Study B-700 February 9, 1996

Memorandum 96-11

Unfair Competition: Revised Draft

BACKGROUND

The Commission considered parts of an earlier staff draft on unfair competition litigation at the September and November 1995 meetings. Further consideration was suspended while the Commission reviewed the overriding issue of whether to continue with the unfair competition study. That issue was resolved at the January 1996 meeting in favor of continuing the project, with the understanding that the Commission may or may not recommend legislative changes. It has been suggested that existing law will not admit of legislative improvement or that it is so delicately balanced that all who attempt to improve it are doomed to fail. This we cannot tell until we have fully explored the various options for dealing with the practical and theoretical problems that have been identified.

Attached is a memorandum from Prof. Robert Fellmeth entitled "Summary of Problems with Existing § 17200 Format; Response to Comments; Revised and Clarified Proposal Concept" (Jan. 9, 1996). This should serve as a refresher on the issue of whether res judicata is a desirable goal, as against reliance on concepts such as equitable estoppel.

In a letter dated January 10, Prof. Fellmeth summarizes his current position as follows:

> The previous statutory draft may have addressed problems beyond those we face. Confining ourselves to the most clearly warranted checks, which do not unduly impede any *bona fide* private action for the general public, should strike a balance. This means requiring a clear pleading of a representative action, prohibiting conflicts, and requiring minimal notice (not *Eisen* individual notice) and hearing prior to final judgment.
>
> I believe it is best not to change the current differentiation in the law between public and private suits, particularly since the staff draft here combining the two is offensive to public prosecutors, and they have some strong policy arguments and historical references

> supporting their position. And the other provisions in the previous drafts which spawned heated opposition are arguably not central to the problems which need to be addressed.

(The full letter was attached to the First Supplement to Memorandum 96-3 considered at the January meeting.)

Revised *Staff* Draft

Also attached to this memorandum is a revised staff draft statute. We would like to emphasize that this is a *staff draft* and that the Commission has not approved these proposals or decided to circulate them even tentatively as candidates for recommended legislation. Press reports and some letter writers have evidenced confusion as to the status of proposals under consideration before the Commission and we would like to avoid this problem in the future. When the Commission has actually approved a tentative recommendation, notice of that achievement will be sent to each person on the Commission's mailing list who has indicated an interested in this topic and to the legal press. Any such tentative recommendation will be clearly labeled "Tentative Recommendation" and will have an orange cover (except in the internet edition — but that, too, will be clearly marked). And as noted above, the Commission may decide not to make a tentative recommendation.

There is no explanatory text included with this draft. Once the Commission has completed its review of the draft, the staff will prepare a revised explanatory text.

ELEMENTS OF REFORM

During several meetings toward the end of 1995, the Commission had under its consideration a set of possible revisions in the existing statutes. A brief description of these possible revisions, drawn from Memorandum 95-57, is set out below in indented text, followed by an evaluation of their status in the current draft, and a summary of major points of opposition. (For the full text of letters of commentary, you should refer to the exhibits attached to Memorandums 95-14, 95-32, 95-43, 95-57, and 96-3 and their supplements.)

1. Form of Pleadings (see revised draft § 17301(b))

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

Professor Fellmeth lists this as one his five proposals. We do not recall any objections to this modest proposal.

2. Notice to Attorney General of Filing of Representative Actions (see revised draft § 17306)

> At the time of filing a representative action on behalf of the general public, a private plaintiff should give notice to the Attorney General. The notice would be for informational purposes, so that prosecutors would be aware through their existing voluntary system of potentially competing private actions. Receipt of notice would not impose any duty on the Attorney General or other prosecutor to investigate or intervene in the private action.

Professor Fellmeth has not continued to recommend this notice provision. It still seems useful, however, and should be relatively unobjectionable. In a statutory scheme that tries to sort out priorities between public and private plaintiffs, a minimal notice provision of this sort seems obvious.

3. Adequacy of Representation and Absence of Conflict of Interest (see revised draft §§ 17303-17304)

> The open-ended standing rules of existing law should be revised to provide minimal protections. A private plaintiff should not be able to proceed in a representative action on behalf of the general public unless the plaintiff's attorney is an adequate legal representative of the public interest. Hence, the attorney for a private plaintiff would be required to apply to the court for approval to act as counsel for the interests of the general public pled. This rule does not go as far as the class action rule requiring that the plaintiff be an adequate representative of the class.
>
> In addition, neither the plaintiff nor the plaintiff's attorney may proceed if either of them has a conflict of interest that reasonably could compromise the good faith representation of the interests of the general public pled.

