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California's Unfair Competition Law: Regulatory Balance or Unlevel Playing Field?

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The business community continues to fret over the use of California's Unfair Competition Law ("UCL"),[1] notwithstanding a series of decisions from the Supreme Court of California over the last half-decade which have clarified and settled many of the most debatable issues under the law. No one can credibly claim that the Supreme Court of California is a "pro-plaintiff / anti-business" court, and since the UCL has not been significantly amended in recent years, it is fair to ask whether the business community's loud protests are anything more than a well orchestrated lobbying and public relations campaign. Is the UCL serving its intended purposes of protecting consumers and competitors from illegal, fraudulent or unfair business practices, or has it created an unlevel playing field where business defendants are unfairly targeted for unwarranted and inefficient judicial intervention?

In the absence of a rigorous, empirical analysis of the costs and benefits of lawsuits under the UCL, we are limited to arguments grounded in general theories of civil liability punctuated by the anecdotal stories found in reported court decisions. I take as a premise that no one in this debate, neither consumers nor businesses, is a staunch defender of unlawful, unfair or fraudulent business practices. The discussion is not about whether we should permit unlawful, unfair or fraudulent business practices. Instead, the question is whether the UCL is being properly enforced. Do courts properly recognize those practices which are unlawful, unfair or fraudulent? Is there any evidence of significant overbreadth or underbreadth in the courts' interpretation of the UCL? Recognizing that errors are inevitable in any system that relies upon human judgment, how confident are we that the type and number of errors in the application of the UCL are within the bounds of acceptability?

Ultimately, these are all questions about enforcement. Is the UCL being properly enforced?

I mean by "enforcement" the sum total of all actions brought under a regulatory regime. When a legislature enacts proscriptive rules to guide private conduct, it must settle upon a range of enforcement mechanisms. Civil or criminal enforcement? Public or private plaintiffs? Administrative or licensing regimes or enforcement by private parties in judicial proceedings? Compensatory remedies, injunctive relief, punitive fines, or criminal sanctions? These are just a few of the most important considerations that must be weighed in the balance.

The goal, ultimately, is to secure effective, efficient and balanced enforcement. Too little enforcement activity permits wrongdoers to profit from their wrongdoing, usually while victimizing others. Too much enforcement activity risks unfairly penalizing or inefficiently deterring innocent actors who fear the costs of facing public or private attorneys general in meritless actions. And, since it is often difficult to know at the beginning of any par-

1 Cal. Bus. & Prof. Code §§ 17200 et seq.

ticular enforcement activity (i.e., at the "go / no-go" decision point) whether that particular activity is too little, too much or just right, we must make some judgments about whether the enforcing authority has the proper incentives to make balanced enforcement decisions.

It is against this backdrop of regulatory enforcement that I review the basic outlines of the UCL as interpreted by a few of the most recent and important decisions by the Supreme Court of California. In the course of this review, I will highlight a few issues that deserve further consideration by policy-makers.

The Basic Regulatory Proscription: Section 17200

Section 17200 of the Business and Professions Code provides as follows:

> As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.[2]

This is very broad language, and the California Supreme Court has repeatedly given this language an interpretation consistent with its broad terms. As the court noted only a few years ago in one of its most important decisions interpreting the scope of Section 17200,

> the unfair competition law's scope is broad. . . . [I]t does not proscribe specific practices. Rather, as relevant here, it defines "unfair competition" to include "any unlawful, unfair or fraudulent business act or practice." (§ 17200.) Its coverage is "sweeping, embracing '"anything that can properly be called a business practice and that at the same time is forbidden by law."[3]

The apparent breadth of Section 17200 is not really all that unusual. After all, Section 5 of the Federal Trade Commission Act, which has been in place for decades, contains the following equally simple and equally broad language: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."[4]

So if we have had a general proscription against unfair, deceptive and unlawful business practices as a matter of federal law, why does there seem to be such concern among California businesses and business lawyers about Section 17200? To address this question, we will examine a few of Section 17200's most pertinent characteristics, each time asking the question of whether there is too much, too little or just the right amount of enforcement. The objective here is to focus issues and raise questions for further consideration.

