Study B-700 October 2 1996

Memorandum 96-67

Unfair Competition Litigation: Comments on Tentative Recommendation

This memorandum reviews comments we have received on the Tentative Recommendation on *Unfair Competition Litigation* (May 1996). (A copy of the tentative recommendation is attached for Commissioners.)

We have received the following letters which are included in the Exhibit (along with some other material of interest):

OVERVIEW

For the most part, the commentators write in opposition to the project as a whole or to several of the provisions in the tentative recommendation. Predictions of dire consequences abound, although some writers recognize that

the proposed revisions are modest and balanced. Although much of the commentary is negative and some writers have mischaracterized the underlying purposes of the unfair competition study, the staff greatly appreciates the significant time and effort that the writers have devoted to considering the tentative recommendation and preparing their commentaries.

Thomas Papageorge, California District Attorneys Association Consumer Protection Committee, and the Los Angeles County District Attorney's Office, Consumer Protection Division, while noting two continuing concerns, summarizes as follows (Exhibit p. 40):

> CDAA members support the narrow and focused approach of the Tentative Recommendation. The Recommendation embodies an attempt to provide greater clarity and certainty in "general public" actions brought by private plaintiffs, while avoiding imposing burdens that would make such cases unworkable. The provisions dealing with notice to relevant parties, clear pleading of the representative causes of action, public hearings on these judgments, and binding effect on similar representative actions, will help promote certainty, finality, and fairness in these private actions.

Jeffrey Margulies, Haight, Brown & Bonesteel, on behalf of the National Paint & Coatings Association (Exhibit pp. 63-64):

> We believe that the May 1996 draft provides an excellent means to force accountability to the private enforcement bar, and brings the UCA in line with established constitutional principles. With slight modifications, we hope that this proposal can eliminate potential loopholes, and ensure that "public interest" litigation is truly brought in the public interest.

On the other hand, Earl Lui, Consumers Union, states that if the proposal were introduced in its present form, CU would, "regrettably, have to oppose the bill vigorously." (Exhibit p. 7.)

Howard Strong, a Reseda attorney, provides the following overview (Exhibit p. 1):

> In summary, the Tentative Recommendations suggest changes in California's unfair competition laws which would have the effect of dramatically weakening those laws and making it very much more difficult to enforce those laws. The Recommendations address non-existent problems, appear to be a mis-guided attempt to graft quasi class action procedure onto the unfair competition law (a graft which would kill the tree), and are very much anti-consumer.

David Link, Proposition 103 Enforcement Project, "joins fully" in the criticisms of other public interest organizations and submits an analysis of why the assumptions underlying the study (as he defines them) are insupportable. (Exhibit pp. 36-38.) He concludes:

> The pernicious side-effect of this current mania for forcing trial judges to jump through more and more procedural hoops would be to cut back dramatically on the ability of individuals to enforce the law that government increasingly does not.…
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> ….
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> The irony of the present proposal is that, at bottom, the concern is really with popular phantasms — judges making poor judgments, plaintiff's lawyers taking advantage of "loopholes" in the law. Both are supported only anecdotally, but they coincide neatly with popular prejudices, and so they appear to need correction.
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> ….
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> The Unfair Competition Act is working as intended. It should not be modified.

The Bet Tzedek group (David Lash, William Flanagan, and Eric Carlson) write: "If these recommendations were to be adopted into law, many victimized individuals would be effectively deprived of meaningful relief from the courts.… The Commission's tentative recommendations would destroy that protection." (Exhibit p. 15.)

Need for Legislation

Many commentators argue that whatever problems may exist are not worthy of legislative attention:

Earl Lui, Consumers Union: "We are still not at all persuaded that the problems identified by the Commission are sufficient to warrant legislative adoption of the Recommendation." (Exhibit p. 4.)

Gus May, Center for Law in the Public Interest: "[P]roceeding in the absence of reliable, hard evidence solely upon anecdotes and litigation 'war stories' is not the most responsible path to such significant reform." (Exhibit p. 8.)

David Pallack, Director of Litigation, San Fernando Valley Neighborhood Legal Services,: "The proposed revisions do not address any real problems that have arisen in these statutes. They would result in more harm to victims than the perceived ills they seek to cure." (Exhibit p. 14.)

Kenneth Babcock, State Bar Legal Services Section: "Simply put, we do not believe the "problem" identified by the Commission is so great as to warrant the drastic changes to unfair competition law the Commission proposes. To the extent there are abuses with respect to unfair competition litigation, we believe it to be a problem involving few lawyers and a small handful of cases." (Exhibit p. 21.)

Alan M. Mansfield, Milberg Weiss Bershad Hynes & Lerach: "The Commission should keep in mind that despite its open request to all interested persons (the private sector, the plaintiffs' bar, the defense bar and public prosecutors) no evidence, other than anecdotal evidence, has been submitted to demonstrate the existence of any problem with the existing statutory scheme that needs to be addressed." (Exhibit p. 50.) However, Mr. Mansfield continues: "Despite this lack of need for change, the provisions addressing the potential problem of using the Unfair Competition Act to leverage an individual settlement are the least controversial. Indeed, with the minor modifications suggested, many, if not all public interest groups would likely support the Commission's recommendation on this issue."

David Link, Proposition 103 Enforcement Project: "Unless and until there is empirical evidence of a genuine problem, or a clear call from the courts for some change, there is no real need for any change at all. Anecdotal evidence, or isolated cases should not serve as the basis for invoking the complex, time-consuming and powerful engine of the Legislature to alter a law that is otherwise working as intended." (Exhibit p. 38.)

On the other hand, Jeffrey Margulies, Haight, Brown & Bonesteel, National Paint & Coatings Association, reports a general problem (Exhibit p. 53):

> The defendant in a UCA enforcement, viewing the combination of adverse publicity, injunctive relief, its own attorney's fees, and the fees of the opponent, is faced with a litigation hammer that may often force a settlement based on factors entirely extraneous to the determination of whether the company has actually done anything improper. When faced with such a claim by a public enforcer such as a District Attorney or the Attorney General, a defendant can at the least assume that the enforcer's ethical obligation to see that justice is served by enforcement has caused a dispassionate assessment of the merits of the action. Furthermore, the decision to enter into a consent decree is not influenced by the threat of bearing expensive legal fees of the opponent where the public prosecutor brings the action

Consensus

Two writers speak of the desirability of finding a consensus for reform. (See Exhibit pp. 39-40, 46, 51.) This is an admirable goal. The Commission has attempted to find a consensus, but as indicated in the attached letters, it does not appear that consensus is likely or even possible. Inability to reach the goal of a consensus on several important elements of the draft statute should not dissuade the Commission from proceeding with its balanced, sensible, and modest reform proposals.

Major Issues

Three provisions were the focus of the writers' objections and concerns:

(1) The rule in draft Section 17302 precluding pursuit of contemporaneous individual and representative claims by the same plaintiff,

(2) The rule in draft Section 17309 providing a limited binding effect of private representative actions on later private representative actions.

(3) The rule in draft Section 17310 giving a priority to prosecutors' enforcement actions over private representative actions.

DETAILED ANALYSIS

The following discussion considers the comments on a section by section basis:

§ 17300. Definitions

There were no comments concerning the definitions.

§ 17301. Requirements for pleading representative cause of action

The provision requiring that the representative cause of action be separately stated is unobjectionable, and has even received some expressions of support. See Exhibit pp. 21, 29.

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

This provision codifies a special conflict of interest rule, prohibiting a private plaintiff from representing the general public while at the same time pursuing an individual cause of action.

(1) Howard Strong writes (Exhibit p. 1):

> There is no good reason that an individual plaintiff should have to abandon his or her claims in order to act as private attorney

> general. I have handled a variety of consumer protection actions under the unfair competition statutes and, it is my view, this change could make it far more difficult to bring such actions in the future because consumer's would, rightly, be concerned about giving up recompense for the individual wrongs done to them in order to seek relief for the general public.

The staff thinks it is indisputable that a potential conflict of interest exists in this situation Whether many or most plaintiffs can rise above the conflict and avoid putting their own interests ahead of the general public is beside the point. The intention of the rule is to eliminate the use of leverage from bringing a representative action to settle personal claims.

(2) Earl Lui, Consumers Union (Exhibit p. 5), argues that this section is unnecessary because the general conflict of interest standard in Section 17303

> should be sufficient to weed out cases where one party simply tacks on a § 17200 claim for leverage against a defendant, where there is no genuine representation of the public. Furthermore, the intent of Section 17307 (fairness hearing for proposed settlements) is to prevent plaintiffs from agreeing to inadequate settlements, such as those that "sell out" the general public. Those two sections allow a judge to make a case-by-case determination of conflicts or harms created by a conflict, rather than applying at the outset a conclusive presumption of "inherent" conflict.

In other remarks, however, Mr. Lui argues that the court review contemplated by Section 17307 "presents a real possibility of rubber stamp approvals." (Exhibit p. 6.) The general standard for plaintiffs under Section 17303(b) (considered next) is a minimum threshold and is not likely to catch all situations where a conflict exists.

(3) Gus May, Center for Law in the Public Interest, disputes the characterization that a conflict of interest exists in these circumstances and argues that sufficient protection from "actual" conflicts of interest is provided in the fairness hearing under draft Section 17307. (Exhibit p. 10-11.)

(4) The Bet Tzedek group (Exhibit p. 16) concludes that draft Section 17302

> would allow a plaintiff or cross-complainant to sue on behalf of the general public only when he or she had a relatively nominal and easily calculable claim for individual relief. If, for example, an individual were charged an improper service fee by a bank, he or she could receive a refund as part of restitution paid to all relevant members of the general public.

This type of case is one where the plaintiff does not have a conflict of interest and, as noted, where the plaintiff could get appropriate restitution. But from this it is not correct to conclude that the statute *requires* such plaintiffs. The proposal does not alter the existing open-ended standing rule which does not require that the plaintiff have any interest in the litigation. The section only says that you can't use a 17200 claim on behalf of the general public as leverage for an individual claim. The plaintiff is required to choose whether to seek personal goals or be a representative of the general public. The commentators recognize that the rule would prevent plaintiffs suing for damages from adding a representative cause of action to their complaint, but err when they conclude that this results in exempting the "worst offenders" from injunctive relief. Like several other commentators, the Bet Tzedek group thinks that the leverage concerns "are better addressed by a case-by-case determination of any conflict of interest" under draft Section 17303(b). (Exhibit p. 17.)

The draft statute takes the position that the type of conflict covered by Section 17302 needs to be strained out from the start and it is relatively simple to do so. Anecdotes of successful cases presented by plaintiffs' attorneys are not really on point — and perhaps a detailed analysis from a neutral perspective might conclude that one or more of these settlements was not free of conflict, that the plaintiff might have received less for the general public than he would have if individual interests were not at stake. But we can't retry these cases here, and it isn't necessary to do so. The determination that there is a potential for a significant conflict of interest in such situations is a rational one. The plaintiff is a fiduciary representing the interests of the general public — and unlike the class action situation, the general public has had no notice that its interests are in the hands of this plaintiff and cannot opt out of the plaintiff's representation.

(5) David Pallack, San Fernando Valley Neighborhood Legal Services, writes: "As a practical matter, our office would probably not be able to pursue injunctive relief against many fraudulent defendants as our clients would understandably want and need a return of the funds defrauded from them." (Exhibit p. 12.) This is *not* the result of the rule in Section 17302. Return of funds defrauded from Mr. Pallack's clients is not precluded by this rule. Restitutionary recovery is available to the named plaintiff in the representative cause of action. The section draws a distinction between individual claims that are distinct from "class" claims. In the case put by Mr. Pallack, we assume that there is more than one aggrieved plaintiff and that the case must involve claims on behalf of the general public.

Otherwise, the unfair competition statutes are not involved. The Comment to Section 17302 states: "This section does not prevent a plaintiff from representing the interests of the general public where the plaintiff is a member of the injured class, but only where the plaintiff seeks recovery distinct from the plaintiff's interest as a member of the general public."

Mr. Pallack's account of *Cash v. Wade* (Exhibit p. 13) similarly presents no problems under the proposed rule since it appears that restitution and injunctive relief were granted on suit by a plaintiff suing for itself and other victims. Although one might quibble whether this case involved the "general public," but as described, it serves as an example of a case where there is no conflict of interest because the named plaintiff is not seeking punitive damages on an individual claim at the potential expense of the interests of the general public. We can agree with Mr. Pallack that there was no conflict in his role as advocate for both the named plaintiff and the general public since *restitution* of money taken from victims of the defendant's scheme and a permanent injunction were sought and obtained. This situation remains unaffected by the rule in Section 17302.

(6) Kenneth Babcock, speaking for the State Bar Legal Services Section, attempts to characterize the purpose behind Section 17302 (Exhibit p. 21):

> The entire concept behind this section is based on the erroneous assumption that preventing a plaintiff in a representative action from having an interest in the action will ensure the bona fides of that plaintiff's desire to benefit the general public. We believe it will have the opposite result.

This is not the "entire concept." The tentative recommendation does not suggest that a *lack* of a conflict of interest would *ensure* the faithful representation of the public interest The purpose of Section 17302 is to avoid an important and obvious source of conflicts of interest — a clear conflict of interest that exist in fact where a plaintiff must consider whether to settle a personal claim at the expense of the interests of the general public. The *existence* of the conflict is undeniable. Citations to one or more cases where a commentator believes the plaintiff has risen above this conflict are irrelevant, and is the sort of anecdotal evidence that commentators have criticized in other connections.

(7) Jeffrey Margulies, Haight, Brown & Bonesteel, National Paint & Coatings Association, argues for high standards to be applied to private attorneys general and concludes that the draft statute "not only would substantially eliminate the

potential for a *conflict* of interest, they appear designed to serve the salutary role of eliminating the *appearance* of such a conflict." (Exhibit pp. 59-63.) He is concerned, however, that there may be an implication that there is not a conflict in other contexts, such as where unfair competition claims are added to Proposition 65 claims. We do not find any implication in the statute that would be relevant in other contexts, and are reluctant to attempt to include too many statements in the Comment concerning what the statute does not cover.

Uninterested Plaintiffs

Several commentators conclude that the end result of the conflict of interest rule in draft Section 17302 will be to eliminate interested or motivated plaintiffs from the arena of unfair competition litigation, leaving only the uninterested or "sham" plaintiff.

(8) Earl Lui, Consumers Union, writes (Exhibit pp. 4-5):

> The effect of this section on individual plaintiffs, particularly indigents, will likely be the unduly burdensome choice of giving up either their individual claim, or serving as a representative of the general public. For example, an individual plaintiff files an action alleging violations of a consumer protection statute, such as the federal or state fair debt collection acts, or fair credit reporting acts. In addition to the statutory claims, plaintiff also alleges tort violations and seeks compensatory, or perhaps punitive, damages. Finally, plaintiff alleges a 17200 claim seeking an injunction to stop the unlawful practices of the defendant that gave rise to plaintiff's injuries.
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> The Tentative Recommendation views the above scenario as presenting an inherent conflict between the individual plaintiff's interests and those of the general public, *no matter what* the facts of the particular case. Section 17302 would deliver a near fatal blow to the practice of private attorney general enforcement. Given the fact pattern above, the individual plaintiff would only have an incentive to pursue his or her individual claim, and not the representative claim. Thus, those who would be the most willing and appropriate plaintiffs, such as those who have been harmed the most by outrageous violations of consumer protection statutes, would likely no longer bring representative actions. Thus, a defendant's pattern or practice of wrongful conduct would likely not be enjoined, and a defendant would be free to continue to harm other members of the public.
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> Furthermore, the only plaintiffs likely to sue on behalf of the general public would be plaintiffs who did not suffer direct harm from the alleged wrongful conduct. Such plaintiffs would likely be

> organizational plaintiffs, such as Consumers Union, who could not be expected to seek redress for every significant violation of law — or, in the worst case scenario, sham plaintiffs who file 17200 claims merely to seek attorneys fees.

The fact situation described seems to present a conflict of interest, but that point is not addressed in Mr. Lui's commentary. He postulates a plaintiff who has claims for compensatory and punitive damages, who also seeks an injunction to stop unlawful practices. What will this plaintiff do if the defendant offers a generous settlement of the individual's claims in connection with dropping the injunctive relief, or watering it down? It is hard to deny at least the potential for a conflict of interest. Perhaps the revisions suggested at the end of the discussion of this section (see pp. 11-12, *infra*) will address Mr. Lui's concerns, while preserving essential protections against conflicts of interest.

(9) Alan M. Mansfield, Milberg Weiss Bershad Hynes & Lerach, also follows the line of reasoning leading to the conclusion that only the "non-aggrieved plaintiff" will be able to bring representative actions. (Exhibit p. 44.) He believes that requiring court approval of settlements and dismissals "should sufficiently resolve the Commission's perceived concerns" and that draft Section 17302 should be deleted.

Increased Litigation

Several commentators write that this conflict of interest rule will result in more lawsuits and duplicative litigation.

(10) Gus May, Center for Law in the Public Interest, gives two examples of cases where a suit for damages is inadequate to achieve the goal of changing a practice or insufficient to pay attorney's fees. (See Exhibit pp. 9-10.) Under the draft statute, the plaintiff would have to forego the limited statutory damages (e.g., $1000 under the Unruh Act) in order to pursue the broader goal of the public interest litigation seeking an injunction and restitution on behalf of the "general public." While Mr. May suggests that this situation would result in duplicative litigation, under the facts as he presents them, there would be no claim for damages because he has postulated that the amount is too small to justify a separate action. This is not a situation created by the draft statute, nor is it clear how much justice is achieved if only one plaintiff gets damages in the representative action which includes the plaintiff's personal claims. But it should also be noted that the draft statute does not prevent joinder of plaintiffs having

damage claims in the representative action. Thus, in the cases Mr. May proposes, it is not necessary that the plaintiff or plaintiffs with damage claims bring a separate action — they just can't represent the general public.

(11) Earl Lui, Consumers Union, suggests that Section 17302 may "increase litigation, not reduce it" because plaintiffs with individual claims will file two suits. (Exhibit p. 5.) The section is not aimed directly at reducing litigation, but preventing improper use of claims on behalf of the general public. If the rule operates to reduce litigation in this context, then so much the better, because it may eliminate an improperly motivated case. It would be undesirable to increase litigation, but we do not see the risk as being very great. Mr. Lui mentions the possibility of leaving the field open to "sham plaintiffs who file 17200 claims merely to seek attorneys fees." Of course, this possibility exists now since existing law does not require the plaintiff to have been injured by the challenged practice. We do not see that the draft statute would increase the likelihood of "sham" plaintiffs.

Prof. Fellmeth suggests that it may be too difficult to establish a "bright line test" and that it may be preferable to allow "some wiggle room" in view of the other conflict qualifications based on class action law. (Exhibit pp. 70-71.) He proposes that Section 17302 be modified to provide that

> where its conditions apply, the court: (1) has an affirmative duty to examine the plaintiff's other causes of action for possible conflict bar; and (2) has an affirmative duty to examine any stipulated or proposed judgment which will affect the representative action remedies benefiting the general public.

The staff recommends serious consideration of this approach. While it would not meet the objections of several writers, it does address the common occurrence where the damages are important, but in a minimal amount. If the absolute bar of Section 17302 is replaced by a more flexible rule, it becomes a variety of the overall conflict of interest standard in draft Section 17303(b). Several commentators have urged the approach of relying on the general standard as an adequate protection against conflicts of interest and the staff is hopeful that these commentators would accept the conflict of interest rule in Section 17302 if it were made a presumption under Section 17303(b). This could be implemented as follows:

17303. (a) ….

(b) A private plaintiff in a representative action may not have a conflict of interest that reasonably could compromise the good faith representation of the interests of the general public pled. A private plaintiff may not maintain an individual cause of action, whether for unfair competition or some other cause, and in the same action or in a contemporaneous action against the same defendant also seek to represent the interests of the general public by way of a representative cause of action, unless the court in the representative action finds that the plaintiff's individual cause of action will not conflict with the plaintiff's representation of the interests of the general public.

The settlement review would best be implemented as a new paragraph added to draft Section 17307 (findings required for entry of judgment):

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

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

(1) The proposed judgment and any stipulations and associated agreements are fair, reasonable, and adequate to protect the interests of the general public pled. If a private plaintiff representing the interests of the general public in a representative cause of action has maintained an individual cause of action, whether for unfair competition or some other cause, in the representative action or in a contemporaneous action against the same defendant, the court shall examine the proposed judgment and any stipulations and associated agreements to ensure that pursuit or settlement of the plaintiff's individual claim has not impaired the interests of the general public.

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

(Comments on Section 17307 are also considered *infra.*)

§ 17303. Adequate legal representation and absence of conflict of interest

Subdivision (a): Adequacy of counsel

(1) Kenneth Babcock, in both capacities, objects to the adequacy of counsel rule in draft Section 17303(a) as follows (Exhibit pp. 23, 30):

> There is no reason to believe that a junior legal aid or public interest attorney, who the court might find to be an inadequate representative, would in fact be an inappropriate representative of the general public's interest. By the same token, an experienced attorney who has abused Section 17200 in the past could be found to be an adequate representative under the proposed standard.

The Legal Services Section recognizes the desirability of the rule requiring the attorney to be an adequate representative, but argues that the language in the section does not achieve the purpose. The staff does not understand why relying on class action principles is not sufficient. Mr. Babcock does not explain the inadequacy nor does he explain how Rule 23 governing class actions is similarly inadequate. We would be happy to review any suggestions for improvement in the standard that Mr. Babcock cares to suggest, but at this point the argument seems to be that reasonable people may come to different conclusions when applying a legal standard.

(2) Howard Strong writes (Exhibit p. 1):

> I recently represented consumers in a class action against Circuit City Stores, Inc. for violations of the Song Beverly Act (Civil Code §§ 1747 et seq.). The case bogged down in the class certification procedure, but went to trial on the unfair competition claims and an injunction was issued which required Circuit City to comply with the law. Had the changes the Commission suggests been in effect, Circuit City's talented counsel, backed by essentially unlimited funds (as is often the case for defendants in consumer protection actions) would have likely been able to use the unneeded procedures of proposed §17303 to bog down and perhaps kill the entire action, thus permitting its violations to continue unhindered.

We do not see how the rules in Section 17303 could be used to kill the action — at least inappropriately. The example given does not explain how the talented defense counsel would manage to do this, and it is not apparent to the staff.

Subdivision (b): Plaintiff conflict of interest standard

(3) Kenneth Babcock, Public Counsel, reports that they "do not oppose" this subdivision and "in fact believe that this section eliminates the need for" the conflict of interest rule in draft Section 17302. (Exhibit p. 31.) Many other commentators cite this section as being a reason why Section 17302 is unneeded, although they may not go as far as supporting Section 17303(b).

(4) Alan M. Mansfield, Milberg Weiss Bershad Hynes & Lerach, proposes a revised standard for subdivision (b) that, in conjunction with elimination of the conflict of interest rule in Section 17302, he believes "could receive broad support." (Exhibit pp. 45-46; it should be noted that Mr. Mansfield reserves his objections to the need for such rules, but offers his suggestions in the spirit of attempting to find a consensus approach.) Mr. Mansfield recommends language drawn from McGhee v. Bank of America, 60 Cal. App. 3d 442, 450, 131 Cal. Rptr. 482 (1976), which could be implemented as follows:

> (b) A private plaintiff in a representative action may not have ~~a conflict of interest that reasonably could compromise the~~ interests antagonistic to good faith representation of the interests of the general public pled.

This language shades the presumption in favor of plaintiffs since it would appear to be easier to show that one does not have antagonistic interests than it may be to show a lack of a conflict of interest that reasonably could compromise the good faith representation of the general public. Mr. Mansfield's suggested revision is consistent with the goal of adopting some minimal class action standards and is worth serious consideration.

