

Memorandum 96-30

Unfair Competition: Revised Draft of Tentative Recommendation

Attached to this memorandum is a staff draft of a tentative recommendation on the unfair competition litigation statutes. This staff draft implements decisions made at the April meeting.

Starting at the January 1995 meeting when the Commission first reviewed Prof. Fellmeth's background study, the unfair competition study has been considered at eight meetings. The Commission has received valuable and detailed commentary from interested persons, both orally and in writing. The Commission has fully considered the many issues and suggestions in the course of the study. The staff thinks it is unlikely that any new, major issues will surface at this point and that it is time to move the project to the next step. Accordingly, the staff recommends that the Commission approve the attached draft as a tentative recommendation to be circulated for comment following the May meeting.

Also attached to this memorandum as an exhibit is a letter from James Sturdevant which was delivered to the staff following the discussion of unfair competition at the April meeting.

The draft implements Commission decisions made at the last meeting, but as noted in the Minutes, several issues need to be given further consideration:

§ 17303. Conflict of interest (draft p. 14)

Following the discussion at the April meeting, the staff removed the former requirement that the plaintiff's attorney be required to meet a conflict of interest standard. The specific reference is really not necessary since, by analogy with class action law, conflict of interest is an element of the overall adequacy of counsel standard. See 7A C. Wright, A. Miller, M. Kane, Federal Practice and Procedure 1769.1, at 383-84 (1986) & Supp. at 36 (1995).

§§ 17304, 17306. Notice (draft pp. 14-16)

Notice of commencement of a representative action is now only required to be given to the Attorney General (draft Section 17304) and notice of the terms of proposed settlement prior to the fairness hearing (draft Section 17306) is given

only to other parties with pending cases, to persons who have requested notice, and to the Attorney General. The earlier concept of giving broader notice to the public has been abandoned. This avoids the bother and expense of publishing in the Notice Register or elsewhere, as well as complications involved in giving notice to the public in a non-class action context where notice is not really required. The concern was also expressed that giving too much notice would engage the attention of the professional objectors.

However, the staff wonders whether some type of notice of the proposed terms should be given. The draft assumes that someone may have requested notice and that someone may seek to intervene, and yet there is no provision for giving notice to the general public. As we have discussed many times in this study, notice to the general public is not constitutionally required here, because only the opportunity to bring a representative action is cut off, not any individual's personal claim for damages. But it may be beneficial from a policy standpoint to give some type of notice of the fairness hearing, perhaps through publication or as ordered by the court. This was an element of Prof. Fellmeth's early drafts, one of which provided for notice to the "general public, through newspaper publication or other form of notice ordered by the court." Should something like this form of notice be added to Section 17306?

§ 17310. Priority between prosecutor and private plaintiff (draft pp. 17-18)

This section was not reviewed in detail at the April meeting. It provides for a nearly automatic stay of private actions so long as a prosecutor is seeking substantial restitution. The section reflects the view that prosecutors as a group should be in a better position to represent the interests of the general public than private parties. It is assumed that the section would not come into play very often, as it is reported by both prosecutors and private attorneys that there is rarely any conflict under the existing statute.

The plaintiffs bar has objected to this section, suggesting that it raises issues of tolling, staleness of discovery, and loss of witnesses while the private plaintiff awaits the conclusion of the prosecutor's action. (See, e.g., letter from James Sturdevant, Exhibit p. 3.) It is also possible that while a prosecutor prays for substantial restitution in the complaint as filed, the case may ultimately be settled without substantial restitution.

This section is not essential to the draft statute. If it were removed from the draft, the parties would be left to their existing remedies. At the April meeting,

the Commission decided to postpone consideration until the views of Prof. Fellmeth could be heard on the issue. However, even if the Commission is inclined toward deleting this provision, consider whether it should be kept in the tentative recommendation for the purpose of exposing it to review and comment by interested persons.

§ 17311. Attorney's fees (draft p. 18)

This section has been simplified by eliminating the parts that repeat the general rules governing attorney fee awards under Code of Civil Procedure Section 1021.5, or potentially conflict with them. Concern was expressed at the April meeting that much of the section overlapped Section 1021.5 and that by using different language the draft section could cause confusion. There is some question whether we need this section at all in light of Section 1021.5 and the detailed case law on the subject of attorney's fees in private attorney general actions. It is folly to attempt to summarize this law in a statute. Unless the statutory provision answers a doubtful point in the case law or provides a new or simpler rule, it is best to avoid rigidifying the rules.

Section 1021.5 provides for the award of attorney's fees to the "successful party" in an action resulting in "enforcement of an important right affecting the public interest" if (1) a "significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons," (2) private enforcement was necessary, (3) the award is justified by the financial burden on private enforcement, and (4) the fees should not be paid out of the recovery. The private right to attorney's fees where a prosecutor brings a similar action was established in *Committee To Defend Reproductive Rights v. A Free Pregnancy Center*, 229 Cal. App. 3d 663, 642-44, 280 Cal. Rptr. 329 (1991) (footnotes omitted):

A private party acting as plaintiff in such cases is not, ipso facto, eligible for attorney fees under section 1021.5 in every case in which that party colitigates with a governmental entity on behalf of the public or a large class of persons, whether by way of intervention or, as here, by consolidation of separately filed cases.

