Catching Up to the California Medical Board: The Dental Board of California May Take Action Against Registered Sex Offenders

Pritee K. Thakarsey

Code Section Affected

Business and Professions Code § 1687 (new).
SB 252 (Aanestad); 2007 STAT. Ch. 13.

I. INTRODUCTION

Dr. Grimmitt, a dentist, was convicted in September 2005 for repeated sexual abuse against multiple female patients.1 One woman testified that Dr. Grimmitt made repeated comments to her about her breasts and, on one occasion, actually caressed her chest.2 Another woman claimed that the dentist placed his hand on her inner thigh.3 Although Dr. Grimmitt was placed on probation for three years for his crimes, his dental license was not revoked.4 The district attorney that prosecuted Dr. Grimmitt continually urged the Dental Board of California (DBC) to revoke his license so that he could not sexually abuse any other patients.5 Unfortunately, Dr. Grimmitt was recently charged again for sexual battery against a female patient.6

Another dentist served two years in a military jail for engaging a child in indecent acts and communications.7 After being released, the dentist moved to California and registered as a sex offender in 2002.8 However, he too was allowed to continue practicing dentistry.9

---

2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
8. Id.
9. Id.
In both cases, the DBC did not have the authority to immediately revoke or deny a dental license to a registered sex offender. Chapter 13, which was sponsored by the DBC, is aimed at resolving this problem.

II. LEGAL BACKGROUND

A. The Dental Board of California (DBC)

The DBC, organized under the umbrella of the Department of Consumer Affairs (DCA), is a consumer protection agency. The Dental Practice Act gives the DBC the power to license practicing dentists and to regulate the practice of dentistry. The DBC has fourteen members who are appointed by the Governor, the Senate Rules Committee, and the Assembly Speaker. Twelve members of the board, including eight dentists, one registered hygienist, one registered dental assistant, and two members of the public, are appointed by the Governor. The Senate Rules Committee, as well as the Assembly Speaker, appoints one public member.

B. Procedures for Revoking Dental Licenses

Existing law allows the DBC to take action against a licensed dentist for a “conviction of a crime substantially related to the qualifications, functions, or duties of a dentist.” However, the DBC’s authority is limited. The DBC may reprimand or place a dentist convicted of a criminal offense on probation. But the DBC may not suspend, revoke, or deny a dentist a license while his or her criminal case is on appeal. Instead, the DBC must wait until either “the judgment of conviction has been affirmed on appeal” or “the time for appeal has elapsed.” As a result, the DBC must continue to issue new licenses and renew existing licenses until a dentist has been convicted of a crime and the criminal

---

10. See CAL. BUS. & PROF. CODE § 1670.1 (West 2003) (lacking any provision that allows the DBC to take action against dentists who are registered as sex offenders).
11. ASSEMBLY COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF SB 252, at 2 (June 12, 2007).
14. Id. § 1601.2 (West 2003).
16. Id.
17. Id.
18. Id. § 1670.1 (West 2003).
19. Id.
20. Id.
21. Id.
22. Id.
appeal has been resolved. The DBC may then hold a time-consuming administrative hearing on the matter. Before Chapter 13, the Dental Practice Act did not contain a provision that would immediately allow the DBC to prohibit registered sex offenders from obtaining or maintaining a dental license.

III. CHAPTER 13

Chapter 13 mandates the DBC to take immediate action against any dentist who has been ordered to register as a sex offender under Penal Code section 290, or the law of any other state, territory, or the military. Not only must the DBC deny a license for the practice of dentistry to any person who is registered as a sex offender, but the DBC must also revoke all California dental licenses from any dentist who is currently registered as a sex offender.

However, Chapter 13 does not pertain to all registered sex offenders. For instance, the DBC is not required to take action against a person who is guilty of a misdemeanor for indecent exposure under Penal Code section 314. Although the DBC is not obligated to pursue action against certain types of registered sex offenders, Chapter 13 allows the DBC, in its discretion, to discipline a licensee who has violated Penal Code section 314.

---

24. Id.; see also ASSEMBLY COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF SB 252, at 2 (June 12, 2007) (“Currently the [DBC] must proceed under a time consuming administrative disciplinary system.”).
26. According to California law, an individual must register as a sex offender if they are convicted of various sexually related crimes including:
   sodomy with a minor, lewd acts with a minor, oral copulation of a minor, forced sexual penetration, kidnapping and rape, assault with the intent to commit rape or sodomy, unlawful intimate touching of a restrained victim, spousal rape, rape of an incapacitated victim, aiding in the prostitution of a minor, aggregated sexual assault of a minor, coerced sexual acts, kidnapping and prostitution of a minor, consensual incest, indecent exposure to a minor, continuous sexual abuse of a minor, possession/distribution/advertisement of child pornography, and sexual exploitation of a child.
   ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 252, at 2 (June 13, 2007); see also CAL. PENAL CODE § 290 (West 1999 & Supp. 2007) (listing persons who must register as sex offenders).
27. CAL. BUS. & PROF. CODE § 1687(a) (enacted by Chapter 13).
28. Id. § 1687(a)(1) (enacted by Chapter 13).
29. Id. § 1687(a)(1)-(2) (enacted by Chapter 13).
30. Id. § 1687(b) (enacted by Chapter 13).
31. Id. § 1687(b)(2) (enacted by Chapter 13).
32. CAL. PENAL CODE § 314 (West 1999).
33. CAL. BUS. & PROF. CODE § 1687(b)(2) (enacted by Chapter 13).
Even after a license is revoked, the DBC may either reinstate or grant a dental license to a person who has been relieved of the duty to register as a sex offender. Chapter 13 specifies that a person may be relieved of the duty to register as a sex offender under Penal Code section 290.5, under other California law, or under the law of the jurisdiction that initially required the person to register as a sex offender.

