Study B-700 June 21, 1995

Memorandum 95-35

Unfair Competition: Constitutional Limits on Binding Absent Parties

INTRODUCTION

Professor Fellmuth proposes to reform California unfair competition law by making changes in the Code of Civil Procedure. See First Supp. to Mem. 95-14, at Exhibit pp. 1-4. The draft proposal essentially attempts to bind persons who are not named plaintiffs but are in the plaintiff group described in the complaint (absent parties or absentees) to a result without certifying a class action under California Code of Civil Procedure Section 382 or the Consumer Legal Remedies Act (Civ. Code § 1750 *et seq.*). As others have pointed out, however, there are federal and state due process constraints on when an absent party may be bound by a judgment. Any statutory reform must comply with those limits. The following discussion attempts to describe what they are.

CLASS ACTION CONTEXT OF CONSTITUTIONAL CASE LAW

Much of the case law on the constitutional requirements for binding absent parties involves class actions under state law or under Rule 23 of the Federal Rules of Civil Procedure (hereafter "Rule 23"). To facilitate discussion of that case law, Rule 23 and the pertinent state statutes are reproduced at Exhibit pp. 1-8 and very briefly summarized below.

Rule 23 of the Federal Rules of Civil Procedure

Under Rule 23, a class action is maintainable only if "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. Proc. 23(a). Additionally, the action must meet at least one of the following conditions set forth in subdivision (b) of Rule 23:

• **Fed. R. Civ. Proc. 23(b)(1)(A).** The prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class.

• **Fed. R. Civ. Proc. 23(b)(1)(B).** The prosecution of separate actions by or against individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

• **Fed. R. Civ. Proc. 23(b)(2).** The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

• **Fed. R. Civ. Proc. 23(b)(3).** The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Class actions under Rule 23 are typically described as (b)(1), (b)(2), or (b)(3) class actions, depending on which set of requirements they satisfy.

Rule 23(c) requires that (b)(3) classes, but not (b)(1) and (b)(2) classes, receive notice of the pending action and an opportunity to opt-out of the class. Consequently, (b)(1) and (b)(2) class actions bind the entire class, while (b)(3) class actions bind only those who have not opted out of the class. Thus, although the "common question" ground of subdivision (b)(3) is broad enough to cover *all* class actions, wherever possible courts favor certification under subdivisions (b)(1) or (b)(2). Arnold v. United Artists Theatre Circuit, 158 F.R.D. 439, 451 (N.D. Cal. 1994); Bell v. American Title Ins. Co., 226 Cal. App. 3d 1589, 1608, 277 Cal. Rptr. 583 (1991); Frazier v. City of Richmond, 184 Cal. App. 3d 1491, 1501, 228 Cal. Rptr. 376 (1986).

Class Actions Under California Law

Under Code of Civil Procedure Section 382, "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or

defend for the benefit of all." Section 382 "is general in nature and does not provide a procedural framework for certifying a class action." Schneider v. Vennard, 183 Cal. App. 3d 1340, 1345, 228 Cal. Rptr. 800 (1986). Thus, the California Supreme Court has "urged trial courts to be procedurally innovative, encouraging them to incorporate procedures from outside sources in determining whether to allow the maintenance of a particular class suit." City of San Jose v. Superior Court, 12 Cal. 3d 447, 453, 525 P.2d 701, 115 Cal. Rptr. 797 (1974). More specifically, the Court has directed them to Rule 23. *Id.;* Green v. Obledo, 29 Cal. 3d 126, 145-46, 624 P.2d 256, 172 Cal. Rptr. 206 (1981). Courts have also sought guidance from the Consumer Legal Remedies Act (Civ. Code § 1750 *et seq.*), which sets forth relatively detailed procedures for class actions based on unfair practices in connection with consumer sales transactions. *Schneider,* 183 Cal. App. 3d at 1345.

NATURE OF DUE PROCESS REQUIREMENTS

Due process requires that persons who are not parties to an action may be bound by the judgment only if the procedure used "fairly insures the protection of the absent parties who are to be bound by it." Hansberry v. Lee, 311 U.S. 32, 42 (1940). In applying this standard, courts have focused on such protections as (1) privity, community of interest, and adequate representation, (2) notice of the pending suit and an opportunity to be heard, (3) according absent parties an opportunity to opt out of the suit, (4) court approval and prior notice of any dismissal or compromise. These protections, and when and to what extent they are required, are discussed in order below.

PRIVITY, COMMUNITY OF INTEREST, AND ADEQUATE REPRESENTATION

General Explanation

A judgment can constitutionally bind persons who do not participate in the litigation only if they are in privity with a party. *See, e.g.,* Clemmer v. Hartford Ins. Co., 22 Cal. 3d 865, 874, 587 P.2d 1098, 151 Cal. Rptr. 285 (1978); Brown v. Rahman, 231 Cal. App. 3d 1458, 1461, 282 Cal. Rptr. 815 (1991). "Privity is a concept not readily susceptible of uniform definition." *Clemmer,* 22 Cal. 3d at 875. Recent California cases define it as a relationship between a party to prior litigation and another person that is "sufficiently close" to justify binding the latter to the result of the prior litigation. *See, e.g., id.; Brown,* 231 Cal. App. 3d at

1461-62. That is essentially a circular definition: privity exists when the relationship is such that the nonparticipant should be bound; the nonparticipant is bound when the relationship is such that privity exists.

Courts have, however, given content to the requirement by clarifying that the party to be bound must have had "an identity or community of interest with, and adequate representation by, the losing party in the first action," and "the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication." *Clemmer,* 22 Cal. 3d at 875; Victa v. Merle Norman Cosmetics, Inc., 19 Cal. App. 4th 454, 464, 24 Cal. Rptr. 2d 117 (1993); *Brown,* 231 Cal. App. 3d at 1462; Lynch v. Glass, 44 Cal. App. 3d 943, 949, 119 Cal. Rptr. 139. Absent such a showing, binding the absentee would violate due process: "It is the fact that the class plaintiff's claims are typical and his representation of the class adequate which gives legitimacy to permitting him to bind class members …." Trotsky v. Los Angeles Fed. Sav. & Loan Ass'n, 48 Cal. App. 3d 134, 146, 121 Cal. Rptr. 637 (1975); *see also City of San Jose,* 12 Cal. 3d at 463; St. Sava Mission Corp. v. Serbian Eastern Orthodox Diocese, 223 Cal. App. 3d 1354, 1376, 273 Cal. Rptr. 340 (1990); Simons v. Horowitz, 151 Cal. App. 3d 834, 843, 199 Cal. Rptr. 134 (1984).

The requirement of adequate representation is interrelated with the concepts of community of interest among class members and typicality of the class representative's claim. Often, the term "adequate representation" is used broadly, subsuming the latter concepts. For example, factors courts examine in assessing the adequacy of representation may include whether counsel for the representatives is well-qualified, whether there is a sharing of interests between the representatives and the absentees, whether there is any antagonism, and whether there is a likelihood that the suit is collusive. *See, e.g.,* Ikonen v. Hartz Mountain Corp., 122 F.R.D. 258, 263 (S.D. Cal. 1988). The term "adequate representation" is used in this broad sense in the discussion that follows.

Is Adequate Representation Always Necessary?

Many cases assert without qualification that adequate representation is necessary if a judgment is to bind a nonparticipant. *See, e.g.,* National Solar Equipment Owners' Ass'n, Inc. v. Grumman Corp., 235 Cal. App. 3d 1273, 1284, 1 Cal. Rptr. 2d 325 (1991); *Brown,* 231 Cal. App. 3d at 1463. But it is possible to argue that in some circumstances, other due process protections supplant the need for adequate representation. Suppose, for instance, that absent parties

receive a notice that informs them of a pending lawsuit, describes the nature of the action, tells them the identity of those purporting to represent their interests, and advises them that they have a right to be heard, as well as a right to opt out of the suit. Arguably, under such circumstances the absent parties have had a fair opportunity to protect their interests and thus have no basis to complain about the representation received. This may be particularly true if the absent party receiving the notice was highly sophisticated and was informed not only about the lawsuit generally but also got specific notice of any proposed settlement and an opportunity to be heard with regard to such a proposal. *See In re* Four Seasons Securities Laws Litigation, 502 F.2d 834 (10th Cir. 1974), *cert. denied*, 419 U.S. 1034 (1974); 7B C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 1789, at 256-59 (1986) (hereafter "C. Wright"). Authority for such an approach is sparse, however, making it advisable to regard adequate representation as an essential element of due process in all representative suits.