> The adequacy of representation and lack of conflict of interest issues would be determined by the court as soon as practicable after commencement of the action. The proposed statute thus requires an affirmative finding by the court that the minimum requirements have been met at an early stage of the proceedings. This rule should provide some assurance that the action is brought in good faith, but without the need to satisfy the class certification rules applicable. If the private plaintiff and plaintiff's counsel do not meet the statutory requirements, the representative cause of action would be stricken from the complaint with prejudice.

Professor Fellmeth mentions the need to avoid conflicts of interest in his latest letter and memorandum, but does not mention the adequacy of representation rule. These proposals have encountered some opposition from commentators on the staff draft. The Commission has also expressed concern about how the rule would operate and has asked that the adequacy of representation rule be fleshed out.

The staff analysis finds that these rules are needed in order to provide the limited binding effect on nonparties proposed in the draft, at least as to money recovery. (See Memorandum 95-35.) Consider also that the absent members of the public have a theoretical right to choose their counsel. In this context, where the public has no notice of the attempt of the plaintiff's counsel to represent its interests in the litigation, some adequacy standard seems to be a necessity.

Draft Section 17303 implements this policy. It adopts the standards applicable in class actions. This law is not obscure and is not difficult to find. In Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968), the court held that the class attorney must be "qualified, experienced and generally able to conduct the proposed litigation" and the lawyer must be willing and able to vigorously prosecute the action. See 7A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1769.1, at 375 (2d ed. 1986). The rule is satisfied where the attorney for the class is experienced in the field in which the suit was brought or has demonstrated professional competence in other ways. *Id.* at 376. Counsel for the class representative must be more than merely an attorney admitted to practice; the attorney must have sufficient experience and training to satisfy the trial court that he will be a strenuous advocate for the class, and his conduct in pretrial matters, discovery and the trial itself will be evidence of his capability adequately to represent the class. *Id.* at 377, n.7, *citing* Johnson v. Shreveport Garment Co., 422 F. Supp. 526 (D.C. La. 1976). An attorney who was diligent, thorough, and

skilled in the subject of the litigation and who did not lack either the incentive to prosecute or the ability to represent the members of the class was an adequate representative. *Id. citing* Cooper v. University of Texas at Dallas, 482 F. Supp. 187 (D.C. Tex. 1979). Counsel who had been a vigorous advocate and demonstrated familiarity with securities litigation did not fail to satisfy the adequate representation rule on the theory that plaintiff's counsel had less experience than might be possessed by other counsel. *Id.* at 379, n.9, *citing* Simon v. Westinghouse Elec. Corp., 73 F.R.D. 480 (D.C. Pa. 1977). The standard is not satisfied in a case where counsel has little experience or if the work completed suggests that counsel may not be effective. The court may refuse to certify a class on this ground where counsel fails to amend a complaint in accord with the court's specifications or is unable to present a valid claim after to opportunities to amend the complaint. *Id.* at 380, n.11. Lack of diligence in seeking discovery may be found to be a failure to display the kind of commitment and ability required to be an adequate representative. *Id.* at 382. Mere allegations of inexperience or incompetence are not enough if other evidence suggests attorney is competent; and the court may cure a defect in representation by appointing additional counsel where appropriate. *Id.* at 383. "However, the extreme importance of the inquiry into the adequacy of the class counsel means that the court should not be easily satisfied with a self-serving and one-sided statement by the class attorney that he meets the requirements of the rule." *Id.*

A conflict of interest may arise if the attorney is involved in multiple lawsuits for the named plaintiff or against the same defendants. See *id.* at 384. There may be conflicts between members of a class that create problems. However, since the draft statute does not require the plaintiff to be an adequate representative of the general public class, the class action learning on the issue of adequacy of the plaintiff's representation and conflicts of interest between the role of the plaintiff's attorney as a class representative are not involved in this statute.

4. Defendant's Disclosure of Other Cases (see revised draft § 17307)

> The defendant would be required to disclose any other representative or class actions pending in California based on substantially similar facts and theories of liability. This is a continuing duty, so that if such a representative or class action is filed when a representative action is pending, the defendant would be required to give notice to the plaintiff and the court of the later actions. This disclosure requirement is intended to help the court to

> determine which plaintiff is best suited to move forward or to make other appropriate orders, such as for consolidation or abatement.

Professor Fellmeth does not mention this feature in his recent proposal. However the staff thinks that it is a valuable rule. It has been generally supported by the persons who have commented on earlier drafts, albeit all of them from the plaintiffs' side, private or public. The question is how far this duty should extend and how it can be enforced. The earlier purpose of providing information to help decide whether a public or private action should proceed is mooted by the revised draft proposal to provide for staying only private representative actions, as discussed below.

