

Memorandum 96-3

Unfair Competition: Status of Study

At the November 1995 meeting, representatives of several public interest groups and the plaintiff's bar stated that there was no need to consider revision of the unfair competition litigation statutes either (1) because nothing is wrong with the existing scheme or (2) because the proposals under consideration do not address the real problems (which typically were not described). The Commission tentatively decided that in the absence of evidence that practical problems exist in this area, it would not proceed with the study. A notice to this effect and request for comment was widely distributed on November 3. (See Exhibit p. 22.)

In response to this inquiry, we have received a number of letters, which are attached as exhibits to this memorandum:

	<i>pp.</i>
1. Nick N. Mrakich, Pasadena (Nov. 8, 1995)	1
2. James Wheaton, Environmental Law Foundation, Oakland (Oct. 31, 1995)	2
3. Sid Wolinsky, Disability Rights Advocates, Oakland (Nov. 14, 1995)	4
4. S. Chandler Visher, San Francisco (Nov. 20, 1995)	6
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The first 12 letters in this list are in general agreement that Business and Professions Code Section 17200 should be left alone. (Happily, only two commentators recited the "ain't broke" refrain.) Professor Fellmeth, the Commission's consultant, has provided an overview of the issues and some

additional suggestions for improving the draft statute. He has addressed some specific questions to those who contend there is no problem (see Exhibit p. 29) — we would also be interested to hear their answers.

Other than Prof. Fellmeth's detailed and well-reasoned analysis, we have not received any letters urging the Commission to proceed with the study or confirming from a practical perspective that the existing statute needs legislative attention.

If the Commission's decision on whether to proceed with the study depends solely on receiving significant support for a reform effort, then the answer is clear.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

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OF
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Law Revision Commission
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NICK N. MRAKICH
SUSAN MRAKICH GROSBARD

November 8, 1995

TELEPHONE
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Stan Ulrich, Esq.
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D1
Palo Alto, California 94303-4739

Re: Business and Professions Code Section 17200

Dear Mr. Ulrich:

Please be advised that B & P Code Section 17200, in its present form, works, and should not be changed or tampered with.

Not only does it work well, but in its present form, it provides an effective tool to check unfair business practices. In a 1995 case in the Los Angeles Superior Court in which this office was involved, § 17200 was enforced by the trial court, which issued an injunction against a major retailer, prohibiting them from requesting or requiring addresses or phone numbers of customers purchasing extended service contracts in connection with third party credit card transactions. This conduct also violated Civil Code Section 1747.8.

Any modification or change in § 17200 which undercuts any enforcement on the part of the private bar would be detrimental to both the consumer and to the public in general.

Very truly yours,



NICK N. MRAKICH

NNM:gh



ENVIRONMENTAL LAW FOUNDATION

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October 31, 1995

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

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FILE
B-700

Re: Study B-700: Business and Professions Code § 17200

Dear Mssrs. Weid, Ulrich, and Members of the Commission:

The Environmental Law Foundation has followed with increasing alarm the Commission's study and proposals in Study B-700 regarding Business and Professions Code § 17200 *et seq.* It is our belief that the proposed solutions in the last two drafts from staff are far beyond the scope of the perceived problems to be addressed. While there is no demonstrated need for a wholesale revision of this proposed law, there will unquestionably be a severe curtailment of the public's rights if these proposals are adopted in their current form.

B&P § 17200 is a vital component in our work. The Environmental Law Foundation provides advice and legal assistance to the poor, urban dwellers, minorities and others facing toxic risks. As such, ELF's work is in the broad field of environmental justice. This rapidly expanding legal and political field rests in part on the principle that individuals and communities must have a real stake in the environmental decisions that may adversely affect their lives. Such populations and communities have traditionally and historically been ill-served by existing mechanisms and institutions, including government. At best such communities have been ignored; at worst they have been treated as dumping grounds for hazards the rest of the populace does not want.

A case in point is the Alviso community, a low-income Latino community in San Jose, adjacent to one of the worst Superfund sites in California. Twenty-five years of illegal dumping of asbestos laced fill into wetlands became home to over 40 illegal and unpermitted heavy industrial operators, such as truckyards, cement manufacture and other uses. All of this was directly across from residences with a high population of children, and all of it was without benefit of any municipal or state permits. US EPA studies showed a cancer risk 1000 times higher than usual just from the dust stirred up by truck traffic. Despite clear evidence and pleas from the community, the federal EPA, the state Department of Health and state EPA, the City Attorney and the City planning department all failed or refused to take definitive action to help the community. The only actor was federal EPA, which declared the entire community a Superfund site (destroying the property values) and ordered clean up of only four truck lots.

The Alviso community despaired of relief from their elected and appointed representatives, and took the matter to court on their own to fight the illegal businesses. Claims were alleged under Proposition 65, various torts (nuisance, personal injury) and most important, B&P § 17200 for a host of unlawful activities. The suit after several years was successful in achieving community-wide clean-ups, agreements to bring all the companies into the city's permit system, and shut down of the worst offenders, all as part of a class-action settlement approved by the Court. In addition, modest monetary relief was

achieved, and several hundred thousand dollars will be set aside for a community health monitoring program for respiratory diagnosis.

B&P § 17200 was a crucial component in securing relief. Before settlement, by using the evidence of unlawful and unpermitted businesses to show violations of 17200, a trial court issued a preliminary injunction against the worst business, ordering it to relocate out of Alviso within 7 days. Only B&P § 17200, because of its unique standing and procedural standards, gave the community the legal handle it needed to speedily protect itself. Despite the stated purposes of the proposed changes to that law, the proposals put forward would in fact only hand to businesses that are engaged in illegal practices additional tools for delay, and deprive law-abiding and generally powerless citizens one of the few legal means they have to protect themselves.

In addition to that one example, I have personally litigated B&P § 17200 cases in a wide variety of contexts, including consumer protection, environmental justice and civil rights. At best, only a handful of anecdotal cases support the alleged problems with the law as it is written and practiced. As we have seen recently in Washington, legislation by anecdote is rarely a step forward. Rather than legislative enactments, there are ample mechanisms already available to address whatever occasional problem arises.

