AN OVERVIEW OF CALIFORNIA'S UNFAIR COMPETITION LAW

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FEBRUARY 2004
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The Unfair Competition Law, California Business and Professions Code Sections 17200 through 17209, is California's most frequently used consumer protection statute, with the number of cases filed with Section 17200 claims by both private and governmental plaintiffs increasing from year to year. Although Section 17200 repeatedly has been criticized, particularly in connection with attorneys accused of improperly utilizing the law to extort attorneys' fees from small businesses, the likelihood of any substantial legislative restriction of the statute's broad and sweeping provisions is unlikely. Instead, Section 17200 will continue to be alleged in almost every consumer protection action, as well as a wide range of other types of litigation, notwithstanding its description by one Justice of the California Supreme Court as "a
standardless, limitless, attorney fees machine." This article provides an overview of the UCL's statutory scheme and addresses salient issues arising in Section 17200 litigation.

I. THE BASIC STRUCTURE OF SECTION 17200

A. The Five Types Of Wrongful Conduct That Constitute "Unfair Competition"

"Unfair competition" is defined in Section 17200 as encompassing any one of the following five types of business "wrongs":

1. An "unlawful" business act or practice;
2. An "unfair" business act or practice;
3. A "fraudulent" business act or practice;
4. "Unfair, deceptive, untrue or misleading advertising";
5. Any act prohibited by Sections 17500-17577.5.

The definitions in Section 17200 are disjunctive. Each of these five "wrongs" operates independently from the others. "[I]n other words, a practice is prohibited as 'unfair' or ['fraudulent'] even if not 'unlawful' and vice versa."

The reach of Section 17200 is broad and imposing; "the Legislature apparently intended to permit courts to enjoin ongoing wrongful business conduct in whatever context such activity might occur." Unlike other unfair and deceptive practices statutes, intent is irrelevant since a Section 17200 plaintiff is not required to show that the defendant actually intended to injure anyone. As detailed below, the "cleansing power" allowed by Section 17200 can pose a formidable challenge to defendants.

5 Stop Youth Addiction, 17 Cal. App. 4th at 598 (Brown, J., dissenting).
6 The full text of Section 17200 reads as follows:

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

8 Id.
10 See State Farm, 45 Cal. App. 4th at 1102. Moreover, with respect to a Section 17200 claim based on "unlawful" conduct, the plaintiff does not even have to show that anyone actually was injured. See People ex rel. Van de Kamp v. Cappuccio, Inc., 204 Cal. App. 3d 750, 758-61 (1988).
B. Who May File Suit Under Section 17200?

The better question to ask here is "who may not file suit under Section 17200?" Section 17200 has broad standing provisions. Section 17204 confers standing to sue on private parties and public prosecutors, including the Attorney General, district attorneys and certain city attorneys.\(^\text{12}\) As a result, the statute authorizes both government enforcement actions and private party suits.\(^\text{13}\) Section 17204 also allows both private parties and public prosecutors to file their lawsuits as representative actions -- i.e., the action may be brought not only on behalf of the person named in the complaint, but also on behalf of the "general public." A plaintiff who files such a representative action commonly is referred to as a "private attorney general."

1. Distinguishing Between Private Party Lawsuits And Government Enforcement Actions

Because the applicable substantive law is the same, court opinions interpreting Section 17200 in government enforcement actions also are applicable in private party suits and vice versa.\(^\text{14}\) With regard to the remedies available, injunctive and restitutionary relief are equally available; however, civil penalties are available only in government enforcement actions.\(^\text{15}\)

\(^{12}\) Section 17204 states, in pertinent part:

> Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney . . . or any city attorney of a city having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor . . . in any city or city and county having a full-time city prosecutor in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.

\(^{13}\) There is no authority precluding a prosecutor and a private party from simultaneously maintaining Section 17200 suits involving the same business act or practice. See Committee to Defend Reprod. Rights v. A Free Pregnancy Ctr., 229 Cal. App. 3d 633, 641 (1991). Furthermore, a private litigant is not required to obtain permission from a public prosecutor before filing suit. See id. The only notice required is set forth in Section 17209, which provides that, "if a violation of [Section 17200] is alleged or the application or construction of [Section 17200] is in issue in any proceeding in the Supreme Court of California, a state court of appeal, or the appellate department of a superior court, the person who commenced that proceeding shall serve notice thereof . . . on the Attorney General . . . ." See Soldate v. Fidelity Nat'l Fin., Inc., 62 Cal. App. 4th 1069, 1074 (1998); Californians for Population Stabilization v. Hewlett-Packard Co., 58 Cal. App. 4th 273, 282-85 (1997).

\(^{14}\) While the fundamental substantive law of Section 17200 similarly is applicable in private and law enforcement actions, there are differences that may arise between public
2. **Standing For Private Parties**

Section 17204 provides that "any person" may sue on behalf of "itself, its members, or on behalf of the general public." This phrase has been interpreted by the courts to authorize standing for any person or organization to file suit regardless of whether that person or organization suffered injury as a result of the alleged wrongful business practice. In addition, a Section 17200 claim that is based on a violation of another law -- an "unlawful" claim -- may lie even where no private right of action exists pursuant to the underlying law. There is authority, prosecutions and private lawsuits. For example, the California Supreme Court recently held that Section 17200 actions brought by public prosecutors against public utilities may proceed in superior court notwithstanding the jurisdiction of the California Public Utilities Commission ("CPUC"). See People ex rel. Thomas J. Orloff v. Pacific Bell, 31 Cal. 4th 1132, 1138 (2003). The Court held that, in Section 17200 cases brought against public utilities by the attorney general or a district attorney, the CPUC's jurisdiction was not exclusive.

15 See Payne v. National Collection Sys., Inc., 91 Cal. App. 4th 1037, 1039-47 (2001) (discussing differences between representative actions under Section 17200 brought by public prosecutors and by private parties); Section 17206 (providing that public prosecutors may obtain civil penalties of up to $2,500.00 per violation).

16 See, e.g., Stop Youth Addiction, 17 Cal. 4th at 561 (holding that a for-profit corporation could bring Section 17200 representative action on behalf of the general public); Aicco, Inc. v. Insurance Co. of N. Am., 90 Cal. App. 4th 579, 591-92 (2001) (rejecting arguments based on plaintiff's lack of standing to bring action under Section 17200 where a corporate restructuring plan to free parent company of obligations to California insurance policyholders under former corporate division without obtaining policyholders' consent violated California Civil Code Section 1457); Consumers Union of United States, Inc. v. Fisher Dev., Inc., 208 Cal. App. 3d 1433, 1439 (1989) (relief under Section 17200 is not limited to "aggrieved" persons).

17 See Stop Youth Addiction, 17 Cal. 4th at 560-67 (holding that a corporation has standing to assert Section 17200 claim for unlawful business practice where such claim was based on violation of penal code statute prohibiting the sale of cigarettes to minors); Committee on Children's Television, 35 Cal. 3d at 210-11; Washington Mut. Bank, FA v. Superior Court, 75 Cal. App. 4th 773, 787 (1999) (determining that plaintiffs could assert a claim under Section 17200, notwithstanding that predicate federal law did not provide for a private right of action); Hangarter v. Paul Revere Life Ins. Co., No. C 00-5286 JL, 2002 WL 31526543, at *28-29 (N.D. Cal. Nov. 12, 2002) (rejecting defendants' argument that plaintiff should not be permitted to use Section 17200 claims as an end-run around the prohibition of private rights of action under California's Unfair Insurance Practices Act and reasoning that predicate statute must actually bar the action or clearly permit the conduct).
however, for the proposition that Section 17200 actions must be brought in the courts and cannot be asserted in administrative proceedings.18

a. Standing In Section 17200 Actions Brought As Class Actions

A Section 17200 action may be brought as a class action, thereby subjecting plaintiffs to the same advantages and disadvantages of class actions generally.19 This rule was confirmed in Corbett v. Superior Court,20 which held that a trial court may certify a Section 17200 claim as a class action when statutory requirements for class actions are met. Pursuant to settled class action jurisprudence, a named class plaintiff seeking to maintain a Section 17200 class action must be a member of the class with his or her own actionable claim.21 This requirement of actual injury22 precludes unaffected corporations and individuals from employing Section 17204's liberal standing requirements to bring a Section 17200 action as a class action.23

18 See Greenlining Inst. v. Public Utilities Comm'n, 103 Cal. App. 4th 1324, 1328-29 (2002) (holding that Public Utilities Commission did not have jurisdiction to adjudicate claim brought under Section 17200 because such claims must be brought in court).
19 In Linder v. Thrifty Oil Co., 23 Cal. 4th 429, 444-47 (2000), the California Supreme Court endorsed class actions in the consumer context by holding that class certification may be appropriate even when the potential recoveries by class members would be extremely small. Prior to this ruling, the defense bar had been encouraged by the Court of Appeal's conclusion that minimal individual damages of putative class members constitute a basis for defeating class certification.
21 See Caro v. Proctor & Gamble Co., 18 Cal. App. 4th 644, 663-64 (1993) ("plaintiff seeking to maintain a class action must be a member of the class"); see also Greater Westchester Homeowners Ass'n, Inc. v. City of Los Angeles, 13 Cal. App. 3d 523, 526 (1970) (homeowners association dismissed as party and class representative where complaint made no mention of association other than it being a nonprofit corporation organized by property owners to represent association members; no cause of action was stated on behalf of the association itself); Payne v. United Cal. Bank, 23 Cal. App. 3d 850, 860 (1972) (denying leave to amend to permit a proper plaintiff to be substituted because named plaintiff was not a member of the class for whose benefit plaintiff sued).
22 A party seeking certification as a class representative also must establish the existence of an ascertainable class and a well-defined community of interest among class members. See Richmond v. Dart Indus., Inc., 29 Cal. 3d 462, 470 (1981) ("The community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class."); see also City of San Jose v. Superior Court, 12 Cal. 3d 447, 454 (1974).
23 The voter initiative currently scheduled to appear on the November 2004 ballot would require private Section 17200 actions to be brought by a person who actually suffered
By asserting a Section 17200 claim as a class action, however, a plaintiff may find it easier to certify a class and overcome problems with typicality and commonality -- arguments generally asserted in opposition to class certification. In Massachusetts Mutual Life Insurance Co. v. Superior Court,\(^{24}\) the Court of Appeal affirmed class certification of a Section 17200 claim based on alleged non-disclosure of certain terms relating to the sale of "vanishing premium" life insurance policies. Although defendant argued that class treatment was not suitable because each plaintiff would be required to make an individual showing of the representation that he or she received,\(^{25}\) the court rejected this argument, reasoning that under the "unique scope" of Section 17200, plaintiffs were not required to prove individualized deception, reliance and/or injury.\(^{26}\) The impact of Massachusetts Mutual is that defendants may have difficulty defeating class certification of Section 17200 claims based on lack of typicality and commonality, particularly where the Section 17200 claim is based on allegations of "non-disclosure."\(^{27}\)

b. Challenging A Section 17200 Representative Action As Improper

In Kraus v. Trinity Management Services, Inc.,\(^ {28}\) the California Supreme Court noted that "because a [Section 17200] action is one in equity, in any case in which a defendant can demonstrate a potential for harm or show that the action is not one brought by a competent plaintiff for the benefit of injured parties, the court may decline to entertain the action as a representative suit."\(^ {29}\) This statement, along with several state and federal decisions, suggests that a defendant may challenge a Section 17200 plaintiff's ability to proceed as a "general public" representative as well as whether the action itself properly can proceed on a representative basis.\(^ {30}\) In Rosenbluth International, Inc. v. Superior Court,\(^ {31}\) the California Court of Appeal

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\(^{25}\) Defendant had presented to the court numerous out-of-state authorities holding that vanishing premium claims were not suitable for class treatment, which the court distinguished based on the broad scope of California's Section 17200 jurisprudence. Id. at 1291.

\(^{26}\) Id. at 1288-92.

\(^{27}\) See also Corbett, 101 Cal. App. 4th at 672 (noting that "[t]he refusal to certify a class on other claims is not dispositive on whether the UCL claim should be certified, because the UCL claim is materially different from the other causes of action. Relief under the UCL is available without individualized proof of deception, reliance and injury.").

\(^{28}\) 23 Cal. 4th 116 (2000).

\(^{29}\) See id., at 138.

\(^{30}\) See e.g., Wilner v. Sunset Life Ins. Co., 78 Cal. App. 4th 952, 969 (2000) (noting that, where Section 17200 representative claims are based upon transactions involving individual and unique factual questions, a representative claim for restitution may not lie); South Bay Chevrolet v. General Motors Acceptance Corp., 72 Cal. App. 4th 861,
directly addressed for the first time the issue of whether a Section 17200 representative action may be dismissed pursuant to the standard set forth in Kraus -- i.e., it is not brought by a "competent plaintiff" for the benefit of injured parties.

In Rosenbluth, plaintiff, an individual, brought a Section 17200 representative action against defendant, a travel agency serving large corporate clients, alleging the use of fraudulent accounting practices that purportedly resulted in the understatement of rebates or "overrides" due defendant's customers. Plaintiff was not a customer of defendant, had not entered into any contract with defendant and suffered no injury as the result of the alleged conduct; rather, plaintiff sued solely in a representative capacity on behalf of the "general public." Defendant moved for summary judgment on the grounds, among others, that plaintiff lacked standing as a "competent plaintiff" to bring the action on behalf of the parties allegedly injured. The trial court denied the motion, finding insufficient evidence of "unfairness" to conclude that it would be inequitable for plaintiff to bring the action.

The Court of Appeal reversed, holding that, "as a matter of law, . . . [plaintiff] lacks standing as a 'competent plaintiff' to bring this action because he has failed to demonstrate that he filed the action on behalf of 'the general public.'" The Court of Appeal reasoned that, unlike the typical Section 17200 representative actions brought on behalf of aggrieved consumers, defendant's customers consisted of large corporations, which did not constitute the "general public." Thus, "[plaintiff's] effort to act as the self-appointed representative of these alleged victims not only raises significant logistical and constitutional issues, it may well leave the victims worse off than they would be if they filed individual actions against [defendant.]

Although limited by its atypical facts, Rosenbluth provides guidance as to how defendants may challenge Section 17200 representative actions based on the "competent plaintiff" standard set forth in Kraus, including, among other things: (i) the appropriate procedural mechanism (summary judgment or adjudication); (ii) the type of facts establishing a

869, 897 (1999) (holding that Section 17200 action could not be maintained on behalf of the general public "on the ground that 'mini-trials' would be necessary with respect to . . . various uniquely individual questions of fact" and that defendant's conduct was "not sufficiently uniform to allow representative treatment"); Lazar v. Trans Union LLC, 195 F.R.D. 665, 674 (C.D. Cal. 2000) (granting defendant's motion to strike representative allegations on grounds that plaintiff's Section 17200 claim involved unique, non-common factual questions such that his claims were not sufficiently similar to those of the general public).


Id. at 1076.

Id.

Id.

Id. at 1076-79.

Id. at 1078 (citing Bronco Wine Co. v. Frank A. Logoluso Farms, 214 Cal. App. 3d 699 (1989)).
lack of standing as a "competent plaintiff" (e.g., where the plaintiff is so attenuated to the alleged "victims" that he or she would not be acting in their best interests); and (iii) circumstances raising due process considerations. Because Rosenbluth involved large corporations as the alleged victims, however, trial courts may distinguish the case and reject such arguments in Section 17200 consumer actions.

Notably, Rosenbluth does not address the other "standard" identified in Kraus -- whether and when a Section 17200 representative action evidences a "potential for harm." Unfortunately, no defined procedure or standard currently exists for this determination. While traditional standards applicable to class certification are best suited for the operative point of reference, the decisions are by no means consistent and the issue remains ripe for review.

The decision in Prata v. Superior Court exemplifies the confusion surrounding this issue. In Prata, plaintiff brought a Section 17200 representative suit against defendant Bank One based on Bank One's "90 days, Same-as-Cash" financing program. Relying on an in-store advertisement and statements of the store representative, plaintiff alleged that Bank One deceptively advertised the "Same-as-Cash" program and improperly billed for interest and fees. Defendant moved for summary adjudication, challenging plaintiff's representative action as improper based on the plaintiff's individual reliance on the store representative's statements and because defendant used 19 different advertisements and various merchants throughout California, each of which might have led customers to believe something different.

A similar decision was affirmed in Blenn v. En Pointe Technologies, Inc., No. H022598, 2003 WL 220603, at *9 (Cal. App. 6 Dist. Jan. 31, 2003) (relying on Rosenbluth and holding that named plaintiffs, who had not suffered injury, could not maintain Section 17200 representative action because plaintiffs' Section 17200 claims "possess individualized characteristics that will necessitate a detailed and factually specific inquiry"). Because Blenn is an unpublished decision, it is not citable precedent.

Cf. Robert I. Weil & Ira A. Brown, California Practice Guide: Civil Procedure Before Trial, ¶ 14:1 (The Rutter Group 2002) ("Class actions and representative actions are quite similar. Both are essentially equitable in nature. They permit persons to sue on behalf of others where this is shown to be necessary and superior to separate lawsuits by or against members of the group individually."); Lazar, 195 F.R.D. at 674 ("[T]hose uncertified class actions that have been validated by the California Court of Appeals [sic] would probably have been certified as class actions under FRCP 23. The plaintiff who brings an uncertified class action should be a reasonable representative of that class.").

Even if courts were to "import" class action standards in evaluating Section 17200 representative actions, because it may be easier to certify a class under Section 17200, typical class action requirements may have little impact. See, e.g., Massachusetts Mut., 97 Cal. App. 4th at 1282 (discussed above).

Id. at 1132-35.
Id. at 1133-34.
Although the trial court granted defendant's motion, the Court of Appeal reversed, holding that plaintiff's UCL representative claim was proper because the trial court was not required to examine each individual consumer's transaction to determine whether or not the financing program, as a whole, was likely to mislead. In discussing how that case should proceed on remand, however, the Prata court instructed that "[t]he trial court also may exercise its discretion to limit the representative action to consumers who relied on the advertisements and program materials produced by Bank One, rather than on representations made by retail store clerks about the 'Same-as-Cash' program." This latter statement brings into question how courts should evaluate Section 17200 representative claims since, on the one hand, individual transactions apparently need not be examined to determine liability, whereas, on the other hand, individual factual questions (such as the consumer's reliance) may be examined to determine the appropriate size of the "representative class." Obviously, further appellate guidance is necessary.

