

Memorandum 96-74

Unfair Competition Litigation: Final Recommendation Draft

Attached to this memorandum is a staff draft recommendation on *Unfair Competition Litigation*. This draft recommendation implements decisions made at the October meeting when the Commission reviewed the comments received on the tentative recommendation. Additional issues are raised in Staff Notes following the relevant sections.

Since the last meeting, we have received the following letters, which are included in the Exhibit:

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| | <i>pp.</i> |
| 1. James C. Sturdevant, San Francisco (Oct. 9, 1996) [Letter directed to tentative recommendation considered at October meeting; firm résumé not included.] | 1 |
| 2. Alan M. Mansfield, Milberg, Weiss, Bershad, Hynes & Lerach, San Diego (Oct. 28, 1996) | 9 |

The sections in the draft recommendation have the same numbers as in the tentative recommendation to facilitate continuity of discussion. However, upon approval of a recommendation, we intend to renumber the sections to eliminate the gaps left from any deleted provisions in compliance with general drafting standards.

The explanatory text of the draft recommendation has been revised to reflect the current draft statute. If Commissioners have any editorial suggestions, they should be raised at the meeting or, if minor, given to the staff for incorporation. If the draft recommendation is acceptable (subject to revisions made at the meeting), it will be prepared for printing and we will get a bill draft prepared by Legislative Counsel.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

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October 9, 1996

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Law Revision Commission
RECEIVED

OCT 11 1996

File: _____

Re: Tentative Recommendation, Unfair Competition Litigation Study
(May, 1996), No. B-700

Dear Messrs. Wied and Ulrich:

On behalf of the Consumer Attorneys of California (CAOC) and the interests of the clients and the statewide classes of clients whom my law firm represents, we appreciate the opportunity to comment upon the tentative recommendation of the Law Revision Commission concerning Unfair Competition Litigation.

By way of background, CAOC is a statewide organization representing attorneys who represent the interests of consumers throughout the State of California. CAOC has more than 3,500 member attorneys. It represents the interests of consumers throughout California in litigation, and in legislative and administrative advocacy. Many of its members frequently represent individuals, affected members of the general public, and consumer and public interest organizations in litigation under Business and Professions Code §§ 17200, et seq., and 17500, et seq.

My firm is a small, private law firm in San Francisco which specializes in the representation of classes of consumers statewide under various state statutes, including Business and Professions Code § 17200, et seq., and 17500, et seq. Over many years of practice, we have provided direct assistance to millions of consumers statewide in a broad variety of cases. A copy of my firm's current resume is attached for the Commission's review.

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BACKGROUND

Over the course of the past year, CAOC and my firm have generally followed, and participated in, the Commission's hearings concerning its review of Unfair Competition Litigation. We have attended several of the Commission's meetings concerning the subject, including those held in San Francisco in September, 1995, in Los Angeles in January, 1996, and in Sacramento in May, 1996. Based upon the Commission's drafts and revised drafts, the meetings we attended, our discussions with colleagues and others who attended these meetings, we are not convinced that the problems cited by the Commission and which it purports to address regarding § 17200 are so widespread or even substantial as to warrant a complete review, let alone substantial overhaul of the statutory scheme. Throughout these hearings, only a handful of anecdotal reports of "abuses" of § 17200 have been reported. They appear to be confined to a very small number of cases filed by less than a handful of lawyers throughout the state.

Against this, the Commission has heard substantial testimony from my firm, and others, as well as reports from governmental attorneys and other public interest organizations, that the enforcement of the statutory scheme embodied and referred to as § 17200 has become an important and effective means of enforcing numerous state statutes against unlawful, unfair and fraudulent business practices throughout California. A substantial body of case law has developed, including numerous reported decisions by the California Supreme Court and the Courts of Appeal, which have interpreted § 17200 and which have provided broad and substantial remedies in cases brought by private litigants and public interest organizations seeking to serve as a private attorney general to represent the interests of the public adversely affected by the practice at issue. In our view, many of the Commission's recommendations will create substantial additional problems which will make it more difficult for private litigants, private law firms such as mine, and public interest organizations to seek substantial redress for predicate acts of unfair competition. Importantly, in our view, the proposed recommendations will do little to address the handful of instances of reported "abuses" which the Commission cites.

I. CONFLICT OF INTEREST

As proposed, § 17302 would prohibit a party from bringing any individual claim or claims in the same action or a contemporaneous action, if the same party also pleads a § 17200 cause of action. This provision presents a significant problem that will prevent the filing of legitimate § 17200 cases by private parties represented by

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private law firms. Any plaintiff who has a legitimate claim for damages which would trigger a jury trial, and perhaps punitive damages as well, might well choose to revise or decline to sue on behalf of the general public under § 17200 which provides only for injunctive relief and restitution at the discretion of the trial court and prohibits a jury trial. This is true although § 17200, *et seq.*, imposes strict liability. State Farm Fire & Casualty Co. v. Superior Court (1996) 45 Cal.App.4th 1093, 1102, *rev. denied*. Because the definition of unfair competition is disjunctive, a business practice "[i]s prohibited if it is 'unfair' *or* 'unlawful' *or* 'fraudulent.'" In other words, a practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' and vice-versa...." *Id.* (emphasis in original) (citation omitted); *Id.*, at 1103-1104 (citing and discussing reported examples of business practices which have been judicially found to be "unlawful" or "unfair.")

Business and Professions Code § 17200 is an extraordinary remedy that dispenses with traditional procedural limitations on equity powers or class actions. Suits under Business and Professions Code § 17200 differ from those in traditional equity jurisdictions in that (1) an adequate remedy at law will not bar an injunction under Business and Professions Code § 17200, 6 Witkin, California Procedure (3d ed. 1985) Provisional Remedies, § 253, at 220; People v. Los Angeles Palm, Inc. (1981) 121 Cal.App.3d 25, 32-33; (2) an injunction under § 17200 may be employed to enjoin criminal acts, 6 Witkin, California Procedure, supra, § 275, at 236, Business and Professions Code § 17202; and (3) the plaintiff does not have to show injury from the challenged practice as standing to bring suit. Hernandez v. Atlantic Finance Co. (1980) 105 Cal.App.3d 65. As in class actions, the court in a suit under § 17200 may order "restitution in favor of absent persons." Dean Witter Reynolds, Inc. v. Superior Court (1989) 211 Cal.App.3d 758. But unlike class actions, the plaintiff in such a suit does not have to be an adequate representative of the class awarded restitution. City of San Jose v. Superior Court (1974) 12 Cal.3d 447, 463; cf. Fletcher v. Security Pacific National Bank (1979) 23 Cal.3d 442, 453-453.

