

# **A Primer on Business and Professions Code Section 17200: California's Unfair Competition Law**

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California State Legislature

January 2003

## **BACKGROUND**

California law has prohibited "unfair competition" by one business against another since the first Civil Code was enacted in 1872. Since 1933, the Unfair Competition Law (UCL) (Business and Professions Code section 17200 *et seq.*) has authorized both public prosecutors and private plaintiffs, acting for themselves or on behalf of the general public, to bring civil actions to enjoin acts of unfair competition or false advertising.

In 1963, the UCL was expanded to protect consumers from fraud and unfair business dealings by prohibiting any "unlawful, unfair, or fraudulent business act or practice."<sup>1</sup> California courts have interpreted the "unlawful" aspect of this amendment to mean that plaintiffs may "borrow ... violations of other laws and treat [them] ... as unlawful practices independently actionable" under the UCL.<sup>2</sup> Thus, a statute that declares a certain type of business practice unlawful, but does not expressly provide for an action to enforce its provisions, may be enforced by a plaintiff under the UCL.

In 1977, the statute was again expanded to permit courts to order restitution as a remedy for UCL violations, requiring "disgorgement of money or property obtained by means of such [unfair or unlawful] practices."<sup>3</sup> For example, if a court finds that a business has been unlawfully overcharging customers for a good or service, the court may order the business to pay the difference between the actual price it received and the price it could have lawfully charged.

## **HOW THE UCL WORKS – PRIVATE PLAINTIFFS' ACTIONS**

A recent background study characterized the UCL as providing "a broad but shallow scheme of relief"<sup>4</sup> -- broad in that it covers a wide range of unfair or unlawful business practices, and allows virtually anyone to sue; but shallow in that it provides only for limited relief, particularly to private plaintiffs.

Unlike public prosecutors, who may seek significant civil penalties for UCL violations, the remedies available to private plaintiffs are more limited: They may seek neither penalties nor damages to compensate for injuries caused by the violation. (Significantly, neither public prosecutors or private plaintiffs may seek punitive damages under the UCL, even for the most egregious practices.<sup>5</sup>)

Instead, private plaintiffs may seek an injunction to halt the unfair, unlawful or fraudulent practice, and restitution of any ill-gotten gains obtained as a result of the violation. As injunctions and restitution are equitable remedies that do not require submission to a jury, private UCL actions are tried before a judge, who has sole discretion to determine if the alleged wrongful act is an unfair, fraudulent, or unlawful business practice, and to determine the appropriate equitable remedy. A court may order restitution in a UCL action without individualized proof of injury if it determines that such a remedy is necessary to prevent the unfair practice.<sup>6</sup>

### **RECENT ALLEGED ABUSES OF THE UCL**

According to several recent news reports, a Beverly Hills law firm called the Trevor Law Group has filed lawsuits under the UCL naming approximately 1,400 automobile repair shops for violations ranging from not having valid business licenses to failing to give customers proper paperwork.<sup>7</sup> Defendants allege that many of the charges against them stem from complaints made to the state Bureau of Automotive Repair and listed on its Web site.<sup>8</sup>

Similar suits by the Trevor firm, plus others by the Long Beach law firm of Brar & Gamulin, have been filed against hundreds of other small, mostly immigrant-owned businesses, including nail salons (for using the same bottle of nail polish for more than one customer),<sup>9</sup> restaurants (for health code violations),<sup>10</sup> and grocery stores (for selling pirated videotapes).<sup>11</sup>

The suits have provoked confusion, fear, and anger among the hundreds of business owners sued, who claim the UCL violations alleged against them are frivolous and unfounded. Further, these defendants claim they are being pressured to agree to quick, out-of-court settlements of \$1,000 or more apiece, which many have paid either because they cannot afford to mount a defense, or because the plaintiffs' attorneys allegedly threaten sharp escalation of their demands if the cases are not settled immediately.

Without knowing the underlying facts of each case, it is impossible to determine at this point whether any or all of the charges alleged against these defendants are meritorious or meritless UCL claims. The alleged settlement pressures on the defendants, however, do raise ethical implications, and the use of the UCL to sue masses of small defendants and then immediately attempt across-the-board, out-of-court settlements of those actions raises questions about the possible misuse of the UCL.

### **ETHICAL IMPLICATIONS OF ALLEGED ABUSES**

In response to a request by Attorney General Bill Lockyer and others, on December 17, 2002, the State Bar of California confirmed publicly that it is investigating allegations that the Trevor Law Group used "extortion tactics" in urging defendants in the UCL suits to enter into quick settlements.<sup>12</sup>

Several statutes and Rules of Professional Conduct governing attorney behavior may be implicated by the alleged abuses noted above. These include requirements that attorneys maintain only those actions as appear legal or just; that they employ only those means as are

consistent with truth; and that they not to bring an action to harass or maliciously injure any person, or from any corrupt motive.<sup>13</sup> Existing law also provides that the commission of any act involving moral turpitude, dishonesty or corruption constitutes a cause for suspension or disbarment.<sup>14</sup>

The State Bar's Chief Trial Counsel has been invited to testify at the informational hearing.

