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Federalizing “Unfair Business Practice”
Claims under California’s Unfair Competition Law

Alexander N. Cross†

INTRODUCTION

Since Congress enacted the Federal Trade Commission Act1 (“FTC Act” or “the Act”), states have passed “Little FTC Acts” to broaden antitrust and consumer protections against “unfair competition.” On the one hand, unfair competition laws are important shields for consumers against unscrupulous business practices that impair competition and consumer welfare. On the other hand, their expansive and unpredictable reach threatens legitimate businesses, unaware of the laws’ boundaries.

California’s “Little FTC Act” is its Unfair Competition Law (UCL). The UCL prohibits unfair competition, which includes unfair, unlawful, and fraudulent business practices.2 While the


1 Pub L No 109-455, 38 Stat 717, 719 (1914), codified at 15 USC § 45 (establishing that “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful”).

2 Cal Bus & Prof Code § 17200 (West 2008).
California legislature intended the UCL's prohibition of "unfair business practices" to increase consumer protections, the UCL has also led to abusive litigation and unpredictable liability for California businesses. The California Courts of Appeal initially applied very broad, vague definitions of "unfair business practices," prompting widespread complaints from California businesses that it was unclear what practices the UCL permits and forbids. Recognizing these administrative and compliance problems, the California Supreme Court rejected these vague unfairness standards in competitor actions. The California Supreme Court then outlined a revised test, more strictly rooted in antitrust law, for unfair practice claims brought by competitors. But because the California Supreme Court expressly excluded consumer actions from this new definition of "unfair business practices," uncertainty over the UCL's reach remains. As a result, the California Courts of Appeal are split over the appropriate definition of "unfair business practices" for consumer actions.

To date, the California Supreme Court has not resolved the lower courts' split. Absent a conclusive ruling, California Courts of Appeal have used three different definitions of "unfair business acts" for consumer suits. The first approach continues to apply the definitions rejected by the California Supreme Court in competitor cases. The second approach extends the new definition in competitor cases to consumer cases. The third approach adopts the definition from § 5 of the federal FTC Act.

The conflict over the appropriate definition of "unfair business practices" in consumer suits illustrates important
themes in consumer protection and state law issues. First, the issue demonstrates that judicial efforts to create a flexible consumer protection standard conflict with the goal of maintaining a predictable liability regime for businesses. Second, since the California legislature modeled the UCL after the federal FTC Act, the conflict shows the interactions between state and federal antitrust and consumer protection laws. Third, the split offers greater insights into how other states should interpret their similarly constructed unfair competition laws. Fourth, the issue has significant economic implications because California has the largest economy among the states, which makes its law influential, and civil litigation affects the state's business environment.10

In this Comment, I analyze the unfair business practice claims under California's UCL. Following this introduction, this Comment has three major parts. In the Part I, I describe the evolution of federal and state unfair competition law. In Part II, I give a general description of the UCL's history, purpose, and substance. After this statutory overview, I also review California courts' treatment of "unfair business practices." In Part III, I argue that the § 5 test from the FTC Act is the best of the three available definitions.11 First, I consider the two alternative approaches and reject them as significantly flawed. Second, I address the strengths and weaknesses of the § 5 approach to demonstrate it is the better standard. I conclude with a brief summary of my argument in favor of the FTC § 5 definition of "unfair business practices."

I. THE EVOLUTION OF FEDERAL AND STATE UNFAIR COMPETITION LAWS

In this Part, I outline the development of federal and state unfair competition laws to place California's UCL in context of the national consumer protection framework. First, I detail the development of the federal definition of unfairness under the

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11 As discussed in Part III, I refer to the "§ 5 test," not to be confused with the rejected Cigarette Rule.
FTC Act. Second, I evaluate the unfair competition laws of several states.

A. Overview of the FTC Act

In 1914, Congress passed the FTC Act as one of its first forays into consumer protection.12 Yet, the original purpose of the FTC Act was not to advance consumer protection policy; rather, it sought to prevent unscrupulous business practices from harming the regular flow of commerce.13 The Supreme Court recognized the FTC Act's limited scope in a 1931 decision holding that the Act's proscribed unfair trade methods were "not per se unfair methods of competition."14 In 1938, however, Congress amended the FTC Act through the Wheeler-Lea Act to categorically prohibit unfair acts and practices affecting individual consumers.15 With this amendment, Congress created the current consumer-oriented statute. But in spite of this new focus, Congress declined to grant consumers a private right of action out of concerns that such a right would spawn abusive litigation.16

Between 1938 and 1964, commentators criticized the FTC's investigations as expansive and unpredictable.17 To quell the seemingly inevitable political backlash, the FTC published a policy statement establishing a new standard for commercial fairness. This rule, called the "Cigarette Rule," provided three criteria for determining if a practice was unfair: (1) whether the act "offends public policy as it has been established by statutes,  

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16 O'Quinn and Watterson, 28 Alaska L Rev at 300 & n 30 (cited in note 12) (explaining that a proposed amendment to the FTC Act would have given a private right of action to those harmed by the Act's violation).
17 Averitt, 70 Georgetown L J at 226-27 (cited in note 13) (discussing the "unstructured" nature of the FTC Act's general prohibition of "unfair competition" and the FTC's original enforcement methods). See also Sawchak and Nelson, 90 NC L Rev at 2057-82 (cited in note 15) (tracing the development and critical reception of the FTC Act).
the common law, statutory, or other established concept of unfairness”; (2) whether the act “is immoral, unethical, oppressive, or unscrupulous”; and (3) whether the act “causes substantial injury to consumers (or competitors or other businessmen).”

In *Federal Trade Commission v Sperry and Hutchinson Co.*, the Supreme Court made a limited endorsement of the Cigarette Rule. Citing the FTC’s duty to protect both consumers and competition, the Sperry Court held that § 5 of the FTC Act allowed the Commission to prohibit unfair or deceptive practices regardless of their competitive effects. The Court then quoted the Cigarette Rule in dicta as an example of the FTC’s authority to regulate unfair practices.

After Sperry, the FTC asserted its regulatory authority over a broad range of behavior, leading to another critical backlash that it had overreached its authority. The FTC again responded with a revised policy statement, rejecting findings of unfairness based solely on the Cigarette Rule criteria of “immoral, unethical, oppressive, or unscrupulous” conduct. To replace the Cigarette Rule, the new policy statement provided a three-element test focusing on “unjustified, substantial consumer injury” as the principle feature of unfair practices.

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18 Federal Trade Commission, *Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking*, 29 Fed Reg 8355 (1964). The rule got its name from its original purpose of governing the advertisements and sales of cigarettes.


21 See id.

22 Id at 244 n 5.

23 See, for example, *The FTC as National Nanny*, Wash Post A22 (Mar 1, 1978) (criticizing the FTC’s proposal to ban or heavily regulate television advertisements of sugar products to children because it is “not a proper role of government” to “protect” children from eating too much sugar).


25 See *International Harvester Co*, 104 FTC at 1044, 1073 (discussing and reprinting
This revised "§ 5 test" has three elements: (1) the consumer injury must be substantial; (2) "not outweighed by any offsetting consumer or competitive benefits that the sales practice also produces"; and (3) of a nature "that consumers themselves could not reasonably have avoided." This third element advances the FTC's view that it should only bring unfair practice claims to "halt some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking."

Through these three elements, the § 5 test elevated the importance of unjustified consumer injury over the other Cigarette Rule criteria. First, the FTC reasoned that the Cigarette Rule's public policy factor simply serves to confirm whether a practice causes consumer injury; and, without being clear and well-established, the policy alone would not establish unfairness. Second, the FTC discarded the Cigarette Rule's consideration of whether the conduct is "immoral, unethical, oppressive, or unscrupulous," as "largely duplicative." In 1994, Congress amended the FTC Act to incorporate the revised § 5 test.

Although the § 5 test gives courts more analytical guidance in determining unfairness (at least compared to the Cigarette Rule), critics complain it still has undesirable results. For example, Robert Bork and Alexander Bickel have argued that Congress should withdraw the FTC's power to label practices as "unfair competition" because agencies should not have unlimited power to "legislate." Further, Jean Braucher claims the § 5 test

the FTC's 1980 policy statement).

Id at 1061 (discussing the essential elements from the policy statement).

Id at 1074. See also Braucher, 68 BU L Rev at 412 (cited in note 24) (describing how the FTC's explanation evidenced its primary concern with seller fault).

See Braucher, 68 BU L Rev at 408 (cited in note 24).

International Harvester Co, 104 FTC at 1074–76 (cited in note 24).

Id at 1076.


See, for example, Braucher, 68 BU L Rev at 412 (cited in note 24) (noting that although the § 5 test created uncertainty through its cost-benefit analysis and a potential for a "consumer-beware" approach, the FTC later allayed these concerns, at least in consumer credit cases, by passing the Credit Practice Rule).

does not establish clear behavioral standards and, consequently, the FTC should only target gross market inefficiencies, not individual consumer harms.34

B. Overview of State Unfair Competition Laws

1. Creation of state unfair competition laws.

State unfair competition laws generally advance three policies: 1) correcting an imbalance of market power between buyers and sellers; 2) making litigation of small claims economical; and 3) deterring unfair competition by allowing private plaintiffs to sue.35 States began to enact “Little FTC Acts” in the wake of public anxiety over reports by Ralph Nader and the American Bar Association about the FTC’s ineffective consumer protection efforts.36 Public pressure on state governments also increased because of the perceived increasing complexity of consumer transactions.37 To address the problems hindering the FTC’s consumer protection efforts—scarce resources, limited staff, and increasing numbers of claims—the states gradually created private rights of action for individual consumers.38

When enacting unfair competition laws, states generally used three versions of the Unfair Trade Practices and Consumer Protection Law (“UTP/CPL”),39 a model statute written by the FTC and the Council of State Governments’ Committee on Suggested State Legislation.40 The first version, patterned on

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34 Braucher, 68 BU L Rev at 351 (cited in note 24).
36 See O’Quinn and Watterson, 28 Alaska L Rev at 300–03 (cited in note 12) (describing the emergence of the “Little FTC Acts” and the consumer protection movement).
38 O’Quinn and Watterson, 28 Alaska L Rev at 302 (cited in note 12). Initially, the FTC and state attorneys general were the only parties who could bring actions. Id.
40 O’Quinn and Watterson, 28 Alaska L Rev at 301 (cited in note 12). There were
the federal FTC Act, bans all "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." The second version prohibits "false, misleading, or deceptive methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." California and fifteen other states have enacted a form of this second version. The third version prohibits twelve specific practices and includes a catch-all provision proscribing "any act or practice which is unfair or deceptive to the consumer." On the whole, the model statute was very popular among the states. By 1973, forty-four states had passed some version of the model statute.

