"Unfair Competition Law" Unfair to California Business

by Bruce Nye, partner, Adams, Nye, Sinunu, Bruni & Becht LLP

Most news-following citizens—both inside and outside of the business community—have often shaken their heads in disgust over the extreme displays of our civil-justice system. Whether it's the multi-billion-dollar verdict against Big Tobacco, the infamous MacDonald's "hot coffee" case, or, most recently, lawsuits against fast-food restaurants for serving (shock!) unhealthy fast food, a sensible person's reaction to these courtroom absurdities must be that Shakespeare was right: Taking aim at the lawyers is the first step toward making a better world.

Upon calmer reflection, most people realize that for all of its excesses and abuses, our justice system is a tremendous improvement over the one originally built on staunch frontier justice. After all, people genuinely injured through the fault of someone else should be compensated for what they lost. A business damaged when someone breaches a contract ought to be made whole. Indeed, businesses with legitimate claims are frequent patrons of the civil courts.

That said, there's still one breed of lawsuit that's become the bane of existence for many California companies: those filed under California Business & Professions Code section 17200. Despite the fact that there is no damage or injury in these cases, and despite the fact that plaintiffs and the defendant companies have had no contact with one another, these cases have multiplied exponentially over the past 10 years-and show no signs of letting up any time soon.

Section 17200, first enacted in 1977, was named the "Unfair Competition Law" by the California Supreme Court, despite the fact that the law has very little to do with competition. The law permits any person acting "on behalf of the general public" to file suit against any person or company that engages in a business practice that is "unlawful, unfair or fraudulent."

One popular example of an Unfair Competition Law suit was one filed against Oreo-maker's Kraft, alleging members of the public had been deceived into thinking they were consuming nutritious snacks. The cookie crumbled on this case when the plaintiff's attorney withdrew it, stating that he had achieved his goal of publicizing the dangers of food containing trans-fat and that he knew he would be unlikely to convince a judge that the public was cluelessly unaware of these dangers.

Under the statute and the court decisions applying it, a person who sues under the Unfair Competition Law need not have been injured in any way by this "unlawful, unfair or fraudulent" practice. The "practice" need not be an ongoing one; one instance will do. Nor does it matter that *nobody* was ever damaged. Though he or she theoretically represents "the general public," he or she need not meet any of the usual requirements for a class action. And if a business settles with this plaintiff, it can be sued again by yet *another* member of the general public suing for the exact same practice.

The courts have made it quite clear that plaintiffs in a 17200 action cannot recover "damages." But they can get an injunction against the "unlawful, unfair or fraudulent" business practice, "restitution" (meaning a restoration of any money or property received as a result of the practice), "disgorgement" (the transfer of profits from the offending business back to the persons who paid those profits) and, of course, attorneys fees and costs for acting in the public interest. The line between this monetary recovery and "damages" as we traditionally think of them is often difficult to find.

In real life, here's how one of these lawsuits plays out: a lawyer or a law firm researches an industry that needs to be "reformed." This "reform" may center on hyper-technical violations of advertising statutes or consumer-credit laws, or some combination of the two. Or it may involve an infinite number of potential violations of other statutes or regulations covering companies doing business in California. The lawyers find a "plaintiff" who has never had any involvement with any of the businesses (but who, no doubt, has an impassioned desire to act on behalf of the general public and assist in this "reform"). Then the lawyer files suit against all offending companies, seeking injunctions, restitution, disgorgement of profits and attorneys' fees for these "unlawful," "unfair" and/or "fraudulent" practices.

After the suit has been filed and served, and after the company has recovered from the shock of being sued by somebody who was never a customer for an obscure violation of a regulation the company has never heard of, its lawyer files an answer to the complaint. The company then receives pre-trial discovery demands, requesting production of customer lists, transaction records, profit-and-loss information, and other proprietary business information. All of this information, it is contended, is necessary to determine the nature and extent of the "unlawful," "unfair" and "fraudulent" practices, as well as to determine how much restitution and disgorgement is appropriate under the circumstances.

