

Memorandum 95-32

Unfair Competition: Issues and Alternatives

At the March meeting, the Commission had before it a draft statute concerning unfair competition litigation prepared by its consultant, Professor Robert Fellmeth, and heard general remarks on unfair competition from a variety of perspectives — public prosecutors, consumer groups, and private attorneys — as well as specific comments directed to the draft. After hearing the discussion, the Commission requested the staff to prepare an outline of issues and alternatives to assist in determining the direction of the study. It was felt to be premature to attempt to consider the details of the draft statute until more fundamental issues had been decided.

In order to move this study forward at this meeting, the Commission needs to make some tentative policy decisions to enable further drafting. However, if the policy decisions are in line with the draft statute already prepared, it would be beneficial to continue consideration of the draft statute, the most recent version of which is attached to this memorandum. (See Exhibit pp. 11-14.)

A separate memorandum (Memorandum 95-35) considers fundamental issues on the extent to which absent parties can be bound — the class action or “half-class” issues that have been raised in earlier materials and in the discussion at both previous meetings on this subject.

Attached to this memorandum are the following exhibits:

Exhibit Item	pp.
Selected Unfair Competition Statutes	1-10
Alternative Draft Statute (the “short draft” or “CCP draft”) (from 1st Supp., Memo 95-14)	11-14
Article from San Diego Association of Business Trial Lawyers Report: “Expected Overhaul of Section 17200”, by Christopher Healey	15-16
Letter from Gail Hillebrand, Consumers Union	17-23

Scope of Study

Perhaps it is useful to start with a reminder of the scope of this study as set out in the legislative resolution enacted in 1993. The Commission has been directed to study:

Whether the law governing unfair competition litigation under Chapter 5 (commencing with Section 17200) of Part 2 of Division 7 of the Business and Professions Code should be revised to clarify the scope of the chapter and to resolve procedural problems in litigation under the chapter, including the res judicata and collateral estoppel effect on the public of a judgment between the parties to the litigation, and related matters.

California District Attorneys Association Economic Crimes Conference

This following discussion is an expanded and revised version of the staff memorandum prepared for the CDAA Economic Crimes Conference on June 1. The Commission will recall that Thomas Papageorge, Head Deputy District Attorney, Consumer Protection Division, Los Angeles County District Attorney's Office, invited a submission from the Commission when he spoke at the March meeting. We understand that Professor Fellmeth addressed the conference.

1. Problems in existing law

Are there serious problems with the existing unfair competition statute? And if so, are the problems amenable to legislative solution? Different groups, depending on their interests and experience, evaluate the unfair competition statute differently. Some may think it is working as well as can be expected, and would resist any change that might worsen their position.

The Commission has heard anecdotal reports of cases where a generous settlement to benefit the public and provide restitution for injured customers is held up by the filing of a private action involving potentially large attorney fees. We also hear that this problem is an aberration and that there is no evidence of an epidemic of cases needing legislative attention. In answer, we hear that things are only going to get worse as the private practice in the area develops and generous awards whet the appetite of a nascent specialty bar.

It has also been claimed that the "market" works fairly well under current conditions. Since there is only so much that a defendant can pay, private plaintiffs will not pursue a defendant "in the public interest" if the defendant has been subjected to suit or settlement by a public prosecutor — the public interest

has already been used up. Similarly, if a large award has already been made to another private plaintiff, with attorney fees for defending the public interest, a wise attorney will realize that there is no fee to be had.

Is there too much litigation in the unfair competition field? Or just too much by the “wrong people”? Are the follow-ups, tag-alongs, and me-too’s undoing the good work of the scouts? Is the situation getting worse or threatening to do so?

Are lack of finality and binding effect the root problem? Or is it the availability of attorney fees? Or the lack of standing requirements for private plaintiffs? Or the competition for damages or restitution or attorney fees between public and private plaintiffs?

2. Finality and binding absent “parties”

Professor Fellmeth has focused on the lack of finality as to absent parties as the major source of the problems. So, too, the resolution of authority singles out the res judicata and collateral estoppel effect on the public. Solutions from this analysis focus on ways to provide some type of finality. The drafts before the Commission at the March meeting both attempt to achieve binding affect through a number of mechanisms. As noted, this issue is presented in greater detail in Memorandum 95-35, and it has received particular attention in the letter from Charles Willey (attached to Memorandum 95-14) and the materials presented by Jan Chilton at the March meeting (see Minutes, March 1995, Exhibit pp. 2-9).

It has also been suggested that providing res judicata and collateral estoppel effect would create problems for private plaintiffs and public interest groups who use Section 17200. Consumers Union opposes proposals for res judicata and collateral estoppel in Section 17200. (See Exhibit pp. 19-20.)

3. Class action model

We have been told that if finality is the problem, then class action is the solution. (See, e.g., letters from Jan Chilton and Charles Willey, *supra*.) There is a host of issues involved in any attempt to reform unfair competition law in the direction of class actions. To the extent that notice, opt-out opportunity, and binding absent parties are of constitutional dimension, the well-developed class action law will continue to be relevant to any statutory reform of unfair competition law. (See Memorandum 95-35.) Consumers Union opposes class

action notice requirements because of the considerable expense. (See Exhibit pp. 19-20.)

The class action model need not be imposed across the board. It may be possible to set some statutory standards at the perimeter of the constitutional limitations, so that certain types of actions under Section 17200 could bind absent parties without invoking the class action notice and opt-out rules. (For further discussion, see Memorandum 95-35.)

4. Multiplicity of actions

The potential for a multiplicity of actions and overlapping proceedings is troubling. The multiplicity may involve public and private plaintiffs in a variety of situations. Cases may overlap and conflict where they are proceeding contemporaneously, where different geographical jurisdictions are involved, or where another action on the same underlying claim is brought after settlement or judgment in a prior action.

