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California's City and County Attorneys Poised to Flex Newly Granted UCL Investigatory Power

Client Alert | May 18, 2023

Unfair business practices encompass fraud, misrepresentation, and oppressive or unconscionable acts or practices by businesses, often against consumers. In California, individuals and specified governmental agencies are authorized to bring civil actions for unfair competition and to recover civil penalties or injunctive relief pursuant to the Unfair Competition Law (UCL) under Business and Professions Code Section 17200.

California's Government Code authorizes the Attorney General, as a head of a state department, to investigate and prosecute actions concerning certain matters, including UCL violations. It also equips the Attorney General with certain investigatory tools, including pre-litigation subpoena power, to effectuate enforcement of the law.

Among the agencies authorized to prosecute UCL actions are city attorneys of cities with populations in excess of 750,000 and county counsel of any county within which a city has a population in excess of 750,000, as well as (in the case of San Francisco) city attorneys of a city and county. Although certain county counsel and city attorneys can bring UCL actions, prior to the passage and enactment of AB 2766, these entities were not afforded the same tools as the Attorney General and district attorneys to *investigate* possible unfair competition cases. AB 2766, enacted on January 1, 2023, amended Section 16759 of the Business and Professions Code to extend these same investigatory powers to city and county attorneys who are also authorized to bring UCL claims (subject to certain requirements).

Sponsors and supporters of the bill cited increased reports of consumer fraud and price gouging during the COVID-19 pandemic, which they claimed demonstrated a need for greater enforcement of California's consumer protection laws.

Pre-Existing Relevant Law

There is a constellation of statutes that are relevant to enforcement of the UCL.

Business and Professions Code Section 17200 defines "unfair competition" to include any unlawful, unfair, or fraudulent business act or practice and any unfair, deceptive, untrue, or misleading advertising, and any act prohibited by the False Advertising Law, Business and Professions Code Section 17500 et seq. Accordingly, the UCL is a tool for enforcement relating to a wide range of consumer-facing business activity.

Government Code Section 11181 authorizes the heads of each state department to make investigations and prosecute actions concerning matters relating to the business activities and subjects under their jurisdiction; violations of any law or rule or order of the department; and such other matters as may be provided by law. In order to effectuate these investigations and actions, the law provides the heads of these departments with certain investigatory powers. Among these powers is the ability to promulgate interrogatories; the ability to issue subpoenas for the attendance of witnesses and the

Related People

Winston Y. Chan

Michael Farhang

Douglas Fuchs

Nicola T. Hanna

Meredith K. Spoto

Eric D. Vandevelde

Benjamin Wagner

Debra Wong Yang

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production of certain documents, testimony, or other materials, and the ability to inspect and copy those same documents and materials. With regard to the UCL specifically, the relevant “state department head” is the Attorney General.

But the Attorney General is not the only entity authorized to prosecute violations of the UCL. Under Business and Professions Code Section 17204, in addition to the Attorney General, actions under the UCL may be brought by a district attorney, a city attorney or county counsel, or an individual person who has suffered injury in fact and has lost money or property as a result of the unfair competition. In the case of city attorneys and county counsels of counties and cities with populations smaller than 750,000, consent from the district attorney is required to bring an action under the UCL. In counties and cities with populations larger than that number, no such consent is required. Thus, the only city attorneys with authority to independently bring actions under the UCL are those in San Jose, San Diego, and Los Angeles, and the only county counsel are those in San Diego County, Los Angeles County, and Santa Clara County (as the cities of San Diego, Los Angeles, and San Jose all have populations over 750,000).

In order to facilitate their investigation of violations of the UCL, district attorneys are granted the same investigative powers given to the Attorney General pursuant to Section 16759 of the Business and Professions Code, subject to certain safeguards. In particular, district attorneys’ investigations under this section must abide by the procedures laid out in the relevant sections of Government Code and are subject to the California Right to Financial Privacy Act.