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2 Cal. Bus. & Prof. Code § 17200.

3 *Cel-Tech Commun., Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999) (footnote omitted).

4 15 U.S.C. § 45(a)(1) (2001).

Who Enforces Section 17200: The Question of "Standing"

Let's first look at the question of who can bring enforcement actions. Under the FTC Act, the Commission itself can file actions for relief, but there is no private party standing. This is a typical type of regulatory structure where Congress or a legislature drafts relatively vague language that sets out broad regulatory goals, but then expects a regulatory agency to fill in the details in the course of rule-making and enforcement. We hope and expect that a regulatory agency will exercise an informed discretion about its enforcement activities. We expect vigorous enforcement, but enforcement within the scope of a reasonable interpretation of the law. We don't expect regulatory enforcement to take sides. We expect even-handed enforcement.

We see that in the Commission's enforcement of Section 5 of the FTC Act. The statutory language is broad, but the guidelines adopted by the FTC ensure that enforcement actions are brought only when there appears to be a serious market malfunction that is likely to injure consumers.

By contrast, standing under Section 17200 is not limited to government enforcers. Instead, it is clear that private persons have standing to seek relief. The fact that a private person has standing to seek relief for statutory violations is not all that unusual. After all, the federal antitrust laws, which are written in equally broad terms, have private enforcement provisions authorizing treble damages. Anyone who has been injured by a violation of the antitrust laws has standing to sue.

But standing under Section 17200 is even broader than this, and herein lies an important difference. Standing to bring an action for violations of Section 17200 is provided for in Section 17204 of the Business and Professions Code as follows: "Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction…by *any person* acting for the interests of itself, its members or the general public."[5]

In 1998, the California Supreme Court reiterated its prior holdings that any person — including a for-profit corporation — has standing to bring an action in the public interest alleging a violation of Section 17200, even if the person bringing the action can show no injury to itself. In *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*,[6] the plaintiff, Stop Youth Addiction, Inc., was a for-profit corporation which brought an action under Section 17200 against a grocery store chain, Lucky Stores, for alleged violations of Penal Code Section 308, which prohibits sale of cigarettes to minors. Rejecting attempts by the defendant and various amici parties to limit standing to sue under Section 17200, the California Supreme Court held that Section 17204 provides standing to "any person" to maintain a suit for violations of Section 17200.[7]

This means the remedies of Section 17200 are essentially open to any person who wants to take on the responsibility of the litigation. Section 17200 itself does not have an attorneys' fees provision. But there are a number of other statutory bases for attorneys fees, most significantly the "private attorney general" statute,[8] that make attorneys fees available, and there is no question that the very broad standing rules for Section 17200 when combined

5 Cal. Bus. & Prof. Code § 17204 (West 1997) (emphasis added).

6 17 Cal. 4th 553 (1998).

7 *Id.* at 578.

8 Cal. Civ. Proc. Code § 1021.5 (West Supp. 2002).

with the possibility of attorneys fees creates significant incentives for private enforcement of the UCL.

The law is no stranger to statutory incentives for private enforcement activity. That, after all, is the primary reason for having double or treble damage recoveries in some contexts and for authorizing attorneys fees to prevailing parties for certain types of civil litigation. Legislatures create these incentives because private enforcement may be more efficient and effective than public enforcement (particularly where the private enforcer actually has been injured and has a real stake in the action) and because limited resources may prevent public authorities from actively and appropriately protecting the public's interests. For example, although the California Department of Justice, under the leadership of Attorney General Bill Lockyer, has filed a number of enforcement actions under Section 17200 over the last four years, that office's history in the area of consumer protection has not been particularly noteworthy or stable. Private enforcement actions have filled that void.

