

Welcome to California Business Litigation #7

Understanding California's Unfair Competition and False Advertising Laws

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In this series of articles, Snell & Wilmer lawyers familiar with both California and non-California business litigation practices share a series of tips—both procedural and substantive—that in-house counsel may find useful in navigating the shoals of California business litigation.

This seventh installment of the “Welcome to California Business Litigation” provides an overview of California’s unique unfair competition and false advertising laws that provide for injunctive relief and restitution from such improper business practices.

GENERAL OVERVIEW OF CALIFORNIA’S UNFAIR COMPETITION LAW

Businesses with ties to California should be cognizant of California’s Unfair Competition Law (“UCL”), set forth in Business and Professions Code Section 17200. This statute provides injunctive relief for three broad categories of behavior: unlawful, fraudulent or unfair business acts or practices. Although case law interpreting this statute does not expressly define the term “business,” courts have interpreted the terms “act” and “practice” broadly to cover most types of business conduct. As a result, the statute covers a wide variety of business actions such as bribery of foreign officials,¹ intentional inference by a corporate

competitor with employment contracts,² and even a ski resort’s removal of trees to develop ski runs.³ In fact, conduct related to a single contract has been determined to constitute a practice under the UCL.⁴ However, California courts have not applied the UCL to business acts involving securities transactions.⁵

¹ *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal. 4th 1134, 1143 (UCL claim, “borrowed” from the federal Foreign Corrupt Practices Act, which prohibits, among other things, bribing a foreign government official for the purpose of influencing any act or decision).

² *CRST Van Expedited, Inc. v. Werner Enterprises, Inc.* (9th Cir. 2007) 479 F.3d 1099, 1107.

³ *Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal. App. 4th 499, 519 (ski resort’s removal of large number of trees from resort area on three separate occasions for purposes of creating ski run constituted “business practice” subject to unfair competition statute; resort’s primary business activity was operation of ski resort, and creation and development of ski runs and ski trails were clearly part of that activity or practice).

⁴ *See, e.g., Allied Grape Growers v. Bronco Wine Co.* (1988) 203 Cal. App. 3d 432, 452 (1988).

⁵ *E.g., Betz v. Trainer Wortham & Co., Inc.*, 829 F. Supp. 2d 860, 866 (N.D. Cal. 2011) (“No court, however, has allowed Section 17200 claims to proceed where, as here, the predicate acts are securities transactions.”).

The UCL does not provide for monetary damages. The statute provides for injunctive relief (to stop the offending business practice), restitution, and in government actions, civil penalties. Remedies under the UCL are cumulative “to each other and to the remedies or penalties available under all other laws of this state.”⁶ To obtain an award of restitution, a UCL plaintiff must have an ownership interest in a defendant’s funds. In other words, a UCL restitution order compels a defendant to “return money obtained through an unfair business practice to those persons in interest from whom the property was taken.”⁷ Thus, UCL remedies are designed to give specific relief by requiring disgorgement of the particular property or money taken by an unfair business practice.

While attorneys’ fees are usually not awarded under the UCL, plaintiffs may seek attorneys’ fees as a private attorney general pursuant to Code of Civil Procedure section 1021.5. On the other hand, there is no provision for such a right for a successful defendant. Because a Section 17200 cause of action is equitable in nature, there is no right to a jury trial.

The UCL’s Three Prongs

The California courts apply different meanings to each of the three prongs of a UCL claim: unlawful, fraudulent, or unfair business acts or practices. A plaintiff need only establish one of the three prongs under the statute in order to bring a UCL claim.

⁶ Cal. Bus. & Prof. Code § 17205.

⁷ *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal. 4th 1134, 1149.

An “unfair” business act or practice is one that is deceptive, even if not specifically prohibited by another law. California courts have not clearly defined what may constitute public deception under this prong of the UCL; however, courts exercise broad discretion in determining whether a business practice is improper. One appellate court has held that an unfair business practice is one that “offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers,”⁸ and another court has observed that to determine whether a business practice is unfair, courts must “weigh the utility of the defendant’s conduct against the gravity of the harm to the alleged victim.”⁹ The California Supreme Court has criticized these tests as being “too amorphous and provid[ing] too little guidance to courts and businesses,” yet has not articulated an alternative test.¹⁰

The “unlawful” prong of the statute is defined as a business act or practice that violates any statute, regulation or rule. This prong of the UCL creates an independent cause of action when a business practice violates some other law.

