

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Unfair Competition Litigation

November 1996

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

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NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Unfair Competition Litigation*, 26 Cal. L. Revision Comm'n Reports 191 (1996).

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STATE OF CALIFORNIA

PETE WILSON, Governor

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November 15, 1996

To: The Honorable Pete Wilson
Governor of California, and
The Legislature of California

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 proposed law 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 proposed law 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 be an adequate representative of the interest of the general public pled and 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 private 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.

- A fairness hearing would be held to make sure that the judgment in a private representative action 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 affected by this rule.
- Prosecutors would be given a degree of 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.

Respectfully submitted,

Allan L. Fink
Chairperson

ACKNOWLEDGMENTS

A large number of individuals and organizations have participated in the Commission's work on this recommendation. The Commission would like to acknowledge the assistance provided by those who have supported all or part of the proposal as well as those who have expressed objections to one or more aspects. The participation of a broad spectrum of experts aids the Commission in preparing a better proposed law, and the Commission benefits greatly from the public service performed by these individuals and organizations.

The Commission is indebted to its consultant, Prof. Robert C. Fellmeth, who prepared a background study (reprinted *infra* pp. 227-76) that provided the starting point for this recommendation and who attended meetings and commented on materials as the project progressed. The Commission appreciates the substantial amount of time devoted by many of those who wrote lengthy commentaries on proposed drafts and who attended Commission meetings. Particularly noteworthy has been the assistance provided by Thomas A. Papageorge (Los Angeles District Attorney's Office and California District Attorneys Association Consumer Protection Committee), representatives of Consumers Union (Harry Snyder, Gail Hillebrand, and Earl Lui); Kenneth W. Babcock (representing Public Counsel, and the State Bar Legal Services Section), Alan M. Mansfield (Milberg, Weiss, Bershad, Hynes & Lerach), and James C. Sturdevant (The Sturdevant Law Firm, and Consumer Attorneys of California).

Inclusion of the name of an individual or organization should not be taken as an indication of the individual's opinion or the organization's position on any part of the proposed law. The Commission regrets any errors or omissions that may have been made in compiling these acknowledgments.

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UNFAIR COMPETITION LITIGATION

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

BACKGROUND

Scope of Statute

California law prohibits any “unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.”¹ Originally a business tort remedy between disputing commercial entities, the unfair competition

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. See Fellmeth, *California’s Unfair Competition Act: Conundrums and Confusions*, 26 Cal. L. Revision Comm’n Reports 227 (1996). See also Fellmeth, *Unfair Competition Act Enforcement by Agencies, Prosecutors, and Private Litigants: Who’s on First?*, Cal. Reg. L. Rep., Winter 1995, at 1.

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

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

The remedies provided in the unfair competition law have extensive application as a cumulative remedy with other statutes.⁶ The unfair competition law applies whenever a business act or practice violates any statute,⁷ not just specifi-

2. As used in this text, "unfair competition law" refers generally to the prohibitions and remedies provided in Section 17200 *et seq.* and Section 17500 *et seq.*, with particular reference to the remedies provided in Sections 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 232-35. 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 236-49.

5. See *Fellmeth Study*, *supra* note 1, at 249-52.

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).

cally-referenced statutes in the Business and Professions Code. Moreover, the unfair competition law applies to acts and practices of unfair competition that are not in violation of any specific statute — the plaintiff need only show that members of the public are likely to be deceived.⁸

Standing

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

In addition, actions may be brought by private parties acting for themselves or in the interests of the general public.¹² As in

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, 875-76, 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

the case of public prosecutors, the unfair competition law provides private plaintiffs a right to sue on behalf of the general public even where the statute allegedly violated by the defendant provides no right of action.¹³

Relief

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

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, 110-11, 496 P.2d 817, 101 Cal. Rptr. 745 (1972).

13. *Committee on Children’s Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 210-11, 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(c) (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 mis-

and in some cases, provides that an award of restitution is preferred over a civil penalty.¹⁷ Damages at law, including punitive damages, are not available under the unfair competition law to either public or private plaintiffs.¹⁸

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

Thus, the unfair competition law provides a "broad but shallow scheme of relief" — broad in substantive scope and standing, but shallow in terms of available relief, because

conduct, 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. 655 (1989).

19. See *Fellmeth Study*, *supra* note 1, at 256-57; 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 (1977) (common fund doctrine).

21. See *Fellmeth Study*, *supra* note 1, at 254.

monetary awards are limited to restitution and attorney's fees are uncertain even if the plaintiff prevails.²²

ISSUES AND PROBLEMS

Strategic Considerations:

Representative Actions and Class Actions

From the perspective of plaintiffs with a genuine interest in vindicating the public interest, representative actions under the unfair competition law offer several distinct advantages over class actions.²³ Under the unfair competition law, a plaintiff can plead a cause of action for restitution on behalf of the general public without the complications and expenses of a class action.²⁴ The plaintiff does not have to seek certification of the class and thus avoids having to show that the action meets the standards of numerosity, commonality, adequacy, typicality, and manageability.²⁵ No type of formal cer-

22. See *Fellmeth Study*, *supra* note 1, at 253.

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. 1996).

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.

tification of the representative action is required under the unfair competition law. Perhaps the single most significant practical factor is that the plaintiff does not have to give notice to the proposed class members, thus avoiding substantial costs. In the arena of consumer actions and public interest law, the representative action under the unfair competition law is a simpler and cheaper alternative than a class action.²⁶

Standing and Binding Effect of Representative Actions ²⁷

The unfair competition law provides unusually broad, and perhaps unique, standing for private parties. They may sue on behalf of others (the “general public”) without the need to show any personal damage arising from the unfair business practice. Those suing on behalf of the general public can range from plaintiffs having a narrow dispute with a defendant in a business context, who tack on the representative claim for discovery and settlement advantages, to plaintiffs serving a true private attorney general function, who seek to vindicate larger interests. The unfair competition law does not provide any mechanism to distinguish among these types of plaintiffs. There is a potential for abuse where a claim on behalf of the general public is added to a complaint for tactical advantage.

While the law is not settled, it appears under class action principles that where the primary purpose of the action is to obtain an injunction against an unfair business practice, a

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, 772-73, 259 Cal. Rptr. 789 (1989).

27. See generally *Fellmeth Study*, *supra* note 1, at 229-30, 270-71.

lower due process standard applies. Thus, where the plaintiff satisfies class action concepts of adequacy, it is not necessary to give the sort of notice and opt-out opportunities that are applicable in class actions seeking damages.²⁸ However, the lack of any adequacy requirement applicable to the plaintiff or the plaintiff's attorney under the unfair competition law may very well preclude application of this body of law where the plaintiff sues in a representative capacity.

Settlement

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

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

Defendants, too, may see an opportunity to settle the absent persons' claims cheaply by paying the individual plaintiff a premium and the absent persons little or nothing.²⁹

Even where the plaintiff, such as a public prosecutor or bona fide public interest group, legitimately desires to achieve finality and binding effect in a settlement with the defendant, the parties are unable to do so under the unfair competition law.³⁰ Hence, the legitimate goals of the unfair competition law are thwarted by its lax standing rules in combination with

28. See Fed. R. Civ. P. 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 230, 257-58.

constitutional limitations on the binding effect of representative actions on absent parties.

Conflicting and Repetitive Actions

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

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

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

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 259-61 & 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 258-60.

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

COMMISSION RECOMMENDATIONS

The Commission recommends a set of minimal procedural revisions designed to put litigation under the unfair competition law on a sound footing. The proposed statute would be added to the Business and Professions Code as a separate chapter dealing with representative actions, commencing with Section 17300.³⁴

These recommended revisions are narrowly focused to address the standards applicable to determining who may represent the interests of the general public and to rationalize the settlement process by providing minimal notice, adequacy, and fairness standards. These revisions are proposed with the conscious intent of avoiding disruption of the overall balance among the potential litigants.

Form of Pleadings

A complaint under Business and Professions Code Section 17204 or 17535 on behalf of the general public should be separately stated in the pleadings and should specifically state that the action is brought "on behalf of the general public."

34. See "Proposed Legislation" *infra* pp. 217-26.

This detail facilitates appropriate treatment under the statute and should help to focus the attention of the parties on the crucial element of the interests of the general public.

Adequacy of Plaintiff and Plaintiff's Counsel

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

A private plaintiff should not be able to proceed in a representative action on behalf of the general public unless the plaintiff can adequately represent the interests of the general public pled. The proposed law requires that the plaintiff be an adequate representative, but does not go so far as to require the plaintiff to show that he or she has suffered an injury by the defendant's challenged practice. By analogy with class action law, the plaintiff would have to vigorously prosecute the action on behalf of the general public.³⁵

The representative action should not proceed if the plaintiff has a conflict of interest that reasonably could compromise the good faith representation of the interests of the general public pled. The plaintiff who acts as a representative of the general public serves in a fiduciary capacity. Courts will need to consider whether it is appropriate for a plaintiff to pursue individual claims for damages or other relief while at the same time trying to represent the interests of the general public.

In addition, the plaintiff's attorney must be an adequate legal representative of the public interest pled.

35. See, e.g., *Opiela v. Bruck*, 139 F.R.D. 257, 261 (D. Mass. 1990); *In re Alcoholic Beverages Litigation*, 95 F.R.D. 321, 325-26 (E.D.N.Y. 1982).

These adequacy and conflict of interest issues will be determined by the court on its own motion, or on the motion of a party to the action. In the interest of efficiency and to avoid unnecessary expense, discovery is not allowed on these issues unless the court otherwise orders.

If the private plaintiff and plaintiff's counsel do not meet the statutory requirements, the representative cause of action would be stricken from the complaint. Regardless of whether the issues are addressed early in the case, before judgment is entered, the court must determine that the adequacy and conflict of interests standards have been met. These standards should provide some guarantee that the action is maintained in good faith, without the need to satisfy stricter class certification rules.

Notice of Filing

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

Defendant's Disclosure of Other Cases

The defendant should disclose any other private representative actions, prosecutor's enforcement actions, or class actions pending in California based on substantially similar facts and theories of liability that are known to the defendant. This is a continuing duty, so that if a potentially overlapping action is filed while a private representative action or prosecutor's enforcement action is pending, the defendant would be

required to give notice to the plaintiff and the court of the later actions. The disclosure requirement is intended to help the court to determine which plaintiff is best suited to move forward or to make other appropriate orders, such as for consolidation or abatement.

Notice of Proposed Settlement in Private Representative Action

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

Court Review and Approval of Settlements

The proposed law requires the court to review a proposed settlement of a claim on behalf of the general public in a private representative action under the unfair competition law. The court must affirmatively find that the procedural requirements of the statute have been satisfied, that the proposed terms are fair, adequate, and reasonable,³⁶ that the plaintiff

36. 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 Prod. Liab. Litig.*, 55 F.3d 768, 785, 805 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 88 (1995); *Malchman v. Davis*, 706 F.2d 426, 433 (2d Cir. 1983); *In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238-40 (5th Cir. 1982); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *Grinin v. International House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975), *cert. denied*, 423 U.S. 864 (1975); *City of Detroit*

and the plaintiff's attorney meet the applicable adequacy and conflict of interest standards, and that any attorney's fees meet statutory and other requirements.

Formalizing the settlement process will help ensure that judgments in representative actions are actually in the public interest. These rules should limit the temptation for a defendant to attempt to select a weak or collusive plaintiff with whom to settle and for a plaintiff to sell out the absent members of the general public whose interests are at stake.

Binding Effect of Representative Actions

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

A nonparty individual's claim for restitution or damages for injury suffered by the individual that arises out of the same facts would not necessarily be barred, but the plaintiff would not be able to assert a claim on behalf of the general public. Giving binding effect as to the right to bring *representative*

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, 871-72, 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).

actions does not affect the due process rights of any person who has a *personal* claim for relief.

The proposed law thus restricts an individual's statutory ability to bring a *repetitive* representative action on behalf of the general public under the unfair competition law. The individual's constitutional right not to have a cause of action in the individual's own right determined without due process is not impaired. But the individual has no constitutional right to bring a representative action,³⁷ and the right to bring representative actions, which is granted by statute, can be limited by statute or repealed.

Priority Between Public and Private Plaintiffs³⁸

Where both private plaintiffs and public prosecutors have commenced actions on behalf of the public against the same defendant based on substantially similar facts and theories of liability, the proposed law gives the prosecutor's action a degree of preference by recognizing that the court may stay the private action until completion of the prosecutor's action may consolidate or coordinate it with the public action, or may make any other order in the interest of justice. The appropriate response is left to judicial discretion in the interests of justice and the statute does not provide any preference

37. Cf. *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).

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 253-54. 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 258-59 n.111. See also *Chilton & Stern*, *supra* note 26, at 100 (referring to informal understanding among Bay Area prosecutors to avoid overlapping actions).

among available orders. The proposed law does not give private plaintiffs any right to displace or stay the public action, and to this extent views public prosecutors as the best representatives of the public.³⁹

Attorney's Fees

The proposed law recognizes that a private plaintiff whose representative action on behalf of the general public is stayed or consolidated with a prosecutor's enforcement action may have a right to attorney's fees in an appropriate case under general principles.⁴⁰ This rule is intended to encourage private plaintiffs to work with public prosecutors rather than competing with them and seeking a separate settlement.

Optional Application to Pending Cases

The proposed law generally applies only to actions filed after its operative date. However, where the parties in a private representative action filed before the operative date substantially comply with the new procedural rules, the new law may be applied in the case, unless the court determines that to do so would interfere with the effective conduct of the action or the rights of parties or other persons.

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).

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 Reprod. Rights v. A Free Pregnancy Ctr.*, 229 Cal. App. 3d 633, 642-44, 280 Cal. Rptr. 329 (1991).