Consumer remedies under state unfair competition laws differ significantly from the FTC Act. Most notably, state

three versions of the model statute to help states to incorporate the statute into existing state codes. Id.


These other states include Arizona, Arkansas, California, Delaware, Iowa, Kansas, Kentucky, Maryland, Minnesota, Missouri, New Jersey, New York, and North Dakota. See Sheila B. Scheuerman, The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element, 43 Harv J on Legis 1, 17 n 123 (2006), citing Federal Trade Commission, Fact Sheet: State Legislation to Combat Unfair Trade Practices (1973). However, since this second version was limited to fraud and did not originally cover "unfair practices," no state currently uses this exact form of the UTP/CPL. Scheuerman, 43 Harv J on Legis at 17 n 123. See, for example, Cal Bus & Prof Code § 17200 (West 2008) (defining "unfair competition" to include "unfair acts").

O'Quinn and Watterson, 28 Alaska L Rev at 301 (cited in note 12).

With some variation in the list of specifically prohibited acts, eight states have enacted this version. See generally Alaska Stat Ann § 45.01.010 et seq; Ga Code Ann § 10-1.320 et seq; Md Com Law Code §§ 12-101; Miss Code § 75-24-1 et seq; NH Rev Stat Ann § 358-A:1 et seq; Pa Stat § 201-1 et seq; RI Gen Laws § 6-13.1 et seq; Tenn Code Ann § 47-18-101 et seq.


See Henry N. Butler and Joshua D. Wright, Are State Consumer Protection Acts Really Little-FTC Acts?, 63 Fla L Rev 163, 173-76 (2011) (explaining that the states "provide a private right of action, different remedies, and relaxed common law limitations on consumer protection actions when compared to FTC policy standards").
unfair competition laws give consumers a private right of action specific to unfair competition.\textsuperscript{47} The federal FTC Act, by contrast, leaves consumers with only private actions under common law fraud or breach of contract.\textsuperscript{48} This is important because private litigants do not face the political pressures applicable to the FTC and, accordingly, can bring smaller cases that would otherwise escape the FTC's attention.\textsuperscript{49} Therefore, the private right of action in state law enhances the deterrence power of consumer protection law.\textsuperscript{50}

2. State approaches in defining unfair business practices.

Although most states have unfair competition laws, the states define unfairness differently.\textsuperscript{51} Twenty-eight states have unfair competition laws like California's UCL that generally prohibit "unfair . . . acts or practices" without providing further guidance to the courts.\textsuperscript{52} Fourteen of these twenty-eight states continue to use the outdated Cigarette Rule standard of unfairness.\textsuperscript{53}

\textsuperscript{47} Id.
\textsuperscript{48} O'Quinn and Watterson, 28 Alaska L Rev at 300 (cited in note 12).
\textsuperscript{49} See Butler and Wright, 63 Fla L Rev at 165 (cited in note 46).
\textsuperscript{51} See generally Alan S. Brown and Larry E. Hepler, Comparison of Consumer Fraud Statutes Across the Fifty States, 55 Fed'n Def & Corp Couns Q 263, 266 (2005).
\textsuperscript{52} See David L. Belt, The Standard for Determining "Unfair Acts or Practices" Under State Unfair Trade Practices Acts, 80 Conn Bar J 247, 249 n 2 (2006), citing Alaska Stat Ann § 45.50.471 (LexisNexis 2006) (providing a non-exclusive list of "unfair or deceptive acts or practices"); Cal Bus & Prof Code § 17200 (West 2008); Conn Gen Stat § 42-110b(a) (2006); Fla Stat Ann § 501.204(1) (West 2006); Ga Code Ann § 10-1-393(a) (LexisNexis 2006); Hawaii Rev Stat Ann § 480-2(a) (LexisNexis 2006); 815 ILCS 505/2 (West 2006); Iowa Code Ann § 714.16.2.a (West 2006); La Rev Stat Ann § 1427 (West 2006); 5 Me Rev Stat Ann § 207 (West 2006); Md Comm Law Code Ann § 13-301 (West 2006); Mass Gen Laws Ann Ch 93a, §2(a) (West 2006); Miss Code Ann § 75-24-5(1) (2006); Mo Ann Stat § 407.020.1 (West 2006); Mont Code Ann § 30-14-103 (2006); Neb Rev Stat Ann § 59-1602 (LexisNexis 2006); NH Rev Stat Ann § 358-A:2 (2006); NC Gen Stat § 75-1.1(a) (2006); Ohio Rev Code Ann § 1345.02(a) (West 2006); Okla Stat Ann § 15-753.20 (West 2006); 10 Puerto Rico Laws Ann § 259(a) (2006); RI Gen Laws § 6-13.1-1 et seq (2006); SC Code Ann § 39-5-20(a) (West 2006); Tenn Code Ann § 47-18-104(a) (2006); 9 Vt Stat Ann § 2453(a) (2006); Wash Rev Code Ann § 19.86.010 (West 2006); W Va Code Ann § 46a-6-104 (LexisNexis 2006); Wis Stat Ann § 100.20 (West 2006); and Wyo Stat Ann § 40-12-105 (LexisNexis 2006). Belt adds that "although the Maryland statute enumerates a list of practices that are unfair or deceptive, the list has been said to be nonexclusive." Belt, 80 Conn Bar J at 249 n 2, citing Golt v Phillips, 517 A2d 328, 331–32 (Md 1986).
\textsuperscript{53} See Belt, 80 Conn Bar J at 303–04 & n 322 (cited in note 52), citing Alaska v O'Neil Investigations, Inc, 609 P2d 520, 535 (Alaska 1980); PNR, Inc v Beacon Property Management, Inc, 842 So2d 773, 777 (Fla 2003); Samuels v King Motor Co of Fort
The remaining fourteen of the twenty-eight states have varied definitions of unfair practices. Some states, like California, use several definitions.\textsuperscript{54} Four states endorse a standard similar to the FTC § 5 test.\textsuperscript{55} And while most other states claim they follow statutory or judicial directives to refer to interpretations of § 5 of the FTC Act, they actually follow Cigarette Rule articulations of unfairness.\textsuperscript{56}

\textsuperscript{54} See, for example, Belt, 80 Conn Bar J at 308 (cited in note 52).

\textsuperscript{55} See id at 306 n 334 (cited in note 52), citing \textit{Legg v Castruccio}, 642 A2d 906, 914–17 (Md Ct Spec App 1994) (citing FTC's 1980 Policy Statement); \textit{Maine v Weinschenk}, 868 A2d 200, 206 (Me 2005) (citing the amended FTC Act); \textit{Tungate v MacLean-Stevens Studios, Inc}, 714 A2d 792, 797 (Me 1998) (same); \textit{Semiński v Maine Appliance Warehouse, Inc}, 602 A2d 1173, 1174 (Me 1992) (citing FTC's Unfairness Policy Statement); \textit{Swiger v Terminix International Co}, 1995 WL 396467, *5 (Ohio Ct App); \textit{Tucker v Sierra Builders}, 180 SW 3d 109, 116–17 (Tenn Ct App 2005) (citing the amended FTC Act). See also Belt, 80 Conn Bar J at 306 n 334 (cited in note 52), citing \textit{United Companies Lending Corp v Sargeant}, 20 F Supp 2d 192, 200–04 (D Mass 1998) (applying the FTC's Unfairness Policy Statement in upholding a regulation promulgated by the Massachusetts Attorney General). Among these fourteen states, only two expressly allow findings of unfairness based on only one criteria of the Cigarette Rule. Belt, 80 Conn Bar J at 309 (cited in note 52), citing \textit{Robinson v Toyota Motor Credit Corp}, 775 NE2d 951, 961 (Ill 2002) (holding that a plaintiff does not need to establish all three Cigarette Rule criteria to state a valid unfairness claim) and \textit{Cheshire Mortgage Service, Inc v Montes}, 223 Conn 80, 106 (1992) (same). Two of these states require the plaintiff to establish two of the three Cigarette Rule criteria, finding unfair business practices when (1) the practice violates an established public policy; and (2) it is either immoral, unethical, or unscrupulous or substantially injurious to consumers. See Belt, 80 Conn Bar J at 309–10 (cited in note 52), citing \textit{Samuels v King Motor Co of Fort Lauderdale}, 782 So 2d 488, 499 (Fla Dist Ct App 2001) and \textit{Hawaii Community Federal Credit Union v Keka}, 11 P3d 1, 16 (Hawaii 2000) (emphasis added). Finally, one state requires the consumer to prove substantial injury along with one of either of the other two Cigarette Rule criteria. See Belt, 80 Conn Bar J at 310 (cited in note 52), citing Mo Code State Reqs § 60-8.020.

\textsuperscript{56} See Conn Gen Stat § 42-110b(a) (2006); 5 Me Rev Stat Ann § 207 (1) (West 2006); Mass Gen Laws Ann Ch 93a, § 2(a) (West 2006); Miss Code Ann § 75-24-5(1) (2006); NH
II. CALIFORNIA'S UNFAIR COMPETITION LAW

In this Part, I describe the UCL and its treatment by the state courts. First, I survey the law's history and substance. Second, I examine the California courts' traditional definitions of unfair business practices under the UCL. Third, I evaluate the California Supreme Court's landmark decision in Cel-Tech Communications, Inc v Los Angeles Cellular Telephone Co, which reshaped the definition of "unfair business practices" in competitor actions. Finally, I outline how the California Courts of Appeal have struggled defining unfairness in consumer claims after the Cel-Tech decision.

