Filed 9/3/03

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CONSUMER CAUSE, INC., Plaintiff and Appellant, v. NATIONAL VISION, INC., Defendant and Respondent.	B165646 (Los Angeles County Super. Ct. No. BC 274257)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard C. Hubbell, Judge. Affirmed.

Law Offices of Morse Mehrban, Morse Mehrban and Marc E. Angelucci for Plaintiff and Appellant.

O'Melveny & Myers, John W. Stamper and Jim P. Kidder for Defendant and Respondent.

Since the 1930s, California has prohibited licensed opticians, who grind lenses and sell glasses, from directly or indirectly employing or leasing office space and equipment to licensed optometrists and ophthalmologists, who conduct eye exams and

prescribe the proper lenses for their patients. California did so to prevent financial and business considerations from impinging on the professional medical treatment optometrists and ophthalmologists offer their patients.

However, in 1975, the Legislature passed the Knox-Keene Act (Health & Saf. Code, § 1340 et seq.), which established a highly regulated system under which healthcare plans could become approved providers after establishing and maintaining strictly regulated programs. Among other aspects, the Knox-Keene Act permitted entities that were not themselves licensed opticians to establish the relationships prohibited by the earlier legislation. The Act did so because the plans were required to build in extensive protections to prevent medical decisions from being unduly influenced by financial and business concerns.

National Vision, Inc., a Knox-Keene-approved provider, set up optician centers in retail stores, and, as part of its agreements with the stores, set up optometrists or ophthalmologists in separate but nearby offices in the stores. These arrangements are permitted under the Knox-Keene Act.

Consumer Cause, Inc., a consumer protection group, sued National under the unfair business practice statute, claiming its arrangement violated the earlier prohibitions on ties between opticians and optometrists. Consumer did so despite its express acknowledgement that National was an approved Knox-Keene Act provider and its arrangements fully complied with the Act. Consumer did not sue on anyone's behalf, nor did it claim National's arrangement harmed anyone.

The trial court sustained National's demurrer with leave to amend. When Consumer declined to amend, the trial court entered judgment for National. Consumer appealed.

We hold that National's arrangement, expressly permitted by the Knox-Keene Act, is not an unfair business practice. We affirm the judgment.

FACTS

Consumer sued National under Business and Professions Code section 17200 (all further undesignated statutory references are to the Business and Professions Code), claiming National's arrangement violated sections 655 and 2556, and thus was an unfair business practice. Consumer twice amended its complaint in response to National's demurrers; the second amended complaint became the operative pleading.

Consumer alleged it sued "in a representative capacity on behalf of California residents." Consumer alleged National was "a registered dispensing [California] optician." Consumer also alleged NVAL Healthcare Systems, Inc. was a wholly owned subsidiary of National, and NVAL Visioncare Systems of California, Inc. was a wholly owned subsidiary of Healthcare.

Consumer acknowledged that Visioncare "has been licensed as a specialized healthcare service plan under the . . . Knox-Keene Act . . . . The California Department of Managed Health Care (the state government arm responsible for oversight and compliance with the Knox-Keene Act) oversees the operations of . . . Visioncare . . . . The California Department of Managed Health Care has examined and approved . . . Visioncare['s] . . . agreements in connection with its original Plan License Application. At all times mentioned herein, . . . Visioncare . . . has been in compliance with the Knox-Keene Act."

Consumer alleged National "has operated at least 94 optical dispensing stores in Wal-Mart stores throughout California. Pursuant to a master license agreement between [National] and Wal-Mart . . . , the latter provides space in its stores for [National]'s optical dispensing stores. In exchange, [National] is required to keep a licensed

California optometrist or ophthalmologist on duty to practice adjacent to or near each of the optical dispensing stores for at least 48 hours per week. The master license agreement further provides that if any law, rule or regulation prohibits [National] from entering into a relationship with an optometrist or an ophthalmologist, Wal-Mart . . . will cooperate with [National] in complying therewith, including entering into a separate agreement directly with an optometrist or ophthalmologist."

