

Study B-700

September 19, 1995

First Supplement to Memorandum 95-43**Unfair Competition: Draft of Tentative Recommendation (Explanatory Text)**

Attached to this supplement is a staff draft of the preliminary part of the draft tentative recommendation on unfair competition. The text will need to be modified to reflect any substantive changes made in the draft statute attached to Memorandum 95-43. The text is not yet polished and some points may need further elaboration before the text is ready to distribute in the form of a tentative recommendation. Thus, if Commissioners have any editorial suggestions for improving the draft, the staff would appreciate receiving them.

Respectfully submitted,

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1 UNFAIR COMPETITION LITIGATION

2 California law provides broad remedies for unfair business practices. Actions
3 may be brought by public prosecutors and by private individuals or groups suing
4 on their own behalf or on behalf of the general public. The open-ended standing
5 provision has the potential for abuse and overlapping actions. This
6 recommendation proposes several procedural improvements to promote finality
7 and resolve conflicts among plaintiffs.

8 BACKGROUND

9 California law prohibits any “unlawful, unfair or fraudulent business act or
10 practice and unfair, deceptive, untrue or misleading advertising.”¹ Originally a
11 business tort remedy between disputing commercial entities, the unfair
12 competition law² is now a primary tool for vindicating consumer or public market
13 abuses by business entities in a host of situations.³ As it has been developed
14 through years of court interpretation and legislative amendment, the California
15 statute has become probably the broadest such statute in the country.⁴ Use of the
16 unfair competition law as a remedy for specific harms to consumers should not
17 obscure the role the statute plays in shaping the marketplace by restraining
18 business practices that would otherwise drive the market to its lowest common
19 denominator.⁵ To the extent that unfair practices confer a competitive advantage
20 on an enterprise, competing businesses will find themselves at a disadvantage if
21 they do not adopt similar measures.

1. Section 17200 (defining “unfair competition”). The definition also includes “any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code” which contains general prohibitions on false advertising (Section 17500) and a host of special statutes applicable to charitable solicitations, telephonic sellers, products made by the blind, travel promoters, travel sellers, motel rate signs, American Indian-made articles, vending machines, water treatment devices, and environmental representations. The false advertising provisions in Section 17500 *et seq.* are subject to their own remedial provisions (Section 17535-17536.5), but are also swept up in the definition of unfair competition in Section 17200.

Parts of this discussion are drawn from the background study prepared by the Commission’s consultant, Professor Robert C. Fellmeth, *California’s Unfair Competition Act: Conundrums and Confusions* (photocopy 43 pp., 1995) (on file with California Law Revision Commission).

All further statutory references are to the Business and Professions Code, unless otherwise indicated.

2. As used in this text, “unfair competition law” refers generally to the prohibitions and remedies provided in Business and Professions Code Section 17200 *et seq.* and Section 17500 *et seq.*, with particular reference to the remedies provided in Section 17204 and 17535. Unfair competition should be taken to include the false advertising statutes in Section 17500 *et seq.* unless the context indicates otherwise.

3. See Fellmeth, *supra* note 1, at 4. For additional background on the history of these statutes, see Note, *Former Civil Code Section 3369: A Study in Judicial Interpretation*, 30 *Hastings L.J.* 705 (1979). Business and Professions Code Sections 17200-17208 are the successors of Civil Code Section 3369.

4. See overview of federal and other states’ law in Fellmeth, *supra* note 1, at 7-19.

5. See Fellmeth, *supra* note 1, at 19-21.

1 The remedies provided in the unfair competition law have extensive application
2 as a cumulative remedy to other statutes.⁶ The unfair competition law applies
3 whenever a business act or practice violates any statute,⁷ not just specifically
4 referenced statutes in the Business and Professions Code. Moreover, the statute
5 applies to acts and practices of unfair competition that are not in violation of any
6 specific statute — the plaintiff need only show that members of the public are
7 likely to be deceived.⁸

