

Memorandum 96-23

Unfair Competition: Revised Draft of Tentative Recommendation

Revised Staff Draft of a Tentative Recommendation

Attached to this memorandum is a staff draft of a tentative recommendation on the unfair competition litigation statutes. This staff draft includes new and revised draft sections (starting at page 13) that implement the general consensus from the February meeting. This revision also includes a revised explanatory text of the tentative recommendation which has been edited for consistency with the current draft statute. Staff notes relevant to particular sections are set out following the sections in the revised draft.

At the April meeting, we intend to proceed through the draft statute section by section. We do not plan to review the explanatory text, but if Commissioners have any editorial suggestions, corrections, or additions, be sure to raise them at the meeting or give them to the staff for incorporation in the next edition. If a general consensus can be reached on this draft, it may be possible to approve it to be distributed for comment as a tentative recommendation, either following this meeting or the next.

Also attached to this memorandum as an exhibit is a letter from Earl Lui on behalf of Consumers Union which he delivered to the staff following the discussion of unfair competition at the February meeting.

Statute of Limitations Issue

A related memorandum was on the February agenda but not considered by the Commission. Memorandum 96-18 discussed the issue of overlapping and inconsistent statutes of limitations that can occur where an unfair competition action is brought on the basis of a violation of another statute with a different statute of limitations. Business and Professions Code Section 17208 provides a four-year limitations period for an action to enforce a cause of action "pursuant to this chapter" — which leaves the door open to an argument that a different statute should apply if the action is brought on the basis of a violation of another statute with its own statute of limitations.

The Commission was informed in a letter from the Coalition of Manufacturers for the Responsible Administration of Proposition 65 that there were conflicting rulings on this issue in superior court cases. As reported in Memorandum 96-18, we had gotten a copy of one judgment that applied the four-year period of Section 17208. The staff has been unable to locate a contrary ruling. The theoretical issue still remains, but we do not have sufficient information to determine whether there is a practical issue in the sense of conflicting court decisions.

Raising this issue of whether the statute of limitations should be clarified has engendered written opposition from Prof. Fellmeth (see Memorandum 96-18, Exhibit pp. 4-5) and Tom Papageorge (see First Supplement to Memorandum 96-11, Exhibit pp. 1-2), as well as comments made orally at the February meeting. In the spirit of not introducing new issues into the project at this stage, the staff does not intend to pursue this issue unless the Commission directs otherwise or we find evidence of a serious problem in interpreting the existing statute.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary



Publisher of Consumer Reports

February 21, 1996

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

Re: Unfair Competition Study, Memorandum 96-11

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 Staff Draft Statute attached to Memorandum 96-11. In summary, we continue to believe there is no need for a res judicata section. Furthermore, the conflict of interest provision is problematic. Our specific comments on the draft statute are set forth in detail below.

1. Absence of conflict of interest (§ 17304)

Based on the staff commentary and Professor Fellmeth's January 9, 1996 memo, it appears the major cause of concern in this area is with a party who has multiple lawsuits against the same defendant. The concern is that the representative action would simply be filed to gain additional leverage against the defendant by a party who is primarily concerned with its separate, private action against the same defendant. This situation involves a conflict between a sham "representative" plaintiff and the interests of the general public.

While the concern over this type of conflict may be valid, the staff draft goes beyond this type of conflict (and Professor Fellmeth's latest memo) by also addressing "conflicts of interest" of representative plaintiff's counsel. This proposal simply seems redundant to the adequacy of representation test in § 17303, and thus unnecessary. The draft and the commentary lack any clear standards or examples of such conflicts, and we doubt any such standards could be enunciated. For example, simply suggesting that an attorney has "multiple lawsuits for the same plaintiff or against the same defendants" is overbroad. We also do not recall the empirical basis justifying this proposed change in law. For example, there may be instances where genuine consumer protection interests have been served by counsel specializing in an area of law that involves filing actions against the same defendant or other defendants in the same industry. The horror stories

cited of "abuse" in this type of litigation do not seem to stem from conflicts of interests on the part of plaintiffs' counsel.

For these reasons, we recommend the draft be amended to prohibit only conflicts between a representative plaintiff and the general public, as proposed by Professor Fellmeth (see Exhibit to Memo 96-11, p. 8). The adequacy of representation test for counsel should be sufficient to protect the interests of the representative plaintiff and the general public.

2. Court review and approval of settlements (§ 17309)

As noted by Senator Kopp and several commentators at the November 2, 1995 Commission meeting, court review of proposed settlements and stipulated judgments creates the danger of cursory, rubber stamp approval. While we support this provision, we believe that the real possibility of rubber stamp approvals makes it even more critical that res judicata not apply to such judgments, as argued in more detail below. Instead, doctrines of equitable estoppel or mootness can be used to dismiss truly repetitive subsequent actions.

3. Res judicata (§ 17312)

Equitable estoppel or mootness is already available to courts as a tool for dismissing truly repetitive actions. The issue at stake is whether or not the interests of justice are served by allowing a subsequent representative action from proceeding. This determination can only be made on a case-by-case basis, not with a blanket res judicata rule. Because current law allows this case-by-case determination, the staff draft upsets the "balance of the law" by creating a res judicata effect of a judgment in a representative action, without allowing the court in the second action the opportunity of determining whether or not the second action is truly "duplicative" or not.¹

In our view, a court dealing with these issues must determine whether or not a subsequent representative action raises identical issues, practices, and alleged illegal conduct, and if so, whether allowing the second action to proceed would be inequitable to the defendant. A finding of inequity could be based on whether or not the prior action stopped the practice complained of and required full restitution to members of the public.

