69th Assembly District Informational Hearing
Assemblyman Lou Correa
Private Attorney Abuse of the Unfair Competition Law
(Business and Professions Code Sec. 17200)

Perspectives and Possible Solutions

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Perspectives

1. Problem involves private attorneys (not district attorneys, the Attorney General, etc.).

2. Problem is not new and is much broader than mass "legal shakedowns" of small businesses.

3. Neither federal law nor the laws of any other state give private lawyers the ability to win attorney fees for bringing business practices lawsuits on behalf of the general public without clients who are directly affected and without any detriment or harm occurring.

4. Law Revision Commission documented abuses in its 1996 report (see excerpt below*) and, in effect, predicted the current problem. Bi-partisan legislative proposals died.

5. The problem cannot be solved one lawyer at a time by the State Bar or anyone else. Past commentaries on the 17200 problem - the Law Revision Commission's, judicial opinions, and law review articles, for example - have either proposed legislation or stated that the remedy lies in statutory amendments. In 1995 the State Bar failed to find wrongdoing by an attorney filing suits and demanding settlements in a process virtually identical to those igniting current outrage.

6. Private lawyers who choose to wear the mantel of "private attorney generals" and file suits "representing the public" should receive much more judicial and public scrutiny than lawyers solely representing named clients. District attorneys and the Attorney General are elected officials and accountable to the public. Private lawyers are not.

7. Solutions which begin only ***after*** a defendant has been dragged into a case will be ineffective. Lawyers will still be able to intimidate and put a defendant in financial jeopardy before a judge, district attorney, or regulatory agency ever hears about the case. "Legal shakedowns" will continue.

Possible Solutions ***(Note: The following are presented for discussion purposes and have not been adopted by the Civil Justice Association of California. Some proposals stand alone and others can be combined. They are listed in no particular order.)***

1. Completely prohibit private attorneys from filing ***representative*** actions under 17200 (may use class action process with certification and notice protection for consumers and defendants).

2. Make it a felony for a private attorney to communicate with a potential defendant in a 17200 ***representative*** action before a court has approved a lawsuit and the lawsuit has been filed and served.

3. Prohibit a private attorney from filing a ***representative*** action over a business practice going on in the past but which ceased before the suit was filed and no one has suffered any loss.

4. Prohibit a private attorney from filing a 17200 action unless the activity involves an actual transaction with a consumer and actual loss has occurred.

5. Require private attorney who proposes a 17200 ***representative*** action (or wants to include a 17200 ***representative*** claim with other causes of action) to first present a judge with an affidavit from the Attorney General's Office and/or the government agency charged with regulating the activity. The affidavit must say that the action will be significantly in the public interest.

6. Require a private attorney filing a 17200 ***representative*** action to pay a filing fee (for example, $200 per defendant or $2,000 - whichever is higher).

7. Unless a 17200 ***representative*** action is totally dismissed, every settlement and compromise must be reviewed and approved by a judge.

Any portion of a settlement or compromise that is proposed to serve as "private attorney general" fees must be separately requested by the attorney and reviewed by the court and set on the basis of whether identifiable persons were actually misled and suffered detriment, whether an intentional act was involved (as opposed to a technical, accidental mistake), whether the activity was ongoing or a one-time event, and other factors the judge may consider in determining whether the lawsuit is truly important to the interests of consumers, businesses, and the general public.

8. Prohibit secret fee and funding agreements between a private attorney filing a ***representative*** action and a named individual client or organization (and its officers) named as a plaintiff in a 17200 case. All agreements must be presented to the court when a private attorney seeks court pre-approval of a 17200 ***representative*** lawsuit.

9. Require a private attorney intending to file a 17200 ***representative*** action to first obtain permission from the Attorney General. If permission is not granted within 60 days of the request, the answer is presumed "no."

10. Prohibit a private attorney from filing a 17200 ***representative*** action over an activity which has already been addressed by a private attorney earlier or is being dealt with by a district attorney or Attorney General or a government regulatory agency.

11. Require a judge to order a private attorney to reimburse defendants named in a ***representative*** action for their attorney fees, costs, and lost business and work time spent defending a claim whenever the court rules in the defendant's favor.

***California Law Revision Commission Report - Comments on 17200 Made in 1996**

"The survey of cases and practitioners involved in Unfair Competition Act litigation indicates that the statute's dilemma is no longer theoretical, it is currently functioning in a number of cases to frustrate just and expeditious resolution of disputes…." The unusual standing license of the Unfair Competition Act, in combination with the lack of class action qualification, certification, and notice requirements applicable, added to two other dynamics

active in the late 1980's to create public/private and private/private civil action conflicts.

"The first such new development has been the increasing use of Section 17200 as a general allegation in complaints. The use of the Act as a cause of action facilitates broad discovery. Moreover, where applicable to a private dispute between two business entities, it may allow the plaintiff to create possible exposure from overcharges applicable to consumers, enhancing a pre-existing plaintiff's bargaining power. At the same time, such "add-on" use of the Act by such private plaintiffs raises serious due process questions; one using an allegation for bargaining purposes may be willing to settle out those claims in order to collect on a proprietary cause of action. On the other hand, if settlements by those seeking to represent "the general public" under the statute do not bind any other person, than the statute is unable to assure finality to any defendant subject to suit. Both of the above alternatives are unacceptable features in any statutory remedy.

"The second new development has been an increase in attorney fee availability and in attorneys (and professional plaintiff firms) specializing in mass tort or class action cases. Where injunctive relief may involve restitution (a common element to an injunctive remedy), and where there is a practice applied en masse to a large marketplace (also common), attorney's fees may be available for prevailing counsel. Moreover, Code of Civil Procedure Section 1021.5 allows for a "private attorney general" attorney fee where a litigant prevails and vindicates rights which extend substantially beyond his or her own proprietary stake. And those fees may involve a "multiplier" substantially enhancing market level billing." Professor Robert C. Fellmeth, University of San Diego Law School, 1996 Report, California Law Revision Commission.