

California’s Unfair Competition Law— Making Sure the Avenger Is Not Guilty of the Greater Crime*

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*California’s unfair competition law can be so “exquisitely ridiculous, it would confound Kafka. In a case that abounds with moral ironies, the worse is this: The avenger may be guilty of the greater crime.”*¹

I. INTRODUCTION

A. Background

In the spring of 2002, a group of young lawyers created a moneymaking plan. The plan was a simple one: (a) set up a shell plaintiff purporting to be a “consumer group”; (b) search agency websites for businesses that had been issued notices of minor regulatory violations; and (c) file omnibus claims against thousands of businesses “on behalf of the general public” under California’s Unfair Competition Law (UCL). The Beverly Hills based Trevor Law Group named as defendants approximately 2200 auto repair shops. Trevor Law Group also filed UCL claims against more than 1000 restaurants and markets, many of which were owned by immigrants. Trevor Law Group’s only prerequisite for suing was that the business’s name had been posted on the website violation pages of either the California Bureau of Automotive Repair or the Los Angeles County Department of Health Services.² The only way

1. Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 950 P.2d 1086, 1114 (Cal. 1998) (Brown, J. dissenting).

2. *In re* Damian S. Trevor, No. 03-TE-00998-RAH, slip op. at 20–21 (Cal. State Bar Ct. May 21, 2003). The Bureau of Automotive Repair did not attach a penalty to the notices, and the website contained a disclaimer stating that the Bureau made no guarantees as to the accuracy or timeliness of the information. *Id.* at 20. Nevertheless, Trevor Law Group did not investigate or monitor the defendant businesses. “They only used the limited information posted on the Bureau website as the basis for UCL lawsuits. They also knowingly sued businesses that had resolved the allegations with the Bureau or with the customers.” *Id.* In December 2002, the Bureau suspended posting of the notices of violations due in part to Trevor Law Group’s misuse of the information to secure UCL settlements. *Id.* at 21. Similarly, the Los Angeles County Department of Health Services website posted a disclaimer regarding possible errors in the notice of violation information posted. *Id.*

defendants could avoid protracted and costly litigation was by signing a secret settlement agreement for an amount between \$6000 and \$26,000, according to a form letter Trevor Law Group sent defendants.³ The Attorney General's Office estimated that the cozenage had the potential to net \$22 million.⁴ According to the State Bar Court, Trevor Law Group settled approximately seventy to eighty claims before the deception was revealed.⁵

Trevor Law Group was not alone in using the UCL for illicit gain rather than vindicating consumer rights. The Attorney General's office took action in 2003 alleging that a partner in an Orange County law firm used the UCL to file fraudulent claims against nail salons. The claims alleged that the salons were in violation of the Code of Barbering and Cosmetology because they used the same bottle of nail polish for more than one patron.⁶ According to the Attorney General, a major problem with the claims was that no such one bottle per patron regulation exists.⁷

These recent abuses spurred yet another round of legislative and popular debate over the problems created by the breadth and unique standing features of Business and Professions Code section 17200, a consumer statute that has inspired a multitude of proposals and criticisms over the years.⁸ Included in much of that debate was the fact that Trevor Law Group and its counterparts had misused the law. Instead of using section 17200 to protect the public from unfair competition, the plaintiffs abused the UCL's broad standing provision to

3. *Id.* at 27. A typical form letter read as follows:
[Y]our company is being sued. Other shops have received notice as well. Some have challenged their lawsuits based on technicalities and now find themselves—after spending a lot of time, money, and energy—in exactly the same position in which they were initially. After all of that, they have two options: either pay even more money to fight in court or settle out of court and get on with business.

Id. at 26 n.19.

4. Complaint at 6, *State v. Trevor Law Group* (Cal. Super. Ct., County of Los Angeles, Feb. 26, 2003), available at <http://caag.state.ca.us/newsalerts/2003/03-021.pdf> (last visited Oct. 22, 2004).

5. *In re Trevor*, No. 03-TE-00998-RAH, at 15.

6. Complaint at 4, *State v. Brar* (Cal. Super. Ct., County of Orange, July 8, 2003), available at <http://caag.state.ca.us/newsalerts/2003/03-085.pdf> (last visited Oct. 22, 2004).

7. *Id.*

8. Eleven reform bills were drafted in 2003 alone. Jeff Chorney, *L.A. Attorneys at Center of 17200 Debate Could Lose Their Bar Cards*, S.F. RECORDER, Mar. 14, 2003, available at WL 3/14/2003-SF 1. All further statutory references are to California's Business and Professions Code unless otherwise provided.

commit unfair competitive acts themselves.⁹

However, unlike previous years, the debate over the UCL in 2004 culminated with the passage of Proposition 64, a voter initiative that curtails the breadth of the consumer statute by effectively limiting much of the law's enforcement to public prosecutors. Private individuals may no longer bring a UCL claim on behalf of the public without meeting class certification requirements and without demonstrating that they themselves have been harmed by the alleged unfair competitive act.¹⁰ While Proposition 64 will undoubtedly put an end to abuses, such as those committed by Trevor Law Group, it remains to be seen whether the Proposition will be the much needed cure-all for a law designed to protect the public from unfair business practices.

B. Purpose and Scope

This Comment will discuss the problems underlying California's Unfair Competition Law that eventually led to the adoption of Proposition 64. It will also assess the Proposition's method of addressing those problems, which arose due to the UCL's broad standing provision and lack of res judicata effect.¹¹ Additionally, this Comment will look at outstanding issues not remedied by the recent amendments to 17200, as well as review recent judicial decisions and evaluate their success at clarifying a law that one California Supreme Court Justice has dubbed a "growth industry."¹²

9. In an ironic twist, the Attorney General utilized section 17200 to prosecute the very same attorneys who had abused it. The Attorney General alleged that by entering into confidential settlement agreements, Trevor Law Group concealed its "compromise of the public interest in order to benefit [itself]" and therefore had committed an "unfair practice." Complaint at 9, *Trevor Law Group* (Cal. Super. Ct., County of Los Angeles, Feb. 26, 2003). Furthermore, Trevor Law Group allegedly misrepresented the UCL when it promised that settlement would preclude additional lawsuits by others, which section 17200 does not do. *Id.* Similarly, the Attorney General alleged that the Orange County firm violated section 17200 "by attempting to obtain, as part of their settlement scheme, civil penalties which may only be awarded in actions brought by public officials" Complaint at 7-8, *Brar* (No. 54773).

10. See Official Voter Information Guide, California General Election, Nov. 2, 2004. The language of Proposition 64 can be found at the California Secretary of State's website, available at <http://www.voterguide.ss.ca.gov/propositions/prop64-title.htm> (last visited Nov. 10, 2004). The language of the proposition is discussed *infra* Part IV and provided in full in notes 115 and 117.

11. Res judicata provides that existing final judgments rendered upon the merits by a court of competent jurisdiction are conclusive of the rights and questions of facts at issue as to the parties and their privies. "Res Judicata is a common law doctrine that signifies 'claim or cause of action preclusion' in contrast to collateral estoppel, which is 'issue or fact preclusion.'" Res judicata and collateral estoppel have the same general objective, which is finality of litigation. See WARREN FREEDMAN, RES JUDICATA AND COLLATERAL ESTOPPEL: TOOLS FOR PLAINTIFFS AND DEFENDANTS 1 (1988).

12. *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1106 (Cal.

Part II of this Comment provides an overview of the UCL prior to the passage of Proposition 64, focusing on what the law does and the policy justifications behind it. Part III illustrates the common UCL abuses that led to a need for reform, how the abuses occur and why due process considerations made judicial remedies difficult. Part IV discusses the impact of Proposition 64 and evaluates the amendments to 17200, which do away with what had been the law's unique standing provision. Part V proposes additional fine tuning of the law in order to maintain the UCL's policy of deterring unfair business practices.

II. OVERVIEW OF THE UCL

A. Statutory and Historical Review

California's UCL initiated in the state's Civil Code in 1872.¹³ In its original form, under former Civil Code section 3369, the UCL provided a statutory cause of action for traditional business torts.¹⁴ In 1933, the section was extensively rewritten to: (1) expressly grant authority to enjoin unfair competition; (2) define unfair competition to include an unfair or fraudulent business practice as well as misleading advertising; and (3) permit a person acting in the interest of the general public to bring an action for an injunction.¹⁵ In 1976, the law was amended to allow for orders of restitution.¹⁶

Despite its broad definition of unfair competition, public prosecutors did not rely upon the statute as a consumer protection provision until the late 1950s.¹⁷ The UCL did not become widely used by private plaintiffs until the 1970s after the seminal decision of *Barquis v. Merchants Collection Ass'n*.¹⁸ In 1977, the UCL was moved to section 17200 et seq. of California's Business and Professions Code.¹⁹ The legislature most recently amended the law in 1992 when it broadened the UCL to

1998) (Brown, J., dissenting). Justice Brown also disparaged the UCL as "[t]he creation of a standardless, limitless, attorney fees machine." *Id.* at 1115.

13. Robert C. Fellmeth, *California's Unfair Competition Act: Conundrums and Confusions*, 26 CAL. L. REVISION COMM'N REPORTS 227, 231 (1995) [hereinafter *Conundrums*].

14. *Id.*

15. *Kraus v. Trinity Mgmt. Servs., Inc.*, 999 P.2d 718, 727 (Cal. 2000).

16. *Id.*

17. *Id.*

18. 496 P.2d 817 (Cal. 1972).

19. *See Kraus*, 999 P.2d at 727. All further statutory references are to California's Business and Professions Code unless otherwise specified.

(1) cover a single act of unfair competition and (2) apply to out-of-state activities that affect California consumers.²⁰

The UCL prohibits “unlawful, unfair or fraudulent business act[s] or practice[s]”²¹ and serves as a “wide standard to guide courts of equity.”²² Prior to the passage of Proposition 64, the law’s broad standing provision allowed just about anyone to bring an unfair competition claim on behalf of himself or the general public regardless of whether the plaintiff had been injured by the unfair competitive act.²³ Courts “of competent jurisdiction”²⁴ are empowered under the UCL to “enjoin ongoing wrongful business conduct in whatever context such activity might occur.”²⁵

The primary remedies available under the UCL are restitution and injunction.²⁶ However, in actions by public prosecutors, civil penalties of up to \$2500 per violation may be assessed. An additional \$2500 fine may be assessed if the unfair competitive act was perpetrated against a senior citizen or disabled person.²⁷

20. *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1097 (Cal. 1998).

21. CAL. BUS. & PROF. CODE § 17200 (West 1997).

22. *Barquis v. Merchs. Collection Ass’n*, 496 P.2d 817, 830 (Cal. 1972). In 1992, the legislature amended section 17200 of California’s Business and Professions Code to include any “act” of unfair competition as well as practices. That same year, the Legislature also amended section 17203 to “expand the scope of injunctive relief to encompass past activity and out-of-state activity.” *See also Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1097 (Cal. 1998).

23. Along with a variety of public prosecutors, including the Attorney General and District Attorneys, section 17204 granted standing to “any person acting for the interests of itself, its members or the general public.” CAL. BUS. & PROF. CODE § 17204.

24. *Id.*

25. *People v. McKale*, 602 P.2d 731, 734 (Cal. 1979). The “court of competent jurisdiction” requirement was given teeth in *Greenlining Institute v. Public Utilities Commission*, 127 Cal. Rptr. 2d 736 (Ct. App. 2002). In *Greenlining*, the court of appeal held that the Public Utilities Commission could not entertain section 17200 claims because the commission was not a court of competent jurisdiction. “Actions seeking any relief under section 17200 et seq. ‘shall,’ i.e., *must*, be brought in court.” *Id.* at 739–40.

26. *See* CAL. BUS. & PROF. CODE § 17203 (“Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined.” Additionally, “[t]he court may make such orders or judgments . . . to restore to any person in interest any money or property, real or personal, which may have been acquired by means of . . . unfair competition.”) *Id.*

27. CAL. BUS. & PROF. CODE § 17206.1(a). Section 17206(a) provides that violators “shall be liable for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation” CAL. BUS. & PROF. CODE § 17206(a). In addition, section 17206.1(a) provides that “any person who violates this chapter, and the act or acts of unfair competition are perpetrated against one or more senior citizens or disabled persons, may be liable for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation” CAL. BUS. & PROF. CODE § 17206.1(a).

