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Who Needs Standing?

Using California’s Unfair Competition Law to Bring Federal Clean Water Act Claims in State Court

By Shaye Diveley-Coyne

1. Introduction

The citizen suit provisions of federal environmental laws authorize private individuals and organizations to bring actions against alleged violators. However, these citizen suit provisions, particularly under the Clean Water Act, often pose a myriad of procedural hurdles that must be overcome to even reach the merits. In addition to these technical legal requirements, such lawsuits are expensive, time-consuming and difficult to manage. Yet these significant, but peripheral, obstacles are moot if the litigants lack standing to bring suit in federal court.

Article III of the U.S. Constitution limits the federal courts to hearing “cases” and “controversies.” This necessarily restricts the federal courts to litigants with actual grievances based on “legally cognizable injuries.” This standing requirement contains three elements. First, the plaintiff must have suffered an actual or imminent personal injury. Second, the injury must be “fairly traceable to the challenged action of the defendant.” Third, a favorable decision by the court must likely redress the injury.

These standing rules apply to individuals as well as organizations maintaining causes of action on their own behalf. However, when an organization sues on behalf of its members, it

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2. Roger Beers, Standing and Rights of Action in Environmental Litigation, SC84 A.L.I.-A.B.A. 1, 3 (1998). Beers notes that “[t]he unwary plaintiff [in an environmental suit] may find that he’s the wrong person, that it is the wrong time, or the wrong place.” Id.
6. Id.
7. Id.
8. Id.
must meet the further requirements of “associational” or “organizational” standing. To have standing, the organization must first establish its members would have individual standing to sue. The organization must then demonstrate “the interests it seeks to protect are germane to the organization’s purpose” and neither the claim nor relief requires the members to participate in the suit.

Although standing is constitutionally required for cases brought in federal court, all hope is not lost for the organization or individual lacking standing. A plaintiff can avoid the standing issue altogether by bringing the cause of action, either on one’s own behalf or on behalf of the public, under California’s Unfair Competition Law in state court. The Unfair Competition Law provides a separate cause of action predicated upon violations of other laws or unfair or fraudulent business practices.

This note will examine the use of California’s Unfair Competition Law to avoid the constitutional standing issue under the Clean Water Act and obtain injunctions, restitution and attorneys’ fees in the process. In doing so, this note provides background information on the Clean Water Act citizen suit provision and the basic requirements for suing under California’s Unfair Competition Law. Finally, it will identify the drawbacks and potential pitfalls of this litigation route, and recommend solutions for overcoming these problems.

II. Background

A. Clean Water Act

Congress originally enacted the Federal Water Pollution Control Act in 1948. The original statute provided a state structure for preventing and abating water pollution, with the federal role “limited to support of, and assistance to, the States.” It was not until 1972 that Congress meaningfully overhauled the law and enacted the measures commonly known today as the Clean Water Act.

The Clean Water Act (CWA) sets two national goals — the attainment of fishable and swimmable waters and the elimination of pollutant discharges into navigable waters. To meet these objectives, the CWA prohibits point source discharges except as authorized by permit. The permit system allows for the discharge of any pollutant upon the condition that such discharge will meet effluent limitations as established by the CWA. Thus, failure to comply with permit conditions is a violation of the CWA.

The Act also establishes pretreatment requirements for discharges to publicly owned treatment works and permit requirements for dredge and fill operations in navigable waters, including wetlands.

The CWA provides for enforcement of its provisions through self-monitoring and reporting by permittees, supported by inspections by the Environmental Protection Agency (EPA). The administrator may address permit violations through administrative actions or civil actions.