Changes to the Law Under AB 2766

AB 2766 extended the same investigatory powers granted to the Attorney General and the district attorneys to the city attorneys and county counsel which are already authorized to bring UCL claims when these entities reasonably believe that there may have been a violation of the UCL.

Specifically, the new law:

1. Grants all of the powers that are granted to the Attorney General as the head of a state department to make investigations and prosecute actions regarding unfair competition laws (commencing with Business and Professions Code Section 17200) to the city attorney of any city having a population in excess of 750,000, to the county counsel of any county within which a city has a population in excess of 750,000, or to a city attorney of a city and county, when the city attorney or county counsel reasonably believes that there may have been a violation of the unfair competition laws;
2. Makes any action brought by a city attorney or county counsel pursuant to the bill, like an action brought by the Attorney General or district attorney, subject to the provisions of the “California Right to Financial Privacy Act” set forth in existing law; and
3. Clarifies that court orders sought pursuant to the bill shall be sought in the superior court of the county in which the district attorney, city attorney, or county counsel, who is seeking the order and authorized to bring an action pursuant to the bill, holds office.

AB 2766 amended Business and Professions Code section 16759—which previously provided district attorneys with pre-litigation investigatory authority for potential UCL actions—to expressly provide city attorneys and county counsel in large jurisdictions with the same pre-litigation investigative authority for suspected UCL violations. Based on the law’s population requirements, AB 2677 applies to legal authorities in San Diego City and County, Los Angeles City and County, Santa Clara County and San Jose, and San Francisco (which co-sponsored the bill).

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Arguments For And Against AB 2766

AB 2766 garnered substantial support on both the Senate and Assembly floors (29 in favor versus 9 against and 57 in favor versus 15 against, respectively). This section will detail some highlights of the discourse regarding the bill in the Legislature prior to its passage.

Proponents of the law argued that "AB 2766 will bolster consumer protection enforcement efforts" and will "[e]nsur[e] a robust consumer protection investigatory framework to protect businesses that play by the rules." Further, it will "ensure consistency in the UCL for those empowered to enforce [it]."

Opponents argued that the bill—particularly the subpoena power—"potentially infring[es] on the judicial due process rights of businesses, organizations and individuals in California," and "makes businesses vulnerable to baseless fishing expeditions and political maneuvers, as standard necessary (sic) to issue a pre-litigation subpoena is disturbingly low."

Supporters of the bill claimed that opponents' concerns about overreaching were unfounded, as "important safeguards exist under current law to protect against overreach by a prosecutor," which also apply under AB 2766. Specifically, the city attorneys and county counsels with new investigative authority are subject to the same parameters currently applied to district attorneys' use of these investigatory powers in Section 16759, including the procedures laid out in the Government Code, and will also be subject to the California Right to Financial Privacy Act. This Act protects the confidential relationship between financial institutions and their customers by, in part, providing more procedural safeguards with respect to subpoenaing financial records. In addition, these city attorneys and county counsel are *only* granted these expanded investigatory powers when the city attorney or county counsel "reasonably believes that there may have been a violation of [the UCL]." Further, the recipient of the subpoena can refuse to comply, leaving it up to the prosecutor to go to court to compel production.

Potential Impacts of AB 2766

Proponents of AB 2766 claimed that complaints of UCL violations rose during the pandemic, necessitating the bolstering of UCL enforcement measures. In response, Assembly Member Brian Maienschein (D-San Diego) authored the bill after "work[ing] with numerous attorneys to identify solutions to strengthening consumer protection laws in California." The bill was co-sponsored by the City and County of San Francisco, City of San Diego, County of Los Angeles, and County of Santa Clara.