It's right about here where many businesses cry "Uncle!" and start looking for a settlement. When the settlement occurs, of course, it consists of no restitution to consumers and no disgorgement of ill-gotten profits, but often just an injunction ordering the company to follow the law—something most companies are perfectly happy to do.

So what's the single common denominator in every known settlement instance? You guessed it: the payment of attorneys' fees for the fine public service the attorneys have performed.

Over the past year this process was automated and turned into a finely tuned and efficient machine, when three recent law-school graduates got together and fashioned "The Trevor Law Group." They developed a plan to short-cut this usual pattern and cut right to the chase: the attorneys' fees. They discovered that the state's Bureau of Automotive Repair kept a list of automotive repair facilities that had been cited for various technical violations of applicable regulations. Similarly, the county health department had publicly available records showing health violations at restaurants. According to the State Bar, the three lawyers formed a shell corporation called "Consumer Enforcement Watch Corp." to serve as plaintiff in suits they filed against thousands of auto-repair shops and restaurants in Southern California. They chugged along, demanding from small businesses immediate settlements (typically on the order of $1,500), and threatening them with thousands of dollars in attorneys' fees if they failed to submit.

The Trevor cases were quickly and correctly cited by the business community as examples of what was wrong with the entire unfair competition law scheme. When Attorney General Bill Lockyer and the State Bar of California reacted, they chose, unfortunately, to treat Trevor Law as an aberration, rather than a symptom of what was wrong with the system. Both conducted extensive investigations, which have resulted in the Trevor lawyers being suspended from the practice of law, with their disbarment expected to follow.

Meanwhile, the law itself remains intact, and, as this article is written, seems on the verge of becoming even more favorable to those suing California businesses. In legislation that made this year's list of "job killer" bills, published by the Chamber—led Coalition for California Jobs (CCJ), Assemblymember Ellen Corbett (D-San Leandro) and Sen. Martha Escutia (D-Montebello) both successfully sent to the floors linked bills to reverse recent Supreme Court decisions that had limited recovery when actual victims could not be identified. The linked bills, which are supported by the plaintiffs' bar, would allow "disgorged" profits to be distributed to public-interest groups. They would also require plaintiffs' lawyers to inform defendants of their rights under the statute, require judges to review all settlements and prevent plaintiffs from joining defendants together in an action just because they're in the same business. The bills passed on the assembly floor on June 5, 2003, and presently appear to be on their way to passing the senate and being signed by the governor.

So far, it is hard to find a silver lining in this gray cloud hanging over the California business community. While a true solution must undoubtedly await a different, and more business-friendly legislature, this author can suggest some early steps that businesses can take to ease, if not eliminate, the pain from an unfair competition lawsuit:

- First, defendant companies need to decide at the beginning whether their proprietary information (customers, transaction information, etc.) are worth protecting from discovery. By agreeing to release this information (perhaps with a strongly worded court order designed to prevent disclosure to competitors), they can disarm the plaintiff's bar of one of its greatest sources of leverage.

• Second, as soon as a company is sued it must determine whether it has, in fact, violated any applicable statute or regulation. If there has been a violation, no matter how trivial, the company should immediately offer: (a) an injunction, by which it agrees to a court order requiring it to comply with the law, and (b) to pay the other side's attorneys' fees as of that date, with the amount to be determined by the court.

Although every case is different, in most cases there is a very strong likelihood that the plaintiff will never obtain anything more than an injunction of the type that is offered, and a plaintiff who litigates for two years, only to receive what he was offered at the beginning, is unlikely to be awarded attorneys' fees.

Once companies realize that their real risk in most Unfair Competition Law litigation is not the ultimate outcome of the case, but the discovery and litigation expense along the way, they can begin to formulate plans to manage these cases. Once the cases are managed by defendant companies, they will become less of a threat to the companies and less of a profit center for the plaintiffs' bar. And once that happens, the litigation will start to go away.