

**RESTITUTION, DISGORGEMENT AND INJUNCTIONS:
THE AVAILABILITY OF EQUITABLE AND INJUNCTIVE RELIEF
UNDER THE CALIFORNIA UNFAIR COMPETITION LAW AND
THE UNIQUE CHALLENGES PRESENTED BY MULTIPLE
ENFORCERS AND FOLLOW-ON LAWSUITS**

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A. Introduction

This paper analyzes the remedies available to private parties bringing class actions and/or representative actions under the California Unfair Competition Law (“UCL”), Bus. & Prof. Code § 17200 *et seq.*, and the California False Advertising Statute, Bus. & Prof. Code § 17500 *et seq.* (“Section 17500”), including equitable relief (restitution and disgorgement) and injunctive relief. The analysis includes relevant statutory provisions and recent decisions of the Supreme Court of California and the California Courts of Appeal construing and applying the UCL.

The context of this analysis is the appropriate roles and interplay between government enforcement actions, private class actions, and “private attorney general” (or “representative”) actions brought under Section 17200 and Section 17500. Since June 2000, the author has served as co-lead counsel for the nationwide class(es) certified by state courts in California and Florida in consumer protection class actions brought against Rexall Sundown, Inc. (“Rexall”), a Florida-based company, arising out of sales of an anti-cellulite dietary supplement called “Cellasene.” Rexall began selling Celasene in March 1999 to women who wanted to reduce or eliminate cellulite. (Cellulite is the dimpling of the skin around the thighs and buttocks that occurs in women.) The product’s instructions required users to take one pill three times per day for at least

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eight weeks. Cellasene was sold in a pink-and-white box with blue lettering that described it as “**The One and Only.**” In its advertisements, Rexall made statements such as “[u]nlike massages and creams, Cellasene works within, nutritionally, to help *eliminate* cellulite at its source.” Rexall’s nationwide advertising campaign targeted women from 18 to 54 years of age, and the product was sold in drug stores, grocery stores and other retail locations throughout the United States. During 1999-2000, retail sales of Cellasene in the United States totaled approximately \$40 million.

In June-July 2000, consumer protection class actions were filed against Rexall in the Los Angeles Superior Court in California and the Palm Beach Circuit Court in Florida. (*Teranchi et al. v. Rexall Sundown, Inc.*, Case No. BC 232370; *LaRaia v. Rexall Sundown, Inc.*, Case No. CL 007021 AF.) In July 2000, the Federal Trade Commission filed an enforcement action against Rexall in the U.S. District Court for the Southern District of Florida in Miami. (*FTC v. Rexall Sundown, Inc.*, Case No. 00-7016-CIV-MARTINEZ.) Upon the filing of the FTC enforcement action, Rexall filed motions asking the California and Florida state courts to dismiss and/or stay those consumer class actions pending resolution of the federal court action; however, both state court judges refused to do so. Eventually, fact witness discovery in the state and federal court cases was coordinated and the parties engaged in extensive litigation and fact witness discovery over a two-year period. Beginning in 2002, the consumer plaintiffs, Rexall, and the FTC participated in a successful mediation before Judge John K. Trotter (Ret.) and reached a global settlement agreement. In April 2003, the California and Florida state court judges preliminarily approved the proposed nationwide settlement and, following dissemination of class notice, those courts granted final approval of the settlement in October 2003.

Under the terms of the nationwide settlement, Rexall agreed to pay \$12 to \$16 million into a Consumer Redress Fund to pay refunds to consumers who purchased Cellasene. (*See Exhibit A* [long-form class notice]; *Exhibit B* [Claim and Release Form].) The class notice described the “Redress Program”:

Purchasers of Cellasene will be allowed to obtain redress for a maximum eight (8) boxes of Cellasene, to be valued at \$30 per box. In order to obtain redress, Class members will have to complete a claim form (“Proof of Claim” form enclosed), stating how many boxes of Cellasene they purchased, that they were dissatisfied with it and sign the form as a waiver of rights to make any further claims against Rexall for the sale of Cellasene. Class Members will not be required to provide proof of purchase, such as empty bottles or receipts, but may include such proof if it is in their possession. The Claims Administrator will have discretion to request additional information from consumers, and to request such submissions be made under penalty of perjury. If valid claims plus costs of Class Notice and claims administration exceed \$8 million, the Claims Administrator may request consumers seeking in excess of 6 boxes to resubmit claims under penalty of perjury. If the total value of all claims received combined with the notice and administration costs exceeds the \$12 million . . . Redress Fund, each class member will receive a pro rata share of the distribution.

(*Exhibit A*, at 2-3.)

In addition to paying for the costs of nationwide class notice and the services of a settlement and claims administrator, Rexall also paid plaintiffs’ counsel’s attorneys’ fees and costs. In addition, to settle the consumer class actions and the FTC enforcement action, Rexall entered into a permanent injunction barring it from making certain claims as to anti-cellulite and weight loss dietary supplements. (*See Exhibit C* [Stipulated Final Order for Permanent Injunction and Settlement of Claims for Monetary Relief].)

The consumer class actions and FTC enforcement action brought against Rexall illustrate the opportunities and problems presented by parallel lawsuits brought by private parties and government agencies. The successful resolution of those cases, in which discovery proceedings

were coordinated, and “global” mediation was successfully conducted by cooperative counsel, provides a model against which similar cases may be judged.

The consumer class actions brought against Rexall were *not* “coattail class actions.”² Indeed, the California class action was filed almost one month before the FTC enforcement action, and the Florida class action was filed on the same day as the FTC enforcement action. Rather than taking advantage of investigative work conducted by government attorneys, plaintiffs’ counsel in the consumer protection class actions fully cooperated with the FTC’s counsel in making discovery available to them. During 1999-2000, the FTC obtained certain documents from Rexall pursuant to a civil investigative demand. After the private class actions were filed in June-July 2000, Rexall’s counsel produced the same documents to plaintiffs’ counsel in the California and Florida cases. FTC attorneys deposed certain Rexall employees first; however, following an *in camera* review, Judge Anthony Mohr of the Los Angeles Superior Court ordered Rexall to produce dozens of “privileged” documents that had been withheld from discovery. Plaintiffs’ counsel sought permission to disclose those documents to the FTC, which was granted by Judge Mohr. FTC attorneys then re-deposed certain key Rexall witnesses.³

² One commentator describes a “coattail class action” as a “class action that follows government litigation, seeking to benefit from the government’s work.” Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco and the Mixing of Public and Private Lawyering in Mass Litigation* (2000) 34 U.C. DAVIS L. REV. 1, 5. Ironically, after a agreement-in-principle to settle the California and Florida class actions and the FTC enforcement action brought against Rexall, a “coattail” enforcement action was filed by a local California district attorney’s office against Rexall. (*State of California v. Rexall Sundown, Inc.*, San Bernardino County Superior Court Case No. SCVSS 093311.) Settlement of the state enforcement action was then folded into the “global” settlement. (See **Exhibit C**, Part VII.J, at 6.)

³ Compare John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working* (1983) 42 MD. L. REV. 215, 222: “[A] recurring pattern is evident under which the private attorney general simply piggybacks on the efforts of public agencies – such as the SEC, the FTC, and the Antitrust Division of the Department of Justice – in order to reap the gains from the investigative work undertaken by those agencies.”