Interestingly, Mr. Mansfield also cites Trotsky v. Los Angeles Fed. Sav. & Loan Ass'n, 48 Cal. App. 3d 134, 146, 121 Cal. Rptr. 637 (1975), which did not employ the "antagonistic" standard, but instead held in relevant part that the "plaintiff must be a person who will fairly and adequately protect the interests of the class." This language drawn directly from Federal Rule of Civil Procedure 23(a)(4) seems even broader than the "lack of conflict of interest" language in the draft statute and the narrower "antagonistic" standard cited in *McGhee*. Courts have given a variety of formulations of the basic idea in Rule 23's requirement that the plaintiff "fairly and adequately protect the interests of the class." A review of case annotations under FRCP 23 suggests that the "antagonistic" standard is probably the most common, although many times it is linked with a "conflict of interest" standard. In the class action context, the "antagonistic" standard is frequently linked with a determination of whether the plaintiff is a proper class representative. In a California unfair competition representative action the plaintiff is not required to be a class representative in the class action sense, and thus the staff is not convinced that the "antagonistic" standard works as well in this context. We are not antagonistic to it, particularly as a consensus-building option, but it appears that the standard proposed in draft Section

17303(b) is more appropriate where a plaintiff is not required to have first qualified as a typical representative of the class with common interests.

The staff has suggested revision of draft Section 17303(b) in connection with the discussion of Section 17302. See pp. 11-12, *supra.* As noted there, the revisions may deal with the concerns of Mr. Mansfield and some other writers with regard to the conflict of interest provision.

Subdivision (c): Pendente lite relief

(5) Earl Lui, Consumers Union, writes (Exhibit p. 6):

> The adequacy determination should not be used to unreasonably delay a proceeding. For example, a party may file an action and move for a TRO on the same day. The section should clarify that the determination of adequacy is not a necessary prerequisite to the granting of a TRO.

(6) Kenneth Babcock, in both capacities, raises the same point. (Exhibit pp. 23, 31.)

Prof. Fellmeth responds (Exhibit p. 71):

> Although rare, such a possibility may exist. I would not confine it to a TRO since many courts operate by preliminary injunction. I suggest a provision or line as a part of § 17303 that qualification is "without prejudice" to a preliminary injunction or other preliminary relief *pendente lite* where otherwise appropriate.

The staff has no objection to adding this technical clarification, if it would take care of the problem raised by CU and Mr. Babcock. Subdivision (e) could be added to draft Section 17303 providing as follows:

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

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

(1) Kenneth Babcock, in both capacities, writes that he does "not oppose" giving notice to the Attorney General and public prosecutors. (Exhibit pp. 23, 31.) He suggests that the time for giving notice be changed to 30 days after filing, rather than 10 days after the adequacy determination under Section 17303 —

"particularly if the Commission were to eliminate the early adequacy of representation hearing in Section 17303."

The staff believes that the proposed 10-day rule is better and should be reconsidered only if Section 17303 is eliminated. Whether the time period should be 10 days or 30 days or some other period is relatively unimportant.

(2) Howard Strong views the notice requirement as "a needless and non-productive burden on plaintiffs in consumer protection actions." (Exhibit p. 2.) He detects an undesirable cumulative effect of the proposals: "If enough procedural burdens are piled up it is certain that, in some instances, meritorious consumer protection actions will not be brought because of the cost and burden of bringing them."

§ 17305. Disclosure of similar cases against defendant

(1) Kenneth Babcock, in both capacities, approves the concept of this section but urges codification of a remedy, including "discovery type sanctions and the exclusion of undisclosed cases from the set-off provision of proposed Section 17309." (Exhibit pp. 23, 31.) The Commission has considered this point at earlier meetings and decided to leave enforcement to the discretion of the court. Does the Commission wish to reconsider this suggestion?

(2) Howard Strong finds this provision requiring the defendant to disclose similar pending cases to be "completely unneeded" since he believes many courts already have such rules, and believes that as part of an effort to consolidate actions or pick which should proceed, "the change would only add another needless (and costly) procedure in consumer protection actions." (Exhibit pp. 2-3.)

§ 17306. Notice of terms of judgment

Kenneth Babcock, in both capacities, considers that the "general concept of prenotification, … as structured in the proposed section, … is essentially meaningless." (Exhibit pp. 24, 31.) On one hand, he argues that the time (45 days) is insufficient to permit review; on the other, he argues that if the case has been fully tried, 45 days is too long to wait to enter judgment. He does not believe courts will permit intervention "at the eleventh hour" or that financially strapped prosecutors will ever seek to intervene. There is clearly no way to satisfy this set of objections, and the Legal Services Section does not propose any improvements in the draft or suggest how their concerns might be met.

The staff thinks that notice and an opportunity to be heard are important principles, both in the abstract and in the effort to provide a minimum level of assurance that those who seek to vindicate the interests of the general public are exposed to some light. Remarks from Mr. Babcock's organizations suggest the conclusion that the statutory standards should be stricter and more rigorous, or that representative actions should be abolished in favor of class actions. If notice of the type proposed is insufficient to accomplish its intended purpose and if court review is meaningless, then it would be best to eliminate the ability of private plaintiffs to sue on behalf of the general public.

Mr. Babcock also argues that the rule should not apply to cases "that go to trial" (Exhibit p. 24) or "to judgments entered after trial" (Exhibit p. 31). The staff would not change the proposal because we do not see a clear way of distinguishing cases that should be subject to the proposed rules from those that should not. A case may "go to trial" with some issues, the very ones we are concerned with here, subject to stipulation. And stipulations may be made at any point in the proceedings. In the relatively few cases that do go to a full trial, we do not see that a 45-day delay is much of a problem, particularly in light of the pendente lite relief that is available. We also view the threshold fairness principles under the draft statute to be important in all representative actions.

§ 17307. Findings required for entry of judgment

Kenneth Babcock, in both capacities, is concerned that this section creates the danger of "rubber stamp" approvals and suggests that the section be revised to provide that "the court should be required to make written findings concerning the adequacy of the settlement." (Exhibit pp. 24, 31.) The Legal Services Section (Exhibit p. 24) suggests that

> those findings include specific findings concerning the nature of the practice at issue, the type and amount of harm involved, the difficulty in determining the number of the members of the general public affected and the difficulty or ease in returning money to individual victims. Moreover, under proposed subdivision (b)(1) the court would determine at the hearing whether the settlement is "fair, reasonable and adequate to protect the interests of the general public pled." The standard should be further defined in the section to require that the court look to whether the settlement is sufficient, in terms of the injunctive and restitutionary relief obtained, to justify a court in any subsequent action concluding that the general public should be precluded from further action (where, as we

discuss below, we believe the determination of the binding effect of the resolution should be made).

Some of the proposed elements appear acceptable. For example, the staff sees no problem in requiring the court to make a specific finding that the terms satisfy the standard of subdivision (b)(1) ("fair, reasonable, and adequate to protect the interests of the general public pled"). And it may be helpful to require a finding that the terms of relief are sufficient, although this seems to be a part of the general standard. It also appears useful to require a clear statement of the practice covered by the relief granted. However, we do not understand the relevance of the other proposals such as the "difficulty in determining the number of the members of the general public affected" or "the difficulty or ease in returning money to individual victims." These relate to the propriety of cy pres relief, a subject that the draft statute does not attempt to govern. If the Commission thinks this is an important issue, then perhaps these matters could be better covered in the Comment. The Comment could state that the court, in considering whether to approve cy pres relief, should make the appropriate findings concerning the difficulty of determining what amounts are payable to individuals. But again, we believe these elements are inherent in applying the general standard set out in subdivision (b)(1). The staff would not recommend requiring the court to attempt to anticipate any eventual preclusive effect. That is an issue that should be determined in any later action that might arise, when the new cause can be compared to the terms of the prior judgment. (The Legal Services Section apparently agrees with this perspective on res judicata, as indicated in comments on Exhibit p. 25.)

§ 17308. Dismissal, settlement, compromise

Kenneth Babcock, in both capacities, notes that cases may be dismissed without a judgment being entered and queries what "substantial compliance" means. (Exhibit pp. 24, 33.) There are places in the law where we do not try to define all the words, and rely instead on judicial discretion. This section, as noted in the Comment, is based on Rule 23(e) of the Federal Rules of Civil Procedure and Civil Code Section 1781(f) in the California Consumers Legal Remedies Act.

§ 17309. Binding effect of judgment in representative action; setoff

Subdivision (a): Binding effect of judgment in private representative action

Before considering the remarks of the various commentators, we need to be clear on what draft Section 17309(a) would do. It codifies one limited aspect of res judicata learning, which follows from the notice and fairness hearing procedures that are part of the draft statute. Subdivision (a) provides that a *private* unfair competition action on behalf of the general public, which complies with the new rules, has binding effect — it bars any further *private* unfair competition actions on behalf of the general public based on "substantially similar facts and theories of liability." It does not say anything about what happens if there is a prosecutor's action before or after a private action or another prosecutor's action. It does not say anything about later class actions or private actions on behalf of individual named plaintiffs.

Some of the commentary appears to be based on an expansive and unfounded reading of the provision. Some may be reading things between the lines that simply are not there. The staff recommends that the section be revised to make its scope clearer and that the Comment make clear that there is nothing written between the lines:

> 17309. (a) The determination of a representative cause of action brought by a private plaintiff in a judgment approved by the court pursuant to Section 17307 is conclusive and bars any further actions on representative causes of action brought by private plaintiffs against the same defendant based on substantially similar facts and theories of liability.
>
> **Comment.** Section 17309 governs the binding effect of a private representative action under this chapter on later private representative actions. Under this section, a final determination of the cause of action (i.e., the cause of action asserted by a private plaintiff on behalf of the general public under Section 17204 or 17535, as provided in Section 17307) is res judicata. In other words, the determination of the cause of action on behalf of the general public has been made and other private plaintiffs are precluded from reasserting the representative cause of action. See also Code Civ. Proc. § 1908 (binding effect of judgments generally). This effect applies to any relief granted the general public, whether by way of injunction or restitution or otherwise.
>
> The scope of this rule is limited: a person who claims to have suffered damage as an individual is not necessarily precluded from bringing an action on that claim, even though the question of the harm to the general public has been determined conclusively. However, as provided in subdivision (b), if the person prevails on an individual claim, any monetary recovery (whether damages or restitution) will be reduced by the amount of any payment received by or due to the person in the prior

> private representative action or prosecutor's enforcement action. Furthermore, if a representative action or enforcement action has resulted in fluid recovery or cy pres relief, the defendant is entitled to a setoff in the amount of the pro rata indirect benefit to the plaintiff as determined by the court.
>
> This section is not intended to affect any other application of the doctrine of res judicata or to limit or expand other judicial doctrines such as equitable estoppel, mootness, or judicial estoppel. Whether these doctrines or any others should be applied in a particular case is not affected by this section and is governed by the otherwise applicable law. Nor does this section have any application to situations involving enforcement actions brought by public prosecutors under the unfair competition statutes.

The concept embodied in this provision has been a pivotal part of the study from the start. In response to proposals to eliminate this provision, Prof. Fellmeth writes that this

> undermines the reform, making it rather moot. If there is no binding effect, what difference do any safeguards make?... If there are no possible final judgments, what do we have at the conclusion of the lawsuit except the payment of money to counsel to (presumably) not bring another action, but without prejudice to a repetition of the same exercise by 24 million other Californians and 120,000 counsel, each on behalf of the general public?

We note a tendency of commentators to ignore the essential preconditions under the draft statute before the binding effect can take place under Section 17309(a), while at the same time they exaggerate the scope of the rule. This leads several writers to insupportable conclusions and predictions of doom that are neither intended by the Commission nor reasonably foreseeable under the draft statute. With this preface, we proceed to a review of the comments on this subdivision:

(1) Earl Lui, Consumers Union, again urges the Commission to abandon attempts to achieve some sort of finality through res judicata and rely instead on "equitable estoppel and mootness." (See Exhibit pp. 6-7.) Several other commentators have now joined with CU in advocating equitable estoppel and mootness as the preferred rules, at least in this area of the law. (See Exhibit pp. 3, 19, 25, 38, 46.) Equitable estoppel and mootness are important, as are res judicata and collateral estoppel and other doctrines — we do not see them as competitors. Nor have we seen any convincing arguments for abandoning principles of res judicata in unfair competition litigation or for giving this area of the law unique treatment.

Mr. Lui writes that the determination whether to allow a subsequent case to proceed must be made on a

> case-by-case basis, not with a blanket res judicata rule. Because current law allows this case-by-case determination, the staff draft upsets the "balance of the law" by creating a res judicata effect for a judgment in a representative action, without allowing a court in any second action the opportunity of determining whether or not the second action is truly "duplicative" or not.

Res judicata is not a mechanical doctrine. Whether a prior judgment will act as a bar is a question that is determined on a case-by-case basis, just as Mr. Lui urges. But once the issue is determined, we should know the outcome. What happens with equitable estoppel and mootness? Where is the body of law that will help us predict the outcome? Or would the second court get to retry the case and reevaluate the earlier judgment or judgments in a potentially endless series of equitable determinations? A court in an earlier case may always be thought to have erred by those who come after, and there is probably no shortage of potential plaintiffs who can improve on the work of their predecessors.

The staff views equitable estoppel and mootness primarily as a fall-back approach that a court may use to prevent injustice in a case where it is unwilling to apply res judicata or where res judicata is inapplicable, as where it is clear that there is no privity. The equitable estoppel and mootness doctrines appear to center on the *results* achieved in the prior case, rather than on issues such as the primary right involved and whether there was privity, which govern res judicata considerations. We think our overview is consistent with the amicus brief submitted by CU in the Safeway meat products case in Alameda County. (The brief, which Gail Hillebrand of CU was kind enough to provide to the staff, has not been included in the Exhibit, but is on file and will be available at the meeting.) The staff does not believe that the (developing?) case law in this area is certain enough to provide a reliable substitute for the proposed statutory rule and we would not want to attempt to codify the equitable estoppel and mootness concept from the cases.

(2) David Pallack, San Fernando Valley Neighborhood Legal Services, argues against the res judicata and setoff rules as follows (Exhibit p. 14, see description of case at Exhibit p. 13):

> The *Redman* case also demonstrates why the res judicata provisions may cause significant problems. It appears the

> prosecuting attorneys may not have been aware of the extent of the fraud engaged in by defendants and there may be hundreds more victims than they realized. Under the set-off provision of § 17309(b), the defendants' liabilities are capped by the terms of the first judgment, even if other uncompensated victims exist.

We see this argument is deficient in three respects. (1) Since the first case was brought by a prosecutor, the rule in Section 17309(a) would not apply. (2) Res judicata has nothing to do with the *number* of victims. The judgment would be res judicata on the right to restitution and victims discovered in the future would take advantage of that judgment. (3) The setoff provision applies on a person by person basis, not to a class pool. It states an obvious principle: a plaintiff is entitled to no more than one satisfaction. If a person has received restitution in an unfair competition action, then any future award for the same injury is to be reduced by the amount received. Mr. Pallack's hypothetical victims are not covered by this rule since they have not received anything to be set off against later recovery. Draft Section 17309(b) does not cap the defendant's liability, except that it prevents double liability.

Mr. Pallack argues that the rule in draft Section 17309(a) would adversely affect the public interest in the circumstances of Cisneros v. U.D. Registry, Inc., 39 Cal. App. 4th, 574-76, 46 Cal. Rptr. 233 (1995). (See description at Exhibit pp. 13-14.) The staff disagrees with the analysis. Section 17309(a) does not provide a general res judicata rule. Nor would res judicata apply in this situation where the appellate court reverses the trial court's sustaining a demurrer on the 17200 claim — res judicata does not preclude appellate review. Most significantly, however, this section affords binding effect only as to *private* representative actions. (See Sections 17300(c) ("representative cause of action" defined), 17307, 17309(a).) The suggestion that this limited rule would have an adverse effect on the public interest in the circumstances of *Cisneros* is without foundation.

(3) Kenneth Babcock, in both capacities, objects to draft Section 17309(a) for the generally the same reasons given by CU and others, arguing for equitable estoppel and mootness and a second-look approach. (Exhibit pp. 25, 33-34.)

(4) Alan Mansfield suggests that the Commission or interested parties should conduct a study to determine what problems exist, looking at court records "to determine how many, if any, unfair competition actions that were filed and settled by public officials involved a 'follow-on' § 17200 action filed by a private party" and would delay or bifurcate any recommendation to the Legislature until

the study is complete. (Exhibit p. 51.) The staff would welcome any systematic research data along these or other lines, but we do not have the resources to conduct such a study. We do not accept the proposition that such a study is a prerequisite to proposing legislation. In any event, a study of "follow-on" suits would not be too relevant to the proposed binding effect rule, since it does not apply to "enforcement actions" brought by prosecutors, as already noted.

(5) Howard Strong finds this section unneeded "[g]iven the long established and well-settled law on estoppel and mootness." (Exhibit p. 3.) The staff's research does not confirm this characterization of "estoppel and mootness." Mr. Strong believes the effect of the rule in Section 17309(a) "would be to provide a new procedural block for malefactors to argue that res judicata prevents a new action against them." Of course, as has been noted, res judicata exists today — it is not invented by the draft section. (See, e.g., the reports and order of the superior court in the Computer Monitor Litigation, Exhibit pp. 65-69.) Mr. Strong also disagrees with the statement that the proposed rule is limited. He believes "that the scope is very broad and would likely eviscerate the entire unfair competition statute."

(6) The Bet Tzedek group disputes the conclusion in the tentative recommendation that there is no constitutional right to bring a representative action (meaning a private action on behalf of the general public under the unfair competition statutes), although we do not understand that they are attempting to argue that there *is* a constitutional right to bring such an action. (See Exhibit pp. 18-19.) The staff believes it is indisputable that the Legislature could repeal Section 17200 *et seq.* or eliminate the power of private plaintiffs to represent the general public under these statutes. The writers argue that the limitation on repetitive representative actions in draft Section 17309 "would not satisfy due process requirements" because parties "who have received no notice of the lawsuit brought on behalf of the general public" would be barred from bringing their own representative actions. The Commission has shaped the draft statute to deal with this type of concern, by providing fairness guarantees and requiring notice (albeit less than full class action notice), and by limiting *only* the right to bring another private representative action. This rule does not prevent assertion of individual claims on an individual basis or through a class action, although we do not imagine that the case would be likely to arise. Still, the right is not cut off, and we therefore fail to understand how the limited res judicata principle embodied in draft Section 17309(a) can possibly be thought to be

unconstitutional. We do not find the cases cited by the Bet Tzedek group to be on point as applied to this limited rule under the conditions set out in the draft statute. We also note that stipulated judgments with the Attorney General under the unfair competition statute have been given complete res judicata effect. (See, e.g., the reports and order of the superior court in the Computer Monitor Litigation, Exhibit pp. 65-69.) If there is no binding effect, then it is a mockery to suggest that private plaintiffs in representative actions truly represent the general public. And if class action style notice is required for any binding effect, then the Commission would need to consider conforming representative action practice to class action practice, with the next logical step being abolition of representative actions in favor of class actions.

The Bet Tzedek group believes that this rule "would create a significant danger of collusive settlements. A wrongdoer might try to insulate itself against representative actions by encouraging and then settling a 'friendly' unfair competition lawsuit brought on behalf of the general public." This would not be a simple matter to accomplish under the draft. The limited binding effect applies only if the rest of the statute has been complied with. And, as we have noted innumerable times, this rule does not act as a complete res judicata bar — it only affects the right to bring further private representative actions.

(7) Alan M. Mansfield, Milberg Weiss Bershad Hynes & Lerach, argues that "as drafted defendants could abuse this provision [draft Section 17309(a)] to bar legitimate claims of affected persons — a far greater preclusive affect. Providing such broad statutory res judicata impact is extremely dangerous, as the concept of res judicata is difficult to deal with, even on a case-by-case basis." (Exhibit p. 46.) We agree that res judicata is a complicated subject and do not disagree with the discussion of some of the relevant case law set out in Mr. Mansfield's letter (see Exhibit pp. 46-47), but as noted above, the draft does not attempt to enact a comprehensive res judicata rule. Once again, it must be remembered that the binding effect only applies if the adequacy, notice, and fairness standards in other parts of the draft statute have been complied with, and it only applies to a private representative action following another private representative action.

Prof. Fellmeth recognizes that an "argument can be made for an escape valve" and suggests the following limited exception to the binding effect rule to try to meet the objections of commentators (Exhibit p. 72):

> There already exists the possibility of a motion to set aside a judgment. I would not oppose a narrowly drawn provision allowing for such a set aside, and would suggest that such a motion to set aside prevail under the following explicit conditions: (1) a fraud on the court in the form of misleading information or material omissions which inhibited the court from protecting the rights of the general public being litigated; or (2) a violation of the notice or other procedural specifications of this section such that the representative action did not allow for meaningful comment and review of the proposed final judgment, and the result did not provide for a substantial remedy responsive to the interests of the general public given the merits of the case.
>
> ….
>
> I would add that the burden of such a set aside must be on its proponent, and that the court has the authority to modify or limit it where *bona fide* third parties have relied upon a facially valid judgment to their detriment — in order to protect their legitimate interests.

If this approach would answer some of the concerns of CU, the Bet Tzedek group, Alan Mansfield, and others over the possibility of collusive settlements or a lack of effective notice, **then the staff recommends considering it for inclusion in the draft.** It should be said, however, that the staff is traditionally reluctant to refer to fraud in a statute, since the law of fraud usually can be counted on to take care of itself, and the judiciary is fully competent to find the necessary remedies should a fraud on the court be demonstrated. Similarly, if the explicit statutory requirements have not been satisfied, then the limited binding effect should not result, and we should not have to say it again. But if a providing an explicit statutory procedure based on Prof. Fellmeth's suggestions would be helpful in this project and alleviate some of the concerns that have been expressed, then it is worth trying.

Subdivision (b): Set-off rule

(8) Kenneth Babcock, in both capacities, argues that the setoff rule should be limited to amounts actually paid by the defendant to the person involved. (Exhibit pp. 25-26, 34.) Alan M. Mansfield, Milberg Weiss Bershad Hynes & Lerach, also makes this point. (Exhibit p. 49).

The staff does not view this as a major issue, but if an amount is ordered to be paid in the first action, creating an enforceable money judgment, there is no reason to include it in a second judgment. If the plaintiff has refused to accept payment, the defendant should not be ordered to pay it again. If the defendant

has neglected or refused to pay the amount owing under the first judgment, then it is an enforcement issue in the hands of the plaintiff under the first judgment, and providing for repetitive liability in a second judgment adds nothing. In civil law generally, if a debtor does not pay a judgment, the remedy is not to seek another judgment, but to enforce the first judgment. As set forth in draft Section 17309(a), the rule recognizes the difference between a finding of liability and enforcement in a way that avoids quibbling over whether the plaintiff was actually paid or not.

As to the pro-rata setoff for cy pres relief, Mr. Babcock, in both capacities, argues against this rule, finding it "troubling" and "impossible to determine." (Exhibit pp. 26, 34.) He argues:

> To arrive at this figure, the court will have to engage in a quantitative and a qualitative analysis of any prior indirect restitutionary recovery. Without knowing the number of total victims, either because they are unknown, there are no records or at the stage of the case that the prior action was settled there had not been significant discovery, a court could not possibly determine, other than by simply guessing, the pro rata set off amount. Moreover, the court would be required to determine the extent to which indirect recovery, such as through cy pres distributions, benefited a particular individual. It is difficult to see how a cy pres distribution to an organization or entity that would have a localized effect would be of sufficient benefit to an individual in another part of the state sufficient to warrant a set off. Finally, there is no good policy reason why a defendant should be entitled to a set off until the defendant has disgorged all of the ill gotten gain it has received by way of the unfair practice, which typically would not have happened if the prior action was settled.

The staff recognizes that it may be a challenge to come up with an appropriate figure under this rule, although we can think of ways to dispose of the issue fairly simply in examples that come to mind. It is not intended that the court spend a great deal of time agonizing over whether the plaintiff was benefited individually. That is why the rule is stated in terms of a "pro rata" setoff. The rule is focused on avoiding a double recovery against the defendant, not so much on preventing the plaintiff being doubly enriched. Where cy pres relief has occurred, the amount involved as allocated to an individual plaintiff is not likely to be very great, and certainly far less than a plaintiff would be suing for in an individual action for damages. It would be a more important principle, however, if a second action took the form of a class action for damages on behalf of a large

class. We are confident that a court that can decide the issues involved in ordering cy pres relief or fluid recovery will be able to justly apply the proposed setoff rule.

