

By Scott C. Lascari

Res Judicata and California's Unfair Competition Law

Section 17200 defendants may face subsequent lawsuits based on the same conduct

Among the bills, letters, and advertisements that clutter residential mailboxes, some people have found documents addressed to them entitled "Notice of a Class Action Settlement." The notice usually refers to a product, such as a car tire or a computer modem, that the notice recipients have been using for a while without any problem. Despite the recipients' personal satisfaction with the product, someone else was unhappy with it and sued the manufacturer "on behalf of" all purchasers. The result, as the notice explains, is payment to the named class representatives and their attorneys as well as nominal compensation for the notice recipients. Usually the recipients need not do anything, so they often throw the notice away and, weeks later, receive a coupon that they never use. Case closed.

But what if a person who never bought the product sued the manufacturer "on the public's behalf" and won an injunction and/or restitution? Could another purchaser nevertheless sue the same manufacturer for his or her personal unhappiness with the

product, or would the previous lawsuit protect the manufacturer? Unfortunately for defendants, the law regarding California's Unfair Competition Law (UCL)—codified in California Business and Professions Code Sections 17200 et seq.—indicates that the second lawsuit might be viable.

The UCL authorizes plaintiffs to sue businesses on the public's behalf for unfair competition, which the law defines as unlawful, unfair, or fraudulent acts or practices or as deceptive, untrue, or misleading advertising.¹ In effect, plaintiffs can use the UCL to sue businesses for any wrongful business activity.² In fact, if a court finds that a company engaged in unfair competition, the court can make whatever orders or judgments are necessary to deter the company from repeating its conduct and to compensate victims of the company's conduct.³

Furthermore, while some statutes expressly forbid individuals to privately prosecute an action if the government has already filed a case,⁴ California courts in the past have combined public and private Business and Professions Code

Section 17200 actions and allowed them to continue as one case.⁵ The courts have even allowed private parties to recover their attorney's fees in these combined actions, regardless of whether the district attorney or the private party initiated the first case.⁶ The UCL further permits courts to make awards favoring absent parties without class certification.⁷ Within this

legal environment, a question arises: 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. One starting point for understanding this result is a 1977 California Supreme Court decision, *People v. Pacific Land Research Company*.

Pacific Land Research Company

In *Pacific Land Research Company*, the California attorney general and the Kern County district attorney brought suit on the People's behalf, alleging that the defendant vendors violated various legal provisions—including Business and Professions Code Section 17500, which is the part of the UCL dealing with deceptive advertising—while selling tracts of land to the public.⁸ In particular, the complaint alleged that the defendants were landowners who solicited purchasers through false and misleading statements and who created subdivisions without following the relevant subdivision provisions of the Business and Professions Code. The complaint sought a temporary restraining order, preliminary and permanent injunctions, a civil penalty, and restitution for the land purchasers. After the trial court ruled in the People's favor on the preliminary injunction, the defendants appealed, contending that the inclusion of restitution in the complaint meant that the court had to follow class action

procedural safeguards.⁹

The California Supreme Court, however, disagreed with the defendants. The court found that the People's action was "fundamentally a law enforcement action designed to protect the public and not to benefit private parties."¹⁰ After all, injunctive relief was intended to prevent parties from continuing to violate the laws and to prevent violators from dissipating illegally obtained funds; civil penalties were meant to punish violators for past illegal conduct. Any requests for restitution were only ancillary to these public remedies, not the primary objective of the public suit.¹¹ The court added that "an action by the People lacks the fundamental attributes of a consumer class action filed by a private party."¹²

Furthermore, if the People were required to follow class action procedures, they might be forced to abandon restitution claims whenever immediate injunctive relief was necessary to protect consumers from further illegal acts by the defendants. The court found this result unacceptable, primarily since a key reason for class action safeguards was to allow defendants to assess the resources that they should spend in defending against this type of litigation. In *Pacific Land Research Company*, since the People sought a \$2,500 civil penalty for each of the defendants' alleged violations, the court believed the defendants had "sufficient incentive to mount a vigorous defense...."¹³ In addition, the court mused that, if the People failed to prevail in their action, the odds that other parties

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seeking restitution would harass the defendant through litigation was no more than “a remote theoretical possibility.”¹⁴

Theory and Reality

More than 20 years later, theory gave way to reality when a California appellate court faced the preclusion issue head on. In *American International Industries v. Superior Court*, a nonprofit corporation served the California attorney general as well as two hair color product manufacturers and distributors with a notification document.¹⁵ It informed the manufacturers and distributors that they had violated the Toxic Enforcement Act by failing to warn consumers of the lead acetate contained in their products. Six months later, the nonprofit corporation sued the manufacturers and distributors in San Francisco—on the public’s behalf and under the UCL—for exposing consumers to lead acetate.¹⁶ Four months after the San Francisco lawsuit was filed, individual plaintiffs brought a class action in Los Angeles against the same defendants on behalf of themselves and others similarly situated, alleging a UCL violation connected to the lead acetate.