So the problem, *if any*, with Section 17200's standing rules lies not in the fact that it permits private party standing or that there are incentives for private party standing. The problem, instead, is that it creates an incentive for someone who, apart from the incentive, would have no independent reason for bringing an enforcement action. It creates, in other words, a free-standing incentive for enforcement that is partly divorced from the underlying purposes of the regulatory regime.[9]

Free-standing incentives for private enforcement that are divorced from underlying regulatory goals can be problematic. When private party standing is limited to persons who have suffered some actual injury at the hands of the defendant, we can be relatively confident that most actions would be brought only when something substantial was at stake and when the public's interest was most likely to be benefited by an enforcement action. By contrast, when there is a strong incentive for private party enforcement that may be divorced from underlying regulatory goals, there is a significant risk of too much enforcement activity.

The court's decision in *Stop Youth Addiction* is undoubtedly correct as a matter of statutory interpretation. This means that if there is to be any change in Section 17200's standing rules, that change must come from the Legislature. The question for the Legislature is whether, in its view, Section 17200's broad private party standing and incentives for filing actions have created an unbalanced regulatory regime where there is too much enforcement activity.

What Is the Target for Enforcement: Unfair, Unlawful or Fraudulent Practices

Let's now turn to the question of what constitutes an unfair, unlawful or fraudulent business practice. Although the statutory language is pretty broad, we have some important guidance from the Supreme Court which defines and limits the scope of the statute.

9 The incentive is not entirely divorced from regulatory purposes since attorneys fees would ultimately be available only if the plaintiff prevails. But the incentive is partly divorced from regulatory purposes because, at the time of filing the action, there is no certainty that the action is meritorious and the filing is just as likely to be motivated by factors unrelated to the statutory regime as it is to be motivated by a genuine desire to secure the right amount of regulatory enforcement.

I'm not going to spend any time on the fraudulent business practice prong of the act. Fraud is a fairly well-defined concept that courts have successfully applied for hundreds of years in a number of different contexts. Suffice it to say that if you commit fraud, you're in trouble under any number of criminal and civil statutes, both state and federal. Of much greater interest under the UCL are the proscriptions against unlawful and unfair practices.

A practice is unlawful when the practice violates some other statute, regulation or law. In this sense, the unfair competition law borrows violations of other laws and treats these violations, when committed as part of business activity, as unlawful practices independently actionable under Section 17200. Those other laws may be civil or criminal, federal, state or municipal, statutory, regulatory or even court-made, in very narrow circumstances.

Section 17200's borrowing provision creates some risk of enforcement overkill since it broadens Section 17200 to cover virtually the entirety of the law. Such a diffuse regulatory objective increases the likelihood that an enforcement action may be far removed from consumer and market protection. The risk of excessive enforcement is particularly apparent when you consider Section 17200's broad standing rule described above. If standing were restricted to injured consumers and competitors, the borrowing provision's impact would be limited as a practical matter to core regulatory concerns. Absent such a limitation, Section 17200 turns into a general authorization for any person, whether injured or not, to enforce the law against any business for any reason.

A good example of how Section 17200 can be used to advance goals largely unrelated to fair competition can be found in *Kasky v. Nike, Inc.* [10] Various newspaper articles and television magazine reports alleged that Nike factory workers overseas were being exposed to physical and verbal abuse, dangerous conditions, and were receiving less than the legal minimum wage. Nike responded to these stories with press releases, letters to newspapers, letters to university presidents and athletic directors, and in other public relations documents. Nike also purchased full-page advertisements in several newspapers to publicize a report Nike had commissioned which found no evidence of illegal or unsafe working conditions. The plaintiff brought an action for restitution and injunction under the UCL and False Advertising Law alleging that Nike had made false statements of fact about its labor practices and working conditions in its public relations campaign.

Nike might have thought that its expressive activities were fully protected by the First Amendment. After all, it was simply attempting to defend its business reputation in a public forum using precisely the same expressive, First-Amendment-protected channels of communication which had been used by Nike's detractors. However, in a 4-3 decision, the court held that Nike's public relations campaign constituted "commercial speech" and that the content of its speech was therefore subject to the very strict requirements of the False Advertising Law. The court reached this conclusion in part by utterly ignoring the medium in which Nike and its detractors had chosen to wage their battle. According to the court, it was enough that Nike was a business engaged in selling a product, the intended audience included customers who might purchase the product, and the content related to the product or to Nike's business operations. The fact that the speech was in the context of a broad-based attack on Nike's business operations, that the criticism of Nike related to important public policy issues regarding workplace standards and the globalization of economic activity, and that Nike responded to the criticism through a public relations campaign rather than through traditional advertising made no difference to the majority.