In the circumstances of this case, an attorney fee award is dependent upon an ultimate finding of the trial court that the colitigating private party rendered necessary and significant services of value to the public or to a large class of persons benefited by the result of the litigation.

Important factors the trial court should address in determining if the services of the private party were necessary, so as to support that ultimate finding, are these: (1) Did the private party advance significant factual or legal theories adopted by the court, thereby providing a material non de

minimis contribution to its judgment, which were nonduplicative of those advanced by the governmental entity? (2) Did the private party produce substantial evidence significantly contributing to the court's judgment which was not produced by the governmental entity, and which was neither duplicative of nor merely cumulative to the evidence produced by the governmental entity?

In short, the necessity element is not to be determined simply by the form of such private services. A private litigant's theories or arguments, while literally different from those advanced by the governmental entity, may or may not lack significance in contributing to the result obtained. Similarly, a private litigant's efforts may result in injunctive or other relief, as here, against a defendant not named in the public entity suit; that result alone will not automatically satisfy the necessity element of section 1021.5. Judgment against that additional defendant may or may not result in a benefit of significance to the public over that obtained by the judgment secured by the public entity, a factor committed to the trial court's sound exercise of its discretion in determining the necessity of a private fee award.

Nothing in the statute, or in the cases discussing it, suggests the Legislature intended it to be utilized by private parties plaintiff as a means of obtaining fees from adverse private defendants solely because the former beats the district attorney to the courthouse in filing their respective lawsuits for substantially the same civil relief afforded by the Business and Professions Code.

Conversely, section 1021.5 does not proscribe payment of attorney fees to private plaintiffs who successfully initiate and try a private lawsuit for the public benefit *solely* because the People have initiated a similar action which is consolidated for trial with that brought by such plaintiff.

The trial court, in considering fee awards to private litigants on the facts and record applicable to each particular case, must carefully walk the line between unreasonably transmuted section 1021.5 into an unwarranted cornucopia of attorney fees for those who intervene in, or initiate litigation against, private parties under the guise of benefiting the public interest while actually performing duplicative, unnecessary, and valueless services; and providing appropriate compensation under that statute in cases where the colitigating private party does render necessary, significant services of value and benefit to the public.

We further stress that, in determining the necessity of the legal services of a private party in such cases, the trial court is not bound to find them to be such solely because they are so explicitly or implicitly characterized (as they apparently were here) by the colitigating public entity or its attorneys, or solely because the attorney for the public entity elects in consolidated cases (as he apparently did in some instances here) to cooperate with the attorney for the private party in the alternative presentation of witnesses and evidence. The court's discretion to determine the necessity, significance, and value of private counsel's services in such cases may

neither be surrendered to nor dictated by such characterizations or tactical decisions of the lawyers representing either the public entity or the private party plaintiff. The trial court has the obligation to guard against payment of section 1021.5 attorney fees to private parties who bring actions ostensibly for the benefit of the public against private parties defendant, which are merely opportunistic or collusive and undertaken simply to generate such attorney fees.

In *Ciani v. San Diego Trust and Savings Bank*, 25 Cal. App. 4th 563, 30 Cal. Rptr. 2d 581 (1994), the court upheld the trial court's rejection of a private plaintiff's claim for attorney's fees in a suit "essentially identical" to one brought by the Coastal Commission. The court found that Ciani's duplicative suit was not necessary since he had "failed to advance significant factual or legal theories which were not duplicative of those advanced by the Commission" and he had "failed to produce any evidence significantly contributing to the trial court or appellate judgments which was not duplicative of or cumulative to that produced by the Commission." *Id.* at 572. On appeal, Ciani urged the court to consider also a "but for" test and a "substantial assistance" test, but these were rejected as waived. In dicta, the court noted (1) that the "but for" test was subsumed in the determination that the Commission had fully advanced the legal issues and (2) that the "substantial assistance" test would "undercut the requirement for 'necessity' by reducing the threshold from 'necessary activity' to mere 'helpful activity.'" *Id.* at 573.

Is the case law adequate to deal with the infrequent situations where a private plaintiff may be displaced by a prosecutor's enforcement action under draft Section 17310? The cases cited above arose in situations where there were two simultaneous actions. Draft Section 17310 generally will stay the private representative action so there will not be two ongoing actions, although the section does allow for consolidation, so the situation presented in the *Reproductive Rights* case could occur. In light of the infrequency of duplicative actions and the apparent breadth and adaptability of the "necessity" rule, the staff believes that draft Section 17311 *could* be omitted from the tentative recommendation, but could also be retained in its simplified form as a useful cross-reference.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

THE STURDEVANT LAW FIRM

JAMES C. STURDEVANT

KIM E. CARD
ANN SAPONARA
VIRGINIA HEWITT
CAROLYN ENCISOHA PROFESSIONAL CORPORATION
THE HUMBOLDT BANK BUILDING
785 MARKET STREET, SUITE 500
SAN FRANCISCO, CALIFORNIA 94103TELEPHONE
(415) 495-4140TELECOPIER
(415) 495-5203

April 11, 1996

BY FACSIMILE AND REGULAR MAIL
(415) 495-1827Law Revision Commission
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File: _____

Mr. Colin Wied, Chairperson
Mr. Stan Ulrich, Asst. Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite 2D
Palo Alto, California 94303-4737

Re: Unfair Competition Study, Memoranda 96-11 and 96-23

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

My law firm, which represents plaintiffs in class action and other representative litigation, wishes to comment further on the drafted statute attached to Memoranda 96-11 and 96-23.

