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Large and Small Business Owners Take Note: "Private Attorney General" Actions Under California's Unfair Competition Law

Many owners of businesses operating in California may be unaware of certain features of California's far-reaching Unfair Competition Law ("UCL") – particularly of the UCL's "private attorney general" provision in Section 17204, which allows private plaintiffs to bring actions on behalf of "the general public" seeking restitution and injunctive relief, even if the "private attorneys general" themselves have suffered no injury.

Codified in Business & Professions Code Section 17200 et seq. ("Section 17200"), the UCL prohibits business practices that are "unlawful," "unfair," and "fraudulent." Section 17200 further prohibits "unfair, deceptive, untrue, or misleading advertising." Its sister statute, Business & Professions Code Section 17500, et seq. ("Section 17500"), also prohibits false and misleading advertising. Both Section 17200 and Section 17500 contain "private attorney general" provisions.

Certain "private attorney general" features are striking, even to lawyers who regularly deal with class and unfair competition actions in other jurisdictions. For example, "any" person may bring an action under Sections 17200 and 17500 as a "private attorney general" even though that person has never suffered any injury from the alleged business practice or advertising. Moreover, by suing on behalf of the general public, a "private attorney general" not only may enjoin a business from acting or refusing to act a certain way, but may even force businesses to pay restitution to millions of people affected by the alleged wrongful business practice or advertising. A "private attorney general" may also win attorneys' fees for doing so, if a court finds the action benefits the public interest.

California's UCL has thus given California attorneys – chiefly plaintiffs' attorneys – a unique statutory vehicle to bring high-stakes litigation against businesses operating in California that would not be possible to bring in another jurisdiction.

One recent example is *Kasky v. Nike, Inc.*, 27 Cal. 4th 939 (2002). In *Kasky*, a "private attorney general" sued Nike for unfair business practices and false advertising, challenging Nike's public relations campaign designed to respond to criticism regarding Nike's foreign labor practices. Among the challenged statements were "Nike products are made in accordance with applicable governmental laws and regulations" and "Nike pays average line workers double the minimum wage in Southeast Asia."

Under traditional standing analysis, there would have been no way for plaintiff to bring such claims against Nike. However, under Section 17200, Mr. Kasky, acting as a "private attorney

general," may have the ability to force Nike to disgorge all monies obtained as a result of Nike's alleged unfair practices, and to force Nike to undergo a court-approved public information campaign to correct any false or misleading statements. The Supreme Court in its May 2002 opinion allowed the suit to proceed, despite Nike's claim that regulation under Section 17200 infringed Nike's First Amendment rights.

Other examples of recent "private attorney general" actions include:

- A lawsuit filed against Bank One in which the plaintiff alleged that Bank One's "Same-As-Cash" advertisements were false and misleading because the advertisements did not indicate that consumers were required to make a minimum monthly payment and would be liable for late payment fees. The Court of Appeal allowed the plaintiff to proceed with the lawsuit under Section 17200.
- A lawsuit filed against AT&T in which the Court of Appeal determined it to be misleading for a long distance telephone company to sell prepaid phone cards without disclosing that the consumer's calls would be rounded up to the next whole minute.

The lack of a standing requirement in Section 17200 has enabled – and even encouraged – the formation of corporations whose sole function is to bring litigation under the statute. For example, in *Stop_Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553 (1998), the plaintiff was a private, for-profit corporation specifically formed to bring a Section 17200 action against a defendant accused of violating a penal statute prohibiting the sale of cigarettes to minors. Other plaintiffs' firms have formed similar corporations that purport to bring actions on behalf of consumers.

What makes matters worse from the defendants' perspective is that Section 17200 actions are difficult to defend against, because the wording and reach of the statute is so broad. Plaintiffs may allege that a business is engaged in "unlawful" business practices merely by alleging that the business is violating or has violated nearly any state or federal regulation, regardless of whether that state or federal regulation would otherwise afford plaintiff a private right of action.