(9) Alan M. Mansfield, Milberg Weiss Bershad Hynes & Lerach, argues (Exhibit p. 48) that

> the set-off requirement for indirect benefits of a settlement (proposed §17309(b)) would quite likely be unconstitutional. Indeed, the preclusive effect of class action settlements is derived from the ability of the unnamed class member to object to the terms of settlement and/or opt out of the settlement after having received notification of the proposed settlement. People v. Pacific Land Research Co., 20 Cal. 3d 10, 17 (1977); Phillips Petroleum Company v. Shutts, 105 S. Ct. 2965, 2971, 472 U.S. 803, 806 (1985). Under the proposed amendments, because individuals are provided neither notice nor an opportunity to opt out of the settlement, reducing their future recovery by some indirect, and potentially unquantifiable, benefit would likely violate their constitutional due process rights.

It is difficult to evaluate the allegation of unconstitutionality based on these authorities since the unfair competition realm is substantially different from class actions, and would remain so under the draft statute. The staff does not agree that opt-out is essential to binding effect in this context, particularly since the claim of the potential disgruntled plaintiff is not cut off. In fact, we have suggested that the opt-out function is served in the context of the draft statute by the ability of the plaintiff to bring an individual action for damages or whatever other relief is available. The setoff rule is intended to avoid the inequity of double liability on the part of the defendant. Mr. Mansfield's argument also brings into question the integrity of cy pres relief, raising the issue of whether the grant of cy pres relief was proper in the first place. In view of the other procedural improvements proposed in the draft statute, including adequacy, notice, opportunity to be heard, and fairness hearing, the stark rules set out by Mr. Mansfield seem unrelated to this statute. But it is new territory, and there is plenty of room for competing principles to lead to different conclusions.

Prof. Fellmeth's proposal for revision of this rule to adopt an equitable allocation, as discussed on the next page, may help resolve Mr. Mansfield's concerns.

(10) Thomas Papageorge, California District Attorneys Association Consumer Protection Committee and Los Angeles County District Attorney's Office,

Consumer Protection Division, notes that CDAA members are "sympathetic to the fairness motivation" behind the setoff rule, but have concerns about how it would work in practice (Exhibit pp. 41-42):

> (1) If this provision causes a prosecutor's cy pres recovery to diminish an individual's purely personal damage claim, it is at least possible that a court would engraft some version of class action procedures onto such a prosecutorial action, to the extent the prosecutor "represents" the private claimants. Class action burdens would work undue hardships on public enforcement actions.
>
> (2) How is the pro rata share to be determined, especially in cases where the total number of victims and/or the total loss for each victim is unknown?
>
> (3) Should offset apply at all unless there is a finding that complete deprivation of any unjust enrichment has already occurred? I.e., why should there be an offset if the defendant still retains ill-gotten gains?
>
> (4) The current provision would allow an offset based on indirect restitution "awarded", not restitution actually paid. Setoff against a subsequent claim should not occur unless actual payment of the initial recovery has taken place.

Prof. Fellmeth suggests two revisions of the setoff rule based on Mr. Papageorge's critique, and which would deal with several concerns raised by others: "First, change 'awarded' to 'paid' in the section so the defendant does not escape a full accounting. Second, instead of 'pro-rata share,' substitute 'equitable apportionment,' to address the problem of uneven damage." (Exhibit pp. 71-72.)

As to the first proposal, **the staff thinks that providing a "paid to" rule is acceptable, if it removes objections.** However, as indicated above, we see nothing wrong with the rule based on liability determinations and think it is theoretically preferable.

As to the second proposal, **the staff suggests that the Commission consider whether the rule on allocation of a share of indirect recovery is important enough to pursue.** We would recommend adoption of Prof. Fellmeth's proposal to employ an "equitable apportionment" standard in Section 17309(b), if it would achieve a consensus.

§ 17310. Priority between prosecutor and private plaintiff

This section seeks to balance the interests of public prosecutors representing the people by virtue of office with the interests of the general public, as represented by private plaintiffs. It does this by providing a presumptive priority

for prosecutors, but permitting consolidation or intervention if the prosecutor's action does not seek "substantial restitution." The right to attorney's fees and costs under existing principles is also recognized in draft Section 17310(d).

(1) David Pallack, San Fernando Valley Neighborhood Legal Services, opposes giving priority to public prosecutors (Exhibit p. 13):

> The fact that an action is brought by a public prosecutor rather than a public interest lawyer or private attorney does not mean the action will more likely benefit the general public. One example is *People v. Marshall Redman, et al.*, Los Angeles Superior Court case no. BC097765. The final judgment entered on May 31, 1995 indicates it was brought pursuant to §§ 17200 and 17500 of the Business and Professions Code. While the judgment provided for injunctive relief against the defendants, apparently for real property fraud, it provided little in terms of monetary compensation for the victims. The judgment provides for $580,000 in civil penalties and attorneys' fees, but most of that money goes to the prosecuting attorneys' offices and the cities for which they work. Moreover, most of the money comes from a receivership estate created by the judgment to manage the properties of the victims, thus, most of the fees and penalties will be paid by the ongoing payments of the defendants' victims. It seems the general public would have been better served if the victims — most of them low-income families — had received most or all of that $580,000.

We do not have sufficient facts to evaluate this case or Mr. Pallack's view of it. But we assume it is a typical reaction of private and public interest attorneys. The staff does not find, however, that it indicts the rule in draft Section 17310. In fact, this case could be cited as an example of why Section 17310 is needed. Section 17310 recognizes a limited right of intervention where the prosecutor is not seeking substantial restitution to the general public and provides for reinstitution of a private action if substantial restitution is not obtained. Although Mr. Pallack concludes by saying that the draft sections "do not address any real problems that have arisen in these statutes," in this case, the rule would directly address one of his concerns.

(2) Howard Strong writes that the rule in draft Section 17310 "would cause private counsel to think once, twice and three times before bringing an unfair competition action on behalf of consumers. Who would want to pour time, money and energy into a case when a public prosecutor might come in and take over the case?" (Exhibit p. 3.) In Mr. Strong's experience, a prosecutor action may obtain "substantially less" for the general public than a private action.

(3) Kenneth Babcock notes that the Legal Services Section is of "two minds" on this provision, with the public prosecutors largely in support or urging additional preference of public actions, and the public interest and legal services attorneys recommending elimination of this section and leaving the issue to the courts. (Exhibit p. 26.) At a minimum, the second group urges elimination of the rule forbidding intervention if the prosecutor seeks substantial restitution, on the grounds that prosecutors will usually seek substantial restitution but may not obtain it.

(4) Alan M. Mansfield, Milberg Weiss Bershad Hynes & Lerach, writes that this section should be "deleted in its entirety" (Exhibit p. 49):

> Under the proposed statutory scheme, it is entirely possible that an "enforcement action" could be filed years after the public agency receives notice of filing of the action. Under this situation, despite the large investment of time and money by the private individual, he or she would lose control over the case. [Discussion of Joe Camel case.]
>
> Under proposed §17310, if the Attorney General's office suddenly elected to file an enforcement action, the Joe Camel action would likely be stayed despite the five years of work put into this important case and the huge expenses that have been borne. Also, in essence five years would be lost because the private action would be stayed, but the public action would just be beginning. Such a delay would only benefit the wrongdoer, to the detriment of the public.

It should be noted that the private attorneys would likely be entitled to costs and fees, as recognized in draft Section 17310(d). It also appears to the staff that the same result predicted by Mr. Mansfield could occur under existing law; it is not a new scenario that is created by the draft statute. Mr. Mansfield proposes that "at a minimum" the draft be revised to provide a time limit for filing and taking priority over a private representative action. He notes that Proposition 65 has a 60-day period. The staff thinks this is too drastic as a general rule, but a substantially longer period might be advisable to deal with extreme cases. It is likely, however, that a time limit short enough to appeal to private litigators would be unacceptable to prosecutors and that a limit acceptable to prosecutors would be viewed as meaningless by private attorneys. **If a compromise time limit can be worked out between the competing interests, the staff would recommend including it in the draft statute.**

(5) Jeffrey Margulies, Haight, Brown & Bonesteel, National Paint & Coatings Association, presents a detailed argument on the constitutionality of private enforcement in the absence of adequate safeguards. (See Exhibit pp. 54-59.) Most relevant to the draft statute, he concludes that it is important to reaffirm the enforcement authority of the Attorney General, and supports provisions directed to that end. Mr. Margulies would go further, however, and recommends (Exhibit p. 59) providing that the Attorney General

> has the right to intervene in and take over any prosecution "in the public interest," regardless of whether he has filed his own action. Without such explicit authority, the proposed legislation could lead to the conclusion that the Attorney General is powerless to affect pending litigation which he believes is without merit, since he would be ethically constrained from filing his own enforcement action, and then seeking primacy under proposed § 17311.

The staff is unclear on why the Attorney General would be ethically constrained in this situation. In fact, draft Section 17310 contemplates that a public prosecutor may commence an enforcement action after the filing of a private representative action.

(6) Thomas Papageorge, California District Attorneys Association Consumer Protection Committee and Los Angeles County District Attorney's Office, Consumer Protection Division, notes that the provision for consolidation "remains controversial" among some CDAA members (Exhibit p. 40):

> Even with the provisions of subparagraph (b) (providing general priority for public actions), there are prosecutors who believe burdensome motions and hearings will be required when "Johnny-come-lately" private plaintiffs seek to free-ride on public actions, perhaps, for example, by contesting the "substantiality" of the restitution sought in the public case.
>
> These prosecutors advocate an automatic stay of private actions, pending completion of related public enforcement cases, as the procedure most consistent with the priority due to the People's elected legal representatives. Not surprisingly, these members and many others are especially troubled by the few recent comments from private plaintiffs counsel seeking even less priority for cases brought by the People.

Prof. Fellmeth is sympathetic to Mr. Papageorge's concerns where a public and private case are consolidated, but is "not sure how to improve the current draft." (Exhibit p. 71.) The staff agrees. We take Mr. Papageorge's comments as an

indicator that the draft statute may provide the best candidate for consensus and that making it stricter or looser would not improve it.

§ 17311. Effect on prosecutors

Kenneth Babcock, State Bar Legal Services Section, supports this section. (Exhibit p. 26.)

§ 17319. Application of chapter to pending cases

(1) Kenneth Babcock, in both of his capacities, opposes application of the new rules to pending cases. (Exhibit pp. 27, 35.)

(2) Alan Mansfield makes the same point and recommends deletion of the section. (Exhibit p. 49.)

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

CONCLUSION

This lengthy review has attempted to summarize the comments received and give the flavor of the sometimes impassioned argumentation. The staff does not anticipate that those who have expressed deep disagreement with the project and sometimes vehement opposition to particular provisions are likely to remove their opposition based on the revisions that have been proposed — but this depends in part on what changes the Commission decides to make in the statute as set out in the tentative recommendation. We still hope that some of the opposition will be mollified and that the areas of disagreement will be minimized. The staff considers the proposal to be a rational, modest, and nonpartisan reform that should meet with general acceptance, and we recommend that the Commission approve either the current draft with minor changes or a draft of a recommendation to be presented for final approval at the November meeting.

The staff also recalls that another approach has been discussed as a response to the high degree of politicization this study has experienced: As discussed at

the January 1996 meeting, the Commission could decide to formally report its conclusions, presumably in a printed pamphlet, but refrain from submitting a recommendation to the Legislature and seeking enactment of a bill. The staff is not recommending this course; we only mentions the possibility as a reminder of the Commission's discussion last January.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

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August 24, 1996

Mr. Colin Wied, Chair
Mr. Stan Ulrich, Asst.
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite 2D
Palo Alto, CA 94303-4739

RE: Unfair Competition Litigation Study, Business & Professions Code §§172000 et seq., Tentative Recommendations

Dear Chair Wied, Secretary Ulrich & Members of the Commission:

Please accept the following comments on the Commission's above captioned Tentative Recommendations.

In summary, the Tentative Recommendations suggest changes in California's unfair competition laws which would have the effect of dramatically weakening those laws and making it very much more difficult to enforce those laws. The Recommendations address non-existent problems, appear to be a mis-guided attempt to graft quasi class action procedure onto the unfair competition law (a graft which would kill the tree), and are very much anti-consumer.

A. The Commission suggests that representative and individual claims should be prohibited in the same action. There is no good reason that an individual plaintiff should have to abandon his or her claims in order to act as private attorney general. I have handled a variety of consumer protection actions under the unfair competition statutes and, it is my view, this change could make it far more difficult to bring such actions in the future because consumer's would, rightly, be concerned about giving up recompense for the individual wrongs done to them in order to seek relief for the general public.

B. The Commission's proposed changes address the non-existent problem of conflicts between private plaintiffs, their

attorneys and the general public. Proposed §17302 creates a procedural nightmare which would have the effect of strangling may consumer protection actions before birth. The great strength of the unfair competition statutes is the avoidance of the sometimes unworkable class action procedures which often may have the effect of allowing malefactors to keep their ill-gotten gains and to continue their unlawful actions. For example, I recently represented consumers in a class action against Circuit City Stores, Inc. for violations of the Song-Beverly Act (Civil Code §§1747 et seq.). The case bogged down in the class certification procedure, but went to trial on the unfair competition claims and an injunction was issued which required Circuit City to comply with the law. Had the changes the Commission suggests been in effect, Circuit City's talented counsel, backed by essentially unlimited funds (as is often the case for defendants in consumer protection actions) would have likely been able to use the unneeded procedures of proposed §17303 to bog down and perhaps kill the entire action, thus permitting its violations to continue unhindered.

Similarly, I also recently handled a B & P 17200 case against Union Oil of California in which an injunction issued. These is a similar class action pending (handled by other counsel) against Unocal dealing with many of the same issues which has yet to be brought to trial. Had the changes tentatively proposed by the Commission been in effect, I suspect that that Unocal would have been able to use the new procedures to fight off the injunction which did issue.

Additionally, there are already too many restrictions on discovery in consumer protection actions. This section would apparently add an additional sort of bifurcation of discovery such as is sometimes, unwisely, in my view, applied in class actions in California Courts. I note that the Federal Courts have determined that bifurcation of discovery (the original source of bifurcation in the California Courts being found in Federal procedure) is generally unworkable and the Manual for Complex Litigation now disapproves such bifurcation. Any such limit on discovery in unfair competition actions will give defendants a giant barricade they will use to stop these actions dead in their tracks.

C. Proposed §17304 requires certain notice to the Attorney General. There is no need for such notice which apparently would place a needless and non-productive burden on plaintiffs in consumer protection actions. If enough procedural burdens are piled up it is certain that, in some instances, meritorious consumer protection actions will not be brought because of the cost and burden of bringing them.

D. Proposed §17305 requires notice of related cases, apparently with the idea in mind that the Court is supposed to determine who is the best representative by choosing among the various cases. Leaving aside the fact that people are not exactly fighting to bring consumer protection actions, this proposed change is completely unneeded as many Courts already

have such a rule (see, e.g., Los Angeles County Superior Court Local Rule 7.3(f)) and the change would only add another needless (and costly) procedure in consumer protection actions.

E. Court approval of settlements and Res Judicata. Given the long established and well-settled law on estoppel and mootness there is no need for the proposed changes to provide a binding effect to judgments in representative actions as in proposed §17309. I an unaware of any problems in this area and, it appears, the effect of this section would be to provide a new procedural block for malefactors to argue that res judicata prevents a new action against them. There are already too many procedural blocks available to those acting unlawfully against consumers.

Further, contrary to the claim in the Tentative Recommendation that "The scope of this rule is limited ...", it appears that the scope is very broad and would likely eviscerate the entire unfair competition statute.

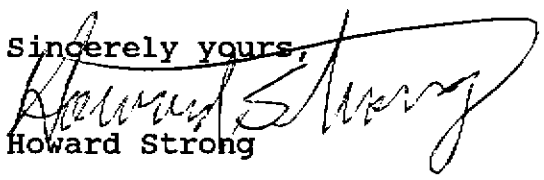
F. Priority to public prosecutor. Proposed §17310 would give "priority" to a public prosecutor's action. This would cause private counsel to think once, twice and three times before bringing an unfair competition action on behalf of consumers. Who would want to pour time, money and energy into a case when a public prosecutor might come in and take over the case?

Also, I am aware of at least one case where a public prosecutor obtained substantially less for the public than likely would have been obtained in a private action. Recently, the Orange County Attorney's office and, later, I understand, the Attorney General's office brought an action against Silo Stores for violation Civil Code §1747.8. The case was resolved with payment by Silo of $100,000. In a similar, recent, case in which I represented three consumers against Zales Jewelers the case was resolved in a settlement valued at two million dollars.

Finally, please note that I commented last year on the Commissions earlier proposed changes and asked that I be placed on the mailing list in this area. However, I did not receive notice of the new proposed changes from the Commission. Please be so kind as to see that I am on the mailing list as to the new proposed changes and future developments in this area.

Thank you for your consideration of my views.

Sincerely yours,



Howard Strong

Consumers Union
Publisher of Consumer Reports

August 27, 1996

Mr. Colin Wied
Chairperson
Mr. Stan Ulrich
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite 2D
Palo Alto, CA 94303-4739

Re: **Tentative Recommendation, Unfair Competition Litigation Study**

Dear Chairperson Wied, Mr. Ulrich and Members of the Law Revision Commission:

Consumers Union, the nonprofit publisher of *Consumer Reports* magazine, wishes to comment on the Commission's Tentative Recommendation. As you know, we have attended many Commission meetings and offered comments on prior drafts of the Recommendation. We are still not at all persuaded that the problems identified by the Commission are sufficient to warrant legislative adoption of the Recommendation. We remind the Commission of the striking lack of response to its Notice in November calling for examples of cases problems caused by Section 17200 litigation. As our prior letters have mentioned, Consumers Union has brought several Section 17200 actions on behalf of the general public. In these cases, we have not experienced the problems cited in Professor Fellmeth's study and relied upon by the Commission as evidence of abuses. The lack of any empirical basis for changing the law should end this inquiry.

The Tentative Recommendation creates greater problems than the ones it attempts to correct. Our specific comments on the draft statute are set forth in detail below.

1. Conflict of interest between individual and representative claims (§ 17302)

This section, which was added to the draft late in the process, would create significant problems for bringing legitimate private representative actions. This conclusive presumption of a conflict between individual and representative claims in a single action is clearly overbroad, unnecessary and harmful to the public interest.

The effect of this section on individual plaintiffs, particularly indigents, will likely be the unduly burdensome choice of giving up either their individual claim, or serving as a representative of the general public. For example, an individual plaintiff files an action alleging violations of a consumer protection statute, such as the federal or state fair debt collection acts, or fair credit reporting acts. In addition to the statutory claims, plaintiff also alleges tort violations and seeks compensatory, or perhaps punitive, damages.

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Finally, plaintiff alleges a 17200 claim seeking an injunction to stop the unlawful practices of the defendant that gave rise to plaintiff's injuries.

The Tentative Recommendation views the above scenario as presenting an inherent conflict between the individual plaintiff's interests and those of the general public, *no matter what* the facts of the particular case. Section 17302 would deliver a near fatal blow to the practice of private attorney general enforcement. Given the fact pattern above, the individual plaintiff would only have an incentive to pursue his or her individual claim, and not the representative claim. Thus, those who would be the most willing and appropriate plaintiffs, such as those who have been harmed the most by outrageous violations of consumer protection statutes, would likely no longer bring representative actions. Thus, a defendant's pattern or practice of wrongful conduct would likely not be enjoined, and a defendant would be free to continue to harm other members of the public.

Furthermore, the only plaintiffs likely to sue on behalf of the general public would be plaintiffs who did not suffer direct harm from the alleged wrongful conduct. Such plaintiffs would likely be organizational plaintiffs, such as Consumers Union, who could not be expected to seek redress for every significant violation of law — or, in the worst case scenario, sham plaintiffs who file 17200 claims merely to seek attorneys fees. Surely these are not the results intended by the Commission.

This section may also increase litigation, not reduce it. Some individual plaintiffs may, despite Section 17302, choose to file two actions, one for their own individual claims, and one on behalf of the general public *after* final resolution of their individual claim.[1] Filing two separate actions on the same fact pattern obviously wastes judicial resources.

Finally, Section 17302 is unnecessary because of other provisions in the Tentative Recommendation. Section 17303's conflict of interest standard should be sufficient to weed out cases where one party simply tacks on a § 17200 claim for leverage against a defendant, where there is no genuine representation of the public. Furthermore, the intent of Section 17307 (fairness hearing for proposed settlements) is to prevent plaintiffs from agreeing to inadequate settlements, such as those that "sell out" the general public. Those two sections allow a judge to make a case-by-case determination of conflicts or harms created by a conflict, rather than applying at the outset a conclusive presumption of "inherent" conflict. Those other sections are sufficient to address the Commission's concerns and thus Section 17302 is unnecessary and should be deleted in its entirety.

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[1] Section 17302 prohibits only "contemporaneous" actions, not subsequent actions by the same plaintiff. Assuming that no statute of limitation problem exists (or perhaps the representative action could be filed and stayed pending resolution of the individual action), then a plaintiff would be able to bring two actions on the same facts.

2. Adequate legal representation and conflict of interest (§ 17303)

The adequacy determination should not be used to unreasonably delay a proceeding. For example, a party may file an action and move for a TRO on the same day. The section should clarify that the determination of adequacy is not a necessary prerequisite to the granting of a TRO.

3. Court review and approval of settlements (§ 17307)

As noted by Senator Kopp and several commentators at the November 2, 1995 Commission meeting, court review of proposed settlements and stipulated judgments creates the danger of cursory, rubber stamp approval.[2] While we support this concept, we believe that the real possibility of rubber stamp approvals makes it even more critical that res judicata not apply to such judgments, as argued in more detail below.

4. Res judicata (§ 17309)

Equitable estoppel or mootness is already available to courts as a tool for dismissing truly repetitive actions. We are not arguing against finality. We simply believe that finality is available now, with existing legal tools, for judgments that deserve finality. Once again, we note the lack of any empirical data suggesting a major problem with "follow-on" or "copy-cat" 17200 actions.

In any event, the real issue at stake when a subsequent representative action is filed is whether or not the interests of justice are served by allowing subsequent action from proceeding. This determination can only be made on a case-by-case basis, not with a blanket res judicata rule. Because current law allows this case-by-case determination, the staff draft upsets the "balance of the law" by creating a res judicata effect for a judgment in a representative action, without allowing a court in any second action the opportunity of determining whether or not the second action is truly "duplicative" or not.[3]

In our view, a court dealing with these issues must determine whether or not a subsequent representative action raises identical issues, practices, and alleged illegal conduct, and if so, whether allowing the second action to proceed would be inequitable to the defendant. A finding of inequity could be based on whether or not the prior action stopped the practice complained of and required full restitution to members of the public.

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[2] The notice provision (§ 17306), while an improvement over current law, will not guarantee sufficient input from interested parties. Public prosecutors and administrative agencies will be unlikely to use dwindling, scarce resources to contest many proposed settlements. Legal Services offices and other public interest organizations will probably not have the resources to monitor these cases either.

[3] Staff comments note that the intent of this section is to prevent "duplicative" representative actions However, the word "duplicative" is not included in the draft statute. By its language, the draft simply creates a bars to any subsequent representative action, duplicative or not, and regardless of the adequacy of the relief obtained.

This "second look" afforded the court in a subsequent action serves several important purposes, under both current law or under the new procedures contemplated by the Recommendation. First, it can correct inequities resulting from inadequate settlements that were rubber stamped by the court in the initial action. Even with court review and notice of the terms of a settlement, a stipulated judgment is still likely to be a nonadversarial proceeding. Courts simply do not engage in the same level of scrutiny in uncontested proceedings. Second, if res judicata is afforded the first judgment, the parties in the initial action have less incentive to "get the settlement right" precisely because of the potential low level of scrutiny by the court and the lack of a "second look" by a subsequent court. Unfortunately, some less scrupulous counsel may attempt to sneak bad settlements by the court and use the res judicata shield to prevent later attack on the settlement.[4] Rather than placing the responsibility entirely on the court of ensuring that the interests of justice are furthered by a proposed settlement, the possibility of a "second look" actually puts more of the responsibility on the parties.

For these reasons, the Recommendation's "solution" of res judicata would, in fact, increase the likelihood of inadequate settlements. We believe this problem would far outweigh in significance and frequency the alleged problem of "copy-cat" litigation that res judicata attempts to address.

If the Tentative Recommendation in its current form were to be introduced in the Legislature next year, Consumers Union would, regrettably, have to oppose the bill vigorously. We hope the Commission will consider our comments in its further deliberations.

