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SAVING 17200: AN ANALYSIS OF PROPOSITION 64

Jacquetta Lannan*

I. INTRODUCTION

In November 2004, the citizens of California passed Proposition 64, a citizens' referendum1 that modified California's Unfair Competition Law ("UCL").2 California's UCL had a long history of protecting consumers from unfair business practices, but in the years preceding the election, the UCL received negative publicity after news articles revealed that five attorneys had been sanctioned or investigated for abusing the broad definitions of the UCL. The result of this publicity was the passage of Proposition 64, which eliminated the broad standing definition under the law, thereby making it more difficult for consumer protection attorneys to safeguard consumers from unfair business practices.3

Following the passage of Proposition 64, state budget cuts

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1. Proposition 64 was a citizens' initiative, as opposed to a measure placed on the ballot by the legislature. Citizens must either file the proposition with the Attorney General and then get the requisite number of voter signatures, or citizens must appeal to the legislature to put the referendum on the ballot. SEC'Y OF STATE KEVIN SHELLEY, A HISTORY OF CALIFORNIA INITIATIVES 4 (Dec. 2002).

2. California Business & Professions Code §§ 17200-17209. were collectively referred to by the California Supreme Court as the Unfair Competition Law (UCL). While the Legislature has never annotated these statutes as the UCL, in practice, most courts and practitioners use this common acronym. Stop Youth Addiction, Inc. v. Lucky Stores, 950 P.2d 1086 (Cal. 1998).

3. See Steven Lawrence, Big Companies Fight Competition Law; Those Targeted by Law Contribute to Proposition 64 Campaign, MONTEREY COUNTY HERALD, July 12, 2004, at 3 [hereinafter Lawrence, Big Companies Fight].
eliminated many consumer protection groups, resulting in increased consumer susceptibility to harmful practices and a variety of consumer injuries.⁴

California’s UCL has been used to enjoin a wide array of abuses. For example, the law was invoked in a variety of contexts, including enjoining convenience stores from selling cigarettes to minors⁵ and a hospital from enforcing a binding arbitration clause against the son of a patient who died of breast cancer.⁶ The UCL has been used to target credit institutions for failing to disclose fees and for issuing misleading credit offerings.⁷ Even environmental advocates have successfully used the UCL to deter and prevent harmful water and soil pollution.⁸

Prior to the passage of Proposition 64, the UCL was unusual because it allowed plaintiffs without standing to bring an action on behalf of the general public.⁹ Virtually every other statute requires that a plaintiff be subject to some harm in order to have standing to sue. Since the passage of Proposition 64, plaintiffs must be injured by an unfair business practice to have standing.¹⁰ Further, with the passage of Proposition 64, plaintiffs must comply with California Code of Civil Procedure section 382 when bringing a UCL class action.¹¹ This may mean that plaintiffs need to certify their claims as class actions in order to obtain relief on behalf of persons other than named plaintiffs. This poses a difficulty to consumer protection lawyers hoping to protect consumers from future unfair business practices.

This comment explores how Proposition 64 failed to prevent unscrupulous attorneys from abusing the UCL and how it also had the unfortunate effect of eliminating many of the UCL’s broad consumer protection qualities. Part II of this comment introduces the historical origins of California’s

⁴. See Esther Landhuis, Nail Salons Board Target of Budget Ax, SAN JOSE MERCURY NEWS, Jan. 12, 2005, at 1B.
⁵. Stop Youth Addiction, 950 P.2d at 1086.
⁷. Id.
⁸. Lawrence, Big Companies Fight, supra note 3, at 3.
⁹. Standing is a "party’s right to make a legal claim or seek judicial enforcement of a duty or right.” BLACK’S LAW DICTIONARY 1442 (8th ed. 2004).
¹⁰. CAL. BUS. & PROF. CODE § 17203 (Deering 2004).
¹¹. CAL. CIV. PROC. CODE § 382 (Deering 2004).
UCL and explains its substantive reach and procedures. In addition, it details the unusual standing rules of the UCL prior to Proposition 64, illustrates the publicity caused by a few unscrupulous lawsuits, and identifies problems with the UCL prior to Proposition 64. Part III describes the problems inherent in California's UCL that Proposition 64 failed to address. Part IV analyzes the purported rationale for the modifications to the UCL leading up to the November 2004 election. Part V proposes three additions to the UCL to discourage frivolous lawsuits, protect businesses against multiple UCL suits, and provide ethical attorneys more power to protect the public against harmful business practices.

