BULLETIN

CIVIL JUSTICE
ASSOCIATION OF CALIFORNIA

California's Unfair Competition Law

Fee-Seeking Lawyers' Weapon of Choice

By Fred J. Hiestand *

Introduction

A law to end all laws. That's California's "Unfair Competition Law" ("UCL")—almost anyway. It will take only a couple more judicial opinions to complete the UCL's mutation to a full scale Omnibus Act that prohibits everything believed objectionable by anyone and allows judicial intervention at the instigation of anyone — injured or not. This intervention comes in the form of injunctive relief or restitution, the latter becoming dangerously indistinguishable from damages under the UCL.

A supreme court justice has already called the UCL "a standardless, limitless, attorney fees machine.[1]" And a law professor has likened litigation under it to a Bosnian war zone: "Anyone may [use it to] attack for any reason and it appears that nobody can negotiate—not only are there factions, but it is unclear who has authority to bind anyone to peace or a final resolution.[2]"

Things didn't start out this way. Originally the UCL was little more than a modest codification of a conventional tort proscribing "unfair competition," which was "synonymous with the act of passing off one's goods as those of another."[3] When the Legislature amended it in 1963 by adding the phrase "unlawful" to the statute's ban on "unfair or fraudulent business practice(s)," the intent was to remove any doubt that "unfair competition" could only be enjoined if fraudulent.

The Civil Justice Association of California & the UCL

Our Association has been tracking lawsuits under the Unfair Competition Law (UCL) for five years. We determined early that a growing number of plaintiffs' lawyers see the act as a significant new area for fee-generating litigation and as a tool to leverage settlements. Indeed, the state's personal injury lawyer association at its annual Hawaii conference last year held a seminar devoted to "How Business and Professions Code Sec. 17200 Can Be a 'Value Added' Component of Your Litigation...." We three times sponsored legislation to reform the law and have filed several amicus briefs with the California Supreme Court and courts of appeal. In 1997 our general counsel co-authored an extensive review of the law's increasing use by private attorneys.

Since then a series of appellate opinions and legislative changes have placed a decidedly more generous gloss on the UCL. Conduct courts have found to violate its substantive prohibition—"any unlawful, unfair or fraudulent business practice"— spans the gamut of imagination and includes the sale of whale meat[4], the filing of small claims court lawsuits by a collection agency in counties distant from where the defendants live[5], the use of the "Joe Camel" caricature to advertise cigarettes[6], marketing sugar coated "cereals" as something other than candy[7], and the sale of cigarettes to minors."[8]

The list of proscribed practices could go on . . . and on, and undoubtedly will unless appellate courts or the Legislature trim the UCL's ever unfurling sails. Here is what has and is happening on that front now.

Q. How Broad is the UCL's Proscription on "Unfair" and "Unlawful" Practices?

A. How "Deep is the Ocean, How High is the Sky?"

"Fraud," the third specific practice prohibited by the UCL, is well defined by statute and case law. But what about the other practices proscribed by the UCL, the "unfair, unlawful" ones that precede those that are "fraudulent" in the statute's verbal formulation "unlawful, unfair or fraudulent?"

We know that, despite legislative history to the contrary, the courts have held that the plain language of the UCL makes the terms "unlawful" and "unfair" independent and disjunctive, not dependent and conjunctive prongs. "Unlawful" has been held to embrace, as a predicate that defines its meaning, state civil and criminal statutes[9], and state and federal regulations.

The "unfairness" prong of the UCL has been given distinct vitality, most recently in *Cel-Tech Communications v. Los Angeles Cellular Telephone Company*[10], which holds that when it comes to "direct competitors, the relevant jurisprudence [is] that arising under section 5 [of the Federal Trade Commission Act's (15 U.S.C. § 45(a)) (section 5)] prohibition against "unfair methods of competition."[11] Thus, when a direct competitor claims that another's conduct is "unfair" under the UCL, it necessarily "means . . . that [it] 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."[12]

Consider…

A woman who charged $70,000 in Internet gambling losses to her credit card sued her bank after it attempted to get her to make payments on the charges. She saw a UCL recovery possibility in the online casinos' display of charge card logos on their web pages.