11. Id.
13. Id.
14. Id.
17. Id.
18. Id.
19. Federal Water Pollution Control Act § 101(a).
20. Id. §§ 301(a), 501(12). A point source is “any discernible, confined and discrete conveyance,” including a pipe, ditch, container or vessel. Id. § 501(13). A point source does not refer to agricultural run-off. Id.
21. Id. § 402(a)(1). Effluent limitations are standards set by the EPA or the state for the quantity or concentration of a pollutant. Id. § 502(11). Effluent limitations are nationally standardized by industry, not by pollutant, facility or condition of waterway.
22. Id. § 301(a).
23. Id. § 307.
24. Id. § 404. See also Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, -- U.S. --, 121 S. Ct. 675, 680 (2001) (holding “navigable waters” does not extend to isolated wetlands).
26. Federal Water Pollution Control Act § 308(a)-(b).
tions through administrative compliance orders, civil penalties of up to $25,000 per day and enforcement actions for injunctive relief.27

The Act also provides for civil enforcement by the federal government and citizens.28 Section 505(a) authorizes

any citizen [to] commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of [a] standard or limitation under this [Act] or [a] order issued by the Administrator or a State with respect to such a standard or limitation.29

The provision gives federal courts jurisdiction over such suits, regardless of diversity or amount in controversy.30 Citizens must provide notice to the EPA and the violator 60 days prior to bringing suit.31 A pending government action requiring compliance bars a citizen suit on the same matter.32

The CWA permits citizen suits to be brought against parties alleged to be “in violation of” the Act.33 The United States Supreme Court, in Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, determined that this language prevented the Chesapeake Bay Foundation from bringing suit against the company for wholly past permit violations.34 Since the statute’s citizen suit provision itself only authorizes suit against a defendant “alleged to be in violation of” the Act, the Court concluded “statutory standing” to bring suit was established only by good faith allegations of current or ongoing violations.35 Accordingly, suits based on wholly past violations lack jurisdiction under section 505 of the Clean Water Act.36

In addition to the statutory standing barrier against citizen suits based on wholly past CWA violations, constitutional standing requirements prohibit such suits as well. In Steel Company v. Citizens for a Better Environment,37 the Supreme Court dismissed a citizen suit for lack of standing because only wholly past violations were alleged. The organization sued the defendant company for failure to make required reporting under the Emergency Planning and Community Right-To-Know Act of 1986.38 The Court found that a case based on wholly past violations fails the third test of standing — redressability.39 A court cannot grant injunctive relief once the injurious conduct has ended.40 Civil penalties paid to the federal government do not redress a private litigant’s injury, and thus cannot support standing.41 Likewise, recovery of litigation costs alone cannot support standing.42 Thus, the organization’s claim failed because the Court was unable to provide relief to remedy the injury allegedly suffered under the statute.

Consequently, citizen suits under the CWA face three significant obstacles. First, diligent government prosecution of violators bars citizen suits seeking compliance with the CWA.43 Second, statutory language prevents citizen suits under the CWA for wholly past violations.44 Third, constitutional standing requirements further limit CWA citizen suits based on past permit infractions.45 Nonetheless, plaintiffs may surmount these impediments by bringing suit under California’s Unfair Competition Law.

27. Id. § 309(a), (b), (d). Citizens bringing suit under the CWA may also receive litigation costs. Id. § 505(d).
28. Id. § 505.
29. Id. § 505(a).
30. Id.
31. Id. § 505(b).
32. Id.
33. Id. § 505(a).
34. 484 U.S. 49, 64 (1987).
35. Id. at 64-65. This requirement is necessary only to survive summary judgment. To prevail at trial, plaintiff must prove actual CWA violations. Id.
36. Id. at 64.
40. Id.
41. Id.
42. Id. at 107-08.
43. Federal Water Pollution Control Act § 505(b), 33 U.S.C. § 1365(b) (1994).
44. Id. § 505(g); Gwaltney, 484 U.S. at 64.
B. California's Unfair Competition Law

California’s Unfair Competition Law ("UCL") prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Anyone "who engages, has engaged, or proposes to engage" in such activity falls under the Act and is subject to its penalties.

The primary purpose of the UCL is to extend to the public a cause of action normally held only by direct business competitors. The UCL is a legislative recognition that unfair competition causes harm in situations that reach beyond normal business competition. Thus, the government or "any person acting for the interests of itself, its members or the general public" may bring an action under the statute. This language provides standing for anyone "to sue to enjoin an unfair practice, regardless of whether the person or organization has suffered injury as a result of the practice." Such an action brought on behalf of the public is referred to as a representative action or a private attorney general suit.

A violation of the UCL requires but a single practice or act that satisfies one of the prongs of the statute — unfair, unlawful or fraudulent. While violations under the UCL generally focus on traditional consumer protection concerns, the statute is "not confined to anti-competitive business practices, but is also directed toward the public's right to protection from fraud, deceit[] and unlawful conduct.