Public prosecutor overlap. Consideration has been given to providing some statutory guidance for coordination of efforts by public prosecutors. It appears that the public prosecutors would prefer not to have any legislative involvement in the existing voluntary system. But do defendants need any additional protection from a multiplicity of actions by public prosecutors? Should settlement with one public prosecutor bind any others? What rules should apply where jurisdictions overlap geographically, as in the case of counties within the state or cities within a county?

Public-private overlap. A private plaintiff may stymie a public prosecutor's action and settlement prospects. Or an intervening public prosecutor's claim for injunction and penalties may disrupt a broader claim for damages and other relief by a private plaintiff. Consumers Union believes this is where the Commission should concentrate reform efforts, but does not believe that follow-on private actions are inherently abusive or inappropriate. (See Exhibit pp. 20-21.)

Repetitive actions. In the absence of binding effect on non-litigants, the prospect for an open-ended series of claims under Section 17200 may face defendants. However, it is not clear that this is a real problem in practice. Fred Kosmo, from the Association of Business Trial Lawyers, suggested at the March meeting that repetitive actions may not be too much of a problem because there is only so much in the way of attorney fees for vindicating the public interest,

and later plaintiffs will tend to have less incentive because the public interest has already been served.

5. Lure of attorney fees

Without the availability of attorney fees based on the private attorney general rules, how many Section 17200 claims would be made? Would it be appropriate to limit fees in some fashion to reduce the incentive of the me-too plaintiff? One proposal before the Commission would preserve the right of a private plaintiff to attorney fees for work actually performed before the matter is taken over by the public prosecutor. Consumers Union believes that attorney fees “are essential to permitting consumer organizations such as our own and others to bring law enforcement cases. In this time of cutbacks in governmental departments throughout the state, state and local consumer agencies simply cannot bring all the cases that need to be brought.” (See Exhibit pp. 21-22.)

6. Adequacy of private counsel or plaintiff

Should the court review the adequacy of private counsel where a claim is made under Section 17200 on behalf of the general public? The idea would be to ensure that private counsel do not have a conflict of interest when purporting to vindicate the interests of the general public. But what standards should the court apply to determine adequacy of counsel in any broader sense? Can we have adequate counsel without adequate plaintiffs?

The minimal or nonexistent standing requirements for a plaintiff under Section 17200 are striking. Should the plaintiff seeking to represent the public interest be required to show an injury from the claimed violation of the unfair competition statute? Raising issues of standing may cause alarm among public interest organizations who do not need to find an injured plaintiff to bring an action under Section 17200.

Consumers Union is not opposed to some statutory provision for adequacy of representation, as long as any plaintiff adequacy revisions do “not impinge upon the broad standing currently available to bring these actions.” (See Exhibit p. 22.)

For a discussion of adequacy of counsel and representative plaintiff in the context of adequacy of representation in class actions, see Memorandum 95-35, pp. 3-8.

7. Prior notice to public prosecutor

Would it be desirable to require private plaintiffs bringing an action on behalf of the general public to give some type of notice to an appropriate public prosecutor? Should notice be before filing, so that the private plaintiff would not spoil an initiative currently in the works? Should receiving notice impose any duty on the public prosecutor, or only facilitate intervention?

The draft statute provides for 30-days' notice to an appropriate public prosecutor when an action is commenced "on behalf of the general public." (See draft Section 382.5(a)(2), Exhibit p. 11.) Consumers Union does not think prior notice would add much, and suggests that the right of a public prosecutor to intervene should be adequate to protect its interests. (See Exhibit p. 22.)

8. Public prosecutor's representation of public interest

Should the public prosecutor have the right to take over the action on behalf of the general public, whether exercised in a prior notice structure or through intervention in an action commenced by a private plaintiff?

Public prosecutors are empowered to act as *parens patriae* and are given the specific statutory authority to pursue unfair competition cases. But where the pot is limited, civil penalties determined in a settlement or judgment reduce the funds available to private plaintiffs who have been injured. Disgorgement of ill-gotten gains may be accomplished in a way that is not in the best interest of the injured parties, as they view it. In other words, the public interest is frequently or usually different from the injured class interest. This issue has been raised in several letters to the Commission. For further discussion of these issues in the class action context, see Memorandum 95-35, p. 7.

A proposal has been made to provide a presumption that the public prosecutor is the inherently superior representative of the public interest in unfair competition cases. Some object, however, that the public prosecutor may have a conflict of interest, more so in a time of shrinking budgets. The "county bounty" may interfere with the interests of injured plaintiffs. How does a public prosecutor decide when to seek civil penalties? Is the potential for reduction of the fund available for restitution or future damage claims taken into consideration? Consumers Union suggests a careful look at the division of the defendant's liability between restitution and penalties and argues that

it would be unfortunate if the civil penalties removed funds that otherwise could be used to make individual consumers whole. The

purpose of enforcement of consumer laws, after all, is to protect consumers. Penalties are valuable to deter, and we believe they should be sought in addition to restitution to affected members of the public, not instead of such restitution.

(See Exhibit p. 23.)

9. Court approval of settlement

Should any special rules apply to settlements? The Commission has heard that sham settlements may be encouraged by the existing statute. On the other hand, it has also been said that defendants are not likely to settle unless they get something for their money; hence, settlement is not so easy and defendants can take care of themselves. Court approval for settlements or dismissals under Section 17200 could be required as to actions on behalf of the general public. This would place more of a burden on the courts than under existing law, but would help avoid the sham settlement and perhaps inhibit some speculative actions on behalf of the general public.