PROPOSED LEGISLATION

Bus. & Prof. Code §§ 17300-17311 (added). Representative actions

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

CHAPTER 6. REPRESENTATIVE ACTIONS ON BEHALF OF PUBLIC

§ 17300. Definitions

17300. As used in this chapter:

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

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

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

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

§ 17301. Requirements for pleading representative cause of action

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

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

Comment. Subdivision (a) of Section 17301 limits the scope of this chapter insofar as it applies to private actions. This chapter does not apply to private actions for unfair competition that are not representative actions.

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

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

§ 17302. Adequacy of plaintiff and plaintiff’s attorney

17302. (a) A private plaintiff in a representative action must be an adequate representative of the interests of the general public plead and may not have a conflict of interest that reasonably could compromise the good faith representation of the interests of the general public pled. The private plaintiff is not required to have sustained any injury by the defendant.

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

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

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

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

Comment. Section 17302 sets forth the prerequisites in a representative action for unfair competition or false advertising of (a) the plaintiff’s adequacy to represent the general public and absence of a conflict of

interest and (b) adequacy of counsel to represent the general public. Section 17302 does not require the private plaintiff to have suffered an injury from the defendant's practice challenged in the complaint, but, by analogy with class action principles, the plaintiff must be of such character as to ensure vigorous prosecution of the action so that interests of the general public are certain to be protected. See, e.g., *Opiela v. Bruck*, 139 F.R.D. 257, 261 (D. Mass. 1990); *In re Alcoholic Beverages Litigation*, 95 F.R.D. 321, 325-26 (E.D.N.Y. 1982). Under subdivision (a), if a plaintiff is pursuing a cause of action as an individual and at the same time is seeking to represent the interests of the general public, it would be appropriate for the court to consider whether the plaintiff can adequately perform this dual role and represent the interests of the general public in good faith. This section does not provide a specific conflict of interest standard applicable to the plaintiff's attorney in the representative action; but lack of conflict of interest is an element of the overall adequacy of counsel standard by analogy with class action law. See, e.g., 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1769.1, at 383-84 (1986) & Supp. at 37 (1996).

Subdivision (c) provides the procedure for determining that the requirements of subdivisions (a) and (b) are met. The court is given broad discretion in making its determination, including the power to investigate any issues that arise, and may make an order permitting discovery. The plaintiff cannot obtain a ruling on the merits of the complaint without first satisfying this section. See Section 17307(b)(3)-(4) (findings required for entry of judgment).

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

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

§ 17303. Notice of commencement of representative action to Attorney General and district attorney

17303. Within 10 days after commencement of a representative action, the private plaintiff shall give notice of the action and of any application for preliminary relief, together with a copy of the complaint, to the Attorney General and to the district attorney of the county where the action is pending. Notice of an application for preliminary relief shall be given in the same manner as notice is given to the defendant.

Comment. Section 17303 requires a private plaintiff to give prompt notice of the filing of a representative action to the Attorney General and

the local district attorney. The notice and copy of the complaint required by this section are given for informational purposes only, as recognized in Section 17310 (effect on prosecutors).

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

§ 17304. Disclosure of similar cases against defendant

17304. (a) Promptly after summons is served on the defendant in an enforcement action or representative action, 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.

(b) Promptly after summons is served on the defendant in an enforcement action, representative action, or 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.

Comment. Section 17304 requires the defendant to disclose similar cases pending or later filed in California. This section applies as to actions brought by prosecutors or private plaintiffs. See Sections 17300(a) (“enforcement action” defined), 17300(b) (“prosecutor” defined), 17300(c) (“representative cause of action” defined).

§ 17305. Notice of terms of judgment in representative action

17305. (a) With respect to a representative cause of action, at least 45 days before entry of a judgment, or any modification of a judgment, which is a final determination of the representative cause of action, the private plaintiff shall give notice of the proposed terms of the judgment or modification, including all stipulations and associated agreements between the parties, together with notice of the time and place set for a hearing on entry of the judgment or modification, to all of the following:

(1) The Attorney General.

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

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

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

(5) Other persons as ordered by the court.

(b) A person given notice under subdivision (a) or any other interested person may apply to the court for leave to intervene in the hearing provided by Section 17306. Nothing in this subdivision limits any other right a person may have to intervene in the action.

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

Comment. Subdivision (a) of Section 17305 requires notice of the terms of any proposed disposition of the representative action to other interested parties. The 45-day notice period is subject to variation on court order pursuant to subdivision (c). The notice of the proposed terms of the judgment under this section may be given at the same time as the notice of commencement of the representative action is given under Section 17303, so long as other requirements are satisfied.

Under subdivision (b), a court may permit intervention in the hearing for approval of the terms of the judgment provided by Section 17306.

As to the effect of notice given to the Attorney General or a district attorney under this section, see Section 17310. See also Sections 17300(b) ("prosecutor" defined), 17300(c) ("representative cause of action" defined).

§ 17306. Findings required for entry of judgment

17306. (a) With respect to a representative cause of action, before entry of a judgment, or any modification of a judgment, which is a final determination of the representative cause of action, a hearing shall be held to determine whether the requirements of this chapter have been satisfied.

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

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

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

(3) The private plaintiff satisfies the requirements of subdivision (a) of Section 17302.

(4) The attorney for the private plaintiff satisfies the requirements of subdivision (b) of Section 17302.

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

Comment. Section 17306 provides for a hearing as a prerequisite to entry of judgment in a representative action brought by a private plaintiff on behalf of the general public for unfair competition or false advertising, and provides standards that must be satisfied. This section does not apply to enforcement actions brought by prosecutors.

The "fair, reasonable, and adequate" standard in subdivision (b)(1) is drawn from the case law on class actions and is intended to be applied consistent with that 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). If a private plaintiff representing the interests of the general public in a representative cause of action has maintained an individual cause of action, whether for unfair competition or some other cause, in the representative action or in a contemporaneous action against

the same defendant, the court should examine the proposed judgment and any stipulations and associated agreements to ensure that pursuit or settlement of the plaintiff's individual claim has not impaired the interests of the general public.

With regard to an award of attorney's fees under subdivision (b)(2), see Section 17309(c). As to the effect of this section on the Attorney General or a district attorney, see Section 17310.

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

§ 17307. Dismissal, settlement, compromise

17307. A representative cause of action may not be dismissed, settled, or compromised without the approval of the court and a determination that the disposition of the representative cause of action is fair, reasonable, and adequate to protect the interests of the general public. The court, in its discretion, may set the matter for hearing on notice to persons who would receive notice under Section 17306.

Comment. Section 17307 is drawn from Rule 23(e) of the Federal Rules of Civil Procedure relating to class actions and Civil Code Section 1781(f) (Consumers Legal Remedies Act). See also Section 17300(c) ("representative cause of action" defined).

§ 17308. Binding effect of judgment in representative action

17308. The determination of a representative cause of action brought by a private plaintiff in a judgment approved by the court pursuant to Section 17306 is conclusive and bars any further actions on representative causes of action brought by private plaintiffs against the same defendant based on substantially similar facts and theories of liability.

Comment. Section 17308 governs the binding effect of a private representative action under this chapter on later private representative actions. Under this section, a final determination of the representative cause of action (i.e., the cause of action asserted by a private plaintiff on behalf of the general public under Section 17204 or 17535, as provided in Section 17306) is *res judicata*. In other words, the determination of the cause of action on behalf of the general public has been made and other private plaintiffs are precluded from reasserting the representative cause of action. See also Code Civ. Proc. § 1908 (binding effect of judgments generally). This effect applies to any relief granted the general public,

whether by way of injunction or restitution or otherwise. The scope of this rule is limited: a person who claims to have suffered damage as an individual is not necessarily precluded from bringing an action on that claim, even though the question of the harm to the general public has been determined conclusively. However, in any later action, the plaintiff's recovery in the prior action should be set off against any potential recovery in the later action in the interests of equity.

Additionally, if this chapter has not been complied with, this section does not apply, and any binding effect will be determined by application of general principles. Of course, if a judgment is obtained through extrinsic fraud, it may be attacked, either by a motion in the same action or by an independent action in a court of equity jurisdiction. *Estate of Sanders*, 40 Cal. 3d 607, 613-15, 710 P.2d 232, 221 Cal. Rptr. 432 (1986); *Rohrbasser v. Lederer*, 179 Cal. App. 3d 290, 297, 224 Cal. Rptr. 791 (1986); *see also* 8 B. Witkin, *California Procedure Attack on Judgment in Trial Court* §§ 195-222, at 595-627 (3d ed. 1985). The court may set aside the judgment or grant other appropriate relief. *Caldwell v. Taylor*, 218 Cal. 471, 475, 23 P.2d 758 (1933); B. Witkin, *supra*, at 595. Similarly, the judgment should be vulnerable to attack if there have been material omissions or misleading statements to the court.

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

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

§ 17309. Priority between prosecutor and private plaintiff

17309. (a) If a private plaintiff has commenced an action that includes a representative cause of action and a prosecutor has commenced an enforcement action against the same defendant based on substantially similar facts and theories of liability, the court in which either action is pending, on motion of a party or on the court's own motion, may stay the private plaintiff's representative cause of action until completion of the prosecutor's enforcement action, may make

an order for consolidation or coordination of the actions, or may make any other order, in the interest of justice.

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

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

Comment. Section 17309 provides a limited degree of priority to public prosecutor enforcement actions over conflicting private representative actions. Under subdivision (a), the court may make any appropriate order in the interest of justice. The subdivision does not provide any preference among the various orders that the court may make. If the enforcement action and representative action are consolidated, the court may give the prosecutor responsibility on the injunctive and civil penalty phases of the case and let the private plaintiff press the restitutionary claims.

Subdivision (c) recognizes that a private plaintiff may have a right to an attorney's fee award under general principles when the private representative action is stayed or consolidated pursuant to this section. This rule is intended to be applied consistent with case law. 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 633, 642-44, 280 Cal. Rptr. 329 (1991).

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

§ 17310. Effect on prosecutors

17310. Notice provided to the Attorney General or a district attorney under Section 17303 or 17305 does not impose any duty on the Attorney General or district attorney. The Attorney General or district attorney is not precluded from taking any future action as a consequence of not taking action in response to notice or any determination made under Section 17306.

Comment. Section 17310 makes clear that notice of filing under Section 17303 and notice of terms of judgment under Section 17305 are given for informational purposes only. The notice provisions do not

imply any duty on the Attorney General or district attorney. In addition, prosecutors may submit comments for the hearing under Section 17306 without intervening. The court's consideration of an objection posed by a prosecutor is not conditioned on the prosecutor's assumption of the litigation. Nor are any future actions by prosecutors affected by whether or not comments or objections were submitted to the court under Section 17306.

§ 17311. Application of chapter to pending cases

17311. (a) Except as provided in subdivision (b), this chapter does not apply to actions pending on its operative date.

(b) If the parties to a representative action commenced before the operative date of this chapter substantially comply with the provisions of this chapter, the substantive rules provided in this chapter apply in the action unless the court determines that application of a particular provision of this chapter would substantially interfere with the effective conduct of the action or the rights of the parties or other interested persons. For the purpose of this subdivision, Sections 17301 and 17302 are not applicable and the duty to give notice under Section 17303 is satisfied if the notice is given promptly after the operative date of this chapter.

Comment. Subdivision (a) of Section 17311 provides the general rule that this chapter applies only prospectively, i.e., to actions filed on or after its operative date (January 1, 1998). However, as provided in subdivision (b), the parties in private representative actions commenced before the operative date may take advantage of the new procedures by substantially complying with the new law. Subdivision (b) makes clear that Sections 17301 (requirements for pleading representative cause of action) and 17302 (absence of conflict of interest and adequate legal representation) do not apply to actions pending on the operative date of this chapter. Subdivision (b) does not apply to enforcement actions brought by public prosecutors before the operative date.

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

CALIFORNIA’S UNFAIR COMPETITION ACT: CONUNDRUMS AND CONFUSIONS*

by Robert C. Fellmeth

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* This report was prepared for the California Law Revision Commission by Professor Robert C. Fellmeth. No part of this report may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this report, and no statement in this report is to be attributed to the Commission. The Commission’s action is reflected in its own recommendation which is separate and distinct from this report. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

CALIFORNIA'S UNFAIR COMPETITION ACT: CONUNDRUMS AND CONFUSIONS

Introduction and Summary

California's Unfair Competition Act (Business and Professions Code § 17200 *et seq.*) prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."¹ Such unfair competition is unlawful as to any person "who engages, has engaged, or proposes to engage" in it.² The statute's breadth is matched by its liberal and perhaps unique standing provisions. Fifty eight offices of district attorney, the Attorney General, and city attorneys in multiple cities may bring an action for injunctive relief and for civil penalties. Moreover, any private party may bring an action for injunctive relief acting "for the interests of itself, its members or the general public."³

While coextensive access to the courts from a variety of sources is not unusual, several factors have coalesced to cause confusion given this law's unusual license for plaintiff representation of the general public. One such factor is an increase in cases where alleged business overcharges may give rise to substantial restitution to the public (either directly or through fluid recovery or *cy pres* relief). That equitable remedy is part of the injunctive relief available to all plaintiffs under the Act. Another factor has been the substantial attorney's fees available to plaintiff's counsel in cases creating a beneficial fund or vindicating interests beyond the named plaintiff.

Private plaintiffs representing the "general public" pose a particular problem under Unfair Competition Act terms. These plaintiffs need not meet the extensive requirements of state or federal class

1. Bus. & Prof. Code § 17200. All further statutory references are to the Business and Professions Code, unless otherwise indicated.

