

## Private Enforcement of the California e-Waste Recycling Act: California's Unfair Competition Law

California's Electronic Waste Recycling Act of 2003 ("the Act"), enacted as Senate Bill 20, established a series of requirements for manufacturers and retailers of electronic products that contain cathode ray tubes (CRTs) and Liquid Crystal Display (LCD) panels. When all of these requirements are fully implemented, California will have a comprehensive recycling and disposal program for CRT and LCD products that are sold in California, and will impose European standards banning the sale of CRT and LCD products containing certain substances. Each requirement will have a ripple effect on manufacturers around the world.

This *e-Waste Recycling Bulletin* and subsequent *Bulletins* in this series will apprise readers of key requirements under the Act and current developments in its implementation.

### ▶ What is the Unfair Competition Law?

California's Unfair Competition Law ("UCL") prohibits businesses from engaging in unlawful, unfair or fraudulent business practices. Unfortunately, the UCL provides little in the way of guidance in determining what constitutes a business practice and when such practice should be deemed unlawful, unfair or fraudulent. To fill this apparent void, California courts have construed the provisions of the UCL broadly to apply to almost any act or practice that

- (1) violates any law, be it federal, state or local;
- (2) violates public policy; or
- (3) is likely to deceive the public.

Consequently, almost any business activity can provide the basis for a UCL action.

Certain enumerated public prosecutors and private parties may sue to enforce the UCL. A private party

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seeking to sue for alleged violations of the UCL need not have been injured by the allegedly unlawful, unfair or fraudulent conduct as a prerequisite to filing suit. That is, the traditional notion of standing to file a lawsuit does not apply.

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Remedies for violation of the UCL include:

- (1) injunctive relief prohibiting the allegedly unlawful or unfair conduct;
- (2) restitution, in the form of returning money or property to the person(s) from whom it was impermissibly taken through such conduct; and
- (3) civil penalties of up to \$2,500 per violation, when the Act is enforced by public prosecutors such as the Attorney General.

Notably, the UCL does not provide for the recovery of compensatory or punitive damages. Nor does the law allow a private enforcer to recover civil penalties. Nevertheless, when a private party prevails in a UCL action, that party typically seeks, and often receives, an award of attorneys' fees under California's Private Attorney General statute.

Despite recent well publicized abuses by certain lawyers and law firms, the UCL continues to provide a fertile avenue for private enforcement of environmental and other laws. To address these perceived abuses, the business community continues to support legislation designed to restrict both the prerequisites to filing a private party UCL action and the remedies available to a successful private party litigant. Simultaneously, the consumer and plaintiff's bars have sought legislation to expand the scope of remedies that are available under the UCL, most notably to include the disgorgement of profits. Despite these competing efforts, seasoned public interest groups will no doubt seize upon the Act as providing yet another predicate law upon which to base a UCL enforcement action.

#### ▶ **What does this mean for manufacturers and retailers under the Act?**

Manufacturers of CRT and LCD devices may find themselves defending UCL actions for, among other things, failing to:

- (1) notify retailers of the requirement to collect the recycling fee mandated by the Act;
- (2) properly label covered electronic devices;
- (3) inform consumers how to recycle covered devices; and
- (4) comply with the prohibition against the sale of covered devices containing certain metals and other allegedly hazardous substances after January 1, 2007.

Likewise, retailers of covered electronic devices may be subject to UCL claims for failing to collect the mandated recycling fee or for selling covered devices that do not conspicuously identify the manufacturer of the product.

Whether litigation is commenced against manufacturers or retailers of covered electronic devices, or both, a private enforcer likely will seek injunctive relief prohibiting the continued violation of the Act's requirements, restitutionary relief, if available, and attorneys fees. Private enforcers may not, however, seek recovery of civil penalties, either those provided for under the UCL or those provided for under the Act.

The possibility of suits under the UCL does not necessarily mean that private enforcement will prove successful. In fact, it is not altogether clear that the UCL can be used by private enforcers to seek compliance with the Act. The Act, by its express terms, reserves enforcement authority to the Department of Toxic Substances Control and the California Integrated Waste Management Board. Case law interpreting the scope of the UCL suggests that a private party may not sue under the UCL when that same party has no right of direct enforcement under the predicate statute. That is, since a private party cannot sue to enforce the Act, that same party should not be allowed to bring suit indirectly under the UCL. Therefore, whether and to what extent California courts will allow indirect UCL actions predicated upon alleged violations of the Act remains to be determined. Additionally, a manufacturer or retailer of covered electronic devices retains all defenses to a UCL action predicated upon the Act that it would have in defense of a direct action under the Act by the Department of Toxic Substances Control.

As with any new law, the interplay between the Act and the UCL is a matter of some conjecture. Past experience suggests, however, that conjecture will give way to lawsuits and actual interpretations, should the plaintiff's bar consider UCL actions predicated upon violations of the Act to be potentially lucrative. Regardless, manufacturers and retailers of covered electronic devices should consider the potential for liability under the UCL in formulating policies and procedures for complying with the Act's requirements. Even where the UCL may not be used by private parties, it still may be used by the Attorney General and other public enforcement authorities to compel compliance with other laws, and to impose additional penalties.

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