8 The broad scope of the unfair competition law is matched by its standing rules.
9 Relief may be sought by a large number of public officials:⁹ (1) the Attorney
10 General, (2) all district attorneys, (3) county counsels authorized by agreement
11 with the district attorney in cases involving violation of a county ordinance, (4)
12 city attorneys of cities with a population over 750,000,¹⁰ and (5) with the
13 consent of the district attorney, city prosecutors in cities with full-time city
14 prosecutors. The unfair competition law may permit enforcement by a public
15 prosecutor even where the underlying statute provides different enforcement
16 authority.¹¹

17 In addition, actions may be brought by private parties acting for themselves or
18 in the interests of the general public.¹² As in the case of public prosecutors, the
19 unfair competition law provides private plaintiffs a right to sue on behalf of the
20 general public even where the statute allegedly violated by the defendant
21 provides no right of action.¹³

6. See Sections 17205, 17534.5.

7. See, e.g., *People v. McKale*, 25 Cal. 3d 626, 631-32, 602 P.2d 731, 159 Cal. Rptr. 811 (1979); *Barquis v. Merchants Collection Ass'n* 7 Cal. 3d 94, 111-13, 496 P.2d 817, 101 Cal. Rptr. 745 (1972). If conduct is expressly permitted, however, the unfair competition law does not provide a remedy. *Hobby Industry Ass'n of America v. Younger*, 101 Cal. App. 3d 358, 369, 161 Cal. Rptr. 601, 608 (1980).

8. See Sections 17200, 17203; *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 211, 673 P.2d 660, 197 Cal. Rptr. 783 (1983); *Chern v. Bank of America*, 15 Cal. 3d 866, 876, 544 P.2d 1310, 127 Cal. Rptr. 110 (1976). The scope of this rule is not unlimited. See *Rubin v. Green*, 4 Cal. 4th 1187, 1203-04, 847 P.2d 1044, 17 Cal. Rptr. 2d 828 (1993) (broad scope of unfair competition law does not override litigation privilege).

9. Section 17204. The false advertising statute does not contain all of the limitations on authority of county counsels and city attorneys provided in the unfair competition statute. Compare Section 17204 with Section 17535. The rules applicable to city attorneys generally apply to the city attorney for the City and County of San Francisco. But see Section 17206(e).

10. Sections 17204.5 and 17206.5 provide a special rule applicable to the San Jose city attorney that is now obsolete because the city's population exceeds 750,000.

11. *People v. McKale*, 25 Cal. 3d 626, 631-32, 602 P.2d 731, 159 Cal. Rptr. 811 (1979).

12. The specific language of Sections 17204 and 17535 is: "upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public." While in context, this language is susceptible of a different meaning (that the private plaintiff may complain to the appropriate public prosecutor), it is well-settled that private plaintiffs may sue for themselves or in a representative capacity. E.g., *Barquis v. Merchants Collection Ass'n*, 7 Cal. 3d 94, 110, 496 P.2d 817, 101 Cal. Rptr. 745 (1972).

13. *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 210, 673 P.2d 660, 197 Cal. Rptr. 783 (1983).

1 Both private and public plaintiffs may seek injunctive relief, including
2 restitution of money or property that may have been acquired through the unfair
3 practice.¹⁴ Public officials may also seek civil penalties, varying from \$2500 to
4 \$6000 per violation.¹⁵ The statute sets forth a number of considerations for
5 determining the appropriate amount of civil penalties,¹⁶ and in some cases,
6 provides that an award of restitution is preferred over a civil penalty.¹⁷ Damages
7 at law, including punitive damages, are not available under the unfair competition
8 law to either public or private plaintiffs.¹⁸

9 The limitation on the type of recovery available under the unfair competition
10 law probably acts as only a minor restraint on litigation. Substantial restitution
11 may be available in an action on behalf of the general public, either as
12 traditionally determined or through the more modern techniques of fluid recovery
13 or cy pres relief.¹⁹ A prevailing plaintiff who vindicates a public right may be
14 entitled to substantial attorney's fees.²⁰ Even in an essentially private dispute
15 between business competitors, more in line with the historical origins of the
16 statute, an unfair competition cause of action on behalf of the general public may
17 be added to a complaint because it facilitates liberal discovery and adds
18 settlement leverage.²¹

19 Thus, the unfair competition law provides a "broad but shallow scheme of
20 relief" — broad in substantive scope and standing, but shallow in terms of

14. Sections 17203, 17535; see also Sections 17510.87 (charitable solicitations), 17511.12(a) (telephone sales), 17522 (labeling of products made by blind).