Sincerely,

Earl Lui
Staff Attorney

[4] Indeed, such counsel have nothing to lose by attempting to do so. If "caught" by the Court, then the worst that would happen is they would craft a fairer settlement. However, under this new res judicata scheme, they would have a stronger negative incentive to make an attempt at benefiting themselves at the expense of the general public.

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August 28, 1996

Mr. Colin Wied, Chair
Mr. Stan Ulrich, Asst. Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite 2D
Palo Alto, CA 94303-4739

Re: Tentative Recommendation, Unfair Competition Litigation Study

Dear Chair Wied, Mr. Ulrich and Members of the Law Revision Commission:

The Center for Law In the Public Interest writes to comment upon and to express its opposition to the proposed revisions to California's Unfair Competition law (Business & Professions Code sections 17200 *et seq.*). If passed, the revisions would likely result in a vast and needless increase in the number of lawsuits filed.

The Center for Law in the Public Interest is a non-profit law firm founded 25 years ago that specializes in public interest impact litigation, counseling on public policy legal issues and legislative advocacy in the areas of civil rights, consumer, public benefits and environmental/land use law. The firm also serves as a policy and legal consultant to consumer groups and represents civil rights organizations, neighborhood coalitions, homeowner and environmental groups.

First, and as a threshold matter, we are concerned that the Commission is moving with too fast with too broad a stroke to "correct" a problem which has not in fact been demonstrated to exist other than in a few anecdotal instances. Considering the long history of the Unfair Competition law in California, any significant problems with that law justifying such a sweeping revision certainly should only be predicated upon an objective, systematic study of the law and its effects, and its record of success or failure as achieving the Legislature's aims. In light of the deep opposition to these revisions by consumer and other public interest groups, proceeding in the absence of reliable, hard evidence solely upon anecdotes and litigation "war stories" is not the most responsible path to such significant reform.

Second, and more specifically, as public interest litigators, we are particularly troubled by proposed section 17302 ("Conflict of interest in pursuing individual and representative claims"). That section would prohibit an individual from maintaining both a representative action for unfair competition and some other, presumably related, cause of action unique to that individual. Two examples of actual situations we have confronted serve to illustrate why enactment of that section would mean many more lawsuits and a needless increase in our already overwhelmed judiciary.

In the first, our plaintiff, an HIV-positive man, was denied services at a nutritional counseling center on the basis of his HIV status. The sole damages incurred were for emotional distress and violation of his civil rights. In a suit brought under the Americans with Disabilities Act (42 U.S.C. §§ 12101 *et seq.*) and California's Unruh Act (Civil Code sections 51 *et seq.*), this plaintiff sought damages, injunctive and declaratory relief. Under recent court cases, however, plaintiff would not be entitled to injunctive relief under the ADA, and potentially under California's related provisions. *See, e.g., Aikins v. St. Helena Hosp.* 843 F.Supp. 1329 (N.D. Cal. 1994) (deaf woman not entitled to injunctive relief against hospital who discriminated against her unless she could demonstrate that she is likely to return to the hospital for future services); *Atakpa v. Perimeter OB-GYN Associates*, 912 F.Supp. 1566 (N.D. Ga 1994) (same). Because monetary damages are typically minimal in such cases, a suit for damages alone provides little incentive for a business to change its discriminatory policies. In fact, it could simply treat such suits as nuisance cases and consider them the cost of doing business. A concurrently-filed claim under B&P 17200 seeking injunctive relief is a crucial component to such a lawsuit -- especially if one is concerned with vindicating the public interest of stopping the discrimination. ***Under the Commission's proposed revisions, however, this plaintiff would be forced to seek either damages under various civil rights provisions or seek injunctive relief under B&P 17200, but not both in the same suit.***

From a public policy perspective, this is senseless and would result in a needless increase of duplicative litigation. As explained above, instead of a single lawsuit in which a plaintiff could obtain both injunctive and compensatory relief, under the Commission's proposal, ***two*** separate, but essentially duplicative lawsuits would have to be filed by public-minded attorneys, thereby adding to the burden of our already clogged court system.

As well, with the proposed elimination of an injunctive relief possibility, a civil rights plaintiff with the typical minimal damages may never be able to secure representation to enforce his or her rights. Under current Ninth Circuit law, an attorneys' fees award must be commensurate with the total recovery. Thus, where a plaintiff has filed in or been removed to federal court and that plaintiff receives, *e.g.*, the minimum statutory damages for violation of the Unruh Act ($1,000), a

commensurate attorneys' fee award would in no way reflect the economics of such a suit. (Typically an attorney will invest between $30,000 and $100,000 in fees to prosecute such an action). If injunctive relief was obtained under B&P 17200 *et seq.* in conjunction with the damages, however, arguably the actual fees incurred could be considered commensurate with the recovery. Under the Commission's proposed revisions, it may thus be nearly impossible to secure private attorneys to prosecute such cases, a situation utterly at odds with the Legislature's purpose in enacting B&P 17200 *et seq.*

A second example further illustrates how dockets would bulge if the Commission's proposal is adopted. In this case, plaintiff lost her job after reporting to a state agency that her health clinic-employer failed to properly inform its clients of certain positive lab tests because to do so would mean it would have to refer the patient to an unaffiliated facility for treatment. Under the Commission's proposal, should this plaintiff seek to file a wrongful termination in violation of public policy lawsuit, the only injunctive relief available would be reinstatement -- she would be precluded from obtaining an injunction to stop the practice or requiring that the clinic notify the previous clients that they had indeed tested positive. Current Unfair Practices law, however, provides an appropriate mechanism for obtaining such crucial judicial relief. Again, precluding this plaintiff from requesting such relief would result in a continuation of this practice, the filing of a second lawsuit, or as many lawsuits as there are potential plaintiffs, or perhaps even a class action, on behalf of each of those patients.

The simple fact of the matter is that in most circumstances, common sense and judicial economy should compel as total a resolution of a dispute as possible in a single case. The B&P method of doing so has worked well for years and there is no hard data to indicate otherwise. Every rule is susceptible to abuse, of course, but sweeping changes in well established law should not be made without knowing whether the abuses are just a few bad apples.

The Commission's comment to proposed section 17302 suggests that its purpose is to address a perceived conflict of interest between an individual plaintiff seeking both damages and a broader injunction. In fact, the comment notes that "this section creates a conclusive presumption that a conflict of interest would exist in such circumstance." This presumption is far from accurate, however. Simply because there may be a *different* interest in the extent of relief sought between an individual litigant and broader injunctive relief does not mean that there is always a *conflict* of interest -- yet alone a "conclusive" conflict. If the conflict were so "conclusive," the attorneys representing plaintiffs in a long line of cases in which an individual plaintiff seeks and obtains injunctive relief, the effect of which extends beyond the individual's situation, would all have potentially breached their ethical duties to avoid conflicts.

See, e.g., Bresgal v. Brock, 843 F.2d 1163, 1170-71 (9th Cir. 1987) (class wide injunctive relief may be appropriate even in an individual action); *Soto-Lopez v. New York City Civil Service Com'n*, 840 F.2d 162, 168-69 (2nd Cir. 1988) (same). Of course, that simply has not happened. Moreover, any determination of an actual conflict would be more than adequately resolved at the proposed section 17307 hearing (requiring that the Court conduct a hearing to determine whether a proposed judgment is adequate and reasonably protects the public interest). This hearing procedure should be -- and will be -- entirely sufficient to ensure the adequacy of any proposed judgment.

With this understanding of the potential public policy implications of the Commission's current proposal, both as it would increase the number of lawsuits filed and result in the continuation of egregious business practices potentially exposing a great number of California's citizens to extreme health risks, the Center hopes that the Commission will not either slam the courthouse door in the face of public interest litigants or needlessly force them to open that door over and over in the same case. The Commission should eliminate section 17302 from the proposed revisions.

Very truly yours,

Gus T. May

GTM:ga

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August 29, 1996

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

Re: *Tentative Recommendation, Unfair Competition Litigation*

Dear Members of the Law Revision Commission:

I am writing to comment on the Commission's tentative recommendation concerning the Unfair Business Practices Act, Business and Professions Code section 17200, et seq (§17200). The attorneys at San Fernando Valley Neighborhood Legal Services, Inc. (SFVNLS) have used §17200 in a variety of cases over the last 16 years to address real property fraud operations, deceptive trade schools and unfair consumer credit reporting practices. Over that time, I have not seen any evidence that there are practical problems with the statute that need to be addressed through legislative action. These statutes provide an effective and fair vehicle to redress fraudulent and unfair business practices.

The three most significant concerns I have with the tentative recommendation are with sections 17302, 17309 and 17310, addressing "conflict of interest," the "binding effect," and the "priority between prosecutor and private plaintiff."

Section 17302. Conflict of Interest in Pursuing Individual and Representative Claims

This provision would make it very difficult for low-income victims to obtain complete relief against a defendant, that is, damages for the harm caused and injunctive relief prohibiting the defendant from engaging in that conduct in the future. This section forces indigent consumers, especially those represented by legal aid organizations, to choose between obtaining a refund or other damages due them from a defendant and from prohibiting the defendant from continuing to defraud consumers in the future. As a practical matter, our office would probably not be able to pursue injunctive relief against many fraudulent defendants as our clients would understandably want and need a return of the funds defrauded from them. Since consumer victims often have relatively small recoveries or their cases require substantial retainers, e.g., in cases of real property fraud, legal aid offices are the only ones able to obtain any relief for them.

For example, last year our office obtained a permanent injunction, damages and restitution against a non-lawyer who was operating a business under the name "Legal Aid Association." *Cash v. Wade*, Los Angeles Superior Court case no. BC116311. He took fees from low and moderate income persons in exchange for empty promises to help them with divorces, evictions and bankruptcies. Several clients were defrauded by this person, but their damages were too small to interest a private attorney, even taken together. We sued on behalf of one victim and the general public under §17200 and obtained a judgment for the named plaintiff, specific restitution for three other victims, an order of restitution for all other victims, and a permanent injunction prohibiting his activities. After judgment we found additional victims and, using that judgment, required him to pay restitution to them as well. There was no conflict between our role as advocates for the individuals and those of the general public. If, however, we were precluded from doing both, the victims no doubt would have preferred that we obtain refunds for them. The defendant would likely have continued defrauding others.

Section 17310. Priority Between Prosecutor and Private Plaintiff

The fact that an action is brought by a public prosecutor rather than a public interest lawyer or private attorney does not mean the action will more likely benefit the general public. One example is *People v. Marshall Redman, et al.*, Los Angeles Superior Court case no. BC097765. The final judgment entered on May 31, 1995 indicates it was brought pursuant to §§17200 and 17500 of the Business and Professions Code. While the judgment provided for injunctive relief against the defendants, apparently for real property fraud, it provided little in terms of monetary compensation for the victims. The judgment provides for $580,000 in civil penalties and attorneys' fees, but most of that money goes to the prosecuting attorneys' offices and the cities for which they work. Moreover, most of the money comes from a receivership estate created by the judgment to manage the properties of the victims, thus, most of the fees and penalties will be paid by the ongoing payments of the defendants' victims. It seems the general public would have been better served if the victims -- most of them low-income families -- had received most or all of that $580,000.

Section 17309. Binding Effect of Judgment in Representative Action

Our office currently represents nine low-income renters and the general public in a §17200 case against a consumer credit reporting agency. When we initially filed this action in 1987, the Santa Monica City Attorney's office had a §17200 action against the same agency. Although the City Attorney's action was pleaded broadly, that office was primarily concerned with a few narrow aspects of the agency's practices, i.e., certain notices provided to consumers. The City Attorney settled with the agency on these few issues and did not pursue other claims or practices. Our action sought redress for a number of other practices that were arguably

subsumed in the Santa Monica City Attorney's complaint, but were, in fact, not addressed. The Court of Appeal recently ruled that the agency engaged in conduct that was illegal -- it required a consumer to give the agency access to her medical, financial and other personal records to resolve a dispute. *Cisneros v. UD Registry, Inc.* (1995) 39 Cal.App.4th 548, 574-76. The Court of Appeal remanded the case to the trial court to determine whether other practices are unlawful and should be enjoined under §17200. Had the Santa Monica City Attorney's case been res judicata as proposed, these practices may not have been redressed, adversely affecting the general public.

The *Redman* case also demonstrates why the res judicata provisions may cause significant problems. It appears the prosecuting attorneys may not have been aware of the extent of the fraud engaged in by defendants and there may be hundreds more victims than they realized. Under the set-off provision of §17309(b), the defendants' liabilities are capped by the terms of the first judgment, even if other uncompensated victims exist.

The proposed revisions do not address any real problems that have arisen in these statutes. They would result in more harm to victims than the perceived ills they seek to cure.

Very truly yours,

David Pallack
Director of Litigation

DP:KK

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August 29, 1996

Colin Wied, Chairperson
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739
BY OVERNIGHT DELIVERY

Re: Opposition to Portions of the Commission's Tentative Recommendation for Amendment of Unfair Competition Law

Dear Mr. Wied and Members of the California Law Revision Commission:

We strongly oppose certain of the Commission's tentative recommendations pertaining to unfair competition law. If these recommendations were to be adopted into law, many victimized individuals would be effectively deprived of meaningful relief from the courts.

The unfair competition law is founded on the premise that vulnerable individuals need practical access to the courts in order to protect themselves from unscrupulous business practices. The Commission's tentative recommendations would destroy that protection. We urge the Commission to withdraw its recommendations, as explained below, in order to preserve access to justice for all Californians.

Bet Tzedek's Experience With Unfair Competition Law

Bet Tzedek Legal Services provides free legal services to indigent residents of Los Angeles County. We represent over 6,000 clients each year in matters such as evictions, foreclosures, bankruptcies, denials of public benefits, and elder abuse.

Our clients -- generally elderly, disabled and/or unsophisticated -- present easy targets for unscrupulous businesses and scam artists. Our typical client may sign a document that he or she cannot even understand. Compounding the problem, he or she then may not be knowledgeable enough to recognize a legal violation, or strong enough to contest a collection action or a foreclosure.

Our clients represent only the tip of an iceberg. For every client we defend against an unlawful or fraudulent business practice, we can assume that countless other victimized individuals are wholly unrepresented.

BET TZEDEK, The House of Justice,
is a non-profit organization funded in part by the Jewish Federation Council of Greater Los Angeles, United Way, the State Bar of California, the City of West Hollywood, and the City and County of Los Angeles.

For example, Bet Tzedek represents many elderly persons who have been tricked into borrowing money to pay for worthless services (such as shoddy home improvements or carpet cleaning), often unknowingly putting up their lifelong homes as security. We know that thousands of elderly persons are targeted in such schemes, although a relatively small percentage of those targeted persons seeks help from Bet Tzedek and similar organizations.

To attack such problems on a comprehensive basis, Bet Tzedek frequently brings unfair competition causes of action on behalf of the general public. While seeking the revocation of a deed of trust, for example, Bet Tzedek often requests and obtains injunctive relief to prohibit the offending business from using the same fraudulent practices against other consumers. Similarly, we recently obtained a settlement under the unfair competition law which obligates a major department store to cease certain illegal debt collection practices. Also recently, we entered into a settlement under the unfair competition law which obligates a slum landlord to make numerous repairs for the benefit of all of a building's tenants.

Two Primary Problems in the Commission's Tentative Recommendation

1. Proposed Section 17302: Prohibiting a Litigant From Suing on Behalf of the General Public, if He or She Also Brings an Individual Cause of Action

Under the Commission's Tentative Recommendation, proposed section 17302 of the Business and Professions Code[1] states that "[a] person may not maintain an individual cause of action, whether for unfair competition or some other cause, and in the same action or in a contemporaneous action against the same defendant also seek to represent the interests of the general public by way of a representative cause of action." Under this proposed section, if an individual were to sue on behalf of the general public, he or she would be able to receive relief only if that relief were provided as part of class-wide relief. See Comment to proposed section 17302.

As a practical matter, proposed section 17302 would allow a plaintiff or cross-complainant to sue on behalf of the general public only when he or she had a relatively nominal and easily-calculable claim for individual relief. If, for example, an individual were charged an improper service fee by a bank, he or she could receive a refund as part of restitution paid to all relevant members of the general public.

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[1] All subsequent citations refer to the Business and Professions Code.

If, on the other hand, an individual had a larger or more complicated claim for relief, proposed section 17302 essentially would not allow him or her to seek relief on behalf of the general public. Recurring Bet Tzedek cases illustrate the problem with this provision. Assume that a shady loan brokerage company has pushed an elderly woman into foreclosure through the use of deceptive and illegal documents. If the woman wishes to revoke a deed of trust and/or recover damages from the company, she would be prohibited from seeking injunctive relief on behalf of potential future victims. Similarly, assume that a child has suffered rat bites due to the negligence of a slum landlord. If the child sues to recover damages for the injury that he has suffered, proposed section 17302 would prohibit him from seeking injunctive relief on behalf of other children living in the same building.

For these reasons, proposed section 17302 essentially would exempt the worst offenders from broad injunctive relief. If a wrongdoer were to cause nominal damage to various individuals, one of the victims could bring an unfair competition suit. If, on the other hand, a wrongdoer were to steal homes or abuse elders on a widespread basis, proposed section 17302 would prevent any of the victims from adding a unfair competition claim to their damage lawsuits.

Proposed section 17302 is based on the faulty premise that lawsuits on behalf of the general public should be brought by "pure" litigants, *i.e.*, persons with no significant individual interest. On the contrary, generally an action on behalf of the general public only will be brought by someone who has suffered significant individualized damage. No one else would be willing to invest the time and effort necessary to litigate a broad challenge to unscrupulous business practices. Even assuming that another person were willing to prosecute such a suit, there is no good reason why the already overworked court system should be forced to adjudicate two cases concerning essentially the same conduct.

The Commission evidently is concerned about the possibility that a private litigant will tack on unfair competition claims in order to gain leverage during litigation. This concern does not warrant the blanket prohibition contained in proposed section 17302. The Commission's concerns are better addressed by a case-by-case determination of any conflict of interest; such a process is provided by proposed section 17303(b).[2]

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[2] "A private plaintiff in a representative action may not have a conflict of interest that reasonably could compromise the good faith representation of the interests of the general public pled." Proposed Section 17303(b).

2. Proposed Section 17309(a): Barring Representative Actions if a Previous Case Has Been Brought on Behalf of the General Public

Under the Commission's Tentative Recommendation, proposed section 17309(a) of the Business and Professions Code would state that "[t]he determination of a representative cause of action in a judgment approved by the court pursuant to Section 17307 is conclusive and bars any further actions on representative causes of action against the same defendant based on substantially similar facts and theories of liability."

This proposed section unfairly would apply a res judicata bar against parties who have received no notice of a lawsuit brought on behalf of the general public.[3] The proposed section thus would not satisfy due process requirements. See, e.g., Frazier v. City of Richmond, 184 Cal. App. 3d 1491, 1498-99 (1986); Bell v. American Title Ins. Co., 226 Cal. App. 3d 1589, 1610, 277 Cal. Rptr. 583, 595 (1991).[4]

In addition, proposed section 17309(a) would create a significant danger of collusive settlements. A wrongdoer might try to insulate itself against representative actions by encouraging and then settling a "friendly" unfair competition lawsuit brought on behalf of the general public.

We recognize that proposed section 17309(a) would apply a res judicata bar only to subsequent representative actions. This is no small matter. As courts have recognized, a representative action sometimes is an individual's only chance for meaningful relief. See, e.g., Fletcher v. Security Pacific Nat'l Bank, 23 Cal. 3d 442, 452, 153 Cal. Rptr. 28, 34 (1979) ("Because of the relatively small individual recovery at issue here, the court may find that a denial of class status . . . would, as a practical matter, insulate defendant from *any*

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[3] Proposed section 17306 provides for notice only to the Attorney General, the local district attorney, other parties with similar cases against the defendant, persons who have filed a request for notice, and "[o]ther persons as ordered by the court."

[4] The Commission claims that "the individual has no constitutional right to bring a representative action." Tentative Recommendation, p. 9. This statement is not supported by the Commission's legal authority, which primarily states that under certain circumstances a class action may be preferable to a representative action brought under unfair competition law. See Tentative Recommendation, p. 9 n.36 (citations to Fletcher v. Security Pacific Nat'l Bank and Bronco Wine Co. v. Frank A. Logoluso Farms).

damage claim.") (emphasis in original). We can state from experience that a representative action frequently is the only legal avenue for our vulnerable and victimized clients.

Furthermore, we question the necessity for proposed section 17309(a). In our practice, we have not observed duplicative actions brought on behalf of the general public. If problems do in fact exist, there is no reason why they cannot be resolved through use of the legal doctrines of equitable estoppel and mootness. A defendant sued in a purely duplicative representative action may end the litigation quickly by raising these defenses in a summary judgment motion.

Conclusion

We respectfully request that the Commission delete proposed sections 17302 and 17309(a) from its Tentative Recommendation. If adopted, they would deprive many vulnerable Californians of their only real protection against illegal and fraudulent business practices.

Sincerely,

David A. Lash
Executive Director

William J. Flanagan
Director of Litigation

Eric M. Carlson
Director of Nursing Home Advocacy Project

THE LEGAL SERVICES SECTION
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CALIFORNIA 94102-4498
(415) 561-8250

TO: California Law Revision Commission

FROM: Kenneth W. Babcock, Chair
Legal Services Section

DATE: August 29, 1996

RE: Comments re California Law Revision Commission's Tentative Recommendation re Unfair Competition Litigation (May 1996), No. B-700

The Legal Services Section of the State Bar of California (hereinafter "LSS") respectfully submits the following comment to the California Law Revision Commission concerning its Tentative Recommendation regarding Unfair Competition Litigation.

INTRODUCTION

By way of background, the LSS is a voluntary membership body within the State Bar. It consists of approximately 800 members. This comment has been prepared for the LSS by its Executive Committee and its Standing Committee on Consumer Advocacy. We anticipate that other Sections of the State Bar will submit their own comments as well. The LSS Executive Committee is generally charged with the oversight and management of the LSS' business as well as the business of its standing committees. The LSS' Consumer Advocacy Committee consists of attorneys and advocates with considerable experience in litigating unfair competition cases under Business & Professions Code § 17200. The Consumer Advocacy Committee contains representatives of both public prosecutors' offices who have experience litigating what the Tentative Recommendation's Proposed Legislation calls "enforcement actions" and non-profit public interest and legal services organizations who have experience litigating what the Proposed Legislation refers to as a "representative cause of action".[1] Finally, we note that several

[1] As the Commission is aware, the Proposed Legislation draws a distinction between enforcement actions and representative causes of action. This distinction has caused a difference of opinion between the Consumer Advocacy Committee's public prosecutor members and its non-profit, public interest/legal services members with respect to one of the proposed provisions, Section 17310, which we note in our comment.

members of the LSS, acting in their individual capacities, have attended various of the meetings held by the Commission over the course of the last year concerning the unfair competition litigation study.

GENERAL COMMENTS

While our comment focuses on the language in the Proposed Legislation portion of the Tentative Recommendation, we begin with a general observation concerning the Tentative Recommendation. Simply put, we do not believe the "problem" identified by the Commission is so great as to warrant the drastic changes to unfair competition law the Commission proposes. To the extent there are abuses with respect to unfair competition litigation, we believe it to be a problem involving few lawyers and a small handful of cases. Based on a few anecdotal instances of so called abuse, the Commission has proposed a system which will overly complicate unfair competition litigation and which will make it more difficult for public interest and legal services organizations as well as private practitioners to seek redress for genuine instances of unfair competition. To the extent there are abuses in unfair competition litigation, individual courts presently have the power to address them. The Proposed Legislation will not put an end to so called "abuses" and will significantly hamper those who sue under the unfair competition law for the public good.

COMMENTS TO SPECIFIC PROPOSED SECTIONS

The following are the LSS's comments with respect to specific sections in the Proposed Legislation:

Section 17301

The LSS does not oppose the requirement in proposed subdivision (b) that a representative cause of action be separately pleaded and specifically designated as being brought on behalf of the general public.

Section 17302

The LSS views this provision as extremely problematic. The entire concept behind this section is based on the erroneous assumption that preventing a plaintiff in a representative action from having an interest in the action will ensure the bona fides of that plaintiff's desire to benefit the general public. We believe the exact opposite will be the result.