Moreover, if the Commission proposes to address problems with section 17200, it ill-behooves it or the public to be piecemeal about it. For instance, the increasing problem of secret settlements in matters that affect the public health, safety and welfare should also be addressed in any even-handed proposal for reform.

As a final matter, we cannot help but notice the remarkable lack of diversity on the Commission. Diversity not in the demographic sense, but in the interests represented by Commission members. While suggesting a new standard for "conflict of interest" for 17200 plaintiffs and plaintiffs' counsel (which is nowhere defined), the Commission is itself composed of members at least half of whom are members of law firms that have represented parties in 17200 actions. Without full disclosure of all such clients, the actions in which they were represented and the outcomes, the public cannot repose the degree of trust it can in an otherwise unbiased panel regarding proposals to curtail the public's rights. Certainly, before addressing or voting upon proposals that will severely limit the average person's ability to use the statute, each member should recuse him or herself if they have clients who have or will expect to be defendants in such actions and therefore will directly benefit from the proposals.

We urge you to withdraw from making major changes in the law.

Cordially,



James Wheaton

cc: Professor Fellmeth



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November 14, 1995 Law Revision Commission

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Affiliation for Identification Purposes

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

File: _____

Re: Study B-700

Dear Messrs. Wied and Ulrich:

We are writing to express our opposition to proposed "reforms" to Business and Professions Code sections 17200, et seq. While no law is beyond improvement, in our view section 17200 has served the people of California extremely well and should be tinkered with, if at all, only with extreme caution. Unfortunately, the "reforms" proposed in the most recent draft tentative recommendation (Memorandum 95-4) could actually undermine the statutory scheme, proving a disservice to consumers and the public generally.

As you are aware, section 17200 is available not only to public prosecutors, but also to private litigants acting as private attorneys general. It is in that latter capacity that Disability Rights Advocates has utilized the statute on many occasions and with a fair degree of success. Most recently, section 17200 litigation has been brought to protect people with disabilities from discrimination and architectural barriers.

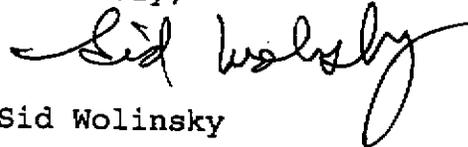
The courts have consistently recognized that private enforcement of section 17200 is an integral part of the statute, independent from and co-equal to the role of public prosecutors. In stark contrast, the thrust of the current draft tentative recommendations is to impose a series of procedural obstacles to private litigants bringing such cases in the future. In our view, these steps, by implication, would establish that private litigants' ability to bring such cases is not concomitant with that of the Attorney General or other prosecutors.

California Law Revision Commission
Re: Study B-700
November 14, 1995
Page 2

This would not be in the public interest. Indeed, if any problem needs to be addressed, it is the absence of aggressive enforcement of section 17200 by overworked public prosecutors and the vital need to encourage, not deter private attorneys general to fill this gap.

In conclusion, imposing burdens on private plaintiffs to bring section 17200 cases is unnecessary, contrary to the overarching purposes of section 17200 and would eventually serve only to reduce protection against consumer fraud and other civil wrongs. Moreover, to adopt these "reforms" would place the Law Revision Commission squarely in the camp of the defense bar and industry, seriously jeopardizing the Commission's well-established role as a neutral and independent body. We urge this proposed draft be rejected.

Sincerely,



Sid Wolinsky

SW:agm
cc: Earl Liu
Wied17.ltr

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November 20, 1995

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California Law Revision Commission
BY FAX ONLY

Re: B & P 17200 & 17500 Revisions -- Study B - 700

Dear Commissioners:

Your tentative decision to take no action to revise these statutes is the correct one. It is true that from a theoretical and academic perspective it would be nice to clear up the "finality" and some other issues these statutes present. From the practical standpoint, however, these theoretical difficulties rarely occur.

I am not familiar with all of the examples of problems that have arisen, but I do have some familiarity with the San Diego cable television late charge situation, although I am not directly involved in it. One might first ask who is copying who? I was one of the trial counsel in *Beasley v. Wells Fargo* that publicized the late charge issue. After *Beasley* the San Diego DA and a variety of private plaintiffs recognized that the cable companies were ripe for attack on their late charges and a number of actions were brought. The fact that the San Diego DA may have jumped on the band wagon before private plaintiffs in that county does not mean that the private plaintiffs were just copying the DA.

A November 9 Daily Journal article says that the DA "won a settlement that included full restitution for customers" in the Cox Cable matter. I would encourage you to inquire exactly how much money was returned to customers versus the amount that went to governmental (including school) entities. The versions of the judgment I have seen did not have any money going to private subscribers, but perhaps something was changed or my memory is in error. If any money went back to private subscribers, how was the restitution amount determined? I do not believe that the San Diego DA action determined what the actual cost of the late payments was to the cable companies, so I don't think there was a rational way in the settlement to determine what amount of restitution was due. If the DA is correct and full restitution was paid to the private subscribers, then presumably the private action will not succeed and little harm will have been done.

Even if you became convinced that the San Diego Cox Cable case was a valid example of the need for change, it is a fairly isolated incident that hardly is a sufficient basis for the sweeping changes envisioned by the proposal.

Your consideration of these comments is appreciated.

Very truly yours,

S. Chandler Visher

November 20, 1995

Mr. Colin Wied
Chairperson
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Palo Alto, CA 94303-4739

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Re: Study B-700

Dear Chairperson Wied, Mr. Ulrich and Members of the Law Revision Commission:

Consumers Union, the nonprofit publisher of *Consumer Reports* magazine, wishes to comment on the issues raised in the Notice on the Status of the Unfair Competition Study, dated November 3. We continue to believe that no significant problems exist under current law that would require legislative action. We therefore strongly support the Commission's tentative decision not to proceed with this study.

The examples of problems cited by Professor Fellmeth in his study represent a small number of isolated anecdotes over the course of more than 20 years of Section 17200 litigation. Those few examples do not show a need for sweeping legislative change.

