

Memorandum 95-6

**Unfair Competition: Initial Policy Considerations
(Professor Fellmeth's Background Study)**

Attached to this memorandum is Professor Robert Fellmeth's background study on *California's Unfair Competition Act: Conundrums and Confusions*. This is a revised version of the preliminary study that was earlier distributed to the Commission.

The study is divided into the following main parts:

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Professor Fellmeth will present his study to the Commission at the January meeting for the purpose of making initial policy determinations.

Respectfully submitted,

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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

BACKGROUND STUDY

California's Unfair Competition Act: Conundrums and Confusions

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January 1995

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California's Unfair Competition Act: Conundrums And Confusions

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CALIFORNIA'S UNFAIR COMPETITION ACT: Conundrums and Confusions

Introduction and Summary

California's Unfair Competition Act [Business and Professions Code § 17200 *et seq.*] prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."¹ Such unfair competition is unlawful as to any person "who engages, has engaged, or proposes to engage" in it.² The statute's breadth is matched by its liberal and perhaps unique standing provisions. Fifty eight offices of district attorney, the Attorney General, and city attorneys in multiple cities may bring an action for injunctive relief and for civil penalties. Moreover, any private party may bring an action for injunctive relief acting "for the interests of itself, its members or the general public."³

While coextensive access to the courts from a variety of sources is not unusual, several factors have coalesced to cause confusion given this law's unusual license for plaintiff representation of the general public. One such factor is an increase in cases where alleged business overcharges may give rise to substantial restitution to the public (either directly or through fluid recovery or *cy pres* relief). That equitable remedy is part of the injunctive relief available to all plaintiffs under the Act. Another factor has been the substantial attorney's fees available to plaintiff's counsel in cases creating a beneficial fund or vindicating interests beyond the named plaintiff.

Private plaintiffs representing the "general public" pose a particular problem under Unfair Competition Act terms. These plaintiffs need not meet the extensive requirements of state or federal class action procedure: e.g., certification as a class with demonstrated common questions and adequacy of representation, notice, manageability, a showing of superiority of the class mechanism to resolve the dispute, *et al.* Rather, the statute provides that any person who files is a party allowed to represent the injunctive/restitutionary interests of all who may be injured - historically or prospectively. If the litigation which then ensues bars others who might have been victims and are due restitution, serious due process issues arise. *I.e.*, many "unfair competition" cases are brought by plaintiffs based on their own narrow dispute with a defendant; alleging public injury warranting restitution beyond their individual interest, may expand discovery scope and increase leverage - a leverage they may sacrifice for their own gain. The statute provides no check to such an abuse short of res

¹ Business and Professions Code § 17200.

² Business and Professions Code § 17203.

³ Business and Professions Code §§ 17204, 17204.5.

judicata denial.⁴

On the other hand, the denial of *res judicata* effect means that where public or private plaintiffs do, in fact, serve a *bona fide* attorney general function and vindicate larger interests, they may be unable to offer a final resolution.⁵ Defendants, who understandably need finality, may be frustrated by duplicate filings, uncertain exposure, and legal fees to litigate identical issues against different plaintiffs, none able to offer a universally binding resolution.⁵

The survey of cases and practitioners involved in Unfair Competition Act litigation indicates that the statute's dilemma is no longer theoretical, it is currently functioning in a number of cases to frustrate the just and expeditious resolution of disputes. In this article, the author sets forth the basis for the current problem, surveys analogous federal and state statutes in other jurisdictions, outlines illustrative examples, and proposes eight amendments to current law. The legislative recommendations are drawn narrowly to address the most egregious problems which have arisen. The intent of the changes suggested is to rationalize and

⁴ Note that the doctrine of *res judicata* is implicated more than the related concept of collateral estoppel. A judgment in a \$ 17200 case may well bar the instant plaintiff from relitigating the same matter - that party is collaterally estopped. But other plaintiffs may file identical causes of action, even claiming the same injury by the same defendants to the same members of the general public over the same time period.

⁵ A *res judicata* plea to bar an action requires: (1) identity of issues; (2) a final judgment on the merits; and (3) identity or privity of parties. The problem in the instant case rests primarily with the third requirement. See *Teitelbaum Furs, Inc. v. Dominion Ins. Co. Ltd.* 58 Cal.2d 601, 604 (1962); see also *Hone v. Climatrol Indus., Inc.* 59 Cal.App.3d 513, 529 (1976).

⁶ At least in theory, where there has been a judgment and restitution rendered and accepted, further litigation to recover duplicate relief for the same wrong would appear to be barred in a court of equity. However, the issue is not that simple. As discussed *infra*, such an arrangement means that the first party to obtain judgment then determines the resolution - an outcome which may be substantially within the control of the defendant. Moreover, a defendant has his own conundrum to settle: he cannot be assured that the settlement he makes will stand until summary judgment proceedings, or perhaps full-fledged litigation, establishes that the settlement he has already made satisfies all of those who might benefit from subsequent filings. As explained below, such a posture impedes meritorious and willing settlements.

order the jurisdictional and standing status of public and private parties to prevent the representation of the general public by those with conflicts of interest, inhibit duplicative litigation, and achieve finality consistent with due process standards.

I. The Origin and History of § 17200⁷

California's "Unfair Competition" statute originated as part of the state's Civil Code in 1872.⁸ In its early form, it simply prohibited "unfair" practices in competition. The law was initially used as an exception to the traditional admonition that "equity will not enjoin a public offense," and to allow a statutory basis for many of the traditional "business torts," such as commercial disparagement, trade secret theft, tradename infringement, et al.⁹ The statute has evolved over the past century through amendment and developing caselaw, both influenced by the existence of a similarly worded federal statute (the Federal Trade Commission Act, enacted in 1914 and amended significantly in 1938 and 1975).¹⁰

Much of the early caselaw interpreting the statute occurred while the law was located at § 3369 of the Civil Code. In 1977, the law was moved to § 17200 et seq. of the Business and Professions Code, a move not intended to alter it substantively nor to affect the applicability of pre-existing interpretive caselaw.¹¹ The law is now sandwiched between the similarly titled "Unfair Practices Act" beginning at § 17000, which is roughly analogous to the federal Clayton Act (e.g. prohibiting predatory below cost and price discrimination offenses) and Section 17500 of the Business

⁷ For additional detail, see *The Unfair Competition Statute: California's Sleeping Giant Awakens*, T. Papageorge, 4 Whittier L.Rev. 561 (1982).

⁸ See *Former Civil Code Section 3369: A Study in Judicial Interpretation*, 30 Hastings L.J. 705 (1979).

⁹ Business and Professions Code § 17202. Notwithstanding § 3369 of the Civil Code, the statute makes available "specific or preventive relief" to enforce a "penalty, forfeiture, or penal law in a case of unfair competition."

¹⁰ 15 U.S.C. § 45.

¹¹ The provision was moved at the suggestion of the analyst for the Senate Judiciary Committee during the course of amendments proposed by the California Association of District Attorneys and eventually enacted.

and Professions Code, which prohibits deceptive advertising.¹²

As the Unfair Competition Act evolved, it became far more than a vehicle for business tort remedy between disputing commercial entities. Rather, it became a means to vindicate consumer or public market abuses by business entities in a variety of contexts, a statute directed at preserving general marketplace fairness and legality. Major alterations of the statute substantively over the past several decades in that direction include:

1. Amendment to prohibit "unlawful" as well as "unfair" competition;¹³

2. Caselaw broadly applying the statute to a wide variety of alleged unlawful¹⁴ or unfair practices,¹⁵ including violations of

¹² Note that the provisions of § 17500 et seq. are also implicitly or explicitly included within § 17200, creating a certain amount of confusion. The former section is confined to deceptive advertising and lacks the breadth of § 17200. § 17500 et seq. focuses on enumerating many practices which are deceptive as a matter of law and applying to specific types of problem sales: charity solicitations, phone sales, et al. It also allows prosecutors (and the Director of the Department of Consumer Affairs) to serve what amounts to a pre-filing interrogatory, asking an advertiser for the factual basis of a claim and allows the propounder to hold the respondent to his answer (see § 17508). Unlike § 17200, § 17500 includes a criminal misdemeanor remedy. However, §§ 17535 and 17536 interpose for deceptive advertising the same private and public injunctive and public civil penalty remedies applicable to § 17200, including the same broad standing grant discussed *infra*. Accordingly, recommendation #8 is to replicate each of the suggested seven reforms applicable to § 17200 to § 17500.

¹³ The word "unlawful" was added in 1963; 3 Sen.J. (1963 Reg.Sess.) pp. 4441-4442; 3 Assem.J. (1963 Reg.Sess.) p.4999.

¹⁴ An "unlawful business practice" includes anything that can properly be called a business practice and that is at the same time forbidden bylaw. See *People v. McKale* 25 Cal.2d 626 (1979).

¹⁵ Although *California v. Texaco, Inc.* 46 Cal.3d 1147 (1988) defined "practice" to require a repeated or customary action, habitual performance, or a pattern of behavior precluding the single act of an unlawful merger to qualify, that decision has been legislative reversed by SB 1586 (1992 Cal Stat. Ch. 430) effective in 1993 to cover an "act" as well as a "practice." The amendment conforms California law to the Federal Trade Commission Act (15 USC § 45).

federal law, restraints of trade,¹⁶ sale of endangered whale meat, purveying obscene material, mobile home park regulation violations, abuse of the legal process, nursing home abuses,¹⁷ and many others;

3. Coverage to include practices originating from out-of-state but affecting California consumers;¹⁸

Perhaps more significant, numerous structural/procedural changes have been engrafted upon the statute over the years to create a mix of remedies and additional actors able to invoke them. Major changes include:

1. The addition of a "civil penalty" of \$2,500 per violation available to the Attorney General and the state's district attorneys for violations;¹⁹

2. Additional civil penalties of \$2,500 per violation where senior citizens or the disabled are victims;²⁰

3. The inclusion of an enhanced civil penalty of \$6,000 per violation where there is an intentional violation of an outstanding injunction under the Act;²¹

4. Interpretation of separate "violations" which can be multiplied times the maximum penalty of \$2,500 (or \$6,000) based on the number of victims affected by them;²²

¹⁶ See *People v. National Association of Realtors* 120 Cal.App.3d 459 (1981).

¹⁷ See *People v. E.W.A.P.* 106 Cal.App.3d 315 (1980); *People v. McKale* 25 Cal.3d 626 (1979); *Barquis v. Merchants Collection Ass'n* 7 Cal.3d 94 (1972); *People v. Casablanca Convalescent Homes, Inc.* 159 Cal.App.3d 509 (1984).

¹⁸ See removal of "within this state" from § 17203 by SB 1586 effective January 1, 1993.

¹⁹ See Business and Professions Code § 17207.