To violate the unlawful prong, the UCL "borrows violations of other laws and treats them as unlawful practices" that are independently actionable under the statute. The UCL does not require the underlying law to provide for civil enforcement. The UCL serves as the enforcement mechanism for "anything that can properly be called a business practice and that at the same time is forbidden by law.

Virtually any law can serve as the predicate statute under the UCL. This includes not only state laws, but also federal statutes, local ordinances and court-made requirements.

46. The legislature did not provide a name for Business and Professions Code sections 17200 through 17208, so this note will use the label "Unfair Competition Law" to refer to the statute.

47. CONSUMER TRUST FUND ACT AND REPRESENTATIVE ACTIONS, supra note 53.


49. Id.


51. CAL. BUS. & PROF. CODE § 17200.


53. Id. at 812-13.


55. CAL. BUS. & PROF. CODE § 17200. However, this was not always the case. Before the legislature amended section 17200 to include "practice or act," the California Supreme Court interpreted UCL as prohibiting only unfair, unlawful or fraudulent practices. California ex rel. Van de Kamp v. Texaco, Inc., 762 P.2d 385, 399 (Cal. 1988). "Practices," according to the court, necessarily implied more than one act — it required a pattern or course of conduct.

56. CAL. BUS. & PROF. CODE § 17200. The UCL essentially creates three categories of unfair competition. Cel-Tech Communications, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 540 (Cal. 1999). In the context of this note, only the first two categories - unlawful or unfair - will be discussed and applied to Clean Water Act breaches. Nevertheless, it is important to note that the fraudulent acts prohibited by the UCL bear little resemblance to the common law torts of deceit or fraud. See generally STERN, supra note 50, at 60. Instead, a court will analyze a business act or practice under the fraud prong by determining whether there is a likelihood that members of the public may be deceived. See Bank of the West v. Superior Court, 833 P.2d 545, 553 (Cal. 1992) (citing Chern v. Bank of Am., 544 P.2d 1310 (Cal. 1976)).


59. Id.


61. See Klein v. Earth Elements, Inc., 59 Cal. App. 4th 965, 969 (1997). See also STERN, supra note 50, at 37-46, for a discussion of the range of laws, regulations, ordinances, court-made directives and professional standards that can serve as the predicate statutes under the UCL.


The underlying laws may be criminal or civil. The UCL “borrows” any law and imposes strict liability for violations of it. Intent is not an element of the UCL violation. Thus, lack of intent to injure anyone or engage in unlawful conduct is not a defense.

Hewlett v. Squaw Valley Ski Corp. illustrates the broad compass of the UCL. In Hewlett, a private individual, the Sierra Club and the county district attorney brought an action under the UCL against Squaw Valley for harvesting timber on its property. The company had been in dispute with various organizations over its plans to expand its ski runs. “When litigation threatened the planned project, Squaw Valley in essence resorted to self-help and cut more than 1,800 trees.” The company claimed it believed its conduct was lawful. However, a California appellate court ruled that Squaw Valley, intentionally or not, violated state forestry laws, a local conditional use permit and a temporary restraining order. These violations served as the predicate unlawful business practices under the UCL. Unintentional violations of underlying laws could not serve as Squaw Valley’s defense to the UCL allegations.

Furthermore, because “[u]nless otherwise expressly provided, the remedies or penalties provided by [the UCL] are cumulative to each other and to the remedies or penalties available under all other laws,” preemption or implied repeal are not usually factors in bringing suit. Preemption occurs when a federal provision is intended, either explicitly or implicitly, to be the exclusive governing authority on the matter, or conflicts with state regulation. Although it is still a common defense to UCL claims based on violations of federal law, the courts have generally limited federal preemption of UCL suits to cases involving comprehensive federal schemes that supersede all state regulation in the field, such as the federal Copyright Act or ERISA. Likewise, many courts have refused to find an implied repeal of the UCL cause of action by other state laws. “[T]he implied repeal doctrine applies ‘[w]hen two or more statutes [enacted by the same legislature] concern the same subject matter and are in irreconcilable conflict.’” Usually the most recent enactment is considered the will of the legislature and, thus, prevails over prior inconsistent measures. However, due to the explicit language of the UCL, claims under the statute generally prevail against implied repeal arguments and relief is permitted, unless the underlying state law expressly provides otherwise.