The Commission's primary concern is for the "potential" for abuse of lawsuits under § 17200 by litigants who use that cause of action as leverage to obtain a settlement of his or her individual claim. While that potential may have been realized in a handful of cases over the more than twenty years that the statutory scheme has been in existence, there is no demonstrated proof of widespread problems in this area put forth by representatives of the business community who are defendants in these cases or the law firms that traditionally represent them.

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Those individuals who are aggrieved by the conduct of a particular business or governmental entity are particularly well suited to represent in an adequate way all others affected by the same practice. Because these litigants have a significant interest in obtaining injunctive relief as well as damages to compensate them for the harm to themselves, they stand to gain only by obtaining substantial relief.

Indeed, many reported cases have involved injured individuals who brought actions and obtained relief both on their own behalf and on behalf of affected members of the general public. These include Fletcher v. Security Pacific National Bank (1979) 23 Cal.3d 442; Barquis v. Merchants Collection Assn. of Oakland (1972) 7 Cal.3d 94; the underlying action referred to in Bank of the West v. Superior Court (1992) 2 Cal.4th 1254; Hitz v. First Interstate Bank (1995) 38 Cal.App.4th 274; and State Farm Fire & Casualty Co. v. Superior Court, *supra*.

Recent experience by my firm highlights the problems underlying the Commission's proposal. One particular consumer scam which we have challenged for many years involves fraud and abuse by private, for-profit trade and vocational schools who induce low income job seekers into enrolling in overpriced, extremely poor quality job training programs paid for with federally guaranteed student loans and grants. We are not alone in focusing our litigation efforts on the outrageously unfair business practices of private trade schools which serve as nothing but means for their owners to line up at the federal financial aid trough. Among others, the Attorney General's office has brought several actions under § 17200 challenging the business practices of fraudulently operated schools.

In one such action, involving a trade school named Wilshire Computer College, closed since December, 1991, the Attorney General's office sued not only the school and its owner, but one of the major banks and the guaranty agency which respectively made and guaranteed the student loans which financed many of the victims' "education" at Wilshire. People v. Wilshire Computer College, et al., Los Angeles Superior Court Case No. BC018391 (filed January 4, 1991). In or about December, 1991, my firm became aware that, for policy reasons, the Attorney General's office was considering dismissing its action against the lender and state guaranty agency defendants. My firm, assisted by Public Counsel in Los Angeles, sought leave to intervene in the action on behalf of three former Wilshire students, and all others similarly situated, on the grounds that dismissal of the People's action would harm their interests and their ability to obtain restitution. Our application to intervene (and a subsequent motion for reconsideration) were denied by the court. It refused to allow victims to come in at the eleventh hour and involve themselves in litigation which was

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about to be, as to these important defendants, dismissed. A few weeks later a stipulation was filed with the court dismissing the People's claims against the bank and guaranty agency with the only payment of money, according to the stipulation, being Bank of America's payment to the Attorney General's office of \$200,000 for costs and expenses. No relief, whatsoever, was obtained from the lender for thousands of defrauded students.

Following the denial of the students' application to intervene, we filed an independent action on behalf of these victims against the same bank and guaranty agency defendants, two other banks, the closed school and its owner. Tillis, et al. v. Bank of America, N.T.&S.A., et al., Los Angeles Superior Court Case No. BC073448 (filed January 26, 1993). Because of the court's refusal to allow intervention, we were required to undertake the inefficient and expensive step of filing a second lawsuit in order to attempt to afford victims of this fraudulent scheme the ability to recover the tuition monies they had paid and obtain cancellation of their student loans.¹

We anticipate that, like the trial judge in Wilshire Computer College, any court considering a request to intervene by an interested party under proposed § 17306 will have great difficulty in so doing. Indeed, in a recent ruling in In re Computer Monitor Litigation, J.C.C.P. No. 3158, San Francisco Superior Court, Judge Cahill issued an order on July 3, 1996 foreclosing the assertion of any claim by any private litigant following the entry of judgment in a prior case under § 17200 brought by the Attorney General and several district attorneys. This was true even though the public agency obtained no relief for those who had been harmed by the unlawful practice and instead accepted a gift of free computer services to an unrelated school which gained positive press for the wrongdoing. Accordingly, we believe that the proposal's safety mechanism for review of settlements in "private" lawsuits prior to a determination of res judicata will likely be of little benefit to the general public.

Most importantly, the Commission's concern is adequately addressed by proposed §§ 17306-17308 which would require court approval of settlements and dismissals of "representative" actions brought under § 17200. Requiring court review of dispositions of such lawsuits will ensure against any actual abuse by any individual litigant who would dismiss a legitimate representative cause of action by obtaining

¹The claims against the lenders and CSAC, the state guaranty agency, were dismissed. A decision on our appeal will be resolved within weeks. A class has been certified against the school and its owners in default, and a hearing to set classwide damages for approximately 10,000 students will be heard in early 1997.

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only individual recovery. Such review would also ensure against dismissal of or judgment upon representative claims for political or other reasons without obtaining any direct relief for those individuals actually harmed by the practice.

Under proposed §§ 17306-17308, the court can address the traditional standards which govern the resolution of class action settlements -- the likelihood of success on the merits compared with the potential relief offered in settlement and the timing of such relief. Under these standards, it is unlikely that a court would approve a settlement in a representative action that provides no or minimal benefits to the general public while providing substantial benefits only to the named plaintiff.