2. Section 17203.

3. Sections 17204, 17204.5.

action procedure: e.g., certification as a class with demonstrated common questions and adequacy of representation, notice, manageability, a showing of superiority of the class mechanism to resolve the dispute, et al. Rather, the statute provides that any person who files is a party allowed to represent the injunctive or restitutionary interests of all who may be injured — historically or prospectively. If the litigation which then ensues bars others who might have been victims and are due restitution, serious due process issues arise. I.e., many “unfair competition” cases are brought by plaintiffs based on their own narrow dispute with a defendant; alleging public injury warranting restitution beyond their individual interest, may expand discovery scope and increase leverage — a leverage they may sacrifice for their own gain. The statute provides no check to such an abuse short of *res judicata* denial.⁴

On the other hand, the denial of *res judicata* effect means that where public or private plaintiffs do, in fact, serve a *bona fide* attorney general function and vindicate larger interests, they may be unable to offer a final resolution.⁵ Defendants, who understandably need finality, may be frustrated by duplicate filings, uncertain exposure, and legal fees to litigate identical issues against different plaintiffs, none able to offer a universally binding resolution.⁶

4. Note that the doctrine of *res judicata* is implicated more than the related concept of collateral estoppel. A judgment in a Section 17200 case may well bar the instant plaintiff from relitigating the same matter — that party is collaterally estopped. But other plaintiffs may file identical causes of action, even claiming the same injury by the same defendants to the same members of the general public over the same time period.

5. A *res judicata* plea to bar an action requires: (1) identity of issues; (2) a final judgment on the merits; and (3) identity or privity of parties. The problem in the instant case rests primarily with the third requirement. See *Teitelbaum Furs, Inc. v. Dominion Ins. Co. Ltd.*, 58 Cal. 2d 601, 604 (1962); see also *Hone v. Climatrol Indus., Inc.*, 59 Cal. App. 3d 513, 529 (1976).

6. At least in theory, where there has been a judgment and restitution rendered and accepted, further litigation to recover duplicate relief for the same wrong would appear to be barred in a court of equity. However, the issue is not that simple. As discussed *infra*, such an arrangement means that the first party to obtain judgment then determines the resolution — an outcome which may be substantially within the control of the defendant. Moreover, a defendant has his own conundrum to settle: he cannot be assured that the settlement he makes will

The survey of cases and practitioners involved in Unfair Competition Act litigation indicates that the statute's dilemma is no longer theoretical, it is currently functioning in a number of cases to frustrate the just and expeditious resolution of disputes. In this article, the author sets forth the basis for the current problem, surveys analogous federal and state statutes in other jurisdictions, outlines illustrative examples, and proposes eight amendments to current law. The legislative recommendations are drawn narrowly to address the most egregious problems which have arisen. The intent of the changes suggested is to rationalize and order the jurisdictional and standing status of public and private parties to prevent the representation of the general public by those with conflicts of interest, inhibit duplicative litigation, and achieve finality consistent with due process standards.

I. The Origin and History of Section 17200⁷

California's "Unfair Competition" statute originated as part of the state's Civil Code in 1872.⁸ In its early form, it simply prohibited "unfair" practices in competition. The law was initially used as an exception to the traditional admonition that "equity will not enjoin a public offense," and to allow a statutory basis for many of the traditional "business torts," such as commercial disparagement, trade secret theft, tradename infringement, et al.⁹ The statute has evolved over the past century through amendment and developing case law, both influenced by the existence of a similarly worded

stand until summary judgment proceedings, or perhaps full-fledged litigation, establishes that the settlement he has already made satisfies all of those who might benefit from subsequent filings. As explained below, such a posture impedes meritorious and willing settlements.

7. For additional detail, see Papageorge, *The Unfair Competition Statute: California's Sleeping Giant Awakens*, 4 Whittier L. Rev. 561 (1982).

8. See Note, *Former Civil Code Section 3369: A Study in Judicial Interpretation*, 30 Hastings L.J. 705 (1979).

9. Section 17202. Notwithstanding Civil Code Section 3369, the statute makes available "specific or preventive relief" to enforce a "penalty, forfeiture, or penal law in a case of unfair competition."

federal statute (the Federal Trade Commission Act, enacted in 1914 and amended significantly in 1938 and 1975).¹⁰

Much of the early case law interpreting the statute occurred while the law was located at Section 3369 of the Civil Code. In 1977, the law was moved to Section 17200 *et seq.* of the Business and Professions Code, a move not intended to alter it substantively nor to affect the applicability of pre-existing interpretive case law.¹¹ The law is now sandwiched between the similarly titled “Unfair Practices Act” beginning at Section 17000, which is roughly analogous to the federal Clayton Act (e.g. prohibiting predatory below cost and price discrimination offenses) and Section 17500 of the Business and Professions Code, which prohibits deceptive advertising.¹²

As the Unfair Competition Act evolved, it became far more than a vehicle for business tort remedy between disputing commercial entities. Rather, it became a means to vindicate consumer or public market abuses by business entities in a variety of contexts, a statute directed at preserving general marketplace fairness and legality. Major alterations of the statute substantively over the past several decades in that direction include:

10. 15 U.S.C. § 45.

11. The provision was moved at the suggestion of the analyst for the Senate Judiciary Committee during the course of amendments proposed by the California Association of District Attorneys and eventually enacted.

12. Note that the provisions of Section 17500 *et seq.* are also implicitly or explicitly included within Section 17200, creating a certain amount of confusion. The former section is confined to deceptive advertising and lacks the breadth of Section 17200. Section 17500 *et seq.* focuses on enumerating many practices which are deceptive as a matter of law and applying to specific types of problem sales: charity solicitations, phone sales, et al. It also allows prosecutors (and the Director of the Department of Consumer Affairs) to serve what amounts to a pre-filing interrogatory, asking an advertiser for the factual basis of a claim and allows the propounder to hold the respondent to his answer (see Section 17508). Unlike Section 17200, Section 17500 includes a criminal misdemeanor remedy. However, Sections 17535 and 17536 interpose for deceptive advertising the same private and public injunctive and public civil penalty remedies applicable to Section 17200, including the same broad standing grant discussed *infra*. Accordingly, Recommendation 8 is to replicate each of the suggested seven reforms applicable to Section 17200 to Section 17500. See *infra* p. 274.

1. Amendment to prohibit “unlawful” as well as “unfair” competition;¹³
2. Case law broadly applying the statute to a wide variety of alleged unlawful¹⁴ or unfair practices,¹⁵ including violations of federal law, restraints of trade,¹⁶ sale of endangered whale meat, purveying obscene material, mobile home park regulation violations, abuse of the legal process, nursing home abuses,¹⁷ and many others;
3. Coverage to include practices originating from out-of-state but affecting California consumers;¹⁸

Perhaps more significant, numerous structural and procedural changes have been engrafted upon the statute over the years to create a mix of remedies and additional actors able to invoke them. Major changes include:

1. The addition of a “civil penalty” of \$2,500 per violation available to the Attorney General and the state’s district attorneys for violations;¹⁹

13. The word “unlawful” was added in 1963; 3 Sen. J. (1963 Reg. Sess.) pp. 4441-42; 3 Assem. J. (1963 Reg. Sess.) p. 4999.

14. An “unlawful business practice” includes anything that can properly be called a business practice and that is at the same time forbidden by law. See *People v. McKale*, 25 Cal. 2d 626 (1979).

15. Although *California v. Texaco, Inc.*, 46 Cal. 3d 1147 (1988), defined “practice” to require a repeated or customary action, habitual performance, or a pattern of behavior precluding the single act of an unlawful merger to qualify, that decision has been legislative reversed by SB 1586 (1992 Cal. Stat. ch. 430, § 2), effective in 1993, to cover an “act” as well as a “practice.” The amendment conforms California law to the Federal Trade Commission Act (15 U.S.C. § 45).

16. See *People v. National Ass’n of Realtors*, 120 Cal. App. 3d 459 (1981).

17. See *People v. E.W.A.P., Inc.* 106 Cal. App. 3d 315 (1980); *People v. McKale*, 25 Cal. 3d 626 (1979); *Barquis v. Merchants Collection Ass’n*, 7 Cal. 3d 94 (1972); *People v. Casablanca Convalescent Homes, Inc.*, 159 Cal. App. 3d 509 (1984).

18. See removal of “within this state” from Section 17203 by SB 1586 (1992 Cal. Stat. ch. 430, § 3).

19. See Section 17207.

2. Additional civil penalties of \$2,500 per violation where senior citizens or the disabled are victims;²⁰
3. The inclusion of an enhanced civil penalty of \$6,000 per violation where there is an intentional violation of an outstanding injunction under the Act;²¹
4. Interpretation of separate “violations” which can be multiplied times the maximum penalty of \$2,500 (or \$6,000) based on the number of victims affected by them;²²
5. Pre-filing discovery powers available to public prosecutors;²³
6. Expansion of the public offices able to bring injunctive and penalty actions to include certain offices of city attorney, and then further expansion in 1991 to include — where the county district attorney consents — any county counsel enforcing a county ordinance, or any full time city attorney.²⁴

20. Section 17206.1.

21. *Id.*

22. See *People v. Superior Court (Jayhill)*, 9 Cal. 3d 283 (1973); see also *People v. Superior Court Orange County*, 96 Cal. App. 3d 181 (1980); *People v. Bestline Prods. Inc.*, 61 Cal. App. 3d 879 (1976). See also references to this case law in Section 6 of SB 1586 (1992 Cal. Stat. ch. 430). The lodestar of “victims” for maximum calculation is not dispositively defined: prosecutors contend that it includes potential victims (e.g. may be based on the circulation of a publication with a misleading advertisement) and defendants contend that it includes only actual victims injured. Note also that this calculation creates a maximum possible penalty, the actual penalty to be imposed under this ceiling is guided by Section 17206(b) and includes “the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant’s misconduct, and the defendant’s assets, liabilities, and net worth.”

23. Prosecutors may invoke the Government Code pre-filing discovery (generally available to the Attorney General, see Gov’t Code § 11180 *et seq.*) where they “reasonably believe” that a violation of antitrust law, or of Section 17200, has occurred. See Section 16759.

24. Sections 17204 grants generic authority to enforce the injunctive and civil penalty provisions of the statute to any city attorney of a city with a population

7. Injunctive relief broadly defined to include restitution under equitable principles, and an injunction is warranted based on “past actions” even if no current violations are occurring;²⁵
8. As noted above, liberal standing to bring actions for injunctive relief and which allows “any person” to sue for himself or “for the general public.”²⁶ Such standing may be assumed by one who is not himself or herself a victim of the practice complained of.²⁷

And the statute makes clear that its remedies are cumulative of other remedies provided for in specific statutes, including those laws claimed as being violated to give rise to an “unlawful” claim, criminal offenses, torts, and regulatory jurisdiction in the normal course.²⁸

of over 750,000; Section 17204.5 added in the city attorney of San Jose — not yet at that population. Sections 17204 and 17206 also allow the district attorney to authorize the county counsel to bring injunctive and civil penalty actions where violations of county ordinances are involved. And finally, as of 1992, the district attorney may authorize any “full time” city prosecutor to bring an action.

25. See Section 17203 as amended by SB 1586 (1992 Cal. Stat. ch. 430, § 3). This amendment reverses the dubious holding of *Mangini v. Aerojet-General Corp.*, 230 Cal. App. 3d 1125 (1991), that injunctive relief under the Unfair Competition Act was available only to remedy “ongoing” conduct, not past conduct.

26. Section 17204; note that this section is poorly worded and could yield the grammatical interpretation that only public prosecutors have standing and that private parties are to complain to *them*. Further, the definition of “person” has been held to exclude cities, while including virtually every other possible actor. Given the involvement of cities in business practices, this exclusion appears to be an anomaly. Both of these problems may warrant correction.

27. See, e.g., *Consumers Union of U.S., Inc. v. Fisher Development, Inc.*, 208 Cal. App. 3d 1433 (1989). Note that under Federal Rule of Civil Procedure 23, a class representative must be a member of the aggrieved class, see *La Mar v. H&B Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973).

28. Section 17205, see also *People v. Los Angeles Palm, Inc.*, 121 Cal. App. 3d 25, 33 (1981). Note that a regulatory scheme may foreclose Section 17200 in the extraordinary case where it “occupies the field” or is legislatively intended to foreclose alternative remedies.

A. Comparison to Section 5 of the Federal Trade Commission Act

Although called California's "Little FTC Act," the Unfair Competition statute takes a very different enforcement approach from its federal counterpart, Section 5 of the Federal Trade Commission Act. The federal Section 5 is roughly comparable in its substantive and generic prohibition of "unfair acts" in competition.²⁹ And federal case law has interpreted Section 5 broadly to include restraints of trade, and a wide variety of unfair business practices and types of misleading advertising.³⁰ The substantive breadth of the federal "unfair" prohibition, recognizing the variety and imagination of entrepreneurs, is relevant to state unfair competition statutes. The latter, including California, generally hold federal cases to be "more than ordinarily persuasive" in interpreting state counterparts.³¹ One premise of the federal statute is to address unfair business practices which might confer a competitive advantage leading others to reciprocate. The resulting downward spiral (the "lowest common denominator" problem discussed *infra*) is a common concern of federal law and its state counterparts.

However, the federal statute has a very different enforcement regime than do 15 of the 16 states with "Little FTC Acts." The Federal Trade Commission (FTC) directly and exclusively enforces the federal Act.³² The traditional remedy of the FTC has

29. 15 U.S.C. § 45.

30. *See, e.g.*, *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1964) (television ad appearing to shave sandpaper was misleading because the paper was soaked unseen for a time prior to the shaving); *see also Feil v. FTC*, 285 F.2d 879 (9th Cir. 1960) (representation, although literally true, must present explanatory facts if relevant to health); *Exposition Press v. FTC*, 295 F.2d 869 (2d Cir. 1961) (lead-in which misleads, even if corrected or clarified prior to purchase, violates Section 5).

31. *See People v. National Research Co.*, 201 Cal. App. 2d 765 (1962).