IV. ANALYSIS

Protecting consumers is the most important service provided by the DBC. With the help of Chapter 13, the DBC can now quickly respond and protect the public’s safety by immediately revoking a dental license from a registered sex offender. The availability of this legal action puts the DBC on par with the California Medical Board (CMB), which is another healing arts board under the DCA. The CMB already has the authority to take action against registered sex offenders. Although laws regulating medical professionals for the most part mirror the laws regulating dentists, there are a few differences. Like Chapter 13, existing law gives the CMB the authority to revoke a medical license from or to refuse a medical license to any physician or surgeon who has been ordered to register as a sex offender. Also, like Chapter 13, a physician or surgeon who is ordered to register as a sex offender for a misdemeanor under Penal Code section 314 will not automatically get his or her license revoked by the CMB. However, unlike Chapter 13, a medical professional whose license has been revoked can petition the superior court for a license reinstatement hearing five years after revocation and three years after termination of parole or probation.

33. Id. § 1687(b)(1) (enacted by Chapter 13).
34. See CAL. PENAL CODE § 290.5 (West 1999 & Supp. 2007) (stating that certain persons required to register under Penal Code section 290 shall be relieved of any further duty to register if that person obtains a certificate of rehabilitation and is not in custody, on parole, or on probation).
35. CAL. BUS. & PROF. CODE § 1687(b)(1) (enacted by Chapter 13).
The DBC’s enforcement section is notified of any licensee who has been convicted of any crimes. Dental Board of California, About the Enforcement Program, http://www.dbc.ca.gov/consumers/enforcement.html (last visited Dec. 9, 2007) (on file with the McGeorge Law Review).
38. CAL. BUS. & PROF. CODE §§ 2221(d), 2232(a) (West 2003 & Supp. 2007).
39. See id. § 2232(c)(1) (allowing a person whose medical license has been revoked to petition for its reinstatement).
40. Id. §§ 2221(d), 2232(a).
41. Id. §§ 2221(d), 2232(a).
42. Id. §§ 2221(e), 2232(c)(1).
43. Id. § 2232(c)(1).
re-file for a subsequent hearing on the same conviction.\textsuperscript{44} A physician or surgeon who has been denied a license must wait three years before reapplying, or one year if the CMB finds, in its discretion, that there is good cause to permit reapplication.\textsuperscript{45}

Although Chapter 13 allows the DBC to better protect the public from sex offenders, Chapter 13 does not give the DBC the authority to automatically revoke a dental license from persons who have been convicted of other crimes.\textsuperscript{46} In those cases, the DBC must wait until either the conviction is affirmed on appeal or the time for an appeal has elapsed.\textsuperscript{47}

\textbf{V. CONCLUSION}

Chapter 13 takes a step toward protecting patients from being treated by convicted sex offenders who practice as healing arts professionals.\textsuperscript{48} The DBC can now take immediate legal action against a dentist who is a registered sex offender.\textsuperscript{49} As a result, patients can be assured that a dentist, like Dr. Grimmitt, will be prohibited from continuing to use the practice of dentistry to sexually abuse patients.

\textsuperscript{44} Id. § 2232(c)(3).
\textsuperscript{45} Id. § 2221(e).
\textsuperscript{46} Id. § 1670.1 (West 2003).
\textsuperscript{47} Id.
\textsuperscript{48} Id. § 1687(a) (enacted by Chapter 13) (allowing the Dental Board of California to revoke the license of certain classes of registered sex offenders).
\textsuperscript{49} Id.
Chapter 17: Giving San Francisco a Leg to Stand on in UCL Actions

Robert Carlin

Code Sections Affected

Business and Professions Code §§ 17204, 17206 (amended).
SB 376 (Migden); 2007 STAT. Ch. 17.

I. INTRODUCTION

Imagine that you own a vehicle that has become inoperable.¹ You cannot find anyone willing to purchase it or even take it off your hands for free.² When you go to dispose of the vehicle, the towing company makes you a seemingly fantastic offer: surrender title of the vehicle to us, and we will tow it free of charge.³ Years later, you are bewildered to discover a bill of several hundred dollars from the towing company for the cost of towing and storing the vehicle you relinquished!⁴ Not willing to spend several times more than the claimed amount in attorney’s fees or risk damaging your credit, you begrudgingly pay the bill.⁵

The above scenario is precisely the sort of situation for which California’s Unfair Competition Law (UCL)⁶ was crafted. California’s UCL empowers the Attorney General of California, district attorneys, and city attorneys of cities with a population over 750,000 to bring an action on behalf of the people against any person engaging in unfair competition.⁷ The City and County of San Francisco have a tradition of defending consumers against unfair competition by unscrupulous businesses.⁸ But with the recent 2006 census data placing San

¹. This hypothetical is loosely based on a press release issued by City Attorney Dennis Herrera’s office. See Press Release, Office of the City Attorney: City & County of S.F., Herrera Moves to Halt City Tow Overcharges (July 28, 2004), http://www.sfgov.org/site/cityattorney_page.asp?id=26658 (on file with the McGeorge Law Review) (describing consumer complaints and allegations related to alleged fraud by a San Francisco towing company).
². Id.
³. Id.
⁴. Id.
⁵. Id. As fate would have it, consumers did not just take this abuse lying down. Id. They contacted San Francisco City Attorney Dennis Herrera and fought back, recovering roughly $340,000. Rachel Gordon, City Tow Storage-Fee Case Settled—Deal Includes Refunds, S.F. CHRON., Nov. 30, 2004, at B4 (discussing the underlying facts of the settlement between the City of San Francisco and City Tow).
⁷. Id. §§ 17204, 17206(a).
Francisco County’s population at 744,000,\(^9\) the San Francisco City Attorney’s standing to bring such actions was in jeopardy.\(^{10}\) Chapter 17 ensures that the City and County of San Francisco will still be able to protect consumers from unfair business practices.\(^{11}\)

## II. LEGAL BACKGROUND

California’s UCL is a “ginormous”\(^{12}\) beast. Although the statute itself is not exceedingly long, there is a plethora of case law that interprets it.\(^{13}\) What follows is a brief, bare bones\(^{14}\) discussion of the UCL, focusing primarily on public prosecution\(^{15}\) by a city attorney.