A. Overview of California's Unfair Competition Law

Frequently invoked by government agencies and private plaintiffs, the UCL is California's most prominent consumer protection statute. The California legislature modeled the UCL, its "Little FTC Act," after the federal FTC Act. Shortly after its enactment, the legislature amended it to prohibit "unfair or fraudulent business practices." The California Supreme Court has recognized the UCL's consumer protection objectives, commenting that its primary purpose was to "extend


973 P2d 527 (Cal 1999).

Competitor actions involve another business, not a consumer, challenging the competitor's practice as unfair to its own business operations.


60 See Joshua D. Taylor, Why the Increasing Role of Public Policy in California's Unfair Competition Law Is a Slippery Step in the Wrong Direction, 52 Hastings L J 1131, 1133 (2011) (describing the evolution of UCL's predecessor and the UCL). The legislature originally enacted the UCL to codify the common law prohibition of name infringement.
[] to the entire consuming public the protection once afforded only to business competitors. 61

The UCL prohibits unfair competition as defined by five acts: unlawful practices; unfair practices; fraudulent conduct; deceptive advertising; and violations of California Business & Professional Code § 17500. 62 Because the act is drafted in the disjunctive, it prohibits unfair business practices even if they are not also unlawful or deceptive. 63 First, the unlawful prong prohibits violations of other federal and state law under the UCL. 64 Second, the “unfair” business practice prong generally proscribes some acts, without actually describing what constitutes such an act. 65 In the absence of clear statutory guidance, California courts first held that the UCL’s prohibition of unfair practices generally empowered the courts to broadly target unpredicted “new schemes which the fertility of man’s invention would contrive.” 66 Third, the fraudulent prong advances the UCL’s consumer protections by requiring only proof of deceit, unlike common law fraud. 67 Finally, the deceptive advertising prong of the UCL is comparable to the UCL’s fraud and § 17500 prongs. 68 These five types of unfair competition ultimately prohibit a wide range of business activity. For example, courts have found unfair business practices where businesses charged consumers $20 for bounced checks, 69 violated zoning permit conditions, 70 or claimed false contractual rights. 71

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61 Barquis v Merchants Collection Association, 496 P2d 817, 828 (Cal 1972) (interpreting Cal Civ Code § 3369, the UCL’s predecessor legislation).
63 Cel-Tech, 973 P2d at 540.
64 See Arkin, 32 W St U L Rev at 158 (cited in note 62).
65 See generally Cal Bus & Prof Code § 17200 (West 2008). See also William L. Stern, Bus & Prof Code § 17200 Practice, Ch 3-G § 3:113 (Rutter 2012) (explaining that the statutory language was intentionally written to be “sweeping”).
68 See Arkin, 32 W St U L Rev at 163 (cited in note 62). See also Stern, Ch 4-A § 4:1 (cited in note 65).
69 See generally Ballard v Equifax Check Services, Inc, 158 F Supp 2d 1163 (ED Cal 2001).
71 See People v McKale, 602 P2d 731, 735–36 (Cal 1979).
Representative of its remedial objectives, the UCL originally granted standing to "any person" suing on behalf of "itself, its members, or on behalf of the general public." This prompted a public outcry over perceived abuses of the UCL because the UCL granted standing to plaintiffs without requiring them to show any actual injury. In response, California voters approved Proposition 64 to amend the UCL to require that the plaintiff prove injury from the unfair practice. Despite this stricter standing requirement, both business competitors and consumers may still sue under the UCL.

If a plaintiff prevails in his or her unfair competition action, the UCL provides several remedies: injunctive relief, restitution, and civil penalties in government enforcement actions. While the UCL does not directly award damages, the legislature gives the courts extensive equitable powers to fashion remedies appropriate for the harms in each case. Equitable remedies include restitutionary relief, like ordering the defendant to disgorge the profits from his unfair competition. Therefore, although a plaintiff may not directly recover damages, the UCL's restitution remedy closely resembles damages.

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73 See Hale v. Sharp Healthcare, 183 Cal. App. 4th 1373, 1381 (2010). See also Cal Bus & Prof Code § 17204 (West 2008) (allowing a person "who has suffered injury in fact and has lost money or property as a result of the unfair competition" to bring suit under the UCL); Blackston, Comment, 41 San Diego L Rev at 1833, 1848–56 (cited in note 72) (discussing the public perception that plaintiffs abused the UCL's broad standing requirements to harm businesses).
74 See Cal Bus & Prof Code § 17204 (West 2008).
75 Cal Bus & Prof Code § 17203 (West 2008).
76 Cal Bus & Prof Code § 17206.1(d) (West 2008).
77 Cal Bus & Prof Code § 17206 (West 2008).
78 See Bank of the West v. Superior Court, 833 P.2d 545, 552–53 (Cal 1992) (drawing a contrast between a claim for common law unfair competition, which allows recovery of damages, and § 17203, which does not).
81 See Arkin, 32 W St U L Rev at 164–65 (cited in note 62).
B. Early Definitions of “Unfair Business Practices” Based on the Cigarette Rule

Following the UCL’s remedial and consumer protection origins, the California Courts of Appeal initially used open-ended definitions of “unfair business practices.” These definitions generally included some or all of the FTC’s Cigarette Rule criteria. In one particularly influential opinion, People v Casa Blanca Convalescent Homes, Inc, the court applied the Cigarette Rule, finding an unfair business practice when the practice “offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.” Another early decision described the unfairness test as the second prong of the Cigarette Rule, the balancing of the utilities test, instructing that “the court must weigh the utility of the defendant’s conduct against the gravity of the harm to the alleged victim.”

With some variation, California courts generally followed the Casa Blanca test. Throughout the reign of the Casa Blanca test, businesses protested the court’s often arbitrary and unpredictable application. Businesses and courts did not have a clear understanding of what was an “unfair business practice” under the UCL—a criticism similar to concerns about the Cigarette Rule.

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83 See id at 530. The Casa Blanca court described the FTC’s test as:
(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).

Id at 530.
84 Id.
86 See Eugene S. Suh, Comment, Stealing from the Poor to Give to the Rich? California’s Unfair Competition Law Requires Further Reform to Properly Restore Business Stability, 35 Sw U L Rev 229, 236–37 (2006) (detailing the abuses of the UCL’s “vague and overbroad statutory language”). See also Butler and Wright, 63 Fla L Rev at 177–78 (cited in note 46) (describing the backlash against laws in other states similar to California’s UCL because of their perceived abusive and frivolous law suits).
87 See Butler and Wright, 63 Fla L Rev at 177–78 (cited in note 46).
C. The Cel-Tech Communications, Inc v Los Angeles Cellular Telephone Co Standard For Competitor Actions

In Cel-Tech Communications, Inc v Los Angeles Cellular Telephone Co, the California Supreme Court tried to restore clarity to the definition of “unfair business practices.” Cel-Tech involved cell phone competitors: the plaintiffs, who sold cell phones, and the defendant, LA Cellular, a seller of both cell phones and cell phone services. The plaintiffs claimed that LA Cellular’s practice of selling cell phones below cost to attract customers to enter cell phone service contracts was “unfair” under the UCL. The California Supreme Court reviewed existing definitions of unfair business practices and rejected them as “too amorphous” because they “provide too little guidance to courts and businesses.” The Cel-Tech court reasoned that the vague public policy references under Casa Blanca trespassed on the legislature’s authority by allowing excessive judicial discretion. Furthermore, the court argued that these ambiguous definitions failed to provide businesses with sufficient guidelines regarding the conduct subject to liability.

After outlining its criticisms of the current standards, the Cel-Tech court created a stricter definition of unfairness. Noting that § 5 of the FTC Act has language parallel to the UCL, the court stressed that antitrust laws protect competition, not competitors. To further guide courts and businesses, the court held that an unfair business act is “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.” This definition tied unfair business acts in competitor actions to antitrust violations.

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88 973 P2d 527 (Cal 1999).
89 See generally id.
90 Id at 533.
91 Id.
92 See Cel-Tech, 973 P2d at 543.
93 See id.
94 Id.
96 See Cel-Tech, 973 P2d at 543.
Although a notable break from the prior definitions, the Cel-Tech court expressly limited this new fairness standard to cases between competitors. In footnote twelve of its opinion, the court cautioned that "[n]othing we say relates to actions by consumers."97

D. Conflicting Outcomes in Consumer Cases after Cel-Tech

The Cel-Tech court's attempt to clarify the bounds of unfair competition claims ironically created more uncertainty. Before the Cel-Tech decision, the courts generally applied some version of the Cigarette Rule. But now, businesses and consumers face uncertainty both in the legal rule and its application to the facts of a case. California courts have had trouble reconciling the Cel-Tech court's criticism of the old Casa Blanca standards with the limiting language in footnote twelve.98 In particular, the California Courts of Appeal have struggled with consumer unfair practice claims, sometimes reaching misleading decisions.99 And unsurprisingly, many courts have tried to avoid this confusion by revising the test.100 The Courts of Appeal directly encountering the issue have used three different definitions of unfair acts under the UCL: (1) the pre-Cel-Tech definitions based on the FTC's Cigarette Rule; (2) the Cel-Tech court's definition; and (3) the FTC § 5 definition.101

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97 Id at 544 n 12.
98 I did not find any consistent patterns between certain districts of the California Courts of Appeal and their definitions of unfairness. For example, the Courts of Appeal in the Second District have adopted both the pre-Cel-Tech and § 5 tests. Compare Smith v State Farm Mutual Auto Insurance Co, 93 Cal App 4th 700 (2001), with Camacho v Auto Club of Southern California, 142 Cal App 4th 1394 (2006).
99 See, for example, Twin City Fire Insurance Co, Inc v Mitsubishi Motors Credit of America, Inc, 2004 WL 5496230, *2 (CD Cal) (applying the old Casa Blanca test without even mentioning the Cel-Tech decision).
100 See, for example, Phipps v Wells Fargo Bank, NA, 2011 WL 302803, *16–17 (ED Cal) (holding that no matter what the definitive test is for "unfair" under the UCL for consumer claims, the consumer plaintiff failed to adequately allege an unfair business practice under any of the tests); Bernardo v Planned Parenthood Federation of America, 115 Cal App 4th 322, 353–54 (2004) (same).
1. The pre-Cel-Tech tests incorporating the Cigarette Rule.

