FEATURE ARTICLE

Unfair Competition Act Enforcement by Agencies, Prosecutors, and Private Litigants: Who's On First?

*by Robert C. Fellmeth**

INTRODUCTION

During 1994, the California Law Revision Commission asked this author to report on the standing and jurisdictional problems of California's Unfair Competition Act. That report, issued mid-January, presents eight proposed amendments to this statute. These proposals are now under consideration by the Commission. The report, entitled *California's Unfair Competition Act: Confusions and Conundrums*, intersects with the jurisdictions of California's regulatory agencies. This article discusses the critique of the report in relation to regulatory agencies, which have additional and coextensive authority over unfair competition within their respective jurisdictions.

California's Unfair Competition Act, Business and Professions Code section 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. The Attorney General, 58 offices of district attorney, plus offices of county counsel and city attorneys in hundreds of cities (where authorized by the local district attorney) may bring an action for injunctive relief and civil penalties under the Act. Moreover, any private party may bring an action for injunctive relief acting "for the interests of itself, its members *or the general public.*"[3]

The general mandate of the law to police "unfair" or "unlawful" competition also covers much of the jurisdiction of California's regulatory agencies. Many regulatory statutes prohibit enumerated business practices as "unfair" or "unlawful." Administrative agencies adopt regulations to clarify and flesh out often broad enabling act directives. The violation of these rules is considered "unfair" in most cases, and "unlawful" universally. Hence, the violation of the statutory provisions enforced by an agency, or its own rules, gives rise to an action under Business and Professions Code section 17200 which may be brought by a myriad of public prosecutors, and by *any* person representing himself *or the general public.* The statute accordingly bootstraps its own remedies onto whatever remedies the agency may have to enforce its enabling act and its own adopted regulations.

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 attorneys' 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 difficulty under Unfair Competition Act terms. These plaintiffs need not meet the extensive requirements of state or federal class 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 Act provides that any person who files is a party allowed to represent the injunctive/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. That is, many "unfair competition" cases are brought by plaintiffs based on their own narrow dispute with a defendant; their allegations of public injury warranting restitution beyond their individual interest may expand discovery scope and increase leverage—a leverage they may sacrifice for their own gain. Although such plaintiffs may not be faithful to the "general public" interests they purportedly represent, the statute imposes no requirement that they "adequately represent" them, nor does it even prohibit direct conflicts of interest. For example, nothing in the statute prohibits a confederate of a corporation engaged in unfair competition from suing on behalf of "the general public" and reaching a stipulated judgment declaring an otherwise unfair or unlawful practice to be legal. The only check on such an abuse is the possible denial of *res judicata*[4] effect to the outcome, allowing others to sue.

From the perspective of regulatory agencies, private actions on behalf of all consumers (allegedly represented by the agency as well) may conflict with an ongoing agency investigation leading toward serious administrative discipline of licensed professionals, including possible revocation of the right to practice. The court is likely not to know of the agency's interest, and the agency may well not know of the private lawsuit. Indeed, many lawsuits are simultaneously filed and settled by stipulation. Although a class action would require that the plaintiff adequately represent the class and also require public notice of a settlement, the Unfair Competition Act includes no such requirement. This means that the agency is not in a position to influence, or even comment on, the proposed settlement. And if given *res judicata* effect, the private action may undercut its enforcement effort in progress. In fact, if such a result binds the agency, the defendant would be foolish not to stimulate such lawsuits, pay substantial attorneys' fees, and obtain an "arranged"

* *The author is the Price Professor of Public Interest Law at the University of San Diego School of Law, and Director of the Center for Public Interest Law.*

court judgment sanctifying the practice the agency is about to challenge.

Nor is this problem confined to the relationship between agencies and private parties. Even public prosecutors can be a problem where conflicting public plaintiffs proliferate. For example, in *People v. Hy-Lond Enterprises, Inc.*,[5] a district attorney in a rural county collected $40,000 in civil penalties for his county treasury and no restitution for victims in a section 17200 case. The defendant was a nursing home with facilities in eleven other counties which received no compensation and whose victims received no restitution. The Department of Health Services (DHS) was in the midst of a disciplinary investigation against the defendant at the time the case was settled. Sure enough, the defendant held out the settled superior court judgment as *stare decisis* to bar the Attorney General, any other district attorney, or DHS from bringing a subsequent action. The judgment instructed that it was a final resolution of the violations alleged. As are all district attorney filings, the action was brought on behalf of and in the name of "The People of the State of California." To top it off, the judgment provided that the local district attorney was "the exclusive governmental agency that may enforce the provisions of this injunction."[6]

The *Hy-Lond* court acknowledged the nursing home's argument that "in order to avoid confusion, parties dealing with the state must be able to negotiate with confidence with the agent authorized to bring the suit, 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."[7] But the court held that where the defendant deliberately manipulates 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 [above] argument does not survive scrutiny."[8]

Currently, regulatory agencies are authorized by section 17200 to request that a public prosecutor to file an action against a licensee under the statute, but they lack the power to file such an action themselves. Moreover, they will not be notified in the normal course about an investigation or filing by a public prosecutor (or private litigant). And many cases, particularly those filed by public prosecutors, are investigated pursuant to the prefiling discovery powers available to the Attorney General and district attorneys,[9] and are filed and settled by stipulation at the same time.

Notwithstanding the problems attending the multiple parties able to bring actions under the Unfair Competition Act, their resolution by denial of *res judicata* effect invokes a separate and similarly distressing set of difficulties. A blanket denial of finality affects not only the hypothetical co-conspirator of the defendant, but a *bona fide* public interest attorney or perhaps a public prosecutor, and under current law would apply whether the case is coordinated with affected agencies or not, and whether it originates with them or not. The denial of *res judicata* status means that no plaintiff can offer finality to a defendant, and no defendant can be assured of securing it. In fact, the concern of the *Hy-Lond* court was well-placed.[10] 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.[11]

The coextensivity permitted in *Hy-Lond* may save DHS' action against that nursing home facility, but it is a Pyrrhic victory even as to the agency. For the coextensivity turns both ways: It means that if DHS had initiated an action through referral to the Attorney General, coordinated its settlement, and arrived at a final resolution it thought was fair to all concerned, it would not be dispositive. Whatever it does, the respondent would remain vulnerable to a civil suit for additional or different injunctive terms by a private party, or by multiple private parties in different fora, all representing "the general public." And if the agency instead opted for the administrative discipline of its licensee, the same unfair or unlawful acts giving rise to its remedy could then be relitigated by private or public plaintiffs *seriatim*.

From the defendant's perspective, life resembles Bosnia. Anyone may attack for any reason and it appears that nobody can negotiate—not only are there factions, but it is unclear who has *authority* to bind anyone to peace or a final resolution. In fact, a public settlement of any disciplinary adjudication by an agency may create a relatively easy follow-on suit by one of the other actors. This "piling on" problem is not merely a difficulty for a defendant—a defendant has dubious reason to settle with an entity enforcing a statute where it is unable to end the matter. This concern is not theoretical; major settlements (described *infra*) are currently stymied by this dilemma.

Notwithstanding the "too many cooks" problem, there are benefits to having more than one entity able to enforce unfair competition law. As discussed below, public prosecutors, private plaintiffs, and agencies each have serious disadvantages as exclusive enforcers of fair and lawful competition. The challenge is to rationalize the interaction of these disparate progenitors, prioritize or allocate the authority of each, provide for notice and participation meeting due process standards, preclude conflicts of interest, and confer important finality to the result. The goal should be that of any dispute resolution system: a consistent, considered, and certain result. The needed finality requires sufficient due process quality to bind those not direct parties to the litigation. The statute needs a traffic cop.