---


10. Cheryl Miller, Population Control Bill Would End Claim S.F. Too Small for 17200 Suits, S.F. RECORDER, Feb. 6, 2006 (noting that some defendants are beginning to argue that San Francisco lacks standing to bring UCL actions because of its shrinking population).

11. Governor Signs Bill, supra note 8 (“SB 376 removes any uncertainty about the San Francisco City Attorney’s standing in UCL cases . . . .”).

12. If the reader is particularly peeved by the usage of the word “ginormous” to describe the size of the UCL, you have my sympathies. I was equally dismayed to discover my children's frequent usage of it, not to mention its addition to the dictionary. See Adam Gorlick, New Dictionary Includes 'Ginormous,' SFGATE.COM, July 10, 2007, http://sfgate.com/cgi-bin/article.cgi?f=/n/a/2007/07/10/national/a114035D37.DTL&tsp=1 (on file with the McGeorge Law Review) (describing dictionary publisher Merriam-Webster’s adoption of “ginormous,” among other trendy words).

13. For some of the highlights, see Californians for Disability Rights v. Mervyn’s, LLC, 39 Cal. 4th 223, 138 P.3d 207 (2006) (holding that Proposition 64’s amendments to the UCL apply to pending cases); Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 63 P.3d 937 (2003) (holding that restitution was the only monetary remedy authorized under the UCL); Cortez v. Purolator Air Filtration Prods. Co., 23 Cal. 4th 163, 999 P.2d 706 (2000) (holding that improperly withheld wages were an authorized restitutionary remedy in an UCL action); Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 973 P.2d 527 (1999) (setting forth a new test for unfair business practices between competitors); Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal. 4th 553, 950 P.2d 1086 (1998) (holding that the UCL conferred standing on private individuals acting for themselves or the general public, as well as named public officials); Comm. on Children’s Television, Inc. v. Gen. Foods Corp., 35 Cal. 3d 197, 673 P.2d 660 (1983) (holding that plaintiffs stated a cause of action against cereal manufacturer and advertiser for ads promoting sugary cereal for children).


15. The use of the term “public prosecution” refers simply to the fact that the individual “prosecuting” the UCL action is one of the designated public officials having standing to do so, namely “the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.” CAL. BUS. & PROF. CODE § 17203 (West 1997 & Supp. 2008).
A. California’s Unfair Competition Law—A Primer

California’s UCL is a powerful and all-encompassing tool against business wrongdoing and misconduct. It defines unfair competition in a broad, tripartite form, prohibiting (1) “any unlawful, unfair or fraudulent business act or practice,” (2) any “unfair, deceptive, untrue or misleading advertising,” and (3) any act prohibited by California’s False Advertising Law. Any person who engages in unfair competition is subject to liability under this statute.

The unlawful conduct prong of the UCL is arguably the most powerful—it provides a civil cause of action for conduct that violates any “law other than the UCL.” Given the numerous categories of law that have been found to act as predicates for an “unlawful” UCL claim, the scope of “unlawful” conduct is breathtakingly broad. Courts are quite flexible in defining what conduct is actually unfair conduct. Courts have traditionally employed two tests to determine whether conduct is unfair. The first test employs a traditional balancing of the utility of the business practice against the harm inflicted upon the victim. In the second test, the court finds conduct unfair when it “offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.” The California Supreme Court criticized these definitions in the context of a business’ conduct against a competitor, but whether this criticism will apply to unfair conduct by a business against consumers is unclear.

16. Cel-Tech Comm’ns, 20 Cal. 4th at 180, 973 P.2d at 539 (“It governs ‘anti-competitive business practices’ as well as injuries to consumers, and has as a major purpose ‘the preservation of fair business competition.’” (quoting Barquis v. Merchants Collection Ass’n, 7 Cal. 3d 94, 110, 496 P.2d 817, 829 (1972))).


18. Id.

19. Id.; id. §§ 17500-17509 (West 2007).

20. The definition of person is just as broad as the conduct prohibited. “[T]he term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons.” Id. § 17201 (West 1997).


22. See Strickland & Simonetti, supra note 14, at 10 (quoting the California Supreme Court’s statement that the unlawful conduct prong “borrows” violations of other laws).

23. State Farm Fire & Cas. Co. v. Super. Ct., 45 Cal. App. 4th 1093, 1103, 53 Cal. Rptr. 2d 229, 234 (2d Dist. 1996); Strickland & Simonetti, supra note 14, at 10 (citing to California cases that have found the violation of “federal statutes; federal regulations; state statutes; state regulations; local ordinances; prior case law; and standards of professional conduct” as a sufficient basis to state an unlawful claim under the UCL).

24. See Strickland & Simonetti, supra note 14, at 12 (noting that courts have had difficulty in defining “unfair” and discussing the two tests used to define “unfairness”).

25. Id.


27. Strickland & Simonetti, supra note 14, at 12 (citing to several cases that discuss this language).

28. Cel-Tech Comm’ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 185-87, 973 P.2d 527, 543-44 (1999) (criticizing the prior tests and articulating a new test for unfairness in the context of two competitors). The court described the new test for unfairness as follows:

When a plaintiff who claims to have suffered injury from a direct competitor’s “unfair” act or
The unfair advertising prong of the UCL was intended to protect the public from misleading advertising or representations, whether based upon outright falsehoods or simple misrepresentation by the business. However, what constitutes unfair advertising for the purpose of the UCL is currently uncertain. Before the enactment of Proposition 64, a plaintiff only had to show that an advertisement was likely to deceive the general public. Whether this standard will survive or be replaced with a narrow requirement of reliance on the misrepresentation by each plaintiff is a pending question.

