

Memorandum 95-43

Unfair Competition: Draft of Tentative Recommendation (Statute)

At the June meeting, the Commission outlined the basic elements of a statute concerning unfair competition litigation. Attached to this memorandum is a draft statute that would implement the Commission decisions. The draft is being distributed before the explanatory text of the tentative recommendation is completed so that interested persons will have more time to review it. The explanatory text will follow in the form of a supplement to this memorandum.

A draft prepared by the Commission's consultant, Professor Robert Fellmeth, is attached as an exhibit. (See Exhibit pp. 1-6.) The attached draft is a revision of Prof. Fellmeth's earlier draft, that takes into account the discussion at the June meeting, and contains some new commentary from Prof. Fellmeth. This material has been very useful to the staff in preparing the draft statute for Commission consideration. The Commission should review Prof. Fellmeth's draft for useful features that may have been omitted from the staff draft.

A letter from Thomas Papageorge along with a proposed statute prepared by the California District Attorneys Association Consumer Protection Committee is attached as Exhibit pp. 7-9. This material was distributed at the June meeting, but is worth further consideration in the context of reviewing the staff draft. The staff also found this draft helpful in preparing the draft statute.

At the September meeting, we plan to proceed through the draft section by section. Several issues are raised in staff notes following relevant sections, and other issues will no doubt arise in the discussion at the meeting. However, if final decisions can be made on essential language, it may be possible to approve a tentative recommendation to be distributed for comment after the September meeting.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

JUL-12-1995 17:47

IPIL:CAI

5192504806 P.02

UNFAIR COMPETITION LIMITED VERSION THROUGH CCP CLARIFICATION

This is a revised version of Professor Fellmeth's Alternative Draft, which was discussed at the San Diego meeting of June 29, 1995. This version incorporates the suggestions of the California District Attorneys' Association as to the public/private conflicts, and the suggestions of Harry Snyder/Gail Hillebrand and Commission members as to private/private conflicts and safeguards. In terms of the private/private conflicts, and as discussed at the meeting, the *res judicata* effect is confined to cases brought on behalf of the "general public" or on behalf of other, unnamed parties; while preserving the relitigation rights of any individual as to restitution or damages (unless double recovery would result). If the parties and court wish to bind absent parties, there must be satisfactory notice - as specified in staff's analysis.

Code Civ. Proc. 382.5 (added). Action on behalf of general public under Business and Professions Code Section 17204 or 17535
 SEC. ____ . Section 382.5 is added to the Code of Civil Procedure, to read:

§ 382.5. (a) Where there is a conflict in representation between private parties representing members of the public who are not named parties, and a public prosecutor representing the general public, and that conflict pertains to defendants based on the same alleged acts and bases for liability, pursuant to Section 382 or 382.5, or Business and Professions Code Sections 17204 or 172353, or otherwise covering the same acts, bases for liability, and remedies, the public prosecutor is presumed to be a superior representative of the public, and particularly of the members of the public within his or her jurisdiction.

(1) Such a presumption is rebuttable where another party can demonstrate:

(A) a substantial conflict-of-interest on the part of the public prosecutor in the representation of the relevant public which is not present in the case of an alternative party and counsel; or

(B) resource or expertise inadequacy in representation by the public prosecutor, and where substantially superior resources and expertise are alternatively available.

(2) The selection of proper party and counsel to proceed on behalf of the general public or absent class members, where there is such a conflict, may be determined at any time and may be based on the initial pleadings of the actions in conflict.

(3) A judgment obtained by a public prosecutor involving restitution or monetary relief on behalf of the people in a civil

action pursuant to Chapter 5 (commencing with Section 17200) of Part 2 of Division 7 or Part 3 (commencing with Section 17500) of Division 7 of the Business and Professions Code is res judicata as to all other actions purporting to represent the general public or unnamed parties.

(A) Any preference decision shall be subject to the right of private counsel in such actions to obtain costs and attorney's fees pursuant to Section 1021.5 or other applicable theories.

(B) Where preference is granted to a public prosecutor, the timely notice by private counsel of the planned or filed private action, and assistance to the public prosecutor, shall be relevant in meeting the requirement of beneficial contribution under Section 1021.5. Advance notice may be sent to: the consumer Law Section of the Office of Attorney General, the consumer department or division of the district attorney of the county in which the action is to be commenced; if the action is to be commenced in a city with a population over 750,000 persons, the city attorney. Where such beneficial contribution has occurred, the private plaintiff need not prevail himself in order to qualify for attorney fee recompense under Section 1021.5.

(4) Such a judgment shall be res judicata as to actions brought by named individuals for restitution or damages on their own behalf, where the following conditions are met:

(A) Notice is given sufficient to protect the due process rights of absent members of the public who may be collaterally estopped by the public action, either by individual notice, or by publication or other forms of notice ordered by the court if individual notice is not practical, of the terms of the restitution and of the time and place of a public court hearing to consider its approval.

(B) At or before the hearing, a person desiring to opt out of the injunctive or restitutionary terms of the judgment as applicable to him or her shall have an opportunity to be so excluded.

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

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

Comment: This revision of the public/private conflict problem is based on the CDAA draft and subsequent discussion by the Commission. It amends the Code of Civil Procedure.

It creates a rebuttable presumption that the public prosecutor is a superior representative of the general public, particularly those within his or her own jurisdiction. However, as discussed with the Commission, where a private public interest counsel can demonstrate either a conflict or inadequate resources vis-a-vis those available to private counsel, private representation is not precluded. Hence, to cite the extreme example noted in discussion, in the situation where the district attorney of a county with a population of 8,000 persons attempts to represent the consumers in the entire state for restitution and a leading public interest firm presents an alternative and superior representative, it may be considered.

