

June 26, 2020

CALIFORNIA SUPREME COURT HOLDS THAT DISTRICT ATTORNEYS MAY SEEK STATEWIDE CIVIL PENALTIES AND RESTITUTION UNDER UNFAIR COMPETITION LAW

To Our Clients and Friends:

On June 25, 2020, the California Supreme Court issued its second major Unfair Competition Law (“UCL”) opinion of the term, unanimously deciding in *Abbott Laboratories v. Superior Court*, No. S249895, ___ Cal.5th ___, that local prosecutors have the power to seek civil penalties for violations in California that occur outside their territorial jurisdiction. According to the Court, the UCL “grants broad civil enforcement authority to district attorneys ... consistent with the statute’s purpose and history.” (*Id.* at [p. 16].) While the Court acknowledged that its ruling could create conflicts of interest and duplicative enforcement among competing district attorneys, the decision and a three-Justice concurrence outlined a path for the Legislature to mitigate these negative consequences.

I. Procedural Background of *Abbott Laboratories*

As summarized in Gibson Dunn’s previous client alert, the UCL empowers the Attorney General as well as any district attorney, any county counsel, and certain city attorneys to file a civil enforcement action on behalf of the People of the State of California. (See Bus. & Prof. Code §§ 17204, 17206.) Local prosecutors have claimed authority under the UCL to bring civil actions for injunctive and monetary relief alleging unfair competition violations occurring *throughout* the State of California—including beyond their territorial jurisdiction.

In this case, the Orange County District Attorney sued various brand and generic pharmaceutical manufacturers and distributors under the UCL, alleging an unlawful conspiracy to prevent other generic manufacturers from launching a generic drug that would compete with Niaspan, a prescription medication used to help maintain healthier levels of cholesterol. As a result of the allegedly unlawful conspiracy, the District Attorney asserted that California consumers paid more than they otherwise would have for generic Niaspan. The District Attorney sought civil penalties not only for alleged violations that occurred in Orange County, but also for violations that occurred anywhere throughout California. Defendants moved to strike the complaint’s claims for monetary relief for violations outside of Orange County; the Superior Court denied that motion.

Defendants sought writ relief, and a divided Court of Appeal vacated the Superior Court’s decision and ordered the claim for statewide civil penalties stricken. Emphasizing that the California Constitution recognizes that the Attorney General is “the chief law officer of the State,” the Court of Appeal majority reasoned that the UCL’s grant of standing to local prosecutors “cannot reasonably or constitutionally be interpreted as conferring statewide authority or jurisdiction to recover such monetary remedies beyond

the county the district attorney serves, or restricting the Attorney General’s constitutional power to obtain relief on behalf of the entire state.” (*Abbott Labs, Inc. v. Sup. Ct* (2018) 24 Cal. App. 5th 1, 24–25.) The Court of Appeal further noted that “the text of the UCL provides no basis to conclude the Legislature intended to grant local prosecutors extraterritorial jurisdiction to recover statewide monetary relief” and that if the Legislature had wished to confer upon local prosecutors the same remedial authority given to the Attorney General, the UCL would have explicitly vested local prosecutors with such authority. (*Id.* at pp. 27–28.)

The Supreme Court granted the Orange County District Attorney’s petition for review.

II. A Divide Emerges Among State and Local Prosecutors

The amicus briefs filed in the Supreme Court manifested a notable divide among state and local prosecutors. The California District Attorneys Association and California Attorney General each filed a brief in support of Defendants, arguing that local district attorneys *lack* the power to seek civil penalties for conduct occurring outside their territorial jurisdiction. The Attorney General argued that the Orange County District Attorney’s reading of the UCL would create conflict and competition among local prosecutors each acting to obtain a greater share of remedies for their localities. Such a construction, argued the Attorney General, would “undercut the constitutional authority of the Attorney General as the State’s chief law officer.” The Attorney General argued instead for a reading that would “encourag[e] cooperation” and permit California to “speak with one voice in consumer law matters.”

The District Attorneys Association expressed concern in its brief to the Court about reduced public accountability of local prosecutors who obtain relief for consumers outside their jurisdiction. The Association argued that “[a] district attorney who could exercise binding authority to alter or extinguish the rights of consumers in other counties would be subject to no democratic safeguards if he or she misused that authority.”

Meanwhile, a coalition of City Attorneys and County Counsels—who do not fall under the broad oversight of the Attorney General (as do district attorneys)—and the League of Cities filed an amicus brief in support of the Orange County District Attorney’s position and in favor of permitting local prosecutors to exercise statewide jurisdiction.