This "second look" afforded the court in a subsequent action serves several important purposes, under both current law or under the new procedures contemplated by the staff draft. First, it can correct inequities resulting from inadequate settlements that were rubber stamped by the court in the initial action. As discussed above, even with court review and notice of the terms of a settlement, a stipulated judgment is still likely to

¹ Staff comments note that the intent of this section is to prevent "duplicative" representative actions (see Memorandum 96-11, p. 9). However, the word "duplicative" is not included in the draft statute. By its language, the draft simply creates a bars to any subsequent representative action, duplicative or not, and regardless of the adequacy of the relief obtained.

be a nonadversarial proceeding.² Courts simply do not engage in the same level of scrutiny in uncontested proceedings. Second, if res judicata is afforded the first judgment, the parties in the initial action have less incentive to "get the settlement right" precisely because of the low level of scrutiny by the first court and the lack of a "second look" by a subsequent court. Rather than placing the full responsibility on the court of ensuring that the interests of justice are furthered by a proposed settlement, the possibility of a "second look" actually puts more of the responsibility on the parties, where it belongs.

For all these reasons, we are still not persuaded that res judicata is necessary. Finally, we remind the Commission of the striking lack of response to its Notice calling for examples of cases where these issues have created problems for defendants. Only one letter came in. We conclude that the problem is not of sufficient magnitude to warrant the drastic step of including a res judicata provision.

Sincerely,



Earl Lui
Staff Attorney

² The notice provision, while an improvement over current law, will not guarantee sufficient input from interested parties. Public prosecutors and administrative agencies will be unlikely to use dwindling, scarce resources to contest many proposed settlements. The funding outlook for Legal Services offices and other public interest organizations, if they even receive a notice, is even bleaker.

Accompanies Memorandum 96-23

REVISED STAFF DRAFT
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UNFAIR COMPETITION LITIGATION

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

8 **BACKGROUND**

9 The statutes prohibit any “unlawful, unfair or fraudulent business act or practice
10 and unfair, deceptive, untrue or misleading advertising.”¹ Originally a business tort

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

1 remedy between disputing commercial entities, the unfair competition law² is now
2 a primary tool for vindicating consumer or public market abuses by business
3 entities in a variety of situations.³ As it has been developed through years of court
4 interpretation and legislative amendment, the California statute has become
5 probably the broadest such statute in the country.⁴ Use of the unfair competition
6 law as a remedy for specific harms to consumers should not obscure the role the
7 statute plays in shaping the marketplace by restraining business practices that
8 would otherwise drive the market to its lowest common denominator.⁵ To the
9 extent that unfair practices confer a competitive advantage on an enterprise,
10 competing businesses will find themselves at a disadvantage if they do not adopt
11 similar measures.

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

seq. are subject to their own remedial provisions (Section 17535-17536.5), but are also swept up in the definition of unfair competition in Section 17200.

Parts of this discussion are drawn from the background study prepared by the Commission's consultant, Professor Robert C. Fellmeth, *California's Unfair Competition Act: Conundrums and Confusions* (photocopy 43 pp., 1995) (on file with California Law Revision Commission) [hereinafter *Fellmeth Study*]. See also Fellmeth, *Unfair Competition Act Enforcement by Agencies, Prosecutors, and Private Litigants: Who's on First?*, 15 Cal. Reg. L. Rep. 1 (Winter 1995).

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

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

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

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

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

6. See Sections 17205, 17534.5.

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

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

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

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

14 Both private and public plaintiffs may seek injunctive relief, including restitution
15 of money or property that may have been acquired through the unfair practice.¹⁴
16 Public officials may also seek civil penalties, varying from \$2500 to \$6000 per
17 violation.¹⁵ The statute sets forth a number of considerations for determining the
18 appropriate amount of civil penalties,¹⁶ and in some cases, provides that an award

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

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

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

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

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

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

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

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

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

16. Sections 17206(b) & 17536 (nature, seriousness, and willfulness of defendant's misconduct, number of violations, persistence and duration of misconduct, defendant's assets, liabilities, and net worth).

1 of restitution is preferred over a civil penalty.¹⁷ Damages at law, including
2 punitive damages, are not available under the unfair competition law to either
3 public or private plaintiffs.¹⁸

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

13 Thus, the unfair competition law provides a "broad but shallow scheme of relief"
14 — broad in substantive scope and standing, but shallow in terms of available
15 relief, because monetary awards are limited to restitution and attorney's fees are
16 uncertain even if the plaintiff prevails.²²

17 ISSUES AND PROBLEMS

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

19 From the perspective of plaintiffs with a genuine interest in vindicating the
20 public interest, representative actions under the unfair competition law offer
21 several distinct advantages over class actions.²³ Under the unfair competition law,
22 a plaintiff can plead a cause of action for restitution on behalf of the general public

Additional factors apply in cases involving senior citizens and disabled persons (Section 17206.1(c)) or where an injunction has been violated (Sections 17207(a), 17535.5(a)).