For the reasons set forth in the letter from Earl Lui, staff attorney for Consumers Union, dated February 21, 1996, and the letter from Alan Mansfield, of Milberg, Weiss, Bershad, Hines & Lerach, dated April 10, 1996, I continue to believe that there is no need for the Commission to continue to address and to attempt to revise the statutory scheme embodied in the Business and Professions Code §17200, et seq. No systemic problems or abuses have been identified, defendants sued under this statutory scheme and their counsel have not come forward despite an open-ended invitation following the November, 1995 meeting and those who have appeared before the Commission at prior meetings, including private attorneys, public interest organizations and representatives of the district attorneys and attorney general's offices, are in agreement that more harm than good would be served by continuing the inquiry and adopting any recommendations for statutory changes to this scheme.

Nevertheless, I wish to comment on some of the tentative recommendations in this letter. I will appear tomorrow to address others in the course in the meeting.

1. Adequacy of Representation and Absence of Conflict of Interest

The staff draft and recommendation is flawed in two respects. First, it seeks to eliminate what it calls "an obvious conflict of interest situation" (Memo. 96-23, at 8) by precluding a private plaintiff from including in the same lawsuit both in individual cause of action and a cause of action on behalf of himself/herself and the general public in a representative capacity. Particularly where the individual claim is based on a statutory violation, this recommendation will require a plaintiff to file two lawsuits, rather than one. This would not necessarily minimize the conflict that the Commission or its staff perceives to exist but instead would require the filing of a separate law suit to protect, in full, the plaintiff's own interests which flow out of the same transaction or core of facts that gives rise to the representative action. Presumably, the defendant would argue that the plaintiff in the representative action had a conflict of interest because of the claims alleged in the separate action. Plaintiffs with legitimate and separate claims against the defendant that stem from the same transaction should be permitted to raise them in the same case.

Second, the draft and background commentary lack any clear standards or examples of such conflicts. Moreover, §17303 appears to require both that the attorney for a private plaintiff in a representative action be an adequate legal representative of the interests of the general public and that neither the private plaintiff nor the plaintiff's attorney in such an action may have a conflict of interest. §17303(a) and (b). Under cases interpreting Rule 23, the court is required to make a determination that the plaintiff is an adequate class representative including the finding only that the plaintiff has no conflicts with members of the class and that proposed class counsel is adequate. There is no separate requirement, even in class cases, for a finding that the plaintiff's attorney does not have a conflict of interest. Thus, while seeking not to apply all procedural requirements applicable to class actions, the revised draft, as written, contains more requirements that exist for actions filed as class actions.

For these reasons, we recommend that the draft be amended to apply only the adequacy of representation test for counsel. That should be sufficient to protect the interests both of the general public and of the representative plaintiff.

2. Court Review and Approval of Settlement

Except where there are other pending cases against the same defendant, a requirement for separate notice and for the court to make affirmative findings that the settlement is fair, adequate and reasonable, will create the danger of cursory, judicial approval of settlements in representative action cases. Even under cases certified as class actions, the judgments provide binding protection to defendants only to the

Mr. Colin Wied
Mr. Stan Ulrich
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extent of notice given and received by individual absent class members. Jurisprudential doctrines such as the doctrine of equitable estoppel, mootness or waiver can be used by defendants to dismiss any subsequent actions which may be filed solely in an attempt to "formaliz[e] the settlement process" will not guarantee that judgments obtained in representative actions are truly in the public interest. In fact, because the draft statute, as revised, seeks to increase the binding effect of a judgment, it may increase the temptation for a defendant to select a weak plaintiff with whom to settle on terms providing minimal relief for absent members of the affected general public.

3. Priority Between Public and Private Plaintiffs

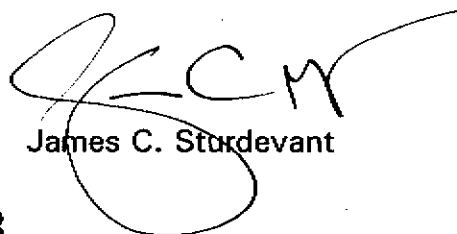
I strongly object to this provision in the proposed draft statute. There are a number of examples in which for political or other reasons, public prosecutors who have commenced actions on behalf of the general public settle or dismiss those actions either for no relief or for the provision of injunctive relief only staying a private action "until completion of the prosecutor's action" will prohibit obtaining critical documentation and key testimony from witnesses, and in many cases, tapes and other data bases from which restitution can and should be made.