15. Sections 17206 (civil penalties generally), 17206.1 (additional \$2500 civil penalty for violations involving senior citizens or disabled persons), 17207 (\$6000 civil penalty for intentional violation of injunction), 17535.5 (\$6000 civil penalty for violation of false advertising injunction).

If the action is brought by the Attorney General, the penalties are split between the state treasury and the county where the judgment is entered; if brought by a district attorney or county counsel, the entire penalty goes to the county treasury; if brought by a city attorney or prosecutor, the penalties are split between the city and the county treasuries. Sections 17206(c)(general rule), 17207 (injunction violation), 17535.5(c) (false advertising injunction violation), 17536(c) (false advertising). The statutes also provide a special rule where the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency. See Sections 17206(d), 17207(d), 17535.5(d), 17536(d).

The general false advertising statute also declares that a violation is a misdemeanor. Section 17500.

16. Sections 17206(b) & 17536 (nature, seriousness, and willfulness of defendant's misconduct, number of violations, persistence and duration of misconduct, defendant's assets, liabilities, and net worth). Additional factors apply in cases involving senior citizens and disabled persons (Section 17206.1(c)) or where an injunction has been violated (Sections 17207(a), 17535.5(a)).

17. Section 17206.1(d) (violations against senior citizens and disabled persons).

18. *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1272, 833 P.2d 545, 10 Cal. Rptr. 2d 538 (1992); *Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal. App. 3d 758, 774, 259 Cal. Rptr 789 (1989); *Industrial Indem. Co. v. Superior Court*, 209 Cal. App. 3d 1093, 1096, 257 Cal. Rptr. 656 (1989).

19. See Fellmeth, *supra* note 1, at 25-26; McCall, Sturdevant, Kaplan & Hillebrand, *Greater Representation for California Consumers — Fluid Recovery, Consumer Trust Funds, and Representative Actions*, 46 Hastings L.J. 797, 798, 833-35 (1995).

20. See Code Civ. Proc. § 1021.5 (private attorney general); *Serrano v. Priest* (Serrano III), 20 Cal. 3d 25, 35-38, 569 P.2d 1303, 141 Cal. Rptr. 315 (1979) (common fund doctrine).

21. See Fellmeth, *supra* note 1, at 23.

1 available relief, because monetary awards are limited to restitution and attorney's
2 fees are uncertain even if the plaintiff prevails.²²

3 ISSUES AND PROBLEMS

4 **Strategic Considerations: Representative Actions and Class Actions**

5 From the perspective of plaintiffs with a genuine interest in vindicating the
6 public interest, representative actions under the unfair competition law offer
7 several distinct advantages over class actions.²³ Under the unfair competition law,
8 a plaintiff can plead a cause of action for restitution on behalf of the general
9 public without the complications and expenses of a class action.²⁴ The plaintiff
10 does not have to seek certification of the class and thus avoids having to show
11 that the action meets the standards of numerosity, commonality, adequacy,
12 typicality, and manageability.²⁵ No type of formal certification of the
13 representative action is required at all under the unfair competition law. Perhaps
14 the single most significant practical factor is that the plaintiff does not have to
15 give notice to the proposed class members, thus avoiding substantial costs. In the
16 arena of consumer actions and public interest law, the representative action under
17 the unfair competition law is a simpler and cheaper alternative to class actions.²⁶

18 **Standing and Binding Effect of Representative Actions²⁷**

19 As previously discussed, the unfair competition law provides unusually broad,
20 and perhaps unique, standing for private parties. They may sue on behalf of

22. See Fellmeth, *supra* note 1, at 22.

23. Code of Civil Procedure Section 382 provides very general authorization for class actions. The courts have developed the body of class action law, with particular reference to Rule 23 of the Federal Rules of Civil Procedure. However, California courts are not bound by nonconstitutional and have been directed to be procedurally innovative. *Southern California Edison Co. v. Superior Court*, 7 Cal. 3d 832, 839-43, 500 P.2d 621, 103 Cal. Rptr. 709 (1972); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 808, 484 P.2d 964, 94 Cal. Rptr. 796 (1971); *Cartt v. Superior Court*, 50 Cal. App. 3d 960, 124 Cal. Rptr. 376 (1975). See generally 4 B. Witkin, *Cal. Procedure Pleading* §§ 193-237, at 225-94 (3d ed. 1985 & Supp. 1995).