This is so even though, as in *Cel-Tech*, the challenged practice of selling cellular telephones below cost was found not to violate a more specific statute than the UCL, one that deals with "below cost" sales. Why? Because "the Legislature's mere failure to pro-

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A Legitimate History

The Unfair Competition Law has a long history of protecting both consumers and businesses. It was originally intended to help district attorneys stop illegal merchandising. However, it evolved to permitting private lawyers to bring suits and win attorney fees, and in this context its procedures are capable of being misused. The current definition of "unfair" is such that private lawyers have advanced lawsuits when no law has been broken and no one has been injured. In many cases these private cases can be brought repeatedly despite the fact that a government agency has investigated and resolved the problem. The California Law Revision Commission studied these concerns and proposed a modest set of amendments in 1996, but all were killed by trial lawyer association lobbyists.

hibit an activity [by a more specific statute that relates to that activity] does not prevent a court from finding it unfair. Plaintiffs may not 'plead around' a 'safe harbor,' but the safety must be more than the absence of danger."[13]

Say what? This rationale is peculiar for a society premised on the importance of individual liberty and limited government. In a free society, that which is not prohibited is generally allowed. But under the "big brother" of arbitrary government where individual liberty is less valued, conduct that is not explicitly prohibited by specific, pertinent statutes is verboten under general proscriptions—in this case, by the vague "unfairness" prong of the UCL.

And what is one to make of *Cel-Tech's* note that, aside from conduct that involves direct economic competitors, "nothing we say [about the UCL] relates to actions by consumers or by competitors alleging other kinds of violations of the unfair competition law such as 'fraudulent' or 'unlawful' business practices or 'unfair, deceptive, untrue or misleading advertising.' We also express no view on the application of federal cases . . . that involve injury to *consumers* and therefore do not relate to actions like this one."?[14] Obviously the content of the "unfairness" prong is broader than an incipient violation of an antitrust law involving direct competitors, but narrower than "vague references to 'public policy," or similar definitions that "are too amorphous and provide too little guidance to courts and businesses."[15] Much falls between these two defining poles. And the "relevant jurisprudence" of analogous laws—state and federal—involving "injury to consumers," looms large.

Consider…

A pet food company was sued under the UCL after it accidentally sold contaminated pet food — despite the fact that it spent $3.7 million in a recall and information campaign that included media announcements and a toll free number, reimbursing customers for veterinary expenses and other costs, and reimbursing distributors' expenses. The suit was eventually thrown out by an appellate court justice who wrote that the recall was "intentionally over inclusive" and that the company's conduct "clearly....does not fit the 'unfairness' bill..... [T]he company's act was accidental and, once discovered, it moved quickly to abate the harm.... There is absolutely nothing deceptive or sharp about the company's behavior. To the contrary, its conduct was exemplary."

One way to fix what has become "broken" by overly expansive interpretations of the UCL's sweep is for the Legislature to add the conjunction "and" between "unlawful" and "unfair," so that the statute bans "any unlawful and unfair or fraudulent" practice consistent with the explanation given the Legislature when "unlawful" was first added to the UCL. That is precisely a change included in a legislative proposal (Senate Bill 593–Morrow) sponsored by the Civil Justice Association of California in the current session. As Justice Janice Brown of the California Supreme Court stated: it is "much easier . . . to stall legislation than to enact it; [and] much simpler to expand what exists that to contract it."[16] This is especially so where, as is now the case with the UCL, "change threatens the balance of advantage between two politically potent and contentious groups—those who sue under the Law, and those who defend." [17]

Another correction of the UCL's perversion beyond its original purpose is for the courts to read the conjunctive connection between "unlawful" and "unfair" into the law. It is common that "[t]he terms 'and' and 'or' are often misused in drafting statutes. The inappropriate use of these words is found in many statutory enactments."[18] "When necessary to harmonize the provisions of a statute or give effect to all of its provisions, the word 'and' may be read as 'or' and conversely."[19]

Consider…

A plaintiffs' lawyer formed an unincorporated association consisting of himself, his girlfriend, his paralegal, and his paralegal's wife to sue a national direct marketing company over its handling and shipping charges and demanded more than $20 million in "restitution" be paid to his association.

Of course, this "fix" is also problematic since the judiciary relies upon the Legislature's inaction to justify its own interpretative expansion of the UCL. "[W]henever the Legislature has acted to amend the UCL, it has done so only to expand its scope, never to narrow it. Consistently, just last term, the Legislature rejected several pieces of proposed legislation designed to restrict UCL standing in various ways."[20] In this way the right hand washes the left, and the beat goes on.

Q. When is a "Class," as in "Class Action," Not a Class?

A. When it's Prosecuted Under the UCL.

The broad substantive scope of the UCL is matched in importance by its equally ample conferral upon anyone, whether or not actually injured, to invoke it on "behalf of the general public."[21] This virtual private attorney representation of the general public permitted by the UCL is not, so far, a "class action." "While all class suits are representative in nature, all representative suits are not necessarily class actions."[22] Therein lies the crux of the problem, which culminates in *Kraus v. Trinity Management Corp*.[23], a case that has been fully briefed before the state's high court for more than a year.