3. "Private Attorney General" Suits By Unaffected Plaintiffs Are Limited To State Court

In federal court, a plaintiff must meet the standing requirements prescribed by Article III of the U.S. Constitution, which limits federal jurisdiction to "cases" and "controversies" and requires the plaintiff to have suffered some "injury in fact." Thus, a party that suffers no injury,

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43 Id. at 1143-45 ("The burden of proof is modest: the representative plaintiff must show that members of the public are likely to be deceived by the practice."). Prata also distinguished between UCL representative actions involving consumers' rights and UCL actions involving sophisticated business entities. Id. at 1143 ("We agree with the distinction in South Bay Chevrolet between actions brought to vindicate the rights of individual consumers under [S]ection 17200, such as the one before us, and an action such as the one in South Bay, which involves sophisticated business finance issues.").

44 Id. at 1145.

45 The Court of Appeal in Prata also rejected defendant's due process argument, finding that the procedures set forth in Kraus for ordering defendant to identify, locate and repay each customer, subject to the execution of a release and acknowledgement, obviated any such concerns. See id. at 1145; Kraus v. Trinity Mgmt. Servs., Inc., 23 Cal. 4th 116, 138 (2000). Defendant argued that, as in Bronco Wine Co. v. Frank A. Logoluso Farms, 214 Cal. App. 3d 699 (1989), allowing the action to proceed on a representative basis would be improper based on due process concerns. Prata, 91 Cal. App. 4th at 1141-42. In Bronco Wine, a grape grower alleged that defendant winery operator breached its contract with the grower and violated Section 17200. There, the court reversed judgment in favor of non-party growers, citing "serious fundamental" due process and manageability concerns. Bronco Wine, 214 Cal. App. 3d at 717, 721.

46 See Fiedler v. Clark, 714 F.2d 77, 80 (9th Cir. 1983) (remanding action brought pursuant to Hawaii statute that conferred standing for "private attorney general" because state-created law cannot confer standing in federal court); Toxic Injuries Corp. v. Safety-Kleen Corp., 57 F. Supp. 2d 947, 955 (C.D. Cal. 1999) (holding unaffected corporate
but rather is filing solely as a "private attorney general" under Section 17200, cannot bring a
diversity-based representative action in federal court, nor can such an action successfully be
removed to federal court.47

C. Who May Be Sued Under Section 17200?

Unlike some other states' unfair and deceptive practices statutes, Section 17200 does not
exempt specific industries, such as those that are highly regulated, from coverage; rather, it
applies to any "person."48 The term "person" broadly is defined as "all natural persons,
corporations, firms, partnerships, joint stock companies, associations and other organizations of

plaintiff did not have standing to sue under Section 17200 in federal court); MAI Sys.
Corp. v. UIPS, 856 F. Supp. 538, 540 (N.D. Cal. 1994) (holding that standing
requirements barred business competitor's Section 17200 representative action); As You
Dec. 21, 1993) (noting that federal standing requires a showing that the plaintiff suffered
925, 929 (N.D. Cal. 1992) (reasoning that state statutes have no effect on the standing
requirements applicable to federal courts).

47 See, e.g., Seibels Bruce Group, Inc. v. R.J. Reynolds Tobacco Co., No. C-99-0593 MHP,
1999 WL 760527, at *6 (N.D. Cal. Sept. 21, 1999) (holding that plaintiff did not have
standing to assert Section 17200 claim in federal court because it did not establish a
distinct and palpable injury); As You Sow, 1993 WL 560086, at *3-4 (holding that
Section 17200 case could not be removed because plaintiff lacked standing); Mangini,
793 F. Supp. at 929 (reasoning that Section 17200 claim premised on violations of federal
law could not be removed because underlying federal law allowed no private right of
action); Boyle v. MTV Networks, Inc., 766 F. Supp. 809, 817-18 (N.D. Cal. 1991)
(noticing that case involving private-party Section 17200 claim could not be removed as it
would result in lack of standing); California v. Beltz Travel Serv., Inc., 379 F. Supp. 948,
950 (N.D. Cal. 1974) (stating that standing is subject to federal requirements following
removal of Section 17200 action to federal court).

(holding that the California Insurance Code did not preclude Section 17200 action against
title insurers based on an alleged conspiracy not to issue title insurance).
persons."\textsuperscript{49} The doctrine of "vicarious liability," however, does not apply to claims brought under Section 17200.\textsuperscript{50}

D. What Constitutes A Business Act Or Practice?

The first three "wrongs" in Section 17200 all require proof of a "business act or practice." Although no reported case explicitly defines the term "business" under Section 17200, if the issue were presented, the courts may well construe this term in accordance with the same broad construction given to the statute's other language.\textsuperscript{51} Nevertheless, defining the scope of the defendant's "business" still can be important. For example, in order for a plaintiff to maintain a Section 17200 suit based on an "unlawful" claim, the defendant must have engaged in "business" as defined by the predicate statute.\textsuperscript{52} With respect to the terms "act" and "practice," the statute

\textsuperscript{49} Cal. Bus. & Prof. Code § 17201; see In re First Alliance Mortgage Co., 280 B.R. 246, 250-51 (C.D. Cal. 2002) (denying motion to dismiss Section 17200 claim brought against subprime mortgage company's CEO that was predicated on a violation of the federal Truth in Lending Act ("TILA") despite the fact that CEO personally was not a "creditor" subject to TILA's requirements); but see Janis v. California State Lottery Comm'n, 68 Cal. App. 4th 824, 831 (1998) (holding that Section 17200 claim failed as a matter of law because government entity was not a "person" as defined in Section 17200).

\textsuperscript{50} See Emery v. Visa Int'l Serv. Ass'n, 95 Cal. App. 4th 952, 960 (2002) ("The concept of vicarious liability has no application to actions brought under [Section 17200].' . . . A defendant's liability must be based on his personal 'participation in the unlawful practices' and 'unbridled control' over the practices that are found to violate section 17200 or 17500.") (quoting People v. Toomey, 157 Cal. App. 3d 1, 14 (1984)); but see Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1187 (C.D. Cal. 2002) (distinguishing Emery and granting preliminary injunction against internet company based on its activities in supervising access to adult online services).

\textsuperscript{51} Payne v. United Cal. Bank, 23 Cal. App. 3d at 856 (stating that whether particular conduct constitutes a Section 17200 "business practice" is a factual question).

\textsuperscript{52} See, e.g., Truta v. Avis Rent-A-Car Sys., Inc., 193 Cal. App. 3d 802, 814-15 (1987) (holding that rental car company was not in the "business" of selling insurance because it was not an "insurer" as provided by statute); see also Crawford v. Farmers Group, Inc., 160 Cal. App. 3d 1164, 1171 (1984) (holding that Section 17200 claim did not lie where defendant's conduct did not fall within the underlying statute's definition of "retail installment sale"); but see Hernandez v. Atlantic Fin. Co., 105 Cal. App. 3d 65, 81 (1980) (holding that lender properly could be enjoined under Section 17200 for "unlawful" conduct despite the fact that underlying statute did not specifically apply to the type of loan at issue); In re First Alliance Mortgage Co., 280 B.R. at 250-51 (discussed above).
thus far has been construed to encompass most conduct; even a one-time act has been deemed sufficient to allege a Section 17200 claim.53

II. THE SUBSTANCE OF SECTION 17200 -- UNLAWFUL, UNFAIR AND/OR FRAUDULENT BUSINESS PRACTICES

The following sections address the three principal types of prohibited business acts or practices upon which Section 17200 claims are founded. In addition to the issues generally arising in Section 17200 litigation,54 these substantive categories of "unlawful," "unfair" and/or "fraudulent" conduct are subject to their own particularized affirmative defenses.

A. "Unlawful" Business Act Or Practice

Put simply, a business act or practice is "unlawful" if it violates some other law. Explaining the "unlawful" prohibition under Section 17200, the California Supreme Court has stated that Section 17200 "borrows' violations of other laws and treats these violations, when committed pursuant to business activity, as unlawful practices independently actionable under [Section] 17200."55 "Unlawful" claims under Section 17200 have been predicated on numerous laws and regulations existing at various levels of government, including: federal statutes;56 federal regulations;57 state statutes;58 state regulations;59 local ordinances;60 prior case law;61 and standards of professional conduct.62


54 General affirmative defenses to Section 17200 claims are discussed infra.


57 See Southwest Marine, 720 F. Supp. at 807-08 ("borrowing" Navy procurement regulation as predicate for Section 17200 was proper where defendant was able to underbid Navy contract as a result of improperly disposing hazardous wastes).

Notwithstanding the broad "borrowing" capability of Section 17200, certain courts have rejected plaintiffs' assertions that the "liability imposed under the doctrines of 'strict products liability and . . . breach of the implied warranty of fitness' will support an independent action under the 'unlawful' prong of section 17200." In Klein v. Earth Elements, Inc., the court reasoned that, "[w]hile these doctrines do provide for civil liability upon proof of their elements they do not, by themselves, describe acts or practices that are illegal or otherwise forbidden by law," Other Section 17200 claims based on common law liability may be defensible pursuant to this reasoning; however, no court directly has addressed the issue.

1. Pleading An "Unlawful" Claim

To effectively plead a Section 17200 claim based on an "unlawful" business act or practice, a plaintiff must allege facts sufficient to show a violation of some underlying law. "[W]ithout supporting facts demonstrating the illegality of a rule or regulation, an allegation that it is in violation of a specific statute is purely conclusionary and insufficient to withstand demurrer."
2. Defenses Specific To "Unlawful" Actions

a. Defense To Or Compliance With Underlying Law

Any defense to the predicate law underlying the "unlawful" claim also is a defense to the Section 17200 action. A defendant's full compliance with the underlying law also acts as a complete defense to a Section 17200 claim alleging an "unlawful" act. Indeed, based on the California Supreme Court's holding in Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., it now is apparent that a defendant's compliance with an express provision of law allowing certain activity precludes a claim for violation of Section 17200 based on the same activity. In addition, the mere failure to perform an act required by law may be insufficient to constitute the commission of an "unlawful" act within the meaning of Section 17200.

67 See Hobby Indus. Ass'n of Am. v. Younger, 101 Cal. App. 3d 358, 372 (1980); see also Aquino v. Credit Control Servs., 4 F. Supp. 2d 927, 930 (N.D. Cal. 1998) (dismissing Section 17200 action where plaintiff failed to "set forth any factual allegations that the defendant's approach violated any state or federal provisions"); Metro Publ'g, Ltd. v. San Jose Mercury News, Inc., 861 F. Supp. 870, 881 (N.D. Cal. 1994) (dismissing Section 17200 claim after underlying trademark infringement and dilution claims were dismissed).


69 See Cel-Tech, 20 Cal. 4th at 184; see also Lazar v. Hertz Corp., 69 Cal. App. 4th 1494, 1505-06 (1999) ("A business practice cannot be unfair if it is permitted by law. [Citation.] [Section 17200] does not apply if the Legislature has expressly declared the challenged business practice to be lawful in other statutes."); California Med. Ass'n, Inc. v. Aetna U.S. Healthcare, Inc., 94 Cal. App. 4th 151, 168-70 (2001) (affirming trial court's order sustaining demurrer without leave to amend because defendant HMO's conduct -- failure to pay physicians for care provided after certain contractual intermediaries received payment from HMOs without passing funds on to physicians -- did not constitute an "unlawful/unfair" business practice since the underlying law did not impose such alleged obligation to pay); Hobby Indus., 101 Cal. App. 3d at 370 ("Although the Supreme Court has construed the orbit of the unfair competition statutes expansively [citations omitted], it cannot be said that this embracing purview also encompasses business practices which the Legislature has expressly declared to be lawful in other legislation."); Chavez v. Whirlpool Corp., 93 Cal. App. 4th 363, 375 (2001) (holding that defendant's conduct was permissible under the Colgate doctrine (United States v. Colgate & Co., 250 U.S. 400, 39 S. Ct. 465, 63 L. Ed. 2d 992 (1919)) and therefore not "unlawful" or "unfair" under Section 17200); Churchill Village, LLC v. General Elec. Co., 169 F. Supp. 2d 1119, 1132-33 (N.D. Cal. 2000) (holding that defendant's compliance with underlying federal law precluded liability under Section 17200); but see Aicco, Inc. v. Insurance Co. of N. Am., 90 Cal. App. 4th 579, 595-96

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b. Change In Underlying Law

A defense may arise by virtue of a change in the underlying law or repeal of the underlying law before the plaintiff obtains final judgment.71

B. "Unfair" Business Act Or Practice

The "unfair" prong of Section 17200 presents the most vague and undefined standard. Because the "unfair" prong has been interpreted broadly so as to allow the courts maximum discretion in prohibiting new schemes to defraud,72 defining the amorphous principle of "unfairness" presents a difficult task.73 The test that many courts have used to determine whether a business practice is unfair "involves an examination of [the practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim . . . n74 In addition to this test, California courts have adopted language from Federal Trade Commission ("FTC") guidelines defining "unfair" conduct with reference to Section 5 of the FTC Act.75 Under this standard, a business act is "unfair" when it "offends an

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70 See Lee v. Underinsurance Exch. of the Auto Club, 50 Cal. App. 4th 694, 713-14 (1996) (holding that actions based on reasonable business judgment and not forbidden by law did not constitute "unlawful" business practices where insurance club chose not to distribute surplus funds to member accounts).

71 See Governing Bd. v. Mann, 18 Cal. 3d 819, 829 (1977) (recognizing California's general rule that "a cause of action or remedy dependent on a statute falls with a repeal of the statute").


73 See Gregory v. Albertson's, Inc., 104 Cal. App. 4th 845, 851-54 (2002) (discussing the amorphous nature of "unfairness" under Section 17200 and stating that "[t]he term unfair is not precisely defined in the statute, and the courts have struggled to come up with a workable definition").

74 See id. (noting that California courts have adopted the FTC guidelines established in FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972)).
established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."\textsuperscript{76}

In \textit{Cel-Tech}, the California Supreme Court, for the first time, addressed the definition of unfairness. The Court rejected the two definitions of "unfair" discussed above and previously utilized by California's Courts of Appeal.\textsuperscript{77} In so doing, the Court sympathized with "the need for California businesses to know, to a reasonable certainty, what conduct California law prohibits and what it permits."\textsuperscript{78} The Court went on to devise a "more precise test" for determining what is "unfair" under Section 17200 in litigation involving competitors. This test relies on principles of federal law pursuant to Section 5 of the FTC Act.\textsuperscript{79} Cel-Tech's rejection of these two tests appears to affect only Section 17200 actions involving "competitors."\textsuperscript{80} However, recent Court of Appeal decisions have criticized, although not completely rejected, the amorphous definitions for "unfair" conduct. These decisions instruct that, where a claim of an


\textsuperscript{77} \textit{Cel-Tech}, 20 Cal. 4th at 185 ("We believe these definitions are too amorphous and provide too little guidance to courts and businesses.").

\textsuperscript{78} \textit{Id.} ("An undefined standard of what is 'unfair' fails to give businesses adequate guidelines as to what conduct may be challenged and thus enjoined and may sanction arbitrary or unpredictable decisions about what is fair or unfair.").

\textsuperscript{79} Specifically, the court adopted the following test for "unfair" business practices involving competitors:

When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes section 17200, the word "unfair" in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

\textit{Cel-Tech}, 20 Cal. 4th at 187. In addition, the court stated that "[o]ur notice of federal law under section 5 means only that federal cases interpreting the prohibition against 'unfair methods of competition' may assist us in determining whether a particular challenged act or practice is unfair under the test we adopt." \textit{Id.} at 186 n.11.

\textsuperscript{80} \textit{Id.} at 187 n.12 ("This case involves an action by a competitor alleging anticompetitive practices. Our discussion and this test are limited to that context. Nothing we say relates to actions by consumers . . ."); see also \textit{Smith v. State Farm Mut. Auto. Ins. Co.}, 93 Cal. App. 4th 700, 720-21 n.23 (2001) ("As the court itself acknowledged, we are not to read \textit{Cel-Tech} as suggesting that such a restrictive definition of 'unfair' should be applied in the case of an alleged consumer injury." (emphasis in original)).
unfair act or practice is predicated on public policy, such public policy must be "tethered" to specific constitutional, statutory or regulatory provisions.\footnote{Gregory, 104 Cal. App. 4th at 854 (stating that Cel-Tech "may signal a narrower interpretation of the prohibition of unfair acts or practices in all unfair competition actions and provides reason for caution in relying on the broad language in earlier decisions that the court found to be 'too amorphous'" and requiring that Section 17200 "unfair" claims based on public policy be tethered to specific constitutional, statutory or regulatory provisions); Scripps Clinic v. Superior Court, 108 Cal. App. 4th 917, 939 (2003) (applying "unfair" definition proposed in Gregory); Schnall v. Hertz Corp., 78 Cal. App. 4th 1144, 1166-67 (2000) (applying Cel-Tech to a consumer case by referencing a legislatively declared policy as the basis for unfairness); see also Shvarts v. Budget Group Inc., 81 Cal. App. 4th 1153, 1158 (2000) (citing Cel-Tech but nevertheless applying previous test for determining whether conduct is "unfair").}

\section{Pleading An "Unfair" Business Practice}

To sufficiently plead a claim founded on an "unfair" act or practice, Cel-Tech's definition of "unfair" notwithstanding, the plaintiff must allege facts showing the "unfair" nature of the conduct. The plaintiff also must allege that the harm caused by the conduct outweighs any benefits that the conduct may have.\footnote{Motors, Inc. v. Times Mirror Co., 102 Cal. App. 3d 735, 740 (1980).} The plaintiff, however, need not allege that the defendant intended to injure anyone.\footnote{State Farm, 45 Cal. App. 4th at 1102 (stating that Section 17200 "imposes strict liability" and that "[i]t is not necessary to show that the defendant intended to injure anyone").}

At least one California decision suggests that Section 17200 "unfair" claims can be premised on a party's alleged systematic breach of an agreement. In Gibson v. World Savings and Loan Association,\footnote{103 Cal. App. 4th 1291 (2002).} plaintiffs brought a Section 17200 action challenging a federal savings association's practice of assessing certain borrowers premiums for forced order insurance ("FOI"). In rejecting defendant's argument that plaintiffs' claims were preempted by federal law, including federal regulations governing the operations of federal savings associations, the Court of Appeal reasoned that plaintiffs' Section 17200 claims were not aimed at regulating defendant's lending practices, but rather, were predicated on "contractual duties" arising from the borrowers' deeds of trust that obligated defendant only to charge what was "necessary" to protect the properties securing its loans.\footnote{Id. at 1301 ("Those [Section 17200] claims are predicated on the duties of a contracting party to comply with its contractual obligations . . .").} The court's reasoning in Gibson -- that Section 17200 "unfair" claims can be predicated on "contractual obligations" -- appears to conflict with other California authorities stating that Section 17200 "is not an all-purpose substitute for a tort or contract
action."86 Gibson is another example of how the "unfair" standard of Section 17200 can be broadly interpreted to assert almost any claim.