Just because an act may not be unlawful does not prevent a plaintiff from seeking redress under the UCL. Since the UCL’s prohibitions are written in the disjunctive, a busi-
ness practice not specifically prohibited by law may still be unfair, thus violating the UCL. 84 This broad scope of the UCL permits tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur. Indeed, the section was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable “new schemes which the fertility of man’s invention would contrive.”85

The type of conduct prohibited under the unfairness prong of the UCL depends on the parties potentially injured by the conduct. 86 Prior to the California Supreme Court’s decision in Cel-Tech Communications, Inc., v. Los Angeles Cellular Telephone Co., the appellate courts utilized many interpretations of the unfairness prong. 87 Lower court definitions of unfairness included practices that “offend an established public policy”88 or result in harm to the victim that outweighs the utility of the conduct. 89 The California Supreme Court determined such definitions lacked guidance and consistent interpretation. 90

As a result, the California Supreme Court determined an unfair act or practice is “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.”91 This holding is based largely on section five of the Federal Trade Commission Act. 92 This foundation, along with other language in Cel-Tech, indicates that the court’s holding may be limited to direct competitors. 93 Consequently, what constitutes unfairness in other scenarios — such as in consumer actions — is still uncertain.

Whether under the unlawful or unfairness prong, “[t]he UCL cannot be used to state a cause of action the gist of which is absolutely barred under some other principle of law.”94 If the legislature has examined certain conduct and expressly made it lawful or “concluded no action should lie, courts may not override that determination.”95 However, this rule does not apply if another statute simply fails to prohibit such conduct or provide for a cause of action. 96 Yet, even with this limitation, the reach of the UCL is extremely broad.

III. Bringing Suit Under the Unfair Competition Law Premised on the Clean Water Act

A violation of the CWA is actionable under the UCL. 97 Although most UCL violations are predicated on state laws, this “does not preclude the use of a violation of federal law as grounds for [UCL] liability.”98

To plead a cause of action under the UCL’s unlawful prong, the “plaintiff must allege facts sufficient to show a violation of some underlying law.”99 Thus, to state a claim under the UCL predicated on the CWA, a plaintiff need only provide sufficient facts to demonstrate a violation of a CWA permit,100 an unauthorized

85. Id. (quoting Am. Philatelic Soc’y v. Claibourne, 46 P.2d 135, 140 (Cal. 1935)).
86. Id. at 554 n.12.
87. Id. at 543.
90. Cel-Tech Communications, Inc., 973 P.2d at 543.
91. Id. at 554.
93. Cel-Tech Communications, Inc., 973 P.2d at 554 n.12 (noting “[n]othing we say relates to actions by consumers or by competitors alleging other kinds of violations of the unfair competition law such as ‘fraudulent’ or ‘unlawful’ business practices”).
95. Cel-Tech Communications, Inc., 973 P.2d at 541.
96. Id.
98. Id.
100. Federal Water Pollution Control Act § 301(a), 33 U.S.C. § 1101(a) (1994).
dredge or fill\textsuperscript{101} or a failure to meet pretreatment qualifications set by the Act.\textsuperscript{102} If a plaintiff is unable to allege a point-source violation of the CWA, it may be possible to seek relief under the unfairness prong of the UCL. This is a more difficult route because it is still unclear how the courts define "unfair" in actions not involving direct competitors.\textsuperscript{103} Although no reported cases have considered the issue, using the unfairness prong might provide a way to bring suit to stop nonpoint sources\textsuperscript{104} of pollutants. The CWA does not specifically prohibit nonpoint sources of contaminants and includes no enforcement mechanism addressing such discharges.\textsuperscript{105} Yet, the discharge of pollutants through nonpoint sources violates the CWA's national goal of eliminating all pollutant discharges into navigable waters.\textsuperscript{106}

When reviewing a claim under the unfairness prong of the UCL, a court will first look to see if any laws provide a "safe harbor" for the alleged unfair conduct.\textsuperscript{107} Such a statute must expressly permit the conduct, not just fail to prohibit it.\textsuperscript{108} In the case of a nonpoint source polluter, the CWA does not permit the conduct; it simply provides no prohibition or enforcement against it.\textsuperscript{109} Thus, a UCL suit based on nonpoint source discharges likely meets the first step.