Moreover, if adopted, proposed §§ 17306-17308 ought to be applicable to all actions brought under § 17200, including those brought by governmental agencies and actors. Public entities should be held to similar standards by supervising courts. The relief obtained in their lawsuits ought to benefit those on whose behalf the action was brought. We should not see situations in the future in which a government agency obtains some form of future prophylactic relief, statutory penalties paid to the agency and no relief for the individuals who have been harmed by the practice of the business entity which agrees to provide some benefit to totally unrelated parties. This would ensure against a situation like that addressed in the recent litigation styled In re Computer Monitor Litigation, J.C.C.P. No. 3158 (San Francisco Superior Court), in which in preceding litigation, the Attorney General and several district attorneys had obtained a judgment which provided no relief to all affected members of the general public who had been harmed by the business practices challenged in the lawsuit.

Finally, the Commission's concerns should be appropriately addressed by traditional standards governing the notion of "adequacy of representation." Under established California law, that standard "[d]epends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." McGhee v. Bank of America (1976) 60 Cal.App.3d 442, 450; see also Trotsky v. Los Angeles Federal Savings and Loan Ass'n. (1975) 48 Cal.App.3d 134, 146. This standard has proved workable in many class actions filed in the last twenty years in California. We would propose that that statutory language be engrafted into proposed § 17302.

II. THE RES JUDICATA PROVISIONS OF PROPOSED §§ 17309 AND 17310

Much of the discussion in the proceedings of the Commission focused on the res judicata provisions of proposed §§ 17309 and 17310. Because of the significance

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of that debate, further consideration and analysis should be given to whether adoption of the adequacy provision in § 17303 and the court approval requirement in § 17307, together with traditional judicial procedures of coordination, consolidation, stay and mootness, will resolve the Commission's concerns. Again, the absence of actual, demonstrated abuses should lead the Commission to be careful before amending a proven successful statutory scheme like that of § 17200 into ways that will disserve the purposes behind the original enactment.

In its present form, § 17309(a) would bar any "further actions on representative causes of action against the same defendant" that are based on similar facts or theories. Section 17309(b) will provide a "set-off" in the amount of direct and indirect monetary relief awarded in a "representative" or "enforcement" action. The problem created by these provisions is illuminated by the anomalous result of Judge Cahill's recent order in In re Computer Monitor Litigation, *supra*. In that case, private litigants represented by private law firms brought an action to secure monetary relief to individuals harmed by the predicate business practice. Judge Cahill sustained the demurrer without leave to amend, concluding that a prior action brought by the Attorney General and several district attorneys which had resulted in a final judgment providing no relief to any of the individuals for whom that action was brought, precluded a subsequent representative action under § 17200 against the same defendant on a similar claim.

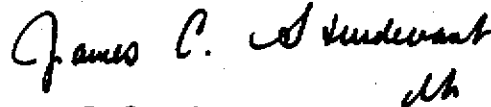
Legislating such a result will cause private parties to seek to intervene early in all lawsuits filed by governmental agencies in order to protect the claims of the individual parties they represent and who should be represented in the governmental action. The Commission should be sensitive to results which have not benefited the very individuals on whose behalf an action was brought. Examples exist not only in the recent In re Computer Monitor Litigation, but also in People v. Wilshire Computer College, *supra*, in which, after two years of intense litigation, the Attorney General, as a result of intense political pressure from Bank of America, agreed to dismiss the lender defendants for a payment of some of its costs and abandoned claims against those defendants and a state guaranty agency which were actually brought on behalf of all members of the general public affected by the vocational school fraud at issue in that case.

With respect to § 17319, it should be clearly stated that any proposed changes to this statutory scheme should not apply to actions pending prior to enactment of any new legislation.

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Thank you for the opportunity to comment on the Commission's proposal. We will be pleased to answer any questions which the Commission or its staff may have.

Sincerely yours,

A handwritten signature in cursive script that reads "James C. Sturdevant". To the right of the signature, there are two small, handwritten initials, "dh".

James C. Sturdevant

JCS/dh

Enclosure

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October 28, 1996

VIA TELECOPIER

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Law Revision Commission
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OCT 28 1996

File: _____

Re: Tentative Recommendation, Unfair Competition Litigation Study

Dear Mr. Ulrich:

Pursuant to your discussion with Mr. Janecek at the last Law Revision Commission Meeting, we provide the following editorial comments which we believe will serve to eliminate some of the misunderstandings that have arisen concerning the proposed amendments to Business & Professions Code §§17200, et. seq.:

§17300. Definitions

For the sake of consistency, the term "Representative Cause of Action" (§17300(c)), should be changed back to "Representative action" -- see e.g. definition of "Enforcement action" (§17300(a)) and proposed definition of "Class action" (proposed §17300(d)). Moreover, the proposed amendments repeatedly refer to "representative actions" -- see e.g. §§17303(a)(b) and (c), §§17305(a) and (b) and §17309. Because this term is used throughout the proposed amendments, it should be defined.

In addition, the term "class action" is used throughout the proposed amendments -- see e.g. §§17305(a) and (b), comment to §17307 and comment to §17308. Accordingly, a new sub-division should be added to specifically define this term. Our suggested language reads:

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(d) "Class Action" means a cause of action asserted by a private plaintiff on behalf of all others similarly situated under California Code of Civil Procedure Section 382 or California Civil Code Section 1781.

§17305. Disclosure of Similar Cases Against Defendant

Sub-division (a) contains superfluous language that should be deleted. This section currently reads:

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

Because the terms "enforcement action" and "representative action" are defined, the highlighted portions are extraneous and should be deleted.

Additionally, sub-division (b) currently reads:
Promptly after the filing of an enforcement action, a representative action, or a class action in this state, the defendant shall give notice of the filing to the plaintiff and the court in all pending enforcement actions and representative actions in this state against the defendant that are based on substantially similar facts and theories of liability and that are known to the defendant.

The highlighted "the" should be changed to "such." This will clarify which actions the defendant is required to provide the required notice. It also seems that the defendant should provide such notice to the plaintiff in any pending class action. This would provide for a greater flow of information and allow the parties to co-ordinate their efforts and conserve the resources of the court, the plaintiffs and the defendants.