2. Defenses Specific To Claims Of "Unfairness"

a. Conduct Is Not "Unfair"

The principal defense against an "unfair" claim is proof that the conduct is not unfair. This may be accomplished through the presentation of evidence showing that the benefits of the conduct outweigh any possible harm.87 For example, in Walker v. Countrywide Home Loans, Inc.88 plaintiffs brought a Section 17200 action challenging defendant's practice of passing on the actual cost of conducting property inspections to delinquent borrowers. The trial court granted summary judgment in favor of defendant and the Court of Appeal affirmed. The court reasoned that defendant's practice of passing on the actual cost of property inspection fees was not "unfair" as a matter of law because the small cost of the inspections ($9.50 to $12.00) was insignificant when compared to their utility -- protecting the real estate securing the loan.89 Moreover, the court held that the assessment of property inspection fees was not "deceptive" since the borrowers' deeds of trust clearly put the borrowers on notice that such fees could be imposed.90


87 See Motors, Inc., 102 Cal. App. 3d at 740 (stating that, if "the utility of the conduct clearly justifies the practice, no more than a simple motion for summary judgment would be called for"); see also Emery v. Visa Int'l Serv. Ass'n, 95 Cal. App. 4th 952, 960 (2002) (holding that association that maintained bank-card payment system (VISA) did not violate Section 17200 for its purported failure to act when its logo was utilized in connection with illegal advertisements of foreign lotteries); Chavez v. Whirlpool Corp., 93 Cal. App. 4th 363, 375 (2001) (holding that conduct was not "unfair" where it was not an unreasonable restraint on trade); Churchill Village, LLC v. General Elec. Co., 169 F. Supp. 2d 1119, 1130-31 (N.D. Cal. 2000) (anecdotal testimony by a few customers regarding defendant's recall notice and rebate scheme for its dishwasher did not establish practice was "unfair" or "deceptive" under Sections 17200 or 17500).


89 Id. at 1175-78 ("There is nothing 'unethical' about passing a reasonable cost of protecting the security to a defaulting borrower.").

90 Id. at 1178.
b. Business Justification

A defendant may use the reasons, justifications and motives underlying the challenged business practice to show that it is not "unfair."91 For example, the defendant may claim that the challenged conduct is an essential part of its business operations or that it is acting consistent with industry practice.92 As discussed above, in analyzing the business justification for the conduct in a Section 17200 action brought in a consumer context, it is likely that an examination will be made of the conduct's utility as compared to the victim's alleged harm.

c. Alternative Source Defense

A defendant may have a defense by showing that the consumer had a "reasonably available alternative source[] of supply."93 Arising out of cases addressing the doctrine of unconscionability, this defense is premised on the notion that a business practice is not "unfair" if the same service or product, without the allegedly offensive term, is available either from the defendant or from the defendant's competitors.94 Similarly, where the plaintiff, or those he or

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91 See Motors, Inc., 102 Cal. App. 3d at 740. In Californians for Population Stabilization v. Hewlett-Packard Co., 58 Cal. App. 4th 273, 286 (1997), plaintiffs brought suit against a computer company on grounds that the inclusion of liquidated damages provisions in defendants' employment contracts with non-U.S. citizens was an "unfair business practice." The court held that there was no "unfair business practice" because, although the provision mandated heavy damages, the nature of the industry and certain facets of immigration law justified those damages. Id.

92 See Walker, 98 Cal. App. 4th at 1175 (discussed above); Kunert v. Mission Fin. Servs. Corp., 110 Cal. App. 4th 472, 265 (2003) (finding that the "unfair" prong of the UCL was not intended to eliminate retailers' profits in action challenging payment of a dealer reserve); Byars v. SCME Mortgage Bankers, Inc., 109 Cal. App. 4th 1134, 1149 (2003) (holding that a lender's payment of a Yield Spread Premium ("YSP") to a broker did not violate Section 17200 on various grounds, including because YSPs are "widespread and commonly used as a method to compensate mortgage brokers for services provided to borrowers and the lender"); but see Chern v. Bank of Am., 15 Cal. 3d 866, 876 (1976) (stating that lender's calculation of "per annum" interest rate based on 360-day year could still violate Section 17200, notwithstanding that such practice was "customary" in the banking community).

93 Dean Witter Reynolds, Inc. v. Superior Court, 211 Cal. App. 3d 758, 772 (1989) (applying the alternative source defense to a Section 17200 claim based on unconscionability).

94 See, e.g., Shadoan v. World Sav. & Loan Ass'n, 219 Cal. App. 3d 97, 103, 106 (1990) (holding a prepayment penalty on a home loan to be an invalid basis for a Section 17200 claim where defendant had simultaneously offered other similar products without the disputed term); Dean Witter, 211 Cal. App. 3d at 772 (holding that, because defendants' competitors were not charging an IRA close-out fee, plaintiff had a meaningful choice and, therefore, such fees were not unconscionable); accord California Grocers Ass'n v.
she represents, had a "choice" in performing some act, such as entering into an obligation, a defendant may argue that the challenged conduct is not unfair within the meaning of Section 17200.95

**d. Conduct Authorized By Law**

A defense exists where the business practice at issue expressly is authorized by statute.96 At the same time, mere compliance with the law may not be a defense to a Section 17200 claim alleging "unfair" conduct.97

**C. "Fraudulent" Business Act Or Practice**

A business act or practice is deemed "fraudulent" under Section 17200 if "members of the public are likely to be deceived."98 Despite this definition, it is not necessary for the alleged wrongful conduct to involve either advertising99 or any false representation.100 Furthermore, unlike a claim based on common law fraud or deceit, establishing a Section 17200 claim premised on "fraudulent" or deceptive conduct does not require proof of intent, scienter, actual

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95 See, e.g., Olsen v. Breeze, Inc., 48 Cal. App. 4th 608, 628-29 (1996) (affirming summary adjudication against plaintiff on a Section 17200 claim involving alleged "unfair" contractual releases relating to ski bindings since consumers had a choice in the matter -- they did not have to ski).

96 See Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 183 (1999) ("Acts that the Legislature has determined to be lawful may not form the basis for an action under the unfair competition law."); Lazar v. Hertz Corp., 69 Cal. App. 4th 1494, 1505-06 (1999) ("A business practice cannot be unfair if it is permitted by law. [Citation.] [Section 17200] does not apply if the Legislature has expressly declared the challenged business practice to be lawful in other statutes."); Hobby Indus. Ass'n of Am. v. Younger, 101 Cal. App. 3d 358, 369-70 (1980) (dismissing Section 17200 action against wholesalers and retailers for sale of certain prohibited packages because the statute prohibiting such packages explicitly exempted wholesalers and retailers); Chavez, 93 Cal. App. 4th at 375 (holding that conduct that was permissible under the Colgate doctrine could not be deemed "unfair" as a matter of law).

97 See Cel-Tech, 20 Cal. 4th at 184 (finding that "the Legislature's mere failure to prohibit an activity does not prevent a court from finding it unfair"); Motors, Inc., 102 Cal. App. 3d at 741.


100 See American Philatelic Soc'y v. Claibourne, 3 Cal. 2d 689, 696-99 (1935).
reliance or damages. According to a recent California decision, the statement at issue need not be "material" to the transaction -- i.e., the statement need not have affected the consumer's purchasing decision.

In Lavie v. Procter & Gamble Co., the California Court of Appeal addressed an important issue regarding the appropriate standard to be applied to "fraudulent" claims brought under Section 17200. The court held that trial courts faced with "fraudulent" claims or false advertising claims under Section 17500 must apply an "ordinary consumer acting reasonably under the circumstances" standard, rather than a "least sophisticated consumer" standard. In Lavie, a consumer who had an ulcer that started to bleed after ingestion of Aleve pain reliever sued defendant under Section 17200 and Section 17500 for stating in television commercials that Aleve was gentler to the stomach lining than aspirin. Following a bench trial, the trial court ruled in favor of defendant, holding that the statements made were true and not likely to deceive reasonable consumers. The Court of Appeal affirmed, reasoning that California and federal courts had never applied a "least sophisticated consumer" standard, absent evidence that the ad targeted particularly vulnerable customers. "A representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed." The court warned, however, that "[w]here the advertising or practice is targeted to a particular group or type of consumers, either more sophisticated or less sophisticated than the ordinary consumer, the question whether it is misleading to public will be viewed from the vantage point of members of the targeted group, not others to whom it is not primarily directed." The Lavie decision is of critical importance since it clarifies what standard should be utilized in UCL claims based on "fraudulent" conduct or false advertising.

101 See Committee on Children's Television, 35 Cal. 3d at 211; see also Wang v. Massey Chevrolet, 97 Cal. App. 4th 856, 871 (2002) (reversing summary judgment on Section 17200 claim and holding that defenses to fraud claim, including those based on the parol evidence rule, were not applicable to plaintiff's Section 17200 cause of action).

102 See People v. Cole, 113 Cal. App. 4th 955, 981-82 (2003) (holding that misleading statements need not be "material" in nature (i.e., important to the purchasing decision) in order to be actionable under Section 17200); Arizona Cartridge Remanufacturers Ass'n, Inc. v. Lexmark Int'l, Inc., 290 F. Supp. 2d 1034, (N.D. Cal. 2003) (noting that California courts have not adopted the FTC's "materiality" requirement for misleading statements under Section 17200).


104 Id. at 512.

105 Id. at 504.

106 Id. at 507 (citation omitted).

107 Id. at 512.

1. Pleading A Claim Based On "Fraudulent" Conduct

To allege a Section 17200 claim founded on a "fraudulent" business practice, the plaintiff must assert that consumers are likely to be deceived by the defendant's conduct.\textsuperscript{109} Despite this broad pleading standard, a recent California case conclusively confirmed that California law requires a plaintiff to prove that a defendant's advertising claims are false and misleading, and that there is no basis "to shift the burden of proof to a defendant in a representative false advertising and unlawful competition action."\textsuperscript{110}

2. Defenses Specific To "Fraudulent" Claims

There are few defenses uniquely applicable to a charge of "fraudulent" business conduct. In addition to any general affirmative defenses, however, the following defenses might be asserted.

a. Conduct Not "Likely To Mislead"

As one California decision instructs, "it is immaterial under \[Section 17200\] whether a consumer has been actually misled by an advertiser's representations. It is enough that the language used is likely to deceive, mislead or confuse."\textsuperscript{111} Hence, the principal defense to a claim of "fraudulent" conduct is proof that the challenged business act or practice is not "likely to mislead" anyone.\textsuperscript{112} Where a disputed contractual term is at issue, courts have held that clear,

\begin{quote}
Cole, 113 Cal. App. 4th at 980 (reasoning that, even under reasonable consumer standard, a reasonable consumer may be "unwary or trusting," "need not be exceptionally acute and sophisticated" and that "courts simply recognize that the general public is more gullible than the sophisticated buyer" (internal quotations and citations omitted)).
\end{quote}

\textsuperscript{109} The common law elements of fraud need not be pleaded in a Section 17200 action. See Committee on Children's Television, 35 Cal. 3d at 212. Nor does the complaint have to be alleged with specificity. See People v. Custom Craft Carpets, Inc., 159 Cal. App. 3d 676, 684 (1984); see also Aicco, Inc. v. Insurance Co. of N. Am., 90 Cal. App. 4th 579, 596 (2001) (allegations sufficiently established that defendant's conduct was likely to deceive the public where defendant parent company transferred the insurance policies of its California customers to a new corporate division without first obtaining their consent, yet represented that the new division remained liable to those policyholders).


\textsuperscript{111} Day v. AT&T Corp., 63 Cal. App. 4th 325, 334 (1998) (holding that plaintiff properly stated a cause of action for violation of Sections 17200 and 17500 based on alleged misrepresentation made in connection with the sale of prepaid phone cards).

\textsuperscript{112} See Kunert v. Mission Fin. Servs. Corp., 110 Cal. App. 4th at 264-65 (holding that payment of dealer reserve in automobile finance contracts was not fraudulent since it was not required to be disclosed and no "reasonable person" would believe that the financing rate in the contract with the dealer is the same rate at which a lender would make a direct
unambiguous language will defeat a Section 17200 "fraudulent" claim as a matter of law. In addition, proof could be offered in the form of testimony from experts, randomly selected members of the "quasi-class" represented in the action and/or consumer surveys.

b. "Puffing" Defense

If the claim involves an alleged false representation, the defendant may argue that the statement was mere "puffing" -- sales talk that no reasonable person would rely upon or mistake as a factual claim. Recently, in Consumer Advocates v. Echostar Satellite Corp., the California Court of Appeal relied on a "puffing" defense in holding that certain statements were not actionable under Section 17200. The statements at issue consisted of advertisements that the defendant's system provided "crystal clear digital" video or "CD quality" audio. The court reasoned that such statements were not "factual representations," but rather, were "boasts, all-but-meaningless superlatives, . . . a claim which no reasonable consumer would take as anything more weighty than an advertising slogan." In addition, two federal district courts in California have accepted "puffing" defenses to Section 17200 claims based upon allegedly untrue or misleading advertising.

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113 See Van Ness v. Blue Cross of Cal., 87 Cal. App. 4th 364, 376 (2001) (affirming summary judgment in favor of defendant on Section 17200 "fraudulent" claim where the language in the health insurance policy and related materials clearly stated the terms of coverage, notwithstanding plaintiff's assertion that he was misled); Shvarts v. Budget Group, Inc., 81 Cal. App. 4th at 496 (discussed above); Churchill Village, LLC v. General Elec. Co., 169 F. Supp. 2d 1119, 1131 (N.D. Cal. 2000) (applying a "reasonable consumer standard" to a UCL claim based on alleged "fraudulent" conduct).


115 Id. at 1361; see also id. at 1361 n.3 ("The statements are akin to 'mere puffing,' which under long-standing law cannot support liability in tort." (quoting Hauter v. Zogarts, 14 Cal. 3d 104, 111 (1975))).

116 See Haskell v. Time, Inc., 857 F. Supp. 1392, 1399-1403 (E.D. Cal. 1994) (dismissing most statements in Publisher's Clearinghouse Sweepstakes solicitations as "puffing" because no reasonable consumer could believe them to be true); Atari Corp. v. The 3DO Co., No. C 94-20298 RMW (EAI), 1994 WL 723601, at *2-3 (N.D. Cal. 1994) (disposing of action under Section 17200 where the statement at issue merely was a general assertion of superiority).
D. General Affirmative Defenses To UCL Actions

In addition to the specific defenses set forth above, there are several additional affirmative defenses that may apply in a UCL action.

1. Constitutional Challenges To Section 17200

Section 17200 has survived numerous constitutional challenges based on vagueness and due process. Although the defense bar had hoped that the California Supreme Court would address due process considerations in its decision in Kraus, the Court expressly declined to do so.

2. First Amendment Defense

In Kasky v. Nike, Inc., the California Supreme Court addressed whether a defendant's statements made in the course of a public relations campaign were constitutionally protected from suit under Section 17200. In response to adverse publicity regarding its overseas labor

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117 See, e.g., People ex rel. Mosk v. National Research Co., 201 Cal. App. 2d 765, 772 (1962) (holding that former California Civil Code Section 3369, Section 17200's predecessor, was not void due to uncertainty and/or vagueness since "[a] statute designed to protect the public good must be upheld unless its nullity clearly, positively, and unmistakably appears"); cf. People v. Superior Court (Caswell), 46 Cal. 3d 381, 389 (1988) (stating that, to avoid a vagueness challenge, "a statute must be sufficiently definite to provide adequate notice of the conduct prescribed. [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process. [Citation."]").

118 See, e.g., People v. Thomas Shelton Powers, M.D., Inc., 2 Cal. App. 4th 330, 343-44 (1992) (overruled in part by Kraus v. Trinity Mgmt. Servs., Inc., 23 Cal. 4th 116, 137-38 (2000)) (rejecting a due process challenge to the court's power to order restitution and/or disgorgement of profits under Section 17200 where there was no cognizable victim).

119 Instead, the Kraus court focused on the particular facts of the case, which involved a small number of known victims of an unlawful practice that already had been tried and made its way through a lengthy appeal, to conclude that, "[a]s a practical matter[,] the likelihood that any former tenants could successfully overcome a statute of limitations barrier and separately recover judgment against defendants is too remote to establish any denial of due process in these proceedings." Kraus, 23 Cal. 4th at 138.