1. Unlawful, Fraudulent, or Unfair

Unfair competition is defined to include business practices that are either unlawful, fraudulent, or unfair.²⁸ “Put simply, a business act or practice is ‘unlawful’ if it violates some other law.”²⁹ The UCL “borrows” violations of other laws, making it possible for plaintiffs to bring section 17200 actions regardless of whether the underlying statute grants standing.³⁰ Virtually any federal, state, or local law can serve as the predicate for a section 17200 action.³¹ For example, a UCL claim may be brought against a defendant who has violated the penal code even where the code does not allow for a private right of action.³²

In interpreting the UCL prior to the passage of Proposition 64, the California Supreme Court held that “it is in enacting the UCL itself, and not by virtue of particular predicate statutes, that the Legislature has conferred upon private plaintiffs ‘specific power’ to prosecute unfair

28. CAL. BUS. & PROF. CODE § 17200. Section 17200 states that “[a]s 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”

29. JULIA B. STRICKLAND ET AL., AN OVERVIEW OF CALIFORNIA’S UNFAIR COMPETITION LAW, 1362 PLI/CORP. 531, 554 (2003), available at WL 1362 PLI/Corp. 531. The California Supreme Court has stated that the legislature intended the “sweeping” language of the UCL to include “‘anything that can properly be called a business practice and that at the same time is forbidden by law.’” *Bank of the West v. Superior Court*, 833 P.2d 545, 553 (Cal. 1992) (quoting *Barquis v. Merchs. Collection Ass’n*, 496 P.2d 817, 830 (Cal. 1972)).

30. *Farmers Ins. Exch. v. Superior Court*, 826 P.2d 730, 734 (Cal. 1992) (holding that the UCL borrows violations from other laws and treats the violations when committed in conjunction with a business activity as independently actionable under section 17200). “The unfair competition law, moreover, states that ‘[u]nless otherwise expressly provided, the remedies . . . are cumulative to each other and to the remedies or penalties available under all other laws of this state.’” *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1099 (Cal. 1998) (quoting CAL. BUS. & PROF. CODE § 17205 (West 1997)). Borrowed violations can stem from state, federal, municipal, and administrative regulation. See James Wheaton, *California Business and Professional Code Section 17200: The Biggest Hammer in the Toolbox?*, 16 J. ENVTL. L. & LITIG. 421, 426 (2001).

31. One limitation of the unlawful prong was seen in *Klein v. Earth Elements, Inc.*, 69 Cal. Rptr. 2d 623 (Ct. App. 1997), where the Court of Appeal held that an unfair competition action cannot be brought under the unlawful prong of the UCL when the action is based on the unintentional distribution of a defective product. The court held that liability imposed under the doctrines of strict products liability and breach of the implied warranty of fitness do not by themselves describe acts or practices that are illegal, and therefore cannot be a predicate for a UCL action based on the unlawful prong. *Id.* at 625–26.

32. *Stop Youth Addiction*, 950 P.2d at 1091.

competition claims.”³³ If a UCL claim is brought based on violation of a predicate statute, it stands to reason that any successful defense as to the predicate law will necessarily preclude the 17200 action.³⁴ Additionally, the California Supreme Court has adopted a safe harbor provision, stating that a plaintiff may not bring a UCL action against a practice that the legislature expressly permits.³⁵

Fraudulent practices are those that are likely to deceive members of the public.³⁶ Any violation of California’s false advertising law is deemed to necessarily violate the state’s UCL as well.³⁷ Unlike common law fraud, allegations of actual deception, reasonable reliance, and damage are not necessary to bring a UCL claim based on the “fraudulent” prong of section 17200.³⁸

The likely to deceive requirement implies more than a mere possibility that the alleged unfair competitive act might conceivably be misunderstood by a handful of unsophisticated consumers.³⁹ Instead, the UCL applies an ordinary or reasonable consumer standard when determining whether a business practice is likely to deceive.⁴⁰ However, where advertising is aimed at a particularly susceptible group of consumers, such as children, its truthfulness is measured by the impact it will likely have on members of that group.⁴¹

Defining acts that fall within the unfair prong of the UCL has been a difficult task. California courts have long recognized the difficulty in predetermining what acts constitute unfair business, noting that “it would be impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited . . . since unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery.”⁴²

33. *Id.* (quoting *People v. McKale*, 602 P.2d 731, 735 (Cal. 1979)).

34. *See, e.g., Metro Publ’g, Ltd. v. San Jose Mercury News, Inc.*, 861 F. Supp. 870, 881 (N.D. Cal. 1994) (dismissing a UCL claim based on alleged trademark infringement and dilution because the plaintiff had failed to meet the burden of showing that its alleged trademark was highly distinctive and well known as required by California’s anti-dilution statute); *Lee v. Interinsurance Exch. of the Auto Club*, 57 Cal. Rptr. 2d 798, 810 (Ct. App. 1996) (stating that actions that fall within the business judgment rule are not forbidden by law and cannot constitute an unlawful business practice).

35. *Cel-Tech Communications, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 541 (Cal. 1999).

36. *Comm. on Children’s Television, Inc. v. Gen. Foods Corp.*, 673 P.2d 660, 668 (Cal. 1983).

37. *Id.* (“Any violation of the false advertising law, moreover, necessarily violates the unfair competition law.”).

38. *Id.*

39. *Lavie v. Procter & Gamble Co.*, 129 Cal. Rptr. 2d 486, 494–95 (Ct. App. 2003).

40. *Id.* at 494.

41. *Id.*

42. *People ex rel. Mosk v. Nat’l Research Co.*, 20 Cal. Rptr. 516, 521 (1962) (holding that the UCL is not void for vagueness and that determining what constitutes

The language of California's UCL fails to provide any guidance as to what business practices will be deemed "unfair" as opposed to unlawful or fraudulent. The legislature has given courts the task of deciding ex post whether a practice falls within the purview of the unfairness component.⁴³ In cases of unfair acts amongst competitors, the California Supreme Court has defined unfair as "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws."⁴⁴ The state's high court, however, has expressly declined to define what acts will be deemed unfair within the consumer context.⁴⁵

California's appellate courts have generally held that an act will be found to be unfair by weighing the utility of the defendant's conduct against the gravity of the harm alleged to the victim⁴⁶ or by determining whether the alleged unfair act offends an established public policy or is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.⁴⁷ The California Supreme Court disapproved of both of these definitions in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, stating that they were "too amorphous and provide too little guidance . . ."⁴⁸ Nonetheless, the court did not delineate the types of business practices that would be deemed unfair where injury to consumers is alleged.⁴⁹

unfair competition is a question of fact). The essential test in determining whether a given practice is unfair is whether "the public is likely to be deceived." *Id.*

43. See, e.g., *Barquis*, 496 P.2d at 817.

[T]he section was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable "new schemes which the fertility of man's invention would contrive." [Am. Philatelic Soc'y v. Claibourne, 46 P.2d 135, 140 (Cal. 1935).] "When a scheme is evolved which on its face violates the fundamental rules of honesty and fair dealing, a court of equity is not impotent to frustrate its consummation because the scheme is an original one. . . ." [*Id.*]

Id. at 830.

44. *Cel-Tech Communications, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 544 (Cal. 1999).

45. *Id.* at n.12.

46. *State Farm Fire & Casualty Co. v. Superior Court*, 53 Cal. Rptr. 2d 229, 234 (Ct. App. 1996).

47. *People v. Casa Blanca Convalescent Homes, Inc.*, 206 Cal. Rptr. 164, 177 (Ct. App. 1984).

48. *Cel-Tech Communications*, 973 P.2d at 543.

49. *Id.* at 544 n.12.

2. Public Prosecutors and Private Litigants

California's UCL empowers two broad categories of plaintiffs: public prosecutors and private litigants.⁵⁰ The statutory scheme of the UCL confers greater authority to public prosecutors who, unlike their private counterparts, may seek civil penalties. Public prosecutors are also given a monitoring role in private litigant UCL actions where application of section 17200 is at issue before a court of appeal.⁵¹

Prior to passage of Proposition 64, the UCL conferred standing to "any person acting for the interests of itself, its members or the general public."⁵² A private party was not required to have suffered a harm to bring what was commonly called a "private attorney general" action on behalf of the public.⁵³ The law's broad standing provision prompted the Practising Law Institute to claim that the proper question under the UCL was not who may file a section 17200 action but "who may not?"⁵⁴ This was an apt question given that whenever the legislature had amended the law, it "ha[d] done so only to *expand* its scope, never to narrow it."⁵⁵

In short, under the previous language of section 17204, "a private plaintiff who ha[d] himself suffered no injury at all [could] sue to obtain relief for others."⁵⁶ Furthermore, a private attorney general was not required to show that the defendant's act caused harm to anyone, but merely had to demonstrate that the "alleged unfair practices . . . are likely

50. CAL. BUS. & PROF. CODE § 17204 (West 1997). The section provides for two classes of plaintiffs that can bring a UCL action. The first class is the public attorney general. "Actions for any relief pursuant" to the state's UCL can be brought by the Attorney General or any district attorney. *Id.* Any full-time city attorney may also file an unfair competition claim as long as she has the consent of the district attorney. *Id.* Similarly, upon agreement with the district attorney, county counsel may file a UCL action for violation of a county ordinance. *Id.* The second class includes "any person acting for the interests of itself, its members or the general public." *Id.*

51. CAL. BUS. & PROF. CODE § 17209 (West 1997 & Supp. 2004). If a UCL violation is alleged or application of the UCL is before a Court of Appeal, "the person who commenced that proceeding shall serve notice thereof . . . on the Attorney General . . . and on the district attorney of the county in which the lower court action or proceeding was originally filed." *Id.*

52. CAL. BUS. & PROF. CODE § 17204 (West 1997). "Persons" are defined as "natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons." *Id.* § 17201.

53. *See* Comm. on Children's Television, Inc. v. Gen. Foods Corp., 673 P.2d 660, 668-69 (Cal. 1983) ("Allegations of actual deception, reasonable reliance, and damage are unnecessary. The court may also order restitution without individualized proof of deception, reliance, and injury" if such a remedy is needed to prevent or stop an unfair practice.).

54. STRICKLAND ET AL., *supra* note 29, at 541.

55. Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 950 P.2d 1086, 1097 (Cal. 1998).

56. *Id.* at 1091.

to deceive”⁵⁷ Upholding the policy of the UCL was in essence public domain, and it could be “vindicated by multiple parties . . . under the broad standing provision of . . . section 17204.”⁵⁸

3. Restorative and Preventive Remedies

The UCL remedies are in equity. The theory behind the UCL’s broad standing provision was to allow the general public to enjoin unfair competitive acts but limit remedies in order to discourage fraudulent suits. “A lot of actors can sue, so the courts will get the cases. But excessive, spurious, and duplicative cases will not be generated because the remedies are substantially prospective, and there is no (or uncertain) allowance for attorneys’ fees, even if the plaintiff prevails.”⁵⁹ This theory, unfortunately, proved false. Spurious suits proliferated because the UCL’s broad standing provision, permitting just about anyone to allege unlawful, fraudulent or unfair acts, made it possible for unscrupulous plaintiffs to extort settlements without having to demonstrate a colorable claim.

The express language of the UCL remedies provision includes both a restorative and a preventive element. The court is given the power to enjoin unfair competitive acts, as well as to “make such orders or judgments . . . as may be necessary to prevent the use or employment . . . of any practice which constitutes unfair competition”⁶⁰ The sole monetary remedy under the UCL is restitution.⁶¹

57. Fletcher v. Sec. Pac. Nat’l Bank, 591 P.2d 51, 57 (Cal. 1979) (“[O]ur concern with thwarting unfair trade practices has been such that we have consistently condemned not only those alleged unfair practices which have in fact deceived the victims, but also those which are likely to deceive them.”).

58. Rubin v. Green, 847 P.2d 1044, 1054 (Cal. 1993). “[T]he courts have repeatedly permitted persons not personally aggrieved to bring suit for injunctive relief under the unfair competition statute on behalf of the general public, in order to enforce other statutes under which parties would otherwise lack standing.” Consumers Union of United States, Inc. v. Fisher Dev., Inc., 257 Cal. Rptr. 151, 155 (Ct. App. 1989).

59. Robert C. Fellmeth, *Unfair Competition Act Enforcement by Agencies, Prosecutors, and Private Litigants: Who’s on First?*, 15 CAL. REG. L. REP. 1, 6 (1995) [hereinafter *Who’s on First?*].