Seven months after the Los Angeles suit, the parties in the San Francisco action settled the case, and the California attorney general signed the settlement, signifying that it was in the general public’s best interest. The settlement agreement provided for a reformulation of the defendants’ products; at least \$70,000 in coupons to California consumers; \$22,500 in a civil penalty; and \$69,000 in restitution and \$173,500 as a fee and expense reimbursement to the plaintiff corporation. As part of that settlement, the parties also agreed that the resulting judgment would bar “any and all other persons” from prosecuting any UCL claims, among others, against the same defendants based on the same conduct.¹⁷ After the entry of judgment in the San Francisco action, the defendants moved for judgment on the pleadings in the Los Angeles action, arguing that the San Francisco judgment had a res judicata effect. The trial court denied the motion, and the defendants appealed.¹⁸

Without reference to the supreme court’s *Pacific Land Research Company* decision, the court of appeal concluded that res judicata applied to the Los Angeles action. The court first found that both the San Francisco and the Los Angeles cases involved identical issues and that the San Francisco action involved a final judgment on the merits.¹⁹ The court then determined that the private plaintiffs in the Los Angeles action were in privity with the nonprofit corporation in the San Francisco action. The court reasoned that privity existed because both entities had the statutory authority to bring the representative actions on behalf

of the California general public. The court also held that the private parties were in privity with the attorney general, who represents the People’s interests in matters of general concern and who both participated in and signed the settlement agreement. Furthermore, since the San Francisco private plaintiff brought a representative action and since the attorney general participated in it, the Los Angeles plaintiffs’ interests were amply protected with respect to any due process concerns.²⁰ As a result, the appellate court instructed the trial court to grant the defendants’ motion for judgment on the pleadings.²¹ This opinion, however, was ordered depublished.

Two years after the *American International Industries* decision, the court of appeal faced another preclusive effect argument in a UCL action. In *Payne v. National Collection Systems*, the Los Angeles district attorney and the California attorney general sued Trans World Airlines and National Collection Systems in connection with a TWA training course that produced \$7.5 million in profits for the defendants.²² The plaintiffs alleged that TWA did not guarantee jobs to those completing the course (as TWA had originally promised), a majority of the travel industry did not use the reservation system taught during the course, classes were unruly and disorganized, educational materials were rarely used, a majority of the teachers were not accredited, and the fees and expenses for the course were such that successful applicants ultimately earned less than the minimum hourly wage.²³ Two years after filing suit, the district attorney and the attorney general secured separate judgments against the defendants, imposing both injunctive and monetary relief based, in part, on the UCL. The attorney general’s judgment even produced restitution for 63 individuals harmed by the defendants’ conduct.²⁴

Three months after the judgments were entered, 23 former job applicants brought a UCL class action against the defendants with regard to the same training course. None of the 63 individuals receiving restitution under the prior judgments were plaintiffs in this second action.²⁵ Nevertheless, the trial court sustained the defendants’ demurrer to the UCL cause of action on res judicata grounds, prompting the plaintiffs to appeal.²⁶

Relying heavily on the *Pacific Land Research Company* decision, the appellate court considered the fundamental differences between public actions and either class actions or other representative litigation.²⁷ In particular, the court found that public prosecutors fundamentally bring UCL actions both for the public benefit and for law enforcement purposes.²⁸ Private parties, on the other hand, typically bring suit to make whole the

victims of improper business practices.²⁹ Therefore, since the prior action was brought on the public’s behalf while the present action was brought on behalf of private individuals, and since the 23 private plaintiffs in the present action did not receive restitution in the first case, res judicata did not apply.³⁰

