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Management Alert

California Decision Expands Companies' Ability to Bring UCL Claims Against Competitors

A recent decision handed down by the California Court of Appeal has made it easier for parties to pursue unfair competition claims against their competitors. In *Law Offices of Matthew Higbee v. Expungement Assistance Services* (Case No. G046778) (Cal. App., 4th Dist., Div. 3, March 14, 2013), the court held that a party's lack of direct dealings with a competitor does not necessarily preclude that party from stating a cause of action for unfair competition against the competitor, so long as the party can show it suffered injury in fact and lost money or property as a result of the competitor's acts of unfair competition. This expansion of standing to bring UCL claims flies in the face of Proposition 64's efforts in 2004 to significantly limit such suits. As a result of this decision, we expect to see an increase in unfair competition claims in California courts brought by parties against competitors to enjoin alleged unfair competition.

Background Facts

In *Higbee*, plaintiff law firm ("Plaintiff") offered legal services for record expungements. Defendant Expungement Assistance Services ("Defendant") provided similar services. Plaintiff brought suit against Defendant, among other things, under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code, §17200, *et seq*. Plaintiff alleged that Defendant was engaging in the unauthorized practice of law because it was not a law firm, and it used employees who were neither licensed to practice law in California (or any other state), nor registered or bonded as "legal document assistants," as required under California law. It charged that Defendant's activities harmed members of the general public, as well as Plaintiff's business. Plaintiff claimed that Defendant competed for the same customers as it, deprived Plaintiff of business opportunities, and caused Plaintiff to suffer lost revenue, increases in its advertising expenses, and a reduction the value of its law practice. Plaintiff had had no direct dealings with Defendant.

Defendant demurred to the UCL claim, arguing that Plaintiff lacked standing to assert it. The trial court sustained the demurrer, without leave to amend, finding that because there had been no direct transactions between Plaintiff and Defendant, Plaintiff's alleged injury was insufficient to give it standing to state a UCL claim against Defendant. "Plaintiff only alleges that defendant is getting some business that plaintiff might possibly obtain for itself," the trial court wrote. "This is insufficient. One may not sue a competitor under [Business and Professions Code Sec.] 17200 because that competitor is obtaining some market share." The Court of Appeal reversed.

Historical Overview

The tort of unfair competition initially arose in the context of one business suing another for having stolen the former's customers through practices considered to be unfair. However, over time, standing to bring UCL claims expanded dramatically to include not only businesses, but consumers as well. California also authorized private Attorney General actions, empowering consumers and businesses to bring UCL claims on behalf of the general public. This led to considerable

abuse of the UCL in California, with "shakedown lawsuits" being brought by many unscrupulous attorneys and plaintiffs to extract settlements from reluctant defendants.

California voters passed Proposition 64 in 2004 to stop this abuse. Proposition 64 greatly reduced the number of private individuals with standing to bring a UCL suit. As the Supreme Court held, under Proposition 64, only those who had "suffered injury in fact or had lost money or property as a result of unfair competition" could bring a private UCL claim. (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 320-321.) The Court further observed that "[w]hile the voters clearly intended to restrict UCL standing, they just as plainly preserved standing for those who had had business dealings with a defendant and had lost money or property as a result of the defendant's unfair business practices." (*Id.* at 321 (emphasis in original).)

The *Higbee* Decision

Despite the language and intent of Proposition 64, the *Higbee* Court reversed the trial court, holding that Plaintiff could state a UCL claim based upon Defendant's alleged violations of California law. The court found that Plaintiff's purported loss of market share and other alleged injuries could be used to show a trifle of injury in order to avoid a demurrer to that claim.

The Court of Appeal also rejected the argument that Plaintiff's complaint must allege direct dealings between it and Defendant to establish causation. In doing so, the *Higbee* Court did not address the Supreme Court's observation in *Kwikset* that Proposition 64 had preserved standing for those plaintiffs that had had business dealings with the defendant and were injured as a result of the defendant's acts of unfair competition. Instead, it focused on the same language quoted in another Supreme Court opinion, which it then distinguished on the basis that that the specific causation question was not before the Court. The *Higbee* Court went on to say that it is possible to "allege facts sufficient to support causation in the absence of direct business dealings" and concluded that "[t]he language of the UCL does not leave the court hamstrung, unable to even consider an action seeking injunctive relief just because the defendant engages in its purportedly unlawful activity via the Internet and has not had any direct business dealings with the plaintiff." Thus, the Court of Appeal concluded that it was not willing to say that Plaintiff's "allegation of causation is insufficient to withstand a demurrer."

What *Higbee* Means for Parties Doing Business in California

Assuming that the Court of Appeal's decision in *Higbee* is not taken up on review by the Supreme Court or de-published, the opinion has the potential to affect significant parties doing business in California in several ways:

1. The Number of Unfair Competition Suits Against Parties Doing Business in California Likely to Increase.

As a result of *Higbee*, the number of UCL suits against parties doing business in California will likely increase. This decision effectively opens the door for a business competitor or claimed competitor to commence a UCL action against a party, despite the fact that the putative plaintiff has had no business dealings with the party. Companies may feel emboldened to seek injunctive relief against competitors they believe are engaged in unfair business practices. There is also a possibility that such suits may be brought by large to medium companies against upstart competitors to attempt to protect the formers' market share.

2. Renewed UCL "Shakedown Suits" Are Also a Possibility.

By finding that competitors having no direct dealings with a business can state a UCL claim sufficient to withstand a demurrer, the *Higbee* Court has arguably paved the way for renewed shakedown suits. Putative plaintiffs are now in a better position to attempt to extract settlements from defendants, who, unable to dispose of a meritless UCL claim on demurrer, are faced with the prospect of having to incur litigation expenses through and including summary judgment before they can otherwise extricate themselves from the suit.

3. Additional Erosion of Proposition 64's Standing Limitations Is Possible.

The *Higbee* Court states at the end of its opinion that its decision is "strictly limited" to the context of business competitors, and it is not suggesting "that a consumer who has never done business with a company has standing to maintain a UCL action against it." Despite these statements, the *Higbee* decision establishes a new precedent, whereby other courts, seeking to further expand the number of persons having standing to bring a UCL claim, may try to rely upon it as a basis for disregarding/undercutting Proposition 64's standing limitations.

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