²⁰ Business and Professions Code § 17206.1

²¹ *Id.*

²² See *People v. Superior Court (Jayhill)* 9 Cal.3d 283 (1973); See also *People v. Superior Court Orange County* 96 Cal.App.3d 181 (1980); See also *People v. Bestline Prods. Inc.* 61 Cal.App.3d 879 (1976). See also references to this caselaw in section 6 of SB 1586. The lodestar of "victims" for maximum calculation is not dispositively defined: prosecutors contend that it includes potential victims (e.g. may be based on the circulation of a

5. Pre-filing discovery powers available to public prosecutors;²³

6. Expansion of the public offices able to bring injunctive and penalty actions to include certain offices of city attorney, and then further expansion in 1991 to include - where the county district attorney consents - any county counsel enforcing a county ordinance, or any full time city attorney.²⁴

7. Injunctive relief broadly defined to include restitution under equitable principles, and an injunction is warranted based on "past actions" even if no current violations are occurring;²⁵

8. As noted above, liberal standing to bring actions for injunctive relief and which allows "any person" to sue for himself

publication with a misleading advertisement) and defendants contend that it includes only actual victims injured. Note also that this calculation creates a maximum possible penalty, the actual penalty to be imposed under this ceiling is guided by Business and Professions Code § 17206(b) added by SB 1586 and includes "the nature and seriousness of the misconduct, the number of violations, ...persistence...length of time (of the misconduct) ...willfulness, and the defendant's assets, liabilities, and net worth."

²³ Prosecutors may invoke the Government Code pre-filing discovery (generally available to the Attorney General, see Government Code § 11180 et seq.) where they "reasonably believe" that a violation of antitrust law, or of § 17200, has occurred. See Business and Professions Code § 16759.

²⁴ See Business and Professions Code §§ 17204 includes generic authority to enforce the injunctive and civil penalty provisions of the statute to any city attorney of a city with a population of over 750,000; § 17204.5 added in the city attorney of San Jose - not yet at that population. §§ 17204 and 17206 also allow the district attorney to authorize the county counsel to bring injunctive and civil penalty actions where violations of county ordinances are involved. And finally, as of 1992, the district attorney may authorize any "full time" city prosecutor to bring an action.

²⁵ See § 17203 as amended by SB 1586 effective January 1, 1993. This amendment reverses the dubious holding of *Mangini v. Aerojet-General Corp.* 230 Cal.App.3d 1125 (1991) that injunctive relief under the Unfair Competition Act was available only to remedy "ongoing" conduct, not past conduct.

or "for the general public;"²⁶ and such standing may be assumed by one who is not himself or herself a victim of the practice complained of.²⁷

And the statute makes clear that its remedies are cumulative of other remedies provided for in specific statutes, including those laws claimed as being violated to give rise to an "unlawful" claim, criminal offenses, torts, and regulatory jurisdiction in the normal course.²⁸

A. Comparison to § 5 of the Federal Trade Commission Act

Although called California's "Little FTC Act", the Unfair Competition statute takes a very different enforcement approach from its federal counterpart, § 5 of the Federal Trade Commission Act. The federal § 5 is roughly comparable in its substantive and generic prohibition of "unfair acts" in competition.²⁹ And federal caselaw has interpreted § 5 broadly to include restraints of trade, and a wide variety of unfair business practices and types of misleading advertising.³⁰ The substantive breadth of the federal

²⁶ Business and Professions Code § 17204; note that this section is poorly worded and could yield the grammatical interpretation that only public prosecutors have standing and that private parties are to complain to them. Further, the definition of "person" has been held to exclude cities, while including virtually every other possible actor. Given the involvement of cities in business practices, this exclusion appears to be an anomaly. Both of these problems may warrant correction.

²⁷ See e.g. *Consumers Union of the United States, Inc. v. Fisher Development, Inc.* 208 Cal.App.3d 1433 (1989). Note that under Federal Rule of Procedure 23, a class representative must be a member of the aggrieved class, see *La Mar v. H&B Novelty & Loan Co.* 489 F.2d 261 (1973).

²⁸ Business and Professions Code § 17205, see also *People v. Los Angeles Palm, Inc.* 121 Cal.App.3d 25, 33 (1981). Note that a regulatory scheme may foreclose § 17200 in the extraordinary case where it "occupies the field" or is legislatively intended to foreclose alternative remedies.

²⁹ 15 U.S.C. § 45.

³⁰ See e.g. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1964) holding a television ad appearing to shave sandpaper was misleading because the paper was soaked unseen for a time prior to the shaving; see also *Feil v. FTC* 285 F.2d 879 (1960) holding that a representation, although literally true, must present explanatory facts if relevant to health; see also *Exposition Press v. FTC* 295 F.2d 869 (1961) holding a lead-in which misleads, even if corrected

"unfair" prohibition, recognizing the variety and imagination of entrepreneurs, is relevant to state unfair competition statutes. The latter, including California, generally hold federal cases to be "more than ordinarily persuasive" in interpreting state counterparts.³¹ One premise of the federal statute is to address unfair business practices which might confer a competitive advantage leading others to reciprocate. The resulting downward spiral (the "lowest common denominator" problem discussed *infra*) is a common concern of federal law and its state counterparts.

However, the federal statute has a very different enforcement regime than do 15 of the 16 states with "Little FTC Acts." The Federal Trade Commission (FTC) directly and exclusively enforces the federal Act.³² The traditional remedy of the FTC has been the filing of an administrative complaint, proceedings, and the entry of a "cease and desist order" against a person or entity committing unfair acts in competition. Where contested, such an order may be appealed by the respondent in federal court. The advantage to a single administrative agency adjudicating such orders rests with the notice and prospective clarity it may afford actors in a marketplace. Where addressing a concept as nebulous as "deceptive advertising", for example, knowing with some certainty where the lines are between selling a product through permissible puffery, and unlawfully misleading consumers may be assisted by a system of advance guidance and warning.

However, prior to the 1970's, the only punitive sanction possible against a violator was a \$5,000 per day violation civil penalty - assessed only against those who violated a pre-existing cease and desist order. One study calculated that it took the FTC, on average, 4.17 years to finalize a contested cease and desist

or clarified prior to purchase, violates § 5.

³¹ See *People v. National Research Co.* 201 Cal.App.2d 765 (1962).

³² See *Holloway v. Bristol-Myers Group* 485 F.2d 986 (1973) which rejected the notion of a private cause of action under the FTC Act. Hence, only the FTC may initiate cease and desist orders or trade regulation rules, and is solely empowered to seek civil penalties for their violation. However, note that there are many specific statutes within the general scope of § 5 which have their own criminal, public civil, and private civil remedy schemes. And note that any existing FTC cease and desist order or trade regulation rule violation would arguably be an "unfair or unlawful act" in competition violating California's Unfair Competition Act and giving rise to its civil penalty remedies in state court.

order.³³ Since most ad campaigns run for less than one year, the efficacy of the agency's most severe sanction was problematical. In fact, from the perspective of the rational advertiser, it would pay to gain market advantage through deception until a cease and desist order were entered. Literally, no sanction from the agency (aside from possible adverse publicity) could be forthcoming until such an order were in place. Hence, some critics contended that the scheme was quite literally a license to mislead, or a system of assured "free bites."³⁴ The FTC Act has been amended procedurally periodically over the past twenty years, with major changes in the 1970's and 1980's allowing the FTC to serve an established cease and desist order on an entity other than the entity against whom it was entered and to assess civil penalties if it is violated, and to assess direct civil penalties where a properly adopted and more general "trade regulation rule" was in place when the act complained of occurred. Notwithstanding these adjustments, unless such an order or rule applies to a practice, and existing orders and rules cover a minuscule portion of potentially violative business practice, there remains no deterrent producing sanction. Only if a specific practice is already subject to one of the enumerated orders or rules prohibiting it may a monetary sanction under the Federal Trade Commission Act occur.

State "little FTC Acts", including California's, generally use a different approach. They allow an immediate sanction to be imposed without warning, accomplishing a theoretically deterrent producing disincentive to engage in "unfair or unlawful" acts in competition. They generally allow certain public agencies and sometimes private parties to assess a punitive damage, treble damage, or civil penalty sanction.

The use of a multitude of sources to bring to the courts possible violations carries with it some clear enforcement advantages. Early detection and action, and more likely response, are important elements in an effective system of disincentives. However, there are some costs which can attend a system of multitudinous and coextensive response, e.g., lack of advance knowledge except through the relatively expensive process of litigation, possible multiple representation of similar interests, possible confusion and conflicts in adjudications, possible estoppel or foreclosure based on prior suits by those who did not and could not adequately represent the interests purportedly

³³ See *The Nader Report on the Federal Trade Commission*, Schulz, Fellmeth, and Cox, (Baron, 1968) at Chapter III.

³⁴ *Id.*, note that the critique of the 1968 Nader Report on the Federal Trade Commission was substantially repeated by a subsequent Report of the American Bar Association undertaken by request of then President Richard Nixon, see *Report on the Federal Trade Commission*, American Bar Association, (Chicago, 1969).

involved. As discussed *infra*, these costs to the Unfair Competition Act's current format in California, which is substantially different than the mechanisms of other states, have been evident in recent years.

B. Comparison to Similar Statutes in Other Jurisdictions

Sixteen other states have statutes roughly comparable to California's Unfair Competition Act: Alaska,³⁵ Connecticut,³⁶ Florida,³⁷ Hawaii³⁸, Illinois³⁹, Louisiana⁴⁰, Maine⁴¹, Massachusetts⁴², Montana⁴³, Nebraska⁴⁴, North Carolina⁴⁵, South Carolina⁴⁶, Utah⁴⁷, Vermont⁴⁸, Washington⁴⁹, and Wisconsin⁵⁰.

Alaska does not have a broad standing in equity provision

³⁵Alaska Statutes § 45.50.471

³⁶Connecticut General Statutes § 42-110b.

³⁷Florida Statutes § 501.204

³⁸ Hawaii Revised Statutes § 480-2.

³⁹Illinois Revised Statutes 121 1/2 § 262.

⁴⁰Louisiana Revised Statutes 51 § 1405.

⁴¹Maine Revised Statutes 5 § 207.

⁴²Massachusetts General Laws 93A § 2.

⁴³Montana Revised Code § 30-14-103.

⁴⁴Nebraska Revised Statutes §59-1602.

⁴⁵North Carolina General Statutes § 75-1.1.

⁴⁶ South Carolina Code § 39-5-20.

⁴⁷Utah Code § 13-5-2.5.

⁴⁸Vermont Statutes 9 § 2453.

⁴⁹Washington Revised Code § 19.86.020.

⁵⁰Wisconsin Statutes § 100.20. Note that Professor Ralph Folsom has reproduced and commented upon all of the restraint of trade related statutes of the respective fifty states in *State Antitrust Law and Practice*, Folsom, (Prentice Hall, Vols. I and II, 1988).

equivalent to California's in its Unfair Competition Act; it allows private class actions beyond the interests of the plaintiff (for others similarly situated) only if they are "approved (in advance) by the Attorney General."⁵¹ Unlike the California statute, equitable remedies are attached as an additional remedy available to the court for actions at law brought under Alaska's Act.⁵² Further, the plaintiff must demonstrate that he or she "adequately represents" the interests of those who are similarly situated and will be bound by the judgment. The statute gives finality to adjudicated awards under the above two conditions.

Connecticut's Unfair Competition Act allows for punitive damages, attorney's fees to prevailing plaintiffs, and class action suits. Unlike the California statute, actions are brought at law for damages and all of the requirements for class action certification, including common questions, adequate representation, notice, et al. fully apply.⁵³ The Attorney General must be notified of any action under the Act upon its commencement, and must receive any judgment obtained.