There is no notice requirement to a public prosecutor included. Rather than a negative prohibition, the reformulation proposes a positive incentive to pre-notify and to cooperate with public prosecutors by providing that such notice and cooperation are relevant to a subsequent attorney fee claim under § 1021.5 which must measure "beneficial contribution" to the outcome.

There is also no notice or hearing requirement imposed on the public prosecutor in the normal course. And the conclusion of a case, including one imposing a restitutionary remedy, is res judicata as to any other person seeking to represent the general public or absent class members. As discussed at the Commission meeting, this would not bar an individual from seeking relief based on damages or harm to him or her. To obtain that more extensive res judicata effect, the public prosecutor would have to comply with the more extensive notice requirements constitutionally necessary to preclude remedy by those individually harmed. Although such a course would be rather rarely chosen by public prosecutors, provision is included for it.

Note also that (b)(3)(A) below requires that private plaintiffs serve any other public or private plaintiffs with pending cases against the defendant in advance of settlement. Hence, for example, if a public prosecutor has filed a case, it cannot be settled out by private counsel without notice and opportunity for a preference decision to be made.

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

(1) The plaintiff states such a cause of action separately from all others, and designates it as being brought "on behalf of the general public" pursuant to Chapter 5 (commencing with Section 17500) of Division 7 of the Business and Professions Code within the pleadings.

(2) The court finds both of the following:

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

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

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

(A) Any other party with a case pending against the same defendant or defendants based on the similar facts and theories of liability;

(B) To any regulatory agency with jurisdiction over the defendant relevant to the allegations in the pleadings; and

(C) To a registry of such actions to be maintained by the Attorney General and available to any person requesting it upon payment of the cost of its provision.

(4) The court may grant such preliminary relief as may be necessary in the interests of equity prior to entry of final judgment and the required notice thereon.

(5) At the hearing to consider the final judgment, the court shall affirmatively inquire, whether or not other persons or objectors appear; and find that:

(A) the defendants have disclosed any other cases pending based on similar facts and theories of liabilities;

(B) the attorney's fees to be paid are appropriate

given the work undertaken, the risk involved, and the balance of relief between counsel and public beneficiaries;

(C) the plaintiffs and their counsel meet the requirements of (2) above, and have provided notice pursuant to (3) above.

(D) the pleadings and proposed stipulations and judgment are adequate and the entry of the judgment is in the interests of justice; and

(E) the complaint has not been amended or supplemented in a manner affecting the interests of the "general public" claimed, unless the court finds affirmatively that the relief granted satisfies those claims, and that the change in the pleadings does not prejudice members of the general public to be affected by the judgment.

(6) Such an action on behalf of the "general public" is *res judicata* only insofar as it bars actions on behalf of the general public or absent class members. Named parties bringing suit because of damage or harm to them individually are not collaterally estopped by the judgment unless the requirements of Section 382 are met.

(c) Notwithstanding (a) and (b) above, an individual may be collaterally estopped from litigating as to damages or harm he or she has suffered where he or she has accepted and benefitted from restitutionary relief granted to the general public or to others, sufficient to satisfy or recompense him or her for those claims.

Comment: This reformulated version corresponds to the discussion at the Commission meeting. Private parties may bring actions on behalf of the general public; however, they must be separately pled. They will collaterally estop any other person from bringing a similar action on behalf of the general public whose rights are being litigated, but will not bar individuals from bringing actions on their own behalf for damages or harm done to them (unless and to the extent the general public restitutionary relief which he or she benefitted from). Accordingly, the notice to be given is based not on the due process rights one has to not have others adjudicate as to his property, but the broader social issue of who should represent the general populace...persons other than the one filing suit.

Even though res judicata is limited to other attempts to represent parties not directly named and before the court, there are due process and justice implications, since a settlement will bar others from similarly resolving a case for the general public. However, the notice required is less, both because the property interest in representing other persons is much less, and because as a practical matter those interested in general public representation are able to monitor a registry. Accordingly, the notice requirements are not expensive, but allow those most likely to seek similar representation to contest a possibly abusive result. Regulatory agencies whose policies may well be implicated and any other parties with pending actions are notified, as is a registry kept with the Attorney General and available to requestors upon payment of costs (to prevent the registry from becoming a financial problem).

Finally, in addition to notice, the court is obligated to affirmatively inquire into lack of conflict, adequacy, and amendment of pleadings; and there is an obligation of disclosure of any other pending cases. These additional safeguards are appropriate since a large-scale resolution is being accomplished. Often this occurs in the context of practical control of the case by private counsel who is extracting what may be substantial attorney's fees; hence, each of the inquiries enumerated is relevant.

LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE
BUREAU OF SPECIAL OPERATIONS • CONSUMER PROTECTION DIVISION

GIL GARCETTI • District Attorney
SANDRA L. BUTTITTA • Chief Deputy District Attorney
R. DAN MURPHY • Assistant District Attorney

ROBERT F. KUHNERT • Director

June 28, 1995

Colin W. Wied, Chairperson
Stan Ulrich, Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Study B-700 -- Unfair Competition

Dear Chairperson Wied, Mr. Ulrich and Members:

I write on behalf of the California District Attorneys Association Consumer Protection Committee, as well as my own office, to provide further information on the views of public enforcement officials regarding the unfair competition issues under consideration by the Commission.