32. *See Holloway v. Bristol-Myers Group*, 485 F.2d 986 (D.C. Cir. 1973), which rejected the notion of a private cause of action under the FTC Act. Hence, only the FTC may initiate cease and desist orders or trade regulation rules, and is solely empowered to seek civil penalties for their violation. However, note that there are many specific statutes within the general scope of Section 5 which have their own criminal, public civil, and private civil remedy schemes. And note that any existing FTC cease and desist order or trade regulation rule violation would

been the filing of an administrative complaint, proceedings, and the entry of a “cease and desist order” against a person or entity committing unfair acts in competition. Where contested, such an order may be appealed by the respondent in federal court. The advantage to a single administrative agency adjudicating such orders rests with the notice and prospective clarity it may afford actors in a marketplace. Where addressing a concept as nebulous as “deceptive advertising,” for example, knowing with some certainty where the lines are between selling a product through permissible puffery, and unlawfully misleading consumers may be assisted by a system of advance guidance and warning.

However, prior to the 1970’s, the only punitive sanction possible against a violator was a \$5,000 per day violation civil penalty — assessed only against those who violated a pre-existing cease and desist order. One study calculated that it took the FTC, on average, 4.17 years to finalize a contested cease and desist order.³³ Since most ad campaigns run for less than one year, the efficacy of the agency’s most severe sanction was problematical. In fact, from the perspective of the rational advertiser, it would pay to gain market advantage through deception until a cease and desist order were entered. Literally, no sanction from the agency (aside from possible adverse publicity) could be forthcoming until such an order were in place. Hence, some critics contended that the scheme was quite literally a license to mislead, or a system of assured “free bites.”³⁴ The FTC Act has been amended procedurally periodically over the past twenty years, with major changes in the 1970’s and 1980’s allowing the FTC to serve an established cease and desist order on an entity other than the entity against whom it was entered

arguably be an “unfair or unlawful act” in competition violating California’s Unfair Competition Act and giving rise to its civil penalty remedies in state court.

33. See *The Nader Report on the Federal Trade Commission*, in Schulz, Fellmeth & Cox (Baron, 1968) at Chapter III.

34. *Id.* Note that the critique of the 1968 *Nader Report on the Federal Trade Commission* was substantially repeated by a subsequent Report of the American Bar Association undertaken by request of then President Richard Nixon, see American Bar Association, *Report on the Federal Trade Commission* (1969).

and to assess civil penalties if it is violated, and to assess direct civil penalties where a properly adopted and more general “trade regulation rule” was in place when the act complained of occurred. Notwithstanding these adjustments, unless such an order or rule applies to a practice, and existing orders and rules cover a minuscule portion of potentially violative business practice, there remains no deterrent producing sanction. Only if a specific practice is already subject to one of the enumerated orders or rules prohibiting it may a monetary sanction under the Federal Trade Commission Act occur.

State “little FTC Acts,” including California’s, generally use a different approach. They allow an immediate sanction to be imposed without warning, accomplishing a theoretically deterrent producing disincentive to engage in “unfair or unlawful” acts in competition. They generally allow certain public agencies and sometimes private parties to assess a punitive damage, treble damage, or civil penalty sanction.

The use of a multitude of sources to bring to the courts possible violations carries with it some clear enforcement advantages. Early detection and action, and more likely response, are important elements in an effective system of disincentives. However, there are some costs which can attend a system of multitudinous and coextensive response, e.g., lack of advance knowledge except through the relatively expensive process of litigation, possible multiple representation of similar interests, possible confusion and conflicts in adjudications, possible estoppel or foreclosure based on prior suits by those who did not and could not adequately represent the interests purportedly involved. As discussed *infra*, these costs to the Unfair Competition Act’s current format in California, which is substantially different than the mechanisms of other states, have been evident in recent years.

B. Comparison to Similar Statutes in Other Jurisdictions

Sixteen other states have statutes roughly comparable to California's Unfair Competition Act: Alaska,³⁵ Connecticut,³⁶ Florida,³⁷ Hawaii,³⁸ Illinois,³⁹ Louisiana,⁴⁰ Maine,⁴¹ Massachusetts,⁴² Montana,⁴³ Nebraska,⁴⁴ North Carolina,⁴⁵ South Carolina,⁴⁶ Utah,⁴⁷ Vermont,⁴⁸ Washington,⁴⁹ and Wisconsin.⁵⁰

Alaska does not have a broad standing in equity provision equivalent to California's in its Unfair Competition Act; it allows private class actions beyond the interests of the plaintiff (for others similarly situated) only if they are "approved (in advance) by the Attorney General."⁵¹ Unlike the California statute, equitable reme-

35. Alaska Stat. § 45.50.471.

36. Conn. Gen. Stat. Ann. § 42-110b.

37. Fla. Stat. Ann. § 501.204.

38. Haw. Rev. Stat. § 480-2.

39. Ill. Ann. Stat. ch. 121 1/2 § 262.

40. La. Rev. Stat. Ann. art. 51 § 1405.

41. Me. Rev. Stat. Ann. tit. 5, § 207.

42. Mass. Gen. Laws Ann. ch. 93A, § 2.

43. Mont. Code Ann. § 30-14-103.

44. Neb. Rev. Stat. § 59-1602.

45. N.C. Gen. Stat. § 75-1.1.

46. S.C. Code Ann. § 39-5-20.

47. Utah Code Ann. § 13-5-2.5.

48. Vt. Stat. Ann. tit. 9 § 2453.

49. Wash. Rev. Code Ann. § 19.86.020.

50. Wisc. Stat. Ann. § 100.20. Note that Professor Ralph Folsom has reproduced and commented upon all of the restraint of trade related statutes of the respective fifty states. See R. Folsom, *State Antitrust Law and Practice* (Prentice Hall 1988).

51. See Alaska Stat. § 45.50.531(b):

A person entitled to bring an action under this section may, after investigation by and approval of the attorney general, if the unlawful act or practice has caused similar injury to numerous other persons similarly situated and he adequately represents the similarly situated persons, bring an action on behalf of himself and other similarly injured and situated

dies are attached as an additional remedy available to the court for actions at law brought under Alaska's Act.⁵² Further, the plaintiff must demonstrate that he or she "adequately represents" the interests of those who are similarly situated and will be bound by the judgment. The statute gives finality to adjudicated awards under the above two conditions.

Connecticut's Unfair Competition Act allows for punitive damages, attorney's fees to prevailing plaintiffs, and class action suits. Unlike the California statute, actions are brought at law for damages and all of the requirements for class action certification, including common questions, adequate representation, notice, et al. fully apply.⁵³ The Attorney General must be notified of any action under the Act upon its commencement, and must receive any judgment obtained.

Florida's Little FTC Act parallels its federal counterpart substantively, and gives "great weight" to FTC interpretations. Procedurally, the statute allows for direct private civil suit for damages and attorney's fees by a plaintiff who is "aggrieved by a violation."⁵⁴ The Florida Department of Legal Affairs and states' attorneys are empowered to bring actions for declaratory relief, to appoint a receiver, and for injunctive relief. These public agencies may also bring class actions for damages on behalf of all injured Florida consumers. Such a suit may be commenced only after an investigation with an opportunity for the defendant to respond to the alleged violations.⁵⁵ And finally, patterned somewhat after the FTC's administrative authority, Florida's Department of Legal Affairs may issue a complaint and order noticing a hearing for the possible administrative entry of a cease and desist order, which

persons A person planning to bring an action under this subsection shall first submit to the attorney general a copy of his proposed complaint, and he may not file the complaint in court without the attorney general's approval.

52. *Id.*

53. Conn. Gen. Stat. Ann. § 42-110g(b).

54. Fla. Stat. Ann. §§ 501.204, 501.210, 501.211.

55. *Id.* § 501.207.

may be judicially reviewed. The violation of such an order gives rise to civil penalties of \$5,000 per violation in a court action which may be brought by the Department. This remedy is entirely cumulative to the other remedies afforded by law.⁵⁶

Hawaii's Unfair Methods of Competition statute also replicates the substance of Section 5 of the FTC Act, prohibiting “unfair methods of competition and unfair or deceptive acts or practices ...”⁵⁷ Procedurally, the statute allows a private civil action for damages, treble damages, injunctive relief, and attorney’s fees by “any person who is injured in his business or property.” Treble damages for unfair competition consisting of deceptive advertising requires a finding that the suit is “in the public interest.”⁵⁸ The attorney general is solely authorized to bring a class action for indirect purchasers (e.g. usually consumers) and may recover damages and attorney’s fees.⁵⁹

Louisiana has a typical substantive prohibition of “unfair methods of competition and unfair or deceptive acts or practices.” but an unusual enforcement scheme. The “Director of the Governor’s Consumer Protection Division” operates in a manner similar to the FTC federally — it may “make rules and regulations” interpreting the statute which it then submits to the attorney general for approval and then possible adoption following administrative proceedings. The rule or its application may be challenged by a declaratory relief action in parish district court.⁶⁰ A direct private civil remedy for damages (trebled if knowingly violated after put on notice by the attorney general or Director), injunction, and attorney’s fees are available to “any person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal” Private suit in a “representative capacity” is expressly prohibited. And the plaintiff’s counsel must send a copy of the

56. *Id.* §§ 501.2075, 501.208.

57. Haw. Rev. Stat. § 480-2.

58. *Id.* § 480-13(a)-(b).

59. *Id.* § 480-14.

60. La. Rev. Stat. art. 51 § 1405.

pleadings and any judgment or decree to the attorney general and Consumer Protection Division Director.⁶¹

Public civil actions may be brought by the Director, who is empowered to “instruct” the attorney general to file for injunctive relief, including possible restitution, and for civil penalties where an outstanding injunction is violated.⁶²

Maine’s Unfair Competition statute has the typical FTC Section 5 broad prohibition and reference to FTC decisions as guide for *Maine’s* Act. The attorney general of the state here “may make rules and regulations interpreting this section.”⁶³ The private civil remedy provided is suit for injunction and restitution by any person ... who suffers any loss of money or property, real or personal” Interestingly, although sitting presumably in equity, there is a trial by jury. The clerk of the court is here required to transmit to the attorney general a copy of any initial pleading or final judgment.⁶⁴ The public civil remedy rests with the attorney general and takes the form of injunctive or restitutionary relief in the name of the State, and civil penalties where an injunction is violated. The attorney general is required to issue an “intent to sue” letter to the defendant at least ten days prior to filing to allow for a pre-filing conference (unless a delay would cause irreparable harm).⁶⁵

Massachusetts has the standard FTC Section 5 prohibition in its Unfair Competition statute, with the declaration that FTC interpretations guide its application. As with *Maine*, the *Massachusetts* attorney general may make “rules or regulations interpreting” the law.⁶⁶ A private civil action may be brought for damages and injunctive relief by any person “who suffers any loss of money or property, real or personal” In addition, double damages are normally awarded and a maximum award of treble damages is

61. *Id.* § 1409.

62. *Id.* § 1411.

63. *Maine Rev. Stat. Ann. tit. 5 § 207.*

64. *Id.* § 213.

65. *Id.* § 209.

66. *Mass. Gen. Laws 93A § 2.*

available where the court finds that an unfair method of competition was engaged in “knowingly.” However, if the defendant offers in settlement more than the measure of damages as found, then only single damages may be awarded. Interestingly, the Massachusetts statute specifically authorizes the bringing of actions by persons in a representative capacity — anticipating class action enforcement. The law specifically provides that such an action may be pursued by those “engaged in commerce” on behalf of others similarly situated, but only after: “the court finds in a preliminary hearing that he [the petitioner] adequately and fairly represents such other persons ... and the court shall require that notice of such action be given to unnamed petitioners in the most effective, practicable manner. Such action shall not be dismissed, settled or compromised without the approval of the court, and notice of any proposed dismissal, settlement or compromise shall be given to all members of the class of petitioners in such a manner as the court directs.”⁶⁷ In another and complex provision, persons “not engaged in commerce” (e.g. consumers) may similarly bring class actions for damages, injunctive relief and attorney’s fees to all consumers injured, with the same double damages to treble damages provision described above. The damage multiplier and attorney fee provisions vary depending upon settlement offer amounts *vis-a-vis* damages as found in order to provide incentives to settle (including a thirty day period prior to filing a damages action of intent to file during which the defendant may tender offers which may impact later damage multipliers and attorney fee awards if refused and actual damages are found at a lower level). No person may be obliged to exhaust administrative remedies prior to filing but the statute includes complicated procedures for coordinating civil cases with any possible pending regulatory discipline by an applicable agency.⁶⁸ Public civil actions may be brought by the attorney general for injunctive relief, public forfeiture of corporate rights, and for civil penalties where the defendant “should have known” his acts constituted unlawful unfair competi-

67. *Id.* § 11.

68. *Id.* § 9.

tion. A higher civil penalty is authorized for violations of outstanding injunctions.⁶⁹

Montana's "Unfair Trade Practices and Consumer Protection Act" in typical fashion prohibits "unfair methods of competition and unfair or deceptive acts or practices ...," and requires "due consideration" to cite FTC Act interpretations.⁷⁰ The first part of the statute covers "consumer protection" and includes the general unfair competition prohibition. Here the statute authorizes a private civil action by consumers for actual damages suffered by the plaintiff, or for injunctive relief, and for attorney's fees. Further, the court may treble the damages "in its discretion." Note that attorney's fees may be awarded under the Montana Act to the prevailing party in the discretion of the court. Class action status is specifically barred. Copies of initial pleadings and final judgments must be sent by the clerk of the court to the appropriate county attorney.⁷¹ The statute addresses those injured in their business (e.g. competitors or retailers) in the separate part II of the statute "Unfair Trade Practices," and with a similar private civil remedy scheme except without the prohibition on class action representation. However, the list of offenses available to those injured in their business does *not* include generic "unfair competition," but rather a substantial listing of restraint of trade offenses, including predation, rebates, price discrimination, and an unusual listing of unlawful agreements.⁷² Public civil enforcement is handled by the Montana Department of Business Regulation which may bring injunctive actions against respondents, petitions to revoke corporate rights, and civil penalties. Penalties are available where a violation is "willful" (should have known it violated the law), and a larger penalty for violations of outstanding injunctions.⁷³

69. *Id.* § 4.

