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DO THE RIGHT THING

Plaintiffs lawyers can help preserve 17200 by filing responsibly

Attacks by tort reform groups against California's unfair competition law have been seen and heard before. But the current political interest in amending the statute may provide tort reform advocates with their best chance ever to gut a law that has been repeatedly described by the California Supreme Court as the state's most potent consumer protection statute.

The volume of the almost annual debate over 17200 has been raised to its present level with the help of several recent high-profile abuses of the statute by a few plaintiffs law firms acting under the law's "private attorney general" provision. Ominously for consumers, these lawsuits may have provided tort reformers with just the fuel they need to eviscerate the UCL.

As long as avarice remains a human trait and corporate decision making is driven by bottom-line profit, consumers will need protection. In these times of Enron, WorldCom and the promise of "8 Minute Abs," the job of looking out for consumers is simply too daunting for California's law enforcement agencies to tackle alone, especially with the budgetary constraints they face. For this reason, the statute's private attorney general component is essential to effectuate the UCL's remedial purpose of providing broad consumer protection.

But plaintiffs lawyers who take on the mantle of private attorneys general must be keenly aware of their obligation to the public to exercise their own prosecutorial discretion. They must be even more acutely sensitive to the practical and eth-

By Andrew A. August

ical constraints all lawyers face in deciding which cases to pursue. Just because a case can be filed does not mean it should be filed.

Given the strength and resiliency of the tort reform lobby in Sacramento, plaintiffs lawyers can no longer afford to file UCL actions every time there is some technical violation of law. Nor can they afford to bring cases over what they subjectively perceive as an unfair business act while collecting a quick fee under the guise of acting in the public's interest. If that mentality persists, the extremists of the tort reform movement will succeed in having the 17200 baby thrown out with the bath water.

Changes to the UCL are necessary both to curb abuses of the law by unscrupulous lawyers and to remedy the effect of *Kraus v. Trinity Management*, 23 Cal.4th 116 (2000), which effectively allows those who violate the statute to retain their ill-gotten gains simply because identifying individual claimants is not possible. Regardless of what, if any, changes to the UCL may be on the horizon, plaintiffs lawyers must be more respectful of the power the statute confers upon them. They should approach the filing of consumer-related UCL actions with a greater sense of responsibility to the principal goal of the statute: protection of the unwary reasonable consumer.

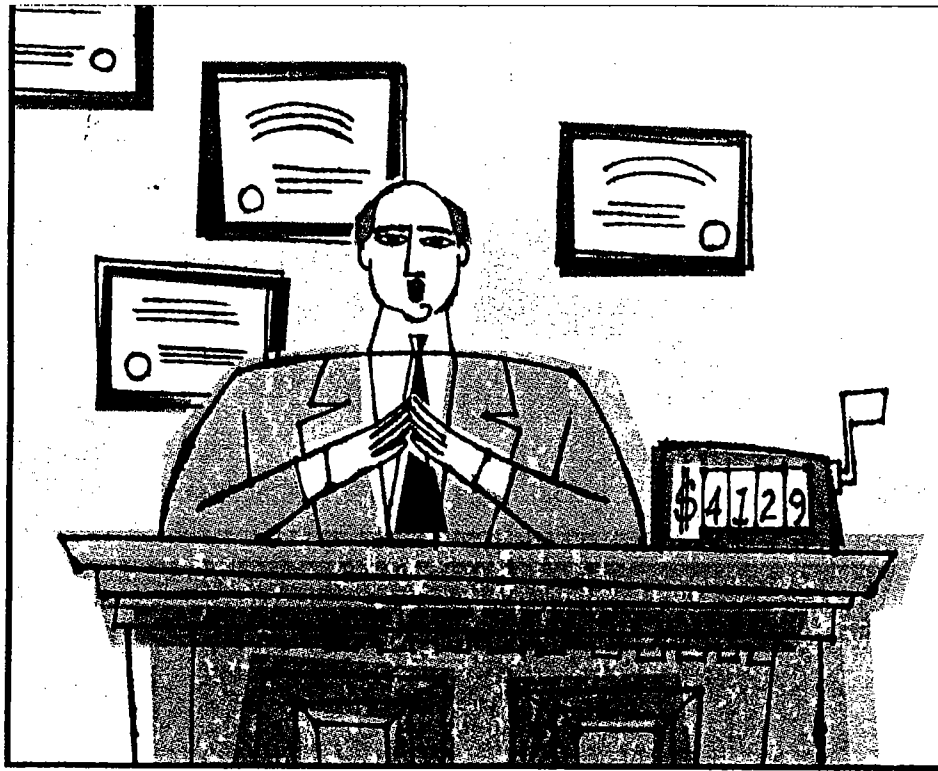
Bottom line: With the political winds swirling around the UCL, plaintiffs counsel must make some practical decisions when it comes to filing lawsuits. The old adage that says "hogs get fat while pigs get slaughtered" has never been more apt.