5. Notice of Proposed Settlement (see revised draft § 17308)

> The draft would require that notice of the terms of a proposed judgment, whether pursuant to stipulation or after trial, be given to other parties with cases pending against the defendant based on substantially similar facts and theories of liability and to the Attorney General [and any regulatory agency with jurisdiction over the defendant relevant to the allegations in the pleadings] at least 45 days before entry of judgment. Since the interests of the general public are being determined in a representative action, any interested person would have the opportunity to apply for leave to be heard when the court considers entry of judgment. Although this procedure is quite different from that applicable to class actions, the intent is to afford a broader scope of participation by potentially interested persons than would generally be available.

This is an important feature in the effort to make representation of the general public meaningful by giving the general public an opportunity to review and comment on the disposition of their rights. This continues to be a feature of the approach recommended by Prof. Fellmeth. (See Exhibit pp. 8-9.)

The draft provides an opportunity for nonparties to be heard in the hearing for approval of the terms of judgment in the representative action. The "other interested persons" language raises the issue of how open this procedure should be. Consumers Union supports permitting interested persons to participate. (See Memorandum 95-57, Exhibit pp. 12-13.) CU argues that

> interested persons such as consumer organizations are sometimes the most effective potential objectors to an inadequate proposed settlement.... [The statute] should permit and indeed encourage

> comment on the adequacy of the proposed judgment from the widest possible group … which might include other persons with claims that have not yet been filed against the defendant, or watchdog public interest groups, or regulatory agencies which did not receive direct notice.

Some additional technical issues also remain. Prof. Fellmeth's earlier draft proposed the regulatory agency notice provided here in draft Section 17308(a)(4). (See Memorandum 95-57, Exhibit p. 4.) This may be a useful provision, but the staff has doubts about how it would be implemented. The plaintiff would have to determine any and all agencies with appropriate jurisdiction and then determine which should get notice. What would be the consequence of failure to give this type of notice to the appropriate agency? S. Chandler Visher suggests that the defendant should have to tell the plaintiff which agencies regulate it. (See Memorandum 95-57, Exhibit p. 33.) Consumers Union also suggests a "safe harbor" so that the notice provision is satisfied if notice is given to agencies disclosed by the defendant. (See Memorandum 95-57, Exhibit p. 12.)

S. Chandler Visher argues that there should be an exemption for small cases from this "cumbersome procedure" — referring to this section and Section 17309. (See Memorandum 95-57, Exhibit p. 33.) He suggests that the procedure be made optional when one of the parties wants to achieve binding effect. (A similar idea was discussed at the September meeting.) The issue of whether the statute can be made optional is discussed below.

6. Court Review and Approval of Settlements (see revised draft § 17309)

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

Professor Fellmeth's memorandum reaffirms his concern with the potential for abuse where the defendant can effectively choose which plaintiff succeeds in representing the public interest. (See Exhibit pp. 2-4.) Requiring court review and approval is an important feature of the procedure as envisioned by Prof. Fellmeth. The staff concurs in this approach.

Consumers Union would expand this section to permit comment by "any person on the fairness or adequacy of the proposed judgment." (See Memorandum 95-57, Exhibit p. 13.) CU notes that the statute requires the court to find entry of judgment to be in the interests of justice but does not require the court to accept or consider comments of the public.

7. Binding Effect of Representative Actions (see revised draft § 17312)

> The draft fills a critical gap in the unfair competition law by providing a limited binding effect on nonparties of a determination of a representative cause of action. If the proposed statutory requirements of notice, adequacy, and court review and approval have been followed, the judgment as to the public interest bars further claims on behalf of the general public. In other words, a judgment in a representative action on behalf of the general public under the unfair competition law is entitled to res judicata and collateral estoppel effect as to the interest of the general public pled.
>
> A nonparty individual's claim for restitution or damages for injury suffered by the individual that arises out of the same facts would not be barred, but the plaintiff would not be able to make a claim on behalf of the general public. This rule does not affect the due process rights of any person who has a personal claim for relief. An injured person is able to "opt out" of the settlement or judgment, in effect, by bringing an action on his or her own behalf. The injured person's due process rights are not affected and class action formalities are unnecessary in the representative action to obtain limited binding effect. In order to avoid duplicate recovery, any monetary relief received by the individual would, however, be reduced by the amount of any restitution received in the representative action.
>
> The draft thus restricts the individual's statutory right under the unfair competition law to bring a representative action on behalf of the general public. The individual's constitutional right not to have a cause of action in the individual's own right determined without due process is not impaired. But the individual has no constitutional right to bring a representative action, and the right to bring representative actions, which is granted by statute, can be limited by statute or repealed.

Professor Fellmeth and the staff continue to believe that minimal res judicata is important and that it will not disturb the balance of the law. It is intended to put the law on a firmer footing. The draft provision has been rewritten to simplify it and to avoid stating a broad rule that the representative action is binding except for individual damage claims. As rewritten, the section simply says that a representative action is binding on the right to bring a duplicative representative action on behalf of the general public. Other issues would be dealt with by general law, including doctrines of equitable estoppel.