70. Montana Rev. Code §§ 30-14-103, 30-14-104.

71. *Id.* § 30-14-133.

72. See *id.* §§ 30-14-205 to 30-14-218, 30-14-222.

73. *Id.* § 30-14-142.

Nebraska's "Consumer Protection Act" is phrased in terms of "unfair methods of competition," and most of its use appears to focus on exclusive dealing, tying, and anticompetitive mergers, all of which are not included in the state's "Junkin Act" covering other antitrust concepts (e.g. traditional combinations in restraint of trade). Procedurally, the statute creates an action at law for damages and requires injury to the plaintiff in his business or property.⁷⁴ The Attorney General is authorized to bring public civil actions for injunctive relief, including restitution, and for attorney's fees and civil penalties.⁷⁵

North Carolina has a typically broad unfair competition prohibition: "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."⁷⁶ Procedurally, the statute authorizes an action at law for treble damages similar to the traditional antitrust offense, and requires business injury to sue. The prevailing party (plaintiff or defense) may be awarded attorney's fees in the discretion of the court.⁷⁷ The Attorney General may bring a public civil action for injunctive relief and for civil penalties.⁷⁸

South Carolina has an Unfair Competition statute phrased similarly to the FTC Act's Section 5. Private enforcement is limited to those who "suffer ascertainable loss," in an action at law, and specifically excludes plaintiffs from suing "in a representative capacity." Willful violations give rise to treble damages.⁷⁹ The state Attorney General is empowered to bring a public civil action for injunctive relief, and for civil penalties for willful violations or corporate forfeiture for violations of outstanding injunctions. The

74. See Neb. Rev. Stat. § 59-1609.

75. *Id.* § 59-1608.

76. N.C. Gen. Stat. § 75-1.1. Note that the law includes a "learned profession" exemption excluding legal and medical unfair practices, and confers qualified immunity to publishers and broadcasters regarding dissemination of allegedly deceptive advertising.

77. *Id.* § 75-16.1.

78. *Id.* § 75-15.1, 15.2.

79. S.C. Code Ann. § 39-5-140.

law requires the Attorney General to notify the defendant of his intention to sue at least three days prior to filing to allow reasons to be presented why suit should not be brought.⁸⁰

Utah appears to be one of the few states with an enforcement system similar in structure to the Federal Trade Commission. The Utah Division of Consumer Protection is empowered to issue “cease and desist orders” where it has cause to believe that an unfair method of competition in commerce is occurring. It may seek court enforcement of those orders itself, or may request court enforcement by the attorney general or county attorneys.⁸¹

Vermont’s “Consumer Fraud Act” prohibits “unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce.”⁸² Consumers (not businesses) may obtain equitable relief, damages, and treble damages for “false or fraudulent representations or practices.” The scope of private consumer actions under the statute are so limited and consumer representation of interests aside from his own appear to require an action at law and class representation status for a plaintiff, including certification, commonality, adequacy, and notice.⁸³ The attorney general or any state’s attorney (the equivalent of district attorneys in many jurisdictions) may bring an action under a broader definition of “unfair competition” for injunctive relief, civil penalties, and forfeiture of corporate rights.⁸⁴

Washington’s “Consumer Protection Act,” although worded similarly to the FTC Act’s broad prohibition, has been interpreted more narrowly.⁸⁵ The remedy for “unfair methods of competition” is combined with the scheme applicable to the state’s antitrust baby “Sherman” and “Clayton” Acts. A private cause of action lies for

80. *Id.* § 39-5-50.

81. Note that the Unfair Competition Act was added in Utah in 1983, see Utah Code Ann. § 13-5-2.5.

82. Vt. Stat. Ann. tit. 9 § 2453.

83. *Id.* § 2461(b).

84. *Id.* §§ 2458-2461.

85. See *State v. Black*, 100 Wash. 2d 793, 676 P.2d 963 (1984).

business injury to the plaintiff — injunctive relief, treble damages, and attorney’s fees are available.⁸⁶ The attorney general may bring a public civil action for injunctive relief, restitution, civil penalties (limited to violations of outstanding injunctions), and forfeiture of corporate rights. Local jurisdictions may bring actions for damages and treble damages; the state is curiously limited to actual damages.⁸⁷

Wisconsin’s Unfair Competition Act prohibits: “unfair methods of competition in business and unfair trade practices”⁸⁸ Structured somewhat similarly to the FTC Act, a state agency, after public hearing, is empowered to issue “general orders” forbidding unfair methods of competition or a “special order” applicable to a named person. Curiously, the administrative department with jurisdiction over the statute is the Wisconsin Department of Agriculture. The state Attorney General may file complaints with the Department and may seek judicial review of Department decisions. Outstanding orders of the Department are enforced by it in court by way of injunction and restitutionary petition. And, unlike the federal statute, there is also a private civil remedy available to “any person suffering pecuniary loss” where an outstanding order has been violated. The private enforcement of outstanding orders is buttressed by an automatic doubling of any damages proved, and attorney’s fees to a prevailing plaintiff.⁸⁹

In summary, most of the 16 states with Unfair Competition statutes similar in substantive terms to California’s use the broad language of the Federal Trade Commission Act and specifically give FTC decisions at least “guidance” status. Most allow actions at law to recover damages (a broader concept than the injunction and restitution allowed by California) and most also allow either punitive or treble damages. But plaintiffs must suffer actual business or personal injury. And where class actions are allowed, such

86. Wash. Rev. Code Ann. § 19.86.090.

87. *Id.* §§ 19.86.080, 19.86.090, 19.86.150.

88. Wisc. Stat. Ann. § 100.20.

89. *Id.*

a qualified plaintiff is permitted to file for others similarly situated only where meeting some of all of the traditional requirements of class action certification (including in particular: (1) adequate representation of absent class members, and (2) notice to absent class members). Some of the statutes spell out these safeguards (e.g. see Massachusetts *supra*) while most provide them as part of their generic class action civil procedures. Most allow public civil actions by a state attorney general or other official and tend to include injunctive, forfeiture of corporate rights, and civil penalty relief.⁹⁰

None of the 16 other state jurisdictions with their own versions of California's Unfair Competition Act gives private attorney general status to any person without qualification. Rather, persons must be injured to obtain redress for themselves, and must undertake a variety of different steps if they are to represent others who are similarly situated. These steps assure adequacy of representation, and *res judicata* finality, and inhibit a multiplicity of remedies for the same alleged offense.

Exacerbating the problem for California defendants are several additional features which distinguish the California legal environment from the other 16 states with Unfair Competition Acts. None of the other states has the population, wealth, economic variety, or active plaintiff and local public prosecutor bars of California. None, except perhaps Illinois and Florida, approaches the scale or complexity of California's business and legal economy.⁹¹ None appears to have a comparable volume of pled unfair competition causes of action.⁹² California also has the possibility of attorney's

90. Although not discussed *supra*, most also give the state attorney general or other public enforcement official substantial pre-filing discovery powers similar in concept to the federal civil investigative demand and the California pre-filing discovery provisions noted *supra*.

91. California has 58 counties, and other public actors authorized to bring civil actions under the Act, together with an active and well organized plaintiff's bar.

92. Note that the breadth of Section 17200 makes it a natural cause of action to append to many civil complaints involving business or consumer disputes. It is commonly pled as a final cause of action, incorporating within it all of the common law and statutory allegations in preceding causes of action, and alleg-

fees under common fund doctrine or under Section 1021.5 of California's Code of Civil Procedure. Ironically, the structure of Section 1021.5 favors attorney's fees for counsel representing interests without any appreciable financial stake in the matter adjudicated, since it is the vindication of rights substantially beyond those of the client which gives rise to fee recompense, including the possibility of a "multiplier" beyond market value billing.⁹³

II. Current Purpose and Justification

Before outlining the current problems attending the unusual structure of California's Unfair Competition Act, it is prudent to review the fundamental purposes it is intended to serve. By keeping those purposes in mind, alterations to cure real or anticipated abuses may be limited and refined to preserve what may be necessary to accomplish its purposes.

One basic common purpose to the federal and counterpart state FTC Acts is to address the "lowest common denominator" problem of certain types of abusive competitive business practices. That is, many unfair or unlawful acts by a given competitor may confer on

ing other "unfair acts." As noted above, such a broad cause of action facilitates liberal discovery for plaintiff, and may leverage the possibility of a restitutionary award covering similar practices applicable to many others — without having to certify or notify an applicable class (see standing problems and discussion *infra*). The possible sanction of broader relief which may be required to others may apply pressure on a defendant to the benefit of the plaintiff. A defendant may be more willing to pay a plaintiff capable of reducing exposure to others by dismissing or settling the Section 17200 action.

93. The incentive balance in the California arrangement may over-stimulate the bringing of cases where restitution is due from past overcharges; counsel may use any person as a named plaintiff, and the substantial fund of moneys potentially owed other persons can serve as the basis for substantial fees. However, there may be an underincentive to bring private actions where the damage is prospective or does not qualify as "restitution." Hence, where consequential damages have occurred, or where harm is prospective, or there is otherwise no past overcharge to collect for restitutionary purposes, there may be minimal incentive for private attorney enforcement of the Act. In these circumstances, the public prosecution remedies must be relied upon, or private enforcement for damages by entities directly injured under other statutory provisions or tort causes of action which may apply.

the offender a competitive advantage. Such a competitive advantage may require other competitors to respond with more extensive abuse in order to preserve market share, which in turn leads the initiator to further abuse. Unless there is a counterforce imposed from some marketplace or public source, certain types of business behavior may spiral naturally down to a lowest common denominator. One common area of such abuse involves what economists call "information imperfections," consumer prosecutors term "deceptive or misleading advertising," and the average citizen calls "lying."

For some products or services, such as those requiring repeat business and where the consumer can judge performance, misleading representations may be assuaged through the marketplace alone. But where massive advertising campaigns can be mounted for one time depredations, there may not be a traditional marketplace response capable of adequate remedy.

In extreme cases, criminal sanctions may well suffice. But beyond criminally enforced standards at the *mens rea* end of the spectrum, a great deal of clearly inaccurate information about products and services may cause consumer purchases contrary to actual consumer preference — the consumer sovereignty standard of a free and effective marketplace. Moreover, tolerance up to the point of extreme cases invoking criminal intervention tends to lead to a bending of the truth by competitors, and the counterstroke exaggeration or material omission by the original offender, leading to further information degradation. Perhaps an extreme example of useless information may be found in the one forum where there are no standards or public intervention: political advertising.

One end result of the degeneration of accurate information about products is a loss in credibility suffered by all advertisers. One public price paid is a barrier to entry to one who has, in fact, a product or service many would greatly desire — if they could believe claims made about it. The story of the boy who cried "wolf" we are all told about as youngsters may apply to cause us to discount advertising to such an extent that it loses much of its informational value. To be sure, the state is ill equipped to be an arbiter and enforcer of absolute truth in advertising, but the other

end of the spectrum involves a momentous price; where a society tolerates misleading claims as a matter of course, truthful messages may not be heard.

There may be significant counterforces to competitive degradation from misleading advertising, or from the many other varieties of unfair or unlawful competition, among them: consumer education and gradual decline in demand, private civil suits by competitors, possible consumer class action response in some circumstances, criminal prosecutions, or regulatory intervention. However, each of these mechanisms has serious limitations. Consumer education may not be feasible or forthcoming. Competitors may choose to join the practice rather than adhere to higher standards — knowing that a private remedy may involve protracted and expensive litigation during which the initiator continues to gain market advantage. Consumer class actions must surmount the considerable class certification and notice barriers — and in the context of uncertain attorney’s fees; moreover, fees and incentives to litigate occur generally only on the basis of damages — after they have occurred. The criminal option may be limited to defined categories of fraud or similar extreme offenses reserved for limited types of transgressions.

The notion of an “unfair competition” statute to superimpose over existing mechanisms is philosophically based on the following premises:

1. Many business practices, not amenable to specific description or definition, impose external costs on others,⁹⁴ endanger effective marketplace prerequi-

94. The market flaw of “external cost” occurs where a producer or merchant is able to impose external costs on others through the sale or use of his product and the price of the product does not reflect that cost. A paradigmatic example would be pollution; factory A pollutes a stream during the production of its product, passing costs onto wildlife or other health and environmental interests of future generations. Factory B does not pollute and thereby incurs 10% higher costs. Competition will drive Factory B out of business or force it to similarly pollute unless the costs of pollution are somehow “internalized” or added to respective production costs, or unless there are minimum standards applicable to all. The means to internalize costs or to establish minimal standards can involve

sites,⁹⁵ or risk irreparable harm.

2. A substantial number of these practices confer a competitive advantage to those engaged in them.
3. Other available remedies do not accomplish the disgorgement of unjust enrichment from unfair or unlawful practices, and do not otherwise provide an effective deterrent to their continuation and likely replication by others.

Hence, the characteristics of the statute reflecting its contextual purpose include:

1. A statute wide in substantive scope, encompassing any “unfair” or “unlawful” practice which may be characterized as a “business” practice or act;⁹⁶
2. An action “lying in equity” for expeditious decision, and allowing the court flexibility in fashioning remedies, including restitutionary relief to disgorge unlawfully obtained moneys;
3. *De minimis* standing requirements for private litigants, combined with injunctive or corrective remedies, and civil penalties reserved to certain public agencies.

regulatory options, criminal enforcement, rules of liability under existing tort law mechanisms, direct assessment or taxation, or other strategies.