Let the conduct of the defendant, not the prospect of fees, be your guide.

The flashpoint for the criticism of consumer UCL actions is the demand for attorneys fees that invariably accompanies every case. Largely due to those fee demands, critics often use words like "extortion," "shakedown" and "frivolous" to describe UCL consumer actions, regardless of the merits of the case. Unfortunately, some judges are buying into this cynicism because they are increasingly seeing cases – often with demands for unreasonable fees even before a complaint is filed – with no identifiable plaintiff, no tangible harm to members of the public, and no objectively reprehensible conduct by the defendant. If plaintiffs attorneys want to preserve the UCL in its current form, they must improve the "integrity factor" of the cases being filed.

This process begins at the case intake stage. Counsel should critically assess the degree of repugnancy of the proposed defendant's conduct in the context of the goals of the UCL. One of these goals is preventing a culpable defendant from retaining his "ill-gotten" gains, a concept that has run amuck. Plaintiffs counsel must better distinguish between prosecuting Vietnamese nail salon owners who barely speak English and who neglect to post their Proposition 65 warnings and, say, a Fortune 100 computer manufacturer that knowingly inflates the advertised value of its software bundle for the sole purpose of selling more computers.

A second step is to make a threshold determination of whether the defendant is aware of his conduct and has deliberately chosen to pursue that conduct for his monetary benefit (either in terms of prof-



it or cost savings). Assess what, if anything, the defendant did to rectify his misconduct before filing suit. Become the catalyst of behavioral change by giving the defendant an opportunity to rectify his actions, especially where the misconduct is technical in nature. Be exceptionally wary of taking on cases that target as offenders numerous "mom and pop" retail storeowners. The marginal case you pass on today will help preserve the UCL.

for the compelling one that you will want to file tomorrow.

Although the UCL permits actions based upon violations of virtually any law, the continued reliance on hyper-technical violations of laws by otherwise non-culpable defendants is sure to help fulfill the prophecy of the baby-and-bathwater metaphor. Before filing, research the case and do a gut check as to whether the defendant's conduct is objectively reprehensible, has harmed a substantial number of people, and/or has resulted in substantial ill-gotten gains, and thus is

worthy of a private attorney general lawsuit. If the case is warranted using these criteria, the fee recovery will be warranted, as well.

Determine whether the "reasonable consumer" has been harmed or deceived.

A private attorney general represents the public. That public is the "reasonable consumer," not the "least sophisticated one" (*Lavie v. Procter & Gamble Co.*, 03 C.D.O.S. 612). In evaluating whether a UCL action is justifiable, keep this standard in the forefront.

It is also important to research the question of reasonableness. This research need not take the form of a scientific survey. Instead, it might simply consist of an informal poll of colleagues and friends (although in significant cases, a scientific survey is a worthwhile up-front investment). The results will either instill great confidence in your case or indicate early

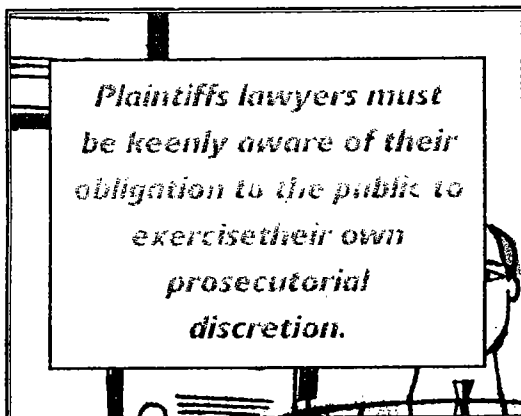
on that the case is not worth pursuing.