The earlier draft included a provision governing the binding effect on individual claims for damages that is not continued in this draft. If the Commission is interested in revisiting this provision, we can include it in the next memorandum.

Jan Chilton has suggested evening the playing field by precluding individuals from claiming benefits of collateral estoppel arising from the representative action. (See Memorandum 95-57, Exhibit p. 30, item 10.) The staff believes this is counter to existing case law, although that does not prevent adopting the suggested approach as a statutory rule. Mr. Chilton would keep some version of the res judicata rule. (See *id.* postscript.)

8. Priority Between Public and Private Plaintiffs (see revised draft § 17315)

> If both private and public plaintiffs have commenced representative actions on behalf of the general public against the same defendant based on substantially similar facts and theories of liability, the court in either action, on motion of a party or on its own motion, may determine which action should proceed and stay the other action. The draft creates a presumption in favor of a public prosecutor as the representative of the general public, but permits a private plaintiff to overcome the presumption by showing that the public prosecutor has a substantial conflict of interest or that the private plaintiff has substantially superior resources and expertise in the case.

Following the suggestion of Prof. Fellmeth and considering comments from prosecutors at earlier meetings, the draft now provides only for a takeover by prosecutors in case of a conflict. The provision permitting a private plaintiff to take over a prosecutor action in the earlier draft was opposed by prosecutors. A more limited provision for correcting inadequate restitution obtained by prosecutors is included in the latest draft. The rationale for this approach is

discussed in Prof. Fellmeth's memorandum. (See Exhibit pp. 6-8.) The prosecutor's role as a law enforcement officer is recognized, but substantial restitution is also encouraged by authorizing private plaintiffs to sue if restitution is inadequate. The staff proposes to stay the private action rather than dismiss it as suggested by Prof. Fellmeth. The provision tolling the running of the limitations period is consistent with a suggestion made by Jan Chilton. (See Memorandum 95-57, Exhibit p. 28, item 2.)

This is likely to be a controversial provision. Consumers Union found the earlier two-way rule to be a "balanced approach" and preferable to the language proposed by CDAA which provided a global preference for prosecutors' enforcement actions. (See Memorandum 95-57, Exhibit pp. 14-15, item 11.) CU would have added a third ground for overcoming the presumption of the earlier draft in favor of prosecutors to permit a private action where the prosecutor "has not vigorously pursued the case." CU would also make the stay discretionary rather than mandatory, and would restrict it to cases concerning "similar time frames and geographic areas."

S. Chandler Visher suggested that the prosecutor could be presumed the better representative as to injunctive relief in all cases and with respect to restitution in cases where the prosecutor does not seek a civil penalty. (See Memorandum 95-57, Exhibit p. 32.) Otherwise, the private plaintiff should be presumed to be the superior representative on the issue of restitution. He would coordinate the cases, with the private plaintiff limited to the restitution issue, rather than staying the private case. In line with the current proposal, Mr. Visher also suggested: "At a minimum this section should apply to DA cases when there has been an order of restitution and the court has made a finding that a private action seeking damages and restitution would likely not have obtained more restitution damages for the class than the DA case." (*Id.* Exhibit p. 34.)

Jan Chilton found that the earlier rule "unduly favors public prosecutors" and would presumably find this even more so in this draft. (See Memorandum 95-57, Exhibit p. 30-31, item 12.)

9. Attorney's Fees (see revised draft § 17317)

> The draft statute emphasizes the need to determine that a benefit is conferred on the general public in making awards of attorney's fees in representative actions.

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

Prof. Fellmeth's memorandum supports this type of rule. (See Exhibit p. 7.) The staff believes it is valuable. Consumers Union has supported it in earlier drafts (see Memorandum 95-57, Exhibit p. 15, item 12), whereas Jan Chilton has expressed disagreement with its policy and would provide additional hurdles to attorney's fee awards.

10. Application to Pending Cases (see revised draft § 17319)

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

We have seen no commentary on this provision, but some sort of transitional rule is needed, depending on the content of the statute.

OTHER ISSUES

Can the Statute Be Optional?

From time to time, commentators have suggested that the statutory procedure be made optional, depending on whether the parties (or the plaintiff only) wishes a judgment with the limited binding effect proposed. Remember that the proposed binding effect is only on the right to represent the general public. In the current staff draft, it would limit only the right of a private plaintiff to represent the general public.

The staff is resistant to making the statute optional since the rules on adequacy of counsel, lack of conflict of interest, notice to the Attorney General, notice of terms of judgment, and the fairness hearing each are substantive improvements. If the parties want to avoid the statute, then the potential defendant may settle before an action is filed. To that extent the statute would be

optional. But once a complaint is filed with a representative cause of action, the matter could not be disposed of without following the statute.

