

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 2766 (Maienschein)
Version: February 18, 2022
Hearing Date: June 14, 2022
Fiscal: No
Urgency: No
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SUBJECT

Unfair Competition Law: enforcement powers: investigatory subpoena

DIGEST

This bill grants 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 California's Unfair Competition Law.

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 to recover civil penalties or injunctive relief pursuant to the Unfair Competition Law (UCL), Business and Professions Code Section 17200 et seq.

Among the agencies authorized to bring such actions are city attorneys of cities with populations in excess of 750,000, county counsel of any county within which a city has a population in excess of 750,000, and city attorneys of a city and county.

The Government Code authorizes the Attorney General, and all other heads of state departments, to investigate and prosecute actions concerning certain matters, and empowers them with certain investigatory tools, including pre-litigation subpoena power. Although certain county counsel and city attorneys can bring UCL actions, they are not currently afforded the same tools as the Attorney General and district attorneys in investigating possible unfair competition cases. These powers allow prosecutors to more efficiently investigate and prosecute UCL actions.

This bill amends Section 16759 to extend these same investigatory powers to the other prosecutors authorized to bring UCL claims when they reasonably believe that a violation of the UCL has occurred.

This bill is sponsored by the City and County of San Francisco, the County of Santa Clara, the County of Los Angeles, and the City of San Diego. It is supported by a variety of other groups and offices, including Attorney General Rob Bonta and the California Labor Federation. It is opposed by the Civil Justice Association of California.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Permits the head of each department to make investigations and prosecute actions concerning:
 - a) all matters relating to the business activities and subjects under the jurisdiction of the department;
 - b) violations of any law or rule or order of the department; and
 - c) such other matters as may be provided by law. (Gov. Code § 11180.)
- 2) Authorizes the heads of each department to do the following acts in connection with any authorized investigation or action:
 - a) issue subpoenas for the attendance of witnesses and the production of papers, books, accounts, documents, any writing as defined by Section 250 of the Evidence Code, tangible things, and testimony pertinent or material to any inquiry, investigation, hearing, proceeding, or action conducted in any part of the state;
 - b) inspect and copy books, records, and other items described above;
 - c) hear complaints;
 - d) administer oaths;
 - e) certify to all official acts;
 - f) promulgate interrogatories pertinent or material to any inquiry, investigation, hearing, proceeding, or action;
 - g) divulge information or evidence related to the investigation of unlawful activity discovered to the Attorney General or to any prosecuting attorney of this state, any other state, or the United States, who has a responsibility for investigating the unlawful activity investigated or discovered, or to any governmental agency responsible for enforcing laws related to the unlawful activity investigated or discovered, if the Attorney General, prosecuting attorney, or agency to which the information or evidence is divulged agrees to maintain the confidentiality of the information received to the extent required by this article; and
 - h) present information or evidence obtained or developed from the investigation of unlawful activity to a court or at an administrative hearing in connection with any action or proceeding. (Gov. Code § 11181.)
- 3) Grants all those powers granted to the Attorney General as head of a department pursuant to Government Code Section 11180 et seq. to the district attorney of any

county when the district attorney reasonably believes that there may have been a violation of (1) California's Unfair Competition Law ("UCL"), Business and Professions Code Section 17200 et seq.; (2) Business and Professions Code Section 16720 et seq.; (3) Business and Professions Code Section 16750 et seq.; or (4) Business and Professions Code Section 17000 et seq. These powers are subject to the provisions of the California Right to Financial Privacy Act, Government Code Section 7460 et seq., and must be conducted in accordance with the procedures set forth in Government Code Section 11180 et seq., including all applicable principles relating to immunity from self-incrimination. (Bus. & Prof. Code § 16759.)

- 4) 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.)
- 5) 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.)
- 6) 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.)

This bill:

- 1) Grants all those powers granted to the Attorney General as head of a department pursuant to Government Code section 11180 et seq. to the city attorney of any city having a population in excess of 750,000, to the county counsel of any county within which a city has a population in excess of 750,000, or to a city attorney of a city and county, when the city attorney or county counsel reasonably believes

that there may have been a violation of the UCL. This bill subjects the use of such powers to the provisions of the California Right to Financial Privacy Act, Government Code section 7460 et seq.

- 2) Requires any investigation carried out pursuant to the powers this bill creates to be conducted in accordance with the procedures set forth in Government Code section 11180 et seq., including all applicable principles relating to immunity from self-incrimination. It provides that Business and Professions Code section 16758 shall not be construed as providing automatic immunity with respect to the subject of a subpoena issued in connection with that investigation. Relevant court orders must be sought in the superior court of the county in which the city attorney or county counsel seeking the order holds office.

COMMENTS

1. A limited extension of powers to specified city attorneys and county counsel

Current law authorizes the heads of each state department to make investigations and prosecute actions concerning matters relating to the business activities and subjects under their jurisdiction; violations of any law or rule or order of the department; and such other matters as may be provided by law. In order to effectuate these investigations and actions, the law provides the heads of these departments certain powers. Among the powers is the ability to promulgate interrogatories; the ability to issue subpoenas for the attendance of witnesses and the production of certain documents, testimony, or other materials; and the ability to inspect and copy those same documents and materials.

