

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

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 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 and is 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 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 the representative claim on behalf of the general public would be conclusive and would bar any further representative 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 contributes to a prosecutor's action.

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

UNFAIR COMPETITION LITIGATION

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

BACKGROUND

9 Scope of Statute

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 statute
7 applies to acts and practices of unfair competition that are not in violation of any
8 specific statute — the plaintiff need only show that members of the public are
9 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 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. 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
36 law.³⁰ Hence, the legitimate goals of the unfair competition law are thwarted by its

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.

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

1 lax standing rules in combination with constitutional limitations on the binding
2 effect of representative actions on absent parties.

3 **Conflicting and Repetitive Actions**

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

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

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

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

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. 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 in 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

34. See "Proposed Legislation" *infra*.

1 relief on an individual claim that is distinct from the injury alleged to have been
2 suffered by the members of the general public.

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

12 **Notice of Filing**

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

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

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

31 **Notice of Proposed Settlement**

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

1 Court Review and Approval of Settlements

2 The proposed law requires the court to review a proposed settlement of a claim
3 on behalf of the general public under the unfair competition law. The court must
4 affirmatively find that the procedural requirements of the statute have been
5 satisfied — i.e., that plaintiff and the plaintiff's attorney have met the conflict of
6 interest and adequacy requirements and that appropriate notices have been given
7 — and is also required to ensure that the proposed terms are fair, adequate, and
8 reasonable,³⁵ and that any attorney's fees meet statutory and other requirements.
9 Formalizing the settlement process will help guarantee that judgments in
10 representative actions are actually in the public interest. These rules should limit
11 the temptation for a defendant to attempt to select a weak or collusive plaintiff
12 with whom to settle and for a plaintiff to sell out the absent members of the
13 general public whose interests are at stake.

14 Binding Effect of Representative Actions

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

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

28 The proposed law thus restricts the individual's statutory right under the unfair
29 competition law to bring a *repetitive* representative action on behalf of the general
30 public. The individual's constitutional right not to have a cause of action in the
31 individual's own right determined without due process is not impaired. But the
32 individual has no constitutional right to bring a representative action,³⁶ and the

35. 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).

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 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.³⁷ The defendant would also have the right to a
10 setoff of a pro rata share of any indirect monetary relief in the nature of cy pres or
11 fluid recovery awarded as a result of the earlier action.

12 **Priority Between Public and Private Plaintiffs**³⁸

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,³⁹ 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

37. There would be no setoff for the amount of any civil penalties assessed.

38. 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).

39. 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.⁴⁰ 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 Except for the rules concerning the contents of the complaint and the conflict of
6 interest and adequacy of counsel rules, the proposed law applies to cases pending
7 on its operative date unless the court determines that to do so would interfere with
8 the effective conduct of the action or the rights of parties or other persons. Special
9 rules concerning filing deadlines are provided to permit application of the statute
10 to cases filed before the operative date. These rules enable the proposed law to try
11 to accomplish its purposes at the earliest opportunity.

40. 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 § 17301. Requirements for pleading representative cause of action

17 17301. (a) A private plaintiff may plead a representative cause of action on
18 behalf of the general public under Section 17204 or 17535 only if the requirements
19 of this chapter are satisfied.

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

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

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

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

28 § 17302. Conflict of interest in pursuing individual and representative claims

29 17302. A person may not maintain an individual cause of action, whether for
30 unfair competition or some other cause, and in the same action or in a
31 contemporaneous action against the same defendant also seek to represent the
32 interests of the general public by way of a representative cause of action.

