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Limiting Legal Scope

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For decades, California's Unfair Competition Law (Business and Professions Code Section 17200) has served as a litigation weapon of choice for plaintiffs, including many with no personal stake in a specific case. The voters' resounding approval of Proposition 64 in November 2004 imposed dramatic new standing and injury requirements in unfair-competition cases, as well as a new class-certification requirement for plaintiffs purporting to sue on behalf of others. See Business and Professions Code Sections 17201, 17204 (as amended); *Californians for Disability Rights v. Mervyn's*, 39 Cal.4th 223 (2006).

Proposition 64 changed who can sue, but what has become of the law's well-known broad substantive scope? After all, the Unfair Competition Law still broadly prohibits any "unlawful, unfair or fraudulent business act or practice," three independent pathways to unfair competition liability. *Podolsky v. First Healthcare Corp.*, 50 Cal.App.4th 632 (1996). Such plaintiffs need not say that a defendant intended to injure anyone, because a violation of the law remains "a strict liability offense." *State Farm Fire & Casualty Co. v. Superior Court*, 45 Cal.App.4th 1093 (1996).

"The UCL covers a wide range of conduct," and it generously allows plaintiffs to "'borrow[]' violations from other laws by making them independently actionable as unfair competitive practices." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134 (2003). Even if a business practice is "not specifically proscribed by some other law," the "practice may be deemed unfair."

That said, the law always has given way to certain legal defenses, which have ended many cases early, including on demurrers. The law frequently has met its match when claims of unlawfulness depend on borrowed laws that an executive agency has been assigned to enforce.

Courts have abstained or declined equitable jurisdiction in unfair-competition cases that ask them to assume administrative-agency functions, to make ad hoc determinations of economic policy or to regulate defendants with rulings, injunctions and other equitable remedies that might conflict with an agency's adjudication of the same subject.

The more apparent the administrative minefield, the less willing courts have been to venture into it in such cases. *Congress of California Seniors v. Catholic Healthcare West*, 87 Cal.App.4th 491 (2001) (affirming dismissal of UCL action alleging unlawful and unfair Medi-Cal cost-reporting by defendant hospitals); *Crusader Ins. Co. v. Scottsdale Ins. Co.*, 54 Cal.App.4th 121 (1997) (affirming dismissal of UCL action seeking regulation of insurers' compliance with Department of Insurance rules).

In 2007, the 2nd District Court of Appeal put an exclamation point on the law's equitable-abstention doctrine. In *Alvarado v. Selma Convalescent Hospital*, 153 Cal.App.4th 1292 (2007), the court affirmed the dismissal of an action in which the plaintiff sought judicial regulation of staffing at nursing homes. The court concluded that the trial court properly declined to enter into the unsettled administrative fray regarding how many nurses, and of what type, should be assisting in the care of nursing -home residents. Since 2000, the Legislature had tasked the Department of Public Health with regulating the defendants permanently.

Alvarado was a quintessential effort to use the judiciary as a private enforcement tool, through attempted deployment of the law as a substitute for regulation by the actual administrative agency charged with the job. The plaintiff was the son of a former nursing home resident. Alvarado filed a putative class action against the nursing home and 18 affiliated facilities, on a theory that the facilities were impermissibly understaffed, based on their purported violation of Health and Safety Code 1276.5, which sets forth a 3.2 aggregate nursing-hours-per-resident-day standard. Invoking the two remedies potentially available to a private plaintiff, Alvarado sought injunctive relief and classwide monetary "restitution" for this alleged understaffing.

But Section 1276.5, the legal linchpin of Alvarado's claim, does not exist in isolation. To the contrary, Section 1276.5 was enacted as part of a comprehensive catalogue of licensing standards that the Legislature created and assigned to the Department of Health Services to enforce. Indeed, the first sentence of Section 1276.5 commanded the agency to adopt regulations requiring nursing homes to provide an average of at least 3.2 hours of nursing care per patient per day. The department, however, had not issued the requisite regulations, leaving it unclear how the 3.2 hours standard was to be calculated or applied. In substance, Alvarado wanted the trial court to look past the absence of mandated regulations and to write and apply those missing regulatory requirements itself.