24. See *McCall et al.*, *supra* note 19, at 839-43.

25. These requirements are set forth in Rule 23 of the Federal Rules of Civil Procedure:

(a) 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.

The manageability requirement is contained in Rule 23(b)(3)(D).

26. *McCall et al.*, *supra* note 19, at 839-43. See also Chilton & Stern, *California's Unfair Business Practices Statutes: Settling the "Nonclass Class" Action and Fighting the "Two-Front War."* 12 CEB Civil Litigation Rep. 95 (1990). In fact, the existence of the representative cause of action under the unfair competition law may preclude a class action in circumstances where the class action is not the demonstrably superior procedure. See *Dean Witter Reynolds, Inc. v. Superior Court* 211 Cal. App. 3d 758, 772, 259 Cal. Rptr. 789 (1989).

27. See generally Fellmeth, *supra* note 1, at 1-2, 37-38.

1 others (the "general public") without the need to show any personal damage
2 arising from the unfair business practice. Those suing on behalf of the general
3 public can range from plaintiffs having a narrow dispute with a defendant in
4 business context, who tack on the representative claim for discovery and
5 settlement advantages, to plaintiffs serving a true private attorney general
6 function who seek to vindicate larger interests. The unfair competition law does
7 not provide any mechanism to distinguish among these types of plaintiffs. The
8 potential for abuse where a claim on behalf of the general public is tacked on for
9 tactical advantage is mitigated only by the denial of res judicata and collateral
10 estoppel effect as to nonparties.²⁸

11 While the law is not settled, it appears that where the primary purpose of the
12 action is to obtain an injunction against an unfair business practice, a lower due
13 process standard applies. Thus, where the plaintiff satisfies class action concepts
14 of adequacy, it is not necessary to give the sort of notice and opt-out
15 opportunities that are applicable in class actions seeking damages.²⁹ However,
16 the lack of any adequacy requirement under the unfair competition law may very
17 well preclude application of this body of law where the plaintiff sues in a
18 representative capacity.

19 Settlement

20 The opportunity to sue on behalf of the general public but without binding
21 effect complicates the settlement process:

22 A plaintiff, permitted to assert claims of absent persons, may be tempted to settle
23 those claims by taking a larger payment for himself or herself and a lower payment
24 for the absent persons. This invites "blackmail" suits, a prospect worsened by the
25 fact that lawyers can sue without the need for an injured client, eliminating even that
26 modest restraint....

27 Defendant, too, may see an opportunity to settle the absent persons' claims
28 cheaply by paying the individual plaintiff a premium and the absent persons little or
29 nothing.³⁰

30 Even where the plaintiff, such as a public prosecutor or bona fide public interest
31 group, legitimately desire to confer finality and binding effect in a settlement with
32 the defendant, the parties are unable to do so under the unfair competition law.³¹
33 Hence, the legitimate goals of the unfair competition law are thwarted its standing

28. There is a danger to a defendant who loses after a trial, however, since the defendant may be bound in a later action by a stranger to the first action under doctrines permitting offensive one-way collateral estoppel. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); 7 B. Witkin, *California Procedure Judgment* §§ 301-10, at 739-51 (3d ed. 1985).

29. See Fed. R. Civ. Proc. 23(b)(2); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 821, 484 P.2d 964, 94 Cal. Rptr. 796, 809 (1971); *Frazier v. City of Richmond*, 184 Cal. App. 3d 1491, 1500, 228 Cal. Rptr 376, 381 (1986).

30. *Chilton & Stern*, *supra* note 26, at 96.

31. *Fellmeth*, *supra* note 1, at 2, 26.

1 rules in combination with constitutional limitations on the binding effect of
2 representative actions on absent parties.