121 Previously, in Blatty v. New York Times Co., 42 Cal. 3d 1033, 1044-45 (1986), the California Supreme Court held that the failure of the New York Times to include a novel within its bestseller list fit within the free speech protections afforded by the First Amendment to the United States Constitution, no matter "the label given the stated cause of action. . . ." Id. at 1042 (citation omitted). Holding that the best seller list was not
practices, Nike issued various documents defending its labor practices, including press releases and letters sent to newspaper editors, university presidents and athletic directors. Plaintiff alleged that Nike's comments were false and misleading statements under Section 17200. The trial court sustained a demurrer without leave to amend, holding that Nike's statements constituted non-commercial speech and were therefore absolutely immune from liability under Section 17200. The Court of Appeal affirmed.

The California Supreme Court reversed, concluding that Nike's statements constituted commercial speech subject only to limited protections, and therefore could be the basis for a Section 17200 claim. The Court rejected arguments that the statements were fully protected by the First Amendment because they dealt with important issues of public concern and were communicated in traditional non-commercial forums. Instead, applying a three-part analysis, the Court reasoned that commercial speech arises from: (a) a commercial speaker; (b) an intent to address a commercial audience; and (c) factual representations of a commercial nature. The decision is particularly troubling since it could support an argument that any statement made by a party engaged in business is "commercial speech" not entitled to full First Amendment protection, so long as the plaintiff alleges that defendant's intent was commercial.

Although the United States Supreme Court initially granted certiorari of the case, it subsequently dismissed certiorari as improvidently granted. Accordingly, Nike remains good law and may be used by plaintiffs in response to defense arguments that the First Amendment precludes certain UCL or false advertising claims. In the dissenting opinion, Justice Breyer, joined by Justice O'Connor, notes some of the problems with the UCL and its grant of purported attorney general status to private citizens. The opinion indicates that a false advertising action "brought on behalf of the State, by one who has suffered no injury, threatens to impose a serious burden upon speech -- at least if extended to encompass the type of speech at issue under the standards of liability that [the UCL] provides." Further, allowing "a purely ideological plaintiff, convinced that his opponent is not telling the truth, to bring into the courtroom the kind of political battle better waged in other forums" causes a flood of actions designed purely to vindicate an individual's own beliefs "unencumbered by the legal and practical checks that tend to keep the energies of public enforcement agencies" focused purely on economic harm. Such "commercial speech," the court determined that plaintiff's Section 17200 claim was defeated. Id. at 1048.

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122 Kasky, 27 Cal. 4th at 948.
123 Id.
124 Id. at 970.
125 Id. at 962, 964-65.
126 Id. at 963-64.
128 Id. at 2567.
129 Id.
activity "easily can chill a speaker's efforts to engage in public debate." Justice Breyer also questioned the necessity of permitting such actions to quell commercial speech by private attorneys general in light of the federal government's laws on unfair competition and false advertising.

3. Statute Of Limitations

The statute of limitations for Section 17200 actions is "four years after the cause of action accrued." At least one court has noted that the doctrine of equitable tolling based on fraudulent concealment may, under the appropriate circumstances, apply to a Section 17200 claim. However, California Court of Appeal decisions conflict as to whether the "discovery rule" applies to Section 17200 claims. At least three federal cases have rejected application of the "discovery rule" to claims brought under Section 17200.

An interesting question answered by the California Supreme Court is whether a plaintiff may utilize Section 17200 to circumvent the statute of limitations applicable to the underlying predicate act supporting an alleged "unlawful" business practice. In Cortez v. Purolator Air Filtration Products Co., the California Supreme Court held that Section 17200's longer four-year statute of limitations applied rather than the three-year statute of limitations under the applicable provisions of the Labor Code, which formed the basis for the plaintiff's "unlawful"

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130 See id.


132 See Snapp & Assocs., Ins. Servs., Inc. v. Malcolm Bruce Burlingame Robertson, 96 Cal. App. 4th 884, 891-92 (2002) (holding that equitable tolling was not appropriate where plaintiff was on notice of the defendant's alleged wrongful conduct).

133 Compare id. at 891 (stating that "[t]he 'discovery rule,' which delays accrual of certain causes of action until the plaintiff has actual or constructive knowledge of facts giving rise to the claim, does not apply to unfair competition actions. Thus, 'the statute begins to run . . . irrespective of whether plaintiff knew of its accrual, unless plaintiff can successfully invoke the equitable tolling doctrine.'" (citation omitted)); with Massachusetts Mut. Life Ins. Co. v. Superior Court, 97 Cal. App. 4th 1282, 1295 (2002) (noting, without any underlying analysis, that the statute of limitations for Section 17200 "will probably run from the time a reasonable person would have discovered the basis for a claim"); Glue Fold, Inc. v. Slautterback Corp., 82 Cal. App. 4th 1018, 1030 (2000) (inferring that the discovery rule applies to Section 17200 claims).


claim. Choosing to ignore the established rule that, with respect to a Section 17200 claim based on "unlawful" conduct, a defense to the underlying claim also is a defense to the Section 17200 action, and noting that "the language of [S]ection 17208 admits of no exceptions," the Court concluded that "[a]ny action on any [Section 17200] cause of action is subject to the four-year period of limitations created by that section."136

4. Contractual Choice-Of-Law Or Forum-Selection Provision

Businesses located outside California often include contractual choice-of-law or forum-selection provisions in the contracts with their customers. Until recently, the question of whether such provisions could be used to defeat a Section 17200 claim had not been addressed by the California state courts. In the first reported decision to address this important issue, the California Court of Appeal, in Net2Phone, Inc. v. Superior Court,137 held that an "unaffected" plaintiff, suing in a representative capacity as a private attorney general under the UCL, is bound by forum-selection and choice-of-law provisions contained in customer agreements entered into by the persons purportedly represented. The Court of Appeal concluded that "where a private plaintiff which has itself suffered no injury files a representative action under California's [UCL] alleging that certain of defendant's contractual provisions subject its customers to an 'unlawful, unfair or fraudulent business . . . practice' and the contract contains a forum selection provision, the plaintiff is bound by that provision just as defendant's customers would be bound had they filed the action themselves."138

In Net2Phone, plaintiff Consumer Cause, Inc. sued defendant, an internet telecommunication services provider with its principal place of business in New Jersey, alleging that defendant violated Section 17200 by not disclosing its billing practice of "rounding-up" to the nearest minute in its advertisements and promotional materials. Relying on its customer agreements, which contained New Jersey forum-selection and choice-of-law provisions, defendant moved to stay or dismiss the action. The trial court found that plaintiff was not bound by the forum selection clause because it was acting as a "private attorney general," and "'had the real Attorney General brought this action, I would doubt if this court would be sending him to New Jersey to try the matter.'"139 The trial court further ruled, however, that New Jersey law governed the action.

The Court of Appeal reversed and stayed the action. Although the Court of Appeal agreed with the trial court that a Section 17200 action brought by a public prosecutor would not be subject to the forum-selection clause, the Court of Appeal distinguished such actions from representative actions brought by private plaintiffs.140 Although not a party to the underlying

136 Id.
138 Id. at 585.
139 Id. at 587.
140 Id. ("Although the label 'private attorney general' is often used (or misused) to describe a private plaintiff in a UCL action, respondent court construed the term too literally. The
contracts, the Court of Appeal reasoned that, by asserting rights on behalf of contracting parties, plaintiff was "closely related to the contractual relationship" so as to be bound by the forum-selection clause.141 The Court of Appeal also rejected plaintiff's argument that the customer agreements were obtained on a "take or leave it" basis and, therefore, unenforceable, and further held that New Jersey was a suitable alternative forum notwithstanding that plaintiff, which had suffered no injury itself, could not sue under New Jersey law.142 While the use of forum-selection provisions may not always be as successful as in Net2Phone,143 businesses located outside California should consider whether a choice-of-law or forum-selection provision can be utilized to defeat a Section 17200 claim.

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141 Id. at 588-89. As explained by the Court of Appeal:

[Plaintiff] has sued in a representative capacity challenging certain contractual terms. By so doing, [plaintiff] purports to assert the rights of those who are parties to the contract. If it prevails, [plaintiff] will succeed in altering the terms of the contract, and reap the fruits of victory including attorney's fees. [Plaintiff] is "closely related" to the contractual relationship because it stands in the shoes of those whom it purports to represent. Its argument to the contrary is inconsistent with its position as a representative plaintiff. Were we to hold otherwise, a plaintiff could avoid a valid forum selection clause simply by having a representative non-party file the action.

142 Id. at 590. With respect to the latter conclusion, the Court reasoned that:

Although the New Jersey legislature has not seen fit to confer on private parties who are not injured the right to bring a representative action on behalf of those who are, this does not necessarily mean that New Jersey does not provide the means to protect injured consumers. . . . While it is true that [plaintiff] stands to lose the opportunity to recover attorney's fees should it prevail in a California UCL action, our paramount consideration is the protection of consumers, not the enrichment of attorneys.


5. Where Plaintiff Attempts To "End-Run" Other Law

A plaintiff suing under the guise of Section 17200 actually may be attempting to "end-run" a restriction associated with the underlying statute. Such an "end-run" may provide a defense to the Section 17200 claim.145

6. Federal Preemption

Federal preemption can sometimes play an important role in defending against Section 17200 actions, especially where the "unlawful" conduct is predicated on federal law. Court decisions have addressed the doctrine's application with respect to a wide array of federal laws,

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145 See Blatty v. New York Times Co., 42 Cal. 3d 1033, 1044-45 (1986) (Section 17200 claim cannot be brought where plaintiff would be unable to state a defamation claim because of First Amendment hurdles); Rubin v. Green, 4 Cal. 4th 1187, 1204 (1993) (plaintiff cannot plead around the litigation privilege's absolute bar to relief by using Section 17200 to re-label the nature of the action); see also Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 184 (1999) (confirming the rule set forth in previous decisions that no Section 17200 action will lie where either: (1) the claim expressly is barred by some other law; or (2) the conduct upon which the claim is based expressly is allowed by some other law, such as, for example, a "safe harbor" provision); Moradi-Shalal v. Firemen's Fund Ins. Co., 46 Cal. 3d 287, 292, 313 (1988) (no private right of action exists under California Insurance Code Section 790.03 and, therefore, third-party claimants cannot file Section 17200 suit based on alleged violations of that statute); Daly v. Viacom, Inc., No. 01-3343(MMC), 2002 WL 31934153, at *6 (N.D. Cal. Aug. 6, 2002) (dismissing Section 17200 claim where plaintiff stated no other claim and reasoning that "[t]he breadth of [Section] 17200, however, 'does not give a plaintiff license to plead around the absolute bars to relief contained in other possible causes of action by recasting those causes of action as ones for unfair competition'" (quoting Glenn K. Jackson, Inc. v. Roe, 273 F.3d 1192, 1203 (9th Cir. 2001))); but see Washington Mut. Bank, FA v. Superior Court, 75 Cal. App. 4th 773, 787 (1999) (Section 17200 action was not preempted by the Real Estate Settlement Procedures Act, which does not allow private right of action for supposed disclosure violations); Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal. 4th 553, 563-66 (1998) (Section 17200 action not barred simply because it is predicated upon a statute that does not expressly provide a plaintiff with a private right of action); Aicco, Inc. v. Insurance Co. of N. Am., 90 Cal. App. 4th 579, 597 (2001) (plaintiffs allowed to plead around the bar to private causes of action under the Unfair Insurance Practices Act, California Insurance Code Section 790, et seq., by recasting claim as Section 17200 action); Hangarter v. Paul Revere Life Ins. Co., No. C 00-5286 JL, 2002 WL 31526543, at *28-29 (N.D. Cal. Nov. 12, 2002) (rejecting defendants' argument that plaintiff should not be permitted to use Section 17200 claims as an end-run around the prohibition of private rights of action under California's Unfair Insurance Practices Act and reasoning that predicate statute must actually bar the action or clearly permit the conduct).
including: federal banking laws; federal environmental laws; federal bankruptcy laws; federal immigration laws; federal consumer protection laws; federal transportation

146 Compare Smiley v. Citibank (South Dakota) N.A., 11 Cal. 4th 138, 164 (1995), aff'd, 517 U.S. 735, 744 (1996) (holding that federal banking laws preempted California law as to allegedly excessive late fees on credit cards); Lopez v. World Sav. & Loan Ass'n, 105 Cal. App. 4th 729, 742 (2003) (holding that Section 17200 claim based on federal savings association's practice of assessing a $10.00 fax fee for payoff demand statements was preempted by federal law, specifically 12 C.F.R. Section 560.2, promulgated by the Office of Thrift Supervision ("OTS"); Washington Mut. Bank, FA v. Superior Court, 95 Cal. App. 4th 606, 610 (2002) (holding that Section 17200 claim based on savings and loan association's practice of charging one day's preclosing interest was preempted by OTS regulations, including Section 560.2); Lopez v. Washington Mut. Bank, FA, 302 F.3d 900, 907 (9th Cir. 2002) (holding that OTS regulations preempted state law that was the underlying basis for plaintiffs' Section 17200 claim); with Gibson v. World Sav. & Loan Ass'n., 103 Cal. App. 4th 1291, 1294 (2002) (holding that Section 17200 claim challenging federal savings association's practice of passing through to its borrowers premiums for forced order insurance was not preempted by OTS regulations, including Section 560.2); Black v. Financial Freedom Senior Funding Corp., 92 Cal. App. 4th 917, 936-38 (2001) (holding that Section 17200 claim challenging marketing of reverse mortgage transactions was not preempted by numerous federal banking laws); Washington Mut. Bank, FA v. Superior Court, 75 Cal. App. 4th at 787 (holding that Section 17200 was not preempted by Real Estate Settlement Procedures Act); People ex rel. Sepulveda v. Highland Fed. Sav. & Loan, 14 Cal. App. 4th 1692, 1708 (1993) (holding that 12 C.F.R. Section 545.2, promulgated under the federal Home Owners Loan Act, did not preempt Section 17200); Fenning v. Glenfed Inc., 40 Cal. App. 4th 1285, 1299 (1995) (same).


149 See, e.g., Diaz v. Kay-Dix Ranch, 9 Cal. App. 3d 588, 599 (1970) (recognizing federal preemption in areas of immigration and holding that California courts should abstain from intervening by way of a Section 17200 claim, which was brought in an attempt to force the Immigration and Naturalization Service to start enforcing federal immigration laws).

laws; federal labor laws; federal copyright laws; federal postal laws; federal communications laws; federal drug and labeling laws; and federal securities laws. A federal preemption defense, however, always is subject to a court's interpretation of congressional intent with respect to the federal law at issue.


154 Flamingo Indus. Ltd. v. United States Postal Serv., 302 F.3d 985, 996 (9th Cir. 2002) (dismissing Section 17200 claim against U.S. Postal Service based on federal preemption).

155 TPS Utilicom Servs., Inc. v. AT&T Corp., 223 F. Supp. 2d 1089, 1108 (C.D. Cal. 2002) (holding that Section 17200 claim was preempted by Federal Communications Act).


7. **Primary Jurisdiction**

Section 17200 actions often arise in heavily regulated areas, such as insurance, where an administrative scheme or procedure already is in place to accommodate certain challenges in the industry. A successful defense based on the doctrine of primary jurisdiction suspends judicial proceedings until the appropriate administrative body can review the underlying claim.159 As explained in Farmers Insurance Exchange v. Superior Court, "[t]he primary jurisdiction doctrine advances two related policies: it enhances court decision making and efficiency by allowing

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159 See, e.g., Farmers Ins. Exch. v. Superior Court, 2 Cal. 4th 377, 394 (1992) (applying primary jurisdiction and staying a Section 17200 government enforcement action pending review by the California Insurance Commissioner); Wise v. Pacific Gas & Elec. Co., 77 Cal. App. 4th 287, 299-300 (1999) (applying the primary jurisdiction doctrine to stay a Section 17200 action); accord Samura v. Kaiser Found. Health Plan, Inc., 17 Cal. App. 4th 1284, 1299 (1993) (holding that a Section 17200 action was barred where the Legislature had expressly entrusted an administrative body with exclusive regulatory powers over the underlying statute); but see Cundiff v. GTE Cal. Inc., 101 Cal. App. 4th 1395, 1412 (2002) (rejecting primary jurisdiction defense in Section 17200 action); Aicco, Inc. v. Insurance Co. of N. Am., 90 Cal. App. 4th 591, 594-95 (2001) (rejecting defense to Section 17200 claim based on doctrine of primary jurisdiction because there were no pending or proposed administrative proceedings focused on the corporate structure at issue in the action).

A doctrine similar to primary jurisdiction is exhaustion of administrative remedies. Differentiating between the two, the United States Supreme Court has explained:

"Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary Jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its view.