Other notable examples of what might be termed “reverse coattail” actions abound. In approving the \$3 billion settlement achieved by plaintiffs’ counsel in a recent antitrust case, *In re Visa Check/MasterMoney Antitrust Litigation* (E.D.N.Y. 2003) 297 F. Supp. 2d 503, Judge Gleeson frankly stated that “the government piggybacked on Class Counsel’s efforts.” (*Id.* at 524 n.31.) As the district court explained:

Two years after this action was filed [in Oct. 1996], the Federal Trade Commission began investigating the practices of defendants at issue here, using the briefings and documentation of Lead Counsel. Based in part on this information, the Department of Justice filed its lawsuit against Visa and MasterCard based on their exclusionary practices. *See United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001), *modified by* 183 F. Supp. 2d 613 (S.D.N.Y. 2001), *aff’d*, 344 F.3d 229 (2d Cir. 2003) . . . [I]n January 2000, I granted the government's motion to intervene in this action to allow Lead Counsel to share with the government their substantial analysis of the documents and depositions in this action. *In re Visa Check/MasterMoney Antitrust Litig.*, 190 F.R.D. 309, 312 (E.D.N.Y. 2000).

(297 F. Supp. 2d at 524 n.31.)

In his law review article, Professor Erichson explicated this point, making reference to the tobacco and Microsoft litigations:

The history of the tobacco litigation demonstrates the folly of trying to make simple statements about complex litigation. My working definition of coattail class actions - class actions that follow government litigation seeking to benefit from the government's work - fails to capture the multi-directional causal links between government and private litigation in complex matters. Class actions often ride the coattails of government litigation, but sometimes the private litigation comes first. Claims also may interact in a more complex process in which the government and private claims propel and reinforce each other. Whereas the Microsoft litigation offers a relatively clean example of coattail class actions, the tobacco litigation is better understood as a complex, two-way process. The state lawsuits turned out to be the breakthrough claims in the tobacco litigation, but it is unlikely that the attorneys general could have launched their attack without the benefit of prior litigation by private tobacco plaintiffs. In particular, the *Castano* class action, by demonstrating the potential power of well-financed, highly coordinated tobacco plaintiffs' lawyers, may have done as much as the state suits to change the momentum. Moreover, powerful insider information became available to tobacco plaintiffs' lawyers in the mid-1990's, greatly strengthening both the states' and private plaintiffs' legal claims. It

probably would be accurate to say that the confluence of these three factors - the insiders' information, the *Castano* class action, and the state attorney general lawsuits - turned the tide of the tobacco litigation.

Given the investigative powers of certain government agencies and the well-developed mass tort plaintiffs' bar, it may be that government actions will usually come first in antitrust and securities litigation, whereas individual or class suits will usually come first in mass tort litigation. Either way, recent experience shows that the onset of government litigation powerfully assists private lawsuits and class actions that follow.

(Erichson, *Coattail Class Actions*, 34 U.C. DAVIS L. REV. at 14-15 [footnotes omitted].) As Professor Erichson concluded, “[t]he relationship between government litigation and coattail class actions is be[st] described as one of symbiosis, an association of mutual advantage. Not only do private class actions often advance government litigation, but the two complement each other as deterrence and compensation mechanisms.” (*Id.* at 41 [footnotes omitted].)

The successful prosecution and global settlement of the Rexall Cellasene class actions and the FTC enforcement action were largely due, in the author’s opinion, to the powerful remedies provided by the California Unfair Competition Law and False Advertising Statute. Although litigation of the California state court class action and the Florida state court class action were coordinated, plaintiffs’ counsel prosecuted them as separate cases. When plaintiffs in those cases sought class certification, the Los Angeles Superior Court was asked only to certify a class of California residents who purchased “Cellasene,” while the Palm Beach Circuit Court was asked to certify a 49-state class. This litigation strategy was dictated to a large extent by the fact that California’s consumer protection laws are arguably the most liberal in the country.

B. The Relevant California Statutory Provisions

The UCL imposes liability for “unfair competition,” which is defined as “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading

advertising. . . .” (Bus. & Prof. Code, § 17200.) Section 17203 of the UCL, entitled “Remedies and Injunction,” expressly authorizes the trial court to award equitable relief (in the form of restitution and disgorgement) *and* injunctive relief:

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***.

(Bus. & Prof. Code, § 17203 [emphasis added].)⁴ Section 17204 of the UCL, which permits actions for injunctions, provides:

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 by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city and county 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***.

(Bus. & Prof. Code § 17204 (emphasis added).

⁴ The corresponding remedies provision of the False Advertising Statute states:

Any person, corporation, firm, partnership, joint stock company, or any other association or organization which violates or proposes to violate this chapter may be enjoined by 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, corporation, firm, partnership, joint stock company, or any other association or organization of any practices which violate this chapter, or which 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 any practice in this chapter declared to be unlawful.

(Bus. & Prof. Code, § 17535.)

Simply stated, the UCL permits “any person acting for the interests of itself, its members or the general public” (*id.*, § 17204), to file an action for restitution and/or injunctive relief (*id.*, § 17203), against any person or business entity alleged to be engaged in “unfair competition.” (*Id.*, § 17200.)⁵ As set forth below, UCL actions may be brought as class actions (in accordance with Section 382 of the Code of Civil Procedure) or as so-called “representative” actions.

C. Standing To Bring UCL Actions

Sections 17203 and 17204 of the UCL permit a private plaintiff who has suffered no injury to file a lawsuit in order to obtain relief for others. (*See Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal. 4th 553, 561-62; *accord Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal. 4th 1134, 1143 [“[S]tanding to sue under the UCL is expansive Unfair competition actions can be brought by a public prosecutor or ‘by any person acting for the interests of itself, its members or the general public.’”] [quoting § 17204].)⁶ In addition to these expansive concepts of standing, “Section 17200 does not require that a plaintiff prove that he or she was directly injured by the unfair practice or that the predicate law provides for a private right of action.” (*Gregory v. Albertson’s, Inc.* (2002) 104 Cal. App. 4th 845, 851 [citation

⁵ As the Supreme Court has stated, the UCL was “one of the so-called ‘little FTC Acts’ of the 1930’s, enacted by many states in the wake of amendments to the Federal Trade Commission Act enlarging the commission’s regulatory jurisdiction to include unfair business practices that harmed, not merely the interests of business competitors, but of the general public as well.” (*Rubin v. Green* (1993) 4 Cal. 4th 1187, 1200.) The legislative history of the UCL was discussed by the Supreme Court in *Kraus v. Trinity Mgmt. Svcs., Inc.* (2000) 23 Cal. 4th 116, 129-31, and summarized by the Court of Appeal in *Corbett v. Superior Court* (2002) 101 Cal. App. 4th 649, 663-64.

⁶ The primary purpose of the UCL is “the preservation of fair business competition.” (*Cel-Tech Comms., Inc. v. Los Angeles Cellular Tele. Co.* (1999) 20 Cal. 4th 163, 180 [citations omitted].). This purpose includes “the right of the public to protection from fraud and deceit.” (*Barquis v. Merchants Collection Ass’n* (1972) 7 Cal. 3d 94, 110; *see also People ex rel. Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal. App. 4th 508.)

omitted].)⁷ Moreover, a “representative” plaintiff need only show that members of the general public are *likely* to be deceived. “Allegations of actual deception, reasonable reliance, and damage are unnecessary.” (*Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal. 3d 197, 211.)