60. CAL. BUS. & PROF. CODE § 17203 (West 1997).

61. While anyone can bring an UCL claim to enjoin a business from engaging in unfair competition or restore those injured by the practice, individuals may not recover damages. Bank of the West v. Superior Court, 833 P.2d 545, 552–53 (Cal. 1992). The Court of Appeal had permitted disgorgement via fluid recovery funds in representative UCL claims. See People v. Thomas Shelton Powers, M.D., Inc., 3 Cal. Rptr. 2d 34, 40 (Ct. App. 1992), *overruled in part* by Kraus v. Trinity Mgmt. Servs., Inc., 999 P.2d 718 (Cal. 2000); People v. Parkmerced Co., 244 Cal. Rptr. 22, 26 (Ct. App. 1988), *overruled in part* by Kraus, 999 P.2d 718. However, in 2000, the California Supreme Court

Prior to Proposition 64, a court could order restitution without proof of individualized reliance if the court determined that such a remedy was necessary to “deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains.”⁶² The goal of deterring violations of the UCL had been deemed so important that the legislature “authorized courts to order restitution without individualized proof of deception, reliance, and injury if necessary to prevent the use or employment of an unfair practice.”⁶³ Orders compelling restitution under the UCL require the defendant to return money acquired through an unfair business practice to persons in interest from whom the property was taken.⁶⁴

The UCL itself does not provide for attorney’s fees, but fees were often awarded in private attorney general actions pursuant to the California Code of Civil Procedure. The applicable section allows a court to award attorneys fees in “the enforcement of an important right affecting the public interest” to a successful party where “a significant benefit . . . has been conferred on the general public or a large class of persons.”⁶⁵

effectively removed the option of nonrestitutionary disgorgement and fluid recovery from the possible monetary UCL remedies in representative private attorney general actions by strictly construing the UCL as expressly authorizing restitution as the only monetary remedy. *Kraus*, 999 P.2d at 726.

62. *Fletcher v. Sec. Pac. Nat’l Bank*, 591 P.2d 51, 55 (Cal. 1979). Nevertheless, while restitution is intended to deter future improper conduct in the absence of a measurable loss, the UCL does not allow the imposition of a monetary sanction merely to achieve a deterrent effect. *Day v. AT&T Corp.*, 74 Cal. Rptr. 2d 55, 64 (Ct. App. 1998).

63. *Prata v. Superior Court*, 111 Cal. Rptr. 2d 296, 302 (Ct. App. 2001) (citing *Committee on Children’s Television Inc. v. Gen. Foods Corp.*, 673 P.2d 660, 668 (Cal. 1983)).

64. *See Day v. AT&T Corp.*, 74 Cal. Rptr. 2d 55, 64 (Ct. App. 1998); *cf. Burt v. Danforth*, 742 F. Supp. 1043, 1053–54 (E.D. Mo. 1990) (holding that a shareholder’s claim for restoration of all remuneration paid to board members did not constitute restitution within the meaning of California’s Unfair Competition Law because any remuneration that individual board members received was for their services and was not acquired by means of the alleged fraudulent acts). Similarly, a consumer who had not paid allegedly unfair finance and interest charges was not permitted to seek individual restitution because there was nothing for the court to restore. *Prata*, 111 Cal. Rptr. 2d at 304.

65. CAL. CIV. PROC. CODE § 1021.5 (West Supp. 2004); *see also Nestande v. Watson*, 4 Cal. Rptr. 3d 18, 23 (Ct. App. 2003) (holding that “attorney fees may be recovered by a private party who acts to enforce laws that public agencies are . . . unwilling to enforce”); *Punsly v. Ho*, 129 Cal. Rptr. 2d 89, 97 (Ct. App. 2003) (providing that private attorney general fees may be awarded to individual parties as well as corporate and governmental parties).

B. Policy Development

1. Protecting Consumers

California's UCL was arguably the broadest statutory scheme in the nation to fight market abuses.⁶⁶ Though initially a statutory remedy for torts committed against competing businesses, California's UCL is now primarily directed toward protecting aggrieved consumers by providing a means to prevent or enjoin unscrupulous business practices.⁶⁷ The California Supreme Court has stated that the primary goal of the UCL is to protect the consuming public.⁶⁸

Since the decision of *Barquis v. Merchants Collections Ass'n*, which broadened both the UCL's "standing provision and [the] conduct falling within its ambit,"⁶⁹ section 17200 has been used to combat a variety of unlawful or unfair business practices that have harmed consumers.⁷⁰

66. *Conundrums*, *supra* note 13, at 239–49. Of the states with unfair competition statutes similar to California none "gives private attorney general status to any person without qualification." *Id.* at 248. Other state statutes allow punitive and treble damages, whereas California limits damages to injunction and restitution. *Id.* at 247. For a plaintiff to file "for others similarly situated," many states require the plaintiff meet some of the traditional class action certification standards, notably adequate representation and notice to absent class members. *Id.* at 247–48. California's UCL and similar statutes in other states have been influenced by the analogous Federal Trade Commission Act, 15 U.S.C. § 45 (2000). *Who's on First?*, *supra* note 59, at 3. While the California UCL and its federal counterpart both seek to eliminate unfair competition, the two statutes are enforced in significantly different ways. California has no administrative agency equivalent to the Federal Trade Commission (FTC), and in California private citizens have a right to seek enforcement of the UCL on behalf of a representative class. *Id.*

67. For a synopsis of the UCL's legislative history, see *Kraus*, 999 P.2d at 727 and *Who's on First?*, *supra* note 59, at 2–3. The state's UCL originated in 1872 and over a century the statute "evolved through amendment and developing caselaw . . ." *Id.* at 2. As the law evolved "it became a means to vindicate consumer or public market abuses . . ." *Id.*

68. See *Barquis v. Merchs. Collection Ass'n*, 496 P.2d 817, 829 (Cal. 1972) ("We conclude that in a society which enlists a variety of psychological and advertising stimulants to induce the consumption of goods, consumers, rather than competitors, need the greatest protection from sharp business practices."). *Id.*

69. *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1107 (Cal. 1998) (Brown, J., dissenting).

70. The broad concept of unfair competition has been applied to violations of the Penal Code, California's endangered species laws, the Health and Safety Code, the Labor Code, the Civil Code, the Public Resources Code, and violations of federal law. THOMAS A. PAPAGEORGE & ROBERT C. FELLMETH, CALIFORNIA WHITE COLLAR CRIME § 3.2221 (2d ed. 2003). The UCL also "sweeps within its scope acts and practices not specifically proscribed by any other law." *Kasky v. Nike, Inc.*, 45 P.3d 243, 249 (Cal. 2002), *cert. dismissed*, 539 U.S. 654 (2003).

Examples include enjoining a lender from using personal property as collateral in loans for the purchase of used cars⁷¹ and ending a cigarette manufacturer's use of a cartoon character that "improperly target[ed] minors, and [sought] to make cigarette smokers of them."⁷² *Barquis* itself is an example of how the UCL protects consumers from unfair practices. In that case, a private representative action enjoined a collection agency's practice of filing lawsuits in improper counties as a means to better its chances of receiving default judgments.⁷³

Despite the recent emphasis on consumer protection, businesses still often use the UCL to enjoin unfair practices by their competitors. In *Southwest Marine, Inc. v. Triple A Machine Shop, Inc.*, an unsuccessful bidder for a Navy contract sought to enjoin a competitor's alleged practice of "obtaining Navy contracts through low bids and costs achieved by improper disposal of hazardous wastes"⁷⁴ While there was an immediate benefit to the plaintiff—not losing business to an unfair player in the market—plaintiff's action necessarily resulted in a public benefit as well, preventing improper disposal of hazardous waste.

2. Unfair Competitive Acts

A common policy justification for California's UCL is to avoid the so-called "race to the bottom" or "lowest common denominator" problem. When unfair or unlawful acts go unchecked and the offender is allowed to benefit from the acts, a competitor's only recourse more often than not is to respond with "more extensive abuse in order to preserve market share, which in turn leads the initiator to further abuse."⁷⁵

Take for example the advertising industry, where unchecked false advertising could cause an industry to degenerate to such an extent that it is no longer beneficial for an advertiser to tell the truth.⁷⁶ In an industry

71. *Hernandez v. Atl. Fin. Co.*, 164 Cal. Rptr. 279, 290 (Ct. App. 1980).

72. *Mangini v. R. J. Reynolds Tobacco Co.*, 875 P.2d 73, 74 (Cal. 1994).

73. *Barquis*, 496 P.2d at 819, 831.

74. *Southwest Marine, Inc. v. Triple A Mach. Shop, Inc.*, 720 F. Supp. 805, 808 (N.D. Cal. 1989) (holding that defendant's alleged conduct fell within the UCL and that the plaintiffs had standing to sue in federal court under section 17200 because the plaintiff had sufficiently alleged an injury in losing the Navy contracts to the competitor).

75. *Conundrums*, *supra* note 13, at 250. Many unfair or unlawful acts by a given competitor may confer a competitive advantage on the offender. This in turn leads to a downward spiral where others in the industry seek to obtain the advantage obtained through unfair acts. Unless the marketplace or a public body creates a "counterforce," there is little to prevent the industry from adopting the unfair practice as a norm. This danger is especially prevalent in industries where there is not a repeat business dynamic and where consumers are unable to judge standards of performance on their own. *Id.* at 249–50.

76. False or misleading advertising claims are typically brought under CAL. BUS. &

of lies, the consumer will not be able to distinguish truths, and the product advertised will not reap the benefits of truth telling. However, before the public becomes inured to the falsities and simply stops believing all ads, there will be consumers who believe the half truths and are thereby harmed.⁷⁷ The UCL attempts to avoid private injury due to unfair competitive acts and stem the “race to the bottom” by providing an immediate remedy for the injury, as well as a mechanism to prevent future occurrences of the unfair business practice. However, the UCL’s inherent due process problems made it difficult to achieve these policy goals.

3. Politics of Reform

At least eleven reform bills were introduced in 2003 to address the problems stemming from the UCL.⁷⁸ Proposals included broadening the

PROF. CODE § 17500 et seq. However, section 17500 and section 17200 claims are often brought in conjunction by a plaintiff acting as a private attorney general. *See, e.g., Day v. AT&T Corp.*, 74 Cal. Rptr. 2d 55, 57, 59 (Ct. App. 1998) (holding that a private attorney general action which seeks to enjoin misleading practicing in the advertising of rates and seeks no monetary discovery falls outside of the federal filed rate doctrine and can proceed under sections 17200 and 17500). Included in the definition of unfair competition is “deceptive, untrue or misleading advertising.” CAL. BUS. & PROF. CODE § 17200 (West 1997). The standard for bringing a successful section 17500 claim is not whether a consumer has actually been misled, but whether the advertisement is likely to deceive. *Day*, 74 Cal. Rptr. 2d at 61 (stating that a UCL action may proceed if the language used is likely to deceive, mislead, or confuse); *see also* STRICKLAND ET AL., *supra* note 29, at 568–69.

77. In the advertising context, a number of issues arise when applying section 17200. For one, the cost of the individual injury is not easy to discern. Would the consumer not have bought the product but for the false advertising, or would the consumer still have been willing to buy the product but only for a lesser amount? The answer to this question will determine the proper amount of restitution due the consumer. In a mass market climate, it is reasonable to assume that where there is one injury there are likely to be many. How should the collective cost be assessed? What if the other consumers who have been injured do not come forward to be restored? Should the false advertiser be allowed to reap the benefits of his false claims because injured parties have not bothered to file a complaint? If so, how can future unfair competitive acts be deterred? If not, what is the court to do with the disgorged profits? More importantly, who should have the right to seek a remedy for the aggrieved absent consumers? Should the duty belong to an individual consumer, whose primary interest is being made whole? Should the duty belong to a public prosecutor whose interest is arguably to right wrongs but due to time constraints and political factors may not be in a position to take action on the unfair competition claim? For further discussion, see *Conundrums*, *supra* note 13, at 249–76.

