



## SUMMARY

♣ California law does not require a business suing a larger competitor for unfair trade practices to prove consumer harm.

♣ In California, unfair business practices are not tolerated “merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy.”

♣ California courts protect competition differently than other jurisdictions.

## THE COURT OF APPEAL PROTECTS “THE SMALL GUY”

By David A. Robinson – October 2011

In a newly minted decision, Division One of the Second District Court of Appeal (Los Angeles) struck a mighty blow for “the small guy” in antitrust and unfair practices cases.

In *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.*, 198 Cal. App. 4th 1366 (2011), as modified on denial of reh'g (Sept. 29, 2011) (“*Flagship*”), the Court held that a business suing larger competitors for anticompetitive or unfair trade practices does not need to prove the defendants’ unfair practices harm consumers by making products or services immediately less available or more expensive. Rather, it is sufficient to show that such practices “*tend to create monopoly*” by eliminating competitors in the same “relevant market.”

In *Flagship*, the plaintiff owns a single location, multi-screen movie theatre located in Palm Desert off Highway 111. The defendant is a corporate conglomerate that owns and operates many theaters, in many towns, all except one outside the Coachella Valley. The defendant’s one location in the Coachella Valley is “less than two miles away” on Highway 111. The theory of the *Flagship* plaintiff’s case is the conglomerate “us[es] the bargaining power deriv[ed] from both [its] size ... and its operation of of numerous theaters in noncompetitive markets” to prevent the

plaintiff from getting equivalent deals with distributors to exhibit high profit, first-run movies. Put another way, the plaintiff alleges, “the pooling of the purchasing power of [defendant’s] entire circuit in bidding for films’ ... undermines the competitive process of bidding for film licenses ‘theatre by theatre.’”

The Los Angeles Superior Court summarily entered a defense judgment for the conglomerate. That is to say, it threw the plaintiff’s case out without a trial. It did so because it accepted the conglomerate’s argument that the plaintiff could not show the requisite antitrust (anti-competitive) injury needed to sue under State and federal law. Specifically, the trial court agreed with the conglomerate’s lawyers that the plaintiff needed, yet failed, to prove its inability to show first-run movies – and thus compete with the conglomerate on an equivalent basis – would have any immediate, appreciable impact on the movie going public. The Second District reversed, explaining the Superior Court misinterpreted and misapplied the law.

The argument the Los Angeles Superior Court was found to have erred by accepting boiled down to this:

That [same] point was also a central holding of *Klor’s v. Broadway-Hale Stores* (1959) 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (hereafter *Klor’s* ). In that case, the plaintiff household appliance retailer alleged that a major department store chain had induced 10 appliance manufacturers and their distributors not to sell to the plaintiff, or to sell to it “only at discriminatory



defendants submitted evidence that “there were hundreds of other household appliance retailers, some within a few blocks of [the plaintiff] who sold many competing brands of appliances, including those the defendants refused to sell to [the plaintiff].” (*Id.* at pp. 209–210, 79 S.Ct. 705.) On that basis, the defendants argued that the plaintiff could not recover, because nothing they were alleged to have done could have injured competition—the market was competitive and would remain so even if the plaintiff were entirely eliminated from it. The Supreme Court noted that the defense position would mean “that unless opportunities for customers to buy in a competitive market are reduced, a group of powerful businessmen may act in concert to deprive a single merchant, like [the owner of the plaintiff corporation], of the goods he needs to compete effectively.” (*Id.* at p. 210, 79 S.Ct. 705.) **The Court rejected the defense position, holding that conduct that is otherwise forbidden by the antitrust laws “is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy.”** (*Id.* at p. 213, 79 S.Ct. 705.) **The Court further observed that “[m]onopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact the Sherman Act has consistently been read to forbid all contracts and combinations ‘which “tend to create monopoly,”’ whether ‘the tendency is a creeping one’ or ‘one that proceeds at full gallop.’** [Citation.]” (*Id.* at pp. 213–214, 79 S.Ct. 705.)

(Bold added.)

In other words, in *Flagship* the Second District concluded the “small guy” is entitled to just as much protection under California’s antitrust

and unfair business practice laws as are “major players” who control large segments of the market. Hence, the Second District stated:

“An anticompetitive practice ‘is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy.’” (*Marin County [Bd. of Realtors, Inc. v. Palsson*, 16 Cal.3d 920, 930–931 (1976)], quoting *Klor’s*, *supra*, 359 U.S. at p. 213, 79 S.Ct. 705.)

(Bold added)

The lesson: California courts interpret the definition, and protection, of “competition” differently than courts in certain other jurisdictions. In California, the “small guy’s” place in the competitive picture still matters. In other jurisdictions, harm to competition means consumers must have already suffered actual, measurable, harm before a right to sue exists. Hence, businesses who believe they have been harmed by unfair or anti-competitive practices should consult counsel to determine whether they have a right to sue under California law.

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