Florida's Little FTC Act parallels its federal counterpart substantively, and gives "great weight" to FTC interpretations. Procedurally, the statute allows for direct private civil suit for damages and attorney's fees by a plaintiff who is "aggrieved by a violation."⁵⁴ The Florida Department of Legal Affairs and states' attorneys are empowered to bring actions for declaratory relief, to appoint a receiver, and for injunctive relief. These public agencies may also bring class actions for damages on behalf of all injured Florida consumers. Such a suit may be commenced only after an investigation with an opportunity for the defendant to respond to the alleged violations.⁵⁵ And finally, patterned somewhat after the FTC's administrative authority, Florida's Department of Legal

⁵¹ See Alaska Statutes § 45.50.531(b): "A person entitled to bring an action under this section may, after investigation by and approval of the attorney general, if the unlawful act or practice has caused similar injury to numerous other persons similarly situated and he adequately represents the similarly situated persons, bring an action on behalf of himself and other similarly injured and situated persons ... A person planning to bring an action under this subsection shall first submit to the attorney general a copy of his proposed complaint, and he may not file the complaint in court without the attorney general's approval."

⁵² *Id.*

⁵³ Connecticut General Statutes § 42-110g(b).

⁵⁴ Florida Statutes §§ 501.204, 501.210, 501.211.

⁵⁵ Florida Statutes § 501.207.

Affairs may issue a complaint and order noticing a hearing for the possible administrative entry of a cease and desist order, which may be judicially reviewed. The violation of such an order gives rise to civil penalties of \$5,000 per violation in a court action which may be brought by the Department. This remedy is entirely cumulative to the other remedies afforded by law.⁵⁶

Hawaii's Unfair Methods of Competition statute also replicates the substance of § 5 of the FTC Act, prohibiting "unfair methods of competition and unfair or deceptive acts or practices..."⁵⁷ Procedurally, the statute allows a private civil action for damages, treble damages, injunctive relief, and attorney's fees by "any person who is injured in his business or property." Treble damages for unfair competition consisting of deceptive advertising requires a finding that the suit is "in the public interest."⁵⁸ The attorney general is solely authorized to bring a class action for indirect purchasers (e.g. usually consumers) and may recover damages and attorney's fees.⁵⁹

Louisiana has a typical substantive prohibition of "unfair methods of competition and unfair or deceptive acts or practices.." but an unusual enforcement scheme. The "Director of the Governor's Consumer Protection Division" operates in a manner similar to the FTC federally - it may "make rules and regulations" interpreting the statute which it then submits to the attorney general for approval and then possible adoption following administrative proceedings. The rule or its application may be challenged by a declaratory relief action in parish district court.⁶⁰ A direct private civil remedy for damages (trebled if knowingly violated after put on notice by the attorney general or Director), injunction, and attorney's fees are available to "any person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal..." Private suit in a "representative capacity" is expressly prohibited. And the plaintiff's counsel must send a copy of the pleadings and any judgment or decree to the attorney general and Consumer Protection Division Director.⁶¹ Public civil actions may be brought by the Director, who is empowered to "instruct" the attorney general to file for injunctive relief, including possible restitution, and for civil penalties

⁵⁶ Florida Statutes §§ 501.2075, 501.208.

⁵⁷ Hawaii Revised Statutes § 480-2.

⁵⁸ Hawaii Revised Statutes § 480-13(a)-(b).

⁵⁹ Hawaii Revised Statutes § 480-14.

⁶⁰ Louisiana Revised Statutes 51 § 1405.

⁶¹ Louisiana Revised Statutes 51 § 1409.

where an outstanding injunction is violated.⁶²

Maine's Unfair Competition statute has the typical FTC § 5 broad prohibition and reference to FTC decisions as guide for Maine's Act. The attorney general of the state here "may make rules and regulations interpreting this section."⁶³ The private civil remedy provided is suit for injunction and restitution by any person...who suffers any loss of money or property, real or personal..." Interestingly, although sitting presumably in equity, there is a trial by jury. The clerk of the court is here required to transmit to the attorney general a copy of any initial pleading or final judgment.⁶⁴ The public civil remedy rests with the attorney general and takes the form of injunctive or restitutionary relief in the name of the State, and civil penalties where an injunction is violated. The attorney general is required to issue an "intent to sue" letter to the defendant at least ten days prior to filing to allow for a pre-filing conference (unless a delay would cause irreparable harm).⁶⁵

Massachusetts has the standard FTC § 5 prohibition in its Unfair Competition statute, with the declaration that FTC interpretations guide its application. As with Maine, the Massachusetts attorney general may make "rules or regulations interpreting" the law.⁶⁶ A private civil action may be brought for damages and injunctive relief by any person "who suffers any loss of money or property, real or personal..." In addition, double damages are normally awarded and a maximum award of treble damages is available where the court finds that an unfair method of competition was engaged in "knowingly." However, if the defendant offers in settlement more than the measure of damages as found, then only single damages may be awarded. Interestingly, the Massachusetts statute specifically authorizes the bringing of actions by persons in a representative capacity - anticipating class action enforcement. The law specifically provides that such an action may be pursued by those "engaged in commerce" (as above) on behalf of others similarly situated, but only after: "the court finds in a preliminary hearing that he [the petitioner] adequately and fairly represents such other persons...and the court shall require that notice of such action be given to unnamed petitioners in the most effective, practicable manner. Such action shall not be dismissed, settled or compromised without the approval of the

⁶² Louisiana Revised Statutes 51 § 1411.

⁶³ Maine Revised Statutes 5 § 207.

⁶⁴ Maine Revised Statutes 5 § 213.

⁶⁵ Maine Revised Statutes 5 § 209.

⁶⁶ Massachusetts General Laws 93A § 2.

court, and notice of any proposed dismissal, settlement or compromise shall be given to all members of the class of petitioners in such a manner as the court directs."⁶⁷ In another and complex provision, persons "not engaged in commerce" (e.g. consumers) may similarly bring class actions for damages, injunctive relief and attorney's fees to all consumers injured, with the same double damages to treble damages provision described above. The damage multiplier and attorney fee provisions vary depending upon settlement offer amounts vis-a-vis damages as found in order to provide incentives to settle (including a thirty day period prior to filing a damages action of intent to file during which the defendant may tender offers which may impact later damage multipliers and attorney fee awards if refused and actual damages are found at a lower level). No person may be obliged to exhaust administrative remedies prior to filing but the statute includes complicated procedures for coordinating civil cases with any possible pending regulatory discipline by an applicable agency.⁶⁸ Public civil actions may be brought by the attorney general for injunctive relief, public forfeiture of corporate rights, and for civil penalties where the defendant "should have known" his acts constituted unlawful unfair competition. A higher civil penalty is authorized for violations of outstanding injunctions.⁶⁹

Montana's "Unfair Trade Practices and Consumer Protection Act" in typical fashion prohibits "unfair methods of competition and unfair or deceptive acts or practices...", and requires "due consideration" to cite FTC Act interpretations.⁷⁰ The first part of the statute covers "consumer protection" and includes the general unfair competition prohibition. Here the statute authorizes a private civil action by consumers for actual damages suffered by the plaintiff, or for injunctive relief, and for attorney's fees. Further, the court may treble the damages "in its discretion." Note that attorney's fees may be awarded under the Montana Act to the prevailing party in the discretion of the court. Class action status is specifically barred. Copies of initial pleadings and final judgments must be sent by the clerk of the court to the appropriate county attorney.⁷¹ The statute addresses those injured in their business (e.g. competitors or retailers) in the separate part II of the statute "Unfair Trade Practices," and with a similar private civil remedy scheme except without the prohibition on class action representation. However, the list of

⁶⁷ Massachusetts General Laws 93A § 11.

⁶⁸ Massachusetts General Laws 93A § 9.

⁶⁹ Massachusetts General Laws 93A § 4.

⁷⁰ Montana Revised Code §§ 30-14-103, 30-14-104.

⁷¹ Montana Revised Code § 30-14-133.

offenses available to those injured in their business does not include generic "unfair competition," but rather a substantial listing of restraint of trade offenses, including predation, rebates, price discrimination, and an unusual listing of unlawful agreements.⁷² Public civil enforcement is handled by the Montana Department of Business Regulation which may bring injunctive actions against respondents, petitions to revoke corporate rights, and civil penalties. Penalties are available where a violation is "willful" (should have known it violated the law), and a larger penalty for violations of outstanding injunctions.⁷³

Nebraska's "Consumer Protection Act" is phrased in terms of "unfair methods of competition," and most of its use appears to focus on exclusive dealing, tying, and anticompetitive mergers, all of which are not included in the state's "Junkin Act" covering other antitrust concepts (e.g. traditional combinations in restraint of trade). Procedurally, the statute creates an action at law for damages and requires injury to the plaintiff in his business or property.⁷⁴ The Attorney General is authorized to bring public civil actions for injunctive relief, including restitution, and for attorney's fees and civil penalties.⁷⁵

North Carolina has a typically broad unfair competition prohibition: "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."⁷⁶ Procedurally, the statute authorizes an action at law for treble damages similar to the traditional antitrust offense, and requires business injury to sue. The prevailing party (plaintiff or defense) may be awarded attorney's fees in the discretion of the court.⁷⁷ The Attorney General may bring a public civil action for injunctive relief and for civil penalties.⁷⁸

⁷² See Montana Revised Code §§ 30-14-205 to 30-14-218, and 30-14-222.

⁷³ Montana Revised Code § 30-14-142.

⁷⁴ See Nebraska Revised Statutes § 59-1609.

⁷⁵ Nebraska Revised Statutes § 59-1608.

⁷⁶ North Carolina General Statutes § 75-1.1; note that the law includes a "learned profession" exemption excluding legal and medical unfair practices, and confers qualified immunity to publishers and broadcasters regarding dissemination of allegedly deceptive advertising.

⁷⁷ North Carolina General Statutes § 75-16.1.

⁷⁸ North Carolina General Statutes § 75-15.1, 15.2.

South Carolina has an Unfair Competition statute phrased similarly to the FTC Act's § 5. Private enforcement is limited to those who "suffer ascertainable loss," in an action at law, and specifically excludes plaintiffs from suing "in a representative capacity." Willful violations give rise to treble damages.⁷⁹ The state Attorney General is empowered to bring a public civil action for injunctive relief, and for civil penalties for willful violations or corporate forfeiture for violations of outstanding injunctions. The law requires the Attorney General to notify the defendant of his intention to sue at least three days prior to filing to allow reasons to be presented why suit should not be brought.⁸⁰

Utah appears to be one of the few states with an enforcement system similar in structure to the Federal Trade Commission. The Utah Division of Consumer Protection is empowered to issue "cease and desist orders" where it has cause to believe that an unfair method of competition in commerce is occurring. It may seek court enforcement of those orders itself, or may request court enforcement by the attorney general or county attorneys.⁸¹

Vermont's "Consumer Fraud Act" prohibits "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce."⁸² Consumers (not businesses) may obtain equitable relief, damages, and treble damages for "false or fraudulent representations or practices." The scope of private consumer actions under the statute are so limited and consumer representation of interests aside from his own appear to require an action at law and class representation status for a plaintiff, including certification, commonality, adequacy, and notice.⁸³ The attorney general or any state's attorney (the equivalent of district attorneys in many jurisdictions) may bring an action under a broader definition of "unfair competition" for injunctive relief, civil penalties, and forfeiture of corporate rights.⁸⁴

Washington's "Consumer Protection Act," although worded similarly to the FTC Act's broad prohibition, has been interpreted

⁷⁹i South Carolina Code § 39-5-140.