As the Supreme Court of California has repeatedly recognized, sound public policy reasons support expansive standing principles in UCL actions: “Class actions and representative UCL actions make it economically feasible to sue when individual claims are too small to justify the expense of litigation, and thereby encourage attorneys to undertake private enforcement actions.” (*Kraus*, 23 Cal. 4th at 126.) For these reasons, as a survey of recent cases demonstrates, private UCL claims have been asserted in a variety of factual scenarios to protect the rights of California consumers, as well as other types of persons and entities:

- *Cruz v. Pacificare Health Sys., Inc.* (2003) 30 Cal. 4th 303 [scheme designed to induce persons to enroll in health care plans]
- *Byars v. SCME Mortg. Brokers* (2003) 109 Cal. App. 4th 1134 [borrowers’ claim regarding “yield spread premium” – rebate paid to mortgage broker by lender]
- *Herr v. Nestle U.S.A., Inc.* (2003) 109 Cal. App. 4th 779 [age discrimination in employment]
- *Nagel v. Twin Labs., Inc.* (2003) 109 Cal. App. 4th 39 [false and misleading advertisements and product labels used to sell dietary supplements]

⁷ In *Lee v. American Nat’l Ins. Co.* (9th Cir. 2001) 260 F.3d 997, the plaintiff brought an action in federal court under the UCL, claiming that California law allowed him to challenge an insurance company’s allegedly unfair business practices as a “private attorney general” even though he suffered no individualized injury as a result of the insurer’s challenged conduct. The Ninth Circuit agreed with the district court that “[even] though the [UCL] requires no . . . actual injury to pursue a claim in state court . . ., Article III of the [U.S.] Constitution takes priority in federal court over the [UCL’s] more liberal standing rules.” (*Id.* at 999.) “So a plaintiff whose cause of action is perfectly viable in state court under state law may be foreclosed from litigating the same cause of action in federal court, if he cannot demonstrate the requisite injury.” (*Id.* at 1001-02; *see also Mortera v. North America Mortg. Co.* (N.D. Cal. 2001) 172 F. Supp. 2d 1240, 1244 [remanding UCL representative action to state court].)

- *In re Vitamin Cases* (2003) 107 Cal. App. 4th 820 [price-fixing scheme for vitamin products]
- *Brockey v. Moore* (2003) 107 Cal. App. 4th 86 [unauthorized practice of law]
- *Lavie v. Procter & Gamble Co.* (2003) 105 Cal. App. 4th 496 [TV commercials advertising pain relief product “Aleve”]
- *Coast Plaza Doctors Hospital v. UHP Healthcare* (2002) 105 Cal. App. 4th 693 [hospital withheld payments from health care providers]
- *People ex rel. Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal. App. 4th 508 [use of misleading statements to sell annuities to senior citizens]
- *Gibson v. World Savs. & Loan Ass’n* (2002) 103 Cal. App. 4th 1291 [lender’s purchase of expensive replacement hazard insurance policies for benefit of borrowers]
- *Consumer Justice Center v. Olympian Labs, Inc.* (2002) 99 Cal. App. 4th 1056 [false and misleading advertisements for dietary supplements]
- *Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal. App. 4th 1158 [lender charged delinquent borrowers for property inspections]
- *Massachusetts Mut. Life Ins. Co. v. Superior Court* (2002) 97 Cal. App. 4th 1282 [insurance policy “vanishing premiums” scheme]
- *Prata v. Superior Court* (2001) 91 Cal. App. 4th 1128 [creditor falsely advertised credit program as "Same as Cash" without advising consumers that the program required minimum monthly payments]
- *AICCO, Inc. v. Insurance Co. of No. America* (2001) 90 Cal. App. 4th 579 [suit against insurance company alleging improper transfer of policies and assignment of liabilities without consent of policyholders]

As the Court of Appeal recently summarized, private UCL actions have been brought on behalf of “unwary targets of false advertising, innocent youths corrupted by lawbreaking retailers, aggrieved used car purchasers, or a ‘singularly dense’ group of consumers who fall prey to misleading advertising designed to lure them into high-interest loan contracts.” (*Rosenbluth Int’l, Inc. v. Superior Court* (2002) 101 Cal. App. 4th 1073, 1077-78; *see also Day v. AT&T Corp.* (1998) 63 Cal. App. 4th 325, 332 [“Section 17200 has been interpreted broadly to bar all

ongoing wrongful business activity, including misleading advertising, in whatever context it presents itself.”.)

With respect to the standard of proof, at trial “a UCL violation is established by the usual preponderance of the evidence.” (*People v. First Fed. Credit Corp.* (2002) 104 Cal. App. 3d 721, 732 [citation omitted].) But “there is no right to a jury trial in such cases.” (*Id.* at 733 [citation omitted].) Rather, bench trials (with or without advisory juries to serve as fact finders) are the norm in Section 17200 cases. But the UCL casts a broad liability net: “As a general matter, parties may be held jointly and severally liable for unfair competition and for making false and misleading statements.” (*Id.* at 734 [citations omitted]; *see also People v. Orange County Charitable Services* (1999) 73 Cal. App. 4th 1054, 1073 [suggesting, but not holding, that restitution may be ordered jointly and severally].)

The statute of limitations for UCL claims is four years. (Bus. & Prof. Code, § 17208.) Given California’s presumption against extraterritorial application of its unfair competition laws, the UCL only applies to injuries that occur in California. (*Norwest Mortg., Inc. v. Superior Court* (1999) 72 Cal. App. 4th 214, 222.)⁸

⁸ In *Norwest Mortg.*, the Court of Appeal affirmed certification of a nationwide class on behalf of residents and nonresidents of California where the defendant's conduct occurred in California; however, the court reversed certification for that portion of the class who were nonresidents and for whom the conduct occurred entirely outside California, by the defendants whose headquarters and principal place of operations were outside California. The court acknowledged that remedies under the California unfair competition law “may be invoked by out-of-state parties when they are harmed by wrongful conduct occurring in California.” (72 Cal. App. 4th at 224-25; *see also Diamond Multimedia Sys., Inc. v. Superior Court* (1999) 19 Cal. 4th 1036, 1063-64.) In those cases where the claims arose “from conduct occurring entirely outside of California,” however, certification would be inappropriate. (*Norwest Mortg.*, 72 Cal. App. 4th at 227.)

D. Section 17200 Proscribes “Unlawful,” “Unfair,” And “Fraudulent” Conduct

Written in the disjunctive, Section 17200 “establishes three varieties of unfair competition.” (*Podolsky v. First Health Care Corp.* (1996) 50 Cal. App. 4th 632, 647.) Section 17200 is violated if a business practice is unlawful *or* unfair *or* deceptive. (*Cel-Tech Comms.*, 20 Cal. 4th at 180.) There are separate lines of legal authority construing the three prongs, each of which can give rise to a UCL claim. (*See Gregory*, 104 Cal. App. 4th at 851.) Because Section 17200’s definition of “unlawful competition” is disjunctive, only one of the three categories of prohibited conduct need be shown. (*South Bay Chevrolet v. General Motors Accep. Corp.* (1999) 72 Cal. App. 4th 861, 878.)⁹ As a practical matter, complaints asserting UCL claims often allege all three types of wrongdoing.

With respect to the *unlawful* prong, “virtually any state, federal or local law can serve as the predicate for an action” under the UCL. (*Podolsky*, 50 Cal. App. 4th at 647.) To be “unlawful” for purposes of Section 17200, a practice must be “forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made.” (*Saunders v. Superior Court* (1994) 27 Cal. App. 4th 832, 838-39 [citation omitted]; *see also People ex rel. Renne v. Servantes* (2001) 86 Cal. App. 4th 1081, 1087.)¹⁰ “In essence, an action based on [§] 17200 to redress an unlawful business practice ‘borrows’ violations of other laws and treats these violations, when committed pursuant to business activity, as unlawful practices independently

⁹ In construing the UCL, the California courts have drawn upon “common law precedents in the fields of business torts” as well as “judicial interpretation of the closely parallel provisions of the Federal Trade Commission Act.” (*Gregory*, 104 Cal. App. 4th at 851 [citations omitted].)