A violation of California’s False Advertising Law also constitutes unfair competition under the UCL. This additional prong of the UCL is somewhat less potent than the first two, in part because it requires the plaintiff to show that the defendant knew or through reasonable care should have known the advertisement was misleading.

The three primary types of unfair competition all operate independently; any one type of unfair competition by itself is sufficient to constitute unfair competition. Thus an unfair though perfectly legal act is actionable under the UCL, and the violation of any other law is actionable as unfair competition, even if the conduct is fair. Importantly, all penalties and injunctive relief practice invokes section 17200, the word “unfair” in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Id.

31. See Strickland & Simonetti, supra note 14, at 16 (noting that pending developments in the law may change the current standard that does not require proof of actual reliance into a standard that does).
32. See infra Part ILB (discussing Proposition 64 in greater detail).
33. Strickland & Simonetti, supra note 14, at 16 (noting that before Proposition 64 the UCL did not require “proof of intent, scienter, actual reliance or damages” for conduct to be fraudulent).
34. Id. at 16 (noting that the issue will likely be resolved when the California Supreme Court hears Pfizer v. Super. Ct., 141 Cal. App. 4th 290, 45 Cal. Rptr. 3d 840 (2d Dist. 2006), cert. granted, 51 Cal. Rptr. 3d 707, 146 P.3d 1250 (2006)).
36. Id. § 17500. Courts have, however, granted broad interpretation to the circumstances under which the False Advertising Law applies. Arkin, supra note 30, at 163-64 (“To establish a § 17500 violation, it must be shown that the defendant publicly disseminated advertising which contained the false statements. Both ‘public dissemination’ and ‘advertising’ have been very broadly construed by the courts to include one-on-one oral statements to a single individual and even product labels.”).
37. Podolsky v. First Healthcare Corp., 50 Cal. App. 4th 632, 647, 58 Cal. Rptr. 2d 89, 98 (2d Dist. 1996) (“Because [the UCL] is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent. ‘In other words, a practice is prohibited as “unfair” or “deceptive” even if not “unlawful” and vice versa.” (quoting State Farm Fire & Cas. Co. v. Super. Ct., 45 Cal. App. 4th 1093, 1102, 53 Cal. Rptr. 2d 229, 233 (2d Dist. 1996))).
available under the UCL “are cumulative to each other and to the remedies or penalties available under all other” state laws.\(^{40}\)

A private party “who has suffered injury in fact and has lost money or property as a result of such unfair competition”\(^{41}\) may bring a UCL action for restitution\(^{42}\) or injunctive relief.\(^{43}\) Public officials\(^{44}\) may bring the same actions that private parties can, but on behalf of the general public and without the requisite “proof of harm” requirement.\(^{45}\) These “attorney general” actions may also be brought by public prosecutors against wrongdoers to impose civil penalties.\(^{46}\)

B. Proposition 64–Private Attorney Generals No More

In November of 2004, Californians enacted Proposition 64 through the initiative process.\(^{47}\) The support for this initiative largely grew out of the abuses of the UCL statute by the Trevor Law Group\(^{48}\) and others.\(^{49}\)

to include any ‘unlawful . . . business act or practice,’ the UCL permits violations of other laws to be treated as unfair competition that is independently actionable.” (citation omitted)). But see In re Tobacco Cases II, 41 Cal. 4th 1257, 1265-70, 63 Cal. Rptr. 3d 418, 423-29 (2007) (discussing cases where federal law can preempt the UCL).

\(^{40}\) \textit{CAL. BUS. \\& PROF. CODE} § 17205 (West 1997). Although the remedies the UCL offers are cumulative, it is worth noting that the statute of limitations is “four years after the cause of action accrued.” \textit{Id.} § 17208 (West 1997).

\(^{41}\) \textit{Id.} § 17204 (West 1997 & Supp. 2008). Prior to 2004, California’s UCL authorized any person to act as a “private attorney general” and bring lawsuits against anyone engaging in unfair competition. Unlike most private civil lawsuits, there was no need for a plaintiff to have been injured by the unfair competition–the mere fact of unfair competition by itself could be the basis of a suit. \textit{See infra} Part II.B (discussing the impact that Proposition 64 had on “private attorney general” actions).

\(^{42}\) \textit{STRICKLAND \\& SIMONETTI}, supra note 14, at 28-31 (discussing how California case law has interpreted restitution generally and under the UCL).

\(^{43}\) \textit{Id.} at 34-35 (“Courts have expansive powers to award injunctive relief under the UCL.”).

\(^{44}\) The following public officials may bring UCL actions on behalf of the public: “the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.” \textit{CAL. BUS. \\& PROF. CODE} § 17203 (West Supp. 2007); \textit{see also id. §§ 17204, 17206(a) (stating that the city attorney of a city and county can only bring UCL actions if the city’s population exceeds 750,000).}

\(^{45}\) \textit{CAL. BUS. \\& PROF. CODE} § 17203.

\(^{46}\) \textit{Id.} § 17206(a) (providing that civil penalties are not to exceed $2,500 per violation).


\(^{48}\) The Trevor Law Group employed numerous duplicitous tactics against small auto-repair shops. [T]he firm had a habit in their suits of naming just one repair shop and tens of thousands of Does. A few days after filing or sometimes even on the same day, Trevor Law Group would file dozens of Doe amendments, making it much harder for defendants to know who their codefendants were or to coordinate with them. To save money on filing fees, the firm also lumped in the same lawsuit defendants who were not involved in the same event. When defense attorneys for the shops challenged joinder, the Trevor attorneys just dismissed the dissenting shop to avoid forcing a decision on the issue and risk having the entire suit thrown out. Then they would file an individual suit against them.