Can There Be Adequate Representation If the Representative Has Not Suffered the Alleged Injury?

To be adequate representatives, named plaintiffs must have a community of interest with, and thus ordinarily must be members of, the group they purport to represent. *See, e.g.,* Stephens v. Montgomery Ward, 193 Cal. App. 3d 411, 422 (1987); Phillips v. Crocker-Citizens Nat'l Bank, 38 Cal. App. 3d 901, 910, 113 Cal. Rptr. 688 (1974); Petherbridge v. Altadena Fed. Sav. & Loan Ass'n, 37 Cal. App. 3d 193, 200-201, 112 Cal. Rptr. 144 (1974); Payne v. United California Bank, 23 Cal. App. 3d 850, 855-60, 100 Cal. Rptr. 672 (1972); 7A C. Wright, *supra*, § 1761, at 132-50; 4 B. Witkin, California Procedure *Pleading* § 207, at 245 (3d ed. 1985). As the United States Supreme Court said in East Texas Motor Freight v. Rodriguez, 431 U.S. 395, 403 (1977), a class representative "must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *See also* Caro v. Proctor & Gamble Co., 18 Cal. App. 4th 644, 664, 22 Cal. Rptr. 2d 419 (1993).

Associations are an exception to this rule. An association may sue even though it has not sustained direct injury; harm to the members of the association is enough. *See, e.g., National Solar Equipment,* 235 Cal. App. 3d at 1280-81; Twain Harte Homeowners Ass'n v. Patterson, 193 Cal. App. 3d 184, 239 Cal. Rptr. 316 (1987). But the association must be acting on behalf of its members. *National Solar Equipment,* 235 Cal. App. 3d at 1280-81; County of San Luis Obispo v. Abalone

Alliance, 178 Cal. App. 3d 848, 862-64, 223 Cal. Rptr. 846 (1986); Greater Westchester Homeowners Ass'n v. Los Angeles, 13 Cal. App. 3d 523, 91 Cal. Rptr. 720 (1970).

Implications of the Injury Requirement in Unfair Competition Actions

From the foregoing it follows that if the result of an unfair competition case is to bind absentees, there must be adequate representation, yet there cannot be adequate representation unless the representative has suffered the harm alleged in the complaint. This conclusion jars with the current broad approach to standing in California unfair competition law, under which plaintiffs may challenge business practices that have caused them no harm. *See* Bus. & Prof. Code §§ 17204, 17535. "Though a plaintiff *not* harmed by the allegedly wrongful practice may have standing to sue under § 17200 or 17500, he or she would not be an 'adequate representative' of the absent persons who *were* harmed by the practice." J. Chilton & W. Stern, *California's Unfair Business Practices Statutes: Settling the "Nonclass" Class Action and Fighting the "Two-Front" War,* 12 CEB Civil Litigation Rptr. 95, 97 (May 1990) (hereafter "Chilton") (emph. in orig.); *see generally Trotsky*, 48 Cal. App. 3d at 147. "[A]lmost certainly," settlement of an unfair competition case "with a plaintiff who has not been personally affected by the allegedly wrongful practice will not operate as res judicata against absent nonclass members." Chilton, *supra,* at 97.

Seeking to achieve a greater degree of finality, Professor Fellmuth proposes that in actions by private parties on behalf of the general public, plaintiffs' counsel must be an "'adequate legal representative' of the interests of the general public pled," and the court must affirmatively find 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." First Supp. to Mem. 95-14, at Exhibit p. 1. Imposing such requirements may indeed help broaden the binding effect of unfair competition judgments, at least if the requirements connote adequate representation and community of interest with the injured persons, as used in the due process cases. It is not self-evident, however, that this is what Professor Fellmuth's requirements mean: "adequate *legal* representative" may connote only adequate lawyering not adequate representative plaintiffs; "the interests of the general public" may not be equivalent to the interests of those injured. Further, if the requirements *do* amount to adequate representation and community of interest as used in the due

process cases, they may effectively undo the rule that "[a] plaintiff suing under § 17200 or 17500 does not have to prove he or she was harmed by the defendant's practice." Chilton, *supra,* at 95.

Professor Fellmuth also proposes that unfair competition judgments obtained by public prosecutors be binding on absent parties. First Supp. to Mem. 95-14, at Exhibit p. 3. He further suggests statutorily declaring that public prosecution is "the inherently superior method for representing the interests of large classes or of the general public within the political jurisdiction represented." *Id.* at Exhibit pp. 2-3.

Arguably, however, public prosecutors are not only inferior but constitutionally inadequate representatives of those harmed by an allegedly wrongful practice. *See* Chilton, *supra,* at 100. Public prosecutors do not belong to the injured group and may have different interests than the group. *See* People v. Superior Court (Good), 17 Cal. 3d 732, 737, 552 P.2d 760, 131 Cal. Rptr. 800 (1976); *see also* State of California v. Levi Strauss & Co., 41 Cal. 3d 460, 482, 715 P.2d 564, 224 Cal. Rptr. 605 (1986) (Bird, C.J., concurring) (the prestige of obtaining a big victory against a corporation, and concomitant boost to a prosecutor's professional reputation, may be analogous to private counsel's interest in a large fee award); *id.* at 488 (Sutter, J., concurring) (in the context of fluid class recovery, trial judges should beware of conflicts of interests, "not only of private organizations, … but also of plaintiffs who are elected public officials"). As the California Supreme Court has commented:

> [A]n action by the People lacks the fundamental attributes of a consumer class action filed by a private party. The Attorney General or other government official who files the action is *ordinarily not a member of the class,* his role as a protector of the *public* may be inconsistent with the welfare of the *class* so that he could not adequately protect their interests ….

People v. Pacific Land Research Co., 20 Cal. 3d 10, 18, 569 P.2d 125, 141 Cal. Rptr. 20 (1977) (emph. added). If public prosecutors cannot "adequately represent" the interests of absent parties, then it follows that judgments obtained by public prosecutors cannot constitutionally be binding on such parties and any statutory reform purporting to mandate as much will be invalidated.

Yet perhaps the requirement that the representative suffer the alleged harm, as opposed to adequate representation and the concomitant requirement of community of interest, is not of constitutional dimension. Due process is a

flexible concept that mandates fundamental fairness. In some circumstances, particularly when a public prosecutor seeks relief pursuant to statutory authority, there might be sufficient indicia of vigorous advocacy and shared interests that the due process requirements are met even though the representative neither belongs to the injured group nor is an association comprised of members injured by the challenged conduct. *See generally*, Rynsburger v. Dairymen's Fertilizer Cooperative, Inc., 266 Cal. App. 2d 269, 277-78, 72 Cal. Rptr. 102 (1968) (action by public prosecutors to enjoin public nuisance precluded subsequent private action); *cf. Victa,* 19 Cal. App. 4th at 463-68 (EEOC did not act as plaintiff's representative and was not in privity with her). Such an approach would at best be controversial, however, and there is no assurance that courts would uphold it in the unfair competition context.

NOTICE OF PENDING SUIT AND AN OPPORTUNITY TO BE HEARD

Types of Actions in Which Notice is Constitutionally Required

Although it has been argued that adequate representation is the touchstone of due process in representative actions, "this view has little to commend it," Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974), and at least in some circumstances due process requires notice and an opportunity to be heard, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985). As the Supreme Court stated in *Shutts,* 472 U.S. at 811-12:

> If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." [Cites omitted.] The notice should describe the action and the plaintiffs' rights in it.

Notice informs absent parties that their rights are in litigation so that they can take steps to protect their interests. "In this way, it guarantees each class member an opportunity to have his day in court or, at least, to oversee the conduct of the action by the representatives." 7B C. Wright, *supra,* § 1786, at 189-90.