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

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

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

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

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

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

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

1 without the complications and expenses of a class action.²⁴ The plaintiff does not
2 have to seek certification of the class and thus avoids having to show that the
3 action meets the standards of numerosity, commonality, adequacy, typicality, and
4 manageability.²⁵ No type of formal certification of the representative action is
5 required at all under the unfair competition law. Perhaps the single most
6 significant practical factor is that the plaintiff does not have to give notice to the
7 proposed class members, thus avoiding substantial costs. In the arena of consumer
8 actions and public interest law, the representative action under the unfair
9 competition law is a simpler and cheaper alternative to class actions.²⁶

10 **Standing and Binding Effect of Representative Actions**²⁷

11 The unfair competition law provides unusually broad, and perhaps unique,
12 standing for private parties. They may sue on behalf of others (the “general
13 public”) without the need to show any personal damage arising from the unfair
14 business practice. Those suing on behalf of the general public can range from
15 plaintiffs having a narrow dispute with a defendant in a business context, who tack
16 on the representative claim for discovery and settlement advantages, to plaintiffs
17 serving a true private attorney general function who seek to vindicate larger
18 interests. The unfair competition law does not provide any mechanism to
19 distinguish among these types of plaintiffs. The potential for abuse where a claim
20 on behalf of the general public is added to a complaint for tactical advantage is
21 mitigated only by the denial of res judicata and collateral estoppel effect as to
22 nonparties.²⁸

23 While the law is not settled, it appears under class action principles that where
24 the primary purpose of the action is to obtain an injunction against an unfair
25 business practice, a lower due process standard applies. Thus, where the plaintiff

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

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

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

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

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

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

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

1 satisfies class action concepts of adequacy, it is not necessary to give the sort of
2 notice and opt-out opportunities that are applicable in class actions seeking
3 damages.²⁹ However, the lack of any adequacy requirement applicable to the
4 plaintiff or the plaintiff's attorney under the unfair competition law may very well
5 preclude application of this body of law where the plaintiff sues in a representative
6 capacity.

7 **Settlement**

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

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

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

18 Even where the plaintiff, such as a public prosecutor or bona fide public interest
19 group, legitimately desires to achieve finality and binding effect in a settlement
20 with the defendant, the parties are unable to do so under the unfair competition
21 law.³¹ Hence, the legitimate goals of the unfair competition law are thwarted by its
22 lax standing rules in combination with constitutional limitations on the binding
23 effect of representative actions on absent parties.

24 **Conflicting and Repetitive Actions**

25 The potential for a multiplicity of actions under the unfair competition law and
26 overlapping or parallel proceedings is troublesome. Some commentators have
27 termed this prospect the "two-front war."³² This situation can result because there
28 is no limitation on multiple plaintiffs seeking relief for the same injury to the
29 general public. The multiplicity may involve public and private plaintiffs in a
30 variety of situations. Cases may overlap and conflict where they are proceeding
31 contemporaneously, where different geographical jurisdictions are involved, or
32 where another action on the same underlying claim is brought after settlement or
33 judgment in a prior action.

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

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

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

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

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

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

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

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

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

1 **COMMISSION RECOMMENDATIONS**

2 The Commission recommends a set of procedural revisions to put litigation
3 under the unfair competition law on a sound footing. The proposed statute would
4 be added to the Business and Professions Code as a separate chapter dealing with
5 representative actions commencing with Section 17300.³⁵

6 These recommended revisions are narrowly focused to address the standards
7 applicable to determining who may represent the interests of the general public
8 and to rationalize the settlement process by providing minimal notice, adequacy,
9 and fairness standards. These revisions are proposed with the conscious intent of
10 avoiding disruption of the overall balance among private plaintiffs, including
11 public interest organizations, public prosecutors, and potential defendants.

12 **Form of Pleadings**

13 A complaint under Business and Professions Code Section 17204 or 17535 on
14 behalf of the general public would have to be separately stated in the pleadings and
15 specifically state that the cause of action is being brought “on behalf of the general
16 public.” This detail facilitates appropriate treatment under the statute and should
17 help to focus the attention of the parties on the crucial element of the interests of
18 the general public.

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

20 The open-ended standing rules of existing law should be revised to provide
21 minimal protections. The Commission has declined to recommend the application
22 of full-blown class action standards to representative actions under the unfair
23 competition law, but some aspects of class action law is ideally appropriate for
24 protection of the interests of the general public.

25 A private plaintiff should not be able to proceed in a representative action on
26 behalf of the general public unless the plaintiff’s attorney is determined by the
27 court to be an adequate representative of the public interest pled. This rule does
28 not go as far as requiring that the plaintiff be an adequate representative of the
29 class, as is required in class action litigation.

30 In addition, neither the plaintiff nor the plaintiff’s attorney may proceed with the
31 action if either of them has a conflict of interest that reasonably could compromise
32 the good faith representation of the interests of the general public pled. As a
33 protection against an obvious conflict of interest situation, the proposed law
34 forbids a private plaintiff to sue on an individual cause of action and at the same
35 time seek to represent the general public in a representative capacity. This
36 recognizes that the plaintiff who acts as a representative of the general public
37 serves in a fiduciary capacity and would have a conflict of interest if the plaintiff
38 were simultaneously pursuing damages or other relief on an individual claim that

35. See “Proposed Legislation” *infra*.

1 is distinct from the injury alleged to have been suffered by the members of the
2 general public.

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

11 **Notice of Filing**

12 At the time of filing a representative action on behalf of the general public, a
13 private plaintiff would be required to give notice to (1) the Attorney General, (2)
14 all local, state, and federal government agencies that license the defendant in the
15 jurisdiction as to the subject of the representative action, and (3) the general public
16 by publication in the Notice Register.³⁶ These notices would be for informational
17 purposes and would not impose any duty on the Attorney General or any other
18 person to investigate or intervene in the private action.. Notice to the Attorney
19 General would have the effect of informing prosecutors throughout the state of
20 relevant private actions through their existing voluntary notice system. Licensing
21 authorities would get notice because of their potential interest in such matters.
22 Interested members of the general public should get early notice so that they can
23 help ensure that the interests of the general public are adequately protected. By
24 providing for publication in the Notice Register involves minimal expense, as
25 contrasted with the sort of individual notice required under class action
26 procedures.