First let me express the thanks of all my colleagues for your kind consideration of the views of the public law enforcement community in this regard. Bus. & Prof. Section 17200 is the principal law enforcement tool used by California prosecutors to protect the public from unfair and deceptive business practices, and it has served the public very well in that role. While we agree that further clarification, especially on the principal issue of finality in public and private litigation, is appropriate, we especially appreciate your careful efforts to avoid hampering legitimate law enforcement uses of this statute.

In that regard, thank you for the assistance of Mr. Ulrich in providing questions of Commission interest for our recent statewide Economic Crime Prosecution Conference. This letter presents initial ideas and a draft proposal to help address some of those questions. Coming only a day after our committee's formal meeting on this subject, the following remarks will be brief, but further discussion of these ideas will follow shortly.

The issue of standing to represent the "general public" (see Section 17204), and the related issue of finality in the context of public and private litigation, merit the attention of the Commission. Although public officials believe problems in this area arise in a only very small percentage of cases, we nonetheless believe it may be fruitful to address these matters with greater clarity in California law.

In particular, where a public enforcement action under Section 17200 has been brought and appropriate remedies have been obtained on behalf of the people of the state, private litigants

have a reasonable interest in knowing that the matter is final. If the "general public" has already been well served by a public enforcement action, a defendant should be able to assert this as a defense to subsequent redundant private actions. In addition, as enforcement agencies serving the public under the leadership of elected officials, public prosecutors have a reasonable interest in precedence over substantially similar private actions purporting to represent the general public.

The attached draft proposal represents our initial view of a statute of more general application (to be located in the Code of Civil Procedure) which might properly address these reasonable concerns. This proposal provides that in matters brought by a private party acting "for the interests of the general public":

- The private action shall be stayed, upon the prosecutor's application, until the final judgment is reached in the public action;

- The defendant(s) shall have a complete defense to a substantially similar private action if the public judgment obtained appropriate injunctive and other relief;

- A rebuttable presumption of the sufficiency of the public judgment shall exist if so indicated by the court in the public judgment.

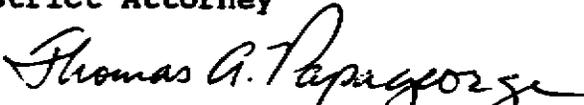
This proposal would address and resolve the most pressing of the concerns expressed in the Prof. Fellmeth's analysis of the present statute. Both finality of these matters and the role of private actions in defending the general public would be clarified. Inappropriately redundant private actions would be discouraged and a greater measure of finality promoted.

We invite your consideration of this proposal and welcome an opportunity to continue to provide input into your analysis of the important law enforcement statute. More detailed analysis of these and related issues will be provided as you might wish.

Thank you once again for your consideration of our views.

Best regards,

GIL GARCETTI
District Attorney

BY 
THOMAS A. PAPAGEORGE, Head Deputy
Consumer Protection Division

Chair, Legislative Subcommittee, CDAA
Consumer Protection Committee

Section 388.5 is added to the Code of Civil Procedure to read:

388.5 (a) For the purpose of this section, the following definitions apply:

(1) "Law enforcement agency" means the Attorney General, a district attorney, or a city attorney authorized by statute to bring an action in the name of the people of the State of California.

(2) "Private party" means a person acting for the interests of the general public.

(b) This section applies to actions pursuant to a statute providing a cause of action to a law enforcement agency and a private party to redress the violation of law.

(c) If a law enforcement agency and a private party have pending actions against the same defendant based on substantially similar alleged facts or violations of law, the court shall, upon the law enforcement agency's application, stay the private party's action, regardless of the order of filing or the stage of proceedings, until a final judgment is obtained in the law enforcement agency's action.

(d) It shall be a complete defense to an action brought by a private party that a final judgment was entered in another action involving substantially similar alleged facts and that the judgment provided an injunction sufficient in scope to protect the public from the recurrence of the alleged violations of law and any additional equitable relief or other orders reasonably necessary under the facts and circumstances to redress the alleged violations of law.

(e) A rebuttable presumption exists that a judgment obtained by a law enforcement agency provides the relief described in subdivision (d) if the court so indicated in the judgment. The law enforcement agency and its members may not involuntarily be called as witnesses or subject to Title 3 (commencing with Section 1985) of Part 4 of the Code of Civil Procedure in any proceeding to contest the presumption established by this subdivision.

(f) Nothing herein affects the right, if any, of a private party to seek appropriate relief pursuant to Section 1021.

UNFAIR COMPETITION LITIGATION

Code of Civ. Proc. §§ 385.10-385.44 (added). Representative actions	1
CHAPTER 5.5. REPRESENTATIVE ACTIONS ON BEHALF OF GENERAL PUBLIC	1
§ 385.10. Definitions	1
§ 385.20. Prerequisites for pleading representative cause of action	2
§ 385.22. Adequate legal representation	2
§ 385.24. Notice to Attorney General’s register	3
§ 385.26. Disclosure of similar cases against defendant	4
§ 385.28. Notice of terms of judgment	4
§ 385.30. Findings required for entry of judgment	5
§ 385.32. Preliminary relief	5
§ 385.34. Binding effect of representative action	6
[§ 385.36. Binding effect on individual claims — <i>included for purposes of discussion</i>]	7
§ 385.40. Priority between public prosecutor and private plaintiff	8
§ 385.42. Attorney’s fees	9
§ 385.44. Application of chapter to pending cases	9
Gov’t Code §§ 12660-12663 (added). Registry of unfair competition actions	10
Article 10. Representative Action Register	10
§ 12660. Establishment of representative action register	10
§ 12661. Rules and regulations	10
§ 12662. Distribution of representative action register	10
§ 12663. Costs of representative action register	10