§17306. Notice of Terms of Judgment

§17306(a)(3) provides that notice of the proposed terms of a judgment in a representative action should be given to:

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

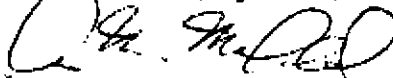
This notice provision appears to go beyond the intent of this section as notice would be required to be given to individuals asserting individual causes of action -- cases about which defendants are not required to notify representative plaintiffs. We believe that the following modification will eliminate this overbreadth:

Other parties asserting enforcement actions, representative actions or class actions pending against the defendant based on substantially similar facts and theories of liability known to the plaintiff.

Any individuals who are interested in the litigation would presumably be provided notice pursuant to §17306(a)(4) which requires notice to all persons who filed a request for such notice with the court.

We look forward to seeing the next draft. In the meantime, should you have any questions or comments do not hesitate to contact me.

Very truly yours,



ALAN M. MANSFIELD

#B-700

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft

RECOMMENDATION

Unfair Competition Litigation

November 1996

California Law Revision Commission
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SUMMARY OF RECOMMENDATION

This recommendation proposes revisions in 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 of 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.
- 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 and district attorney. Notice of the proposed terms of the judgment would also be given to parties in other similar cases against the defendant, to anyone who requests notice, and to other persons as ordered by the court.
- 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 determination of a private representative claim on behalf of the general public would bar any further private representative claims on that cause of action. Any right to sue for individual claims would not be cut off by this rule.
- Prosecutors would be given procedural priority over private plaintiffs in representing the public. The right of the private plaintiff to attorney's fees is recognized in cases where a private plaintiff contributes to a prosecutor's action.

This recommendation is submitted pursuant to Resolution Chapter 38 of the Statutes of 1996.

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 ensure the fair and competent
6 representation of the interests of the general public, promote finality, and resolve
7 some potential conflicts among plaintiffs.

BACKGROUND

8 Scope of Statute

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

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 competing businesses will find themselves at a disadvantage if they do not adopt
2 similar measures.

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

10 Standing

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

19 In addition, actions may be brought by private parties acting for themselves or in
20 the interests of the general public.¹² As in the case of public prosecutors, the unfair
21 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 than 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

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. There is a potential for abuse where a
11 claim on behalf of the general public is added to a complaint for tactical
12 advantage.

13 While the law is not settled, it appears under class action principles that where
14 the primary purpose of the action is to obtain an injunction against an unfair
15 business practice, a lower due process standard applies. Thus, where the plaintiff
16 satisfies class action concepts of adequacy, it is not necessary to give the sort of
17 notice and opt-out opportunities that are applicable in class actions seeking
18 damages.²⁸ However, the lack of any adequacy requirement applicable to the
19 plaintiff or the plaintiff’s attorney under the unfair competition law may very well
20 preclude application of this body of law where the plaintiff sues in a representative
21 capacity.

22 **Settlement**

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

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

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

33 Even where the plaintiff, such as a public prosecutor or bona fide public interest
34 group, legitimately desires to achieve finality and binding effect in a settlement
35 with the defendant, the parties are unable to do so under the unfair competition

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. 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).

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

1 law.³⁰ Hence, the legitimate goals of the unfair competition law are thwarted by its
2 lax standing rules in combination with constitutional limitations on the binding
3 effect of representative actions on absent parties.

4 **Conflicting and Repetitive Actions**

5 The potential for a multiplicity of actions under the unfair competition law and
6 overlapping or parallel proceedings is troublesome. Some commentators have
7 termed this prospect the “two-front war.”³¹ This situation can result because there
8 is no limitation on multiple plaintiffs seeking relief for the same injury to the
9 general public. The multiplicity may involve public and private plaintiffs in a
10 variety of situations. Cases may overlap and conflict where they are proceeding
11 contemporaneously, where different geographical jurisdictions are involved, or
12 where another action on the same underlying claim is brought after settlement or
13 judgment in a prior action.

14 *Public-private overlap.* A private plaintiff may hold up a public prosecutor’s
15 attempt to settle a dispute.³² Such a conflict might reflect an important concern
16 over the appropriate allocation of relief between civil penalties, fluid recovery, or
17 direct restitution, or it might be a case of a hold-up for attorney’s fees. On the
18 other hand, an intervening public prosecutor’s claim for injunction and penalties
19 may disrupt a broader claim for restitution and other relief by a private plaintiff.

20 *Public prosecutor overlap.* There also may be coordination problems in actions
21 brought by public prosecutors.³³ The district attorneys and the Attorney General
22 have created a voluntary system for coordinating investigations and actions by
23 public prosecutors. But the law is still unclear on the effect of local or regional
24 actions by public prosecutors.

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

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

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

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

33. 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 17300.³⁴

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. The plaintiff who acts as a
32 representative of the general public serves in a fiduciary capacity. Courts will need
33 to consider whether it is appropriate for a plaintiff to pursue individual claims for
34 damages or other relief while at the same time trying to represent the interests of
35 the general public.

36 The adequacy of representation and lack of conflict of interest issues should be
37 determined by the court on its own motion, or on the motion of a party to the
38 action. In the interest of efficiency and to avoid unnecessary expense, discovery

34. See “Proposed Legislation” *infra*.

1 would not be allowed on these issues. This standard should provide some
2 guarantee that the action is brought in good faith, without the need to satisfy
3 stricter class certification rules. If the private plaintiff and plaintiff's counsel do
4 not meet the statutory requirements, the representative cause of action would be
5 stricken from the complaint.

6 **Notice of Filing**

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

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

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

25 **Notice of Proposed Settlement**

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

36 **Court Review and Approval of Settlements**

37 The proposed law requires the court to review a proposed settlement of a claim
38 on behalf of the general public under the unfair competition law. The court must
39 affirmatively find that the procedural requirements of the statute have been

1 satisfied, that the proposed terms are fair, adequate, and reasonable,³⁵ and that any
2 attorney's fees meet statutory and other requirements. Formalizing the settlement
3 process will help guarantee that judgments in representative actions are actually in
4 the public interest. These rules should limit the temptation for a defendant to
5 attempt to select a weak or collusive plaintiff with whom to settle and for a
6 plaintiff to sell out the absent members of the general public whose interests are at
7 stake.