27 **Defendant's Disclosure of Other Cases**

28 The defendant would be required to disclose any other private representative
29 actions, prosecutor's enforcement actions, or class actions pending in California
30 based on substantially similar facts and theories of liability. This is a continuing
31 duty, so that if a potentially overlapping action is filed when a private
32 representative action or prosecutor's enforcement action is pending, the defendant
33 would be required to give notice to the plaintiff and the court of the later actions.
34 The disclosure requirement is intended to help the court to determine which
35 plaintiff is best suited to move forward or to make other appropriate orders, such
36 as for consolidation or abatement.

36. The California Regulatory Notice Register is established pursuant to Government Code Section 11344.1. The proposed law gives authority to the Office of Administrative Law to provide for the form of materials submitted for publication and to use an informative summary in place of lengthy materials.

1 **Notice of Proposed Settlement**

2 The proposed law would require 45 days' notice of the terms of a proposed
3 judgment be given to other parties with cases pending against the defendant based
4 on substantially similar facts and theories of liability and to the Attorney General,
5 licensing agencies, and persons who have filed a request for notice. In addition, the
6 proposed terms would be published in the Notice Register in the same manner as
7 notice of filing. Since the interests of the general public are being determined in a
8 representative action, any interested person would have the opportunity to apply
9 for leave to be heard when the court considers entry of judgment. Although this
10 procedure is quite different from that applicable to class actions, the intent is to
11 afford a broader scope of participation by potentially interested persons than is
12 generally available under existing law.

13 **Court Review and Approval of Settlements**

14 The proposed law requires the court to review the proposed settlement of a claim
15 determining the interests of the general public under the unfair competition law.
16 The court would have to affirmatively find that the plaintiff and the plaintiff's
17 attorney have met the adequacy and conflict of interest requirements, that
18 appropriate notices have been given, that the proposed terms are fair, adequate,
19 and reasonable,³⁷ and that any attorney's fees meet the statutory requirements.
20 Formalizing the settlement process will help guarantee that judgments in
21 representative actions are actually in the public interest. These rules should limit
22 the temptation for a defendant to select a weak or collusive plaintiff with whom to
23 settle and for a plaintiff to sell out the absent members of the public.³⁸

24 **Binding Effect of Representative Actions**

25 The proposed law fills a critical gap in the unfair competition law by providing a
26 limited binding effect on nonparties of a determination of a representative cause of
27 action. If the proposed statutory requirements of notice, adequacy, and court
28 review and approval have been followed, the judgment as to the public interest
29 bars further claims on behalf of the general public. In other words, a judgment in a
30 representative action on behalf of the general public under the unfair competition
31 law is entitled to res judicata and collateral estoppel effect as to the interest of the
32 general public pled.

37. The "fair, adequate, and reasonable" standard is drawn from class action law. See, e.g., *In re General Motors Pickup Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, ____ (3d Cir. 1995); *In re Chicken Antitrust Litigation, American Poultry*, 669 F.2d 228, ____ (5th Cir. 1982); *Girsh v. Jepson*, 521 F.2d 153, ____ (3d Cir. 1975); *Grunin v. International House of Pancakes*, 513 F.2d 114, ____ (8th Cir. 1975), *cert. denied* 423 U.S. 864 (____). See also *La Sala v. American Savings & Loan Ass'n*, 5 Cal. 3d 864, 871-71, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971) (plaintiff as fiduciary for class).

38. The notice and hearing provisions would not apply to the Attorney General or other prosecutors unless the Attorney General has received notice of the filing of a private action based on substantially similar facts and theories of liability before the judgment is entered in the public prosecutor's action. This exception is intended to preserve the law enforcement function of the prosecutors without unnecessary delay that would be caused by delaying entry of judgment for notice and hearing.

1 A nonparty individual’s claim for restitution or damages for injury suffered by
2 the individual that arises out of the same facts would not be barred, but the
3 plaintiff would not be able to make a claim on behalf of the general public. In
4 other words, the judgment as to the representative cause of action is binding on all
5 persons, having met fundamental standards safeguarding the due process rights of
6 the general public. Giving binding effect as to the right to bring representative
7 actions does not affect the due process rights of any person who has a personal
8 claim for relief.

9 An injured person is able to “opt out” of the settlement or judgment, in effect, by
10 bringing an action on his or her own behalf. The injured person’s due process
11 rights are not affected and class action formalities are unnecessary in the
12 representative action to obtain this limited binding effect. However, to avoid
13 duplicate recovery, any monetary relief awarded the plaintiff on an individual
14 cause of action would be reduced by any restitution due the individual as a
15 member of the general public and the defendant would have the right to set off a
16 pro rata share of any penalties or cy pres or fluid recovery awarded as a result of
17 an earlier representative action or enforcement action.

18 The proposed law thus restricts the individual’s statutory right under the unfair
19 competition law to bring a repetitive representative action on behalf of the general
20 public. The individual’s constitutional right not to have a cause of action in the
21 individual’s own right determined without due process is not impaired. But the
22 individual has no constitutional right to bring a representative action,³⁹ and the
23 right to bring representative actions, which is granted by statute, can be limited by
24 statute or repealed.