Next, the court applies the Cel-Tech test for unfairness, considering whether the conduct "violates the policy or spirit" of an antitrust law "or otherwise significantly threatens or harms competition."\textsuperscript{110} This language would appear to limit the UCL's unfairness prong to anticompetitive business practices. However, the test was designed for cases involving direct competitors,\textsuperscript{111} rather than consumers or other injured parties. If courts were to artificially limit the scope of the unfairness prong to the narrow realm of traditionally anticompetitive conduct, it would be inconsistent with judicial and legislative recognition that other business acts create unfair competition and threaten to deceive the public as well.\textsuperscript{112}

In fact, the Cel-Tech court reiterated the need for the unfairness prong of the UCL to address wrongful business acts "in whatever context such activity might occur," including such acts that fall outside the explicit reach of applicable laws.\textsuperscript{113} Accordingly, the proper interpretation of the Cel-Tech test would be to find a business act that "violates the policy or spirit" of other laws is a proper basis for the unfairness prong. Under such a standard, a court could determine that a nonpoint source discharge violates the national policy of the CWA and, thus, is an unfair act under the UCL.

IV. Benefits of Using the Unfair Competition Law

A. UCL Relaxes Standing Requirements

The relaxed standing requirement is the obvious benefit of bringing a state cause of action under the UCL instead of a federal claim based solely on the CWA citizen suit provision. The UCL provides standing to any person, regardless of injury, to bring suit as a private attorney general on behalf of the public.\textsuperscript{114} This enables an organization or individual, lacking standing to bring a CWA action in federal court, to bring the same action in state court.

B. UCL May Allow for Actions Based on Wholly Past Violations

Under the UCL, plaintiffs possibly can bring claims premised on wholly past violations of the CWA. By using the UCL as the legal

\textsuperscript{101} Id. § 404.
\textsuperscript{102} Id. § 307.
\textsuperscript{103} Supra notes 86-93 and accompanying text.
\textsuperscript{104} Although not defined by CWA, nonpoint sources generally refer to discharges that do not fall under the definition of point source in § 501(13) of the Act. These includes urban run-off and agricultural discharges.
\textsuperscript{105} Id. § 309.
\textsuperscript{106} Id. § 101(a).
\textsuperscript{108} Id. at 542.
\textsuperscript{109} Federal Water Pollution Control Act §§ 301(a), 309.
\textsuperscript{110} Cel-Tech Communications, Inc., 973 P.2d at 540.
\textsuperscript{111} Id. at 554 n.12.
\textsuperscript{113} Cel-Tech Communications, Inc., 973 P.2d at 540.
\textsuperscript{114} McCall, supra note 52 at 812-15.
mechanism for bringing suit, plaintiffs do not have to rely on the citizen suit provision of the CWA to support a cause of action. Consequently, plaintiffs are not limited by the statutory language allowing suits only against parties “in violation of” the Act.

Litigants seeking this route should be aware that the outcome is uncertain. Previous case law indicates the UCL “is unavailable to remedy past misconduct.” However, this assertion may be based on prior construction of the UCL, which limited claims to “business practices” rather than a single business act. The courts interpreted “practices” to “require, at a minimum, ongoing conduct,” thus precluding claims for past violations. Since the UCL has been amended to prohibit a single act of unfair competition, the bar on claims based past violations is likely no longer applicable. Thus, UCL claims based on past CWA violations are possible, as long as litigants request some relief that the court can grant.

C. State Actions May Not Bar UCL Claims

UCL remedies “are cumulative to each other and to the remedies or penalties available under all other laws.” Thus, even if other entities are pursuing penalties for the same unfair competition, UCL remedies still apply. This differs from the citizen suit provision of the CWA, which bars citizen suits when the federal government is already prosecuting to secure compliance with the permit.