II. BACKGROUND

A. History of the California Unfair Competition Law

California's UCL grew out of common law principles of trademark and tradename infringement. Unfair competition at common law was an equitable doctrine that protected businesses from competitors attempting to pirate labor or otherwise gain an unearned economic benefit. Traditionally, causes of action for unfair competition between

12. See infra Part II.A.
13. See infra Part II.B.
15. See infra Part II.D.
16. See infra Part II.E.
17. See infra Part III.
18. See infra Part IV.A.
19. See infra Part V.A.
20. See infra Part V.B.
21. See infra Part V.C.
22. The set of statutes which comprise the UCL does not have a legislatively imposed name. Most recently the group has been referred to by courts as the "Unfair Competition Law" or UCL. See Stop Youth Addiction, Inc. v. Lucky Stores, 950 P.2d 1086, 1086 (Cal. 1998); Comm. on Children's Television v. Gen. Foods Corp., 673 P.2d 660 (Cal. 1983); ABC Int'l Traders, Inc. v. Matsushita Elec. Corp., 931 P.2d 290 (Cal. 1997).
24. See id.; KGB, Inc. v. Giannoulas, 164 Cal. Rptr. 571 (Cal. Ct. App. 1980) (ex-employee wearing company chicken suit did not constitute unfair competition because he did not wear the company logo or otherwise imply that he worked for the company).
competitors required proof of public deception or public confusion and public identification of some name or design connected to the goods or services of the plaintiff. Consumers, on the other hand, had no standing to allege unfair competition even if they were the ones ultimately harmed by deviant or dishonest business practices. Thus, caveat emptor prevailed, and consumers who were victims of unfair business practices lacked recourse under the UCL.

In 1933, the California legislature modified Civil Code section 3369, and effectively created the State's first UCL. Section 3369, originally enacted in 1872, was little more than a codification of nuisance doctrine and was not used to combat unfair competition until 1933. The 1933

26. See Lutz v. De Laurentiis, 260 Cal. Rptr. 106 (Cal. Ct. App. 1989) (titling and advertising a movie to mislead the public into believing the film was the anticipated sequel to a movie produced by plaintiffs was unfair competition).
27. See Stern, supra note 23, at 2-1.
28. Caveat emptor is Latin for "let the buyer beware." This doctrine holds that "purchasers buy at their own risk." Black's Law Dictionary, supra note 9, at 236.

Neither specific nor preventive relief can be granted to enforce a penalty of forfeiture in any case, nor to enforce a penal law, except in a case of nuisance or unfair competition. Any person performing or proposing to perform an act of unfair competition within this state may be enjoined in any court of competent jurisdiction. As used in this section, unfair competition shall mean and include unfair or fraudulent business practices and unfair, untrue or misleading advertising and any act denounced by Penal Code sections 654(a), 654(b) or 654(c). As used in this section, the term "person" shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons. Actions for injunctions under this section may be prosecuted by the Attorney General or any district attorney 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 interest of itself, its members, or the general public.

Id.
32. See id.
33. Id. Original California Civil Code section 3369 read: "Neither specific nor preventative relief can be granted to enforce a penal law, except in a case of nuisance, nor to enforce a penalty or forfeiture in any case," and merely created a "nuisance" exception to the common law rule that violations of criminal statutes cannot be enjoined. Cal. Civ. Code § 3369 (1872) (amended 1933).
amendment to section 3369 had two substantial effects.\textsuperscript{34} First, the amendment represented the end of the government's laissez faire attitude toward unfair competition.\textsuperscript{35} Second, the 1933 amendment illustrated California's need to protect consumers\textsuperscript{36} by enabling them to initiate civil actions to stop unfair business practices, both on their own behalf and on behalf of the public.\textsuperscript{37}

Despite a number of minor amendments, the language of the statute has remained intact since the 1933 amendment.\textsuperscript{38} Until the 1960s, attorneys used the statute mainly to reinforce common-law tradename and trademark infringement causes of action.\textsuperscript{39} In 1977, California's UCL was recodified in the Business and Professions Code, where it remains today.\textsuperscript{40}