Charles Willey has suggested requiring a good faith settlement hearing, perhaps along the lines applicable to joint tortfeasors or contract co-obligors under Code of Civil Procedure Section 877.6. (See letter attached to Memorandum 95-14, Exhibit pp. 3-4.) Consumers Union also supports court approval of settlements or dismissals with prejudice in Section 17200 actions brought on behalf of the general public. (See Exhibit p. 23.)

10. False advertising claims under Bus. & Prof. Code § 17500 et seq.

Should false advertising claims under Section 17500 be treated the same in any new statutory scheme as unfair competition claims under Section 17200? Professor Fellmeth has provided in both of his draft statutes for consistent treatment of general unfair competition claims under Section 17200 and false advertising claims under Section 17500. This makes sense because Section 17200 defines unfair competition to include “unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500)” In addition, some provisions in these two sets of statutes are drafted in parallel fashion. (Compare Sections 17203-17204 with Section 17535, in Exhibit pp. 2-3 & 7-8.)

At the March meeting, Harry Snyder of Consumers Union suggested that this would not be necessary, on the basis that false advertising is easily remedied by

stopping the false or misleading advertisement, and that elaborate rules concerning notice, adequacy of counsel or plaintiff, waiting periods, priority of public prosecutors, or court approval of settlements or dismissals would be over burdensome in this context. Gail Hillebrand's letter suggests that it might be appropriate to provide for judicial approval of settlements in false advertising cases. (See Exhibit p. 23.)

Location of Statute

Professor Fellmeth's first draft was directed toward the Business and Professions Code, which seems the logical place to make amendments relating to unfair competition litigation. Professor Fellmeth's second draft adds new provisions following the state class action rule in Code of Civil Procedure Section 382. (A version of this shorter, CCP draft is attached for discussion purposes in Exhibit pp. 11-14.)

One argument for placing a revised procedure with class actions is to avoid opening up review of the unfair competition statutes themselves in the context of a revision of litigation rules. It might also be thought logical to put such a quasi-class action statute with the true class action statute.

On the other hand, intuitively one would expect a special procedure related only to unfair competition to be with the substantive unfair competition provisions and the other procedural rules. Unless a specialized procedure is likely to be expanded to cover other subjects, it is probably best to put it where the cross-references point. In this case, with the main body of unfair competition statutes following Business and Professions Code Section 17200.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

Exhibit

SELECTED UNFAIR COMPETITION STATUTES

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DIVISION 7. GENERAL BUSINESS REGULATIONS

PART 1. LICENSING FOR REVENUE AND REGULATION

CHAPTER 5. ENFORCEMENT [17200-17209]

1 **Bus. & Prof. Code § 17200. “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 or
4 misleading advertising and any act prohibited by Chapter 1 (commencing with Section
5 17500) of Part 3 of Division 7 of the Business and Professions Code.

6 **Bus. & Prof. Code § 17201. “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 other
9 organizations of persons.

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

12 17201.5. As used in this chapter:

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

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

22 **Bus. & Prof. Code § 17203. 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 make
25 such orders or judgments, including the appointment of a receiver, as may be necessary
26 to prevent the use or employment by any person of any practice which constitutes unfair
27 competition, as defined in this chapter, or as may be necessary to restore to any person in
28 interest any money or property, real or personal, which may have been acquired by
29 means of such unfair competition.

30 **Bus. & Prof. Code § 17204. Commencement of action**

31 17204. Actions for any relief pursuant to this chapter shall be prosecuted exclusively in
32 a court of competent jurisdiction by the Attorney General or any district attorney or by
33 any county counsel authorized by agreement with the district attorney in actions

1 involving violation of a county ordinance, or any city attorney of a city, or city and
2 county, having a population in excess of 750,000, and, with the consent of the district
3 attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the
4 consent of the district attorney, by a city attorney in any city and county in the name of
5 the people of the State of California upon their own complaint or upon the complaint of
6 any board, officer, person, corporation or association or by any person acting for the
7 interests of itself, its members or the general public.

8 **Bus. & Prof. Code § 17204.5. San Jose and Santa Clara County**

9 17204.5. In addition to the persons authorized to bring an action pursuant to Section
10 17204, the City Attorney of the City of San Jose, with the annual consent of the Santa
11 Clara County District Attorney, is authorized to prosecute those actions.

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

15 **Bus. & Prof. Code § 17205. Cumulative remedies**

16 17205. Unless otherwise expressly provided, the remedies or penalties provided by
17 this chapter are cumulative to each other and to the remedies or penalties available under
18 all other laws of this state.

19 **Bus. & Prof. Code § 17206. Penalties**

20 17206. (a) Any person who engages, has engaged, or proposes to engage in unfair
21 competition shall be liable for a civil penalty not to exceed two thousand five hundred
22 dollars (\$2,500) for each violation, which shall be assessed and recovered in a civil
23 action brought in the name of the people of the State of California by the Attorney
24 General or by any district attorney or by any county counsel authorized by agreement
25 with the district attorney in actions involving violation of a county ordinance, or any city
26 attorney of a city, or city and county, having a population in excess of 750,000, and,
27 with the consent of the district attorney, by a city prosecutor in any city having a full-
28 time city prosecutor or, with the consent of the district attorney, by a city attorney in any
29 city and county, in any court of competent jurisdiction.

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

37 (c) If the action is brought by the Attorney General, one-half of the penalty collected
38 shall be paid to the treasurer of the county in which the judgment was entered, and one-
39 half to the State General Fund. If brought by a district attorney or county counsel, the
40 penalty collected shall be paid to the treasurer of the county in which the judgment was
41 entered. Except as provided in subdivision (d), if brought by a city attorney or city
42 prosecutor, one-half of the penalty collected shall be paid to the treasurer of the city in

1 which the judgment was entered, and one-half to the treasurer of the county in which the
2 judgment was entered.