The California appellate courts’ first approach holds that the old standards still apply because the Cel-Tech court’s stricter definition does not apply to consumers. As discussed, these pre-Cel-Tech standards resemble the defunct Cigarette Rule. The South Bay Chevrolet v General Motors Acceptance Corporation court was one of the first to reach this conclusion. Although the case involved business competitors, the court described Cel-Tech in dicta as restricted to competitor actions and concluded that in consumer actions the court must “weigh the utility of the defendant’s conduct against the gravity of the harm to the alleged victim.”

The Smith v State Farm Mutual Auto Insurance Co court expanded on South Bay in a consumer’s challenge of an insurer’s requirement that customers either purchase uninsured motorist coverage for each of their vehicles or waive uninsured motorist coverage for all of their vehicles. Although the Smith court commented that “[c]ourts may not simply impose their own notions of the day as to what is fair or unfair,” the court adopted the South Bay court’s balancing test. This balancing test resembles one of the “amorphous” standards from the Cigarette Rule. In its ruling, the Smith court favorably quoted the Casa Blanca court’s statement of the Cigarette Rule. The Smith court

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102 See, for example, Smith v State Farm Mutual Automobile Insurance Co, 93 Cal App 4th 700, 720 n 23 (2001).
103 See Part II.B. See, for example, Casa Blanca, 159 Cal App 3d at 530 (concluding that “an ‘unfair’ business practice occurs when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers”).
105 Id at 886 & n 24.
106 Id at 886.
108 Id at 705–06.
109 Id at 718–19.
110 This balancing test is only one of the definitions of “unfair business practices” that the prior courts used. See, for example, Casa Blanca, 159 Cal App 3d at 530 (outlining two different standards to define “unfair” from the federal Cigarette Rule: “when [the practice] offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers”).
consequently adopted both a balancing test and the other two criteria of the Cigarette Rule.\textsuperscript{111}

Since the early decisions of \textit{South Bay} and \textit{Smith}, several courts have adopted the balancing test and other forms of the Cigarette Rule to define unfairness in consumer cases.\textsuperscript{112} These courts provide a variety of justifications for using the pre-Cel-Tech standard in consumer actions. First, they stress that Cel-Tech did not explicitly overrule the Cigarette Rule tests in consumer actions.\textsuperscript{113} Moreover, they argue that the Cel-Tech court’s rejection of the prior standards for competitor actions does not necessitate its rejection in consumer actions. For example, when encountering this issue, the Ninth Circuit concluded that without a clear ruling from the California Supreme Court, courts do not err in using the Cigarette Rule’s balancing test.\textsuperscript{114} Second, these courts argue for more malleable tests in consumer cases because the UCL’s ban of “unfair business acts” specifically gives courts discretion to target innovative schemes.\textsuperscript{115} Finally, some decisions endorsing the balancing test do so without mentioning the ambiguity left by the Cel-Tech court.\textsuperscript{116} It is unclear whether these courts simply did not recognize the Cel-Tech court’s criticisms of the pre-Cel-Tech...
standards or if they implicitly distinguished Cel-Tech as restricted to competitor cases.

2. The Cel-Tech “tethering” test.

The California courts’ second approach applies the Cel-Tech court’s definition of unfairness to consumer claims.117 Gregory v Albertson’s, Inc118 is the dominant authority supporting the Cel-Tech test. In Gregory, the court began its analysis of a consumer’s claim by recounting the Cel-Tech court’s criticisms of the Casa Blanca definitions and “[v]ague references to public policy.”119 The court preliminarily concluded that Cel-Tech is limited to competitor challenges and, therefore, decisions by the Courts of Appeal continue to provide the appropriate standard for consumer actions.120 But the Gregory court nevertheless found that Cel-Tech cautions courts against using the amorphous pre-Cel-Tech definitions in consumer claims.121 The Gregory court held that “where a claim of an unfair act or practice is predicated on public policy, we read Cel-Tech to require that the public policy predicing the action must be ‘tethered’ to specific constitutional, statutory or regulatory provisions.”122 While the Gregory court’s ruling is potentially limited to claims based on public policy grounds, it is difficult to imagine a consumer’s unfairness action without an argument that the practice offends public policy.

Many other decisions have endorsed the Cel-Tech test in consumer claims of “unfair business acts or practices.”123 Like the Gregory court, these courts emphasize the Cel-Tech court’s criticisms of the vague and amorphous standards like the balancing test.124 Some courts also reason that the Cel-Tech test should apply to consumer actions because the UCL draws no

117 See, for example, Churchill Village, LLC v General Electric Co, 169 F Supp 2d 1119, 1130 (ND Cal 2000). I refer to this approach as the "Cel-Tech test."
119 See id at 852–53 (citation omitted).
120 See id at 853–54.
121 See id at 854.
122 Gregory, 104 Cal App 4th at 854.
123 See, for example, Scripps Clinic v The Superior Court of San Diego, 108 Cal App 4th 917, 940 (2003).
124 See, for example, Durell v Sharp Healthcare, 183 Cal App 4th 1350, 1364–65 (2010).
distinction between consumers and competitors.\textsuperscript{125} And, similar to the decisions endorsing the pre-Cel-Tech tests, some courts apparently apply Cel-Tech without considering whether the Cel-Tech court limited its impact to the competitor context.\textsuperscript{126}

3. The FTC Act § 5 Test

The California appellate courts’ third approach uses § 5 of the FTC Act to define “unfair business acts and practices.” The \emph{Camacho v Auto Club of Southern California}\textsuperscript{127} court presents the strongest arguments in favor of the § 5 test for unfairness.\textsuperscript{128} The \emph{Camacho} court began its analysis of the consumer’s claim by reviewing the Cel-Tech court’s criticism of the pre-Cel-Tech standards. The court then determined that Cel-Tech overruled these old tests in both competitor and consumer contexts.\textsuperscript{129} However, the \emph{Camacho} court declined to apply the Cel-Tech test to consumer cases for two reasons. First, the court argued that requiring the underlying public policy to tether to a specific constitutional, statutory, or regulatory provision “does not comport with the broad scope of [the UCL].”\textsuperscript{130} In the \emph{Camacho} court’s view, the Cel-Tech definition undermines the UCL’s prohibition of “unfair business acts or practices,” distinct from “unlawful” or “deceptive” practices.\textsuperscript{131} Second, the court reasoned that the anticompetitive conduct at issue in competitor actions is closely related to antitrust law, unlike the varied laws “tethering” to unfair business practices.\textsuperscript{132} Based on these two arguments, the \emph{Camacho} court concluded that the Cel-Tech test is improper for consumer cases.\textsuperscript{133}

After rejecting the pre-Cel-Tech and Cel-Tech tests,\textsuperscript{134} the \emph{Camacho} court turned to the Cel-Tech court’s instruction to refer

\textsuperscript{125} See \emph{Churchill Village LLC}, 169 F Supp 2d at 1130 n 10. This court, however, acknowledged the Cel-Tech court’s warning that its holding did not extend to consumer actions. See generally Cal Bus & Prof § 17200 (West 2008).
\textsuperscript{126} See, for example, \emph{Rodriguez v US Bank}, NA, 2012 WL 1996929, *6 (ND Cal).
\textsuperscript{127} 142 Cal App 4th 1394 (2006).
\textsuperscript{128} Id at 1403.
\textsuperscript{129} Id at 1402.
\textsuperscript{130} Id.
\textsuperscript{131} \emph{Camacho}, 142 Cal App 4th at 1402-03.
\textsuperscript{132} Id at 1403.
\textsuperscript{133} Id at 1402–03.
\textsuperscript{134} Id. In \emph{Camacho}, the California Attorney General unsuccessfully urged the court to apply the Cigarette Rule from \emph{FTC v Sperry & Hutchinson Co}, 405 US 233, 244–45
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135 The court thereby adopted the three-prong FTC § 5 test to find unfairness where the consumer injury is (1) substantial; (2) not "outweighed by any countervailing benefits to consumers or competition"; and (3) one that "consumers themselves could not reasonably have avoided."136

The Camacho court endorsed the § 5 test by arguing it is both "more focused, less dependent on subjective notions of fairness and . . . easier to apply and administer" and explicitly constructed for consumer claims.137 And according to the Camacho court, the test's second element, the balancing test, ensures that courts still evaluate the practice by normative standards.138

Even though the § 5 test is the newest of the three alternatives to defining fairness, many Courts of Appeal have endorsed it. For example, in Davis v Ford Motor Company,139 one Court of Appeals reconsidered its previous rulings in favor of the pre-Cel-Tech tests, rejected the pre-Cel-Tech tests, and applied the § 5 test instead.140 However, it is still unclear whether that particular court has changed its view or if the change is just particular to those judges.

III. Analysis of the Three Definitions

In this Part, I argue that the California Supreme Court should adopt the FTC § 5 definition of "unfair business acts or practices" for consumer claims. First, I evaluate the merits of the pre-Cel-Tech and Cel-Tech standards for unfair business practices to explain why these standards are flawed. Second, I

(1972) to accommodate the expansive scope of the UCL. Camacho, 142 Cal App 4th at 1403–04.

135 Camacho, 142 Cal App 4th at 1403.
136 Id at 1403–5.
137 Id at 1403–04.
138 Id at 1404.
140 Id at 594–97. See also Eric P. Enson, Davis v. Ford Motor Credit Company: More Confusion Regarding the Definition of "Unfair" or an Indication of Growing Consensus?, 19 Competition J Anti & Unfair Comp L Section St Bar Cal 24, 26–29 (2010) (summarizing the Davis court's decision and remarking that the appellate court's reconsideration of the pre-Cel-Tech balancing test for the § 5 test suggests a growing consensus in favor of the § 5 test).
examine the FTC § 5 test to argue that it is a better alternative to the pre-Cel-Tech and Cel-Tech standards.