The circumstances under which notice of a pending action is constitutionally required are far from clear. *Shutts* involved a plaintiff class including numerous

members who had no ties to the forum state. Arguably, the Court's comments in *Shutts* about the requirements of due process apply only to such plaintiffs. As a leading treatise states: "The criteria properly viewed seem to provide a means of meeting due process standards when traditional personal jurisdiction standards do not apply." 7B C. Wright, *supra,* § 1789, at 255; *see also Bell*, 226 Cal. App. 3d at 1611.

But the discussion in *Shutts* is not expressly so limited. Rather, the Court characterized the scope of its decision as follows:

> Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief.

Shutts, 472 U.S. at 811 n.3. Additionally, *Shutts* is not the Court's only decision bearing on constitutional notice requirements. Although cases such as Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), and *Eisen,* 417 U.S. at 176-77, do not hold as much, it is a reasonable and widely accepted conclusion from them that notice of the pending suit is an essential element of due process in (b)(3) class actions. *See, e.g.,* 7B C. Wright, *supra,* § 1786, at 189-91; 3B J. Moore & J. Kennedy, Moore's Federal Practice, ¶ 23.55, at 23-414 to 23-417 (2d ed. 1993) (hereafter "Moore's Federal Practice").

Further, the majority of lower courts hold that notice of the pending suit is *not* mandatory in (b)(1) and (b)(2) actions so long as there is adequate representation. *See, e.g., Frazier,* 184 Cal. App. 3d at 1499-1503; Johnson v. American Airlines, Inc., 157 Cal. App. 3d 427, 433, 203 Cal. Rptr. 638 (1984); 7B C. Wright, *supra,* § 1786, at 191-94; 3B Moore's Federal Practice, *supra,* ¶ 23.55, at 23-415. There are exceptions: For example, some courts regard notice of inception of suit as an essential element of due process in all class actions, *see* 7B C. Wright, *supra,* § 1786, at 191-93 and cases cited therein, while other courts link such notice to whether damages are at stake, *see, e.g.*, Brown v. Ticor Title Ins. Co., 982 F.2d 386 (1992) (arguably concluding that regardless of how it is certified, a class action is not res judicata as to *substantial* damage claims unless notice is provided), *cert. granted,* __ U.S. __ 114 S. Ct. 56 (1993), *cert. dismissed as improvidently granted,* __ U.S. __, 114 S. Ct. 1359 (1994); Johnson v. General Motors Corp., 598 F.2d 432 (5th Cir. 1979) (before absentee may be barred from pursuing an individual damage claim, absentee must get notice, even in a (b)(2) action). But in general the lower

courts seem to view the constitutional dividing line as the distinction between (b)(3) versus (b)(1) and (b)(2) actions. That is the same as the statutory dividing line set in Rule 23, which makes notice of pendency of the action mandatory in (b)(3) class actions and discretionary in other class actions.

What are the implications of this for representative actions outside the class action context? The distinction between (b)(3) versus (b)(1) and (b)(2) class actions does not precisely track the distinction between types of relief sought in different class actions. Under the rule that (b)(1) and (b)(2) certification is preferable where possible, (b)(3) class actions are largely actions seeking damages; other actions generally meet the requirements of (b)(1) or (b)(2) or both. But if damages are sought from a limited fund, (b)(1) certification is in order. Further, where damage claims are joined with claims for other types of relief, the presence of the damage claims does not necessarily preclude certification under subdivisions (b)(1) and (b)(2). *See, e.g.,* Ticor Title Ins. Co. v. Brown, __ U.S. __, 114 S. Ct. 1359, 1363 (1994) (O'Connor, J., dissenting) ("The lower courts have consistently held that the presence of monetary damage claims does not preclude class certification under Rules 23(b)(1)(A) and (b)(2)"); *Frazier,* 184 Cal. App. 3d at 1501. A class action may not be certified under subdivision (b)(2), however, if it seeks predominately money damages. *Arnold,* 158 F.R.D. at 450; *Rules Advisory Committee Notes to 1966 Amendments to Rule 23, reprinted at* 39 F.R.D. 69, 102 (1966).

Thus, if the categories of Rule 23 are the constitutional benchmark, as the lower courts generally agree, there is no easily transferable rule of thumb (e.g., notice is only required for damage claims), other than the categories of Rule 23 themselves. It is uncertain, moreover, whether the United States Supreme Court would agree that the categories of Rule 23 precisely coincide with the constitutional limits for requiring notice in representative actions. The Court could do anything from requiring notice to absentees at the inception of all representative actions, to requiring such notice only for pure damage claims, to any number of other possibilities, including the one expressly hinted at in *Shutts* itself: Distinguishing between "claims wholly or predominately for money judgments" and "other types of class actions, such as those seeking equitable relief."

What the last of these standards amounts to is unclear in and of itself. It refers to claims predominately for "money judgments," not "money damages." That could reflect a conscious attempt to encompass restitution, or it could merely be

an insignificant variation from the terminology of the Advisory Committee Note to Rule 23, which states that (b)(2) certification is improper if "the appropriate final relief relates exclusively or predominantly to money damages." Further, courts have struggled with the meaning of the Advisory Committee language for years, yet have developed no clear standards for when an action is *predominately* for money damages. *See, e.g., Arnold,* 158 F.R.D. at 451 ("Most of the reported cases applying this 'predominance' standard are rather conclusory and do not enunciate clear rules for applying the test"); *Bell,* 226 Cal. App. 3d at 1606 (the predominance test is dependent on exercise of the trial court's discretion, no clear standards have been or could be developed, and there is little doubt that reasonable courts reach opposite conclusions under similar circumstances); *see also American Bar Association Section of Litigation: Report and Recommendations of the Special Committee on Class Action Improvements*, 110 F.R.D. 195, 203-04 (1986) (recommending elimination of the distinctions between (b)(1), (b)(2), and (b)(3) class actions, in part because of excessive skirmishing over whether monetary relief is "predominant").

Chief Judge Henderson of the Northern District of California recently considered this dilemma, and concluded that in assessing whether the predominance standard is met, courts should focus on the cohesiveness of the class and homogeneity of their interests because "[i]t is this characteristic that allows the court to dispense with notice to the class and bind all members to any judgment on the merits without an opportunity to opt out." *Arnold,* 158 F.R.D. at 451. Likewise, others have stressed group cohesiveness and homogeneity in explaining when due process requires notice of a pending representative action:

> Mandatory notice in all class actions would be too inflexible and in many cases, when (b)(1) or (b)(2) actions have gained wide notoriety, notice would add little or nothing. There will be situations where the class is cohesive, or where the legal relationship of the members enable one or more to stand in judgment for all, and where the representatives are truly representative and faithful — a most important factor. In these and related situations we suggest that, although some notice may be desirable and may be given as provided in (d)(2), a judgment should be res judicata as to entire (b)(1) or (b)(2) class even in the absence of notice, when the requirements of Rule 23 have been satisfied. On the other hand, in the (b)(3) type of class suit there is no jural relationship between the members. They are legal strangers related only by some common question of law or fact and they have

> a right to opt out of the class. Mandatory notice under (c)(2) informs them of that right, and satisfies the presumed due process precondition to entering a binding judgment against them.

3B Moore's Federal Practice, *supra*, ¶ 23.55 at 23-417 (fns. omitted); 7B C. Wright, *supra,* § 1786, at 194-95.

Focusing on policy considerations relating to group cohesiveness and homogeneity by no means provides any certainty in deciding when due process requires notice of inception of a representative action. At least, however, it is a logical, not merely arbitrary, basis for assessing the need for notice. *Cf.* Grimes v. Vitalink Communications Corp., 17 F.3d 1553 (3d Cir. 1994) (Grimes, J., dissenting) (distinction between equitable relief as opposed to money damages has no logical relation to due process and is "a vestigial reminder of the different ways in which the law relating to joinder of parties evolved in courts of equity as opposed to courts of law"), *cert. denied,* __ U.S. __, 115 S. Ct. 480 (1994). Coupling that approach with the United States Supreme Court's comments about notice in *Shutts,* it is perhaps safe to conclude:

• The more a complaint focuses on monetary relief (particularly damages), as opposed to nonmonetary relief, the more likely it is that notifying absentees of the pendency of the representative action is constitutionally required if the result is to bind the absentees.