Exactly how widely the new powers granted under the bill will be operationalized remains to be seen, but there are many indications from attorneys in the co-sponsoring cities and counties that they intend to use them widely. Following Governor Gavin Newsom's signing of AB 2766 in September 2022, many public prosecutors lauded the legislation and publicly forecasted their offices' plans to use the new investigative powers once the law took effect. Said San Francisco City Attorney David Chiu:

> "During the pandemic we saw a troubling surge in price gouging, consumer fraud, and unfair business practices," said San Francisco City Attorney David Chiu. "As our office continues to pursue bad actors that seek to defraud the public, this new law will give us more tools to better protect consumers and workers."

Then-Los Angeles City Attorney Mike Feuer echoed this sentiment, stating:

> "Time and again, we've successfully fought for hard-working Angelenos who've been ripped off—sometimes devastated—by unlawful business practices. Our office will be all the more impactful now that we have this key investigative tool, allowing us to get to the heart of scams and put a stop to them even faster."

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Acting Los Angeles County Counsel Dawyn Harrison, Santa Clara County Counsel James R. Williams, and San Diego City Attorney Mara W. Elliott also released similar statements.

Indeed, the San Francisco and San Diego City Attorneys' offices have already begun utilizing their investigative powers in a highly public context—openly touting their initiation of an investigation into a home title locking business, which the city attorneys allege to be deceptive and predatory. Not only did the San Francisco City Attorney issue a press release proudly proclaiming that "[t]he subpoena [it issued] reflects an early use of city attorney's authority under Assembly Bill 2766"–it coupled the announcement with a clear indication that the office was seeking to use its new power immediately to stop, and not just investigate, the target's conduct, which the office labeled as "a scam, plain and simple."

It is impossible to say with certainty that AB 2766 will result in increased *numbers* of UCL prosecutions by public prosecutors, as county counsel have possessed the power to prosecute UCL violations since the passage of SB 709 in 1991 and city attorneys since the passage of SB 1725 in 1974. However, AB 2766 is aligned with a general push toward broader power to prosecute and enforce the UCL since the advent of the statute. Most recently, the Supreme Court of California confirmed that local prosecutors' power to enforce the UCL goes beyond their territorial jurisdictions, in lockstep with that of the Attorney General. (*Abbott Lab'ys v. Superior Ct. of Orange Cnty*. (2020) 9 Cal. 5th 642, 661.) Because of the relationship between Sections 17200 and 16759 of the Business and Professions Code, the new investigatory powers of city and county attorneys under AB 2766 also likely extend outside of local prosecutors' jurisdictions, granting them the authority to investigate conduct that occurred elsewhere. This combination of greater authority to investigate UCL offenses, more expansive jurisdictional reach, and early signals from newly empowered city and county attorneys following the passage of AB 2766, point to the potential for a pronounced rise in aggressive UCL investigations by public prosecutors—particularly by city attorneys in California's largest cities, which are already known for their frequent use of affirmative enforcement lawsuits on behalf of consumers.

The following Gibson Dunn lawyers prepared this client alert: Winston Chan, Michael Farhang, Douglas Fuchs, Nicola T. Hanna, Meredith Spoto, Chuck Stevens, Eric D. Vandevelde, Benjamin Wagner, and Debra Wong Yang.

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White Collar Defense and Investigations Group - United States:

Los Angeles Michael H. Dore (+1 213-229-7652, mdore@gibsondunn.com) Michael M. Farhang (+1 213-229-7005, mfarhang@gibsondunn.com) Diana M. Feinstein (+1 213-229-7351, dfeinstein@gibsondunn.com) Douglas Fuchs (+1 213-229-7605, dfuchs@gibsondunn.com) Nicola T. Hanna – Co-Chair (+1 213-229-7269, nhanna@gibsondunn.com) Poonam G. Kumar (+1 213-229-7554, pkumar@gibsondunn.com) Marcellus McRae (+1 213-229-7675, mmcrae@gibsondunn.com) Eric D. Vandevelde (+1 213-229-7186, evandevelde@gibsondunn.com) Debra Wong Yang (+1 213-229-7472, dwongyang@gibsondunn.com) Meredith K. Spoto (+1 213-229-7060, mspoto@gibsondunn.com)