In order to facilitate their investigation of certain misconduct, including violations of the UCL, district attorneys are granted the investigative powers discussed above by Section 16759 of the Business and Professions Code. Their use of these powers is still subject to certain safeguards. In particular, district attorneys' investigations under this section must abide by the procedures laid out in the Government Code and are subject to the California Right to Financial Privacy Act.

City attorneys of cities with populations in excess of 750,000 and city attorneys of a city and county may bring UCL actions without seeking consent. Currently, the City and County of San Francisco is the only consolidated city-county in California, a status it has held since 1856. Thus, in practice, San Francisco is the only public entity that is affected by the statutory provisions granting authority to a city attorney of a city and county to bring unfair competition actions. Currently, the only city attorneys granted authority to bring actions under the UCL based on population are those in San Jose, San Diego, and Los Angeles.

Recently, 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.

This bill extends the same powers granted to department heads and the district attorneys to the city attorneys and county counsel that are already authorized to bring UCL claims when they reasonably believe that there may have been a violation of the UCL.

According to the author:

AB 2766 will close the existing gap in the law by providing those city attorneys and county counsels who already have full authority to independently bring UCL actions with the same investigative tools as their counterparts, subject to the limitations that already apply under existing law. Specifically, AB 2766 amends Business & Professions Code section 16759—which currently provides district attorneys with pre-litigation investigatory authority for potential UCL actions—to expressly provide city attorneys and county counsels in large jurisdictions with the same pre-litigation investigative authority for UCL actions. AB 2766 will bolster the ability of local governments to protect consumers and ensure fair competition among businesses by providing city attorneys and county counsels with the tools necessary to effectively investigate potential violations of the UCL.

2. Fortifies the ability of city attorneys to protect consumers and businesses

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. This bill seeks a modest extension of current law to grant the city attorneys and county counsel of the state's largest cities and counties to have the same investigative powers in connection with UCL actions that the Attorney General and all 58 district attorneys already have.

Affording these public prosecutors these additional powers will enable them to more robustly address unfair competition in their communities. For instance, the ability to issue pre-litigation subpoenas allows city attorneys to quickly act upon a reasonable suspicion of wrongdoing by seeking more information in a timely and targeted manner rather than forcing a city attorney or county counsel into a more time-consuming and

costly lawsuit. With these efficient and versatile new tools, these entities will be better equipped to protect consumers from unfair practices and to protect businesses who follow the rules from the businesses that seek to reap the advantages that come with unlawful and unfair business practices.

Although some in opposition to this bill argue that this power is unlimited and ripe for abuse, these powers would be limited in scope. First, they will be subject to the same parameters currently applied to district attorneys' use of these investigatory powers in Section 16759. Namely, they must abide by the procedures laid out in the Government Code and are subject to the California Right to Financial Privacy Act. The latter of which protects the confidential relationship between financial institutions and their customers by, in part, providing more procedural safeguards with respect to subpoenaing financial records.

In addition, these city attorneys and county counsel are only granted these expanded investigatory powers when the city attorney or county counsel "reasonably believes that there may have been a violation of [the UCL]." This bill does not extend the right to bring actions pursuant to the UCL to any additional agencies or extend the powers to investigations of violations of any other laws.

The County of Los Angeles, a co-sponsor of this bill, makes the case:

Significant protections exist to ensure due process when an agency issues a UCL administrative subpoena. There must be a reasonable belief of a violation of the UCL, and investigations must follow procedures outlined in the Government Code, including strict confidentiality requirements. Where a business objects to the basis or scope of a subpoena, they may refuse to comply. The issuing agency must move to compel, and a court determines the outcome.

While certain city attorneys and county counsels now have the authority to bring actions under UCL, Business and Professions Code §16759 has not been updated to provide them with administrative subpoena authority that can currently be exercised by the Attorney General and district attorneys for UCL investigations. AB 2766 would grant administrative subpoena power to the County Counsels of Los Angeles, Santa Clara, and San Diego, and the City Attorneys of Los Angeles, San Diego, San Francisco, and San Jose.

3. Opposition

A large coalition of groups previously in opposition to this bill, including the California Chamber of Commerce and the California Bankers Association, argues the bill is "an unnecessary and harmful expansion" of these investigative powers. They assert:

The authority being granted under AB 2766 can be used against anyone at any time from the largest of corporations to the most struggling of nonprofits and small businesses as this power applies broadly to any “person,” defined as “all natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons.” This will make businesses vulnerable to baseless fishing expeditions and political maneuvers, as standard necessary to issue a pre-litigation subpoena is disturbingly low, lacking guardrails to ensure the authority is not misused.

However, no examples have been presented of any of the offices who would be granted these investigatory powers engaging in ethically suspect practices.

The coalition also argues that these prosecutors will be able to issue subpoenas that hang over businesses unable to do anything about them until the prosecuting entity moves to compel in court:

Currently, a business is only able to use the motion to quash after the moving party (district attorney or Attorney General) moves to compel production. Under current law, respondent businesses would be unable to file a motion to quash or amend a subpoena issued under AB 2766 by city attorneys or county counsel unless they move to compel.

