

Stop The Madness (Before It Starts): UCL Abstention

Law360, New York (February 21, 2012, 1:37 PM ET) -- In an instant, California's Unfair Competition Law can turn a business asset into a business liability. The UCL gives plaintiffs the ability to obtain restitution and injunctive relief for "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200.

And though a powerful tool for positive change, for businesses, a UCL claim often appears to be a shakedown — even if not deceptive, a defendant's business practices can be attacked for violating any federal, state or municipal regulation, or for simply being "unfair" in a way that is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Bardin v. Daimlerchrysler Corp.*, 136 Cal. App. 4th 1255, 1268 (2006).

For businesses defending UCL suits, there are limits to the UCL's reach. California courts have recognized that "because the remedies available under the UCL, namely injunctions and restitution, are equitable in nature, courts have the discretion to abstain from employing them." *Desert Healthcare Dist. v. PacifiCare, FHP Inc.*, 94 Cal. App. 4th 781, 795 (2001).

To state a claim, UCL plaintiffs are technically able to "borrow" unlawful or unfair conduct from any statute. But California courts now consistently recognize that some statutory schemes are too complex or too undefined to support judicial enforcement. When plaintiffs try to use UCL claims to enforce such schemes, defendants may be able to invoke the doctrine of abstention to gain early dismissal of those claims.

When Courts Refuse Their Aid

UCL abstention was first introduced in 1970 when the court of appeal abstained from hearing a UCL claim seeking to enforce federal immigration laws. See *Diaz v. Kay-Dix Ranch*, 9 Cal. App. 3d 588, 599 (1970). The court gave no fanfare for the doctrine, but simply stated: "Plaintiffs seek the aid of equity because the national government has breached the commitment implied by national immigration policy. It is more orderly, more effectual, less burdensome to the affected interests, that the national government redeem its commitment. Thus the court of equity withholds its aid." *Id.*

Building on the logic of Diaz, California courts over the past four decades have broadened the doctrine to employ UCL abstention in three scenarios. See *Alvarado v. Selma Convalescent Hosp.*, 153 Cal. App. 4th 1292 (2007) (tracing the development of UCL abstention).

The first, and broadest, allows courts to abstain if enforcing the plaintiff's claim would interfere with "a complex economic or similar policy which is best handled by the legislature or an administrative agency." *Shamsian v. Dep't of Conserv.*, 136 Cal. App. 4th 621, 641 (2006). The second allows courts to abstain "where granting injunctive relief would be unnecessarily burdensome for the trial court to monitor and enforce given the availability of more effective means of redress." *Alvarado*, 153 Cal. App. 4th at 1298. The third scenario allows courts to abstain "when federal enforcement of the subject law would be 'more orderly, more effectual, less burdensome to the affected interests.'" *Id.*

The UCL abstention doctrine serves defendants particularly well because it results in a dismissal with prejudice, unlike other abstention doctrines — like primary jurisdiction — that result only in dismissal without prejudice. Cf. *Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993) (holding that referral of an issue to an administrative agency under the doctrine of primary jurisdiction gives the court discretion to either retain jurisdiction or dismiss without prejudice); *Alvarado*, 153 Cal. App. 4th at 1295 (sustaining demurrer without leave to amend under UCL abstention).

"Public Policy" Is Not Enough

The relative simplicity of UCL abstention may tempt some defendants to see it as a kind of public policy "get out of jail free card." But this is not the case.

Regardless of a statute's overall complexity, courts generally will not abstain when enforcement of the UCL claim only requires the court to interpret and apply the law. See *Arce v. Kaiser Found. Health Plan Inc.*, 181 Cal. App. 4th 471 (2010). The court in *Arce* rejected the defendant's arguments for abstention because enforcement of the plaintiff's claims under the Mental Health Parity Act, a section of the Knox-Keene Act, would only "require the trial court to decide whether the therapies are health care services under the Mental Health Parity Act, and if so, whether the statute mandates that services only be provided by health care professionals licensed or certified by the state." *Id.* at 494.

And regardless of an agency's parallel authority, courts generally will not abstain from cases simply because an administrative agency could also enforce the law. See *People v. McKale*, 25 Cal.3d 626, 632 (1979) ("[E]ven though a specific statutory enforcement scheme exists, a parallel action for unfair competition is proper pursuant to applicable provisions of the Business and Professions Code.").

In *Blue Cross of California Inc. v. Superior Court*, 180 Cal. App. 4th 1237, 1257 (2010), the defendants urged the court to abstain because the "pernicious 'dual regulation' of health plans [would] have an adverse effect on California's fragile healthcare 'ecosystem'" that was already regulated by the Department of Managed Health Care. *Id.* The court responded that "[s]uch arguments are properly addressed to the Legislature, not to this court." *Id.* The court already had concluded that the plaintiff's claim did not "duplicate any enforcement powers that a statute expressly makes the exclusive province of the [Department of Managed Health Care]." *Id.* at 1256.

Typically, public policy interests such as government efficiency or judicial convenience are not persuasive enough to merit UCL abstention. As a result, even for heavily regulated industries where abstention is most often applied, it is not always a winning argument. So when is UCL abstention worth advancing?

The Practical Reasons for UCL Abstention

Underneath the broad scenarios discussed above, there are three themes that stand out as potentially winning defense strategies.

1) Abstention is appropriate when the court must define the acts that are “unlawful.”