B. Substantive and Procedural Scope of the UCL

1. Conduct Prohibited by California's UCL

The UCL lists five different kinds of prohibited conduct: (1) unlawful business acts or practices;\textsuperscript{41} (2) unfair business acts or practices;\textsuperscript{42} (3) fraudulent business acts or practices;\textsuperscript{43}

\begin{itemize}
  \item \textsuperscript{34} See STERN, supra note 23, at 2-3.
  \item \textsuperscript{35} Id.
  \item \textsuperscript{36} Id.
  \item \textsuperscript{37} See CAL. CIV. CODE § 3369 (1933).
  \item \textsuperscript{38} See STERN, supra note 23, at 1-2. The most important amendments to section 17200 include: the 1963 amendment, which added the term "unlawful" to the list of prohibited practices; the 1977 amendment, which recodified the statutes in to the Business and Professions Code; and the 1992 amendment, which expanded the law to include one-time acts, instead of only ongoing acts. Id.
  \item \textsuperscript{39} Id.
  \item \textsuperscript{40} CAL. BUS. & PROF. CODE §§ 17200-17209 (Deering 2004).
  \item \textsuperscript{41} Id. This prong of the law is unique compared to similar statutes in other states because it allows plaintiffs to bring causes of action if the purported unfair practice violates another law. See Barquis v. Merchs. Collection Ass'n, 496 P.2d 817, 828 (Cal. 1972) (plaintiffs brought suit against defendant collection agency for repeatedly violating civil procedure laws). The term "unlawful" has come to be defined as "anything that can properly be called a business practice and that at the same time is forbidden by law." Id. at 826.
  \item \textsuperscript{42} CAL. BUS. & PROF. CODE § 17200. Unfair practices do not also need to be unlawful or deceptive. See, e.g, Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 561 (Cal. 1999). Unfairness has been defined as "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."
\end{itemize}
(4) unfair, deceptive, untrue, or misleading advertising; and
(5) acts prohibited by Business and Professions Code sections 17500 through 17577.5. The remedies available under the UCL are set forth in section 17203, which enables courts to "enjoin" and "enter other equitable judgments" 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." Plaintiffs are not entitled to any other remedy under the law.

2. Remedies Available Under the UCL

The UCL provides two categories of penalties to private plaintiffs in order to deter unfair competition: injunctive relief and restitution. Courts have liberally construed the UCL in order to serve the legislative purpose of protecting the

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Id. at 544. This clause is intentionally broad and allows courts the maximum amount of discretion. See Motors, Inc. v. Times Mirror Co., 162 Cal. Rptr. 543 (Cal. Ct. App. 1980).

43. CAL. BUS. & PROF. CODE § 17200. The test for "fraudulent" business practices is significantly different from common law fraud. With respect to section 17200, a business practice is fraudulent if "members of the public are likely to be deceived." Comm. on Children's Television v. Gen. Foods Corp., 673 P.2d 660, 672 (Cal. 1983).

44. CAL. BUS. & PROF. CODE § 17200. Because the fourth prong of section 17200 is significantly similar to the third prong, courts often do not distinguish the two. See STERN, supra note 23, at 3-58.

45. California Business & Professions Code section 17500 is often referred to as the "False Advertising Law" or the "False and Misleading Advertising Statute." See STERN, supra note 23, at 3-2.

46. CAL. BUS. & PROF. CODE § 17200.

47. CAL. BUS. & PROF. CODE § 17203. The statute reads in full:
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. Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, country counsel, city attorney, or city prosecutor in this state.

Id.

48. Id. Civil monetary penalties can be awarded when law enforcement officials bring the action. CAL. BUS. & PROF. CODE § 17206.
As one court explained, "it would be impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited, since unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery."\(^{50}\)

*Barquis v. Merchants Collection Ass'n*\(^{51}\) held that courts could "enjoin on-going wrongful business conduct in whatever context such activity may occur,"\(^ {52}\) including any "unlawful, unfair, or [deceptive] business practice," whether the practice harmed competitors or consumers.\(^ {53}\) Courts have enjoined companies from a wide variety of activities. For instance, a collection agency was prohibited from filing actions against debtors in an improper county;\(^ {54}\) a publishing company was prohibited from selling forms that were intentionally made to look like important government-issued questionnaires;\(^ {55}\) retailers were restricted from selling cigarettes to minors;\(^ {56}\) and a dairy was prohibited from advertising its milk as "safe," "pure," and produced under the "highest standards" when the milk actually contained harmful and potentially dangerous bacteria.\(^ {57}\)

Courts have broad discretion in awarding restitution under the UCL: "a court of equity may exercise the full range of its inherent powers in order to accomplish complete justice between the parties, restoring if necessary the status quo ante as nearly as may be achieved."\(^ {58}\) For example, restitution has been awarded to customers defrauded by door-to-door encyclopedia salesmen\(^ {59}\) and to employees who were never paid overtime wages.\(^ {60}\) Restitution under the UCL, however,
is not as broad as in certified class actions. For example, when it is impossible to restore money directly to victims, defendants in UCL actions are not required to repay undeserved gains. By contrast, in a certified class action, such funds generally do not revert to the defendant, but must be disgorged into a fluid recovery fund. Further, in a UCL action, a court is not required to grant restitution even if it finds the defendant liable.