The filing of a subpoena alone is not evidence of wrongdoing, but the public awareness of a subpoena could have real financial and reputational consequences for a business or organization – putting the punishment before any evidence of misconduct. Respondents should be able to petition the court to quash pre-litigation subpoenas before action is taken to compel compliance.

In order to address this identified issue, the author has agreed to the following amendment, which authorizes entities receiving pre-litigation subpoenas from city attorneys and county counsel pursuant to this bill the ability to challenge those subpoenas through a motion to quash upon being served. With this amendment nearly all groups in opposition have moved to neutral. The Civil Justice Association of California is the lone organization in opposition.

Amendment

Insert the following provision: “Should the recipient of such subpoena issued pursuant to the powers granted in subdivision (b) object to the request in whole or in part, the recipient must serve objections and meet and confer with the issuer of the subpoena in an attempt to address those objections. If after meeting and conferring, the issuer and recipient cannot reach agreement, the recipient

may petition the Superior Court for an order quashing or modifying the subpoena in whole or in part.”

4. Stakeholder support

Attorney General Bonta writes in support:

This authority is critical to the Attorney General and District Attorneys’ effective enforcement of consumer protection laws. Pre-filing investigations have allowed our offices to uncover evidence of misconduct, understand its scope and scale, and make more informed decisions about whether to close an inquiry pre-filing, or to pursue settlement or litigation. Our ability to conduct robust pre-filing investigations has also created enhanced opportunities for coordination and deconfliction among our offices in cases of regional, statewide or national interest. This includes the interagency sharing of investigative resources and information (Government Code Section 11181(g)) with local, sister state, and federal partners, the logging of ongoing investigations to aid deconfliction, the negotiation of joint settlements, and the prosecution of joint and coordinated enforcement actions.

The City Attorneys of San Francisco, San Diego, Los Angeles and San Jose have long had the authority to bring UCL actions, and that authority was recently extended to the Los Angeles, San Diego, and Santa Clara County Counsels. However, none of these local officials currently enjoy the authority afforded to District Attorneys, pursuant to Government Code section 11181(e), to conduct pre-filing investigations. This is the discrepancy in the law that AB 2766 seeks to fix. It makes little sense from a policy perspective to deny these officials the ability to conduct robust pre-filing investigations.

A coalition of labor groups, including the California Teamsters Public Affairs Council and SEIU California State Council, write in support: “AB 2766 will enhance efficiency and interagency coordination in the enforcement of consumer protection and worker rights laws by providing pre-filing investigative subpoena authority to a limited number of additional agencies who already have authority to bring actions under California’s Unfair Competition Law (UCL).”

Oakland Privacy makes the case for the bill:

The UCL is an enormously important law for the state of California as we grapple with rapidly changing technologies that are establishing, and sometimes dominating, new markets with [lightning] speed. Unfair competition laws allow for the courts to consider a variety of issues

related to balancing markets between competitors and correcting some corporate behavior that has strongly negative impacts for consumers. It is fair to say that the right of action granted by the UCL provides a pathway to the courts that may otherwise be unavailable to consumer and small business plaintiffs.

By expanding the investigatory powers offered under the Unfair Competition Law to city attorneys in significantly sized cities and to county counsels, AB 2766 increases the capacity of California's public agencies to gather evidence regarding unfair and anti-competitive practices on behalf of impacted consumers and businesses.

This is a common sense change to improve the functioning of an existing California law, reduce workload for California's district attorneys and make sure that cases brought under the UCL by local governments are as thoroughly investigated as possible.

If City Attorneys and County Counsels, as defined, are authorized to prosecute cases under the Unfair Competition Law, as is the case under current law, then they should be provided with the proper tools to investigate possible violations and issue subpoenas in order to construct those cases and procure the needed evidence.

SUPPORT

City and County of San Francisco (co-sponsor)
City of San Diego (co-sponsor)
County of Los Angeles (co-sponsor)
County of Santa Clara (co-sponsor)
Attorney General Rob Bonta
Bet Tzedek Legal Services
California Labor Federation
California Conference Board of the Amalgamated Transit Union
California Conference of Machinists
California State Legislative Board of the SMART - Transportation Division
California Teamsters Public Affairs Council
City of San Jose
Consumer Attorneys of California
Consumer Federation of California
Earthjustice
Engineers and Scientists of California, Local 20, IFPTE, AFL-CIO
Los Angeles City Attorney Michael Feuer
Oakland Privacy
Public Rights Project

SEIU California State Council
UFCW Western States Council
Unite-Here
University Council-AFT

OPPOSITION

Civil Justice Association of California

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

SB 461 (Cortese, Ch. 140, Stats. 2021) *See* Comment 1.

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

AB 814 (Bloom, 2017) was substantially similar to this bill and would have granted a city attorney of any city having a population in excess of 750,000 or a city attorney of a city and county 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. This bill died on the Senate Floor.

PRIOR VOTES:

Assembly Floor (Ayes 47, Noes 19)

Assembly Judiciary Committee (Ayes 8, Noes 1)