We proposed in the past that there are existing procedures which adequately provide for the management of cases filed by both private plaintiffs and public prosecutors. Procedures exist for consolidation or coordination of cases filed in the same court or in different courts in the state. At the end of a public prosecutor's case, it may be too late for the private plaintiff to overcome the presumption and represent the interests in monetary restitution of affected members of the general public. Moreover, appropriate use of consolidation and coordination would forestall a defendant from seeking to put political or economic pressure on a public prosecutor to forego restitution in return for a simple cessation of the practice prospectively and perhaps with the payment of some nominal fine. Existing procedures fully protect both the private and public prosecutors and the interests of the general public.

We thank the Commission for its consideration of these comments.

Sincerely,

THE STURDEVANT LAW FIRM



James C. Sturdevant

JCS/mkf

#B-700

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft

TENTATIVE RECOMMENDATION

Unfair Competition Litigation

May 1996

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN August 30, 1996.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
(415) 494-1335 FAX: (415) 494-1827

SUMMARY OF TENTATIVE RECOMMENDATION

This recommendation proposes a set of minor revisions to the unfair competition law (Business and Professions Code Section 17200 *et seq.*) to limit the potential for abuse and to help ensure that the interests of the general public are adequately represented. The proposal focuses on the need to provide a degree finality in representative actions to avoid repetitive claims on behalf of the general public and improve the settlement process. The proposal also imposes certain formalities that should inhibit the use of claims on behalf of the general public to increase leverage in disputes between business entities. Under the proposed revisions:

- A plaintiff seeking to represent the general public would have to meet basic conflict of interest standards and would be prohibited from representing the general public while at the same time pursuing an individual cause of action against the defendant.
- The plaintiff's attorney would have to be an adequate legal representative of the interests of the general public pled in the action.
- Notice of commencement of a representative action, and notice of proposed terms of a judgment, would be given to the Attorney General. Notice of the proposed terms of the judgment would also be given to parties in other similar cases against the defendant and anyone who requests notice.
- A fairness hearing would be held to make sure that the judgment is "fair, reasonable, and adequate" to protect the interests of the general public. Interested persons would be permitted to appear and comment on the proposed terms.
- The judgment determining the representative claim on behalf of the general public would be conclusive and would bar any further claims on that cause of action. The right to sue for individual claims would not be cut off by this rule, but any individual recovery would be subject to setoff in the amount of any monetary recovery due the individual as a member of the general public.
- Prosecutors would be given priority over private plaintiffs in representing the public, so long as substantial restitution is obtained in the prosecutor's action. The right of the private plaintiff to attorney's fees is recognized in cases where a private plaintiff's action is stayed by commencement of an action by a prosecutor.

This recommendation was prepared pursuant to Resolution Chapter 31 of the Statutes of 1993, continued in Resolution Chapter 87 of the Statutes of 1995.

1 UNFAIR COMPETITION LITIGATION

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

9 BACKGROUND

10 **Scope of Statute**

11 The statutes prohibit any “unlawful, unfair or fraudulent business act or practice
12 and unfair, deceptive, untrue or misleading advertising.”¹ Originally a business tort
13 remedy between disputing commercial entities, the unfair competition law² is now
14 a primary tool for vindicating consumer or public market abuses by business
15 entities in a variety of situations.³ As it has been developed through years of court
16 interpretation and legislative amendment, the California statute has become
17 probably the broadest such statute in the country.⁴ Use of the unfair competition
18 law as a remedy for specific harms to consumers should not obscure the role the
19 statute plays in shaping the marketplace by restraining business practices that
20 would otherwise drive the market to its lowest common denominator.⁵ To the

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 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.

1 extent that unfair practices confer a competitive advantage on an enterprise,
2 competing businesses will find themselves at a disadvantage if they do not adopt
3 similar measures.

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

11 **Standing**

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

20 In addition, actions may be brought by private parties acting for themselves or in
21 the interests of the general public.¹² As in the case of public prosecutors, the unfair
22 competition law provides private plaintiffs a right to sue on behalf of the general

6. See Sections 17205, 17534.5.

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

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

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

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

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

12. The specific language of Sections 17204 and 17535 is: "upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public." While in context, this language is susceptible of a different meaning (that the private plaintiff may only 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).

1 public even where the statute allegedly violated by the defendant provides no right
2 of action.¹³

3 **Relief**

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

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

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). 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).

1 unfair competition cause of action on behalf of the general public may be added to
2 a complaint because it facilitates liberal discovery and adds settlement leverage.²¹

3 Thus, the unfair competition law provides a “broad but shallow scheme of relief”
4 — broad in substantive scope and standing, but shallow in terms of available
5 relief, because monetary awards are limited to restitution and attorney’s fees are
6 uncertain even if the plaintiff prevails.²²

7 ISSUES AND PROBLEMS

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

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

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 the courts 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).

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).

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

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

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

23 **Settlement**

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

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

31 Defendant, too, may see an opportunity to settle the absent persons’ claims
32 cheaply by paying the individual plaintiff a premium and the absent persons little
33 or nothing.³⁰

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).