When it came time to settle, they really showed their teeth. Numerous stories in the State Bar’s
Before Proposition 64, any individual could bring a UCL action on behalf of the public as a sort of “private attorney general.” There was no need to demonstrate any harm on the part of the plaintiff or the public—only that the defendant had engaged in unfair competition.

Proposition 64 placed “private attorney general” actions in the dustbin of history. Proposition 64 changed the UCL so that a private party must now demonstrate that it “has suffered injury in fact and has lost money or property as a result of such unfair competition.” Furthermore, actions brought by private plaintiffs on behalf of the public must now comply with California’s class action requirements. The ability of public prosecutors to bring UCL actions on behalf of the public was not affected by Proposition 64.

C. An Exception is Made—San Jose is Given a Reprieve

Granting exceptions for UCL standing because of a smaller-than-required city population is not without precedent. In 1988, California’s legislature faced a similar problem with the City of San Jose’s ability to prosecute UCL actions.

49. Kevin Yamamura, Business Law is Targeted Prop. 64: Work to Find a Compromise to Improve the Law has Failed, SACRAMENTO BEE, Oct. 15, 2004, at A3 (describing the shakedown lawsuits brought by the Trevor Law Group and noting how pro-business interests had capitalized on this example); see also Arkin, supra note 30, at 167 (noting the “extensive media coverage of alleged abuses of the Unfair Competition Law”).

50. Arkin, supra note 30, at 166.

51. Id. at 167-68 (explaining that prior to Proposition 64 “traditional standing principles did not apply and there was no transactional nexus required between the plaintiff and the defendant”).


California law previously authorized any person acting for the general public to sue for relief from unfair competition. After Proposition 64, . . . a private person has standing to sue only if he or she “has suffered injury in fact and has lost money or property as a result of such unfair competition.” Id. (citations omitted).

53. CAL. BUS. & PROF. CODE § 17204 (West 1997 & Supp. 2008); see also STRICKLAND & SIMONETTI, supra note 14, at 3 n.14 (collecting cases dealing with the ramifications of Proposition 64).

54. CAL. BUS. & PROF. CODE § 17204; CAL. CIV. PROC. CODE § 382 (West 2004). Although section 382 does not spell out the requirements of a class action, courts “have interpreted [it] to impose the requirements that usually apply in other state and federal courts—commonality, typicality, adequacy of representation and superiority.” STRICKLAND & SIMONETTI, supra note 14, at 4-5.

55. STRICKLAND & SIMONETTI, supra note 14, at 5.

56. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 376, at 3 (June 18, 2007); CAL. BUS. & PROF. CODE § 17204.5 (West 1997).
The Legislature passed legislation enabling San Jose to bring UCL actions, even though its population was below the threshold 750,000 people requirement. The Legislature granted San Jose UCL standing based upon its population nearly reaching 750,000 and the competence of the San Jose City Attorney’s Office.

III. CHAPTER 17

Chapter 17 ensures that the City Attorney of San Francisco will have standing to bring actions under the UCL. Existing law requires that a city and county have a population of over 750,000 for a city attorney to sue under the UCL. Chapter 17 also grants standing to any city attorney of a city and county to pursue injunctive relief or to recover penalty fees under the UCL.

IV. LEGAL ANALYSIS

Chapter 17 is needed to ensure that the City Attorney of San Francisco can continue to bring UCL actions on behalf of the public. San Francisco’s fluctuating population places it in a precarious position when questions of standing arise, giving malfeasant businesses a procedural escape from substantive wrongs. Chapter 17 eliminates any possibility that population size will prevent the San Francisco City Attorney’s Office from bringing UCL actions.

San Francisco City Attorney Dennis Herrera has highlighted the importance of city attorneys bringing UCL actions to police the marketplace. Although he conceded that the UCL was not necessary to pursue actions against business misconduct, he stressed the UCL’s benefits to a city attorney: the ability to focus primarily on the wrongful conduct of the defendant, the deterrence value of being able to bring suit on behalf of the public, powerful injunctive relief and civil penalties.

57. Unlike Chapter 17, San Jose’s population exception was only to apply until the city attained a population of 750,000, at which point San Jose’s UCL standing would be based upon population like any other city. Id. at 3; see also CAL. BUS. & PROF. CODE §§ 17204.5, 17206.5 (West 1997) (codifying the San Jose exception to UCL standing).
58. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 376, at 3-4 (June 18, 2007).
59. Id. at 1.
61. Id. §§ 17204, 17206(a) (amended by Chapter 17).
63. See id. (“San Francisco’s city attorney would lose standing to file such lawsuits, if the city’s population were to drop below 750,000 . . . .”).
64. Governor Signs Bill, supra note 8.
penalties, and the ability to protect both consumers and other businesses from anti-competitive conduct. 66

As one commentator has noted, many of California’s laws do not provide a private right of action against a wrongdoer. 67 Before Proposition 64 was enacted, private groups could bring UCL actions against businesses that violated such laws. 68 Now, such actions can only be brought through public prosecutors, such as the City Attorneys’ Office. 69

The sole opposition to Chapter 17 came from the California Chamber of Commerce. 70 They feared that creating yet another exception to the defenses available to defendants under the UCL would create a precedent for even more exceptions. 71 This fear was apparently strengthened by San Francisco’s “history of establishing ordinances and policies that are particularly burdensome to businesses.” 72 While businesses are understandably concerned with expanding litigation, it appears that such fears of burdensome litigation may not be entirely unfounded. 73 On the other hand, it is not clear that the City Attorney of San Francisco has ever utilized the UCL in an abusive manner. 74

V. CONCLUSION

The enactment of Chapter 17 guarantees San Francisco’s ability to continue bringing UCL actions to police the marketplace and protect the public from unfair competition. 75 In the wake of Proposition 64’s eradication of “private attorney general” UCL actions, the need for public prosecutions is more

66. Id. at 4-5.

67. Arkin, supra note 30, at 169 (“There are numerous state environmental laws and privacy laws . . . that provide no private right of action.”).

