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PERSPECTIVE

The Scope of District Attorney's Ability to Pursue a UCL Claim

By Nancy Harris

The California 4th District Court of Appeal has issued an opinion that foretells new litigation strategies for all parties in Unfair Competition Law cases, investigations and settlements that are pursued by California district attorneys and city attorneys. The most powerful aspects of the court's holding are that a local prosecutor suing under the UCL (1) may only seek monetary relief for conduct occurring within the county or city where he or she serves and (2) lacks jurisdiction to pursue state-wide monetary remedies, absent the California attorney general's involvement.

While public prosecutors and attorneys representing targets of UCL investigations have been awaiting answers to these key questions for many years, the court left a few additional questions unanswered. The court's limitations on the jurisdictional scope of a local prosecutor's authority may have profound ramifications for UCL practice.

Abbott Labs' Guidance

In *Abbott Laboratories v. Superior Court*, 2018 DJDAR 5247 (May 31, 2018), the Orange County district attorney alleged that Abbott Labs and four other pharmaceutical companies schemed to keep generic versions of a prescription drug off the market in violation of California's Unfair Competition Law. The district attorney brought the action on behalf of the "People of the State of California" and sought an injunction, restitution and civil penalties.

The defendants moved to strike allegations in the complaint that sought to recover penalties and restitution for each sale of the drug in California, on the ground that a district attorney may only seek monetary recovery for violations within his or her county. The trial court denied the motion to strike.

The pharmaceutical companies took the issue up on a writ and the Court of Appeal reversed. The appellate court held that the attorney general, as the state's "chief law officer," is vested with the power to prosecute UCL matters on behalf of the "People" of the entire state. It found that the jurisdiction of district attorneys, who are supervised by the AG, to pursue penalties and restitution for violations of the UCL is limited to violations that occurred within their specific county. The court noted that to allow a district attorney to seek and recover restitution and civil penalties for violations outside his or her elected jurisdiction "would permit the District Attorney to usurp the Attorney General's statewide authority and impermissibly bind his sister district attorneys, precluding them from pursuing their own relief."

In short, the court found that one district attorney or even a group of district attorneys may not sue for monetary relief on violations outside of the jurisdictions that they collectively represent.

Inconclusive Guidance Prior to Abbott Labs

Before *Abbott Labs*, to find state court guidance on the limits of the local prosecutors' authority

to pursue UCL state-wide relief, one needs to reach back nearly 40 years to *People v. Hy-Lond Enterprises, Inc.*, 93 Cal. App. 3d 734, 751 (1979), a 1st District Court of Appeal decision.

Hy-Lond involved an action brought by the Napa County district attorney against a nursing home operator who ran nursing facilities in 12 counties. The Napa district attorney settled the action against the operator on terms that involved an affirmative injunction with ongoing compliance obligations and a financial payment to Napa County. The attorney general objected that the injunctive provisions interfered with its oversight authority over nursing facilities but the trial court denied the attorney general's motion to intervene.

On appeal, the *Hy-Lond* court held that the settlement exceeded the district attorney's enforcement authority because it infringed on other prosecutors' enforcement authority under California's UCL as well as its False Advertising Law.

However, because the attorney general's objection focused primarily on the validity of the injunctive terms of the settlement between the nursing facility and Napa County, *Hy-Lond* did not provide a completely satisfactory answer on the question of the scope of a local prosecutor's authority to pursue penalties and restitution across county lines and throughout the state.

Abbott Labs provides an explicit answer, at least for the 4th District, that a district attorney's UCL enforcement authority does not extend beyond that district attorney's territorial jurisdiction.

Practical Realities of for Multi-jurisdictional Actions

For consumer protection cases involving wide-spread impact, district and city attorneys often form ad hoc task forces to investigate violations and file UCL enforcement actions. However, these multijurisdictional cases involving groups of district and city attorneys typically only include a small number of prosecutors and rarely involve the attorney general.

Of course, local prosecutors have an incentive to keep enforcement actions local. When the attorney general brings a UCL action, half of the civil penalties awarded/collected are paid into the state's general fund and half are paid to the county in which the action was filed. However, in actions brought by a district attorney, all of the collected civil penalties are paid to the county's treasury. When a group of district attorneys brings an action or obtains a settlement together, the counties typically split the penalties pursuant to a joint prosecution agreement.

Scores of local prosecutors in California have authority to pursue claims under the UCL. In some cases, there may be multiple distinct or overlapping district attorney groups pursuing similar types of cases against different defendants. While this semi-coordinated pursuit by the district attorneys of consumer protection cases likely results in far more enforcement actions than could be practically pursued by the attorney general, it injects the potential for inconsistent treatment of similarly situated defendants and a lack of transparency — particularly as to monetary resolutions.

Res Judicata Challenges of Multijurisdictional Actions

The prospect of inconsistent treatment interacts with concepts of res judicata. The issue of the collateral estoppel/res judicata effect of a negotiated settlement and consent judgment as against the attorney general and the district attorneys who do not sign onto a settlement has long been an opaque issue. To date, there was no California case law affirmatively holding that a resolution with one county would have a res judicata impact for future actions from the same conduct by a different prosecutor.

Although the district attorneys purport to resolve cases on behalf of the entire state and include statewide violations in penalty calculations, there remains uncertainty as to the true res judicata effect of those settlements. Typically, these district attorney

groups ask defendants to rely upon an informal “comity” that exists among the district attorneys. However, defendants have little to no insight into the nature and durability of that comity and no contractual guarantee that they can enforce a settlement judgment vis-à-vis a local prosecutor who determines that he or she is not bound by comity.

Implicit in such settlements is the understanding that entering into a consent judgment with one group of local prosecutors will resolve the entirety of claims arising from the alleged violations state-wide, even in the absence of attorney general-sign-on. *Abbott Labs* injects further uncertainty into those settlements and into the district attorneys’ current process for managing consumer protection cases with state-wide impact, at least without the attorney general’s involvement.

Abbot Labs’ Unanswered Questions

Abbott Labs is the first in a set of anticipated cases in other appellate districts addressing the issue of the scope of local prosecutor authority to seek monetary relief for a statewide violations of the UCL. If other courts follow the majority in *Abbott Labs*, the analysis may have long-range impact on how defendants respond to district attorney investigations and the terms on which settlement is feasible for defendants. For instance, in a typical investigation, a district attorney task force will seek state-wide information from a defendant that allows the district attorney to calculate potential penalties on a state-wide basis and to use those, often astronomical figures, to encourage settlement.

Defendants will need to carefully consider whether such

demands from prosecutors are well-grounded in the law. Relatedly, retailers and manufacturers that sell services and products throughout California must assess whether to agree to pay penalties and restitution to settle a UCL investigation if that action does not involve attorney general-sign on.

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