D. Limited Participants Means Decreased Costs

Seeking relief via a private attorney general suit under the UCL rather than a claim under the CWA is less costly for organizations. Since establishing constitutional and associational standing is unnecessary under the UCL, organizations do not have to engage its membership in proving traceable and redressable injuries. Fewer people involved in the litigation means faster, more efficient trials with lower costs.

V. Drawbacks and Pitfalls

A. Remedies Are Limited

While the UCL’s scope is broad, its remedies are primarily limited to restitution, injunctive relief and civil penalties. Damages are not available under the UCL.

Due to the nature of CWA violations, citizens generally would not be seeking restitution for UCL violations. Restitution restores to the interested parties money or property unlawfully taken through unfair competition. Most citizen suits premised on CWA violations seek to prevent or halt pollution, not to recover a monetary loss. However, even if restitution is an applicable remedy, relief may be limited when citizens bring a representative action under the UCL on behalf of absent parties.

The California Supreme Court recently determined disgorgement into a fluid recovery fund is not permitted for representative actions under the UCL.

115. See supra notes 58-60 and accompanying text.
118. CAL. BUS. & PROF. CODE § 17200 (West 1997); see also supra note 55.
120. CAL. BUS. & PROF. CODE § 17200.
121. Infra Section V.A. for discussion of how requests for injunctive relief can undermine UCL claims based on wholly past CWA violations.
122. CAL. BUS. & PROF. CODE § 17205
125. McCall, supra note 52, at 849.
126. Id. at 839-40.
127. CAL. BUS. & PROF. CODE § 17205 (West 1997).
128. Id.
129. Id. § 17206. Only government entities may seek penalties for UCL violations.
132. Id.
actions have sought fluid recovery funds for a number of years to force a defendant company to disgorge all profit obtained through unfair competition. While fluid recovery funds may require a defendant to return money obtained through ill-gotten means to injured parties, it is also "used to . . . [force the] surrender of all profits earned as a result of an unfair business practice regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice." 

Although the legislature authorized such recovery in class action suits, it has given no such statutory permission for representative actions under the UCL. As already noted, monetary relief under the UCL is limited to restitution. Given this legislative directive, the court refused to extend the remedy to UCL representative actions and, as a result, the extent of restitutionary relief under the UCL is measured by the actual loss of the parties.

Injunctive relief is the most likely remedy under the UCL for CWA violations. Since "unfair business practices can take many forms, the Legislature has given the courts the power to fashion remedies to prevent their 'use or employment' in whatever context they may occur." Plaintiffs seeking remedial relief, however, must provide the court with ample reason to grant it. This depends greatly on the facts of the case.

For example, in Hewlett, the trial court ordered Squaw Valley to "restock, revegetate and reforest" the land it unlawfully harvested in the event the local government does not issue a new use permit for the area. The court also prohibited development in another area, despite Squaw Valley's claims it had no intention of harvesting more timber. The appellate court upheld the prohibitory injunction, finding that "the trial court was properly concerned that Squaw Valley might once again decide to develop these runs without obtaining the necessary permits, severely harming an environmentally sensitive area."

However, injunctive relief poses problems as well. Citizens seeking only injunctive relief for wholly past acts need to be aware that doing so presents a viable defense for defendant companies that could undermine the entire UCL claim. Although injunctive relief under the UCL is available for past conduct, a court is unlikely to grant such relief if the practice is not likely to recur. An injunction under such circumstances would be meaningless. If an injunction was the only relief sought in such a case, the absence of a meaningful remedy, combined with the lack of a recurring violation, would make the claim moot and the court would dismiss the entire action. Thus, while the UCL presents an opportunity for addressing past CWA violations, it is only applicable where plaintiffs can seek a viable remedy — and an injunction may not be one of them if there is no likelihood of future misconduct.

Civil penalties under the UCL are only available when sought by the government on

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133. Id. A fluid recovery fund requires three steps:

First, the defendant's total damage liability is paid over to a class fund. Second, individual class members are afforded an opportunity to collect their individual shares by proving their particular damages, usually according to a lowered standard of proof. Third, any residue remaining after individual claims have been paid is distributed by one of several practical procedures that have been developed by the courts.

