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"Deceptive Trade Practices and Consumer Protection Litigation: A Future Trend?"

California's Wide-Reaching Unfair Competition Law:

Bending Consumer Protection into a Profit Center

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Note: California's Business & Professions Code Section 17200 has gained national notoriety for breaking new ground in creative litigation against businesses. It is part of a growing trend of lawsuits pursued without injuries or damages - sometimes even without clients. The Civil Justice Association of California has been tracking lawsuits under the Unfair Competition Law (UCL) for half a decade, sponsoring legislation to reform the law and filing numerous amicus briefs with the California Supreme Court and courts of appeal.

We determined early on 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 held a seminar devoted to "How Business and Professions Code Sec. 17200 Can Be a 'Value Added' Component of Your Litigation."

Despite several opportunities, the California Legislature has not reined in private attorney use of the UCL. Neither has the state's Supreme Court. The following discussion of recent Supreme Court opinions illustrates the problems this law continues to pose for firms, regardless of their location, trying to do business in California.

Al, a saloon piano player we once knew, would amuse patrons at the end of a well-received tune by extending his left hand high, palm down, to restrain applause - while on his right hand, held cupped in close to his

belly, his fingers wiggled together to drum up more clapping.

We thought of old Al when we finished reading the mixed message in the California Supreme Court's two June rulings on the scope and application of the state's Unfair Competition Law (UCL).

California's unique law, found at Business and Professions Code Sec. 17200 et seq., bars anyone from engaging in "unlawful, unfair or fraudulent" activity, terms broad enough to sweep within their ambit just about anything imaginable that gives offense to someone. No one need actually incur a loss from the conduct complained about in order for a private attorney to file suit under the UCL. While damages are not recoverable, injunctive relief and restitution are; and a defendant ordered to pay back money under the restitution remedy can be forgiven for not fathoming how this differs from being socked with a damage award. On top of all this, a successful plaintiff can often obtain court-awarded attorney fees for prosecuting the UCL claim as a self-appointed representative of the amorphous "public," an extraordinarily broad right of standing also conferred by this statute.

Furthermore, defendants are exposed to the potential of multiple lawsuits over the same business activity, regardless of whether a public prosecutor or public attorney has previously weighed in with a 17200 action.

The cases decided in June involved different aspects of the UCL's application to apartment rental security deposit and wage and hours law disputes. In the first (Kraus v. Trinity Management Services, S064870) the court ruled 6-1 that one cannot use the UCL on behalf of the general public to force a landlord to "disgorge" money from collected rental security deposits into a "fluid recovery fund" allegedly for the future benefit of that public. In other words, one cannot claim to represent the general public or some segment of it, in this case residential tenants, and collect money on its behalf as is possible under a class action suit.

This is welcome news for consumers and business defendants, because a class action at least requires certification. Certification serves to determine whether the named plaintiffs and their attorneys adequately represent the interests of those on whose behalf they claim to be suing. It also assures notice to potential class beneficiaries and the finality that protects defendants from repeated future suits.

Kraus reduces the incentive for those attorneys interested in UCL

litigation to help fund their ongoing operations. (One lawyer has been litigating on behalf of a non-profit corporation "Intervention, Inc.," headed by his mother.) However, it may prove to be only a marginal disincentive to private attorneys using the UCL to install (as a plaintiffs' bar seminar title put it) "a value-added component" in their litigation.

At the same time that the majority ruled out requiring a defendant to pay money into a recovery fund absent a class action, it strongly endorsed a trial judge's power in a non-class representative action (supposedly for the general public) to order that same defendant to "identify, locate, and repay to each former tenant . . . the full amount of funds improperly acquired. . ., retaining the power to supervise defendants' efforts to ensure that all reasonable means are used to comply. . . ." Faced with this kind of judgment, it would not be unreasonable for a defendant to wish it had been hit with a class action suit instead of a UCL claim.

In the second case (Cortez v. Purolator, S071934) the court unanimously held that unpaid wages ordinarily recoverable as damages may be recovered as restitution under the UCL. A key part of this ruling, and one most unfavorable to defendants, was the courts' determination that in UCL claims it is that law's four-year statute of limitations that always applies, not that of the underlying statute being used to argue "unlawfulness." Since most tort claims have a one-year statute of limitations, this portion of Cortez is a boon to plaintiffs' attorneys.