10 27 Cal.4th 939 (2002) cert granted, 71 U.S.L.W. 3319 (2003).

The court's holding in this case shows how Section 17200 can be used to create an unlevel playing field. A business's critics can secure nearly impenetrable protection from legal liability by executing a public relations campaign that triggers the high standards for libel under *New York Times v. Sullivan*. [11] By contrast, under the court's interpretation, the targeted business is not permitted to respond in kind without exposing itself to a lawsuit under the False Advertising Law and Unfair Competition Law. In effect, Section 17200 can be used to regulate a business's efforts to participate in a public and political debate about its practices or the practices of its industry. This context is far removed from the primary focus of the UCL, ensuring fair competition and consumer protection.

An even more difficult and interesting question is what sort of practices are unfair and actionable under Section 17200 even though they are not unlawful or fraudulent? The definitive answer came in Cel-Tech Communications. [12] The case involved allegations of below cost sales of cellular telephones where the defendant was one of two government-protected providers of cellular services. The below cost sales by the defendant were intended to gain subscribers where the losses on sales of cellular telephones would be offset by increased sales of services. The plaintiffs were competitors in the market for cellular telephones which were not allowed to sell services. The plaintiffs alleged violations of both the Unfair Practices Act (below-cost sales and loss leaders)[13] and the Unfair Competition Law.[14]

The court held that a violation of the below-cost sales and loss leader provisions of the Unfair Practices Act could be established only with evidence that the defendant had a purpose or desire to injure competitors or destroy competition.[15] Since the evidence established that the defendant's purpose was simply to compete for subscribers and not to injure competitors or destroy competition, the court held that the Unfair Practices Act claims were properly dismissed by the trial court.[16]

However, the claims under the Unfair Competition Law were given different treatment. The court noted that Section 17200 contained much broader language than the Unfair Practices Act, generally proscribing "any unlawful, unfair or fraudulent" practice.[17] Since the below cost sales were not unlawful under the Unfair Practices Act or any other law, and since there was no allegation of fraud, the issue was whether the practice was "unfair." The court began its discussion by noting that, on the one hand, a practice did not have to be unlawful to be unfair, and, on the other hand, that a practice which fit within a statutory "safe harbor" would be declared fair as a matter of law.[18]

A number of lower courts had suggested that a practice was unfair when it offends public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. The court found these definitions to be too vague. In order to give businesses adequate guidance as to what is fair and what is unfair, the court held that, in an action brought by a competitor under Section 17200,

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11 376 U.S. 254 (1964).

12 20 Cal. 4th 163.

13 Cal. Bus. & Prof. Code §§ 17043-17044 (West 1997).

14 Cal. Bus. & Prof. Code §§ 17200-17209 (West 1997 & Supp. 2002).

15 *Cel-Tech Communications*, 20 Cal. 4th at 174-175.

16 *Id.* at 175, 178.

17 *Id.* at 180.

18 *Id.* at 180, 182.

> we must require that any finding of unfairness to competitors under Section 17200 be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition. We thus adopt the following test: When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes Section 17200, the word "unfair" in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.[19]

This standard was drawn from analogous federal cases interpreting one part of Section 5 of the Federal Trade Commission Act.[20]

The court's holding brings a measure of certainty to the interpretation and application of the "unfairness" prong. Moreover, the limitation suggested by the court – that the conduct threatens or harms competition – might be a useful gloss even on the "unlawfulness" prong since it would focus enforcement efforts on consumer and competitor harm. But, we should not expect this change to come from the court. Indeed, it is not even clear that the court's rule will apply to all cases invoking the unfairness prong. The court pointedly warned in a footnote that its holding applied only to an action by a business against its competitor, alleging competitive injury, and that a different standard might apply in a case where an injury to consumers is alleged.[21]