The complaint alleged that National originally had an agreement with an independent company to supply the optometrists and ophthalmologists, but that company later assigned the agreement to Visioncare, which since then has contracted with and supplied them to Wal-Mart. The complaint acknowledged that the contracting optometrists' activities "are governed by the Knox-Keene Act." Visioncare "(a) recruited and contracted with licensed California optometrists, (b) subleased spaces adjacent to [National]'s optical dispensing stores in California Wal-Mart stores to those optometrists, and (c) leased optical equipment to those optometrists. A wall separates the space occupied by those optometrists from [National]'s optical dispensing stores in California Wal-Mart stores."

Consumer alleged the optometrists pay Visioncare a percentage of their eye exam revenue for the space and equipment, and Visioncare pays National two percent of its gross revenue. However, Visioncare does not pay National directly. Rather, National applies Visioncare's payments to increase Visioncare's capital account. Consumer alleged these payments had increased Visioncare's capital account by $1,479,213.

Consumer alleged National's arrangement with Wal-Mart violated sections 655 and 2556 "by (a) indirectly maintaining near its premises used for optical dispensing in California optometrists for the purpose of examination and treatment of the eyes, and

(b) having landlord-tenant relationships indirectly with optometrists in California." Section 655, enacted in 1969, prohibits direct or indirect relationships between optometrists or ophthalmologists and registered dispensing opticians or suppliers of optometric products, and makes violations misdemeanors. As relevant, section 2556, enacted in 1939, makes it unlawful "to directly or indirectly employ or maintain on or near the premises used for optical dispensing, a refractionist, an optometrist, a physician and surgeon, or a practitioner of any other profession for the purpose of any examination or treatment of the eyes . . . ."

Consumer alleged National's practices constituted an unfair business practice under section 17200. Consumer sought an injunction prohibiting National "from committing the violations alleged herein; [¶] . . . costs of suit; and [¶] . . . such relief as is fair, just, and equitable."

National demurred to the second amended complaint, contending it failed to state sufficient facts to constitute a cause of action. National argued the Knox-Keene Act expressly excepted National from the section 655/2556 prohibitions, that the legislature, not the courts, should make the difficult economic, business, and health care decisions involved in this highly regulated field, and that, in any event, National's activity harmed no one and Consumer had no interest in the issue.

The trial court sustained the demurrer with leave to amend, finding that Consumer "has not alleged the predicate 'unlawful, unfair or fraudulent business act or practice' by [National]. . . . [T]he sole basis for [National]'s liability is its relationship to [Visioncare]. [Citation.] However, . . . the Second Amended Complaint alleges that [Visioncare] 'has been licensed as a specialized healthcare service plan under the Knox-Keene . . . Act . . .' and '[a]t all times mentioned herein, . . . has been in compliance with the Knox-Keene Act.' Further, in its opposition to the Demurrer, [Consumer]

admits that '[National] is correct in its assertion that the relationship between [Visioncare] and California optometrists is authorized by Health and Safety Code, Section 1395.' [Citation.]"

The trial court entered judgment dismissing the case when Consumer failed to amend within the time allowed.

DISCUSSION

Consumer contends the trial court erred because National's compliance with the Knox-Keene Act does not exempt it from the section 655/2556 prohibition. We disagree.

The standard of review for dismissals following the sustaining of demurrers is well known and not disputed. (*Blank* v. *Kirwan* (1985) 39 Cal.3d 311, 318; *Aragon-Haas* v. *Family Security Ins. Services, Inc.* (1991) 231 Cal.App.3d 232, 238-239.) We will not discuss it further.

Health and Safety Code section 1395, as relevant, states: "(b) Plans licensed under this chapter shall not be deemed to be engaged in the practice of a profession, and may employ, or contract with, any professional licensed pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code to deliver professional services. Employment by or a contract with a plan as a provider of professional services shall not constitute a ground for disciplinary action against a health professional licensed pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code by a licensing agency regulating a particular health care profession.

