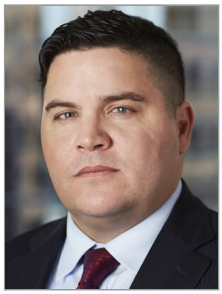
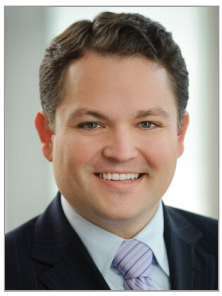
Standing Issues Prevail In Wake Of Calif. Competition Ruling

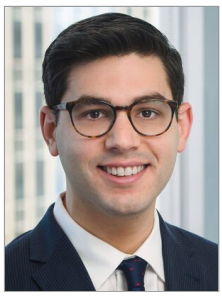
By **Jason Russell, Matthew Martino and Evan Levicoff** (August 11, 2023, 3:44 PM EDT)



Jason Russell



Matthew Martino



Evan Levicoff

The California Supreme Court's recent California Medical Association v. Aetna Health of California decision broadens **how organizations can show** standing to sue under California's unfair competition law, or UCL, and it leaves open several questions that could pose challenges for unfair competition litigants going forward.

The CMA dispute stemmed from a policy that defendant Aetna Health of California — a health insurance provider — implemented in 2009 to encourage physicians to refer patients to in-network care providers.[1]

In 2010, the CMA — a nonprofit medical association that advocates on behalf of California physicians — learned about Aetna Health's policy from its members.[2]

Given the association's mission to protect public health and better the medical profession, CMA staff spent about 200 to 250 hours working to address Aetna Health's policy, including by investigating the policy, preparing paperwork about it, and engaging with affected physicians.[3]

Ultimately, the CMA challenged Aetna's policy under the unfair completion law, which is designed to "protect both consumers and competitors by promoting fair competition in commercial markets for goods and services."[4]

In 2004, California voters amended the unfair competition law by adopting Proposition 64, which limited standing to those who suffered an injury in fact and "lost money or property as a result of the unfair competition."[5]

Rejecting the CMA's argument that its "diver[sion] [of] resources in response to [Aetna's] policy" showed that it lost money or property as a result of Aetna's alleged unfair competition, the Los Angeles County Superior Court granted summary judgment to Aetna Health, holding that the CMA lacked standing to sue.[6]

In 2021, the Court of Appeal of the State of California, Second Appellate District, agreed, explaining that:

> If CMA's expenditure of resources in this manner sufficed to establish standing, ... "then any organization acting consistently with its mission to help its members through legislative, legal and regulatory advocacy could claim standing based on its efforts to address its members' injuries."[7]

After granting the CMA's petition for review, the California Supreme Court reversed, holding that

> the UCL's standing requirements are satisfied when an organization, in furtherance of a bona fide, preexisting mission, incurs costs to respond to perceived unfair competition that threatens that mission, so long as those expenditures are independent of costs incurred in UCL litigation or preparations for such litigation.[8]

In reaching this conclusion, the California Supreme Court elaborated on two statutory inquiries:

- "[W]hether diversion of staff time can qualify as an 'injury in fact' and loss of 'money or property' within the meaning" of the UCL; and
- If such time is lost "as a result of" the defendant's allegedly unfair competition.[9]

It also aimed to quell concerns that "recognizing a diversion-of-resources theory in this case will open the door" to abusive litigation under the UCL and "flout the intent of the voters who passed Proposition 64 in order to restrict UCL standing."[10][11]

First, to support its conclusion that "diversion of salaried staff time and other office resources" constitutes an injury-in-fact and loss of "money or property" under the UCL, California's highest court relied on a line of federal cases beginning with the U.S. Supreme Court's 1982 Havens Realty Corp. v. Coleman decision, given that "Proposition 64 intended to adopt the injury-in-fact requirement from federal standing law."[12][13]

In Havens, the U.S. Supreme Court held that a fair-housing organization had Article III standing based on allegations that the defendants' practices impaired the organization's mission and caused a "consequent drain on the organization's resources."[14]