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

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

13 (e) If the action is brought by a city attorney of a city and county, the entire amount of
14 the penalty collected shall be paid to the treasurer of the city and county in which the
15 judgment was entered. However, if the action is brought by a city attorney of a city and
16 county for the purposes of civil enforcement pursuant to Section 17980 of the Health and
17 Safety Code or Article 3 (commencing with Section 11570) of Chapter 10 of Division 10
18 of the Health and Safety Code, either the penalty collected shall be paid entirely to the
19 treasurer of the city and county in which the judgment was entered, or upon the request
20 of the city attorney, the court may order that up to one-half of the penalty, under court
21 supervision and approval, be paid for the purpose of restoring, maintaining, or
22 enhancing the premises which were the subject of the action, and that the balance of the
23 penalty be paid to the treasurer of the city and county.

24 **Bus. & Prof. Code § 17206.1. Additional penalties in violations against senior citizens**

25 17206.1. (a) In addition to any liability for a civil penalty pursuant to Section 17206,
26 any person who violates this chapter, and the act or acts of unfair competition are
27 perpetrated against one or more senior citizens or disabled persons, may be liable for a
28 civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation,
29 which may be assessed and recovered in a civil action as prescribed in Section 17206.

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

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

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

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

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

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

43 (ii) Any mental or psychological disorder, such as mental retardation, organic brain
44 syndrome, emotional or mental illness, and specific learning disabilities. The term
45 "physical or mental impairment" includes, but is not limited to, such diseases and

1 conditions as orthopedic, visual, speech and hearing impairment, cerebral palsy, epilepsy,
2 muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation,
3 and emotional illness.

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

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

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

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

17 (3) Whether one or more senior citizens or disabled persons are substantially more
18 vulnerable than other members of the public to the defendant's conduct because of age,
19 poor health or infirmity, impaired understanding, restricted mobility, or disability, and
20 actually suffered substantial physical, emotional, or economic damage resulting from the
21 defendant's conduct.

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

32 **Bus. & Prof. Code § 17206.5. San Jose and Santa Clara County**

33 17206.5. In addition to the persons authorized to bring an action pursuant to Section
34 17206, the City Attorney of the City of San Jose, with the annual consent of the Santa
35 Clara County District Attorney, is authorized to prosecute those actions.

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

39 **Bus. & Prof. Code § 17207. Penalties**

40 17207. (a) Any person who intentionally violates any injunction prohibiting unfair
41 competition issued pursuant to Section 17203 shall be liable for a civil penalty not to
42 exceed six thousand dollars (\$6,000) for each violation. Where the conduct constituting
43 a violation is of a continuing nature, each day of that conduct is a separate and distinct
44 violation. In determining the amount of the civil penalty, the court shall consider all

1 relevant circumstances, including, but not limited to, the extent of the harm caused by
2 the conduct constituting a violation, the nature and persistence of that conduct, the
3 length of time over which the conduct occurred, the assets, liabilities, and net worth of
4 the person, whether corporate or individual, and any corrective action taken by the
5 defendant.

6 (b) The civil penalty prescribed by this section shall be assessed and recovered in a
7 civil action brought in any county in which the violation occurs or where the injunction
8 was issued in the name of the people of the State of California by the Attorney General
9 or by any district attorney, any county counsel authorized by agreement with the district
10 attorney in actions involving violation of a county ordinance, or any city attorney in any
11 court of competent jurisdiction within his or her jurisdiction without regard to the
12 county from which the original injunction was issued. An action brought pursuant to this
13 section to recover civil penalties shall take precedence over all civil matters on the
14 calendar of the court except those matters to which equal precedence on the calendar is
15 granted by law.

16 (c) If such an action is brought by the Attorney General, one-half of the penalty
17 collected pursuant to this section shall be paid to the treasurer of the county in which the
18 judgment was entered, and one-half to the State Treasurer. If brought by a district
19 attorney or county counsel the entire amount of the penalty collected shall be paid to the
20 treasurer of the county in which the judgment is entered. If brought by a city attorney or
21 city prosecutor, one-half of the penalty shall be paid to the treasurer of the county in
22 which the judgment was entered and one-half to the city, except that if the action was
23 brought by a city attorney of a city and county the entire amount of the penalty collected
24 shall be paid to the treasurer of the city and county in which the judgment is entered.

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

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

35 **Bus. & Prof. Code § 17208. Limitations**

36 17208. Any action to enforce any cause of action pursuant to this chapter shall be
37 commenced within four years after the cause of action accrued. No cause of action
38 barred under existing law on the effective date of this section shall be revived by its
39 enactment.

40 **Bus. & Prof. Code § 17209. Notice of appeal**

41 17209. If a violation of this chapter is alleged or the application or construction of this
42 chapter is in issue in any proceeding in the Supreme Court of California, a state court of
43 appeal, or the appellate department of a superior court, the person who commenced that
44 proceeding shall serve notice thereof, including a copy of the person's brief or petition

1 and brief, on the Attorney General, directed to the attention of the Consumer Law
2 Section, and on the district attorney of the county in which the lower court action or
3 proceeding was originally filed. The notice, including the brief or petition and brief,
4 shall be served within three days after the commencement of the appellate proceeding,
5 provided that the time may be extended by the Chief Justice or presiding justice or judge
6 for good cause shown. No judgment or relief, temporary or permanent, shall be granted
7 until proof of service of this notice is filed with the court.