¹⁰ For example, violations of federal law may serve as predicates for a Section 17200 claim. (*See, e.g., Roskind v. Morgan Stanley Dean Witter & Co.* (2000) 80 Cal. App. 4th 345, 352 [securities laws]; *see also Joseph v. J.J. MacIntyre Cos., LLC* (N.D. Cal. 2002) 238 F. Supp. 2d 1158, 1171 [Federal Debt Collection Practices Act]; *Hendricks v. Dynegy Power Mktg., Inc.* (S.D. Cal. 2001) 160 F. Supp. 2d 1155, 1164-65 [Federal Power Act].) Federal law can, in some

actionable under [§] 17200 et seq. and subject to the distinct remedies provided thereunder.”
(*Farmers Ins. Exch. v. Superior Court* (1992) 2 Cal. 4th 377, 383; see also *Brockey*, 107 Cal. App. 4th at 98 [Section 17200 “borrows standards of conduct from other statutes, and a plaintiff need only show the violation of any law”] [citation omitted].)

In *Stop Youth Addiction*, 17 Cal. 4th at 556, a nonprofit corporation sued retailers for selling cigarettes to minors in violation of Section 308 of the California Penal Code, which does not authorize a private right of action. The trial court sustained the retailers’ demurrer; however, the Court of Appeal reversed and the Supreme Court affirmed the decision of the Court of Appeal. The court reasoned as follows: (1) the nonprofit corporation had standing under the UCL to bring a private action, even though Section 308 of the Penal Code, which was a predicate to the UCL action, did not provide a private right of action; (2) private party standing under the UCL was not impliedly repealed by the Penal Code section prohibiting tobacco sales to minors or by the Stop Tobacco Access to Kids Enforcement (STAKE) Act; and (3) a private action did not violate public policy by putting prosecutorial discretion within the control of an interested party or by diminishing the enforcement responsibilities of the California Department of Health Services under the STAKE Act.¹¹

As to the second prong of Section 17200, the Supreme Court of California has not yet developed or approved a definition regarding what is *unfair* in the context of a UCL action

instances, preempt actions brought under the UCL. (See, e.g., *Congress of Calif. Seniors v. Catholic Healthcare West* (2001) 87 Cal. App. 4th 491, 495, 510-11.)

¹¹ See also *Chabner v. United of Omaha Life Ins. Co.* (9th Cir. 2000) 225 F.3d 1042 [UCL action predicated upon violations of California Insurance Code]; *Hangarter v. Paul Revere Life Ins. Co.* (N.D. Cal. 2002) 236 F. Supp. 2d 1069, 1105-06 [UCL action predicated upon violations of California Unfair Insurance Practices Act]. When alleging “unlawful” conduct for purposes of a UCL action, plaintiff’s complaint must allege the “particular section of the statutory scheme which was violated” and “state with reasonable particularity the facts supporting the statutory elements of the violation.” (*Khoury v. Maly’s of California* (1993) 14 Cal. App. 4th 612, 619.)

involving injury to consumers. (*See Cel-Tech*, 20 Cal. 4th at 184-87 & n.12.) The court has cautioned that in deciding what is unfair, "courts may not apply purely subjective notions of fairness." (*Id.* at 184.) However, this prong of Section 17200 is "intentionally broad, thus allowing courts maximum discretion to prohibit new schemes to defraud." (*State Farm Fire & Cas. Co. v. Superior Court* (1996) 45 Cal. App. 4th 1093, 1103.) To satisfy the **unfairness** prong, the plaintiff must allege and prove conduct that, if not unlawful, is "tethered to some legislatively declared policy" as stated in specific constitutional, statutory, or regulatory provisions. (*Gregory*, 104 Cal. App. 4th at 854 [property owner could not state UCL claim by alleging that supermarket chain's closure of store was in violation of public policy underlying Community Redevelopment Law].) The **unfairness** prong of Section 17200 has often been employed to enjoin deceptive or sharp practices. (*See, e.g., Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal. App. 4th 1284, 1299 n.6.) For example, "unfair" business practices include unconscionable provisions in standardized agreements. (*See People v. McKale* (1979) 25 Cal. 3d 626, 634-37 [tenants of mobile home park required to sign documents that include illegal provisions].)¹²

Finally, the **fraudulent** prong of Section 17200 "bears little resemblance to common law fraud or deception." (*State Farm*, 45 Cal. App. 4th at 1105.) Under the UCL, "the test is whether the public is likely to be deceived. This means that a [§] 17200 violation, unlike common law

¹² In *Cel-Tech*, a Section 17200 unfair competition case, the Supreme Court of California developed a definition of "unfair" conduct but expressly limited it to anticompetitive cases and excluded cases involving injury to consumers. (20 Cal. 4th at 187 n.12.) The Supreme Court defined "unfair" as follows: "When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes [§] 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." *Id.*; *see also Gregory*, 104 Cal. App. 4th at 853.

fraud, can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage." (*Id.*; *see also Fremont Life*, 104 Cal. App. 4th at 517.) To allege "fraudulent conduct" under the UCL, the plaintiff must do more than allege the conduct is misleading; rather, he, she, or it must state with reasonable particularity the manner in which the conduct is misleading the defendant's customers, such as by describing the effect of the conduct on those who are exposed to it. (*Khoury*, 14 Cal. App. 4th at 619.) One court has stated that a UCL action requires allegations and proof that the "fraudulent" business was likely to deceive the "consumer to whom the practice was directed." (*South Bay Chevrolet*, 72 Cal. App. 4th at 878.)

What is "unfair" or "fraudulent" in a particular case, unlike unlawfulness, "is a question of fact, which involves an equitable weighing of all the circumstances, a process which usually precludes the court from sustaining a demurrer."¹³ (*Community Assisting Recovery, Inc. v. Aegis Sec. Ins. Co.* (2001) 92 Cal. App. 4th 886, 894-95 [citing *Schnall*, 78 Cal. App. 4th at 1167]; *see also Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc.* (C.D. Cal. 2001) 178 F. Supp. 2d 1099, 1117 ["Whether a business act or practice constitutes unfair competition within Section 17200 is a question of fact."] [citation omitted].)

¹³ *See, e.g., Schnall v. Hertz Corp.* (2000) 78 Cal. App. 4th 1144, 1163-70 [trial court erred in dismissing plaintiff's unfair business practice concealment claim because the rental car company's per gallon rate for fuel purchases was not disclosed in the rental agreement but only in the rental record, a small and hard-to-read document consisting of mainly indecipherable abbreviations, which raised an issue of fact as to whether a reasonable customer would know of the charge]; *Shvarts v. Budget Group, Inc.* (2000) 81 Cal. App. 4th 1153, 1160 [car renters claimed that a refueling charge for rental cars returned without a full gas tank was an unlawful business practice; court held that the public was not likely to be deceived because the amount per gallon was clearly printed on the first page of the rental agreement].)

E. Section 17203 Must Be Given A Liberal Construction

The Supreme Court of California has repeatedly recognized that the statutory remedies provisions – Section 17203 of the UCL and Section 17535 of the False Advertising Statute – must be given a liberal reading so that the “cleansing power” purposes of these statutes may be fulfilled. “The general equitable principles underlying [§] 17535 as well as its express language arm the trial court with the cleansing power to order restitution to effect complete justice.

Accordingly the statute clearly authorizes a trial court to order restitution in the absence of proof of lack of knowledge in order to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains.” (*Fletcher v. Security Pac. Nat’l Bank* (1979) 23 Cal. 3d 442, 449; *see also Cortez v. Purolator Air Filtration Prods. Co.* (2000) 23 Cal. 4th 163, 179 [discussing trial courts’ broad power to fashion appropriate relief for UCL violations].)