• The more the interests of the absentees and issues relating to their claims diverge from those of the representatives, the more likely it is that notifying the absentees of the pendency of the action is constitutionally necessary if the result is to bind the absentees.

Is Notice of Suit Constitutionally Required To Bind Absentees in Unfair Competition Cases?

With these vague guidelines in mind, we can turn to the question of whether notice of the pending suit is constitutionally required if the judgment in an action under California's unfair competition statutes is to bind absentees. Bell v. American Title Ins. Co., 226 Cal. App. 3d 1589, 277 Cal. Rptr. 583 (1991), provides some insight into that question as well.

Bell involved requests for injunctive relief and restitution under the unfair competition statutes, as well as damage claims under other theories. *Bell* was settled, but some class members appealed the court's approval of the settlement, arguing that although they were notified of the settlement, they should also have

been given an opportunity to opt out of it. In making that argument, they relied on the due process discussion of *Shutts,* which encompasses not only notice of a class action, but also an opportunity to opt out of it. *See* 472 U.S. at 811-12. The Court of Appeal rejected their argument. It determined that the due process discussion of *Shutts* did not apply, in part because it was "within the trial court's discretion to find the case was not predominately for monetary relief." 226 Cal. App. 3d at 1609-10.

Although *Bell* does not concern the notice aspects of the due process discussion in *Shutts,* it is possible to infer from it that in determining whether the notice requirement of *Shutts* applies to a representative action, courts are to assess whether *the overall case,* not just the unfair competition claim, is "predominately for monetary relief." If a case were heavily weighted towards injunctive relief, as the court found in *Bell,* then it would essentially be a (b)(2) class action and notice would not be necessary. Presumably, however, if a case were heavily weighted towards damages, then the opposite would be true.

Consider, however, a case consisting solely of an unfair competition claim. Damages are not available in unfair competition cases; the only monetary remedies available are disgorgement and civil penalties. *See* Bus. & Prof. Code § 17206; Rubin v. Green, 4 Cal. 4th 1187, 1201 n.7, 847 P.2d 1044, 17 Cal. Rptr. 2d 828 (1993); Bank of the West v. Superior Court, 2 Cal. 4th 1254, 1266, 833 P.2d 545, 10 Cal. Rptr. 2d 538 (1992). Disgorgement, also referred to as restitution, is not just available in unfair competition cases; the California Supreme Court has "concluded that *the essence* of the statutory unfair competition claim lies in its restitutionary nature." *Rubin* , 4 Cal. 4th at 836 (emph. added).

Are civil penalties and restitution the type of monetary relief referenced in the due process discussion in *Shutts?* On the one hand, maybe not, because restitution is an equitable remedy, and the Court says in *Shutts* that its holding only covers class actions "wholly or predominately for money judgments," not "other types of class actions, such as those seeking equitable relief." 472 U.S. at 811 n.3. On the other hand, however, a judgment for restitution is a "money judgment" and restitution is sometimes virtually indistinguishable from damages.

In sum, it is difficult to know whether the reference to "money judgments" in *Shutts* includes restitution. It is still more difficult to predict what the California Supreme Court, much less the United States Supreme Court, would decide about whether notice of the pending suit and an opportunity to be heard are

constitutionally necessary to bind absentees in actions under California's unfair competition statutes. From *Bell, Shutts,* and the policy arguments for giving notice to groups lacking cohesion and homogeneity, the staff makes the following observations:

• It is likely that notice of the pending suit and an opportunity to be heard will be constitutionally necessary in some unfair competition actions but not in others.

• When an unfair competition claim seeks only injunctive relief and is not coupled with any other claims, courts are likely to conclude that notice at inception of the action is not necessary. Among the explanations the court might give are: (1) notice is not required because the case is not predominately for monetary relief, (2) notice is not necessary because no damages are at stake, (3) notice is not needed because the action is essentially a (b)(2) action, and (4) notice is not needed because the group represented is cohesive and homogeneous.

• When an unfair competition claim is asserted by itself and seeks injunctive relief as well as restitution and civil penalties, it is unclear whether notice of inception of the suit is constitutionally required to bind the absentees. Significant factors may include how much emphasis is placed on obtaining the injunctive relief, and how individualized the proof of restitution has to be. Some, if not all, courts are likely to conclude that notice of the pending suit is never necessary in such a case, because such notice is only required when damages are sought.

• When an unfair competition claim is asserted by itself and seeks only restitution and/or civil penalties, the result is again unclear and depends largely on whether there is a constitutionally significant distinction between damages as opposed to restitution or civil penalties.

• When an unfair competition claim is asserted in conjunction with other claims, courts are likely to examine the overall nature of the complaint in determining the need for notice, not just the unfair competition claim. *See, e.g., Bell.* Key considerations may include the presence or absence of damage claims, their magnitude and importance relative to claims for other types of relief, whether the damage claims are asserted on a group-wide basis (or only on behalf of the representative plaintiff), and whether the issues of proof relating to the damage claims are highly individualized. These considerations will differ from case to case, and different courts are likely to have different approaches to the due process notice requirement. A wide spectrum of results is possible. If a (b)(3) class is certified, the court will follow (b)(3) procedures, and the result should be

constitutionally binding on all members of the class who do not opt out. But if the case is not treated as a (b)(3) class action, then the extent and nature of notice requirements and other due process protections incorporated into the unfair competition statutes may determine whether the result of the case is constitutionally binding on absentees.

If Notice Is Constitutionally Required, What Manner of Notice Is Sufficient?

Assuming that notice is constitutionally required in a particular case, the next issue is determining what type of notice is required. The United States Supreme Court has made clear that "[t]he notice must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Shutts*, 472 U.S. at 812, *quoting Mullane*, 339 U.S. at 314-15. "The notice should describe the action and the plaintiffs' rights in it." *Shutts*, 472 U.S. at 812.

Notice by publication is acceptable in some circumstances. "[I]n the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." *Mullane*, 339 U.S. at 317; Kinder v. Pacific Public Carriers Co-op, Inc., 105 Cal. App. 3d 657, 664, 164 Cal. Rptr. 567 (1980).

But notice by publication is a poor substitute for actual notice, and its justification is difficult at best. *Eisen*, 417 U.S. at 175. As the United States Supreme Court commented in *Mullane*, 339 U.S. at 315:

> It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. …Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed.

Under Rule 23, notice by publication is insufficient for class members whose names and addresses can be obtained through reasonable effort; they must receive individual notice by first class mail. *Eisen*, 417 U.S. at 173-77.

It is unclear, however, whether that is a requirement of constitutional dimension. One interpretation is that "where members of a class have a

substantial claim, individual notice is required because it is essential for them to decide whether to remain as members of the class and become bound by the rule of res judicata; whether to intervene with their own counsel; or whether to 'opt out' and pursue their independent remedies." Cooper v. American Sav. & Loan Ass'n, 55 Cal. App. 3d 274, 285, 127 Cal. Rptr. 579 (1976) (emph. added). In contrast, "when the membership of the class is huge, the damages are minimal, and res judicata and the other problems listed in the first group are insignificant, notice by publication is adequate." *Id.; see also* Civ. Code § 1781 (authorizing notice by publication "if personal notification is unreasonably expensive or it appears that all members of the class cannot be notified personally").

The staff finds significant, however, the following passage from *Mullane*, 339 U.S. at 315, quoted with approval in *Eisen*, 417 U.S. at 174:

> [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected.

These comments focus on whether the notice is reasonably calculated to inform the intended recipient of the pending lawsuit, not whether the expense of providing individual notice is reasonable. Where the names and addresses of absentees are ascertainable with reasonable effort, those persons may be entitled to individual notice regardless of the expense involved. "There is nothing in Rule 23 to suggest that the [statutory] notice requirements can be tailored to fit the pocketbooks of particular plaintiffs." *Eisen*, 417 U.S. at 176; *see also In re* Victor Technologies Securities Litigation, 792 F.2d 862 (9th Cir. 1986) (requiring plaintiffs not only to provide postage-paid notices to brokerage houses, but also to offer to reimburse the record owners for the costs of forwarding the notice). The same may be true of constitutional notice requirements.