8 **Binding Effect of Representative Actions**

9 The proposed law fills a critical gap in the unfair competition law by giving the
10 determination of a private representative cause of action a limited binding effect
11 on nonparties. If the proposed statutory requirements of notice, adequacy, and
12 court review and approval have been followed, the judgment as to claims on behalf
13 of the general public bars further private representative actions under the unfair
14 competition law. In other words, a judgment in a representative action brought by
15 a private plaintiff on behalf of the general public under the unfair competition law
16 is entitled to res judicata effect as to the interests of the general public. The
17 proposed law does not otherwise affect whatever judicial doctrines of res judicata,
18 mootness, or

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

24 The proposed law thus restricts an individual's statutory ability to bring a
25 *repetitive* representative action on behalf of the general public under the unfair
26 competition law. The individual's constitutional right not to have a cause of action
27 in the individual's own right determined without due process is not impaired. But
28 the individual has no constitutional right to bring a representative action,³⁶ and the
29 right to bring representative actions, which is granted by statute, can be limited by
30 statute or repealed.

35. The "fair, adequate, and reasonable" standard is drawn from class action law. See, 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).

36. 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 **Priority Between Public and Private Plaintiffs**³⁷

2 Where both private plaintiffs and public prosecutors have commenced actions on
3 behalf of the public against the same defendant based on substantially similar facts
4 and theories of liability, the proposed law gives the prosecutor's action a
5 preference and the private action should be stayed until completion of the
6 prosecutor's action. The court could permit consolidation of the public and private
7 actions in the interest of justice. The proposed law thus creates a presumption in
8 favor of a public prosecutor as the best representative of the general public.³⁸

9 **Attorney's Fees**

10 The proposed law recognizes that a private plaintiff whose representative action
11 on behalf of the general public is stayed or consolidated with a prosecutor's
12 enforcement action may have a right to attorney's fees in an appropriate case
13 under general principles.³⁹ This rule is intended to encourage private plaintiffs to
14 work with public prosecutors rather than competing with them and seeking a
15 separate settlement.

16 **[Application to Pending Cases**

17 Except for the rules concerning the contents of the complaint and the conflict of
18 interest and adequacy of counsel rules, the proposed law applies to cases pending
19 on its operative date unless the court determines that to do so would interfere with
20 the effective conduct of the action or the rights of parties or other persons. Special
21 rules concerning filing deadlines are provided to permit application of the statute
22 to cases filed before the operative date. These rules enable the proposed law to try
23 to accomplish its purposes at the earliest opportunity.]

37. 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).

38. 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).

39. 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).

PROPOSED LEGISLATION

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 Chapter 5
8 (commencing with Section 17200) or Part 3 (commencing with Section 17500).

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

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

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

16 ☞ **Staff Note.** Alan Mansfield suggests that the term “representative cause of action” be changed
17 back to “representative action,” for consistency with the other terms, and he proposes addition of
18 a definition of “class action” (which is used in Sections 17303 and 17305). (See Exhibit pp. 9-10.)
19 The new definition, as modified by the staff, could read as follows:

20 “Class action” means a cause of action asserted by a private plaintiff on behalf of all others
21 similarly situated under the Section 1781 of the Civil Code or Section 382 of the Code of Civil
22 Procedure [or other law].

23 The Commission should consider whether to add a class action definition. It may be useful, as far
24 as it goes, but is it inclusive enough? What about federal class actions under FRCP Rule 23? And
25 what happens if some other statutory “class action” is added without adjusting the definition? On
26 the other hand, is there any confusion caused if we just use the term without defining it? If there
27 is a problem, then we may need define the term, but at this point, it appears that a definition might
28 raise more questions than it answers. We also think that the meaning is clear enough in context.
29 For example, Section 17303 requires the court to consider class action standards in determining
30 adequacy of counsel and the Comment refers to FRCP Rule 23(c)(1). Section 17305 refers to
31 “enforcement actions, representative actions, and class actions,” which seems clear in context,
32 although it is true, as Mr. Mansfield points out, that the definitions are not parallel with this
33 usage.

34 This leads to his second point: that “representative action” should be defined instead of
35 “representative cause of action.” Some earlier drafts defined “representative action” to mean an
36 action by a private plaintiff that included a representative cause of action on behalf of the general
37 public for unfair competition. The Commission felt that this was confusing in some usages and
38 implied that the whole action had a representative nature even though most claims, and the gist of
39 the action, involved a private, nonrepresentative dispute. The staff believes that the substance of
40 the statute is clear with either term. **Does the Commission want to return to the earlier**
41 **definition?**

1 **§ 17301. Requirements for pleading representative cause of action**

2 17301. (a) A private plaintiff may plead a representative cause of action on
3 behalf of the general public under Section 17204 or 17535 only if the requirements
4 of this chapter are satisfied.

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

8 **Comment.** Subdivision (a) of Section 17301 provides the scope of this chapter. This chapter
9 does not apply to actions for unfair competition that are not representative actions.

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

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

13 **§ 17303. Absence of conflict of interest and adequate legal representation**

14 17303. (a) A private plaintiff in a representative action may not have a conflict
15 of interest that reasonably could compromise the good faith representation of the
16 interests of the general public pled.

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

19 (c) On noticed motion of a party or on the court’s own motion, the court shall
20 determine by order whether the requirements of subdivisions (a) and (b) are
21 satisfied. The determination may be based on the pleadings. Discovery is not
22 available, but the court may inquire into the matters in its discretion. In making its
23 determination, the court shall consider standards applied in class actions. If the
24 court determines that the requirements of subdivisions (a) and (b) are not satisfied,
25 the representative cause of action shall be stricken from the complaint.

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

28 (e) This section does not preclude the court from granting appropriate
29 preliminary relief before a determination is made under subdivision (c).