95. In addition to the problem of “external costs,” the American model of the marketplace rests on assumptions. Two of the most important such assumptions relevant to the Unfair Competition Act are: a sufficient number of competitors independently acting and pricing to provide “effective competition,” and accurate information about the respective characteristics of competing products available to consumers choosing between them. The maintenance of these two prerequisites helps to assure the “consumer sovereignty” underlying goal of the marketplace.

96. Hence, wrongful business activity is enjoined under the Act in whatever context it might appear. See *People v. McKale*, 25 Cal. 3d 626 (1979). Note that this includes abuse of legal process to the extent it involves using the courts to augment an essentially business practice; see e.g., the leading case of *Barquis v. Merchants Collection Ass’n*, 7 Cal. 3d 94, 108-14 (1972); *contrast with O’Connor v. Superior Court (Wyman)*, 177 Cal. App. 3d 1013 (1986) (refusing to apply Act to political candidate or consulting firm for unfair and misleading statements during course of political campaign).

This broad charter to address judicially unfair acts in competition is ameliorated in the Act by limited remedies, creating — in essence — a broad but shallow scheme of relief. The idea is: a lot of actors can sue, so the courts will get the cases. But excessive, spurious, and duplicative cases will not be generated because the remedies are substantially prospective and there is no (or uncertain) allowance for attorney's fees, even if the plaintiff prevails.

III. Confusions and Conundrums

From 1972, when the leading *Barquis*⁹⁷ case ushered in the broad application of Section 17200, until the late 1980s, there had been little conflict between the many potential litigants able to invoke the terms of the statute. Public prosecutors in some of the larger counties have used Section 17200 consistently over the years.⁹⁸ But common use of the remedy did not spread to small or rural counties. Further, district attorneys and the Attorney General have entered into an arrangement to coordinate such filings, beginning with initial investigations. The Attorney General maintains a computer file and offices of district attorney “register” the name of any prospective defendant under investigation for Section 17200 offenses. Hence, district attorneys are put on notice of possible action by another public jurisdiction, and the Attorney General is able to monitor investigations and filings in order to intervene if needed. The status of the Attorney General in this regard as the “chief law enforcement officer of the state” allows that office to intervene and to assume jurisdiction over any filing by a district attorney where there is a conflict warranting it.

However, the unusual standing license of the Unfair Competition Act, in combination with the lack of class action qualification, certification, and notice requirements applicable, added to two other dynamics active in the late 1980's to create public-private and private-private civil action conflicts.

97. *Barquis v. Merchants Collection Ass'n*, 7 Cal. 3d 94 (1972).

98. The district attorneys of San Diego and Los Angeles Counties, and the city attorneys of both cities, have been particularly active in civil use of Section 17200.

The first such new development has been the increasing use of Section 17200 as a general allegation in complaints. The use of the Act as a cause of action facilitates broad discovery. Moreover, where applicable to a private dispute between two business entities, it may allow the plaintiff to create possible exposure from overcharges applicable to consumers, enhancing a pre-existing plaintiff's bargaining power. At the same time, such "add-on" use of the Act by such private plaintiffs raises serious due process questions; one using an allegation for bargaining purposes may be willing to settle out those claims in order to collect on a proprietary cause of action.⁹⁹ On the other hand, if settlements by those seeking to represent "the general public" under the statute do not bind any other person, than the statute is unable to assure finality to any defendant subject to suit. Both of the above alternatives are unacceptable features in any statutory remedy.

The second new development has been an increase in attorney fee availability and in attorneys (and professional plaintiff firms) specializing in mass tort or class action cases. Where injunctive relief may involve restitution (a common element to an injunctive remedy, and where there is a practice applied *en masse* to a large marketplace (also common), attorney's fees may be available for prevailing counsel. Moreover, Code of Civil Procedure Section 1021.5 allows for a "private attorney general" attorney fee where a litigant prevails and vindicates rights which extend substantially beyond his or her own proprietary stake. And those fees may involve a "multiplier" substantially enhancing market level billing.¹⁰⁰

99. A plaintiff serving as a "class representative" in a traditional class action may be impeded from exercising such a conflict because of the fiduciary duty obligations of the class representative (and counsel) to the class, certification as one able to "adequately represent" absent class members, and the fact of required notice. Where an Unfair Competition Act settlement, lacking those safeguards, may bar others who might seek relief for the same wrong, a clear due process denial may occur: one cannot secretly litigate away the rights of another.

100. See *Serrano v. Priest*, 20 Cal. 3d 25 (1972).

To recapitulate, the combination of the following features of the Unfair Competition Act and related events, have created actual and potential confusion:

1. The breadth of the Act allows its inclusion as a cause of action in many business and consumer civil actions (private and public) brought on other bases. It may be invoked for any business practice which is unlawful, or unfair.
2. Fifty-eight county district attorneys, five city attorneys, and the state Attorney General may bring an action for injunction and for civil penalties — a portion of the latter accruing to the general fund of the jurisdiction filing.
3. As of 1992, and with the consent of the district attorney, any full time city attorney may bring an action for injunction and civil penalties under Section 17200 (California has over 400 cities); and a county counsel may similarly sue for Section 17200 injunction and civil penalties for violations of county ordinances.¹⁰¹
4. Private parties may also file suit; critically, the Act allows any person to bring an action for injunctive relief, “acting in the interests of itself, its members *or the general public*.”¹⁰²
5. Injunctive relief, available to all of the potential plaintiffs enumerated above, encompasses “such orders or judgments, including the appointment of a receiver, as may be necessary to prevent ... unfair competition, ... or may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired [through] ... unfair competition.”¹⁰³

101. Section 17204.

102. *Id.*

103. Section 17203; in other words, any one of the possible plaintiffs listed above can file for prospective injunctive relief, to appoint a receiver, for any equitable order necessary to provide restitution to all those who may have been overcharged or lost money from unfair competition.

6. The Act is attractive as an add-on cause of action in pre-existing cases because it facilitates liberal discovery and adds settlement leverage by exposing the defendant to restitution beyond the instant plaintiff.¹⁰⁴
7. The private standing conferral to vindicate unfair practices for “the general public” is akin to “private attorney general” status and does not require the numerosity, commonality, adequacy, typicality, manageability, or other requirements of class actions under California Code of Civil Procedure Section 382 or Federal Rule of Civil Procedure 23, nor does it require formal certification, nor notice to those affected.
8. Where damages have accrued because of overcharges or where restitution otherwise may involve a substantial fund of moneys in dispute, the case may adjudicate a dispute comparable in substance to a standard class action,¹⁰⁵ with attendant problems of collateral estoppel, duplication, adequacy of representation, and due process notice and opt-out requirements.¹⁰⁶
9. Where there is a common fund, or where a large benefit has been conferred on a large number of persons other than the named plaintiff, attorney’s fees may be available; whether from a common fund or as “private attorney general” under Code of Civil Procedure Section

104. Note that although Section 17200 appears to be an action in equity, an older line of cases holds that insofar as it encompasses standard business torts for damages, one injured by such torts may recover damages therefrom; see *Western Electro-Plating Co. v. Henness*, 196 Cal. App. 2d 564, 570 (1961) (discussing Civ. Code § 3369).

105. Note that in many consumer class actions at law, the measure of damages is equivalent to restitution in equity. Where the gravamen of the complaint is an overcharge, the two concepts may be equivalent.

106. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (affirming minimal the due process requirements to bind an absent plaintiff, including primarily the rights of notice, opportunity to opt out, and “adequate representation”).

1021.5, such an award may be substantially more than the fair market value of services proffered.¹⁰⁷

10. Restitution to large numbers of persons overcharged a small sum each is often impractical via direct delivery of checks, and is accomplished through “fluid recovery” where future prices are lowered for the same group allegedly overcharged, or through *cy pres* relief (where a fund is established to disgorge unjust gain and is granted for charitable purposes to generally benefit the persons injured).¹⁰⁸ Hence, potential victims (members of the public being “represented” by a party plaintiff) may not be aware that they have benefited. Notwithstanding the payment of substantial restitution, a defendant may not be able to bar further suit by victims, even those who are the beneficiaries of such restitution.¹⁰⁹

107. See *Consumers Lobby Against Monopolies v. PUC*, 25 Cal. 3d 891 (1979), for discussion of the alternative bases for private attorney general or common fund recompense for attorneys; see also Code Civ. Proc. § 1021.5 (setting forth the requirements for private attorney general recompense for counsel whose client prevails in an action and vindicates a right substantially beyond the direct financial interest of his client). Note that the statute allows a “multiplier” to be applied to fair market value billing based on the risk of the case, skill of counsel, and other factors. See *Serrano v. Unruh*, 32 Cal. 3d 621 (1982). Note that most Section 1021.5 awards have been assessed against public agencies, however, the statute does not distinguish between types of defendants and private defendants are vulnerable to fee assessment. See, e.g., *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy*, 4 Cal. App. 4th 963, 977 (1992).

108. For a leading example of fluid recovery, see *Daar v. Yellow Cab*, 67 Cal. 2d 695 (1967); for a leading example of *cy pres* relief, see *State v. Levi Strauss & Co.*, 41 Cal. 3d 460 (1986).

109. Theoretically, the receipt of a benefit by a victim would appear to estop that person from seeking duplicative relief from the same defendant for the same alleged wrong — particularly where the court sits in equity. However, in the context of fluid recovery or *cy pres* relief, there is no advance notice to the victim nor any opportunity to opt out, and he or she may not individually receive an actual benefit. Hence, *res judicata* foreclosing access to the courts raises understandable due process concerns. See *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967).

The confluence of these factors poses a serious dilemma for public prosecutors and *bona fide* public interest attorneys attempting to resolve unfair competition cases; they cannot confer assured finality. And the dilemma is particularly frustrating for defendants who are unable to end a dispute they are willing to resolve.

The following examples highlight more precisely the dilemmas implicit in the statute's current procedural posture:

1. A private party files a Section 17200 case against a pyramid sales scheme on behalf of all victims; the local district attorney files a similar case and it settles first — taking all of the assets of the defendant as civil penalties (half of which go to the county general fund); none are assigned for restitution. The private action cannot compel intervention or consolidation in the public civil action to compel a coordinated resolution.¹¹⁰

2. A county district attorney settles a Section 17200 case, collecting \$40,000 in civil penalties for his county treasury and no restitution for victims; the defendant is a nursing home with facilities in 11 other (generally more populous) counties whose victims receive no restitution and whose counties receive no compensation. The district attorney petitioner filed and settled for “the People of the State of California” and the defendant contends the matter is final statewide. Moreover, the judgment provides that the local district attorney is “the exclusive governmental agency that may enforce the provisions of this injunction.” Are the district attorneys in those other counties and the attorney general subject to *res judicata* bar? If not, is it fair to a defendant who settled with a public prosecutor and paid penalties? Subsequently, the Department of Health Services began administrative proceedings against the facility, within its regulatory purview. Is it barred from imposing licensure sanctions for the offenses purportedly litigated?¹¹¹

110. See *People v. Pacific Land Research*, 20 Cal. 3d 10 (1977).

111. See *People v. Hy-Lond Enterprises, Inc.*, 93 Cal. App. 3d 734 (1979). Note that there is surprisingly little law covering the extraterritorial jurisdiction of a district attorney in public civil filings. The *Hy-Lond* court acknowledged:

[I]n order to avoid confusion, parties dealing with the state must be able to negotiate with confidence with the agent authorized to bring the suit,

3. A county district attorney files a Section 17200 case against a defendant primarily operating within his county, but the defendant understandably wants a statewide settlement which will estop all other public and private actions, and is willing to pay full restitution; can the district attorney give the defendant that assurance? Can the district attorney do so if joined by the Attorney General? If they cannot do so, does that impede a final resolution beneficial to all concerned?

4. A county district attorney investigates a local cable company for excessive late charges, serving pre-filing subpoenas, consulting experts and arriving at a pre-filing settlement after an eighteen month investigation which will give restitution amounting to the entire alleged overcharge, including both direct payments to subscribers and a requirement to provide *cy pres* relief in the form of direct interactive wiring of all classrooms within the service area for educational enhancement. In addition to complete restitution, the final judgment provides for substantial civil penalties, plus costs. One week before the filing of a district attorney's complaint and settlement, a plaintiff firm which had learned of the investigation, files a Section 17200 action for the same practices against the same defendant. The defendant is assured by the district attorney that full restitution will preclude a private action on behalf of persons already satisfied. The defendant believes the district attorney. Then the defendant's demurrer to the private action is overruled by a superior court judge, opining that the public and private civil actions are different because the former are not "in privity" with the consumer victims, and hence there is no *res judicata* effect.¹¹²

and without the fear that another agency or other state entity might overturn any agreement reached ... to avoid being caught in the midst of a power struggle among various state agencies and other entities.

Id. at 752. But the court held that the defendant deliberately manipulated a district attorney into concessions to "limit the powers of other state agents or entities, which he knows are involved and are not parties to the action, the argument does not survive scrutiny." *Id.*

112. Plaintiff Vincent Ross argued that the public civil action by public prosecutors served a separate law enforcement function from a private civil action, citing *People v. Pacific Land Research*, 20 Cal. 3d 10 (1977), and leapt to the *non sequitur* that both could proceed and claim full (i.e. double) restitution

The district attorney, although joined by the Attorney General in the action, and negotiating a case providing for penalties and complete restitution, is unable to provide a final resolution.¹¹³

5. In the investigation and settlement described above, another cable company is also investigated for a similar violation and is about to similarly agree to settlement with the district attorney joined by the Attorney General. It is also filed against, except by two private named plaintiffs and law firms in separate actions.