* * * * *

PART 3 . REPRESENTATIONS TO THE PUBLIC

CHAPTER 1. ADVERTISING

Article 1. False Advertising in General [§§ 17500-17509]

8 **Bus. & Prof. Code § 17500. False or misleading advertising**

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

* * * * *

Article 2. Particular Offenses [§§ 17530-17539.6]

* * * * *

27 **Bus. & Prof. Code § 17535. Injunction**

28 17535. Any person, corporation, firm, partnership, joint stock company, or any other
29 association or organization which violates or proposes to violate this chapter may be
30 enjoined by any court of competent jurisdiction. The court may make such orders or

1 judgments, including the appointment of a receiver, as may be necessary to prevent the
2 use or employment by any person, corporation, firm, partnership, joint stock company, or
3 any other association or organization of any practices which violate this chapter, or which
4 may be necessary to restore to any person in interest any money or property, real or
5 personal, which may have been acquired by means of any practice in this chapter
6 declared to be unlawful.

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

12 **Bus. & Prof. Code § 17535.5. Civil penalties**

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

22 (b) The civil penalty prescribed by this section shall be assessed and recovered in a
23 civil action brought in any county in which the violation occurs or where the injunction
24 was issued in the name of the people of the State of California by the Attorney General or
25 by any district attorney, county counsel, or city attorney in any court of competent
26 jurisdiction within his jurisdiction without regard to the county from which the original
27 injunction was issued. An action brought pursuant to this section to recover such civil
28 penalties shall take special precedence over all civil matters on the calendar of the court
29 except 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 which the
32 judgment was entered, and one-half to the State Treasurer. If brought by a district
33 attorney or county counsel, the entire amount of the penalty collected shall be paid to the
34 treasurer of the county in which the judgment is entered.

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

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

41 Before any penalty collected is paid out pursuant to subdivision (c), the amount of such
42 reasonable expenses incurred by the board shall be paid to the State Treasurer for deposit
43 in the special fund of the board described in Section 205. If the board has no such special
44 fund, the moneys shall be paid to the State Treasurer. The amount of such reasonable

1 expenses incurred by a local consumer affairs agency shall be paid to the general fund of
2 the municipality or county which funds the local agency.

3 **Bus. & Prof. Code § 17536. Civil penalties**

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

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

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

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

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

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

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

35 **Bus. & Prof. Code § 17536.5. Notice of appeal**

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

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

* * * * *

Exhibit

ALTERNATIVE DRAFT STATUTE: UNFAIR COMPETITION

LIMITED VERSION THROUGH CCP CLARIFICATION

Staff Note. This is the revised version of Professor Fellmeth's Alternative Draft, which was previously distributed with the First Supplement to Memorandum 95-14. A few additional technical revisions have been made. The draft is discussed in Professor Fellmeth's remarks on pages 3-4.

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

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

4 382.5. (a) An action may be commenced and maintained on behalf of the
5 "general public" by a private party pursuant to Section 17204 or 17535 of the
6 Business and Profession Code only where all of the following requirements are
7 satisfied:

8 (1) The plaintiff states that a cause of action is brought "on behalf of the
9 general public" pursuant to Chapter 5 (commencing with Section 17200) of Part
10 2 of Division 7 or Part 3 (commencing with Section 17500) of Division 7 of the
11 Business and Professions Code.

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

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

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

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

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

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

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

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

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

5 (A) The Attorney General.

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

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

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

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

14 (b) A motion for preliminary relief where relevant to the "general public"
15 allegations may be entertained during the initial 30-day period after
16 commencement of the action, but notice of motion shall also be served on the
17 offices listed paragraph (2) of subdivision (a).

18 (c) For good cause shown, the court may grant an extension of time of not more
19 than 30 days to a person given notice under paragraph (5) of subdivision (a),
20 other than the general public.

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

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

26 (2) 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 or to protest or limit the res judicata effect of the judgment.

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

34 **Staff Note.** For a discussion of this section, see Professor Fellmeth's Explanation following
35 the next section.

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

41 As a general issue, the staff is concerned about the use of the terms "res judicata" and
42 "collateral estoppel" in the statutes. There are more sections in the California codes using
43 these terms than we would have guessed. See Bus. & Prof. Code §§ 6158.4, 6204, 16760; Civ.
44 Code § 3205; Code Civ. Proc. § 99; Ins. Code § 11580.5; Rev. & Tax. Code §§ 6456, 7176,
45 17282, 18533, 19006, 19088, 19802, 24436.1, 38805; Veh. Code §§ 13353.2, 13376,

1 13557, 13558, 13559, 40834. Cf. Fam. Code § 3412 (“binding effect”). Most of these
2 sections provide that an adjudication does not have collateral estoppel effect, which is easier to
3 understand than an affirmative provision that something has res judicata or collateral estoppel
4 effect. The staff intends to do more research and give this issue further thought.

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

7 **SEC. ____.** Section 382.7 is added to the Code of Civil Procedure, to read:

8 **382.7. (a)** Where there is a conflict in remedies sought from the defendants
9 based on the same alleged acts and bases for liability between a private action
10 pursuant to Section 382 or 382.5 and a civil action by a public prosecutor on
11 behalf of the people under Business and Professions Code Section 17204 or
12 17353 or covering the same theories of acts and bases for liability, the public
13 prosecution is entitled to preference [as the inherently superior method for
14 representing the interests of large classes or of the general public within the
15 political jurisdiction represented]. Such preference may be determined by motion
16 at any time and may be based on the initial pleadings of the actions in conflict.

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

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

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

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

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

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

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

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

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

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

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

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

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

33 5. It has been placed in the Code of Civil Procedure as a form of class action procedural
34 instruction due to the concern of both public and private counsel that opening up Section
35 17200 itself to legislative change in the current climate may invite collateral amendments
36 and issues.

ASSOCIATION OF BUSINESS TRIAL LAWYERS
SAN DIEGOabtl
REPORT

Volume II No. 3

May 1995

**Expected Overhaul of
Section 17200**by Christopher J. Healey, Esq. of Luce, Forward, Hamilton
and Scripps

The California Law Revision Commission is considering proposals to amend California's unfair business practices statute, Business & Professions Code Section 17200 *et seq.* For many defense counsel and the companies they represent, some limitation on Section 17200 can come none too soon.