The same appellate panel faced another res judicata issue in a UCL case just a few months later. In *Zinzun v. Great Western Bank*, more than 20 individuals sued a financial institution and its subsidiaries, claiming that they conspired to defraud their bank customers by having those customers purchase high risk, noninsured mutual funds.³¹ The representative UCL action sought restitution for members of the general public who had bought and sold the questionable mutual funds before April 13, 1992. Months later, a class action (later split into two class actions) was brought against the same defendants on behalf of people who had bought and sold the questionable funds after April 13, 1992, and before April 13, 1995.³² The latter class actions were eventually settled, and a \$17.2 million settlement fund was established for distribution to all members of the class. The settlement agreement also provided for the general release of claims against the defendants that would arise under the UCL.³³ Once settlement was reached in the class actions, the defendants moved for summary judgment on res judicata grounds in the previously filed representative action. The trial court granted the defendants’ motion and dismissed the case. The plaintiffs thereafter appealed.³⁴

The court of appeal first acknowledged that the law was unclear “as to whether and when an unfair competition law action by a private litigant seeking injunctive and/or restitutionary relief on behalf of the general public has a *res judicata* effect.”³⁵ In fact, due process concerns would “arise because the ‘general public’ are nonparties to the action, are not given notice of the proceedings, and have no opportunity to be heard.”³⁶ The court therefore found that a triable issue existed as to whether individuals purchasing the defendants’ mutual funds prior to April 13, 1992, were adequately represented in the settled class actions.

Specifically, the court found that, while the settling class plaintiffs had a “personal and substantial financial stake” in the litigation’s outcome, there was no evidence that the general public’s interests were considered during the settlement process. Furthermore, the settlements did not provide for relief to members of the general public or restitution to persons falling outside of the defined class. In addition, no injunctive relief was secured on the general public’s behalf.³⁷ As a result of these triable issues of fact, the appellate court reversed the

summary judgment that had been granted by the lower court in the defendants' favor.

Just three months after *Zinzun*, the appellate court handed down another UCL res judicata ruling. In *Braco v. Superior Court*, an individual brought 23 UCL representative lawsuits against 23 bars in 23 days, with each lawsuit alleging that a particular bar violated the Smoke Free Workplace Act by allowing people to smoke inside.³⁸ The plaintiff asked for preliminary and permanent injunctive relief, profit disgorgement, customer restitution, and attorney's fees. The actions were eventually reassigned to a single judge and then consolidated into a single action. The trial court thereafter ruled that the plaintiff was not competent and lacked standing to prosecute the UCL claims.³⁹

On appeal, the defendants claimed that allowing the particular plaintiff to prosecute the representative action would be improper because it would preclude later actions by customers and competitors who were actually harmed. The appellate court disagreed. Since the action was a representative action instead of a class action on behalf of customers, competitors, or employees, no one would receive notice of the lawsuit or an opportunity to opt out: "[A]s a result, the judgment in this case [would] have no *res judicata* or collateral

estoppel effect."⁴⁰ Like *Zinzun*, however, *Braco* was not certified for publication.

Principles and Policies

Interestingly, only two cases among this group of decisions—*Pacific Land Research Company* and *Payne*—are on the books and thus citable in briefs before the courts. Nevertheless, at least one general principle emerges. If the first UCL suit is a public suit, it will not act to bar a later, private UCL action—even if the public suit seeks restitution—because the courts believe that public and private actions fundamentally differ from each other. Public suits have a protective and deterrent effect, while private suits are aimed at individual restitution.

Furthermore, if a private UCL action is followed by another private UCL action, the preclusion question might very well turn on whether due process concerns are satisfied. As the court observed in *Pacific Land Research Company*:

Failure to require notification of the class before a decision on the merits prevents a binding adjudication against the class because members of the class who were not notified are not barred by the determination in the defendant's favor since they were not parties.

On the other hand, a defendant who loses an action brought by individual class members may be estopped under the doctrine of collateral estoppel to deny the binding effect of the judgment against him in a subsequent action brought by other class members.⁴¹

Parties defending against or settling unfair competition actions must therefore be alert. With either litigation or settlement, it remains questionable whether res judicata will apply to future actions based on the same conduct, in spite of specific language indicating otherwise in the settlement or judgment.