If the statute is made optional by the plaintiff's failure to comply at some stage, then it would be appropriate to deny attorney's fees. It is anomalous to permit representation of the general public without satisfying minimum standards designed to encourage faithful representation of those interests. Where the defendant fails to comply with the statute, such as by not disclosing related actions so that notice can be given, it has been suggested that the binding effect should be limited so that it does not affect such parties. (See letter from Consumers Union, Memorandum 95-57, Exhibit p. 11, item 4.)

Constitutional Limits on Binding Absent Parties

Late in the discussion at the September 1995 meeting, the question arose as to the extent to which absent parties may be constitutionally bound in the context of representative actions. The staff analysis of the issues in this area, focusing on federal and state class action law and considering its application to unfair competition actions, was presented in detail in Memorandum 95-35 at the June 1995 meeting. The issues are complex and not fully resolved, but general conclusions can be drawn, even if some of the finer distinctions are open to speculation.

Class action procedures meet constitutional requirements, but not all class action rules are constitutionally mandated. In other words, class action law is not automatically applicable to representative actions in unfair competition litigation. The class action rules of constitutional dimension must be strained out of the voluminous state and federal case law.

The open-ended standing afforded by Business and Professions Code Section 17204 permitting a suit on behalf of the general public for injunctive relief and restitution is inconsistent with several fundamental rules applied in class actions. The plaintiff need not be an adequate representative of the class of injured persons in the sense of having suffered the alleged injury. A class representative, on the other hand, must be a member of the represented class. We cannot say for certain whether the protections in the draft statute directed toward plaintiff adequacy — lack of a conflict of interest and adequate legal representation — are sufficient to overcome the weight of authority in the class action context. The staff concluded that it would be controversial and that there would be no

guarantee that the courts would find it constitutionally sufficient to bind absent parties in unfair competition actions.

The other major problem is notice and an opportunity to be heard. No certain conclusions can be drawn. Notice may not be required in an action for injunctive relief, where the case is not predominately for monetary relief (or "damages"). The scope and form of notice would also be an issue. If notice is required, then mere published notice is not likely to be sufficient to save a statutory scheme that is suspect on due process grounds, although such notice may be permissible in some cases. Requiring class action type notice raises the serious issue of expense and would eliminate one of the major advantages of the unfair competition statute over class actions from the perspective of plaintiffs — perhaps the most attractive feature of the unfair competition statute from a litigation standpoint.

In view of these uncertainties, a statute that attempted to impose binding effect under the current draft statute could result in much litigation as the parties and courts tried to apply the constitutional principles in each case. Settlement would be uncertain, since the effect would be unknown until a court had determined the issue in a later action. Some statutory guidelines are needed or the courts will have to fill in the rules on a case by case basis (or hold the statute unconstitutional). This is not to say that the working approach — providing minimum standards of adequacy and precluding only later representative actions — is the only constitutional approach. It could be combined with a rule that attempted to distill the case law applicable to injunctive cases and assert a binding effect on absent parties. But any approach that seeks to test the constitutional limits will necessarily result in appeals until the issues are settled. Other creative options may also be available.

Location of Statute

The June 1995 Minutes note the opinion of commentators at that meeting that the statute should be located in the Code of Civil Procedure. The concern expressed at the meeting was that undue attention might be drawn to the unfair competition statutes themselves if the rules on litigation were added to the Business and Professions Code.

Professor Fellmeth's early proposals were directed to the relevant parts of the Business and Professions Code. His July 1995 draft (see Memorandum 95-57, Exhibit pp. 1-6) would place the new statute immediately following Code of Civil Procedure Section 382, the class action statute.

The revised staff draft is relocated back in the Business and Professions Code. While the staff stated in Memorandum 95-43 that it is "not inappropriate" to locate a statute on representative actions in the class action vicinity of the Code of Civil Procedure, the obvious and *more appropriate* place to put a statute dealing with unfair competition litigation under Business and Professions Code Sections 17204 and 17535 is in that code. This part of the Business and Professions Code is not ideally organized. The basic unfair competition statute is in one Part — Chapter 5 (commencing with Section 17200) (Enforcement) in Part 2 (commencing with Section 16600) (Preservation and Regulation of Competition) — and the related false advertising statute, which is incorporated by Section 17200, is in another Part — Article 2 (commencing with Section 17530) (Particular Offenses) of Chapter 1 (Advertising) of Part 3 (Representations to the Public). Adding a new chapter following the 17200 series is fairly consistent with the existing structure. It is also consistent with the approach normally taken, as in the Consumers Legal Remedies Act, Civ. Code § 1750 *et seq.*, which contains its own special class action rules. But the class action area of the Code of Civil Procedure is not well-organized either.

