

Memorandum 95-14

Unfair Competition: Consultant's Recommendations

Attached to this memorandum is a draft statute to implement the recommendations set forth in Professor Robert Fellmeth's background study on *California's Unfair Competition Act: Conundrums and Confusions*. (The background study was attached to Memorandum 95-6, considered at the January meeting.)

The draft statute has been revised for form and style purposes by the staff from the initial draft prepared by Prof. Fellmeth. The draft also includes important related statutes that are not recommended for revision to assist the Commission in understanding the context of the proposed revisions. (The new provisions proposed by Prof. Fellmeth are marked with lines to distinguish them from existing law.) The staff has resisted the temptation to propose technical reorganization of statutes that are not being revised, although it is readily apparent that the confusion level of the existing statute could be lowered significantly if the statute were reorganized and redrafted.

Professor Fellmeth has supplied a commentary on the draft sections which are set out in the attached draft statute.

Also attached to this memorandum is a detailed letter from Charles W. Willey. (See Exhibit pp. 1-9.) Mr. Willey offers his personal comments on the background study and comments made by those in attendance at the January meeting. The staff has correlated many of Mr. Willey's remarks to the relevant section in the draft statute so that the Commission can consider them in context.

Information supplied by Commissioner Byrd about a case involving multiplicity of actions under Business and Professions Code Section 17402 is attached as Exhibit page 10.

Respectfully submitted,

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IN REPLY REFER TO:

February 10, 1995

Law Revision Commission
FILED
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Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Study of Business and Professions Code
§17200 of Unfair Competition Act

Dear Nat:

As I told the Commission at its hearing on January 27, 1995, this Unfair Competition Act issue has not been presented to, nor commented upon, by the Committee on Administration of Justice. My comments are therefore simply those of an individual lawyer, and not a position on behalf of any segment of the State Bar.

Since I understand you and Stan Ulrich will be preparing the draft of an amendment to B. & P. §17200 for study by the Commission at its March meeting, I thought I should share with you the specific bases for some of the suggestions which I made at the January 27 meeting in San Diego:

1. Although in his oral discussion with the Commission on January 27 Professor Robert Fellmeth acknowledged that due process is in fact a serious problem and that restitution may no longer be realistically available as an arrow in the quiver of the D.A. for consumer-related civil actions, I question whether his written presentation focuses sufficiently on what appear to be significant constitutional problems. Since the duplicate recovery potential which exists under the statute in its present form is occurring precisely because there is insufficient notice and other due process safeguards which are adequate to provide collateral estoppel, it appears to me that the Commission needs to squarely face the issues presented by the present statutory structure, and particularly with reference to the following elements:

a. If we set aside for a moment the civil actions undertaken by law enforcement agencies, everyone seems to agree

that it would be highly desirable to have finality and collateral estoppel characteristics attached to any judgment under the Unfair Competition Act which involves either:

- i. A determination of fault; or
- ii. A monetary recovery.

b. If collateral estoppel is to apply, then it appears constitutionally necessary that:

i. Adequate notice be given to all potentially affected parties, including not only parties who may wish to participate as plaintiffs, but also perhaps to similarly situated defendants;

ii. That the court be required to make a threshold determination as to whether the person(s) in whose name the action is being instituted adequately represents the group of people who are being harmed by the conduct of the particular defendant. It may not be necessary to go the full scope of a class action certification, but it does appear to me that the real underpinnings for the present class action statute are grounded in the constitutional requirements of due process, including at least notice and an opportunity to participate; and

iii. I am troubled by the concept that a lawyer with no client to whom he or she is responsible can, under the present statute, file a case which is in reality simply a hunt for a fee. No real public interest motivation is involved at all in such a proceeding, and it seems largely accidental if the public interest is incidentally served in such a "scramble-for-a-fee" process. I realize that the Professor believes that sort of process is entirely acceptable, but I see it as an invitation to abuse.

b. Under traditional notions which underlie collateral estoppel, there is an inherent requirement of sufficient identity of interests between the party(ies) who has litigated the issue and the parties who are sought to be bound (i.e., collaterally estopped) thereby. If we do not adequately address that fundamental constitutional requirement, I have serious question as to whether collateral estoppel or res judicata can properly be applied.

2. I recognize that the position stated at the meeting by the Deputy District Attorney from San Diego County was very uncompromising, but it does still appear to me that there is some fundamental duplication, with the risk of a double recovery, between a recovery by the District Attorney which is labeled

"restitution" and a recovery by a private Attorney General, in an independent civil action, which is labeled "damages." Although the Deputy District Attorney took the position that restitution is not by way of punishment, he concurrently acknowledged that in many of the circumstances which they face it is not possible to determine what specific members of the public have been damaged by some specific act of unfair competition, such as false advertising by an auto dealer. I do, however, think it would be useful to distinguish between a D.A.'s recovery for "the People" in the abstract, and a recovery on behalf of certain specific individuals. In the Cox Cable example which he mentioned, the underlying theory apparently was that Cox Cable had overcharged its customers. It seems to me that that is a definable, and readily ascertainable group of specific individuals. If a recovery is being had on behalf of specific persons who have been overcharged, it strikes me as inappropriate for the funds to go into the County Treasurer, because that simply becomes an alternative government revenue source. I recognize that the D.A.'s office does not wish to incur the time or expense of giving notice to anyone of any proposed settlement. It does, however, still seem to me that there is a legitimate need for such notice when proposed restitution is in fact on behalf of specifically identifiable persons. If restitution is granted by an auto dealer for false advertising, it may in fact be appropriate for that recovery to go into the public fisc because the persons who are wronged have not been specifically identified. But when there is an identifiable group of the public on whose behalf a monetary recovery is being had, it still appears to me that the recovery should go to those persons who were damaged, and not to the County of San Diego. Otherwise, the theory that those who are damaged are being recompensed is turned upon its head. This principle should apply whether the recovery is labeled "restitution" or labeled "damages."

I therefore still submit that whenever there is restitution being sought by a D.A., a County Counsel, or a City Attorney on behalf of an identifiable group of individuals who have been harmed, there should be a mandatory, and not merely discretionary, good faith settlement hearing. The procedure could be analogous to (although obviously not identical to) the procedure involving multiple tortfeasors, some but not all of whom are settling, and in which the settling parties wish to have assurance against a subsequent demand for double payment. See C.C.P. §877.6.

3. When a District Attorney, County Counsel, or City Attorney undertakes a purely civil enforcement action under §17200, it strikes me that one of three alternative mechanisms might be appropriate to deal with the problem:

a. If a D.A. wishes to seek restitutionary remedies on behalf of "the People", then the people for whom he or she is

acting should be no larger in geographic scope than the county from which he or she is elected and which he represents. A District Attorney may in theory represent the larger public interest, but at least in many counties it would appear that the practical reality is that the D.A. represents those interests which are of greatest concern to the particular county constituency by whom he or she was elected. If a D.A.'s restitutionary judgment in San Diego only applied to San Diego County, it appears there would be considerably less due process risk in making that judgment operative as collateral estoppel only within that county; or

b. Alternatively, if a District Attorney, County Counsel or City Attorney elects to seek a restitutionary remedy, we should perhaps candidly face the fact that there is very little which distinguishes such restitution from damages in a civil action, at least where there is a specifically identifiable group of individuals, the wrongs on whom are being remedied; or

c. If a D.A., County Counsel or City Attorney elects to seek a restitutionary remedy which is for wrongs committed upon an identifiable group, perhaps that public official should be required to give some sort of public notice (such as that published in the newspaper, and given by mail to persons who request special notice and provide prepaid envelopes) of a proposed settlement. That would give any members of the private sector who in fact have a good faith interest in the settlement an opportunity to seek intervention and an opportunity to be heard upon any court approval of the settlement; or

d. Alternatively, a settlement in an action instituted and conducted solely by a law enforcement public entity could perhaps be entirely denied collateral estoppel effect, unless:

i. The D.A. or other public law enforcement entity is willing to accord collateral estoppel status to the settlement judgment; and

ii. A court hearing in the nature of a good faith settlement determination is had so that if private sector participants are legitimately entitled to participate in the settlement, they would have an opportunity to do so.