Although individual notice is likely to be mandatory in most instances, the California Supreme Court has determined that in some circumstances California defendants may be required to bear the cost of initial notice to absentees. *See, e.g.*, Civil Service Employees Ins. Co. v. Superior Court, 22 Cal. 3d 362, 374-81, 584 P.2d 497, 149 Cal. Rptr. 360 (1978); *see also* Civ. Code § 1781 ("If the action is permitted as a class action, the court may direct either party to notify each member of the class of the action."). The Court has explained:

> In the absence of such a cost-shifting procedure, the class action mechanism might frequently be completely frustrated since the representative plaintiff, whose individual claim will ordinarily be relatively small, may often be unable to afford the initial cost of notifying all absent members of the pendency of the action. [Cite omitted.] Under such circumstances, a defendant who may have improperly inflicted a small financial loss upon a great number of people could succeed in defeating a class action suit without regard to the strength of the plaintiff's claim. [Cite omitted.] In light of the public interest in establishing a procedure that permits such actions to be decided on their merits, such a cost-shifting procedure is neither arbitrary nor irrational and thus does not abridge substantive due process guarantees.

Civil Service Employees Ins. Co., 22 Cal. 3d at 377-78. Whether the United States Supreme Court would agree with this analysis remains to be seen.

In sum, the due process requirements governing the manner of providing mandatory notice to absentees in representative suits seem to be:

• For absentees whose names and addresses are not reasonably ascertainable, notice by publication or some other reasonable method will suffice.

• For absentees whose names and addresses are reasonably ascertainable, due process requires individual notice by first class mail, perhaps even where the amount at stake for each absentee is minimal and the cost prohibitive. Under California if not federal law, defendants may be ordered to bear the cost of notice, at least in some circumstances.

If Notice Is Constitutionally Required, Must It Be Received?

In *Shutts*, the Court says that absent plaintiffs must *receive* notice, not just that absent plaintiffs must be *given* notice. 472 U.S. at 812. Nonetheless, "courts generally have ruled that an absent class member will be bound by any judgment that is entered if appropriate notice is given, even though that individual never actually received notice." 7B C. Wright, *supra*, § 1789, at 253. As the Ninth Circuit recently stated: "We do not believe that *Shutts* changes the traditional standard for class notice from 'best practicable' to 'actually received' notice." Silber v. Mabon, 18 F.3d 1449, 1454 (9th Cir. 1994); *Ikonen*, 122 F.R.D. at 261.

OPPORTUNITY TO OPT OUT

In *Shutts*, the Court held that "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the

class by executing and returning an 'opt out' or 'request for exclusion' form to the court." 472 U.S. at 812. The Court specifically rejected the contention that due process requires absentees to affirmatively opt into the action, rather than merely refraining from opting out. *Id.*

Like the part of *Shutts* discussing notice requirements, these comments on opting out arguably apply only to absentees who lack ties to the forum state. *See Bell,* 226 Cal. App. 3d at 1611. The United States Supreme Court recently granted certiorari on this point, agreeing to decide "'[w]hether a federal court may refuse to enforce a prior federal class action judgment, properly certified under Rule 23, on grounds that absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf.'" *Ticor Title,* 114 S. Ct. at 1362. But the Court later dismissed the case, concluding that certiorari had been improvidently granted. *See id.*

However, "[c]ourts which have addressed the effect of *Shutts* on mandatory classes under rule 23(b)(1) and (b)(2) have interpreted the case as creating no due process right to opt out of such classes." *Bell,* 226 Cal. App. 3d at 1610. "[E]ven where a class action involves claims for money damages, mandatory non-opt-out class certification remains proper as long as the class claims for equitable or injunctive relief predominate over the claims for damages." White v. National Football League, 822 F. Supp. 1389, 1410 (D. Minn. 1993), *aff'd,* 41 F.3d 402 (8th Cir. 1994).

Thus, although it is not precisely clear when the privilege of opting out is constitutionally required, it generally seems to coincide with when notice of the pending suit is constitutionally required. That makes sense, because a major purpose of such notice is to inform absentees of their right to opt out. *See* 7B C. Wright, *supra,* § 1786, at 195-96. Where there is no right to opt out, "notice really serves only to allow [absentees] the opportunity to decide if they want to intervene or to monitor the representation of their rights." *Id.*

NOTICE OF DISMISSAL, COMPROMISE, OR OTHER RESULT

Although Rule 23 does not require notice to absentees at the inception of a (b)(1) or (b)(2) class action, it *does* require advance notice of a proposed dismissal or compromise in *all* types of class actions. Likewise, California courts have generally required notice to absentees prior to dismissal of representative actions.

See, e.g., La Sala v. American Sav. & Loan Ass'n, 5 Cal. 3d 864, 872-74, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971).

The United States Supreme Court has not resolved the exact importance of such notice as a matter of due process, but lower courts regard notice of a proposed dismissal or compromise as highly significant, as well as whether absentees have an opportunity to be heard in connection with such a proposal, and whether court approval is a prerequisite to effectiveness of the dismissal or compromise. For example, in *White*, 822 F. Supp. at 1412, the court said:

> Even though class members in the present case may not opt out, the court concludes that the requirements of due process have been satisfied because the objectors have been: (1) adequately represented by the named plaintiffs; (2) adequately represented by capable and experienced class counsel; (3) provided with adequate notice of the proposed settlement; (4) given an opportunity to object to the settlement; and (5) assured that the settlement will not be approved unless the court, after analyzing the facts and law of the case and considering all objections to the proposed settlement, determines it to be fair, reasonable and adequate.

See also Bell, 226 Cal. App. 3d at 1610. Similarly, in Bruno v. Superior Court, 127 Cal. App. 3d 120, 129, 179 Cal. Rptr. 342 (1981), the court made clear that in distributing moneys paid by defendants, due process requires "notice and claim procedures that give class members an adequate opportunity to obtain their individual shares …."

The notice of settlement or other result should provide sufficient information in unbiased form for absentees to rationally decide what, if any, action to take in response:

> Due process requires that notice of a hearing to review the compromise of a class suit be structured in terms of content in a manner that enables class members rationally to decide whether they should intervene in the settlement proceedings or otherwise make their views known, and if they choose to become actively involved, to have sufficient opportunity to prepare their position.

Reynolds v. National Football League, 584 F.2d 280, 284 (8th Cir. 1978); *see also* Trotsky, 48 Cal. App. 3d at 151-52.

It seems clear, however, that where absentees have already been notified of the pendency of a class action and their right to opt out of it, notice of settlement or other result need *not* afford absentees a second opportunity to opt out of the

suit. Officers for Justice v. Civil Service Comm'n, 688 F.2d 615, 635 (9th Cir. 1982), *cert. denied,* 459 U.S. 1217 (1983). "'[A]llowing objectors to opt out would discourage settlements because class action defendants would not be inclined to settle where the result would likely be a settlement applicable only to class members with questionable claims, with those having stronger claims opting out to pursue their individual claims separately.'" *Id., quoting* Kincade v. General Tire & Rubber Co., 635 F.2d 501, 507 (5th Cir. 1981); *see also* People v. Pacific Land Research Co., 20 Cal. 3d at 16-17.

DOES CONSULTANT'S DRAFT COMPLY WITH DUE PROCESS REQUIREMENTS ?

Professor Fellmuth proposes to modify unfair competition law through changes in the Code of Civil Procedure. See First Supp. to Mem. 95-14, at Exhibit pp. 1-4. Aside from the concerns already expressed regarding adequate representation and community of interest, are there constitutional impediments to his proposal? The staff has the following comments:

(1) The draft proposal does not require notice to absentees at the inception of an action, just notice of the proposed terms of any judgment at least 45 days prior to the entry of final judgment. These types of notice are not interchangeable: Absentees' ability to monitor and enter into an action "may be substantially impaired if [they] are not notified of the suit's existence until shortly before a judgment is entered." 7B C. Wright, *supra,* § 1786, at 198.