THE ORIGIN AND HISTORY OF SECTION 17200

California's "unfair competition" statute originated as part of the state's Civil Code in 1872.[12] 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, trade name infringement, *et al.*[13] Over the past century, the statute has evolved through amendment and developing caselaw, both influenced by the existence of a similarly worded federal statute—the Federal Trade Commission Act, enacted in 1914.[14]

Much of the early caselaw 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 caselaw.[15] 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 and prohibits below cost predation and price discrimination offenses) and section 17500, which prohibits deceptive advertising.[16]

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, and to preserve general marketplace fairness and legality. Major alterations of the statute substantively over the past several decades in

that direction include the following:

- an amendment which prohibits "unlawful" as well as "unfair" competition;[17]
- caselaw broadly applying the statute to a wide variety of alleged unlawful[18] or unfair business practices,[19] including restraints of trade,[20] sale of endangered whale meat,[21] purveying obscene material,[22] mobile home park regulation violations,[23] abuse of the legal process,[24] nursing home abuses,[25] and many others; and
- coverage to include practices originating from out-of-state but affecting California consumers.[26]

Perhaps more significant, numerous structural/procedural changes have been engrafted upon the statute over the years to create a mix of remedies and additional actors able to apply them, including the following:

- the addition of a "civil penalty" of $2,500 per violation available to the Attorney General and the state's district attorneys for violations;[27]
- additional civil penalties of $2,500 per violation where the victim is a senior citizen or is disabled;[28]
- 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;[29]
- 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;[30]
- prefiling discovery powers available to public prosecutors;[31]
- expansion of the public offices able to bring actions to include certain offices of city attorney,[32] 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;[33]
- injunctive relief broadly defined to include restitution under equitable principles, and an injunction based on "past actions" even if no current violations are occurring;[34] and
- 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,"[35] and such standing may be assumed by one who is not himself or herself a victim of the practice complained of.[36]

And the statute makes clear that its remedies are cumulative of other remedies provided for in specific statutes, including those laws which prohibit business acts as "unlawful," crimes, torts, and regulatory offenses in the normal course.[37]

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 or deceptive acts" in competition.[38] And federal caselaw has interpreted section 5 broadly to include restraints of trade and a wide variety of unfair business practices and types of misleading advertising.[39] The substantive breadth of the federal "unfair" prohibition, recognizing the variety and imagination of entrepreneurs, is analogous to state unfair competition statutes. State courts, including California's, generally hold federal cases to be "more than ordinarily persuasive" in interpreting state counterparts.[40] 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 the "Little FTC Acts" in the states.

However, the federal statute has a very different enforcement regime than do fifteen of the sixteen states with "Little FTC Acts." The Federal Trade Commission directly and exclusively enforces the federal Act.[41] The FTC's traditional remedy has 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 the lines between permissible puffery and unlawfully misleading advertising theoretically may be assisted by a system of advance guidance and warning.

However, prior to the 1970s, the only punitive sanction possible against a violator was a $5,000-per-day civil penalty—assessed only against those who violated a preexisting 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.[42] 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 and unless 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."[43]

The FTC Act has been amended procedurally periodically over the past twenty years, with major changes in the 1970s and 1980s allowing the FTC to serve an established cease and desist order on an entity other than the entity against whom it was entered 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 practices), 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 be imposed under the Federal Trade Commission Act.

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, and 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 of the Unfair Competition Act's current format in California, which is substantially different than the mechanisms of other states, are increasingly evident.

COMPARISON TO SIMILAR STATUTES IN OTHER JURISDICTIONS

Sixteen other states have statutes most directly comparable to California's Unfair Competition Act: Alaska,[44] Connecticut,[45] Florida,[46] Hawaii,[47] Illinois,[48] Louisiana,[49] Maine,[50] Massachusetts,[51] Montana,[52] Nebraska,[53] North Carolina,[54] South Carolina,[55] Utah,[56] Vermont,[57] Washington,[58] and Wisconsin.[59] To summarize their features, most 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/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, only a qualified plaintiff is permitted to file for others similarly situated, and must in every case meet some or all of the traditional requirements of class action certification (including, in particular, adequate representation of and notice to absent class members). Some of the statutes spell out these safeguards,[60] 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.[61]

None of the sixteen other state jurisdictions with versions close to 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 sixteen 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.[62] None, except perhaps Illinois and Florida, approaches the scale or complexity of California's business and legal economy. None appears to have a comparable volume of pled unfair competition causes of action.[63] California also has the possibility of attorneys' fees under the common fund doctrine or under Code of Civil Procedure section 1021.5. Ironically, the structure of section 1021.5 favors attorneys' 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.[64]

CURRENT PURPOSE AND JUSTIFICATION

Before outlining the current problems besetting 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 refined to preserve its purposes.

THE "LOWEST COMMON DENOMINATOR" PROBLEM

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 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 a counterforce is imposed from the marketplace or some 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—which betrays 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 we are all told about as youngsters of the boy who cried "wolf" may apply to cause us to discount all 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.

ALTERNATIVES TO PRIVATE OR PUBLIC LITIGATION

There may be significant counterforces to competitive degradation from misleading advertising or to the many other varieties of unfair or unlawful competition, including 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 attorneys' fees; moreover, fees (and incentives to litigate) depend on recoverable damages—after they have occurred. The criminal option may be lim-

ited to defined categories of fraud or similar extreme offenses.

The Case for Agency Jurisdiction

Theoretically, societal response to many kinds of market flaws ideally comes from regulatory agencies. Their *raison d'etre* is to address external costs, anticompetitive practices, or other market flaws. Currently, civil litigation is used as a primary means of assessing the damages from external costs, both to provide a disincentive and to recompense victims. However, its effectiveness is dubious on both counts. According to the *Harvard Medical Practice Study*, the largest examination to date of medical negligence and resulting incidence of litigation remedy, "eight times as many patients suffered an injury from [medical] negligence as filed a malpractice claim in New York State. About 16 times as many patients suffered an injury from negligence as received compensation from the tort liability system."[65] The study included a review of hospital records covering thousands of cases by a panel of experts. The panel adjudged facial negligence resulting in various levels of injury and correlated these errors with subsequent litigation. The results indicate some of the problems in relying on private civil suit to provide systemic compensation. It is costly, delay-ridden, and arbitrary—providing compensation and a disincentive only in a small fraction of cases.

Similar conclusions may apply to unfair or unlawful acts in competition. Arguably, even a lesser percentage become the subject of court action. However, there is one distinguishing factor. Unlike individual acts of negligence, most unfair competition practices are replicated *en masse* to a broad public. A suit theoretically vindicates all of the small grievances occurring or prospective in one case. In that sense, a private Unfair Competition Act action is more akin to a mass tort case or other class action, taking advantage of significant economies of scale in resolving a dispute.

However, even with the grouping of many transactions into a single case, a regulatory remedy may have other advantages: Mass tort or other class actions involve millions of dollars in legal fees and many years of delay, and tackling health or environmental abuses may be difficult for private parties lacking expertise to bring or finance. An agency is likely to specialize in the subject matter at hand, with in-house experts. Finally, an agency is better able to anticipate harm, and to inquire effectively prior to any civil filing. An agency may even act *in advance* of an abuse, preventing it through rulemaking, barriers to entry, or other regulatory tactics. It can theoretically alter practices industry-wide and quickly, using a mix of quasi-legislative and adjudicative powers.

The legislature has structured the Unfair Competition Act for substantial, indeed excessive, coextensivity. However, the courts find the doctrines of exhaustion of remedies and primary jurisdiction, *et al.*, attractive. Where given the chance, or occasionally fabricating their own opportunity, courts are sympathetic to agency jurisdiction.[66] In *Farmers Insurance Exchange v. Superior Court*,[67] the California Supreme Court erected a novel state "primary jurisdiction" bar to an unfair competition action under section 17200.[68] In *Samura v. Kaiser Foundation Health Plan*,[69] a court held that the Knox-Keene Health Care Service Plan Act regulating health maintenance organizations (HMOs) limited substantially any action under the Unfair Competition Act.[70]

The Problem of Reliance on Agencies

The theoretical advantages of agency jurisdiction listed above, although persuasive in some courts, have not been actualized empirically. As discussed below, one countervailing factor is the alleged "capture" of regulatory agencies by those with a profit stake in their policies. To the extent this contention has merit, it commends rejection of reliance on agencies as an exclusive remedy for unfair competition.

