

New California Class Action Targeting Ivanka Trump's Fashion Line Tests the Limits of California's Unfair Competition Law

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by Kent J. Schmidt



California class actions are frequently in the news, often prompted by stories or controversies that have cable news abuzz or involve new cutting-edge technology. On March 16, 2017, a class action lawsuit was filed in San Francisco against *Ivanka Trump Marks, LLC*. *Modern Appealing Clothing v. Ivanka Trump Marks, LLC*, Cal. Sup. Ct, County of

San Francisco, Case No. CGC-17-557575. The lawsuit provides an opportunity to review the basics of California's Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code § 17200), which enjoins business practices that are "unlawful, unfair or fraudulent" and explore the statute's outer limits.

The Claim Against Ivanka Trump Marks, LLC

The gravamen of the claim is that Ms. Trump's company is using the power and prestige of her father's position to sell her products and promote her brands, thereby unfairly competing with other women's clothing and accessories companies. The putative class is comprised of "[a]ll women's clothing and accessories businesses in California at any time from November 9, 2016, through the date of trial." *Modern Appealing Clothing* ("MAC"), owned by the storied Ospital family, which has been in the business in San Francisco for 40 years, is the representative Plaintiff.

On behalf of the class, MAC alleges:

"Defendant Ivanka Trump and its employees and agents have, since the election, promoted defendant Ivanka Trump's brand by exploiting the power and prestige of the White House for personal gain, including, but not limited to, piggy-backing promotion of defendant Ivanka Trump Products on appearances at executive branch and other governmental events. ¶ President Donald J. Trump and his individual and White House employees and agents have, since the election, promoted [sic] defendant Ivanka Trump brand by exploiting the power and prestige of the White House. For example, President

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Donald J. Trump has condemned Nordstrom and other retailers for dropping defendant Ivanka Trump's line. As another example, Counselor to the President Kellyanne Conway endorsed defendant Ivanka Trump's products on February 9, 2017, in an interview on Fox News from the White House briefing room with the White House insignia visible behind her. As another example, White House Press and Communications Director Sean Spicer has used his positions at the White House to support defendant Ivanka Trump."

Plaintiffs seek disgorgement of ill-gotten gains as restitution as well as an injunction prohibiting future violations.

It is doubtful that this lawsuit will survive a motion to dismiss, but it presents a good case study to consider the UCL and a few of its parameters.

Is this a Real Lawsuit or "Fake" UCL Claim?

The question is whether the highly-publicized statements and tweets by President Trump, Mr. Spicer and Ms. Conway rise to the level of "unlawful, unfair or fraudulent" promotional activities in violation of Section 17200. There are specific requirements for each of these three prongs, as well as limitations on the remedies that can be sought and the type of injury that must be alleged.

Unlawful: Any business practice that violates another law is "unlawful" under Section 17200. It is not necessary that the law provide a private right of action. This is what separates California from other jurisdictions which do not allow litigants to cite a violation of a law as a basis for a civil claim unless there is a private right of action. The best example of this is *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1148 (2003), in which a government contractor claimed that its competitor obtained a lucrative defense contract from a foreign government by engaging in bribery in violation for the Foreign Corrupt Practices Act ("FCPA"). There is no private right of action under the FCPA. But a violation of the FCPA is sufficient to state a claim. (The UCL claim failed for other reasons, discussed below.) Here, the Plaintiff's counsel never bothers to allege what law was violated. An argument has been made that Ms. Conway's statement violated 5 C.F.R. 2635.702 which provides: "An employee shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the employee is an officer or member, and persons with whom the employee has or seeks employment or business relations."

Assuming that this is the law that undergirds the "unlawful" theory, and that, as many have opined, Ms. Conway violated this regulation by her comments, there is a fatal flaw in the theory. While the corporate entity may have benefited from the publicity, there are no allegations that Ms. Conway was an agent of the company or that the company directed her to make those comments. Other than broad and vague allegations of a conspiracy with un-named co-conspirators, the Complaint fails to tie the statements of President Trump, Mr. Spicer or Ms. Conway to the company. The President talks about

and tweets about companies that he likes (and dislikes) all the time, but those companies cannot be said to have violated any regulation by words arguably constituting an endorsement. And there is another problem. Although *Korea Supply* supports the concept of basing an “unlawful” claim on a federal statute or regulation, the key holding in that case was to limit the types of “restitutionary” recovery that can be obtained by a UCL plaintiff. “Under the UCL, an individual may recover profits unfairly obtained to the extent that these profits represent monies given to the defendant or benefits in which the plaintiff has an ownership interest.” *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1148 (2003). Based on this holding, even if they could tie the endorsements to the company, MAC will not be able to obtain the “restitution” remedy it seeks because the profits from the unlawful promotion are not monies that MAC or other competitors gave to Ivanka Trump Mark, LLC. At most, the claim would be limited to injunctive relief as its sole remedy.

Unfair: The next question is whether Ivanka Trump’s company engaged in an “unfair” business practice. “Cases have employed three different criterion to determine whether a business practice is ‘unfair’ under the UCL. One states [a]n ‘unfair’ business practice occurs when that practice ‘offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. A second rule provides the public policy which is a predicate to the action must be tethered to specific constitutional, statutory or regulatory provisions. A third holds [a]n act or practice is unfair if the consumer injury is substantial, is not outweighed by any countervailing benefits to consumers or to competition, and is not an injury the consumers themselves could reasonably have avoided.” *Moran v. Prime Healthcare Mgmt., Inc.*, 3 Cal. App. 5th 1131, 1150 (2016) (internal quotations and citations omitted).

The best case for satisfying the unfair business practice requirement is for MAC to allege that the practice violates public policy, tethered to a regulatory provision. Again, the difficulty is showing that Ivanka Trump Mark, LLC, through its management, employees or agents, engaged in an allegedly “unfair” business practice as opposed to merely benefiting from ill-advised comments of others.

Fraudulent: The last prong of a UCL claim appears to be weakest of the three. The “UCL’s fraud prong generally ‘require[s] ... a showing that members of the public are likely to be deceived.’ [Lueras v. BAC Home Loans Servicing, LP, 221 Cal. App. 4th 49, 81 (2013).] To establish a private party’s standing to maintain a UCL cause of action under the fraud prong, *In re Tobacco II Cases*, 46 Cal. 4th 298, held the phrase “as a result of” appearing in Business and Professions Code section 17204 “imposes an actual reliance requirement on plaintiffs prosecuting a private enforcement action under the UCL’s fraud prong.” [*In re Tobacco II Cases*, 46 Cal. 4th [298, 326 (2009).] *Moran*, 3 Cal. App. 5th at 1149-50. MAC and the class it seeks to represent – women’s clothing and accessories companies – are not deceived or misled by any act or omission of Ivanka Trump or her company. They may contend that sales were diverted and they may be annoyed, irritated or harmed by the alleged endorsements, but that is not the same as being deceived.

This new Complaint, while it may be creative, is a reminder that, “[a]lthough the unfair competition law’s scope is sweeping, it is not unlimited.” *Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 182 (1999). Stay tuned for further developments on this case to see if the prediction that the lawsuit will not make it past the pleading stage is correct.