1 **Code of Civ. Proc. §§ 385.10-385.44 (added). Representative actions**

2 SECTION 1. Chapter 5.5 (commencing with Section 385.10) is added to Title 3
3 of Part 2 of the Code of Civil Procedure, to read:

4 CHAPTER 5.5. REPRESENTATIVE ACTIONS ON
5 BEHALF OF GENERAL PUBLIC

6 ☞ **Staff Note.** In order to provide better organization, the draft has been placed following the
7 “Permissive Joinder” chapter, which contains Section 382, the subtly stated California class
8 action statute. “Permissive joinder” is not a very good description for parts of the existing of the
9 chapter, and it is not very descriptive of the subject of this draft. However, it is not inappropriate
10 to locate this statute on representative actions in this vicinity of the Code of Civil Procedure. Title
11 3 of this part of the Code of Civil Procedure — entitled “Of the Parties to Civil Actions” —
12 includes chapters entitled General Provisions, Married Person, Disability of Party, Effect of
13 Death, Permissive Joinder, Interpleader, Intervention, and Compulsory Joinder. Note that the
14 draft statute goes beyond the issue of parties and joinder, but so do several of the other existing
15 provisions. This part of the Code of Civil Procedure looks ripe for reorganization and revision by
16 an appropriate group.

17 **§ 385.10. Definitions**

18 385.10. As used in this chapter:

- 19 (a) “Private plaintiff” means a person other than a public prosecutor.

1 (b) “Public prosecutor” means the Attorney General or appropriate district
2 attorney, county counsel, city attorney, or city prosecutor.

3 (c) “Representative action” means an action that includes a representative cause
4 of action.

5 (d) “Representative cause of action” means a cause of action on behalf of the
6 general public under Section 17204 or 17535 of the Business and Professions
7 Code.

8 **Comment.** Section 385.10 defines terms used in this chapter. See also Section 17 (general
9 definitions). For public prosecutors empowered to bring actions for unfair competition or false
10 advertising, see, e.g., Bus. & Prof. Code §§ 17204, 17204.5, 17206.5, 17207, 17535, 17536.

11 ☞ **Staff Note.** The private plaintiff can be a certified class that is also suing in a representative
12 capacity on behalf of the non-class general public.

13 § 385.20. Prerequisites for pleading representative cause of action

14 385.20. (a) A private plaintiff may plead a representative cause of action on
15 behalf of the general public under Section 17204 or 17535 of the Business and
16 Professions Code only if the requirements of this chapter are satisfied.

17 (b) The plaintiff shall separately state the representative cause of action in the
18 pleadings, and shall designate the cause of action as being brought “on behalf of
19 the general public” under Section 17204 or 17535 of the Business and Professions
20 Code, as applicable.

21 **Comment.** Subdivision (a) of Section 385.20 provides the scope of this chapter. Subdivision
22 (b) provides a technical rule on the form of pleadings that include a representative cause of action
23 for unfair competition or false advertising under the Business and Professions Code. See Section
24 385.10(a) (“private plaintiff” defined).

25 ☞ **Staff Note.** This section presents an issue that crops up several times in the draft: to what
26 extent should these rules be applied to public prosecutors. As draft Section 385.20 is written, it
27 applies only to private plaintiffs. If it is to be applied to public prosecutors, then some
28 adjustments would need to be made because under the relevant Business and Professions Code
29 sections, public prosecutors bring actions “in the name of the people of the State of California.”

30 § 385.22. Adequate legal representation

31 385.22. (a) The attorney for a private plaintiff in a representative action must be
32 an adequate legal representative of the interests of the general public pled.

33 (b) Neither the private plaintiff nor the plaintiff’s attorney in a representative
34 action may have a conflict of interest that might compromise the good faith
35 representation of the interests of the general public pled.

36 (c) As soon as practicable after the commencement of the representative action,
37 the court shall determine by order whether the requirements of subdivisions (a)
38 and (b) have been satisfied. An order under this subdivision may be conditional,
39 and may be altered or amended before judgment in the action.

40 **Comment.** Section 385.22 sets forth the basic prerequisites of adequacy of counsel and absence
41 of conflict of interest applicable to bringing an action for unfair competition or false advertising
42 on behalf of the general public. Consistent with the broad approach to standing codified in
43 Business and Professions Code Sections 17204 and 17535, Section 385.22 does not require the
44 private plaintiff to be a member of the injured group.

1 Subdivision (c) is drawn from Rule 23(c)(1) of the Federal Rules of Civil Procedure, applicable
2 to class actions. Before entry of judgment in the representative action, the court is also required to
3 make a finding that the standards in this section have been satisfied. See Section 385.30 (findings
4 required for entry of judgment).

5 See also Sections 385.10(a) (“private plaintiff” defined), 385.10(c) (“representative action”
6 defined).

7  **Staff Note.** This section has not been applied to public prosecutors, but the issues of
8 conflict of interest and the adequacy of the public prosecutor’s resources are dealt with in a
9 different fashion in draft Section 385.40 (priority between public prosecutor and private plaintiff).
10 The statutory scheme thus places some threshold requirements on private plaintiffs that are
11 presumed *ex officio* in the case of public prosecutors.

12 § 385.24. Notice to Attorney General’s register

13 385.24. At or before the time of filing a representative action or amending a
14 complaint to add a representative cause of action, a private plaintiff shall give
15 notice of the filing or amendment, together with a copy of the complaint, to the
16 Attorney General for publication in the register of representative actions
17 established pursuant to Government Code Section 12660, and pay any fee
18 required.