In general, regulation involves an agency being asked to intervene on behalf of the broad body politic to address a serious market flaw. But its activities are of practical concern to those with a profit stake in its decisions; and those interests are increasingly organized horizontally (*e.g.*, by trade or profession).[71] In fact, many regulatory agencies are governed, from curious statutory requirement, by boards or commissions composed in majority of persons from the trade or profession regulated.[72] Of those with a majority of public members, the professional members tend to control the agency's decisionmaking. And in most cases, an acculturation process occurs because those with a narrow interest in the agency's policies are able to dominate agency advocacy, information dissemination, and even related social events. The effect of such domination may not always be apparent from minutes of meetings—the problem is most often not what agencies do, as what they do not do.

Those serving on agency governing boards who are part of the profession or trade regulated, or those advocating for a trade or industry before an agency, do not often promote readily apparent public harm. Many agency boards are made up of volunteers who are personally ethical and well-intentioned. They seek to raise the standards of their trade or profession. And, likely as not, they judge more harshly than most the flagrant depredations of their peers. Indeed, the outcasts among them may receive greater discipline than is recommended by the administrative law judge in an enforcement proceeding.

The problem with control of occupational licensing agencies by those with a profit stake interest in the agency's decisionmaking is not with consciously self-serving intentions, or with lack of indignation over those within the "tribe" who defraud or injure. The problem is in the almost universal failure to address the tribal rules themselves, even where unfair in their impact on others. The most egregious problems for many trades and businesses subject to Unfair Competition Act enforcement are rarely on the agendas of relevant regulatory agencies. In order to gauge the incidence of what is inherently not examined, one may survey the unfair competition cases which—although arguably within the jurisdiction of a regulatory agency—are brought by more neutral public prosecutors or by private counsel. A few examples indicate the extent of agency unreliability as a sole repository of enforcement:

• Virtually every licensed real estate broker belongs to a private association of "realtors" which controls multiple listing services (listings of all properties available for sale in an area—the effective marketplace for practitioners). In 1978, trade association members in San Diego openly combined to use the MLS system to sanction a licensee who charged a commission price different than the 6%-of-sale-price commission followed slavishly by the rest. Although the trade association of licensees openly arranged for the joint sanction of the independent pricer, the Real Estate Commissioner did not act.

In a related and broader offense extending throughout the state, the same realtor trade associations arranged for group boycotts and unlawful tie-ins. For example, they required all licensed agents who used the MLS marketplace they controlled to use only "exclusive listings" (homeowners wanting to sell their homes were required

to choose one broker and give him an exclusive right to sell the property). And the associations required all agents wishing access to the MLS marketplace to purchase it, and to separately pay for political lobbying and campaign contributions of the association as a precondition to access—which was necessary to practice the profession. Although these practices were widespread and open, the Real Estate Commissioner did nothing while the offense continued for over a decade. Finally, a public prosecutor filed an action under the Unfair Competition Act to end all three practices.[73]

• Beginning in the 1970s, banks and savings and loans began a series of classic unfair business practices. For example, they set up "impound accounts" applicable to consumers with real estate loans with positive balances to pay taxes and insurance—without the consent of the accountholder and collecting the interest on positive balances for themselves. Other licensed institutions charged outlandish sums for bounced checks, although they suffered little damage as the checks were not honored. Others imposed late payments in violation of state law pertaining to liquidated damages. And so on. Some of these abuses continue, but at no time has the Superintendent of Banking or any other applicable regulator intervened. Instead, remedy came from private plaintiff cases, using—*inter alia*—the Unfair Competition Act.[74]

• At this writing, several independent certified shorthand reporters (CSRs) are challenging the practice of "direct contracting," an exclusive dealing arrangement whereby an association of CSRs contracts with a major consumer of reporter services, such as an insurance company, for the exclusive right to report depositions taken by attorneys representing that consumer. The independent CSRs allege that "direct contracting," at least as practiced by the defendant CSRs and insurance companies, compromises the impartiality of the defendant CSRs, provides them with a financial interest in the outcome of the litigation, and constitutes an unreasonable restraint of trade.[75] Although regulation of this practice clearly falls within the jurisdiction of the Department of Consumer Affairs' Court Reporters Board, the Board has taken no action to prohibit the practice or even require its disclosure.[76]

The examples of agency failure to attack prevalent abuses proliferate throughout the pages of 50 issues of the *California Regulatory Law Reporter* over the past fifteen years. In a recent year, the Medical Board revoked the licenses of only 27 physicians (almost all for criminal felony offenses or in response to discipline by other states), while in that same year over 700 suffered civil malpractice judgments or settlements in excess of $30,000 and 249 lost their admitting privileges at hospitals due to incompetence or impairment.[77] The body of law known as "insurance bad faith" involves, essentially, unfair competition allegations against insurance firms which refuse to pay valid claims. During the same twenty-year period in which literally hundreds of such cases were brought and won, the Insurance Commissioner initiated public discipline against no regulated licensee.[78] In 1988, the California Supreme Court rejected a third-party claimant's right to sue an insurance firm for bad faith; the court cited the jurisdiction of the Insurance Commissioner as the appropriate vehicle to enforce unfair competition standards, ignoring the dissent which pointed out that—notwithstanding coextensive jurisdiction to at least discipline licensees—no such enforcement had ever occurred against a single licensee.[79]

The depth of the problem is usually indicated by a comparison of the interest of most occupational licensing agencies in barriers to entry into a trade and in stopping "unlicensed practice," versus their records in disciplining serious abuse by licensed practitioners.[80]

Although the theoretical advantages of agency response to many competitive abuses are undeniable, until there is a clear demarcation between these agencies and the interests being regulated, and until other reforms are undertaken, they are not worthy of substantial reliance standing alone. Ideally, until such reforms are accomplished, they are best made aware of what others are doing in subject areas relevant to their jurisdiction. And their expertise may be useful to counsel and courts in the course of Unfair Competition Act litigation. The task is to provide those benefits without allowing agencies to block or delay court adjudication of serious business abuses.

A Statute for Many Initiators—Broad But Shallow

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

• many business practices, not amenable to specific description or definition, impose external costs on others,[81] endanger effective marketplace prerequisites,[82] or risk irreparable harm;

• a substantial number of these practices confer a competitive advantage to those engaged in them; and

• 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:

• a statute wide in substantive scope, encompassing any "unfair" or "unlawful" practice which may be characterized as a "business" practice or act;

• an action "lying in equity" for expeditious decision, and allowing the court flexibility in fashioning remedies, including restitutionary relief to disgorge unlawfully obtained moneys; and

• *de minimis* standing requirements for private litigants, combined with injunctive or corrective remedies, and civil penalties reserved to certain public agencies.

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 as follows: 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 attorneys' fees, even if the plaintiff prevails.

Confusions and Conundrums

From 1972 (when the leading *Barquis*[83] 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.[84] But common use of the remedy did not spread to small or rural counties. Further, district attorneys and the Attorney General have now entered into an arrangement to coordinate such filings, beginning with initial investigations. The Attorney General maintains a computer file in which 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 ju-

risdiction over any filing by a district attorney where there is a conflict warranting it.

However, the unusual standing license of the Unfair Competition Act, and the lack of class action qualification, certification, and notice requirements, now combine to create public/private and private/private civil action conflicts given two recent developments.

The first change 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 preexisting plaintiff's bargaining power. At the same time, such "add-on" use of the Act by 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.[85] On the other hand, if settlements by those seeking to represent "the general public" under the statute do not bind any other person, then 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 a practice is applied *en masse* to a large marketplace (also common), attorneys' fees may be available for prevailing counsel. Moreover, Code of Civil Procedure section 1021.5 allows for "private attorney general" attorneys' fees 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.[86]

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, and it facilitates liberal discovery and enhanced leverage for plaintiffs.