6. In the investigation and settlement described above, a third cable firm refuses to settle the district attorney case unless the district attorney can obtain the sign off of the Attorney General and all private litigants who have filed or who may file. As matters currently stand, the district attorney and Attorney General cannot

against the same defendants for the same wrong. See “Plaintiff’s Memorandum of Points and Authorities in Opposition to the Cox Defendants’ Motion for Judgment on the Pleadings,” *Ross v. Cox Cable Communications, Inc.*, San Diego County Superior Court, No. 678526 (Aug. 24, 1994), at 6-8. The question in *Pacific Land* concerned whether a trial court could be compelled to consolidate a private and public civil action into the same case. Many private actions involve other causes of action sounding at law and involving use of a jury. The public civil action is in equity with only a court hearing it, and with many of the private defenses unavailable. Giving the court discretion to keep the two proceedings separate is a far cry from concluding that a court sitting in equity should entertain duplicative restitution awards to the same beneficiaries from the same defendant for the same alleged wrongs. Nevertheless, private plaintiffs are correct that there is no established way to ascertain who is representing who for what, who is bound by what, and how “members of the public” receive notice or otherwise knows that someone has filed for relief to benefit them.

113. See *People v. Cox Cable Inc.*, San Diego County Superior Court, No. 679554 (Aug. 5, 1994), recently filed and final judgment entered and joined by the Attorney General; *compare to* *Preisendorfer v. Cox Cable San Diego, Inc.*, San Diego County Superior Court, No. 678198 (Nov. 8, 1994); and *compare to* *Ross v. Cox Cable Communications, Inc.*, San Diego County Superior Court, No. 67825, filed during the same period. The latter two cases remain pending at this writing covering the same allegations of the complaint filed by the district attorney and Attorney General, and are now pending in San Diego County. The last case lists four separate law firms representing the named plaintiff. Note that the author has been retained to consult for the Office of District Attorney in the investigation of the cable industry in San Diego County with regard to possible restraint of trade and consumer law violations.

provide such an assurance. The defendant rather reasonably protests that where he is willing to pay full restitution plus penalties he should be able to achieve a final resolution and avoid duplicate liability for the same alleged wrong.¹¹⁴

7. A competitor who is injured in a tradename infringement case files suit for damages in tort, and alleges a violation of Section 17200, seeking derivative damages thereunder. In order to increase his leverage against the defendant, he also seeks to collect restitution “on behalf of the general public” for the confusion and erroneous purchases which occurred. The plaintiff settles the case for substantial damages for the tort and token restitution for the class. The token restitution is in the form of *cy pres* grants to the economics department of plaintiff counsel’s alma mater. There is no notice and a consumer law attorney whose clients have been victimized learns of the settlement after it has been entered.

8. A plaintiff files a meritorious unfair competition case against a mobile home park, and the defendant countersues, also alleging violation of Section 17200 against the plaintiff and counsel. Both plaintiff and defendant sue for themselves and the general public. The defendant may be willing to settle if the case is a wash, i.e., the plaintiff contends that the Section 17200 countersuit is a SLAPP type of action designed to discourage the plaintiff, and the defendant has no affirmative motivation to prosecute. If the plaintiff gives up his claims, the defendant may well agree to settle the case, perhaps by straight dismissal, perhaps with token remedies intended to bind others. Can such a countersuit be brought by a defendant on behalf of the general public? Is such an advocate an adequate representative of the interests he purports to represent? Should the result be *res judicata* as to others?¹¹⁵

114. *Id.*

115. See *Rubin v. Green*, 4 Cal. 4th 1187 (1993). The Court here acknowledged the scope of the Unfair Competition Act, and the standing of defendants to counterclaim under it. However, the narrow holding of the case precluded this particular Section 17200 cause of action because it involved alleged solicitation by plaintiff’s counsel which was categorically subject to the litigation communication privilege under Civil Code Section 47(b). However, three justices contended that injunctive relief did lie through Section 17200. Moreover, the factual

Certainly the law is unclear as to when an action by a public or private litigant purporting to represent all consumers has *res judicata* effect.¹¹⁶ But as discussed *supra*, the underlying problem is unresolved under either alternative. If the action does bar others from an identical suit, there is no mechanism to assure that the remedy legitimately satisfies the claims at issue or represents the “general public” interests being litigated. But if it is not *res judicata*, then the defendant is subject to an unlimited number of lawsuits from future litigants over the same alleged practice.

The procedural problem of Section 17200 arises from the multiple tracks available for court hearing or resolution. The public and private litigants with standing to sue for themselves and others assure us of more likely response when there are unfair and unlawful acts in competition. Such enhanced response has important positive advantages. But the current arrangement of “let everyone in” without criteria or limitation does not provide a structure for finality. The perceived lack of finality by defendants leads them to delay or avoid publicly advantageous settlements. And if finality were to be achieved under current procedures, it might be based on who reaches the courthouse door the first, or more likely, based on who the defendant settles with first — effectively giving the “private attorney general” selection to the defendant, not the ideal party to make such a decision.¹¹⁷

setting of the case indicates the collateral use of statutes for leverage purposes by both plaintiffs and defendants. For a candid description of the opportunities Section 17200 may avail the defense side, see Stern, *With Some Help from 17200, the Empire Can Strike Back*, L.A. Daily J., July 29, 1992.

116. See, e.g., *Bronco Wine Co. v. Frank A. Logoluso Farms*, 214 Cal. App. 3d 699, 715-21 (1989) (judgments in actions brought on behalf of general public are “not binding” as to absent class members) *But see Fletcher v. Security Pac. Nat’l Bank*, 23 Cal. 3d 442 (1979); *Dean Witter Reynolds, Inc. v. Superior Court (Abascal)*, 211 Cal. App. 3d 758 (1989).

117. If there is *res judicata* effect based solely on the “first judgment filed” resolving a Section 17200 cause of action, the defendant is in a position to bargain with alternative public and private plaintiffs to reduce restitution or injunctive terms. E.g., where a public and two private litigants have filed suits under Section 17200, the defendant could approach one of the private litigants, offer substantial fees to counsel and token restitution, and perhaps file a stipulated

IV. Proposed Amendments

The areas of confusion in current Unfair Competition Act procedure involve the coextensive jurisdictional conflicts of public agencies vs. public agencies; public agencies vs. private litigants; and private litigants vs. private litigants. Each has separate problems and different possible solutions.

In general, there are strategies drawn from other statutes and procedures which may allow us to maintain the benefit of multiple access to the courts to assure a fair and lawful system of competition, without the confusion, duplication, and possible abuse of process harms now occurring. Several relatively minor alterations in procedure may accomplish substantial reform: ordering priorities in representation of the general public, requiring notice where appropriate, and interposing just those elements of class action law representation necessary to inhibit the use of the Unfair Competition Act for collateral and improper advantage. Although more extensive surgery might be suggested, several changes addressing the specific abuses now clearly evident are appropriately considered immediately. The prudent course argues for monitoring their impact before imposing more draconian limitations.

The purpose of the proposed eight amendments is to address narrowly the conflicts and problems which have arisen and are likely to arise, without changing the basic structure of the statute. Hence, the changes preserve both public and private causes of action and allow coextensive access to the courts. However, some rules: notice, prioritization, and “adequacy of representation” safeguards are imposed to enhance finality.

This study proposes eight amendments to the current Unfair Competition Act. Rather than presenting purported final language, they are roughly paraphrased as follows:¹¹⁸

final judgment. Courts understandably tend to sign judgments proffered to them by apparently adverse parties.

118. The discussion paraphrases possible statutory language and explains the rationale for each suggested change *seriatim*. Precise statutory language will be developed by the Law Revision Commission in the course of preparing a bill to implement any recommendation it may make to the Legislature. See *Unfair Competition Litigation*, 26 Cal. L. Revision Comm’n Reports 191, 217-26.

1. Attorney General Registry; Notice; Consent; Public Prosecution Priority

The Attorney General shall keep a registry of all investigations and filings undertaken by any local public prosecutors pursuant to Section 17200. Any local public prosecutor undertaking any such investigation shall notify the Attorney General in a timely fashion for inclusion in the registry. The Attorney General shall inform any local prosecutor upon registration or inquiry of any entry in the registry (or pending matter of which he is aware) which may conflict with or relate to a Section 17200 investigation or case that the local prosecutor is considering or pursuing. Where there is wasteful duplication by multiple local jurisdictions investigating the same defendant for the same acts or practices, and those practices extend substantially beyond the territorial jurisdiction of any one prosecutor, the Attorney General may either assume control of the case, or designate one local prosecutor to handle the case, or direct more than one to handle the case in a coordinated manner, including possible joint filing by local prosecutors or with the Attorney General. Where a city attorney or county counsel with authority to bring an action under Section 17200 commences an investigation he or she shall also notify the office of district attorney in his or her county. The district attorney may direct one city attorney to investigate and/or prosecute an action, direct more than one to do so in coordination, or assume investigation and/or prosecution of the case. The Attorney General may consent to sign any proposed settlement or final judgment in any case filed by a local prosecutor, which shall confer statewide *res judicata* application.

Rationale: The number of public prosecutors able to bring Section 17200 actions may well exceed 300 if all cities with full time city attorneys (who may receive district attorney consent to file Section 17200 cases) are included. Given the *Hy-Lond* case discussed *supra*, and the fact that many alleged practices cross county

lines — sometimes many county lines, there is a clear need to rationalize and order possible filings. To its credit, the basic terms of this proposed section are now being followed informally due to an arrangement worked out between the Office of Attorney General and the California District Attorneys' Association. The proposed amendment codifies current practice. It also places it in statute where it will not depend on individual perpetuation. And in at least some cases, the failure to have a provision clarifying the role of the Attorney General and the reach of district attorney judgments, causes defendants to hesitate in settling a case, apparently uncertain precisely what they are settling.

2. Private Party Advance Notice to the AG and DA; Public Civil Prosecution Assumption or Declination

Private litigants purporting to represent the “interests of the general public” under Section 17200 must so state specifically in their complaint or other pleadings. Such an interest is involved wherever the plaintiff seeks to represent or bind any interest beyond the direct pecuniary and beneficial stake of the plaintiff. If the representation of such a larger interest is so pled, the plaintiff must first submit its proposed civil complaint to the district attorney of the county where it is to be filed, and to the Attorney General. The Attorney General shall transmit civil complaints to any regulatory agency where allegations are relevant to persons it licenses or regulates. If the district attorney includes a city attorney with Section 17200 authority, the district attorney shall transmit a copy of the complaint with that city attorney. The public authorities shall have sixty days to decide to take the case.¹¹⁹ If any public prosecutor decides to pursue the matter it must include all of the reasonable

119. The priority for assumption of the case for representation of the interests of the general public should be: Attorney General, District Attorney, County Counsel as to county ordinances with district attorney consent, eligible city attorney. The first entity in this list assumes the representation of the interests of the general public where it so decides, but if it declines, the next entity on the list and agreeing to do so assumes the case, etc.

costs and fees incurred by the private plaintiff and counsel on behalf of the general public as a cost bill in any settlement or final judgment where it prevails, subject to court review and approval. Where such an assumption occurs, the plaintiff may continue an action on behalf of his or her own direct interests, which will be noticed as a related case. Where preliminary relief is warranted for the protection of the general public, the public prosecutor may permit private preliminary motions within the sixty day period, or may prosecute such preliminary motions himself or herself, or may do so in conjunction with those private parties.

Rationale: This procedure does not preclude the private plaintiff who has been injured from seeking preliminary relief for himself within the initial sixty days; the plaintiff would merely exclude “general public” allegations until after the sixty day period and amend accordingly.

The rationale for the notice requirement rests in the judgment that, all other things being equal, the publicly elected prosecutor or official is a superior representative of the interests of the general public than is a single individual or a group of persons represented by private counsel. “Superiority” of the class action remedy has become a requirement to maintain such an action at law and the public civil action by an official has the following advantages: (1) an elected official is politically accountable to the public whose interests are being represented; (2) agencies often have expertise in consumer law matters, including in-house forensic and investigative resources; (3) the agency plaintiff will not extract attorney’s fees based on a restitution fund, and the fees will usually be substantially lower, leaving more restitution for victims; (4) the attorney general and district attorneys have substantial pre-filing discovery authority; (5) a public official has a continuing and institutionalized presence for the monitoring of outstanding orders.

On the other hand, to confine all injunctive relief to certain public officials, or to civil suit by those with a large proprietary stake, will exclude thousands of historically meritorious cases. Public prosecutors are able to pursue only a small fraction of potentially

meritorious cases, including those which impact on large numbers of consumers. Each public official with authority has other, and more primary, responsibilities — and limited resources. In fact, most of the significant consumer abuses over the past two decades have been detected and litigated by private counsel, including the three leading cases under the Unfair Competition Act.¹²⁰ None of those cases would likely have generated public civil suit by any of the agencies currently empowered to file. Nor could they reasonably produce a competitor or single consumer with a sufficient individual stake to make suit feasible. But modern marketing allows substantial damage and unjust enrichment through the mass application of deception or unfair competition, and as argued *supra*, society has a strong stake in an inherently fair marketplace, and in effective means to draw and enforce lines of behavior.

It is anticipated that only a small fraction of those cases submitted will be taken over by public prosecutors, but those which will be taken will include those cases where prosecutors are already in the course of investigation — perhaps ready to file, or cases where pre-existing expertise or concern make it the superior plaintiff on behalf of larger interests. Nor is the fear of prosecutors opting for civil penalties over restitution well placed. In fact, it well behooves a local district attorney to favor restitution, which goes to the public. The examples of abuse which exist in that direction, such as *Hy-Lond, supra*, involve the much more likely conflict of a prosecutor for county “x” attempting to capture the assets of a violator doing business in counties “y” and “z” for restitution to his residents and penalties to his treasury. This more serious problem is addressed in Recommendation 1 *supra*.

A similar notice procedure to the one here proposed is used in the taxpayer waste *qui tam* actions authorized under both federal¹²¹

120. See *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695 (1967); *Vasquez v. Superior Court*, 4 Cal. 3d 800 (1971); *Barquis v. Merchants Collection Ass’n*, 7 Cal. 3d 94 (1972).