San Francisco Winston Y. Chan (+1 415-393-8362, wchan@gibsondunn.com) Charles J. Stevens – Co-Chair (+1 415-393-8391, cstevens@gibsondunn.com) Michael Li-Ming Wong (+1 415-393-8333, mwong@gibsondunn.com)

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GIBSON DUNN

Palo Alto Benjamin Wagner (+1 650-849-5395, bwagner@gibsondunn.com)

Washington, D.C. Stephanie Brooker – Co-Chair (+1 202-887-3502, sbrooker@gibsondunn.com) Courtney M. Brown (+1 202-955-8685, cmbrown@gibsondunn.com) David P. Burns (+1 202-887-3786, dburns@gibsondunn.com) John W.F. Chesley (+1 202-887-3788, jchesley@gibsondunn.com) Daniel P. Chung (+1 202-887-3729, dchung@gibsondunn.com) M. Kendall Day (+1 202-955-8220, kday@gibsondunn.com) David Debold (+1 202-955-8551, ddebold@gibsondunn.com) Michael S. Diamant (+1 202-887-3604, mdiamant@gibsondunn.com) Gustav W. Eyler (+1 202-955-8610, geyler@gibsondunn.com) Richard W. Grime (+1 202-955-8219, rgrime@gibsondunn.com) Scott D. Hammond (+1 202-887-3684, shammond@gibsondunn.com) George J. Hazel (+1 202-887-3674, ghazel@gibsondunn.com) Judith A. Lee (+1 202-887-3591, jalee@gibsondunn.com) Adam M. Smith (+1 202-887-3547, asmith@gibsondunn.com) Patrick F. Stokes – Co-Chair (+1 202-955-8504, pstokes@gibsondunn.com) Oleh Vretsona (+1 202-887-3779, ovretsona@gibsondunn.com) F. Joseph Warin – Co-Chair (+1 202-887-3609, fwarin@gibsondunn.com) Amy Feagles (+1 202-887-3699, afeagles@gibsondunn.com) David C. Ware (+1 202-887-3652, dware@gibsondunn.com) Ella Alves Capone (+1 202-887-3511, ecapone@gibsondunn.com) Nicholas U. Murphy (+1 202-777-9504, nmurphy@gibsondunn.com) Melissa Farrar (+1 202-887-3579, mfarrar@gibsondunn.com) Nicole Lee (+1 202-887-3717, nlee@gibsondunn.com) Jason H. Smith (+1 202-887-3576, jsmith@gibsondunn.com) Pedro G. Soto (+1 202-955-8661, psoto@gibsondunn.com)

New York Zainab N. Ahmad (+1 212-351-2609, zahmad@gibsondunn.com) Reed Brodsky (+1 212-351-5334, rbrodsky@gibsondunn.com) Mylan L. Denerstein (+1 212-351-3850, mdenerstein@gibsondunn.com) Barry R. Goldsmith (+1 212-351-2440, bgoldsmith@gibsondunn.com) Karin Portlock (+1 212-351-2666, kportlock@gibsondunn.com) Mark K. Schonfeld (+1 212-351-2433, mschonfeld@gibsondunn.com) Orin Snyder (+1 212-351-2400, osnyder@gibsondunn.com) Alexander H. Southwell (+1 212-351-3981, asouthwell@gibsondunn.com) Brendan Stewart (+1 212-351-6393, bstewart@gibsondunn.com)

Denver Kelly Austin – Co-Chair (+1 303-298-5980, kaustin@gibsondunn.com) Ryan T. Bergsieker (+1 303-298-5774, rbergsieker@gibsondunn.com) Robert C. Blume (+1 303-298-5758, rblume@gibsondunn.com) John D.W. Partridge (+1 303-298-5931, jpartridge@gibsondunn.com) Laura M. Sturges (+1 303-298-5929, lsturges@gibsondunn.com)

Houston Gregg J. Costa (+1 346-718-6649, gcosta@gibsondunn.com)

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