33 **Comment.** Section 17302 precludes plaintiffs from attempting to represent both their
34 individual interests and the interest of the general public under the unfair competition statutes,
35 whether in the same action or in contemporaneous separate actions. In effect, this section creates
36 a conclusive presumption that a conflict of interest would exist in such circumstances. Any type
37 of individual cause of action against the defendant is covered by this prohibition. This section
38 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. The section does not
31 provide a specific conflict of interest standard applicable to the plaintiff's attorney in the
32 representative action, but conflict of interest is an element of the overall adequacy of counsel
33 standard by analogy with class action law. See, e.g., 7A C. Wright, A. Miller & M. Kane, Federal
34 Practice and Procedure 1769.1, at 383-84 (1986) & Supp. at 36 (1995).

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

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

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

1 **§ 17304. Notice of commencement of representative action to Attorney General and district**
2 **attorney**

3 17304. Not later than 10 days after the court makes an order under Section
4 17303 that the representative action may proceed, the private plaintiff shall give
5 notice of the action, together with a copy of the complaint, to the Attorney General
6 and to the district attorney of the county where the action is pending.

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

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

14 **§ 17305. Disclosure of similar cases against defendant**

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

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

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

29 **§ 17306. Notice of terms of judgment**

30 17306. (a) At least 45 days before entry of a judgment, or any modification of a
31 judgment, which is a final determination of the representative cause of action, a
32 private plaintiff shall give notice of the proposed terms of the judgment or
33 modification, including all stipulations and associated agreements between the
34 parties, together with notice of the time and place set for a hearing on entry of the
35 judgment or modification, to all of the following:

36 (1) The Attorney General.

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

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

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

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

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

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

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

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

15 As to the effect of notice given to the Attorney General or a district attorney under this section,
16 see Section 17311. See also Sections 17300(b) ("prosecutor" defined), 17300(c) ("representative
17 cause of action" defined).

18 § 17307. Findings required for entry of judgment

19 17307. (a) Before entry of a judgment, or any modification of a judgment, which
20 is a final determination of the representative cause of action, a hearing shall be
21 held to determine whether the requirements of this chapter have been satisfied.

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

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

27 (2) Any award of attorney's fees included in the judgment or in any stipulation
28 or associated agreements complies with applicable law.

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

32 The "fair, reasonable, and adequate" standard in subdivision (b)(1) is drawn from the case law
33 on class actions and is intended to be applied consistent with that law. See, e.g., *In re General*
34 *Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 785, 805 (3d
35 Cir. 1995); *Malchman v. Davis*, 706 F.2d 426, 433 (2d Cir. 1983); *In re Chicken Antitrust*
36 *Litigation American Poultry*, 669 F.2d 228, 238-40 (5th Cir. 1982); *Girsh v. Jepson*, 521 F.2d
37 153, 157 (3d Cir. 1975); *Grunin v. International House of Pancakes*, 513 F.2d 114, 123 (8th Cir.
38 1975), *cert. denied*, 423 U.S. 864 (1975); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462-63
39 (2d Cir. 1974). See also *La Sala v. American Savings & Loan Ass'n*, 5 Cal. 3d 864, 871-71, 489
40 P.2d 1113, 97 Cal. Rptr. 849 (1971) (plaintiff as fiduciary for class); *Rebney v. Wells Fargo*
41 *Bank*, 220 Cal. App. 3d 1117, 1138, 269 Cal. Rptr. 844, 857 (1990) (broad trial court powers to
42 determining fairness of proposed class action settlement).

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

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

1 **§ 17308. Dismissal, settlement, compromise**

2 17308. A representative cause of action may not be dismissed, settled, or
3 compromised without the approval of the court and substantial compliance with
4 the requirements of this chapter.

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

8 **§ 17309. Binding effect of judgment in representative action**

9 17309. (a) The determination of a representative cause of action in a judgment
10 approved by the court pursuant to Section 17307 is conclusive and bars any further
11 actions on representative causes of action against the same defendant based on
12 substantially similar facts and theories of liability.

13 (b) If a person obtains a judgment against the defendant for damage to the person
14 as an individual arising out of the same facts as the representative cause of action,
15 the defendant is entitled to a setoff in the amount of any monetary recovery
16 directly due to the person and a pro rata share of any indirect restitutionary relief
17 awarded as a result of a representative action or enforcement action.