For the “fraudulent” prong, a plaintiff is not required to satisfy the elements of a common law fraud claim, which requires establishing fraud directed at securing a competitor’s

⁸ *People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal. App. 3d 509, 530.

⁹ *State Farm Fire & Casualty Co. v. Superior Court* (1996) 45 Cal. App. 4th 1093, 1104.

¹⁰ *Cel-Tech Commc’ns v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal. 4th 163, 185 & fn. 12 (adopting test of unfairness in anticompetitive actions).

business. Instead, a plaintiff is only required to demonstrate that the public is likely to be deceived. Thus, a UCL violation, unlike a common law fraud claim, may be established even where no one was actually deceived, relied upon the fraudulent practice, or sustained any damage.

Recent Decisions and
Developments in UCL Practice

Standing Requirements

In March 2013, the California Court of Appeal determined that the language of the UCL “is clear on its face and contains no requirement that the plaintiff must have engaged in business dealings with the defendant” to show injury caused by defendant’s unfair business practices.¹¹ The Court of Appeal held that “lack of direct dealings between two business competitors is not necessarily fatal to UCL standing, provided the plaintiff competitor has suffered injury in fact and lost money or property as a result of the defendant competitor’s unfair competition.” This decision appears to jettison the requirement to show direct business dealings with a competitor in order to bring an UCL case, which may open the door for increased litigation under this statute.

Statute of Limitations

The California Supreme Court in *Aryeh v. Canon Business Solutions, Inc.*, resolved a split in the appellate courts over controlling

statute of limitations for UCL claims.¹² The UCL provides that a suit must be filed “within four years after the cause of action accrued.” The Supreme Court held that the UCL “is governed by common law accrual rules to the same extent as any other statute,” which includes the theory of continuous accrual. By applying this doctrine, the *Aryeh* court opened the door for plaintiffs to assert claims that would cover conduct that extends beyond four years. The application of these accrual rules are predicated upon the facts of the case and the causes of action asserted.

GENERAL OVERVIEW OF CALIFORNIA’S FALSE ADVERTISING LAW

California’s False Advertising Law (“FAL”) makes it unlawful for any person to “induce the public to enter into any obligation” based on a statement that is “untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.”¹³ Like the UCL, the FAL provides for injunctive relief and restitution. In order to obtain injunctive relief, a plaintiff must show that the objectionable conduct is likely to reoccur. Also like the UCL, attorneys’ fees are not directly available, but may be pursued under the private attorney general doctrine.

¹¹ *Law Offices of Mathew Higbee v. Expungement Assistance Servs.* (2013) 214 Cal. App. 4th 544, 563.

¹² *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal. 4th 1185, 1196.

¹³ Cal. Bus. & Prof. Code § 17500.

What Constitutes a Misleading Advertisement Under the FAL

In order to establish a claim under Section 17500, a plaintiff must show that (1) the defendant intends to dispose of real or personal property or perform services; and (2) the defendant publicly disseminates advertising containing an untrue or misleading statement, which the defendant knew, or in the exercise of reasonable care should have known, to be false or misleading and which concerned the property or services at issue, or without the intent to settle the property or services at the price stated or advertised. Whether an advertisement is “misleading” is judged by the effect it would have on a reasonable consumer. To prevail under this standard, a plaintiff must show that the advertisement is likely to deceive members of the public. The FAL has

been broadly construed by California courts to include not just advertising that is false, but also advertising which, even though literally true, is misleading or has the capacity, likelihood, or tendency to deceive or confuse the public. Actual deception or confusion caused by misleading statements is not required.

CONCLUSION

Prosecuting and defending cases under California’s unfair competition and false advertising statutes is distinct from federal and out-of-state practice. Hiring counsel with knowledge of and experience with these important California statutes can help to avoid litigation pitfalls and streamline costs associated with navigating such laws.



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