

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

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).

## CONTENTS

|  |     |
|--|-----|
| Letter of Transmittal .....  | 195 |
| Acknowledgments .....  | 197 |
| Recommendation .....   | 201 |
| Proposed Legislation .....   | 217 |
| Background Study   |     |
| Fellmeth, <i>California's Unfair Competition Act:<br/>    Conundrums and Confusions</i> (January 1995) ..... | 227 |



STATE OF CALIFORNIA

PETE WILSON, Governor

## CALIFORNIA LAW REVISION COMMISSION

4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739  
(415) 494-1335

ALLAN L. FINK, Chairperson  
CHRISTINE W.S. BYRD, Vice Chairperson  
ASSEMBLYMAN DICK ACKERMAN  
ROBERT E. COOPER  
BION M. GREGORY  
SENATOR QUENTIN L. KOPP  
ARTHUR K. MARSHALL  
EDWIN K. MARZEC  
SANFORD M. SKAGGS  
COLIN W. WIED

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.

MARY E. ALEXANDER  
*Consumer Attorneys of California*  
Sacramento

CHRISTOPHER AMES  
*Attorney General's Office, Consumer*  
*Law Section, San Francisco*

KENNETH W. BABCOCK  
*Public Counsel*  
*State Bar Legal Services Section*  
Los Angeles

HANNAH BENTLEY  
*Environmental Law Foundation, Oakland*

TERRENCE BROWN  
*Sacramento County District  
Attorney's Office*

ERIC M. CARLSON  
*Bet Tzedek, Los Angeles*

JAN T. CHILTON  
*Severson & Werson, San Francisco*

DIANE DE KERVOR  
*Proposition 103 Enforcement Project  
Los Angeles*

WINTER DELLENBACH  
*Midpeninsula Citizens for Fair Housing  
Palo Alto*

CLIFFORD P. DOBRIN  
*San Diego County District  
Attorney's Office*

JOHN DONHOFF  
*Attorney General's Office, Antitrust  
Section, San Francisco*

LEE SMALLEY EDMON  
*State Bar Committee on Administration  
of Justice, Los Angeles*

HERSCHEL T. ELKINS  
*Attorney General's Office, Los Angeles*

WILLIAM J. FLANAGAN  
*Bet Tzedek, Los Angeles*

MERIELLE K. FLOOD  
*Attorney General's Office, Consumer  
Law Section, San Francisco*

ROBERT L. GORMAN  
*State Bar Litigation Section  
San Francisco*

CARLYLE W. HALL, JR.  
*Hall & Associates, Los Angeles*

JAMES W. HAN  
*State Bar Business Law Section, Irvine*

FRED J. HIESTAND  
*Association for California Tort Reform  
Sacramento*

GAIL HILLEBRAND  
*Consumers Union, San Francisco*

FRANK JANECEK  
*Milberg, Weiss, Bershad, Hynes & Lerach  
San Diego*

WILLIAM E. JOHNSON  
*Los Angeles*

DANIEL M. KOLKEY  
*Governor's Office, Sacramento*

FRED KOSMO  
*Association of Business Trial Lawyers  
San Diego*

JOHN C. LAMB  
*Sacramento*

STANLEY W. LANDFAIR  
*Coalition for Responsible Administration  
of Proposition 65, Los Angeles*

DAVID A. LASH  
*Bet Tzedek, Los Angeles*

DAVID LINK  
*Proposition 103 Enforcement Project  
Santa Monica*

CAROL LIVINGSTON  
*Livingston & Mattesich  
Association for California Tort Reform  
Sacramento*

EARL LUI  
*Consumers Union, San Francisco*

B. DANIEL LYNCH  
*Pasadena*

ALAN M. MANSFIELD  
*Milberg, Weiss, Bershad, Hynes & Lerach  
San Diego*

JEFFREY B. MARGULIES  
*Haight, Brown & Bonesteel  
National Paint & Coatings Association  
Santa Monica*

ANN MARQUART  
*Project Sentinel, Palo Alto*

LINUS MASOUREDIS  
*Attorney General's Office, Oakland*

GUS T. MAY  
*Center for Law in the Public Interest  
Los Angeles*

- DENISE MCGUIRE  
*San Diego County District  
Attorney's Office*
- AL MEYERHOFF  
*Natural Resources Defense Council  
San Francisco*
- NICK N. MRKICH  
*Pasadena*
- DAVID PALLACK  
*San Fernando Valley Neighborhood  
Legal Services, Pacoima*
- THOMAS A. PAPAGEORGE  
*Los Angeles County District  
Attorney's Office  
California District Attorneys Association  
Consumer Protection Committee*
- NANCY PEVERINI  
*Consumer Attorneys of California  
Sacramento*
- ROBYN RANKE  
*San Diego County District  
Attorney's Office*
- DAVID ROE  
*Environmental Defense Fund, Oakland*
- HARVEY ROSENFELD  
*Proposition 103 Enforcement Project  
Los Angeles*
- JEROME SAPIRO, JR.  
*State Bar Committee on Administration  
of Justice, San Francisco*
- AL SHELDEN  
*Attorney General's Office, Consumer  
Law Section, San Diego*
- HARRY SNYDER  
*Consumers Union, San Francisco*
- WILL STERN  
*Severson & Werson, San Francisco*
- M. DAVID STIRLING  
*Chief Deputy Attorney General  
Sacramento*
- MARK STIVERS  
*Sentinel Fair Housing, Oakland*
- HOWARD STRONG  
*Reseda*
- JAMES C. STURDEVANT  
*The Sturdevant Law Firm  
Consumer Attorneys of California  
San Francisco*
- BRUCE TELKAMP  
*Coalition for Responsible Administration  
of Proposition 65, Los Angeles*
- S. CHANDLER VISHER  
*San Francisco*
- DANIEL WAX  
*Coalition for Responsible Administration  
of Proposition 65, Los Angeles*
- JAMES WHEATON  
*Environmental Law Foundation, Oakland*
- BARBARA WHEELER  
*Association for California Tort Reform  
Sacramento*
- CHARLES W. WILLEY  
*Santa Barbara*
- SID WOLINSKY  
*Disability Rights Advocates, Oakland*



## 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.”<sup>1</sup> 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.

law<sup>2</sup> is now a primary tool for vindicating consumer or public market abuses by business entities in a variety of situations.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> The unfair competition law applies whenever a business act or practice violates any statute,<sup>7</sup> 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.<sup>8</sup>

### **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:<sup>9</sup> (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,<sup>10</sup> 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.<sup>11</sup>

In addition, actions may be brought by private parties acting for themselves or in the interests of the general public.<sup>12</sup> 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.<sup>13</sup>

## 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.<sup>14</sup> Public officials may also seek civil penalties, varying from \$2500 to \$6000 per violation.<sup>15</sup> The statute sets forth a number of considerations for determining the appropriate amount of civil penalties,<sup>16</sup>

---

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.<sup>17</sup> Damages at law, including punitive damages, are not available under the unfair competition law to either public or private plaintiffs.<sup>18</sup>

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.<sup>19</sup> A prevailing plaintiff who vindicates a public right may be entitled to substantial attorney's fees.<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup>

## 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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup>

### **Standing and Binding Effect of Representative Actions** <sup>27</sup>

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.<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup> 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.”<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup>

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.<sup>35</sup>

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,<sup>36</sup> 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); *Grunin 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,<sup>37</sup> and the right to bring representative actions, which is granted by statute, can be limited by statute or repealed.

### **Priority Between Public and Private Plaintiffs**<sup>38</sup>

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.<sup>39</sup>

### **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.<sup>40</sup> 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).

---