Although the statute does not require any actual harm or damage to the consumer to state a cause of action, actual harm should always be a very important criterion when assessing the perceived legitimacy of a case. Before filing a case, plaintiffs counsel should be able to identify some harm, whether monetary or otherwise, resulting from the defendant's conduct.

Golfers who purchased Nike golf balls that were advertised as "the ball Tiger plays" were not harmed by the fact that the core of the golf ball was one millimeter

smaller than the one custom-made for Tiger Woods (yes, this was a real case). Consequently, it was not a case worthy of a private attorney general action on behalf of the public.

Due to the nature of consumer actions in general (i.e., where the loss by the individual consumer is typically small but suffered by a large number of persons), the amount of loss by each individual should be considered but is not necessarily controlling. If, for example, a bank adds a 50-cent hidden charge to tens of millions of customer statements, the fact that each individual consumer may recover only 50 cents is irrelevant to the propriety of the case, especially when gauged against the total amount of the ill-gotten gain by the bank.



definitively answered about consumer UCL actions is when – and to what degree – *res judicata* is available to a settling defendant. It is not reasonable to expect a defendant to settle a lawsuit brought by plaintiff A on behalf of the general public and then be sued by plaintiff B for the same alleged UCL violation. Yet related due process issues exist for plaintiff B when the settlement was neither subject to court review nor publicized. These secret settlements are at the eye of the storm over the recent spate of UCL abuses.

If the case is truly in the public's interest and there has been some measurable harm to a sufficiently identifiable number of people by objectively wrongful conduct, responsible plaintiffs counsel will bring the case on behalf of an affected plaintiff as well as a pure representative plaintiff. When it's time for settlement talks, both the plaintiff and defendant will be well positioned to seek court approval with notice and other due process protections afforded by traditional class actions.

Proceed carefully, but deliberately, with settlement talks.

Begin efforts to settle cases early and pursue settlement discussions often. Always try to negotiate a public service component into the case. In the recent Microsoft settlement, for example, plaintiffs negotiated to have tens of millions of dollars of Microsoft products donated to public schools. Thoroughly document your efforts and the defendant's responses. This may pay big dividends when the time comes for a fee application.

Do not, however, discuss attorneys fees until the defendant has presented a written conceptual settlement proposal with acceptable benefits for the public. If you are in a direct calendar court, get the assigned judge involved at the earliest possible time. If the court is a master calendar court, as it is in San Francisco, seek early settlement intervention from the presiding judge or the law and motion department. Alternatively, get a well-respected private mediator involved at an early stage. If the defendant is underestimating the merits of the plaintiffs' case, all of this can aid immeasurably.

Many plaintiffs lawyers are reluctant to broach a settlement early in the case for fear that their entreaty will be construed by the defendant as a sign of weakness. Or because the lodestar/multiplier method for calculating fees is often used in consumer UCL actions, there may be a fear that the defendant will engage in settlement dialogue and thus limit the lodestar.

Not to worry. It is a rare defendant that acknowledges the error of its ways and capitulates to an early resolution. If the case is a justifiable one and counsel is committed for the long haul, inferences of weakness will be meaningless. On the other hand, plaintiffs counsel will have set the stage for well-deserved substantial attorneys fees by attempting early on to minimize those fees.

As we await the fallout from the current legislative reform efforts, preservation of the deterrent power of the UCL's private

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attorney general provision rests with those who wield that power. It's worth repeating that just because a case can be filed does not mean it *should* be filed.

Plaintiffs counsel must look more critically at the cases they are bringing. Those who abuse their power for immediate personal gain under the guise of doing public good will destroy a critically important consumer protection tool. ♦

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