68. Id. at 167.

69. Id. at 168-69.

70. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 376, at 4 (June 18, 2007). One commentator has argued that even after the passage of Proposition 64, the UCL is still in need of serious remedial treatment. See Eugene S. Suh, Comment, Stealing from the Poor to Give to the Rich? California’s Unfair Competition Law Requires Further Reform to Properly Restore Business Stability, 35 Sw. U. L. Rev. 229, 246-51 (2006) (arguing that the UCL is duplicative of existing statutes and, in its current form, does not serve the interests of consumers).

71. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 376, at 4 (June 18, 2007).

72. Id.; see also SMALL BUS. COMM’N, GETTING A BUSINESS STARTED: A GUIDE TO DOING BUSINESS IN SAN FRANCISCO (2003), http://www.ci.sf.ca.us/site/uploadedfiles/bus_start/21_GettingBusStarted.pdf (on file with the McGeorge Law Review) (discussing what the guide itself refers to as the “‘maze’” of rules and regulations businesses must comply with in San Francisco).

73. See Justin Scheck, Plaintiff Lawyers Hunt for Partners Needing Public Faces for Private AG Lawsuits, Lawyers Turn on Das, City Attorneys, S.F. Recorder, Feb. 25, 2005 (describing that while most district attorneys are shy about partnering up with private lawyers, many city attorneys do not share the same apprehension).

74. Let S.F. Enforce Consumer Rights, supra note 62 (“In a letter to legislators in opposition to SB376, the California Chamber of Commerce offered not a single example of the city attorney’s abuse of this law.”).

75. Governor Signs Bill, supra note 8.
imperative now than ever.\textsuperscript{76} The San Francisco City Attorney’s Office may not be capable of eradicating business misconduct altogether, but by punishing the fraudulent conduct of tow truck companies and others, the Office lets malfeasant businesses know that all businesses must operate within the law when doing business in the City by the Bay.

\textsuperscript{76} Let S.F. Enforce Consumer Rights, supra note 62.

California voters approved Proposition 64 to cut back the ability of individuals, who were not personally damaged by an unfair business practice, to sue companies under the law. That measure, which we supported, was intended to stop the “shakedown lawsuits” that were being peppered against businesses such as auto dealers and nail salons. Proponents of 64 argued that the enforcement of such laws should be handled by the attorney general, district attorneys and city attorneys of major municipalities . . . .

\textit{Id.}
All Dried Up: Summer Holiday Prohibition on the Lower American River

Isaac T. Bacher

Code Section Affected
Business and Professions Code § 25608.5 (new).
AB 951 (Jones); 2007 STAT. Ch. 19 (Effective June 28, 2007).

I. INTRODUCTION

Brian Haight was nineteen years old, an only child, and preparing for his sophomore year at the University of California, Berkeley.¹ Kendall Lui was eighteen years old, an economics major at the University of California, San Diego, and “a disciplined dancer.”² After a day of floating down the American River on the Fourth of July, 2006, the two college students and two other friends got into a car with their designated driver Michael Dimitras.³ Speeding down Folsom Boulevard at approximately seventy miles per hour, Dimitras, whose blood alcohol level was above the 0.08 legal limit, lost control of the car and crashed into a utility pole, killing Brian and Kendall.⁴ Dimitras, “charged with two counts of vehicular manslaughter without gross negligence, and with driving under the influence causing great bodily injury,” faces up to eight years and four months in state prison.⁵

During that tragic weekend, Brian, Kendall, and Dimitras were among a record-setting 10,000 people who floated down the stretch of the American River between the Hazel Avenue and Watt Avenue bridges.⁶ It is estimated that “roughly 5,000-6,000 people rafted down [the] 13-mile river stretch [during the] Memorial and Labor Day holidays” in 2006.⁷ Although nobody has drowned during one of these busy weekends, many believe that the river has become an increasingly dangerous place.⁸ As one supporter of Chapter 19 explained, “[n]ot only are many too drunk to stand, let alone walk or drive, many of those who are able to still function resort to attacks on other—often innocent—rafters, fight

---

². Id.
³. Id.
⁴. Id.
⁵. Id.
⁶. Letter from Don Nottoli et al., Chairman, Sacramento County Bd. of Supervisors, to Arnold Schwarzenegger, Cal. State Governor (June 18, 2007) [hereinafter Nottoli Letter] (on file with the McGeorge Law Review).
⁷. Id.
among themselves, remove their clothing, and defecate and urinate on the river banks.⁹ Beginning as a fun holiday celebration, floating down the American River can quickly devolve into a dangerous, alcohol-fueled melee; one that has claimed the lives of two bright young college students.¹⁰

II. LEGAL BACKGROUND

In 1933, the era of Prohibition came to an end with the enactment of the Twenty-First Amendment to the U.S. Constitution.¹¹ After the repeal of prohibition, states retained the power to create laws to regulate the sale and distribution of alcoholic beverages.¹² In California, the Legislature established the Department of Alcoholic Beverage Control¹³ (ABC) and entrusted it with the responsibility of enforcing the provisions of the ABC Act.¹⁴

The ABC Act makes it illegal to “operate any vessel¹⁵ or manipulate water skis, an aquaplane, or a similar device while under the influence of an alcoholic beverage.”¹⁶ For recreational vessels,¹⁷ this means a blood alcohol concentration¹⁸ (BAC) of 0.08 percent or greater.¹⁹ For non-recreational vessels, under the influence means a BAC of 0.04 percent or greater.²⁰ A violation of either provision carries a first-offense penalty of up to a $1000 fine, six months in county jail, or both.²¹ For the second violation within seven years, the penalty