F. UCL Class Actions and Representative Actions

While acknowledging that a Section 17204 “representative” action is not the same as an action brought by the certified class, the California courts recognize that the purpose served by such a “representative” action is very similar. As the Supreme Court of California has stated:

Both consumer class actions and representative UCL actions serve important roles in the enforcement of consumers' rights. Class actions and representative UCL actions make it economically feasible to sue when individual claims are too small to justify the expense of litigation, and thereby encourage attorneys to undertake private enforcement actions. Through the UCL a plaintiff may obtain restitution and/or injunctive relief against unfair or unlawful practices in order to protect the public and restore to the parties in interest money or property taken by means of unfair competition. These actions supplement the efforts of law enforcement and regulatory agencies. This court has repeatedly recognized the importance of these private enforcement efforts.

(*Kraus*, 23 Cal. 4th at 126 [footnote omitted].)¹⁴ Although UCL class actions and representative actions have features in common, different procedures govern their prosecution, and different remedies are available.

The California courts have a “common practice” of “certifying UCL claims” as class actions “in appropriate cases.” (*Corbett v. Superior Court* (2002) 101 Cal. App. 4th 649, 670 [citation omitted].) In that case, the appellate court held that (a) a trial court may certify a UCL claim as a class action when the statutory requirements of Section 382 of the Code of Civil Procedure are met; and (b) where a class has properly been certified, a plaintiff in a UCL action may seek disgorgement of unlawful profits into a fluid recovery fund. (*Id.* at 663, 667-68.) As the court recognized in that decision, “permitting a class action for UCL claims may not prejudice but benefit defendants.” (*Id.* at 671.) As the Court of Appeal explained:

Judgments 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. With a class action, each participating member of the class is a party to the lawsuit and subject to the court's jurisdiction. Class action defendants can achieve final repose of the claims against them.

(*Id.*; see generally Scott C. Lascari, *Res Judicata and California's Unfair Competition Law* (Apr. 2003) 26 LOS ANGELES LAWYER 20 [“If a plaintiff brings a UCL lawsuit on behalf of the California general public, and the lawsuit is not a class action, will that lawsuit preclude future Section 17200 suits against the same defendant for the same conduct? Recent case precedent indicates that the later action might not be precluded.”].)

¹⁴ The Supreme Court has used the term “representative actions” to refer to UCL actions that are not certified as class actions in which a private person seeks relief on behalf of persons other than or in addition to the plaintiff. (*Kraus*, 23 Cal. 4th at 126 n.10; see also *Marshall v. Standard Ins. Co.* (C.D. Cal. 2001) 214 F. Supp. 2d 1062, 1067-71 [explicating differences between representative actions and class actions under UCL].)

Accordingly, when deciding whether to bring the case as a class action or a representative action, the plaintiff in a UCL action must “balance the burden of expense of a class action by its potential benefit.” (*Corbett*, 101 Cal. App. 4th at 671.) The trial court must engage in a similar balancing analysis because, as the Court of Appeal explained:

Providing the plaintiff with this alternative would not obstruct the purpose of the UCL, nor would it place any greater burden on the defendants. Moreover, the court would only permit class certification when the benefits outweigh the burdens. As our Supreme Court stated: "Although an individual action may eliminate the potentially significant expense of pretrial certification and notice, and thus may frequently be a preferable procedure to a class action, the trial court may conclude that the adequacy of representation of all allegedly injured [plaintiffs] would best be assured if the case proceeded as a class action. Before exercising its discretion, the trial court must carefully weigh both the advantages and disadvantages of an individual action against the burdens and benefits of a class proceeding for the underlying suit."

(*Id.* [quoting *Fletcher*, 23 Cal. 3d at 454].)

G. Government Enforcement Actions Under The UCL

Government enforcement actions under Section 17200 and Section 17500 may be brought by numerous law enforcement officials, including (a) the California Attorney General; (b) 58 county district attorneys; (c) five city attorneys (*i.e.*, for each of the five California cities having populations greater than 750,000 people; (d) full-time city attorneys in the more than 400 California cities (although such actions can only be brought with the consent of the district attorney; and (e) county counsel. (Bus. & Prof. Code, §§ 17204, 17535.) Law enforcement officials are authorized to recover civil penalties. (Bus. & Prof. Code, §§ 17206, 17536.) The standard of proof in civil penalty proceedings is not the criminal “reasonable doubt” standard but the civil “preponderance of the evidence” standard. (*People v. E.W.A.P., Inc.* (1980) 106 Cal. App. 3d 315, 323.) Several recent cases discuss the amount of civil penalties and/or the methods by which they may be calculated. (*See People v. First Fed. Credit Corp.* (2002) 104 Cal. App.

4th 721 [court affirmed civil penalty of \$200,000 based on finding of 300 separate violations of Section 17200, calculated at \$500 per violation, and another 400 violations of Section 17500, calculated at \$125 per violation]; *People v. Fremont Life Ins. Co.* (2002) 104 Cal. App. 4th 508 [affirming civil penalty of \$2.5 million based on a finding of 9,143 California violations, or \$210 per violation].)

It is not uncommon for parallel UCL suits to be brought by both private litigants and public officials in California. (*See, e.g., People v. Good* (1976) 17 Cal. 3d 732, 737 [district attorney filed civil complaint seeking injunction, civil penalties, and payment of restitution to investors in oil drilling scheme; two days later, an individual sued on behalf of a class of defrauded investors and sought to intervene in district attorney's action on ground that state was settling out cheaply in return for large payment to county; Supreme Court allowed intervention and permitted cases to proceed simultaneously].) A judgment or settlement of a public law enforcement action under the UCL is not res judicata with respect to a subsequent private action. (*See Payne v. National Collection Sys., Inc.* (2001) 91 Cal. App. 4th 1037, 1047 [enforcement action brought by Attorney General and Los Angeles County District Attorney against defendants who conspired to defraud low-income job applicants out of approximately \$2,800 each for sales training course did not bar private consumer protection class action brought by private litigants seeking restitution; “[B]ecause res judicata principles were inapplicable to the prior [law enforcement] litigation, plaintiffs in this subsequent lawsuit are not barred from securing restitution because they did not receive such in the prosecutors’ litigation”].)

H. The Trial Courts Have Broad Power To Award Injunctive Relief

Under Section 17203, the trial 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. . . .” (Bus. & Prof. Code, § 17203.) “The Legislature . . . intended by this sweeping language to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur.” (*Barquis*, 7 Cal. 3d at 111 [footnote omitted]; *accord Children’s Television*, 35 Cal. 3d at 210 [“The Legislature apparently intended to permit courts to enjoin ongoing wrongful business conduct in whatever context such activity might occur.”]).

The trial courts’ power to grant injunctive relief is “extraordinarily broad.” (*Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal. App. 4th 499, 540 [quoting *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy* (1992) 4 Cal. App. 4th 963, 972].) This power “necessarily includes the authority to make orders to prevent such activities from occurring in the future. While an injunction against future violations might have some deterrent effect, it is only a partial remedy since it does not correct the consequences of past conduct. An ‘order which commands [a party] only to go and sin no more simply allows every violator a free bite at the apple.’” (*Consumers Union*, 4 Cal. App. 4th at 973; *see also Hewlett*, 54 Cal. App. 4th at 540.)

