

*People v. Potter Handy, LLP, et al.*  
**2023 DJDAR 11655**

Where a statute is more specific than the litigation privilege it applies to the litigation privilege must give way to applicable exceptions. Carving out an exception to the litigation privilege would not be proper if the Legislature's proscribed remedies remain viable.

**FACTS/PROCEDURE**

The law firm Potter Handy, LLP and several of its attorneys (collectively, "Potter") have filed thousands of complaints in federal courts in California alleging violation of the Americans with Disabilities Act of 1990 ("ADA"). Several on behalf of repeat plaintiffs and against small businesses with little regard to whether those businesses actually violated the ADA. Many of the cases were aimed at small businesses owned by immigrants and individuals for whom English is a second language, who are often less familiar with the American legal system. The People allege that these ADA complaints contain standing allegations Potter knows to be false, that Potter files the complaints as part of a shakedown scheme to extract coerced settlements from small business owners in California, and that this conduct constitutes an "unlawful" business practice under our state's unfair competition law ("UCL"). The People relied on Business and Professions Code section 6128, subdivision (a) (§ 6128(a)), which makes it a misdemeanor for an attorney to engage in deceit or collusion with intent to deceive the court or a party, and on two Rules of Professional Conduct governing lawyers. Potter Handy demurred on the ground that the litigation privilege, which generally protects communications made as part of a judicial proceeding, immunizes their alleged conduct. The People argued that the litigation privilege does not bar their UCL claim as it is predicated on violations of a regulatory statute or rule that is itself exempt from the privilege. The trial court sustained Potter's demurrer without leave to amend, and the People appealed.

The question before the court was whether the People's UCL claim could survive a demurrer brought on the ground that the litigation privilege immunizes Potter's alleged conduct in this case. (Civ. Code, § 47, subd. (b) (§ 47(b)).) Communications made as part of a judicial proceeding are generally privileged, so as to afford litigants "the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." (Action Apartment Assn., Inc. v. City of Santa Monica (2007) 41 Cal.4th 1232, 1241.)

**HOLDING/DISCUSSION**

**Holding:** Affirmed. The litigation privilege did not apply to the People's UCL claim. The parties agreed that had the People filed criminal charges directly under section 6128(a), the case could have proceeded. Courts have long recognized that the privilege must give way where a statute like section 6128(a) "is more specific than the litigation privilege and would be significantly or wholly inoperable if its enforcement were barred when in conflict with the privilege." (Action Apartment, at p. 1246.) The court concluded that the exception does not extend to a UCL claim predicated on violation of section 6128(a) and on Rules of Professional Conduct. Carving out an exception to the litigation privilege for the People's UCL claim would not be proper because the Legislature's proscribed remedies, prosecution directly under section 6128(a) and State Bar disciplinary proceedings, remain viable. The People's contention did not support their claim of error.