78. Jeff Chorney, *L.A. Attorneys at Center of 17200 Debate Could Lose Their Bar Cards*, S.F. RECORDER, Mar. 14, 2003, at 1, available at WL 3/14/2003 RECORDER-SF

UCL remedies,⁷⁹ requiring notification of public prosecutors when a private litigant brings a representative section 17200 claim,⁸⁰ and requiring plaintiffs to have suffered harm and demonstrate typicality of claims before filing a representative action.⁸¹ Nonetheless, the legislature failed to enact section 17200 reform.⁸² The legislature's inability to reach consensus on UCL reform was not new. Numerous proposals, including procedural improvements suggested by the California Law Revision Commission in 1996, have not survived committee.⁸³

In 1998, California Supreme Court Justice Janice Rogers Brown encouraged legislators to summon the "political will" to draft changes to the state's UCL and urged more restrictive UCL standing requirements as a good start.⁸⁴ Justice Brown suggested that the inertia preventing reform was the result of an unwillingness of two "politically potent and contentious groups" to allow a change in the "balance of advantage between . . . those who sue under the Law, and those who defend."⁸⁵ Indeed, political jockeying in 2003 also halted attempts to amend the law.⁸⁶

III. ABUSES AND DUE PROCESS

A. Common Abuses

There have generally been three common types of abuses committed

1. Many of the reform bills were drafted in response to the abuses committed by Trevor Law Group. *Id.*

79. See S.B. 122, 2003–04 S. (Cal. 2003). The proposal to broaden the UCL remedies by expressly providing for fluid recovery in representative claims was later removed from the bill's language.

80. A.B. 69, 2003–04 Assemb. (Cal. 2003).

81. A.B. 102, 2003–04 Assemb. (Cal. 2003).

82. Jeff Chorney, *For Plaintiffs Bar, A Mixed Bag; Despite Last-Minute Setbacks, Consumer Attorneys Grab a Few Goodies*, S.F. RECORDER, Sept. 15, 2003, at 1, available at WL 9/15/2003 RECORDER-SF 1.

83. See *Unfair Competition Litigation Recommendation*, 26 CAL. L. REVISION COMM'N REPORTS 191, 217–26 (1996) [hereinafter *Unfair Competition Litigation*]. The Law Revision Commission proposals to implement adequate plaintiff standards, notice requirements for filing and settlements of judgment, as well as a preference to public prosecutors, has been included in various bills. For examples of bills that incorporated aspects of the 1996 Law Revision Commission recommendations prior to the 2003–2004 Legislative Session, see S.B. 593 (Morrow, 1999–2000 Session); A.B. 2511 (Morrow, 1997–1998 Session); A.B. 1295 (Caldera, 1997–1998 Session).

84. *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1115 (Cal. 1998) (Brown, J., dissenting).

85. *Id.*

86. See Jeff Chorney, *Plaintiffs Bar Drops Fight for Disgorgement*, S.F. RECORDER, Sept. 5, 2003, at 1, available at WL 9/5/2003 RECORDER-SF 1. Much of the contention was between trial lawyers, who sought to reinstate a UCL disgorgement remedy and tort reformers who proposed doing away with private attorney general actions. *Id.*

by plaintiffs in UCL litigation. The abuses continued because section 17200 did not require court review of UCL claims or settlements. While it is possible that a plaintiff will receive attorney fees and costs for successful UCL claims, the lure of attorney fees alone did not spawn UCL abuse. Rather, it was the possibility of mass settlement demands combined with a lack of court review that led to section 17200 abuse.

1. *Divide and Conquer*

Plaintiffs could use the UCL to extort money from defendants via a process of divide and conquer. The Attorney General's action against the Orange County law firm for filing frivolous lawsuits against nail salons illustrates this tactic. According to the Attorney General's brief, after filing a UCL complaint which named one defendant accompanied by 500 "Does," the firm directly contacted individual nail salons with an offer of settlement. The settlement proposal first threatened a lawsuit, the cost of which could exceed \$10,000. The settlement letter then offered to "compromise" the action and release the defendant from "all claims" for a "consideration" of \$1000. For good measure, the firm threw in an expediency clause, noting that if the defendant did not act fast, discovery would soon commence and the cost of settlement would rise to \$2500.⁸⁷

A defendant's quick cost-benefit analysis, which may or may not have included the cost of investigating the merits of the claim, would likely yield the conclusion that paying off the firm would be the simplest and cheapest solution. Under the pre Proposition 64 language of the UCL, an unscrupulous plaintiff held all the cards. By playing divide and conquer, such plaintiffs could take advantage of two important factors. First, the plaintiffs could file representative actions against an extraordinary number of defendants without having to worry about a reciprocal defendant class because the UCL contains no notice requirement. Public prosecutors and the defendant recipients of the settlement offers had no way of knowing that other defendants were being targeted in the same manner.⁸⁸ Secondly, plaintiffs were able to parlay the low cost of filing

87. Complaint at 4, *State v. Brar* (Cal. Super. Ct., County of Orange, July 8, 2003), available at <http://caag.state.ca.us/newsalerts/2003/03-085.pdf> (last visited Oct. 22, 2004).

88. *In re* Damian S. Trevor, No. 03-TE-00998-RAH, slip op. at 25-26 (Cal. State Bar Ct. May 21, 2003). The State Bar Court found that it appeared Trevor Law Group misused the "Doe" procedures in order to make it difficult for defendants to contact each other and take advantage of the UCL's lack of notice provisions:

numerous claims under the UCL's broad standing provision with threats of expensive litigation and restitution exposure against many defendants. This combination allowed plaintiffs to offer low settlement demands that were likely to be accepted by each individual defendant and still yield substantive rewards by merely playing the numbers.⁸⁹

2. *Pile On*

Along with divide and conquer, the UCL allowed plaintiffs to play "pile on." The Trevor Law Group litigation illustrates this problem. Trevor Law Group found its defendants by preying on actions taken by administrative agencies. An investigator with the respective regulatory agency sent the notices of violation to the auto repair shops and restaurants because the investigator determined that the violation did not merit formal disciplinary action.⁹⁰ The purpose of the notice was to inform the business owner and to seek voluntary compliance with agency regulations.

However, Trevor Law Group used these requests for voluntary compliance as a means to file UCL claims and then proceeded to play divide and conquer. The only cost associated with Trevor Law Group's investigation of its claims was the brief amount of time it took to peruse the agency websites. An unharmed plaintiff with private attorney general status should not have been able to file a case on behalf of the general public solely to pile on an additional sanction against a defendant who is in the midst of complying with a regulatory process. In such a case, the public interest was already being served.

By using the "Doe" procedures . . . [Trevor Law Group attorneys] were able to keep these identities unknown for a long enough time to allow their aggressive settlement tactics . . . to take place. The effect of such acts would be to discourage or prevent other defendants from joining together and retaining joint defense counsel to litigate their claims.

Id. The lawyers would try to "quickly settle the claims before they were required to disclose the defendants' identities; using paralegals to engage in high pressure settlement tactics; and dismissing defendants who demurred in the lawsuits, sometimes naming them again in later cases." *Id.* at 5.

89. The Attorney General estimated the alleged Brar & Gamulin abuse had the potential to net approximately \$1.5 million in costs and attorney fees. *See* Complaint at 4, *Brar* (Cal. Super. Ct., County of Orange, July 8, 2003).

90. *In re Trevor*, No. 03-TE-00998-RAH, at 20. The Bureau of Automotive Repair issued the notice of violations when it determined that no formal disciplinary action was warranted. Trevor Law Group, rather than investigating the merits of their claims, used the limited information posted on the Bureau website as the basis for its section 17200 lawsuits. *Id.* Similarly, the notices issued to the restaurant defendants by the Los Angeles County Department of Health Services entailed minor violations where the department still gave the establishment a high letter grade of "A" or "B". *Id.* at 32.

3. Tacking On

A third common area of abuse under the UCL was the practice of “tacking on” section 17200 claims in an effort to broaden a plaintiff’s scope of discovery and increase settlement leverage.⁹¹ A plaintiff with an individual and distinct complaint against a single defendant would almost be foolish not to have taken advantage of the UCL’s broad standing provision if the opportunity arose. A plaintiff merely needed to find an alleged “unfair” practice of the defendant that affects a number of people, and the plaintiff was transformed from a private party suing on one’s own behalf into a private attorney general suing on behalf of the public. The transformation gave unscrupulous plaintiffs a powerful artifice for broadening discovery and extorting settlements.

A problem that often arose in such a scenario was that the concern for the “public interest” disappeared as soon as the individual plaintiff’s interests were met.⁹² In some settlement scenarios the plaintiff could compromise the public interest in order to better benefit his own. That is, the plaintiff could lower the cost of the UCL restitution remedy, which would apply to absent plaintiffs, in exchange for an increase in damages for his personal claim.⁹³ If the defendant was amenable, a bargain that compromises the public interest would likely stand because section 17200 did not require judicial review of settlements based on private attorney general actions.⁹⁴

91. Trevor Law Group employed this tactic and routinely threatened UCL defendants with audits or reviews of their business records, which they claimed would reveal more violations and cost defendants more money to settle. *Id.* at 28.

92. See Jan T. Chilton & William L. Stern, *California’s Unfair Business Practices Statutes: Settling the “Nonclass Class” Action and Fighting the “Two-Front War”*, 12 CIV. LITIG. REP. 95, 96 (1990).

93. *Id.*

For plaintiffs, [section 17200] claims offer many of the attractions of class actions, including the threat of classwide relief, but without the drawbacks of true class actions. A plaintiff, permitted to assert claims of absent persons, may be tempted to settle those claims by taking a larger payment for himself or herself and a lower payment for the absent persons. This invites “blackmail” suits, a prospect worsened by the fact that lawyers can sue without the need for an injured client, eliminating even that modest restraint.

Id.

94. The problem of collusive settlements is exacerbated by the fact that “[c]ourts understandably tend to sign judgments proffered to them by apparently adverse parties.” *Who’s on First?*, *supra* note 59, at n.102.

B. Due Process

1. Endless Litigation

A major dilemma with the UCL had been the law's lack of finality. When combined with section 17204's broad standing provision, the lack of finality created a quagmire of due process problems for both defendants and absent plaintiffs. While the granting of private attorney general status gave California residents sweeping authority to fight market abuses, it also subjected defendants to multiple claims regardless of whether a previous suit over the same unfair competitive act had already been resolved by settlement or adjudication.⁹⁵ On the other hand, simply granting finality to UCL claims jeopardized the due process rights of absent plaintiffs who may have had their rights litigated under section 17200 without ever having the opportunity to ensure their rights were adequately protected.⁹⁶

Unlike class action litigation, pre Proposition 64 UCL actions did not provide finality. Thus, another party could bring forth a UCL action against the same defendant regarding the exact same unfair competitive act.⁹⁷ Principles of equity may have given finality to a claim where the victims had been restored because estoppel will not permit double recovery.⁹⁸ But in cases such as *Trevor Law Group*, where settlements

95. See Chilton & Stern, *supra* note 92, at 97–100.

96. See *Bronco Wine Co. v. Frank A. Logoluso Farms*, 262 Cal. Rptr. 899, 910–11 (Ct. App. 1989) (holding that an award of restitution on behalf of twenty-seven absent grape farmers denied the absent plaintiffs their right to notice and opportunity to be heard).

97. Part[ies] will be collaterally estopped from relitigating an issue only if: “(1) the issue decided in a prior adjudication is identical with that presented in the action in question; and (2) there was a final judgment on the merits; and (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication.” *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1105 n.5 (Cal. 1998) (Baxter, J., concurring) (quoting *Clemmer v. Hartford Ins. Co.*, 587 P.2d 1098, 1101–02 (Cal. 1978)). However, a defendant in a subsequent UCL representative action on behalf of the general public will be hard pressed to prove that the subsequent plaintiff was in privity with the prior plaintiff. A Court of Appeal decision holding that collateral estoppel barred a subsequent UCL action by Los Angeles residents suing manufacturers and distributors for violating the Toxic Enforcement Act was ordered depublished. A San Francisco based nonprofit corporation had filed a similar claim four months prior. The Court of Appeal had reasoned that the Los Angeles and San Francisco plaintiffs were in privity because they were both bringing the representative action on behalf of the California general public. See *Am. Int'l Indus. v. Superior Court*, 85 Cal. Rptr. 2d 815, 824 (Ct. App. 1999) (ordered depublished). For additional discussion, see Scott C. Lascari, *Res Judicata and California's Unfair Competition Law*, LOS ANGELES LAWYER, Apr. 2003, at 20.