3. Attorneys' Fees Under the UCL

The UCL does not expressly award attorneys' fees, yet this was a common misconception during the Proposition 64 campaign. Prior to Proposition 64, as well as today, there are three circumstances under which an attorney can obtain fees. First, fees can be obtained if the lawsuit involves a contract that contains a provision for attorneys' fees. Second, when the lawsuit involves another statute containing a provision for attorneys' fees for a prevailing party, attorneys' fees can be awarded. Third, attorneys' fees can be awarded if the lawsuit enforces an important right on behalf of the general public or a significant population. This is known as the Private Attorney General Doctrine.

The Private Attorney General Doctrine recognizes that "privately initiated lawsuits are often essential to the effectuation of fundamental public policies." By awarding attorneys' fees, lawyers who were previously unable to take

62. Id. at 726.
63. Cortez, 999 P.2d at 712.
65. Contract-based attorneys' fees are only applicable when the cause of action is rooted in a contract-based claim in addition to other claims. See, e.g., Xuereb v. Marcus & Millichap, Inc., 5 Cal. Rptr. 2d 154, 157 (Cal. Ct. App. 1992) (allowing attorneys' fees when the contract read "lawsuit or other legal proceeding to which this Agreement gives rise").
66. See STERN, supra note 23, at 8-30. Generally, statutory awards come from the underlying statute in an unfair competition claim for an "unlawful" business practice. Id. at 8-31.
67. Id. at 8-30.
68. See, e.g., Cal. CIV. PROC. CODE § 1021.5 (Deering 2004) (outlining California's requirements for awarding fees under the Private Attorney General Doctrine).
69. See STERN, supra note 23, at 8-30.
these types of cases for financial reasons are able to do so if the cases are in the public interest.\textsuperscript{70} Not all actions, however, serve the public interest to such extent as to warrant an award of attorneys' fees.\textsuperscript{71} For example, in \textit{California Licensed Foresters Ass'n v. California State Board of Forestry},\textsuperscript{72} the court denied attorneys' fees to a lawyer who brought an action on behalf of the seven hundred members of the California Licensed Foresters because the members were not representative of the public.\textsuperscript{73} Further, in \textit{Baxter v. Salutary Sportsclubs, Inc.},\textsuperscript{74} the plaintiffs' attorney was denied fees because no significant public benefit was conferred by filing a suit against the defendants for unfair and illegal clauses in their membership contracts.\textsuperscript{75} The court also found that the injunctive relief was too minor to justify an award of attorneys' fees.\textsuperscript{76} In contrast, the court in \textit{Planned Parenthood v. Aakhus}\textsuperscript{77} awarded fees to lawyers who sued to enjoin protestors from interrupting the plaintiff's business because the action was beyond a "self-serving, private dispute commenced by [the clinic] to protect its own pocketbook."\textsuperscript{78} The distinction rests upon whether the action is brought on behalf of the public at large as opposed to a large group of self-interested parties.

Courts must find that four requirements are satisfied in order to award attorneys' fees under the Private Attorney General Doctrine.\textsuperscript{79} First, the court must find that the action will have an important effect on the public interest.\textsuperscript{80} Second, the court must conclude that the general public or a large

\textsuperscript{70} See Woodland Hills Residents Ass'n v. City Council, 593 P.2d 200, 208 (Cal. 1979).


\textsuperscript{73} See id. at 400.


\textsuperscript{75} Id. at 320-21.

\textsuperscript{76} Id. at 322.


\textsuperscript{78} Id. at 516.

\textsuperscript{79} See Disner & Jussim, supra note 71, at 45.

\textsuperscript{80} CAL. CIV. PROC. CODE § 1021.5 (Deering 2004).
class of persons has been conferred a significant benefit. Next, the "necessity and financial burden of private enforcement" must justify an award of attorneys' fees. Finally, in the interest of justice, attorneys' fees cannot be paid out of the recovery.