What Are the Tools of Enforcement: Remedies Under Section 17200

The remedies for violations of Section 17200 are found in Section 17202[22] (authorizing specific or preventive relief to enforce a penalty or forfeiture in cases of unfair competition), Section 17203[23] (injunctions and equitable relief), Section 17206[24] (civil penalties), Section 17206.1[25] (additional civil penalties in cases involving senior citizens or disabled persons), and Section 17205[26] (remedies are cumulative). The remedies fall essentially into three categories: (1) injunctive relief; (2) restitution; and (3) civil penalties. Notably absent is a provision for compensatory damages, although restitution can go a long way towards compensation for harm.

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19 *Id*. at 186-187.

20 15 U.S.C. § 45(a) (2001).

21 *Cel-Tech Communications*, 20 Cal. 4th at 187 n.12.

22 Cal. Bus. & Prof. Code § 17202 (West 1997).

23 *Id*. at § 17203

24 *Id*. at § 17206 (West Supp. 2002).

25 *Id*. at § 17206.1 (West 1997).

26 *Id*. at § 17205 (West Supp. 2002).

Injunctive Relief

Section 17203 provides, in relevant part, that "any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction."[27]

In addition, Section 17202 authorizes the court to employ its injunctive powers "to enforce a penalty, forfeiture, or penal law in a case of unfair competition,"[28] notwithstanding the bar to such injunctions which otherwise applies under Section 3369 of the Civil Code.[29]

The power granted by Section 17203 is "extraordinarily broad. Probably because ... unfair business practices can take many forms, the Legislature has given the courts the power to fashion remedies to prevent their 'use or employment' in whatever context they may occur."[30] As a general matter, injunctive relief under Section 17203 "may be as wide and diversified as the means employed in perpetration of the wrongdoing."[31]

Courts have used Section 17203 as the basis for both mandatory and prohibitory injunctions. For example, in *Hewlett v. Squaw Valley Ski Corp.*,[32] the defendant, a ski resort, was found to have violated Section 17200 by virtue of the illegal removal of a large number of trees without securing the required governmental approvals. The trial court ordered the defendant "to restock, revegetate and reforest the unlawfully cut area in conformity with the Forest Practices Act."[33] In addition to this mandatory injunction, the court permanently enjoined the defendant "from further development in any manner" a portion of the defendant's land.[34] The court of appeal upheld this extraordinarily broad prohibition and found it directly related to the violation because of the defendant's "complete disregard for procedures designed to protect the environment and forest resources."[35] Because the defendant had previously ignored perfectly clear permitting requirements, the court held that it was appropriate to impose an outright ban on future development (instead of the lesser remedy of a ban on development without securing necessary governmental approvals and permits). As the court concluded, defendant's "actions destroyed an irreplaceable natural treasure without the benefit of proper environmental review. While that land obviously cannot be returned to its precut state, the injunctive relief ensures that similar land will not be similarly decimated."[36]

A court may also issue a preliminary injunction under Section 17203. In *People v. James*,[37] for example, the district attorney brought an action against the owner of a liquor store and an automobile towing service because of unlawful conduct related to towing vehicles from

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27 *Id.* at § 17203 (West 1997).

28 *Id.* at § 17202.

29 Cal. Civ. Code § 3369 (West 1997).

30 *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy*, 4 Cal. App. 4th 963, 972 (1992).

31 *People v. Casa Blanca Convalescent Homes, Inc.*, 159 Cal. App. 3d 509, 536 (1984).

32 54 Cal. App. 4th 499 (1997).

33 *Id.* at 537.

34 *Id.* at 538.

35 *Id.* at 541.

36 *Id.* at 542.