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

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

36 **§ 17310. Priority between prosecutor and private plaintiff**

37 17310. (a) If a private plaintiff has commenced an action that includes a
38 representative cause of action and a prosecutor has commenced an enforcement
39 action against the same defendant based on substantially similar facts and theories
40 of liability, the court in which either action is pending, on motion of a party or on
41 the court’s own motion, shall stay the private plaintiff’s representative cause of
42 action until completion of the prosecutor’s enforcement action or, in the interest of
43 justice, may make an order for consolidation of the actions.

44 (b) The determination under subdivision (a) may be made at any time during the
45 proceedings and regardless of the order in which the actions were commenced, but

1 if the prosecutor's enforcement action was the first commenced, a representative
2 action brought by a private plaintiff may not be consolidated with the prosecutor's
3 enforcement action, and the private plaintiff may not intervene in the enforcement
4 action, unless the prosecutor's enforcement action does not seek substantial
5 restitution to the general public.

6 (c) If the prosecutor's enforcement action does not result in substantial
7 restitution to the general public, the private plaintiff's representative cause of
8 action may be reinstated. The time during which pursuit of the representative
9 cause of action was stayed is not counted in determining whether the applicable
10 limitations period has expired.

11 (d) 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. Subdivision (b) recognizes a right to pursue restitution
16 in a private representative action where the restitutionary recovery under the enforcement action
17 is not substantial. If the enforcement action and representative action are consolidated, the court
18 may give the prosecutor responsibility on the injunctive and civil penalty phases of the case and
19 let the private plaintiff press the restitutionary claims.

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

26 See also Sections 17300(a) ("enforcement action" defined), 17300(b) ("prosecutor" defined),
27 17300(c) ("representative cause of action" defined).

28 § 17311. Effect on prosecutors

29 17311. Notice under Section 17304 or 17306 does not impose any duty on the
30 Attorney General or district attorney. The Attorney General or district attorney is
31 not precluded from taking any future action as a consequence of not taking action
32 in response to notice or any determination made under Section 17307.

33 **Comment.** Section 17311 makes clear that notice of filing under Section 17304 and notice of
34 terms of judgment under Section 17306 are given for informational purposes only. The notice
35 provisions do not imply any duty on the Attorney General or district attorney. In addition,
36 prosecutors may submit comments for the hearing under Section 17307 without intervening. The
37 court's consideration of an objection posed by a prosecutor is not conditioned on the prosecutor's
38 assumption of the litigation. Nor are any future actions by prosecutors affected by whether or not
39 comments or objections were submitted to the court under Section 17307.

40 § 17319. Application of chapter to pending cases

41 17319. (a) Except as provided in subdivision (b), on and after January 1, 1998,
42 this chapter applies to all pending actions that include a representative cause of
43 action, regardless of whether they were filed before January 1, 1998, unless the
44 court determines that application of a particular provision of this chapter would

1 substantially interfere with the effective conduct of the action or the rights of the
2 parties or other interested persons.

3 (b) Sections 17301, 17302, and 17303 apply only to actions filed on or after
4 January 1, 1998.

5 (c) For the purpose of applying this chapter to pending actions, the duty to give
6 notice under Section 17304 is satisfied if the notice is given promptly after January
7 1, 1998.

8 **Comment.** Subject to exceptions, Section 17319 applies this chapter to all representative
9 actions, including those filed before the operative date except where the court orders otherwise.
10 Subdivision (a) is drawn from Code of Civil Procedure Section 694.020 (application of
11 Enforcement of Judgments Law). Subdivision (b) makes clear that Sections 17301 (requirements
12 for pleading representative cause of action), 17302 (conflict of interest in pursuing individual and
13 representative claims), and 17303 (adequate legal representation and absence of conflict of
14 interest) do not apply to actions pending on the operative date of this chapter.

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