The purpose of the proposed section appears to be the elimination of the practice of including an unfair competition cause of action for the general public in a lawsuit involving a private dispute without a sincere motivation to benefit the general public. To be sure, adding such a cause of action for the sole purpose of expanding discovery or increasing settlement pressure to gain an advantage in a purely private dispute would be improper. But in addressing this potential for abuse, proposed Section 17302 would open the door wide for the very kind of unmeritorious unfair competition cases the Commission seeks to preclude. This section would not prevent the filing of "phoney" unfair competition litigation. In fact, such suits could well

become the norm as legitimate public interest, legal services and private practitioners will be effectively precluded from bringing representative actions since they would typically act only on behalf of an injured client.

There simply is no basis for the assumption that a plaintiff who alleges both individual and representative causes of action in the same lawsuit will not seek to protect the interests of the general public. A number of reported appellate decisions provide examples of how private plaintiffs who have suffered individual harm have sued on their and the general public's behalf and properly represented both interests. For example, in Hernandez v. Stabach (1983) 145 Cal. App. 3d 309, 193 Cal. Rptr. 350, the Court of Appeal affirmed a lower court's issuance of a preliminary injunction in an action brought by low income renters in a run down slum apartment who sought to prevent their landlord from, among other things, violating applicable building or health and safety codes. The tenants had sought to end the uninhabitable, dangerous and unhealthful conditions in which they lived only to face a series of improper eviction actions by the landlord. Through their unfair competition action, the renters were able to obtain an appropriate injunction to benefit themselves and other similarly situated tenants from the landlord's abusive practices.

Examples of the many other cases in which injured individuals have brought actions both on their own and the general public's behalf include Fletcher v. Security Pacific Nat'l Bank (1979) 23 Cal. 3d 442, 591 P.2d 51, 153 Cal. Rptr. 28 (Supreme Court remanded to trial court for determination of remedy in action brought by bank customer seeking restitution for himself and the general public for unfair calculation of interest); Barquis v. Merchants Collection Ass'n of Oakland (1972) 7 Cal. 3d 94, 496 P. 2d 817, 101 Cal. Rptr. 745 (Supreme Court reversed lower court order denying injunctive relief in action brought by individuals on their and the general public's behalf against collection agency which engaged in unfair business practice by routinely filing debt collection actions in counties of improper venue with the intent and effect of having their adversaries default); and Cisneros v. U.D. Registry, Inc. (1995) 39 Cal. App. 4th 548, 46 Cal. Rptr. 2d 233 (Court of Appeal reversed lower court's sustaining of demurrer without leave to amend in action brought by low income renters on behalf of themselves and the general public seeking injunctive relief under § 17200, as well as damages under a variety of other statutory rights of action, against a business which was violating fair credit reporting statutes by gathering information concerning residential renters and selling it to landlords).

If Section 17302 were the law, the likelihood is that none of the above noted cases would have been brought. It is unrealistic to think that a completely uninjured party would file a representative action -- acting as a "white knight" to come to the aid of the general public. Instead it is those who have suffered injury who are interested enough in the particular unfair business practice to be likely to sue. Proposed Section 17302 would require those persons to forgo their individual claims in favor of the representative action. Moreover, it would put counsel for plaintiffs in such actions in a real dilemma exposing them to potential malpractice claims for failing to pursue meritorious claims. The practical result is that few, if any, of those injured parties who could bring a representative cause of action will do so.

In fact, frivolous Section 17200 claims are just as likely, or even more likely, in lawsuits brought by uninjured plaintiffs, such as attorneys who file Section 17200 actions on behalf of themselves, other uninjured members of their law offices or for fictitious "consumer rights"

organizations, for the sole purpose of coercing settlements and obtaining attorneys' fees from defendants. See, Bell v. American Title Ins. Co. (1991) 226 Cal. App. 3d 1589, 1600, 277 Cal. Rptr. 583, 588 (Court notes trial court findings concerning non bona fide consumer organization's activities in unfair competition litigation). The proposed section would serve to sanction and encourage these abusive lawsuits.

Section 17303

While the LSS supports the general principal that an attorney representing a plaintiff in a representative action be an adequate representative of the general public's interest, the language in proposed Section 17303 does not achieve that purpose. The standards for the adequacy of representation hearing are not defined. While the staff comment states that determination of whether the plaintiff's attorney has a conflict of interest should be determined by analogy to class action principles, it provides no other guidance for a court in determining whether the plaintiff's attorney is an adequate representative. Moreover, it would be extremely easy for an attorney to satisfy the undefined standard in this section and make it appear that he or she is an adequate representative when in fact they are not. Indeed, because the court's hearing is based on the pleadings, a lawyer could simply plead around the adequacy requirement. To the extent that any abuses in the area of unfair competition litigation have occurred, it is through the filing of frivolous lawsuits -- not because of the inexperience of counsel. There is no reason to believe that a junior legal aid or public interest attorney, who the court might find to be an inadequate representative, would in fact be an inappropriate representative of the general public's interest. By the same token, an experienced attorney who has abused Section 17200 in the past could be found to be an adequate representative under the proposed standard.

We note that the language in the proposed section also leaves it unclear as to whether a plaintiff in a representative action could obtain preliminary relief, such as a temporary restraining order or a preliminary injunction, prior to the adequacy of representation hearing. The language in the section should make clear that a court may not deny such a request for preliminary relief on the grounds that the hearing contemplated by the Section has not been held.

Section 17304

The LSS does not oppose the concept of providing notice to law enforcement of the pendency of a representative action. We believe, however, that a notice period which ran for 30 days from the date the action was filed would be more appropriate -- particularly if the Commission were to eliminate the early adequacy of representation hearing in Section 17303.

Section 17305

The LSS supports the concept in proposed Section 17305. We note, however, that there does not appear to be any remedy against a defendant who does not comply with the proposed section's disclosure requirement. We suggest that appropriate remedies for non-disclosure would include discovery type sanctions and the exclusion of undisclosed cases from the set-off provision of proposed Section 17309.

Section 17306

The language in proposed Section 17306 raises several concerns. As to the general concept of prenotification, we believe that, as structured in the proposed section, it is essentially meaningless. The proposal does not prevent sweetheart deals or collusive settlements because the protection mechanism is ineffective. Those who would receive the notice would have little time to review and evaluate the proposed settlement, decide whether to intervene and prepare an application for intervention for filing sufficiently in advance of the hearing anticipated by proposed Section 17307. As a result, those entities and individuals who could object will rarely, if ever, have the practical ability to object to proposed settlements. Given the limited resources of most public prosecutors' offices, it is questionable how many, if any, public prosecutors will ever seek to intervene. Moreover, it is extremely unlikely that a court would be willing to entertain objections from intervenors at the eleventh hour, right before the court is about to enter judgment. Finally, we do not believe it is realistic to apply the 45 day prejudgment notification period to cases that go to trial. If a judge has heard all the evidence in a case and is ready to rule, it is unclear why the court should have to wait 45 days to enter judgment.

Section 17307

The hearing called for by proposed Section 17307 leaves the door open for "rubber stamp" approvals of settlements. To ensure that the court actually determines the sufficiency of the settlement, the court should be required to make written findings concerning the adequacy of the settlement. We suggest that those findings include specific findings concerning the nature of the practice at issue, the type and amount of harm involved, the difficulty in determining the number of the members of the general public affected and the difficulty or ease in returning money to individual victims. Moreover, under proposed subdivision (b)(1) the court would determine at the hearing whether the settlement is "fair, reasonable and adequate to protect the interests of the general public pled." The standard should be further defined in the section to require that the court look to whether the settlement is sufficient, in terms of the injunctive and restitutionary relief obtained, to justify a court in any subsequent action concluding that the general public should be precluded from further action (where, as we discuss below, we believe the determination of the binding effect of the resolution should be made).

Section 17308

The LSS sees a number of problems with this proposed section. There are no standards in the proposed section for determining when a case should be dismissed. The proposal seems to assume that all dismissals, settlements and compromises will result in a judgment. That is not the case -- indeed it is much more common that cases are settled without entry of a judgment. It is unclear from the proposed section whether those dismissals, settlements and compromises which do not result in a judgment are subject to the provisions of the chapter. Moreover, it is unclear what the term "substantial compliance" means. A court could interpret the "substantial compliance" requirement in such a way as to apply only to certain settlements and compromises, thereby allowing for the same type of collusive or abusive behavior that the Commission seeks to address. The Commission should spell out for courts how to deal with dispositions which do not result in a judgment since the hearing under proposed Section 17307 only seems to apply to judgments.

Section 17309

The LSS views this proposed section as one of the more problematic in the Tentative Recommendation. We believe that the determination of the binding effect of the resolution of a representative action, if any, should be made in any subsequent action -- not by the court in the original representative action. A court in any subsequent action is in the best position to determine, on a case by case basis, whether the facts support the conclusion that the resolution of the first action should have binding effect. Existing doctrines such as equitable estoppel and mootness are available to serve as the basis for the court in a second action to determine whether that second action is truly duplicative.

Allowing the court in a subsequent action a "second look" at the resolution of the earlier action serves several important purposes, under both current law or under the new procedures contemplated by the Tentative Recommendation. First, it can correct inequities resulting from inadequate settlements that were "rubber stamped" by the court in the initial action. As discussed above, even with court review and notice of the terms of the settlement, a stipulated judgment is still likely to be a nonadversarial proceeding. Second, if res judicata is afforded the first judgment, the parties in the initial action have less incentive to "get the settlement right" precisely because of the low level of scrutiny by the court in the first action and the lack of review by a court in a subsequent action. Rather than placing the full responsibility on the court of ensuring that the interests of justice are furthered by a proposed settlement, the possibility of a "second look" actually puts more responsibility on the parties, where it belongs.

The LSS is mindful, however, of the desire of a defendant in a subsequent action, having previously settled an unfair competition claim brought on behalf of the general public, to avoid protracted litigation in that subsequent suit. Accordingly, we believe it appropriate that the issue be addressed early in any subsequent suit. The issue should be raised by way of a motion to dismiss at which the court would consider evidence as to the binding effect issue. Defendants could raise the issue of the binding effect of the prior action in their responsive pleading, which under Code of Civil Procedure Sections 412.20 and 430.40 would be made within 30 days of service of the summons and complaint. Failure to do so would result in a waiver of the defendant's ability to argue that the result in the earlier suit had binding effect on the claims of the general public raised in the subsequent suit. Rather than have a conclusive, irrebuttable presumption of binding effect in the first action, we believe there should be a rebuttable presumption in the subsequent action that the resolution of the prior action so sufficiently protected the interests of the general public that it be given binding effect. As such, the plaintiff would have the burden of showing that the prior resolution did not sufficiently protect the general public's interests. In its discretion the court in the subsequent action could allow limited discovery on the issue of the fairness and adequacy of the earlier resolution as it affects the subsequent case. By adopting such a procedure for early determination of the binding effect in subsequent actions, we believe the interests of plaintiffs, defendants and the general public can be protected.

The LSS also believes that proposed subdivision (b) contains a number of problems. The proposed language allows for a set off of restitution due to the person. A set off should only be allowed, however, for restitution paid by the defendant to the person. Defendants should be

encouraged to satisfy any outstanding judgment -- they should not be given credit for recovery amounts they have not paid.

The reference in the subdivision to the pro rata share of indirect restitutionary relief is even more troubling. We believe this figure will be impossible to determine. To arrive at this figure, the court will have to engage in a quantitative and a qualitative analysis of any prior indirect restitutionary recovery. Without knowing the number of total victims, either because they are unknown, there are no records or at the stage of the case that the prior action was settled there had not been significant discovery, a court could not possibly determine, other than by simply guessing, the pro rata set off amount. Moreover, the court would be required to determine the extent to which indirect recovery, such as through cy pres distributions, benefited a particular individual. It is difficult to see how a cy pres distribution to an organization or entity that would have a localized effect would be of sufficient benefit to an individual in another part of the state sufficient to warrant a set off. Finally, there is no good policy reason why a defendant should be entitled to a set off until the defendant has disgorged all of the ill gotten gain it has received by way of the unfair practice, which typically would not have happened if the prior action was settled. For these reasons, we believe a defendant's set off should be limited just to those amounts actually received by the individual plaintiff in the subsequent action.

Section 17310

With respect to proposed Section 17310, the LSS's Consumer Advocacy Committee is of two minds. Those public prosecutors on the Committee support the principal of a stay of any representative action pending resolution of the enforcement action. Indeed, those members of the Committee would have the Commission go further and impose a stay regardless of whether the enforcement action was filed before or after the representative action.

Those members who represent public interest or legal services organizations or who are private practitioners prefer that the issue be left up to the court and that the court have a range of options available, including stays, consolidation, coordination and "low numbering." These members also note that subdivision (a) requires that the court stay the representative action unless, in the interests of justice, the court believes an order of consolidation is more appropriate. Under subdivision (b), however, the court may not order consolidation, regardless of the interests of justice, if the enforcement action was filed first and it seeks substantial restitution. As a practical matter, this means a stay will be required in virtually all instances in which the enforcement action was filed first since prosecutors typically seek substantial restitution. Whether the enforcement action actually results in substantial restitution is another story. Given the no intervention provision in subdivision (b), the plaintiff in the representative action, who is the person most likely to bring to the court's attention the inadequacy of the restitutionary relief in the enforcement action, is precluded from doing so. Accordingly, the no intervention provision should be eliminated, leaving the issue of intervention in the court's discretion.

Section 17311

The LSS supports the provisions in this proposed section.

Section 17319

The LSS opposes the application of this chapter to existing cases. There has been no showing that the "problem" with respect to unfair competition litigation is so drastic as to justify the tremendous burden on litigants and the courts which retroactive application would cause. The chapter should operate prospectively only, if at all.

Public Counsel

YEARS OF SERVICE 25

THE PUBLIC INTEREST LAW OFFICE OF THE LOS ANGELES COUNTY AND BEVERLY HILLS BAR ASSOCIATIONS

BY FIRST CLASS MAIL AND FACSIMILE

August 30, 1996

Law Revision Commission
RECEIVED
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File:

Stan Ulrich
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite 2D
Palo Alto, CA 94303-4739

RE: Comments re California Law Revision Commission's Tentative Recommendation re Unfair Competition Litigation (May 1996)

Dear Mr. Ulrich:

Public Counsel respectfully submits the following comments to the California Law Revision Commission's Tentative Recommendation regarding Unfair Competition Litigation.

By way of background, Public Counsel is the public interest law firm of the Los Angeles County and Beverly Hills Bar Associations. Founded in the early 1970s, we are the oldest and largest bar sponsored pro bono law firm in the nation. Over many years of practice, we have provided direct assistance and recruited and trained volunteer attorneys to provide assistance to hundreds of victims of consumer fraud. Both Public Counsel staff attorneys and volunteer attorneys frequently utilize California Business and Professions Code Sections 17200 *et seq.* ("Section 17200") in an attempt to end ongoing unlawful, unfair and deceptive business practices engaged in by individuals and business in Los Angeles County and to provide restitution to the often hundreds of victims of these consumer scams.

GENERAL COMMENTS

We have generally followed, over the course of the last year, the Commission's review of unfair competition litigation. We attended two of the Commission's meetings concerning the subject, one in San Francisco in September 1995 and one in Los Angeles in January 1996. Based on the Commission's drafts, the discussions we heard and participated in at the two

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meetings we attended, our discussions with colleagues and our and our volunteers' experiences, we are not convinced that the problems cited by the Commission regarding Section 17200 as it currently stands are so widespread as to warrant a complete overhaul of the law. Abuses of Section 17200, if any, are confined to a small number of cases instigated by a few lawyers. For the most part, Section 17200 is an important and effective means of supplementing law enforcement efforts in ridding society of individuals and entities who prey upon consumers by violating the law and engaging in unfair and deceptive practices. The Commission's recommendations overly complicate Section 17200 litigation and create additional problems which will make it more difficult for public interest and legal services organizations, as well as private practitioners, to seek redress for genuine instances of unfair competition. Moreover, the proposed legislation does little to address the so called "abuses" that the Commission cites.

COMMENTS TO SPECIFIC PROPOSED SECTIONS

Section 17301. Requirements for pleading representative cause of action.

We do not oppose the provision in subdivision (b) that a representative cause of action be separately pleaded and specifically designated as brought on behalf of the general public.

Section 17302. Conflict of interest in pursuing individual and representative claims.

The Commission's assumption underlying this proposed section, that an injured plaintiff is incapable of adequately representing both his or her own interests and the interests of the general public, is erroneous. A number of reported appellate decisions provide examples of how private plaintiffs who have suffered individual harm have sued on their and the general public's behalf and properly represented both interests. For example, in Hernandez v. Stabach (1983) 145 Cal. App. 3d 309, 193 Cal. Rptr. 350, the Court of Appeal affirmed a lower court's issuance of a preliminary injunction in an action brought by low income renters in a run down slum apartment who sought to prevent their landlord from, among other things, violating applicable building or health and safety codes. The tenants had sought to end the uninhabitable, dangerous and unhealthful conditions in which they lived only to face a series of improper eviction actions by the landlord. Through their unfair competition action, the renters were able to obtain an appropriate injunction to benefit themselves and other similarly situated tenants from the landlord's abusive practices.

Examples of the many other cases in which injured individuals have brought actions both on their own and the general public's behalf include Fletcher v. Security Pacific Nat'l Bank (1979) 23 Cal. 3d 442, 591 P.2d 51, 153 Cal. Rptr. 28 (Supreme Court remanded to trial court for determination of remedy in action brought by bank customer seeking restitution for himself and the general public for unfair calculation of interest); Barquis v. Merchants Collection Ass'n of Oakland (1972) 7 Cal. 3d 94, 496 P. 2d 817, 101 Cal. Rptr. 745 (Supreme Court reversed

lower court order denying injunctive relief in action brought by individuals on their and the general public's behalf against collection agency which engaged in unfair business practice by routinely filing debt collection actions in counties of improper venue with the intent and effect of having their adversaries default); and Cisneros v. U.D. Registry, Inc. (1995) 39 Cal. App. 4th 548, 46 Cal. Rptr. 2d 233 (Court of Appeal reversed lower court's sustaining of demurrer without leave to amend in action brought by low income renters on behalf of themselves and the general public seeking injunctive relief under § 17200, as well as damages under a variety of other statutory rights of action, against a business which was violating fair credit reporting statutes by gathering information concerning residential renters and selling it to landlords). If section 17302 were the law, the above noted cases would probably never have been brought.

In fact, frivolous Section 17200 claims are just as likely, or even more likely, in lawsuits brought by uninjured plaintiffs, such as attorneys who file Section 17200 actions on behalf of themselves, other uninjured members of their law offices or for fictitious "consumer rights" organizations, for the sole purpose of coercing settlements and obtaining attorneys' fees from defendants. See, Bell v. American Title Ins. Co. (1991) 226 Cal. App. 3d 1589, 1600, 277 Cal. Rptr. 583, 588 (Court notes trial court findings concerning non bona fide consumer organization's activities in unfair competition litigation); Yancy v. American Savings & Loan Ass'n (1989) 262 Cal. Rptr. 792 (Unpublished opinion referred to herein solely for further background information regarding the non bona fide consumer organization referred to in Bell). The proposed section would serve to sanction and encourage these abusive lawsuits.

On the other hand, the proposed section would effectively preclude the ability of legitimate public interest, legal services and private practitioners to bring representative actions. Not only do these lawyers typically act only on behalf of an injured client, they often only learn of the unfair competition through injured clients. The proposed section would require legitimate lawyers to ask their injured clients to forego individual relief (who would be unlikely to do so) and/or expose counsel to potential malpractice claims for failing to pursue meritorious claims on behalf of their clients. In any event, to the extent that a conflict of interest does exist in a particular case which prevents an individual plaintiff from adequately representing the interests of the general public, that problem is adequately addressed by proposed section 17303(b).

Section 17303. Adequate legal representation and absence of conflict of interest.

Proposed subdivision (a) is problematic in that it fails to define the standards for determining whether an attorney is an "adequate" legal representative. There is no reason why a junior legal aid or public interest lawyer could not be an "adequate" representative of the general public, nor is there any assurance that an experienced and seasoned private attorney will not bring a frivolous Section 17200 action. In any event, the elimination of frivolous claims is best achieved through the many litigation procedures designed precisely for this purpose, not by attempting to assess the caliber of counsel bringing the claim.

We do not oppose proposed subdivision (b), and in fact believe that this section eliminates the need for Section 17302, as discussed above.

Finally, proposed subdivision (c) should make clear that the hearing requirements shall not unreasonably delay the imposition of preliminary relief, such as a temporary restraining order or preliminary injunction seeking to prevent ongoing unfair business practices.

Section 17304. Notice of commencement of representative action to Attorney General and district attorney.

We do not oppose the concept of providing notice to law enforcement of the pendency of a representative action. We believe, however, that a notice period which ran for 30 days from the date the action was filed would be more appropriate -- particularly if the Commission were to eliminate the early adequacy of representation hearing in Section 17303.

Section 17305. Disclosure of similar cases against defendant.

Public Counsel approves of the concept contained in this proposed section. We suggest that it would be beneficial to provide a remedy in the event that defendants fail to comply with this section. Appropriate remedies would include discovery type sanctions and the exclusion of undisclosed cases from the set-off provision of proposed Section 17309.

Section 17306. Notice of terms of judgment.
Section 17307. Findings required for entry of judgment.

Although the Commission's commentary on this section refers to notice of "settlements," nothing in the language of the draft statute indicates that these requirements do not also apply to entry of judgment after trial. It is inappropriate to require judges to delay entry of their rulings after the case has been heard on the merits, and therefore, this section should not apply to judgments entered after trial.

To the extent that this section refers to out-of-court settlements, for all practical purposes the notice and hearing requirements are meaningless. First, it is exceedingly unlikely that courts will be willing to entertain objections from intervenors at the eleventh hour, especially as courts are more and more eager to clear their ever-increasingly burdened dockets. Second, for practical reasons, many affected individuals will never get notice of the hearing. Third, those affected individuals who do get notice prior to the hearing will not have time to learn the facts and evidence relevant to the case and then evaluate the settlement. Because this hearing requirement does nothing to ensure fair settlements and only creates the danger of cursory, rubber stamp approval of settlements, these settlement should not preclude future plaintiffs from bringing actions to vindicate their rights. A better and fairer approach to preventing multiple

actions against the same defendant is outlined in our comment to proposed Section 17309.

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

In one such action, involving a now closed trade school named Wilshire Computer College, the Attorney General's office sued not only the school and its owner, but one of the banks and the guaranty agency which respectively made and guaranteed the student loans which financed many of the victims' "education" at Wilshire. People v. Wilshire Computer College, et al., Los Angeles Superior Court Case No. BC 018391 (filed January 4, 1991). In or about December 1992, our office learned that, for policy reasons, the Attorney General's office was considering dismissing its action against the bank and guaranty agency defendants. Our office, along with the law firm of Sturdevant & Sturdevant, sought leave to intervene in the action on behalf of three former Wilshire students, and all others similarly situated, on the grounds that dismissal of the People's action would harm their interests and their ability to obtain restitution. Our application to intervene (and a subsequent motion for reconsideration) were denied by the court as it was unwilling to allow victims to come in at the eleventh hour and involve themselves in litigation which was about to be, as to these defendants, resolved. A few weeks later a stipulation was filed with the court dismissing the People's claims against the bank and guaranty agency with the only payment of money, according to the stipulation, being the bank's payment to the Attorney General's office of $200,000 for costs and expenses.

Following the denial of our application to intervene, we filed an independent action on behalf of these victims against the same bank and guaranty agency defendants, two other banks, the school and its owner. Tillis, et al. v. Bank of America, N.T. & S.A., et al., Los Angeles Superior Court Case No. BC 073448 (filed January 26, 1993). Because of the court's refusal to allow intervention, we were required to undertake the inefficient and expensive step of filing a second lawsuit in order to afford victims the ability to recover the tuition monies they had paid and obtain cancellation of their student loans. We anticipate that, like the judge in Wilshire Computer College, any court considering a request to intervene by an interested party under proposed section 17306 will have great difficulty in so doing. Accordingly, we believe the proposal's safety mechanism for review of settlements prior to a determination of res judicata will likely be of little benefit to the general public.

Section 17308. Dismissal, settlement, compromise.

