

Study B-700

March 22, 1995

First Supplement to Memorandum 95-14

Unfair Competition: Consultant's Recommendations

Attached to this memorandum is an alternative draft statute to the draft attached to Memorandum 95-14. This draft is discussed in Professor Fellmeth's remarks on pages 3-4 of the draft. The staff has revised the original draft received from Professor Fellmeth for form and style purposes. (The original draft is attached hereto as an Exhibit; the staff's redraft follows the Exhibit.)

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

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Law Revision Commission
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File: _____



University of San Diego

Center for Public Interest Law

Robert C. Fellmeth, Director

To: Stan Ulrich, Nat Sterling Law Revision Commission

From: Prof. Robert C. Fellmeth

Re: Promised Alternative Version of Unfair Competition Act

Date: 3-16-95

An Alternative, Limited Version Through CCP Clarification

Code of Civil Procedure § 382.5 is added to read:

An action may be brought on behalf of the "general public" by a private party pursuant to §§ 17204 or 17535 of the Business and Profession Code only where:

(a) the plaintiff states that a cause of action pursuant to § 17200 *et seq.* or § 17500 *et seq.* is brought "on behalf of the general public;"

(b) the pleading is served on the consumer department or division of the district attorney of the county in which it is to be filed, and on the city attorney where filed in a city with a population of over 750,000 persons, and on the Consumer Law Section of the Office of Attorney General, at least 30 days prior to court filing, and:

(1) said service shall include a statement summarizing the evidence upon which the complaint is based relevant to the allegations on behalf of the general public;

(2) proof of the service required above shall be filed with the complaint;

(3) motions for preliminary relief where relevant to the "general public" allegations may be entertained during the initial thirty day period, but shall also be served on the offices listed in (b);

(c) counsel for the plaintiff is found by the court to be an "adequate legal representative" of the interests of the general public pled;

(d) the court affirmatively finds that neither any plaintiff nor counsel for plaintiffs, has a conflict of interest which might compromise the good faith representation of the interests of the general public claimed;

(e) at least 45 days prior to the entry of final judgment, or to any modification of a final judgment or order thereto, there is notice of the proposed terms, including all stipulations and associated agreements between the parties, to:

- (1) the district attorney of the county where filed and the city attorney where filed in a city with a population of over 750,000 persons;
- (2) the state attorney general;
- (3) regulatory agencies with jurisdiction over the subject matter of the dispute or of any of the parties allegedly acting within the scope of regulated practice;
- (4) the general public through newspaper publication, or such other form of notice as specified by the court; and
- (5) any of the persons so notified in (1) through (4) may petition the court for an extension of time of up to thirty days, for good cause shown.

(f) where the above conditions of (a) through (e) are met, the judgment shall be *res judicata* as to any restitutionary or monetary terms or orders, including fluid recovery and *cy pres* methods of monetary adjustment, contribution, or disgorgement, where, in addition:

(1) prior to entry of final judgment, there is a hearing thereon, with opportunity for all persons responding to the notice of proposed entry to object or otherwise be heard, to remove themselves from collateral estoppel coverage, or to protest or limit the *res judicata* effect of the judgement; and

(2) the complaint shall not be amended or supplemented in a manner affecting the interests of the "general public" claimed unless the court affirmatively finds that such alteration does not prejudice members of the general public to be bound by the judgment.

Code of Civil Procedure § 382.7 is added to read:

(a) Where there is a conflict in remedies sought from the same parties based on the same alleged acts and bases for liability between a private action pursuant to Code of Civil Procedure § 382 or an action "on behalf of the general public" under § 17204 or § 17535 of the Business and Profession Code, and a civil action by a public prosecutor on behalf of the People of the State of California under the same sections, or covering the same theories

of acts and bases for liability, the public prosecution is entitled to preference as the inherently superior method for representing the interests of large classes or of the general public within the political jurisdiction represented. Such preference may be determined by motion at any time and may be based on the initial pleadings of actions in conflict.

(b) Judgments obtained by a public prosecutor involving restitution or monetary relief on behalf of the People of the State of California in civil actions pursuant to § 17200 *et seq.* or § 17500 *et seq.* of the Business and Professions Code are *res judicata* as to the issues and parties covered thereby, except such status:

(1) is without prejudice to cost or attorney fee recompense by private counsel who otherwise meet the criteria of § 1021.5 of the Code of Civil Procedure; and

(2) where restitution is included in such a judgment which purports to collaterally estop further restitution claims against the named defendants by persons who may have been damaged or otherwise harmed:

(a) there shall be notice by publication of the terms of such restitution, and of a public court hearing to consider its approval, and

(b) at or before such a hearing, persons desiring to opt out of the judgment's terms of injunctive or restitutionary terms as applicable to them shall have an opportunity to exclude themselves from *res judicata* effect, and any person objecting to the fairness or adequacy of the proposed judgment shall have opportunity to comment.