A. Pre-Cel-Tech Tests

The pre-Cel-Tech tests use various forms of the three Cigarette Rule criteria to define "unfair business acts or practices." The Smith court mainly endorsed a simple balancing test but also favorably restated the two other Cigarette Rule factors:

The test of whether a business practice is unfair involves an examination of [that practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer . . . [T]he court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim . . . [A]n "unfair" business practice occurs when that practice offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.141

1. Arguments in favor of the pre-Cel-Tech tests.

The pre-Cel-Tech definitions have three related benefits: (1) flexibility; (2) support of the UCL's consumer protection goals; and (3) a large body of state case law applying the Cigarette Rule. First, the pre-Cel-Tech test provides substantial flexibility in targeting evolving commercial exploitation. California courts originally followed the Cigarette Rule standards to deter the abusive business schemes that the legislature could not predict ahead of time.142 In contrast to the FTC's administrative enforcement powers, this considerable judicial discretion also has the benefit of early detection through private-consumer actions. These claims lead to quick determinations of whether a competitive act is unfair.143 While the FTC can provide clearer guidance and notice, its bureaucratic investigations are slower,
and its cease-and-desist orders are less beneficial to consumers than the UCL's injunctive and restitutionary remedies. Flexibility also conceivably enhances the UCL's remedies. The courts can tailor this standard by considering whether the public policy predicate to the challenged practice is tethered to legislation or regulations when awarding equitable relief in UCL consumer claims. The pre-Cel-Tech standards conceivably ban a wide range of behavior. So, when dealing with prohibited but relatively minor abuses, the courts can adjust the standard by awarding less equitable remedies.

Second, the pre-Cel-Tech test's greater flexibility also supports—at least on first glance—the UCL's consumer protection objectives. The California legislature intended the UCL to provide extensive protections for consumers and businesses against unfair competition. Legislatures want to strengthen regulations and consumer rights by enacting consumer protection statutes like California's UCL. Not only is the UCL intended to provide antitrust protections parallel to the FTC Act, but it also serves as California's primary consumer protection law. Maintaining a separate standard for the consumers is important because antitrust law more narrowly tethers to anti-competitive practices than the greater universe of laws supporting a consumer's claim of "unfair business practices." And while the UCL has led to abusive litigation, the legislature has repeatedly denied efforts to reform the statute and has even expanded the UCL's reach in response to limiting judicial action.

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144 Id at 1865 n 156 (commenting that while the FTC can give notice to the marketplace, it also allows businesses a "free bite" before the FTC officially investigates and prohibits an unfair practice).
145 Id at 1866.
146 See Barquis, 496 P2d at 829–31 (explaining that the UCL's predecessor was not intended to be confined to anti-competitive business practices but also extends more broadly for consumer protection purposes).
149 See Blackston, Comment, 41 San Diego L Rev at 1866 (cited in note 73).
150 See Greve, 7 Chap L Rev at 176 n 140 (cited in note 147), citing, for example, Cal Bus & Prof Code § 17203 (West 2008), superseding Mangini v Aerojet-General Corp, 230 Cal App 3d 1125, 1156 (1991). But see Butler and Johnston, 2010 Colum Bus L Rev at 6 (cited in note 35) (discussing a popular referendum that amended the UCL to require
wishes to keep the UCL as broad as possible to advance the law's consumer protection goals.

Considering the UCL's consumer protection objectives, the pre-Cel-Tech tests arguably provide the greatest consumer protections. Since businesses face uncertain judicial findings of unfairness under these relatively vague standards, they have strong incentives to monitor their behavior and refrain from exploitative practices. Consumers might benefit from keeping these potential offenders in the dark. If the unfair business practice standard is more of a bright line rule, then the unscrupulous business will simply maneuver around the line to extract benefits from the consumer without penalty.

Third, given its roots in the Cigarette Rule, this test allows the California courts to draw on voluminous case law in evaluating unfair practice claims. It therefore theoretically advances legal uniformity between the states in defining unfair competition under the “Little FTC Acts” because half of the states with similar unfair competition laws follow some form of the Cigarette Rule in defining unfair practices. This uniformity benefits businesses dealing in different states because it allows them to more easily comply with various regulatory regimes.

2. Arguments against the pre-Cel-Tech tests.

The pre-Cel-Tech definitions of “unfair business practices” have four important weaknesses: (1) increased legal uncertainty despite its more uniform use across the states; (2) over-deterrence; (3) more opportunities for abusive litigation; and (4) additional administrative costs. First, these standards burden businesses with an uncertain liability regime. Businesses may not know what practices the courts will consider unfair before a consumer challenges them and wins a costly award. The amorphous quality of the pre-Cel-Tech tests provides significantly less guidance on acceptable commercial practices than the § 5 test. As discussed below, delegating such great discretion to courts inexperienced in complex consumer transactions could lead to haphazard decision making. The pre-

plaintiffs to also show actual injury and reliance).

151 See Belt, 80 Conn Bar J at 319 (cited in note 52).

152 Id at 319 n 414. But, as I argue, this uniformity is better characterized as a uniform use of an unpredictable rule.
Cel-Tech standards are too undefined to constitute a valid legal principal because they do not provide any easily recognizable behavioral norm.\textsuperscript{153} These definitions offer relatively thin labels that encourage the courts to use conclusory reasoning.\textsuperscript{154} As one commentator describes: “Opinions on direct unfairness claims usually follow the same script: they quote one or more of the above tests for unfairness. They then restate the facts. Finally, they state the conclusion that the facts satisfy or do not satisfy the test for liability.”\textsuperscript{155} This amorphous analysis makes businesses’ compliance efforts more difficult. Consumer advocates may argue this uncertainty provides the best protection to consumers since businesses have an incentive to constantly check their behavior. But the situation is not so simple. Rather, the balancing test’s ambiguous nature may not provide optimal deterrence. It may instead over-deter businesses’ information sharing practices. In their compliance efforts, businesses may refrain from behavior that both is fair and offers efficiency benefits that trickle down to the consumer in the form of greater business price, product, and service competition.\textsuperscript{156}

Second, the pre-Cel-Tech tests may therefore chill information sharing and incentivize sellers to make only detailed and cautionary descriptions of their products and the associated risks because of the heightened risk of liability.\textsuperscript{157} For example, if faced with this standard, a business offering credit card services may hesitate from informing consumers about the potential benefits from a line of credit out of a fear that a state court may find the practice unfair even if it complied with

\textsuperscript{153} See, for example, Rice, 52 Geo Wash L Rev at 21–22 (cited in note 20) (arguing the FTC’s substantial consumer injury criterion “only partially fulfills the role of a legal standard because it fails to state a behavioral norm”).

\textsuperscript{154} See, for example, Horvath, 2012 WL 2861160 at *10–11 (summarizing plaintiff’s arguments and then immediately concluding that the alleged harm to the plaintiff outweighs any benefits to the business); Sawchak and Nelson, 90 NC L Rev at 2052–54 (cited in note 15) (collecting conclusory decisions by North Carolina state and federal courts).

\textsuperscript{155} Sawchak and Nelson, 90 NC L Rev at 2052 (cited in note 15) (discussing the similarly constructed North Carolina unfair competition law).

\textsuperscript{156} See generally Rice, 52 Geo Wash L Rev at 57–58 (cited in note 20).

\textsuperscript{157} See id. Although Rice directs her criticisms to the § 5 test, her comments apply with even greater weight to the significantly more amorphous Cigarette Rule criteria used in the pre-Cel-Tech definitions of unfair practices. See id.
Courts could perhaps limit this disclosure problem by properly accounting for the benefits of the challenged practice. If the practice has efficiency benefits that boost competition and benefit consumers, then the court could find that, on balance, the practice is not unfair. In addition, given the apparent complexity of this disclosure problem, it is unlikely to be a frequent issue for businesses and the courts. Generally, businesses, consumers, and courts would see more consumer disclosures as a socially beneficial practice, not an unfair one.

Third, the pre-Cel-Tech test incentivizes frivolous litigation. Before the Cel-Tech decision, commentators noted that attorneys used the amorphous definitions of unfairness to burden California businesses with litigation expenses. The combination of private actions, generous remedies, broad definitions of prohibited conduct, judges’ inexperience in complicated consumer transactions, and relaxed common law standards is likely too attractive a mix for plaintiffs’ attorneys. As one critic states, the UCL lawsuits “were initiated by lawyers, not injured consumers, and they all seek court-ordered attorney fees and the only beneficiaries of these cases, most of which settle for a nuisance value, are the lawyers who bring them.” Given their unpredictability, the pre-Cel-Tech standards present the greatest possibility for a “litigation tax” on all consumer goods and services.

If the California Supreme Court adopted the pre-Cel-Tech test for consumer claims, it could cause a return to the abuses prevalent under the prior standards. Abusive lawsuits harm California’s economy because they make the state less attractive.

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158 To carry this example further, a consumer creditor may wish to provide a greater description of the credit card terms than the mechanical requirements under the Truth in Lending Act. This could conceivably include the creditor’s projection of the variable interest rates based on current business conditions. However, the creditor may refrain from telling the consumer about its projections because of the risk its disclosures may constitute an “unfair business practice” under the UCL. Since such projections are only estimates, a court could see them as manipulative and, therefore, unfair.

159 See Suh, Comment, 35 Sw U L Rev at 236–37 (cited in note 86).

160 See Butler and Wright, 63 Fla L Rev at 166 (cited in note 46).


162 See Butler and Johnston, 2010 Colum Bus L Rev at 44 (cited in note 35) (arguing that “expansive and uncertain” liability imposes a tax on every consumer good and service).
to businesses and cost California taxpayers millions of dollars in revenue each year.\textsuperscript{163} Courts and businesses could try to limit these abuses by eliminating frivolous claims during pre-trial motions to dismiss or motions for summary judgment.\textsuperscript{164} However, pre-trial litigation nevertheless poses significant costs to businesses.