25 **Priority Between Public and Private Plaintiffs**⁴⁰

26 Where both private plaintiffs and public prosecutors have commenced actions on
27 behalf of the public against the same defendant based on substantially similar facts
28 and theories of liability, the prosecutor’s action is given a preference and the
29 private action should be stayed until completion of the prosecutor’s action. The
30 court could permit consolidation of the public and private actions on a showing
31 that the prosecutor was not seeking substantial restitution. The proposed law thus
32 creates a presumption in favor of a public prosecutor as the best representative of

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

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

1 the general public,⁴¹ but permits a private plaintiff to overcome the presumption
2 where the restitutionary interests of the general public are not being adequately
3 represented.

4 **Attorney's fees**

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

7 In cases where a public prosecutor has taken over an action from a private
8 plaintiff, the proposal makes clear the private plaintiff may still be entitled to costs
9 and attorney's fees under Code of Civil Procedure Section 1021.5 or other law.

10 These rules are intended to encourage private plaintiffs to work with public
11 prosecutors rather than competing with them and seeking a separate settlement.

12 **Application to Pending Cases**

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

41. This rule is generally consistent with the spirit of *People v. Pacific Land Research Co.*, 20 Cal. 3d 10, 18, 569 P.2d 125 141 Cal. Rptr. 20, 24 (1977), where the Supreme Court noted that a public prosecutor's "role as a protector of the public may be inconsistent with the welfare of the class so that he could not adequately protect their interests." See also *People v. Superior Court (Good)*, 17 Cal. 3d 732, 552 P.2d 760, 131 Cal. Rptr. 800 (1976) (intervention in district attorney's unfair competition law action by private plaintiffs).

Accompanies Memorandum 96-23

REVISED STAFF DRAFT STATUTE

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

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

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

4 CHAPTER 6. ACTIONS ON BEHALF OF GENERAL PUBLIC

5 **§ 17300. Definitions**


6 17300. As used in this chapter:

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

10 (b) “Prosecutor” means the Attorney General or appropriate district attorney,
11 county counsel, city attorney, or city prosecutor.

12 (c) “Representative cause of action” means a cause of action asserted by a
13 private plaintiff on behalf of the general public under Section 17204 or 17535.

14 **Comment.** Section 17300 defines terms used in this chapter. For prosecutors empowered to
15 bring actions for unfair competition or false advertising, see, e.g., Sections 17204, 17204.5,
16 17206.5, 17207, 17535, 17536.

17  **Staff Note.** The earlier definition of “representative action” has been omitted since it
18 appeared to cause confusion rather than achieve its purpose of simplifying drafting. Some
19 sections still use the term “representative action” for convenience where the context is clear. The
20 staff has also omitted the definition of “private plaintiff” because it did not appear to be needed.

21 Perhaps the Commission does not want to complicate the statute any further, but it should be
22 considered whether “enforcement action” should include actions brought by government
23 agencies, such as the Department of Consumer Affairs. This is relevant to the issue of what type
24 of information the defendant is required to provide under Section 17305 and could be relevant to

1 issues of priority. For the purpose of this project, it might be most efficient to avoid dealing with
2 the issue, but it is an apparent gap in some of the following sections.

3 **§ 17301. Requirements for pleading representative cause of action**

4 17301. (a) A private plaintiff may plead a representative cause of action on
5 behalf of the general public under Section 17204 or 17535 only if the requirements
6 of this chapter are satisfied.

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

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

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


16 See Section 17300(c) (“representative cause of action” defined).

17 **§ 17302. Combination of individual claims and general public claims forbidden**

18 17302. A person may not bring suit on an individual cause of action and in the
19 same action seek to represent the interests of the general public.

20 **Comment.** Section 17302 precludes plaintiffs from representing both their individual interests
21 and the interest of the general public. In effect, this section creates a conclusive presumption that
22 a conflict of interest would exist in such circumstances. This section does not prevent a plaintiff
23 from representing the interests of the general public where the plaintiff is a member of the injured
24 class, but only where the plaintiff brings suit on claims distinct from the plaintiff’s interest as a
25 member of the general public. Under the rule of this section, the individual’s personal cause of
26 action is separate from the representative cause of action on behalf of the general public. Thus,
27 there is no violation of policies against splitting causes of action.

28 See also Section 17303(b) (absence of conflict of interest).

29  **Staff Note.** This section is new to the draft and attempts to implement a Commission
30 direction at the February meeting.

31 **§ 17303. Adequate legal representation and absence of conflict of interest**

32 17303. (a) The attorney for a private plaintiff in a representative action must be
33 an adequate legal representative of the interests of the general public pled.

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

37 (c) As soon as practicable after the commencement of the representative action,
38 on application of the plaintiff made on noticed motion or on the court’s own
39 motion, the court shall determine by order whether the requirements of
40 subdivisions (a) and (b) are satisfied. The determination shall be based on the
41 pleadings. Discovery is not available, but the court may inquire into the matters in
42 its discretion. In making its determination, the court shall consider standards
43 applied in class actions. If the court determines that the requirements of

1 subdivisions (a) and (b) are not satisfied, the representative cause of action shall be
2 stricken from the complaint.


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

5 **Comment.** Section 17303 sets forth the prerequisites in a representative action for unfair
6 competition or false advertising of (a) adequacy of counsel to represent the general public and (b)
7 absence of a conflict of interest on the part of the plaintiff or the plaintiff's counsel. Consistent
8 with the broad approach to standing codified in Sections 17204 and 17535, Section 17303 does
9 not require the private plaintiff to be a member of the injured group. Conversely, a named party
10 plaintiff may not plead a cause of action as an individual and at the same time seek to represent
11 the interests of the general public. See Section 17302.