Conflicting Statutes of Limitations

An issue has arisen concerning potential conflicts between the four-year statute of limitations applicable to unfair competition actions under Business and Professions Code Section 17208 and a different statute applicable under an incorporated statute. The staff recommends that the Commission consider resolving the conflict, as discussed in Memorandum 96-18 on this meeting's agenda.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

TO: California Law Revision Commission

File:

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 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 <u>able</u> 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 prefiling. 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 <u>can</u> 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. Therefor, 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 <u>proposed</u> 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 <u>not</u> 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.

Accompanies Memorandum 96-11

REVISED STAFF DRAFT STATUTE

Bus. & Prof. Code §§ 17300-17319 (added). Representative actions

Bus. & Prof. Code §§ 17300-17319 (added). Representative actions

SECTION 1. Chapter 6 (commencing with Section 17300) is added to Part 2 of Division 7 of the Business and Professions Code, to read:

CHAPTER 6. REPRESENTATIVE ACTIONS ON BEHALF OF GENERAL PUBLIC

§ 17300. Definitions

17300. As used in this chapter:

(a) "Enforcement action" means an action by a prosecutor under Section 17204 or 17535 or other provisions of Chapter 5 (commencing with Section 17200) or of Part 3 (commencing with Section 17500).

(b) "Private plaintiff" means a person other than a prosecutor.

(c) "Prosecutor" means the Attorney General or appropriate district attorney, county counsel, city attorney, or city prosecutor.

(d) "Representative action" means an action that includes a representative cause of action.

(e) "Representative cause of action" means a cause of action by a private plaintiff on behalf of the general public under Section 17204 or 17535.

Comment. Section 17300 defines terms used in this chapter. For prosecutors empowered to bring actions for unfair competition or false advertising, see, e.g., Sections 17204, 17204.5, 17206.5, 17207, 17535, 17536. Representative actions are not class actions; however, a private plaintiff may be a certified class that is also suing in a representative capacity on behalf of the non-class general public under Section 17204 or 17535.

§ 17301. Prerequisites for pleading representative cause of action

17301. (a) A private plaintiff may plead a representative cause of action on behalf of the general public under Section 17204 or 17535 only if the requirements of this chapter are satisfied.

(b) The private plaintiff shall separately state the representative cause of action in the pleadings, and shall designate the representative cause of action as being brought "on behalf of the general public" under Section 17204 or 17535, as applicable.

Comment. Subdivision (a) of Section 17301 provides the scope of this chapter. This chapter does not apply to actions for unfair competition that are not representative actions. If an action is no longer a representative action, then the procedures of this chapter would cease to apply.

Subdivision (b) provides a technical rule on the form of pleadings that include a representative cause of action for unfair competition or false advertising under the Business and Professions Code.

See Sections 17300(b) ("private plaintiff" defined), 17300(d) ("representative cause of action" defined).

§ 17303. Adequate legal representation

17303. (a) The attorney for a private plaintiff in a representative action must be an adequate legal representative of the interests of the general public pled.

(b) As soon as practicable after the commencement of the representative action, the attorney for the private plaintiff shall apply to the court for an order approving the attorney as the legal representative of the interests of the general public in the action. In making its determination, the court shall consider standards applied in class actions. Discovery is not available regarding the issue of adequacy of legal representation, but the court may inquire into the matter in its discretion. If the court determines that the requirement of subdivision (a) is not satisfied, the representative cause of action shall be stricken from the complaint.

(c) An order under this subdivision may be conditional, and may be modified before judgment in the action.

Comment. Section 17303 sets forth the prerequisite of adequacy of counsel to represent the general public in an action for unfair competition or false advertising. Consistent with the broad approach to standing codified in Sections 17204 and 17535, Section 17303 does not require the private plaintiff to be a member of the injured group.

Subdivision (b) requires the private plaintiff's attorney to apply for approval in order to proceed with a representative action. The court is given broad discretion in making its determination, including the power to investigate any issues that arise, but discovery is specifically forbidden in the interests of efficiency. The plaintiff cannot obtain a ruling on the merits of the complaint without first satisfying this section and the conflict of interest rule in Section 17304.

Subdivisions (b) and (c) are drawn in part from Rule 23(c)(1) of the Federal Rules of Civil Procedure, applicable to class actions. Before entry of judgment in the representative action, the court is also required to make a finding that the standards in this section have been satisfied. See Section 17309 (findings required for entry of judgment).

See also Sections 17300(b) ("private plaintiff" defined), 17300(d) ("representative action" defined).

§ 17304. Conflict of interest

17304. (a) Neither a private plaintiff nor the plaintiff's attorney in a representative action may have a conflict of interest that reasonably could compromise the good faith representation of the interests of the general public pled.

(b) As soon as practicable after the commencement of the representative action, the court shall determine by order whether the requirements of subdivision (a) are satisfied. The determination shall be based on the pleadings and discovery is not available. If the court determines that the requirements of subdivision (a) are not satisfied, the representative cause of action shall be stricken from the complaint.