(3) the court shall consider all comments relevant to the proposed judgment and may alter its terms or its *res judicata* scope or effect in the interests of justice.

Explanation: This revised version incorporates various suggestions of Gail Hillebrand of Consumer's Union, Herschel Elkins and Mike Botwin of the office of Attorney General, Cliff Dobrin of the San Diego Office of District Attorney and Bill Newsome of the San Diego Office of City Attorney, various plaintiff and defense attorneys, and others. I have taken special effort to preserve the elements vigorously defended by Mr. Willey - whose comments I particularly appreciate.

The approach here is more minimalist and differs from the more extensive draft in the following respects:

1. The requirement of public coordination between the Attorney General and ancillary public agencies is removed. The argument

here is that there is a system in place similar to that which the previous draft would require and which works. The suggested provision could be added in if the current practice is stopped or fails. My concern has been with the addition of numerous city attorneys and county counsels upon approval of 58 different district attorneys; but the DAs are organized in a Consumer Protection Council which meets regularly and they make a persuasive argument that if problems develop, the current cross communication can head it off.

2. The requirement of notice and consent analogous to Proposition 65 has been replaced with a less formal system of advance notice and designation of the public prosecutor as the inherently superior class representative. The previous version concerned prosecutors who felt that a failure to take over a case could have negative political consequences, and that they did not want the affirmative burden of judging yes or no under a time constraint. Plaintiff counsel have some problems with having to wait one year on tenterhooks while the case may be litigated to near conclusion on fast track. The revised version seems to make both sides happier. Where a DA or the AG is already in the middle of an investigation, he or she will know a conflict is coming and can act accordingly to head it off and to mitigate private waste of resources. On the other hand, only a small percentage of cases are handled on the public side, and there is no reason to hold private parties up or in suspense. The declaration that public counsel is inherently superior as a class representative is hardly controversial since few courts have opined or would conclude otherwise. But the revised structure gives private counsel better opportunity to claim fees based on work performed, and the claim is strengthened the longer public counsel waits and the more the work of private counsel occurs or is used.

3. The § 1021.5 attorney fee claim is filed by the private party and not submitted through the public attorney cost bill. Neither private plaintiff counsel nor public attorneys like the idea of surrogate submission of the bill through the public attorney. There is law currently allowing private attorney general recompense - with possible multiplier - for litigation which contributes to a beneficial outcome - even where there is a government co-litigator. See esp. *Committee to Defend Reproductive Rights v. A Free Pregnancy Center* (1991) 229 Cal.App.3d 1.

4. The structure is simplified and the language refined thanks to some very useful suggestions by Mike Botwin.

5. It has been placed in the Code of Civil Procedure as a form of class action procedural instruction due to the concern of both public and private counsel that opening up § 17200 itself to legislative change in the current climate may invite collateral amendments and issues.

ALTERNATIVE DRAFT STATUTE: UNFAIR COMPETITION

LIMITED VERSION THROUGH CCP CLARIFICATION

Code Civ. Proc. § 382.5 (added). Action on behalf of general public under Business and Professions Code Section 17204 or 17535

SEC. _____. Section 382.5 is added to the Code of Civil Procedure, to read:

382.5. (a) An action may be commenced and maintained on behalf of the “general public” by a private party pursuant to Section 17204 or 17535 of the Business and Professions Code only where all of the following requirements are satisfied:

(1) The plaintiff states that a cause of action is brought “on behalf of the general public” pursuant to Chapter 5 (commencing with Section 17200) of Part 2 of Division 7 or Part 3 (commencing with Section 17500) of Division 7 of the Business and Professions Code.

(2) At least 30 days before the action is commenced, the plaintiff serves a copy of the pleading, together with a statement summarizing the evidence on which the complaint is based relevant to the allegations on behalf of the general public, on all of the following:

(A) The Consumer Law Section of the Office of Attorney General.

(B) The consumer department or division of the district attorney of the county in which the action is to be commenced.

(C) If the action is to be commenced in a city with a population over 750,000 persons, the city attorney.

(3) Proof of service pursuant to paragraph (2) is filed with the complaint when the action is commenced.

(4) The court [affirmatively] finds both of the following:

(A) That counsel for the plaintiff is an adequate legal representative of the interests of the general public pled.

(B) That no plaintiff or counsel for plaintiff has a conflict of interest that might compromise the good faith representation of the interests of the general public pled.

(5) At least 45 days before entry of final judgment or any modification of a final judgment or order thereunder, the plaintiff gives notice of the proposed terms, including all stipulations and associated agreements between the parties, to all of the following:

(A) The Attorney General.