Fourth, the pre-Cel-Tech tests also impose greater administrative costs for the courts given their susceptibility to frivolous litigation. UCL lawsuits clog the California courts, which administer 1.5 million suits in a single year.\textsuperscript{165} Moreover, the pre-Cel-Tech standards burden courts with the difficult task of properly instructing juries on the tests' application.\textsuperscript{166}

Altogether, the flexibility of the pre-Cel-Tech tests is both its greatest strength and weakness in consumer suits. Given the difficulty of predetermining all predatory and "unfair" business practices, it is useful to empower the courts with discretion to subjectively consider a practice to determine whether it victimizes consumers. However, this flexible test is also an amorphous one, ripe for abuse by plaintiffs' attorneys. The Cel-Tech court was right to reject a standard that provides too little guidance to the courts, and consequently, increases legal uncertainty, deters healthy disclosure, enables frivolous litigation, and imposes high administrative costs.

B. The Cel-Tech Test

The Gregory court adapted the Cel-Tech test for consumer cases, stating "where a claim of an unfair act or practice is predicated on public policy ... the public policy which is a

\textsuperscript{163} See Suh, Comment, 35 Sw U L Rev at 238 (cited in note 86) (citation omitted). See also Evan Halper and Marc Lifsher, Initiative Seeks Carbs on Consumer Lawsuits, LA Times (LA Times July 6, 2004), online at http://articles.latimes.com/2004/jul/06/local/me-consumer6 (visited on Sept 15, 2013) (describing the arguments for and against Proposition 64 to amend the UCL).

\textsuperscript{164} See, for example, Motors, Inc v Times Mirror Co, 102 Cal App 3d 735, 740 (1980) (explaining that the question of unfairness could potentially be resolved by a motion for summary judgment).

\textsuperscript{165} See Suh, Comment, 35 Sw U L Rev at 244 (cited in note 86) (describing the total number of claims brought in California courts between 2003 and 2004). However, the percentage of UCL unfairness suits is unclear. Given that plaintiffs often allege "unfair business practices" as part of a multi-claim lawsuit, the number may be significant.

\textsuperscript{166} See David L. Belt, Should the FTC's Current Criteria for Determining "Unfair Acts or Practices" Be Applied to State "Little FTC Acts"?, 9-FEB Antitrust Source 1, 9–10 (2010). Yet, it is unclear how this is not a problem with all three tests. For instance, courts may have trouble adequately describing a "sufficiently tethered predicate policy."
predicate to the action must be 'tethered' to specific constitutional, statutory or regulatory provisions."^{167}

1. Arguments in favor of the Cel-Tech test.

The Cel-Tech test's strengths include: (1) increased legal certainty; (2) few additional burdens on consumers; and (3) uniformity across unfairness claims in California. First, the Cel-Tech test furthers the Cel-Tech court's goals of promoting predictable liability. As a general principal, courts should read legal opinions and documents as a whole.^168 The majority of the Cel-Tech court's opinion criticized the pre-Cel-Tech tests as too ambiguous in light of a business's legitimate need to know what the UCL allows and forbids.^{169} If the Cel-Tech court meant to leave the pre-Cel-Tech tests intact for consumers, it could have distinguished the consumer case law and competitor case law.^{170} But the Cel-Tech court did not explicitly draw that distinction. Even though the Cel-Tech court limited its ruling to competitors, the thrust of its opinion does not suggest that the California Supreme Court would view the definitions any differently in consumer cases.^171

Applying the Cel-Tech test to consumer cases therefore advances the California Supreme Court's goal of predictable liability. This is a reasonable goal because businesses need to know what practices are legally acceptable in order to properly structure their transactions with consumers. The Cel-Tech test produces more predictable results because businesses can look to already-enacted law to determine what practices the UCL condemns. Businesses can then structure their dealings to properly comply with the UCL and other law. Legislation and regulation already "on the books" is a more certain body of authority by which to structure business practices than the whims of a jury.

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^{167} Gregory, 104 Cal App 4th at 854.
^{168} See Merchants' National Bank of San Francisco v Carmichael, 196 P 76, 78 (Cal Ct App 1920).
^{169} See Cel-Tech, 973 P2d at 542–43.
^{171} See Cel-Tech, 973 P2d at 538–44.
Second, the *Cel-Tech* definition is not overly harsh simply because it requires the plaintiff to show that the underlying public policy tethers to some enacted law. Rather, the tethering requirement only eliminates frivolous litigation in unfairness claims that lack any legislative or regulatory support. The consumer is not left without remedy under the *Cel-Tech* test because of the scope of state and federal law.\footnote{See Bardin Brief at *4–5 (cited in note 170).} Tethering the public policy predicate to a specific provision arguably does not require the plaintiff to separately prove the practice is actually unlawful under another state or federal law but only that it meaningfully relates to some legal authority.\footnote{Id.}

Third, the *Cel-Tech* standard establishes uniform definitions of “unfair business acts and practices” for consumer and competitor actions under California’s UCL.\footnote{This uniformity contrasts with the type of uniformity advanced by the pre-*Cel-Tech* tests, which expand uniformity among the different states, not within California law.} California courts have reasoned that the UCL’s primary purpose was to “extend[ ] to the entire consuming public the protection once afforded only to business competitors.”\footnote{See Barquis, 496 P2d at 829 (interpreting the UCL’s predecessor). See also Bank of the West, 833 P2d at 552–53 (summarizing that before the UCL the common law tort of unfair competition did not provide an effective consumer remedy).} This suggests that the California legislature intended to put consumers and competitors on equal, but not better, footing. Furthermore, the California legislature enacted only one definition of unfairness; it created no statutory distinction between consumer and competitor unfairness claims.\footnote{See generally Cal Bus & Prof Code § 17200 (West 2008).} The word “unfair,” therefore, should only have one meaning. Since the legislature drew no such distinction, the UCL’s meaning should not vary based on which parties bring the action.

In addition, applying a different standard in consumer and competitor cases could create additional litigation over whether a plaintiff is a competitor or consumer.\footnote{See, for example, National Rural Telecommunications Co-op v DIRECTV, Inc, 319 F Supp 2d 1059, 1075–77 (CD Cal 2003) (considering whether *Cel-Tech* standard applied to a plaintiff’s based on the defendant’s claim that it competed with the plaintiff).} This new litigation could merely shift administrative costs from applying an amorphous definition of unfairness to determining if the
plaintiff is a consumer or competitor. And if the consumers could still sue businesses under the amorphous pre-Cel-Tech tests, businesses would still face the unpredictable liability regime criticized by the Cel-Tech court. Facing only a vague unfairness test for consumer challenges does not meaningfully increase certainty over the UCL's reach.

2. Arguments against the Cel-Tech test.

The Cel-Tech test has three significant weaknesses: it (1) weakens the UCL's consumer protections; (2) contradicts the UCL's structure; and (3) is inconsistent with the Cel-Tech court's reasoning. First, the Cel-Tech test does not adequately protect consumers. California courts have repeatedly explained that consumers, not competitors, need the greatest protection from "sharp business practices." The courts have also rejected the argument that the UCL (and its predecessor) is limited to "anticompetitive business practices" and does not extend more generally to advance consumer protection goals. Applying the same Cel-Tech standard to both consumers and competitors would arguably return California law to its pre-UCL state, which lacked meaningful consumer protections. In contrast, the California legislature intended that the UCL and its predecessor expand the common law's prohibition of unfair competition, which protected competitors alone, because consumers need the greatest legal protection. Further, a concurrence in Cel-Tech argued that the UCL's purpose is to prevent deceptive conduct, not merely to act as an extension of antitrust law's prohibitions of restraints of trade.

Second, the Cel-Tech tethering test weakens the "unfair business acts and practices" prong of the UCL, contrary to the UCL's disjunctive structure. Since the test's tethering requirement demands that the public policy predicate relate to

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178 I did not find many of these cases in my research. The added litigation over whether a challenger is a consumer or competitor might be insignificant.

179 See Barquis, 496 P2d at 829-31.

180 See id at 829.

181 See Michael Wallenstein, Comment, Gun Manufacturers and Unfair Business Practices, 30 Sw U L Rev 435, 463-64 (2001) ("This new definition would seem to anchor the law of unfair business practices to its old moorings of common law protection of business competition and significantly narrow the scope of the [UCL].").

182 See Cel-Tech, 973 P2d at 547 (Kennard concurring).
established law, it collapses the separate prohibition of "unfair business acts or practices" into unlawful or fraudulent practices. This test renders the UCL's independent prohibition of "unfair business acts and practices" redundant if "unfair" actually means "unlawful." This reading of the UCL violates the statutory interpretation canon against surplusage. Under this general rule, California courts interpret statutes to avoid rendering sections redundant by giving them an independent meaning.

Moreover, conflating "unfair" with "unlawful" does not advance the legislature's goal of providing a separate proscribed category inclusive of behavior the legislature had not yet encountered and prohibited. Applying the Cel-Tech test to consumer claims could subsequently limit consumer protections against unscrupulous practices not explicitly proscribed by law. As predatory businesses innovate, consumers encountering a new practice might have no remedy because the legislature or regulators have not yet "tethered" the new scam to a legal policy. Proponents of the Cel-Tech test may respond that the test does not require the plaintiff to prove that the practice actually violates an established law. But the test still requires, at minimum, the legislature to have previously encountered the practice in some capacity and create some legal authority against the practice. In today's rapidly evolving and


184 In order to show the challenged practice "tethers" to some legally grounded policy, the consumer would likely have to show it offends the letter of the law or at least its spirit. But it is unclear what exactly "tether" means.

185 See Chickasaw Nation v United States, 534 US 84, 94–95 (2001) (recognizing the canon of statutory interpretation against surplusage but declining to apply it where "inadvertently inserted or if repugnant to the rest of the statute"). In contrast, it is difficult to argue that the UCL's "unfairness" was either "inadvertently inserted" or "repugnant to the rest of the statute."