One example cited is the adulterated meat cases: *Alexandra v. Lucky Stores*, No. 727750 (Alameda County Superior Court) and *Gray v. Safeway*, No. H171057 (Alameda County Superior Court). In those cases, a public action against grocery stores for mislabeling of meat was settled. Subsequent private actions were filed, but the trial court **sustained** defendants' demurrers in both cases.

A third private action, involving a different theory of damages, was also filed, *Rahmany, et al. v. Lucky Stores*, No. C95-00453 (Contra Costa County Superior Court) (Muslims sued for emotional distress, etc., from meat labeled as beef that actually contained pork, which is forbidden in their religion, case pending). *Rahmany*, however, should not be considered a follow-on case under Section 17200, since it involves a set of plaintiffs seeking recovery of individual damages based on a different injury than that of the general public in the prior public enforcement action.

The other major example cited was the San Diego cable television overcharge cases, in which Professor Fellmeth participated as a consultant to the San Diego District Attorney. After an 18-month investigation, the District Attorney was prepared to file a complaint and settlement against a cable company for excessive charges. However, one week prior to filing, private actions were filed against the same defendant for the same practices. In this case, unlike the adulterated meat cases, defendant's demurrer to the private action was overruled by the Superior Court, which held that the public action was not **res judicata**.

Based on these examples, we believe that courts already have sufficient tools, such as equitable estoppel or mootness, to deal with truly repetitive follow-on actions. In the meat cases, the trial courts ruled that the private actions were, in effect, repetitive actions, and sustained demurrers. In the cable actions, Professor Fellmeth believes the trial court wrongly overruled defendant's demurrer. However, even if Professor Fellmeth is correct, one erroneous trial court ruling is an insufficient basis for a complete overhaul of the statutory scheme.

In addition, a courts' ruling on a demurrer in an alleged follow-on action may be in a much better position to do justice than a court ruling in the abstract on the adequacy of a proposed settlement, as contemplated by the Commission's latest draft. A court in a hearing on a proposed settlement will be rendering the equivalent of an advisory opinion on whether any subsequent action should be barred. In contrast, the demurrer hearing in a subsequent action squarely presents the issue of preclusion in an actual, live controversy and would be superior to a likely brief, perfunctory, and nonadversarial settlement hearing. As the *Alexandra and Gray* (adulterated meat) cases illustrate, the existing tools for addressing follow-on actions do work.

Furthermore, several commentators, and at least one Commissioner, Senator Kopp, pointed out at the last meeting that most courts will not carefully scrutinize settlement agreements for their adequacy with regard to the general public, but instead may essentially "rubber-stamp" the settlement agreement. This concern not only raises the danger of inadequate settlements, but also the danger of approving "sweetheart" settlements between colluding parties. Thus, these concerns represent another disadvantage of the Commission's draft proposal as compared to mechanisms available under existing law.

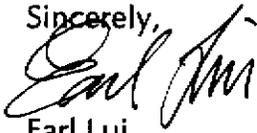
As our prior letters have mentioned, Consumers Union has brought several Section 17200 actions on behalf of the general public. In these cases, we have not experienced the problems cited by the Fellmeth study. These cases were:

- 1) A case challenging health claims in the advertising of unpasteurized milk. In that case a permanent injunction was entered, imposing a corrective warning label describing health risks of the product to older persons, pregnant women, infants, and other vulnerable groups. (*Consumers Union v. Altadena Certified Dairy*);
- 2) A case challenging allegedly deceptive advertising of adjustable rate mortgages, which was settled for 16 newspaper statewide corrective advertising campaign. (*Consumers Union v. California Federal*);
- 3) A case challenging sales practices in the sale of insurance premium finance loans, which was settled for changes in practice plus restitution. (*Fallat, et. al and Consumers Union v. Central Bank*);
- 4) A case challenging the manner of calculating the fee on small loans by a major consumer finance lender which was settled for a cessation in the practice plus restitution of two times the alleged overcharge. (*Aetna Finance Company v. Consumers Union*) and

- 5) A case challenging sales practices in the door to door sale of health maintenance organization services (*Ivy v. Belshe*).

Because of the lack of empirical evidence of major abuses of Section 17200, we support the Commission's termination of this study.

Sincerely,

A handwritten signature in black ink, appearing to read "Earl Lui", written in a cursive style.

Earl Lui
Staff Attorney

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November 20, 1995

Mr. Colin Weid
Chair

Mr. Stan Ulrich
Assistant Executive Secretary

California Law Revision Commission
4000 Middlefield Road, #2D
Palo Alto, California 94303-4739

RE: Proposed Revisions to Business and Professions
Code §§ 17200 et seq. (Study B-700)

Dear Messers Weid and Ulrich and Members of the Law Revision
Commission:

This letter is to set out my serious concerns about the
Commission's Study B-700 which proposes drastic changes to the
Unfair Competition Act (B & P Code §§ 17200 et seq.). I would
like to be involved in your process and ask that I be added to
your mailing list.

Also, I understand that the Commission will be holding a
hearing on this matter on December 8, 1995 at its Palo Alto
offices and would like to testify at that hearing. Please let
me know when to appear for that testimony.

I also understand that, after looking into the matter, the
Commission is apparently inclined to drop, for the present, the
proposed changes to the Unfair competition Act and I submit
that this is the proper decision.

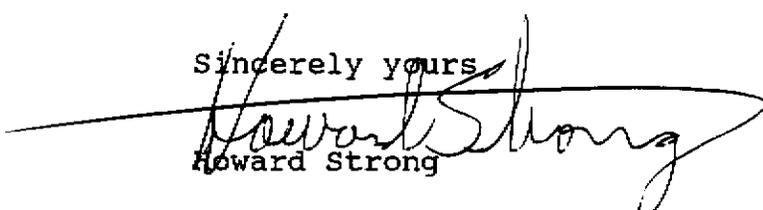
As an attorney who has been involved in a variety of private consumer protection actions which included allegations of violations of the Unfair Competition Act, I have not seen any of the purported problems discussed in the Commission's study actually arise. In my view, the Unfair Competition Act works well as is and there is no need to amend it in such a way as to essentially make it impossible to bring private enforcement actions under B & P Code §§ 17200 et seq., which is what it appears the proposed changes would do.