⁸⁰ South Carolina Code § 39-5-50.

⁸¹ Note that the Unfair Competition Act was added in Utah in 1983, see Utah Code § 13-5-2.5.

⁸² Vermont Statutes 9 § 2453.

⁸³ Vermont Statutes 9 § 2461(b).

⁸⁴ Vermont Statutes 9 §§ 2458 - 2461.

more narrowly.⁸⁵ The remedy for "unfair methods of competition" is combined with the scheme applicable to the state's antitrust baby "Sherman" and "Clayton" Acts. A private cause of action lies for business injury to the plaintiff - injunctive relief, treble damages, and attorney's fees are available.⁸⁶ The attorney general may bring a public civil action for injunctive relief, restitution, civil penalties (limited to violations of outstanding injunctions), and forfeiture of corporate rights. Local jurisdictions may bring actions for damages and treble damages; the state is curiously limited to actual damages.⁸⁷

Wisconsin's Unfair Competition Act prohibits: "unfair methods of competition in business and unfair trade practices..."⁸⁸ Structured somewhat similarly to the FTC Act, a state agency, after public hearing, is empowered to issue "general orders" forbidding unfair methods of competition or a "special order" applicable to a named person. Curiously, the administrative department with jurisdiction over the statute is the Wisconsin Department of Agriculture. The state Attorney General may file complaints with the Department and may seek judicial review of Department decisions. Outstanding orders of the Department are enforced by it in court by way of injunction and restitutionary petition. And, unlike the federal statute, there is also a private civil remedy available to "any person suffering pecuniary loss" where an outstanding order has been violated. The private enforcement of outstanding orders is buttressed by an automatic doubling of any damages proved, and attorney's fees to a prevailing plaintiff.⁸⁹

In summary, most of the 16 states with Unfair Competition statutes similar in substantive terms to California's use the broad language of the Federal Trade Commission Act and specifically give FTC decisions at least "guidance" status. Most allow actions at law to recover damages (a broader concept than the injunction/restitution allowed by California) and most also allow either punitive or treble damages. But plaintiffs must suffer actual business or personal injury. And where class actions are allowed, such a qualified plaintiff is permitted to file for others similarly situated only where meeting some of all of the traditional requirements of class action certification (including in particular: (1) adequate representation of absent class members, and (2) notice to absent class members). Some of the statutes

⁸⁵ See *State v. Black* 100 Wash.2d 793, 676 P.2d 963 (1984).

⁸⁶ Washington Revised Code §19.86.090.

⁸⁷ Washington Revised Code §§ 19.86.080, 19.86.090, 19.86.150.

⁸⁸ Wisconsin Statutes § 100.20.

⁸⁹ *Id.*

spell out these safeguards (e.g. see Massachusetts *supra*) while most provide them as part of their generic class action civil procedures. Most allow public civil actions by a state attorney general or other official and tend to include injunctive, forfeiture of corporate rights, and civil penalty relief.⁹⁰

None of the 16 other state jurisdictions with their own versions of California's Unfair Competition Act gives private attorney general status to any person without qualification. Rather, persons must be injured to obtain redress for themselves, and must undertake a variety of different steps if they are to represent others who are similarly situated. These steps assure adequacy of representation, and *res judicata* finality, and inhibit a multiplicity of remedies for the same alleged offense.

Exacerbating the problem for California defendants are several additional features which distinguish the California legal environment from the other 16 states with Unfair Competition Acts. None of the other states has the population, wealth, economic variety, or active plaintiff and local public prosecutor bars of California. None, except perhaps Illinois and Florida, approaches the scale or complexity of California's business and legal economy.⁹¹ None appears to have a comparable volume of pled unfair competition causes of action.⁹² California also has the possibility of attorney's fees under common fund doctrine or under

⁹⁰ Although not discussed *supra*, most also give the state attorney general or other public enforcement official substantial pre-filing discovery powers similar in concept to the federal civil investigative demand and the California pre-filing discovery provisions noted *supra*.

⁹¹ California has 58 counties, and other public actors authorized to bring civil actions under the Act, together with an active and well organized plaintiff's bar.

⁹² Note that the breadth of Business and Professions Code § 17200 makes it a natural cause of action to append to many civil complaints involving business or consumer disputes. It is commonly pled as a final cause of action, incorporating within it all of the common law and statutory allegations in preceding causes of action, and alleging other "unfair acts." As noted above, such a broad cause of action facilitates liberal discovery for plaintiff, and may leverage the possibility of a restitutionary award covering similar practices applicable to many others - without having to certify or notify an applicable class (see standing problems and discussion *infra*). The possible sanction of broader relief which may be required to others may apply pressure on a defendant to the benefit of the plaintiff. A defendant may be more willing to pay a plaintiff capable of reducing exposure to others by dismissing or settling the § 17200 action.

§ 1021.5 of California's Code of Civil Procedure. Ironically, the structure of § 1021.5 favors attorney's fees for counsel representing interests without any appreciable financial stake in the matter adjudicated, since it is the vindication of rights substantially beyond those of the client which gives rise to fee recompense, including the possibility of a "multiplier" beyond market value billing.⁹³

II. Current Purpose and Justification

Before outlining the current problems attending the unusual structure of California's Unfair Competition Act, it is prudent to review the fundamental purposes it is intended to serve. By keeping those purposes in mind, alterations to cure real or anticipated abuses may be limited and refined to preserve what may be necessary to accomplish its purposes.

One basic common purpose to the federal and counterpart state FTC Acts is to address the "lowest common denominator" problem of certain types of abusive competitive business practices. That is, many unfair or unlawful acts by a given competitor may confer on the offender a competitive advantage. Such a competitive advantage may require other competitors to respond with more extensive abuse in order to preserve marketshare, which in turn leads the initiator to further abuse. Unless there is a counterforce imposed from some marketplace or public source, certain types of business behavior may spiral naturally down to a lowest common denominator. One common area of such abuse involves what economists call "information imperfections," consumer prosecutors term "deceptive or misleading advertising", and the average citizen calls "lying." For some products or services, such as those requiring repeat business and where the consumer can judge performance, misleading representations may be assuaged through the marketplace alone. But where massive advertising campaigns can be mounted for one time depredations, there may not be a traditional marketplace response capable of adequate remedy.

⁹³ The incentive balance in the California arrangement may over-stimulate the bringing of cases where restitution is due from past overcharges; counsel may use any person as a named plaintiff, and the substantial fund of moneys potentially owed other persons can serve as the basis for substantial fees. However, there may be an underincentive to bring private actions where the damage is prospective or does not qualify as "restitution". Hence, where consequential damages have occurred, or where harm is prospective, or there is otherwise no past overcharge to collect for restitutionary purposes, there may be minimal incentive for private attorney enforcement of the Act. In these circumstances, the public prosecution remedies must be relied upon, or private enforcement for damages by entities directly injured under other statutory provisions or tort causes of action which may apply.

In extreme cases, criminal sanctions may well suffice. But beyond criminally enforced standards at the *mens rea* end of the spectrum, a great deal of clearly inaccurate information about products and services may cause consumer purchases contrary to actual consumer preference - the consumer sovereignty standard of a free and effective marketplace. Moreover, tolerance up to the point of extreme cases invoking criminal intervention tends to lead to a bending of the truth by competitors, and the counterstroke exaggeration or material omission by the original offender, leading to further information degradation. Perhaps an extreme example of useless information may be found in the one forum where there are no standards or public intervention: political advertising.

One end result of the degeneration of accurate information about products is a loss in credibility suffered by all advertisers. One public price paid is a barrier to entry to one who has, in fact, a product or service many would greatly desire - if they could believe claims made about it. The story of the boy who cried "wolf" we are all told about as youngsters may apply to cause us to discount advertising to such an extent that it loses much of its informational value. To be sure, the state is ill equipped to be an arbiter and enforcer of absolute truth in advertising, but the other end of the spectrum involves a momentous price; where a society tolerates misleading claims as a matter of course, truthful messages may not be heard.

There may be significant counterforces to competitive degradation from misleading advertising, or from the many other varieties of unfair or unlawful competition, among them: consumer education and gradual decline in demand, private civil suits by competitors, possible consumer class action response in some circumstances, criminal prosecutions, or regulatory intervention. However, each of these mechanisms has serious limitations. Consumer education may not be feasible or forthcoming. Competitors may choose to join the practice rather than adhere to higher standards - knowing that a private remedy may involve protracted and expensive litigation during which the initiator continues to gain market advantage. Consumer class actions must surmount the considerable class certification and notice barriers - and in the context of uncertain attorney's fees; moreover, fees and incentives to litigate occur generally only on the basis of damages - after they have occurred. The criminal option may be limited to defined categories of fraud or similar extreme offenses reserved for limited types of transgressions.

The notion of an "unfair competition" statute to superimpose over existing mechanisms is philosophically based on the following premises:

1. Many business practices, not amenable to specific

description or definition, impose external costs on others,⁹⁴ endanger effective marketplace prerequisites,⁹⁵ or risk irreparable harm.

2. A substantial number of these practices confer a competitive advantage to those engaged in them.

3. Other available remedies do not accomplish the disgorgement of unjust enrichment from unfair or unlawful practices, and do not otherwise provide an effective deterrent to their continuation and likely replication by others.

Hence, the characteristics of the statute reflecting its contextual purpose include:

1. A statute wide in substantive scope, encompassing any "unfair" or "unlawful" practice which may be characterized as a "business" practice or act;⁹⁶

⁹⁴ The market flaw of "external cost" occurs where a producer or merchant is able to impose external costs on others through the sale or use of his product and the price of the product does not reflect that cost. A paradigmatic example would be pollution; factory A pollutes a stream during the production of its product, passing costs onto wildlife or other health and environmental interests of future generations. Factory B does not pollute and thereby incurs 10% higher costs. Competition will drive Factory B out of business or force it to similarly pollute unless the costs of pollution are somehow "internalized" or added to respective production costs, or unless there are minimum standards applicable to all. The means to internalize costs or to establish minimal standards can involve regulatory options, criminal enforcement, rules of liability under existing tort law mechanisms, direct assessment or taxation, or other strategies.

⁹⁵ In addition to the problem of "external costs," the American model of the marketplace rests on assumptions. Two of the most important such assumptions relevant to the Unfair Competition Act are: a sufficient number of competitors independently acting and pricing to provide "effective competition," and accurate information about the respective characteristics of competing products available to consumers choosing between them. The maintenance of these two prerequisites helps to assure the "consumer sovereignty" underlying goal of the marketplace.