3 **Conflicting and Repetitive Actions**

4 The potential for a multiplicity of actions under the unfair competition law and
5 overlapping or parallel proceedings is troubling. Some commentators have termed
6 this prospect the "two-front war."³² This situation can result because there is no
7 limitation on multiple plaintiffs seeking relief for the same public victims. The
8 multiplicity may involve public and private plaintiffs in a variety of situations.
9 Cases may overlap and conflict where they are proceeding contemporaneously,
10 where different geographical jurisdictions are involved, or where another action
11 on the same underlying claim is brought after settlement or judgment in a prior
12 action.

13 *Public-private overlap.* A private plaintiff may hold up a public prosecutor's
14 attempt to settle a dispute.³³ Such a conflict may reflect an important concern
15 over the appropriate allocation of relief between civil penalties, fluid recovery, or
16 direct restitution, or it may be a case of a hold-up for attorney's fees. On the other
17 hand, an intervening public prosecutor's claim for injunction and penalties may
18 disrupt a broader claim for damages and other relief by a private plaintiff.

19 *Public prosecutor overlap.* There also may be coordination problems in actions
20 brought by public prosecutors.³⁴ The district attorneys and the Attorney General
21 have created a voluntary system for coordinating investigations and actions by
22 public prosecutors. But the law is still unclear on the effect of local or regional
23 actions by public prosecutors.

24 *Repetitive actions.* In the absence of binding effect on non-litigants, a
25 defendant theoretically faces the prospect of an open-ended series of claims for
26 restitution under the unfair competition law. This does not yet appear to be a real
27 problem in practice, perhaps because of a natural disincentive for plaintiffs'
28 lawyers to attempt to dip into the same pocket. And if the public interest has been
29 vindicated in a suit by a public prosecutor, later potential plaintiffs would
30 naturally be expected to face major hurdles in convincing a court to reexamine
31 the public interest determinations in the earlier case.

32. Chilton & Stern, *supra* note 26, at 95.

33. See the discussion of the Cox Cable cases in San Diego County in Fellmeth, *supra* note 1, at 28-29 & nn. 112-13.

34. See *People v. Hy-Lond Enterprises, Inc.*, 93 Cal. App. 3d 734, 155 Cal. Rptr. 880 (1979); Fellmeth, *supra* note 1, at 27-28.

1 COMMISSION RECOMMENDATIONS

2 The Commission recommends a set of procedural revisions to put litigation
3 under the unfair competition law on a sound footing. The proposed statute would
4 be added to the Code of Civil Procedure as a separate chapter dealing with
5 representative actions.³⁵

6 **Form of Pleadings**

7 A complaint under Business and Professions Code Section 17204 or 17535 on
8 behalf of the general public would have to be separately stated in the pleadings
9 and specifically state that the cause of action is being brought "on behalf of the
10 general public." This detail facilitates appropriate treatment under the statute and
11 should help to focus the attention of the parties.

12 **Notice of Filing and Register of Representative Actions**

13 The proposed legislation would provide for establishment of a register of
14 representative actions under the auspices of the Attorney General. The register
15 would provide a central point where notice of representative actions would be
16 filed so that parties with potential claims on behalf of the general public could be
17 informed of a competing or overlapping action. The register would be published
18 and would be available on a subscription basis.

19 At the time of filing a representative action on behalf of the general public, a
20 private plaintiff would be required to give notice to the Attorney General, along
21 with a copy of the complaint, for publication or digest in the register. The
22 operation of the register and the exact form of notices to the register and the
23 contents of publication are left to the control of the Attorney General by
24 regulation. The register should be self-supporting out of filing and subscription
25 fees.

26 **Adequacy of Representation and Absence of Conflict of Interest**

27 The open-ended standing rules of existing law should be revised to provide
28 minimal protections. A private plaintiff should not be able to proceed in a
29 representative action on behalf of the general public unless the plaintiff's
30 attorney is an adequate representative of the public interest. This rule does not go
31 as far as requiring that the plaintiff be an adequate representative of the class, as is
32 required in class action litigation.

33 In addition, neither the plaintiff nor the plaintiff's attorney may proceed if either
34 of them has a conflict of interest that might compromise the good faith
35 representation of the interests of the general public.