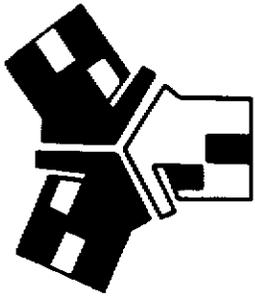
For example, I recently was co-lead counsel in a case in the Orange County Superior Court involving the Zale Corporation, a major retailer of jewelry in California. It appeared that Zale was violating Civil Code § 1747.8 by collecting the addresses and telephone numbers (for direct marketing purposes) of its credit card customers, something expressly forbidden by the Legislature in order to protect, inter alia, the privacy rights of customers paying with credit cards. After suit, which included allegations of violations of B & P Code §§ 17200 et seq., was filed, Zale agreed to end the practices attacked in the action and the case was resolved, thus vindicating the privacy rights of hundreds of thousands of Californians. In my view the relief available under B & P Code §§ was an important element in the successful conclusion of the Zale case. Certainly, in my experience with the Unfair Competition Act I have seen no problems of the sort which could possibly justify the draconian changes discussed in the Commission's papers.

Actually, the big problem with the Unfair Competition Act is that it is not strong enough. The most glaring problem is that damages are apparently not available under B & P Code §§ 17200 et seq. Rather than seeking to weaken the law as the Commission has been discussing, I submit that some thought should be given to adding a damages remedy to the statute, if there are to be any changes at all.

"If it ain't broke, don't fix it" is folk wisdom which applies to the proposed changes to the Unfair Competition Act which is working rather well.

Sincerely yours,


Howard Strong



**project
sentinel**

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November 14, 1995

Mr. Colin Wied, Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite 2D
Palo Alto, CA 94303-4739

Dear Chairperson Wied and Members of the Commission,

Project Sentinel is a private, non-profit fair housing organization serving the counties of San Francisco, San Mateo, and Santa Clara. This correspondence is intended to protest proposed changes to the California Unfair Competition Act. We know of no abuses or misuses of Section 17200 of the Business and Professions Code and instead we believe that this is a balanced, useful law. The issues concerning the private right of action by community organizations should be approved from a practical rather than theoretical stand point. Non-profit fair housing agencies, such as Project Sentinel, move forward as plaintiffs only after careful and considerable review and scrutiny by their Boards of Directors.

We urge you to recognize the public interest and benefits from Section 17200 and not to diminish the individual's right to redress.

Sincerely,

Ann Marquart
Executive Director

(disc/jj1/law.com)

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December 1, 1995

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Business and Professions Code §17200

Dear Commission:

I am writing on behalf of nine low-income renters this office represents in a pending action against a consumer credit reporting agency. The Court of Appeal recently remanded the case for a new trial on, among other things, their claims of unfair business practices under Business and Professions Code §17200 et seq. (§17200).

The proposed changes to §17200 would hinder not only these plaintiffs but both public and private attorneys from effectively redressing unlawful business practices. The attorneys at San Fernando Valley Neighborhood Legal Services (SFVNLS) have used §17200 in a variety of cases over the last 15 years to stop, for example, real property fraud operations, deceptive trade schools, and a non-lawyer operating a phony "legal aid" business. We have not experienced any of the perceived problems addressed by the proposed changes; we have not had conflicts with public prosecutors or experienced any reluctance to settle by defendants based on a perceived lack of res judicata. The statutes work well as they are.

In our pending case against the credit reporting agency, there was an overlap with a public prosecutor and the proposed revisions concerning res judicata would have been detrimental not only to the plaintiffs but the general public as well. SFVNLS and other legal services offices filed the action in 1987 and it included a §17200 cause of action. The Santa Monica City Attorney's office had a §17200 action against the same agency at the time we filed. Although the city attorney's action was pleaded broadly, that office was primarily concerned with a few narrow aspects of the agency's practices, i.e., certain notices provided to consumers. The city attorney settled with the agency on these few issues and did not pursue other claims or practices.

Our action sought redress for a number of other practices that were arguably subsumed in the Santa Monica City Attorney's complaint, but were in fact not addressed. Recently the Court of Appeal held the agency engaged in conduct that was illegal as a matter of law -- it required a consumer to give the agency access to her medical, financial and other personal records to resolve a dispute. The Court of Appeal also remanded the case to the trial court to determine whether other practices should be enjoined under §17200 -- including making unverified reports of alleged tenant misconduct and refusing to disclose consumers' files at the agency's office. Had the Santa Monica City Attorney's case been res judicata as proposed, these practices may not have been redressed.

Companies that engage in unfair business practices are notorious for their ingenuity and creativity. The unfair competition statutes provide an effective and equitable vehicle to address those practices and would be unnecessarily weakened by the proposed changes.

Very truly yours,



David Pallack
Director of Litigation

DP:kk

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December 5, 1995

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Re: **Business and Professions Code Section 17,200**

Dear Members of the Commission:

I have been a member of the California bar since 1974. I have practiced with major Los Angeles law firms such as Kindel & Anderson and Loeb and Loeb,¹ and as a sole practitioner. I have had many cases involving Section 17,200 and related sections of the Business and Professions Code, and know other lawyers who have had similar experiences. I do not believe there are any significant problems with the statutes and believe that legislative attention with respect thereto is not warranted and a misuse of taxpayers' resources.

Very truly yours,



William E. Johnson

WEJ:njqh

H:\JOHNSON\PERSONAL\MISC\CLRC\1205

¹ The views contained in this letter are my personal views and not the views of any one else.

John C. Lamb
Attorney at Law

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Law Revision Commission
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12/7/95
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December 5, 1995

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303

Re: Unfair Competition Litigation Study (B-700)

Dear Law Revision Commission:

This is to urge the Law Revision Commission to abandon its study of possible revisions to the law governing unfair competition litigation, as suggested in the Commission's November 3, 1995 status report.