188 See Blackston, Comment, 41 San Diego L Rev at 1864–65 (cited in note 72).

189 See Gregory, 104 Cal App 4th at 854 (adopting the tethering test without explicitly requiring the plaintiff to establish the actual illegality of the practice).
sophisticated marketplace, this may be asking too much of the legislature and regulators.

Third, extending the *Cel-Tech* test to consumer suits misreads the *Cel-Tech* decision. The court’s limiting language in footnote twelve suggests the court did not equate the unfairness question for competitor cases to consumer cases. If the court had desired the same standard, it could have rejected the *Casa Blanca* tests for all suits alleging “unfair business practices.” However, this is a weak argument because the court could have simply wished to save that question for another day. Just as we cannot infer anything from the court’s choice not to distinguish consumer cases from competitor cases, we cannot definitively infer anything from the court’s decision to limit its holding to the facts of the case.

Although the *Cel-Tech* test moves the UCL too far in the other direction, the *Cel-Tech* standard has its advantages: it encourages predictable administration of claims to the benefit of the courts, businesses, and consumers. However, the test also undermines the UCL’s goal of providing flexible protections against evolving exploitations in the marketplace. Therefore, the California Supreme Court should reject the *Cel-Tech* test as inconsistent with the UCL.

C. The FTC Act § 5 Test

The FTC § 5 test requires that the consumer’s injury (1) is substantial; (2) “not outweighed by any offsetting consumer or competitive benefits that the sales practice also produces”; and (3) not one the consumer could have “reasonably avoided.”

1. Arguments in favor of the FTC § 5 test.

The California Supreme Court should adopt the FTC § 5 test for “unfair business practices” in consumer actions. The FTC test is the best of the three approaches because it (1) provides sufficient flexibility for consumer protection purposes; (2) limits abusive litigation; (3) and advances uniformity between California and federal law. First, the § 5 test is both sufficiently flexible and specific to give the courts direction of

190 15 USC § 45.
what practices are unfair under the UCL.\textsuperscript{191} The second prong of the § 5 test directs the court to use the same normative considerations of unfairness as the pre-Cel-Tech balancing test.\textsuperscript{192} Balancing the practice's costs and benefits gives California courts discretion to weigh a practice's overall social utility, without considering whether the underlying public policy tethers to established law.

This normative evaluation, with its accompanying flexibility, is truer to the California legislature's intent to advance consumer protection goals.\textsuperscript{193} This balancing is important because it can adapt to emerging commercial practices, unlike the Cel-Tech test. It is also an uncontroversial element. In a competitive environment, it is difficult to imagine why a business would act in a way that damages consumers more than benefits consumers. The only conceivable explanation for such action is an intent to defraud or victimize the consumer through commercial coercion.

Second, the § 5 approach broadens the court's scrutiny of a transaction, compared to the Cigarette-Rule-derived pre-Cel-Tech definitions, to limit abusive litigation. Namely, the "not reasonably avoidable" consumer injury prong addresses the consumer's options at the time of injury.\textsuperscript{194} Evaluations of consumer behavior and commercial coercion facilitate the courts' efforts to eliminate frivolous litigation since the test rejects an opportunistic lawsuit where a consumer had alternatives to the injury.\textsuperscript{195} The test provides greater legal certainty because the courts will find unfairness only if the business unreasonably blocks the free exercise of consumer decision making.\textsuperscript{196}

\textsuperscript{191} See Camacho, 142 Cal App 4th at 1404.

\textsuperscript{192} Compare Camacho, 142 Cal App 4th at 1404 (detailing the second element of the § 5 test as "the injury must not be outweighed by any countervailing benefits to consumers or competition"), with Smith, 93 Cal App 4th at 718 (specifying the balancing test as "an examination of that practice's impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer").

\textsuperscript{193} See Part II.A.

\textsuperscript{194} See Sawchak and Nelson, 90 NC L Rev at 2060–61 (cited in note 15) (arguing that the North Carolina courts should apply the federal definition of unfairness in North Carolina's similarly constructed unfair competition law).

\textsuperscript{195} Id at 2072–73. On the other hand, the likelihood of a consumer consciously suffering injury as part of a manufactured lawsuit seems low. The UCL only awards damages for restitution and would not give this unscrupulous consumer a windfall. See Cal Prof & Bus Code § 17203 (West 2008).

Businesses can hardly complain that they must tailor their practices to avoid coercing a consumer's choices. Rather, this requirement benefits businesses by protecting them against a competitor who gains an advantage through eliminating free commercial choice. Considerations of substantial consumer harm likewise help the courts focus on serious misconduct by businesses.

Third, the reasonable avoidance and substantial injury elements supplement the otherwise amorphous pre-Cel-Tech balancing test and other Cigarette Rule formations of "unfairness." By these requirements, the § 5 test reins in the abusive claims straying from the UCL's purpose of complementing the FTC Act. Past scholarship shows that state "Little FTC Acts" impose greater liability on businesses than the FTC's Cigarette Rule or the § 5 test and, accordingly, over-deter commercial behavior useful for businesses and consumers. Conversely, the Cel-Tech and pre-Cel-Tech definitions do not further the UCL's goal of complementing the FTC's consumer protections. These alternatives counteract the FTC's balance between optimal consumer protections and public welfare. This imbalance often presents itself because the interests of private litigants may not always align with the overall public interest. Adopting the § 5 test would consequently help bring California's UCL back in line with its federal roots.

At the same time, these requirements do not bar any legitimate claims under the UCL. If consumers cannot show a non-negligible harm from the challenged practice, the claim is probably frivolous. In contrast, the Cel-Tech test does not consider the overall consumer harm, which implies that liability attaches to potentially insignificant harms. Additionally, requiring that the consumer could not reasonably avoid the

197 See Butler and Wright, 63 Fla L Rev at 165 (cited in note 46) (explaining that state "Little FTC Acts" were originally meant to supplement the Federal Trade Commission's consumer protection goals).
198 See id at 187–88 (finding that under a "Shadow FTC's" analysis, 78 percent of sample state claims would not constitute unfair or deceptive conduct under the FTC policy statements).
199 Id.
200 Recall that California's UCL was directly modeled on the federal FTC. See Part II.A.
201 See Camacho, 142 Cal App 4th at 1405 (arguing that the California Attorney General and the consumer plaintiff could not identify any type of legitimate cases that the § 5 test would systematically exclude from the UCL's reach).
practice's harm ensures businesses protect a consumer's free choice, rather than imposing an additional due care requirement on the consumer. Under the reasonable avoidance requirement, the proper focus is on whether the business coercively restricted the consumer's choices, not if the consumer failed to exercise due care in interacting with the business.202

Businesses similarly benefit from this guided test of consumer fairness, in comparison to a pre-Cel-Tech regime, because they can better police their practices. In contrast to the pre-Cel-Tech regime, businesses would likely have trouble predicting ex ante what a court may find unfair ex post under only a consideration of the practice's costs and benefits. Businesses know that they cannot restrict consumers' free decision-making without risking liability. Likewise, the § 5 test is not onerous simply because it penalizes business practices that cause consumers substantial harm.

Fourth, the § 5 test promotes uniformity between California and federal law.203 The California Supreme Court has endorsed references to the FTC's definitions of unfair business practice claims.204 Some commentators even believe there is potential trend in the California courts toward endorsing the § 5 test over the competing approaches.205 For example, the Davis court abandoned its previous endorsements of the pre-Cel-Tech tests for the FTC § 5 test.206 And since the Cigarette Rule's rejection in 1980, there will be no further federal court or agency decisions to provide guidance on unfair business practice claims as defined by the pre-Cel-Tech tests.207 The FTC's adoption of the § 5 test, over the pre-Cel-Tech standards, suggests that the California courts should also reject those outdated definitions of unfair practices.208 The FTC is an agency with considerable

203 See notes 230–233 and accompanying text.
204 See generally 15 USC § 45.
205 See, for example, Mosk, 201 Cal App 2d at 772–73 (“In view of the similarity of language and obvious identity of purpose of the two statutes, decisions of the federal court on the subject are more than ordinarily persuasive.”).
206 See 179 Cal App 4th at 595–97; Enson, 19 Competition J Anti & Unfair Comp L Sec St Bar Cal at 28–29 (cited in note 140).
207 See Belt, 80 Conn Bar J at 317–18 (cited in note 52) (outlining some of the arguments in favor of applying the federal § 5 test to state law unfairness actions).
208 See Barquis, 496 P2d at 829–31 (summarizing the UCL's legislative origins and its similarities to the Federal Trade Commission Act and federal jurisprudence).
expertise in consumer protection and developed the § 5 test specifically for consumer actions.\textsuperscript{209}

Promoting uniformity between California and federal law would produce several benefits. First, it would provide an increased volume of persuasive case law and FTC investigations to help California courts in applying the § 5 test.\textsuperscript{210} California courts can use federal and state court decisions for guidance in applying the same three-prong test in unfair competition actions under the FTC Act. In addition, as the FTC continues to grow more experienced in applying the revised § 5 test, its expertise will also help California courts evaluate California’s own unfairness claims. It is reasonable for the state courts to defer to the FTC’s definitions of unfair practices given both the FTC’s active role in the states’ adoption of the “Little FTC Acts” and its commercial expertise.\textsuperscript{211} Therefore, this form of uniformity is superior to the state-centric uniformity advanced by the Cel-Tech and pre-Cel-Tech standards.

Second, uniformity with federal law gives businesses a better opportunity to comply with the UCL. Since this federal standard applies to businesses across the nation, businesses operating in many different states do not need to waste resources trying to comply with another standard of fairness. As it is federal law, California businesses already must comply with the § 5 test of unfair business practices.\textsuperscript{212} Extending the Cel-Tech’s tethering standard could be difficult for courts as the body of available law addressing consumer harms could be much greater than the small universe of antitrust law. Furthermore, businesses benefit because their unscrupulous competitors face

\textsuperscript{209} See Part I.A.