36 The adequacy of representation and lack of conflict of interest issues would be
37 determined by the court as soon as practicable after commencement of the

35. See "Proposed Legislation" *infra*. [This refers to the draft attached to Memorandum 95-43.]

1 action.³⁶ The proposed statute thus requires an affirmative finding by the court
2 that the minimum requirements have been met at an early stage of the
3 proceedings. This rule should provide some guarantee that the action is brought
4 in good faith, without the need to satisfy the class certification rules applicable.

5 **Defendant's Disclosure of Other Pending Unfair Competition Cases**

6 The defendant would be required to disclose any other pending cases based on
7 substantially similar facts and theories of liability. This disclosure is intended to
8 help the court to determine which plaintiff is best suited to move forward or to
9 make other appropriate orders, such as for consolidation or abatement.

10 **Notice of Proposed Settlement**

11 The proposed law would require that notice of the terms of a proposed
12 judgment be given to other parties with cases pending against the defendant
13 based on substantially similar facts and theories of liability and to the Attorney
14 General [and any regulatory agency with jurisdiction over the defendant relevant
15 to the allegations in the pleadings] at least 45 days before entry of judgment. The
16 proposed terms of the judgment relevant to the representative action on behalf of
17 the general public would be published in the register for consideration by
18 interested persons. Since the interests of the general public are being determined
19 in a representative action, any interested person would have the opportunity to
20 apply for leave to be heard when the court considers entry of judgment.
21 Although this procedure is quite different from that applicable to class actions, the
22 intent is to provide a broader scope of participation of potentially interested
23 persons than would generally occur.

24 **Court Review and Approval of Settlements**

25 The proposed law requires the court to review the proposed settlement of a
26 claim determining the interests of the general public under the unfair competition
27 law. The court would have to affirmatively find that the plaintiff and the
28 plaintiff's attorney have met the adequacy and conflict of interest requirements,
29 that appropriate notices have been given, that the entry of judgment is in the
30 interests of justice, and that any attorney's fees meet the statutory requirements.
31 Formalizing the process for entering a judgment, whether pursuant to a
32 stipulation or after trial, should help guarantee that judgments in representative
33 actions are actually in the public interest. These rules should limit the temptation
34 for a defendant to select a weak or collusive plaintiff with whom to settle and for
35 a plaintiff to sell out the absent members of the public.

36 **Binding Effect of Representative Actions**

37 The proposed law fills a critical gap in the unfair competition law by providing a
38 limited binding effect on nonparties of a determination of a representative cause

36. This provision is drawn from Rule 23(c)(1) of the Federal Rules of Civil Procedure (class actions).

1 of action. If the proposed statutory requirements of notice, adequacy, and court
2 review and approval have been followed, the judgment as to the public interest
3 bars further claims on behalf of the general public. In other words, a judgment in a
4 representative action on behalf of the general public under the unfair competition
5 law is entitled to res judicata and collateral estoppel effect as to the interest of the
6 general public pled.

7 A nonparty individual's claim for restitution or damages for injury suffered by
8 the individual that arises out of the same facts would not be barred, but the
9 plaintiff would not be able to make a claim on behalf of the general public. This
10 rule does not affect the due process rights of any person who has a personal claim
11 for relief. An injured person is able to "opt out" of the settlement or judgment, in
12 effect, by bringing an action on his or her own behalf. The injured person's due
13 process rights are not affected and class action formalities are unnecessary in the
14 representative action to obtain limited binding effect. In order to avoid duplicate
15 recovery, any monetary relief received by the individual would, however, be
16 reduced by the amount of any restitution received in the representative action.

17 The proposed law thus restricts the individual's statutory right under the unfair
18 competition law to bring a representative action on behalf of the general public.
19 The individual's constitutional right not to have a cause of action in the
20 individual's own right determined without due process is not impaired. But the
21 individual has no constitutional right to bring a representative action,³⁷ and the
22 right to bring representative actions, which is granted by statute, can be limited
23 by statute or repealed.

24 [Staff Note. This discussion does not include a description of draft Section 385.36
25 (binding effect on individual claims) in the staff draft attached to Memorandum 95-
26 43.]

