

Unfair Competition Lawsuits Against Doctors: Latent, But Looming

By John H. Sullivan, President, Civil Justice Association of California

Overview

Excessive litigation and biological disease have much in common. Each has an ability to mutate to cope with stronger defenses or benefit from new opportunities. This phenomenon is demonstrated in the evolution of business competition litigation into a form of liability law. As the medical profession and its allies succeed in bringing balance and fairness to the world of medical malpractice law, look for legal “end runs” focusing on the business side of the practice of medicine.

California’s Unfair Competition Law (UCL), for example, offers a case study worth knowing. Like similar laws in many states, it was enacted decades ago as an adjunct to federal fair trade statutes. The intent was to protect businesses whose competitors were seeking an economic edge through unfair tactics, ranging from misleading advertising to violating weight and measure rules.

Danger of Unclear Definition

Because “unfairness” was not clearly defined in the federal law, Congress prohibited enforcement by anyone except government agencies. Lawmakers recognized that a vague standard could be misused by some private lawyers whose profiteering motive outweighed their interest



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in protecting legitimate business. A number of states, in adopting their competition laws, permitted “private enforcement” but included restrictions that reduced the opportunity for extortion-by-lawsuit. Not so California.

Nevertheless, the California UCL remained primarily used by district attorneys until the litigation industry began to burgeon in the early 1970s. A state court ruled that the law was a consumer protection tool, not just a measure to protect one business from another. That set up a legal and public relations basis for expansion. Pressure to expand came later as a major court ruling shrank auto accident litigation opportunities and law schools turned out soaring numbers of new lawyers. By the mid-1990s, the state personal injury lawyer association was giving seminars on using the UCL to build a new law practice and bring “added-value” to litigation. A California law revision official proclaimed a, “large underground economy” in UCL claims.

Implications for Physicians

As California entered the new century, the UCL was well-established as a unique device allowing a private lawyer without a client to sue a business on behalf of the general public for doing something “unfair,” even though there was no evidence of harm or financial loss to anyone! Some other states were considering opening similar gates on their business competition laws. The highest profile medical cases in California involved dentists and health plans. Individual dentists were sued for using amalgam containing mercury. Because the lawsuit did not have to allege harm, it leaped past “junk science” defenses and posed costly problems for dismissal. The state dental association was sued by an attorney operating behind a front organization, “Kids Against Pollution.” Here the alleged “unfairness” was distributing information that failed to warn about amalgam dangers.

Another lawsuit, brought by the president of the state personal injury lawyer association, accused Kaiser Permanente of

committing unfair business practices by giving some of its patients prescriptions in larger pills, a pill-splitter, and instructions on how to use it. Never was any evidence produced of an individual being harmed by a wrong dose or even cut by a pill-splitter. Kaiser strongly defended the lawsuit, demonstrating physician-developed protocols for prescribing pill-splitting. Kaiser ended up winning at every level, but at a cost of tens of thousands of dollars in legal fees to its member patients. Most defendants are forced to settle these kinds of cases for economic reasons because it costs far less to pay the lawyers to go away than to try to beat them. That is certainly the plight of smaller businesses, including many medical practices.

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Does Liability Insurance Help?

An important issue for a physician or anyone else facing an unfair business practice lawsuit is the extent of help his insurer will provide. An action that is “unfair, unlawful, or fraudulent” (California’s unfair competition trigger words) is usually viewed as an intentional act, not the result of negligence. Insurance often does not apply in these situations, though policies are sometimes written to encompass

this kind of claim.

While lack of insurance can mean a smaller pot of money for a plaintiff’s lawyer, it increases the chance of an easy nuisance settlement. Lawyers playing the California game either added a UCL claim to harass their defendants into a higher overall settlement or to collect quick, low overhead payouts. Some lawyers developed a “usual and customary” settlement amount, which they shamelessly explained to their victims via a settlement form. Others dispensed with lawsuits altogether, sending businesses letters telling each victim that a costly lawsuit was in the wings but could be avoided by quickly sending a thousand or so dollars to cover the lawyer’s “fees” to date.

Legislature Fails to Step In

Beginning in 1995 the Civil Justice Association of Cali-

California (CJAC) annually sponsored legislation to stop private lawyer abuse of the Unfair Competition Law. These efforts, even though bipartisan, routinely failed. As major funders of leadership political campaigns, personal injury lawyers controlled the key judiciary committees and refused to let reform bills reach the floor for a full vote.

In the fall of 2001 the Civil Justice Association board directed its staff to begin researching an initiative solution. In California, a statute may be enacted either by the Legislature or directly by the people on the statewide ballot. A CJAC-led coalition began drafting and political research. This led to building a coalition to fund petition signature gathering and later, the \$15 million ballot campaign. The goal was to retain the law's protection for consumers and businesses but stop its abuse by fee-seeking private lawyers. That called for a simple change: Bring the law into conformity with legal tradition by requiring private lawyers filing these suits to have a real client who has actually suffered a loss.

Not only did this change make legal sense, but the public liked it as well. In focus groups, people were amazed that the law allowed client-less lawyers to bring lawsuits without evidence of harm.

Californians To Stop Shakedown Lawsuits

As we moved into the 2004 election year, allies flocked to the campaign. Few areas of business, regardless of size or type, had escaped what were becoming known as "shakedown lawsuits." An enterprising trio of lawyers - the Trevor Law Group - gained media notoriety for filing mass lawsuits against immigrant-owned nail salons and auto repair shops. The allegations were absurd, but under the law could not easily be tossed out of court.

For the first time, personal injury lawyers admitted there was a problem. Their solution was to urge an investigation of the Trevor lawyers while sponsoring legislation that actually increased their income opportunities under the law! The California Legislature still lacked the political will to stop the abuses, but at least voted against making the problem worse. As the initiative campaign developed momentum, the plaintiffs' lawyers fired up front groups which predicted dire lapses in environmental and consumer protection should the measure pass. Our side was accused of "throwing out the baby with the bath water," and a Sierra Club spokesman predicted there would be

"bodies in the street" if the law were changed.

A Big Win on the November 2004 Ballot

Voters approved what became known as Proposition 64, and did so by a wide 59% to 41% margin. There have not been "bodies in the street" or any evidence at all of public harm. Environmental, health, and consumer protection has continued. Opponents tried to portray the Unfair Competition Law as the only public protection tool in the legal kit. With sound research we convinced people otherwise. Most of the major newspapers in the state supported Proposition 64. We addressed Governor Arnold Schwarzenegger's environmental concerns by reviewing the host of federal and state laws unaffected by the initiative, laws that do a better environmental protection job than the UCL. The governor came out in strong support of Proposition 64.

Warning and Lesson for Other States

It's not hard to imagine the ways an unfettered consumer protection law might be used against doctors. A lawyer claims you are not providing adequate information about a prescription drug. Unfair competition. A lawyer claims you are not setting follow-up appointments soon enough. Unfair competition. The sky is the limit when there is no need to document an adverse outcome.

Fortunately, we are not aware of a state law that currently is being warped as badly as California's was pre-Proposition 64. But it would only take a minor legislative tweak or a state appellate court decision to change the situation. Physicians and their associations everywhere need to be watchful and ready to respond if lawyers in their states try to exploit business competition laws to beef up their income stream, particularly in states where it may have been diminished by recently-enacted caps on non-economic damages in medical liability lawsuits.

As we learned in California, early prevention would have been far healthier than our costly, long-delayed cure. ●

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