We see a number of problems with this proposed section. There are no standards in the proposed section for determining when a case should be dismissed. The proposal seems to assume that all dismissals, settlements and compromises will result in a judgment. That is not the case -- indeed it is much more common that cases are settled without entry of a judgment. It is unclear from the proposed section whether those dismissals, settlements and compromises which do not result in a judgment are subject to the provisions of the chapter. Moreover, it is unclear what the term "substantial compliance" means. A court could interpret the "substantial compliance" requirement in such a way as to apply only to certain settlements and compromises, thereby allowing for the same type of abusive behavior that the Commission seeks to address. The Commission should spell out for courts how to deal with dispositions which do not result in a judgment since the hearing under Section 17307 only seems to apply to judgments.

Section 17309. Binding effect of judgment in representative action

As discussed above, the procedures set forth in proposed sections 17306 and 17307 do not provide sufficient safeguards to ensure that all potential Section 17200 claims have been fairly and adequately adjudicated in a particular action. As such, affording a res judicata effect to all Section 17200 judgments would bar those plaintiffs whose interests have not been addressed in prior litigation from pursuing their claims in the future. We believe that it would be better to address this issue on a case-by-case basis in the subsequent action, as detailed below.

We are mindful of the desire of a defendant in a subsequent action, having previously settled an unfair competition claim brought on behalf of the general public, to avoid protracted litigation in that subsequent suit. Accordingly, we believe it appropriate that the issue be addressed early in any subsequent suit. The issue should be raised by way of a motion to dismiss at which the court would consider evidence as to the binding effect issue. Defendants could raise the issue of the binding effect of the prior action in their responsive pleading, which under Code of Civil Procedure Sections 412.20 and 430.40 would be made within 30 days of service of the summons and complaint. Failure to do so would result in a waiver of the defendant's ability to argue that the result in the earlier suit had binding effect on the claims of the general public raised in the subsequent suit. Rather than have a conclusive, irrebuttable presumption of binding effect in the first action, we believe there should be a rebuttable presumption in the subsequent action that the resolution of the prior action so sufficiently protected the interests of the general public that it be given binding effect. As such, the plaintiff would have the burden of showing that the prior resolution did not sufficiently protect the general public's interests. In its discretion the court in the subsequent action could allow limited discovery on the issue of the fairness and adequacy of the earlier resolution as it affects the subsequent case. By adopting such a procedure for early determination of the binding effect in subsequent actions, we believe the interests of plaintiffs, defendants and the general public can

be protected.

Such a procedure would afford plaintiffs whose interests were not represented in a prior action because that action was settled pursuant to a "sweetheart" deal to obtain remedy by demonstrating to the court that the prior judgment and/or settlement was not fair and sufficient. This rule will also encourage defendants to resolve the first action in a fair manner in order to avoid additional liability and litigation, hence discouraging "sweetheart" deals. At the same time, it will protect defendants from facing frivolous and burdensome actions after that defendant has fairly resolved the issue in previous litigation.

We also believe that proposed subdivision (b) contains a number of problems. The proposed language allows for a set off of restitution due to the person. A set off should only be allowed, however, for restitution paid by the defendant to the person. Defendants should be encouraged to satisfy any outstanding judgment -- they should not be given credit for recovery amounts they have not paid.

The reference in the subdivision to the pro rata share of indirect restitutionary relief is even more troubling. We believe this figure will be impossible to determine. To arrive at this figure, the court will have to engage in a quantitative and a qualitative analysis of any prior indirect restitutionary recovery. Without knowing the number of total victims, either because they are unknown, there are no records or at the stage of the case that the prior action was settled there had not been significant discovery, a court could not possibly determine, other than by simply guessing, the pro rata set off amount. Moreover, the court would be required to determine the extent to which indirect recovery, such as through cy pres distributions, benefited a particular individual. It is difficult to see how a cy pres distribution to an organization or entity that would have a localized effect would be of sufficient benefit to an individual in another part of the state sufficient to warrant a set off. Finally, there is no good policy reason why a defendant should be entitled to a set off until the defendant has disgorged all of the ill gotten gain it has received by way of the unfair practice, which typically would not have happened if the prior action was settled. For these reasons, we believe defendants' set offs should be limited just to those amounts actually received by the individual plaintiff in the subsequent action.

Section 17310. Priority between prosecutor and private plaintiff

We believe that it is appropriate for a court to decide, on a case-by-case basis, how to handle the issue of simultaneous private and public enforcement actions against the same defendant. Solutions could range from consolidation to coordination to staying one of the actions. In addition, given the no intervention provision in proposed subdivision (b), the person most likely to bring to the court's attention the inadequacy of the restitutionary relief in the enforcement action, the plaintiff in the representative action, is precluded from doing so. Accordingly, the no intervention provision should be eliminated, leaving the issue of intervention

in the court's discretion--although as we noted above with respect to our experience in the Wilshire Computer College case, intervention is likely to prove an illusory alternative.

Section 17319. Application of chapter to pending cases

Any proposed changes to the law should not apply to actions pending before enactment of the new legislation.

We are pleased to have had the opportunity to comment on the Commission's proposal. If the Commission or its staff have any questions concerning our comments, do not hesitate to give us a call.

Sincerely,

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Directing Attorney
Consumer Fraud and Housing Project

Kathleen A. Michon
Staff Attorney

PROPOSITION 103 ENFORCEMENT PROJECT

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August 30, 1996

Mr. Colin Wied, Chairperson
Mr. Stan Ulrich, Asst. Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite 2D
Palo Alto, California 94303-4739

Re: Proposed Changes to Bus. & Prof. Code sec. 17200

Dear Mr. Wied, Mr. Ulrich and Members of the Commission:

The Proposition 103 Enforcement Project is a non-profit consumer rights organization dedicated to protecting the interests of insurance consumers in the judicial, regulatory, and legislative arenas. In particular, the Project focuses on the enforcement of Proposition 103, the 1988 insurance reform initiative. One of Proposition 103's many reforms was making the Unfair Competition Act and other business regulation laws applicable to the business of insurance.

We are seriously concerned about your proposed changes to the existing Unfair Competition Act (Bus. & Prof. Code sec. 17200 et seq.). Specifically, they appear to be both unnecessary and harmful. It is our understanding that many other public interest organizations will emphasize the actual harms this proposal would cause. The Project does not wish to repeat those arguments here, but joins fully in them. Rather, the Project would like to focus on why this proposal is unnecessary.

The proposal is based on assumptions that are neither supported empirically, nor even very probable. As Prof. Robert Fellmeth acknowledges in his article "Unfair Competition Act Enforcement by Agencies, Prosecutors, and Private Litigants: Who's on First?", the Unfair Competition Act is, for the most part, working just the way it was intended. The Commission's proposal for change, however, rests on two speculative assumptions. First is the problem that defendants don't know who they should properly deal with when faced with multiple lawsuits. Second is a concern based on two recent developments: the increasing use of the statute as a general allegation in complaints, and an increase in the availability of attorney's fees. There is concern that these two developments will combine to provide an incentive for "professional plaintiff firms" to file cases they might not otherwise have filed, frustrating the efforts of public agencies or prosecutors to resolve the problems on their own, and creating problems for defendants.

The most obvious answer to the first concern is that the case law shows that this is far from a problem that needs to be solved legislatively. The Fellmeth article cites *People v. Hy-Lond Enterprises, Inc.* (1979) 93 Cal.App.3d 734, as an illustration of how multiple public agencies pursuing the same public claim can come into conflict. That is, of course, true, but the more relevant point from that case is that the appellate court used quite ordinary principles of law in order to vindicate the power of the Attorney General over the power of a District Attorney. The changes proposed here would thus have had no effect on the outcome of Prof. Fellmeth's Exhibit A.

It is this fact that the Project wishes to emphasize to the Commission. The proposed changes to section 17200 proceed from an assumption of profound mistrust

of the judiciary. Whenever such an assumption is made, the proposed solution is always to require legislatively procedures that will correct trial judge errors. (This suspicion about judges is, of course, the major impetus behind other changes in the law, including three-strikes laws and the federal sentencing guidelines) Consequently, the worst example of an abuse of the current law that has been cited is the trial court's decision in the *Cox Cable Communications* case.

The case cannot sustain such weight. It is quite clear in that case that the court just got it wrong, and accepted a virtually untenable argument based on a wild misreading of a 1979 case, *People v. Pacific Land Research* (1979) 20 Cal.3d 10. Just because one trial judge was asleep at the switch, however, is no reason to effectuate the massive change in current law that is now being considered. In the first place, it is clear that correcting mistakes like this is precisely the reason we have appellate courts. Indeed, as discussed above, in *Hy-Lond* itself the appellate court reversed an incorrect trial court judgment. Thus, the argument for change rests essentially on two cases, one from more than 15 years ago, which was corrected on appeal, and a more recent one from 1994 that was (apparently) not appealed.

Even considering other cases, it is clear that there is no massive abuse of existing law, and no congestion of defendants faced with a rush of complaints all based on the same theory. On the contrary, existing law is working quite well. Given the fact that the statute is frequently relied on, it should be clear that on those rare occasions when some kind of conflict could or does arise, judges are able to sort through the arguments in order to achieve justice. As Prof. Fellmeth notes, even in the *Cox Cable* case, double restitution from the same defendant for the same wrong is an obvious outrage. Even the most callous court of appeal would promptly correct it on equitable grounds, if the case ever got that far (which, it appears from Prof. Fellmeth's description of the facts, it did not).

One of the primary reasons that there is a severe shortage of defendants beleaguered by an onslaught of similar public and private suits is explained by the supreme court in the *Pacific Land Research* case:

> ". . . if the People, with their vast resources, fail to prevail on the merits of their suit there is little prospect that a defendant will be harassed by subsequent suits instituted by vendees seeking restitution. . . . If, in spite of such an advantage the People fail to prevail on the merits, there is little likelihood that private parties will expend their resources to seek restitution upon the same facts in a subsequent action. In this situation, 'renewed harassment is nothing but a remote theoretical possibility.' (See *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 969, 124 Cal.Rptr. 376, 382.)" *People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 41 Cal.Rptr. 20, 26

A second reason is that public agencies of any kind do not have the resources to bring suits except in the most outrageous cases, and even this limited ability to enforce the law is being eroded year-by-year due to cutbacks and government downsizing. Consequently, it is, for the most part, the private parties who are affected by actions falling somewhat short of sheer scandal who have both an interest in enforcing the law and an efficient means of doing so.

This reveals the second unstated assumption in the proposal for change. In addition to a distrust of the judiciary, there is also an apparent distrust of plaintiff's attorneys--or, more specifically, an increasingly pernicious stereotype of plaintiff's

attorneys that is no less noxious than all other stereotypes.

As the supreme court implied in *Pacific Land Research*, plaintiff's lawyers may sometimes act precipitously, but they are not suicidal. If a local D.A., or the state Department of Justice cannot make out a violation of the statute, few private attorneys working on the knowledge that they will only get paid if they prevail, will want to follow the leader. Nor, given both modern communications and the computerized coordination government agencies have been exploring, is it likely that conflicting suits against the same defendant will unknowingly be filed by multiple agencies, the concern from the *Hy-Lond* case. Even if such a thing were to occur, it would not be likely to go unnoticed for long.

The pernicious side-effect of this current mania for forcing trial judges to jump through more and more procedural hoops would be to cut back dramatically on the ability of individuals to enforce the law that government increasingly does not. It is for just this reason that Proposition 103 permitted consumer intervention in the rate regulatory process. On more than one occasion in the past two years, only consumer intervenors have challenged unwarranted rate hike requests by insurers, with the Department of Insurance taking a passive role if it took any role at all.

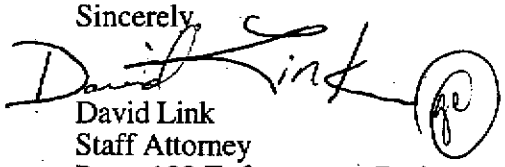
Further, virtually everything the current proposals impose can be (and most likely is being) implemented under existing law. If an individual plaintiff were to have a conflict of interest with a group he or she is purportedly representing, and if her or his counsel failed to point this out, ordinary conflict laws, not to mention basic equitable principles of justice, are available to correct the situation. There is every reason to believe the affected defendant would not long remain quiet about such a problem. Similarly, the doctrine of *res judicata* as it already exists, could address a number of situations that might arise concerning multiple suits or judgments against the same defendant, and those that the doctrine would not reach could be resolved under other legal principles, such as equitable estoppel or mootness.

The irony of the present proposal is that, at bottom, the concern is really with popular phantasms--judges making poor judgments, plaintiff's lawyers taking advantage of "loopholes" in the law. Both are supported only anecdotally, but they coincide neatly with popular prejudices, and so they appear to need correction.

Unless and until there is empirical evidence of a genuine problem, or a clear call from the courts for some change, there is no real need for any change at all. Anecdotal evidence, or isolated cases should not serve as the basis for invoking the complex, time-consuming and powerful engine of the Legislature to alter a law that is otherwise working as intended. Given the Legislature's many other priorities, advising them to correct a nonexistent problem for strictly pedagogical reasons seems a waste of both time and effort that legislators could spend more profitably dealing with problems that actually do exist.

The Unfair Competition Act *is* working as intended. It should not be modified.

Sincerely,



David Link
Staff Attorney
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LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE
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August 29, 1996

Colin W. Wied, Chairperson
Stan Ulrich, Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Study B-700 -- Unfair Competition

Dear Chairperson Wied, Mr. Ulrich and Members:

I write once again on behalf of the California District Attorneys Association Consumer Protection Committee, as well as my own office, to provide further comments from public enforcement officials regarding the unfair competition study (B-700) and the Commission's Tentative Recommendation of May 1996.

This letter will offer a few general observations and then specific comments on two areas of continuing concern. I will also appear at the Commission's October 10 meeting (at which the next B-700 discussion is scheduled) to offer any other assistance you may wish.

General Observations on the B-700 Study and Tentative Recommendation

At its January meeting the Commission voted to continue the B-700 study in order to offer either a consensus-based proposal for change or, in the alternative, a report on the Commission's study and findings. Chairman Wied reiterated that the Commission's goal is to work by consensus to improve California law, not to champion partisan views or to change the balance between plaintiffs and defendants in this or any other area. The Chairman's mandate was that we all work together to seek a narrowly focused proposal on which all sides might agree.

Consultant Prof. Bob Fellmeth has also urged that the Commission adopt a carefully tailored approach to address the principal issue in the B-700 study: concern over the scope and finality of private "general public" actions under §17200. The law enforcement community shares Prof. Fellmeth's view that this is the proper focus of the B-700 study, and the one most likely to result in a consensus within the legal community.

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As we have seen in the many views submitted to the Commission to date, the unfair competition statute (like its federal counterpart in the FTC Act) is a carefully balanced statute which is important to a wide range of interests in the legal community. Section 17200 is the principal consumer protection statute in California, and serves other important public and private functions as well. Given the clearly beneficial overall record of §17200, there is no evidence to support sweeping change in the law, and realistically there would be no chance of achieving a consensus on such change.

We renew our agreement with the Chairman and Prof. Fellmeth in this regard. We applaud the Commission and its staff for its determination to concentrate exclusively on the "general public" representative action issue. This focus, and the balanced approach the Commission has adopted, will maximize the chances for consensus on the B-700 study.

Tentative Recommendation of May 1996

CDAA members support the narrow and focused approach of the Tentative Recommendation. The Recommendation embodies an attempt to provide greater clarity and certainty in "general public" actions brought by private plaintiffs, while avoiding imposing burdens that would make such cases unworkable. The provisions dealing with notice to relevant parties, clear pleading of the representative causes of action, public hearings on these judgments, and binding effect on similar representative actions, will help promote certainty, finality, and fairness in these private actions.

Comments from our members identify two continuing concerns about the new draft, although neither issue would prevent a majority of our members from supporting the Recommendation.

Priority and consolidation. Draft §17310 regarding public/private priority is a source of some concern, especially in light of a few comments previously received from private counsel regarding this provision. The provision for possible consolidation of public and private actions (p.17, lines 42-43) remains controversial among at least some of our members.

Even with the provisions of subparagraph (b) (providing general priority for public actions), there are prosecutors who believe burdensome motions and hearings will be required when "Johnny-come-lately" private plaintiffs seek to free-ride on public actions, perhaps, for example, by contesting the "substantiality" of the restitution sought in the public case.

These prosecutors advocate an automatic stay of private actions, pending completion of related public enforcement cases, as the procedure most consistent with the priority due to the People's elected legal representatives. Not surprisingly, these members and many others are especially troubled by the few recent comments from private plaintiffs counsel seeking even less priority for cases brought by the People.

In this connection we note once again that actions brought by the Attorney General or the 58 district attorneys under §17200 are "civil law enforcement actions," not private tort actions or even private actions to right wrongs for the "general public." People v. Pacific Land Research (1977) 21 Cal.3d 683. In contrast to private "general public" cases, public actions are brought by different actors (elected officials vs. private interests), subject to different checks and balances, and seek different remedies. As a practical matter, consolidation of such cases is difficult, and as a policy matter, the work of the People as a whole merits priority over the narrower private interests of an individual or a smaller group.

A provision permitting consolidation of these very different public and private actions must be crafted carefully and narrowly. The majority of our members find the present provision an acceptable compromise in that regard. However, because the current version is itself problematical to a group of our members, any changes that would increase the likelihood of delay or consolidation with private "me-too" actions would galvanize opposition among important offices in our organization. We urge the Commission to resist any requests to undermine priority for the work of the People and their elected representatives.

Restitution setoff. Section 17309(b) entitles a defendant found liable in an individual action on a personal claim to offset "a pro rata share of any indirect restitutionary relief awarded as a result of a representative or enforcement action." This provision raises a number of questions among our members:

(1) If this provision causes a prosecutor's cy pres recovery to diminish an individual's purely personal damage claim, it is at least possible that a court would engraft some version of class action procedures onto such a prosecutorial action, to the extent the prosecutor "represents" the private claimants. Class action burdens would work undue hardships on public enforcement actions.

(2) How is the pro rata share to be determined, especially in cases where the total number of victims and/or the total loss for each victim is unknown?

(3) Should offset apply at all unless there is a finding that complete deprivation of any unjust enrichment has already occurred? I.e, why should there be an offset if the defendant still retains ill-gotten gains?

(4) The current provision would allow an offset based on indirect restitution "awarded", not restitution actually paid. Setoff against a subsequent claim should not occur unless actual payment of the initial recovery has taken place.

Our members are sympathetic to the fairness motivation behind the offset concept in this draft. However, further thought should be given to how such an offset would work in actual application.

In conclusion, California prosecutors view the Tentative Recommendation as properly focused and generally well-crafted to achieve the Commission's goal relating to "general public" representative actions. We stand ready to assist in the analysis of the remaining issues arising from the Recommendation.

Thank you for your continuing courtesy in considering the thoughts of the law enforcement community on this subject.

Best regards,

GIL GARCETTI
District Attorney

By Tom Papageorge

THOMAS A. PAPAGEORGE, Head Deputy
Consumer Protection Division

Chair, Legislative Subcommittee, CDAA
Consumer Protection Committee

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August 30, 1996

VIA TELECOPIER
AND U.S. MAIL

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Law Revision Commission
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Re: Tentative Recommendation, Unfair Competition Litigation Study

Dear Chairperson Wied, Mr. Ulrich and
Members of the Law Revision Commission:

We appreciate the opportunity to comment on the tentative recommendation of the Law Revision Commission to add a new section to the Unfair Competition Statutes, California Business & Professions Code §§17200 et. seq. As substantial work has progressed on the proposed amendments, it now appears the Commission is attempting to address two perceived "potential" concerns: (1) preventing a litigant from using a private Attorney General claim as "settlement leverage" in the context of private litigation; and (2) providing a public Attorney General settlement, under certain circumstances, with preclusive effect on other private Attorney General claims (as compared to §17200 claims

asserted on either an individual or class-wide basis).[1] The following comments address each of these issues.

I. THE ADEQUACY OF REPRESENTATION PROVISIONS OF PROPOSED §§17302 AND 17303

With respect to the Commission's first concern -- existence of a "potential" for abuse by a litigant to use a private Attorney General claim as "leverage" for an individual settlement -- assuming the Commission still believes there is a need to address this general issue, we feel that broad support for this idea can be achieved. However, we believe that, as drafted, §17302 and §17303 do not serve the Commission's interests and impose requirements contrary to public policy.

As written, proposed §17302 requires aggrieved individuals to, in effect, waive any claim for personal damages they may have if they wish to file a "representative" action. This provision will virtually ensure that no persons having an "interest" in the litigation will represent the general public. In addition, private Attorney General claims typically accompany class action claims. Followed to its logical conclusion, a "representative action" could only be brought by a "non-aggrieved" plaintiff -- a result which makes little sense. Public policy and class action procedures suggest that those aggrieved by a defendant's conduct are suited to adequately represent others affected by the same practice due to their interest in obtaining redress -- i.e., those who stand to gain by securing the relief requested. We would suggest §17302 be deleted in its entirety because it does not address the concerns the Commission is attempting to address.

Moreover, proposed §§17306-08, requiring court approval of settlements and dismissals of "representative" actions, should sufficiently resolve the Commission's perceived concerns. By requiring Court review, any actual abuse that may occur can be

[1] While preclusive effect for all actions may have been an initial concern of the Commission, because of the due process considerations of such a rule the proposed amendments have eliminated individual and class claims from the scope of the recommended amendment. These same due process concerns make it important to make this point clear in both the language of the proposed statute and their accompanying comments.

appropriately dealt with by the Court during the review process.[2] Indeed, it is unlikely that a court would approve a representative settlement that provides no or minimal benefits to the general public while providing substantial benefits to the named plaintiff.

Finally, throughout previous hearings the discussion has focused on drafting a provision which essentially tracks the class action standard of "adequacy of representation" for acting as a class representative. This standard was succinctly laid out in McGhee v. Bank of America, 60 Cal. App. 3d 442, 450 (1976) which states: "[a]dequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." See also Trotsky v. Los Angeles Fed. Sav. & Loan Ass'n, 48 Cal. App. 3d 134, 146 (1975). As this is workable and clear language, proposed §17303 should be amended as follows:

> §17303. Adequate legal presentation and absence of conflict of interest.
>
> 17303. (a) The attorney for a private plaintiff in a representative action must be qualified to conduct the representative action on behalf of the general public pled.
>
> (b) A private plaintiff in a representative action may not have interests antagonistic to good faith representation of the interests of the general public pled.
>
> (c) As soon as practicable after the commencement of the representative action, on application of the plaintiff made on noticed motion or on the court's own motion, the court shall determine by order whether the requirement of subdivisions (a) and (b) are satisfied. The determination shall be based on the pleadings. Discovery is not available, but the court may inquire into the

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[2] The Commission should recall that in response to its request for evidence of the existence of any actual such abuses, the Commission received just one report (inaccurately reported) for the entire 30-year history of section 17200 litigation, despite making this request to the private sector, the plaintiffs' bar, the defense bar and public prosecutors.

matters in its discretion. In making its determination, the court shall consider standards applied in class actions. If the court determines that the requirements of subdivisions (a) and (b) are not satisfied, the representative cause of action shall be stricken from the complaint.

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

As one express goal of the Commission is to act only where consensus can be reached, we believe that with the above modifications §17303 could receive broad support.

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

The provisions proposed to be codified as §§17309-10 are much more controversial than the above Sections. As more fully discussed below, because these proposed amendments are miles away from any consensus on their language, let alone their efficacy, we suggest that a substantive study be conducted to determine whether there is in fact any actual problem which needs to be addressed, or whether adoption of the adequacy provision (§17303), the court approval of settlement provision (§17307), and the existing judicial tools of coordination, stay and mootness will resolve the Commission's perceived concerns. Absent evidence of actual -- rather than theoretical -- abuses, consumer and environmental groups will likely not support such a radical change in the delicate balance that has existed so successfully over the last thirty years.

As drafted, §17309(a) will bar any "further actions on representative causes of action against the same defendant" that are based on similar facts or theories, and §17309(b) will provide a "set-off" in the amount of direct and indirect monetary relief awarded in a "representative" or "enforcement" action. While the intent may be to bar a subsequent private or public Attorney General action under §17200 (which itself raises concerns), as drafted defendants could abuse this provision to bar legitimate claims of affected persons -- a far greater preclusive affect. Providing such broad statutory res judicata impact is extremely dangerous, as the concept of res judicata is difficult to deal with, even on a case-by-case basis.