In UCL cases, the California courts have recognized that injunctive relief “may be as wide and diversified as the means employed in the perpetration of the wrongdoing.” (*People v. Casa Blanca Convalescent Homes* (1984) 159 Cal. App. 3d 509, 536.) This may include both mandatory **and** prohibitory injunctive relief. For example, in *Consumers Union*, 4 Cal. App. 4th at 972-74, the Court of Appeal affirmed a trial court’s entry of an injunction requiring a dairy that was found guilty of false advertising to place a warning on all of its advertisements and products for the next ten (10) years, stating that there is no proof (a) that pasteurization reduces the nutritional value of milk, or (b) that the risks of consuming raw milk outweigh any of its

alleged health benefits. The Court of Appeal held that the trial court’s authority under Sections 17203 and 17205 included the power to order an affirmative disclosure.

Consumers Union was followed in *Hewlett*, 54 Cal. App. 4th 499, a UCL action brought against a ski resort operator that had engaged in illegal tree cutting. The trial court had imposed \$223,000 in fines, awarded plaintiffs’ attorneys’ fees, and ordered mandatory and prohibitory injunctive relief, directing Squaw Valley Ski Corporation to “remove sawed logs from the watercourse and deposit areas” and “continue with reforestation and revegetation” efforts. (*Id.* at 517.) Affirming the trial court’s orders, the Court of Appeal offered an extensive analysis of injunctive relief under the UCL (*see id.* at 537-41), before concluding: “The trial court properly exercised its discretion in fashioning injunctive relief to meet the needs of this particular case.” (*Id.* at 541.)¹⁵

I. The Trial Courts Have Broad Power To Fashion Restitutionary Relief

Section 17203 states that the trial court “may make such orders or judgments . . . 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.” (Bus. & Prof. Code, § 17203.) As the Supreme Court has stated, “restitution is the only monetary remedy expressly authorized by [§] 17203.” (*Kraus*, 23 Cal. 4th at 129; *see also Cruz*, 30 Cal. 4th at 317 [“Under the UCL, remedies are limited. ‘A UCL action is equitable in nature; damages cannot be recovered.

¹⁵ Another example of the trial court’s discretion to fashion appropriate injunctive relief is provided by *First Fed. Credit Corp.*, 104 Cal. App. 4th at 735-36, a Section 17200 enforcement action brought by the district attorney’s office arising out of a consumer loan scam, the Court of Appeal affirmed the trial court’s entry of an order permanently enjoining one of the defendants from performing loan-related services without obtaining a valid real estate broker’s license. (*See also Podolsky*, 50 Cal. App. 4th at 656-57 [in UCL action brought by relatives of nursing home residents claiming that admission agreement was unfair and deceptive, holding that third-party guarantee agreement violated Section 17200 because it did not give full disclosure of rights and

Prevailing plaintiffs are generally limited to injunctive relief and restitution.”] [quoting *Korea Supply*, 29 Cal. 4th at 1144); *id.* at 318].)

While in § 17203, the Legislature authorized the trial courts to “enjoin present or proposed unfair business practices” (*Kraus*, 23 Cal. 4th at 137), the Supreme Court has also recognized that “[o]rders for disgorgement may have deterrent force beyond that of injunctions coupled with restitutionary orders” and are appropriate when “necessary to prevent the use or employment . . . of any practice which constitutes unfair competition.” (*Id.* [quoting § 17203].) In *Fletcher*, the Supreme Court emphasized the important public policies served by a trial court’s disgorgement order, stating: “[T]he full impact of the deterrent force that is essential if adequate enforcement [of the law] is to be achieved. One requirement of such enforcement is a basic policy that those who have engaged in proscribed conduct surrender all profits flowing therefrom.” (23 Cal. 3d at 451 [citation omitted].)¹⁶

Restitution and disgorgement are separate but corresponding remedies that may be imposed by the trial court in a UCL action. The Supreme Court made this clear in *Kraus* where, under the heading “UCL MONETARY REMEDIES,” it stated:

In our ensuing discussion of the UCL, when we refer to orders for restitution, we mean orders 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. An order that a defendant disgorge money

lacked sufficient consideration; after noting that the “remedial power” under Sections 17203 and 17535 is “extraordinarily broad,” directing trial court to enter appropriate injunctive relief].)

¹⁶ In a different context, the Supreme Court has declined to permit defendants in a UCL action to retain their profits gained from their unfair practices. In *Bank of the West*, the Supreme Court refused to allow companies violating the UCL to shift their loss to their insurer(s) because it would permit the company to retain the proceeds of its unlawful conduct. (2 Cal. 4th at 1267.) As the court asserted: “If insurance coverage were available for monetary awards under the [UCL], a person found to have violated the act would simply shift the loss to his insurer and, in effect, retain the proceeds of his unlawful conduct. ***Such a result would be inconsistent with the [UCL’s] deterrent purpose.***” (*Id.* [emphasis added].)

obtained through an unfair business practice may include a restitutionary element, but is not so limited. As in this case, such orders may compel a defendant to surrender all money obtained through an unfair business practice even though not all is to be restored to the persons from whom it was obtained or those claiming under those persons. It has also been used to refer to surrender of all profits earned as a result of an unfair business practice regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice.

(23 Cal. 4th at 126-27 [footnote omitted].)

In *Kraus*, the Supreme Court also delineated the procedure to be followed by the trial courts in administering the matching remedies of “restitution” and “disgorgement”:

The judgment of the trial court for disgorgement of sums collected to secure liquidated damages may be enforced only to the extent that it compels restitution to those former tenants who timely appear to collect restitution. This does not mean . . . that defendants may retain the funds improperly taken from their former tenants as liquidated damages. ***On remand the trial court should order defendants to identify, locate, and repay to each former tenant charged liquidated damages the full amount of funds improperly acquired from that tenant, retaining the power to supervise defendants' efforts, to ensure that all reasonable means are used to comply with the court's directives.***

Because an order to disgorge into a fluid recovery fund is not authorized in such representative UCL actions, the trial court may order the defendant to notify the absent persons on whose behalf the action is prosecuted of their right to make a claim for restitution, establish a reasonable time within which such claims must be made to the defendant, and retain jurisdiction to adjudicate any disputes over entitlement to and the amount of restitution to be paid.

If defendants have already made restitution to any claimant, defendants may introduce evidence of prior payment and need not pay any tenant twice, thus alleviating the due process concerns of defendants.

(23 Cal. 4th at 138 & n.18 [emphasis added].) This language suggests that in a UCL case where those persons who are entitled to collect restitution can be readily identified (such as workers who are owed wages for overtime worked, or consumers of financial services who have been overcharged), and the amounts owed to them calculated, a certified class action (with attendant notice costs and administrative difficulties) is not a superior method of proceeding.

In *Korea Supply*, where the plaintiff corporation sued its competitor seeking to recover profits lost because the latter had allegedly secured a business opportunity through bribery, the Supreme Court arguably sought to clarify the concepts of “restitution” and “disgorgement.” Rejecting plaintiff’s UCL cause of action, the court termed the plaintiff’s claim as “a claim for nonrestitutionary disgorgement of profits” (29 Cal. 4th at 1150), because “it is clear that plaintiff is not seeking the return of money or property that was once in its possession,” and “[t]he object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest.” (*Id.* at 1149.) These concepts are not difficult to apply where the plaintiff is a defrauded consumer who has spent money (is “out-of-pocket”) on a worthless product or service. Whether the consumer brings a class action or a representative action, he or she can sue for **restitution** (the “return” to him or her of “money obtained through an unfair business practice”) and **disgorgement** (the defendant’s “surrender” of “all money obtained through an unfair business practice”). (*Kraus*, 23 Cal. 4th at 126-27.) The differences between class actions and representative actions come into sharp relief when we consider the amount of unlawfully obtained money still held by the defendant.