(c) An order under this section may be conditional, and may be modified before judgment in the action.

Comment. Section 17304 precludes conflict of interest applicable to bringing an action for unfair competition or false advertising on behalf of the general public. Consistent with the broad approach to standing codified in Sections 17204 and 17535, Section 17303 does not require the private plaintiff to be a member of the injured group. The plaintiff cannot obtain a ruling on the merits of the complaint without first satisfying this section and the adequacy of representation rule in Section 17303.

Subdivision (c) is drawn from Rule 23(c)(1) of the Federal Rules of Civil Procedure, applicable to class actions. Before entry of judgment in the representative action, the court is also required to make a finding that the standards in this section have been satisfied. See Section 17309 (findings required for entry of judgment).

See also Sections 17300(b) ("private plaintiff" defined), 17300(d) ("representative action" defined).

§ 17306. Notice to Attorney General

17306. Not later than 10 days after a private plaintiff commences a representative action or amends a complaint to add a representative cause of action, the private plaintiff shall give notice of the filing or amendment, together with a copy of the complaint, to the Attorney General.

Comment. Section 17306 provides for notice of filing of a representative action and a copy of the complaint to be given to the Attorney General. The notice and copy required by this section are given for informational purposes only. This section is not intended to create or imply any duty on the part of the Attorney General or other prosecutor to intervene or take other action in response to the notice.

See also Sections 17300(b) ("private plaintiff" defined), 17300(d) ("representative action" defined), 17300(e) ("representative cause of action" defined).

§ 17307. Disclosure of similar cases against defendant

17307. (a) Promptly after an enforcement action or a representative action is filed, the defendant shall notify the plaintiff and the court of any other enforcement actions, representative actions, or class actions pending in this state against the defendant that are based on substantially similar facts and theories of liability.

(b) Promptly after an enforcement action, a representative action, or a class action is filed in this state, the defendant shall give notice of the filing to the plaintiff and the court in all pending enforcement actions and representative

actions in this state against the defendant that are based on substantially similar facts and theories of liability.

Comment. Section 17307 requires the defendant to disclose similar cases pending or later filed in California. This section applies as to actions brought by either private plaintiffs or prosecutors. See Sections 17300(a) ("enforcement action" defined), (b) ("private plaintiff" defined), 17300(c) ("prosecutor" defined), 17300(d) ("representative action" defined).

§ 17308. Notice of terms of judgment

17308. (a) At least 45 days before entry of a judgment in a representative action, or any modification of the judgment, which is a final determination of the representative cause of action, the private plaintiff shall give notice of the proposed terms of the judgment or modification, including all stipulations and associated agreements between the parties, together with notice of the time and place set for the hearing on entry of the judgment or modification, to all of the following:

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

(2) The Attorney General.

(3) Any prosecutor who has filed a request for notice with the court.

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

(b) A person given notice under subdivision (a) or any other interested person may apply to the court for leave to intervene in the hearing provided by Section 17309. Nothing in this subdivision limits any other right a person may have to intervene in the action.

(c) The court for good cause may shorten or lengthen the time for giving notice under subdivision (a), on the motion of a party or on the court's own motion.

Comment. Subdivision (a) of Section 17308 requires notice of the terms of any proposed disposition of the representative action to other interested parties. This section applies to both private plaintiffs and prosecutors. The 45-day notice period is subject to variation on court order pursuant to subdivision (c).

Subdivision (b) recognizes a limited right to intervene in the hearing for approval of the terms of the judgment provided by Section 17309.

See also Sections 17300(b) ("private plaintiff" defined), 17300(c) ("prosecutor" defined), 17300(d) ("representative action" defined), 17300(e) ("representative cause of action" defined).

§ 17309. Findings required for entry of judgment

17309. (a) Before entry of a judgment in a representative action that is a final determination of the representative cause of action, a hearing shall be held to determine whether the requirements of this chapter have been satisfied.

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

(1) The plaintiff and the plaintiff's attorney satisfy the requirements of Section 17303 and 17304.

(2) The defendant has disclosed other pending cases pursuant to Section 17307.

(3) Notice has been given pursuant to Sections 17306 and 17308.

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

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

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

(7) Any award of attorney's fees included in the judgment or any stipulation or associated agreements complies with Section 17317.

Comment. Section 17309 provides for a hearing as a prerequisite to entry of judgment on a cause of action on behalf of the general public for unfair competition or false advertising.

See also Sections 17300(d) ("representative action" defined), 17300(e) ("representative cause of action" defined).

§ 17310. Dismissal, settlement, compromise

17310. A representative action may not be dismissed, settled, or compromised without the approval of the court. If the representative action is dismissed, settled, or compromised with prejudice, or the complaint is amended to strike the representative cause of action with prejudice, the notice and hearing requirements of Sections 17308 and 17309 must be satisfied.