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.

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

7 **Conflicting and Repetitive Actions**

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

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

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

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

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

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

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 minimal procedural revisions designed to
3 put litigation under the unfair competition law on a sound footing. The proposed
4 statute would be added to the Business and Professions Code as a separate chapter
5 dealing with 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 the potential litigants.

11 **Form of Pleadings**

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

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

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

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

29 In addition, the representative action should not proceed if the plaintiff has a
30 conflict of interest that reasonably could compromise the good faith representation
31 of the interests of the general public pled. As a protection against an obvious
32 conflict of interest situation, the proposed law forbids a private plaintiff to sue on
33 an individual cause of action and at the same time seek to represent the general
34 public in a representative capacity, whether in the same action or a
35 contemporaneous action. This recognizes that the plaintiff who acts as a
36 representative of the general public serves in a fiduciary capacity and would have
37 a conflict of interest if the plaintiff were simultaneously pursuing damages or other
38 relief on an individual claim that is distinct from the injury alleged to have been
39 suffered by the members of the general public.

35. See “Proposed Legislation” *infra*.

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

10 **Notice of Filing**

11 At the time of filing a representative action on behalf of the general public, a
12 private plaintiff would be required to give notice to the Attorney General. This
13 notice would be for informational purposes and would not impose any duty on the
14 Attorney General to investigate or intervene in the private action. Notice to the
15 Attorney General would have the effect of informing prosecutors throughout the
16 state of relevant private actions through their existing voluntary notice system.

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

18 The defendant should disclose any other private representative actions,
19 prosecutor's enforcement actions, or class actions pending in California based on
20 substantially similar facts and theories of liability. This is a continuing duty, so
21 that if a potentially overlapping action is filed while a private representative action
22 or prosecutor's enforcement action is pending, the defendant would be required to
23 give notice to the plaintiff and the court of the later actions. The disclosure
24 requirement is intended to help the court to determine which plaintiff is best suited
25 to move forward or to make other appropriate orders, such as for consolidation or
26 abatement.

27 **Notice of Proposed Settlement**

28 The proposed law requires 45 days' notice of the terms of a proposed settlement
29 be given to other parties with cases pending against the defendant based on
30 substantially similar facts and theories of liability, to the Attorney General, and to
31 persons who have filed a request for notice. Since the interests of the general
32 public are being determined in a representative action, any interested person would
33 have the opportunity to apply for leave to be heard when the court considers entry
34 of judgment. Although this procedure is quite different from that applicable to
35 class actions, the intent is to afford a broader scope of participation by potentially
36 interested persons than is generally available under existing law.

37 **Court Review and Approval of Settlements**

38 The proposed law requires the court to review a proposed settlement of a claim
39 on behalf of the general public under the unfair competition law. The court must
40 affirmatively find that the procedural requirements of the statute have been
41 satisfied — i.e., that plaintiff and the plaintiff's attorney have met the adequacy

1 and conflict of interest requirements and that appropriate notices have been given
2 — and is also required to ensure that the proposed terms are fair, adequate, and
3 reasonable,³⁶ and that any attorney’s fees meet the statutory requirements.
4 Formalizing the settlement process will help guarantee that judgments in
5 representative actions are actually in the public interest. These rules should limit
6 the temptation for a defendant to attempt to select a weak or collusive plaintiff
7 with whom to settle and for a plaintiff to sell out the absent members of the
8 general public whose interests are at stake.³⁷

9 **Binding Effect of Representative Actions**

10 The proposed law fills a critical gap in the unfair competition law by providing a
11 limited binding effect on nonparties of a determination of a representative cause of
12 action. If the proposed statutory requirements of notice, adequacy, and court
13 review and approval have been followed, the judgment as to claims on behalf of
14 the general public bars further representative actions under the unfair competition
15 law. In other words, a judgment in a representative action on behalf of the general
16 public under the unfair competition law is entitled to res judicata and collateral
17 estoppel effect as to the interests of the general public.

18 A nonparty individual’s claim for restitution or damages for injury suffered by
19 the individual that arises out of the same facts would not be barred, but the
20 plaintiff would not be able to assert a claim on behalf of the general public. Giving
21 binding effect as to the right to bring representative actions does not affect the due
22 process rights of any person who has a personal claim for relief.

23 The proposed law thus restricts the individual’s statutory right under the unfair
24 competition law to bring a repetitive representative action on behalf of the general
25 public. The individual’s constitutional right not to have a cause of action in the
26 individual’s own right determined without due process is not impaired. But the
27 individual has no constitutional right to bring a representative action,³⁸ and the

36. The “fair, adequate, and reasonable” standard is drawn from class action law. *ee, e.g., In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 785, 805 (3d Cir. 1995); *Malchman v. Davis*, 706 F.2d 426, 433 (2d Cir. 1983); *In re Chicken Antitrust Litigation American Poultry*, 669 F.2d 228, 238-40 (5th Cir. 1982); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *Grunin v. International House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975), *cert. denied*, 423 U.S. 864 (1975); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462-63 (2d Cir. 1974). 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); *Rebney v. Wells Fargo Bank*, 220 Cal. App. 3d 1117, 1138, 269 Cal. Rptr. 844, 857 (1990) (broad trial court powers to determine fairness of proposed class action settlement).