12 Subdivision (c) requires a private plaintiff to apply for a court determination that the
13 requirements of subdivisions (a) and (b) are met before the representative action may proceed.
14 The court is given broad discretion in making its determination, including the power to
15 investigate any issues that arise, but discovery is specifically forbidden in the interests of
16 efficiency. The plaintiff cannot obtain a ruling on the merits of the complaint without first
17 satisfying this section.

18 Subdivisions (c) and (d) are drawn in part from Rule 23(c)(1) of the Federal Rules of Civil
19 Procedure, applicable to class actions. Before entry of judgment as to a representative cause of
20 action, the court is also required to make a finding that the standards in this section have been
21 satisfied. See Section 17307 (findings required for entry of judgment).

22 See also Section 17300(c) ("representative cause of action" defined).

23  **Staff Note.** This section combines the adequacy of counsel and conflict of interest rules that
24 were separately stated in the prior draft. At the last meeting, the general feeling was that it would
25 be better to take this approach.

26 § 17304. Notice of commencement of representative action

27 17304. Not later than 10 days after the court makes an order under Section
28 17303 that the representative action may proceed, the private plaintiff shall give
29 notice of the action, together with a copy of the complaint, to the following
30 persons:

31 (a) The Attorney General.

32 (b) All local, state, or federal government agencies, known to the plaintiff, that
33 license the defendant in the jurisdiction with regard to the subject matter of the
34 representative cause of action.

35 (c) The general public, by filing with the Office of Administrative Law for
36 publication in the California Regulatory Notice Register.

37 **Comment.** Section 17304 requires a private plaintiff to give prompt notice of the filing of a
38 representative action to other potentially interested parties. The notice and copy of the complaint
39 required by this section are given for informational purposes only. This section is not intended to
40 create or imply any new duty on the part of the Attorney General or other prosecutor or of a
41 licensing agency to intervene or take other action in response to the notice. Where such a duty
42 exists, it exists by virtue of other law, not this section or this chapter. The notice of the proposed
43 terms of the judgment under Section 17306 may be given at the same time as the notice of
44 commencement of the representative action is given under this section, so along as other
45 requirements are satisfied.

46 See also Sections 17300(c) ("representative cause of action" defined), 17318 (regulation by
47 Office of Administrative Law).

1 ☞ **Staff Note.** The 10-day period for giving notice has been changed to run from the adequacy
2 determination under Section 17303, instead of from the date of filing the action. This helps
3 coordinate these provisions and avoids the situation where the notice would have had to be given
4 before the plaintiff was authorized to proceed with the representative action. Is the 10-day period
5 too short? Should the the 10-day or other period for giving notice of filing run from the time
6 when the plaintiff is given *notice* of the order, rather than when the order is made?

7 Subdivisions (b) and (c) have been revised pursuant to the Commission’s direction at the
8 February meeting. The staff does not recall that the issue of local and federal agencies was
9 discussed at any earlier meeting, but it seems appropriate and consistent with the purpose of the
10 notice to give it to all relevant agencies, regardless of governmental branch.

11 **§ 17305. Disclosure of similar cases against defendant**

12 17305. (a) Promptly after the filing of an enforcement action by a prosecutor or a
13 representative action by a private plaintiff, the defendant shall notify the plaintiff
14 and the court of any other enforcement actions, representative actions, or class
15 actions pending in this state against the defendant that are based on substantially
16 similar facts and theories of liability.

17 (b) Promptly after the filing of an enforcement action, a representative action, or
18 a class action in this state, the defendant shall give notice of the filing to the
19 plaintiff and the court in all pending enforcement actions and representative
20 actions in this state against the defendant that are based on substantially similar
21 facts and theories of liability.

22 **Comment.** Section 17305 requires the defendant to disclose similar cases pending or later filed
23 in California. This section applies as to actions brought by either private plaintiffs or prosecutors.
24 See Sections 17300(a) (“enforcement action” defined), 17300(b) (“prosecutor” defined), 17300(c)
25 (“representative cause of action” defined).

26 ☞ **Staff Note.** We have not found a way to make this duty mesh with the adequacy hearing
27 under Section 17303 and the notice required by Section 17304. It seems premature to require the
28 defendant to give notice under this section if the plaintiff has not satisfied Section 17303, but if
29 the defendant is permitted to wait until Section 17303 is satisfied, there is only a 10-day window
30 under Section 17304.

31 **§ 17306. Notice of terms of judgment**

32 17306. (a) At least 45 days before entry of a judgment, or any modification of a
33 judgment, which is a final determination of the representative cause of action, a
34 private plaintiff shall give notice of the proposed terms of the judgment or
35 modification, including all stipulations and associated agreements between the
36 parties, together with notice of the time and place set for a hearing on entry of the
37 judgment or modification, to all of the following:

- 38 (1) Other parties with cases pending against the defendant based on substantially
39 similar facts and theories of liability.
- 40 (2) Each person who has filed with the court a request for notice of the terms of
41 judgment.
- 42 (3) The Attorney General.
- 43 (4) Any government agency that licenses the defendant in the jurisdiction with
44 regard to business practices relevant to the terms of the judgment.

1 (5) The general public, by filing with the Office of Administrative Law for
2 publication in the California Regulatory Notice Register.


3 (b) A person given notice under subdivision (a) or any other interested person
4 may apply to the court for leave to intervene in the hearing provided by Section
5 17307. Nothing in this subdivision limits any other right a person may have to
6 intervene in the action.

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

9 **Comment.** Subdivision (a) of Section 17306 requires notice of the terms of any proposed
10 disposition of the representative action to other interested parties. The 45-day notice period is
11 subject to variation on court order pursuant to subdivision (c). The notice of the proposed terms of
12 the judgment under this section may be given at the same time as the notice of commencement of
13 the representative action is given under Section 17304, so long as other requirements are
14 satisfied. See also Section 17318 (regulation by Office of Administrative Law).