I have represented my employer (a public agency) in unfair competition litigation under B&P § 17200, and also have worked with a non-profit plaintiff in such an action. My views do not reflect those of either my employer or the non-profit entity.

The Commission's efforts to achieve finality in B&P § 17200 actions, as expressed in the October 24, 1995 staff recommendations, would severely limit the effectiveness of this important consumer protection tool while opening the door to new possible abuses.

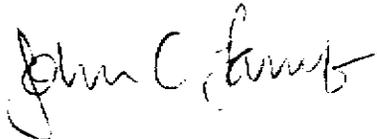
In my view, the greatest concern is the proposal to characterize an action under B&P § 17204 by a public prosecutor as a representative action on behalf of the general public. Nearly twenty years ago, the California Supreme Court made it abundantly clear that an action by a public prosecutor has fundamentally different purposes and goals than a private action on behalf of the general public. (People v. Pacific Land Research (1977) 21 Cal.3d 683.) The validity of this distinction continues today. A public agency's goal in bringing a B&P § 17200 action is to make certain that the defendant does not engage in the offending conduct again. The public agency typically will seek to accomplish this through a combination of civil penalties and equitable relief. A private plaintiff, on the other hand, typically seeks to make himself or herself whole, and may seek some relief for others who have been affected by the defendant's conduct. To abolish the fundamental distinction between these two types of actions, as the October 24 draft proposes, would seriously undermine public agencies' ability to protect the public from unlawful business practices.

John C. Lamb

I am also particularly concerned by the draft's proposal to apply to B&P § 17200 actions the class action concepts of adequacy of representation, prohibition of conflict of interest, and public notice/hearing before entry of final judgment. These concepts simply do not mesh with the B&P § 17200 action. Moreover, the draft's provisions on adequacy of representation, lack of conflict of interest, and public review of the final judgment would not prevent collusive resolution of unfair competition actions, which then would be binding and conclusive on all persons. It should not be possible to preclude meritorious private or public actions in this manner.

By all accounts, the Commission has engaged in this study and proposed these and other significant changes to B&P § 17200 litigation based on anecdotes and one instance of a "tag along" private action frustrating the settlement of a public prosecutor's action. In my view and experience, B&P § 17200 law and procedures, although not perfect, function well and fairly in the overwhelming majority of cases. I urge the Commission to abandon this study, and to allow B&P § 17200 to remain intact.

Sincerely,

A handwritten signature in cursive script that reads "John C. Lamb". The signature is written in dark ink and is positioned above the typed name.

JOHN C. LAMB

B. DANIEL LYNCH
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December 7, 1995

Law Revision Commission
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File: _____

VIA FACSIMILE

Stan Ulrich, Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: *Proposed Revision of Business & Professions Code §17200, et seq.*

Dear Mr. Ulrich:

As indicated in our several telephone conferences, I would like to endorse the proposal that the commission not submit a recommendation to revise the statute.

In its current form, the unfair competition statute leaves solely to prosecutors the collection of civil penalties, not only in actions initiated by their own offices, under Business & Professions Code §17206, but also to collect civil penalties of up to \$6,000 for a violation of an injunction which has been obtained by a private party, under Business & Professions Code §17207.

Although it would be helpful for attorneys for private party's to have this authority, not to mention the authority to collect civil penalties directly, it is not essential. As is, private party's can obtain an injunction by way of trial or settlement, and thereby stop a practice which is in violation of the law. Since there are many more private party's than there are public prosecutors, this will permit more widespread enforcement of statutes which may otherwise go unheeded. As a former prosecutor in both State and Federal court, I am very cognizant of the limitations of the resources of prosecutor's offices.

The rare occurrence when both a private party and a public prosecutor file lawsuits against the same defendant can certainly be worked out under the current system. There is clearly a disincentive for counsel for a private party to do any work that is superfluous to that already done by a prosecutor, since the private party's counsel can only collect an award of attorney's fees under Code of Civil Procedure §1021.5, by showing a significant benefit to the public or a large number of persons.

Mr. Stan Ulrich
California Law Revision Commission
Business & Professions Code §17200, et seq.
December 7, 1995
Page 2

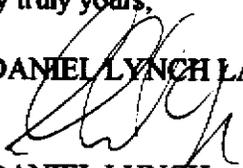
Even more rare, if not nonexistent, is the supposed problem that business litigators will add on an additional cause of action under Business & Professions Code §17200 purporting to represent the people of the State of California in a case otherwise involving the entirely selfish interest of plaintiff. Once again, the prospect of convincing the court that "substantial benefit" has been obtained on behalf of a large number of people would preclude obtaining attorney's fees in such a situation. The concern that the mere threat of such a cause of action would provide leverage encouraging defendant to settle, or would provide additional discovery, is misplaced. The Discovery Act can only be enforced through the courts. If a §17200 cause of action is being used in bad faith in an attempt to obtain discovery for the real causes of action, plaintiff and plaintiff's counsel would be subject to sanctions under the Discovery Act, under Code of Civil Procedure §§128.5 and 128.7. Plaintiff's counsel could also be subject to a claim of ethical violations, and at the very least would lose credibility with the court.

Business & Professions Code §17200, *et seq.* provides a useful, although limited tool for public interest lawyers to assist in the enforcement of important statutes. The potential for misuse or abuse of the statute is minimal. If some of the proposed changes were made, this useful and valuable tool would be lost, to the detriment of the consumer interests and other public interests, which at the present time can be enforced through these statutes.

Thank you for your courtesy.