---

⁹. Letter from Warren V. Truitt, President, Save the Am. River Ass’n, Inc. (SARA), to Assembly Member Dave Jones, Cal. State Assembly (Mar. 1, 2007) (on file with the McGeorge Law Review); see Bill Lindelof, First-Aid Skill Put to the Test: Effie Yeaw Nature Workers Help Rafters Hurt in July 4 Rock-Throwing Fight, SACRAMENTO BEE, July 13, 2006, at G1 (telling the story of a violent rock-throwing fight where ten people were hit in the head with rocks).
¹⁰. See Hedlund, supra note 1 (telling the tragic story of the death of Brian Haight and Kendall Lui); Lindelof, supra note 9 (telling the story of a violent rock-throwing fight where ten people were hit in the head with rocks).
¹¹. See U.S. CONST, amend. XXI, § 1 (repealing the Eighteenth Amendment to the U.S. Constitution); U.S. CONST. amend. XVIII, § 1 (making the “manufacture, sale or transportation of intoxicating liquors” within the U.S. illegal).
¹². See U.S. CONST. amend XXI, § 1 (repealing the Eighteenth Amendment, which had been the sweeping ban on all alcoholic beverages known as Prohibition); U.S. CONST. amend. X (reserving to the states or the people all powers “not delegated to the United States by the Constitution, nor prohibited by it to the States”).
¹⁴. See id. § 23049 (West 1997).
¹⁵. See CAL. HARB. & NAV. CODE § 651(aa) (West 2001) (defining vessel to “include[] every description of watercraft used or capable of being used as a means of transportation on water”).
¹⁶. Id. § 655(f).
¹⁷. See id. § 651(t) (defining recreational vessel to “mean[] a vessel that is being used only for pleasure”).
¹⁸. See id. § 651(b) (defining alcohol concentration to “mean[] either grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath”).
¹⁹. Id. § 655(c).
²⁰. Id. § 655(d).
²¹. Id. § 668(e).
increases to a combination of any of the following: up to a $1000 fine, one year in jail, or eighteen to thirty months in a state licensed rehabilitation program. The State of California grants cities and counties the power to prohibit the possession of open containers of alcoholic beverages without a license in any city or county owned public place. Sacramento approved one such resolution, making it illegal to possess an open alcoholic beverage along the banks of the American River without a license. According to both state and local law, possessing an open container in a public place without a license from the ABC Board is punishable as an infraction.

Faced with the problem of rowdy river rafters, California is not the first state to ban alcohol from one of its rivers. In Idaho, officials “[f]aced with a similar situation” banned alcohol on the Boise River in 2005. The city has since issued fewer alcohol citations, and the “[p]olice get fewer calls for fights and public nudity.” According to one source, rafting down the Boise River has since “been voted by residents as the city’s ‘Best Family Recreational Destination.” Oregon has not gone so far as to ban alcohol on the water, but it has enacted a temporary ban along the Clackamas River in Barton and Carver parks in response to problems with drunken rafters’ behavior once they have migrated ashore. Texas also passed ordinances last year “to clamp down on rowdy tubers[,] . . . limit the size of coolers allowed on the rivers, prohibit alcohol consumption in some riverside parks, and ban Jell-O shots and beer bongs on the rivers.”

22. Id. § 668(f). The penalty for the second offense within seven years is also triggered if the first offense was vehicular manslaughter, grossly negligent driving, or driving an automobile while under the influence. Id.


25. See CAL. GOV'T CODE § 36900(a) (West 1988 & Supp. 2007) (“Violation of a city ordinance is a misdemeanor unless by ordinance it is made an infraction.”); SACRAMENTO, CAL., SACRAMENTO CITY CODE § 9.04.055(E) (“Unless another penalty is specified in state law, any person violating this section shall be guilty of an infraction.”). An infraction is punishable by up to a $100 fine for the first offense, up to $200 for the second offense within one year, and up to $500 for each additional offense within the same year. CAL. GOV'T CODE § 36900(b).

26. See Editorial, Deter River Drunkfests, SACRAMENTO BEE, June 20, 2007, at B6 (explaining a similar alcohol ban enacted in Idaho with regard to the Boise River).

27. Id.

28. Id.

29. Id.


Chapter 19 is an urgency measure designed to ban alcohol “on the portion of the Lower American River . . . from the Hazel Avenue Bridge to the Watt Avenue Bridge.” Chapter 19 makes it an infraction to possess an open or closed container of alcohol while floating down the specified part of the river in a nonmotorized vessel. The alcohol ban is enforceable only “during the summer holiday periods that the Sacramento County Board of Supervisors prohibits the consumption or possession of an open alcoholic beverage container on the land portions along the river.”

IV. ANALYSIS

Essentially, Chapter 19 increases the power of the Sacramento County Board of Supervisors by extending the alcohol ban from the land out into the water. In doing so, Chapter 19 creates a new infraction within the meaning of section 17556 of the Government Code. Without the new measure, the power of the Sacramento County Board of Supervisors to ban alcohol ended at the American River’s shoreline because “[t]he state as sovereign retains continuing supervisory control over its navigable waters and the lands beneath those waters.” Chapter 19 was designed specifically to “close this loophole.”

32. 2007 Cal. Stat. ch. 19, § 4 (“[D]ue to the problem of consumption of alcohol during certain summer holiday periods[,] . . . it is necessary for this act to take effect immediately.”).
33. CAL. BUS. & PROF. CODE § 25608.5(a) (enacted by Chapter 19).
34. See CAL. GOV’T CODE § 25132(b) (West 2003 & Supp. 2007) (defining the potential penalties for an infraction).
35. CAL. BUS. & PROF. CODE § 25608.5(b) (enacted by Chapter 19) (defining container to mean a “bottle, can, or other receptacle”).
36. Id. § 25608.5(a), (c) (enacted by Chapter 19).
37. Id. § 25608.5(a) (enacted by Chapter 19).
38. See id. (creating an alcohol ban on the water, an area over which the state has exclusive jurisdiction).
39. 2007 Cal. Stat. ch. 19, § 3; see also CAL. GOV’T CODE § 17556(g) (West 1995 & Supp. 2007) (explaining that the state shall not pay mandated costs when enacting a law that creates a new crime or infraction).
40. See SENATE COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 951, at 3 (May 22, 2007) (“T]he County resolution does not prevent an individual from carrying an alcoholic beverage to the river in a closed container and then consuming that beverage in a non-motorized vessel on the river.”).