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.[87]

4. Regulatory agencies with possible subject matter expertise, jurisdiction, and their own enforcement plans may not be informed of a pending public (or private) case while under investigation, and perhaps not until after filed and settled.

5. 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.*"[88]

6. 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 as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition."[89]

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 or 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,[90] with attendant problems of collateral estoppel, duplication, adequacy of representation, and due process notice and opt-out requirements.[91]

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, attorneys' fees may be available; whether from a common fund or as "private attorney general" under Code of Civil Procedure section 1021.5, such an award may be substantially more than the fair market value of services proffered.[92]

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).[93] Hence, potential victims (members of the public being "represented" by a party plaintiff) may not be aware that they have benefitted. 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.[94]

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.

In addition to the *Hy-Lond* case described in the introduction, the following examples highlight the real dilemmas of the current statute:

• 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 ensure a coordinated resolution.[95]

• A county district attorney investigates a local cable company for excessive late charges by serving prefiling subpoenas, consulting experts, and arriving at a prefiling 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 the district attorney's complaint and settlement, a plaintiff firm which had learned of the investigation filed a section 17200 action for the same practices against the same defendant. The defendant had been assured by the district attorney that full

restitution would preclude a private action on behalf of persons already satisfied, and the defendant believed the district attorney. However, the defendant's demurrer to the private action was overruled by a superior court judge, opining that the public and private civil actions are different because the former is not "in privity" with the consumer victims, and hence there is no *res judicata* effect.[96] 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.[97]

• In the investigation and settlement described above, the same cable company was sued again by another private plaintiff in yet another action for the same alleged excessive late charges.[98]

• A plaintiff files a meritorious unfair competition case against a mobile home park; the defendant countersues, also alleging violation of section 17200 against the plaintiff *and* plaintiff's counsel (primarily for violation of the State Bar Act for allegedly "soliciting" plaintiff as unfair competition). 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[99] 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?[100]

The law is unclear as to when an action by a public or private litigant purporting to represent all consumers has *res judicata* effect.[101] But as discussed above, there are unacceptable problems whether it is given effect, or whether it is not. 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 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 eschew settlements they would otherwise accept. And if finality were to be granted under current procedures, it might be based on which plaintiff reaches the courthouse door first, or (more likely) on who the defendant settles with first, which effectively gives the selection of who represents "the general public" to the defendant—not the ideal party to make such a decision.[102]

PROPOSED AMENDMENTS

The areas of confusion in current Unfair Competition Act procedure involve the coextensive jurisdictional conflicts of public prosecutors versus private plaintiffs versus private defendants versus public agencies in all combinations. But it is possible to draw from other statutes and procedures in a way allowing us to maintain the benefit of multiple access to the courts without the confusion, duplication, and possible abuse of process harms now occurring. Several 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.

Accordingly, we propose the following amendments to the current Unfair Competition Act, as follows:

(1) Section 17204.1 is added to the Business and Professions Code as follows:

Where an action is brought on behalf of "the general public" pursuant to section 17204, injunctive judgments or orders resulting therefrom shall be res judicata *as to the issues litigated against named defendants where:*

(a) the plaintiff separately pleads a cause of action for unfair or unlawful competition "on behalf of the general public";

(b) the pleading is submitted to the district attorney of the county in which it is to be filed, and to the state attorney general, at least 60 days prior to court filing, during which time either office may notify the plaintiff of its intention to file a case covering substantially similar alleged acts of unfair competition. If either office so notifies the plaintiff:

(1) the plaintiff shall not file the action unless neither notified public office files such an action within a one year period of plaintiff's notice, in which case the plaintiff may proceed;

(2) where either notified public office files such an action, the plaintiff shall submit to it an itemized cost bill including all out-of-pocket costs and all attorneys' fees reasonably incurred in investigating the case and in preparing initial pleadings;

(A) the cost bill shall only include those costs and fees directly attributable to the representation of the general public;

(B) the cost bill shall not include a multiplier for attorney hours; and

(C) the cost bill shall be submitted by the public office filing the case to the court for an appropriate award from the defendant(s) as a part of any resulting final judgment other than dismissal;

(c) counsel for the plaintiff must be an "adequate legal representative" of the interests of the general public pled;

(d) no plaintiff may have a conflict of interest precluding the good faith representation of the interests of the general public claimed;

(e) prior to the entry of final judgment, notice of the proposed terms, including all stipulations and associated agreements between the parties, is provided to:

(1) the district attorney in the county where the action is filed;

(2) the state attorney general;

(3) regulatory agencies with jurisdiction over the subject matter of the dispute or any of the parties allegedly acting within the scope of regulated practice; and

(4) the general public through newspaper publication, or such other form of notice as specified by the court;

(f) prior to entry of final judgment, there is a hearing thereon, with opportunity for all persons responding to the notice of proposed entry to object or otherwise be heard, and to remove themselves from collateral estoppel coverage; and

(g) there is no expansion of the scope of the original applicable complaint, or of the final judgment from that complaint, unless the court affirmatively finds that such alteration does not prejudice members of the general public to be bound by the judgment.

Explanation: As argued above, current law allows any person to sue on behalf of "the general public," without conferring finality as to any such suit. It allows any person to serve as a *de jure* private attorney general with no qualifications. If finality were to be conferred in such a setting, it would bind absent victims to a result without opportunity to be heard, in violation of due process rights. The proposed amendments alter the law to confer finality with conflict of interest and due process safeguards.

This amendment applies only to those cases where a private plaintiff is not litigating a wrong as to him or her, but on behalf of "the general public." Such contentions are to be specifically pled to make certain where they are claimed. There must be advance notice to public prosecutors and, as an inherently superior class representative of the general public, they may pick up the case.[103] This precludes further private action if there is a subsequent public filing; out-of-pocket costs and reasonable fees may be recovered should the public prosecutor prevail.

However, most cases will not be assumed by a public prosecutor given limited resources and increasing burdens from "three strikes" and other related criminal justice system changes. Accordingly, private counsel clearing public prosecutor notice must be an adequate representative of the general public he or she claims to represent, and the named plaintiff must not have a conflict of interest *vis-a-vis* the members of the general public to compromise the fiduciary duty of counsel between the named plaintiff and the general public. These barriers are substantially more surmountable than the full gamut of traditional class action requirements (many of which do not apply to a section 17200 case). Finally, there must be notice to affected persons and a hearing to allow for opt out and for consideration of the fairness of the proposed judgment.

And that hearing must involve notice to any agency with jurisdiction over the subject matter or any of the parties to the action to allow intervention, *amicus curiae* participation, or other appearance. Agencies themselves are not given authority to bring actions since they are not general prosecutorial entities and are already specifically empowered to request filings by the Attorney General under section 17206(c) and to receive investigative cost recompense from defendants under section 17207(d).

If the preceding due process standards are met, then a case brought by a private party on behalf of "the general public" may constitutionally and equitably be entitled to *res judicata* effect.

(2) Section 17204.2 is added to the Business and Professions Code as follows:

(a) Actions brought by the public officials specified in section 17204 shall be res judicata *as to issues litigated against named defendants. However, said public officials may limit the collateral estoppel effect to allow a private cause of action to determine the application or nature of a particular remedy, including restitution.*

(b) Where a final judgment in an action by the public officials specified in section 17204 includes a provision for restitution to alleged victims, it shall collaterally estop all such persons or others on their behalf from litigating the same issues against the named defendants, where a public plaintiff complies with sections 17204.1(e)(2), (e)(3), and (f).

