

# Protect Your Business From Unfair Competition

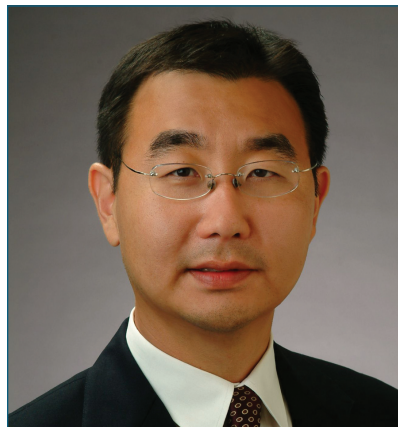
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In Hawai'i, businesses have extensive legal remedies to protect them from lost revenue and profit caused by a competitor's deceptive or wrongful conduct. A Hawai'i statute specifically outlaws "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Prior to 2002, only the State Attorney General could enforce this statute; however, in 2002, the Hawai'i State Legislature amended the statute to allow "businesses and consumers to enforce the law."

## What is an Unfair Method of Competition?

By design, the Hawai'i statute leaves the term "unfair method of competition" undefined. In enacting a related federal statute, the U.S. Congress noted that "[i]t is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known practices were specifically defined and prohibited, it would be at once necessary to begin over." The courts, however, have provided some guidance and parameters.

An unfair competition claim, almost counter-intuitively, is not limited to an action against a "competitor." In 2006, the Hawai'i Supreme Court ruled that an association of physicians could assert an unfair competition claim



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against a health plan provider, even though the two entities were not competitors. To the contrary, from one perspective, they are viewed as complementary partners working together -- the physicians provide medical services to the health plan subscribers and the health plan then reimburses the physicians. Nevertheless, the Hawai'i Supreme Court allowed the unfair competition claim to proceed, reasoning that a plaintiff and defendant need not be competitors. As this case demonstrated, it was sufficient that the plaintiff (the physicians' association) alleged that the health plan's handling of the physician reimbursements caused the association to "divert substantial resources and time to deal with its members' problems ... resources that otherwise would go to support its principal mission in service of its members."

Other examples of potential unfair competition include a gas station owner who operates convenience stores under the name "Star Mart," with a logo similar to that of supermarket operator, "Star Markets"; and a business that imports from Taiwan or the Philippines jewelry items with kukui or similar nuts not grown in Hawai'i and markets those products as "genuine" Hawaiian kukui nut products. Note that in the latter example, the defendants did not misappropriate any property or trademark belonging to the plaintiff and did not commit a wrongful act directly against the plaintiff. They simply engaged in misleading conduct targeted at consumers. The result of that conduct, however, adversely affected the plaintiff's business. Thus, your business does not necessarily have to be the specific target of a competitor's conduct to support an unfair competition claim. The issue is whether the unfair conduct causes injury to your business or property.

## What are the Remedies?

The unfair competition statute requires that a business suffer damages to establish a claim. As seen in the physicians' association case, the nature of the damages, however, does not have to be limited to a direct loss of revenue, but can include the expenditure of resources and increased costs supposedly caused by the unfair conduct.

If an unfair competition claim is established, the remedies can be substantial. The statute provides not only for an award of damages, but treble damages, which means the amount of actual damages is tripled. The statute also provides for an award of reasonable attorneys' fees and costs, as well as for injunctive relief to prevent future injury. An injunction is a court order that prohibits a party from engaging in specific conduct.

## Other Provisions of Hawai'i Law Dealing with Unfair Competition

In addition to the general prohibition on unfair methods of competition, Hawai'i law also prohibits certain specific anti-competitive, unfair and deceptive trade practices. A number of these prohibited practices are similar to those prohibited under federal antitrust laws. They include: (1) entering into contracts or combinations in restraint of trade, such as a price-fixing agreement among competitors; (2) selling or buying a commodity or setting the price of the commodity based on an agreement that the buyer will not deal with a competitor of the seller or the seller will not deal with a competitor of the buyer, if the effect would be to substantially lessen competition or tend to create a monopoly; (3) refusing to deal with a person for the purpose of inducing that person to agree to do something that would violate Hawai'i's unfair competition laws; (4) acquiring an interest in another business, if the effect of the acquisition would be to substantially lessen competition or tend to create a monopoly; (5) being an officer, director, or partner in competing businesses, if a hypothetical merger of those competing businesses would substantially lessen competition or tend to create a monopoly; and (6) monopolizing, attempting to monopolize, or conspiring with another to monopolize any part of any trade or commerce in any commodity in the state. As with the general prohibition on unfair competition, "any person who is injured in the person's business or property" by a prohibited practice may sue and recover triple damages and attorneys' fees.