Finding Havens and its progeny persuasive, the California Supreme Court held "every organization, including the CMA, has finite resources" so "when staff are diverted to a new project undertaken in response to an unfair business practice, the organization loses the value of their time, which otherwise would have been used to benefit the organization in other ways."[15][16]

Second, to support its conclusion that the CMA's loss of resources occurred as a result of Aetna Health's policy, the California Supreme Court refused to adopt either a but-for or proximate causation test, but again looked to federal law, including Havens.[17]

Adopting federal decisions, the California Supreme Court agreed that "in assessing causation under the diversion-of-resources theory, 'the proper focus is on whether the plaintiff 'undertook the expenditures in response to, and to counteract, the effects of the defendants' alleged [misconduct] rather than in anticipation of litigation.'"[18]

Indeed, to parallel the rule adopted in some federal decisions, the California Supreme Court held that "expenditures an organization makes in the course of UCL litigation, or to prepare for such litigation," cannot confer standing, because if they could, an organization could simply "manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit."[19]

And in the case at hand, the California Supreme Court held that a triable issue of fact existed as to whether the CMA satisfied these causation requirements — the record contained evidence that the CMA diverted resources not to prepare for litigation, but in response to Aetna's policy that threatened the CMA's preexisting organizational mission.

Third, the California Supreme Court discussed its belief that its holding would prevent the sort of "shakedown" lawsuits by uninjured parties that Proposition 64 sought to foreclose.[20] For example, the California Supreme Court doubted the hypothetical — raised by Aetna and amicus curiae — that accepting a diversion-of-resources theory of standing would allow an organization to "create standing for [itself] by" engaging in "a brief stint of advocacy" against any policy it disliked.[21]

To dismiss this concern, the California Supreme Court pointed to the portion of its holding granting standing to organizations that pursue a "bona fide mission" — not "one formed for the purpose of UCL litigation" — and noted that the CMA fit this description because its advocacy on behalf of physicians "substantially predate[ed] the events that gave rise to the litigation."[22]

In other words, the Supreme Court doubted that, unlike the CMA's longstanding advocacy, "an isolated 'brief stint of advocacy,' unconnected to a preexisting mission independent of UCL litigation, would suffice to show [standing]."[23]

Nevertheless, California Medical leaves open several issues that could pose challenges for potential UCL litigants. For example, the California Supreme Court did not provide detailed guidance on how to determine whether an organization diverted resources in furtherance of a bona fide mission, or in connection with UCL litigation.[24]

Instead, it relied on a fact-specific analysis, holding that unlike a made-for-litigation organization that engaged in advocacy for only "a few weeks," and the CMA's resource expenditure was not dubious because its mission — dating back to 1856 — substantially predated the events giving rise to the case.[25]

Notably, this analysis does not explicitly address conduct in between these two extremes. Nor does it provide clear guidance on how to assess mixed motive cases, such as where an organization acts both in furtherance of a preexisting, bona fide mission and to prepare for potential UCL litigation.

Similarly absent is concrete guidance on the extent to which an organization must divert resources to have standing, or how specifically an organization must identify the alternate activities on which it might have focused. Instead, the California Supreme Court held that it was sufficient for the CMA to have expended 200 to 250 hours of staff time in response to Aetna's policy, but left open the possibility that far less significant diversions could suffice.

The uncertainties left by the CMA may be especially notable for defendants who seek dismissal on the pleadings or summary judgment, given potential arguments by plaintiffs that resolving their standing implicates issues of fact that cannot be resolved as a matter of law.

Indeed, if potentially costly litigation becomes a precursor to testing an organization's standing under the UCL, it is possible that defendants could look instead to settle such suits — and create tension with Proposition 64's aim of

eliminating shakedown lawsuits.

The CMA's reliance on federal standing law could add another layer of uncertainty for potential UCL litigants going forward. That is because the California Supreme Court's decision broadening standing — based on the U.S. Supreme Court's 1982 decision in Havens — comes at a time when more modern federal cases tend to narrow Article III standing.