As discussed above, however, due process does not always require notice at the inception of an action. If courts stress the equitable nature of restitution, rather than its monetary nature akin to damages, they may conclude that notice at inception is never necessary in a "pure" unfair competition case. Further, although notice at inception may be required where unfair competition claims are combined with large damage claims, the remedy for failure to provide such notice may leave the unfair competition result intact. *See generally* Tetzlaff v. Swinney, 678 F. Supp. 812 (D. Nev. 1987) (prior adjudication was binding as to injunctive and declaratory relief, but not as to damages, because notice of pendency of the action was not provided).

Thus, requiring only notice of proposed unfair competition judgments, not notice of inception of such actions, may prove constitutionally acceptable. Whether it in fact does may well turn on how individualized proof of restitution

tends to be, in comparison with proof of damages. Perhaps the Commission should solicit comments on this point.

(2) The draft proposal calls for notice of proposed judgments 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 ….

Notably, the proposal does not require individualized notice to the injured persons. The staff considers that a serious constitutional problem, particularly where the names and addresses of the injured persons are reasonably ascertainable, the number of such persons is manageable, and their claims are not *de minimis.* Although the draft allows for notice to "the general public through newspaper publication, *or such other form of notice as specified by the court"* (emph. added), the staff questions whether this provides sufficient leeway and guidance to ensure constitutional compliance.

(3) The draft proposal only requires notice of the proposed terms of the judgment, not notice of the right to be heard or notice of sufficient information to allow persons to make rational decisions regarding involvement in the action. This is a minor flaw and could easily be fixed.

(4) Under Professor Fellmuth's proposal, prior to entry of a final judgment, persons would be entitled to "remove themselves from collateral estoppel coverage." This poses the specter of one-way intervention: If the proposed judgment is favorable, absentees will accept it; otherwise they will exclude themselves from coverage, particularly if their individual claims are weak. The resultant burdens on defendants may withstand constitutional attack, at least at the state level. *See Pacific Land Research,* 20 Cal. 3d at 16-20. Nonetheless, the staff questions whether allowing one-way intervention is a sound approach. If absentees are to have an opportunity to opt out at all, they should be notified of it

and required to exercise it at an early stage of the case, not when the outcome of the case is apparent.

(5) Lastly, the draft proposal would statutorily specify the res judicata and collateral estoppel effect of an unfair competition judgment. But if the procedure used in an unfair competition action complies with due process, res judicata and collateral estoppel effect should follow naturally, without the necessity of statutory guidance. Although a statutory pronouncement may not intrude on court prerogatives to the extent of violating separation of powers (a point the staff has not researched), the staff wonders whether it would add much of value.

CONCLUSION

The precise boundaries of due process are unclear. It is challenging to draft a statute complying with them, yet not imposing costly and unnecessary procedural burdens.

Professor Fellmuth's proposal raises a number of constitutional issues, perhaps the most serious of which is the tension between the broad standing provisions of California's unfair competition statutes, and the due process requirements of adequate representation and community of interest. The staff also urges close attention to the manner of providing notice to persons affected by an unfair competition action.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

UNITED STATES CODE ANNOTATED
RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS
IV. PARTIES
[Amendments received to 11-7-94]

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class.

The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Cal. Code Civ. Proc. § 382. Lack of consent to joinder as plaintiff; representative actions

382. If the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

CHAPTER 1. GENERAL PROVISIONS

Section
1750. Citation.
1751. Waiver: public policy.
1752. Cumulative remedies: class actions.
1753. Partial invalidity.
1754. Exemptions: structures.
1755. Exemptions: advertising media.
1756. Time of application of title.
1757. Renumbered.
1758, 1759. Repealed.

§ 1750. Citation

This title may be cited as the Consumers Legal Remedies Act. *(Added by Stats.1970, c. 1550, p. 3157, § 1.)*

Cross References

Consumer affairs, see Business and Professions Code § 300 et seq.

§ 1751. Waiver; public policy

Any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void. *(Added by Stats.1970, c. 1550, p. 3157, § 1.)*

§ 1752. Cumulative remedies; class actions

The provisions of this title are not exclusive. The remedies provided herein for violation of any section of this title or for conduct proscribed by any section of this title shall be in addition to any other procedures or remedies for any violation or conduct provided for in any other law.

Nothing in this title shall limit any other statutory or any common law rights of the Attorney General or any other person to bring class actions. Class actions by consumers brought under the specific provisions of Chapter 3 (commencing with Section 1770) of this title shall be governed exclusively by the provisions of Chapter 4 (commencing with Section 1780); however, this shall not be construed so as to deprive a consumer of any statutory or common law right to bring a class action without resort to this title. If any act or practice proscribed under this title also constitutes a cause of action in common law or a violation of another statute, the consumer may assert such common law or statutory cause of action under the procedures and with the remedies provided for in such law. *(Added by Stats. 1970, c. 1550, p. 3157, § 1. Amended by Stats.1975, c. 615, p. 1344, § 1.)*

Cross References

Attorney general, powers and duties, see Government Code § 12510 et seq.
Class actions, see Code of Civil Procedure § 382.
Consumer affairs, see Business and Professions Code § 300 et seq.

§ 1753. Partial invalidity

If any provision of this title or the application thereof to any person or circumstance is held to be unconstitutional, the remainder of the title and the application of such provision to other persons or circumstances shall not be affected thereby. *(Added by Stats.1970, c. 1550, p. 3157, § 1.)*

§ 1754. Exemptions; structures

The provisions of this title shall not apply to any transaction which provides for the construction, sale, or construction and sale of an entire residence or all or part of a structure designed for commercial or industrial occupancy, with or without a parcel of real property or an interest therein, or for the sale of a lot or parcel of real property, including any site preparation incidental to such sale. *(Added by Stats.1970, c. 1550, p. 3157, § 1.)*

§ 1755. Exemptions; advertising media

Nothing in this title shall apply to the owners or employees of any advertising medium, including, but not limited to, newspapers, magazines, broadcast stations, billboards and transit ads, by whom any advertisement in violation of this title is published or disseminated, unless it is established that such owners or employees had knowledge of the deceptive methods, acts or practices declared to be unlawful by Section 1770. *(Added by Stats.1970, c. 1550, p. 3157, § 1.)*

Cross References

False advertising, broadcasters and publishers acting in good faith, see Business and Professions Code § 17502.

§ 1756. Time of application of title

The substantive and procedural provisions of this title shall only apply to actions filed on or after January 1, 1971. *(Added by Stats.1970, c. 1550, p. 3158, § 1.)*

§ 1757. Renumbered § 1785.8 and amended by Stats. 1973, c. 167, p. 467, § 9.

§§ 1758, 1759. Repealed by Stats.1963, c. 819, p. 1997, § 2, eff. Jan. 1, 1965

CHAPTER 2. CONSTRUCTION AND DEFINITIONS

Section
1760. Construction and application.
1761. Definitions.
1762 to 1769. Repealed.

§ 1760. Construction and application

This title shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection. *(Added by Stats.1970, c. 1550, p. 3158, § 1.)*

Cross References

Consumer affairs, see Business and Professions Code § 300 et seq.

§ 1761. Definitions

As used in this title:

(a) "Goods" means tangible chattels bought or leased for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for these goods, and including goods which, at the time of the sale or subsequently, are to be so affixed to real property as to become a part of * * * real property, whether or not severable therefrom.

(b) "Services" means work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods.

(c) "Person" means an individual, partnership, corporation, limited liability company, association, or other group, however organized.

(d) "Consumer" means an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes.

(e) "Transaction" means an agreement between a consumer and any other person, whether or not the agreement is a contract enforceable by action, and includes the making of, and the performance pursuant to, that agreement.

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

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

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

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

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

(2) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. *(Added by Stats.1970, c. 1550, p. 3157, § 1. Amended by Stats.1988, c. 823, § 2; Stats.1994, c. 1010 (S.B.2053), § 34.)*

§§ 1762 to 1769. Repealed by Stats.1963, c. 819, p. 1997, § 2, eff. Jan. 1, 1965

CHAPTER 3. DECEPTIVE PRACTICES

Section
1770. List of proscribed practices.
1771 to 1779. Repealed.