⁹⁶ Hence, wrongful business activity is enjoined under the Act in whatever context it might appear. See *People v. McKale* 25 Cal.3d 626 (1979). Note that this includes abuse of legal process to the extent it involves using the courts to augment an essentially business practice; see e.g. the leading case of *Barquis*

2. An action "lying in equity" for expeditious decision, and allowing the court flexibility in fashioning remedies, including restitutionary relief to disgorge unlawfully obtained moneys;

3. *De minimis* standing requirements for private litigants, combined with injunctive or corrective remedies, and civil penalties reserved to certain public agencies.

This broad charter to address judicially unfair acts in competition is ameliorated in the Act by limited remedies, creating - in essence - a broad but shallow scheme of relief. The idea is: a lot of actors can sue, so the courts will get the cases. But excessive, spurious, and duplicative cases will not be generated because the remedies are substantially prospective and there is no (or uncertain) allowance for attorney's fees, even if the plaintiff prevails.

III. Confusions and Conundrums

From 1972, when the leading *Barquis*⁹⁷ case ushered in the broad application of § 17200, until the late 1980's, there had been little conflict between the many potential litigants able to invoke the terms of the statute. Public prosecutors in some of the larger counties have used § 17200 consistently over the years.⁹⁸ But common use of the remedy did not spread to small or rural counties. Further, district attorneys and the Attorney General have entered into an arrangement to coordinate such filings, beginning with initial investigations. The Attorney General maintains a computer file and offices of district attorney "register" the name of any prospective defendant under investigation for § 17200 offenses. Hence, district attorneys are put on notice of possible action by another public jurisdiction, and the Attorney General is able to monitor investigations and filings in order to intervene if needed. The status of the Attorney General in this regard as the "chief law enforcement officer of the state" allows that office to intervene and to assume jurisdiction over any filing by a district attorney where there is a conflict warranting it.

v. Merchants Collection 7 Cal.3d 94, 108-114 (1972); contrast with *O'Connor v. Superior Court (Wyman)* 177 Cal.App.3d 1013 (1986) refusing to apply Act to political candidate or consulting firm for unfair and misleading statements during the course of a political campaign.

⁹⁷ *Barquis v. Merchants Collection Assn.* 7 Cal.3d 94 (1972).

⁹⁸ The district attorneys of San Diego and Los Angeles Counties, and the city attorneys of both cities, have been particularly active in civil use of § 17200.

However, the unusual standing license of the Unfair Competition Act, in combination with the lack of class action qualification, certification, and notice requirements applicable, added to two other dynamics active in the late 1980's to create public/private and private/private civil action conflicts.

The first such new development has been the increasing use of § 17200 as a general allegation in complaints. The use of the Act as a cause of action facilitates broad discovery. Moreover, where applicable to a private dispute between two business entities, it may allow the plaintiff to create possible exposure from overcharges applicable to consumers, enhancing a pre-existing plaintiff's bargaining power. At the same time, such "add-on" use of the Act by such private plaintiffs raises serious due process questions; one using an allegation for bargaining purposes may be willing to settle out those claims in order to collect on a proprietary cause of action.⁹⁹ On the other hand, if settlements by those seeking to represent "the general public" under the statute do not bind any other person, than the statute is unable to assure finality to any defendant subject to suit. Both of the above alternatives are unacceptable features in any statutory remedy.

The second new development has been an increase in attorney fee availability and in attorneys (and professional plaintiff firms) specializing in mass tort or class action cases. Where injunctive relief may involve restitution (a common element to an injunctive remedy, and where there is a practice applied *en masse* to a large marketplace (also common), attorney's fees may be available for prevailing counsel. Moreover, Code of Civil Procedure § 1021.5 allows for a "private attorney general" attorney fee where a litigant prevails and vindicates rights which extend substantially beyond his or her own proprietary stake. And those fees may involve a "multiplier" substantially enhancing market level billing.¹⁰⁰

To recapitulate, the combination of the following features of the Unfair Competition Act and related events, have created actual and potential confusion:

⁹⁹ A plaintiff serving as a "class representative" in a traditional class action may be impeded from exercising such a conflict because of the fiduciary duty obligations of the class representative (and counsel) to the class, certification as one able to "adequately represent" absent class members, and the fact of required notice. Where an Unfair Competition Act settlement, lacking those safeguards, may bar others who might seek relief for the same wrong, a clear due process denial may occur: one cannot secretly litigate away the rights of another.

¹⁰⁰ See *Serrano v. Priest* 20 Cal.3d 25 (1972)

1. The breadth of the Act allows its inclusion as a cause of action in many business and consumer civil actions (private and public) brought on other bases. It may be invoked for any business practice which is unlawful, or unfair.

2. 58 county district attorneys, 5 city attorneys, and the State Attorney General may bring an action for injunction and for civil penalties - a portion of the latter accruing to the general fund of the jurisdiction filing.

3. As of 1992, and with the consent of the district attorney, any full time city attorney may bring an action for injunction and civil penalties under § 17200 (California has over 400 cities); and a county counsel may similarly sue for § 17200 injunction and civil penalties for violations of county ordinances.¹⁰¹

4. Private parties may also file suit; critically, the Act allows any person to bring an action for injunctive relief, "acting in the interests of itself, its members or the general public."¹⁰²

5. Injunctive relief, available to all of the potential plaintiffs enumerated above, encompasses "such orders or judgments, including the appointment of a receiver, as may be necessary to prevent...unfair competition,...or may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired [through]...unfair competition."¹⁰³

6. The Act is attractive as an add-on cause of action in pre-existing cases because it facilitates liberal discovery and adds settlement leverage by exposing the defendant to restitution beyond the instant plaintiff.¹⁰⁴

7. The private standing conferral to vindicate unfair practices for "the general public" is akin to "private attorney

¹⁰¹ Business and Professions Code § 17204.

¹⁰² Business and Professions Code § 17204.

¹⁰³ Business and Professions Code § 17203; in other words, any one of the possible plaintiffs listed above can file for prospective injunctive relief, to appoint a receiver, for any equitable order necessary to provide restitution to all those who may have been overcharged or lost money from unfair competition.

¹⁰⁴ Note that although § 17200 appears to be an action in equity, an older line of cases holds that insofar as it encompasses standard business torts for damages, one injured by such torts may recover damages therefrom; see *Western Electro-Plating Co. v. Henness* 196 Cal.App.2d 564, 570 (1961) discussing Civil Code § 3369.

general" status and does not require the numerosity, commonality, adequacy, typicality, manageability, or other requirements of class actions under California Code of Civil Procedure § 382 or Federal Rule of Civil Procedure 23, nor does it require formal certification, nor notice to those affected.

8. Where damages have accrued because of overcharges or where restitution otherwise may involve a substantial fund of moneys in dispute, the case may adjudicate a dispute comparable in substance to a standard class action,¹⁰⁵ with attendant problems of collateral estoppel, duplication, adequacy of representation, and due process notice and opt-out requirements.¹⁰⁶

9. Where there is a common fund, or where a large benefit has been conferred on a large number of persons other than the named plaintiff, attorney's fees may be available; whether from a common fund or as "private attorney general" under Code of Civil Procedure § 1021.5, such an award may be substantially more than the fair market value of services proffered.¹⁰⁷

10. Restitution to large numbers of persons overcharged a small sum each is often impractical via direct delivery of checks, and is accomplished through "fluid recovery" where future prices are lowered for the same group allegedly overcharged, or through cy pres relief (where a fund is established to disgorge unjust gain

¹⁰⁵ Note that in many consumer class actions at law, the measure of damages is equivalent to restitution in equity. Where the gravamen of the complaint is an overcharge, the two concepts may be equivalent.

¹⁰⁶ See *Phillips Petroleum Co. v. Shutts* 472 U.S. 797, 812 (1985) affirming minimal the due process requirements to bind an absent plaintiff, including primarily the rights of notice, opportunity to opt out, and "adequate representation."

¹⁰⁷ See *Consumers Lobby Against Monopolies v. PUC (CLAM)* 25 Cal.3d 891 (1979) for discussion of the alternative bases for private attorney general or common fund recompense for attorneys; see also § 1021.5 of the Code of Civil Procedure setting forth the requirements for private attorney general recompense for counsel whose client prevails in an action and vindicates a right substantially beyond the direct financial interest of his client. Note that the statute allows a "multiplier" to be applied to fair market value billing based on the risk of the case, skill of counsel, and other factors. See *Serrano v. Unruh* 32 Cal.3d 621 (1982). Note that most § 1021.5 awards have been assessed against public agencies, however, the statute does not distinguish between types of defendants and private defendants are vulnerable to fee assessment. See e.g. *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy* 4 Cal.App.4th 963, 977 (1992).

and is granted for charitable purposes to generally benefit the persons injured).¹⁰⁸ Hence, potential victims (members of the public being "represented" by a party plaintiff) may not be aware that they have benefitted. Notwithstanding the payment of substantial restitution, a defendant may not be able to bar further suit by victims, even those who are the beneficiaries of such restitution.¹⁰⁹

The confluence of these factors poses a serious dilemma for public prosecutors and bona fide public interest attorneys attempting to resolve unfair competition cases; they cannot confer assured finality. And the dilemma is particularly frustrating for defendants who are unable to end a dispute they are willing to resolve. For them, it is akin to the following parable:

The nation of Ames is attacked by a foreign country in a dispute solely over an uninhabited island possession. The leaders of Ames decide that the disputed territory is far away, with few ties to their homeland, and should be surrendered to the attacker. But then Ames is told that there is nobody on the other side with authority to negotiate a peace, in fact, the other side consists of three factions also at odds with each other. As the foreign troops from the largest faction gratuitously march into the capital city of Ames, its baffled President greets them with a white flag and a deed to the island. The other two factions individually announce that they want the island, and if it is given to any of the others, it will conquer a substantial portion of Ames and the assets and people thereon - in order to extract its equivalent. As the frustrated President of Ames screams "will someone take this damned island and everyone get out of our country," he receives even more ominous news: there are now two other nations - perhaps more - and each quite powerful, considering their ancient and sacred claims to the island as well. The only thing the three factions and two other foreign nations can agree upon is that they will not fight among themselves over the island in dispute - only with Ames. Their view is that any of the five (or any other claimants who

¹⁰⁸ For a leading example of fluid recovery, see *Daar v. Yellow Cab* 67 Cal.2d 695 (1967); for a leading example of *cy pres* relief, see *State of California v. Levi Strauss & Co.* 41 Cal.3d 460 (1986).

¹⁰⁹ Theoretically, the receipt of a benefit by a victim would appear to estop that person from seeking duplicative relief from the same defendant for the same alleged wrong - particularly where the court sits in equity. However, in the context of fluid recovery or *cy pres* relief, there is no advance notice to the victim nor any opportunity to opt out, and he or she may not individually receive an actual benefit. Hence, *res judicata* foreclosing access to the courts raises understandable due process concerns. See *Eisen v. Carlisle & Jacqueline* 370 F.2d 119, cert den. 386 U.S. 1035 (1966).

might appear) is entitled to equivalent territory from the mainland of the hapless nation trying to surrender the island in dispute.

Jonathan Swift would be proud.