4. Whether or not there is a "good faith settlement" hearing analogous to that required by C.C.P. §877.6 for one of multiple tortfeasors who is settling, I strongly submit that the court should be required in all instances to determine whether the settlement is fair, reasonable, and in the public interest.

5. I also strongly submit that whenever a settlement is made which purports to be on behalf of "the People", whether by law

enforcement or by private counsel acting under the private Attorney General theory, that notice of the settlement hearing should be given to the Attorney General, who could then act as an arbiter of whether a particular settlement was really in the public interest. As Professor Fellmeth appropriately points out, many private litigants are interested solely in grinding their own particular axes, and are inclined to enter into any kind of a settlement which resolves their particular personal grievances, and that they in fact represent a much narrower interest than the public at large.

As I mentioned at the conference, the Probate Policy Memorandum of the Los Angeles Superior Court contains the following provision requiring notice to the Attorney General of any compromise settlement in an estate which involves a "cut down" of the interest which would otherwise pass to a public charity:

"No settlement of any probate matter which reduces the amount to be received by any charity will be given effect by the court unless the Attorney General is represented in the proceedings. This requirement is jurisdictional. Government Code section 12591."

(A copy of that rule is attached.) There is some question in my mind as to whether a literal reading of Government Code §12591 in fact mandates notice to the Attorney General in all cases, but it does seem that such notice, and a screening by the Attorney General, is perhaps an appropriate way to obtain an independent measurement of whether a given proposed settlement in fact represents the public interest. Hence any inclusion of this concept in a proposed statute should perhaps not be tied directly to a Government Code section, but rather to the underlying policy which the Los Angeles Superior Court was apparently applying when it elected to treat Government Code §12591 as if it were mandatory.

6. It does appear to me that there is a legitimate need to have some recognition by law enforcement that some reasonable accommodation needs to be reached in dealing with those restitutionary recoveries under §17200 which do appear to pose a due process problem. I certainly recognize that law enforcement does not wish to have even the slightest incursion upon the remedies available to it, but I submit that it is not reasonable in the long haul for law enforcement to insist upon completely unfettered discretion in pursuing the remedies available to it, if the end result is a determination that the entire procedure is unconstitutional. Some element of practicality and reasonability needs to prevail on all sides.

7. Where both law enforcement and private sector remedies may be implicated in a particular fact situation, there may be justification for giving some pre-filing notice. For example, if

a private party wanted to file a \$17200 action, he or she should perhaps give a notice to law enforcement (perhaps to the local D.A.) of such party's intent to file, and give the D.A. an opportunity to intervene or request priority of filing, so we don't get 11th hour civil "tag-alongs" on a case the D.A. has already long had in process. If, however, that is to be done, a single notice should be sufficient, and it probably should go to whichever agency is in fact most likely to be interested in participating. In light of the large number and enormous variation in the size and capabilities of the various cities, and the political aspects which in some counties affect the positions of County Counsel, it would seem that such a notice should probably be sent to the local District Attorney. (This is not intended to be a substitute for notice to the Attorney General of an ultimate proposed settlement, but rather a threshold requirement for institution of an action.) There are precedents for this approach in at least the following areas:

a. The threshold notice requirements under MICRA which must be fulfilled before an action can be instituted against a physician (see C.C.P. §364); and

b. The preliminary showing required under Civil Code §1714.10 before a plaintiff may name the opposing party's attorney as a co-conspirator; and

c. The requirement of an administrative claim being filed before suit against a governmental entity may be filed under the Tort Claims Act.

8. I also believe that any revision of or supplement to B.& P. §17200 needs to take into consideration the many areas of civil litigation in which the present statute has apparently served well. We need to be sure that any revision does not "throw the baby out with the bath water." Those aspects of the present statute which work well now need to be preserved, and it will not be an easy task to delineate between the presently satisfactory aspects and those aspects in which some revision may be appropriate.

Consideration should be given to the following two examples of recent cases in the area, both of which appear to be appropriate applications of B.& P. §17200:

a. Saunders v. Superior Court (1994) 27 C.A.4th 832, 33 C.R.2d 438 (Certified shorthand reporters stated cause of action for unfair business practices against direct contractors and their clients. The direct contractors had exclusive contracts for some clients for depositions but also could act as trainers, commentators and evaluators. Direct contractors' fee schedules also

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discounted costs of original transcripts to their exclusive clients but increased costs of copies provided to others);

b. Hi-Top Steel Corp. v. Lehrer (1994) 24 C.A.4th 570, 29 C.R.2d 646 (Plaintiff who sought permits to enter into shredding business held to have stated cause of action in alleging that competitor made false statements to public officials and filed baseless appeal to injure plaintiff's business. Usual first amendment exemption for efforts to influence government held inapplicable because such efforts were only a sham.)

Perhaps some distinction could be drawn for cases in which statewide effect is not desired, and in which due process constraints therefore may not be implicated.

As noted at the outset, I cannot, and do not purport to, speak here on behalf of CAJ, since the Committee has not yet had an opportunity to fully consider and evaluate a specific proposal. CAJ does, however, endeavor to look at proposed legislation affecting the civil court system on a broad, public interest basis, and not on behalf of either the plaintiff's bar or the defense bar.

When the first draft of a proposed statute has been prepared, so that there is specific proposed statutory language upon which we might comment, CAJ would be interested in considering this proposal.

Since actions under B. & P. §17200 may often arise in the context of environmental litigation, I have taken the liberty of sending a copy of Professor Fellmeth's initial study to the Chair of the State Bar's Section on Environmental Law, so that if either the plaintiffs' or defendants' constituencies within that section wish to submit their suggestions, they will have a full opportunity to do so.

I wish to express my appreciation to the Commission for the opportunity which it has provided to the private sector to comment on matters such as this which affect private litigants as much as, or more than, the public sector.

I am also sending a copy of this letter to Professor Fellmeth, in the event that it contains anything which would be of use to him in his continuing studies of and recommendations upon this subject. I hope he will not view this as any kind of a personal critique, because he has obviously expended a great deal of effort and thought on endeavoring to bring some order to the crazy-quilt of situations which it appears can now arise under Section 17200 in its present form.

Contrary to the position articulated by the San Diego County

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Deputy District Attorney who attended the January 27 meeting of the Commission, I do not see how the problems which presently exist can be remedied without at least some amendment to the existing statute. I can well appreciate that from the perspective of law enforcement the present situation "ain't broke and shouldn't be fixed", but that seems clearly not to be the case with respect to at least some civil actions in the private sector. Whatever remedial format is adopted, it must necessarily accommodate both the law enforcement and private litigant interests, including in the latter both the plaintiffs and defendants.

9. I also have difficulty seeing how the due process problems which are inherent in at least some applications of the present §17200 can be remedied adequately without requiring compliance with at least most of the present requirements for a class action. (See 4 Witkin, California Procedure, Pleading, §222 et seq.) It may be that a determination of adequacy of representation could be made without going through the full scope of a class certification, but it would appear that there certainly needs to be some fairly rigorous filtration process, so that a plaintiff who is really pursuing an essentially private cause of action, and is alleging a violation of §17200 as a "tag-along" or after-thought, should not be permitted to impose the rather dramatic limitations of collateral estoppel on other members of the public who never knew about, never had an opportunity to participate in, and never had an opportunity to opt out of, his or her essentially private proceeding.

10. It would also appear that a distinction needs to be drawn between a true "class" and a situation where each plaintiff's injuries depend upon a separate set of facts. (See Witkin, supra, at §219, commenting on the Supreme Court's decisions in Daar v. Yellow Cab and Weaver v. Pasadena Tournament of Roses.) Perhaps the ultimate dividing line could be predicated, at least in material part, on whether the injury is a common injury to a definable group (where a class action is often appropriate), or whether the injury is to an amorphous "public" the constituents of which cannot be identified. Even in the latter category, there may be room for use of the coordination procedure (Rules of Court, Rule 1521 et seq. and C.C.P. §404 et seq.) when cases are pending in different courts.