III. California Supreme Court Holds First Teleconference Oral Argument After COVID-19 Shelter-In-Place Order

On Tuesday, March 26, 2020, oral argument was held before the California Supreme Court. Notably, it was one of the first teleconference hearings after COVID-19-related safer-at-home orders were issued. The argument centered around two themes: how to interpret the UCL’s silence on the issue presented, and the practical import of the Court’s ruling.

Generally, the teleconference format worked well. While there were a few instances of delayed questions causing some cross-talk and confusion, the Court managed the argument well. In a departure from traditional practice, at the conclusion of each advocate’s argument, the Chief Justice invited each of the Justices to ask any remaining questions any of them had.

Ultimately, the argument foreshadowed the Court’s opinions: Justice Liu appeared most skeptical of the practical concerns raised by Defendants and amici, and ultimately authored the Court’s decision ruling in favor of the Orange County District Attorney.

IV. The Supreme Court’s Opinion

Justice Liu authored the unanimous opinion of the Court. Justice Kruger filed a separate concurrence in which Chief Justice Cantil-Sakauye and Justice Corrigan joined to outline their view that the UCL should be amended to provide for a more robust notice provision. All seven Justices (including Justice Fujisaki of the First Appellate District, who sat pro tem in place of Justice Groban, who was recused) agreed that “[t]he UCL does not preclude a district attorney, in a properly pleaded case, from including allegations of violations occurring outside as well as within the borders of his or her county,” confirming their ability to seek “civil penalties for violations occurring outside of the district attorney’s county as well as restitution on behalf of Californians who do not reside in the county.” (*Abbott Laboratories, supra*, ___Cal.5th___[p. 1, 11].)

A. Justice Liu’s Opinion for the Court Holds That the “Text and Purpose of the UCL” Supports District Attorneys Exercising Statewide Authority

Justice Liu, writing for the Court, reasoned that the UCL uses “broad language” in authorizing courts to impose civil penalties “for each violation” and to make orders to restore to “any person in interest any money.” (*Id.* at [p. 12].) Reviewing the provisions contemplating statewide injunctions (sections 17203 and 17207), and those empowering courts to impose civil penalties (section 17206), the Court emphasized that “[t]he statute contains no geographic limitation on the scope of relief that courts may order in an enforcement action brought by a district attorney.” (*Id.*)

The Court first distinguished *Safer v. Superior Court* (1975) 15 Cal.3d 230, cited by Defendants for the proposition that civil litigation by district attorneys must be specifically authorized by the Legislature. Justice Liu noted that “the district attorney is expressly authorized to maintain a civil action for either injunctive relief or civil penalties for acts of unfair competition” under the UCL. (*Abbott Laboratories, supra*, ___Cal.5th___[p. 10].) Next, the Court emphasized that “*Safer* says nothing about the scope of remedies that may be sought,” and was thus inapposite to the question before the Court. (*Id.*)

Turning to the “text and purpose of the UCL,” Justice Liu made three points. (*Id.* at [p. 11].) First, as noted above, the statute’s broad language, coupled with the lack of any geographic limitation, suggest no legislative “concern about the geographic scope of relief sought in an enforcement action by a district attorney.” (*Id.* at [p. 13].) Here, the Court assumed that district attorneys may seek statewide injunctive relief under the UCL (and Defendants conceded as much in their brief). While the issue of statewide injunctive relief was not squarely before the Court, this assumption nevertheless guided the Court’s decision. Second, the Court noted that section 17206(c), which allocates “one-half of civil penalties in a statewide action [brought by the Attorney General] to the county in which the judgment was entered indicates that the Legislature did not design the civil penalty scheme to ensure an allocation of civil penalties to counties in accordance with the number of violations in each county.” (*Id.*) Third, the fact that section 17207(b) distinguishes “‘any county in which the violation occurs’ and ‘any county . . .

where the injunction was issued” for purposes of civil penalties imposed for violating injunctions suggests that the “Legislature knows how to write language limiting the award of civil penalties to the county in which the violation occurs”; here though, the Legislature “did not enact any such limitation.” (*Id.* at [p. 13-14].)

Taken together, the Court held that “the text of the UCL grants broad civil enforcement authority to district attorneys, and this broad grant of authority is consistent with the statute’s purpose and history.” (*Id.* at [p. 14].)

Next, the Court rejected Defendants’ argument that the California Constitution limited district attorneys’ enforcement authority to their districts’ boundaries, “find[ing] nothing in those provisions that constrains the Legislature’s prerogative to structure UCL enforcement so that a district attorney has authority to seek civil penalties and restitution for violations outside of his or her county.” (*Id.* at [p. 18].)