37 122 Cal. App. 3d 25 (1981).

the liquor store's parking lot. According to the complaint, the parking lot did not contain adequate warning signs regarding the risk of towing, the towing service charged unconscionable fees, intimidated vehicle owners, damaged vehicles, and charged "let-down fees" before releasing vehicles which had been hoisted for towing but not yet removed from the lot.[38] The complaint also alleged that the owner of the liquor store received unlawful kickbacks from the towing service.[39] The court of appeal affirmed a preliminary injunction that prevented towing from the lot unless clearly visible signs were posted, prevented the charging of a let-down fee for vehicles that had not yet been removed from the lot, and prevented charging fees for impoundment other than as compensation for towing and storage.[40]

Injunctions under Section 17200 can also apply outside of California. Prior to an amendment in 1992, Section 17203 provided that injunctive relief was available against a "person performing or proposing to perform an act of unfair competition *within this state*".[41] The 1992 amendment[42] removed the limitation that an act of unfair competition occur "within this state." As the California Supreme Court noted in *Stop Youth Addiction*, "the Legislature . . . amended Section 17203 to expand the scope of injunctive relief to encompass . . . out-of-state activity."[43]

California case authorities have long held that California courts can issue injunctions with extraterritorial effect so long as personal jurisdiction is properly obtained over the defendant. For example, an extraterritorial injunction was upheld in *Pines v. W.R. Tomson*,[44] to enjoin violation of three California statutes which prohibit religious discrimination in business practices (including an alleged violation of Section 17200 *et seq*.). The defendant published a business telephone directory called the "Christian Yellow Pages" which only accepted advertisements placed by persons who affirmed they had accepted Jesus Christ as their personal savior.[45] The plaintiffs sold imported tiles, some of which depicted Christian images and scenes. Plaintiffs wanted to place an add in the Christian Yellow Pages, but because they were of the Jewish faith, refused to sign the born-again Christian oath required by the defendants. Finding the requirement imposed by defendants violated California law, the trial court entered an injunction prohibiting the defendants from requiring advertisers, in or outside of California, to affirm the born-again Christian oath.[46] The court rejected the defendants contention that the injunction was overbroad because it applied to publications outside of California.[47]

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38 *Id*. at 31.

39 *Id*.

40 *Id*. at 33, 35.

41 1977 Cal. Stat. ch. 299, p. 1202 § 1 (amended in 1992) (emphasis added).

42 1992 Cal. Stat. ch. 430 § 3.

43 17 Cal. 4th at 570.

44 160 Cal. App. 3d 370 (1984).

45 *Id*. at 375.

46 *Id*. at 377-78.

47 *Id*. at 399.

Restitution

Section 17203 also authorizes the court to enter orders of restitution to disgorge the defendant of any profits made from the unfair practices and to restore those profits to any injured person. In pertinent part, Section 17203 provides as follows:

> The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.[48]

An example of a broad disgorgement / restitution order is found in *People v. Toomey*.[49] Defendants sold discount coupons for use at various Reno casinos. The advertising for the coupons did not inform customers of a variety of conditions and restrictions on the coupons and, in other ways, misled consumers about the value of the coupons. Defendants' continued this course of conduct for several years, selling more than 8,000 coupon books per month.[50] Finding that the defendants had engaged in unfair competition, the court ordered civil penalties totaling $300,000 and, in addition, ordered the defendant "to make restitution to all customers who purchased goods or services from him or his distributors between February 8, 1978, and the date of judgment, and to maintain an impound account for this purpose."[51] The court of appeals affirmed this broad restitution order even though only a small number of customers had testified at trial. As the court explained,

> Since the unlawful business practices act seeks to protect the public from continued violations rather than benefit private litigants . . ., reliance and actual damages are not necessary elements to an award under sections 17203 and 17535. . . . Restitution is not intended to benefit the tendees by the return of money, but instead is designed to penalize a defendant for past unlawful conduct and thereby deter future violations. . . . Reliance has no place in this legislative scheme. The evidence shows that misrepresentations and nondisclosures were standard practice in appellant's business. All purchasers were misled, and the public as a whole was deceived. The trial court was fully justified in ordering restitution to all purchasers.[52]

Until just a few years ago, one of the unsettled issues under Section 17203 was whether a court could order the remedy of disgorgement of the defendant's profits into a fluid recovery fund.

A little background will set the stage. In addition to injunctive relief, Section 17203 authorizes restitution, which can involve an order requiring the defendant to disgorge

48 Cal. Bus. & Prof. Code § 17203 (West 1997).

49 157 Cal. App. 3d 1 (1984).