Comment. The first sentence of Section 17310 is drawn from Rule 23(e) of the Federal Rules of Civil Procedure relating to class actions and Civil Code Section 1782(f) (Consumers Legal Remedies Act).

§ 17312. Binding effect of representative action

17312. The determination of a representative cause of action in a judgment approved by the court pursuant to Section 17309 is binding and conclusive as to the right to bring a representative action.

Comment. Section 17312 governs the binding effect of a representative action under this chapter. Under this section, a final determination of the cause of action (i.e., the cause of action on behalf of the general public under Section 17204 or 17535, as provided in Section 17309) is res judicata. In other words, the determination of the cause of action on behalf of the general public has been made and other plaintiffs are precluded from reasserting the same claim on behalf of the general public. See also Code Civ. Proc. § 1908 (binding effect of judgments generally). This effect applies to any relief granted the general public, whether by way of injunction or restitution or otherwise. The scope of this rule is limited: it should be noted that a person who claims to have suffered damage as an individual is not necessarily precluded from bringing an action on that claim, even though the question of the harm to the general public has been determined conclusively. However, even if the person prevails on this claim, any monetary recovery (whether damages or restitution) should be reduced by the amount of any restitution received by the person as a member of the general public in the representative action.

See also Sections 17300(d) ("representative action" defined), 17300(e) ("representative cause of action" defined).

§ 17315. Priority between prosecutor and private plaintiff

17315. (a) If a private plaintiff has commenced a representative action and a prosecutor has commenced an enforcement action against the same defendant based on substantially similar facts and theories of liability, the court in which either action is pending, on motion of a party or on the court's own motion, shall stay the private representative action until completion of the enforcement action or, in the interest of justice, make an order for consolidation of the actions. The determination may be made at any time during the proceedings and regardless of the order in which the actions were commenced.

(b) If the prosecutor's enforcement action does not result in substantial restitution to the general public, the private representative action may be reinstituted. The time during which the representative action was stayed shall not be counted in determining whether the applicable limitations period has expired.

Comment. Section 17315 provides a priority for public prosecutor enforcement actions over conflicting private representative actions. Subdivision (b) recognizes a right to pursue restitution in a private representative action where the restitutionary recovery under the enforcement action is not substantial. Where a private plaintiff has contributed to the prosecution of the enforcement action, attorney's fees may be awarded as provided in Section 17317. If the enforcement action and representative action are consolidated, the court may give the prosecutor responsibility on the injunctive and civil penalty phases of the case and let the private plaintiff press the restitutionary claims.

See also Sections 17300(a) ("enforcement action" defined), 17300(b) ("private plaintiff" defined), 17300(c) ("prosecutor" defined), 17300(d) ("representative action" defined).

§ 17317. Attorney's fees

17317. (a) In addition to any other applicable factors, an award of attorney's fees in a representative action shall be based on the work performed, the risk involved, and a consideration of benefit conferred on the general public.

(b) If a prosecutor is given preference over a private plaintiff under Section 17315, the private plaintiff may be entitled to costs and attorney's fees pursuant to Section 1021.5 of the Code of Civil Procedure or other applicable law.

(c) Timely notice by the attorney for the private plaintiff of a planned or filed representative action and assistance to the prosecutor are relevant factors in meeting the requirement of beneficial contribution under Section 1021.5 of the Code of Civil Procedure. Where beneficial contribution has occurred, the private plaintiff need not have been the successful party in order to qualify for an attorney's fee award under Section 1021.5 of the Code of Civil Procedure.

Comment. Subdivision (a) of Section 17317 provides special factors applicable to an award of attorney's fees in representative actions.

Subdivision (b) makes clear that the operation of the preference rule in Section 17315 does not deprive a private party of the right to costs and attorney's fees.

Subdivision (c) provides an incentive for private plaintiffs to cooperate with prosecutors in common cases.

See also Sections 17300(b) ("private plaintiff" defined), 17300(c) ("prosecutor" defined), 17300(d) ("representative action" defined).

§ 17319. Application of chapter to pending cases

17319. (a) On and after its operative date, this chapter applies to all pending representative actions, regardless of whether they were filed before the operative date, unless the court determines that application of a particular provision of this chapter would substantially interfere with the effective conduct of the action or the rights of the parties or other interested persons.

(b) For the purpose of applying this chapter to pending actions, the duty to give notice under Section 17306 is satisfied if the notice or information is given promptly after the operative date of this chapter.

Comment. Section 17319 applies this chapter to all representative actions, including those filed before the operative date except where the court orders otherwise. Subdivision (a) is drawn from Code of Civil Procedure Section 694.020 (application of Enforcement of Judgments Law). See also Section 17300(d) ("representative action" defined).