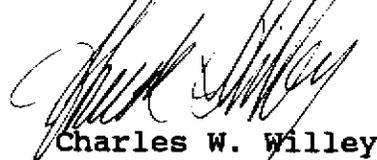
I know that several members of our Committee have themselves had extensive experience with B. & P. §17200, so I am sending copies of this letter to them now, so they will have an opportunity to think about the matter while we are awaiting the first version of the draft statute.

I have no way of knowing whether CAJ will or will not agree with these personal comments. One of the Committee's great

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strengths is that its members represent a large cross-section of experience and perspective, and its members are (entirely appropriately) very independent in their judgments.

Very truly yours,



Charles W. Willey

CWW:bp
Encls.

cc: Monroe Baer, Esq.
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University of San Diego School of Law

MAR 13 1995

File: _____

Water Pump Manufacturer Named in Prop. 65 Suit Challenges Right of Private Enforcers to Sue Along With AG

A water pump manufacturer named in a Prop. 65 suit filed by the Attorney General has appealed to the court to dismiss a parallel suit filed by two environmental groups. The private suit charges the company with violations of laws prohibiting unfair business practices for the same alleged exposures that resulted in the Prop. 65 suit.

Attorneys for Goulds Pumps, Inc., say they are seeking relief from the "burden and unfairness of being forced to defend two prosecutions dealing with the same controversy."

Goulds, along with a number of other water pump companies, is a defendant in two lawsuits—*People v. Aeromotor Pumps & Water Systems, et al.*, Alameda Superior Court No. 733686-7 and *Environmental Defense Fund and Natural Resources Defense Council v. Sta-Rite, Inc., et al.*, Alameda Superior Court No. 733842-9.

While EDF and NRDC recognized that they were precluded from prosecuting under Prop. 65, "they claim authority to sue on behalf of the 'general public' under Business and Professions Code Section 17204."

The appeals court has previously ruled that private parties, such as EDF and NRDC, have standing to sue under the Business and Professions Code, even if they have no personal stake in the outcome of the dispute.

In August, Goulds petitioned the court to throw out the EDF/NRDC case, citing "the burden and complexity of defending two virtually identical lawsuits under the control of two different groups of attorneys both suing on behalf of the same plaintiffs."

In October, Judge James R. Lambden overruled Goulds' petition without a written opinion, allowing the EDF/NRDC case to continue. Goulds filed the petition with the California Court of Appeal, First District, on November 21, 1994.

The AG's suit alleges that submers-

ible water pumps manufactured by Goulds included brass components that leach lead into drinking water when they are installed in water wells.

The EDF/NRDC suit alleges that the water pump companies also violated the Business and Professions Code by selling products that violate Prop. 65.

Goulds is seeking relief from what it called the "burden and complexity of defending two virtually identical suits." The complaint states that there are three important legal issues at stake related to the emerging question whether private parties are permitted to mount "duplicative" law enforcement actions under the Unfair Business Practice provisions of the Business and Professions Code where the Attorney General has already commenced a civil prosecution under that statute.

The three issues, listed below, "have never been resolved by any previous appellate decision," according to the suit.

1. Whether the language employed by the Legislature in enacting Section 17204 can be construed to authorize two concurrent actions to enforce the Business and Professions Code against the same defendant.

2. If so, whether the legislative branch's authorization of such redundant private party law enforcement actions, when the Attorney General has previously sued, invades the province of the executive branch in violation of the Constitution's separations of powers doctrine.

3. Whether, under the Code of Civil Procedure, Goulds was entitled to abatement of the EDF/NRDC suit in light of the prior pending action filed by the Attorney General.

The Superior Court has previously resolved each of these issues by overruling, without opinion, Goulds demurrer to the EDF/NRDC complaint, thereby allowing the private party case to proceed along with the AG's case. □

Attorneys for Goulds Pumps, Inc., say they are seeking relief from the "burden and unfairness of being forced to defend two prosecutions dealing with the same controversy."

DRAFT STATUTE: UNFAIR COMPETITION

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DIVISION 7. GENERAL BUSINESS REGULATIONS

[§ 16000 *et seq.*]

PART 2. PRESERVATION AND REGULATION OF COMPETITION [§ 16600 *et seq.*]

CHAPTER 5. ENFORCEMENT

1 ***Bus. & Prof. Code § 17200 (unchanged). “Unfair competition” defined***

2 17200. As used in this chapter, unfair competition shall mean and include any
3 unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue
4 or misleading advertising and any act prohibited by Chapter 1 (commencing with
5 Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

6 ***Bus. & Prof. Code § 17201 (unchanged). “Person” defined***

7 17201. As used in this chapter, the term person shall mean and include natural
8 persons, corporations, firms, partnerships, joint stock companies, associations and
9 other organizations of persons.

10 ***Bus. & Prof. Code § 17201.5 (unchanged). “Board within Department of Consumer Affairs”***
11 ***and “local consumer affairs agency” defined***

12 17201.5. As used in this chapter:

13 (a) “Board within the Department of Consumer Affairs” includes any
14 commission, bureau, division, or other similarly constituted agency within the
15 Department of Consumer Affairs.

16 (b) “Local consumer affairs agency” means and includes any city or county body
17 which primarily provides consumer protection services.

18 ***Bus. & Prof. Code § 17202 (unchanged). Specific or preventive relief***

19 17202. Notwithstanding Section 3369 of the Civil Code, specific or preventive
20 relief may be granted to enforce a penalty, forfeiture, or penal law in a case of
21 unfair competition.

22 ***Bus. & Prof. Code § 17203 (unchanged). Injunctions and equitable remedies***

23 17203. Any person who engages, has engaged, or proposes to engage in unfair
24 competition may be enjoined in any court of competent jurisdiction. The court may
25 make such orders or judgments, including the appointment of a receiver, as may be
26 necessary to prevent the use or employment by any person of any practice which
27 constitutes unfair competition, as defined in this chapter, or as may be necessary to
28 restore to any person in interest any money or property, real or personal, which
29 may have been acquired by means of such unfair competition.

1 **Bus. & Prof. Code § 17204 (unchanged). Commencement of action**

2 17204. Actions for any relief pursuant to this chapter shall be prosecuted
3 exclusively in a court of competent jurisdiction by the Attorney General or any
4 district attorney or by any county counsel authorized by agreement with the district
5 attorney in actions involving violation of a county ordinance, or any city attorney
6 of a city, or city and county, having a population in excess of 750,000, and, with
7 the consent of the district attorney, by a city prosecutor in any city having a full-
8 time city prosecutor or, with the consent of the district attorney, by a city attorney
9 in any city and county in the name of the people of the State of California upon
10 their own complaint or upon the complaint of any board, officer, person,
11 corporation or association or by any person acting for the interests of itself, its
12 members or the general public.

13 **Staff Note.** This section could be vastly improved by tabulating the permissible plaintiffs in a
14 list. It is difficult to read this section and determine with full accuracy the antecedents of the
15 prepositional phrases. What is the intent of the word "exclusively" in the second line? Is it surplus
16 or out of place?

17 **Bus. & Prof. Code § 17204.1 (added). Prerequisite to bringing action on behalf of general**
18 **public**

19 SEC. _____. Section 17204.1 is added to the Business and Professions Code, to
20 read:

21 17204.1. (a) At least 60 days before commencing an action pursuant to Section
22 17204 on behalf of the general public, a private plaintiff shall submit the proposed
23 pleadings in the action to the Attorney General and to the district attorney of the
24 county in which the action is to be commenced.

25 (b) Within the 60-day period, the Attorney General or district attorney to whom
26 the pleadings have been submitted may notify the plaintiff of the public officer's
27 intention to commence an action covering substantially similar alleged acts of
28 unfair competition.