Farmers Ins., 2 Cal. 4th at 390 (quoting United States v. Western Pac. R.R. Co., 352 U.S. 59, 63-64, 775 S. Ct. 161, 1 L. Ed. 2d 126 (1956)). Because a claim for violation of Section 17200 will be "originally cognizable in the courts," only the primary jurisdiction doctrine appears applicable in most actions. See id. at 391. It should be noted that, regardless of whether primary jurisdiction might apply, administrative review may not be controlling. See People v. Damon, 51 Cal. App. 4th 958, 972 (1996) (holding that the res judicata effect of an administrative proceeding is inapplicable where a Section 17200 remedy could not be sought through that proceeding).
courts to take advantage of administrative expertise, and it helps assure uniform application of regulatory laws." 160


A number of California decisions have held that Section 17200 actions should not proceed where the issues at bar require trial courts to engage in "microeconomic management."161 These decisions are based on the notion that "[j]udicial intervention in

160 Farmers Ins., 2 Cal. 4th at 391.

161 See, e.g., Desert Healthcare Dist. v. Pacificare, FHP, Inc., 94 Cal. App. 4th 781, 794-95 (2001) (dismissing Section 17200 claim challenging defendant healthcare provider's capitation agreement with an intermediary because assessing appropriate levels of capitation and industry oversight -- i.e., determining economic policy -- "is primarily a legislative and not a judicial function"); Crusader Ins. Co. v. Scottsdale Ins. Co., 54 Cal. App. 4th 121, 138 (1997) (holding that plaintiff's claim under Section 17200, in essence, challenged whether the Department of Insurance properly regulated certain insurance providers; since "[i]nstitutional systems are . . . in place to deal with [plaintiff's allegations,] . . . [t]here is no need or justification for the courts to interfere with the Legislature's efforts to mold and implement public policy in this area . . . ."); Wolfe v. State Farm Fire & Cas. Ins. Co., 46 Cal. App. 4th 554, 562 (1996) (holding that the trial court properly sustained a demurrer without leave to amend on a Section 17200 claim where plaintiffs brought suit against certain insurance companies based on their refusal to issue homeowners and earthquake insurance); California Grocers Ass'n v. Bank of Am., 22 Cal. App. 4th 205, 218 (1999) (reversing trial court's judgment under Section 17200, which enjoined a bank from imposing certain service charges, because the "case implicates a question of economic policy: whether service fees charged by banks are too high and should be regulated" and emphasizing that "[j]udicial review of one service fee charged by one bank is an entirely inappropriate method of overseeing bank service fees"); Samura v. Kaiser Found. Health Plan, Inc., 17 Cal. App. 4th 1284, 1301-02 (1993) (reversing the trial court's entry of an injunction under Section 17200 because "the courts cannot assume general regulatory powers over health maintenance organizations [relating to service agreement provisions] through the guise of enforcing [Section 17200]" and holding that such regulatory powers are entrusted by the Legislature to the Department of Corporations); Korens v. R.W. Zukin Corp., 212 Cal. App. 3d 1054, 1058-59 (1989) (affirming summary judgment on Section 17200 claim in a class action and rejecting tenants' contention that landlord's failure to pay interest on security deposits was an unfair business practice because the Legislature extensively regulated security deposits and, if the Legislature intended interest to be payable, it would have so provided); Diaz v. Kay-Dix Ranch, 9 Cal. App. 3d 588, 599 (1970) (affirming the sustaining of a demurrer without leave to amend on plaintiffs' Section 17200 claim, challenging the hiring of Mexican workers, because "[i]t is more orderly, more effectual, less burdensome to the affected interests, that the national government redeem its commitment [to regulate immigration]. Thus the court of equity withholds its aid."); Beasley v. Wells Fargo Bank, N.A., 235 Cal. App. 3d 1383, 1391 (1991) (noting the trial court's determination to rule in
complex areas of economic policy is inappropriate. 162 Indeed, in the dissenting opinion in Stop Youth Addiction, Inc. v. Lucky Stores, Inc., Justice Brown noted:

Although California courts have not yet developed the doctrine fully, the fundamentals of an equitable jurisprudence of abstention in litigation brought under [Section 17200] exists under both the California Constitution (Art. III, § 3) and case law. As [numerous California decisions] show, the Courts of Appeal have done an admirable job of reining in [Section 17200's] potential for adverse regulatory effects by declining to grant relief in appropriate cases.163

The gist of the judicial abstention defense is that, where a challenged business practice arises in the context of an industry that is highly regulated by the Legislature or an authorized agency, and such business practice has not been prohibited, the courts should not do what the Legislature or agency has left undone.

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162 Wolfe, 46 Cal. App. 4th at 562; accord Desert Healthcare, 94 Cal. App. 4th at 795 ("Where a UCL action would drag a court of equity into an area of complex economic policy, equitable abstention is appropriate."); Max Factor & Co. v. Kunsman, 5 Cal. 2d 446, 454 (1936) (stating that courts have "neither the power nor the duty to determine the wisdom of any economic policy; that function rests solely with the legislature").

163 Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal. 4th 553, 596-97 (1998) (footnote omitted) (Brown, J., dissenting); see also Quelimane Co. v. Stewart Title Guar. Co., 19 Cal. 4th 26, 63 (1998) (Brown, J., dissenting) ("It is not simply that a single superior court judge hearing a single [Section 17200] case is a poor choice to resolve a myriad of complicated fact and policy issues tied to the economics, risks, cost and availability of [certain insurance]. It is that given the scope of its administrative authority and depth of regulatory experience, the Department of Insurance is likely to prove better at the job.").
9. Challenged Business Practice Has Been Declared Lawful In Other Statutes -- The "Safe Harbor" Defense

As noted above, in Cel-Tech, the California Supreme Court confirmed that "[a]cts that the Legislature has determined to be lawful may not form the basis for an action under [Section 17200]. . . ." Because "[c]ourts may not simply impose their own notions of the day as to what is fair or unfair" and "[s]pecific legislation may limit the judiciary's power to declare conduct unfair," the Court concluded that "courts may not use [Section 17200] to condemn actions the Legislature permits." Other California decisions have dismissed Section 17200 claims on these same "safe harbor" grounds -- i.e., where the business practice forming the basis of the claim has been explicitly approved, or exempted from prosecution, by the Legislature. In addition, defendants may raise a "safe harbor" defense based upon case law as a complete defense to a UCL claim.

The California Supreme Court recently confirmed in Olszewski v. Scripps Health, that the "safe harbor" defense applies retrospectively following a change in the law authorizing the

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164 20 Cal. 4th at 183.
165 Id. at 182, 184. As discussed above, however, the decision in Cel-Tech was based on a dispute between two competitors and, therefore, may be distinguishable in the context of consumer transactions. But see Schnall v. Hertz Corp., 78 Cal. App. 4th 1144, 1166-67 (2000) (applying Cel-Tech standard in a consumer action).
166 See, e.g., Ochs v. PacifiCare of Cal., No. B160624, 2004 WL 232759, at *6 (Cal. App. 2 Dist. Feb. 9, 2004) (holding that "safe harbor" defense precluded Section 17200 claim in action challenging health care service plan's obligation to pay for emergency services); Byars v. SCME Mortgage Bankers, Inc., 109 Cal. App. 4th at 1148 (holding that a lender's payment of a Yield Spread Premium to a broker did not violate Section 17200 because the payment of such a premium had been deemed lawful under federal law); Swanson v. St. John's Reg'l Med. Ctr., 97 Cal. App. 4th 245, 248 (2002) (holding that defendant's filing of liens pursuant to Hospital Lien Act precluded Section 17200 action as a matter of law; "[i]t is settled that a business practice does not violate the UCL if it is permitted by law"); Smith v. State Farm Mut. Auto. Ins. Co., 93 Cal. App. 4th at 704 (holding that defendant insurers' compliance with California Insurance Code Section 11580.2 precluded Section 17200 claim as a matter of law); Lazar, 69 Cal. App. 4th at 1505-06; Hobby Indus. Ass'n of Am. v. Younger, 101 Cal. App. 3d 358, 370 (1980) ("Although the Supreme Court has construed the orbit of the unfair competition statutes expansively [citations omitted], it cannot be said that this embracing purview also encompasses business practices which the Legislature has expressly declared to be lawful in other legislation.").
167 See, e.g., Chavez v. Whirlpool Corp., 93 Cal. App. 4th 363, 375 (2001) (holding that defendant's conduct was permissible under the Colgate doctrine (United States v. Colgate & Co., 250 U.S. 400, 39 S. Ct. 465, 63 L. Ed. 2d 992 (1919)) and therefore not "unlawful" or "unfair" under Section 17200).
conduct at issue. In *Olszewski*, plaintiff challenged a medical provider's conduct of asserting a lien, which was authorized by statute, against any recovery plaintiff might obtain from a third-party tortfeasor who caused the plaintiff's injury. Although the Court held that the statutes authorizing the liens at issue were preempted by federal law, and thus invalid, the Court confirmed that the "safe harbor" defense still applied to defeat plaintiff's UCL claim.169

III. REMEDIES AVAILABLE UNDER SECTION 17200

There are basically three types of remedies available under Section 17200: injunctive relief, restitution and civil penalties. Injunctive relief and restitution are available in both private party and government actions.170 Civil penalties, however, are available only in government enforcement actions.171 Neither compensatory nor punitive damages are available under Section 17200.172 As with the substantive provisions of Section 17200, the remedial provisions have been liberally construed to give the courts broad powers to fashion creative awards of injunctive relief, restitution and civil penalties.173 The remedies available under Section 17200 are cumulative to other remedies, regardless of whether those other remedies arise under Section 17200 or other law.174

169 *Id.* at 827-30 ("[R]etroactive application of a decision disapproving prior authority on which a person may reasonably rely in determining what conduct will subject the person to penalties, denies due process." (citation omitted)).

170 See Cal. Bus. & Prof. Code § 17203. The full text of Section 17203 reads as follows:

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.


173 See *Fletcher v. Security Pac. Nat'l Bank*, 23 Cal. 3d 442, 449 (1979) (noting that principles of equity combined with express statutory language arms "the trial court with the cleansing power to order restitution to effect complete justice"); *Barquis v. Merchants Collection Ass'n*, 7 Cal. 3d 94, 111 (1972) (explaining that the Legislature's intent was "to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur").

174 See Cal. Bus. & Prof. Code § 17205 ("Unless otherwise expressly provided, the remedies or penalties provided by the chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state.").
A. Restitution Under Section 17200

"[A] court of equity may exercise the full range of its inherent powers in order to accomplish complete justice between the parties, restoring if necessary the status quo ante as nearly as may be achieved."175 Typically, the restitution authorized by Section 17200 is a return of the monies obtained from violations of Section 17200 to the victims of such violations.176 Courts have ordered restitution in representative actions even where there is no proof that each member of the general public is entitled to recovery.177 In certain cases, plaintiffs have not been required to show specifically what money the defendant received as a direct result of the purported wrongful conduct for restitution to be awarded.178

1. The California Supreme Court's Limitations On Section 17200
   Monetary Remedies: Kraus, Cortez and Korea Supply

   With respect to Section 17200 remedies, the California Supreme Court in Kraus179 and Cortez180 ruled that, in a Section 17200 representative action that is not brought as a class action, a defendant may not be required to disgorge monies into a "fluid recovery" fund for distribution other than to identifiable victims. Further clarifying the Kraus decision, the California Supreme Court concluded in Korea Supply v. Lockheed Martin Corporation181 that disgorgement of profits that are not restitutionary in nature (i.e., where plaintiff, or those represented, never had an ownership interest in the funds at issue) is not an authorized remedy in an individual action under the UCL. These cases reflect the California Supreme Court's continuing trend to allow the broad and amorphous liability standards implicated under Section 17200, but to restrict the monetary relief available in civil actions.

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175 People v. Superior Court (Jayhill Corp.), 9 Cal. 3d 283, 286 (1973).
176 See Kraus v. Trinity Mgmt. Servs., Inc., 23 Cal. 4th 116, 126-27 (2000) (orders for restitution are "orders compelling a [Section 17200] defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property or those claiming through that person"); see also Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal. 4th 553, 581 (1998) (Baxter, J., concurring).
177 See Fletcher, 23 Cal. 3d at 449; but see Bronco Wine Co. v. Frank A. Logoluso Farms, 214 Cal. App. 3d 699, 715-21 (1989) (reversing the trial court's restitution order based on certain due process considerations potentially affecting non-parties).
178 See Fletcher, 23 Cal. 3d at 450-51; but see Bank of the West, 2 Cal. 4th at 1266 (implying that there can be no disgorgement under Section 17200 if no money is received as the result of the wrongful business conduct).
In **Kraus**, six tenants brought a representative Section 17200 action against, among others, a property owner and management company, alleging illegal rental practices. After concluding that defendants' practices violated Section 17200, the trial court ordered, among other things, that certain funds be disgorged and placed in a fluid recovery fund. The disgorged funds were to be disbursed "for the purpose of providing financial assistance for the advancement of legal rights and interests of residential tenants in the City and County of San Francisco." Reviewing the judgment of the trial court, the Court of Appeal affirmed, holding that the trial court's disgorgement order was proper under Section 17200, notwithstanding that the action was brought on behalf of absent persons by a private party under Section 17200 and that it had not been certified as a class action.

With respect to the disgorgement issue, the California Supreme Court reversed and held that the equitable powers provided under Section 17200 do not authorize orders for disgorgement into a fluid recovery fund in Section 17200 actions brought solely on a representative basis. The Court reasoned that the only monetary relief expressly available under Section 17200 is restitution, which it defined as an order "compelling a Section 17200 defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken."

In **Cortez**, the companion case to **Kraus**, plaintiff sued her former employer for violations of Section 17200 and the California Labor Code, alleging that defendant unlawfully failed to pay overtime wages to approximately 175 employees, including herself. With respect to disgorgement, the California Supreme Court cited **Kraus** and directed that "the trial court may not make an order for disgorgement of all benefits defendant may have received from failing to pay overtime wages. It may only order restitution to persons from whom money or property has been unfairly or unlawfully obtained."

In **Korea Supply**, plaintiff brought an individual Section 17200 action based on allegations that defendants committed an unfair business practice by obtaining a military

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182 23 Cal. 4th at 121-22.
183 Id. at 123-24.
184 Id. at 124-25.
185 Id. at 137-38.
186 Id. at 126-27, 129. This ruling may be bittersweet for the defense bar because the court also "order[ed] defendants to identify, locate and repay to each former tenant . . . the full amount of funds improperly acquired from that tenant, retaining the power [with the trial court] to supervise defendants' efforts to ensure that all reasonable means are used to comply . . . ." Id. at 138. The Court shed no light on the efforts required of defendants, beyond those that are "reasonable," to actually identify and locate alleged victims. What happens to funds that cannot be matched with actual victims also is unclear.
187 23 Cal. 4th at 169.
188 Id. at 172.
equipment sales contract with the Korean government through wrongful means, including bribes and sexual favors. Plaintiff further alleged that, had defendants not interfered with the contract, plaintiff's client would have received the contract and plaintiff would have earned approximately $30 million in commission fees. The trial court sustained defendants' demurrer to the UCL claim without leave to amend. The Court of Appeal reversed, holding that Kraus allowed the courts to order disgorgement of profits to deter future violations of Section 17200 "regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice."

Reasoning that the Court of Appeal had "misread" Kraus, the California Supreme Court reversed, holding that a plaintiff in an individual Section 17200 action may not seek disgorgement of profits that is not restitutionary in nature, i.e., the plaintiff first must have had some "ownership interest" in the money to be disgorged. The Court explained that "nonrestitutionary disgorgement of profits" is not an authorized remedy under the UCL:

Our previous cases discussing the UCL indicate our understanding that the Legislature did not intend to authorize courts to order monetary remedies other than restitution in an individual action. This court has never approved of nonrestitutionary disgorgement of profits as a remedy under the UCL. While prior cases discussing the UCL may have characterized some of the relief available as "disgorgement," we were referring to the restitutionary form of disgorgement, and not to the nonrestitutionary type sought here by plaintiff. [Citations omitted.] The present case merely confirms what we have previously held: Under the UCL, an individual may recover profits unfairly obtained to the extent that these profits represent monies given to the defendant or benefits in which the plaintiff has an ownership interest.

The Court further reaffirmed that Section 17200 "is not an all-purpose substitute for a tort or contract action," and that damages disguised as "disgorgement" are not permitted.

Based on the foregoing decisions, it is now clear that plaintiffs seeking "disgorgement" of monies under Section 17200 must file their claims as class actions. Section 17200 representative actions in which plaintiffs seek disgorgement, as opposed to restitution, are subject to challenge by defendants and plaintiffs typically either will abandon their claims for disgorgement or seek to plead their claims as class actions. In addition, since disgorgement is the remedy of choice in virtually all Section 17200 cases, class certification proceedings are gaining more favor. Prior to Kraus and Cortez, defendants often had little incentive to oppose class certification since success often resulted in a Pyrrhic victory -- the defendant was left to defend a Section 17200 representative action in which the res judicata protections of a class action were not present. Now, however, class certification will determine the extent to which plaintiffs can seek disgorgement of monies under Section 17200.

189  29 Cal. 4th at 1144-46.
190  Id. at 1148.
191  Id. at 1149-50.
As recently recognized by the California Court of Appeal, however, a UCL plaintiff cannot utilize the potential for disgorgement as the basis for certifying a class. In Frieman v. San Rafael Rock Quarry, plaintiffs who resided near a rock quarry moved for class certification of their UCL and nuisance claims. Affirming the trial court's ruling, the Court of Appeal held that plaintiffs failed to establish that the action was appropriate for certification, including by demonstrating that a class action was more beneficial than a representative action under the UCL. Because plaintiffs could establish no right to restitution for the putative class members, and because plaintiffs failed to show that substantial benefits would accrue to the litigants or the courts from class treatment, the Court of Appeal reasoned that the possibility of obtaining disgorgement in a class action was not a sufficient basis for certifying a class -- "[p]laintiffs' argument puts the cart before the proverbial steed."194

It should be noted that statements made by the Court in Kraus may have the effect of essentially transforming Section 17200 representative actions into a situation similar to a claims-made settlement in a class action.195 In addressing due process concerns, the Court suggested in Kraus that trial courts ordering restitution under Section 17200 may implement a claims procedure pursuant to which non-parties may be given notice of their right to make claims contingent upon their execution of a release in favor of the defendant.196 Since "fluid recovery" no longer is an option in non-class Section 17200 representative actions, a defendant's monetary liability may depend on the number of claims actually made.197

A final issue that remains to be conclusively determined by the California Supreme Court is whether, based on the Court's statements in Korea Supply, the remedy of nonrestitutionary disgorgement of profits is available in any Section 17200 action. While both Korea Supply and Kraus make clear that nonrestitutionary disgorgement is not available in Section 17200 individual and representative actions, the Court has not specifically addressed what type of disgorgement remedy is available in class actions.198 In other words, can a Section 17200 plaintiff alleging a class action seek disgorgement of monies in excess of or unrelated to what he or she paid or gave to the defendant, such as investment profits or costs savings made by the defendant? The Court's language in Korea Supply appears to say no: "This court has never approved of nonrestitutionary disgorgement of profits as a remedy under the UCL."199 And

193 Id. at *4.
194 Id.
195 In a "claims-made" class action settlement, the defendant typically agrees to pay claims made by class members up to a certain cap or based on a fund of monies.
196 See Kraus, 23 Cal. 4th at 138 n.18.
197 This is an important factor to be considered in the context of settlement negotiations.
198 See Frieman, 2004 WL 345619, at *4 ("The issue of the availability of nonrestitutionary disgorgement in a properly certified UCL class action was not resolved by [Kraus, Cortez, Corbett or Korea Supply].").
199 29 Cal. 4th at 1148.
given the Court's repeated attempts to restrict the monetary relief available in private Section 17200 actions, an argument can be made that the remedy of disgorgement in Section 17200 actions (even in class actions) must be restitutionary, and not punitive, in nature.200

2. "Fluid Recovery" In UCL Class Actions

As discussed above, the remedy of disgorgement in into a fluid recovery fund is not available in UCL representative actions that are not certified as class actions. However, where a judgment awards disgorgement on a restitutionary basis and there are unidentifiable victims, the doctrine of "fluid recovery" may be used to distribute the residue of any unclaimed funds.201 Put differently, a court might order a defendant to disgorge a total amount into a fund for distribution to class members; under "fluid recovery" (or "fluid class recovery"), the portion of the fund that cannot be directly distributed to individual class members may be awarded in a manner that will put the residue to its "next best" use and produce benefits for as many class members as possible.202 The California Supreme Court has proposed several specific "fluid recovery" procedures, including price rollback;203 general escheat;204 earmarked escheat;205 and the establishment of an equitable trust fund.206

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200 See Korea Supply, 29 Cal. 4th at 1147-48 (discussing the language and legislative history of Section 17200 to conclude that monetary relief should be limited to restitutionary context).