To get a flavor for the dilemmas companies face under the current statute, consider the following hypothetical conversation. Assume you get a call from the in-house counsel of a corporation, a national widget retailer. This corporation imposes a late charge on past due invoices. He tells you the corporation was sued under Section 17200. The plaintiff claims the late fee policy is an unfair business practice. Purporting to act for the public, she seeks sweeping injunctive relief, restitution and attorneys' fees.

With equal parts of outrage and puzzlement, your client reports that corporate counsel thoroughly researched the legality of a late charge. They found that

(Continued on page 2)



Christopher J. Healey

the corporation could impose such a charge without violating any statute or regulation. Ought to be a slam-dunk, right?

Not quite. In measured tones, you recite a string of cases that hold that an unfair or fraudulent practice claim may be found under Section 17200, even if there is no actual violation of law. With few exceptions, most Section 17200 complaints survive demurrer, thanks to cases that hold that any business practice that the court might view as unfair states a claim.

"Well," your client continues, "here, the plaintiff isn't even a customer. She admits in the complaint that she has sustained no injury herself. She is obviously not a qualified representative for the public of aggrieved consumers. She can't meet the basic class action requirements, right?"

"Not necessarily," you caution. "Section 17200 has no specific injury requirement. Further, Section 17200 permits class-like relief without the procedural class action niceties, such as class certification and notice. Any named plaintiff can seek relief for absent parties as a private attorney general."

"Wait a minute," shouts the client. "We already settled these allegations with the Attorney General last year when they complained about our late charges. We bought our peace, stipulated to an injunction and had the settlement confirmed in a court judgment. To keep the legal fees down, we handled the whole matter in-house. Surely, a stipulated judgment with the Attorney General bars this private Section 17200 action on the same allegations, right?"

"Not exactly," you explain. "While no reported decision has directly addressed the issue, the lack of public notice and opt out procedures probably mean the prior settlement will not bar the private Section 17200 action." You express heart-felt indignation with the illogic of this result, assure the client that you'll give him the best defense that a lot of money can buy, and mumble something about not shooting the messenger.

Thankfully, relief may be on the way, although probably not in time for your hypothetical client. Armed with background analysis from USD professor and veteran Section 17200 litigator, Robert Fellmeth, the California Law Revision Commission is considering several proposals to limit this expansive statute. The key revisions under consideration include the following.

Attorney General Oversight

Step one is to establish the State Attorney General's Office as a watchdog to coordinate and oversee Section 17200 actions. The Attorney General would maintain a registry of all Section 17200 investigations and filings, with the goal of ensuring coordination between local and state prosecutors. The Attorney General also could join in the settlement of any Section 17200 case filed by a local prosecutor. This would create state-wide res judicata.

Most significantly, private plaintiffs could not pursue claims for the public, unless the Attorney General and other public prosecutors with jurisdiction decline to take the case, after 60 days advance notice. This proposal tracks the 60-day notice requirement that now exists under Proposition 65, California's Safe Drinking Water and Toxic Enforcement Act of 1985. Private litigants would still be allowed to maintain individual Section 17200 claims and, in limited circumstances, seek preliminary relief for the public if warranted.

Adequate Representation Requirement

Another proposed change is to require private Section 17200 litigants and their lawyers to show their ability to represent adequately the interests of the public. This change is aimed at reducing the possibility for conflicts of interest that invariably arise in private 17200 cases. Further, the adequate representation element is a critical prerequisite for res judicata application.

Consistent with current law, however, the private plaintiff would not be required to establish other class action elements, such as common issues and manageability.

Public Notice and Court Approval of Settlements

Another significant proposal is to require public notice through publication of any Section 17200 settlement, before entry of judgment. This would apply in both private and public prosecutor litigation. Affected persons would be given the opportunity to opt out of the proposed judgment. Trial courts would be empowered (and required) to inquire about the adequacy of the stipulated relief.

Res Judicata Status

Assuming compliance with the above requirements, a litigated or stipulated judgment in a Section 17200 action brought for the public would be res judicata as to any other person asserting Section 17200 claims based on the same allegations.

While these revisions are clearly steps in the right direction, the proposed revisions are a mixed bag for both plaintiffs and defendants. Private plaintiffs are likely to balk at the 60-day notice requirement and the class action hurdles.

For defendants, finality in Section 17200 litigation sounds great, but res judicata protection does not come without a price. For many companies, the adverse publicity associated with public notification may be worse than the uncertain preclusive effect under current Section 17200 settlements. Most importantly, the broad and arguably amorphous test for what is an unfair business practice would remain unchanged. ■

May 26, 1995

Nat Sterling, Esq.
Chairman
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Law Revision Commission
RECEIVED

MAY 30 1995

File: _____

Re: Further Comments on Unfair Competition Issues - Business and Professions Code Section 17200 et. seq.

Dear Chairman Sterling and Members of the Law Revision Commission:

Consumers Union has reviewed the memorandum prepared by the staff of the California Law Revision Commission for the California District Attorneys Association Economic Crimes Conference. Mr. Ulrich was kind enough to invite our comments on the position paper. We would like to comment on each of the ten topics presented in the position paper. We preface our comments with a brief discussion of the need for private actions under the Unfair Business Practices Act to enforce consumer protection statutes.

Value and Importance of Private Unfair Business Practices Actions

The Unfair Business Practices Act, Business and Professions Code Sections 17200 and 17500, et. seq. is the fundamental tool for both law enforcement entities and for private organizations which are interested in the enforcement of consumer laws.

