

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2023-2024 Regular Session**

AB 1366 (Maienschein)  
Version: April 5, 2023  
Hearing Date: June 27, 2023  
Fiscal: Yes  
Urgency: No  
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**SUBJECT**

Unfair competition and false advertising: disgorgement

**DIGEST**

This bill authorizes the Attorney General to seek the remedy of disgorgement in actions brought pursuant to California's Unfair Competition Law or False Advertising Law. Such amounts may be used to provide restitution to victims in other actions, as provided.

**EXECUTIVE SUMMARY**

Unfair business practices encompass fraud, misrepresentation, and oppressive or unconscionable acts or practices by businesses, often against consumers. In California, individuals and specified governmental agencies are authorized to bring civil actions for unfair competition and false advertising and to recover civil penalties or injunctive relief pursuant to the Unfair Competition Law (UCL), Business and Professions Code Section 17200 et seq., and the False Advertising Law (FAL), Business and Professions Code Section 17500 et seq. Specified public prosecutors, including the Attorney General, are authorized to seek civil penalties, restitution, and injunctive relief.

Despite these remedies, in certain cases, the Attorney General may secure an award of restitution for victims, but the defendant is unable to satisfy the judgment, leaving the consumers without an adequate remedy. This bill allows only the Attorney General to seek disgorgement in actions brought pursuant to the UCL or FAL. This remedy allows the Attorney General to force violators to give up any profits from their wrongdoing. These funds are then made available for consumers in other UCL or FAL actions brought by the Attorney General that are awarded restitution, but where the defendant is unable to pay it.

The bill is sponsored by Attorney General Rob Bonta. There is no known support or opposition.

**PROPOSED CHANGES TO THE LAW**

Existing law:

- 1) Establishes the Unfair Competition Law (UCL), which provides a statutory cause of action for any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising, including over the internet. (Bus. & Prof. Code § 17200 et seq.)
- 2) Establishes the False Advertising Law (FAL), which proscribes making or disseminating any statement that is known or should be known to be untrue or misleading with intent to directly or indirectly dispose of real or personal property. (Bus. & Prof. Code § 17500 et seq.)
- 3) Defines “unfair competition” to mean and include any unlawful, unfair, or fraudulent business act or practice and any unfair, deceptive, untrue, or misleading advertising, and any act prohibited by the False Advertising Law, Business and Professions Code section 17500 et seq. (Bus. & Prof. Code § 17200.)
- 4) Provides that any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. (Bus. & Prof. Code § 17203.)
- 5) Requires actions for relief pursuant to the UCL be prosecuted exclusively in a court of competent jurisdiction and only by the following:
  - a) the Attorney General;
  - b) a district attorney;
  - c) a county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance;
  - d) a city attorney of a city having a population in excess of 750,000;
  - e) a county counsel of any county within which a city has a population in excess of 750,000;
  - f) a city attorney in a city and county;
  - g) a city prosecutor in a city having a full-time city prosecutor in the name of the people of the State of California upon their own complaint or upon the complaint of a board, officer, person, corporation, or association with the consent of the district attorney; or
  - h) a person who has suffered injury in fact and has lost money or property as a result of the unfair competition. (Bus. & Prof. Code § 17204.)
- 6) Provides that any person who engages, has engaged, or proposes to engage in unfair competition is liable for a civil penalty not to exceed \$2,500 for each violation. The court shall impose a civil penalty for each violation. In assessing the amount of the civil penalty, the court shall consider any one or more of the

relevant circumstances presented by any of the parties to the case, including the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth. (Bus. & Prof. Code § 17206.)

- 7) Provides remedies for individuals who have suffered damages as a result of fraud or deceit, including situations involving fraudulent misrepresentations. (See Civil Code §§ 1709-1710, 1572-1573.)

This bill:

- 1) Authorizes the Attorney General, in an action brought pursuant to the UCL or FAL, and in addition to the remedies provided for in those statutes, to obtain the remedy of disgorgement.
- 2) Requires funds recovered to be deposited into the Victims of Consumer Fraud Restitution Fund (the Fund), which the bill establishes in the State Treasury.
- 3) Authorizes funds in the Fund, upon appropriation by the Legislature, to be used by the Attorney General to provide restitution to victims of acts or practices for which consumer restitution has been ordered but not paid in an action brought by the Attorney General pursuant to the UCL or FAL.
- 4) Authorizes the Attorney General to promulgate regulations in furtherance of this section.