The availability of the restitutionary remedy (and the measure of restitution) may be illustrated by reference to *Fremont Life*, 104 Cal. App. 4th 508, a UCL enforcement action brought against a life insurance company (Fremont Life) arising from the unlawful sales of inter vivos trusts and annuities primarily to senior citizens. (*Id.* at 511-12.) Fremont Life used an independent intermediary, Alliance for Mature Americans (AMA), to solicit potential consumers through a telemarketing scheme, and an AMA representative visited consumers in their homes to solicit and consummate sales of annuity policies that were then issued by Fremont Life. (*Id.* at 512.)

At the conclusion of a bench trial, the trial court ordered injunctive relief and imposed more than \$2.5 million in civil penalties against Fremont Life. The trial court “also ordered restitution and notice of restitution” pursuant to Section 17203 of the UCL. (*Id.* at 513, 530.) On appeal, the Court of Appeal rejected each of Fremont Life’s challenges to the trial court’s restitution order (*see id.* at 514, 530-35). In that restitution order, the trial court directed Fremont Life to make an offer of restitution to each non-settling California consumer (or beneficiary under the terms of the policy) to restore the premium charge for the annuity policy, plus legal interest thereon. (*Id.* at 531-33.) The Court of Appeal affirmed the restitution order because it was “reasonably calculated to restore the status quo ante by requiring [Fremont Life] to offer to restore, inter alia, any premium charges imposed, and legal interest thereon from the date of imposition.” (*Id.* at 532.)¹⁷

¹⁷ *Fremont Life* was recently followed by Judge Ronald Styn in *Jason Park v. Cytodyne Technologies, Inc.* (May 30, 2003) San Diego Superior Court Case No. GIC 768364, a UCL class action brought by a consumer against a dietary supplement manufacturer. In his decision ordering Cytodyne to pay \$12.5 million in unlawful profits “into a fund to be distributed as ordered by this Court” (*id.* at 36), “either under a theory of restitution or ‘disgorgement’” (*id.* at 35), Judge Styn offered an extensive analysis of the monetary remedy available under Section 17203 of the UCL. (*Id.* at 32-36.) The trial court quoted from the Supreme Court’s decision in *Korea Supply*, which discussed the purposes of the UCL (*see id.* at 33), but observed the limitation of the Supreme Court’s decision:

The issue in *Korea Supply* is different from this case because *Korea Supply* did not deal with the measurement of restitution per se. The court dealt with the issue of whether disgorgement was a proper remedy for an individual action, ***not a class action.***

(*Id.* [emphasis added].) According to trial testimony in that case, bogus dietary supplements were sold by Cytodyne directly to consumers, and by Cytodyne through retailers, including GNC. Expert witnesses testified that Cytodyne received \$16,538,328 “from retailers or direct sales”; the cost of goods was calculated to be \$4,001,508, “leaving a net to [Cytodyne] of \$12,536,820.” (*Id.* at 35.) Rejecting various deductions and set-offs argued by Cytodyne, Judge Styn concluded that “there is no justification to reduce the amount of restitution from the total amount received by [Cytodyne] of \$12,536,820.” (*Id.* at 36.)

J. The “Fluid Recovery” Doctrine

Although disgorgement into a “fluid recovery” fund is not authorized in a UCL action that is not certified as a class action (*see Cortez*, 23 Cal. 4th at 172), the Supreme Court of California has reaffirmed that “the Legislature ‘has authorized disgorgement into a fluid recovery fund in class actions.’” (*Korea Supply*, 29 Cal. 4th at 1148 n.6 [quoting *Kraus*, 23 Cal. 4th at 137]; *accord Cruz*, 30 Cal. 4th at 318 [“[U]nder the UCL, a class action would allow for disgorgement into a fluid recovery fund and distribution by various means”] [citing *Kraus*, 23 Cal. 4th at 127, 137, and *Korea Supply*, 29 Cal. 4th at 1148 n.6].) As codified in Section 384 of the Code of Civil Procedure, the implementation of “fluid recovery” involves three steps:

- The defendant’s total damage liability is paid over to a class fund.
- Individual class members are afforded an opportunity to collect their individual shares by proving their particular damages, usually according to a lowered standard of proof.
- Any residue remaining after individual claims have been paid is distributed by one of several practical procedures that have been developed by the courts.

(*See Kraus*, 23 Cal. 4th at 124 n.6, 127; *Granberry v. Islay Investments* (1995) 9 Cal. 4th 738, 750 n.7.)

In *Corbett*, which expressly held that class actions may be brought under the UCL (101 Cal. App. 4th at 658-73), the Court of Appeal explicated the utilization of “fluid recovery” in such class actions:

If . . . the UCL claim is brought as a class action, the total monies to be disgorged can be placed in a fluid recovery fund, thus preventing the company from benefiting from its wrongfully-obtained profits. In many UCL actions defendants found to have committed unfair practices can be prevented from retaining wrongfully-obtained profits only if the proceeding has been certified as a class action. In this manner, the purpose of a liquid recovery, as described in *Bruno* . . . complements and, under the appropriate circumstances, furthers the deterrent purpose of the UCL.

(101 Cal. App. 4th at 668.)

The plaintiff(s) need not establish the amount that should be restored to particular Class members. In *In re Vitamin Cases*, 107 Cal. App. 4th 820, a class action was brought on behalf of all California residents who were indirect purchasers of vitamins. In the motion for preliminary approval of the class action settlement, the number of potential claimants was estimated to be 30 million persons. Given the size of the class compared to the size of the settlement – roughly \$38 million – the amount of individual recovery would be quite small, especially when the anticipated costs of claims administration were taken into account. Under the settlement, therefore, the \$38 million was to be distributed to charitable, governmental and non-profit organizations promoting the health and nutrition of class members, or that otherwise furthered the purposes underlying the lawsuit. In affirming the trial court’s approval of the proposed settlement, the Court of Appeal held that neither Section 384 of the Code of Civil Procedure nor case law requires that a settlement allow for individual claims before its fund can be distributed to *cy pres* relief pursuant to the “fluid recovery” doctrine.¹⁸

In the Rexall Cellasene class actions and FTC enforcement action, the *cy pres* remedy is being employed. After every consumer’s claim has been paid out of the Consumer Redress Fund, it is anticipated that the residue will total approximately \$6.8 million. Under the global

¹⁸ “The theory underlying fluid class recovery is that since each class member cannot be compensated exactly for the damage he or she suffered, the best alternative is to pay damages in a way that benefits as many of the class members as possible and in the approximate proportion that each member has been damaged, even though, most probably, some injured class members will receive no compensation and some people not in the class will benefit from the distribution; or, as one commentator states it, ‘where funds cannot be delivered precisely to those with primary legal claims, the money should if possible be put to the ‘next best’ use.’” (*Bruno v. Superior Court* (1981) 127 Cal. App. 3d 120, 123-24 [citation omitted]; see generally Stan Karas, Note, *The Role of Fluid Recovery in Consumer Protection Litigation: Kraus v. Trinity Management Services* (2002) 90 CALIF. L. REV. 959, 970-74; James R. McCall *et al.*, *Greater*

settlement achieved by the consumer plaintiffs, Rexall and the FTC, one-half (1/2) of that amount will be paid into the U.S. Treasury and one-half (1/2) will be distributed to charitable organizations that will indirectly benefit Settlement Class members. (See **Exhibit C**, Part VI.J, at 6.)