98. See *Kraus v. Trinity Mgmt. Servs., Inc.*, 999 P.2d 718, 746 (Cal. 2000) (Werdegar, J., concurring in part and dissenting in part). A remedial order requiring defendant to restore funds gained through unfair competition forecloses the possibility of double recovery for restored plaintiffs. *Id.*

that would be split between attorneys and a single plaintiff were sought, subsequent lawsuits could not be estopped because only a single plaintiff would have been restored.⁹⁹ Furthermore, even if a defendant successfully defended a UCL action brought on behalf of the general public, the defendant could once again find himself defending essentially the same claim for the same allegedly unfair competitive act despite the prior litigation.¹⁰⁰ This problem was compounded by the fact that virtually anyone could file a UCL action on behalf of the public interest.

Unlike class action litigation, representative actions under section 17200 did not require superiority, typicality, notice to absent plaintiffs, the option to opt out, adequate representation, or adequate counsel.¹⁰¹ It is precisely these safeguards, designed to protect the interests of absent plaintiffs, that permit courts to grant finality to class action litigation. In contrast, a representative action on behalf of a specified group of consumers could have commenced without the affected absent plaintiffs ever knowing that their “interests” were being litigated.¹⁰² As many courts have noted, representative actions where the alleged victims are not parties have “serious and fundamental due process deficiencies.”¹⁰³

2. *Disincentives to Settlement*

The problems that stemmed from the UCL's lack of finality were most acute in the realm of settlements. Instead of creating an incentive to

99. Despite this lack of finality, Trevor Law Group stated that its shell plaintiff, CEW, promised to release defendants from all claims arising from the alleged occurrences that led to the section 17200 claim. Furthermore between 70% and 90% of the settlement fees obtained went to Trevor Law Group's attorney fees. *In re* Damian S. Trevor, No. 03-TE-00998-RAH, slip op. at 27–28 (Cal. State Bar Ct. May 21, 2003).

100. See *Stop Youth Addiction*, 950 P.2d at 1105 (Baxter, J., concurring).

101. See FED. R. CIV. P. 23(b). For a comparison between class action procedures and representative actions under the UCL, see *Dean Witter Reynolds, Inc. v. Superior Court*, 259 Cal. Rptr. 789, 798 (Ct. App. 1989) (holding that for class certification on an unfair competition theory, the court shall weigh whether formation of a representative class affords plaintiffs a better opportunity to protect their interests than would an individual action). “In contrast to the streamlined procedure expressly provided by the Legislature, the management of a class action is a ‘difficult legal and administrative task.’” *Id.* at 799 (citing *Lazar v. Hertz Corp.*, 191 Cal. Rptr. 849, 858 (Ct. App. 1983)).

102. See, e.g., *Comm. on Children's Television, Inc. v. Gen. Foods Corp.*, 673 P.2d 660 (Cal. 1983); *Stop Youth Addiction*, 950 P.2d at 1086.

103. *Bronco Wine Co. v. Frank A. Logoluso Farms*, 262 Cal. Rptr. 899, 911 (Ct. App. 1989) (“One must question the utility of a procedure that results in a judgment that is not binding on the nonparty and has serious and fundamental due process deficiencies for parties and nonparties.”).

settle, the UCL's lack of finality frustrated defendants "who [were] unable to end a dispute they [were] willing to resolve."¹⁰⁴ The lazy litigation style of Trevor Law Group provides ample reason why a defendant would be reluctant to settle a representative action with both private parties and government agencies. If a simple posting of a notice of violation could proliferate private attorney general action, the unending litigation that a settlement agreement could bring would be daunting.¹⁰⁵

People v. Cox Cable Communications, Inc., in which three section 17200 claims stemmed from the same alleged unfair act, is such an example. Cox first agreed to settle a district attorney's investigation into the cable company's alleged practices of issuing excessive late charges. In return, Cox received assurances from the district attorney that paying full restitution would preclude private attorney general actions on the same charges.¹⁰⁶ However, shortly before settlement, a private plaintiff's firm filed its own section 17200 claim against Cox.¹⁰⁷ The cable company demurred based on the settlement agreement with the district attorney. The superior court overruled the demurrer, finding that the district attorney's office was not in privity with the consumer interest the private firm represented.¹⁰⁸

Without privity, the doctrine of res judicata could not be applied, and therefore the settlement agreement lacked the stamp of finality that both the cable company and the district attorney's office sought.¹⁰⁹ Moreover, the private action against Cox lacked finality as well. A few

104. See *Who's On First?*, *supra* note 59, at 7. The lack of finality also causes a serious "dilemma for public prosecutors and *bona fide* public interest attorneys attempting to resolve unfair competition cases; they cannot confer assured finality." *Id.*

105. See *Chilton & Stern*, *supra* note 92, at 97–100. Absent class certification, defendants may remain subject to numerous future lawsuits based on the same alleged unfair competitive act even if the defendant has prevailed in the UCL action. *Id.* If the plaintiff prevails, the defendant still remains liable to all of the nonjoined representative UCL class members who are entitled to a restitution award. *Id.* The California Supreme Court declined to address the due process concerns that arise in multiple section 17200 suits against defendants. See *Kraus v. Trinity Mgmt. Servs., Inc.*, 999 P.2d 718, 733 (Cal. 2000). In *Kraus*, the defendant's concern about multiple suits was rendered moot by the applicable statute of limitations. As a practical matter, the likelihood that any potential plaintiffs could successfully overcome the applicable statute of limitations and separately recover judgment against the defendant was too remote to establish denial of due process concerns. *Id.*

106. *People v. Cox Cable Communications, Inc.*, No. 679554, slip op. at 3 (Cal. Super. Ct. 1994). For further discussion, see *Who's on First?*, *supra* note 59, at 6–8.

107. *Ross v. Cox Cable Communications, Inc.*, No. 678526 (Cal. Super. Ct. 1994).

108. See also *People v. Pac. Land Research Co.*, 569 P.2d 125, 129 (Cal. 1977) (holding that an action by the public prosecutors lacks fundamental attributes of a class action filed by a private party because a prosecutor's role as protector of the public may be inconsistent with the welfare of the class).

109. *Ross*, No. 678526 (Cal. Super. Ct. 1994).

months after the court's refusal to sustain Cox's demurrer, a second private plaintiff sued the cable company for the exact same alleged late charges.¹¹⁰ The UCL's broad standing provision turned section 17200 into a source of endless litigation.

Despite obvious disincentives to settle, some defendants have settled UCL claims, as evidenced by the seventy to eighty settlements Trevor Law Group obtained. Settling a UCL claim, under the pre Proposition 64 scheme, was not necessarily foolery.¹¹¹ For one, the likelihood of subsequent UCL actions may have been miniscule in light of the applicable four-year statute of limitations.¹¹² Defendants also may have been able to reduce potential restitution costs by finding a collusive plaintiff with which to settle and thus avoid litigation by paying off the plaintiff, while at the same time keeping monies gained from the unfair practice via a less than adequate restitution remedy.¹¹³

IV. THE REFORMS OF PROPOSITION 64

Proposition 64 fundamentally alters California's UCL. The proposition: (1) requires representative claims brought by private plaintiffs to comply with procedural requirements applicable to class action litigation, (2) authorizes only public prosecutors to sue on behalf of the general public to enforce unfair business competition laws, and (3) limits an individual's

110. *Preisendorfer v. Cox Cable Communications, Inc.*, No. 678198 (Cal. Super. Ct. 1994); *cf. Hewlett v. Squaw Valley Ski Corp.*, 63 Cal. Rptr. 2d 118, 124 (Ct. App. 1997) (discussing that a private individual, an environmental rights organization, and the county district attorney were all allowed to bring an unfair competition claim against a ski resort that refused to abide by an injunctive order).

111. One way to avoid subsequent suits is to include a nonpublicity clause in the settlement. However, the clauses can be "easily breached without detection" and "the breach is virtually impossible to remedy." Chilton & Stern, *supra* note 92, at 98.

112. CAL. BUS. & PROF. CODE § 17208 (West 1997); *see, e.g., Kraus v. Trinity Mgmt. Servs., Inc.*, 999 P.2d 718, 733 (Cal. 2000).

113. While not necessarily foolery, defendants did take a great risk when settling representative UCL claims with individual plaintiffs. The ability to settle a UCL suit "without court approval may appear, at first blush, to be a boon for defendants. If the plaintiff is not altruistically serving the interests of absent nonclass members, the defendant may be able to settle for less than if class action procedures were followed." Chilton & Stern, *supra* note 92, at 97. However, "[t]o meet the demands of due process, the interests of absent parties must be 'adequately represented' in the litigation if absent parties are to be bound by any settlement or judgment in the action." *Id.* (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)). "Thus, the . . . defendant may be able to settle with the unharmed plaintiff cheaply, but the defendant buys little or no peace by such a settlement" because both initial and subsequent plaintiffs are not required to meet adequate plaintiff standards to bring a representative UCL claim. *Id.*

right to sue by allowing private enforcement only if that individual has been actually injured by, and suffered financial/property loss because of an unfair business practice.¹¹⁴ Under the proposition, penalties recovered by the Attorney General or local prosecutors are to be used only for enforcement of consumer protection laws.¹¹⁵

The measure greatly restricts who can bring an unfair competition claim and in essence eliminates all private attorney general actions. By importing the elements of class certification into UCL claims, the proposition resolves the due process and lack of finality concerns that had besieged section 17200 actions. As with class certification requirements, imposing a harm requirement on private UCL actions also limits standing. Individuals no longer have standing to seek judicial relief under the UCL by simply crying foul. Rather, they must be harmed themselves and “establish the existence of an ascertainable class and a well-defined community of interest among the class members.”¹¹⁶

A. *Importing the Procedural Requirements of Class Actions*

In order to bring a representative UCL claim on behalf of others, Proposition 64 requires the plaintiff to establish a section 17200 class.¹¹⁷ Under California Law, formation of a class entails, *inter alia*, demonstrating: (1) a predominate question of law or fact, (2) representation by plaintiffs who have claims typical of the class, and (3) competent counsel.¹¹⁸ Additionally, in many instances, class formation also

114. See Official Voter Information Guide, California General Election, Nov. 2, 2004. The language of Proposition 64 can be found at the California Secretary of State’s website, *available at* <http://www.voterguide.ss.ca.gov/propositions/prop64-title.htm> (last visited Nov. 10, 2004). See *infra* note 117 for the actual language of the proposition pertaining to the class action and harm requirement.

115. See Proposition 164, *supra* note 114. Proposition 64 amends section 17206 so that civil penalties collected by public prosecutors in UCL actions “shall be for the exclusive use by the Attorney General, the district attorney, the county counsel, and the city attorney for the enforcement of consumer protection laws.” *Id.*

116. *Richmond v. Dart Indus., Inc.*, 629 P.2d 23, 27–28 (Cal. 1981).

117. See Official Voter Information Guide, California General Election, Nov. 2, 2004. The language of Proposition 64 can be found at the California Secretary of State’s website, *available at* <http://www.voterguide.ss.ca.gov/propositions/prop64-title.htm> (last visited Nov. 10, 2004). The Proposition amends Section 17203 so that it reads:

Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.

Id. Additionally the amendments to section 17204 state that any person can bring a UCL claim as long as that person has “suffered injury in fact and has lost money or property as a result of such unfair competition.” *Id.*

118. *Richmond*, 629 P.2d at 28.

requires notifying absent class members of pending class litigation and of any settlements stemming from the class action.¹¹⁹ Class action procedures ensure that representative plaintiffs are competent to litigate the interests of the absent class members, which in turn assists in affording defendants the benefit of finality. Furthermore, requiring a private plaintiff to form a class before alleging a violation of section 17200 on behalf of others similarly situated reduces the potential for abuse stemming from plaintiffs simply tacking on a UCL claim. Plaintiffs will no longer be able to gain leverage by purporting to bring an action on behalf of others unless they can establish before a court that they are competent to bring forth such a claim.

The goal of the UCL is to provide a “streamlined procedure by which to challenge unfair business practices”¹²⁰ and to promote a “policy of permitting members of the public to police the spectrum of ‘unfair competition.’”¹²¹ It has been argued that class action notice requirements have the potential to become an obstruction to this streamlined approach. Under federal and California class action law, plaintiffs are often required to notify all potential plaintiffs of the pending litigation before forming a class.¹²² The “cost of individual notice lessens the usefulness of class actions in enforcing consumer protection laws” because it acts as a “considerable deterrent” to filing, especially when the cost of notice outweighs the potential recovery.¹²³ The California Law Revision Commission expressly declined to adopt all of the class certification procedural requirements in its proposal to improve the UCL in large part because of fears that notice requirements would hinder section 17200

119. CAL. CIV. CODE § 1781(d–e) (West 1998). Although section 1781 is written so as to be applied to consumer actions, the California Supreme Court has suggested that, along with Federal Rule of Civil Procedure 23, it be used as a procedural guideline to ensure fairness in class action lawsuits. *Richmond*, 629 P.2d at 27 n.7.