Finally, the Court addressed the Attorney General’s amicus brief and the practical concerns it raised about political accountability, degradation of the Attorney General’s primary role in consumer protection, and a loss of inter-office cooperation. While Justice Liu “[did] not take [these concerns] lightly,” conceding that the Court’s decision may incentivize a race to the courthouse, the Court was “unable to conclude that the Legislature necessarily believed this concern outweighs the incentive that the scheme provides for district attorneys to bring enforcement actions that might otherwise not be brought at all.” (*Id.* at [p. 20, 22].) Further, the Attorney General’s “authority to intervene or take over the case” from a district attorney mitigated, in the Court’s view, any concerns about coordinated enforcement of the UCL. (*Id.* at [p. 22].) Indeed, at oral argument Justice Liu noted that Defendants failed to identify a case in which local prosecutors “ran amok” with such authority.

Justice Liu’s opinion noted that the “pros and cons” of the result of this decision “is a matter of policy for the Legislature to decide,” adding that voters could “plac[e] an initiative on the ballot to restrict this authority for local prosecutors if they believe it is not sound policy.” (*Id.* at [p. 25].)

In conclusion, Justice Liu was careful to outline the limits of the Court’s holding, writing that the Court did not “address whether a district attorney could bring a UCL claim for conduct occurring entirely outside the bounds of his or her county”; in the case before the Court, the Orange County District Attorney had alleged violations of the UCL both within and outside of Orange County. (*Id.* at [p. 26].)

B. Justice Kruger’s Concurrence Emphasizes the “Gap in the Statutory Scheme”

Justice Kruger agreed with the Court’s reading of the UCL’s text and purpose. However, she wrote a separate concurrence, in which the Chief Justice and Justice Corrigan joined, to point out the “gap in the statutory enforcement scheme” that should be filled by the Legislature. (*Abbott Laboratories, supra*, ___Cal.5th___[conc. opn. of Kruger, J.], at [p. 1].) Indeed, at oral argument Justice Kruger repeatedly asked about the sufficiency of the notice provided to the Attorney General. Noting that the “current statutory scheme contains no mechanism to ensure notice to the Attorney General for trial proceedings,” Justice Kruger wrote that the “Legislature may wish to fill this gap by requiring that district attorneys and other public prosecutors serve the Attorney General with a copy of any UCL complaint whose prayer for relief seeks monetary relief for violations occurring beyond the borders of their respective

jurisdictions.” (*Id.* at [p. 3].) Justice Kruger voiced concern that “absent an effective mechanism for coordinating efforts, [this decision] will inevitably create some practical challenges,” including the possibility of “district attorneys . . . rac[ing] each other to the courthouse and . . . enter[ing] settlements that maximize their own counties’ recoveries, potentially at the expense of consumers elsewhere in the state.” (*Id.* at [p. 1-2].)

V. Implications for Future Cases and Outstanding Questions

The Court’s opinion and Justice Kruger’s concurrence firmly place the ball in the Legislature’s court to address any potential policy implications of the Court’s decision. Time will tell whether voters or the Legislature act swiftly to write into the UCL a means for coordinating enforcement actions or pull back on the authority of district attorneys to seek statewide monetary relief.

In the meantime, the Court’s reading of the UCL establishes a significant incentive for district attorneys to bring UCL actions, given the potential financial windfall of statewide civil penalties. As a result, defendants should be prepared for the possibility of multiple and overlapping cases, brought not only by district attorneys, but also by other prosecutors.

Overlapping suits will in turn increase the need for companies to effectively coordinate their defense of government enforcement actions with any parallel matters. Defendants should look carefully at how government enforcement cases interact with arbitrations, consumer class actions, and suits brought under the Private Attorneys General Act, Lab. Code. § 2699 *et seq.*, and develop a cohesive unified strategy. With overlapping issues, defendants may need to consider arguments for stays, preclusion and other remedies.

In addition to the issues of the power of district attorneys to prosecute purely extraterritorial violations and to seek statewide injunctive relief, an additional question not squarely presented by this case remains unanswered: does the Court’s decision extend to city attorneys and county counsels, over whom the Attorney General does not exercise supervisory authority? Indeed, the Court emphasized the potential problems resulting from its decision were mitigated because the Attorney General “has direct supervision over the district attorneys,” and “retains authority to intervene or take over the case.” (*Abbott Laboratories, supra*, ___Cal.5th___[p. 18-19, 22].) Defendants may therefore wish to carefully scrutinize any future enforcement matters brought by city attorneys and county counsels seeking civil penalties on a statewide basis. Further, in pursuing any reform to the UCL, the Legislature may wish to consider the different relationship the Attorney General has with district attorneys compared to city attorneys and county counsels.



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