The issue is further complicated by policy arguments from both sides that have done nothing to resolve the problem. On the one hand, if res judicata applies to later private actions, victims who should receive restitution might be deprived of their due process. After all, they most likely will not receive notice, the opportunity to object or opt out, or other information and safeguards that correspond to class actions. In addition, many plaintiffs bring UCL actions based on their own narrow dispute with a defendant but allege a public interest to expand discovery and increase leverage. Those same plaintiffs might sacrifice the UCL allegations, however, if it means that a quick or beneficial resolution might be obtained.⁴² Furthermore, if the current procedures produced finality, "it might be based on who reaches the courthouse door first, or more likely, based on who the defendant settles with first—effectively giving the 'private attorney general' selection to the defendants, not the ideal party to make such a decision."⁴³

On the other hand, the denial of res judicata means that plaintiffs who are serving a true private attorney general function and who are attempting to vindicate larger interests cannot offer defendants a final resolution.⁴⁴ A perceived lack of finality by defendants would lead them to "delay or avoid publicly advantageous settlements" because they would be subjected "to an unlimited number of lawsuits from future litigants over the same alleged practice."⁴⁵ As a result, defendants could face having to vigorously defend a suit only to find that they must do so over and over again. Or defendants could attempt to settle a lawsuit with no guarantee that the settlement would preclude future actions.

The California Legislature has made attempts to resolve the preclusion issue, to no avail. For example, in February 2002, Assemblyman Robert Pacheco introduced a bill in the state Assembly that, in its amended form, recognized that:

(d) The unfair competition law is being misused by a significant number of private attorneys as a means of generating attorneys' fees without creating

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a corresponding public benefit in *certain* situations, including the following:...(3) Filing repetitive claims on behalf of the general public over issues and activities that have already been resolved by a prior claim on behalf of the general public.⁴⁶

The bill proposed a new section, Business and Professions Code Section 17300, which would allow for private, representative UCL actions if 1) the plaintiff suffered a distinct and palpable injury due to unfair competition, 2) the plaintiff served the defendant with a copy of a notice of intent to sue 90 days before commencing the action, 3) no public prosecution was initiated against the defendant "alleging substantially similar facts and theories of liability," and 4) no other private, representative action was initiated against the defendant "alleging substantially similar facts and theories of liability."⁴⁷

The bill never made it out of the Assembly Committee on Judiciary, however. Sadly, this was not surprising, for, as the California Supreme Court aptly noted, "[W]henver the Legislature has acted to amend the UCL, it has done so only to *expand* its scope, never to narrow it."⁴⁸

² People v. Dollar Rent-A-Car Sys., 211 Cal. App. 3d 119, 129 (1989).

³ BUS. & PROF. CODE §17203.

⁴ See, e.g., HEALTH & SAFETY CODE §25249.7(d).

⁵ Hewlett v. Squaw Valley Ski Corp., 54 Cal. App. 4th 499 (1997); Consumers Union of U.S. v. Alta-Dena Certified Dairy, 4 Cal. App. 4th 963 (1992); Committee to Defend Reproductive Rights v. A Free Pregnancy Ctr., 229 Cal. App. 3d 633 (1991).

⁶ Hewlett, 54 Cal. App. 4th at 545; Consumers Union of U.S., 4 Cal. App. 4th at 977; Committee to Defend Reproductive Rights, 229 Cal. App. 3d at 633.

⁷ Dean Witter Reynolds v. Superior Court, 211 Cal. App. 3d 758, 773 (1989).

⁸ People v. Pacific Land Research Co., 20 Cal. 3d 10, 14 (1977).

⁹ *Id.* at 15.

¹⁰ *Id.* at 17.

¹¹ *Id.*

¹² *Id.* at 18.

¹³ *Id.* at 20.

¹⁴ *Id.* (quoting Cartt v. Superior Court, 50 Cal. App. 3d 960, 969 (1975)).

¹⁵ American Int'l Indus. v. Superior Court of L.A. County, 85 Cal. Rptr. 2d 815, 819 (Cal. Ct. App. 1999) (depublished).

¹⁶ *Id.*

¹⁷ *Id.* at 820.

¹⁸ *Id.* at 821.

¹⁹ *Id.* at 823-25.

²⁰ *Id.* at 824.

²¹ *Id.* at 828.

²² Payne v. National Collection Sys., 91 Cal. App. 4th 1037, 1040, 1044 (2001).

²³ *Id.* at 1041-42.

²⁴ *Id.* at 1039.

²⁵ *Id.* at 1039-40.

²⁶ *Id.* at 1039.