201 See, e.g., California v. Levi Strauss & Co., 41 Cal. 3d 460, 464 (1986) (holding that proof of individual injury is not required for recovery in consumer class actions and discussing the "largely uncharted area of 'fluid recovery'"); Thomas Shelton Powers, 2 Cal. App. 4th at 330 (overruled in part by Kraus, 23 Cal. 4th at 137-38); People ex rel. Smith v. Parkmerced Co., 198 Cal. App. 3d 683, 689 (1988) (determining that unclaimed funds of restitution award should go to a tenant's rights organization to the extent that victimized former tenants could not be located) (overruled in part by Kraus, 23 Cal. 4th at 137-38).

202 "Fluid recovery" is borrowed from the doctrine of "cy pres" -- a concept developed in the law of charitable trusts -- which provides that, if a particular interest cannot go to an intended trust, it will be put to its next best use.

203 Under the price rollback method, the defendant distributes the unclaimed funds throughout the market by lowering prices in the product and/or service area where the wrongful conduct occurred. See Levi Strauss & Co., 41 Cal. 3d at 473.

204 Under the general escheat approach, the unclaimed portion of the award is paid over to a general government fund. See id. at 475.

205 Under the earmarked escheat method, the uncollected funds are distributed to an appropriate government organization for use on projects that potentially could benefit non-collecting class members. See id. at 474.

206 Here, the court appoints a board of directors to administer recovery in the best interests of the represented parties. See id. at 476.
3. Defenses Specific To Restitution

a. No Restitution Where Defendant Received No Profits Or Ill-Gotten Gains

A defendant who receives no pecuniary benefit from the plaintiff as a direct result of the conduct at issue possibly could assert this defense to an award of restitution, particularly given recent statements made by the California Supreme Court in Korea Supply. A similar argument could be made where the defendant did not profit from the conduct at issue. Although no published decision directly has addressed this issue, numerous courts have stated that Section 17200 is designed to preclude a defendant from retaining ill-gotten gains or profits.

b. The Filed Rate Doctrine

Under the "filed rate doctrine," defendants that charge consumers certain rates for their products or services, which rates are required by law to be filed with, and approved by, a designated regulatory body, are insulated from lawsuits challenging those rates and from court orders having the effect of imposing a rate other than that filed with the regulatory body.

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207 See Korea Supply, 29 Cal. 4th at 1148-49 ("The present case merely confirms what we have previously held: Under the UCL, an individual may recover profits unfairly obtained to the extent that these profits represent monies given to the defendant or benefits in which the plaintiff has an ownership interest. . . . [A]n order for restitution is one 'compelling a UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property or those claiming through that person.'" (emphasis added) (citation omitted); see also Bank of the West v. Superior Court, 2 Cal. 4th 1254, 1266 (1992).

208 See, e.g., Kraus, 23 Cal. 4th at 127 (stating that disgorgement is the surrender "of all profits earned as a result of an unfair business practice"); Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal. 4th 553, 579, 581 (1998) (Baxter, J., concurring) ("Compelled disgorgement of profits earned by unlawful sales deters future violations of the law and levels the playing field on which the business activity occurs"; "If we are faithful to language [sic] of [S]ection 17203 and the purpose of the UCL, therefore, the restitution authorized by the UCL is a return of the profit earned from an unfair business practice to the person who was the victim of that unlawful practice."); Fletcher v. Security Pac. Nat'l Bank, 23 Cal. 3d 442, 452 (1979) ("the trial court may order restitution to the plaintiff class in order to foreclose defendant's retention of any wrongful gains").

209 See Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 18 (2d Cir. 1994) ("Simply stated, the [filed rate] doctrine holds that any 'filed rate' -- that is, one approved by the governing regulatory agency -- is per se reasonable and unassailable in judicial proceedings brought by ratepayers."); Day v. AT&T Corp., 63 Cal. App. 4th 325, 335 (1998) ("It has been said that the doctrine furthers two legitimate goals: [1] nondiscriminatory rate setting and [2] agency autonomy in rate setting without court interference."); AT&T Co. v. Central
Relying on this doctrine, the court in *Day v. AT&T Corporation* held that plaintiffs were precluded from seeking any monetary recovery, including disgorgement, under Section 17200 based on defendant's billing practices for, and rounding up of, telephone charges on prepaid phone cards since the rates for such charges were disclosed and approved in publicly filed rates.\(^\text{210}\) The court in *Walker v. Allstate Indemnity Co.*\(^\text{211}\) applied similar reasoning in dismissing a Section 17200 action. In *Walker*, the Court of Appeal held that plaintiffs could not maintain a Section 17200 claim against certain insurance companies based on allegations that the rates were excessive. The court reasoned that no civil challenge could be brought to recoup insurance premiums charged pursuant to rates approved by the insurance regulatory agency.\(^\text{212}\) The court also recognized that the filed rate doctrine "is analogous to the scheme explicitly embodied in the Insurance Code and . . . is consistent with our interpretation of the statutory provisions at issue in this case."\(^\text{213}\) In addition, other courts around the country have applied the filed rate doctrine in a number of regulatory contexts, including insurance, telecommunications and utilities.\(^\text{214}\)

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\(^{210}\) 63 Cal. App. 4th at 335. The court, however, did hold that plaintiffs still could seek injunctive relief under Section 17200. See id. In *Spielholz v. Superior Court*, 86 Cal. App. 4th 1366, 1377 (2001), the court rejected the filed rate doctrine as a defense to a UCL action where plaintiff alleged that defendant's advertising of a "seamless calling area" was misleading and deceptive.


\(^{212}\) Id. at 760; see id. at 756 ("[U]nder the statutory [insurance] scheme enacted by the voters, the charging of an approved rate cannot be deemed "illegal" or "unfair" for purposes of . . . . [Section 17200] or, indeed, tortious.").

\(^{213}\) Id. at 757 n.4 (citing to decision in *Day v. AT&T Corp.*); see also *Duggal v. G.E. Cap. Communications Servs., Inc.*, 81 Cal. App. 4th 81, 87 (2001) (holding that filed rate doctrine barred plaintiff's state law claims).

\(^{214}\) See, e.g., *Jader*, 975 F.2d at 527 (applying the doctrine to bar state law claims pursuant to an insurance regulatory scheme); *Wegoland*, 27 F.3d at 20 (stating that the "Supreme Court has ruled that the filed rate doctrine acts to bar state causes of action" and "that the rationales underlying the filed rate doctrine apply equally strongly to regulation by state agencies"); but see *Spielholz*, 86 Cal. App. 4th at 1377 (rejecting filed rate doctrine as a defense to a Section 17200 action because allegations were directed at false advertising, not the defendant's rates).
c. Plaintiff Received A Benefit Or Something Of Value

Defendant may assert that restitution is not available to the extent that the general public received something of value in exchange.215 The scope of this defense is unclear.

d. Ability To Pay As A Defense

At least one California court has determined that the equal protection clause "requires a court to grant a hearing on the defendant's ability to pay restitution"; however, "it does not require a trial judge to make a finding of ability to pay before ordering restitution."216

e. Restitution As A Disguised Damages Claim

A plaintiff should not be allowed to recharacterize a damages claim as a Section 17200 action for restitution.217 The distinction between damages and restitution often is blurred. In Cortez,218 the California Supreme Court rejected defendant's argument that unpaid wages constitute an impermissible claim for damages rather than restitution. The Court reasoned that, because the defendant improperly had "acquired" its employees' money as a result of unlawful conduct, the trial court could order the defendant to pay the overtime wages to each affected employee as a form of restitution.219 Unfortunately, Cortez further blurs the distinction between a claim for "damages" and a claim for "restitution" under Section 17200.220 Some fear that the Supreme Court's expansive restitution definition, which now may be argued to include the

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215 See Day, 63 Cal. App. 4th at 339 (reasoning that plaintiff could not seek monetary relief based on allegedly misleading phone card rates because "once the cards were purchased and used, the members of the public received exactly what they paid for" (emphasis in original)).


219 Id.

"value" of virtually any benefits conferred on defendants, will encourage more creative demands for restitution in future Section 17200 actions. This gray area was not sufficiently clarified in Korea Supply, which merely held that "[t]he present case merely confirms what we have previously held: Under the UCL, an individual may recover profits unfairly obtained to the extent that these profits represent monies given to the defendant or benefits in which the plaintiff has an ownership interest," the highlighted language still providing plaintiffs significant latitude in developing theories of restitution.

B. Civil Penalties Under Section 17200

Recently, government agencies, including the California Attorney General, city attorneys and the California Department of Corporations, increasingly have utilized the UCL's civil penalty provision in enforcement actions brought against California businesses, many of which arise from regulatory examinations. In the hands of aggressive government officials, the liability multiplies.

In government enforcement actions, the UCL provides that civil penalties shall be assessed in an amount not to exceed $2,500.00 for each violation. Indeed, if a violation of the UCL is proven in a government enforcement action, it is error for the court not to impose penalties in some amount. In construing the phrase "for each violation," courts typically have applied a "per-victim" test. Recently, however, the Court of Appeal, Sixth District, awarded statutory civil penalties under the UCL on a "per-act" rather than "per victim" basis.
The potential penalty is not automatically set at $2,500.00 per violation. In determining the amount of the penalty, courts must consider "any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: [i] the nature and seriousness of the misconduct, [ii] the number of violations, [iii] the persistence of the conduct, [iv] the length of time over which the misconduct occurred, [v] the willfulness of the defendant's misconduct, and [vi] the defendant's assets, liabilities, and net worth." Given the discretionary nature of UCL civil penalties, however, it is difficult to predict which factors courts will focus on in assessing penalties in any given case.

C. Injunctions Under Section 17200

As discussed above, the courts have broad powers to award injunctive relief under Section 17200. For example, in one case, a court exercised its injunctive power to require a ten-year mandatory disclosure in the form of a warning on the defendant's future products.

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228 See Custom Craft Carpets, 159 Cal. App. 3d at 686 ("The amount of each penalty . . . lies within the court's discretion.").

229 Cal. Bus. & Prof. Code § 17206(b); see People v. First Fed. Credit Corp., 104 Cal. App. 4th at 728.

230 See, e.g., People v. First Fed. Credit Corp., 104 Cal. App. 4th at 728 (assessing $500.00 UCL penalty per violation); People ex rel. Bill Lockyer v. Fremont Life Ins. Co., 104 Cal. App. 4th at 513 (imposing $210.00 UCL penalty per violation, plus a $210.00 per violation enhancement as to victims who were senior citizens, based on what the trial court found to be "serious" and "harmful" misconduct); City and County of San Francisco v. Sainez, 77 Cal. App. 4th 1302, 1306-08 (2000) (assessing $100.00 penalty on each of the 53 violations of the housing code); Casa Blanca Convalescent Homes, 159 Cal. App. 3d at 534-35 ($167,500.00 penalty affirmed based on 67 violations ($2,500.00 per violation)); People v. Dollar Rent-A-Car Systems, Inc., 211 Cal. App. 3d 119, 132 (1989) ($100,000.00 penalty affirmed where company used over 500,000 misleading contracts and submitted 1,500 false repair invoices (no "per violation" penalty determined)); People v. Thomas Shelton Powers, M.D., Inc., 2 Cal. App. 4th 330, 339-44 (1992) (imposing maximum $17,500.00 penalty for 7 violations ($2,500.00 per violation)); People v. Morse, 21 Cal. App. 4th 259, 272 (1993) (affirming $400,000.00 in civil penalties for 4 million violations of false advertising statute ($40 per violation)).

231 See Consumers Union of United States, Inc. v. Alta-Dena Certified Dairy, 4 Cal. App. 4th 963, 972-74 (1992) (requiring a warning to be placed on all of dairy company's advertisements and products for the next ten years because the dairy was found guilty of false advertising); but see Isuzu Motors Ltd. v. Consumers Union of United States, Inc., 12 F. Supp. 2d 1035, 1048-49 (C.D. Cal. 1998) (granting motion to dismiss a Section 17200 claim on the grounds that the injunction sought constituted a prior restraint in violation of the First Amendment).
D. Equitable Defenses To Section 17200 Remedies

In Cortez, the California Supreme Court held that trial judges assessing 17200 claims for "unlawful" business practices are not limited to consideration of defenses arising under the underlying statute that was allegedly violated. In addition, the Court noted that trial judges may consider equitable defenses and "considerations," including laches, good faith, waiver and estoppel, when fashioning an award. Accordingly, a defendant in a Section 17200 action may be able to reduce or eliminate the amount of restitution or disgorgement ordered or the scope of an injunction based on equitable considerations, including potentially the value of the services provided. Nonetheless, despite its general authorization of equitable defenses in Section 17200 actions, the Court observed in Cortez that reduction of a restitution award may be unusual, particularly where an unlawful violation of Section 17200 is proven.

E. Attorneys' Fees Under Section 17200

Section 17200 does not expressly provide for attorneys' fees. A successful plaintiff, however, may seek attorneys' fees where the action has been brought as a "private attorney general" action pursuant to California Code of Civil Procedure Section 1021.5. Under Section 1021.5, a plaintiff may recover an attorneys' fees award if: (1) the lawsuit "has resulted in the enforcement of an important right affecting the public interest"; (2) "a significant benefit" is "conferred on the general public or a large class of persons"; (3) "the necessity and financial burden of private enforcement . . . are such as to make the award appropriate"; and (4) the fees "should not in the interest of justice be paid out of the recovery, if any." In addition, courts have uniformly recognized that an attorneys' fees award is inappropriate when the applicant has a large economic or non-economic stake in the outcome of a case. The decisions construing Section 1021.5 do not offer any uniform application of the statute; attorneys' fees awards turn

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233 Id. at 182 ("equitable considerations normally should not lead a trial court to reduce or eliminate a Section 17200 restorative order when it is established that the defendant committed an unlawful practice") (Werdegar, J., concurring).

234 See Shadoan v. World Sav. & Loan Ass'n, 219 Cal. App. 3d 97, 108 n.7 (1990) ("The Business and Professions Code does not provide for an award of attorney fees for an action brought pursuant to [S]ection 17203, and there is nothing in the statutory scheme from which such a right could be implied.").

235 See Williams v. San Francisco Bd. of Permit Appeals, 74 Cal. App. 4th 961, 966-67 (1999); Save Open Space Santa Monica Mountains v. Superior Court, 84 Cal. App. 4th 235, 253-54 (2000) (Section 17200 defendant is entitled to limited discovery on subject of whether public interest organization litigated private attorney general action primarily for the benefit of non-litigants).
upon the facts of the case. In a Section 17200 action that proceeds on a class basis, attorneys' fees may be awarded pursuant to traditional principles governing fees for class counsel, including the "common fund" doctrine. Notwithstanding a successful plaintiff's ability to seek attorneys' fees under Section 1021.5, there is no corresponding right for a successful defendant to seek attorneys' fees in a Section 17200 representative action.

IV. SPECIFIC PROCEDURAL ASPECTS OF A SECTION 17200 ACTION

A. Arbitration Of UCL Claims

Since many consumer businesses nationwide include arbitration provisions in their respective customer agreements, the enforceability of such provisions has become an increasingly important subject in Section 17200 jurisprudence. Generally, there are two issues that have drawn attention from the courts: (1) whether the Section 17200 claim is arbitrable; and (2) if so, whether the Section 17200 claim should be arbitrated on a class/representative basis or on an individual basis.

1. Arbitrability Of Section 17200 Claims

The California Supreme Court issued its decision in Cruz v. PacifiCare Health Systems, Inc., holding that Section 17200 claims for injunctive relief are not arbitrable, but that

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236 Compare California Licensed Foresters Ass'n v. State Bd. of Forestry, 30 Cal. App. 4th 562, 570 (1994) (narrowly construing the third prong of Section 1021.5 and stating that attorneys' fees only are awarded if a significant public benefit is made "through litigation pursued by one whose personal stake is insufficient to otherwise encourage the action"), and Olsen v. Breeze, Inc., 48 Cal. App. 4th 608, 628-29 (1996) (refusing to award attorneys' fees even though defendants had changed their business practices), with Hewlett v. Squaw Valley Ski Corp., 54 Cal. App. 4th 499, 543-46 (1997) (granting an award of attorneys' fees pursuant to Section 1021.5) (superseded by statute).

237 See Walker v. Countrywide Home Loans, 98 Cal. App. 4th at 1179-81 (holding that successful defendant did not have the right to seek attorneys' fees in Section 17200 action). In addition, although a successful defendant may have the right to seek attorneys' fees on other grounds, such as a contract at issue in the action, trial courts have the discretion to apportion or deny such fees where the action principally was to enjoin an unfair business practice. See id.

238 30 Cal. 4th 303 (2003).