120. *Kraus v. Trinity Mgmt. Servs., Inc.*, 999 P.2d 718, 724 (Cal. 2000).

121. *Rubin v. Green*, 847 P.2d 1044, 1052 (Cal. 1993).

122. *Mullane v. Cent. Hanover Trust Co.*, 339 U.S. 306, 314 (1950). “[A] fundamental requirement of due process” is to provide notice “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* In California class action litigation, “‘meaningful’ notice by publication may [in some instances] be sufficient to satisfy [state constitutional] due process” concerns. However, in many cases California courts are likely to require individual notice as well. James R. McCall et al., *Greater Representation for California Consumers—Fluid Recovery, Consumer Trust Funds, and Representative Actions*, 46 HASTINGS L.J. 797, 805 (1995).

123. McCall, *supra* note 122, at 806.

enforcement.¹²⁴

However, given California's liberal class action laws, this fear may prove to be unfounded. California courts have taken a lenient approach to class notification procedures and allowed notice by publication when the class action predominately seeks injunctive relief and the damages sought per class member are minimal.¹²⁵ Because the only remedies available under section 17200 are injunction and restitution, it should follow that in many representative UCL claims individual notice to absent plaintiffs may not be required. Additionally, in consumer class actions, the courts are authorized to shift the burden of the cost of notification from plaintiffs to defendants.¹²⁶

Furthermore, under California's class action law, courts have broad discretion and may certify a class as one seeking injunctive relief when the relief sought is predominately prospective and seeks to prevent future abuses.¹²⁷ An intermediate appeals court has held that even where a class action seeks monetary damages, it may be classified as an injunctive class with its less stringent notice requirements, as long as the plaintiff's request for injunctive relief predominates.¹²⁸ Thus, in *Bell v. American Title Insurance Co.*, the court approved a class action settlement and did not require individualized notice to absent class members or the option to opt out of the class even though the settlement required the defendant to pay \$250,000 in restitution and implement a price rollback scheme for a period of four years.¹²⁹ The court expressed a preference for the injunctive class, noting one commentator's opinion that the injunctive class provides res judicata effect as to the entire class because it does not provide absent class members the opportunity to opt out.¹³⁰

Recently adopted Rule 1856 of the California Rules of Court provides guidance for the appropriate notification necessary for absent class members.

124. *Unfair Competition Litigation*, *supra* note 83, at 211. The Commission Report noted that one of the most significant practical distinctions between class actions and pre-Proposition 64 UCL actions is that representative UCL actions are a "simpler and cheaper" alternative to class actions because representative plaintiffs are able to avoid the substantial costs often associated with class action notice requirements. *Id.* at 207.

125. California courts will require individual mailed notice to class members where members of the class have a substantial damage claim such that members may decide to "opt out" of the class and pursue their independent remedies, but when membership in the class is huge and damages per member minimal, notice by publication may be adequate. *Cooper v. Am. Sav. & Loan Ass'n*, 127 Cal. Rptr. 579, 585 (Ct. App. 1976).

126. CAL. CIV. CODE § 1781(d) (West 1998).

127. *Bell v. Am. Title Ins. Co.*, 277 Cal. Rptr. 583, 592 (Ct. App. 1991).

128. *Id.* at 591-94.

129. *Id.* at 586-87.

130. *Id.* at 594.

In determining the manner of notice, the court must consider:

- (1) The interests of the class;
- (2) The type of relief requested;
- (3) The stake of the individual class members;
- (4) The cost of notifying class members;
- (5) The resources of the parties;
- (6) The possible prejudice to class members who do not receive notice; and
- (7) The res judicata effect on class members.¹³¹

If the cost of individual notice appears to be prohibitively expensive in light of the interests of the class members, then the court may order notice by publication.¹³²

Given the policy goals of the UCL, it is likely that many, if not most, legitimate section 17200 representative actions will fall within the injunctive class designation. Such a designation will in turn assist in shaping the appropriate notification to absent plaintiffs. Undoubtedly, the high level of judicial discretion permitted in class formation poses the practical problem of unpredictable results.¹³³ Nevertheless, the benefit of finality that class certification procedures bring outweighs the burden of the errant decisions that the passage of Proposition 64 is likely to breed during its formative years.

B. A Showing of Harm

Proposition 64 requires plaintiffs to demonstrate a cognizable harm before they may bring a representative claim under section 17200.¹³⁴ At first blush, such a limitation on standing would appear to have the potential to decrease the filing of unmeritorious UCL lawsuits. Additionally, it seems logical that a person who has been harmed by an alleged unfair act is more competent to bring a representative action on behalf of

131. CAL. COURT RULES § 1856(e) (West Supp. 2004).

132. *Id.*

133. "Because the predominance test in this context is dependent on the exercise of sound discretion by the court, there is little doubt that reasonable courts can and do reach opposite results under similar circumstances. No clear standards have been or could be developed to yield more predictable results in this area so pregnant with judicial discretion."

Bell, 277 Cal. Rptr. at 592 (quoting HERBERT B. NEWBERG, 1 NEWBERG ON CLASS ACTIONS 298 (2d ed. 1985)).

134. Under its amendments to section 17204, Proposition 64 requires a plaintiff bringing a UCL action to have suffered injury in fact and to have lost money or property as a result of the alleged unfair competition.

injured consumers similarly situated than someone who has not been harmed by the unfair act.

However, when combined with the requirements of class certification, the additional benefits that a harm requirement provides may not be as great as it would initially appear. For one, a harm requirement can be easily overcome in many instances. In actions alleging false advertising, a plaintiff need only purchase the advertised product to demonstrate harm.¹³⁵

Secondly, requiring UCL plaintiffs to demonstrate financial injury in some instances has the potential to undermine section 17200's policy of giving the public the power to police unfair competition. For example, private representative UCL actions brought to enjoin a violation of the state's environmental laws are now precluded where a direct harm to the representative plaintiff cannot be shown even when the violation clearly falls within the UCL's unlawful prong. While prosecutors could certainly bring an action against the violator, the State Attorney General and the California District Attorneys Association has stated that private UCL enforcement is a vital supplement to their efforts against illegal business practices.¹³⁶ "Although there are within the executive branch . . . offices and institutions . . . whose function it is to represent the general public . . . for various reasons the burden of enforcement is not always adequately carried by those offices and institutions, rendering some sort of private action imperative."¹³⁷ Moreover, private attorney general actions, such as those brought by consumer groups, played an important role in curbing market abuse.¹³⁸

135. For example, plaintiffs could readily have representatives enter defendant nail salons to get their nails painted in order to create "harmed" plaintiffs for a claim that using the same bottle of nail polish for more than one customer constitutes an unfair practice. Complaint at 4, *State v. Brar* (Cal. Super. Ct., County of Orange, July 8, 2003), available at <http://caag.state.ca.us/newsalerts/2003/03-085.pdf> (last visited Oct. 22, 2004).

136. See *Kraus v. Trinity Mgmt. Servs., Inc.*, 999 P.2d 718, 738 (Cal. 2000) (Werdegar, J., concurring in part and dissenting in part). See Marc Lifsher, *Lockyer Joins Prop. 64 Fray: The attorney general wants voters to defeat the measure that would limit the Unfair Competition Law*, L.A. TIMES, Oct. 1, 2004, at C2, available at 2004 WL 55940741; Christian Berthelsen, *Prop. 64 Would Limit Suits Against Businesses*, S.F. CHRON., Oct. 19, 2004, available at 2004 WL 58610943.

137. *Serrano v. Priest*, 569 P.2d 1303, 1313-15 (Cal. 1977) (holding attorneys fees may be awarded in private attorney general actions).

138. *Id.* at 1313.

Through the UCL a plaintiff may obtain restitution and/or injunctive relief against unfair or unlawful practices in order to protect the public and restore to the parties in interest money or property taken by means of unfair competition. These actions supplement the efforts of law enforcement and regulatory agencies. This court has repeatedly recognized the importance of these private enforcement efforts.

Kraus v. Trinity Mgmt. Servs., Inc., 999 P.2d 718, 725 (Cal. 2000).

A harm requirement for standing is necessary where a plaintiff seeks damages, but the UCL's remedies are limited.¹³⁹ Injunction and restitution are directed at preventing future harm. Injunctions stop harmful acts.¹⁴⁰ Restitution prevents future unlawful acts by removing the incentive to commit them.¹⁴¹ The limited remedies available under the UCL, combined with class certification requirements, temper what had been section 17200's overbroad standing provision. Under the pre-Proposition 64 scheme, in cases where plaintiffs had suffered little to no harm, restitution was minimal or nonexistent, and the effect of a representative UCL action would have been to enjoin an unfair practice before it harmed the public.

Now that demonstration of actual injury is necessary for individuals to bring a UCL action, private plaintiffs will have to wait until an injury occurs before being able to enjoin an unfair practice. In most instances, this is a sensible result. But it is worth considering the effect on cases such as *Mangini v. R.J. Reynolds Tobacco Co.*, where a private attorney general action enjoined a cigarette manufacturer's practice of using a cartoon character, Joe Camel, to advertise cigarettes to teenagers.¹⁴² If the UCL had been saddled with a harm requirement, it would have been much more difficult to enjoin the ad campaign. Questions such as "Would a child have to become addicted to cigarettes or be diagnosed with a tobacco-related illness as an adult in order to bring a UCL claim?" become paramount.

The creation of a harm requirement may or may not stem UCL abuses. Certainly, the requirement will assist plaintiffs in demonstrating that they are adequate representatives to form a section 17200 class. However, it remains to be seen whether Proposition 64's creation of a harm requirement and its subsequent effect of removing a category of UCL claims from the realm of private enforcement will have a positive or a deleterious impact on California's business environment.

139. Cf. *Conundrums*, *supra* note 13, at 247. In other states with unfair competition statutes, plaintiffs may recover damages, as well as punitive or treble damages. However, in order to have standing to bring an unfair competition claim in those states, the plaintiff must suffer actual business or personal injury.

140. See BLACK'S LAW DICTIONARY 788 (7th ed. 1999) (defining "injunction" as "court order commanding or preventing an action").

141. *Fletcher v. Sec. Pac. Nat'l Bank*, 591 P.2d 51, 57 (Cal. 1979). The court stated that while injunction has some deterrent force, restitution is a necessary remedy in UCL actions to deter unfair competitive acts. *Id.*

142. *Mangini v. R.J. Reynolds Tobacco Co.*, 875 P.2d 73 (Cal. 1994).

V. ISSUES TO BE RESOLVED

Proposition 64 left two important issues concerning the enforcement of California's UCL unresolved. The Proposition did not address what has been the extraordinarily difficult task of defining what constitutes an unfair, rather than fraudulent or unlawful, business practice. Additionally, while imposing class action requirements for the enforcement of representative UCL claims, the Proposition did not touch upon the issue of fluid recovery. The California Supreme Court has precluded fluid recovery in section 17200 claims, stating that the legislature has permitted such relief only in the context of class actions.¹⁴³ Now that all representative UCL claims must undergo the rigorous procedures of class certification, it would seem to follow that the establishment of a fluid recovery scheme is permissible.

A. Defining Unfair

It is inherently difficult to predetermine what constitutes an unfair competitive act because it is impossible to contemplate with any certainty "the innumerable 'new schemes which the fertility of man's invention would contrive.'"¹⁴⁴ Recent judicial decisions have limited the scope of the UCL's unfairness prong, making it more difficult to bring representative private attorney general claims against businesses based solely on an allegation that a given practice is unfair, rather than unlawful or fraudulent. However, such a reduction of the UCL's power to enjoin unfair competition unnecessarily burdens consumers who may find themselves without a means to fight unfair business acts.

1. Tethered Argument

In cases of unfair acts amongst competitors, the California Supreme Court has tethered the section 17200 definition of unfair to "conduct that threatens an incipient violation of an antitrust law, or violates the policy

143. *Kraus v. Trinity Mgmt. Servs., Inc.*, 999 P.2d 718, 732 (Cal. 2000).

In sum, the Legislature has not expressly authorized monetary relief other than restitution in UCL actions, but has authorized disgorgement into a fluid recovery fund in class actions. Although the Legislature is well aware of the distinction between class actions and representative actions, it has not done so for representative actions.

Id.