For instance, in the 2013 Clapper v. Amnesty International USA decision, the U.S. Supreme Court held that certain organizations lacked standing to enjoin portions of a national security law, rejecting the plaintiffs' argument that they could, similar to California Medical, "establish standing based on the measures that they have undertaken to avoid" the effects of the law.[26]

In doing so, Clapper also warned against a broad rule that would allow an enterprising plaintiff to "secure a lower standard for Article III standing by making an expenditure based on a nonparanoid fear."[27]

In 2021, the U.S. Supreme Court echoed similar sentiments in the TransUnion LLC v. Ramirez decision rejecting "an expansive understanding of Article III" that could, like the defense argued in California Medical, entitle "virtually any citizen [to sue] virtually any defendant who violated virtually any federal law."[28]

While neither Clapper nor TransUnion discussed Havens — an underpinning of the CMA — the U.S. Supreme Court may soon have occasion to discuss Havens' application, given its recent grant of certiorari in Acheson Hotels LLC v. Laufer.[29]

Although Laufer concerns standing in "tester" suits under the Americans with Disabilities Act, the petition for certiorari references difficulty lower courts face in seeking to "reconcile older Supreme Court case law taking a more lenient view of standing" with more modern and restrictive cases, and calls on the Supreme Court to "provide guidance on what its own precedents mean."[30]

Indeed, federal appellate judges have questioned, in various contexts, whether Havens is, as the U.S. Court of Appeals for the Eleventh Circuit commented in the 2022 Laufer v. Arpan decision, "inconsistent (in whole or in part) with current standing jurisprudence."[31]

They have also commented on the problem of what lower court "precedent has done with Havens," as per the U.S. Court of Appeals for the District of Columbia Circuit's 2015 People for the Ethical Treatment of Animals v. U.S. Department of Agriculture decision.

If federal and California standing law continue to move in opposite directions, it may pose challenges for those seeking to navigate and estimate potential risks of competition litigation under both sets of rules.

For example, in such a world, an organization might lack Article III standing to enjoin anti-competitive conduct under the federal Sherman Act, but have standing to enjoin the very same conduct under the UCL. Those subject to California law should thus continue to monitor trends in federal standing law and their potential effects on the development of standing law under the UCL.

At bottom, courts and litigants will need to grapple with uncertainty in the wake of California Medical's organizational standing rule. While additional litigation will likely be required to develop its contours, defendants can still rely on typical merits-based defenses to mitigate some of the uncertainty in the meantime.

Jason Russell and Matthew Martino are partners, and Evan Levicoff is an associate. at Skadden Arps Slate Meagher & Flom LLP.

[1] Cal. Med. Ass'n v. Aetna Health of Cal. Inc., 532 P.3d 250, No. S269212, 2023 WL 4553703, at *1 (Cal. July 17, 2023) (Pincites are to Westlaw pages, as pincites were not yet assigned in the published version of the case as of the date of this article).

[2] Id. at *2.

[3] Id.

[4] Id. at *3.

[5] Id. at *1.

[6] Id. at *2.

[7] Id. at *2.

[8] Id. at *1.

[9] Id. at *4.

[10] Id. at *15.

[11] Id. at *14.

[12] Id. at *5.

[13] Id. at *9.

[14] Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982).

[15] Cal. Med. Ass'n, 2023 WL 4553703, at *9.

[16] Id. at *5.

[17] Id. at *10.

[18] Id. at *12.

[19] Id. at *13.

[20] Id. at *14.

[21] Id. at *15.

[22] Id.

[23] Id.

[24] Id. at *1.

[25] Id.

[26] 568 U.S. 398, 415 (2013).

[27] Id. at 416.

[28] 141 S. Ct. 2190, 2206 (2021).

[29] 143 S. Ct. 1053 (2023) (granting petition for certiorari).

[30] Brief for Petitioner at 6, Acheson Hotels, LLC v. Laufer, No. 22-429 (U.S. May 18, 2021), available at https://www.supremecourt.gov/DocketPDF/22/22429/245794/20221104110538361_Acheson%20v.%20Laufer%20-%20cert.%20petition.pdf.

[31] Laufer v. Arpan LLC, 29 F.4th 1268, 1276 (11th Cir. 2022) (Jordan, J. concurring).

[32] People for the Ethical Treatment of Animals v. U.S. Dep't of Agric., 797 F.3d 1087, 1101 (D.C. Cir. 2015) (Millett, J.) (dubitante).