An action alleging "unfair" business practices is even more difficult to defend against. An action is "unfair" when its harm outweighs its utility, or where a business practice offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. This "intentionally broad" standard is designed to allow courts "maximum discretion to prohibit new schemes to defraud." *Motors, Inc. v. Times Mirror Co.*, 102 Cal. App. 3d 735 (1980). As a result of this broad wording, it is difficult to get a Section 17200 action dismissed on the pleadings or on summary judgment.

Finally, an action alleging "fraudulent" business practices or "deceptive" or "false" advertising need only demonstrate that the business practice or advertising is "likely" to deceive the public. There is no need to prove that any member of the public was actually deceived, that any member of the public reasonably relied on the business practice or advertising, or that any member of the public sustained injury as a proximate result of the business practice or advertising. Thus, unlike class actions based on common-law fraud, a defendant cannot defeat a "private attorney general" action based on fraudulent business practices or advertising by showing that individualized issues of reliance make the action untenable. *See Fletcher v. Security Pacific National Bank*, 23 Cal. 3d 442 (1979).

Defendants are at risk for "private attorney general" actions brought by state residents to the extent defendants are doing business in California. To the extent out-of-state residents are harmed by conduct occurring in California, they too may seek the protections of Sections 17200 and 17500.

See Wershba v. Apple Computer, Inc., 91 Cal. App. 4th 224 (2001); *Norwest Mortgage, Inc. v. Superior Court*, 72 Cal. App. 4th 214 (1999); *see also Diamond Multimedia Systems, inc. v. Superior Court*, 19 Cal. 4th 1036 (1999) (out-of-state purchasers of securities entitled to bring suit under California Corporations Code section prohibiting market manipulation). Apparently, the only defendants beyond the reach of Sections 17200 and 17500 are those engaging in activities wholly outside California, and which harm only out-of-state residents. *See Norwest Mortgage*, above.

Notwithstanding the broad reach or such actions, there are significant limitations to "private attorney general" actions under Sections 17200 and 17500. For example, a "private attorney general" action under Sections 17200 and 17500 may recover only restitution and injunctive relief. For now, the Supreme Court has read "restitution" narrowly to mean either (1) the return of money (or property) that was once in the possession of the plaintiff and/or (2) "quantifiable sums one person owes to another," such as back wages. *Kraus v. Trinity Mgmt. Servs., Inc*., 23 Cal. 4th 116 (2000); *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163 (2000).

This could change, however. The Court of Appeal, in a class action under the UCL that did not involve a "private attorney general," recently held that it would allow the recovery of disgorged profits over and above the *Kraus* and *Cortez* definition of restitution. *Corbett v. Superior Court*, 2002 WL 1969843 (Aug., 27, 2002). This holding will likely vastly increase the sums defendants will be required to pay to settle or satisfy judgment in UCL class actions going forward. Moreover, the California Supreme Court is currently poised to decide whether a "private attorney general" in a non-class action can also seek disgorgement of profits. Should the Supreme Court decide that disgorgement is an allowable remedy in non-class actions as well, it will encourage "private attorneys general" to bring more such claims. In the meantime, "private attorneys general," such as Mr. Kasky above, continue to assert their entitlement to the disgorgement remedy.

There are various defenses to "private attorney general" actions, though, as noted above, "private attorney general" actions are rarely dismissed on the pleadings. For example, the California Supreme Court has limited the sweeping scope of Section 17200 by identifying a 'safe harbor' exception to the standard for "unfair" practices. *Cel-Tech v. Los Angeles Cellular Telephone*, 20 Cal. 4th 163 (1999). In *Cel-Tech*, the Court articulated the view that plaintiffs could not use Section 17200 to "plead around" a statute or regulation that had expressly legalized the targeted conduct.

While the *Cel-Tech* "safe harbor" is good news for defendants who find a statute that expressly permits the business practice or advertising, quite often defendants face an uphill battle in defending a "private attorney general" action brought under Section 17200 and 17500. Should a business face such an action, it should retain competent California counsel who have experience with the issues raised in the unique context of a "private attorney general" action.

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