Very truly yours,

B. DANIEL LYNCH LAW OFFICES


B. DANIEL LYNCH

BD/js

1995

File: _____

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PUBLIC INTEREST FELLOW
RASHMI DYAL-CHAND*
*MEMBER MASSACHUSETTS BAR ONLY

December 12, 1995

Mr. Colin Wied, Chair
Mr. Stan Ulrich, Assistant Executive Secretary
California Law Revision Commission
400 Middlefield Road, Suite 2-D
Palo Alto, California 94303-4739

Dear Messrs. Wied and Ulrich:

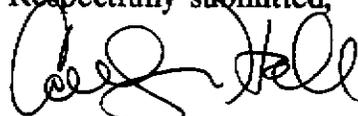
We write respectfully to express our opposition to the proposed changes to Business & Professions Code §§ 17200 *et seq.* In our view, many of the alleged "reforms" proposed would unjustifiably weaken a statutory scheme with a long history as being one of California's foremost consumer protections.

My public interest firms, both in private practice and for a non-profit, have used section 17200 with some frequency and, often, with laudable results for consumers and those who have been victims of discrimination. Given that section 17200 cases are often not those that would be attractive financially to typical plaintiff firms, imposition of the burdens contemplated by the Commission, coinciding with an already overworked and underfunded public prosecution bar, is tantamount to a practical repeal of this long-standing and valuable public interest tool.

While every law could use improvement, the "reforms" contemplated by the Commission are a step backwards. Indeed, they seem to take their page from the politicized debate around tort reform; politicized because objective researchers have all concluded that there is, in fact, no civil litigation "explosion." See 1994 Annual Report, Judicial Council of California at 103 ("The number of cases filed in California Superior courts during fiscal year 1992-93 decreased 3 percent[.]"). This is essentially a political arena, one which the Commission ought not, respectfully, enter. Furthermore, I am not aware that the issue of "finality" has ever been an important or especially "live" issue as to section 17200, or that it represents challenges or issues that are significantly different from many other areas of public interest litigation.

We respectfully urge that the proposed draft be rejected. As they say, "if it ain't broke, don't fix it."

Respectfully submitted,

21 
Carlyle W. Hall, Jr.

CALIFORNIA LAW REVISION COMMISSION

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November 3, 1995

STATUS OF UNFAIR COMPETITION LITIGATION STUDY

Pursuant to a legislative direction, the Commission has been considering possible revisions in the law governing unfair competition litigation under Business and Professions Code Section 17200 and related sections. Although no tentative or final proposals have been approved, the discussion has focused on providing finality in unfair competition actions where a claim is asserted on behalf of the general public. The Commission has also been considering proposals to ensure that plaintiffs claiming to represent the interests of the general public satisfy minimum standards of adequacy of counsel and lack of conflict of interest, analogous to class action standards, and to require the court to review the terms of a settlement or judgment to make sure that they are fair and adequate to protect the interests of the general public.

To date, comment on these draft proposals has come primarily from the plaintiffs bar, both public interest groups and law firms, as well as public prosecutors. Comments have included the following:

- There are no substantial problems under existing law that merit legislative attention.
- Providing finality is not an important goal (either because it is too burdensome to achieve or is unnecessary).
- Finality would not aid significantly in the settlement process.
- There is no significant problem in using Section 17200 as a routine add-on cause of action.
- Conflicts between prosecutors and private plaintiffs (tag-along actions) are rare and not worth addressing by statute.
- Repetitive actions under Section 17200 by private plaintiffs are not a problem in the real world.

Consequently, the Commission has tentatively decided not to proceed with this study in the absence of evidence that problems exist.

The Commission would like to hear from those with experience in unfair competition law and practice, particularly from those who have not yet commented. The Commission encourages detailed comments drawn from practical experience that would assist in assessing the magnitude of any problems and the need for statutory solutions.

We must receive comments on these issues before the next Commission meeting on December 8. Comments should be sent to:

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739



University of San Diego

Law Revision Commission
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JAN 08 1996

Center for Public Interest Law

~~Children's~~ Advocacy Institute

To: California Law Revision Commission

From: Professor Robert C. Fellmeth
Contracted Consultant on Unfair Competition Act Study
re Business and Professions Code § 17200

Date: January 9, 1996

Re: Summary of Problems with Existing § 17200 Format;
Response to Comments; Revised and Clarified Proposal Concept

ReCapitulation of Problem

Section 17200 of the Business and Professions Code broadly covers any "unfair" or "unlawful" act in competition. In a provision unique in California and the rest of the nation, "any person" may sue "for himself or the general public." There is no class representation, notice, hearing, or other qualifying provision.

The suit is limited to injunctive relief. However, it may include substantial monetary restitution. Attorney's fees are not provided. However, where interests substantially beyond those of the named plaintiff are vindicated - attorney's fees are available under CCP § 1021.5. Such fees are more likely where there is a fund created through a restitutionary claim (as with an overcharge allegation). A portion of that fund may be collectible as fees by plaintiff counsel without separate assessment of the defendant.

The Attorney General, district attorneys, and many city attorneys may also sue on behalf of the general public under the same statute in a civil law enforcement action, and have the additional remedy of civil penalties.

Several advocates have argued that the above arrangement should remain in place because there is "no actual problem."

You are a private public interest attorney or a district attorney attempting to stop unfair competition. You have confronted the defendant. They agree there is exposure and the practice should stop. What can you do?

Can you file a complaint and achieve a result? Is the result

- 23 ¹

5998 Alcalá Park, San Diego, California 92110-2492 619/260-4806
926 J Street, Suite 709, Sacramento, California 95814 916/444-3875

Reply to: San Diego Office • Sacramento Office

final as to the dispute you have? If the defendant wants to settle, perhaps at point of initial complaint filing, can you do so and end the matter?

If the defendant says: "I'll settle with you and pay all restitution, but I want that to be the end of the matter", can it happen? Should a defendant be able to settle a matter with finality?

The answers to these questions turn on the *res judicata* effect of a §17200 judgment. The first problem which all should acknowledge is current uncertainty over whether there is *res judicata* and how far it extends. We know that under some circumstances the doctrine of "equitable estoppel" may prevent a precise copycat repeat of the settled litigation. Theoretically, a court should not award duplicative awards to the same beneficiaries. We also know that a public prosecutor may be limited in filing for the public outside of his county which bind other public agencies in conflict (*Hylond*). We know that a public prosecutor cannot be forced to combine a § 17200 action with a private action where both are pending (*Pacific Land Research*). We know that a plaintiff can convert his action into a traditional class action and achieve more certain *res judicata* effect. But these lines leave a great deal uncertain.