The trial court refused the entreaty and sustained the defendants' demurrer. The 2nd District affirmed, agreeing that the trial court chose the right path. Both courts

agreed that Section 1276.5 was a regulatory law and that the court should not invade the powers of the agency, which it would be forced to do if the action proceeded.

The *Alvarado* opinion traces the abstention doctrine from its start. In the inaugural abstention case, *Diaz v. Kay-Dix Ranch*, 9 Cal.App.3d 588 (1970), the Supreme Court agreed it was proper for the trial court to decline equitable jurisdiction over an action to enjoin ranchers from hiring illegal immigrants. A federal agency (the Immigration and Naturalization Service) had this responsibility, and the court held that the trial court could "withhold ... its aid" when presented with an action to redress the government's failure to act by directly suing a regulated business. Weighing the expertise and resources of the INS against the experience of the trial court in such matters mandated dismissal of the action... "It is more orderly, more effectual, less burdensome to the affected interests, that the national government redeem its commitment."

The California Supreme Court later applied *Diaz* to deny injunctive relief to plaintiffs who tried to regulate billboards on Native American land, because the federal Department of the Interior has that responsibility. *Department of Transportation v. Naegele Outdoor Advertising Co.*, 38 Cal.3d 509 (1985).

In a raft of appellate decisions spanning the last two decades, courts have applied the abstention doctrine to stop other cases that would have embroiled courts in parallel judicial and administrative regulation of regulated businesses.

For example, in *Crusader*, the court dismissed a case attempting to enforce regulations relating to sales of surplus lines insurance policies. The court observed, "Institutional systems are ... in place to deal with the problem. ... There is no need or justification for the courts to interfere with the Legislature's efforts to mold and implement public policy ... by extrapolating ... enactments into areas beyond those specified."

Similarly, *Wolfe v. State Farm Fire & Cas. Ins. Co.*, 46 Cal.App.4th 554 (1996), ended litigation over an insurer's refusal to issue homeowners' earthquake damage policies. The unfairness claim did "not permit unwarranted judicial intervention in an area of complex economic policy."

The court in *California Grocers' Ass'n v. Bank of America*, 22 Cal.App.4th 205 (1994), rejected a challenge by grocers to bank fees on returned checks, stating "'ad hoc decisions of the courts'" in such actions are "an entirely inappropriate method of overseeing bank service fees."

Samura v. Kaiser Foundation Health Plan Inc., 17 Cal.App.4th 1284 (1993), likewise rejected a claim by a health maintenance organization member to stop the HMO from seeking reimbursement from third parties. The court held that "the courts cannot assume general regulatory powers over health maintenance organizations through the guise of enforcing" the law.

More recently, in *Desert Healthcare District v. PacifiCare FHP Inc.*, 94 Cal.App.4th 781 (2001), the court upheld abstention in a case alleging an improper transfer of risk between a health plan and a hospital, because "such an inquiry would

pull the court deep into the thicket of the health care finance industry, an economic arena that courts are ill-equipped to meddle in."

In another case, the plaintiffs said that hospitals submitted improper claims for Medi-Cal reimbursement. The court noted the complex regulatory scheme governing Medi-Cal providers, including its significant federal component, and concluded that abstention was mandated in these circumstances. *Congress of California Seniors*.

Last year, in *Shamsian v. Department of Conservation*, 136 Cal.App.4th 621 (2006), the court held that the trial court properly abstained from adjudicating a claim brought against the Department of Conservation for allegedly failing to provide the recycling opportunities contemplated in the Public Resources Code, because a court should not "become involved in determining how to meet complex recycling goals the Legislature has entrusted to the [department]."

The *Alvarado* decision reinforced the ability of trial courts to abstain in appropriate circumstances. In *Alvarado*, the court declared that agency enforcement was "a more effective means of ensuring compliance" than judicial action on claims. In contrast, private lawsuits, such as Alvarado's, "interfere with the functions of an administrative agency."

The *Alvarado* decision has resonated with other courts in the few months since it was announced. Such cases alleging understaffing of nursing homes have either been abandoned or ordered dismissed, based on *Alvarado*.

Many California businesses have been easy marks for similar actions, merely because they are subject to complex statutory and regulatory schemes. The *Alvarado* decision and other cases that apply the abstention doctrine make such businesses less inviting targets.

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