In response to past violent behavior that has occurred during the three holiday weekends, last summer the County adopted a resolution banning open containers of alcohol, or its consumption, along portions of the American River Parkway “shoreline” where rafting occurs between the Hazel Avenue Bridge and the Watt Avenue Bridge during the three summer holidays.

However, the state has jurisdiction over alcohol on the waterway itself.

Id.

42. SENATE COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 951, at 3 (May 22, 2007).
Chapter 19 was passed as an urgency measure because supporters adamantly wanted to ban alcohol on the American River in time to prevent another Fourth of July tragedy. While they were successful in banning alcohol in time for the Fourth of July, the language used by Chapter 19 may not be specific enough to include Memorial Day weekend.

By grouping together Memorial Day, Labor Day, and the Fourth of July under the label “summer holiday periods,” Chapter 19 may have no effect on Memorial Day weekend because it is a holiday that does not fall in the summer season. Summer generally consists of “the period between the summer solstice (year’s longest day), June 21 or 22, and the autumnal equinox ([when the] day and night [are] equal in length), September 22 or 23” in the Northern Hemisphere. Since Memorial Day always falls on the last Monday of May, one could argue that it is not a “summer holiday” within the meaning of Chapter 19. However, the Senate Committee on Governmental Organization indicated Memorial Day is to be included in the term “summer holiday.” Still, Memorial Day is technically more than two weeks before the first day of the summer season. Moreover, the rule of lenity, a rule of statutory construction, generally requires that ambiguities in criminal statutes be resolved in favor of the defendant.

While multiple states have faced similar problems, California’s approach seems to have had at least some success in reducing the chaos this past Fourth of July. Although some alcohol was confiscated by the police, “[m]ost offenders

43. See Nottoli Letter, supra note 6 ("The bill contains an urgency clause in hopes that the bill can become law by the upcoming 4th of July weekend.").
44. CAL. BUS. & PROF. CODE § 25608.5(a) (enacted by Chapter 19).
47. See 36 U.S.C.A. § 116(a) (West 2001) (“The last Monday in May is Memorial Day.”). As an interesting aside, several attempts have been made to restore the traditional day of observance of Memorial Day to May 30th. See, e.g., S. 70, 110th Cong. § 1(a) (2007).
48. See CAL. BUS. & PROF. CODE § 25608.5(a) (enacted by Chapter 19) (prohibiting possession of alcoholic beverages during the "summer holiday periods").
49. See COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 951, at 3 (May 22, 2007) (“This measure . . . [applies] during the three-day Memorial Day, Fourth of July and Labor Day weekends.”).
50. Compare 36 U.S.C.A. § 116(a) ("The last Monday in May is Memorial Day.") with Summer, supra note 46 (explaining that the summer season begins at the summer solstice on either June 21 or 22).
51. People v. Canty, 32 Cal. 4th 1266, 1277, 90 P.3d 1168, 1173 (2004) ("[U]nder the traditional 'rule of lenity,' language in a penal statute that truly is susceptible of more than one reasonable construction in meaning or application ordinarily is construed in the manner that is more favorable to the defendant.").
52. See Mark Hedlund, River Booze Ban Calms Holiday Waters, NEWS10 ABC, July 4, 2007, http://www.news10.net/display_story.aspx?storyid=29899 (on file with the McGeorge Law Review) (claiming that the river was not as rowdy as usual and that the total number of people was reduced by up to fifty percent).
were simply given a warning and lost their alcohol."\textsuperscript{53} This brings into question the assertion by some that the additional cost to enforce this new law would be offset by revenue from fines.\textsuperscript{54} It is possible that the river will continue to be policed during major holiday weekends without generating revenue. However, it is equally plausible that the police went out of their way to be lenient this past Fourth of July because the law was new and the general public may not have been aware of it. Even if offsetting fees are not collected, creating a family friendly environment on the river may be a price taxpayers are happy to pay.\textsuperscript{55}

V. CONCLUSION

Although it is unclear whether the language of Chapter 19 applies to Memorial Day weekend, at least the Senate Committee on Governmental Organization clearly supports its inclusion within the term “summer holiday periods.”\textsuperscript{56} Less clear is whether or not fees collected for future infractions will offset the cost to enforce the law. Regardless, the American River is likely to be a safer place during summer holidays for years to come.\textsuperscript{57} Unfortunately for Brian Haight and Kendall Lui, Chapter 19 came one year too late.

\begin{small}
\begin{enumerate}
\item \textsuperscript{53} Id.
\item \textsuperscript{54} See \textsc{Assembly Floor, Committee Analysis of AB 951}, at 2 (June 18, 2007) (“According to the Assembly Appropriations Committee, potential non-reimbursement costs for enforcement offset by revenue for fines.”).
\item \textsuperscript{55} See Hedlund, \textit{supra} note 52 (quoting a comment from one man who brought his kids to the river on the Fourth of July because he heard that the alcohol ban was going to be in enforced).
\item \textsuperscript{56} See \textsc{Senate Committee on Governmental Organization, Committee Analysis of AB 951}, at 3 (May 22, 2007) (“This measure . . . [applies] during the three-day Memorial Day, Fourth of July and Labor Day weekends.”).
\item \textsuperscript{57} See Hedlund, \textit{supra} note 52 (noting that there were half as many people on the American River in 2007 in comparison to 2006 and that those who were there were much less rowdy).
\end{enumerate}
\end{small}