Cross References

Law governing class actions under this chapter, see § 1752.

§ 1770. List of proscribed practices

The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:

(a) Passing off goods or services as those of another.

(b) Misrepresenting the source, sponsorship, approval, or certification of goods or services.

(c) Misrepresenting the affiliation, connection, or association with, or certification by, another.

(d) Using deceptive representations or designations of geographic origin in connection with goods or services.

(e) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have.

(f) Representing that goods are original or new if they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used, or secondhand.

(g) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.

(h) Disparaging the goods, services, or business of another by false or misleading representation of fact.

(i) Advertising goods or services with intent not to sell them as advertised.

(j) Advertising goods or services with intent not to supply reasonably expectable demand, unless the advertisement discloses a limitation of quantity.

(k) Advertising furniture without clearly indicating that it is unassembled if such is the case.

(*l*) Advertising the price of unassembled furniture without clearly indicating the assembled price of such furniture if the same furniture is available assembled from the seller.

(m) Making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions.

(n) Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law.

(*o*) Representing that a part, replacement, or repair service is needed when it is not.

(p) Representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not.

(q) Representing that the consumer will receive a rebate, discount, or other economic benefit, if the earning of the benefit is contingent on an event to occur subsequent to the consummation of the transaction.

(r) Misrepresenting the authority of a salesperson, representative, or agent to negotiate the final terms of a transaction with a consumer.

(s) Inserting an unconscionable provision in the contract.

(t) Advertising that a product is being offered at a specific price plus a specific percentage of that price unless (1) the total price is set forth in the advertisement, which may include, but is not limited to, shelf tags, displays, and media advertising, in a size larger than any other price in that advertisement, and (2) the specific price plus a specific percentage of that price represents a markup from the seller's costs or from the wholesale price of the product. This subdivision shall not apply to in-store advertising by businesses which are open only to members or cooperative organizations organized pursuant to Division 3 (commencing with Section 12000) of Title 1 of the Corporations Code where more than 50 percent of purchases are made at the specific price set forth in the advertisement.

(u) Selling or leasing goods in violation of Chapter 4 (commencing with Section 1797.8) of Title 1.7.

(v) (1) Disseminating an unsolicited prerecorded message by telephone without an unrecorded, natural voice first informing the person answering the telephone of the name of the caller or the organization being represented, and either the address or the telephone number of the caller, and without obtaining the consent of that person to listen to the prerecorded message.

(2) This subdivision does not apply to a message disseminated to a business associate, customer, or other person having an established relationship with the person or organization making the call, to a call for the purpose of collecting an existing obligation, or to any call generated at the request of the recipient. *(Added by Stats.1970, c. 1550, p. 3157, § 1. Amended by Stats.1975, c. 379, p. 853, § 1; Stats.1979, c. 819, p. 2827, § 4, eff. Sept. 19, 1979; Stats.1984, c. 1171, § 1; Stats.1986, c. 1497, § 1; Stats.1990, c. 1641 (A.B.4084), § 1.)*

Cross References

Advertisement defined, see Health and Safety Code § 26002.
Advertising by travel promoters, see Business and Professions Code § 17540.6.
Advertising secondhand, used, defective, second grade or blemished merchandise, see Business and Professions Code § 17531.
American Indian made articles, see Business and Professions Code § 17569 et seq.
Butter substitutes, passing off as butter, see Food and Agricultural Code §§ 39431, 39432.
Canneries, mislabeling and false advertising, see Health and Safety Code § 28366.
Check sellers and cashers, false advertising, see Financial Code § 12311.
Circulation of newspapers or periodicals, misrepresentation, see Business and Professions Code § 17533.
Coal, sale of one kind as another kind, see Business and Professions Code § 17532.
Contracts with rebate contingent upon happening of future event, see § 1803.10.
Dance studio lesson contracts, invalidity for fraud, see § 1812.60.
Deceit, see § 1710.
Defense of good faith, see § 1784.
Exemption of advertising media without knowledge of practices listed in this section, see § 1755.
Explosives, deceptive marking, see Health and Safety Code § 12088.
Fair packaging and labeling, see Business and Professions Code § 12601 et seq.; Health and Safety Code § 26430 et seq.
False advertising,
Generally, see Business and Professions Code § 17500 et seq.; Health and Safety Code §§ 26400, 26460 et seq.
Private detectives, see Business and Professions Code § 7561.3.
Fraud, see § 1571 et seq.
Health care service plans, deceptive advertising, see Health and Safety Code §§ 1360, 1361.
Health studio service contracts, invalidity for fraud, see § 1812.92.
Label requirements, etc., see Health and Safety Code § 26401 et seq.
Liability of agents, see Business and Professions Code § 17095 et seq.
Limitation of actions, see § 1783.
"Made in U.S.A." label on goods made elsewhere, see Business and Professions Code § 17533.7.
Milk containers, deceptive advertising, see Food and Agricultural Code § 36061.
Misbranded cosmetics, see Health and Safety Code § 26730 et seq.
Misrepresentation of products as made by blind persons, see Business and Professions Code § 17522.
Motel and motor court rate signs, see Business and Professions Code § 17560 et seq.
Outdoor advertising, see Business and Professions Code § 5200 et seq.
"Pasteurized", use of word in advertising, see Food and Agricultural Code § 34091.
Penalties for unfair trade practices, see Business and Professions Code § 17100 et seq.
Preliminary notices and demands, see § 1782.
Price of articles purchased at forced closeout or bankrupt sale, etc., advertising, see Business and Professions Code § 17027.
Removal of manufacturer's distinguishing identification mark from mechanical or electrical devices, see § 1710.1.
Secret rebates, refunds, etc., see Business and Professions Code § 17045.
Television picture tube labeling, see Business and Professions Code § 17531.5 et seq.
Unadvertised restrictions on quantity of articles advertised, see Business and Professions Code § 17500.5.
Unfair competition, see § 3369; Business and Professions Code § 17000 et seq.
Unfair trade practices, see Business and Professions Code § 17000 et seq.

§§ 1771 to 1779. Repealed by Stats.1963, c. 819, p. 1997, § 2, eff. Jan. 1, 1965

CHAPTER 4. REMEDIES AND PROCEDURES

Section

Cross References

Application of chapter to class actions, see § 1752.

§ 1780. Consumer's action; relief; senior citizens or disabled persons; venue; court costs and attorney's fees

(a) Any consumer who suffers any damage as a result of the use or employment by any person of a method,

act, or practice declared to be unlawful by Section 1770 may bring an action against such person to recover or obtain any of the following:

(1) Actual damages, but in no case shall the total award of damages in a class action be less than one thousand dollars ($1,000).

(2) An order enjoining such methods, acts, or practices.

(3) Restitution of property.

(4) Punitive damages.

(5) Any other relief which the court deems proper.

(b) Any consumer who is a senior citizen or a disabled person, as defined in subdivisions (f) and (g) of Section 1761, as part of an action under subdivision (a), may seek and be awarded, in addition to the remedies specified therein, up to five thousand dollars ($5,000) where the trier of fact (1) finds that the consumer has suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct, (2) makes an affirmative finding in regard to one or more of the factors set forth in subdivision (b) of Section 3345, and (3) finds that an additional award is appropriate. Judgment in a class action by senior citizens or disabled persons under Section 1781 may award each class member such an additional award where the trier of fact has made the foregoing findings.

(c) An action under subdivision (a) or (b) may be commenced in the county in which the person against whom it is brought resides, has his or her principal place of business, or is doing business, or in the county where the transaction or any substantial portion thereof occurred.

If within any such county there is a municipal or justice court, having jurisdiction of the subject matter, established in the city and county or judicial district in which the person against whom the action is brought resides, has his or her principal place of business, or is doing business, or in which the transaction or any substantial portion thereof occurred, then such court is the proper court for the trial of such action. Otherwise, any municipal or justice court in such county having jurisdiction of the subject matter is the proper court for the trial thereof.