Explanation: Public prosecutors are clearly entitled to collaterally estop others from litigating the same issues they have litigated against named defendants. However, where restitution is sought which will bind and preclude victims from private redress, due process requires that there be minimal notice and opportunity to be heard. For example, if a single victim lost $100,000 as a result of a violation of the Unfair Competition Act and the restitutionary system proposed by the public prosecutor provides for a *pro rata* payment of $4 to every person in a group of alleged victims, there should be an opportunity for such a person to be heard and perhaps separately treated prior to entry of a final judgment which may preclude his or her extraordinary relief.

(3) Section 17204.5 of the Business and Professions Code is repealed, and replaced with the following new section 17204.5:

(a) Any city attorney or county counsel authorized to bring actions under this chapter pursuant to section 17206(a) shall inform the district attorney of its county of any unfair competition investigation formally undertaken at the earliest practicable time. If a complaint is filed by an authorized city attorney or county counsel which includes an allegation pursuant to this chapter, copies shall be forwarded at time of filing to the district attorney of the county and to the attorney general, respectively.

(b) The attorney general shall keep a registry of cases currently being investigated and pleadings filed by public officials, and by private parties alleging representation of the general public, under this chapter. The registry of the attorney general shall be used to coordinate possible conflicts between local jurisdictions where alleged violations extend substantially outside the county where the matter is being investigated or brought.

Explanation: Existing section 17204.5, which permits the San Jose City Attorney (with the permission of the Santa Clara County District Attorney) to bring section 17200 actions, has been rendered obsolete by recent amendments to section 17206(a), and can be repealed. The proposed new language simply requires notice of actions brought by public prosecutors to ensure coordination of cases where multiple cases against the same defendants for the same violations may occur.

(4) Conform Business and Professions Code section 17535 to the above amendments. Because section 17535 of the Business and Professions Code includes provisions similar to the broad standing license of the Unfair Competition Act, similar amendments should be enacted applicable to it as well. Section 17500 *et seq.* covers the broad category of misleading advertising; section 17535 similarly allows the same wide array of public prosecutors to file for injunctive and civil penalty relief, and allows private parties to sue for themselves or "the general public" with the same lack of safeguards. Accordingly, sections 17535.1, 17535.2, and 17536.4 should be added corresponding to the three amendments proposed above.

(5) An Alternative, Limited Version Through Clarification of the Code of Civil Procedure. A more limited version of suggested reform is being alternatively considered by the Law Revision Commission. The narrower approach was developed by this author following discussions with the California District Attorneys' Association's Consumer Protection Council, and with the assistance of Gail Hillebrand of Consumers Union, Deputy Attorneys General Herschel Elkins and Mike Botwin, San Diego prosecutors Cliff Dobrin and Bill Newsome, discussions within the Law Revision Commission, and consideration of comments by private plaintiff and defense counsel. This alternative focuses on private/public/agency interaction, and would amend the Code of Civil Procedure as follows:

• Section 382.5 is added to the Code of Civil Procedure to read as follows:

An action may be brought on behalf of "the general public" by a private party pursuant to sections 17204 or 17535 of the Business and Profession Code only where:

(a) the plaintiff states that a cause of action pursuant to section 17200 et seq. *or section 17500* et seq. *is brought "on behalf of the general public";*

(b) the pleading is served on the consumer department or division of the district attorney of the county in which it is to be filed, and on the city attorney where filed in a city with a population of over 750,000 persons, and on the Consumer Law Section of the Office of Attorney General, at least 30 days prior to court filing, and:

(1) said service shall include a statement summarizing the evidence upon which the complaint is based relevant to the allegations on behalf of the general public;

(2) proof of the service required above shall be filed with the complaint; and

(3) motions for preliminary relief where relevant to "the general public" allegations may be entertained during the initial thirty-day period, but shall also be served on the offices listed in (b);

(c) counsel for the plaintiff is found by the court to be an "adequate legal representative" of the interests of the general public pled;

(d) the court affirmatively finds that neither any plaintiff nor counsel for plaintiffs has a conflict of interest which might compromise the good faith representation of the interests of the general public claimed;

(e) at least 45 days prior to the entry of final judgment, or to any modification of a final judgment or order thereto, notice of the proposed terms, including all stipulations and associated agreements between the parties, is provided to:

(1) the district attorney of the county where filed and the city attorney where filed in a city with a population of over 750,000 persons;

(2) the state attorney general;

(3) regulatory agencies with jurisdiction over the subject matter of the dispute or any of the parties allegedly acting within the scope of regulated practice;

(4) the general public through newspaper publication or such other form of notice as specified by the court; and

(5) any of the persons so notified in (1) through (4) may petition the court for an extension of time of up to thirty days, for good cause shown.

(f) Where the conditions in (a) through (e) above are met, the judgment shall be res judicata *as to any restitutionary or monetary terms or orders, including fluid recovery and cy pres methods of monetary adjustment, contribution, or disgorgement, where, in addition:*

(1) prior to entry of final judgment, there is a hearing thereon, with opportunity for all persons responding to the notice of proposed entry to object or otherwise be heard, to remove themselves from collateral estoppel coverage, or to protest or limit the res judicata effect of the judgment; and

(2) the complaint shall not be amended or supplemented in a manner affecting the interests of "the general public" claimed unless the court affirmatively finds that such alteration does not prejudice members of the general public to be bound by the judgment.

• Section 382.7 is added to the Code of Civil Procedure to read:

(a) Where there is a conflict in remedies sought from the same parties based on the same alleged acts and bases for liability between a private action pursuant to Code of Civil Procedure section 382 or an action "on behalf of the general public" under section 17204 or section 17535 of the Business and Profession Code, and a civil action by a public prosecutor on behalf of the People of the State of California under the same sections, or covering the same theories of acts and bases for liability, the public prosecution is entitled to preference as the inherently superior method for representing the interests of large classes or of the general public within the political jurisdiction represented. Such preference may be determined by motion at any time and may be based on the initial pleadings of actions in conflict.

(b) Judgments obtained by a public prosecutor involving restitution or monetary relief on behalf of the People of the State of California in civil actions pursuant to section 17200 et seq. *or section 17500* et seq. *of the Business and Professions Code are* res judicata *as to the issues and parties covered thereby, except such status:*

(1) is without prejudice to cost or attorney fee recompense by private counsel who otherwise meet the criteria of section 1021.5 of the Code of Civil Procedure; and

(2) where restitution is included in such a judgment which purports to collaterally estop further restitution claims against the named defendants by persons who may have been damaged or otherwise harmed:

(i) there shall be notice by publication of the terms of such restitution, and of a public court hearing to consider its approval, and

(ii) at or before such a hearing, persons desiring to opt out of the judgment's terms of injunctive or restitutionary terms as applicable to them shall have an opportunity to exclude themselves from res judicata *effect, and any person objecting to the fairness or adequacy of the proposed judgment shall have opportunity to comment.*

(3) The court shall consider all comments relevant to the proposed judgment and may alter its terms or its res judicata *scope or effect in the interests of justice.*

Explanation: This limited proposal differs from the more extensive draft in the following respects:

(1) The requirement of public coordination between the Attorney General and ancillary public agencies is removed. There is already an informal system in place which accomplishes substantially what the Attorney General "monitoring and coordination" of district attorney filings would require. The more extensive draft above reflects the concern that the addition of numerous city attorneys and county counsels as possible public filers (upon approval of 58 respective district attorneys within the state's counties) complicates matters. However, thus far, there have not been coordination problems. Accordingly, the shorter draft eliminates the prophylactic provision.

(2) The requirement of notice and consent analogous to Proposition 65 has been replaced with a less formal system of advance notice and designation of the public prosecutor as the inherently superior class representative. The previous version concerned prosecutors who felt that a failure to take over a case could have negative political consequences, and that they did not want the affirmative burden of judging "yes" or "no" under a time constraint. Plaintiffs' counsel have some problems with having to wait one year on tenterhooks while the case may be litigated to near conclusion on fast track. The revised version satisfies some of the concerns of both. Where a district attorney or the Attorney General is already in the middle of an investigation, he or she will know a conflict is coming and can act accordingly to head it off and to mitigate private waste of resources. On the other hand, only a small percentage of cases is handled on the public side, and there is no reason to hold private parties up, or subject them to suspense. The declaration that public counsel is inherently superior is consistent with the view of courts. The revised structure gives private counsel better opportunity to claim fees based on work performed, and the claim is strengthened the longer public counsel waits and the more the work of private counsel occurs or is used.