29 (c) If the private plaintiff receives notice pursuant to subdivision (b), the private
30 plaintiff may not commence the proposed action within the one-year period
31 following the date of the notice.

32 (d) If a public officer given notice pursuant to subdivision (a) commences an
33 action as provided in subdivision (b), the private plaintiff may not commence the
34 proposed action, but may submit to the public officer an itemized cost bill
35 including out-of-pocket costs and attorney's fees reasonably incurred in
36 investigating the case and in preparing initial pleadings. The cost bill may include
37 only costs and fees directly attributable to the representation of the general public,
38 and may not include a multiplier for attorney hours.

39 (e) After receipt of a private plaintiff's cost bill pursuant to subdivision (d), the
40 public officer shall submit the cost bill to the court for an appropriate award from
41 the defendant as a part of any final judgment in the action, other than dismissal.

42 **Staff Note.** This section has been extracted from Prof. Fellmeth's draft of the following section.
43 See the Explanation following that section.

1 On the issue of double recovery, see item 2 in Mr. Willey's letter, Exhibit pp. 2-3.

2 On the issue of prefilng by private plaintiffs, see item 7 in Mr. Willey's letter, Exhibit pp. 5-6.

3 **Bus. & Prof. Code § 17204.2 (added). Res judicata and collateral estoppel effect of action**
4 **brought by private plaintiff on behalf of general public under Section 17204**

5 SEC. _____. Section 17204.2 is added to the Business and Professions Code, to
6 read:

7 17204.2. Where a private plaintiff commences an action pursuant to Section
8 17204 on behalf of the general public, any injunctive judgment or order in the
9 action is res judicata as to the issues litigated against the defendant if all of the
10 following requirements are satisfied:

11 (a) The plaintiff specifically pleads a cause of action on behalf of the general
12 public for unfair competition under this chapter.

13 (b) Counsel for the plaintiff is an "adequate legal representative" of the interests
14 of the general public pled.

15 (c) The plaintiff does not have a conflict of interest precluding the good faith
16 representation of the interests of the general public pled.

17 (d) Before entry of final judgment, notice of the terms of the proposed judgment,
18 including all stipulations and associated agreements between the parties, is given
19 to all of the following:

20 (1) The Attorney General.

21 (2) The district attorney in the county where the action is commenced.

22 (3) Regulatory agencies with jurisdiction over the subject matter of the dispute
23 or of any of the parties allegedly acting within the scope of regulated practice.

24 (4) The general public, through newspaper publication, or such other form of
25 notice as specified by the court.

26 (e) Before entry of final judgment, there is a hearing on the proposed judgment,
27 with an opportunity for all persons responding to the notice of proposed entry to
28 object or otherwise be heard, and to remove themselves from the operation of
29 collateral estoppel.

30 (f) If the scope of the original complaint or of the final judgment has been
31 expanded, the court finds that the expansion does not prejudice members of the
32 general public who are to be bound by the judgment.

33 **Prof. Fellmeth's Explanation:** The current law allows any person to sue for the general
34 public, without conferring finality as to any such suit. It allows any person to serve as a
35 *de jure* private attorney general with no qualifications. If finality were to be conferred in
36 such a setting, it would bind absent victims to a result without opportunity to be heard, in
37 violation of due process rights. The amendments minimally alter the law to confer finality
38 with conflict of interest and due process safeguards. This amendment applies only to
39 those cases where a private plaintiff is not litigating a wrong as to him or her, but on
40 behalf of the "general public" — as presently authorized. Such contentions are to be
41 specifically pled to make certain where they are claimed. There must be advance notice to
42 public prosecutors, and as an inherently superior class representative of the general
43 public, they may pick up the case. This precludes further private action if there is a

1 subsequent public filing; out of pocket costs and reasonable fees may be recovered should
2 the public prosecutor prevail.

3 Cases are entitled to *res judicata* effect. However, counsel must be an adequate
4 representative of the general public he or she claims to represent, and the named plaintiff
5 must not have a conflict of interest *vis-a-vis* the members of the general public to
6 compromise the fiduciary duty of counsel between the named plaintiff and the general
7 public. Finally, there must be notice to affected persons and a hearing to allow for opt out
8 and for consideration of the fairness of the proposed judgment.

9 **Staff Note.** On class-action issues, such as notice, adequacy of representation, and identity of
10 interests, see item 1 in Mr. Willey's letter, Exhibit pp. 1-2.

11 On class-action issues, such as adequacy of representation and opportunity to opt out, see items
12 9-10 in Mr. Willey's letter, Exhibit p. 8.

13 **Bus. & Prof. Code § 17204.3 (added). Res judicata and collateral estoppel effect of action by**
14 **public officer**

15 SEC. _____. Section 17204.3 is added to the Business and Professions Code, to
16 read:

17 17204.3. (a) A judgment in an action commenced by a public officer specified in
18 Section 17204 is *res judicata* as to issues litigated against [named] defendants. The
19 public official may limit the collateral estoppel effect of the judgment to allow an
20 action by a private plaintiff to determine the application or nature of a particular
21 remedy, including, but not limited to, restitution.

22 (b) If a final judgment in an action commenced by a public officer specified in
23 Section 17204 includes a provision for restitution to victims, the judgment
24 operates as collateral estoppel of the victims from litigating the same issues against
25 the [named] defendants, where the following requirements are satisfied:

26 (1) Before entry of final judgment, the public officer gives notice of the terms of
27 the proposed judgment, including all stipulations and associated agreements
28 between the parties, to all of the following:

29 (A) Regulatory agencies with jurisdiction over the subject matter of the dispute
30 or of any of the parties allegedly acting within the scope of regulated practice.

31 (B) The general public, through newspaper publication, or such other form of
32 notice as specified by the court.

33 (2) Before entry of final judgment, there is a hearing on the proposed judgment,
34 with an opportunity for all persons responding to the notice of proposed entry to
35 object or otherwise be heard, and to remove themselves from the operation of
36 collateral estoppel.

37 **Prof. Fellmeth's Explanation:** Public prosecutors are entitled to collaterally estop others
38 from litigating the same issues they have litigated against the named defendants.
39 However, where restitution is sought which will bind and preclude victims from private
40 redress, due process requires that there be minimal notice and opportunity to be heard.

41 For example, if there is a single victim who lost \$100,000 as a result of a violation of
42 the Unfair Competition Act and the restitutionary system proposed by the public
43 prosecutor provided for a pro-rata payment of \$4 to every person in a group of alleged
44 victims, there should be an opportunity of such a person to be heard and perhaps

1 separately treated prior to entry of a final judgment which may preclude his or her
2 extraordinary relief.

3 **Staff Note.** The staff is unclear on how the public officer goes about limiting the collateral
4 estoppel effect under this section.

5 On the issue of scope of an action by public officers, see item 3 in Mr. Willey's letter, Exhibit
6 pp. 3-4.

7 On the issue of settlement, see items 4-5 in Mr. Willey's letter, Exhibit pp. 4-5.

8 On the issue of restitution to private parties, see item 6 in Mr. Willey's letter, Exhibit p. 5.

9 **Bus. & Prof. Code § 17204.5 (repealed). Authority of San Jose city attorney**

10 SEC. _____. Section 17204.5 of the Business and Professions Code is repealed.

11 ~~17204.5. In addition to the persons authorized to bring an action pursuant to~~
12 ~~Section 17204, the City Attorney of the City of San Jose, with the annual consent~~
13 ~~of the Santa Clara County District Attorney, is authorized to prosecute those~~
14 ~~actions.~~

15 ~~This section shall remain in effect until such time as the population of the City of~~
16 ~~San Jose exceeds 750,000, as determined by the Population Research Unit of the~~
17 ~~Department of Finance, and at that time shall be repealed.~~

18 **Prof. Fellmeth's Explanation:** 1991 amendments to Section 17206(a) moot Section 17204.5,
19 providing that *any* city with a full time city attorney qualifies to bring actions with the consent of
20 the district attorney. It is unlikely that San Jose would prefer the annual renewal required in
21 current Section 17204.5 and would want to take advantage of the civil penalty split provision of
22 Section 17206(e).