Consumers Union has used these statutes to successfully enforce critical consumer rights. Such cases have included:

- 1) A case challenging health claims in the advertising of unpasteurized milk. In that case a permanent injunction was entered, imposing a corrective warning label describing health risks of the product to older persons, pregnant women, infants, and other vulnerable groups;
- 2) A case challenging allegedly deceptive advertising of adjustable rate mortgages, which was settled for 16 newspaper statewide corrective advertising campaign;
- 3) A case challenging sales practices in the sale of insurance premium finance loans, which was settled for changes in practice plus restitution;

- 4) A case challenging the manner of calculating the fee on small loans by major consumer finance lender which was settled for a cessation in the practice plus restitution; and
- 5) A case challenging sales practices in the door to door sale of health maintenance organization services, which is still pending.

Issues Presented for Comment in the Commission Staff Paper

1. *Possibility of Restrictions on Standing or Attorneys Fees*

The first set of questions posed in the position paper relate to whether there are serious problems with the existing unfair competition statute. Any problems that have arisen with the statute are not sufficiently serious to warrant significant statutory changes. There have been some private actions filed after or at about the time a public action is being filed or settled. However, we believe that the courts already have adequate power to control any private cases which do not provide true benefit to the public.

One existing limitation on non-helpful private suits is that it should be difficult for the attorneys in those cases to receive an award of attorneys fees if the courts adhere to the existing statutory standards for the award of such fees. In an unfair competition action, attorneys fees can be awarded under California Code of Civil Procedure section 1021.5. Under that statute, a private party must show that its action has provided significant benefit to the public. If courts are awarding attorneys fees in tag-along actions which do not result in any significant additional law enforcement benefit or additional payment of restitution, the remedy would seem to be to encourage courts to more carefully apply the standards of section 1021.5 on the award of attorneys fees, rather than to narrow the types of cases which can be brought under the Unfair Business Practices Act. If fees are being secured by settlement of actions not benefiting the public, this could be addressed by requiring judicial approval of settlements.

Under this same item, the memo seeks comment on the appropriateness of the broad "any person" standing of section 17200 for private plaintiffs. This standing is not only appropriate, it is essential. Aggrieved individual consumers may be extremely hesitant to bring litigation on behalf of the general public, since it is the individual and not the general public who would bear the burden of any subsequent cost award if the individual loses the action. Consumer organizations add an important deterrent to lawbreaking when they stand ready, willing and able (under the standing rules of section 17200) to sue to enforce consumer protection statutes even though they are not directly harmed by the violation of those statutes.

An ordinary consumer who has standing under traditional standards may not even be the most desirable plaintiff to bring litigation representing the public. Individual consumers tend to be less sophisticated than organizational plaintiffs, and therefore may be more dependent on the advice of their counsel about what is and is not a fair resolution.

2. *Finality, binding absent parties, and appropriateness of class action model*

The second question posed in the Law Revision Commission's staff issues paper is whether or not a section 17200 action should provide for finality and for binding absent members of the public. Such a measure is not necessary, and unfortunately could entail costly and burdensome procedural mechanisms such as individualized class-type notice which would impede the usefulness of these actions as streamlined tools for public and private law enforcement.

We oppose proposals for res judicata and/or collateral estoppel in section 17200 actions for several reasons. First and most fundamentally, the increased notice and other procedural requirements that must accompany an action which binds absent persons would eliminate the chief advantages of section 17200 actions as law enforcement tools for private attorneys general. The lost advantages include speed, simplicity, and a relatively inexpensive method to have a court examine the legality of a challenged business practice.

Class-type notice requirements would seriously restrict the ability of nonprofit consumer organizations and other citizen groups to enforce existing laws through the private attorney general mechanism. The Unfair Business Practices Act is sometimes used to challenge practices where no class action has been filed. Perhaps there is not enough at stake for any one affected individual to act as a class representative, or perhaps such individuals have been unable to find counsel or to assume the potential liability for the expenses of a class case. The more streamlined procedure of the Unfair Business Practices Act is particularly necessary in such cases.

Providing res judicata or collateral estoppel effect to section 17200 settlements also increases the risk that these cases could be used in the future as "set-up" litigation to validate business practices without a full airing of the issues.

We urge the Law Revision Committee to reject the invitation to struggle with ill-defined notions of res judicata and collateral estoppel, which may require imposing very significant new procedural burdens upon section 17200 actions. Instead, the Commission can address the possibility of inappropriate or unnecessary follow-on suits

much more directly and simply. It can do so by proposing a procedure to permit a defendant in an unfair business practices case to move for early dismissal of the action on the ground that the action would be inequitable because the substance of the action has been litigated to judgment or settled by a public law enforcement office for the same geographic area.

Such a standard would permit the court to dismiss truly repetitive claims. At the same time, it would protect the public from being bound by a result negotiated by an occasional underfunded or underzealous public attorney general, as well as permitting subsequent litigation on issues not litigated or compensated for in the public proceeding.

3. *Multiplicity of actions*

We would like to see what the public prosecutors recommend before making any suggestions on how the issue of overlap between two public prosecutors should be handled. It is not unfair to a defendant to be sued in more than one jurisdiction if the defendant has engaged in allegedly illegal practices in multiple jurisdictions. Perhaps a defendant should have the option to seek discretionary judicial consolidation of multiple actions challenging the same practice. Caution should be exercised, however, so that local prosecutorial discretion is not displaced by a single statewide entity such as the attorney general's office.

On the issue of public/private overlap, we believe it is always appropriate for a public prosecutor to intervene in a case brought by a private plaintiff. The issue of a private plaintiff bringing a case at the same time or after a public prosecution is more difficult. However, we believe that filing of follow-on cases can be addressed with measures tailored to that issue, rather than with the broad revisions importing burdensome and inappropriate notice requirements or collateral estoppel effects or class action procedures into every unfair business practices case.