(3) The Code of Civil Procedure section 1021.5 attorney fee claim is filed by the private party and not submitted through the public attorney cost bill. Neither private plaintiffs' counsel nor public attorneys favor surrogate submission of the bill through the public attorney. There is law currently allowing private attorney general recompense—with possible multiplier—for litigation which contributes to a beneficial outcome, even where there is a government co-litigator.[104]

(4) The structure is simplified, and it has been placed in the Code of Civil Procedure as a form of class action procedural instruction due to the concern of both public and private counsel that opening up section 17200 itself to legislative change in the current climate may invite collateral amendments and issues.

CONCLUSION

Many attorneys, both public and private, will oppose these recommendations. They will find a myriad of objections to what we believe is a sensible prescription. However, before allowing the inevitable "parade of horribles" to affect one's judgment, consider the "horrible" now extant. No statute of which we are aware in this state or nation confers the kind of unbridled standing to so many without definition, standards, notice requirements, or independent review. The substantive goal of this statute is important: It safeguards a fair and competitive marketplace. It requires a workable, rational means of enforcement. At present, it is unclear who can sue for whom, what they have to do, whether it is final, and as to whom. It must be the purpose of the judicial system to both achieve finality and to assure decisionmaking quality warranting that finality. The current system is, notwithstanding its beneficial use by many historically, headed toward the worst of all possible legal worlds: abuse of process as unqualified person disingenuously invoke the interests of the general public, extortionate nuisance lawsuits with high exposure, confusion and duplication of litigation resources, and uncertain finality.

❧

ENDNOTES

1. CAL. BUS. & PROF. CODE § 17200.
2. *Id.* at § 17203.
3. *Id.* at § 17204 (emphasis added).
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 matterthat 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. 93 Cal. App. 3d 734 (1979).
6. *Id.* at 741 n.1.
7. *Id.* at 752.
8. *Id.*
9. *See* CAL. GOV'T CODE § 11180 *et seq.*; CAL. BUS. & PROF. CODE § 16759.
10. 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 Industries, Inc., 59 Cal. App. 3d 513, 529 (1976).
11. 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: He cannot be assured that the settlement he makes with one plaintiff will stand until a summary judgment proceeding (or perhaps trial) in a subsequent case by another plaintiff establishes that the settlement he has already made satisfies all of those who might benefit from subsequent filings. As discussed below, such a posture impedes meritorious settlements by otherwise willing parties.
12. For a detailed treatment of the history of section 17200, *see* Thomas A. Papageorge, *The Unfair Competition Statute: California's Sleeping Giant Awakens*, 4 WHITTIER L. REV. 561 (1982); Wesley J. Howard, *Former Civil Code Section 3369: A Study in Judicial Interpretation*, 30 HASTINGS L.J. 705 (1979).
13. Note that although section 17200 appears to create 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 Civil Code § 3369).
14. 15 U.S.C. § 45.
15. The provision was moved at the suggestion of the analyst for the Senate Judiciary Committee during the course of amendments proposed by the California District Attorneys' Association (CDAA). This author was CDAA's representative during negotiations on the bill.
16. Note that the provisions of Business and Professions Code 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 which apply to specific types of problem sales, such as charity solicitations and phone sales. It also allows prosecutors (and the Director of the Department of Consumer Affairs) to serve what amounts to a prefiling interrogatory, asking an advertiser for the factual basis of a claim and able to hold the respondent to his answer (*id.* at § 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*. Since the same problem of private plaintiff/public prosecutor/agency coordination apply to this related statute, we recommend identical amendments applicable to it as well; *see infra* section entitled "Proposed Amendments."
17. The word "unlawful" was added in 1963; *see* 1963 Cal. Stat. ch. 1606, § 1, at 3184.
18. 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. 3d 626, 632 (1979).
19. Although State of 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 part of the decision has been legislatively reversed by Senate Bill 1586 (Presley), 1992 Cal. Stat. ch. 430, § 2 (hereinafter "SB 1586"), 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.
20. *See* People v. National Association of Realtors, 120 Cal. App. 3d 459 (1981).
21. *See* People v. K. Sakai Co., et al., 56 Cal. App. 3d 531 (1976).
22. *See* People v. E.W.A.P., Inc., 106 Cal. App. 3d 315 (1980).
23. *See* People v. McKale, 25 Cal. 3d 626 (1979).
24. *See* Barquis v. Merchants Collection Ass'n of Oakland, Inc., 7 Cal. 3d 94 (1972).
25. *See* People v. Casa Blanca Convalescent Homes, Inc., 159 Cal. App. 3d 509 (1984).
26. The phrase "within this state" was removed from section 17203 by SB

1586, *supra* note 19, effective January 1, 1993.

27. CAL BUS. & PROF. CODE § 17206.

28. *Id.* at § 17206.1.

29. *Id.* at § 17207.

30. *See* People v. Superior Court (Jayhill), 9 Cal. 3d 283 (1973); *see also* People v. Superior Court (Olson), 96 Cal. App. 3d 181 (1980); People v. Bestline Products, Inc., 61 Cal. App. 3d 879 (1976). *See also* references to this caselaw in section 6 of SB 1586, *supra* note 19. 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 Business and Professions Code section 17206(b) added by SB 1586, which requires consideration of "the nature and seriousness of the misconduct, the number of violations, the persistence... [and] length of time [of the misconduct], the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth."

31. Prosecutors may invoke the Government Code prefiling discovery option (generally available to the Attorney General; *see* CAL. GOV'T CODE § 11180 *et seq.*) where they "reasonably believe" that a violation of antitrust law or of section 17200 has occurred. *See* CAL. BUS. & PROF. CODE § 16759.

32. Business and Professions Code section 17204 includes generic authority to enforce the injunctive and civil penalty provisions of the statute to any city attorney of a city with a population of over 750,000; section 17204.5 adds in the city attorney of San Josenot yet at that population.

33. 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. *Id.*

34. *See id.* at § 17203, as amended by SB 1586, *supra* note 19. This amendment reverses the dubious language of Mangini v. Aerojet-General Corp., 230 Cal. App. 3d 1125 (1991) (injunctive relief under the Unfair Competition Act is available only to remedy "ongoing," not past, conduct).

35. CAL. BUS. & PROF. CODE § 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, there is some doubt as to whether the definition of "person" in section 17201 includes cities, while including every other actor. Given the involvement of cities in business practices, this exclusion appears to be an anomaly. Both of these problems may warrant correction.

36. *See, e.g.*, Consumers Union of United States, Inc. v. Fisher Development, Inc., 208 Cal. App. 3d 1433 (1989). Note that under Federal Rule of 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).

37. CAL. BUS. & PROF. CODE § 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" (*i.e.*, is legislatively intended to provide exclusive coverage and to foreclose alternative remedies). *See, e.g.*, Bloom v. Universal City Studios, Inc., 734 F.Supp. 1553, 1560-61 (C.D. Cal. 1990), *aff'd*, 933 F.2d 1013 (9th Cir. 1991).

38. 15 U.S.C. § 45.

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

40. *See* People v. National Research Co., 201 Cal. App. 2d 765, 773 (1962).

41. *See* Holloway v. Bristol-Myers Corp., 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 many specific statutes within the general scope of section 5 have their own criminal, public civil, and private civil remedy schemes. And note that violation of any existing FTC cease and desist order or trade regulation rule would 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.

