



The Role of a Forensic Accountant in Combating Unfair Business Practices

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In difficult economic times, businesses are struggling to compete for fewer revenue opportunities. This environment creates more incentives to participate in fraudulent activities to protect and maintain revenue. Such unfair business and trade practices involve a wide range of matters, including business conspiracy, breach of fiduciary duty, misappropriation of trade secrets and other proprietary information, fraud, tortious interference with contracts, misrepresentation, and other oppressive or unconscionable acts or practices.

When to use a forensic accountant?

Whether from a plaintiff or defense perspective, proving or disproving unfair business practices may hinge greatly upon the documentation trail that is left by the alleged perpetrator. Through an examination of financial and other data records, a forensic accountant can therefore play a vital role in uncovering facts that can support or repudiate an unfair business practice claim. Forensic accountants are uniquely qualified for this role because of their knowledge and experience in financial document analysis, accounting principles and auditing techniques.

Once the case has been made that unfair competition has occurred, the decision is made whether to pursue criminal prosecution, civil remedies, or both. Civil litigation can result in a range of penalties including injunctions, a reallocation of profit earned from the criminal act by the party that benefitted from the theft, reimbursement of actual damages, and punitive damages. In some jurisdictions, the award can include a multiple of actual damages.

The role and necessity of the forensic accountant becomes more apparent as we examine examples of unfair competition matters.

Typical matters

Fraud is an especially likely crime in a troubled economy and it takes many forms. For example, a business may bill another for services not actually rendered, double-bill, or misrepresent services/products rendered. A construction contractor can deceive a customer into thinking that some extra technical work was performed in order to meet code requirements, and bill significantly for it, when in fact the work was done as a standard part of the job.

False advertising and other misrepresentations are also another way a business "stretches the truth" to gain unfair advantage. The enterprise may make false statements in advertisements about a products quality, ingredients, or effectiveness, or advertise sale items that are not actually available to convince people to visit the seller's store. "Bait and Switch" is another form of fraud in advertising, in which the seller advertises an item but does not really want to sell it, so that the consumer can be convinced to purchase a different item for a higher price or on less favorable terms. The seller's techniques for discouraging the purchase of the "sale" object can include refusing to discuss the advertised item or representing it as a poor product or an inferior guarantee. Not only do these practices harm the consumer, they also reduce the revenue of competitors.



Deceptive pricing practices are another way that businesses gain profits when revenue and profitability is down. For example, a common scheme is claiming that the item is on sale by artificially and untruthfully pretending the product usually sells for a price higher than its normal price. Some businesses advertise an item at a low price to induce customers to come in and then only selling the item at that price if the purchaser also buys another more expensive product. Consumers can also be duped by terms such as "going out of business," "special price" or "clearance price" when the items are not being sold at reduced prices and without clearly disclosing the actual former price or the percentage reduction from the former price that is actually being offered.

Another common example is trade secret misappropriation. Businesses generally protect trade secrets through the use of non-compete and non-disclosure contracts with vendors, customers, employees, and others who have access to the information. The most common case of trade secret theft is when an employee resigns or is terminated. It is common in trade secret cases to discover that the departing employee was recruited by a competitor business and offered employment and compensation for changing employment and bringing secrets with them. Resolving these cases is often dependent on sophisticated data tracking systems that retain emails and date/time stamped records of data dumps from servers and hard drives. This generally requires an extraordinary effort to obtain (often, secret) communications, data download histories, relationship clues, and interviews/cooperation from individuals (recipients of the secrets) who are not motivated to assist in the investigation.

Conspiracy is an especially devious crime, which can be defined as an "an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful and harmful towards another person." There are many variants in business matters. A vendor might sue its customer after its contract was not renewed, but instead was awarded to a competitor that paid bribes in the form of kickbacks. In another example, a business may covertly work with a top manager at a competitor to persuade employees that the company is going under and they should look for other employment at the other company, when in fact there are not compelling facts for bankruptcy.

Proving facts

The freedom to operate a business and compete in the marketplace is essential to a capitalist marketplace. However, the law prohibits a business from unfairly profiting at the expense of a competitor. In many matters, a forensic accountant can make-or-break a case. An experienced forensic accountant can help to determine whether the alleged crime actually took place, how to best prove or disprove it, and can perform a calculation of economic damages. For example, he will know what documents should be obtained to resolve the matter. The scope and scale of the document request list will be driven by the complexity of the matter. He might then reconstruct accounting records, analyze business transactions, provide guidance to attorneys, then render expert witness testimony in court.

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