Any attempt to codify the concept of res judicata by statute will likely create substantial problems. California courts have

recognized that: "Even the draftsmen of Rule 23, in spite of their 'preoccupation with res judicata' recognized that 'the court conducting the [class] action cannot predetermine the res judicata effect of the judgment; this can be tested only in a subsequent action.'" Cartt v. Superior Court, 50 Cal. App. 3d 960, 968 n.12 (1975) (citations omitted), accord Taunton Gardens Co. v. Hills, 557 F.2d 877, 878 (1st Cir. 1977); In re U.S. Fin. Sec. Litig., 69 F.R.D. 24, 53 (S.D. Cal. 1975); 7B Charles A. Wright et al., Federal Practice and Procedure §1789 (1986).

Moreover, the Commission should be particularly cautious in implementing such a radical change to the law of res judicata in light of the recent Supreme Court decision of Matsushita Electric Industrial Co. v. Epstein, ___ U.S. ___, 116 S. Ct. 873 (1996). In Matsushita, the Supreme Court held that a Delaware Chancery Court judgment settling state and federal claims of a class of shareholders had preclusive effect in federal courts under the Full Faith and Credit Act, notwithstanding the fact that the shareholders could not have pressed their federal claims in the Delaware State Court. In so holding, the Court looked to the law of Delaware on the preclusive force of settlement judgements. Id. at 878-80.

Because the res judicata law of the State rendering the judgment controls the effect the judgment will have in other jurisdictions, at least in part, the changes proposed by the Commission could have far-reaching and unanticipated implications. Such changes could potentially operate to bar the claims of consumers not only in California, but in other States as well. The following hypothetical factual scenario is illustrative of the problems inherent in the current draft of the proposed amendments:

> Company X is engaging in a nationwide fraudulent over-charging scheme. To rectify this practice, an aggrieved Californian, unwilling to waive his claim for damage, files a class action asserting violations of the Consumers Legal Remedies Act and common law fraud, seeking monetary and injunctive relief. Concurrently, an unaggrieved Californian files a representative action seeking injunctive relief and restitution for violation of the Unfair Competition statutes. And, an aggrieved Nevada resident brings a common law fraud class action in Nevada, also seeking monetary and injunctive relief. The "representative" action settles for an injunction prohibiting overcharges and a cy pres remedy requiring Company X to publish and disseminate in California a

consumer handbook explaining how consumers can avoid being overcharged.

Under the Court's decision in Matsushita, the proposed amendments may bar the injunctive relief that could otherwise have been obtained on behalf of California and Nevada residents. Similarly, the monetary recovery of California and Nevada citizens would be reduced by the pro-rata share of the indirect restitutionary relief obtained in the "representative" action -- no matter that such amount may be difficult, if not impossible, to measure. Even calculating the amount of set-off for either the California or Nevada class actions would encompass a Herculean task, as the trial court is provided with no objective criteria to assist its assessment. How is the Court to determine the required pro-rata off-set to those persons who never received, or even who did receive, a copy of this hypothetical pamphlet?[3] As drafted, if a nationwide class action were brought in California with a §17200 claim attached, the result might be even more convoluted.

In addition, the set-off requirement for indirect benefits of a settlement (proposed §17309(b)) would quite likely be unconstitutional. Indeed, the preclusive effect of class action settlements is derived from the ability of the unnamed class member to object to the terms of settlement and/or opt out of the settlement after having received notification of the proposed settlement. People v. Pacific Land Research Co., 20 Cal. 3d 10, 17 (1977); Phillips Petroleum Company v. Shutts, 105 S. Ct. 2965, 2971, 472 U.S. 803, 806 (1985). Under the proposed amendments, because individuals are provided neither notice nor an opportunity to opt out of the settlement, reducing their future recovery by some indirect, and potentially unquantifiable, benefit would likely violate their constitutional due process rights.

When weighing the extreme difficulties presented by proposed §§17309-10 against protection of a wrongdoer from subsequent actions which may provide full compensation to the injured parties, it should be clear that the Commission cannot recommend these amendments on the basis of the record before it. As explained in Cartt, there is no class action requirement, or any other requirement for that matter, that a defendant "be assured in advance that in the event of a defense victory all members of the class will be foreclosed from further proceedings. A defendant who

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[3] Furthermore, costs of prosecution should not be credited to such amounts, but the statute makes such a point unclear.

in one way or another victimizes hundreds of thousands, has, after all, no constitutional right to be subjected to only one lawsuit." 50 Cal. App. 3d at 968. Why should the proposed amendments provide any greater protection to the wrongdoer, particularly since the right to claim a set-off against prior settlements already exists under California jurisprudence? Indeed, a defendant can always assert that the court has continuing jurisdiction over an injunction that has been previously entered.

As drafted, these sections give a wrongdoer substantially greater protection than is merited. At an absolute minimum, these provisions should be amended to clarify that the only preclusive effect is against subsequent "representative" private Attorney General actions under §17200. And, it should be clear that any statutory set-off only applies to direct monetary restitution received by individual members of the general public, since, as explained in People v. Pacific Land Research Co., 20 Cal. 3d at 17, the public and private litigation goals may substantially conflict.

III. THE PRIORITY BETWEEN PUBLIC PROSECUTORS AND PRIVATE PLAINTIFF AND RETROACTIVE APPLICATION PROVISIONS OF §17310 AND §17319

As was discussed at the last Commission hearing, §17310 should be deleted in its entirety. Section 17310, in conjunction with §17311, provides priority to public enforcement actions regardless of how long the earlier filed action has been pending. The Commission should be aware that over 95% of subsequently filed enforcement actions are "sue and settle" claims. Section 17319 further complicates the issue by retroactively applying the amendments to cases pending as of the effective date. Such retroactive application can also lead to extremely inequitable results and should likewise be deleted.

Under the proposed statutory scheme, it is entirely possible that an "enforcement action" could be filed years after the public agency receives notice of filing of the action. Under this situation, despite the large investment of time and money by the private individual, he or she would lose control over the case. By way of example, our firm has been prosecuting a "representative action" against R.J. Reynolds Tobacco Company alleging that the Joe Camel advertising campaign is illegally targeted at children. See Mangini v. R.J. Reynolds Tobacco Company, S.F.S.C. Case #939359. This action has been pending since 1991, and has resulted in a ground breaking opinion from the California Supreme Court. Mangini v. R.J. Reynolds Tobacco Company, 7 Cal. 4th 1057 (1994).

Under proposed §17310, if the Attorney General's office suddenly elected to file an enforcement action, the Joe Camel action would likely be stayed despite the five years of work put into this important case and the huge expenses that have been borne. Also, in essence five years would be lost because the private action would be stayed, but the public action would just be beginning. Such a delay would only benefit the wrongdoer, to the detriment of the public. A similar inequitable result could occur if the res judicata provisions are enacted and a subsequent representative action is filed and promptly settled by either a public enforcement agency or a private Attorney General. At a minimum, proposed §17111 allowing public prosecutors an indefinite amount of time to bring a follow-on enforcement action should be amended to place a time limit for doing so. This concept is not new, as such time limits are found in Proposition 65 environmental enforcement actions which allow 60 days for public enforcement officials to decide whether to prosecute the action.

In sum, no priority should be given to public enforcement actions, and at an absolute minimum a reasonable time limit must be imposed as to when priority may be asserted by public enforcement officials. Also, there has been absolutely no showing of any need for retroactive application for any of the proposed amendments. In light of the potential inequities that can result from retroactive application, we respectfully urge that §17319 be changed so that any amendments apply to actions filed after the effective date, not pending on the effective date.

IV. CONCLUSION

The Commission should keep in mind that despite its open request to all interested persons (the private sector, the plaintiffs' bar, the defense bar and public prosecutors) no evidence, other than anecdotal evidence, has been submitted to demonstrate the existence of any problem with the existing statutory scheme that needs to be addressed. Despite this lack of need for change, the provisions addressing the potential problem of using the Unfair Competition Act to leverage an individual settlement are the least controversial. Indeed, with the minor modifications suggested, many, if not all public interest groups would likely support the Commission's recommendation on this issue.

However, the proposed res judicata provisions are highly controversial and will likely be actively opposed by numerous consumer and environmental groups, absent a showing of an actual, existing need for the proposed amendments. As drafted, the

statutory scheme would upset the delicate balance referred to by Tom Popageorge of the California District Attorneys Association that has proven so successful over the last 30 years. Before undertaking such a far-reaching and treacherous course, we believe it is imperative to commission a study on the issue of what, if any, actual problems exist that need to be addressed. Such a study could be undertaken by either the Commission or the interested parties, and should look at Court records to determine how many, if any, unfair competition actions that were filed and settled by public officials involved a "follow-on" §17200 action filed by a private party. Public prosecutors have actively used the Unfair Competition Act since 1962, and according to Mr. Popageorge, his office brings nearly 300 cases each year under these statutes. Such information could serve as a database for determining if in fact "follow-on" actions are actually a problem. Such a study could likely be concluded by the end of the year, and would provide an evidentiary basis for the Commission to determine whether any need for change truly exists, rather than making this important decision based on the sparse anecdotal evidence that has been submitted to date.

If the Commission feels it is constrained to immediately propose amendments, perhaps the Commission's proposal could be split into two portions -- an immediate proposal regarding amendments for adequacy of representation, followed by a recommendation for res judicata, after further study and opportunity to reach consensus regarding any proposed amendments on this issue.

We thank the commission for their consideration of these views and we look forward to continuing to work with the Commission on these proposed recommendations.

Very truly yours,

Alan M. Mansfield. By FJJ

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Re: Unfair Competition Litigation May 1996 Tentative Recommendations

Dear Commission Members:

These comments to the May 1996 Tentative Recommendations to reform the Unfair Competition Act are offered on behalf of the National Paint & Coatings Association, Inc. (NPCA), a non-profit trade association with 500 members, representing 75% of the paint and coatings manufacturers in the United States. NPCA's members have been the subject of a number of prosecutions by private persons under *Business & Professions Code* §§ 17200 et seq., and 17500 et seq., most notably in enforcement of claims under Proposition 65, *Health & Safety Code* §25249.7. The purpose of these comments is not to repeat the enunciation of problems necessarily inherent in the use of the Unfair Competition Act (UCA) in Proposition 65 enforcement, as we believe that this issue has been amply demonstrated by prior comments submitted by the Coalition for the Responsible Administration of Proposition 65. Rather, our experience with such actions leads us to believe that the proposed revisions are not only appropriate public policy, they are mandated by the California Constitution's separation of powers clause (Art. III, §3), and the Due Process Clauses of the United States Constitution, fourteenth amendment, and the California Constitution (Art. I, § 7).

The provisions of, and policies underlying, the UCA will not be repeated herein, other than to elucidate the comments. In summary, the UCA has been construed to allow any person to bring a cause of action "in the public interest," and has been construed so broadly as to allow it to apply to any "business practice" which is illegal or unfair. Unconstrained by either statutory limitations or the public accountability imposed upon elected officials, private plaintiffs (e.g., alleged "bounty hunters" pursuing violations of various state laws) are free to assert claims under the UCA whenever, *in*

their own minds, the business practice complained of is "unfair." Given the broad berth of statutory construction by the courts, the availability of preliminary injunctive relief against a defendant even if the case is ultimately found to be without merit, and the high hurdles courts have required defendants to clear to obtain summary judgment (even on undisputed facts), private enforcers are seemingly not only given the "keys to the car," they can lock the doors from the inside, and make up their own speed limits! Such a situation is clearly at odds with the Attorney General's constitutional mandate to see that the laws of the state are adequately and uniformly enforced. Furthermore, the courts' willingness to award attorney's fees even where the private plaintiff does not prevail, and the potential for civil penalties and other reimbursement under such acts as Proposition 65, leads ineluctably to the conclusion that a structural conflict of interest exists in "private attorney general" enforcement.

The defendant in a UCA enforcement, viewing the combination of adverse publicity, injunctive relief, its own attorney's fees, and the fees of the opponent, is faced with a litigation hammer that may often force a settlement based on factors entirely extraneous to the determination of whether the company has actually done anything improper. When faced with such a claim by a public enforcer such as a District Attorney or the Attorney General, a defendant can at the least assume that the enforcer's ethical obligation to see that justice is served by enforcement has caused a dispassionate assessment of the merits of the action. Furthermore, the decision to enter into a consent decree is not influenced by the threat of bearing expensive legal fees of the opponent where the public prosecutor brings the action. Where public enforcers have declined to pursue such claims, however, private enforcers are often seen truly as bounty hunters, to whom ransom must be paid in order to buy one's peace. While it is not our intent to impugn the integrity of any particular private enforcer who has utilized the UCA, suffice it to say that the enforcement structure breeds an environment in which vigilante plaintiffs and mercenary lawyers can bend the "public interest" to their own financial benefit. Alleged usurpation by private, "quasi-judicial" private attorneys of the exclusive constitutional authority accorded the executive branch in law enforcement provides the most definitive and compelling justification for safeguards to be built into the UCA to preserve its purpose and authority. Their leveraging of the UCA to bolster the threat of enforcement of Proposition 65, and other state laws, combines to form a formidable club in the hands of pecuniary-minded private attorneys against unwitting defendants, many of whom are small businesses located both within and without the state. It is for these reasons that we urge the Commission to adopt, with minor revisions, the May 1996 draft as its final recommendation to the Legislature.

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1. Separation of Powers.

Article III, Section 3 of the California Constitution states:
"The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

This clause "articulates a basic philosophy of our constitutional system of government; it establishes a system of checks and balances to protect any one branch against the over reaching of any other branch. [Citations.]" *Bixby v. Pierno*, 4 Cal.3d 130, 141 (1971). Article V, Section 13 of the California Constitution provides, in pertinent part:

> "[T]he Attorney General shall be the chief law officer of the state. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. The Attorney General shall have direct supervision over every district attorney and sheriff and over such law enforcement officers as may be designated by law . . . ."

In *State Board of Education v. Levit*, 52 Cal.2d 441 (1959), the court invalidated legislative action which prevented the executive branch from performing its constitutionally mandated duties, holding:

> "'[S]uch powers as are specially conferred by the Constitution upon the Governor, or upon any other specified officer, the Legislature cannot require or authorize to be performed by any other officer or authority. . . . Those matters which the Constitution specifically confides to [a specified body or agency] the Legislature cannot directly or indirectly take from his control.'" 52 Cal.2d at 461.

In *People v. Municipal Court*, 27 Cal.App.3d 193 (1972), the Court of Appeal held that the lower court had no power to appoint a special prosecutor to charge two persons with battery on the complaining witness's complaint, over the objection of the district attorney's office. The court emphasized that the district attorney's function is "quasi-judicial in nature," and that "he is vested with discretionary power in determining whether to prosecute in any particular case." *Id.* As the court stressed, "[a]n unbroken

line of cases in California have recognized this discretion and its insulation from control by the court." 27 Cal.App.3d at 208. The court stated:

> "The municipal court judge here recognized that he had no power to compel the district attorney to prosecute and he did not attempt directly to do so. He did, however, by purporting to appoint a 'special prosecutor' to supplant the district attorney, attempt indirectly to accomplish the same results. In effect, the judge himself became the prosecutor by overriding the judgment of the district attorney and ordering the prosecution to proceed. The so-called 'special prosecutor' became the deputy of the judge in attempting to press forward with the prosecution in clear violation of the doctrine of separation of powers.
>
> "Except for the situation where the district attorney is himself charged with a crime, his failure to act, even if improperly or corruptly motivated, is not a matter for the court. In the final analysis, the district attorney, like a judge, is answerable to the electorate for the manner in which he conducts his office." 23 Cal.App.3d at 207-208.

In *People v. Cimarusti*, 81 Cal.App.3d 314 (1978), the Court of Appeal found that a court had violated the separation of powers clause by interfering with the prosecutorial function of the Attorney General in a civil case. In *Cimarusti*, a consumer protection action, the Attorney General and two defendants agreed to a stipulation for judgment, and trial proceeded against the third defendant. The trial court granted injunctive relief and imposed a civil penalty against the third defendant. Thereafter the court ordered the Attorney General to agree to a modification of the stipulation, reducing the penalty against the first two defendants. The Attorney General refused, and the court denied the motion to set the case for trial. 81 Cal.App.3d at 316-18.

The Court of Appeal held that the superior court had acted in excess of its jurisdiction by attempting to compel a litigant to settle and by substituting itself for the prosecutor in negotiations with the defense for a more lenient disposition without trial. 81 Cal.App.3d at 323-24. As the court reasoned, this interference "with the prosecutorial function of the Attorney General raises serious questions concerning the separation of powers." 81 Cal.App.3d at 323. Even though the case was a civil matter, "the situation is analogous to a criminal proceeding with respect to the division of power between the executive and judicial branches of the government." *Id.*

"[C]learly the charging function of the criminal process is within the exclusive control of the executive." 81 Cal.App.3d at 323. Similarly, the court concluded, the lower court had no authority to substitute itself as the representative of the People in the negotiation process and agree to a disposition of the case over prosecutorial objection. *Id.* As the court explained, "the Legislature defined certain deceptive practices, prescribed the range of penalties, and placed the enforcement responsibility within the executive branch" in enacting the consumer protection statutes at issue." *Id.* In violation of the separation of powers doctrine, the lower court "substituted itself into the negotiation process by attempting to prescribe the penalties without a trial." 81 Cal.App.3d at 323.

In *State of California v. Superior Court*, 184 Cal.App.3d 394 (1986), the state sought extraordinary relief from an order of the trial court compelling it to be joined as a defendant, because the trial court believed that the Attorney General's office had issued advisory opinions of some relevance to the interpretation of a penal statute at issue in that case. 184 Cal.App.3d at 396. In issuing the writ, the Court of Appeal cited the doctrine of separation of powers and stressed that "[s]uch trespass upon the internal management and policy decisions of the Attorney General's office seems perilously close to the brink of unwarranted interference in violation of constitutional mandate." 184 Cal.App.3d at 397. As the court explained, it is well established that "a court may not tell a district attorney whom to prosecute nor otherwise interfere with the charging function, another purely executive power." 184 Cal.App.3d at 397-98. Analogizing the case before it to cases dealing with decisions regarding the prosecution and conduct of criminal trials, the Court of Appeal concluded that the decision of the Attorney General in this matter regarding whether to participate in the lawsuit was exclusively within the province of the Attorney General's office and not subject to judicial coercion. 184 Cal.App.3d at 398.

In a case highly relevant to the question of "public interest" prosecution by allegedly "disinterested" private parties, the United States Supreme Court relied on the separation of powers doctrine to limit citizen suit enforcement of the Endangered Species Act in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).[1] In *Lujan*, members of environmental organizations dedicated to wildlife

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[1] California courts have often referred to federal decisions in resolving constitutional questions, including separation of powers analyses. See *Hustedt* (continued...)

conservation and preserving natural resources challenged the legality of a rule promulgated by the Secretary of the Interior in interpreting the Act. One of the bases for asserting standing in *Lujan* was the "citizen suit" provision of the Act. The court relied on separation of powers notions to dismiss the plaintiff's standing claim based on this provision. As the court stated:

> "To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to transfer from the President to the courts the Chief Executive's most important constitutional duty to 'take Care that the Laws be faithfully executed.'. . . It would enable the courts, with the permission of Congress 'to assume a position of authority over the governmental acts of another and co-equal department,' . . . and to become '"virtually continuing monitors of the wisdom and soundness of executive action."' 504 U.S. at 576-78 (citations omitted.)

Admittedly, the separation of powers clause is intended to prevent one branch of government from exercising the complete power another, not to prohibit one branch from taking an action that has the "incidental effect of duplicating a function or procedure delegated to another branch." *Younger v. Superior Court*, 21 Cal.3d 102, 117 (1978) (emphasis in original). Private enforcement of the UCA is hardly an "incidental" abgrogation; either alone or where the Attorney General is prosecuting an action against the same violator based on the same alleged facts, it creates a situation where any and all persons may usurp the Attorney General's constitutional function of "see[ing] that the laws of the state are uniformly and adequately enforced." Allowing differences of opinion between private enforcers and the Attorney General's office to be settled by the court, the current lack of oversight goes well beyond an "incidental effect," and ultimately

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[1](...continued)
v. Worker's Compensation Appeals Board, 30 Cal.3d 329, 338 (1981) (relying on *Buckley v. Valeo*, 424 U.S. 1 (1976)), and *Davis v. Municipal Court*, 46 Cal.3d 64, 78 (1988) (relying on *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977)). "The opinions of the United States Supreme Court, although not binding on this court in interpreting the separation of powers principle of the California constitution, supply a persuasive body of case authority." *Butt v. State of California*, 4 Cal.4th 668, 707 (1992) (Kennard, J., concurring and dissenting).

substitutes the court's judgment for the Attorney General's. Any such reapportionment of power delegated by the People to the Attorney General may only be achieved by means of a constitutional amendment. See *Laisne v. California State Board of Optometry*, 19 Cal.2d 831, 834 (1942).

It may be asserted that private UCA actions do not constitute a true separation of powers violation because the clause primarily limits the balance between the three branches of government, and does not address the scattering of executive authority to members of the general public. Yet, constitutional infirmity may not be avoided by this strict construction of the separation of powers clause, since such actions violate the sections of the Constitution" establishing the Governor's and Attorney General's executive authority. The courts have held that an unlimited delegation of the constitutional functions of one branch of the government to private citizens is improper. For example, in *Bayside Timber Co. v. Board of Supervisors*, 20 Cal.App.3d 1, 10 (1971), the court invalidated a delegation by the Legislature "to timber owners and operators the exclusive power to formulate forest practice rules which, when adopted, have the force and effect of law." As the court stated:

> "It has repeatedly been held that (1) 'truly fundamental issues' should be resolved by the Legislature, and (2) that any grant of legislative authority must be accompanied by 'safeguards adequate to prevent its abuse.' Lacking the required safeguards such a grant of authority is an unconstitutional delegation of legislative power. [Citations.] And the Legislature cannot constitutionally avoid its responsibility as to such fundamental issues 'by explicitly delegating that function to others or by failing to establish an effective mechanism to assure the proper implementation of its policy decisions.' [Citation.] [¶] . . . It follows, since the Legislature has chosen to delegate such law-making power, that its failure to prescribe any standards or 'safeguards to prevent its abuse' impresses upon the Act constitutional taint. [¶] When legislative authority without standards for its guidance is delegated to an agency or group of individuals with a pecuniary interest in its subject matter, the constitutional fault is compounded." 20 cal.App.3d at 11-12.

Thus, even if private enforcement of the UCA does not implicate the traditional concept underlying the separation of powers clause, it clearly raises the same concerns,

and the very same analysis, with respect to whether the forced delegation of the executive's law enforcement responsibilities is accompanied by "safeguards to prevent its abuse." Accordingly, the constitutional questions may not be avoided merely because the Act does not purport directly to place the executive power in another branch. The executive's constitutional responsibilities are initially ceded to any private citizen, without any "safeguards," subject to only potential control by the courts should a matter actually proceed to litigation. Although courts have construed the UCA to allow for private actions, no authority validates this type of enforcement scheme in the constitutional paradigm discussed herein.

In our opinion, the tentative recommendation takes significant strides toward reaffirming the Attorney General's primacy in enforcement, and curing this serious constitutional infirmity. Specifically, the adequacy of representation provision of proposed §17303, the notice provisions of proposed §17304, the settlement provisions of §§17306 through 17308, and the priority provisions of proposed §17311, allow for input by public enforcers so as to ensure that the Attorney General can perform his constitutional functions. Consistent with the foregoing, however, we believe that the proposed legislation should explicitly delineate that the Attorney General has the right to intervene in and take over any prosecution "in the public interest," regardless of whether he has filed his own action. Without such explicit authority, the proposed legislation could lead to the conclusion that the Attorney General is powerless to affect pending litigation which he believes is without merit, since he would be ethically constrained from filing his own enforcement action, and then seeking primacy under proposed §17311.

2. Conflict of Interest.

In *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980), the United States Supreme Court considered the claim that a defendant's due process rights were violated by an enforcement proceeding under a federal law which provided that money collected as civil penalties would be returned to the Department of Labor as reimbursement for the amounts expended in determining the violation. Although the court held that there was too tenuous a link between the award of civil penalties and a prosecutor's discretion to rise to the level of a constitutional violation, the court did "not suggest . . . that the due process clause imposes no limits on the partisanship of administrative prosecutors." 446 U.S. at 249. Continuing, the court noted that:

> "Moreover, the decision to enforce -- or not to enforce -- may itself result in significant burdens on a defendant or a statutory beneficiary, even if he is ultimately vindicated in an adjudication. [Citation.] A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial discretion and in some contexts raise serious constitutional questions. [Citations.] 446 U.S. at 249-50.