In some sense, finality may occur when a practice stops, no suits have been filed, and the statute of limitations has passed. A system of dispute resolution that operates by applying law to evidence without the waste of duplicative proceedings. We accomplish that doctrine through notions of "standing," "class certification", "case and controversy", "ripeness", "exhaustion of remedies", and through "indispensable third parties", "petitions to consolidate", and "petitions to intervene" (e.g. as Real Parties in Interest). All of these procedures, and others, are designed to get the optimum parties before the court to decide a dispute and to do it once.

The current options available under § 17200 and cited by commentators as adequate, have the following respective deficiencies:

Alternative #1: No Res Judicata from the § 17200 Judgment

Assume there is no *res judicata* in a judgment entered under § 17200 on behalf of the general public. That is, not only may individuals who have been damaged file suit, but others may also file suit "on behalf of the general public." Repeated quasi-class actions are then possible. This has been the issue raised in the four related San Diego cases, and in two unrelated cases in Northern California discussed in previous articles.

The problem with this option involves the combination of the

lack of notice required under § 17200 and the power of an accomplished settlement.

Reliance on this "after-the-fact" check has serious disadvantages:

(1) Many settlements are negotiated pre-filing. Section 17200 does not preclude a person from representing the "general public" who has a contrary and narrow personal interest in the matter at issue. It does not require notice. Hence, a matter may be settled based on who the defendant chooses to settle it with and the primary check is a possible subsequent action by a more bona fide party representing the "general public."

(2) A settlement which begins upon filing is subject to court review, but courts presume that settling parties represent all relevant interests and this settlement will have no notice or other requirement to alert the court to any possible collateral problems. For example, a plaintiff attorney may settle a case for substantial attorney's fees and a restitution system with a high number, but which consists of cy pres or other relief which the defendant would have paid anyway, or which involves affirmative protection for the defendant in its stipulated injunctive terms. Such settlements do occur even where there is notice and hearing; the Public Citizen Litigation unit has challenged 18 such alleged "sell-out" arrangements. Under the current format, such results may be obtained without visible notice until after the final judgment is entered and is announced only by the judgement itself. The current opportunity to at least raise the issue before a judge prior to entry of final judgment is not assured with § 17200; a protestor might well have to file an independent action and seek to defeat the practical collateral estoppel effect through that more expensive and difficult vehicle.

(3) A stipulated judgement filed when a complaint is filed (negotiated pre-filing) without notice under § 17200 may take effect immediately. Hence, any challenge to its sufficiency bears a heavy burden. Whatever money has been paid, restitution received or arrangements made, must then be unwound or interfered with in a subsequent challenge.

(4) The first one to file a stipulated judgment under such a system has a substantial advantage over others who might file, or as to others who may have already filed. The decision as to whom will be first in the door with a judgment which is immediately executed and in effect, and "representing the general public" is...the defendant. The defendant is not an advantageous party to determine who should represent the general public against it, but may play that role under the current regime, and leave protestors the burden of filing a case, litigating it over a long period of time, and then using their separate litigated judgment to overturn the previous judgment agreed to by the defendant.

Variation on Alternative #1: Res Judicata by Class Action if Desired

Some commentators have argued that "there is no problem" because even were a court to declare no *res judicata* impact for \$ 17200 actions on behalf of the general public, a clear *res judicata* result can be obtained by filing a class action, stipulating to certification, assuring "adequacy of representation" and giving proper notice for court hearing to review the class representative, and terms of a judgment.

But this alternative does not solve the problems outlined above. Such an alternative requires the agreement of both parties. That fact that they can potentially "do it right" and provide reasonable safeguards before entering a judgment taking effect immediately does not mean that will be the course chosen.

In this regard, some have argued that there is actually no problem because defendants will never agree to a settlement without collateral estoppel since they want the matter ended. Therefore, they will insist on a parallel cause of action alleging a class action, which will give all of the safeguards of concern. But the problem is there are many reasons why a defendant would rather take the \$ 17200 even without this assured collateral estoppel, file the matter and hope there are not further filings. Remember, the defendant - for what in many cases may be essentially an attorney fee payment to plaintiff's counsel - can achieve a court order. It can be obtained without notice to or challenge by anyone. There it sits. It may include injunctive terms. For example, a recently proposed judgment would set the "lawful" late charge of the San Diego cable firms at \$5. The public prosecutors had contended that \$3 was the lawful maximum but refused to specify an amount because they did not want to "regulate rates" and the legitimate costs determining a proper level change.

Even if one is giving funds, if the funds to be given consist largely of funds the defendant would have given anyway and are being manipulated to appear as if a major *cy pres* contribution is being accomplished, the defendant may accomplish under Alternative #1 *post facto* collateral estoppel. The defendant, plaintiff, and any possible third party plaintiff challenger (including a public prosecutor seeking actual disgorgement) would confront a standard equitable estoppel argument: the second action should be dismissed because the matter has been litigated and the victim group has received its remedy (perhaps through *cy pres* contributions to a charity). In theory, a court may overturn such a judgment already in place. But it is likely to be a judgment which begins immediately and where money may have already changed hands. Further, as noted above, courts do not like to undo proposed settlements where there are objectors, they are less likely to undo a settlement signed by a colleague which has been completed.

In fact, the gist of this problem is that there may well be reasons why both parties can gain from an action at the expense of outside persons and interests. These are the persons the Commission has not heard from because they are diffuse and future interests; but arguably they are the interests which should be of paramount concern.

Where one can represent all of those with a possible grievance as a group, the case can become a non-zero sum game - where the two parties can both gain and those who are absent are the losers. It is this fear of which created all of the many class action certification, notice and hearing requirements - requirements that are imposed before judgment is entered, not policed by theoretical and difficult challenge after the cart has left the barn.