37. 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.

38. 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).

1 right to bring representative actions, which is granted by statute, can be limited by
2 statute or repealed.

3 **Right of Setoff**

4 An injured person is able to “opt out” of the judgment in a representative action,
5 in effect, by bringing an action on his or her own behalf. However, to avoid
6 duplicate recovery, any monetary relief awarded the plaintiff on an individual
7 cause of action would be reduced by any restitution due the individual as a
8 member of the general public in the private plaintiff’s representative action or
9 prosecutor’s enforcement action. The defendant would also have the right to a
10 setoff of a pro rata share of any cy pres or fluid recovery awarded as a result of the
11 earlier action.

12 **Priority Between Public and Private Plaintiffs**³⁹

13 Where both private plaintiffs and public prosecutors have commenced actions on
14 behalf of the public against the same defendant based on substantially similar facts
15 and theories of liability, the proposed law gives the prosecutor’s action a
16 preference and the private action should be stayed until completion of the
17 prosecutor’s action. The court could permit consolidation of the public and private
18 actions on a showing that the prosecutor was not seeking substantial restitution.
19 The proposed law thus creates a presumption in favor of a public prosecutor as the
20 best representative of the general public,⁴⁰ but permits a private plaintiff to
21 overcome the presumption where the restitutionary interests of the general public
22 are not being adequately represented.

23 **Attorney’s fees**

24 The proposed law recognizes that a private plaintiff whose representative action
25 on behalf of the general public is stayed or consolidated with a prosecutor’s
26 enforcement action may have a right to attorney’s fees in an appropriate case

39. 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).

40. 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).

1 under general principles.⁴¹ This rule is intended to encourage private plaintiffs to
2 work with public prosecutors rather than competing with them and seeking a
3 separate settlement.

4 **Application to Pending Cases**

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

41. See e.g., *Ciani v. San Diego Trust and Savings Bank*, 25 Cal. App. 4th 563, 572-73, 30 Cal. Rptr. 2d 581 (1994); *Committee To Defend Reproductive Rights v. A Free Pregnancy Center*, 229 Cal. App. 3d 663, 642-44, 280 Cal. Rptr. 329 (1991).

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PROPOSED LEGISLATION

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. ACTIONS ON BEHALF OF GENERAL PUBLIC

§ 17300. Definitions

17300. As used in this chapter:

(a) “Enforcement action” means an action by a prosecutor under Chapter 5 (commencing with Section 17200) or Part 3 (commencing with Section 17500).

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

(c) “Representative cause of action” means a cause of action asserted 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.

§ 17301. Requirements 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 it 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.

Subdivision (b) provides a technical rule on the form of pleadings that include a representative cause of action.

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

§ 17302. Conflict of interest in pursuing individual and representative claims

17302. A person may not maintain an individual cause of action, whether for unfair competition or some other cause, and in the same action or in a contemporaneous action against the same defendant also seek to represent the interests of the general public by way of a representative cause of action.

Comment. Section 17302 precludes plaintiffs from attempting to represent both their individual interests and the interest of the general public under the unfair competition statutes, whether in the same action or in contemporaneous separate actions. In effect, this section creates a conclusive presumption that a conflict of interest would exist in such circumstances. Any type of individual cause of action against the defendant is covered by this prohibition. This section does not prevent a plaintiff from representing the interests of the general public where the

1 plaintiff is a member of the injured class, but only where the plaintiff seeks recovery distinct from
2 the plaintiff's interest as a member of the general public. Under the rule of this section, the
3 individual's personal cause of action is separate from the representative cause of action on behalf
4 of the general public. Thus, there is no violation of policies against splitting causes of action.

5 See also Sections 17300(c) ("representative cause of action" defined), 17303(b) (absence of
6 conflict of interest).

7 **§ 17303. Adequate legal representation and absence of conflict of interest**

8 17303. (a) The attorney for a private plaintiff in a representative action must be
9 an adequate legal representative of the interests of the general public pled.

10 (b) A private plaintiff in a representative action may not have a conflict of
11 interest that reasonably could compromise the good faith representation of the
12 interests of the general public pled.

13 (c) As soon as practicable after the commencement of the representative action,
14 on application of the plaintiff made on noticed motion or on the court's own
15 motion, the court shall determine by order whether the requirements of
16 subdivisions (a) and (b) are satisfied. The determination shall be based on the
17 pleadings. Discovery is not available, but the court may inquire into the matters in
18 its discretion. In making its determination, the court shall consider standards
19 applied in class actions. If the court determines that the requirements of
20 subdivisions (a) and (b) are not satisfied, the representative cause of action shall be
21 stricken from the complaint.

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

24 **Comment.** Section 17303 sets forth the prerequisites in a representative action for unfair
25 competition or false advertising of (a) adequacy of counsel to represent the general public and (b)
26 absence of a conflict of interest on the part of the plaintiff. Consistent with the broad approach to
27 standing codified in Sections 17204 and 17535, Section 17303 does not require the private
28 plaintiff to be a member of the injured group. Conversely, a named party plaintiff may not plead a
29 cause of action as an individual and at the same time seek to represent the interests of the general
30 public by way of a representative cause of action. See Section 17302.