23 **Staff Note.** This section would seem to be repealed under its own terms. According to the
24 Demographic Research Unit of the Department of Finance, as of January 1, 1994, San Jose's
25 population was 835,500.

26 **Bus. & Prof. Code § 17205 (unchanged). Cumulative remedies**

27 17205. Unless otherwise expressly provided, the remedies or penalties provided
28 by this chapter are cumulative to each other and to the remedies or penalties
29 available under all other laws of this state.

30 **Bus. & Prof. Code § 17206 (unchanged). Civil penalties in action by public officer**

31 17206. (a) Any person who engages, has engaged, or proposes to engage in
32 unfair competition shall be liable for a civil penalty not to exceed two thousand
33 five hundred dollars (\$2,500) for each violation, which shall be assessed and
34 recovered in a civil action brought in the name of the people of the State of
35 California by the Attorney General or by any district attorney or by any county
36 counsel authorized by agreement with the district attorney in actions involving
37 violation of a county ordinance, or any city attorney of a city, or city and county,
38 having a population in excess of 750,000, and, with the consent of the district
39 attorney, by a city prosecutor in any city having a full-time city prosecutor or, with
40 the consent of the district attorney, by a city attorney in any city and county, in any
41 court of competent jurisdiction.

1 (b) The court shall impose a civil penalty for each violation of this chapter. In
2 assessing the amount of the civil penalty, the court shall consider any one or more
3 of the relevant circumstances presented by any of the parties to the case, including,
4 but not limited to, the following: the nature and seriousness of the misconduct, the
5 number of violations, the persistence of the misconduct, the length of time over
6 which the misconduct occurred, the willfulness of the defendant's misconduct, and
7 the defendant's assets, liabilities, and net worth.

8 (c) If the action is brought by the Attorney General, one-half of the penalty
9 collected shall be paid to the treasurer of the county in which the judgment was
10 entered, and one-half to the State General Fund. If brought by a district attorney or
11 county counsel, the penalty collected shall be paid to the treasurer of the county in
12 which the judgment was entered. Except as provided in subdivision (d), if brought
13 by a city attorney or city prosecutor, one-half of the penalty collected shall be paid
14 to the treasurer of the city in which the judgment was entered, and one-half to the
15 treasurer of the county in which the judgment was entered.

16 (d) If the action is brought at the request of a board within the Department of
17 Consumer Affairs or a local consumer affairs agency, the court shall determine the
18 reasonable expenses incurred by the board or local agency in the investigation and
19 prosecution of the action.

20 Before any penalty collected is paid out pursuant to subdivision (b), the amount
21 of such reasonable expenses incurred by the board shall be paid to the State
22 Treasurer for deposit in the special fund of the board described in Section 205. If
23 the board has no such special fund, the moneys shall be paid to the State Treasurer.
24 The amount of such reasonable expenses incurred by a local consumer affairs
25 agency shall be paid to the general fund of the municipality or county which funds
26 the local agency.

27 (e) If the action is brought by a city attorney of a city and county, the entire
28 amount of the penalty collected shall be paid to the treasurer of the city and county
29 in which the judgment was entered. However, if the action is brought by a city
30 attorney of a city and county for the purposes of civil enforcement pursuant to
31 Section 17980 of the Health and Safety Code or Article 3 (commencing with
32 Section 11570) of Chapter 10 of Division 10 of the Health and Safety Code, either
33 the penalty collected shall be paid entirely to the treasurer of the city and county in
34 which the judgment was entered, or upon the request of the city attorney, the court
35 may order that up to one-half of the penalty, under court supervision and approval,
36 be paid for the purpose of restoring, maintaining, or enhancing the premises which
37 were the subject of the action, and that the balance of the penalty be paid to the
38 treasurer of the city and county.

39 ***Bus. & Prof. Code § 17206.1 (unchanged). Additional penalties in violations against senior***
40 ***citizens***

41 17206.1. (a) In addition to any liability for a civil penalty pursuant to Section
42 17206, any person who violates this chapter, and the act or acts of unfair

1 competition are perpetrated against one or more senior citizens or disabled
2 persons, may be liable for a civil penalty not to exceed two thousand five hundred
3 dollars (\$2,500) for each violation, which may be assessed and recovered in a civil
4 action as prescribed in Section 17206.

5 Subject to subdivision (d), any civil penalty shall be paid as prescribed by
6 subdivisions (b) and (c) of Section 17206.

7 (b) As used in this section, the following terms have the following meanings:

8 (1) "Senior citizen" means a person who is 65 years of age or older.

9 (2) "Disabled person" means any person who has a physical or mental
10 impairment which substantially limits one or more major life activities.

11 (A) As used in this subdivision, "physical or mental impairment" means any of
12 the following:

13 (i) Any physiological disorder or condition, cosmetic disfigurement, or
14 anatomical loss substantially affecting one or more of the following body systems:
15 neurological; musculoskeletal; special sense organs; respiratory, including speech
16 organs; cardiovascular; reproductive; digestive; genitourinary; hemic and
17 lymphatic; skin; or endocrine.

18 (ii) Any mental or psychological disorder, such as mental retardation, organic
19 brain syndrome, emotional or mental illness, and specific learning disabilities. The
20 term "physical or mental impairment" includes, but is not limited to, such diseases
21 and conditions as orthopedic, visual, speech and hearing impairment, cerebral
22 palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease,
23 diabetes, mental retardation, and emotional illness.

24 (B) "Major life activities" means functions such as caring for one's self,
25 performing manual tasks, walking, seeing, hearing, speaking, breathing, learning,
26 and working.

27 (c) In determining whether to impose a civil penalty pursuant to subdivision (a)
28 and the amount thereof, the court shall consider, in addition to any other
29 appropriate factors, the extent to which one or more of the following factors are
30 present:

31 (1) Whether the defendant knew or should have known that his or her conduct
32 was directed to one or more senior citizens or disabled persons.

33 (2) Whether the defendant's conduct caused one or more senior citizens or
34 disabled persons to suffer: loss or encumbrance of a primary residence, principal
35 employment, or source of income; substantial loss of property set aside for
36 retirement, or for personal or family care and maintenance; or substantial loss of
37 payments received under a pension or retirement plan or a government benefits
38 program, or assets essential to the health or welfare of the senior citizen or
39 disabled person.

40 (3) Whether one or more senior citizens or disabled persons are substantially
41 more vulnerable than other members of the public to the defendant's conduct
42 because of age, poor health or infirmity, impaired understanding, restricted

1 mobility, or disability, and actually suffered substantial physical, emotional, or
2 economic damage resulting from the defendant's conduct.

3 (d) Any court of competent jurisdiction hearing an action pursuant to this section
4 may make orders and judgments as may be necessary to restore to any senior
5 citizen or disabled person any money or property, real or personal, which may
6 have been acquired by means of a violation of this chapter. Restitution ordered
7 pursuant to this subdivision shall be given priority over recovery of any civil
8 penalty designated by the court as imposed pursuant to subdivision (a), but shall
9 not be given priority over any civil penalty imposed pursuant to subdivision (a) of
10 Section 17206. If the court determines that full restitution cannot be made to those
11 senior citizens or disabled persons, either at the time of judgment or by a future
12 date determined by the court, then restitution under this subdivision shall be made
13 on a pro rata basis depending on the amount of loss.

14 **Bus. & Prof. Code § 17206.2 (added). Attorney General's registry**

15 SEC. _____. Section 17206.2 is added to the Business and Professions Code, to
16 read:

17 17206.2. The Attorney General shall establish and keep a registry of cases being
18 investigated and actions commenced by public officers and by private plaintiffs
19 alleging representation of the general public under this chapter. The Attorney
20 General's registry shall be used to coordinate possible conflicts between local
21 jurisdictions where alleged violations extend substantially outside the county
22 where the matter is being investigated or brought.