239 Previously, in Broughton v. Cigna Healthplans, 21 Cal. 4th 1066 (1999), the California Supreme Court held that claims for injunctive relief under the CLRA were not subject to arbitration. Thereafter, several California appellate courts extended Broughton to hold that claims for injunctive relief under the UCL also were inarbitrable. Until Cruz, however, whether the UCL's equitable monetary remedies of restitution and disgorgement were subject to arbitration remained undecided. The Court in Cruz confirmed that Broughton remains good law notwithstanding two recent decisions of the
Section 17200 monetary claims for restitution and/or disgorgement are arbitrable.\textsuperscript{240} Although the Court limited its holding on the injunctive relief claim to "the circumstances of the present case," it did not specifically describe the "circumstances" critical to its decision.\textsuperscript{241} The opinion simply distinguishes between Section 17200 injunctive claims brought in the context of commercial disputes and Section 17200 injunctive claims brought in the consumer protection context, the latter being inarbitrable.\textsuperscript{242}

With respect to Section 17200 monetary claims for restitution and/or disgorgement, the Court reasoned that such claims are similar to damages claims under the CLRA, which it held in \textit{Broughton} to be arbitrable, and do not require substantial judicial supervision.\textsuperscript{243} The Court rejected arguments of the amici that "anyone acting in a private attorney general capacity should not be bound by an arbitration agreement." In this regard, the Court opined that, in view of the strong federal policy in favor of enforcing arbitration agreements, a party to an arbitration agreement should not be permitted "to evade its contractual obligation to settle its own restitutionary claims through arbitration merely by acting as a representative on behalf of other similarly situated claimants."\textsuperscript{244} One issue expressly left undecided by \textit{Cruz} is whether a Section 17200 plaintiff acting solely in a private attorney general capacity is bound by the contractual arbitration agreements of those persons he or she purports to represent.\textsuperscript{245}

\section*{2. Whether Section 17200 Claims Are Arbitrable On A Class/Representative Basis}

Whether Section 17200 claims should be arbitrated on a class/representative basis or on an individual basis remains undecided. The first consideration is whether the arbitration agreement is silent on the issue or includes a provision expressly prohibiting class or representative treatment -- often referred to as a "class action waiver."

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{240} \textit{Cruz}, 30 Cal. 4th at 317-20.
\item \textsuperscript{241} \textit{Id.} at 307.
\item \textsuperscript{242} \textit{See id.} at 315-17.
\item \textsuperscript{243} \textit{Id.} at 317.
\item \textsuperscript{244} \textit{Id.} at 320. The Court also held that claims for restitution and disgorgement under Section 17500 (California's false advertising statute) and for unjust enrichment likewise are arbitrable. \textit{Id.}
\item \textsuperscript{245} \textit{Id.} at 320 n.7 ("The question whether someone who is not a party to an arbitration agreement may bring a representative action pursuant to [Section 17200] for restitution on behalf of injured consumers who are parties to the arbitration agreement is one that is not before us, and about which we express no opinion.").
\end{itemize}
\end{footnotesize}
Where the agreement is silent, the general rule previously applied in California was that class actions may proceed to arbitration, particularly where plaintiffs sought to recover only damages.246 However, the United States Supreme Court's decision in Green Tree Financial Corp. v. Bazzle,247 changed the landscape. Applying Bazzle, the California Court of Appeal in Garcia v. DIRECTV, Inc.,248 concluded that these rules no longer apply. There, the Court of Appeal held that, where an arbitration agreement governed by the Federal Arbitration Act ("FAA") is silent as to class arbitration, the issue of whether the arbitration agreement prohibits class arbitration should be determined by the arbitrator, not the courts.249

For arbitration agreements that include a class action waiver, California courts, unlike other courts across the country,250 typically have been hostile to such provisions and have held them to be unenforceable under the doctrine of unconscionability.251 The California Supreme Court, however, is poised to address this issue in the near future in Discover Bank v. Superior

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249 Id. at *1 ("The Supreme Court has spoken, and the foundational issue -- whether a particular arbitration agreement prohibits class arbitrations -- must (in FAA cases) henceforth be decided by the arbitrators, not the courts."). Although Garcia answers the question directly presented, the Court of Appeal recognized that there are many other "unresolved issues" arising in consumer arbitration disputes, especially those involving explicit class action waivers. Id. at *4 n.1, n.4.
251 See, e.g., Szetela v. Discover Bank, 97 Cal. App. 4th 1094, 1099 (2002) (holding that class action waiver in credit card arbitration agreement was unenforceable); Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003) (refusing to enforce class action waiver in consumer arbitration agreement); ACORN v. Household Int'l, Inc., 211 F. Supp. 2d 1160, 1170-71 (N.D. Cal. 2002) (refusing to enforce arbitration clause in consumer lending agreement based on unconscionability).
In Discover, the Court of Appeal upheld a class action waiver in a credit card arbitration agreement governed by the FAA. Briefing is complete in Discover, and a decision is anticipated later this year.

B. Filing A Demurrer To A Section 17200 Claim

Although demurrers rarely are successful in disposing of Section 17200 causes of action, demurrers have been sustained, and the decisions affirmed, in some California cases. With respect to the specificity of pleading required in a Section 17200 action, in Quelimane Co., Inc. v. Stewart Title Guaranty Co., the California Supreme Court rejected the argument that plaintiffs asserting violations of Section 17200 should be required to plead particularized facts,


253 See, e.g., Motors, Inc. v. Times Mirror Co., 102 Cal. App. 3d 735, 741-42 (1980) (stating that a Section 17200 complaint usually should be construed to withstand demurrer); Cairns v. Franklin Mint Co., 24 F. Supp. 2d 1013, 1037 (C.D. Cal. 1998) (stating that "[w]hether consumers have been or will be misled is a factual question that cannot be resolved on a motion to dismiss").

254 See, e.g., Gregory v. Albertson's, Inc., 104 Cal. App. 4th 845, 857 (2002) (affirming trial court's sustaining of demurrer where plaintiff's underlying theory of "unfairness" was not sufficient as a matter of law); Searle v. Wyndham Int'l, Inc., 102 Cal. App. 4th 1327, 1330 (2002) (affirming trial court's sustaining of demurrer where hotel's practice of paying "service charge" to its employees was neither "unfair" nor "fraudulent"); Lazar v. Hertz Corp., 69 Cal. App. 4th 1494, 1505-06 (1999) (sustaining defendant's demurrer to Section 17200 claim because the challenged business practice was approved and authorized by the Legislature); Khoury v. Maly's of Cal., Inc., 14 Cal. App. 4th 612, 619-20 (1993) (sustaining demurrer without leave to amend where plaintiff, despite three attempts, neither identified the specific section of law allegedly violated nor pleaded with any reasonable particularity the facts supporting the underlying violations); Wolfe v. State Farm Fire & Cas. Ins. Co., 46 Cal. App. 4th 554, 568 (1996) (sustaining demurrer to a Section 17200 claim challenging insurance companies' alleged "unfair" practice of failing to offer earthquake insurance because the issue was a matter within the legislative domain); Shvarts v. Budget Group Inc., 81 Cal. App. 4th 1153, 1158-60 (2000) (sustaining demurrer to Section 17200 complaint without leave to amend on grounds that per gallon fuel price could not be "unfair," given Civil Code section allowing for charge, and could not have been likely to deceive, given full disclosure of charge on rental car contract); see also Kentmaster Mfg. Co. v. Jarvis Prods. Corp., 146 F.3d 691, 695-96 (9th Cir. 1998) (affirming trial court's grant of motion for judgment on the pleadings on plaintiff's Section 17200 claim since defendant's conduct only benefited consumers and, therefore, precluded any possible finding of a Section 17200 violation), modified, 164 F.3d 1243, 1243 (9th Cir. 1999).
similar to pleading a cause of action for fraud. The Court held that fraud was the only exception to the well-settled rule that pleading specific facts is not required to state a cause of action and, therefore, a plaintiff pleading a Section 17200 cause of action should not be held to the higher standard.

C. Special "Anti-SLAPP" Motions

Where a Section 17200 claim threatens to impose upon defendants' right to free speech, defendants previously have relied upon the "anti-SLAPP" statute, which authorizes the filing of a special motion to strike against causes of action arising out of conduct "in furtherance of the person's right of petition or free speech under the United States or California Constitution." In the consumer protection context, however, recently enacted legislation places critical restrictions on future use of the "anti-SLAPP" statute. The new statute, effective as of January 1, 2004, prohibits anti-SLAPP motions in actions: (1) brought solely in the public interest on behalf of


257 Cal. Civ. Proc. Code § 425.16(b)(1). To succeed on such a motion, a defendant must first establish that the action "alleges acts in furtherance of defendant's right of petition or free speech in connection with a public issue." DuPont Merck, 78 Cal. App. 4th at 565; see also Gallimore v. State Farm Fire & Cas. Ins. Co., 102 Cal. App. 4th 1388, 1395-1400 (2002) (holding that anti-SLAPP statute did not apply in Section 17200 action challenging insurer's claims handling practices because action was not premised entirely on insurer's reports to the California Department of Insurance). Once this first test is satisfied, the burden shifts to plaintiff to establish that there is "a probability" of prevailing on the claim. See Wilcox, 27 Cal. App. 4th at 823 (overruled in part by Equilon Enter., 29 Cal. 4th at 68 n.5); Yu v. Signet Bank/Virginia, 103 Cal. App. 4th 298, 317 (2002) (affirming trial court's denial of anti-SLAPP motion to strike and stating that "a plaintiff's burden as to the second prong of the anti-SLAPP test is akin to that of a party opposing a motion for summary judgment").

258 See Cal. Civ. Proc. Code § 425.17 (Senate Bill No. 515, which was signed by former Governor Gray Davis on September 6, 2003).
the general public (subject to certain conditions); and/or (2) brought against a defendant engaged in the business of selling or leasing goods and services (subject to certain conditions). Given these broad prohibitions, the use of the anti-SLAPP statute in Section 17200 actions will be substantially restricted, particularly in the consumer transaction context.

D. Motion That Representative Action Not Proper

As discussed above, it appears that a defendant may make a motion challenging whether a Section 17200 plaintiff may proceed as a representative plaintiff and/or whether the action is a proper representative action. At least one published decision has allowed this determination on a motion for summary judgment.

E. Discovery In Section 17200 Actions

There are few cases considering specific discovery issues under Section 17200. The biggest issue that arises is the scope of discovery in private attorney general actions -- i.e., can plaintiffs obtain discovery regarding defendants' business practices as to non-parties merely because the action is purportedly brought on behalf of the general public? Currently, there is no answer to this question.

F. Summary Judgment Under Section 17200

Although Section 17200 claims often involve disputed questions of fact, thus precluding summary judgment, Section 17200 claims may be decided as a matter of law where the material facts are undisputed. In addition, one California decision reasoned that, because "[i]nterpretation and application of statute is a question of law, subject to [the courts'] independent review," "whether a practice is unfair under [Section 17200] is such a question.

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261 See supra at notes 28-45.
263 In Californians for Population-Stabilization, 58 Cal. App. 4th at 286, the court stated that "[i]t is settled that what constitutes 'unfair competition' . . . under any given set of circumstances is a question of fact. [citations omitted] . . . However, where, as here, there is no dispute or conflict in the evidence, the finding of the trial court that the defendant's conduct is not in violation of section 17200 amounts to a conclusion of law. [citations omitted]."
264 People v. Duz-Mor Diagnostic Lab Inc., 68 Cal. App. 4th 654, 660 (1998) (affirming the trial court's judgment that a laboratory did not violate Section 17200 by offering discounts to physicians' private-pay patients or utilizing an "unbundled" billing system, but finding that commissions paid for marketing services were unlawful and, thus, in violation of Section 17200).
Hence, whether a defendant's conduct rises to the level of "unfairness" under Section 17200 potentially could be the basis for a summary judgment motion.265

G. Removal Of A Section 17200 Action

Federal court is an attractive forum for most Section 17200 defendants, since federal courts generally are more willing to dispose of frivolous Section 17200 actions at the pleading or pre-trial stages.266 On the other hand, removal of a state court action involving Section 17200 can be difficult, if not impossible, even where the predicate violation supporting an "unlawful" claim is based on federal law.267 This difficulty arises from the requirement that a party can only remove a case to federal court where the action could have been brought in federal court in the first place, whether based on a question arising under federal law or diversity.268

265 See Motors, Inc. v. Times Mirror Co., 102 Cal. App. 3d 735, 740 (1980) (stating that, if "the utility of the conduct clearly justifies the practice, no more than a simple motion for summary judgment would be called for").

266 See, e.g., Herman v. Salomon Smith Barney, Inc., 266 F. Supp. 2d 1208, 1210-13 (S.D. Cal. 2003) (dismissing UCL action where plaintiff had no standing to assert claim in federal court and refusing to remand based on federal court's exclusive jurisdiction); Feitelberg v. Merrill Lynch & Co., 234 F. Supp. 2d 1043 (N.D. Cal. 2002), aff'd, 353 F.3d 765 (9th Cir. 2003) (dismissing UCL action based on securities transactions); Kentmaster Mfg. Co. v. Jarvis Prods. Corp., 146 F.3d 691, 695-96 (9th Cir. 1998) (affirming trial court's grant of motion for judgment on the pleadings on plaintiff's Section 17200 claim), modified, 164 F.3d 1243, 1243 (9th Cir. 1999); Aquino v. Credit Control Servs., 4 F. Supp. 2d 927, 930 (N.D. Cal. 1998) (granting motion to dismiss a Section 17200 action).

267 See, e.g., Klussman v. Cross-Country Bank, No. C-01-4228-SC, 2002 WL 1000184, at *2-6 (N.D. Cal. May 15, 2002) (removal held improper where plaintiff's Section 17200 claim was based on violation of federal Fair Credit Reporting Act ("FCRA") because the alleged FCRA violation was not a necessary element of Section 17200 claim -- plaintiff could assert a Section 17200 claim without the FCRA violation); As You Sow v. Sherwin-Williams Co., No. C-93-3577-VRW, 1993 WL 560086, at *2-3 (N.D. Cal. Dec. 21, 1993) (holding that Section 17200 case could not be removed because plaintiff lacked standing); Mangini v. R.J. Reynolds Tobacco Co., 793 F. Supp. 925, 929 (N.D. Cal. 1992) (reasoning that Section 17200 claim premised on violations of federal law could not be removed because underlying federal law conferred no private right of action); Boyle v. MTV Networks, Inc., 766 F. Supp. 809, 817-18 (N.D. Cal. 1991) (noting that a representative Section 17200 claim could not be removed as it would result in lack of standing); California v. Beltz Travel Serv., Inc., 379 F. Supp. 948, 950 (N.D. Cal. 1974) (stating that standing is subject to federal requirements following removal of a Section 17200 action to federal court).

268 See Merrel Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 814, 106 S. Ct. 3229, 92 L. Ed. 2d 650 (1986) (holding that, because federal question jurisdiction only lies when a
1. Removal Based On Federal Question

The situation often arises where a plaintiff bases his or her Section 17200 claim on an underlying federal statute. Notwithstanding that a plaintiff's claim is based entirely on a question of federal law, a federal court probably will not allow removal because the federal law merely is an "element" of plaintiff's state law claim.269 Where the action involves securities claims, however, recent authority supports a strong basis for removal.270

2. Removal Based On Diversity Jurisdiction

The impediment to removing most consumer-oriented, Section 17200 actions is that the amount in controversy requirement -- $75,000.00 -- cannot be met.271 Although parties seeking plaintiff's claim "arises under" federal law, defendant could not remove case to federal court where plaintiff merely alleged violation of a federal statute as an element of a state cause of action and federal statute itself provided no private right of action).

269 See Lippit v. Raymond James Fin. Servs., Inc., 340 F.3d 1033, 1042-43 (9th Cir. 2003); Klussman, 2002 WL 1000184, at *2-6 (holding that FCRA violation was not a necessary element of plaintiff's Section 17200 claim and that defense based on federal preemption was not sufficient to warrant removal); Pickern v. Stanton's Rest. & Woodsman Room, No. C01-2112 (SL), 2002 WL 143817 (N.D. Cal. Jan. 29, 2002) (finding no federal court jurisdiction where violation of federal Americans with Disabilities Act was alleged as predicate law for violation of Section 17200); Mangini, 793 F. Supp. at 929 (relying on decision in Merrel Dow, 478 U.S. at 814, in holding that Section 17200 action allegedly preempted by federal law did not "arise under" federal law so as to create an appropriate "federal question" for removal purposes); but see Lockyer v. Mirant Corp., Nos. C-02-1787 et al., 2002 WL 1897669 (N.D. Cal. Aug. 6, 2002) (denying motions to remand in numerous cases challenging power companies' post de-regulation conduct where plaintiff's Section 17200 claim primarily was based on questions of federal law).

270 See, e.g., Feitelberg, 234 F. Supp. 2d at 1043 (holding that UCL action based on securities transactions was removable under Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. Sections 77p & 78bb(f) ("SLUSA"), which bars filing certain kinds of securities class actions in state court; court held that, while SLUSA only applies to actions seeking "damages," which are not available under the UCL, that term should be interpreted broadly to encompass claims for restitution and disgorgement under the UCL).