30 **Comment.** Section 17303 sets forth the prerequisites in a representative action for unfair
31 competition or false advertising of (a) absence of a conflict of interest on the part of the plaintiff
32 and (b) adequacy of counsel to represent the general public. Section 17303 does not require the
33 private plaintiff to be a member of the injured group the plaintiff seeks to represent. Under
34 subdivision (a), if a plaintiff is pursuing a cause of action as an individual and at the same time
35 seeking to represent the interests of the general public, it would be appropriate for the court to
36 consider whether the plaintiff can adequately perform this dual role and represent the interests of
37 the general public in good faith. This section does not provide a specific conflict of interest
38 standard applicable to the plaintiff’s attorney in the representative action; but lack of conflict of
39 interest is an element of the overall adequacy of counsel standard by analogy with class action
40 law. See, e.g., 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* 1769.1, at
41 383-84 (1986) & Supp. at 36 (1995). Consistent with the broad approach to standing codified in
42 Sections 17204 and 17535,

43 Subdivision (c) requires a private plaintiff to apply for a court determination that the
44 requirements of subdivisions (a) and (b) are met before the representative action may proceed.
45 The court is given broad discretion in making its determination, including the power to
46 investigate any issues that arise, but discovery is specifically forbidden in the interests of

1 efficiency. The plaintiff cannot obtain a ruling on the merits of the complaint without first
2 satisfying this section.

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

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

6 ☞ **Staff Note.** James Sturdevant suggests adoption of the “not antagonistic” standard to
7 determine whether the plaintiff has a conflict of interest. (See Exhibit p. 6.) This idea was
8 considered, but not adopted, at the last meeting.

9 At the October meeting, it was decided that the section “should make clear that the court may
10 grant appropriate preliminary relief even if the standards of subdivisions (a) and (b) have not yet
11 been satisfied.” This has been implemented in subdivision (e). However, the **Commission should**
12 **consider whether this rule is needed** once the adequacy determination is not mandatory, but is
13 raised only on motion or a party or on the court’s own motion. (The prior draft required the
14 determination to be made “as soon as practicable.”)

15 **§ 17304. Notice of commencement of representative action to Attorney General and district**
16 **attorney**

17 17304. Within 10 days after commencement of a representative action, the
18 private plaintiff shall give notice of the action and any application for preliminary
19 relief, together with a copy of the complaint, to the Attorney General and to the
20 district attorney of the county where the action is pending. Notice of preliminary
21 relief shall be given in the same manner as is given to the defendant.

22 **Comment.** Section 17304 requires a private plaintiff to give prompt notice of the filing of a
23 representative action to the Attorney General and the local district attorney. The notice and copy
24 of the complaint required by this section are given for informational purposes only, as recognized
25 in Section 17311 (effect on prosecutors). The notice of the proposed terms of the judgment under
26 Section 17306 may be given at the same time as the notice of commencement of the
27 representative action is given under this section, so long as other requirements are satisfied.

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

29 ☞ **Staff Note.** This section has been revised to provide notice of preliminary relief. The question
30 whether such notice would be useful was postponed so that we could get the opinion of the
31 prosecutors. The staff conferred with Tom Papageorge, who indicated that such notice would be
32 useful, even though it may not occur very often. Rather than set any particular time limits, the
33 section attempts to incorporate whatever rules apply in the case, including telephone notice that
34 may be required under local rules.

35 **§ 17305. Disclosure of similar cases against defendant**

36 17305. (a) Promptly after the filing of an enforcement action by a prosecutor or a
37 representative action by a private plaintiff, the defendant shall notify the plaintiff
38 and the court of any other enforcement actions, representative actions, or class
39 actions pending in this state against the defendant that are based on substantially
40 similar facts and theories of liability and that are known to the defendant.

41 (b) Promptly after the filing of an enforcement action, a representative action, or
42 a class action in this state, the defendant shall give notice of the filing to the
43 plaintiff and the court in all pending enforcement actions and representative
44 actions in this state against the defendant that are based on substantially similar
45 facts and theories of liability and that are known to the defendant.

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

5 ☞ **Staff Note.** Alan Mansfield notes that the phrases “enforcement action by a prosecutor” and
6 “representative action by a private plaintiff” contain unneeded language because the definitions
7 already provide who brings each type of action. (See Exhibit p. 10.) The staff agrees, but the
8 redundant language has been added for clarity. We have discovered that the full import of the
9 definitions is not clear to everyone, as indicated by some written commentary and occasional
10 discussions at Commission meetings. The terms are somewhat artificial, but still useful. See also
11 Civ. Code § 3537 (superfluity does not vitiate).

12 Mr. Mansfield suggests that the defendant should also give notice to the plaintiff in any
13 pending class action to “provide for a greater flow of information and allow the parties to co-
14 ordinate their efforts and conserve the resources of the court.” (See Exhibit p. 10.) This makes
15 some sense, but this statute has not attempted to affect class actions. The proposed addition would
16 mean that a defendant in a class action would be required by this section to give notice of the
17 filing of another class action, even though no other part of this statute applies to the case.

18 The suggestion to say “such filing” instead of “the filing” is not adopted. Current drafting style
19 does not allow use of “such,” so the section would have to use “that filing” (which the staff
20 disfavors) or be rewritten. It should be rewritten only if it is unclear, and we do not believe there
21 is any doubt as to which filing is involved.

22 § 17306. Notice of terms of judgment

23 17306. (a) At least 45 days before entry of a judgment, or any modification of a
24 judgment, which is a final determination of the representative cause of action, a
25 private plaintiff shall give notice of the proposed terms of the judgment or
26 modification, including all stipulations and associated agreements between the
27 parties, together with notice of the time and place set for a hearing on entry of the
28 judgment or modification, to all of the following:

29 (1) The Attorney General.

30 (2) The district attorney of the county where the action is pending.

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

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

35 (5) Other persons as ordered by the court.

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

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

42 **Comment.** Subdivision (a) of Section 17306 requires notice of the terms of any proposed
43 disposition of the representative action to other interested parties. The 45-day notice period is
44 subject to variation on court order pursuant to subdivision (c). The notice of the proposed terms of
45 the judgment under this section may be given at the same time as the notice of commencement of
46 the representative action is given under Section 17304, so long as other requirements are
47 satisfied.