### ANALYSIS OF THE COMPLAINTS

Copies of the formal complaints filed by the Trevor and Brar firms in the above-referenced cases, as well as some of the settlement demand letters sent to defendants, have been provided to Committee staff. Although staff has no evidence of the truth or falsity of the complaints' allegations, the following tentative conclusions may be drawn from an analysis of the allegations and the settlement demands themselves:

*(1) Even where a UCL violation is established, restitution will not necessarily be awarded.*

Settlement demand letters warning of potentially large restitution awards if the case isn't settled may exaggerate or misstate the actual prospect of restitution. Not all UCL violations result in measurable financial gains to the violators. For example, the complaints against the nail salon owners include allegations of unsanitary maintenance and sterilization of manicuring tools. While such behavior, if proved to exist and to constitute an "unlawful business practice," may be subject to an injunction for health reasons, it is not immediately apparent that unsanitary cleaning practices would lead to increased profits for the salons that would justify an award of restitution. (In fact, the practice could have allowed the salons to charge customers a lower price.)

*(2) Even where a UCL violation is established, plaintiffs' attorneys may not be entitled to attorneys' fees.*

The UCL does not directly provide for the award of attorneys' fees to prevailing plaintiffs. Rather, plaintiffs who bring UCL or similar actions may seek a fee award from the court when they prove that they have successfully enforced "an important right affecting the public interest," and that "the necessity of private enforcement" makes such an award appropriate. [Cal. Code Civ. Proc. Sec. 1021.5.] Assuming, for example, that a court were to find that any of the allegations against any of the auto repair dealers constitute legitimate UCL violations, news articles have indicated that all of these complaints already have been investigated by the Bureau of Automotive Repair, and presumably, appropriate remedial actions were instituted by the state agency. Under such circumstances, a court may well find that there was no "necessity of private enforcement" justifying an award of attorney fees under CCP Section 1021.5.

(3) *Even where these plaintiffs' attorneys might be entitled to attorneys' fees, the Attorney General has compared their settlement tactics to extortion.*

A letter from the Brar law firm to a nail salon owner dated November 15, 2002 (two weeks after the lawsuit against salon owners was filed), seeks to settle the case against that particular defendant for a payment of \$1,000 and a written promise not to engage in future violations. The letter requires payment by December 2, after which the demand would escalate to \$2,500.

According to news articles, similar demand letters have been sent to all the defendants in these recent cases, seeking immediate settlements of \$1,000 or more in exchange for early dismissal from the case. The Attorney General has likened this practice to extortion, in that it pressures businesses to agree to relatively small settlements to get out of the case when the business owners may not even understand their rights and potential defenses to the actions.<sup>15</sup>

### **DO THESE CASES ABUSE THE UCL? IF SO, WHAT NEEDS TO BE DONE?**

The purpose of this informational hearing is to explore whether the UCL has been abused by the filing of the recent actions against numerous small business. If the demands for restitution and attorneys' fees in some of these cases is of doubtful validity, such facts may reflect inexperience or competence problems on the part of the plaintiffs' attorneys. Or, they may signal intentional abuse.

Further, the practice of making out-of-court settlement demands against multiple defendants - - the vast majority of whom are recent immigrants unsophisticated in the American legal system, and thus far more likely to simply accede to the demand in order to get out of the case as soon as possible -- has serious implications both ethically and as an abuse of the UCL. Although the State Bar has been asked to investigate the ethical issues involved, legislation may be appropriate to eliminate any incentive to use the UCL as an extortion tool.

Panel 5 of the hearing will ask representatives of various organizations for their views on possible solutions to the alleged abuses.

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<sup>1</sup> 3 Sen. J. (1963 Reg. Sess.) pp. 4441-42, 3 Assem. J. (1963 Reg. Sess.) p. 4999.

<sup>2</sup> Farmers Insurance Exchange v. Superior Court (1992) 2 Cal. 4th 377, 383.

<sup>3</sup> State Farm Fire & Casualty Co. v. Superior Court (1996) 45 Cal. App. 4th 1093, 1110.

<sup>4</sup> Fellmeth, *California's Unfair Competition Act: Conundrums and Confusions*, 26 Cal. L. Revision Comm'n Reports 227, 252 (1996).

<sup>5</sup> Bank of the West v. Superior Court (1992) 2 Cal. 4th 1254.

<sup>6</sup> Committee on Children's TV, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197 (citations omitted).

<sup>7</sup> "Business Owners Claiming Old Law Used in Shakedowns," *The Daily Breeze*, December 17, 2002.

<sup>8</sup> "State Bar Probes Duo's Tactics," *The Daily Journal*, December 19, 2002.

<sup>9</sup> "Salon Owners Wring Hands Over Nail Polish Lawsuit," *The Press Enterprise*, November 25, 2002. The plaintiffs allege using the same nail polish brush on more than one customer is a violation of state regulations. It has been reported, however, that state rules do not specifically prohibit the practice and the California Bureau of Barbering and Cosmetology considers the practice "standard and safe." *Id.*

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<sup>10</sup> “Backlash Against Lawsuit Gains Steam,” *Whittier Daily News*, January 2, 2003.

<sup>11</sup> *Id.*

<sup>12</sup> “State Bar Confirms Investigation of Los Angeles Lawyers After Multiple Small Business Sued,” State Bar of California Press Release, December 17, 2002.

<sup>13</sup> Bus. & Prof. Code § 6068.

<sup>14</sup> Bus. & Prof. Code § 6106.

<sup>15</sup> “Attorney General Asks Probe of 'Extortionist' Legal Tactics,” *The Los Angeles Times*, December 17, 2002.