In any action subject to the provisions of this section, concurrently with the filing of the complaint, the plaintiff shall file an affidavit stating facts showing that the action has been commenced in a county or judicial district described in this section as a proper place for the trial of the action. If a plaintiff fails to file the affidavit required by this section, the court shall, upon its own motion or upon motion of any party, dismiss any such action without prejudice.

(d) The court shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section. Reasonable attorney's fees may be awarded to a prevailing defendant upon a finding by the court that the plaintiff's prosecution of the action was not in good faith. *(Added by Stats.1970, c. 1550, p. 3157, § 1. Amended by Stats.1988, c. 823, § 3. Amended by Stats.1988, c. 823, § 3; Stats.1988, c. 1343, § 2.)*

Cross References

Actions subject to title, time, see § 1756.
Consumer affairs, see Business and Professions Code § 300 et seq.
Corrective steps as bar to action, see § 1782.
Damages for fraudulent deceit, see § 1709.
Dance studio lesson contracts, invalidity for fraud, see § 1812.60.
Exemplary damages, see § 3294.
False corporate financial statements, liability, see Corporations Code § 1507.
Health studio service contracts, invalidity for fraud, see § 1812.92.
Injunction against unfair competition, see § 3369.
Injunction against unfair trade practices, see Business and Professions Code §§ 17070, 17078 et seq.
Injunction against violation of television picture tube labeling requirements, see Business and Professions Code § 17531.9.
Injunctions, see § 3420 et seq.
Liability of agents, see Business and Professions Code § 17095 et seq.
Penal damages, see § 3345.
Penalties for unfair trade practices, see Business and Professions Code § 17100 et seq.
Representation of consumers, see Business and Professions Code §§ 320, 321.

§ 1781. Consumer's class action; conditions; notices; judgment

(a) Any consumer entitled to bring an action under Section 1780 may, if the unlawful method, act, or practice has caused damage to other consumers similarly situated, bring an action on behalf of himself and such other consumers to recover damages or obtain other relief as provided for in Section 1780.

(b) The court shall permit the suit to be maintained on behalf of all members of the represented class if all of the following conditions exist:

(1) It is impracticable to bring all members of the class before the court.

(2) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members.

(3) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class.

(4) The representative plaintiffs will fairly and adequately protect the interests of the class.

(c) If notice of the time and place of the hearing is served upon the other parties at least 10 days prior thereto, the court shall hold a hearing, upon motion of any party to the action which is supported by affidavit of any person or persons having knowledge of the facts, to determine if any of the following apply to the action:

(1) A class action pursuant to subdivision (b) is proper.

(2) Published notice pursuant to subdivision (d) is necessary to adjudicate the claims of the class.

(3) The action is without merit or there is no defense to the action.

A motion based upon Section 437c of the Code of Civil Procedure shall not be granted in any action commenced as a class action pursuant to subdivision (a).

(d) If the action is permitted as a class action, the court may direct either party to notify each member of the class of the action. The party required to serve notice may, with the consent of the court, if personal notification is unreasonably expensive or it appears that all members of the class cannot be notified personally, give notice as prescribed herein by publication in accordance with Section 6064 of the Government Code in a newspaper of general circulation in the county in which the transaction occurred.

(e) The notice required by subdivision (d) shall include the following:

(1) The court will exclude the member notified from the class if he so requests by a specified date.

(2) The judgment, whether favorable or not, will include all members who do not request exclusion.

(3) Any member who does not request exclusion, may, if he desires, enter an appearance through counsel.

(f) A class action shall not be dismissed, settled, or compromised without the approval of the court, and notice of the proposed dismissal, settlement, or compromise shall be given in such manner as the court directs to each member who was given notice pursuant to subdivision (d) and did not request exclusion.

(g) The judgment in a class action shall describe those to whom the notice was directed and who have not requested exclusion and those the court finds to be members of the class. The best possible notice of the judgment shall be given in such manner as the court directs to each member who was personally served with notice pursuant to subdivision (d) and did not request exclusion. *(Added by Stats.1970, c. 1550, p. 3157, § 1.)*

Cross References

Actions subject to title, time, see § 1756.
Arbitration, submission of at-issue civil actions, inapplicability to this section, see Code of Civil Procedure § 1141.11.
Class action, see Code of Civil Procedure § 382.
Consumer complaints, see Business and Professions Code § 325 et seq.
Liability of agents, see Business and Professions Code § 17095 et seq.
Representation of consumers, see Business and Professions Code § 320.

§ 1782. Preliminary notices and demands; defenses; injunctive relief; evidence

(a) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of this title, the consumer shall do the following:

(1) Notify the person alleged to have employed or committed methods, acts or practices declared unlawful by Section 1770 of the particular alleged violations of Section 1770.

(2) Demand that such person correct, repair, replace or otherwise rectify the goods or services alleged to be in violation of Section 1770.

Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, such person's principal place of business within California, or, if neither will effect actual notice, the office of the Secretary of State of California.

(b) Except as provided in subdivision (c), no action for damages may be maintained under the provisions of Section 1780 if an appropriate correction, repair, replacement or other remedy is given, or agreed to be given within a reasonable time, to the consumer within 30 days after receipt of such notice.

(c) No action for damages may be maintained under the provisions of Section 1781 upon a showing by a person alleged to have employed or committed methods, acts or practices declared unlawful by Section 1770 that all of the following exist:

(1) All consumers similarly situated have been identified, or a reasonable effort to identify such other consumers has been made.

(2) All consumers so identified have been notified that upon their request such person shall make the appropriate correction, repair, replacement or other remedy of the goods and services.

(3) The correction, repair, replacement or other remedy requested by such consumers has been, or, in a reasonable time, shall be, given.

(4) Such person has ceased from engaging, or if immediate cessation is impossible or unreasonably expensive under the circumstances, such person will, within a reasonable time, cease to engage, in such methods, act, or practices.

(d) An action for injunctive relief brought under the specific provisions of Section 1770 may be commenced without compliance with the provisions of subdivision (a). Not less than 30 days after the commencement of an action for injunctive relief, and after compliance with the provisions of subdivision (a), the consumer may amend his complaint without leave of court to include a request for damages. The appropriate provisions of subdivision (b) or (c) shall be applicable if the complaint for injunctive relief is amended to request damages.

(e) Attempts to comply with the provisions of this section by a person receiving a demand shall be construed to be an offer to compromise and shall be inadmissible as evidence pursuant to Section 1152 of the Evidence Code; furthermore, such attempts to comply with a demand shall not be considered an admission of engaging in an act or practice declared unlawful by Section 1770. Evidence of compliance or attempts to comply with the provisions of this section may be introduced by a defendant for the purpose of establishing good faith or to show compliance with the provisions of this section. *(Added by Stats.1970, c. 1550, p. 3157, § 1.)*

Cross References

Actions subject to title, time, see § 1756.
Injunction against unfair competition, see § 3369.
Injunction against unfair trade practices, see Business and Professions Code §§ 17070, 17078 et seq.

Injunction against violation of television picture tube labeling requirements, see Business and Professions Code § 17531.9.

§ 1783. Limitation of actions

Any action brought under the specific provisions of Section 1770 shall be commenced not more than three years from the date of the commission of such method, act, or practice. *(Added by Stats.1970, c. 1550, p. 3157, § 1.)*

Cross References

Actions subject to title, time, see § 1756.
Damages, generally, see §§ 3274, 3281 et seq.
Three year statute of limitations, see Code of Civil Procedure § 338.

§ 1784. Damages, defense

No award of damages may be given in any action based on a method, act, or practice declared to be unlawful by Section 1770 if the person alleged to have employed or committed such method, act, or practice (a) proves that such violation was not intentional and resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid any such error and (b) makes an appropriate correction, repair or replacement or other remedy of the goods and services according to the provisions of subdivisions (b) and (c) of Section 1782. *(Added by Stats.1970, c. 1550, p. 3157, § 1.)*

Cross References

Actions subject to title, time, see § 1756.

§ 1785. Repealed by Stats.1963, c. 819, p. 1997, § 2, eff. Jan. 1, 1965