The following examples highlight more precisely the dilemmas implicit in the statute's current procedural posture:

1. A private party files a § 17200 case against a pyramid sales scheme on behalf of all victims; the local district attorney files a similar case and it settles first - taking all of the assets of the defendant as civil penalties (half of which go to the county general fund); none are assigned for restitution. The private action cannot compel intervention or consolidation in the public civil action to compel a coordinated resolution.¹¹⁰

2. A county district attorney settles a § 17200 case, collecting \$40,000 in civil penalties for his county treasury and no restitution for victims; the defendant is a nursing home with facilities in 11 other (generally more populous) counties whose victims receive no restitution and whose counties receive no compensation. The district attorney petitioner filed and settled for "the People of the State of California" and the defendant contends the matter is final statewide. Moreover, the judgment provides that the local district attorney is "the exclusive governmental agency that may enforce the provisions of this injunction." Are the district attorneys in those other counties and the attorney general subject to *res judicata* bar? If not, is it fair to a defendant who settled with a public prosecutor and paid penalties? Subsequently, the Department of Health Services began administrative proceedings against the facility, within its regulatory purview. Is it barred from imposing licensure sanctions for the offenses purportedly litigated?¹¹¹

¹¹⁰ See *People v. Pacific Land Research*, 20 Cal.3d 10 (1977).

¹¹¹ See *People v. Hy-Lond Enterprises, Inc.* 93 Cal.App.3d 734 (1979). Note that there is surprisingly little law covering the extraterritorial jurisdiction of a district attorney in public civil filings. The *Hy-Lond* court acknowledged that: "in order to avoid confusion, parties dealing with the state must be able to negotiate with confidence that the agent authorized to bring the suit, and without the fear that another agency or other state entity might overturn any agreement reached...to avoid being caught in the midst of a power struggle among various state agencies and other entities." (at 752) But the court held that the defendant deliberately manipulated a district attorney into concessions to "limit the powers of other state agents or entities, which he knows are involved and are not parties to the action, (the above argument) does not survive scrutiny." (*Id.*)

3. A county district attorney files a § 17200 case against a defendant primarily operating within his county, but the defendant understandably wants a statewide settlement which will estop all other public and private actions, and is willing to pay full restitution; can the district attorney give the defendant that assurance? Can the district attorney do so if joined by the Attorney General? If they cannot do so, does that impede a final resolution beneficial to all concerned?

4. A county district attorney investigates a local cable company for excessive late charges, serving pre-filing subpoenas, consulting experts and arriving at a pre-filing settlement after an eighteen month investigation which will give restitution amounting to the entire alleged overcharge, including both direct payments to subscribers and a requirement to provide *cy pres* relief in the form of direct interactive wiring of all classrooms within the service area for educational enhancement. In addition to complete restitution, the final judgment provides for substantial civil penalties, plus costs. One week before the filing of the DA complaint and settlement, a plaintiff firm which had learned of the investigation, files a § 17200 action for the same practices against the same defendant. The defendant is assured by the district attorney that full restitution will preclude a private action on behalf of persons already satisfied. The defendant believes the district attorney. Then the defendant's demurrer to the private action is overruled by a superior court judge, opining that the public and private civil actions are different because the former are not "in privity" with the consumer victims, and hence there is no *res judicata* effect.¹¹² The district attorney,

¹¹² Plaintiff Vincent Ross, represented by four separate law firms, argued that the public civil action by public prosecutors served a separate law enforcement function from a private civil action, citing *People v. Pacific Land Research* 20 Cal.3d 10 (1977), and leapt to the *non sequitur* that both could proceed and claim full (i.e. double) restitution against the same defendants for the same wrong. See "Plaintiff's Memorandum of Points and Authorities in Opposition to the Cox Defendants' Motion for Judgment on the Pleadings", *Ross v. Cox Cable Communications, Inc.* San Diego Superior Court #678526, filed 8-26-94 at 6-8. The question in *Pacific Land* concerned whether a trial court could be compelled to consolidate a private and public civil action into the same case. Many private actions involve other causes of action sounding at law and involving use of a jury. The public civil action is in equity with only a court hearing it, and with many of the private defenses unavailable. Giving the court discretion to keep the two proceedings separate is a far cry from concluding that a court sitting in equity should entertain duplicative restitution awards to the same beneficiaries from the same defendant for the same alleged wrongs. Nevertheless, private plaintiffs are correct that there is no established way to ascertain who is representing who

although joined by the Attorney General in the action, and negotiating a case providing for penalties and complete restitution, is unable to provide a final resolution.¹¹³

5. In the investigation and settlement described above, another cable company is also investigated for a similar violation and is about to similarly agree to settlement with the district attorney joined by the Attorney General. It is also filed against, except by two private named plaintiffs and law firms in separate actions.

6. In the investigation and settlement described above, a third cable firm refuses to settle the district attorney case unless the district attorney can obtain the sign off of the Attorney General and all private litigants who have filed or who may file. As matters currently stand, the district attorney and Attorney General cannot provide such an assurance. The defendant rather reasonably protests that where he is willing to pay full restitution plus penalties he should be able to achieve a final resolution and avoid duplicate liability for the same alleged wrong.¹¹⁴

7. A competitor who is injured in a tradename infringement case files suit for damages in tort, and alleges a violation of § 17200, seeking derivative damages thereunder. In order to increase his leverage against the defendant, he also seeks to collect restitution "on behalf of the general public" for the confusion and erroneous purchases which occurred. The plaintiff settles the case for substantial damages for the tort and token restitution for

for what, who is bound by what, and how "members of the public" receive notice or otherwise knows that someone has filed for relief to benefit them.

¹¹³ See *People v. Cox Cable Inc.* San Diego County Superior Court #679554 (August 5, 1994) recently filed and final judgment entered and joined by the Attorney General; compare to *Preisendorfer v. Cox Cable San Diego, Inc.* San Diego County Superior Court #678198 filed November 8, 1994; and compare to *Ross v. Cox Cable Communications, Inc.* San Diego County Superior Court #678256 filed during the same period. The latter two cases remain pending at this writing covering the same allegations of the complaint filed by the district attorney and Attorney General, and are now pending in San Diego County. The last case lists four separate law firms representing the named plaintiff. Note that the author has been retained to consult for the Office of District Attorney in the investigation of the cable industry in San Diego County with regard to possible restraint of trade and consumer law violations.

¹¹⁴ *Id.*

the class. The token restitution is in the form of *cy pres* grants to the economics department of plaintiff counsel's alma mater. There is no notice and a consumer law attorney whose clients have been victimized learns of the settlement after it has been entered.

8. A plaintiff files a meritorious unfair competition case against a mobile home park, and the defendant countersues, also alleging violation of § 17200 against the plaintiff and counsel. Both plaintiff and defendant sue for themselves and the general public. The defendant may be willing to settle if the case is a wash, i.e., the plaintiff contends that the § 17200 countersuit is a SLAPP type of action designed to discourage the plaintiff, and the defendant has no affirmative motivation to prosecute. If the plaintiff gives up his claims, the defendant may well agree to settle the case, perhaps by straight dismissal, perhaps with token remedies intended to bind others. Can such a countersuit be brought by a defendant on behalf of the general public? Is such an advocate an adequate representative of the interests he purports to represent? Should the result be *res judicata* as to others?¹¹⁵

Certainly the law is unclear as to when an action by a public or private litigant purporting to represent all consumers has *res judicata* effect.¹¹⁶ But as discussed *supra*, the underlying problem is unresolved under either alternative. If the action does bar others from an identical suit, there is no mechanism to assure that the remedy legitimately satisfies the claims at issue or represents the "general public" interests being litigated. But if it is not *res judicata*, then the defendant is subject to an

¹¹⁵ See *Rubin v. Green* 4 Cal.4th 1187 (1993). The Court here acknowledged the scope of the Unfair Competition Act, and the standing of defendants to counterclaim under it. However, the narrow holding of the case precluded this particular § 17200 cause of action because it involved alleged solicitation by plaintiff's counsel which was categorically subject to the litigation communication privilege under Civil Code § 47(b). However, three justices contended that injunctive relief did lie through § 17200. Moreover, the factual setting of the case indicates the collateral use of statutes for leverage purposes by both plaintiffs and defendants. For a candid description of the opportunities § 17200 may avail the defense side, see "With Some Help from 17200, the Empire Can Strike Back," William L. Stern, L.A. Daily Journal, July 29, 1992.

¹¹⁶ See, for example *Bronco Wine Co. v. Frank A. Logoluso Farms* 214 Cal.App.3d 699, 715-721 (1989) holding that judgments in actions brought on behalf of the general public are "not binding" as to absent class members. But contrast *Bronco* with *Fletcher v. Security Pacific National Bank* 23 Cal.3d 442 (1979) and *Dean Witter Reynolds, Inc. v. Superior Court (Abascal)* 211 Cal.App.3d 758 (1989).

unlimited number of lawsuits from future litigants over the same alleged practice.

The procedural problem of § 17200 arises from the multiple tracks available for court hearing or resolution. The public and private litigants with standing to sue for themselves and others assure us of more likely response when there are unfair and unlawful acts in competition. Such enhanced response has important positive advantages. But the current arrangement of "let everyone in" without criteria or limitation does not provide a structure for finality. The perceived lack of finality by defendants leads them to delay or avoid publicly advantageous settlements. And if finality were to be achieved under current procedures, it might be based on who reaches the courthouse door the first, or more likely, based on who the defendant settles with first - effectively giving the "private attorney general" selection to the defendant, not the ideal party to make such a decision.¹¹⁷

IV. Proposed Amendments

The areas of confusion in current Unfair Competition Act procedure involve the coextensive jurisdictional conflicts of public agencies vs. public agencies; public agencies vs. private litigants; and private litigants vs. private litigants. Each has separate problems and different possible solutions.

In general, there are strategies drawn from other statutes and procedures which may allow us to maintain the benefit of multiple access to the courts to assure a fair and lawful system of competition, without the confusion, duplication, and possible abuse of process harms now occurring. Several relatively minor alterations in procedure may accomplish substantial reform: ordering priorities in representation of the general public, requiring notice where appropriate, and interposing just those elements of class action law representation necessary to inhibit the use of the Unfair Competition Act for collateral and improper advantage. Although more extensive surgery might be suggested, several changes addressing the specific abuses now clearly evident are appropriately considered immediately. The prudent course argues for monitoring their impact before imposing more draconian limitations.

¹¹⁷ If there is *res judicata* effect based solely on the "first judgment filed" resolving a § 17200 cause of action, the defendant is in a position to bargain with alternative public and private plaintiffs to reduce restitution or injunctive terms. *E.g.*, where a public and two private litigants have filed suits under § 17200, the defendant could approach one of the private litigants, offer substantial fees to counsel and token restitution, and perhaps file a stipulated final judgment. Courts understandably tend to sign judgments proffered to them by apparently adverse parties.

The purpose of the proposed eight amendments is to address narrowly the conflicts and problems which have arisen and are likely to arise, without changing the basic structure of the statute. Hence, the changes preserve both public and private causes of action and allow coextensive access to the courts. However, some rules: notice, prioritization, and "adequacy of representation" safeguards are imposed to enhance finality.