50 *Id.* at 9.

51 *Id.* at 10.

52 *Id.* at 25-26.

unjust profits received as a result of an unfair practice. As described above, the UCL also permits "representative" actions in which a private person as the plaintiff seeks relief on behalf of persons other than or in addition to the plaintiff.[53]

For several years during the 1990s, plaintiffs tried to combine the representative action provision with disgorgement to create the equivalent of a fluid recovery fund remedy without satisfying the requirements of a class action. Essentially, you could get the remedy of a class action without all of the troublesome class action requirements. Two court of appeal decisions had previously approved fluid recoveries in UCL actions that had not been certified as class actions.[54]

But in *Kraus v. Trinity Management Services, Inc.*,[55] the court rejected the fluid recovery fund as a remedial device in a representative action under the UCL absent certification of a class. A few individual plaintiffs filed suit on their own behalf and on behalf of present and former tenants of the defendants. Among other things, the defendants required tenants to pay unlawful nonrefundable security deposits in the amount of $100 at the time of signing the lease.[56] The trial court entered an order requiring defendants to disgorge all of those deposits received within the four-year statute of limitations period, which equaled $447,000. This amount was to be placed in a fluid recovery fund. Pursuant to the court's order, the defendants were supposed to use "due diligence" for 90 days to find all present and former tenants who had paid the unlawful deposits and to pay each person found $100. The residual funds were to be organized and administered as a trust fund for the purpose of providing financial assistance for the advancement of legal rights and interests of residential tenants in the City and County of San Francisco.[57]

The court reversed this remedial order by a vote of 6-1 with an opinion by Justice Baxter for the court and a dissenting opinion by Justice Werdegar. Critical to the court's decision was the distinction between disgorgement and restitution in the context of an action under the UCL. Restitution, which Section 17203 clearly authorizes, involves restoring to a particular victim unjust profits taken by the defendant from the victim. Disgorgement, by contrast, involves taking all unjust profits away from a defendant resulting from an unfair practice without regard to whether there is a particular victim to whom the unjust profits should be paid. If the disgorged profits can be paid to victims by way of restitution, so much the better, but any disgorged profits that cannot be paid to particular victims may be put to other uses as part of a fluid recovery fund (which is a application of the *cy pres* doctrine to class actions).

The majority explained that when the Legislature added restitution to the list of UCL remedies in the 1970's, there was no authority for a fluid recovery and that the Legislature is therefore unlikely to have intended fluid recoveries under the UCL.[58] The court's conclusion was fortified when the Legislature subsequently endorsed fluid recoveries in class actions by virtue of the 1993 enactment of what is now C.C.P. § 384,[59] and did not add any language to extend that type of remedy to a representative action under the UCL.

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53 Cal. Bus. & Prof. Code § 17204 (West 1997).

54 *People v. Powers*, 2 Cal. App. 4th 330 (1992); *People ex rel. Smith v. Parkmerced Co.*, 198 Cal. App. 3d 683 (1988).

55 23 Cal. 4th 116 (2000).

56 *Id.* at 122.

57 *Id.* at 123-124.

58 *Id.* at 153.

59 Cal. Civ. Proc. Code § 384 (West Supp. 2002).

Rejecting the fluid recovery fund remedy under the UCL will make it more difficult for plaintiffs to use the UCL as an alternative to a class action. However, all is not lost for plaintiffs who desire to use the UCL to provide restitution to injured consumers who are not parties to the action. The court in *Kraus* clearly approves using a representative action under the UCL to provide restitution to non-plaintiff consumers who were injured by an unfair practice. Justice Baxter explained that "the trial court should order defendants to identify, locate, and repay to each former tenant charged [unlawful fees] the full amount of funds improperly acquired from that tenant, retaining the power to supervise defendants' efforts, to ensure that all reasonable means are used to comply with the court's directives."[60]

Civil Penalties

In addition to injunctive relief and restitution, courts may also impose civil penalties for unfair competition. Section 17206 provides in relevant part as follows:

Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, [or] by any district attorney. . . .