Alternative #2: grant res judicata effect to § 17200 actions

Such an alternative would merely apply generic civil procedure to this unique standing opportunity. A court could hold theoretically that because individual rights to compensation are not involved, the first one to file and settle achieves collateral estoppel status. The due process rights of individuals are not abridged, only the right of persons to sue "for the general public." The right to sue for the grievances of others does not have a history of constitutional protection; it is rather based on statutes and procedural rules.

However, such a rule encounters most of the problems listed above: the defendant chooses, there is no assured opportunity for challenge or to raise relevant issues.

A Revised Proposal: General Principles

The underlying problem here is very real. It involves the fact that in these kinds of cases there are a multitude of conflicting interests - with many of them likely not to be before the court. Yet the court is here asked to decide without warning, with the major check apparently consisting of a post facto challenge of uncertain duration.

Rather than tread over the extensive ground already trod, I would propose a series of modest principles to regulate who sues when where representing the "general public" under §§ 17200 and 17500, without imposing all of the often stultifying panoply of requirements involved in a full blown class action.

I would propose that a statute be drafted incorporating the following principles:

(1) Where there is a conflict between a public prosecutor and private plaintiff in bringing a § 17200 action against the same defendant for the same unlawful conduct, the public prosecutor

should have priority. The private plaintiff case should be dismissed - without prejudice to refile for restitution or injunctive relief where the public civil action does not include injunctive relief and achieve substantial disgorgement of unlawfully obtained gains where applicable.

I suggest this arrangement because although a public prosecutor should be given priority in "representing the public", where a prosecutor were to seek only civil penalties, the opportunity for injunctive/restitutionary relief should not be extinguished. This after the fact check works for a number of reasons. First, it will be rarely necessary. Public prosecutors usually include injunctive and restitutionary relief which achieves "substantial disgorgement." Where restitution is not sought, it is usually because the defendant has no assets available to disgorge, which would not lead a private plaintiff to replicate the action. Further, this after-the-fact check operates in the context of a public prosecutor who presumably has little conflict of interest problem and is rather unlikely to be selected by the defendant.

Nevertheless, the arrangement allows for some check on public prosecutors where they fail to assess available restitution.

Where there is a conflict between a private action and a public filing after counsel for the private plaintiff has performed substantial work which contributes to the public case, he or she should retain eligibility for private attorney general compensation under § 17200 for that contribution.

The major objection within the Commission to this provision has been the fear that a small public prosecutor may attempt to bring a large statewide action; perhaps a prosecutor may be influenced by local civil penalties to achieve estoppel for other public and private litigants. And the Commission has noted that there may be some private public interest law firms in a better position to bring such a suit than a small county DA.

However, public prosecutors object to the notion of a "beauty contest" where they must demonstrate their superiority as representatives of the general public over private counsel after they have been elected to enforce this and other statutes by and for the "People." Significantly, the Attorney General is empowered to coordinate district attorney actions and a repository and coordination already exists. More important, the Hylond case establishes the limitation of a district attorney in binding the residents of other counties where there is a conflict.

The fact of existing computer notice between offices of district attorney as to § 17200 investigations and filings, mediation by the Attorney General, and the Hylond limitation where there is a conflict, should reduce the concern of the Commission in this regard.

As opposed to the problems cited above, this is one problem which has not occurred and which is not likely to occur given the incentives and checks currently in place.

(2) Where a private plaintiff wishes to represent the general public he or she must: (a) separately plead the action as such; (b) not have a conflict of interest making him an inadequate representative of the class; and (c) give proper notice and hearing prior to final entry of final judgment.

Note that the first requirement here is a practical necessity. Current pleading practice allows for an ambiguous allegation invoking § 17200 for one's own injury, without making clear whether all claims as to the general public are included, or are not included. If there are to be any conditions or checks on § 17200 invocation on behalf of the general public, it must be clear whether such a unique and important representative status is claimed. It must not be implied for leverage purposes while not accomplishing a result for those (the general public) whose invocation makes the leverage possible. And as a practical matter, we need to know which plaintiffs must meet the two conditions listed.

As to the conditions themselves, on what basis should lack of conflict, notice and hearing not be required? What is the basis for not providing for them? Can *res judicata* be achieved without them? Should it be?

I would note in closing that many of the comments submitted by public prosecutors and private counsel have assisted the Commission in clarifying this problem, and in appreciating some of the collateral concerns. The proposals herein are intended to respond to those points. At the same time, few discussions are advanced without understanding what others are saying and why they are saying it. In this regard, there have been some comments which have an unclear relation to the problem under discussion or to the solutions proposed.

In particular, to those who have contended that "there is no problem" two questions should be addressed:

(1) Under § 17200, where any person has filed an action on behalf of "the general public", is a stipulated judgment *res judicata* as against any other person similarly filing on "behalf of the general public"? Please discuss what the law is at present under these circumstances, what it should be, and why.

(2) What objection do you have to specifying public prosecutor priority, as limited and described above, or to the requirement for private counsel to separately plead, not have a conflict of interest, and give notice and hearing prior to entry of final judgment? Discuss why these measures are undesirable as a matter of public policy.

As to actual examples of problems, my earlier articles cite recent and pending examples of the various dilemmas noted above - and others - and need not be repeated here. See "Unfair Competition Act Enforcement by Agencies, Prosecutors, and Private Litigants: Who's on First?", *California Regulatory Law Reporter* Vol. 15, No. 1 (Winter 1995) at 1.

However, only a small portion of those cases reflecting the conflict and other difficulties do surface. The vast majority of stipulated judgments filed or cases dismissed with side settlements and without public challenge may well reflect many additional examples of the abuses cited.

If the Commission is concerned about incidence levels and trends in this regard, it might commission a study (by someone other than myself) of a substantial and representative sample of § 17200 causes of action filed in initial pleadings. Ideally, such a study would evaluate their clarity as causes of actions on behalf of the plaintiff or on behalf, alternatively, of the "general public." Where the latter, such an inquiry might analyze the apparent conflicts extant from the complaint itself defining other disputes between the parties. Finally, it might advisedly track the final disposition of each. I believe that such a survey may further confirm the Commission's judgement in selecting this section as a candidate for reform.