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

37 Subdivisions (c) and (d) are drawn in part from Rule 23(c)(1) of the Federal Rules of Civil
38 Procedure, applicable to class actions.

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

40 **§ 17304. Notice of commencement of representative action to Attorney General**

41 17304. Not later than 10 days after the court makes an order under Section
42 17303 that the representative action may proceed, the private plaintiff shall give
43 notice of the action, together with a copy of the complaint, to the Attorney
44 General. Receipt of notice under this section does not impose any duty on the
45 Attorney General to take any action in response to the notice.

1 **Comment.** Section 17304 requires a private plaintiff to give prompt notice of the filing of a
2 representative action to the Attorney General. The notice and copy of the complaint required by
3 this section are given for informational purposes only, as recognized in the second sentence. The
4 notice of the proposed terms of the judgment under Section 17306 may be given at the same time
5 as the notice of commencement of the representative action is given under this section, so long as
6 other requirements are satisfied.

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

8 **§ 17305. Disclosure of similar cases against defendant**

9 17305. (a) Promptly after the filing of an enforcement action by a prosecutor or a
10 representative action by a private plaintiff, the defendant shall notify the plaintiff
11 and the court of any other enforcement actions, representative actions, or class
12 actions pending in this state against the defendant that are based on substantially
13 similar facts and theories of liability.

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

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

23 **§ 17306. Notice of terms of judgment**

24 17306. (a) At least 45 days before entry of a judgment, or any modification of a
25 judgment, which is a final determination of the representative cause of action, a
26 private plaintiff shall give notice of the proposed terms of the judgment or
27 modification, including all stipulations and associated agreements between the
28 parties, together with notice of the time and place set for a hearing on entry of the
29 judgment or modification, to all of the following:

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

32 (2) Each person who has filed with the court a request for notice of the terms of
33 judgment.

34 (3) The Attorney General.

35 (b) A person given notice under subdivision (a) or any other interested person
36 may apply to the court for leave to intervene in the hearing provided by Section
37 17307. Nothing in this subdivision limits any other right a person may have to
38 intervene in the action.

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

41 **Comment.** Subdivision (a) of Section 17306 requires notice of the terms of any proposed
42 disposition of the representative action to other interested parties. The 45-day notice period is
43 subject to variation on court order pursuant to subdivision (c). The notice of the proposed terms of
44 the judgment under this section may be given at the same time as the notice of commencement of

1 the representative action is given under Section 17304, so along as other requirements are
2 satisfied.

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

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

7 **§ 17307. Findings required for entry of judgment**

8 17307. (a) Before entry of a judgment, or any modification of a judgment, which
9 is a final determination of the representative cause of action, a hearing shall be
10 held to determine whether the requirements of this chapter have been satisfied.

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

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

16 (2) Any award of attorney’s fees included in the judgment or in any stipulation
17 or associated agreements complies with Section 17311.

18 **Comment.** Section 17307 provides for a hearing as a prerequisite to entry of judgment on a
19 cause of action on behalf of the general public for unfair competition or false advertising and
20 provides standards that must be satisfied.

21 The “fair, reasonable, and adequate” standard in subdivision (b)(2) is drawn from the case law
22 on class actions and is intended to be applied consistent with that law. See, e.g., *In re* General
23 Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768, 785, 805 (3d
24 Cir. 1995); *Malchman v. Davis*, 706 F.2d 426, 433 (2d Cir. 1983); *In re* Chicken Antitrust
25 Litigation American Poultry, 669 F.2d 228, 238-40 (5th Cir. 1982); *Girsh v. Jepson*, 521 F.2d
26 153, 157 (3d Cir. 1975); *Grunin v. International House of Pancakes*, 513 F.2d 114, 123 (8th Cir.
27 1975), *cert. denied*, 423 U.S. 864 (1975); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462-63
28 (2d Cir. 1974). See also *La Sala v. American Savings & Loan Ass’n*, 5 Cal. 3d 864, 871-71, 489
29 P.2d 1113, 97 Cal. Rptr. 849 (1971) (plaintiff as fiduciary for class); *Rebney v. Wells Fargo*
30 *Bank*, 220 Cal. App. 3d 1117, 1138, 269 Cal. Rptr. 844, 857 (1990) (broad trial court powers to
31 determining fairness of proposed class action settlement).

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

33 **§ 17308. Dismissal, settlement, compromise**

34 17308. A representative cause of action may not be dismissed, settled, or
35 compromised without the approval of the court and substantial compliance with
36 the requirements of this chapter.

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

40 **§ 17309. Binding effect of judgment in representative action**

41 17309. (a) The determination of a representative cause of action in a judgment
42 approved by the court pursuant to Section 17307 is conclusive and bars any further
43 claims on behalf of the general public on that cause of action.