19 **Comment.** Section 385.24 provides for notice of filing of a representative action to be given to
20 the Attorney General and provides authority for the Attorney General to determine the form and
21 content of the notice. The form and content of the notice may be prescribed by the Attorney
22 General. See Gov’t Code § 12661. If no special form is prescribed by the Attorney General, the
23 plaintiff may use any reasonable means to comply with this section.

24 See also Sections 385.10(a) (“private plaintiff” defined), 385.10(c) (“representative action”
25 defined), 385.10(d) (“representative cause of action” defined).

26 **Staff Note**

27 1. At the June meeting, the Commission decided that, at a minimum, notice should be given to
28 the Attorney General. The issue of giving notice to local prosecutors was considered, along with
29 the question when notice should be given. The draft section provides only for notice to the
30 Attorney General in connection with the new register of representative actions. Interested local
31 prosecutors can follow the publication of the register or rely on other informal sources.

32 2. A less dramatic alternative would be to provide only for notice to the Attorney General, and
33 not publication in the register. We expect that if the Attorney General and other public
34 prosecutors find such notice valuable, they can further develop their informal system to provide
35 for direct notice to local prosecutors who may have an interest in the case.

36 3. The section applies only to filings by private plaintiffs. This assumes that public prosecutors
37 will be voluntarily complying with the system for coordination used by the district attorneys and
38 Attorney General. However, there would be some benefit in providing information on filings by
39 public prosecutors to the public generally.

40 4. Should the Attorney General get the whole complaint or only the part relevant to the claim
41 on behalf of the general public? What should be published in the register? Draft Government
42 Code Section 12661 provides authority for the Attorney General to determine what should
43 actually be published.

44 5. Prof. Fellmeth’s draft does not include a notice provision. (See Exhibit p. 3.) He relies on
45 voluntary cooperation impelled by the opportunity for attorney fees under Section 1021.5 on the
46 grounds of making a “beneficial contribution” to the outcome of the case. See draft Section
47 385.42.

1 **§ 385.26. Disclosure of similar cases against defendant**

2 385.26. Promptly after a representative action is filed, the defendant shall
3 disclose to the plaintiff and to the court any other cases pending in this state
4 against the defendant based on substantially similar facts and theories of liability.

5 **Comment.** Section 385.26 requires the defendant to disclose similar cases, whether they are
6 representative actions, class actions, or otherwise. This section applies to both private plaintiffs
7 and public prosecutors. See Sections 385.10(a) (“private plaintiff” defined), 385.10(b) (“public
8 prosecutor” defined), 385.10(c) (“representative action” defined).

9  **Staff Note.** This section does not provide any particular time limits. Ultimately, the
10 disclosure must take place in order for the court to make the necessary findings under Section
11 385.30, but it is unclear what would happen if the defendant does not comply. If the register of
12 representative actions works as intended, then this disclosure duty placed on the defendant may
13 not be very important.

14 **§ 385.28. Notice of terms of judgment**

15 385.28. (a) At least [45] days before entry of a judgment in the representative
16 action, or any modification of the judgment, which is a final determination of the
17 representative cause of action, the plaintiff shall give notice of the proposed terms
18 of the judgment or modification, including all stipulations and associated
19 agreements between the parties, together with notice of the time and place set for
20 the hearing on entry of the judgment or modification, to all of the following:

21 (1) Other parties with cases pending against the defendant based on substantially
22 similar facts and theories of liability.

23 (2) The Attorney General for publication in the register of representative actions
24 under Government Code Section 12660.

25 [(3) Any regulatory agency with jurisdiction over the defendant relevant to the
26 allegations in the pleadings.]

27 (b) A person given notice under subdivision (a) or any other interested person
28 may apply to the court for leave to intervene in the hearing provided by Section
29 385.30. Nothing in this subdivision limits any other right a person may have to
30 intervene in the action.

31 **Comment.** Subdivision (a) of Section 385.28 requires notice of the terms of any proposed
32 disposition of the representative action to other interested parties and publication in the Attorney
33 General’s registry. This section applies to both private plaintiffs and public prosecutors.

34 Subdivision (b) recognizes a limited right to intervene in the hearing for approval of the terms
35 of the judgment provided by Section 385.30.

36 See also Sections 385.10(a) (“private plaintiff” defined), 385.10(b) (“public prosecutor”
37 defined), 385.10(c) (“representative action” defined), 385.10(d) (“representative cause of action”
38 defined).

39  **Staff Note**

40 1. The 45-day period in the lead clause of subdivision (a) is in brackets to suggest
41 consideration of the best time limit for this section. Prof. Fellmeth suggests 45 days. (See Exhibit
42 p. 4.)

43 2. Prof. Fellmeth’s draft proposes the regulatory agency notice provided here in subdivision
44 (a)(3). (See Exhibit p. 4.) This may be a useful provision, but the staff has doubts about how it
45 would be implemented. The plaintiff would have to determine any and all agencies with
46 appropriate jurisdiction and then determine which should get notice. Making these determinations

1 could be daunting. If the purpose of this notice is informational, then interested agencies can read
2 the register of representative actions and monitor the action or intervene as desired. What would
3 be the consequence of failure to give this type of notice to the appropriate agency?

4 3. There is a bit of slack here since subdivision (a)(1) requires notice to parties in other similar
5 cases against the defendant, but the plaintiff may not have sufficient information because the
6 defendant may not have given notice of similar cases pursuant to draft Section 385.26.

7 4. Subdivision (b) provides an opportunity for nonparties to be heard in the hearing for
8 approval of the terms of judgment in the representative action. The “other interested persons”
9 language raises the issue of how open this procedure should be.

10 5. Is it useful to refer specifically to modifications in this section? Alternatives are to drop
11 such references as an unnecessary or rely on a separate subdivision stating that the section applies
12 to modifications with the same force.