134. Id. (quoting California v. Levi Strauss & Co., 41 Cal. 3d 460, 472-73 (1986)).

135. Id. at 726.

136. Id. at 732.

137. Id.


139. Id at 537-38.

140. Id.

141. Id. at 542.

142. Stern, supra note 50, at 164-65.

143. Cal. Bus. & Prof. Code § 17203 ("Any person who . . . has engaged . . . in unfair competition may be enjoined in any court of competent jurisdiction."). This provision illustrates legislative intent for the UCL to reach past conduct. Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 950 P.2d 1086 (Cal. 1998).


145. Id.

146. Id (dismissing UCL action as moot where an injunction was sought for an alleged unlawful rental policy used four years ago and there was no indication it would ever be used again).
behalf of the people of California. Penalties are limited to $2,500 per violation, significantly less than the $25,000 per day available under the CWA. In assessing civil penalties, the court considers "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." 

The UCL does not provide for attorney fees, but a plaintiff pursuing a private attorney general suit may obtain litigation costs. California’s Private Attorney General statute provides for an award of litigation costs when:

(a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.

Because application of the doctrine varies case-by-case, courts look to the facts of a matter when determining an award of attorney fees.

Engaging a government attorney in the litigation to impose civil penalties on a UCL violator may preclude a plaintiff’s chances of obtaining attorney fees. Private enforcement is required; the government cannot claim attorney fees. Again, how this rule is applied depends on the facts of the case. In Hewlett, the trial court awarded plaintiffs Hewlett and the Sierra Club attorney fees totaling $672,000. The appellate court upheld the attorney fees, despite imposing civil penalties. The trial court did not abuse its discretion when it awarded the attorney fees, although they were "excessive," because the case "was beyond the capabilities of the . . . District Attorney to prosecute," making outside assistance essential.

B. Defendants May Attempt to Remove to Federal Court

Many suits filed under the UCL premised on the CWA may involve corporate defendants residing in other states. Such parties may seek to remove UCL suits to federal court based on diversity and convenience. These efforts may also be tactical if a plaintiff lacks standing — an attempt to force the dismissal.

Axiomatically, the UCL does not provide standing for bringing suit in federal court. "[A] state legislature may not waive by statute the prudential or constitutional limitations on standing in federal court." For example, in MAI Systems, the federal district court dismissed a counterclaim under the UCL based on an allegedly misleading software licensing agreement. Defendant was not a party to the agreement; instead, it was bringing suit under the UCL on behalf of the public. The court found the defendant lacked standing to bring the UCL claim in federal court for several reasons. The defendant’s UCL "private attorney general" claim "violate[d] the prudential limitation that parties must assert their own rights and not rest their claim to relief on the legal

147. CAL. BUS. & PROF. CODE § 17206(a).
148. Id.
150. CAL. BUS. & PROF. CODE § 17206(b).
151. CAL. CIV. PROC. § 1021.5 (West 1997).
152. Id.
154. CAL. BUS. & PROF. CODE § 17206(a).
155. CAL. CIV. PROC. § 1021.5.
157. Id. at 544.
158. Id. at 545. Possibly adding to the court’s determination to award attorney fees and impose civil penalties is the sheer audaciousness of Squaw Valley’s conduct. The trial court noted “it is important that Squaw Valley not jeopardize environmental resources still within its control.” Id. at 538.
160. Id.
161. Id.
162. Id.
rights or interests of others." Also, the defendant failed to allege actual personal harm caused by the agreement. Finally, the court could not award relief that would redress the injury alleged — the defendant did not suffer a cognizable injury and could not seek relief for the harm suffered by the actual parties.

The removal threat is basically an empty one — if the plaintiff lacks constitutional standing to bring an action in federal court, a removal action necessarily fails. However, for plaintiffs lacking constitutional standing to bring suit in federal court, opposing removal may still be strategically challenging and expensive. The party seeking removal has the burden of showing that standing exists. If a defendant company is arguing that an organization or individual person has the requisite injury for standing, that organization is in the precarious position of disputing the claims. For example, an organization, which under normal circumstances would argue that it is representative of the injuries of its members, must contend that it lacks standing to bring suit in federal court.

Contesting removal can be long and costly. Attorney fees are available, but only at the discretion of the court. A court may award attorney fees if it can be shown the party seeking removal relied on frivolous arguments or an improper basis. Again, this determination turns on the facts of the case.