"(c) A health care service plan licensed under this chapter may directly own, and may directly operate through its professional employees or contracted licensed professionals, offices and subsidiary corporations . . . as are necessary to provide health

care services to the plan's subscribers and enrollees."

As the trial court found, this section expressly defines Knox-Keene-approved health care plans as non-professionals, i.e., as not being, among others, optometrists or ophthalmologists. Moreover, this section expressly permits such approved plans to own and operate, through professional employees, offices providing professional health care services. Thus, Health and Safety Code section 1395 expressly exempts approved plans such as National's Visioncare from the section 655/2556 prohibitions. Approved plans operating such offices do not violate sections 655 and 2556, are not acting unlawfully, and thus do not violate section 17200.

"Although the unfair competition law's scope is sweeping, it is not unlimited. Courts may not simply impose their own notions of the day as to what is fair or unfair. Specific legislation may limit the judiciary's power to declare conduct unfair. If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination. When specific legislation provides a 'safe harbor,' plaintiffs may not use the general unfair competition law to assault that harbor." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 182, emphasis added.)

"A business practice cannot be unfair if it is permitted by law. [Citation.] The UCL does not apply if the Legislature has expressly declared the challenged business practice to be lawful in other statutes. [Citations.]" (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1505-1506.)

Here, the Legislature expressly permits Knox-Keene-approved health care plans to engage in conduct which would be prohibited under sections 655 and 2556 if done by non-approved groups or individuals. Because National's Visioncare subsidiary is an approved plan, National's relationship with Wal-Mart is legal and does not violate

section 17200.

In construing section 2556, we earlier said: "The basic aim of all of the statutes enacted with reference to this subject matter having to do with prohibiting the employment of optometrists and ophthalmologists by lay persons or corporations is the elimination of the chance of dominion of the professional decisions of the practitioner by commercial interest. However, courts have refused to interfere with honest business arrangements in the absence of lay control of professional practice or lay disturbance of professional relationships." (*Drucker v. State Bd. of Med. Examiners* (1956) 143 Cal.App.2d 702, 712.)

The Knox-Keene Act is a comprehensive plan to assure through regulation that quality health care, specifically including maintaining medical professionals' independence in diagnosing and treating illness, is provided to the most people at the least cost. Its myriad sections require that only licensed medical professionals make health care decisions, and limits the plans' ability to impact those decisions. Thus, the Act expressly protects against the abuses sections 655 and 2556 prohibit if attempted by non-approved plans. (See 83 Ops. Cal. Atty. Gen 170, 174 (2000).) The legislative plan is comprehensive and should not be overruled by the judiciary, a branch of government far less able to balance complicated factors such as quality, availability, and cost of health care. (*Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.App.4th 1284, 1291-1302; *Van de Kamp v. Gumbiner* (1990) 221 Cal.App.3d 1260, 1282-1285.) Because the Legislature expressly chose to permit approved plans to engage in this conduct, it cannot be unlawful under section 17200.

California Assn. of Dispensing Opticians v. Pearle Vision Center, Inc. (1983) 143 Cal.App.3d 419, 426-435, upon which Consumer relies, does not apply. That case affirmed an injunction prohibiting a company which was not a licensed health care

provider from engaging in the relationships prohibited by sections 655 and 2556. The company was not a Knox-Keene-approved plan, and the case does not affect our analysis.

In any event, Consumer did not and could not allege that National's conduct, even if unlawful, caused harm, a necessary element of a section 17200 cause of action. (See *Krause v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 138.) Consumer admits National's subsidiary was an approved Knox-Keene plan, and does not allege its arrangement with Wal-Mart violates the plan, results in inappropriate medical care, or harms any consumer. This lack of harm independently supports the trial court's ruling.

DISPOSITION

We affirm the judgment. National is entitled to its costs on appeal.

CERTIFIED FOR PUBLICATION.

ORTEGA, Acting P.J.

We concur:

VOGEL (Miriam A.), J.

MALLANO, J.