23 **Bus. & Prof. Code § 17206.3 (added). Notice of investigation and filing under Section 17206**

24 SEC. _____. Section 17206.3 is added to the Business and Professions Code, to
25 read:

26 17206.3. (a) A city attorney or county counsel authorized to bring actions under
27 this chapter pursuant to Section 17206(a) shall, at the earliest practicable time,
28 inform the district attorney of that county of any unfair competition investigation
29 formally undertaken.

30 (b) If the city attorney or county counsel files a complaint including an
31 allegation pursuant to this chapter, a copy of the complaint shall promptly be given
32 to the Attorney General and to the district attorney of that county.

33 **Prof. Fellmeth's Explanation:** This provision requires notice of actions brought by public
34 prosecutors to ensure coordination of cases where multiple cases against the same defendants for
35 the same violations may occur.

36 **Bus. & Prof. Code § 17206.5 (repealed). Authority of San Jose city attorney**

37 SEC. _____. Section 17206.5 of the Business and Professions Code is repealed.

38 ~~17206.5. In addition to the persons authorized to bring an action pursuant to~~
39 ~~Section 17206, the City Attorney of the City of San Jose, with the annual consent~~

1 ~~of the Santa Clara County District Attorney, is authorized to prosecute these~~
2 ~~actions.~~

3 ~~This section shall remain in effect until such time as the population of the City of~~
4 ~~San Jose exceeds 750,000, as determined by the Population Research Unit of the~~
5 ~~Department of Finance, and at that time shall be repealed.~~

6 **Staff Note.** If Section 17204 is repealed, why not this section? In any event, this section would
7 seem to be repealed under its own terms. According to the Demographic Research Unit of the
8 Department of Finance, as of January 1, 1994, San Jose's population was 835,500.

9 ***Bus. & Prof. Code § 17207 (unchanged). Penalties***

10 17207. (a) Any person who intentionally violates any injunction prohibiting
11 unfair competition issued pursuant to Section 17203 shall be liable for a civil
12 penalty not to exceed six thousand dollars (\$6,000) for each violation. Where the
13 conduct constituting a violation is of a continuing nature, each day of that conduct
14 is a separate and distinct violation. In determining the amount of the civil penalty,
15 the court shall consider all relevant circumstances, including, but not limited to,
16 the extent of the harm caused by the conduct constituting a violation, the nature
17 and persistence of that conduct, the length of time over which the conduct
18 occurred, the assets, liabilities, and net worth of the person, whether corporate or
19 individual, and any corrective action taken by the defendant.

20 (b) The civil penalty prescribed by this section shall be assessed and recovered in
21 a civil action brought in any county in which the violation occurs or where the
22 injunction was issued in the name of the people of the State of California by the
23 Attorney General or by any district attorney, any county counsel authorized by
24 agreement with the district attorney in actions involving violation of a county
25 ordinance, or any city attorney in any court of competent jurisdiction within his or
26 her jurisdiction without regard to the county from which the original injunction
27 was issued. An action brought pursuant to this section to recover civil penalties
28 shall take precedence over all civil matters on the calendar of the court except
29 those matters to which equal precedence on the calendar is granted by law.

30 (c) If such an action is brought by the Attorney General, one-half of the penalty
31 collected pursuant to this section shall be paid to the treasurer of the county in
32 which the judgment was entered, and one-half to the State Treasurer. If brought by
33 a district attorney or county counsel the entire amount of the penalty collected
34 shall be paid to the treasurer of the county in which the judgment is entered. If
35 brought by a city attorney or city prosecutor, one-half of the penalty shall be paid
36 to the treasurer of the county in which the judgment was entered and one-half to
37 the city, except that if the action was brought by a city attorney of a city and
38 county the entire amount of the penalty collected shall be paid to the treasurer of
39 the city and county in which the judgment is entered.

40 (d) If the action is brought at the request of a board within the Department of
41 Consumer Affairs or a local consumer affairs agency, the court shall determine the

1 reasonable expenses incurred by the board or local agency in the investigation and
2 prosecution of the action.

3 Before any penalty collected is paid out pursuant to subdivision (c), the amount
4 of the reasonable expenses incurred by the board shall be paid to the State
5 Treasurer for deposit in the special fund of the board described in Section 205. If
6 the board has no such special fund, the moneys shall be paid to the State Treasurer.
7 The amount of the reasonable expenses incurred by a local consumer affairs
8 agency shall be paid to the general fund of the municipality or county which funds
9 the local agency.

10 ***Bus. & Prof. Code § 17208 (unchanged). Limitations***

11 17208. Any action to enforce any cause of action pursuant to this chapter shall be
12 commenced within four years after the cause of action accrued. No cause of action
13 barred under existing law on the effective date of this section shall be revived by
14 its enactment.

15 ***Bus. & Prof. Code § 17209 (unchanged). Notice of appeal***

16 17209. If a violation of this chapter is alleged or the application or construction
17 of this chapter is in issue in any proceeding in the Supreme Court of California, a
18 state court of appeal, or the appellate department of a superior court, the person
19 who commenced that proceeding shall serve notice thereof, including a copy of the
20 person's brief or petition and brief, on the Attorney General, directed to the
21 attention of the Consumer Law Section, and on the district attorney of the county
22 in which the lower court action or proceeding was originally filed. The notice,
23 including the brief or petition and brief, shall be served within three days after the
24 commencement of the appellate proceeding, provided that the time may be
25 extended by the Chief Justice or presiding justice or judge for good cause shown.
26 No judgment or relief, temporary or permanent, shall be granted until proof of
27 service of this notice is filed with the court.

PART 3. REPRESENTATIONS TO THE PUBLIC

CHAPTER 1. ADVERTISING

Article 1. False Advertising in General

1 *Bus. & Prof. Code § 17500 (unchanged). False or misleading advertising*

2 17500. It is unlawful for any person, firm, corporation or association, or any
3 employee thereof with intent directly or indirectly to dispose of real or personal
4 property or to perform services, professional or otherwise, or anything of any
5 nature whatsoever or to induce the public to enter into any obligation relating
6 thereto, to make or disseminate or cause to be made or disseminated before the
7 public in this state, or to make or disseminate or cause to be made or disseminated
8 from this state before the public in any state, in any newspaper or other
9 publication, or any advertising device, or by public outcry or proclamation, or in
10 any other manner or means whatever, any statement, concerning such real or
11 personal property or services, professional or otherwise, or concerning any
12 circumstance or matter of fact connected with the proposed performance or
13 disposition thereof, which is untrue or misleading, and which is known, or which
14 by the exercise of reasonable care should be known, to be untrue or misleading, or
15 for any such person, firm, or corporation to so make or disseminate or cause to be
16 so made or disseminated any such statement as part of a plan or scheme with the
17 intent not to sell such personal property or services, professional or otherwise, so
18 advertised at the price stated therein, or as so advertised. Any violation of the
19 provisions of this section is a misdemeanor punishable by imprisonment in the
20 county jail not exceeding six months, or by a fine not exceeding two thousand five
21 hundred dollars (\$2,500), or by both.

* * * * *

Article 2. Particular Offenses [§ 17530 *et seq.*]

* * * * *

22 *Bus. & Prof. Code § 17535 (unchanged). Injunction*

23 17535. Any person, corporation, firm, partnership, joint stock company, or any
24 other association or organization which violates or proposes to violate this chapter
25 may be enjoined by any court of competent jurisdiction. The court may make such
26 orders or judgments, including the appointment of a receiver, as may be necessary
27 to prevent the use or employment by any person, corporation, firm, partnership,
28 joint stock company, or any other association or organization of any practices
29 which violate this chapter, or which may be necessary to restore to any person in

1 interest any money or property, real or personal, which may have been acquired by
2 means of any practice in this chapter declared to be unlawful.

3 Actions for injunction under this section may be prosecuted by the Attorney
4 General or any district attorney, county counsel, city attorney, or city prosecutor in
5 this state in the name of the people of the State of California upon their own
6 complaint or upon the complaint of any board, officer, person, corporation or
7 association or by any person acting for the interests of itself, its members or the
8 general public.