### COMMENTS

#### 1. California's consumer protection laws

The Legislature has long considered consumer protection to be a matter of high importance. State law is replete with statutes aimed at protecting California consumers from unfair, dishonest, or harmful market practices. These consumer-protection laws authorize consumers to enforce their own rights and seek remedies to make them whole.

The UCL (Bus. & Prof. Code § 17200) provides remedies for "anything that can properly be called a business practice and that at the same time is forbidden by law." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 [citations omitted].) The UCL provides that a court "may make such orders or judgments . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." (Bus. & Prof. Code § 17203; see also *Korea Supply Co. v. Lockheed Martin*

*Corp.* (2003) 29 Cal.4th 1134, 1146 [“An order for restitution, then, is authorized by the clear language of the [UCL.”]]). The law also permits courts to award injunctive relief and, in certain cases, to assess civil penalties against the violator. (Bus. & Prof. Code §§ 17203, 17206.)

The FAL proscribes making or disseminating any statement that is known or should be known to be untrue or misleading with intent to directly or indirectly dispose of real or personal property. (Bus. & Prof. Code § 17500 et seq.) Violators are subject to a civil penalty not to exceed \$2,500 for each violation in an action brought by the Attorney General or by any district attorney, county counsel, or city attorney. (Bus. & Prof. Code § 17536.) Similar to the UCL, the FAL provides that a person may bring an action for an injunction or restitution if the person has suffered injury in fact and has lost money or property as a result of a violation of the FAL. (Bus. & Prof. Code § 17535.)

## 2. Providing a new tool to the Attorney General inuring to the benefit of consumers

The purpose of the UCL is to combat and prevent the use or employment by any person of any practice which constitutes unfair competition. The law provides for civil penalties and whatever other relief is necessary to effectuate its purpose. In addition, the UCL currently grants certain government entities the ability to prosecute such actions.

However, in some cases, the public prosecutor may secure an award of restitution for consumers but the defendant is unable to satisfy such judgments. Therefore, consumers are unable to be made whole. However, in other cases, wrongdoers may have benefited and made profit off of their unfair or unlawful practices and the judgment may not fully recover such funds.

A recent article lays out the problem:

In November 2022, the California attorney general’s office secured a \$20 million judgment against Paul Blanco’s Good Car Co., a network of auto dealerships, over hundreds of thousands of false advertising and other consumer protection law violations.

In fall of 2016, a multistate judgment against USA Discounters for defrauding military service members with high-interest loans and hidden fees should have resulted in \$7 million in debt relief for 4,000 California victims.

Earlier that year, the for-profit Corinthian Colleges was hit with a \$1.1 billion judgment for its predatory marketing and lending tactics.

But in all of these cases, the actual consumers harmed by these businesses' shady practices saw little to none of the compensation. That's because despite the attention-grabbing numbers, oftentimes the companies in question go bankrupt, leaving people with little recourse and disappointing results.<sup>1</sup>

This bill solves this problem by making available the remedy of disgorgement. Disgorgement is a remedy requiring a party who profits from illegal or wrongful acts to give up any profits they made as a result of that illegal or wrongful conduct. The purpose of this remedy is to prevent unjust enrichment and make illegal conduct unprofitable. While UCL and FAL actions can be brought by a wide array of public prosecutors, disgorgement can only be sought by the Attorney General.

The bill requires any funds received through this new remedy to be placed into the Fund, which is created by the bill. Upon appropriation, the Attorney General can then draw monies from the Fund to award to consumers that were granted restitution through actions brought by the Attorney General in separate UCL or FAL actions but where such restitution was not or was unable to be paid by a defendant.

The structure established by this bill is not unprecedented, with states such as Arizona authorizing their Attorney General to seek disgorgement in similar actions. In fact, California already authorizes this remedy in connection with state enforcement of consumer protection laws. AB 1864 (Limon, Ch. 157, Stats. 2020) authorized the Department of Financial Protection and Innovation (DFPI), which oversees financial institutions and financial services, to seek disgorgement in enforcing a different law, the California Consumer Financial Protection Law (CCFPL). The law authorizes DFPI to bring an enforcement action against any covered person or service provider who engages in unlawful, unfair, deceptive or abusive practices with respect to consumer financial products and services. DFPI is authorized to seek specified relief including disgorgements. Recovered funds are placed in a separate Financial Protection Fund to be used for DFPI's administration of the CCFPL.