44 (b) In any case where a person obtains a judgment against the defendant for
45 damage to the person as an individual arising out of the same facts as the

1 representative cause of action, the defendant is entitled to a setoff in the amount of
2 any monetary recovery directly due to the person and a pro rata share of any
3 indirect restitutionary relief awarded as a result of a representative action or
4 enforcement action.

5 **Comment.** Section 17309 governs the binding effect of a representative action under this
6 chapter. Under this section, a final determination of the cause of action (i.e., the cause of action
7 on behalf of the general public under Section 17204 or 17535, as provided in Section 17307) is
8 res judicata. In other words, the determination of the cause of action on behalf of the general
9 public has been made and other private plaintiffs are precluded from reasserting the representative
10 cause of action. See also Code Civ. Proc. § 1908 (binding effect of judgments generally). This
11 effect applies to any relief granted the general public, whether by way of injunction or restitution
12 or otherwise. The scope of this rule is limited: a person who claims to have suffered damage as an
13 individual is not necessarily precluded from bringing an action on that claim, even though the
14 question of the harm to the general public has been determined conclusively. However, as
15 provided in subdivision (b), if the person prevails on an individual claim, any monetary recovery
16 (whether damages or restitution) will be reduced by the amount of any payment received by or
17 due to the person in the prior private representative action or prosecutor’s enforcement action.
18 Furthermore, if a representative action or enforcement action has resulted in fluid recovery or cy
19 pres relief, the defendant is entitled to a setoff in the amount of the pro rata indirect benefit to the
20 plaintiff as determined by the court.

21 See also Sections 17300(a) (“enforcement action” defined), 17300(c) (“representative cause of
22 action” defined).

23 **§ 17310. Priority between prosecutor and private plaintiff**

24 17310. (a) If a private plaintiff has commenced an action that includes a
25 representative cause of action and a prosecutor has commenced an enforcement
26 action against the same defendant based on substantially similar facts and theories
27 of liability, the court in which either action is pending, on motion of a party or on
28 the court’s own motion, shall stay the private plaintiff’s representative cause of
29 action until completion of the prosecutor’s enforcement action or, in the interest of
30 justice, may make an order for consolidation of the actions.

31 (b) The determination under subdivision (a) may be made at any time during the
32 proceedings and regardless of the order in which the actions were commenced, but
33 if the prosecutor’s enforcement action was the first commenced, a representative
34 action brought by a private plaintiff may not be consolidated with the prosecutor’s
35 enforcement action, and the private plaintiff may not intervene in the enforcement
36 action, unless the prosecutor’s enforcement action does not seek substantial
37 restitution to the general public.

38 (c) If the prosecutor’s enforcement action does not result in substantial
39 restitution to the general public, the private plaintiff’s representative cause of
40 action may be reinstated. The time during which pursuit of the representative
41 cause of action was stayed is not counted in determining whether the applicable
42 limitations period has expired.

43 **Comment.** Section 17310 provides a priority for public prosecutor enforcement actions over
44 conflicting private representative actions. Subdivision (b) recognizes a right to pursue restitution
45 in a private representative action where the restitutionary recovery under the enforcement action
46 is not substantial. Where a private plaintiff has contributed to the prosecution of the enforcement

1 action, attorney’s fees may be awarded as provided in Section 17311. If the enforcement action
2 and representative action are consolidated, the court may give the prosecutor responsibility on the
3 injunctive and civil penalty phases of the case and let the private plaintiff press the restitutionary
4 claims.

5 See also Sections 17300(a) (“enforcement action” defined), 17300(b) (“prosecutor” defined),
6 17300(c) (“representative cause of action” defined).

7 **§ 17311. Attorney’s fees**

8 17311. If a prosecutor is given preference over a private plaintiff under Section
9 17310 or if the private plaintiff’s representative action is consolidated with the
10 prosecutor’s enforcement action, the private plaintiff may be entitled to costs and
11 attorney’s fees pursuant to Section 1021.5 of the Code of Civil Procedure or other
12 applicable law.

13 **Comment.** Section 17311 recognizes that a private plaintiff may have a right to an attorney’s
14 fee award under general principles when the private representative action is stayed or
15 consolidated pursuant to Section 17310. This section is intended to be applied consistent with
16 case law. See, e.g., *Ciani v. San Diego Trust and Savings Bank*, 25 Cal. App. 4th 563, 572-73, 30
17 Cal. Rptr. 2d 581 (1994); *Committee To Defend Reproductive Rights v. A Free Pregnancy*
18 *Center*, 229 Cal. App. 3d 663, 642-44, 280 Cal. Rptr. 329 (1991).

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

21 **§ 17319. Application of chapter to pending cases**

22 17319. (a) On and after its operative date, this chapter applies to all pending
23 actions that include a representative cause of action, regardless of whether they
24 were filed before the operative date, unless the court determines that application of
25 a particular provision of this chapter would substantially interfere with the
26 effective conduct of the action or the rights of the parties or other interested
27 persons.

28 (b) For the purpose of applying this chapter to pending actions, the duty to give
29 notice under Section 17304 is satisfied if the notice is given promptly after the
30 operative date of this chapter.

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

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