“When a litigated or settled aggregate class recovery cannot feasibly be distributed to individual class members . . . the court may direct that such undistributed funds be applied prospectively to the indirect benefit of the class.” (3 Alba Conte & Herbert B. Newberg (4th ed. 2002) NEWBERG ON CLASS ACTIONS, § 10:17 at 514-15 [footnote omitted].) Such a distribution for the indirect prospective benefit of the class is known as a “*cy pres* distribution.” (*Id.* at 715.)¹⁹ Numerous federal and state court decisions support employment of *cy pres* distributions in class action and enforcement action settlements.²⁰

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¹⁹ The *cy pres* doctrine “is a rule of construction utilized by courts to effectuate testamentary charitable gifts that would otherwise fail.” If the testator had the intent to accomplish “only the specific purpose that has since become impossible . . . the gift must fail. If the testator had a general charitable intent, the court will look for an alternate donee that will best serve the testator’s original purpose.” (Shepherd, Note, *Damage Distributions in Class Actions: The Cy Pres Remedy* (1972) 39 U. CHI. L. REV. 448, 452.) The history of the *cy pres* doctrine and its use to distribute class action settlement funds was traced by Judge Will in *Superior Beverage Co. v. Owens-Illinois, Inc.* (N.D. Ill. 1993) 827 F. Supp. 477, 478-79. (See also Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought By State Attorneys General* (1999) 68 FORDHAM L. REV. 361, 406; Barnett, Note, *Equitable Trusts: An Effective Remedy in Consumer Class Actions* (1987) 96 YALE L.J. 1591.)

²⁰ See, e.g., *State of New York v. Salton, Inc.* (S.D.N.Y. 2003) 265 F. Supp. 2d 310, 314 [approving settlement of antitrust price-fixing case; “Because of the difficulty in identifying and locating individual purchasers of the [George Foreman] Grills, and the minimal amount of recovery an individual consumer would be entitled to compared to the cost of administering individual relief, the Court finds that the *cy pres* method of distribution proposed in the Settlement Agreement is reasonable and adequate.”] [citations omitted]; *In re Toys “R” Us Antitrust Litigation* (E.D.N.Y. 2000) 191 F.R.D. 347, 349, 353-54 [approving settlement of antitrust enforcement action wherein defendants would distribute toys and cash “nationally to or through public and charitable entities”; “The decision to forego individual recoveries [by

K. The Drainage Ditch Illustration

One way to understand the inherent differences between class actions and representative actions brought under Section 17200 and/or Section 17500 is to picture a drainage ditch with a reservoir at one end. Assume that the case is a certified *class action*. A defendant found liable of UCL violations parks a tanker truck at the other end of the drainage ditch. The valves on the tanker truck are opened and the defendant pours its “disgorged” unlawful profits into the drainage ditch. (This is the first stage of “fluid recovery”: “The defendant’s total damage liability is paid over to a class fund.”) The victims of defendant’s unlawful (or unfair or deceptive) business practices line up on either side of the drainage ditch, with buckets in their hands, and fill those buckets from the “fluid” that flows through the ditch. (This is the second stage of “fluid recovery”: Individual class members are afforded an opportunity to collect their individual shares by proving their particular damages, usually according to a lowered standard of proof.) The “fluid” that flows through the ditch and is not scooped up in the victims’ buckets ends up in the reservoir at the end of the drainage ditch. This is the third stage of “fluid recovery”: Any residue remaining after individual claims have been paid is distributed by one of several practical procedures that have been developed by the courts.”) Because the case was a certified class action, the defendant obtains global “peace” and res judicata protection.

Now assume that the case is not a certified class action but, rather, a *representative* action. The monies unlawfully obtained by the defendant are still stored in a tanker truck, and

consumers] was sensible, given the difficulty of identifying proper claimants and the difficulty, and especially the costs, that such recoveries and their administration would have entailed. The net monetary recovery relief for any individual claimant would have been limited.”] [collecting cases]; *Boyle v. Giral* (D.C. App. 2003) 820 A.2d 561, 568-70 [same; settlement of antitrust class action alleging price-fixing scheme by vitamin product manufacturers and distributors]; *Northrup v. Southwestern Bell Tele. Co.* (Tex. Ct. App. 2002) 72 S.W.3d 16, 22 [collecting cases].)

the defendant's victims are still standing in a field, but there is no drainage ditch and no reservoir. The tanker truck drives through the field, stopping to locate, identify and repay each victim the money that he or she is owed by "filling" the buckets held by the victims. When those buckets are filled, the truck drives away. In contrast to a certified class action, the defendant obtains no res judicata protection; however, the defendant need not pay any victim twice.

Biographical Information

Kevin P. Roddy is a member of the California, New York and Virginia bars. He graduated *cum laude* from The Cranbrook School in Bloomfield Hills, Michigan, in 1973. He received his B.A. with Honors from the University of North Carolina in 1977, and his J.D. from the University of North Carolina School of Law in 1980. From 1980 to 1986, Mr. Roddy practiced law in Charlottesville, Virginia. Since 1986, Mr. Roddy has practiced law in Los Angeles, California. During the past 18 years, he has served as lead counsel for plaintiffs in numerous securities fraud class actions and shareholder derivative actions litigated in federal and state courts in California and elsewhere, including cases brought under the Private Securities Litigation Reform Act of 1995 and the Securities Litigation Uniform Standards Act of 1998. Among the notable shareholder and consumer class actions and/or derivative actions in which Mr. Roddy has served as lead (or co-lead counsel) for plaintiffs are *ACC/Lincoln Savings Securities Litigation* (\$260 million in settlements and \$3.2 billion jury verdict on behalf of 20,000+ defrauded bondholders); *McDonnell Douglas ERISA Litigation* (\$450 million settlement on behalf of 23,000 retired aerospace engineers); *Prudential Securities (Polaris Limited Partnerships) Securities Litigation* (\$110 million settlement on behalf of limited partners); *Western Union Money Transfer Litigation* (\$65 million worldwide settlement on behalf of approximately 15 million consumers located in more than 80 countries); *Pacific Enterprises Securities Litigation* (\$45 million settlement for shareholders); *Stratosphere/Grand Casinos Securities Litigation* (\$18 million settlement for shareholders); *Ria Telecommunications Money Transfer Litigation* (\$18 million settlement for consumers); *Rexall Cellasene Dietary Supplement Litigation* (\$12-16 million); *Bancomer Money Transfer Litigation* (\$15 million settlement); *McDonald's* (\$12.5 million settlement).

From February 1990 to April 2000, Mr. Roddy was the managing partner of the Los Angeles office of Milberg Weiss Bershad Hynes & Lerach, LLP. From April 2000 to present, Mr. Roddy has been the managing partner of the Los Angeles office of Hagens Berman LLP. He is also a member of his Firm's Executive Committee.

Mr. Roddy is a member of the Executive Committee of the National Association of Shareholder and Consumer Attorneys (NASCAT) and, since 1995, he has served as Chairman of the NASCAT Amicus Committee. In April 2003, he was chosen as President-Elect of NASCAT. He is the author or co-author of numerous articles on securities fraud and civil RICO litigation, including G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding and Abetting and Conspiracy Liability Under RICO* (1996) 33 AMER. CRIM. L. REV. 1345, which was published as the 25th Anniversary Special Edition of the AMERICAN CRIMINAL LAW REVIEW, and the award-winning two-volume treatise, *RICO IN BUSINESS AND COMMERCIAL LITIGATION* (Shepard's/McGraw-Hill, Inc. 1991).

Mr. Roddy is a frequent lecturer at continuing legal education programs sponsored by the American Bar Association, the American Law Institute, the Practising Law Institute, the SEC Institute, the Securities Regulation Institute, and the Los Angeles County Bar Association.