Closely following the decision in *Marshall* was the California Supreme Court's holding in *People v. Barboza*, 29 Cal.3d 375 (1981). In *Barboza*, the court was faced with the question of whether a public defender's contract, which limited his compensation when outside attorneys were hired due to conflicts of interest, required the reversal of convictions obtained when two defendants were represented by the same public defender. The court found significance in the holding of *Marshall*, but stressed that this presented a more egregious case requiring reversal:

> "The danger of prejudice in the matter before us is not so tenuous. Here the public defender's income and office budget are directly affected by his determination of whether or not a conflict of interests exists between multiple defendants jointly represented. [Citation.]" 29 Cal.3d at 380.

The next California court to face a similar situation was the Supreme Court in *People ex. rel. Clancy v. Superior Court*, 39 Cal.3d 740 (1985). In *Clancy*, the City of Corona hired a private attorney on a contingency basis under which he was to be paid $60 per hour, but if an adverse final judgment was entered in any manner in which he represented the city, his fee was to be reduced to $30 per hour. In this case, involving a request for injunctive relief to abate a public nuisance, the defendants moved to disqualify the private prosecutor on the basis of his financial interest. The court focused upon the duties owed by a public prosector in order to determine whether this particular prosecution was appropriate:

> "[A] prosecutor's duty of neutrality is born of two fundamental aspects of his employment. First, he is a representative of the sovereign; he must act with the impartiality required of those who govern. Second, he has the vast power of the government available to him; he must refrain from abusing that power by failing to act evenhandedly. These duties are not limited to criminal prosecutors; 'a government lawyer in a civil action or

> administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.' [Citation.]
>
> "Not only is a government lawyer's neutrality essential to a fair outcome for the litigants in the case in which he is involved, it is essential to the proper function of the judicial process as a whole. Our system relies for its validity on the confidence of society; without a belief by the people that the system is just and impartial, the concept of the rule of law cannot survive. [Citation.]
>
> "When a government attorney has a personal interest in the litigation, the neutrality so essential to the system is violated." 39 Cal.3d at 746.

The court held that the city's attempt to portray the prosecutor as a "private" attorney working on behalf of the city did not compel a different conclusion regarding his ethical duties:

> "[A] lawyer cannot escape the heightened ethical requirements of one who performs governmental functions merely by declaring he is not a public official. The responsibility follows the job: If Clancy is performing tasks on behalf of and in the name of the government to which greater standards of neutrality apply, he must adhere to those standards.
>
> "In the case at bar, Clancy has an interest in the results of the case: His hourly rate will double if the city is successful in the litigation. Obviously this arrangement gives him an interest extraneous to his official function and the actions he prosecutes on behalf of the city." 39 Cal.3d at 748.

The court ultimately concluded that the "rigorous ethical duties imposed on a criminal prosecutor" also applied to a private attorney acting in civil litigation on behalf of the government, and the contingent fee arrangement violated the neutrality principal. 39 Cal.3d at 748.

Federal courts have come to similar conclusions in analogous situations. For example, in *Ganger v. Peyton*, 39 F.2d 709 (4th Cir. 1967), the court held that a state prosecutor should not have prosecuted a defendant in a criminal action while he was simultaneously representing the defendant's wife in the divorce action. The court noted that "[s]uch a conflict of interest clearly denied Ganger the possibility of fairminded exercise of the prosecutorial discretion." 379 F.2d at 712. Ultimately, the court concluded that:

> "[T]he conduct of this prosecuting attorney in attempting to serve two masters, the people of the commonwealth and the wife of Ganger, violates the requirement of fundamental fairness imposed by the due process clause of the Fourteenth Amendment." 379 F.2d at 714 (citations omitted).

In considering whether attorneys for an interested party may prosecute a criminal contempt proceeding arising from violation of a civil injunction, the United States Supreme Court held that "prosecution by someone with conflicting loyalties 'calls into question the objectivity of those charged with bringing a defendant to judgment.'" *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 810, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987). The court was not persuaded that judicial oversight was an appropriate check on the conflicting interests of the private attorney:

> "A prosecutor exercises considerable discretion in matters such as the determination of which person should be targets of investigation, what methods of investigation should be used, what information will be sought as evidence, which person should be charged with what offenses, which person should be utilized as witnesses, whether to enter into any plea bargains and the terms on which they will be established, and whether any individuals should be granted immunity. These decisions, critical to the conduct of a prosecution are all made outside the supervision of the court." 481 U.S. at 807.

Prosecution of defendants by interested parties is improper, either because such prosecution violates the due process clause, or simply since the attorney may be disqualified due to the conflict. A "private attorney general," acting on behalf of the public, stands in the shoes of the public prosecutor. Such a person must be subject to precisely the same ethical limitations as those imposed upon the government attorney. A private prosecutor, having expended money to fund a prosecution, must absorb the costs

of an unsuccessful prosecution. On the other hand, a state prosecutor earns his salary whether he wins or not. Clearly, the structural conflict of interest identified by the courts in *Marshall*, *Barboza*, *Clancy*, and *Young*, exists in a UCA enforcement, and may in fact be the driving force behind such actions, even where public prosecutors have filed suit. This conflict of interest raises the specter as enunciated by the case law cited herein that private counsel is unable to act with the requisite neutrality and impartiality, and it violates the due process clauses of the Fourteenth Amendment and the California Constitution.

The proposed revisions to the UCA not only would substantially eliminate the potential for a conflict of interest, they appear designed to serve the salutary role of eliminating the *appearance* of such a conflict. We remain somewhat concerned, however, that the express delineation of the conflict between "individual" and "representative" actions set forth in proposed §17302 could lead the courts to conclude that suits brought in other "representative" capacities would not create such a conflict. As we have noted above, UCA claims are often asserted as "tag along" claims in Proposition 65 enforcement matters. Since the private plaintiff is entitled to receive 25% of civil penalties assessed under that Act, it is our view that such a bounty creates the same type of conflict inherent in "individual" actions. Given that penalties may be assessed in an amount of up to $2500 per violation, and a consumer products manufacturer, for example, who has shipped 10,000 units to California without a Proposition 65 warning may be facing a very substantial $25 million in penalties,[2] such a "representative" suit poses a potential for recovery by the private enforcers which may be orders of magnitude larger than, for example, a personal injury action. Thus, this is no small gap in the lines of demarcation proposed to be reset in accord with the law and better public policy. Accordingly, we believe that, while the language of proposed §17302 is appropriate, it should be modified to make explicit the fact that conflicts can arise in other circumstances.

3. Conclusion.

We believe that the May 1996 draft provides an excellent means to force accountability to the private enforcement bar, and brings the UCA in line with established constitutional principles. With slight modifications, we hope that this

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[2] Large consumer products manufacturers may actually be facing claims of violations for hundreds of thousands of units.

proposal can eliminate potential loopholes, and ensure that "public interest" litigation is truly brought in the public interest.

We thank the Commission for the opportunity to comment on the proposed draft, commend its hard and valuable work, and welcome the opportunity to provide further testimony during the public hearings. In the interim, we would be delighted to answer any questions the Commission may have.

Very truly yours,

Jeffrey B. Margulies
HAIGHT, BROWN & BONESTEEL, L.L.P.

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San Francisco Daily Journal, July 1, 1996, pp. 1, 8:

Judge Tentatively Rules '95 Accord Blocks Private Suits

■ The issue pits Lungren against plaintiffs attorneys over video monitor screens.

By Dolores Ziegler
Daily Journal Staff Writer

A San Francisco judge said he plans to rule this week that private parties are barred from pursuing unfair business practices suits over an issue the state attorney general settled in a controversial pact last year.

There is no case law spelling out who has priority when the attorney general and private lawyers are pursuing similar claims — something that rarely happens, according to an involved lawyer, Alan Mansfield of San Diego's Milberg, Weiss, Bershad, Hynes & Lerach.

The issue pits Attorney General Daniel Lungren, who claims his negotiating power is on the line, against a score of plaintiffs attorneys who claim that Lungren made a bad deal in 1995 when he settled a suit claiming computer makers misled buyers about the size of video monitor screens. The suit was settled for $1.5 million in computer equipment for schools and $200,000 in costs for the Merced district attorney and others.

At a hearing Friday, Superior Court Judge William Cahill tentatively ruled that the 1995 settlement of the Merced County suit negotiated by Lungren and seven district attorneys blocks private plaintiffs lawyers from pursuing 26 private suits in San Francisco.

Cahill noted that the Merced Superior Court has already issued an injunction barring false advertising and that the attorney general represented the people of California.

"One problem I have is you just do not like the stipulated judgment," Cahill told one of the plaintiffs attorneys, Robert Green of Girard & Green in San Francisco. "[You think] the $1.5 million is too low. But we don't get to look at whether it's right or wrong. It's over."

In his tentative ruling, Cahill said the private plaintiffs' displeasure with the Merced settlement does not mean the doctrine of res judicata should be defeated.

Cahill is expected to decide this week whether to toss out much of the 26 coordinated suits assigned to him by the Judicial Council and whether the plaintiffs may continue to press their cases against defendants not involved in the Merced settlement. The San Francisco cases are known as *In Re Computer Monitors*, JCC 3158.

Unlike the state toxics law, Proposition 65, which spells out the procedure for giving the attorney general the first crack at enforcement, there are no guidelines in the Unfair Business Practices Act saying what to do if both the attorney general and private attorneys pursue similar cases, Mansfield said.

There are only three known cases in which the issue arose in the trial courts, he said. One San Diego case was over late charges for cable services and two Alameda County cases alleged misrepresentation of the quality of meat at Safeway and Lucky grocery chains.

The plaintiffs contend that Lungren was not an adequate representative of the class in Merced and that the consumers didn't get notice of the terms of the settlement.

The plaintiffs in San Francisco want between $100 and $700 each in restitution plus an injunction that will stop false advertising and unfair business practices across the United States, said Mansfield.

Because of the Merced suit, computer monitor makers reveal the actual viewing area, but retailers in California vary in the way they present the monitor size in advertisements. They either give the actual viewing area or screen size. In a 17-inch screen, the viewing area can really be 12.5 inches or 15 inches, said Mansfield.

Outside of California, retailers generally give the screen size and not the viewing area, he said.

The defendants, led by Penelope Preovolos of Morrison & Foerster in San Francisco and Debra Albin-Riley of Fried, Frank, Harris, Shriver & Jacobson in Los Angeles told Cahill that the Merced injunction barred further suits against their clients.

The attorney general weighed in with an amicus brief urging Cahill to toss out the private suits in favor of the judgment he helped negotiate.

The attorney general said his ability to negotiate "broad based restitution" under the Unfair Business Practices and false advertising laws on behalf of California consumers would be threatened if Cahill allows the private suits.

"Ironically, while plaintiffs cast themselves as the guardians of consumer interests, their arguments, if accepted, would undermine consumer protection law in California," Deputy Attorney General Linus Masouredis wrote in a memo supporting the dismissal of the suits. Defendants would have no incentive to settle with the attorney general or district attorneys if private litigants could bring similar suits, Masouredis argued.

Lungren himself came under attack when the monitor suit was pending in the Merced trial court. Merced County District Attorney Gordon Spencer, who brought the original suit, and other local prosecutors charged the attorney general with trying to undercut them by negotiating a settlement without any monetary payment.

Critics charged Lungren with not strenuously pursuing the case because his political allies represented the defendants and had contributed to his campaigns. Lungren attempted to settle the case for only injunctive relief but after an outcry by the district attorneys, the case included a cy pres remedy of computers for schools.

San Francisco Daily Journal, July 8, 1996, pp. 1, 2:

Settlement on Computer Screens Bars Private Cases

■ The state attorney general's $1.5 million pact stops consumers from litigating the size issue separately, a judge finds.

By Dolores Ziegler
Daily Journal Staff Writer

Affirming the dominance of the state attorney general over unfair business practices suits, a San Francisco Superior Court judge has held that a settlement state prosecutors reached on the size of computer monitor screens precludes private plaintiffs from litigating the issue separately.

Judge William Cahill said Friday that a $1.5 million settlement negotiated by Attorney General Daniel Lungren and several district attorneys in 1995 prohibited California buyers of computer monitors from pressing their damage claims against both the makers and retailers of the equipment. The consumers had alleged that the manufacturers and retailers had made a practice of inaccurately advertising the size of the visible portion of video monitors.

The plaintiffs had argued that, at a minimum, they should be allowed to pursue their suits against retailers such as Circuit City, which were not part of the Merced County Superior Court suit the state settled.

During a hearing on the issue, Judge Cahill said that although the plaintiffs were unhappy with the Merced settlement, which gave $1.5 million in computer equipment to schools, they could not ignore the agreement.

In his decision, Cahill concluded that the San Francisco plaintiffs were suing over the same issue that the attorney general did — misleading advertising. Therefore, the San Francisco plaintiffs are barred under the doctrine of res judicata from pursuing their suits, Cahill held in *In re Computer Monitor Litigation*, JCCP 3158.

Cahill tossed out the claims of California monitor buyers contained in 26 consolidated suits. Remaining are the claims of out-of-state buyers in cases filed as national class actions.

"It [Cahill's ruling] reflects the fact that when the attorney general speaks for the people of California, private plaintiffs really won't be able to come back later on and attack it as unsatisfactory," said Stephen Goldberg of San Francisco's Heller, Ehrman, White & McAuliffe, who represents Phillips Electronics.

Penny Preovolos, an attorney for Apple Computer and other manufacturers, said her clients would probably bring a motion to dismiss the out-of-state plaintiffs from the suits. "It doesn't seem that California should be hosting class actions when there are no state plaintiffs," said Preovolos, of Morrison & Foerster in San Francisco.

One of several plaintiffs attorneys, Thomas Keeling of Kronick, Moskovitz, Tiedemann & Girard in Sacramento, said they had not yet decided what action to take next.

The San Francisco plaintiffs argued that the Merced settlement gave nothing to consumers. The San Francisco plaintiffs contended they were not given notice or a chance to object to the attorney general's settlement. Moreover, the plaintiffs argued, their suits posed additional claims to those asserted by the attorney general.

The arguments did not persuade Cahill.

"The fact that this action seeks recovery under additional statutes and different relief is irrelevant to the analysis of whether the two actions involve the same 'primary right,' " or injury, Cahill wrote.

The plaintiffs in the San Francisco cases sought between $100 and $700 each in restitution for buying monitors advertised as 17 inches but which had a viewing area of between 12.5 inches and 15 inches.

CALIFORNIA SUPERIOR COURT

CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT NUMBER EIGHT

IN RE COMPUTER MONITOR LITIGATION

THIS DOCUMENT RELATES TO: ALL CASES

NO. JCCP - 3158

ORDER SUSTAINING DEMURRER WITHOUT LEAVE TO AMEND BY "ACER" AND "NON-ACER" DEFENDANTS ON GROUNDS OF RES JUDICATA

This matter came before the court on June 28, 1996. The Honorable William Cahill, presiding, ordered this matter submitted. After further consideration of all papers and arguments, the court orders as follows:

IT IS HEREBY ORDERED THAT: the Defendants in the People v. Acer, et al. case, Merced Superior Court No. 123614, demurrer to Plaintiffs' Entire Consolidated Complaint on the grounds of res judicata is SUSTAINED WITHOUT LEAVE TO AMEND as to California Plaintiffs and Private Attorney General actions.

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Under California law, *res judicata* bars a plaintiff from litigating a claim if: (1) there is a prior final judgment on the merits; (2) which involved the same cause of action as that being asserted int he subsequent suit; and (3) the current plaintiff was a party or in privity with a party to the prior lawsuit. Victa v. Merle Norman Cosmetics, Inc. (1993) 19 Cal. App.4th 454, 459. All three elements are met in this case.

It is undisputed that there is a prior final judgment on the merits. The stipulated judgment entered by the Merced Superior Court on September 28, 1995 is a final judgment on the merits entitled to full res judicata effect if the other elements are satisfied. Victa v. Merle Norman Cosmetics, Inc., supra, 19 Cal. App. 4th at 460-61.

The cause of action asserted in this class action is the same as that in the Government Action because the same "primary right" is involved in both cases. See Second Amended Complaint in the Government Action, Exhibit 2 to Preovolos Declaration, ¶¶42-50 and Consolidated Complaint in this action, ¶¶84-97. The "harm" or "wrong" at issue in the Government Action was the defendants' advertising and sale of computer monitors which had less of a useable screen size than consumers were led to believe. The "injury" to plaintiffs in the Government Action was the misleading advertising and purchase by consumers of computer monitors which had less of a screen size than advertised. That is the same "harm" and "injury" alleged in this consolidated action. The fact that this action seeks recovery under additional statutes and different relief is irrelevant to the analysis of whether the two actions involve the same "primary right." Eichman v. Fotomat (1983) 147 Cal. App. 3d 1170, 1174.

As to the California plaintiffs and the private attorney general cases, these plaintiffs were in privity with the Attorney General and District Attorneys in the Merced case and therefore are barred from asserting claims here. In California, privity, for res judicata purposes, focuses on whether there is a special relationship between parties such that a party in a prior action is deemed to represent the interests of, and bind the other party. Clemmer v. Hartford Insurance Co. (1978) 22 Cal.3d 865, 875. "If it appears that a particular party, although not before the court in person, is so far represented by others that his interest received actual and efficient protection, the decree will be held to be binding upon him." Rynsburger v. Dairymen's Fertilizer Coop., Inc. (1968) 266

Cal. App. 2d 269, 277. A government suit brought on behalf of the public or a segment thereof can have binding res judicata effect which precludes a subsequent suit by private members of the public represented in the government action. See Id. at 277-78.

Privity depends on whether there is a special relationship between the representative and absent parties to be bound. The Attorney General has such a special relationship with the public. The cases that the plaintiffs cite for their argument that notice and an opportunity to be heard are required did not involve government suits brought on behalf of the public. Richards v. Jefferson County, Alabama 1996 U.S. LEXIS 3721, relied on extensively by plaintiffs here, can be distinguished on that basis.

IT IS HEREBY ORDERED THAT: the "ACER" Defendants' demurrer to Plaintiffs' entire Consolidated Complaint is SUSTAINED WITHOUT LEAVE TO AMEND as to California Plaintiffs and the Private Attorney General actions.

As to the "NON-ACER" Defendants, (Circuit City, et al.), Defendants' demurrer to Plaintiffs' entire Consolidated Complaint is SUSTAINED WITHOUT LEAVE TO AMEND as to California Plaintiffs and the Private Attorney General actions. Miller v. City of Bakersfield (1967) 256 Cal. App. 2d 820, 822.

DATED: July 3, 1996

Judge William Cahill
San Francisco Superior Court

file no. JCCP - 3158

University of San Diego

Center for Public Interest Law | Children's Advocacy Institute

To: Stan Ulrich, Law Revision Commission Members

From: Prof. Robert C. Fellmeth

Re: Comments on Status of Unfair Competition Proposal

Date: September 30, 1996

As we have discussed, an irreconcilable conflict has arisen for me on October 10; I shall be at the Commission meeting in Sacramento on November 14, and look forward to testifying on behalf of the proposal before the state legislature. I congratulate you, Nat and the Commission on the outstanding job reflected in a sophisticated and balanced draft.

I have read the comments submitted and have the following suggestions for possible refinement.

(1) § 17302 prohibition on the add-on cause of action

The concept here is to prohibit the use of a § 17200 cause of action on behalf of the general public as leverage in the course of a private dispute with a defendant; one danger in such a conflict can be the sell-out of the general public for private gain outside the class status of the named plaintiff.

Consumer's Union and others make the point that many legitimate causes of action may be brought on behalf of the general public in a *bona fide* manner by those who also may have other disputes with the defendant. They argue that it is unnecessary to sacrifice the broader public benefits that may occur from a generalized resolution unless there is a real conflict inhibiting good faith representation. They note that two protections already exist in the draft to inhibit the danger cited: (1) the conflict prohibition of § 17303, including an affirmative procedure to examine and certify the plaintiff as able to represent the general public; (2) a required notice and procedure to test stipulated judgments in a hearing format.

It is difficult to fashion a bright line test here, and perhaps it would be preferable to allow some wiggle room since we are already going through a qualifying step which specifically examines conflicts using class action precedent and the body of law applicable to it.

One response to this criticism might be to adjust § 17302 to

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specify that where its conditions apply, the court: (1) has an affirmative duty to examine the plaintiff's other causes of action for possible conflict bar; and (2) has an affirmative duty to examine any stipulated or proposed judgment which will affect the representative action remedies benefiting the general public.

2. TRO possibility before representative qualification.

Consumer's Union points out that there may be a legitimate basis for a TRO which cannot wait for qualification. Although rare, such a possibility may exist. I would not confine it to a TRO since many courts operate by preliminary injunction. I suggest a provision or line as a part of § 17303 that qualification is "without prejudice" to a preliminary injunction or other preliminary relief *pendente lite* where otherwise appropriate.

3. § 17310 (a) Prosecutor priority.

Tom Papageorge's concern about public/private consolidation is not theoretical. There is some fear that private litigants will learn of a pending public action, file first, and then force a consolidation of the public case with their case. This may lead some prosecutors to avoid the normal pre-filing investigation which benefits all concerned (filings are not made where the evidence is lacking and there is no public relations harm). This is, in fact, what happened in the Cox cases in San Diego. Although I agree with Tom, I am not sure how to improve the current draft.

It seems to me that within such a consolidated case the court would hopefully follow the overall direction of the section and suspend the private case until the public case is finished, and then determine whether it makes adequate restitution to leave anything for the private action, and (importantly) to preserve the attorney fee right of the private litigant for his or her legitimate contribution to the case. The way Stan drafted this does allow for beneficial outcomes in general; after all, if a private litigant has progressed well into a case, done a great deal of work, and then a public prosecutor comes in near the end, the latter should not necessarily supplant the former wholly.

4. § 17309(b) restitution offset.

This is a tricky issue. Tom Papageorge for CDAA and the LA District Attorney outlines some of the possible subsidiary questions which may arise from it. He phrases it diplomatically, but one fear is a set-up private action which empties a defendant for a private litigant and leaves little for the general public. Other provisions proposed here lessen concern: the prosecutor has priority if involved, and I am suggesting an affirmative duty above to review the balance between private and representative remedies.

I suggest two changes arising from Tom's critique. First, change "awarded" to "paid" in the section so the defendant does not escape a full accounting. Second, instead of "pro-rata share", substitute "equitable apportionment," to address the problem of

uneven damage. There may be other adjustments which could improve this provision and the matter should be discussed with CDAA.

5. § 17309 binding effect.

A number of comments would eliminate § 17309 binding effect. I believe this undermines the reform, making it rather moot. If there is no binding effect, what difference do any safeguards make? What is the point? Is there any final judgment which has no binding effect between the same parties in the same factual dispute under the same causes of action? If so, is it a final judgment? How? If there are no possible final judgments, what do we have at the conclusion of the lawsuit except the payment of money to counsel to (presumably) not bring another action, but without prejudice to a repetition of the same exercise by 24 million other Californians and 120,000 counsel, each on behalf of the general public? The courts are here to decide disputes, not to provide a forum for multiple pay-offs. It is better to improve the forum so it can be trusted to make the decisions it is charged with making, rather than to inhibit its decisional role by withholding binding effect. The bias here is: do it right, and do it once. A number of commentators note that settlements can occur without a judgment. This is true - and they will have no estoppel effect of course. But if a final judgment is entered, it should have some effect on others litigating the same question for the same parties. That is the point of this reform.

An argument can be made for an escape valve. There already exists the possibility of a motion to set aside a judgment. I would not oppose a narrowly drawn provision allowing for such a set aside, and would suggest that such a motion to set aside prevail under the following explicit conditions: (1) a fraud on the court in the form of misleading information or material omissions which inhibited the court from protecting the rights of the general public being litigated; or (2) a violation of the notice or other procedural specifications of this section such that the representative action did not allow for meaningful comment and review of the proposed final judgment, and the result did not provide for a substantial remedy responsive to the interests of the general public given the merits of the case.

The rationale here is: if one depends upon specific safeguards to protect the interests of the general public being litigated to give a judgment finality, those safeguards must be there to get it.

I would add that the burden of such a set aside must be on its proponent, and that the court has the authority to modify or limit it where *bona fide* third parties have relied upon a facially valid judgment to their detriment - in order to protect their legitimate interests.