Plaintiff tenants sued their apartment manager and landlord for charging them expense fees and an advance rent deposit in violation of specific statutes. Plaintiffs sought restitution or disgorgement of the fees, liquidated damages and an order enjoining defendants from collecting these amounts in the future. They also sought attorney's fees and costs.

Consider…
Dozens of manufacturers, wholesalers, and retailers of computer monitors were sued under the UCL by private attorneys over the same screen size issue that had already been litigated and settled by the Attorney General.

The trial and appellate courts ruled in favor of the plaintiffs. But two issues raised by defendants are now before the Supreme Court. First, should plaintiffs' claims have been brought on behalf of a class, as a "class action" in which notice to and certification of the class is required? Second, can a court order the disgorgement of monies into a fluid recovery fund for the purpose of advancing the legal rights and interests of residential tenants in San Francisco absent a "class action?" Defendants urge the court to give an affirmative answer to the first query and a negative to the second.

Justice Baxter referred to this very problem in *Stop Youth Addiction* when he stated that "[a]n attempt by . . . [a few] litigant[s] to compel payment [under the UCL] . . . of restitution owed to third parties who have not authorized the action raises substantial due process issues implicating the rights of both the defendant and absent parties."[24]

Consider…
The Supreme Court refused to hear an appeal of a case where lower courts let an insurer be sued under the UCL by people who were not customers of the company but who complained about its pricing, coverage, and claims practices.

Indeed, as if presciently considering how to construe the "representative" aspect of the UCL to avoid a constitutional conflict, Justice Baxter submitted that "[i]t cannot have been the intent of the Legislature which enacted the UCL when it authorized 'any person' to prosecute a UCL action that private parties be permitted to seek the restitution relief for which it provides on behalf of third parties who have not authorized the action, who have no notice of the action, and who may themselves bring individual actions."

The Unfair Competition Law in the Courts

While the appellate courts have been reviewing a continuing parade of UCL cases, the Supreme Court majority has generally taken the approach well-summarized by Justice Marvin Baxter in a 1998 UCL decision: The "court is not unmindful of the abuses to which the UCL is subject. Many of those concerns are matters that should be addressed to the Legislature, not the judiciary, however." Justice Janice Brown, a regular dissenter in UCL decision, has called the act "a means of generating attorneys fees without any corresponding public benefit" and proclaimed that "No statute...in this state or the nation confers the kind of unbridled standing to so many without definition, standards, notice requirements, or independent review." In a dissent in a subsequent case she stated that "Orderly legal development is not advanced by placing this court's imprimatur on yet another unfair competition claim of dubious pedigree."

The Civil Justice Association of California, in its friend of the court brief filed (under its former name the Association for California Tort Reform) in *Kraus*, argues that due process requires that notice be given that is reasonably calculated, under all the circumstances, to inform interested parties of the pendency of the action and afford them an opportunity to opt-in or opt-out of the litigation. Failure to do so is fatal to an order of disgorgement or restitution except as to the parties actually appearing.

The Association also contends that the giving of adequate notice to third parties whose rights and duties are to be determined in a "representative" UCL action not only protects them, but assures defendants of finality of judgment, or *res judicata*. Defendants cannot, then, in violation of their rights to due process, be sued repeatedly for the same alleged offense and ordered to make restitution or disgorgement of monies previously paid out or determined not to be owed.

Q. When is an Order to Pay Money Not an Award of Damages?

A. When it is an Order of "Restitution" Under the UCL.

We have already seen that another statute can define the "unlawful" prong of the UCL. But when that occurs, which statute of limitations applies—the predicate statute's or the four year limitations period of the UCL? Moreover, when the predicate statute allows for damages, can the plaintiff rely upon it as a basis to obtain restitution under the UCL in a representative capacity?

Both questions are before the high court in *Cortez v. Purolator Products Air Filtration Co*.[26] The plaintiff Rosa Cortez sued her former employer for back pay after she was fired. She claimed that she was owed this money due to her employer's failure to comply with certain regulations when it changed its workers' 40 hour workweek schedule from five 8-hour days to four days at 10-hours per day. In addition to her individual claim for failure to pay overtime wages pursuant to Labor Code section 1198, Cortez prosecuted a UCL claim seeking restitution of the overtime wages withheld from approximately 175 Purolator employees.

The trial court awarded the plaintiff back wages, with penalties and interest totaling about $5000 and attorney fees in excess of $88,000, but denied her injunctive relief and restitution. The appellate court upheld the award of damages and attorney fees, but reversed the trial court's denial of restitution. Review was granted by the state Supreme Court and briefing was completed in March 1999.

Consider…
A number of software companies were sued for $1 million each because their retail packages were "too large" for the disks they contained — even though no customer ever came forward claiming deception or even confusion. (In the one legislative success story involving the UCL, the Legislature in 1997 enacted AB 1496 to amend packaging statutes and end these ludicrous suits which were also being filed against perfume and toy manufacturers.)