9 **Bus. & Prof. Code § 17535.1 (added). Prerequisite to bringing action on behalf of general**
10 **public**

11 SEC. _____. Section 17535.1 is added to the Business and Professions Code, to
12 read:

13 17535.1. (a) At least 60 days before commencing an action pursuant to Section
14 17535 on behalf of the general public, a private plaintiff shall submit the proposed
15 pleadings in the action to the Attorney General and to the district attorney of the
16 county in which the action is to be commenced.

17 (b) Within the 60-day period, the Attorney General or district attorney to whom
18 the pleadings have been submitted may notify the plaintiff of the public officer's
19 intention to commence an action covering substantially similar alleged acts that
20 violate this chapter.

21 (c) If the private plaintiff receives notice pursuant to subdivision (b), the private
22 plaintiff may not commence the proposed action within the one-year period
23 following the date of the notice.

24 (d) If a public officer given notice pursuant to subdivision (a) commences an
25 action as provided in subdivision (b), the private plaintiff may not commence the
26 proposed action, but may submit to the public officer an itemized cost bill
27 including out-of-pocket costs and attorney's fees reasonably incurred in
28 investigating the case and in preparing initial pleadings. The cost bill may include
29 only costs and fees directly attributable to the representation of the general public,
30 and may not include a multiplier for attorney hours.

31 (e) After receipt of a private plaintiff's cost bill pursuant to subdivision (d), the
32 public officer shall submit the cost bill to the court for an appropriate award from
33 the defendant as a part of any final judgment in the action, other than dismissal.

34 **Staff Note.** This section has been extracted from Prof. Fellmeth's draft of the following section.
35 See the Explanation following that section. Note that it is almost identical to draft Section
36 17204.1. This points up an unfortunate organizational problem. Section 17200 in Chapter 5 of
37 Part 2 defines "unfair competition" to include any act prohibited by this chapter, Chapter 1 of Part
38 3. Since the two sets of provisions are identical except for some cross-references, it would make
39 sense to state them only once. The difficulty in this obvious course of action is that there is no
40 logical place to put them. It would be possible to ride on the coattails of the definition of "unfair
41 competition" in Section 17200 and apply the new sections in Chapter 5 of Part 2 to the provisions
42 in Chapter 1 of Part 3. Then all that would be needed is a cross-reference in Chapter 1 of Part 3 to
43 the governing rules in Chapter 5 of Part 2. The danger in attempting to set out two virtually

1 identical procedures is that they are not likely to remain consistent as amendments are proposed
2 in later legislative sessions.

3 **Bus. & Prof. Code § 17535.2 (added). Res judicata and collateral estoppel effect of action**
4 **brought by private plaintiff on behalf of general public under Section 17535**

5 SEC. _____. Section 17535.2 is added to the Business and Professions Code, to
6 read:

7 17535.2. Where a private plaintiff commences an action pursuant to Section
8 17535 on behalf of the general public, any injunctive judgment or order in the
9 action is res judicata as to the issues litigated against the defendant if all of the
10 following requirements are satisfied:

11 (a) The plaintiff specifically pleads a cause of action on behalf of the general
12 public for for violation of this chapter.

13 (b) Counsel for the plaintiff is an “adequate legal representative” of the interests
14 of the general public pled.

15 (c) The plaintiff does not have a conflict of interest precluding the good faith
16 representation of the interests of the general public pled.

17 (d) Before entry of final judgment, notice of the terms of the proposed judgment,
18 including all stipulations and associated agreements between the parties, is given
19 to all of the following:

20 (1) The Attorney General.

21 (2) The district attorney in the county where the action is commenced.

22 (3) Regulatory agencies with jurisdiction over the subject matter of the dispute
23 or of any of the parties allegedly acting within the scope of regulated practice.

24 (4) The general public, through newspaper publication, or such other form of
25 notice as specified by the court.

26 (e) Before entry of final judgment, there is a hearing on the proposed judgment,
27 with an opportunity for all persons responding to the notice of proposed entry to
28 object or otherwise be heard, and to remove themselves from the operation of
29 collateral estoppel.

30 (f) If the scope of the original complaint or of the final judgment has been
31 expanded, the court finds that the expansion does not prejudice members of the
32 general public who are to be bound by the judgment.

33 **Prof. Fellmeth’s Explanation:** The same exact infirmity addressed above with regard to
34 Business and Professions Code Section 17200 exists in relation to Section 17500. Both
35 are broad substantively, with the former covering all unlawful and unfair acts in
36 competition, and the latter including all misleading advertising, and a long list of specific
37 abusive and unlawful practices. As with Section 17200, current law allows any person to
38 sue for the general public, without conferring finality as to any such suit. It allows any
39 person to serve as a *de jure* private attorney general with no qualifications. If finality
40 were to be conferred in such a setting, it would bind absent victims to a result without
41 opportunity to be heard, in violation of due process rights. The amendments minimally
42 alter the law to confer finality with conflict of interest and due process safeguards. This
43 amendment applies only to those cases where a private plaintiff is not litigating a wrong
44 as to him or her, but on behalf of the “general public” — as presently authorized. Such

1 contentions are to be specifically pled to make certain where they are claimed. There
2 must be advance notice to public prosecutors, and as an inherently superior class
3 representative of the general public, they may pick up the case. This precludes further
4 private action if there is a subsequent public filing; out of pocket costs and reasonable
5 fees may be recovered should the public prosecutor prevail.

6 Cases are entitled to *res judicata* effect. However, counsel must be an adequate
7 representative of the general public he or she claims to represent, and the named plaintiff
8 must not have a conflict of interest *vis-a-vis* the members of the general public to
9 compromise the fiduciary duty of counsel between the named plaintiff and the general
10 public. Finally, there must be notice to affected persons and a hearing to allow for opt out
11 and for consideration of the fairness of the proposed judgment.

12 **Staff Note.** This section is virtually identical to draft Section 17204.2. See the staff note
13 following draft Section 17204.1.

14 **Bus. & Prof. Code § 17535.3 (added). Res judicata and collateral estoppel effect of action**
15 **brought by public officer**

16 SEC. _____. Section 17535.2 is added to the Business and Professions Code, to
17 read:

18 17204.3. (a) A judgment in an action commenced by a public officer specified in
19 Section 17535 is *res judicata* as to issues litigated against [named] defendants. The
20 public official may limit the collateral estoppel effect of the judgment to allow an
21 action by a private plaintiff to determine the application or nature of a particular
22 remedy, including, but not limited to, restitution.

23 (b) If a final judgment in an action commenced by a public officer specified in
24 Section 17535 includes a provision for restitution to victims, the judgment
25 operates as collateral estoppel of the victims from litigating the same issues against
26 the [named] defendants, where the following requirements are satisfied:

27 (1) Before entry of final judgment, the public officer gives notice of the terms of
28 the proposed judgment, including all stipulations and associated agreements
29 between the parties, to all of the following:

30 (A) Regulatory agencies with jurisdiction over the subject matter of the dispute
31 or of any of the parties allegedly acting within the scope of regulated practice.

32 (B) The general public, through newspaper publication, or such other form of
33 notice as specified by the court.

34 (2) Before entry of final judgment, there is a hearing on the proposed judgment,
35 with an opportunity for all persons responding to the notice of proposed entry to
36 object or otherwise be heard, and to remove themselves from the operation of
37 collateral estoppel.

38 **Prof. Fellmeth's Explanation:** Public prosecutors are entitled to collaterally estop others
39 from litigating the same issues they have litigated against the named defendants.
40 However, where restitution is sought which will bind and preclude victims from private
41 redress, due process requires that there be minimal notice and opportunity to be heard.

42 For example, if there is a single victim who lost \$100,000 as a result of misleading
43 advertising and the restitutionary system proposed by the public prosecutor provided for a
44 pro-rata payment of \$4 to every person in a group of alleged victims, there should be an

1 opportunity of such a person to be heard and perhaps separately treated prior to entry of a
2 final judgment which may preclude his or her extraordinary relief.