We propose eight amendments to the current Unfair Competition Act. Rather than presenting purported final language, they are roughly paraphrased as follows:¹¹⁸

1. Attorney General Registry; Notice; Consent; Public Prosecution Priority

The Attorney General shall keep a registry of all investigations and filings undertaken by any local public prosecutors pursuant to § 17200 of the Business and Professions Code. Any local public prosecutor undertaking any such investigation shall notify the Attorney General in a timely fashion for inclusion in the registry. The Attorney General shall inform any local prosecutor upon registration or inquiry of any entry in the registry (or pending matter of which he is aware) which may conflict with or relate to a § 17200 investigation or case that the local prosecutor is considering or pursuing. Where there is wasteful duplication by multiple local jurisdictions investigating the same defendant for the same acts or practices, and those practices extend substantially beyond the territorial jurisdiction of any one prosecutor, the Attorney General may either assume control of the case, or designate one local prosecutor to handle the case, or direct more than one to handle the case in a coordinated manner, including possible joint filing by local prosecutors or with the Attorney General. Where a city attorney or county counsel with authority to bring an action under § 17200 commences an investigation he or she shall also notify the office of district attorney in his or her county. The district attorney may direct one city attorney to investigate and/or prosecute an action, direct more than one to do so in coordination, or assume investigation and/or prosecution of the case. The Attorney General may consent to sign any proposed settlement or final judgment in any case filed by a local prosecutor, which shall confer statewide *res judicata* application.

Rationale: The number of public prosecutors able to bring § 17200 actions may well exceed 300 if all cities with full time

¹¹⁸ The discussion paraphrases possible statutory language and explains the rationale for each suggested change *seriatim*. Precise statutory language should be achievable in consultation with the Office of Legislative Counsel should an author refer the recommendations to the Office.

city attorneys (who may receive district attorney consent to file § 17200 cases) are included. Given the *Hy-Lond* case discussed above, and the fact that many alleged practices cross county lines - sometimes many county lines, there is a clear need to rationalize and order possible filings. To its credit, the basic terms of this proposed section are now being followed informally due to an arrangement worked out between the Office of Attorney General and the California District Attorneys' Association. The proposed amendment codifies current practice. It also places it in statute where it will not depend on individual perpetuation. And in at least some cases, the failure to have a provision clarifying the role of the Attorney General and the reach of DA judgments, causes defendants to hesitate in settling a case, apparently uncertain precisely what they are settling.

2. Private Party Advance Notice to the AG and DA; Public Civil Prosecution Assumption or Declination

Private litigants purporting to represent the "interests of the general public" under § 17200 must so state specifically in their complaint or other pleadings. Such an interest is involved wherever the plaintiff seeks to represent or bind any interest beyond the direct pecuniary and beneficial stake of the plaintiff. If the representation of such a larger interest is so pled, the plaintiff must first submit its proposed civil complaint to the district attorney of the county where it is to be filed, and to the Attorney General. The Attorney General shall transmit civil complaints to any regulatory agency where allegations are relevant to persons it licenses or regulates. If the district attorney includes a city attorney with § 17200 authority, the DA shall transmit a copy of the complaint with that city attorney. The public authorities shall have sixty days to decide to take the case.¹¹⁹ If any public prosecutor decides to pursue the matter it must include all of the reasonable costs and fees incurred by the private plaintiff and counsel on behalf of the general public as a cost bill in any settlement or final judgment where it prevails, subject to court review and approval. Where such an assumption occurs, the plaintiff may continue an action on behalf of his or her own direct interests, which will be noticed as a related case. Where preliminary relief is warranted for the protection of the general public, the public prosecutor may permit private preliminary motions within the sixty day period, or may prosecute such preliminary motions himself or herself, or may do so

¹¹⁹ The priority for assumption of the case for representation of the interests of the general public should be: Attorney General; District Attorney; County Counsel as to county ordinances with district attorney consent, eligible city attorney. The first entity on this list assumes the representation of the interests of the general public if it so decides, if it declines, the next entity on the list and agreeing to do so assumes the case, etc.

in conjunction with those private parties.

Rationale: This procedure does not preclude the private plaintiff who has been injured from seeking preliminary relief for himself within the initial sixty days; the plaintiff would merely exclude "general public" allegations until after the sixty day period and amend accordingly.

The rationale for the notice requirement rests in the judgment that, all other things being equal, the publicly elected prosecutor or official is a superior representative of the interests of the general public than is a single individual or a group of persons represented by private counsel. "Superiority" of the class action remedy has become a requirement to maintain such an action at law and the public civil action by an official has the following advantages: (1) an elected official is politically accountable to the public whose interests are being represented; (2) agencies often have expertise in consumer law matters, including in-house forensic and investigative resources; (3) the agency plaintiff will not extract attorney's fees based on a restitution fund, and the fees will usually be substantially lower, leaving more restitution for victims; (4) the attorney general and district attorneys have substantial pre-filing discovery authority; (5) a public official has a continuing and institutionalized presence for the monitoring of outstanding orders.

On the other hand, to confine all injunctive relief to certain public officials, or to civil suit by those with a large proprietary stake, will exclude thousands of historically meritorious cases. Public prosecutors are able to pursue only a small fraction of potentially meritorious cases, including those which impact on large numbers of consumers. Each public official with authority has other, and more primary, responsibilities - and limited resources. In fact, most of the significant consumer abuses over the past two decades have been detected and litigated by private counsel, including the three leading cases under the Unfair Competition Act.¹²⁰ None of those cases would likely have generated public civil suit by any of the agencies currently empowered to file. Nor could they reasonably produce a competitor or single consumer with a sufficient individual stake to make suit feasible. But modern marketing allows substantial damage and unjust enrichment through the mass application of deception or unfair competition, and as argued *supra*, society has a strong stake in an inherently fair marketplace, and in effective means to draw and enforce lines of behavior.

It is anticipated that only a small fraction of those cases

¹²⁰ See *Daar v. Yellow Cab Co.* 67 C.2d 695 (1967); *Vasquez v. Superior Court* 4 C.3d 800 (1971); *Barquis v. Merchants Collection Assn.* 7 C.3d 94 (1972).

submitted will be taken over by public prosecutors, but those which will be taken will include those cases where prosecutors are already in the course of investigation - perhaps ready to file, or cases where pre-existing expertise or concern make it the superior plaintiff on behalf of larger interests. Nor is the fear of prosecutors opting for civil penalties over restitution well placed. In fact, it well behooves a local district attorney to favor restitution, which goes to the public. The examples of abuse which exist in that direction, such as *Hy-Lond, supra*, involve the much more likely conflict of a prosecutor for county "x" attempting to capture the assets of a violator doing business in counties "y" and "z" for restitution to his residents and penalties to his treasury. This more serious problem is addressed in recommendation #1 *supra*.

A similar notice procedure to the one here proposed is used in the taxpayer waste *qui tam* actions authorized under both federal¹²¹ and California law,¹²² and in the enforcement system for Proposition 65.¹²³ Both remedies involve a filing under seal in court and contemporaneous submission to the attorney general. The AG may take over the case or decline to do so. If he declines,

¹²¹ See 31 U.S.C. § 3729 *et seq.*

¹²² See Government Code § 12650 *et seq.*; Note that under the citizen filing procedure, a case is filed in superior court under seal for up to sixty days, it is not served; the Attorney General is also served and must notify the court that it either intends to proceed with the action itself, or that it declines, in which case the seal is lifted and the private *qui tam* plaintiff may proceed. If there are local losses, the Attorney General must submit the matter to the district attorney within 15 days, and the latter has 45 days to decide to prosecute the case. The *qui tam* plaintiff receives 15-33% of the judgment or settlement proceeds if a prosecutor takes the action, and 25%-50% if he prosecutes it himself. See § 12652. The federal statute is similar.

¹²³ See § 25249.5 *et seq.* of the Health and Safety Code; see esp. § 25249.7 which provides: "(c) Actions pursuant to this section may be brought by the Attorney General in the name of the People...or by any district attorney or by any city attorney of a city having a population in excess of 750,000 or with the consent of the district attorney by a [full time] city prosecutor...(d) Actions pursuant to this section may be brought by any person in the public interest if (1) the action is commenced more than sixty days after the person has given notice of the violation ...to the Attorney General and the district attorney and any city attorney...and to the alleged violator, and (2) neither the Attorney General nor any district attorney nor any city attorney or prosecutor has commenced and is diligently prosecuting an action against such violation."

the private litigant may pursue the matter. A similar system is also used in federal employment discrimination civil rights complaints.

The recommendation would allow recovery by private litigants of reasonable costs and fees when their case is taken over. Both the taxpayer waste and Proposition 65 statutes allow the private party to collect a portion of moneys collected as a reward for finding or initiating a suit, such a reward may be substantial, and has amounted to millions of dollars. The instant proposal is far short of that proffered incentive. There, a high reward may be warranted because "discovery" of the violation is often both difficult and risky or expensive. Unfair methods of competition are somewhat more visible and detectable. Further, unlike the financial gains from taxpayer waste, an Unfair Competition Act case may proceed independent of monetary restitution. There is no assured fund from which to gauge the value of the case or to assess for the initiator.

On the other hand, there is justification to allow private litigants at least their costs and reasonable fees in working up what may be a socially valuable case. They collect only if the case is meritorious enough to be taken by the public agency, and the agency settles or prevails on the merits. No possible recovery would give counsel an incentive to send out pleadings to the attorney general/district attorney prematurely, and incur investigative and legal expense only after the case is not taken, without the preliminary inquiry appropriate to limit spurious actions. Giving recompense for actual work which eventually contributes to a beneficial result is likely to have a number of beneficial consequences: (1) attorneys may be somewhat more likely to look into and investigate Unfair Competition cases affecting the general population which appear to have merit (they will at least not be out-of-pocket); (2) an incentive to look a bit harder may limit the number of "trial balloon" or problematical submissions to the attorney general and district attorneys, allowing those offices to pay greater attention to those they receive; (3) there is somewhat less of a tendency to couch a matter to the attorney general or district attorney in a way to stimulate artificially a rejection.

The experience with the Proposition 65 scheme indicates that prior submission and either public prosecution or deferral to private suit is workable. A survey of filings under Proposition 65 indicates that the notice/assumption or declination procedure works well. Of the 46 cases filed from 1988 to July of 1994, 29 have been taken over by public prosecutors and 17 have been pursued privately. Almost all of the cases have ended in stipulated judgments beneficial to the public and relatively expeditious for the parties. In each case, all parties knew who was enforcing the statute and the plaintiff could and did confer *res judicata* as part of the resolution. The defendant has prevailed in one fully

litigated case against a private plaintiff where public prosecution was declined. Six cases are pending.¹²⁴

3. Private Party Qualification: Adequate Representation.

In a private case purporting to represent the interests of the general public, and where there has been a public agency declination, the class action certification requirements of Code of Civil Procedure § 382 do not apply, except for the requirement that the plaintiff affirmatively demonstrate, and the court certify, that the plaintiff and his counsel "adequately represent" the interests of the general public allegedly involved.