121. See 31 U.S.C. § 3729 *et seq.*

and California law,¹²² and in the enforcement system for Proposition 65.¹²³ Both remedies involve a filing under seal in court and contemporaneous submission to the attorney general. The Attorney General may take over the case or decline to do so. If he declines, the private litigant may pursue the matter. A similar system is also used in federal employment discrimination civil rights complaints.

The recommendation would allow recovery by private litigants of reasonable costs and fees when their case is taken over. Both the taxpayer waste and Proposition 65 statutes allow the private party to collect a portion of moneys collected as a reward for finding or initiating a suit, such a reward may be substantial, and has amounted to millions of dollars. The instant proposal is far short of that proffered incentive. There, a high reward may be warranted because “discovery” of the violation is often both difficult and risky or expensive. Unfair methods of competition are somewhat more visible and detectable. Further, unlike the financial gains from taxpayer waste, an Unfair Competition Act case may proceed

122. See Gov’t Code § 12650 *et seq.* Note that under the citizen filing procedure, a case is filed in superior court under seal for up to sixty days, it is not served; the Attorney General is also served and must notify the court that it either intends to proceed with the action itself, or that it declines, in which case the seal is lifted and the private *qui tam* plaintiff may proceed. If there are local losses, the Attorney General must submit the matter to the district attorney within 15 days, and the latter has 45 days to decide to prosecute the case. The *qui tam* plaintiff receives 15%-33% of the judgment or settlement proceeds if a prosecutor takes the action, and 25%-50% if he prosecutes it himself. See Section 12652. The federal statute is similar.

123. See Health & Safety Code § 25249.5 *et seq.*; see esp. Section 25249.7 which provides:

(c) Actions pursuant to this section may be brought by the Attorney General in the name of the People ... or by any district attorney or by any city attorney of a city having a population in excess of 750,000 or with the consent of the district attorney by a [full time] city prosecutor

(d) Actions pursuant to this section may be brought by any person in the public interest if (1) the action is commenced more than sixty days after the person has given notice of the violation ... to the Attorney General and the district attorney and any city attorney ... and to the alleged violator, and (2) neither the Attorney General nor any district attorney nor any city attorney or prosecutor has commenced and is diligently prosecuting an action against such violation.

independent of monetary restitution. There is no assured fund from which to gauge the value of the case or to assess for the initiator.

On the other hand, there is justification to allow private litigants at least their costs and reasonable fees in working up what may be a socially valuable case. They collect only if the case is meritorious enough to be taken by the public agency, *and* the agency settles or prevails on the merits. No possible recovery would give counsel an incentive to send out pleadings to the attorney general or district attorney prematurely, and incur investigative and legal expense only after the case is not taken, without the preliminary inquiry appropriate to limit spurious actions. Giving recompense for actual work which eventually contributes to a beneficial result is likely to have a number of beneficial consequences: (1) attorneys may be somewhat more likely to look into and investigate Unfair Competition cases affecting the general population which appear to have merit (they will at least not be out-of-pocket); (2) an incentive to look a bit harder may limit the number of "trial balloon" or problematical submissions to the attorney general and district attorneys, allowing those offices to pay greater attention to those they receive; (3) there is somewhat less of a tendency to couch a matter to the attorney general or district attorney in a way to stimulate artificially a rejection.

The experience with the Proposition 65 scheme indicates that prior submission and either public prosecution or deferral to private suit is workable. A survey of filings under Proposition 65 indicates that the notice and assumption or declination procedure works well. Of the 46 cases filed from 1988 to July of 1994, 29 have been taken over by public prosecutors and 17 have been pursued privately. Almost all of the cases have ended in stipulated judgments beneficial to the public and relatively expeditious for the parties. In each case, all parties knew who was enforcing the statute and the plaintiff could and did confer *res judicata* as part of the resolution. The defendant has prevailed in one fully litigated

case against a private plaintiff where public prosecution was declined. Six cases are pending.¹²⁴

3. Private Party Qualification: Adequate Representation

In a private case purporting to represent the interests of the general public, and where there has been a public agency declination, the class action certification requirements of Code of Civil Procedure Section 382 do not apply, except for the requirement that the plaintiff affirmatively demonstrate, and the court certify, that the plaintiff and his counsel “adequately represent” the interests of the general public allegedly involved.

Rationale: Code of Civil Procedure Section 382 authorizes traditional class actions at law “when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them before the court.” The party seeking certification must establish the existence of an ascertainable class and a well-defined community of interest. The community of interest requirement in turn involves three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.”¹²⁵ Traditionally, the first two of these requirements involve establishing: numerosity, commonality, and typicality.¹²⁶ These three requirements are understandably absent in the context of a statute applying to a business practice and a cause of action by definition seeking remedy for the “general public.” Structurally, a described “unfair or unlawful” act in competition binds the case and constitutes factual and legal commonality. And Section 17200 cases

124. See *Special Report: Proposition 65 Enforcement*, California Environmental Insider, Oct. 31, 1994, at 3-11.

125. See *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 654 (1993), citing *Richmond v. Dart Indus.*, 29 Cal. 3d 462, 470 (1981),

126. See, e.g., Fed. R. Civ. P. 23(a).

involving relief sought for the general public generally fall within the rubric of traditional class action cases.¹²⁷

But the adequacy of representation requirements remain valid where one wishes to confer the advantageous finality of *res judicata*. The advantages of such a conferral are substantial: defendants buy peace, duplicative litigation is avoided, and there is finality. In return for that finality, given the foreclosure of suit to those who might seek remedy, fulfillment of the requirement of “adequate representation” (and some notice prior to final judgment, discussed below) are properly imposed. Their current absence creates a conundrum for all concerned: finality is impossible without potential conflicts of interest by those purporting to represent the general public, but possibly with their own substantial financial stake — a stake which may often be enhanced by sacrificing the interests of a larger population.

4. Notice, Review, and Publication of Final Judgments

In a private case purporting to represent the interests of the general public under Section 17200 (where the public agencies have declined), a proposed judgment and including all stipulations and proposed agreements, shall be submitted in advance to the same public agencies listed in Recommendation 3 above for their review and possible comment to the court in advance of final entry; final judgments where secured from both public and private plaintiffs so representing the interests of the general public shall be noticed to the general public by publication for comment to the court prior to final entry. All proposed final judgments applicable to persons regulated by a California regulatory agency shall be submitted in advance to that agency for possible comment to the court. Notice shall include time and place for a scheduled hearing during which those who wish to opt out may appear for that purpose, and during which the court may, in its discretion, take testimony or evidence relevant to objections to a proposed judgment.

127. See, e.g., *Vasquez v. Superior Court*, 4 Cal. 3d 800 (1971).

Rationale: A finding that a plaintiff is an “adequate representative” of members of the public affected by an injunctive or restitutionary order is useful as a matter of qualification. However, standing alone it is insufficient to provide assurance that the result is appropriate for *res judicata* status. The recommendation is to require workable notice by publication and only prior to final judgment, not for purposes of certification. That notice requirement applies to both private and public plaintiffs.¹²⁸ Its purpose is to assist the court in assuring himself or herself that the settlement is appropriate for *res judicata* effect and finality as to absent plaintiffs. Invitation to comment is a good policy where an order under review is undertaken by a court sitting in equity, and where it will apply to “the general public” as a party in the case. Moreover, the fact of notice may well be required in order to confer a binding judgment on those not before the court.¹²⁹

5. Affirmative Court Inquiry into Settlement Adequacy

Where a judgment or dismissal is proposed by stipulation, the trial court shall have an affirmative obligation to inquire into the adequacy of representation, the nature and adequacy of the remedy, including restitution. Where a case is settled by agreement of the parties, the court shall refuse to enter judgment, or may withhold *res judicata* effect, unless

128. Note that public agencies may also be subject to inappropriate conflicts, either to divert restitution into civil penalties for the local treasury to buttress office budget arguments with a Board of Supervisors, or to intrude into the jurisdiction of other agencies. See the *Pacific Land Research* and *Hy-Lond* cases, *supra*.

129. Note the constitutional basis for notice in the leading federal case of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). Note also that Code of Civil Procedure Section 1908(b) provides that a non-party who controls an action is bound by an adjudication as if he were a party where he has a financial interest in the outcome; if the other party has notice of his participation, the other party is equally bound. The California Supreme Court has held: “In the context of collateral estoppel, due process requires that ... the circumstances must be ... such that the party to be estopped should reasonably have expected to be bound by the prior adjudication.” *Clemmer v. Hartford Ins. Co.*, 22 Cal. 3d 865, 875 (1978). The changes proposed are designed to provide the elements necessary to accomplish binding effect under these and related standards.

he or she finds that, given the facts adduced, substantial recovery is received by or on behalf of the interests aggrieved. The court shall not permit the expansion or alteration of a complaint for purposes of settlement unless clearly in the interests of justice, not likely to prejudice non-named-party persons affected but absent from the case, and properly noticed prior to entry. The court shall also review any attorney fee award, including actual hours expended, and shall not approve any agreed settlement which does not award substantially more in restitutionary or injunctive value to the general public than to counsel representing those interests.

Rationale: Defendants have a right to finality. However, those persons whose rights are being adjudicated in their absence may have no advocate before the court. There are many scenarios where the parties to an action can find common ground to the detriment of absent persons affected and bound by the result. Indeed, the negotiation process tends to lead to such resolutions. The actor most capable of providing a check on such abuse is the court. The recommendation is to address directly the three most troublesome indicia of conflict of interest: (1) the case where there is no restitution awarded to absent interests, but injunctive or indirect benefits to the named private plaintiff dominate the settlement; (2) the expansion of the allegations of the complaint to bar other pending or prospective plaintiffs, accomplishing a grant of immunity to a defendant in return for a settlement which may not benefit those whose rights have been foreclosed; (3) the case where counsel controls a named private plaintiff and extracts most of the proceeds for attorney's fees.

Having noted the *caveat* of needed judicial scrutiny, it is also clear that many settlements are not exercises in precision. The suggested amendment is not intended to require 100% restitution based on allegations made, nor is it intended to bind parties or the court to a particular pre-set scheme of relief, e.g. direct or by fluid recovery or by *cy pres* means. The precise nature of injunctive or restitutionary relief turns on too many variables to predict in

advance. And there are cases where appropriate restitution will not be complete restitution. There may be many reasons for partial restitution: a case may involve untested or close issues which the parties are reasonably compromising; some of the victims may have a measure of complicity (e.g. pyramid scheme cases); the assets remaining may be limited; et al. The “substantial recovery” test is suggested as a requirement that there be more than token recovery for finality to be conferred, recognizing that the factors such as those enumerated above may moderate it. The purpose of court review is not to accomplish a perfect result, but to inhibit abuses at the extremes.

6. Notice of Related Cases; Referral to Common Court; Consolidation

Where a party, plaintiff or defendant, knows of another case with similar allegations in any jurisdiction, whether pled as a class action at law, or pursuant to Section 17200 or 17500, or as a person not seeking relief for any other person, and against the same defendant, that party shall file a notice of related case. The court shall refer related cases to one court where practicable and may consolidate such related cases on its own motion in the interests of justice or for judicial economy. Where similar allegations are made against one defendant in different jurisdictions, the matter should be subject to coordination under Judicial Council procedures. Where more than one private party or counsel purports to represent the “general public” in similar Unfair Competition Act allegations against the same defendant(s), the court may, after hearing, choose one to pursue such allegations or may compel plaintiffs and counsel to share responsibility.

Rationale: As of yet, there have not been many reported cases of conflicts between contending private plaintiffs to represent the general public under the Unfair Competition Act. However, in the currently pending cable late-charge case in San Diego, at least two different private plaintiff and law firm combinations have filed

cases against cable firms who were in the process of settling a two year long investigation brought by the office of district attorney. Both sets of plaintiffs and firms have pressed their claims to maintain and pursue their cases despite a settlement agreed to by defendants with the district attorney which included substantial civil penalties and restitutionary amounts allegedly representing 100% of the overcharge over the period of the statute of limitations. Although private party participation in such proceedings may be beneficial, and serve as an additional check as provided for in Recommendation 3, there must be a means to rationalize and choose appropriate litigants in the unusual cases where more than one appears to vindicate the same wrong against the same defendant on behalf of the same general public interests.

The requirement to file a related party notice includes defendants. While a plaintiff may not know of other filings, particularly if in another county, the defendant should be well aware of them.

The requirement includes notice of cases whether pled on behalf of the general public under Section 17200 or 17500, or as a class action at law, or as an individual plaintiff seeking individual damages. The reason for this breadth lies in the possible *res judicata* effect the amendments would confer; they might estop any of the above plaintiffs and their existence should be flagged.

7. *Res Judicata* Status

Given the elements added *supra* and their compliance by applicable parties, a litigated or stipulated judgment as to the general public shall be *res judicata* as to any other person seeking to represent the general public interest under the Unfair Competition Act, and shall bar any other person from any injunctive or restitutionary remedy for the alleged violation of the Act against those defendants bound by that judgment.

Rationale: Only *res judicata* status will allow binding settlements to resolve disputes with the finality all parties deserve and the system requires. It is the purpose of the changes enumerated above to create a constitutional and practical basis for that finality.

8. Application to Section 17500

The changes enumerated above should also apply in identical fashion to Section 17500 *et seq.*

Rationale: Sections 17535 and 17536 replicate the wording and problems of Sections 17204 and 17206 addressed herein, including the same actors able to bring public civil actions for injunctive relief and civil penalties (calculated in the same way), and the exact same private standing grant to “any person acting for the interests of itself, its members or the general public.” See Section 17535. The breadth of Section 17500 *et seq.* is substantial, subsuming virtually all deceptive practices in sales, is often associated with Section 17200 cases, and any alteration should include both statutes in a similar manner.