In *Samura v. Kaiser Foundation Health Plan Inc.*, 17 Cal. App. 4th 1284, 1301-02 (1993), the court dismissed the plaintiff’s UCL claim seeking to enforce provisions of the Knox-Keene Act governing health insurance. The court reasoned that the provisions allegedly violated did not define “unlawful” acts and therefore could not be enforced under the UCL. *Id.*

For example, unlike a prohibition on deceptive practices in health care plan advertising, which would be enforceable, a provision requiring service agreements to be “fair, reasonable, and consistent with the objectives” of the Knox-Keene Act would not be enforceable under the UCL because it did not define what acts would violate it. *Id.*

Put another way, only a statute’s clear prohibitions will support a UCL claim for unlawful conduct. A statute’s positive directives have only “purely regulatory import” and are designed to guide administrative, not judicial, enforcement. Under *Samura*, if a plaintiff bases his or her UCL claim on a directive rather than a prohibition, abstention may be appropriate.

2) Abstention is appropriate when the court must create an enforcement mechanism.

Even when a statute defines unlawful acts, courts may be reluctant to enforce it if they have little guidance as to how to enforce its provisions. In *Alvarado v. Selma Convalescent Hospital*, the plaintiff alleged that the defendant hospital had violated the unlawful and unfair prongs of the UCL by violating provisions of the Welfare and Institutions Code that required a daily minimum of 3.2 nursing hours per patient in a skilled nursing facility. 153 Cal. App. 4th at 1298.

The court affirmed the trial court’s decision to abstain because the Department of Health Services was “better equipped” to determine compliance with the provision. *Id.* The provision contained multiple exceptions to the minimum-hours requirement, and even a plain application of the provision would require the court to use multiple formulas to identify qualifying facilities, employees and types of hours. *Id.* The court concluded that it could not be responsible for crafting a regimen of complex injunctions to identify, sort and penalize nursing facilities across the state. *Id.*

The court in *Desert Healthcare District v. PacifiCare, FHP Inc.*, came to a similar conclusion when the plaintiff argued that the defendant unfairly used the capitation system for its health care plans to transfer too much risk to its intermediaries. 94 Cal. App. 4th at 795. The court found that the plaintiff did not sufficiently state a claim for relief under the UCL but that even if it had, the court would properly abstain because “[i]n order to fashion an appropriate remedy ... the trial court would have to determine the appropriate levels of capitation and oversight [for health care financing].” Id.

When a plaintiff seeks to enforce a statute that does not provide clear guidelines or mechanisms for enforcement, abstention may be a viable defense. As *Alvarado* and *Desert Healthcare* indicate, there is a level at which the burdens of enforcing a statute outweigh the benefits of hearing a claim.

3) Abstention is appropriate when the court must predict the will of the legislature or the goals of an administrative agency.

Just as courts are reluctant to define unlawful acts or create new enforcement mechanisms, they are also reluctant to predict future policy. A court may be likely to abstain when the policy question is complicated enough that the court cannot rule without potentially conflicting with another governmental body.

In *California Grocers Ass’n v. Bank of America*, 22 Cal. App. 4th 205, 218 (1994), for example, the plaintiff asked for injunctive relief under the UCL because the defendant bank charged unfairly high check processing fees. The court abstained, reasoning that “[j]udicial review of one service fee charged by one bank is an entirely inappropriate method of overseeing bank service fees.” Id.

The court likewise abstained in *Shamsian v. Department of Conservation*, where the plaintiff sued the Department of Conservation under the UCL for failing to provide “convenient, economical, and efficient” beverage container redemption opportunities as required by statute. 136 Cal. App. 4th at 641.

Again the court refused to hear the case because it did not want to “interfere with the department’s administration of the [Beverage Container Recycling and Litter Reduction] Act and regulation of beverage container recycling and potentially risk throwing the entire complex economic arrangement out of balance.” Id. at 642.

Unlike other cases involving complex health care or insurance statutes, these cases involved relatively simple questions — Were the bank fees unfair? Did the department provide enough recycling centers? Even so, the courts abstained because answering these questions would risk conflicting with later legislative or administrative decisions. If enforcing the plaintiff’s claim might interfere with the present or future goals of the legislature or an agency, the defendant should consider arguing for abstention.

Consider the Implications

It is worth noting that if abstention embodies judicial practicality, the UCL’s related issues of standing and “safe harbor” are its useful corollaries. A plaintiff lacks standing to bring a UCL claim if the underlying statute either expressly or impliedly bars private suits. *Rose v. Bank of Am.*, 200 Cal. App. 4th 1441, 1448 (2011) (noting a plaintiff may not use the UCL to “plead around an absolute bar to relief”).

And even if the plaintiff can establish standing, the defendant can defeat the claim simply by proving its conduct was permitted by law. See *Cal. Medical Ass'n Inc. v. Aetna U.S. Healthcare of Cal. Inc.*, 94 Cal. App. 4th 151, 169 (2001) (outlining “safe harbor” defense for permitted conduct).

Ultimately, whether through abstention or some other form of practical defense, UCL defendants have access to a widening array of arguments to seek dismissal of UCL claims at the demurrer stage. And given the recent attention courts have devoted to the subject, the underlying policy implications of a UCL claim should be at least a consideration for any business defendant, and if supported by the doctrine of abstention, may support a successful dismissal for those facing overly broad or impracticable claims.

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