13 § 385.30. Findings required for entry of judgment

14 385.30. (a) Before entry of a judgment in the representative action that is a final
15 determination of the representative cause of action, a hearing shall be held to
16 determine whether the requirements of this chapter have been satisfied.

17 (b) At the hearing, the court shall consider the showing made by the parties and
18 any other persons permitted to appear and shall order entry of judgment only if the
19 court finds that all of the following requirements have been satisfied:

20 (1) The plaintiff and the plaintiff’s attorney satisfy the requirements of Section
21 385.22.

22 (2) The defendant has disclosed other pending cases pursuant to Section 385.22.

23 (3) Notice has been given pursuant to Sections 385.24 and 385.28.

24 (4) The proposed judgment and any stipulations and associated agreements are
25 fair and adequate to protect the interests of the general public pled.

26 (5) The pleadings have not been amended, or supplemented by any stipulations
27 or associated agreements, to the detriment of the interests of the general public
28 pled.

29 (6) Entry of the judgment is in the interests of justice.

30 (7) Any award of attorney fees included in the judgment or any stipulation or
31 associated agreements complies with Section 385.42.

32 (c) A representative action may not be dismissed without the approval of the
33 court.

34 **Comment.** Section 385.30 provides for a hearing as a prerequisite to entry of judgment on a
35 cause of action on behalf of the general public for unfair competition or false advertising.

36 Subdivision (c) is drawn from Rule 23(e) of the Federal Rules of Civil Procedure relating to
37 class actions.

38 See also Sections 385.10(c) (“representative action” defined), 385.10(d) (“representative cause
39 of action” defined).

40  **Staff Note.** This section is drawn in part from Prof. Fellmeth’s draft in Exhibit pp. 4-5.

41 § 385.32. Preliminary relief

42 385.32. During the pendency of the representative action, the court may grant
43 preliminary relief relative to the representative cause of action in the interest of
44 justice.

1 **Comment.** Section 385.32 makes clear that preliminary relief is available in a representative
2 action. See also Sections 128 (power of courts), 385.10(c) (“representative action” defined),
3 385.10(d) (“representative cause of action” defined).

4 ☞ **Staff Note.** This provision is drawn from Prof. Fellmeth’s draft. Is it useful? Or does it
5 unnecessarily duplicate inherent equitable authority of the court?

6 **§ 385.34. Binding effect of representative action**

7 385.34. (a) Except as otherwise provided in subdivision (b), the determination of
8 a representative cause of action on behalf of the general public in a judgment
9 approved by the court pursuant to Section 385.30 is binding and conclusive on all
10 persons.

11 (b) A person who commences an action based on damage to the person
12 individually, as distinguished from a cause of action in a representative capacity, is
13 not bound by the judgment on the representative cause of action, except that any
14 monetary recovery awarded to the person individually shall be reduced by the
15 amount of any monetary recovery the person received as a result of the
16 representative action.

17 **Comment.** Section 385.34 governs the binding effect of a representative action under this
18 chapter. Subdivision (a) makes clear that the final determination of the representative cause of
19 action (i.e., the cause of action on behalf of the general public under Business and Professions
20 Code Section 17204 or 17535, as provided in Section 385.30) is res judicata. In other words, the
21 determination of the cause of action on behalf of the general public has been made and other
22 plaintiffs are precluded from reasserting the same claim on behalf of the general public. See also
23 Section 1908 (binding effect of judgments generally). This effect applies to any relief granted the
24 general public, whether by way of injunction or restitution or otherwise.

25 Subdivision (b) provides a notable exception to the rule in subdivision (a). A person who
26 claims to have suffered damage as an individual is not precluded from bringing an action on that
27 claim, even though the question of the harm to the general public has been determined
28 conclusively. However, even if the person prevails on this claim, any monetary recovery (whether
29 damages or restitution) is to be reduced by the amount of any restitution received by the person as
30 a member of the general public in the representative action.

31 See also Sections 385.10(c) (“representative action” defined), 385.10(d) (“representative cause
32 of action” defined).

33 ☞ **Staff Note**

34 1. Prof. Fellmeth split this rule into two parts, one applicable to actions brought by private
35 plaintiffs and the other to actions brought by public prosecutors. (See Exhibit pp. 2 & 5.) After
36 boiling the draft down, the staff concluded that one general rule would be preferable.

37 2. Prof. Fellmeth also proposes to state the effect of the judgment on absent class members in
38 the case of a class action, but the staff is not convinced this is needed and we are unclear on how
39 to do it correctly if it is a needed feature. Prof. Fellmeth’s draft provision is as follows:

40 Such an action on behalf of the “general public” is res judicata only insofar as it bars actions on
41 behalf of the general public or absent class members. Named parties bringing suit because of
42 damage or harm to them individually are not collaterally estopped by the judgment unless the
43 requirements of Section 382 [class actions] are met.

44 3. Should subdivision (b) be strictly limited to monetary setoff? Prof. Fellmeth’s draft
45 includes language that might be interpreted more broadly:

46 [A]n individual may be collaterally estopped from litigating as to damages or harm he or she has
47 suffered where he or she has accepted and benefitted from restitutionary relief granted to the
48 general public or to others, sufficient to satisfy or recompense him or her for those claims.