(B) The district attorney of the county in which the action was commenced.

(C) If the action was commenced in a city with a population over 750,000 persons, the city attorney.

(D) All regulatory agencies having jurisdiction over the subject matter of the action or over any of the parties allegedly acting within the scope of regulated practice.

(E) The general public, through newspaper publication or other form of notice ordered by the court.

(b) A motion for preliminary relief where relevant to the “general public” allegations may be entertained during the initial thirty-day period after commencement of the action, but notice of motion shall also be served on the offices listed paragraph (2) of subdivision (a).

(c) For good cause shown, the court may grant an extension of time of not more than thirty days to a person given notice under paragraph (5) of subdivision (a), other than the general public.

(d) If subdivision (a) is satisfied, the judgment in the action is *res judicata* as to any restitutionary or monetary [terms or] orders, including fluid recovery and *cy pres* methods of monetary adjustment, contribution, or disgorgement, where all of the following requirements are satisfied:

(1) The requirements of subdivision (a) have been satisfied.

(2) Before entry of final judgment, there is a hearing on the proposed judgment, with an opportunity for all persons responding to the notice of proposed entry to object or otherwise be heard and to remove themselves from the operation of collateral estoppel or to protest or limit the *res judicata* effect of the judgment.

(3) The complaint has not been amended [or supplemented] in a manner affecting the interests of the “general public” claimed, unless the court [affirmatively] finds that the amendment does not prejudice members of the general public to be bound by the judgment.

Staff Note. For a discussion of this section, see Professor Fellmeth’s Explanation following the next section.

The staff has made a substantial number of drafting revisions in this section, and more will need to be made, but the section should serve adequately as a basis to focus the discussion of the issues. As a drafting matter, the staff does not believe this can be accomplished in one section, but time has not permitted a more detailed redrafting. Brackets indicate that the staff has some doubts about the need for or meaning of the particular language.

As a general issue, the staff is concerned about the use of the terms “*res judicata*” and “collateral estoppel” in the statutes. There are more sections in the California codes using these terms than we would have guessed. See Bus. & Prof. Code §§ 6204, 16760, 61584; Civ. Code § 3205; Code Civ. Proc. § 99; Ins. Code § 11580; Rev. & Tax. Code §§ 6456, 7176, 17282, 18533, 19006, 19088, 19802, 24460.1, 38808, 40834; Veh. Code §§ 13353.2, 13376, 13557, 13558, 13559, 40834. *Cf.* Fam. Code § 3412 (“binding effect”). Most of these sections provide that an adjudication does not have collateral estoppel effect, which is easier to understand than an affirmative provision that something has *res judicata* or collateral estoppel effect. The staff intends to do more research and give this issue further thought.

Code Civ. Proc. § 382.7 (added). Action on behalf of general public under Business and Professions Code Section 17204 or 17535

SEC. _____. Section 382.7 is added to the Code of Civil Procedure, to read:

382.7. (a) Where there is a conflict in remedies sought from the defendants based on the same alleged acts and bases for liability between a private action pursuant to Section 382 or 382.5 and a civil action by a public prosecutor on behalf of the people under Business and Professions Code Section 17204 or

17353 or covering the same theories of acts and bases for liability, the public prosecution is entitled to preference [as the inherently superior method for representing the interests of large classes or of the general public within the political jurisdiction represented]. Such preference may be determined by motion at any time and may be based on the initial pleadings of the actions in conflict.

(b) Judgments obtained by a public prosecutor involving restitution or monetary relief on behalf of the people in a civil action pursuant to Chapter 5 (commencing with Section 17200) of Part 2 of Division 7 or Part 3 (commencing with Section 17500) of Division 7 of the Business and Professions Code are res judicata as to the issues and parties covered thereby, subject to the following conditions:

(1) The judgment does not prejudice the right of a private plaintiff to costs and attorney's fees pursuant to Section 1021.5.

(2) If restitution is included in the judgment purporting to bar further restitution claims against the [named] defendants by persons who may have been suffered damage [or been otherwise harmed], the following requirements shall be satisfied:

(A) There shall be notice by publication of the terms of the restitution and of the time and place of a [public] court hearing to consider its approval.

(B) At or before the hearing, a person desiring to opt out of the injunctive or restitutionary terms of the judgment as applicable to the person shall have an opportunity to be excluded from res judicata [collateral estoppel?] effect.

(C) Any person objecting to the fairness or adequacy of the proposed judgment shall have an opportunity to comment.

(3) The court shall consider all comments relevant to the proposed judgment and may alter its terms or its res judicata [scope or] effect in the interests of justice.

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