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

3 As to the effect of notice given to the Attorney General or a district attorney under this section,
4 see Section 17311. See also Sections 17300(b) (“prosecutor” defined), 17300(c) (“representative
5 cause of action” defined).

6 ☞ **Staff Note.** Alan Mansfield questions the scope of subdivision (a)(3), since it is not limited to
7 other plaintiffs with pending enforcement, representative, or class actions, but would include
8 plaintiffs with individual causes of action. (See Exhibit pp. 10-11.) He correctly notes that
9 individuals might get notice under subdivision (a)(4) and the court could require notice under
10 subdivision (a)(5). As drafted, subdivision (a)(3) is not consistent with the defendant’s duty to
11 disclose other cases under Section 17305. The question is whether individual plaintiffs should
12 automatically get notice under this section or whether they would already have to know about the
13 case so that they can request notice.

14 The original concept behind this section was to provide a level of notice to meet minimum
15 standards of fairness and due process. The notice to other potentially interested persons should be
16 broad enough to justify giving the judgment limited binding effect under Section 17309. As work
17 on the draft has proceeded, however, the scope of the binding effect rule and related principles
18 has been cut back a bit. It may be thought best to reduce the burden of giving notice under this
19 section if the need to provide broader notice is not quite as great. The staff tends to favor broader
20 notice, and Prof. Fellmeth has promoted that concept even beyond what is in the current draft. On
21 the other hand, the main players we are interested in are the other enforcement, representative,
22 and class actions, as noted by Mr. Mansfield, and it would be appropriate to limit the notice
23 requirement under subdivision (a)(3) to those plaintiffs. Substantively, it should not have any
24 effect, since the draft statute does not purport to bind individual claims by a representative action.

25 **The Commission needs to decide whether subdivision (a)(3) should be limited to plaintiffs**
26 **who have filed enforcement, representative, or class actions as described.**

27 **§ 17307. Findings required for entry of judgment**

28 17307. (a) Before entry of a judgment, or any modification of a judgment, which
29 is a final determination of the representative cause of action, a hearing shall be
30 held to determine whether the requirements of this chapter have been satisfied.

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

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

36 (2) Any award of attorney’s fees included in the judgment or in any stipulation
37 or associated agreements complies with applicable law.

38 (3) All other requirements of this chapter have been satisfied.

39 **Comment.** Section 17307 provides for a hearing as a prerequisite to entry of judgment in a
40 representative action brought by a private plaintiff on behalf of the general public for unfair
41 competition or false advertising, and provides standards that must be satisfied.

42 The “fair, reasonable, and adequate” standard in subdivision (b)(1) is drawn from the case law
43 on class actions and is intended to be applied consistent with that law. See, e.g., *In re* General
44 Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768, 785, 805 (3d
45 Cir. 1995); *Malchman v. Davis*, 706 F.2d 426, 433 (2d Cir. 1983); *In re* Chicken Antitrust
46 Litigation American Poultry, 669 F.2d 228, 238-40 (5th Cir. 1982); *Girsh v. Jepson*, 521 F.2d
47 153, 157 (3d Cir. 1975); *Grunin v. International House of Pancakes*, 513 F.2d 114, 123 (8th Cir.
48 1975), *cert. denied*, 423 U.S. 864 (1975); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462-63
49 (2d Cir. 1974). See also *La Sala v. American Savings & Loan Ass’n*, 5 Cal. 3d 864, 871-71, 489

1 P.2d 1113, 97 Cal. Rptr. 849 (1971) (plaintiff as fiduciary for class); *Rebney v. Wells Fargo*
2 *Bank*, 220 Cal. App. 3d 1117, 1138, 269 Cal. Rptr. 844, 857 (1990) (broad trial court powers to
3 determining fairness of proposed class action settlement). If a private plaintiff representing the
4 interests of the general public in a representative cause of action has maintained an individual
5 cause of action, whether for unfair competition or some other cause, in the representative action
6 or in a contemporaneous action against the same defendant, the court should examine the
7 proposed judgment and any stipulations and associated agreements to ensure that pursuit or
8 settlement of the plaintiff's individual claim has not impaired the interests of the general public.

9 With regard to an award of attorney's fees under subdivision (b)(2), see Section 17310(d)
10 (priority of prosecutor's action). As to the effect of this section on the Attorney General or a
11 district attorney, see Section 17311.

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

13 § 17308. Dismissal, settlement, compromise

14 17308. A representative cause of action may not be dismissed, settled, or
15 compromised without the approval of the court and substantial compliance with
16 the requirements of this chapter.

17 **Comment.** Section 17308 is drawn from Rule 23(e) of the Federal Rules of Civil Procedure
18 relating to class actions and Civil Code Section 1781(f) (Consumers Legal Remedies Act). See
19 also Section 17300(c) ("representative cause of action" defined).

20 § 17309. Binding effect of judgment in representative action

21 17309. The determination of a representative cause of action brought by a
22 private plaintiff in a judgment approved by the court pursuant to Section 17307 is
23 conclusive and bars any further actions on representative causes of action brought
24 by private plaintiffs against the same defendant based on substantially similar facts
25 and theories of liability.

26 **Comment.** Section 17309 governs the binding effect of a private representative action under
27 this chapter on later private representative actions. Under this section, a final determination of the
28 representative cause of action (i.e., the cause of action asserted by a private plaintiff on behalf of
29 the general public under Section 17204 or 17535, as provided in Section 17307) is *res judicata*. In
30 other words, the determination of the cause of action on behalf of the general public has been
31 made and other private plaintiffs are precluded from reasserting the representative cause of action.
32 See also Code Civ. Proc. § 1908 (binding effect of judgments generally). This effect applies to
33 any relief granted the general public, whether by way of injunction or restitution or otherwise.
34 The scope of this rule is limited: a person who claims to have suffered damage as an individual is
35 not necessarily precluded from bringing an action on that claim, even though the question of the
36 harm to the general public has been determined conclusively. In addition, if this chapter has not
37 been complied with, this section does not apply, and any binding effect will be determined by
38 application of general principles.