1 [§ 385.36. Binding effect on individual claims — *included for purposes of discussion*]

2 385.36. The determination of a representative cause of action on behalf of the
3 general public in a judgment approved by the court pursuant to Section 385.30 is
4 binding and conclusive as to an action brought by a private plaintiff for restitution
5 or damages on the individual’s own behalf, if the following conditions are
6 satisfied:

7 (a) Notice is given sufficient to protect the due process rights of absent members
8 of the public who may be bound by the representative action, either by individual
9 notice, or by publication or other forms of notice ordered by the court if individual
10 notice is not practical, of the terms of the restitution and of the time and place of a
11 hearing to consider its approval.

12 (b) At or before the hearing, a person desiring to opt out of the injunctive or
13 restitutionary terms of the judgment shall have an opportunity to be so excluded.

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

16 (d) The court shall consider all comments relevant to the proposed judgment and
17 may alter its terms or its binding effect in the interests of justice.

18 **Comment.** Section 385.36 provides for a limited binding effect of a representative action on
19 individual claims. See also Sections 385.10(a) (“private plaintiff” defined), 385.10(c)
20 (“representative action” defined).

21  **Staff Note**

22 1. This section is drawn from Prof. Fellmeth’s draft at Exhibit p. 2 and is included for
23 discussion purposes — the staff is not recommending it. Under Prof. Fellmeth’s draft, this rule
24 would apparently be applied only where the action was brought by a public prosecutor. Based on
25 the discussion at the June meeting, the staff has some doubt that the Commission wants to attempt
26 to extend the res judicata effect this far, or if so, whether these proposed safeguards are sufficient
27 to accomplish the goal.

28 2. As discussed in Memorandum 95-35 (considered at the June meeting), notice to absentees
29 at the inception of a lawsuit is not interchangeable for constitutional purposes with notice of
30 proposed settlement terms. As presently drafted, this section appears to require the latter type of
31 notice, but not the former. There is some question whether this can constitutionally achieve its
32 purpose.

33 3. Another concern is that permitting opt-out after the terms are known may significantly
34 inhibit settlement. If the terms are favorable to the general public, absent members of the public
35 are likely to accept the settlement, but otherwise they are likely to opt out if the stakes are high
36 enough. “From a defendant’s viewpoint, this is said to result in ‘an open-ended lawsuit that
37 cannot be defeated, cannot be settled, and cannot be adjudicated.’” *People v. Pacific Land*
38 *Research co.* 20 Cal. 3d 10, 17, 569 P.2d 125, 141 Cal. Rptr. 20 (1977), *quoting* *Home Savings &*
39 *Loan Ass’n v. Superior Court*, 42 Cal. App. 3d 1006, 1011, 117 Cal. Rptr. 485 (1975). This
40 problem of one-way intervention could be avoided by eliminating any opportunity to opt out, but
41 that may not be constitutionally permissible. See Memorandum 95-35.

42 4. Alternatively, the statute could require opt-out at the inception of a representative action,
43 which would necessitate notice at inception and its concomitant expense — a subject that has
44 been frequently discussed at prior meetings. The statute could specify that such notice and opt-out
45 privileged are necessary only for obtaining a binding effect on individual claims. The staff
46 wonders, however, what a statute along these lines would accomplish, given the existing option of
47 pursuing an unfair competition claim as a class action, which would cover much of the same
48 ground.

1 5. Finally, and perhaps most importantly, adequate representation of absent members of the
2 injured group may be a due process prerequisite to binding such members to a determination of
3 their damage. Because this scheme, as set out in draft Section 385.22, does not require such
4 representation, the broader res judicata provision in discussion draft Section 385.36 may run afoul
5 of that constitutional requirement.

6 **§ 385.40. Priority between public prosecutor and private plaintiff**

7 385.40. (a) If a private plaintiff has commenced a representative action and a
8 public prosecutor has commenced an action against the same defendant based on
9 substantially similar facts and theories of liability, the court in which either action
10 is pending, on application of either plaintiff, shall determine which action should
11 proceed and shall stay the other action. The determination may be made at any
12 time during the proceedings and regardless of the order in which the actions were
13 commenced. The court may base its determination on the pleadings in the
14 conflicting actions without hearing additional evidence.

15 (b) In the case of conflicting claims to represent the general public, the public
16 prosecutor is presumed to be a superior representative of the public [and
17 particularly of the members of the public within the public prosecutor's
18 jurisdiction]. This presumption may be overcome where a party demonstrates
19 either of the following:

20 (1) The public prosecutor has a substantial conflict of interest in representing the
21 public interest pled that is not present in the case of an alternative private plaintiff
22 and the plaintiff's attorney.

23 (2) The resources or expertise available to the public prosecutor to pursue the
24 case are inadequate and the private plaintiff has available substantially superior
25 resources and expertise.

26 **Comment.** Section 385.40 provides for determining priority between public and private
27 plaintiffs in conflicting actions. Subdivision (b) provides a presumption in favor of public
28 prosecutors in the area of representing the interests of the general public. See also Sections
29 385.10(a) ("private plaintiff" defined), 385.10(b) ("public prosecutor" defined), 385.10(c)
30 ("representative action" defined).

31  **Staff Note**

32 1. Prof. Fellmeth uses the phrase "conflict in representation" to set out the scope of this
33 provision in his draft. (See Exhibit p. 1.) In addition, his draft refers to Section 382 (class actions)
34 as being a source of conflicting actions. The staff draft does not include these features, but the
35 Commission should consider whether they are desirable.

36 2. Prof. Fellmeth's draft also applies the preference rule to conflicts "otherwise covering the
37 same acts, bases for liability, and remedies." The staff is unclear on how far this language would
38 extend. We have proposed a more limited rule.

39 3. The bracketed language in subdivision (b), as currently drafted, is a dead end, in that the
40 standard for overcoming the presumption applies without regard to the local jurisdiction aspect.
41 Should the bracketed language be dropped? Or should another preference rule be added?