15 Subdivision (b) recognizes a limited right to intervene in the hearing for approval of the terms
16 of the judgment provided by Section 17307.

17 See also Sections 17300(b) ("prosecutor" defined), 17300(c) ("representative cause of action"
18 defined).

19  **Staff Note.** This section has been revised to implement Commission directions at the
20 February meeting. The notice rules in this section are consistent with the notice of filing rules
21 under Section 17304.

22 § 17307. Findings required for entry of judgment

23 17307. (a) Before entry of a judgment that is a final determination of the
24 representative cause of action, a hearing shall be held to determine whether the
25 requirements of this chapter have been satisfied.

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

29 (1) The plaintiff and the plaintiff's attorney satisfy the requirements of Section
30 17303.

31 (2) The defendant has disclosed other pending cases pursuant to Section 17305.

32 (3) Notice has been given pursuant to Sections 17304 and 17306.

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

36 (5) The proposed judgment and any stipulations and associated agreements are
37 fair, reasonable, and adequate to protect the interests of the general public pled.

38 (6) Any award of attorney's fees included in the judgment or any stipulation or
39 associated agreements complies with Section 17311.

40 **Comment.** Section 17307 provides for a hearing as a prerequisite to entry of judgment on a
41 cause of action on behalf of the general public for unfair competition or false advertising and lists
42 a set of standards that must be satisfied. The "fair, reasonable, and adequate" standard in
43 subdivision (b)(5) is drawn from the case law on class actions and is intended to be interpreted
44 under that law. See, e.g., *In re General Motors Pickup Truck Fuel Tank Products Liability*
45 *Litigation*, 55 F.3d 768, ____ (3d Cir. 1995); *In re Chicken Antitrust Litigation*, American

1 Poultry, 669 F.2d 228, ____ (5th Cir. 1982); Girsh v. Jepson, 521 F.2d 153, ____ (3d Cir. 1975);
2 Grunin v. International House of Pancakes, 513 F.2d 114, ____ (8th Cir. 1975), *cert. denied* 423
3 U.S. 864 (____). See also La Sala v. American Savings & Loan Ass’n, 5 Cal. 3d 864, 871-71, 489
4 P.2d 1113, 97 Cal. Rptr. 849 (1971) (plaintiff as fiduciary for class).

5 See also Section 17300(c) (“representative cause of action” defined).

6 ☞ **Staff Note.** This section has been revised to implement a Commission direction at the
7 February meeting. The interest of justice test was eliminated as duplicative and the word
8 “reasonable” was added in subdivision (b)(5) for consistency with cases on class actions. The
9 staff wonders whether subdivision (b)(4) adds much to the broad authority stated in subdivision
10 (b)(5).

11 As written, it would seem that a defendant could stymie entry of judgment by failing to give the
12 notice of similar actions under Section 17305, as required by subdivision (b)(2). The only remedy
13 would seem to be the threat of sanctions. A way to simplify the section and sidestep this issue
14 would be to delete paragraphs (1), (2), and (3) from subdivision (b). The sections referred to
15 (17303,17306) should be effective on their own terms without being listed in this section. This
16 would also focus on the remaining parts of the subdivision which appear in this section for the
17 first time.

18 § 17308. Dismissal, settlement, compromise

19 17308. A representative cause of action may not be dismissed, settled, or
20 compromised without the approval of the court and substantial compliance with
21 the requirements of this chapter.

22 **Comment.** Section 17308 is drawn from Rule 23(e) of the Federal Rules of Civil Procedure
23 relating to class actions and Civil Code Section 1782(f) (Consumers Legal Remedies Act). See
24 also Section 17300(c) (“representative cause of action” defined).

25 ☞ **Staff Note.** The word “substantial” has been added to deal with technical arguments such as
26 might arise where the plaintiff had failed to satisfy the 10-day notice requirement under Section
27 17304.

28 § 17309. Binding effect of judgment in representative action


29 17309. (a) The determination of a representative cause of action in a judgment
30 approved by the court pursuant to Section 17307 is binding on all persons and
31 conclusive of the representative cause of action.

32 (b) In any case where a person obtains a judgment against the defendant for
33 damage to the person as an individual arising out of the same facts as the
34 representative cause of action, the defendant is entitled to a setoff in the amount of
35 any monetary recovery directly due to the person and a pro rata share of any civil
36 penalties or other indirect relief awarded as a result of a representative action or
37 enforcement action.

38 **Comment.** Section 17309 governs the binding effect of a representative action under this
39 chapter. Under this section, a final determination of the cause of action (i.e., the cause of action
40 on behalf of the general public under Section 17204 or 17535, as provided in Section 17307) is
41 *res judicata*. In other words, the determination of the cause of action on behalf of the general
42 public has been made and other plaintiffs are precluded from reasserting the same claim on behalf
43 of the general public. See also Code Civ. Proc. § 1908 (binding effect of judgments generally).
44 This effect applies to any relief granted the general public, whether by way of injunction or
45 restitution or otherwise. The scope of this rule is limited: it should be noted that a person who
46 claims to have suffered damage as an individual is not necessarily precluded from bringing an
47 action on that claim, even though the question of the harm to the general public has been

1 determined conclusively. However, as provided in subdivision (b), if the person prevails on an
2 individual claim, any monetary recovery (whether damages or restitution) will be reduced by the
3 amount of any payment received by the person in a private representative action or prosecutor’s
4 enforcement action. Furthermore, if a representative action or enforcement action has resulted in
5 fluid recovery or cy pres relief, the defendant is entitled to a setoff in the amount of the pro rata
6 indirect benefit to the plaintiff as determined by the court.