The statute of limitations issue is basic. If the ruling below is permitted to stand it will effectively repeal statutes of limitations for a variety of offenses that form the basis for the "unlawful" prong of UCL claims, and substitute in their stead the UCL's four year statute of limitations. The Civil Justice Association of California argues in its *amicus* brief (filed under its former name the Association for California Tort Reform) that this case affords the

court an opportunity to recognize that the appropriate statute of limitations is the one applicable to the substantive provision which serves as the source of the court's rule of decision on the merits (Cal. Lab. C. § 1198, which has a three year limitations period), not the UCL's general prong of "unlawfulness" and its four year statute of limitations.

More significantly, the blurring of differences between damages and restitution by the majority appellate opinion should be corrected. Unpaid wages, including overtime wages not paid, are economic damages. One who seeks to obtain them from an employer in a representative action under the UCL must give adequate notice to affected third parties, whether by way of class action certification or otherwise. The giving of adequate notice to third parties whose rights and obligations are to be determined in a "representative" UCL action not only protects them, but assures defendants of finality of judgment, or *res judicata*. As noted earlier, this protects defendants so that they cannot, in violation of their rights to due process, be sued repeatedly for the same alleged offense and ordered to make restitution or disgorgement of monies previously paid out or determined not to be owed.

Consider…

A cellular phone company was targeted with an unfair competition lawsuit for selling its phones at less-than-cost as part of a marketing campaign for its services. Despite the fact that this practice is legal under all state and federal laws relating to phone services, an appellate court let a case go forward under the UCL.

Justice Haerle, in a separate concurring opinion in *(Cortez)* at the intermediate appellate level, stated his concern "with the majority's rather easy acceptance of the proposition that what is sought here, both on behalf of the appellant and the quasi-class she is purporting to represent, constitutes the sort of relief that is available under [the UCL]. The proposition the majority adopts implicates an issue of continuing (and even escalating) confusion in our law as to the distinction — if any — between 'restitutionary relief' and 'damages.'"

The Supreme Court can either clarify that confusion or make it "confusion worse confounded."

Conclusion

The Unfair Competition Law is fast becoming the weapon of choice for fee-seeking private lawyers and vexatious litigants. Whether it will be defined as a limited statute or continue to grow as an omnivorous attorney fee machine is in the hands of the state's high court and the legislature. One can only hope that the growing number and variety of privately-filed lawsuits under the Unfair Competition Law and the sweep of grievances embraced by it sufficiently arouses the opinion leaders and educates the government as to the need for its reform.

Notes

1. *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal. 4th 553, 598 (Brown, J, dissenting.)
2. Fellmeth, *Unfair Competition Act Enforcement by Agencies, Prosecutors, and Private Litigants: Who's on First?* (Winter 1995) 15 Cal. REGULATORY L. RPTR., pp. 1, 2.
3. *Bank of the West v. Superior Court* (1992) 2 Cal. 4th 1254, 1263.
4. *People v. Sakai* (1976) 56 Cal.App.3d 531.
5. *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94.
6. *Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057.
7. *Committee on Children's Television, Inc. v. General Foods Corporation* (1983) 35 Cal.3d 197.
8. *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, supra, 17 Cal. 4th 553.
9. *People v. McKale* (1979) 25 Cal. 3d 626
10. (1999) 973 P.2d 527.
11. *Id.* at p. ___.
12. *Id.*
13. *Id.*
14. *Id.* (italics added).
15. *Id.*
16. *Stop Youth Addiction, supra* note 1, 17 Cal.4th at 598 (J. Brown, dissenting.)
17. *Id.*
18. Singer, *SUTHERLAND STAT. CONST.* § 21.14 (5th ed. 1991)
19. *People v. Wright* (1955) 131 Cal.App.2d Supp. 853, 862.
20. *Stop Youth Addiction*, supra note 1,17Cal.4th at p. 570.
21. Cal. B & P C § 1704.
22. *Residents of Beverly Glen, Inc. v. City of Los Angeles* (1973) 34 Cal.App.3d 117, 129.
23. S064870.
24. *Stop Youth Addiction, Inc., supra*, 17 Cal.4th at 582 (concurring opinion, Baxter J.)
25. *Id.* at p. 584, fn. omitted.
26. S071934.

Civil Justice Association of California

The Civil Justice Association of California is a coalition of citizens, taxpayers, businesses, local governments, professionals, manufacturers, financial institutions, insurers, and medical organizations. Founded in 1978, as the Association for California Tort Reform, CJAC is the only statewide association dedicated solely to improving California's civil liability system.

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