42 4. The Commission should also consider the draft proposed by the California District
43 Attorneys Association Consumer Protection Committee. (See Exhibit p. 9.) This draft would put a
44 new section in the intervention chapter of this part of the Code of Civil Procedure. The proposed
45 priority rule (which is not limited to unfair competition litigation), reads as follows:

46 (c) If a law enforcement agency and a private party have pending actions against the same
47 defendant based on substantially similar alleged facts or violations of law, the court shall, upon the

1 law enforcement agency's application, stay the private party's action, regardless of the order of
2 filing or the stage of proceedings, until a final judgment is obtained in the law enforcement
3 agency's action.

4 5. The staff draft requires a choice between the public and private plaintiffs. That is, the court
5 has to decide whether the private plaintiff before the court (or one of several) is a better plaintiff
6 than the public prosecutor. It is not an option to toss everyone out.

7 **§ 385.42. Attorney's fees**

8 385.42. (a) In addition to any other applicable factors, any award of attorney's
9 fees in a representative action shall be based on the work performed, the risk
10 involved, and a consideration of benefit conferred on the general public.

11 (b) If a public prosecutor is given preference over a private plaintiff under
12 Section 385.40, the private plaintiff may be entitled to costs and attorney's fees
13 pursuant to Section 1021.5 or other applicable law.

14 (c) Timely notice by the attorney for the private plaintiff of a planned or filed
15 representative action and assistance to the public prosecutor shall be relevant in
16 meeting the requirement of beneficial contribution under Section 1021.5. Where
17 beneficial contribution has occurred, the private plaintiff need not have been the
18 successful party in order to qualify for an attorney fee award under Section 1021.5.

19 **Comment.** Subdivision (a) of Section 385.42 provides special factors applicable to an award of
20 attorney's fees in representative actions.

21 Subdivision (b) makes clear that the operation of the preference rule in Section 385.40 does not
22 deprive a private party of the right to costs and attorney's fees.

23 Subdivision (c) encourages private plaintiffs to cooperate with public prosecutors in common
24 cases by providing an incentive to cooperate.

25 See also Sections 385.10(a) ("private plaintiff" defined), 385.10(b) ("public prosecutor"
26 defined), 385.10(c) ("representative action" defined).

27 ☞ **Staff Note.** Compare Prof. Fellmeth's draft on Exhibit pp. 2, 4-5.

28 **§ 385.44. Application of chapter to pending cases**

29 385.44. (a) On and after its operative date, this chapter applies to all pending
30 representative actions, regardless of whether they were filed before the operative
31 date, unless the court determines that application of a particular provision of this
32 chapter would substantially interfere with the effective conduct of the action or the
33 rights of the parties or other interested persons.

34 (b) For the purpose of applying this chapter to pending actions, the duty to give
35 notice under Section 385.24 or to provide information under Section 385.26 is
36 satisfied if the notice or information is given promptly after the operative date of
37 this chapter.

38 **Comment.** Section 385.44 applies this chapter to all representative actions, including those
39 filed before the operative date except where the court orders otherwise. Subdivision (a) is drawn
40 from Section 694.020 (application of Enforcement of Judgments Law). See also Section
41 385.10(c) ("representative action" defined).

1 **Gov't Code §§ 12660-12663 (added). Registry of unfair competition actions**

2 SEC. 2. Article 10 (commencing with Section 12660) is added to Chapter 6 of
3 Division 3 of Title 2 of the Government Code, to read:

4 Article 10. Representative Action Register

5 **§ 12660. Establishment of representative action register**

6 12660. The Attorney General shall establish and maintain a register of
7 representative actions, as defined in Section 385.10 of the Code of Civil
8 Procedure.

9 **Comment.** Section 12660 provides for the establishment of a register for receipt of notice of
10 filings of representative actions on behalf of the general public for unfair competition and false
11 advertising. See Bus. & Prof. Code §§ 17204 (unfair competition), 17535 (false advertising);
12 Code Civ. Proc. §§ 385.10-385.44 (representative actions).

13 **§ 12661. Rules and regulations**

14 12661. The Attorney General by regulation may prescribe the form of notice for
15 submission of representative action filings pursuant to Section 385.24 of the Code
16 of Civil Procedure and may provide for the amount of information to be published
17 in the register of representative actions. The Attorney General may make other
18 rules and regulations necessary for the administration of this article.

19 **Comment.** Section 12661 recognizes the need to regularize the form of notice required by
20 Code of Civil Procedure Section 385.24 and the information to be published in the register. The
21 general authority to make rules and regulations is similar to Section 12587 (charitable trusts
22 register).

23 **§ 12662. Distribution of representative action register**

24 12662. The Attorney General by regulation shall provide a procedure for
25 publication and distribution of the register of representative actions.

26 **Comment.** Section 12660 is intended to facilitate the purpose of the register, i.e., to provide a
27 means for interested persons to be informed of representative actions filed on behalf of the
28 general public under Business and Professions Code Sections 17204 or 17535. See Code Civ.
29 Proc. §§ 385.10-385.44 (representative actions). Publication and distribution may be by any
30 appropriate manner, including electronic media.

31 **§ 12663. Costs of representative action register**

32 12663. The register established pursuant to this article is intended to be self-
33 supporting. To this end, filing fees and fees for receiving notice of filing shall be
34 set at an amount that will reimburse the state for all costs incurred in establishing
35 and maintaining the register.

36 **Comment.** Section 12663 makes clear that the register is intended to be self-supporting. This
37 provision is comparable to Section 11344.4 (Code of Regulations).