39 This section is not intended to affect any other application of the doctrine of *res judicata* or to
40 limit or expand other judicial doctrines such as equitable estoppel, mootness, or judicial estoppel.
41 Whether these doctrines or any others should be applied in a particular case is not affected by this
42 section and is governed by the otherwise applicable law. Nor does this section have any
43 application to situations involving enforcement actions brought by public prosecutors under the
44 unfair competition statutes.

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

1 **§ 17310. Priority between prosecutor and private plaintiff**

2 17310. (a) If a private plaintiff has commenced an action that includes a
3 representative cause of action and a prosecutor has commenced an enforcement
4 action against the same defendant based on substantially similar facts and theories
5 of liability, the court in which either action is pending, on motion of a party or on
6 the court's own motion, shall stay the private plaintiff's representative cause of
7 action until completion of the prosecutor's enforcement action or, in the interest of
8 justice, may make an order for consolidation of the actions.


9 (b) The determination under subdivision (a) may be made at any time during the
10 proceedings and regardless of the order in which the actions were commenced.

11 (c) Nothing in this section affects any right the plaintiff may have to costs and
12 attorney's fees pursuant to Section 1021.5 of the Code of Civil Procedure or other
13 applicable law.

14 **Comment.** Section 17310 provides a priority for public prosecutor enforcement actions over
15 conflicting private representative actions. If the enforcement action and representative action are
16 consolidated, the court may give the prosecutor responsibility on the injunctive and civil penalty
17 phases of the case and let the private plaintiff press the restitutionary claims.

18 Subdivision (c) recognizes that a private plaintiff may have a right to an attorney's fee award
19 under general principles when the private representative action is stayed or consolidated pursuant
20 to this section. This rule is intended to be applied consistent with case law. See, e.g., *Ciani v. San*
21 *Diego Trust and Savings Bank*, 25 Cal. App. 4th 563, 572-73, 30 Cal. Rptr. 2d 581 (1994);
22 *Committee To Defend Reproductive Rights v. A Free Pregnancy Center*, 229 Cal. App. 3d 663,
23 642-44, 280 Cal. Rptr. 329 (1991).

24 See also Sections 17300(a) ("enforcement action" defined), 17300(b) ("prosecutor" defined),
25 17300(c) ("representative cause of action" defined).

26  **Staff Note.** James Sturdevant discusses issues of intervention and public-private conflict in
27 his letter. (See Exhibit pp. 2-6.) Some of his concerns have been mooted with the removal of the
28 conflict of interest rule formerly set out in draft Section 17302. As the draft now stands, it does
29 not attempt to resolve the Computer Monitor Litigation situation, discussed on Exhibit pp. 5-6.
30 Mr. Sturdevant urges that the rules in Sections 17306-17308 be applied to public prosecutors as
31 well as private plaintiffs.

32 Mr. Sturdevant also suggests that the setoff rules in the prior draft would encourage private
33 plaintiffs to seek to intervene in all public actions. (See Exhibit p. 7.) Now that the setoff rule has
34 been dropped from the statute, we need not further consider the issue, but it is worth noting that
35 the setoff rule would not have caused problems itself. It is only the creative extension of the
36 doctrine of *res judicata* in the Computer Monitor Litigation that creates the problem.

37 **§ 17311. Effect on prosecutors**

38 17311. Notice under Section 17304 or 17306 does not impose any duty on the
39 Attorney General or district attorney. The Attorney General or district attorney is
40 not precluded from taking any future action as a consequence of not taking action
41 in response to notice or any determination made under Section 17307.

42 **Comment.** Section 17311 makes clear that notice of filing under Section 17304 and notice of
43 terms of judgment under Section 17306 are given for informational purposes only. The notice
44 provisions do not imply any duty on the Attorney General or district attorney. In addition,
45 prosecutors may submit comments for the hearing under Section 17307 without intervening. The
46 court's consideration of an objection posed by a prosecutor is not conditioned on the prosecutor's

1 assumption of the litigation. Nor are any future actions by prosecutors affected by whether or not
2 comments or objections were submitted to the court under Section 17307.

3 **§ 17319. Application of chapter to pending cases**


4 17319. (a) Except as provided in subdivision (b), on and after January 1, 1998,
5 this chapter applies to all pending actions that include a representative cause of
6 action, regardless of whether they were filed before January 1, 1998, unless the
7 court determines that application of a particular provision of this chapter would
8 substantially interfere with the effective conduct of the action or the rights of the
9 parties or other interested persons.

10 (b) Sections 17301 and 17303 apply only to actions filed on or after January 1,
11 1998.

12 (c) For the purpose of applying this chapter to pending actions, the duty to give
13 notice under Section 17304 is satisfied if the notice is given promptly after January
14 1, 1998.

15 **Comment.** Subject to exceptions, Section 17319 applies this chapter to all representative
16 actions, including those filed before the operative date except where the court orders otherwise.
17 Subdivision (a) is drawn from Code of Civil Procedure Section 694.020 (application of
18 Enforcement of Judgments Law). Subdivision (b) makes clear that Sections 17301 (requirements
19 for pleading representative cause of action) and 17303 (adequate legal representation and absence
20 of conflict of interest) do not apply to actions pending on the operative date of this chapter.

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

22  **Staff Note.** This transitional issue was not resolved at the last meeting. Kenneth Babcock
23 opposed application of the new rules to pending cases. (See Memorandum 96-67, Exhibit pp. 27,
24 35.) Alan Mansfield made the same point and recommended deletion of the section. (See
25 Memorandum 96-67, Exhibit p. 49.) James Sturdevant would also not apply the statute to pending
26 actions. (See Exhibit p. 7.)

27 Application to pending cases is not essential to the proposal, and the staff recommends that this
28 section be changed so that the new rules apply only to actions filed after the operative date. The
29 consequence would be that for some years following enactment there may be confusion as to
30 whether the new law applies. Providing for only prospective application may result in a small
31 bulge of filings right before the operative date if plaintiffs attempt to avoid the new statute based
32 on real or imagined concerns.

33 In its prospective form, Section 17319 would read:

34 17319. This chapter does not apply to actions pending on its operative date.

35 In this form, the rule might just as well be uncodified.
