Ex-New Yorker Explains California's Far-Reaching Unfair Competition Law

By Robert M. Bodzin

In my 25-years of practice, there are few laws that have caused clients as much uncertainty and stress as California Business & Professions Code § 17200 et seq. (known as the "UCL"). When I moved to California in 1999, I was stunned to learn that someone with no injury and no connection to a business could sue the company and cause it to suffer great economic harm. As I just celebrated my 18th year as a California attorney, I thought I would share my insight into this important law, how I achieved several defense verdicts on these cases, and advice on navigating this unpredictable and often misused statute.

What Is the UCL?

The statute protects business competitors and consumers from unfair, unlawful, or fraudulent business and trade practices in California. It is important to understand that these categories are in the *disjunctive,* which means that a business practice need not be illegal to be found to violate the UCL.[1] The UCL's scope is sweeping and embraces anything that can be considered a business practice.[2]

Who Can Sue and Be Sued?

California government attorneys, including the Attorney General, local district attorneys, and city attorneys from large counties have the right to prosecute UCL cases. Private parties also have the right to pursue these matters. Up until 2004, the UCL had the dubious distinction of featuring a "no standing, standing" rule for private litigants. This meant that anyone—persons, businesses, consumer groups, or lobby groups—could prosecute a UCL lawsuit to remedy an alleged wrongful business practice without needing to show a connection to the target of the lawsuit or the alleged harm.

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In November 2004, California voters passed Proposition 64, which eliminated this loophole and required a private plaintiff to have an actual injury in fact. California Business & Professions Code § 17204 now requires a plaintiff to have a real connection to the alleged harm as a pre-requisite for filing a UCL lawsuit.

Businesses based out of state can be sued under the UCL in California when the alleged unfair, improper, or unlawful business practices take place within the state or affect people working in the state.[3] Where the actions of a California employer impact non-resident employees or workers, a UCL suit will generally not be permitted.[4]

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Real Success Stories from the UCL Trenches: From the Wine Country to Hong Kong

When a UCL suit is filed and prosecuted, it has been my experience that the highest monetary demands come from plaintiffs asserting that my clients made significant money on the alleged improper business practice and, as such, plaintiff is entitled to recover the alleged "ill-gotten gains." During a two-month bench trial in the Wine Country, my partner Tom Downey and I defended a multi-million dollar claim against a small horse ranch that was alleged to have committed improper acts that violated the UCL.

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The plaintiff was a large commercial horse ranch that hosted top-rated equestrian events on a regular basis. Our client operated a much smaller facility that provided riding lessons, but not the luxury-style events of the neighboring plaintiff. Plaintiff's claim was based in part on the fact that several former trainers on his ranch were now giving riding lessons on our client's ranch. We defeated the claim by proving that not only were the two facilities not comparable but that every trainer who ended up on our client's ranch did so after being kicked out of the plaintiff's operation. Our judge plainly told the plaintiff

that he could not recover restitution for horse trainers who were cast out of his own facility and whom he did not want.

In a commercial litigation case that took my partner John Verber and me to Hong Kong for depositions, we obtained a pre-trial dismissal of a UCL claim worth $8 million. The $8 million claim was allegedly based on monies our client earned because of its unfair business practices directed toward plaintiff, who was a former exclusive distributor of product in Asia. The UCL claim was dismissed by our trial judge on a motion shortly before the start of the San Francisco federal court trial. In this case, plaintiff improperly sought *non-restitutionary disgorgement* by asserting his right to money earned by our client when plaintiff offered no proof the money belonged to him. The judge noted that plaintiff did seek "disgorgement of profits" but never proved such monies rightfully belonged to or should have been earned by him. The judge also dismissed the UCL claim because plaintiff had never even sought or alleged a right to *injunctive relief* under the UCL. We then won the trial by obtaining a defense verdict on the remaining claims of breach of contract and fraud. The UCL dismissal and the defense verdict were upheld by the Ninth Circuit Court of Appeal.

Clarifying a Big Misconception: Can a UCL Plaintiff Collect a Money Judgment?

It is my experience in almost every single UCL case I handle that the plaintiff asks the judge for "all money earned and received as a result of the business's alleged wrongful conduct." Even at trial, experienced plaintiffs' attorneys make this request even when the law clearly *prohibits* such requests. Money damages are not recoverable on a UCL claim.[5] Money and property that falls into the category of *restitution* does fall into the category of permissible recovery.[6]

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The California Supreme Court limits such recovery to "money or property that defendants took directly from plaintiffs" or "money or property in which [plaintiff] has a vested interest."[7] Money or property that falls outside of this category is considered to be *non-restitutionary disgorgement* and is strictly forbidden as recovery in a UCL action.[8]

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Beware the Longer Statute of Limitations, Civil Penalties on Government Actions, and Real Injunctive Relief Claims

Given that a UCL plaintiff has four years to file suit, the statute is attractive because it can add extra years to other claims, prosecuted either individually or as class actions. For example, while the statutes of limitations for many violations of California's wage and hour laws are three years, class actions in this area routinely assert the UCL to get an additional year for recovery.

On UCL claims prosecuted by the government, civil penalties in the amount of $2,500 per violation can be imposed.[9]

Additionally, courts have significant discretion and latitude in fashioning injunctions when UCL violations are found. The ability of a judge to grant even a preliminary injunction against a business can have catastrophic results. The fact that an out-of-state business can be subject to a UCL injunction by a California judge raises the stakes in such litigation. As such, it is extremely important to mount an aggressive response and defense to any UCL claim.

Endnotes

1. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163 (1999).
2. *Id.* at 180.
3. *Mazza v. American Honda*, 666 F.3d 581, 594-595 (9th Cir. 2012); *Sullivan v. Oracle*, 51 Cal. 4th 1191, 1206 (2011); and *Application Group v. Hunter Group*, 61 Cal. App. 4th 881 (1998).
4. *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191 (2011).
5. *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1266 (1992).
6. *Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 338-339 (1998).
7. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1146-47 (2003).
8. *Id.* at 1150-51.
9. Business & Professions Code § 17206(a).