The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.[61]

In addition to this civil penalty, Section 17206.1 authorizes a civil penalty in cases involving senior citizens or disabled persons as follows:

In addition to any liability for a civil penalty pursuant to

> Section 17206, any person who violates this chapter, and the act or acts of unfair competition are perpetrated against one or more senior citizens [defined in subdivision (b)(1) as a person "65 years of age or older"] or disabled persons [defined in subdivision (b)(2) as "any person who has a physical or mental impairment which substantially limits one or more major life activities"], may be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which may be assessed and recovered in a civil action as prescribed in Section 17206.[62]

60 *Id.* at 138.

61 Cal. Bus. & Prof. Code § 17206 (West Supp. 2002).

62 Cal. Bus. & Prof. Code § 17206.1 (West 1997).

Because both Section 17206 and 17206.1 authorize a $2,500 civil penalty "for each violation," civil penalties in unfair competition cases can be quite substantial. In *Hewlett v. Squaw Valley Ski Corp.*,[63] for example, the plaintiff sought a $2,500 penalty for each tree which the defendant had illegally cut down. If this remedy had been granted, the total civil penalties would have been $4.5 million. The trial court rejected this measure as "'excessive in light of the conduct which is apparent before this court along with the other remedies imposed herein.'"[64] Although finding the plaintiff's request excessive, the court nevertheless imposed civil penalties of $223,000 (part of which was calculated at $2,500 per tree), which the appellate court characterized as "modest in light of [defendant's] egregious behavior."[65] It is apparent that the court of appeals would have affirmed a much larger civil penalty had it been imposed by the trial court.

The courts have not adopted a single definition of what counts as a single "violation" for purposes of imposing civil penalties. Instead, determining what counts as a single violation "depends on the type of violation involved, the number of victims and the repetition of the conduct constituting the violation—in brief, the circumstances of the case."[66] The California Supreme Court has held, however, that counting the number of misrepresentations made to a single customer is improper and that "the number of violations is to be determined by the number of persons to whom the misrepresentations were made."[67] Using the "per victim" basis of calculating violations, the court in *People v. Toomey*,[68] affirmed a $150,000 civil penalty against the defendant based upon the court's finding that there had been around 150,000 solicitations and sales by the defendant with each violation assessed a $1 penalty. The court of appeal explained that "[w]hen compared with the maximum possible fine of $2,500 per violation, the trial court's assessment was reasonable, if not lenient."[69]

Remedies Wrap-Up

The remedies described above are, in combination, quite potent. The absence of compensatory damages is really not missed at all, and the absence of compensatory damages does not create a significant risk of under enforcement. An action seeking restitution on behalf of all injured consumers combined with an injunction is sufficient to get any business's attention. The remedies are similar to what any public agency would need to engage in meaningful enforcement activity.

63 54 Cal. App. 4th 499.

64 *Id.* at 536.

65 *Id.* at 537.

66 *People v. Witzerman*, 29 Cal. App. 3d 169, 180 (1972).

67 *People v. Super. Ct.*, 9 Cal. 3d 283, 289 (1973).

68 157 Cal. App. 3d 1.

69 *Id.* at 23.

Conclusion

The rights and remedies available under Section 17200 are quite flexible and broad. In the hands of a good lawyer, Section 17200 can really put pressure on a business defendant in a way that an ordinary action for civil damages can only begin to approximate.

In terms of judicial trends under Section 17200, we certainly see the Supreme Court giving the plain language of Section 17200 its full force, including its broad standing provision and its expansive remedies. Even as limited by *Cel-Tech* and *Kraus*, Section 17200 remains an extremely potent weapon for a civil litigant to use against a business engaged in unfair, unlawful or fraudulent business practices.

Private enforcement activities under Section 17200 have been a useful and necessary adjunct to public enforcement. For me, the areas of greatest potential concern relate to the broad private standing rule and the ability to use Section 17200 to redress alleged wrongs that may not be directly related to consumer injury or non-competitive markets. These characteristics create the possibility of systemic, excessive enforcement activities under Section 17200.