271 See, e.g., Phipps v. Praxair, Inc., No. 99-CV-1848 TW (LAB), 1999 WL 1095331, at *6-7 (S.D. Cal. Nov. 12, 1999) (remanding action based on, among other things, defendant's failure to establish amount in controversy for purposes of diversity jurisdiction); Daniels v. Philip Morris Cos., 18 F. Supp. 2d 1110, 1116 (S.D. Cal. 1998) (holding that plaintiffs' claims for restitution under Section 17200 could not be "aggregated" to satisfy $75,000.00 amount in controversy requirement for each plaintiff); Arnold v. General Motors Corp., No. C 98-3047 IS, 1998 WL 827726, at *2 (N.D. Cal. 1998) (holding that "common fund" for disgorgement under Section 17200 would not satisfy amount in controversy required for diversity jurisdiction).
removal on diversity grounds have attempted to establish the amount in controversy by
aggregating the total amount sought in the action, this argument has been rejected, whether by
looking at that amount from the plaintiff's or defendant's perspective.\textsuperscript{272} It should be noted that
at least two California federal district court decisions have held that the "anti-aggregation rule"
does not apply to claims brought under Section 17200; thus, such claims can be evaluated from
the defendant's perspective of cost.\textsuperscript{273} The reasoning underlying these two decisions has been
questioned, however.\textsuperscript{274}

3. Removal Improper Where Plaintiff Does Not Have Standing Under
Federal Law

Where the plaintiff is acting as a private attorney general that has not been injured itself --
such as, for example, a corporation formed for the purpose of bringing Section 17200 consumer

\textsuperscript{272} See Johnson v. America Online, Inc., No. C-01-21083, 2002 WL 1268397, at *3-4 (N.D.
Cal. Mar. 21, 2002) (remanding class action for unpaid wages and Section 17200
violations, holding individual rights were asserted and aggregation of disgorgement
claims was not appropriate unless the defendants owed an obligation to plaintiffs as a
group and not to plaintiffs individually); Boston Reed Co. v. Pitney Bowes, Inc., No. 02-
01106 SC, 2002 WL 1379993, at *1-7 (N.D. Cal. June 20, 2002) (same); Phipps, 1999
WL 1095331, at *2-6; Snow v. Ford Motor Co., 561 F.2d 787, 790 (9th Cir. 1977)
(holding that claims could not be aggregated to establish the amount in controversy
requirement, even where relief sought was equitable in nature and, from defendant's
perspective, exceeded the amount in controversy).

\textsuperscript{273} See Ecker v. Ford Motor Co., No. CV0206833SVWTLX, 2002 WL 31654558, at *2-3
(C.D. Cal. Nov. 12, 2002) (remanding Section 17200 class and representative action and
rejecting defendant's arguments that Section 17200 claims for monetary relief brought on
behalf of the general public should be aggregated and that claims seeking injunctive relief
should be measured by the total cost to defendant); Mangini, 793 F. Supp. at 928-29
(holding that the rule prohibiting multiple plaintiffs from aggregating their claims did not
apply to non-class action cases brought under Section 17200); Myers v. Merrill Lynch &
Mangini in finding removal proper in a Section 17200 action).

(disapproving the court's holdings in Mangini and Myers); Phipps v. Praxair, Inc., 1999
WL 1095331, at *5-6 (disapproving the court's determination in Mangini and Myers
because it violates the well-established anti-aggregation rule); see also Morison v. Rand
(rejecting the argument that anti-aggregation rules do not apply to Section 17200 actions
brought on behalf of the general public).

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lawsuits -- federal standing requirements of Article III will prevent the plaintiff from obtaining standing in federal court and, therefore, preclude removal.275

H. Extraterritorial Application Of Section 17200

The potentially broad jurisdictional application of Section 17200 is based upon the language of Section 17203, which states that anyone "who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction." Although Section 17200 formerly applied to "[a]ny person performing or proposing to perform an act of unfair competition within this state," in 1992 the Legislature deleted the words "within this state."276 This amendment could be construed as clarifying the Legislature's intent that the power

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275 See Herman, 266 F. Supp. 2d at 1210-13 (dismissing UCL action (removed to federal court) based on private attorney general's lack of Article III standing and further holding that a state court action was prohibited because plaintiff's claim (challenging certain securities transactions) was based solely on an issue exclusively within the jurisdiction of federal courts); Hamelin v. Allstate Ins. Co., No. 01CV7954, 2002 WL 441581, at *1-3 (C.D. Cal. Mar. 12, 2002) (granting without prejudice defendant's motion to dismiss plaintiff's Section 17200 claim based on lack of Article III standing); Mortera v. North Am. Mortgage Co., 172 F. Supp. 2d 1240, 1242-44 (N.D. Cal. 2001) (holding that Section 17200 claim brought by unaffected plaintiff as a "private attorney general" did not meet Article III standing requirements and could not be removed to federal court); Seibels Bruce Group, Inc. v. R.J. Reynolds Tobacco Co., No. C-99-0593 MHP, 1999 WL 760527, at *6 (N.D. Cal. 1999) (holding that plaintiff did not have standing to assert Section 17200 claim in federal court because it did not establish a distinct and palpable injury); Stationary Eng'rs Local 39 Health & Welfare Trust Fund v. Philip Morris, Inc., No. C-97-01519 DLJ, 1998 WL 476265, at *16 (N.D. Cal. 1998) (dismissing Section 17200 claim since plaintiffs did not have standing under Article III to sue on behalf of their members and the beneficiaries of certain health trust funds; "[a]lthough state law may establish standing to sue in state court, state standing rules need not be honored by the federal courts if the requirements of Article III are not met"); Fiedler v. Clark, 714 F.2d 77, 80 (9th Cir. 1983) (remanding action brought pursuant to Hawaii statute that conferred standing for "private attorney general" because state-created law cannot confer such standing in federal court); MAI Sys. Corp. v. UIPS, 856 F. Supp. 538, 540 (N.D. Cal. 1994) (holding that standing requirements barred business competitor's Section 17200 representative action); As You Sow, 1993 WL 560086, at *2 (noting that federal standing requires a showing that the plaintiff suffered a "distinct and palpable injury"); Mangini, 793 F. Supp. at 929 (reasoning that state statutes have no effect on the standing requirements applicable to federal courts); but see Lee v. American Nat'l Ins. Co., 260 F.3d 997 (9th Cir. 2001) (holding that, where plaintiff's Section 17200 claim as to only one defendant lacked Article III standing, remaining claims were properly removed and the deficient Section 17200 claim should be dismissed or remanded).

276 By contrast, the counterpart to Section 17200, Section 17500, contains language that could be interpreted to limit the statute's extraterritorial application. Section 17500
of the California courts to remedy business practices under Section 17200 is coextensive with the outer reaches of due process -- i.e., as long as the "minimum contacts" test of personal jurisdiction is met, a California court may enjoin a defendant's business practice. Indeed, Court of Appeal decisions have held that an out-of-state defendant may be held liable under Section 17200 where the conduct at issue adversely affected California residents.\(^\text{277}\)

The decision in *Norwest Mortgage, Inc. v. Superior Court*,\(^\text{278}\) however, delineates the extraterritorial application of Section 17200. Addressing the issue of extraterritorial application of Section 17200 in the context of nationwide class certification, the Court of Appeal held that Section 17200 could not be used to regulate conduct unconnected to California.\(^\text{279}\) Specifically, the court held that Section 17200 would not apply to claims of class members residing outside of California for conduct occurring outside of California by a company headquartered outside of California.\(^\text{280}\) As the only published California state court decision directly discussing the extraterritorial application of Section 17200, *Norwest* is of significant import to businesses based outside California.\(^\text{281}\)

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prohibits false or misleading statements made "before the public in this state" and "from this state before the public in any state."

\(^{277}\) See *Yu v. Signet Bank/Virginia*, 69 Cal. App. 4th 1377, 1391 (1999) (holding that plaintiffs could sue Virginia bank under Section 17200 for acts that allegedly occurred in Virginia since, "[i]n the absence of any federal preemption, a defendant who is subject to jurisdiction in California and who engages in out-of-state conduct that injures a California resident may be held liable for such conduct in a California court"), cert. denied, 120 S. Ct. 400 (1999); *Application Group, Inc. v. Hunter Group, Inc.*, 61 Cal. App. 4th 881, 908 (1998) (affirming trial court's decision that out-of-state employer's use of unlawful non-compete clause violated Section 17200).


\(^{279}\) Id. at 222-24.

\(^{280}\) See id. at 225. The court held that application of Section 17200 to claims of non-residents based on conduct occurring outside California by a company headquartered outside of California would be arbitrary and unfair and, therefore, violative of due process. See id. at 225-27 (relying on *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 629 (1985)).

\(^{281}\) See also *Churchill Village, LLC v. General Elec. Co.*., 169 F. Supp. 2d 1119, 1126-27 (N.D. Cal. 2000) (finding that "section 17200 does not support claims by non-California residents where none of the alleged misconduct or injuries occurred in California," and defendant's incorporation out-of-state results in a "lack [of] a nexus with California [that] 'raises significant due process problems'") (citing *Norwest*, 72 Cal. App. 4th at 222; *Shutts*, 472 U.S. at 810-11).
I. Providing Notice To The Attorney General's Office In Section 17200
Appellate Matters

Section 17209 requires that, where a proceeding involving Section 17200 is commenced in California's appellate courts, including the California Supreme Court, courts of appeal or the appellate division of superior courts, the party commencing such proceeding should provide notice thereof to the California Attorney General and to the district attorney of the county in which the lower court action was originally filed.282

J. Settlement In Section 17200 Non-Class Actions

A defendant in a Section 17200 representative action can settle individually with the named representative plaintiff. Although this practice of "picking-off" the named plaintiff without court approval generally is prohibited in true class actions,283 there is no authority addressing this situation with respect to Section 17200 representative actions. It also is unclear whether a settlement of a non-class, purely representative action will have res judicata effect.284

282 Section 17209 specifically provides:

If a violation of [Section 17200] is alleged or the application or construction of [Section 17200] is in issue in any proceeding in the Supreme Court of California, a state court of appeal, or the appellate department of a superior court, the person who commenced that proceeding shall serve notice thereof, including a copy of the person's brief, on the Attorney General, directed to the Consumer Law Section, and on the district attorney of the county in which the lower court action or proceeding was originally filed. The notice, including the brief or petition and brief, shall be served within three days after commencement of the appellate proceeding, provided that the time may be extended by the Chief Justice or presiding justice or judge for good cause shown. No judgment or relief, temporary or permanent, shall be granted until proof of service of this notice is filed with the court.


283 See Cal. R. Ct. 1860 (requiring court approval for dismissal of class action).

284 The only appellate cases directly addressing the res judicata effect of a previous judgment in a "private attorney general" Section 17200 action are not published decisions, and thus are not citable precedent. See American Int'l Indus. v. Superior Court, 72 Cal. App. 4th 1376 (1999) depublished (Oct. 20, 1999) (holding that plaintiffs' causes of action for violation of Section 17200 were barred by the doctrine of res judicata where defendants had settled a previous Section 17200 representative action brought on behalf of the
although it is highly likely that such settlements would not be enforceable against non-parties.\(^{285}\) Indeed, a California Court of Appeal decision, \textit{Payne v. National Collection Systems, Inc.},\(^{286}\) held that a prior settlement of a Section 17200 claim brought by the Attorney General and a district attorney did not provide \textit{res judicata} protection against a subsequent Section 17200 class action.

In \textit{Payne}, plaintiffs alleged class claims against defendants for violation of Section 17200, among other things, based on alleged improper business practices arising out of an airline sales reservations training program.\(^{287}\) Prior to plaintiffs' action, the California Attorney General and a district attorney each secured judgments in representative Section 17200 actions against defendants.\(^{288}\) Although the trial court dismissed the lawsuit based on \textit{res judicata} grounds, the Court of Appeal reversed, concluding that \textit{res judicata} principles did not apply because an action brought by the government to enforce Section 17200 is fundamentally different from a class or other representative action.\(^{289}\)

Based on this decision, the \textit{res judicata} effect of a Section 17200 non-class settlement is highly questionable. Moreover, the due process problems that may arise in resolving representative actions under Section 17200 have been recognized, but remain unaddressed, by

\begin{itemize}
  \item See \textit{Corbett v. Superior Court}, 101 Cal. App. 4th 649, 671 (2002) (stating in dicta that "[j]udgments in individual representative UCL actions are not binding as to nonparties. Thus, a defendant may be exposed to multiple lawsuits and therefore reluctant to settle a case that will not be final as to all injured parties.").
  \item 91 Cal. App. 4th 1037 (2001).
  \item \textit{Id.} at 1040.
  \item \textit{Id.} at 1039. In the prior lawsuit, the defendants were enjoined from continuing certain conduct with respect to the training program, and one of the defendants was ordered to pay money to the Attorney General for safekeeping in a "Restitution Account" out of which the 63 class members were to be paid. None of the \textit{Payne} plaintiffs were among those 63 persons. \textit{Id.} at 1043-44.
  \item \textit{Id.} at 1044-45. The court primarily based its decision on the California Supreme Court's analysis in \textit{People v. Pacific Land Research Co.}, 20 Cal. 3d 10, 17-19 (1977), which cited certain fundamental differences between Attorney General Section 17200 claims and those brought by private litigants, including that restitution is not the primary objective of Attorney General actions and that, since public prosecutors are not members of the class, their role might not be consistent with the welfare of the class. \textit{Payne v. National Collections Sys., Inc.}, 91 Cal. App. 4th at 1045-46 (citing \textit{Pacific Land Research Co.}, 20 Cal. 3d at 18; Cal. Civ. Code §§ 1781(b)(3), (4)).
\end{itemize}
the judiciary. Accordingly, defendants attempting to settle Section 17200 actions must seriously consider a class action settlement, with proper notice and due process, in order effectively to "buy peace."

K. **Res Judicata Effect Of Judgments And Settlements In Section 17200 Actions**

The absence of res judicata in a Section 17200 action affects litigation under Section 17200 in two distinct ways. First, as mentioned above, whether a settlement in a Section 17200 representative action will bar subsequent suits is of primary concern to defendants in determining whether to settle and the monetary terms and structure of any settlement.

Second, representative actions under Section 17200 are burdened with the problem of "one-way intervention." One-way intervention occurs when a named plaintiff in a class action seeks a dispositive ruling on the merits before class certification. If the decision is favorable, the other plaintiffs will elect to join the class; if the decision is unfavorable, other plaintiffs may simply seek relief in a different forum. With respect to true class actions, California courts have attempted to alleviate this problem by providing the defendant with the option to first resolve any procedural class issues before adjudicating the merits of the case. With respect to Section 17200 representative actions, however, no such protection exists.

L. **Insurance Coverage For Section 17200 Actions**

An important question that often arises at the outset of a Section 17200 action is whether insurance coverage applies. Unfortunately, the answer in most cases is in the negative. Although coverage always is dependent upon the terms and conditions of the relevant policy or policies and the circumstances of each case, a Section 17200 claim generally falls outside the

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290 See **Bronco Wine Co. v. Frank A. Logoluso Farms**, 214 Cal. App. 3d 699, 720 (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."); cf. **Kraus v. Trinity Mgmt. Servs., Inc.**, 23 Cal. 4th 116, 138-39 (2000) (cautioning that in a representative action "it may be appropriate for the court to condition payment of restitution to beneficiaries of a representative [Section 17200] action on execution of acknowledgment that the payment is in full settlement of claims against the defendant, thereby avoiding any potential for repetitive suits on behalf of the same persons or dual liability to them").

291 See **Home Sav. & Loan Ass'n v. Superior Court**, 54 Cal. App. 3d 208, 211-13 (1976) ("Home II") (holding that court may not consider summary judgment until certification of class); **Home Sav. & Loan Ass'n v. Superior Court**, 42 Cal. App. 3d 1006, 1010-11 (1975) ("Home I") (reversing trial court's order that the entire class case may be tried after individual representative's case); see also **Colwell Co. v. Superior Court**, 50 Cal. App. 3d 32, 34 (1975) (stating that the rule of **Home I** and **Home II** is designed to protect defendant's rights, but may be waived).
scope of coverage or, in some cases, may be expressly excluded. In Bank of the West v. Superior Court, the California Supreme Court held that there was no coverage under a standard comprehensive general liability ("CGL") insurance policy for a settling defendant in a Section 17200 action. Since the decision in Bank of the West, other courts have followed suit in determining that Section 17200 claims are not covered under most standard CGL policies.

V. CONCLUSION

Although courts continue in their attempts to interpret and apply Section 17200, several courts, including the California Supreme Court, have declined to address the problematic, broad and often unworkable provisions of Section 17200 or, even when given the opportunity, have done little to clarify the statute's application and interpretation. Instead, the courts have invited the Legislature to address the troublesome aspects of the statute. Indeed, recognizing the problems inherent in Section 17200 actions, the California Supreme Court stated:

[Defendant] may be correct in observing [Section 17200] is broadly cast. [Defendant] asserts [Section 17200] has lax standing provisions, lacks res judicata effect and carries the potential for multiple, repetitive suits. [Defendant's] concerns here are best addressed to the Legislature. Generally, it is not within our province to judge the fundamental wisdom of [Section 17200's] overall scheme... Accordingly, we decline [defendant's] invitation judicially to categorize potential plaintiffs as qualified or unqualified to maintain [Section 17200] claims on behalf of the general public. The Legislature has expressly provided that "any person"... may maintain such a suit, and -- it need hardly be noted -- should the Legislature disagree with our conclusion here, it remains free to provide otherwise.

292 Many policies include express exclusions for willful or fraudulent acts. Because intent is not an element of a Section 17200 claim, even if based on an alleged "fraudulent" business practice, such an exclusion would not appear to be applicable.

293 2 Cal. 4th 1254 (1992).

294 Specifically, the Court held that there was no coverage for the Section 17200 action as a claim for damages because of "Advertising Injury." Id. at 1277. The Court reasoned, among other things, that: (1) "damages" were not available under Section 17200 -- only restitution and injunctive relief were available; and (2) "unfair competition," as used in the insurance policy, referred only to the common law tort of unfair competition and did not include a statutory violation of Section 17200. See id. at 1261-73.


296 Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal. 4th 553, 578 (1998); see also id. at 598 (Brown, J., dissenting) (stating that "[t]he judicial gloss given [Section 17200] has
Legislative initiatives to modify Section 17200, however, have been consistently unsuccessful. As a result, some tort reformists and businesses recently have opted to take their concerns directly to the voters by way of a November 2004 ballot initiative -- an initiative that would restrict the statute's broad standing provisions and require UCL representative claims to be treated as class actions. Barring success on this initiative, however, the likelihood of any legislative amendment of the UCL to the benefit of the corporate defendant probably is remote.

changed, probably forever, the perception of the role of private attorneys general. We simply cannot put this genie back into the old bottle. The Legislature at least has the wherewithal to make a new bottle. Perhaps it will also have the political will.")