3 **Staff Note.** This section is virtually identical to draft Section 17204.3. See the staff note
4 following draft Section 17204.1.

5 ***Bus. & Prof. Code § 17535.5 (unchanged). Civil penalties***

6 17535.5. (a) Any person who intentionally violates any injunction issued
7 pursuant to Section 17535 shall be liable for a civil penalty not to exceed six
8 thousand dollars (\$6,000) for each violation. Where the conduct constituting a
9 violation is of a continuing nature, each day of such conduct is a separate and
10 distinct violation. In determining the amount of the civil penalty, the court shall
11 consider all relevant circumstances, including, but not limited to, the extent of
12 harm caused by the conduct constituting a violation, the nature and persistence of
13 such conduct, the length of time over which the conduct occurred, the assets,
14 liabilities and net worth of the person, whether corporate or individual, and any
15 corrective action taken by the defendant.

16 (b) The civil penalty prescribed by this section shall be assessed and recovered
17 in a civil action brought in any county in which the violation occurs or where the
18 injunction was issued in the name of the people of the State of California by the
19 Attorney General or by any district attorney, county counsel, or city attorney in
20 any court of competent jurisdiction within his jurisdiction without regard to the
21 county from which the original injunction was issued. An action brought pursuant
22 to this section to recover such civil penalties shall take special precedence over all
23 civil matters on the calendar of the court except those matters to which equal
24 precedence on the calendar is granted by law.

25 (c) If such an action is brought by the Attorney General, one-half of the penalty
26 collected pursuant to this section shall be paid to the treasurer of the county in
27 which the judgment was entered, and one-half to the State Treasurer. If brought by
28 a district attorney or county counsel, the entire amount of the penalty collected
29 shall be paid to the treasurer of the county in which the judgment is entered.

30 If brought by a city attorney or city prosecutor, one-half of the penalty shall be
31 paid to the treasurer of the county in which the judgment was entered and one-half
32 to the city.

33 (d) If the action is brought at the request of a board within the Department of
34 Consumer Affairs or a local consumer affairs agency, the court shall determine the
35 reasonable expenses incurred by the board or local agency in the investigation and
36 prosecution of the action.

37 Before any penalty collected is paid out pursuant to subdivision (c), the amount
38 of such reasonable expenses incurred by the board shall be paid to the State
39 Treasurer for deposit in the special fund of the board described in Section 205. If
40 the board has no such special fund, the moneys shall be paid to the State Treasurer.
41 The amount of such reasonable expenses incurred by a local consumer affairs

1 agency shall be paid to the general fund of the municipality or county which funds
2 the local agency.

3 ***Bus. & Prof. Code § 17536 (unchanged). Civil penalties***

4 17536. (a) Any person who violates any provision of this chapter shall be liable
5 for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for
6 each violation, which shall be assessed and recovered in a civil action brought in
7 the name of the people of the State of California by the Attorney General or by any
8 district attorney, county counsel, or city attorney in any court of competent
9 jurisdiction.

10 (b) The court shall impose a civil penalty for each violation of this chapter. In
11 assessing the amount of the civil penalty, the court shall consider any one or more
12 of the relevant circumstances presented by any of the parties to the case, including,
13 but not limited to, the following: the nature and seriousness of the misconduct, the
14 number of violations, the persistence of the misconduct, the length of time over
15 which the misconduct occurred, the willfulness of the defendant's misconduct, and
16 the defendant's assets, liabilities, and net worth.

17 (c) If the action is brought by the Attorney General, one-half of the penalty
18 collected shall be paid to the treasurer of the county in which the judgment was
19 entered, and one-half to the State Treasurer.

20 If brought by a district attorney or county counsel, the entire amount of penalty
21 collected shall be paid to the treasurer of the county in which the judgment was
22 entered. If brought by a city attorney or city prosecutor, one-half of the penalty
23 shall be paid to the treasurer of the county and one-half to the city.

24 (d) If the action is brought at the request of a board within the Department of
25 Consumer Affairs or a local consumer affairs agency, the court shall determine the
26 reasonable expenses incurred by the board or local agency in the investigation and
27 prosecution of the action.

28 Before any penalty collected is paid out pursuant to subdivision (c), the amount
29 of such reasonable expenses incurred by the board shall be paid to the State
30 Treasurer for deposit in the special fund of the board described in Section 205. If
31 the board has no such special fund the moneys shall be paid to the State Treasurer.
32 The amount of such reasonable expenses incurred by a local consumer affairs
33 agency shall be paid to the general fund of the municipality which funds the local
34 agency.

35 (e) As applied to the penalties for acts in violation of Section 17530, the
36 remedies provided by this section and Section 17534 are mutually exclusive.

37 ***Bus. & Prof. Code § 17536.1 (added). Attorney General's registry***

38 SEC. _____. Section 17536.1 is added to the Business and Professions Code, to
39 read:

40 17536.1. The Attorney General shall establish and keep a registry of cases being
41 investigated and actions commenced by public officers and by private plaintiffs

1 alleging representation of the general public under this chapter. The Attorney
2 General's registry shall be used to coordinate possible conflicts between local
3 jurisdictions where alleged violations extend substantially outside the county
4 where the matter is being investigated or brought.

5 **Staff Note.** This section is virtually identical to draft Section 17206.2. See the staff note
6 following draft Section 17535.1.

7 **Bus. & Prof. Code § 17536.2 (added). Notice of investigation and filing under Section 17206**

8 SEC. _____. Section 17536.2 is added to the Business and Professions Code, to
9 read:

10 17536.2. (a) A city attorney or county counsel authorized to bring actions under
11 this chapter pursuant to Section 17206(a) shall, at the earliest practicable time,
12 inform the district attorney of that county of any unfair competition investigation
13 formally undertaken.

14 (b) If the city attorney or county counsel files a complaint including an
15 allegation pursuant to this chapter, a copy of the complaint shall promptly be given
16 to the Attorney General and to the district attorney of that county.

17 **Prof. Fellmeth's Explanation:** This provision requires notice of actions brought by
18 public prosecutors to ensure coordination of cases where multiple cases against the same
19 defendants for the same violations may occur. Note that Section 17535 is even broader
20 than the Unfair Competition Act's allowance of public prosecutor standing; under this
21 chapter *any* county counsel or city attorney may bring an action, without permission from
22 or notice to any other public official. Since advertising often crosses county lines, the
23 current format either allows a county counsel or city attorney where such advertising
24 appears to establish public policy on behalf of the People (if *res judicata* effect is
25 conferred). If it is not conferred, than no prosecutor has the authority to settle or litigate a
26 case to finality, nor can any such case which might be brought accomplish finality for a
27 defendant. Either outcome is unacceptable. Under the proposed format, the Attorney
28 General is in a position to sign judgments and confer binding statewide effect, but cannot
29 do so if he or she cannot be assured of advance notice of what relevant public officials are
30 investigating and litigating.

31 **Staff Note.** This section is virtually identical to draft Section 17206.3. See the staff note
32 following draft Section 17535.1.

33 **Bus. & Prof. Code § 17536.5 (unchanged). Notice of appeal**

34 17536.5. If a violation of this chapter is alleged or the application or construction
35 of this chapter is in issue in any proceeding in the Supreme Court of California, a
36 state court of appeal, or the appellate department of a superior court, the person
37 who commenced that proceeding shall serve notice thereof, including a copy of the
38 person's brief or petition and brief, on the Attorney General, directed to the
39 attention of the Consumer Law Section, and on the district attorney of the county
40 in which the lower court action or proceeding was originally filed. The notice,
41 including the brief or petition and brief, shall be served within three days after the
42 commencement of the appellate proceeding, provided that the time may be
43 extended by the Chief Justice or presiding justice or judge for good cause shown.

- 1 No judgment or relief, temporary or permanent, shall be granted until proof of
 - 2 service of this notice is filed with the court.
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