42. *See* EDWARD F. COX, ROBERT C. FELLMETH, JOHN E. SCHULZ, THE NADER REPORT ON THE FEDERAL TRADE COMMISSION (Baron Publishing 1969) at Ch. III.

43. *Id.* Note that the critique of the January 1969 *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* ABA Commission to Study the Federal Trade Commission, *Report of the ABA Commission to Study the Federal Trade Commission* (Chicago, Sept. 15, 1969).

44. ALASKA STATS. § 45.50.471.

45. CONN. GEN. STAT. § 42-110b.

46. FLA. STAT. § 501.204.

47. HAWAII REV. STAT. § 480-2.

48. ILL. COMP. STAT. ANN. 505/2 (formerly ILL. REV. STAT. 121-1/2, § 262).

49. LA. REV. STAT. 51:1405.

50. ME. REV. STAT. ANN. tit. 5, § 207.

51. MASS. ANN. L. ch. 93A, § 2.

52. MONT. CODE ANN. § 30-14-103.

53. NEB. REV. STAT. § 59-1602.

54. N.C. GEN. STAT. § 75-1.1.

55. S.C. CODE ANN. § 39-5-20.

56. UTAH CODE ANN. § 13-5-2.5.

57. VT. STAT. ANN. tit. 9, § 2453.

58. WASH. REV. CODE § 19.86.020.

59. WIS. STAT. § 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 in RALPH H. FOLSOM, STATE ANTITRUST LAW AND PRACTICE (Prentice Hall 1988).

60. *See, e.g.*, MASS. ANN. L. ch. 93A, § 2, *supra* note 51.

61. Most also give the state attorney general or other public enforcement officials substantial prefiling discovery powers similar in concept to the federal civil investigative demand and the California prefiling discovery provisions; *see supra* note 9.

62. California has 58 county district attorneys and many other public actors authorized to bring civil actions under the Act, together with an active and well-organized plaintiffs' bar.

63. 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. As noted above, such a broad cause of action facilitates liberal discovery for plaintiff,

and may expose the other party to a possible restitutionary assessment covering similar practices applicable to many otherswithout having to certify or notify an applicable class (*see infra* for discussion of standing and notice problems). The possible sanction of substantial restitution for others may apply pressure on a defendant to the benefit of the plaintiff, who may take a larger sum than he deserves and dismiss out or compromise the interests of others in whose names he litigates. And a defendant may be more willing to pay a plaintiff a premium where he is capable of reducing exposure to others by dismissing or settling the section 17200 action.

64. The incentive balance in the California arrangement may overstimulate 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 *under*incentive to bring private actions where the damage is prospective or does not qualify as "restitution." Hence, where harm is prospective, or there is otherwise no past overcharge to collect as restitution, 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, or agencies with applicable jurisdiction must act.

65. Harvard Medical Practice Study, *Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York* (Harvard Medical Practice Study 1990) at 6.

66. Some, particularly the Critical Legal Studies group centered at the Harvard Law School faculty, opine that this sentiment reflects conservative courts hostile to private counsel suing businesses. Rather than reflecting economic class allegiance, we believe that judges' sociological empathy with agency officials who have similar positions *vis-a-vis* courts stimulates deference to agency jurisdiction and common affirmation of agency substantive decisions.

67. 2 Cal. 4th 377 (1992).

68. While the rationale cited by the court involving advantages in using the agency's substantive expertise and in assuring consistent application of standards between agency and court has theoretical merit, Business and Professions Code section 17205 provides clearly that its remedies are cumulative to all others; nor does the Insurance Code provide an exclusive system of regulation entirely occupying the field. Moreover, in point of fact, waiting for the Insurance Commissioner to act has been historically the legal equivalent of "waiting for Godot." *See infra* notes 78-79.

In Cellular Plus v. Superior Court (U.S. West Cellular), 14 Cal. App. 4th 1224 (1993), the Fourth District Court of Appeal indicated a limited application of *Farmers*: "In Farmers, the particular claim *required* an interpretation and application of statutes and regulations within the expertise of the insurance commissioner." *Id.* at 1248 (emphasis added).

69. 17 Cal. App. 4th 1284 (1993).

70. The *Samura* case is confused and ambiguous as an expression of sole or primary jurisdiction resting with the Commissioner of Corporations who regulates HMOs, because the court contended that the acts complained of were not unlawful under Knox-Keene, and implied that acts which were unlawful could have been enjoined under Business and Professions Code section 17200 by a party other than the Commissioner. "But, despite the existence of a statutory enforcement scheme, Samura may still sue to enjoin acts which are made unlawful by the Knox-Keene Act." 17 Cal. App. 4th at 1299.

71. Over 1,000 registered full-time lobbyists advocate before the California legislature and the state's regulatory agencies.

72. Most of the critical medical, pharmacy, dental, and related health care occupational licensing boards retain a strong majority of members from the profession regulated. The State Bar Board of Governors includes seventeen attorneys and six non-attorneys. Historically, almost all of the persons who head departments or bureaus (insurance, savings and loan, real estate, corporations, banking, *et al.*) are former practitioners in the trade or profession and/or associate with it in some profitable manner upon leaving government service. For a systematic listing of vested interest membership in agency governing bodies, *see The Decline of Public Members: The Cartels Retake the Field*, 6:4 CAL. REG. L. REP. (Fall 1986) at 9.

73. People v. National Association of Realtors, 120 Cal. App. 3d 459 (1981).

74. *See, e.g.*, Perdue v. Crocker Nat'l Bank, 38 Cal. 3d 913 (1985) (excessive NSF check charges); Beasley v. Wells Fargo Bank, 235 Cal. App. 3d 1383 (1991) (excessive late payment and "overlimit" fees on credit card accounts).

75. Saunders v. Superior Court of Los Angeles County (California Reporting Alliance), 27 Cal. App. 4th 832 (1994).

76. *See* 14:4 CAL. REG. L. REP. (Fall 1994) at 100.

77. *See* 9:2 CAL. REG. L. REP. (Spring 1989) at 1.

78. *See* Bourhis v. Gillespie, No. 907349 (San Francisco Superior Court), a 1989 case in which plaintiffs' counsel Ray Bourhis successfully sued Insurance Commissioner Roxani Gillespie for systematically failing to enforce the California Insurance Code by investigating consumer complaints against insurers and taking disciplinary action where warranted. Among other things, Bourhis alleged that "tens of thousands" of complaints had been filed over the prior thirty years, and that the Department of Insurance has "never enforced or prosecuted a single...violation in any of those cases." In December 1990, Superior Court Judge John Dearman agreed with Bourhis and ordered Gillespie to prosecute errant insurance companies and save consumer complaints for six months. Judge Dearman found that valid complaints made to the Department rose between 50-400% in the past five years but, during the same period, only three orders to show cause had been issued. *See* 10:1 CAL. REG. L. REP. (Winter 1990) at 110; 9:4 CAL. REG. L. REP. (Fall 1989) at 97.

79. *See* Moradi-Shalal v. Fireman's Fund Ins. Cos., 46 Cal. 3d 287, 317 (1988) (Mosk, J., dissenting), in which Justice Mosk excoriated the majority for relegating third parties claiming bad faith under Insurance Code section 790 to the jurisdiction of the Insurance Commissioner: "Since 1959 when sections 790 and following of the Insurance Code were adopted, 62 volumes of *California Reports* and 297 volumes of *California Appellate Reports* have been published. In those 359 volumes there are more than 300,000 pages. On not one page of one volume is a single case reported in which the Insurance Commissioner has take disciplinary action against a carrier for 'unfair and deceptive acts or practices in the business of insurance' involving a claimant. Not one case in 29 years."