### 3. Stakeholder positions

According to the author:

In order to ensure that there is a source of funding to help make whole victims who otherwise might go uncompensated because of the inability of the defendant to pay restitution, AB 1366 would establish a new Victims of Consumer Fraud Restitution Fund in the state Treasury.

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<sup>1</sup> Marisa Endicott, *New California law would compensate consumer fraud victims stiffed by shady companies* (April 12, 2023) The Press Democrat, <https://www.northbaybusinessjournal.com/article/news/new-california-law-would-compensate-consumer-fraud-victims-stiffed-by-shady/> [as of June 21, 2023].

The new Victims of Consumer Fraud Restitution Fund would be funded from the ill-gotten gains of businesses that violate California's consumer protection laws, rather than through taxes or fees charged to law abiding businesses. Specifically, AB 1366 would authorize the Attorney General to seek the remedy of disgorgement in actions brought under the existing Unfair Competition Law (UCL) and False Advertising Law (FAL), two of the cornerstone consumer protection laws in California. Unlike the existing and [complementary] remedies in these laws, disgorgement aims to deter wrongdoing by preventing the wrongdoer from retaining ill-gotten gains from its illegal conduct.

Under AB 1366, funds in this new Restitution Fund may, upon appropriation of the Legislature, be used by the Attorney General to provide restitution to fraud victims for which consumer restitution has been ordered but not paid in an action brought by the AG under the UCL or FAL.

Attorney General Rob Bonta, the sponsor of this bill, writes:

In order to ensure that there is a source of funding to help make whole victims who otherwise might go uncompensated because of the inability of the defendant to pay restitution, AB 1366 would establish a new Victims of Consumer Fraud Restitution Fund in the state Treasury.

AB 1366 follows the example set at the federal level by the Dodd-Frank Act, which addressed this problem by creating a fund that the Consumer Financial Protection Bureau can use to pay such victims (12 US Code § 5497(d)(2)). It would supplement funds, like the Student Tuition Recovery Fund, Client Security Fund, and the Secretary of State's Victims of Corporate Compensation Fund, that use fee revenue to provide restitution to victims of certain types of misconduct at a state level.

Under AB 1366, the new Victims of Consumer Fraud Restitution Fund would be funded from the ill-gotten gains of businesses that violate California's consumer protection laws, rather than through taxes or fees charged to law abiding businesses. Specifically, AB 1366 would authorize the AG to seek the remedy of disgorgement in actions brought under the existing UCL and False Advertising Law (FAL), two of the cornerstone consumer protection laws in California. Unlike the existing and complimentary remedies in these laws, disgorgement aims to deter wrongdoing by preventing the wrongdoer from retaining ill-gotten gains from its illegal conduct.

**SUPPORT**

Attorney General Rob Bonta (sponsor)

**OPPOSITION**

None known

**RELATED LEGISLATION**

Pending Legislation: AB 315 (Bauer-Kahan, 2023) prohibits a person doing business in California who is performing, has performed, or intends to perform a pregnancy-related service from advertising using a false or misleading statement related to the person's provision, or lack of provision, of abortion. A violation of this provision is an unfair business practice under the UCL. This bill was held in the Assembly Appropriations Committee.

Prior Legislation:

AB 2766 (Maienschein, Ch. 698, Stats. 2022) granted certain city attorneys and county counsel the power to conduct investigations, including the ability to issue pre-litigation subpoenas, when they reasonably believe there has been a violation of the UCL.

SB 461 (Cortese, Ch. 140, Stats. 2021) extended the authority to bring these cases independently to county counsel of any county within which a city has a population in excess of 750,000. Currently this provides authority to three county counsel in California, those in San Diego County, Los Angeles County, and Santa Clara County, as the cities of San Diego, Los Angeles, and San Jose have populations over 750,000.

AB 1864 (Limon, Ch. 157, Stats. 2020) *See* Comment 2.

AB 3020 (Gloria, Ch. 75, Stats. 2020) adjusted the distribution of civil penalties recovered by the City Attorney of San Diego in UCL actions.

**PRIOR VOTES:**

Assembly Floor (Ayes 74, Noes 0)  
Assembly Appropriations Committee (Ayes 14, Noes 0)  
Assembly Judiciary Committee (Ayes 11, Noes 0)

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