\textsuperscript{210} See Sawchak and Nelson, 90 NC L Rev at 2080–81 (cited in note 15) (making a similar argument to apply the FTC definition in unfairness claims under North Carolina law). While the Supreme Court rejected the concept of a federal common law in \textit{Erie Railroad Co v Tompkins}, 304 US 64, 78 (1938), the California courts may consider federal law as persuasive, not mandatory, authority. To some extent, promoting uniformity of federal and state definitions of unfairness may push against \textit{Erie}’s boundaries. But under this proposal, the California courts are not bound by federal interpretations, and vice versa.

\textsuperscript{211} See Butler and Johnston, 2010 Colum Bus L Rev at 86–87 (cited in note 35) (arguing that the states should adopt the FTC’s definitions of unfair and deceptive practices because the current state approaches deter valuable information sharing by sellers to consumers).

\textsuperscript{212} However, it is conceivable that many small businesses would not see the federal standard as entirely applicable since the FTC primarily targets major frauds and would be unlikely to investigate a small-time offender.
more difficulty in avoiding UCL liability through new fraudulent practices, unlike in a *Cel-Tech* regime. Businesses could then reduce costs, leading to increased consumer welfare through reduced prices.

Third, this uniformity improves enforcement of the UCL. Namely, it helps courts, government agencies, and consumers detect unfair practices because it is a clearer standard in California law. Legal uniformity potentially benefits consumers because businesses, armed with a clearer understanding of what is “unfair” will face fewer costs from wasteful and inefficient compliance efforts than with an unwieldy standard like the pre-*Cel-Tech* rules.

2. Arguments against the FTC § 5 test.

The § 5 test’s potential weaknesses include: (1) potential ambiguity compared to the *Cel-Tech* test; (2) absence of dedicated enforcement agency like the FTC; (3) regulatory and antitrust focuses; and (4) weakened consumer protections. First, critics could argue that the § 5 test’s second element perpetuates the same amorphous balancing of a practice’s utility as the pre-*Cel-Tech* tests. This presents many of the same problems previously addressed regarding the pre-*Cel-Tech* tests: increased unpredictability, administrative costs, and frivolous litigation. Some critics claim that the balancing test element is unguided and, therefore, the test provides little useful instruction to the courts. The § 5 test thus presents some nebulous features which may prompt risk-averse actors to overcorrect and not engage in useful information disclosures. In addition, consumers may likewise have trouble separating the risk-avoiders and “risk-preferers.” Risk-averse sellers, those who still provide useful and reliable information to consumers in the face of uncertain liability, may also have trouble in signaling their reliability and, thus, may face a competitive disadvantage. This unpredictable liability and incomplete

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213 See Part III.A.2.
215 See id at 56–57.
216 See id at 57–58.
217 See id at 58.
enforcement could arguably drive "non-injuring risk-sensitive competitors" out of the market.\textsuperscript{218}

However, as discussed above, the "significant" and "not reasonably avoidable" injury requirements mitigate the balancing element's unpredictability.\textsuperscript{219} Even if it has some chilling effect, the § 5 test is still a preferable middle ground between the vague pre-\textit{Cel-Tech} standard and the rigid \textit{Cel-Tech} standard. Engaging in this flexible normative evaluation of business practices is necessary to target evolving commercial exploitations.

Second, some authorities question the appropriateness of applying the § 5 test, normally enforced by a dedicated agency (the FTC), to determine the fairness of a business practice under state law.\textsuperscript{220} For example, a concurrence in \textit{Cel-Tech} argued that the § 5 test is inappropriate in private civil litigation because the FTC's authority is based on its economic expertise and investigative resources.\textsuperscript{221} A state court, in contrast, lacks comparable fact-finding capabilities.\textsuperscript{222} Additionally, a defendant faces greater liability from the UCL's restitutionary and injunctive remedies than the FTC's cease-and-desist orders. In essence, this argument claims that imposing the UCL's larger liabilities distorts the § 5 test's original purpose to prohibit current practices that, while causing harm that might become unlawful anticompetitive practices, do not presently violate antitrust law.\textsuperscript{223}

\textsuperscript{218} See Rice, 52 Geo Wash L Rev at 58 (cited in note 20) (citation omitted).

\textsuperscript{219} See Sawchak and Nelson, 90 NC L Rev at 2072–73 (cited in note 15); see also Belt, 9-FEB Antitrust Source at 11–13 (cited in note 166) (arguing that the revised § 5 test "made the determination of unfairness both more clear and less clear: It made the standard more clear by eliminating potentially ambiguous elements of the Cigarette Rule standard; it made it less clear by requiring application of the balancing test in every case").

\textsuperscript{220} See, for example, Belt, 80 Conn Bar J at 320 (cited in note 52).

\textsuperscript{221} See \textit{Cel-Tech}, 973 P2d at 552 (Kennard concurring) (arguing the court should not presume that the California legislature intended the UCL's predecessor law to "incorporate the antitrust portion of § 5 of the FTC Act" and to reject the common law definition of unfair competition). See also Federal Trade Commission v Keppel & Bro, Inc, 291 US 304, 314 (1934) (explaining that the Commission is a uniquely qualified because of its knowledge and experience with business and economic matters), quoting Report of Senate Committee on Interstate Commerce, S Rep No 597, 63d Cong 2d Sess 9, 11 (1914) (quotation marks omitted).

\textsuperscript{222} See \textit{Cel-Tech}, 973 P2d at 553 (Kennard concurring) (noting the different ways that state and federal unfair competition laws are enforced and California's lack of an agency like the FTC).

\textsuperscript{223} Id ("The[] justifications for having an administrative agency search out incipient
This argument overlooks important features of the § 5 test. As noted, the § 5 test incorporates the balancing test as one element of the court’s evaluation of commercial fairness. And assuming that the courts lack the same economic expertise as the FTC, providing the courts with greater guidance is a significant improvement over the relatively unguided pre-Cel-Tech definitions. Similarly in a Cel-Tech regime, the courts still face a disadvantage of relating potentially complex transactions to established law. The FTC may have an advantage over courts in evaluating business practices, but it is unclear how the pre-Cel-Tech and Cel-Tech standards meaningfully address the courts’ disadvantage. California courts fare better under the § 5 test because it focuses their attention on clear exploitations—substantial consumer harms resulting from coercive business practices.

Third, critics of the § 5 test claim that it overlooks the Cel-Tech court and the FTC Act’s focus on antitrust law and competitor actions, not consumer protection law. Some commentators have argued that the Cel-Tech court’s reference to federal antitrust law for guidance makes less sense when the case does not involve a denial of competitive position. This counterargument has some weight. Namely, the Cel-Tech court clarified in footnote twelve that it expressed no view on the application of federal unfair competition cases that involve injury to consumers. The Cel-Tech court’s limited inquiry into competitor actions, however, does not exclude the possibility that the court would find the § 5 test appropriate to apply to consumer cases. And perhaps more importantly, the § 5 test is specifically geared toward consumer claims in its original use.
Fourth, opponents of the § 5 test could argue that its third element—requiring that the consumer could not have reasonably avoided the harm—greatly limits the UCL's consumer protections. Critics may argue that this requirement could have harsh results on consumers by introducing a contributory negligence analysis. State attorneys general have generally opposed adoption of the § 5 test, in favor of the Cigarette Rule. For example, California's Attorney General has claimed that the § 5 test would make enforcement of predatory business practices more difficult. At first glance, this seems like a valid concern.

However, criticism of the “not reasonably avoidable” requirement is overstated. Courts have held that the “not reasonably avoidable” test is not about the consumer's conduct but about the options and information that the consumer had during the underlying transaction. Precedent further limits this requirement by holding that consumers cannot “reasonably avoid the injury” if they (1) could not reasonably anticipate the injury; (2) lacked the means to avoid it, or (3) their “free market decisions were unjustifiably hampered by the conduct of the seller.”

On the whole, the § 5 test has the best balance between the predictability needed for effective administration of the UCL and the flexibility needed for potent consumer protections in an evolving market. While allowing the courts significant discretion

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230 See Belt, 9-FEB Antitrust Source at 13 (cited in note 166).
231 Camacho, 142 Cal App 4th at 1403–05.
232 The Davis court rejected an unfair business practice claim because the consumer could have reasonably avoided the alleged injury. Davis, 179 Cal App 4th at 597–98. In Davis, the business had a billing practice of applying the consumer's monthly payments to any missed installments, rather than the current month's installment, resulting in new late fees each time a delinquent consumer tried to pay the new month's installment. Id at 585–86. The Davis court reasoned that the consumer could have reasonably avoided the successive late fees by making his payments. Id at 598. This ruling is a harsh result for indigent consumers because the business apparently took advantage of a consumer's delinquency for its own benefit.
233 See, for example, Federal Trade Commission v Neoul, Inc, 604 F3d 1150, 1158 (9th Cir 2010).
234 See Camacho, 142 Cal App 4th at 1405, restating Orkin Exterminating Co, Inc v Federal Trade Commission, 849 F2d 1354, 1365 (11th Cir 1988) (affirming the FTC's finding that consumer injury was not "reasonably avoidable" when they have no reason or means to anticipate the "impending harm"). The Eleventh Circuit's decision also suggests that the Davis court may have been mistaken in finding the plaintiff could have reasonably avoided the successive late payments considering the plaintiff may have lacked the means to make his timely payments.
to weigh a practice's social utility, the test also limits the potential for abusive litigation, high administrative costs, and uncertainty by requiring the harm to be "significant" and "not reasonably avoidable." It also promotes uniformity between state and federal law by adopting the definition under the federal FTC Act.

IV. CONCLUSION

As in several states, California law is unsettled regarding the appropriate definition of "unfair business acts and practices." The California Supreme Court introduced a heightened standard of unfairness for competitor cases, but confusion remains over the appropriate definition in consumer claims. Although I focused on the development of California's unfair competition law, my analysis applies with near equal force to other states' unfair competition laws. The shared evolution from federal enforcement to state unfair competition laws translates to uncertainty in the definitions used by many states. As I argued in this Comment, the FTC § 5 test provides the best compromise between consumer protection goals and a sufficiently clear legal standard to optimally minimize uncertainty, administrative costs, and abusive litigation.