²⁷ *Id.* at 1045.

²⁸ *Id.* at 1046.

²⁹ *Id.* at 1047.

³⁰ *Id.* at 1047-48.

³¹ Zinzun v. Great W. Bank, Case No. B147122, 2001 WL 1613850, at *1 (Cal. Ct. App. Dec. 18, 2001) (not certified for publication).

³² *Id.* at *2-3.

³³ *Id.* at *2.

³⁴ *Id.* at *1.

³⁵ *Id.* at *6.

³⁶ *Id.*

³⁷ *Id.* at *9.

³⁸ Braco v. Superior Court, Case No. B152188, 2002 WL 472257, at *1 (Cal. Ct. App. Mar. 28, 2002) (not certified for publication).

³⁹ *Id.* at *2.

⁴⁰ *Id.*

⁴¹ People v. Pacific Land Research Co., 20 Cal. 3d 10, 17 (1977).

⁴² Robert C. Fellmeth, *California's Unfair Competition Act: Conundrums and Confusions*, 26 LAW REVISION COMMITTEE REPORT 227, 230 (Jan. 1995), available at <http://clrc.ca.gov/pub>.

⁴³ *Id.*, 26 LAW REVISION COMMITTEE REPORT at 262.

⁴⁴ *Id.* at 230.

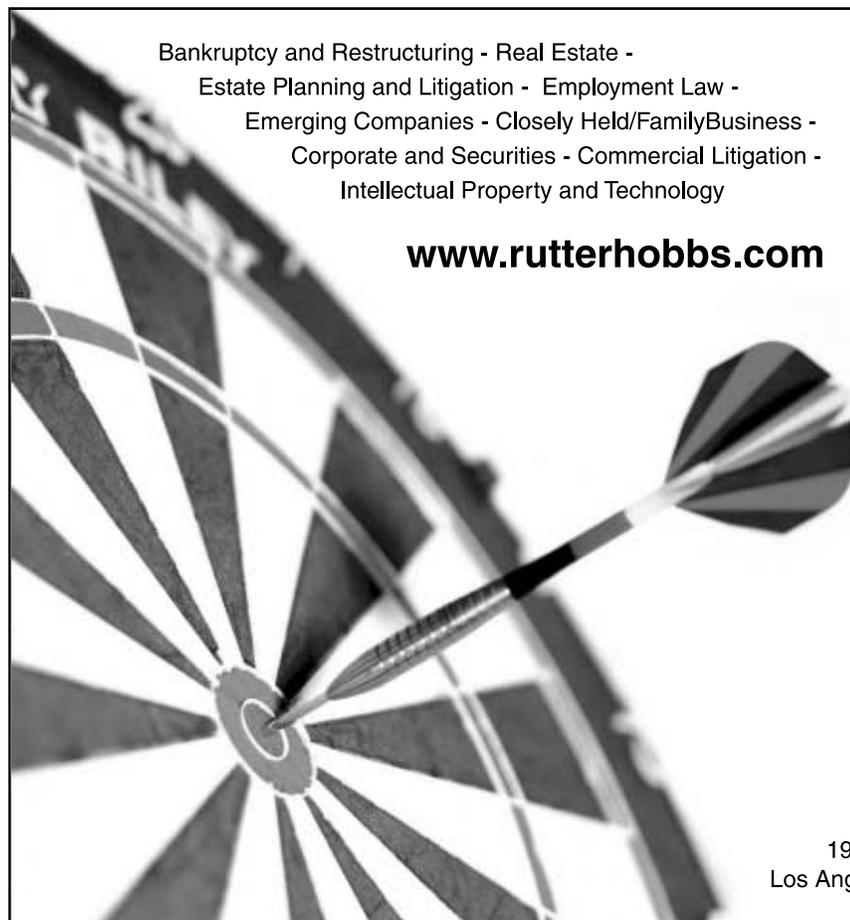
⁴⁵ *Id.* at 262.

⁴⁶ AB 1884 (introduced Feb. 5, 2002, as amended in the state Assembly, May 9, 2002) (emphasis in original). The bill and its history are available at <http://leginfo.ca.gov/bilinfo.html>.

⁴⁷ *Id.*

⁴⁸ Stop Youth Addiction v. Lucky Stores, 17 Cal. 4th 553, 570 (1998) (emphasis in original).

¹ BUS. & PROF. CODE §17200.



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