80. *See, e.g.*, Julianne B. D'Angelo and Robert C. Fellmeth, *A Perspective on California's Regulation of Tax Preparers, Certified Public Accountants, Architects, and Landscape Architects*, 13:4 CAL. REG. L. REP. (Fall 1993) at 5; Robert C. Fellmeth, *Physician Discipline in California: A Code Blue Emergency*, 9:2 CAL. REG. L. REP. (Spring 1989) at 1; Robert C. Fellmeth, *The Discipline System of the California State Bar: An Ini-*

tial Report, 7:3 CAL. REG. L. REP. (Summer 1987) at 1; Michael T. Hartney, *The State Board of Geology: Standing on Shaky Ground*, 4:3 CAL. REG. L. REP. (Summer 1984) at 3; Elizabeth A. Mulroy, *Regulating Funeral Directors and Embalmers: What to Preserve*, 2:2 CAL. REG. L. REP. (Spring 1982) at 3.

81. 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 typical example is 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 Factory A's pollution are somehow "internalized" or added to its respective production costs, or unless minimum standards are imposed on all. The means to internalize costs or to establish minimal standards can involve regulatory options, criminal enforcement, rules of liability under existing tort law mechanisms, direct assessment or taxation, or other strategies. *See* Robert C. Fellmeth, *A Theory of Regulation: A Platform for State Regulatory Reform*, 5:2 CAL. REG. L. REP. (Spring 1989) at 3.

82. The American model of the marketplace rests on fundamental prerequisites, including two relevant to the Unfair Competition Act: 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" goal of the marketplace.

83. Barquis v. Merchants Collection Ass'n of Oakland, Inc., 7 Cal. 3d 94 (1972).

84. 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.

85. A plaintiff serving as a "class representative" in a traditional class action has a fiduciary obligations to the class (as does counsel), and certification as one able to "adequately represent" absent class members is required, as is notice to absent class members to allow them the opportunity to "opt out" and pursue their own remedies as they see fit. An Unfair Competition Act settlement which lacks those safeguards may not constitutionally bar others who might seek relief for the same wrong; one cannot secretly litigate away the rights of another. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985) (affirming minimal required due process to bind an absent plaintiff, including primarily the rights of notice, opportunity to opt out, and "adequate representation").

86. *See* Serrano v. Priest, 20 Cal. 3d 25 (1977).

87. CAL. BUS. & PROF. CODE § 17204.

88. *Id.* (emphasis added).

89. *Id.* at § 17203. In other words, any one of the possible plaintiffs listed above can file for prospective injunctive relief, to appoint a receiver, or for any equitable order necessary to provide restitution to all those who may have been overcharged (or otherwise lost money) from unfair competition.

90. 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.

91. *See* Phillips Petroleum Co. v. Shutts, *supra* note 85, 472 U.S. at 812.

92. *See* Consumers Lobby Against Monopolies v. Public Utilities Comm'n, 25 Cal. 3d 891 (1979), for discussion of the alternative bases for private attorney general or common fund recompense for attorneys; *see also* CAL. CIV. PROC. CODE § 1021.5, which sets 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. Priest, *supra* note 86, 20 Cal. 3d at 49. 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).

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

94. 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).

95. *See* People v. Pacific Land Research, 20 Cal. 3d 10 (1977). Note that the decision itself does not recite the underlying facts; this author participated in the argument in this case.

96. Following an eighteen-month investigation, a complaint and stipulated settlement in People v. Cox Cable Communications, Inc., No. 679554 (San Diego County Superior Court), were filed by the San Diego County District Attorney's Office (joined by the Attorney General) on August 5, 1994. In July 1994, plaintiff Vincent Ross, represented by four separate law firms, filed Ross v. Cox Cable Communications, Inc., No. 678526. In his opposition to Cox's later motion for judgment on the pleadings, Ross cited People v. Pacific Land Research, *supra* note 95, for the proposition that the public civil action by public prosecutors served a separate law enforcement function from a private civil action, and leapt to the *non sequitur* that both could proceed and claim full (*i.e.*, double) restitution against the same defendants for the same wrong. The question in *Pacific Land Research* 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. *Pacific Land Research* gives the trial court discretion to keep the two proceedings separate, distinguishable from whether 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 general public" receive notice or otherwise know that someone has filed for relief to benefit them.

97. Note that a similar scenario recently occurred in the San Francisco Bay Area regarding the alleged mislabelling of meat by Safeway and Lucky Stores. Public prosecutors sued both grocery stores under section 17200 and both stores settled. Lucky paid $4 million in civil penalties, costs, and restitution; Safeway paid over $6 million. Thereafter, private counsel brought class actions against both stores on the same and related grounds, but there—unlike the San Diego case—the superior court sustained defendants' demurrers. Alexandra v. Lucky Stores, No. 727750 (Alameda County Superior Court), was dismissed in May 1994 and is not being appealed, and Gray v. Safeway, No. H171057 (Alameda County Superior Court), was dismissed on a motion for judgment on the pleadings in August 1994; *Gray* is currently pending appeal, No. A067323, in the First District Court of Appeal. Additionally, a class of Muslims sued Lucky on January 27, 1995 in Rahmany, et al. v. Lucky Stores, No. C95-00453 (Contra Costa County Superior Court), for—among other things—emotional stress damages, on grounds that meat labelled as ground beef actually contained pork, which is strictly forbidden in the Muslim religion. At this writing, *Rahmany* is pending in superior court.

Note that these public prosecutor resolutions underscore the appropriateness of public hearings and examination of "restitution" which collaterally estops all others. For example, in the *Safeway* case, $2 million in civil penalties and $350,000 in costs are split between Alameda County's budget (its district attorney filed the case, along with the Attorney General) and the state's general fund. The recovery of $350,000 in costs if the case were litigated is dubious—they would more likely be below $50,000. Of the $2 million in restitution, $1,250,000 is guaranteed to be allocated to the Consumer Protection Prosecution Trust Fund—a fund to be used by prosecutors to investigate similar cases. Further, the remaining $750,000 consists of grants to be awarded by court application through the Alameda County District Attorney and the Attorney General to enhance "empirical tests for the effective investigation and prosecution of multi-species adulteration cases...." The defendant is also required to donate $1 million worth of food (at wholesale value) to nonprofit food banks for the poor in nine northern California counties.

While allocating restitution as above described may be justified as the most effective *cy pres* alternative, over 80% of the cash and other consideration will go to public treasuries and for public agency funding or assistance. Such an allocation should not be approved in a way barring others where the sole decision-makers are the defendant and the public agencies involved.

98. Preisendorfer v. Cox Cable Communications, Inc., No. 678198 (San Diego County Superior Court), filed November 8, 1994; *compare with* Ross v. Cox Cable Communications, Inc., *supra* note 96. These two cases remain pending at this writing, and cover the same allegations of the complaint filed by the district attorney and Attorney General in People v. Cox Cable Communications, Inc., *supra* note 96. Note that this 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.

99. "SLAPP" is an acronym for "Strategic Litigation Against Public Participation."

100. *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 is categorically subject to the so-called "litigation privilege" under Civil Code section 47(b). However, three justices opined that injunctive relief did lie through section 17200. Moreover, the factual 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* William L. Stern, *With Some Help from 17200, the Empire Can Strike Back*, L.A. DAILY J., July 29, 1992.

101. *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 the general public are not binding as to absent class members). *But see* Dean Witter Reynolds, Inc. v. Superior Court (Abascal), 211 Cal. App. 3d 758, 773 (1989) (section 17200 case on behalf of "the general public" may proceed without class certification and may grant "restitution in favor of absent persons").

102. 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. For example, where one 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 final judgment. Courts understandably tend to sign judgments proffered to them by apparently adverse parties.

103. Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986, provides precedent for this proposal. Proposition 65 added section 25249.7 to the Health and Safety Code; section 25249.7(d) allows "any person" to commence a Proposition 65 enforcement action so long as the person provides 60 days' notice to the Attorney General, the district attorney and city attorney in whose jurisdiction the violation is alleged to have occurred, and the alleged violator, and "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."

104. *See especially* Committee to Defend Reproductive Rights v. A Free Pregnancy Center, 229 Cal. App. 3d 1 (1991).