7 See also Section 17300(a) (“enforcement action” defined), 17300(c) (“representative cause of
8 action” defined).

9  **Staff Note.** Subdivision (b) has been added to implement a Commission direction at the
10 February meeting. The monetary offset rule is clear enough where money has been paid or is due
11 the plaintiff as a member of the general public in another action, but evaluation of the share of cy
12 pres relief and fluid recovery may be problematic. Is this statement sufficient to guide the courts?
13 Or does the standard need to be rephrased to provide a different test?

14 § 17310. Priority between prosecutor and private plaintiff


15 17310. (a) If a private plaintiff has commenced an action that includes a
16 representative cause of action and a prosecutor has commenced an enforcement
17 action against the same defendant based on substantially similar facts and theories
18 of liability, the court in which either action is pending, on motion of a party or on
19 the court’s own motion, shall stay the private plaintiff’s representative cause of
20 action until completion of the prosecutor’s enforcement action or, in the interest of
21 justice, make an order for consolidation of the actions.

22 (b) The determination under subdivision (a) may be made at any time during the
23 proceedings and regardless of the order in which the actions were commenced, but
24 if the prosecutor’s enforcement action was the first commenced, a representative
25 action brought by a private plaintiff may not be consolidated with the prosecutor’s
26 enforcement action, and the private plaintiff may not intervene in the enforcement
27 action, unless the prosecutor’s enforcement action does not seek substantial
28 restitution.

29 (c) If the prosecutor’s enforcement action does not result in substantial
30 restitution to the general public, the private plaintiff’s representative cause of
31 action may be reinstated. The time during which pursuit of the representative
32 cause of action was stayed shall not be counted in determining whether the
33 applicable limitations period has expired.

34 **Comment.** Section 17310 provides a priority for public prosecutor enforcement actions over
35 conflicting private representative actions. Subdivision (b) recognizes a right to pursue restitution
36 in a private representative action where the restitutionary recovery under the enforcement action
37 is not substantial. Where a private plaintiff has contributed to the prosecution of the enforcement
38 action, attorney’s fees may be awarded as provided in Section 17311. If the enforcement action
39 and representative action are consolidated, the court may give the prosecutor responsibility on the
40 injunctive and civil penalty phases of the case and let the private plaintiff press the restitutionary
41 claims.

42 See also Sections 17300(a) (“enforcement action” defined), 17300(b) (“prosecutor” defined),
43 17300(c) (“representative cause of action” defined).

44  **Staff Note.** This section has been revised to avoid the possibility of routine interventions by
45 private plaintiffs in prosecutors’ actions.

1 **§ 17311. Attorney’s fees**

2 17311. (a) In addition to any other applicable factors, an award of attorney’s fees
3 in a representative action brought by a private plaintiff shall be based on the work
4 performed, the risk involved, and a consideration of benefit conferred on the
5 general public.

6 (b) If a prosecutor is given preference over a private plaintiff under Section
7 17310, the private plaintiff may be entitled to costs and attorney’s fees pursuant to
8 Section 1021.5 of the Code of Civil Procedure or other applicable law.

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

15 **Comment.** Subdivision (a) of Section 17311 provides special factors applicable to an award of
16 attorney’s fees in representative actions.

17 Subdivision (b) makes clear that the operation of the preference rule in Section 17310 does not
18 deprive a private party of the right to costs and attorney’s fees.

19 Subdivision (c) provides an incentive for private plaintiffs to cooperate with prosecutors.

20 See also Sections 17300(b) (“prosecutor” defined), 17300(c) (“representative cause of action”
21 defined).

22 **§ 17318. Regulation by Office of Administrative Law**

23 17318. The Office of Administrative Law by regulation may:

24 (a) Prescribe the form for submission of materials for publication as required by
25 this chapter.

26 (b) Provide for publication of an informative summary of materials submitted for
27 publication where the material submitted is lengthy.

28 **Comment.** Section 17318 provides special regulatory authority to the Office of Administrative
29 Law relating to publications required by this chapter. See Sections 17304 (notice of
30 commencement of representative action), 17306 (notice of terms of judgment). See also Gov’t
31 Code Section 11344.1 (California Regulatory Notice Register).

32 ➡ **Staff Note.** This section is new to the draft. After informal discussions with Herb Bolz of
33 the Office of Administrative Law, it appeared that specific regulatory authority would be
34 beneficial, as set out in subdivision (a). The power to regulate the length of the material to be
35 published as provided in subdivision (b) also seems beneficial considering the overriding purpose
36 of the Notice Register as a way for agencies to publish notice.

37 **§ 17319. Application of chapter to pending cases**

38 17319. (a) On and after its operative date, this chapter applies to all pending
39 actions that include a representative cause of action, regardless of whether they
40 were filed before the operative date, unless the court determines that application of
41 a particular provision of this chapter would substantially interfere with the
42 effective conduct of the action or the rights of the parties or other interested
43 persons.

1 (b) For the purpose of applying this chapter to pending actions, the duty to give
2 notice under Section 17304 is satisfied if the notice or information is given
3 promptly after the operative date of this chapter.

4 **Comment.** Section 17319 applies this chapter to all representative actions, including those filed
5 before the operative date except where the court orders otherwise. Subdivision (a) is drawn from
6 Code of Civil Procedure Section 694.020 (application of Enforcement of Judgments Law).

7 See also Section 17300(c) (“representative cause of action” defined).