Hawai'i also has older laws prohibiting anti-competitive practices that are commonly known as the Hawai'i Fair Trade Act (HFTA). HFTA prohibits: (1) discriminatory pricing between different sections, communities or cities, if the purpose of the discriminatory pricing is to harm an existing competitor or prevent a competitor from emerging; (2) selling below cost, if the purpose of the sale below cost is to destroy competition; and (3) extending special rebates, refunds, commissions or other privileges to certain purchasers and not to others, where the rebate or similar privilege tends to destroy competition. As with the unfair competition laws described above, a plaintiff may bring a lawsuit and recover triple damages. Attorneys' fees, however, are not available.

Hawai'i has also adopted the Uniform Deceptive Trade Practice Act (UDTPA), which, in general, deals with the specialized area of trademarks, trade dress, labeling of products and similar issues. It also contains some very broad prohibitions against unfair competition that do not involve infringement of trademarks or mislabeling of products. For example, the UDTPA broadly prohibits disparaging "the goods, services, or business of another by false or

misleading representations of fact"; and engaging in any "conduct which ... creates a likelihood of confusion or of misunderstanding."

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The remedies under the UDTPA, however, are quite limited. Only an injunction is available and damages may not be recovered. Attorneys' fees may be granted only if the defendant "willfully engaged in the trade practice knowing it to be deceptive."

Plaintiffs may also have recourse in federal laws, such as the various antitrust laws, the Lanham Act, and even the Racketeer Influenced and Corrupt Organizations Act, which have been used to bring claims for unfair competition. Hawai'i courts have also recognized common law claims, based on judicial cases rather than statutes, for interfering with someone's contractual or business relationships and trade libel.

## Do You have an Unfair Competition Claim?

The following are some practical steps you can take if you believe you are being injured by unfair competition:

### Identify and analyze the potential defendant

Is the potential defendant a direct competitor? If not, what specifically is being done and how is it harming your business?

### Analyze the extent of harm

How much revenue have you lost because of the other party's conduct? Have you also experienced increased costs or expenditures of resources?

### Gather and preserve evidence

Put together documents in your possession that you believe support your claim. These include not only documents showing the potential defendant's unfair conduct, but also financial documents reflecting the damages you suffered, such as reduced revenues, increased costs, employee work hours and other resources that had to be used because of the other party's conduct. Until you consult with an attorney, limit your search to internal documents or those in the public domain, such as newspaper ads or information on the Internet, to avoid potential claims by your competitor that you have actually interfered with its business by misappropriating proprietary information. The same is true with interviewing witnesses. Talk to your executives and managers about the issues, but consult with an attorney before interviewing individuals outside of your company, such as customers or vendors.

### Review your potential case with an experienced attorney

The law of unfair competition can be complex and a determination of whether you have a viable claim will depend on the details of your specific situation, which an attorney specializing in unfair competition laws can help you determine.

The above discussion is meant only to provide a general introduction to the law of unfair competition. If you feel that you may have a claim for unfair

competition, you should have your case reviewed by an experienced attorney. Some attorneys will do at least an initial review of your potential case without charge. Attorneys and law firms are increasingly willing to take unfair competition cases on a partial contingency basis; the attorneys will discount their normal hourly fees and take a percentage of any settlement or damages awarded.

Hawai'i's laws provide strong protections for businesses against unfair competition. Knowing at least the basics of those laws will help ensure that your business can compete freely and fairly on a level playing field.

*This article is intended to address issues of general interest, is not intended to be construed as legal advice, and does not take the place of consultation with qualified legal counsel.*

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