4. *Follow-on private action*

Follow-on private actions are not inherently abusive or inappropriate. The factual question that we believe the court should examine in each case is whether the practices, issues, and alleged illegalities are truly the same in the second action, and if so whether the second action would therefore be inequitable to the defendant. What might appear to be a follow-on case can have the beneficial effect of exposing problems with a defendant's course of conduct that were not addressed by a public prosecution. One example of this that we are aware of occurred after the filing of a

problems with a defendant's course of conduct that were not addressed by a public prosecution. One example of this that we are aware of occurred after the filing of a complaint and negotiated stipulation injunction against ITT Consumer Financial Services by the Attorney General and the Alameda District Attorney.

That public case was important and valuable, and resulted in many significant changes to the defendant's practices. However, the public case did not address the validity or appropriateness of an arbitration clause commonly used in the same contracts which had been at issue in the public case. That clause required California consumers to travel to Minnesota if they wanted to be present at the hearings of their complaints. After filing of private litigation which might have initially appeared to be in part a follow-on case, the issue of the validity of the arbitration clause was presented and appealed. Because of that private litigation, the Court of Appeal examined and invalidated the arbitration clause calling for a hearing in a distant state, holding that even a general state policy strongly in favor of arbitration could not excuse such an unfairly structured arbitration. Patterson v. ITT Consumer Financial Corp., 14 Cal. App. 4th 1659 (1993).

While some apparent follow-on private cases have value, others may not. Any inappropriate follow-on private actions can be addressed by a clarification, and perhaps modest statutory expansion, of the inherent ability of a court hearing a cause of action in equity to do equity. The Unfair Business Practices Act action sounds in equity. A court sitting in equity has the authority to dismiss a private unfair business practices action which follows a resolved public action, if the court finds that it would be inequitable to the defendant to permit the follow-on actions. Such a finding should be simple for a court to reach if the resolution of the public action stopped the practice and required the defendant to disgorge the full benefit of the illegal practice through restitution. On the other hand, if the public action resulted solely in civil penalties and not in a change in practice or in restitution, a court might determine that the follow-on private case would not be inequitable.

5. *Attorneys fees*

Next, the issues paper asks whether attorneys fees should be available in private attorney general cases. We believe that these attorneys fees are essential to permitting consumer organizations such as our own and others to bring law enforcement cases. In this time of cutbacks in governmental departments throughout the state, state and local consumer agencies simply cannot bring all the cases that need to be brought. As already discussed, the existing requirements of Code of Civil Procedure section 1021.5 ought to create an incentive not to file "me too" cases which do not provide additional benefit to the public. That section already permits the court to consider the necessity of private enforcement.

Section 1021.5 also preconditions an award of attorneys fees on a finding that the action "has resulted in the enforcement of an important right affecting the public interest." If the private action does not confer a significant benefit on the general public or a large class of persons because the public action has already done so, then this should permit the court to deny attorneys fees in such cases under existing law.

6. Adequacy of private counsel or plaintiff

We believe it would be valuable for the court to review the adequacy of private counsel where a claim is made under section 17200 on behalf of the general public. The standards which the court should apply to determine adequacy of counsel include counsel's experience, reputation, history of handling similar cases to an effective resolution, and other similar standards.

We are not opposed to a process for the court to examine the history, integrity, track record and motives of a private plaintiff seeking to represent the public interest. However, it is very important that any requirement about adequacy of the plaintiff in section 17200 actions not impinge upon the broad standing currently available to bring these actions. In the class action context, a plaintiff's claims must be typical of others in the affected group before that plaintiff is deemed adequate. That test is inconsistent with the standing principles of the Unfair Business Practices Act. It also is not necessary. A public interest organization which has been involved with the issues presented in the complaint can be as adequate, and sometimes a much better plaintiff, than a single individual who suffered the practice.

7. Prior notice to public prosecutor

On the issue of prior notice to public prosecutors, we believe the Law Revision Commission should talk with environmental groups and others who have developed cases under prior notice statutes such as Proposition 65. If any such proposal is pursued, great care should be taken so that the any notice requirement does not eliminate the ability of a private plaintiff to move promptly to seek a temporary restraining order and preliminary injunction against illegal activity.

We are uncertain what would be added by prior notice. If the public prosecutor has the opportunity to intervene, that should be adequate to protect its interests without also requiring it to receive notice before a case is filed. Many consumer statutes affect public health, safety and well being. A party who has developed a law enforcement action to enforce such a statute should not have to delay bringing that action and securing temporary relief for the public in order to give notice to a public prosecutor that has not acted upon the issue up to that time.

8. Public prosecutors' representation of public interest

In general, we believe that a public prosecutor should have the right to apply to the court to intervene as a plaintiff in a private action brought on behalf of the general public. The court, however, should look carefully at the distribution of funds in any proposed settlement or in any judgment between restitution to injured members of the public and civil penalty. Both are important and valuable. However, it would be unfortunate if the civil penalties removed funds that otherwise could be used to make individual consumers whole. The purpose of enforcement of consumer laws, after all, is to protect consumers. Penalties are valuable to deter, and we believe they should be sought in addition to restitution to affected members of the public, not instead of such restitution.

9. Court approval of settlement

We would support a requirement for court approval of settlement or of dismissals with prejudice of section 17200 actions brought on behalf of the general public. This could help to protect the integrity of the process.

10. False advertising claims under Business and Professions Code Section 17500

We agree with the suggestion in the issues paper that, whatever provisions might be considered to be added to section 17200 actions, they are not necessary or appropriate for section 17500 actions, with the possible exception of judicial approval of settlements.

Thank you for the opportunity to comment on these issues. We trust that the Commission will move cautiously in this critical area.

Very truly yours,


Gail Hillebrand

GKH:sw

cc: Mr. Ulrich