144. *Barquis v. Merchs. Collection Ass'n*, 496 P.2d 817, 830 (Cal. 1972) (holding that by permitting a restraint on all unfair business practices, the UCL establishes a wide standard to guide courts of equity and the legislature concluded that a less inclusive standard was not adequate) (quoting *Am. Philatelic Soc'y v. Claibourne*, 46 P.2d 135, 140 (1935)).

or spirit of one of those laws.”¹⁴⁵ The court expressly stated that the definition does not apply to unfair acts affecting consumers or to fraudulent acts affecting competitors.¹⁴⁶ Nevertheless, two intermediate appellate courts have held that when public policy arguments are the impetus for unfair competition act litigation, the claims must “be ‘tethered’ to specific constitutional, statutory or regulatory provisions.”¹⁴⁷ Tethering UCL claims to such provisions negates the section’s unfair component and inappropriately requires unfair competitive acts to be defined at the expense of consumers.

In *Scripps Clinic v. Superior Court*, a couple, who had contracted with a health care organization for medical insurance and had chosen Scripps as their provider, filed a malpractice claim against two Scripps physicians.¹⁴⁸ In retaliation, Scripps invoked a clause in its contract with the health care organization that allowed Scripps to refuse service to the couple and *all members of their family*. The couple filed a number of claims against the hospital, including a section 17200 action that alleged Scripps’ policy, allowing it to refuse medical treatment, was unfair because “it impedes a patient’s right to seek redress for malpractice in the courts”¹⁴⁹

The far reaching consequences of Scripps’ action meant that family members of any patient who filed a malpractice claim against one of Scripps’ doctors could no longer see any of the 350 Scripps physicians. This ban on treatment was made without inquiry into the merits of the malpractice claim and could be overridden only where another medical

145. *Cel-Tech Communications, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 544 (Cal. 1999) (holding that the effects of unfair acts amongst competitors are comparable to or the same as violations of antitrust law).

146. *Id.* at 544 n.12.

147. *See Gregory v. Albertson’s, Inc.*, 128 Cal. Rptr. 2d 389, 395 (Ct. App. 2002) (holding that a grocery store’s lease arrangement requiring a nearby location to remain permanently closed so that no competing groceries could enter the local market was not an unfair practice because the Health and Safety Code does not call for a “private remedy affecting a single parcel of property under the unfair competition law”); *see also Scripps Clinic v. Superior Court*, 134 Cal. Rptr. 2d 101, 116 (Ct. App. 2003).

148. *Scripps Clinic*, 134 Cal. Rptr. 2d at 105.

149. *Id.* at 114. Scripps contended that it had not violated the UCL because “physicians have the right to withdraw from a patient’s care and because patients have no right to treatment by a particular physician.” *Id.* The court narrowly construed the UCL claim as applying to the particular plaintiffs and failed to fully consider the couple’s representative claim. The court declined to consider Scripps’ policy of transferring all members of a patient’s family when a patient sues. “Scripps did not apply that policy in this case because both [individuals in the couple] were plaintiffs in the malpractice action.” *Id.* at 118.

system could not duplicate Scripps' services and the transfer would not jeopardize the patient's care.¹⁵⁰ On its face, such a policy seems patently unfair, albeit not illegal or fraudulent, and worthy of judicial review, not summary adjudication. However, the court summarily dismissed the couple's section 17200 claim because it was premised on public policy that was not tethered to specific constitutional, statutory, or regulatory provisions.¹⁵¹

2. *Unfair v. Unlawful*

The *Scripps* case demonstrates the problem that arises when section 17200 claims are conditioned upon the business practice being unlawful or fraudulent. Under the *Scripps* scheme, the unfair component is no longer effectual, and section 17200 no longer promotes a "policy of permitting members of the public to police the spectrum of 'unfair competition.'"¹⁵² By default, the only public policies that are clearly tethered to constitutional, statutory, or regulatory provisions will be unlawful or fraudulent ones. This means unscrupulous competitive acts may not be precluded unless the legislature or a regulatory agency has expressly proscribed them. The first consumer who files a claim against an unscrupulous business practice that is not fraudulent, unlawful, or clearly based on the overall scheme of a statute will likely have no remedy because the public policy behind the section 17200 claim has not been "tethered."¹⁵³ The *Scripps* case also portends a dramatic race to the bottom in the healthcare industry. Surely, other medical providers will

150. *Id.* at 105.

151. *Id.* at 117. "[W]here a claim of an unfair act or practice is predicated on public policy . . . the public policy which is a predicate to the action must be "tethered" to specific constitutional, statutory or regulatory provisions." *Id.* at 116 (quoting *Gregory*, 128 Cal. Rptr. 2d at 394). The court did not think the constitutional right of persons to seek judicial redress without retaliation was an applicable constitutional predicate. The court stated that the right to seek redress in the courts is a constitutional right but held that the Scripps' policy does not interfere with the right to pursue malpractice claims, but merely "chooses not to treat the litigants once the decision to litigate has been communicated to Scripps." *Id.* at 117.

152. *See* *Rubin v. Green*, 847 P.2d 1044, 1052 (Cal. 1993) (stating that private plaintiff could not avoid bar of statute that provides a privilege for publications made during judicial proceedings by seeking injunctive relief under section 17204).

153. The benefit of tethering unfair acts based on public policy is that businesses may predetermine whether a given practice is unfair by looking to laws and regulations already on the books. The legislature and California's regulatory agencies would, in effect, assume a role in determining what acts are unfair. For example, does using one bottle of nail polish for multiple patrons constitute an unfair business practice? The regulations promulgated by the Board of Barbering and Cosmetology may provide the answer. However, it may take agencies years to determine whether a new scheme constitutes an unfair practice, leaving consumers with little or no immediate relief. For further discussion see *Conundrums*, *supra* note 13, at 236–38.

implement similar clauses if they prove to be a means to reduce the number of malpractice claims.

Apart from *Scripps*, judicial attempts to define “unfair” in consumer actions have centered around “weigh[ing] the utility of the defendant’s conduct against the gravity of the harm to the alleged victim”¹⁵⁴ or determining whether the alleged unfair act offends an established public policy or is “immoral, unethical, or oppressive, unscrupulous [or] whether it causes substantial injury to consumers”¹⁵⁵ These definitions provide little assistance to businesses seeking to know with reasonable certainty whether a given practice will be susceptible to private representative actions. California’s UCL scheme, giving courts the power to determine what constitutes an unfair practice, has the advantage of “early detection” and provides a relatively quick means of determining whether a competitive act is unfair.¹⁵⁶ But businesses are given little guidance in predetermining what may constitute an unfair act.

This lack of certainty presents the converse problem of *Scripps*, which is allowing courts to define “unfair” at the expense of businesses.¹⁵⁷

154. *State Farm Fire & Casualty Co. v. Superior Court*, 53 Cal. Rptr. 2d 229, 234 (Ct. App. 1996); *see also* *Motors, Inc. v. Times-Mirror Co.*, 162 Cal. Rptr. 543, 546 (Ct. App. 1980) (holding that summary judgment for the defendant is appropriate if the utility of the conduct clearly justifies the practice). An example of a business practice that was not deemed unfair under the UCL is found in *Walker v. Countrywide Home Loans, Inc.*, 121 Cal. Rptr. 2d 79 (Ct. App. 2002). The court upheld as not unfair a loan agency’s practice of passing on the \$9.50 to \$12.00 cost of property inspections to delinquent borrowers. “There is nothing ‘unethical’ about passing a reasonable cost of protecting the security to a defaulting borrower.” *Id.* at 92.

155. *People v. Casa Blanca Convalescent Homes, Inc.*, 206 Cal. Rptr. 164, 177 (Ct. App. 1984) (citing *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972)).

156. In contrast to California’s UCL, enforcement of the federal unfair competition act is not left to the courts but is the duty of the Federal Trade Commission. *See* 15 U.S.C. § 45 (2000). Similar to California’s UCL, the federal counterpart provides a “generic prohibition” against unfair acts, but a single administrative agency determines whether a cease and desist order should be issued “against a person or entity committing unfair acts in competition.” *Conundrums, supra* note 13, at 236–37. One advantage of having the FTC adjudicate all federal unfair competition claims is that it gives “clarity” and “notice” to the marketplace by creating a “system of advance guiding and warning.” *Id.* at 237. A marked disadvantage is the “free bite” phenomenon, which may allow a business to continue an unfair practice for years because no punitive sanction is possible against the violator until the FTC completes the lengthy bureaucratic process necessary to issue a cease and desist order. *Id.*

157. *See* *Cel-Tech Communications, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 543 (Cal. 1999). An undefined standard of what is unfair fails to give businesses adequate guidelines as to what conduct may be challenged. Furthermore, undefined standards may lead to arbitrary or unpredictable decisions about what is fair or unfair, and in some cases “may even lead to the enjoining of *pro* competitive conduct and

Such an approach in the consumer context, however, is preferable because safeguards are in place to ameliorate the painful aftermath that a business may face when it finds itself on the losing end of a section 17200 test case.¹⁵⁸ Though the practice will still be enjoined, the remedies and civil penalties may be lessened since a trial court has “very broad” discretion in formulating equitable relief in UCL actions.¹⁵⁹ Whether a practice is tethered to an existing law or policy is relevant to setting equitable remedies and civil penalties, but should not determine whether a practice is unfair and should, therefore, be enjoined.

B. *The Role of Fluid Recovery*

The balance struck by California’s UCL is between broad liability and limited relief.¹⁶⁰ Under section 17203, monetary relief is limited to orders “as may be necessary to restore to any person in interest any money or property . . . which may have been acquired by means of . . . unfair competition.”¹⁶¹ California’s high court has held that section 17200 does not authorize a court to order a defendant to disgorge all profits gleaned from unfair competition to a plaintiff who does not have an ownership interest in those profits.¹⁶² Additionally, the court has interpreted section 17203 as not permitting profits obtained from unfair competitive acts to be disgorged into a fluid recovery fund.¹⁶³

thereby undermine consumer protection, the primary purpose of the antitrust laws.”
Id.

158. See *People v. Nat’l Ass’n of Realtors*, 202 Cal. Rptr. 243 (Ct. App. 1984). In setting civil penalties, courts take into account such equity considerations as the need to deter future misconduct, the nature and seriousness of the misconduct, and the willfulness of the misconduct. In *National Ass’n of Realtors*, the court held that the “lack of need to deter” is an appropriate consideration for “setting the amount of the penalty.” *Id.* at 248. Additionally, the court concluded that the trial court had erred in imposing civil penalties without considering the numbers of persons directly affected by each act of unfair competition, the number of specific unfair acts, the malicious or predatory nature of the acts, and the degree of harm the acts of unfair competition actually caused. *Id.* at 249.

159. See *Cortez v. Purolator Air Filtration Prods. Co.*, 999 P.2d 706, 717 (Cal. 2000) (stating that consideration of the equities between the parties is necessary to ensure an equitable result); cf. *People v. Dollar Rent-A-Car Sys., Inc.*, 259 Cal. Rptr. 191, 199 (Ct. App. 1989) (holding that in a UCL action the trial court properly increased penalties by imposing civil liability on an individual defendant “[b]ecause of his control over the policies and procedures followed by defendant corporations”).

160. *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 949 (Cal. 2003).

161. CAL. BUS. & PROF. CODE § 17203 (West 1997).

162. *Korea Supply Co.*, 63 P.3d at 946.

163. *Kraus v. Trinity Mgmt. Servs., Inc.*, 999 P.2d 718, 732 (Cal. 2000). For a definition of fluid recovery see *infra* note 173.

I. Nonrestitutionary Disgorgement

Restitution under the UCL is broad enough to allow a plaintiff to recover money or property in which he or she has a vested interest.¹⁶⁴ “Under the UCL, an individual may recover profits unfairly obtained to the extent that [the] profits represent monies given to the defendant or benefits in which the plaintiff has an ownership interest.”¹⁶⁵ For example, unpaid wages may be recovered under the UCL because they “are as much the property of the employee who has given his or her labor to the employer . . . as is property a person surrenders through an unfair business practice.”¹⁶⁶ In contrast, the commission a broker expects to receive from landing a deal for a client cannot be restored under the UCL.¹⁶⁷ In such an instance, the broker will be found to have an expectancy interest in the profits, not an ownership interest.¹⁶⁸

Nonrestitutionary disgorgement is not an available remedy under the UCL.¹⁶⁹ Nonrestitutionary disgorgement is best defined as an order to surrender all profits earned as a result of an unfair business practice regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice.¹⁷⁰ A prohibition on nonrestitutionary disgorgement is in keeping with the balance struck by the UCL between broad liability and limited relief. Plaintiffs should not be able to rely on the UCL to disgorge defendants of profits in which the victims of the unfair competitive act have no ownership interest. In such

164. *Korea Supply Co.*, 63 P.3d at 947.