Rationale: Code of Civil Procedure § 382 authorizes traditional class actions at law "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them before the court." The party seeking certification must establish the existence of an ascertainable class and a well-defined community of interest. The community of interest requirement in turn involves three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.¹²⁵ Traditionally, the first two of these requirements involve establishing: numerosity, commonality, and typicality.¹²⁶ These three requirements are understandably absent in the context of a statute applying to a business practice and a cause of action by definition seeking remedy for the "general public." Structurally, a described "unfair or unlawful" act in competition binds the case and constitutes factual and legal commonality. And § 17200 cases involving relief sought for the general public generally fall within the rubric of traditional class action cases.¹²⁷

But the adequacy of representation requirements remain valid where one wishes to confer the advantageous finality of *res judicata*. The advantages of such a conferral are substantial: defendants buy peace, duplicative litigation is avoided, and there is finality. In return for that finality, given the foreclosure of

¹²⁴ See "Special Report: Proposition 65 Enforcement," *California Environmental Insider*, October 31, 1994, at 3-11.

¹²⁵ See *Caro v. Procter & Gamble Company* 18 Cal.App.4th 644, 654 (1993), citing *Richmond v. Dart Industries* 29 Cal.3d 462, 470 (1981),

¹²⁶ See e.g. Federal Rule of Civil Procedure 23(a).

¹²⁷ See e.g. *Vasquez v. Superior Court* 4 C.3d 800 (1971).

suit to those who might seek remedy, fulfillment of the requirement of "adequate representation" (and some notice prior to final judgment, discussed below) are properly imposed. Their current absence creates a conundrum for all concerned: finality is impossible without potential conflicts of interest by those purporting to represent the general public, but possibly with their own substantial financial stake - a stake which may often be enhanced by sacrificing the interests of a larger population.

4. Notice, Review, and Publication of Final Judgments.

In a private case purporting to represent the interests of the general public under § 17200 (where the public agencies have declined), a proposed judgment and including all stipulations and proposed agreements, shall be submitted in advance to the same public agencies listed in #3 above for their review and possible comment to the court in advance of final entry; final judgments where secured from both public and private plaintiffs so representing the interests of the general public shall be noticed to the general public by publication for comment to the court prior to final entry. All proposed final judgments applicable to persons regulated by a California regulatory agency shall be submitted in advance to that agency for possible comment to the court. Notice shall include time and place for a scheduled hearing during which those who wish to opt out may appear for that purpose, and during which the court may, in his or her discretion, take testimony or evidence relevant to objections to a proposed judgment.

Rationale: A finding that a plaintiff is an "adequate representative" of members of the public affected by an injunctive or restitutionary order is useful as a matter of qualification. However, standing alone it is insufficient to provide assurance that the result is appropriate for *res judicata* status. The recommendation is to require workable notice by publication and only prior to final judgment, not for purposes of certification. That notice requirement applies to both private and public plaintiffs.¹²⁸ Its purpose is to assist the court in assuring himself or herself that the settlement is appropriate for *res judicata* effect and finality as to absent plaintiffs. Invitation to comment is a good policy where an order under review is undertaken by a court sitting in equity, and where it will apply to "the general public" as a party in the case. Moreover, the fact of notice may well be required in order to confer a binding judgment

¹²⁸ Note that public agencies may also be subject to inappropriate conflicts, either to divert restitution into civil penalties for the local treasury to buttress office budget arguments with a Board of Supervisors, or to intrude into the jurisdiction of other agencies. See the *Pacific Land Research and Hy-Lond* cases, *supra*.

on those not before the court.¹²⁹

5. Affirmative Court Inquiry into Settlement Adequacy.

Where a judgment or dismissal is proposed by stipulation, the trial court shall have an affirmative obligation to inquire into the adequacy of representation, the nature and adequacy of the remedy, including restitution. Where a case is settled by agreement of the parties, the court shall refuse to enter judgment, or may withhold *res judicata* effect, unless he or she finds that, given the facts adduced, substantial recovery is received by or on behalf of the interests aggrieved. The court shall not permit the expansion or alteration of a complaint for purposes of settlement unless clearly in the interests of justice, not likely to prejudice non-named-party persons affected but absent from the case, and properly noticed prior to entry. The court shall also review any attorney fee award, including actual hours expended, and shall not approve any agreed settlement which does not award substantially more in restitutionary or injunctive value to the general public than to counsel representing those interests.

Rationale: Defendants have a right to finality. However, those persons whose rights are being adjudicated in their absence may have no advocate before the court. There are many scenarios where the parties to an action can find common ground to the detriment of absent persons affected and bound by the result. Indeed, the negotiation process tends to lead to such resolutions. The actor most capable of providing a check on such abuse is the court. The recommendation is to address directly the three most troublesome indicia of conflict of interest: (1) the case where there is no restitution awarded to absent interests, but injunctive or indirect benefits to the named private plaintiff dominate the settlement; (2) the expansion of the allegations of the complaint to bar other pending or prospective plaintiffs, accomplishing a grant of immunity to a defendant in return for a settlement which

¹²⁹ Note the constitutional basis for notice in the leading federal case of *Eisen v. Carlisle & Jacquelin* 417 U.S. 156 (1974). See also the discussion *supra* of due process state requirements at note 106, *supra*. Note also that Code of Civil Procedure § 1908(b) provides that a non-party who controls an action is bound by an adjudication as he were a party if he has a financial interest in the outcome; if the other party has notice of his participation, the other party is equally bound. The California Supreme Court has held: "In the context of collateral estoppel, due process requires that...the circumstances must be...such that the party to be estopped should reasonably have expected to be bound by the prior adjudication." *Clemmer v. Hartford Ins. Co.* 22 Cal.3d 865, 875 (1978). The changes proposed are designed to provide the elements necessary to accomplish binding effect under these and related standards.

may not benefit those whose rights have been foreclosed; (3) the case where counsel controls a named private plaintiff and extracts most of the proceeds for attorney's fees.

Having noted the caveat of needed judicial scrutiny, it is also clear that many settlements are not exercises in precision. The suggested amendment is not intended to require 100% restitution based on allegations made, nor is it intended to bind parties or the court to a particular pre-set scheme of relief, e.g. direct or by fluid recovery or by *cy pres* means. The precise nature of injunctive or restitutionary relief turns on too many variables to predict in advance. And there are cases where appropriate restitution will not be complete restitution. There may be many reasons for partial restitution: a case may involve untested or close issues which the parties are reasonably compromising; some of the victims may have a measure of complicity (e.g. pyramid scheme cases); the assets remaining may be limited; *et al.* The "substantial recovery" test is suggested as a requirement that there be more than token recovery for finality to be conferred, recognizing that the factors such as those enumerated above may moderate it. The purpose of court review is not to accomplish a perfect result, but to inhibit abuses at the extremes.

6. Notice of Related Cases; Referral to Common Court; Consolidation

Where a party, plaintiff or defendant, knows of another case with similar allegations in any jurisdiction, whether pled as a class action at law, or pursuant to §§ 17200 or 17500 of the Business and Professions Code, or as a person not seeking relief for any other person, and against the same defendant, that party shall file a notice of related case. The court shall refer related cases to one court where practicable and may consolidate such related cases on its own motion in the interests of justice or for judicial economy. Where similar allegations are made against one defendant in different jurisdictions, the matter should be subject to coordination under Judicial Council procedures. Where more than one private party or counsel purports to represent the "general public" in similar Unfair Competition Act allegations against the same defendant(s), the court may, after hearing, choose one to pursue such allegations or may compel plaintiffs and counsel to share responsibility.

Rationale: As of yet, there have not been many reported cases of conflicts between contending private plaintiffs to represent the general public under the Unfair Competition Act. However, in the currently pending cable late-charge case in San Diego, at least two different private plaintiff and law firm combinations have filed cases against cable firms who were in the process of settling a two year long investigation brought by the office of district attorney. Both sets of plaintiffs and firms have pressed their claims to maintain and pursue their cases despite a settlement agreed to by

defendants with the district attorney which included substantial civil penalties and restitutionary amounts allegedly representing 100% of the overcharge over the period of the statute of limitations. Although private party participation in such proceedings may be beneficial, and serve as an additional check as provided for in the third recommendation above, there must be a means to rationalize and choose appropriate litigants in the unusual cases where more than one appears to vindicate the same wrong against the same defendant on behalf of the same general public interests.

The requirement to file a related party notice includes defendants. While a plaintiff may not know of other filings, particularly if in another county, the defendant should be well aware of them.

The requirement includes notice of cases whether pled on behalf of the general public under §§ 17200 or 17500, or as a class action at law, or as an individual plaintiff seeking individual damages. The reason for this breadth lies in the possible *res judicata* effect the amendments would confer; they might estop any of the above plaintiffs and their existence should be flagged.

7. Res Judicata Status.

Given the elements added *supra* and their compliance by applicable parties, a litigated or stipulated judgment as to the general public shall be *res judicata* as to any other person seeking to represent the general public interest under the Unfair Competition Act, and shall bar any other person from any injunctive or restitutionary remedy for the alleged violation of the Act against those defendants bound by that judgment.

Rationale: Only *Res Judicata* status will allow binding settlements to resolve disputes with the finality all parties deserve and the system requires. It is the purpose of the changes enumerated above to create a constitutional and practical basis for that finality.

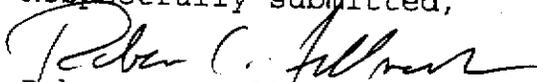
8. Application to § 17500.

The changes enumerated above should also apply in identical fashion to § 17500 *et seq.*

Rationale: Business and Professions Code §§ 17535 and 17536 replicate the wording and problems of §§ 17204 and 17206 addressed above, including the same actors able to bring public civil actions for injunctive relief and civil penalties (calculated in the same way) and the exact same private standing grant to "any person acting for the interests of itself, its members or the general public." See § 17535. The breadth of § 17500 *et seq.* is substantial, subsuming virtually all deceptive practices in sales,

is often associated with § 17200 cases, and any alteration should include both statutes in a similar manner.

Respectfully submitted,


Robert C. Fellmeth

Professor Robert C. Fellmeth is a graduate of Stanford University (AB 1967) and Harvard Law School (JD 1970). He holds the Price Chair in Public Interest Law at the University of San Diego School of Law and has directed the statewide Center for Public Interest Law since 1980. Professor Fellmeth served as a deputy district attorney in San Diego from 1973-1981, and was cross commissioned as an assistant united states attorney from 1979-1981, specializing in antitrust and white collar crime prosecutions. He has litigated a substantial number of antitrust and Unfair Competition Act cases as both a public prosecutor and a private practitioner, and serves as an expert witness on antitrust, unfair competition, and legal ethics issues, and remains active in advising public prosecutors on white collar crime matters. From 1977-1981 Professor Fellmeth served as the State Bar Discipline Monitor, reporting to the Attorney General and the Chief Justice of the Supreme Court. He has served on the Board of Directors of Consumers Union of the United States, California Common Cause, and currently chairs the Board of Directors of the national Public Citizen Foundation. He has served on the faculties of the National College of District Attorneys, the California Judicial College, and the National Judicial College. He is the author or co-author of 13 books and legal treatises, including *California Administrative and Antitrust Law* (Butterworths, Vols. I and II, with Folsom, 1990), and *California White Collar Crime* (Butterwoths, w/ Papageorge, public. date: March 1, 1995).