expressly *authorize* the kind of below-cost telephone sales in which L.A. Cellular was engaged, the Court concluded such conduct might be unfair and actionable under Section 17200.

The Supreme Court went on, however, to create a new test for "unfair" conduct, responding to concerns expressed by L.A. Cellular and various amici curiae for the "need for California business to know, to a reasonable certainty, what conduct California prohibits and what it permits."<sup>4</sup> Widely-quoted Court of Appeal decisions had defined "unlawful" to mean a business practice that "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers,"<sup>5</sup> or to mean that "the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim."<sup>6</sup> The Supreme Court found that these approaches "are too amorphous and provide too little guidance to courts and businesses."<sup>7</sup>

Hence the Supreme Court's new definition, which emphasizes the protection of competition rather than competitors and which borrows federal jurisprudence interpreting Section 5 of the Federal Trade Commission Act. Although California courts are to be the final arbiters of the meaning and scope of Section 17200, these courts may now look to a body of federal law for guidance.

This new definition of "unfair" conduct promises dramatically to reshape litigation involving disputes over competitive business practices. The decision clarifies that conduct that is not actionable under other statutes, for example the Unfair Practices Act or California's Uniform Trade Secrets Act,<sup>8</sup> might nevertheless be actionable as unfair competition. The analysis, however, must now be on the harm to competition - essentially an antitrust analysis - rather than on the reprehensibility of the conduct or its damage to a competitor.<sup>9</sup>

The court's new definition may well fail in its objective of providing certainty and predictability to California businesses. As Justice Kennard argues in dissent, the Court's new test "might be called 'antitrust lite': such vague and dubious metaphysical entities as incipient violations, violations of policies and spirits, and anything that might be characterized as a significant threat or harm to competition."<sup>10</sup> Whether the test proves workable or not, there can be no doubt that it will radically alter the landscape of unfair competition litigation in California.

## Notes

1. 20 Cal. 4th 163, 973 P.2d 527, 83 Cal. Rptr. 2d 548 (1999).
2. Cel-Tech, supra at 186.
3. Cel-Tech, supra at 169.
4. Cel-Tech, supra at 185.
5. People v. Casa Blanca Convalescent Homes, Inc., 159 Cal. App. 3d 509, 206 Cal. Rptr. 164 (1984).

6. State Farm Fire & Casualty Co. v. Superior Court, 45 Cal. App. 4th 1093, 53 Cal. Rptr. 2d 229 (1996).
7. Cel-Tech, supra at 185.
8. Civil Code section 3426 et seq.
9. In a footnote that no doubt will be much debated, the Court states that "[t]his case involves an action by a competitor alleging anticompetitive practices. Our discussion and this test are limited to that context. Nothing we say relates to actions by consumers or by competitors alleging other kinds of violations of the unfair competition law...." Cel-Tech, supra, at 187, n.12.
10. Cel-Tech, supra at 206.