165. *Id.*

166. *Id.* at 946 (quoting *Cortez v. Purolator Air Filtration Prods. Co.*, 999 P.2d 706, 715 (Cal. 2000)).

167. *Id.* The case involved a broker for a defense contractor that filed an unfair competition claim against a competitor whose agent had used bribes and sexual favors to garner a contract with the Republic of Korea. *Id.* at 942. The broker sought the competitor's profits to be disgorged and handed over to the firm.

168. *Id.* at 947. The Korea Supply court held that the UCL does not permit disgorged profits to be awarded to an individual plaintiff who has no ownership interest in the profits. *Id.* at 946. Further, the court stated that allowing the transfer of disgorged profits in individual actions where the plaintiff has no ownership interest would improperly turn the UCL into “an all-purpose substitute” for tort claims over intentional interference with prospective economic advantage. *Id.* at 948. “Allowing the plaintiff in this case to recover nonrestitutionary disgorgement under the UCL would enable it to obtain tort damages while bypassing the burden of proving elements of liability under its traditional tort claim.” *Id.* The court held that individual competitors should have quick access to the judiciary to enjoin unfair competition, but monetary remedies should be strictly limited to restitution. *Id.*

169. *Id.* at 949.

170. *Kraus v. Trinity Mgmt. Servs., Inc.*, 999 P.2d 718, 725 (Cal. 2000).

instances, any disgorgement of those profits is better described as an award for damages.

However, it must be noted that in some cases this limitation on remedies will undermine the deterrent prong of the UCL and potentially permit unjust enrichment. For example, in *Southwest Marine, Inc. v. Triple A Machine Shop, Inc.*, discussed *supra*, where an unsuccessful bidder for a Navy contract brought a claim against a competitor for allegedly cutting bid costs by improperly disposing hazardous waste, the bidder's only remedy under the UCL would be an injunction.¹⁷¹ Under the California Supreme Court's interpretation of the UCL, the bidder has no interest in the profits that the competitor received from unfairly obtaining the contract and, therefore, is not entitled to restitution.

Limiting relief to enjoining the competitor's improper disposal of hazardous waste arguably gives the competitor a free bite at achieving one-time profits through illegal means. There is little incentive for a business to stop cutting costs by improperly disposing waste when the only repercussion a competitor's UCL claim will bring is a court order to stop the practice. Nonetheless, the UCL does not operate in a vacuum and, as in *Southwest Marine* where the plaintiff sought treble damages under an applicable federal statute, plaintiffs need not rely solely on section 17200 for relief.¹⁷²

2. Fluid Recovery

In *Kraus v. Trinity Management Services, Inc.*, the California Supreme Court held that establishment of a fluid recovery fund as a form of *cy pres* relief is not a proper remedy under the UCL.¹⁷³ The decision is not

171. *Southwest Marine, Inc. v. Triple A Mach. Shop, Inc.*, 720 F. Supp. 805, 808 (N.D. Cal. 1989).

172. *Id.*

173. Directly translated, *cy pres* means "as near as." It is an equitable doctrine that is often used in "construing charitable gifts when the donor's original charitable purpose cannot be fulfilled." BLACK'S LAW DICTIONARY 392 (7th ed. 1999). That is, "where funds cannot be delivered precisely to those with primary legal claims, the money should if possible be put to the 'next best' use." *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1522 (1976).

"The term 'fluid recovery' refers to the application of the equitable doctrine of *cy pres* in the context of a modern class action. [State v. Levi Strauss & Co., 715 P.2d 564, 570 (Cal. 1986).] 'The implementation of fluid recovery involves three steps. [Citation.] First, the defendant's total damage liability is paid over to a class fund. Second, individual class members are afforded an opportunity to collect their individual shares by proving their particular damages, usually according to a lowered standard of proof. Third, any residue remaining after individual claims have been paid is distributed by one of several practical procedures that have been developed by the courts. [Levi Strauss & Co., 715 P.2d at 571.]"

Kraus, 999 P.2d at 725 (quoting *Granberry v. Islay Invs.*, 889 P.2d 970, 977).

in keeping with the broad liability and limited relief envisioned by the UCL. It also has the potential to render ineffectual an entire class of section 17200 claims where plaintiffs bring a representative action on behalf of consumers who are not easily located. Moreover, establishment of a fluid recovery fund assists in alleviating the due process concerns of defendants and absent plaintiffs.

In *Kraus*, tenants of a rental agency, which owned approximately 2000 residential units in San Francisco, brought a representative UCL action against the agency's practice of wrongfully requiring nonrefundable security deposits.¹⁷⁴ The plaintiff sought to disgorge the profits the agency illegally obtained from absent tenants into a fluid recovery fund.¹⁷⁵ The court held that section 17203 did not authorize fluid recovery and directed the trial court to order the defendants to use "all reasonable means" to "identify, locate, and repay" each former tenant.¹⁷⁶ In other words, the rental agency had to restore, that is, pay back, only the former tenants it could find with reasonable effort.

In dissent, Justice Kathryn Werdegar complained that the majority's decision allowed the rental agency to keep nearly a half million dollars in "illegal gains from unfair competition."¹⁷⁷ She claimed the majority's decision also made the preventative component of the UCL ineffectual by potentially permitting defendants to retain a portion of illicit profits and thereby impair the UCL's deterrent force.¹⁷⁸ Moreover, requiring UCL defendants to restore only those victims they can find is an awkward and costly endeavor. It provides defendants with an incentive not to find victims, and in the mass market context such a scheme is wasteful. It requires defendants to incur the exorbitant cost of notifying injured consumers only to make comparatively meager individual restitution payments.¹⁷⁹

174. *Kraus*, 999 P.2d at 722–24.

175. *Id.* at 722.

176. *Id.* at 732.

177. *Id.* at 736.

178. *See id.* at 737; *cf.* Sec. & Exch. Comm'n v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1103–05 (2d Cir. 1972) (indicating that the deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators did not disgorge illicit profits into a trust fund).

179. Given the facts of *Kraus*, such an order could be found reasonable because the deposits were \$100 and the defendant could reasonably be expected to have some record of the whereabouts of its former tenants. However, generally requiring UCL defendants to locate their potential adversaries is neither an effective nor efficient means of ensuring that defendants do not benefit from, or are unjustly punished for, their unfair business

Fluid recovery does not present double recovery and due process concerns for defendants as the defendant in *Kraus* claimed.¹⁸⁰ Quite the contrary, it assists in bringing finality to UCL claims and precludes multiple payouts for a single injury because the entire restitution owed is determined in one lump sum rather than piecemealed based on the class the plaintiff purports to represent. A defendant's total liability is paid over to a fluid recovery fund, and individual members of the representative class are restored. The residue is calculated and deposited into a trust fund over which the trial court will retain jurisdiction. If subsequent plaintiffs file representative UCL claims over the same acts, "no court entertaining such action could award additional disgorgement because, by virtue of the [prior judgment], defendants would have given up all their ill-gotten gains and, as a matter of law, would have nothing left to disgorge."¹⁸¹

Subsequent successful claims for restitution would be directed to the trust fund. The fund would remain in place until the applicable statute of limitations has run. Depending on court order or agreement between the parties, any funds remaining after the expiration of the statute of limitations could be handled in one of a variety of ways. The residual funds would escheat to a state agency or be handed over to consumer groups active in protecting the interests of the representative class.¹⁸² In the alternative, the funds could be returned to the defendant who would then be required to issue a corresponding price rollback.

3. Restitution Provisions

The legislature should intervene to clarify the available monetary remedies in UCL actions by carefully defining restitution, so as not to be confused with nonrestitutionary disgorgement, and expressly providing for fluid recovery. Such a provision should include the following:

practices. In instances where small amounts of individual restitution are owed, while a business has reaped large gains from unfair competitive acts, locating potential plaintiffs may be cost prohibitive. For example, a retailer that shortchanged customers could find restitution costs prohibitive if not impossible. The cost could easily outpace the amount of illicit profits the retailer garnered. For further discussion, see Stan Karas, *The Role of Fluid Recovery in Consumer Protection Litigation: Kraus v. Trinity Management Services*, 90 CAL. L. REV. 959, 981–84 (2002); see also McCall, *supra* note 122, at 845–49.

180. *Kraus*, 999 P.2d at 724. The defendant was concerned that absent class certification, a defendant in a UCL action where fluid recovery was permitted may remain subject to innumerable future lawsuits based on the same conduct and raising the same issues as the initial litigation despite the fact that the defendant has previously prevailed. *Id.*

181. *Id.* at 746 (Werdegar, J., concurring in part and dissenting in part).

182. For further discussion see Karas, *supra* note 179, at 988.

Restitution is intended to return parties to their status prior to the commission of the violations of Section 17200 et seq. Such restitution calculates gains and losses by and from the violations committed, and includes consideration of offsetting benefits against incurred losses where applicable. If restitution cannot be provided to individuals suffering loss or it would be unfairly burdensome to defendants or impractical to require it, it may be accomplished through fluid recovery or cy pres means intended to benefit the general grouping of persons suffering losses from the violations at issue.

The foregoing language requires close causation between the section 17200 violation and the monetary remedy. Only profits stemming directly from the unfair act should be awarded. Further, allowing for fluid recovery when consumers cannot be easily restored prevents unfair players in the market from reaping the benefits of their unfair acts simply because their victims cannot be readily found.¹⁸³

VI. CONCLUSION

Prior to the passage of Proposition 64, enforcement of California's UCL was clearly chaotic. Private attorney general claims were filed on behalf of the public without prosecutors ever knowing that an unfair act, which harmed the public at large, had been alleged. Settlements on behalf of all Californians were entered into, yet purported benefits to consumers went undisclosed. Businesses that complied with regulatory action subsequently found themselves defending a private attorney general suit over the same matter they thought they had resolved. Nearly a decade after the legislature's own Law Revision Commission proposed several procedural improvements to the UCL and despite numerous attempts at reform, California's UCL was still in need of a "traffic cop."¹⁸⁴

183. Cf. *State v. Levi Strauss & Co.*, 715 P.2d 564, 570–71 (Cal. 1986):

Fluid recovery may be essential to ensure that the policies of disgorgement or deterrence are realized. [*Simer v. Rios*, 661 F.2d 655, 676 (7th Cir. 1981).] Without fluid recovery, defendants may be permitted to retain ill gotten gains simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts.

184. *Who's on First?*, *supra* note 59, at 2. In recent years, legislative consensus regarding the UCL appeared only to have achieved the removal of the topic from the Law Revision Commission's agenda, which was accomplished in 2000. See Wheaton,

Lawsuits were threatened and settlements were entered into on behalf of the public, but too often the result was merely personal gain rather than vindication of the public interest. When California's UCL is abused, the avenger may, indeed, be guilty of the greater crime. Proposition 64 provides the necessary review of section 17200 claims, by ensuring that all representative actions are funneled through class action procedures. These procedures will no longer allow unscrupulous plaintiffs to willy-nilly blow the whistle of unfair competition without properly investigating their claims or convincing the court that they are competent to protect the public interest.

Proposition 64 goes a long way toward improving California's UCL, but the effects of class action certification and the establishment of a harm requirement has yet to be seen. To be sure, the number of section 17200 actions will be reduced. Nonetheless, it should be remembered that the goal of California's UCL is to ensure fair dealing. State prosecutors and regulatory agencies should be the first line of defense. When they fail, the public should have the ability to step in, provided that private plaintiffs demonstrate that their claims truly represent the public interest. If profits are gained through unlawful, unfair, or fraudulent acts, those profits should be disgorged if the alleged victims can demonstrate a property interest, but the remedy should not be disproportionate to the harm caused. Foremost, once litigated, representative claims should be put to rest, and only persons actually harmed should have claims to be restored.

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supra note 30, at 443. Though an active legislative topic for several years efforts at reform were stagnant prior to Proposition 64. Wheaton states that in 2001 several bills were circulating that would have limited the scope of section 17200 and benefited defendants but that few "observers of the legislative scene" were willing to predict that UCL reform would be forthcoming. *Id.*