27 **Priority Between Public and Private Plaintiffs³⁸**

28 If both private and public plaintiffs have commenced representative actions on
29 behalf of the general public against the same defendant based on substantially
30 similar facts and theories of liability, the court in either action, on motion of a
31 party or on its own motion, may determine which action should proceed and stay

37. See *Fletcher v. Security Pacific Nat'l Bank*, 23 Cal. 3d 442, 454, 591 P.2d 51, 153 Cal. Rptr. 28 (1979); *Bronco Wine Co. v. Frank A. Logoluso Farms*, 214 Cal. App. 3d 699, 718-20, 262 Cal. Rptr. 899 (1989).

38. The proposed law does not deal with potential conflicts between public prosecutors on the assumption that the informal system currently in place for coordinating public prosecutors' activities, managed by the California District Attorneys Association and the Attorney General, is sufficient protection. See *Fellmeth*, *supra* note 1, at 22-23. Thus, the Commission is assured that the situation in *People v. Hy-Lond Enterprises, Inc.*, 93 Cal. App. 3d 734, 155 Cal. Rptr. 880 (1979), would not occur today and there is no need to impose additional rules by statute. Prof. Fellmeth notes, however, that there is "surprisingly little law covering the extraterritorial jurisdiction of a district attorney in public civil filings." *Fellmeth*, *supra* note 1, at 27 n. 11. See also *Chilton & Stern*, *supra* note 26, at 100 (referring to informal understanding among Bay Area prosecutors to avoid overlapping actions).

1 the other action. The proposed law creates a presumption in favor of a public
2 prosecutor as the representative of the general public,³⁹ but permits a private
3 plaintiff to overcome the presumption by showing that the public prosecutor has
4 a substantial conflict of interest or that the private plaintiff has substantially
5 superior resources and expertise in the case.

6 [Staff Note. Section 385.40(a) of draft statute attached to Memorandum 95-43
7 provides only for a motion by the plaintiff in either action. This is unduly restricted,
8 and the staff would revise the draft section to provide for a motion by any party or
9 on the court's own motion.

10 A further step could be taken to resolve the conflict between the interest of private
11 plaintiffs in restitution and the availability of civil penalties that can attract public
12 prosecutors. A preference for restitution could be added to the general civil penalties
13 section (Bus. & Prof. Code § 17206). As noted elsewhere, in cases involving
14 senior citizens and disabled persons, the statute provides that restitution "shall be
15 given priority over recovery of any civil penalty." Bus. & Prof. Code §
16 17206.1(d). This rule applies only as to Section 17206.1(a) and is specifically
17 made inapplicable to civil penalties imposed under the general provision, Section
18 17206(a).]

19 **Attorney's fees**

20 The proposed law emphasizes the need to determine that a benefit is conferred
21 on the general public in making awards of attorney's fees in representative
22 actions.

23 In cases where a public prosecutor has taken over an action from a private
24 plaintiff, the proposal makes clear the private plaintiff may still be entitled to costs
25 and attorney's fees under Code of Civil Procedure Section 1021.5 or other law.
26 These rules are intended to encourage private plaintiffs to work with public
27 prosecutors rather than competing with them and seeking a separate settlement.

28 **Application to Pending Cases**

29 The proposed law would apply to cases pending on its operative date unless
30 the court determines that to do so would interfere with the effective conduct of
31 the action or the rights of parties or other persons. Special rules concerning filing
32 deadlines are provided to permit application of the statute to cases filed before
33 the operative date. These rules enable the proposed law to try to accomplish its
34 purposes at the earliest opportunity.

39. This rule takes a different approach from the language in *People v. Pacific Land Research Co.*, 20 Cal. 3d 10, 18, 569 P.2d 125 141 Cal. Rptr. 20, 24 (1977), where the Supreme Court noted that a public prosecutor's "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." However, in light of the other procedural protections offered by the proposed statute, the rebuttable presumption is appropriate. See also *People v. Superior Court (Good)*, 17 Cal. 3d 732, 552 P.2d 760, 131 Cal. Rptr. 800 (1976) (intervention in district attorney's unfair competition law action by private plaintiffs).