C. UCL is Overused

Nearly every civil claim in California seems to include a cause of action under the UCL. Consequently, the general perception of this law is that it is overused and abused. This view is so pervasive that California Supreme Court Justice Brown recently referred to the UCL as "a standardless, limitless, attorney fees machine." It is no wonder that calls for reform of the UCL abound.

Not surprisingly, critics of the UCL often attack the law’s provisions that are most favorable to plaintiffs. In Stop Youth Addiction v. Lucky Stores, the California Supreme Court noted that the UCL "has lax standing provisions, lacks res judicata effect and carries the potential for multiple, repetitive suits." In particular, the relaxed standing requirements give frivolous litigants a field day, although at the same time, provide citizens with legitimate claims a valuable passageway into the courtroom. This contradiction poses a strategic problem for citizen-groups seeking valid claims. The more the UCL is used, the more likely legislators and the defense bar will seek reform of its more liberal provisions.

However, by using the UCL appropriately and sparingly, citizen-groups may minimize the scrutiny of so-called "reformers" and protect the law's unique benefits. Citizens should try to use the UCL to bring claims consistent with the statute’s purpose. Environmental problems rooted in or coupled with economic concerns are more legitimate foundations for UCL suits than frivolous claims based on tenuous injuries and vexatious motives. The UCL should be viewed as a helpful back-up for standing deficiencies, not as carte blanche for bringing claims unsupported by facts or rejected by other courts.

163. Id.
164. Id.
165. Id. at 542.
167. Id.
170. Id.
171. Id. at 958 (finding removal was not "so obviously barred" as to warrant an award of attorney fees to a public benefit corporation contesting removal of a UCL private attorney general suit); cf. As You Sow v. Sherwin-Williams Co., No. C-93-3977-
VI. Conclusion

Private attorney general suits under the UCL serve an important role in citizen enforcement of the CWA. The language and structure of the CWA citizen suit provisions can hinder lawsuits brought by the general public, especially for wholly past violations and for organizations lacking standing. Under the UCL, citizens find relief otherwise unavailable by other laws and the federal courts.

Nevertheless, there are drawbacks to this route. The remedies available to citizens under the UCL are primarily limited to restitution and injunctive relief. Civil penalties are available only to government litigants. Furthermore, attorney fees are not guaranteed for successful private attorney general suits. There is also a public relations concern about bringing suit under the UCL. Due to its broad scope and liberal standing requirements, suits under the UCL are ubiquitous to the point of being vexatious. There is a groundswell of backlash against such suits, possibly leading to reform of the UCL in the coming years.

Accordingly, plaintiffs seeking remedies under the UCL for CWA violations should heed some warnings. First, UCL suits are best used when there are potential standing issues, when there is a viable remedy sought for past violations or when limited funds prevent broader participation in the suit. However, the UCL cannot create a CWA violation where there is none or provide a remedy where none is applicable. Second, parties should consider, whenever possible, enlisting government parties in the action to allow for civil penalties. However, plaintiffs should do so cautiously as it may jeopardize their chances to recover attorney fees. Third, parties should remember that the UCL is not a gold mine and will not provide damages. It is best used when the relief sought is restitution or injunction. Finally, plaintiffs should use the UCL sparingly and appropriately. The statute provides a valuable passageway to the courtroom that otherwise may not be available. The relaxed standing provisions and representative action measures can provide help to standing-deficient and economically strapped parties. However, overuse and abuse of the UCL will only threaten its viability and the future of citizen suits. The UCL should not be used as an excuse to bring suit where no other law would even remotely sustain jurisdiction or a cause of action.

The UCL plays a valuable role in California law by acknowledging that commercial activity can negatively impact the public in ways that substantive statutes and government authorities cannot anticipate, prevent or remedy. Furthermore, the UCL provides a conduit for recasting unfair competition into legally recognized consumer issues. In the case of the CWA, the broad and nebulous nature of the UCL gives the public the power to say protection of clean water is not only an environmental concern, but one of economic and consumer significance as well. Thus, the UCL may not only provide standing to citizen groups, but a new context for the enforcement of federal environmental laws.