The court left undecided how the due process protections of res judicata - giving conclusive effect to a former judgment in later litigation over the same controversy - fits into UCL claims. In Kraus the court stated that in order to prevent exposing a defendant to multiple suits over the same alleged conduct "it may be appropriate for the court to condition payment of restitution to beneficiaries of a representative UCL action on execution of acknowledgment that the payment is in full settlement of claims against the defendant." This seems to leave an opportunity for a new claim and lawsuit by a person who, despite a defendant's reasonable effort to contact him, does not learn of the restitution opportunity until after the court-supervised process has ended and before the four- year statute of limitations has run. Or perhaps the justices contemplated that trial courts will routinely retain jurisdiction until the statute of limitations expires.

Time will tell whether the restitution remedy reduces the UCL exposure of defendants whose customers are unreasonably difficult to locate and identify - such as those selling retail for cash. Likewise, the decisions may make more attractive as potential defendants those whose customers are well documented - firms ranging from cable TV companies to auto makers, for example.

Whatever the future holds, the res judicata/due process issue so squarely presented by Kraus, yet ducked by the court, will surface again -- perhaps in a federal forum, given the fundamental due process right at stake and the fact that 17200's reach is dramatically expanding beyond California's borders. Despite the discussion in Kraus, the decision does not deliver to future defendants a process that can assure them a final judgment.

In Cortez, the court affirmed the "grant of broad equitable power" to a court hearing a UCL case, restating earlier holdings that a trial judge "may make such orders or judgments. . .as may be necessary to prevent the use or employment . . .of any practice which constitutes unfair competition or may be necessary to restore money or property." (It appears from this that even the aforementioned "retail cash" defendants might find themselves required to advertise so that past customers might learn what funds they have coming.) In its "equitable power" proclamation, the court emphasized that a defendant is entitled to equitable defenses in addition to defending against "a charge of violation of a statute that underlies a UCL action."

In Kraus, one equitable defense described is a defendant's ability to block a representative suit under the UCL by showing that "the action is not one brought by a competent plaintiff for the benefit of injured parties." Thus future UCL defendants have been clearly instructed to fight back in the appropriate circumstances by challenging the competency of a plaintiff as they might challenge a class certification.

An equitable defense not mentioned is "unclean hands," which might be relevant to an action involving a private sting operation with threatening demand letters or the ginning up of a lawsuit with a non-injured party plaintiff in order to obtain a settlement encompassing attorney fees.

And what about "laches"? Might one be within the generous UCL statute of limitations but still find an action barred for sitting too long on what

should have been a tort claim?

On this topic, it may be instructive to consider the California Supreme Court's even more recent unanimous class action ruling (Linder v. Thrifty Oil Co., S065501), which bars a trial judge from refusing to certify a class action lawsuit on the grounds that the plaintiffs are unlikely to win on the merits and, even if they do, the true benefits to be conferred on class members are insufficient to justify the legal action.

Taken together, Cortez and Linder suggest a defendant in a UCL suit may be in a better position to post a successful early challenge to an attorney bent on settlement-bludgeoning with a dubious claim than that defendant would be if the same scheme were advanced a la class action.

Kraus and Cortez have clarified some UCL issues and sharpened others for future appellate courts. Time will tell whether the decisions will promote a seismic shift from representative UCL claims to class actions.

Kraus and Cortez did not touch the most serious abuses that plaintiffs' lawyers will continue to inflict through creative use of the UCL. A private attorney remains "licensed" by earlier decisions to use a statute that standing alone can only be enforced by a public agency. The possibilities for legal coercion in such an unprecedented scheme will be realized in time. Right now we have a court of appeal decision (Roskind v. Morgan Stanley Dean Witter, A087546) that could give plaintiffs' securities lawyers a way to bootstrap federal securities law into 17200 actions. We have personal injury lawyers, whose attempt to renew third-party claims handling lawsuits foiled by the voters in the March election, looking at ways to use the Penal Code for 17200 lawsuits aimed at to leveraging higher settlements.

The legal mind shows galactic capacity when prodded by financial profit and challenged by the opportunity to pour content into as flexible a verbal vase as "unlawful or unfair." The need grows for the courts, the Legislature, or the people to set limits on runaway uses of the California Unfair Competition Law.

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