C. Issues with the UCL Prior to Proposition 64

1. The Controversial Standing Requirement Under the UCL

One of the most controversial aspects of the UCL prior to Proposition 64 was that anyone, even someone not directly affected or injured by the prohibited action, could bring a lawsuit under the UCL on behalf of the public. In almost all other cases in California and elsewhere, standing is required before a plaintiff can sue. As one court explained, "this rule [requiring standing] is designed to protect a defendant from a multiplicity of suits and from further annoyance and vexation, and to fix and determine the real liability which is alleged in the complaint." California's UCL, compared to similar statutes in other states, was the broadest in the country prior to Proposition 64. The broad standing definition contributed to the most controversial UCL issues, including abuses by attorneys, multi-front lawsuits, and vast representative actions.

2. Perceived UCL Abuses

During the spring of 2004, several examples of attorneys'
abuse of the broad standing provision of the UCL received significant publicity.\textsuperscript{88} The lawyers in those cases filed actions that theoretically were legally sound.\textsuperscript{89} For example, in one such case, an attorney filed actions against nail salons that purportedly used nail polish from the same bottle on multiple customers, in violation of statute.\textsuperscript{90} These salons, therefore, had technically committed an “unlawful” business practice prohibited by the UCL.\textsuperscript{91} The Bar Association’s subsequent sanctioning of the attorneys, however, was not based on their filing lawsuits under the UCL, but rather for ethical violations committed in conjunction with the lawsuits.\textsuperscript{92} These violations included misrepresenting to banks the State Attorney General’s support of their actions,\textsuperscript{93} misinforming a charity of lawsuits purportedly filed on its behalf,\textsuperscript{94} threatening audits,\textsuperscript{95} sending settlement letters with misleading information,\textsuperscript{96} making false promises that settlements would bar any further action against them,\textsuperscript{97} and requiring settlements to be confidential.\textsuperscript{98}

However, attorney misconduct has only tainted a small fraction of UCL cases, and many legitimate and meritorious lawsuits have used the UCL to achieve positive ends.\textsuperscript{99} For years, the UCL has been an important tool to protect both consumers and ethical businesses from unfair competition.\textsuperscript{100} For example, Kaiser Hospital’s use of a binding arbitration

\textsuperscript{89} See id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} McCarthy, \textit{supra} note 90, at 7.
\textsuperscript{97} Disner & Jussim, \textit{supra} note 71, at 44.
\textsuperscript{98} McCarthy, \textit{supra} note 90, at 7.
\textsuperscript{99} See Lisa Muñoz, \textit{Lawyer Accused of Frivolous Suits Fined}, ORANGE COUNTY REG., Oct. 21, 2003, at 1 [hereinafter Muñoz, \textit{Lawyer Accused}]. For examples of lawsuits using the UCL to reach such positive results, see Van Wyngarden, \textit{supra} note 6, at 34.
\textsuperscript{100} Evan Pondel, \textit{Baiting the Hook Prop. 64 on the November Ballot has Business and Consumers Divided}, DAILY NEWS, Aug. 15, 2004, at B1.
clause was challenged by the son of a patient who died of breast cancer. In addition, the UCL was used to enjoin Safeway from re-labeling outdated meat for resale. Public health advocates used the UCL to enjoin food companies from marketing sugary candy cereals as "healthy." Other cases forced the reduction of toxic emissions from tanker docks at Southern California ports. After the 1994 Northridge Earthquake, a nonprofit organization used the UCL to collect tens of millions of dollars owed by State Farm Insurance to homeowners whose homes were destroyed. A Los Angeles-based company was sued under the UCL for falsely advertising to low-income Latinos that the company sold water filters when it actually sold water softeners. Online auctioneers and trading websites were enjoined for misleading advertising and consumer fraud. These are just a few examples of the public benefits of UCL actions that strongly outweigh the few perceived abuses.

3. Simultaneous Public, Private, and Administrative Lawsuits

Under the UCL, both prior to Proposition 64 and today, defendants can be sued simultaneously by private plaintiffs, the attorney general, and administrative agencies for exactly the same unfair business conduct, causing expensive litigation for the defendant in both time and resources. The courts have interpreted the statute to permit private suits even if there is a parallel law enforcement action. Thus, "the necessity of appellants' private pursuit of the present action is not foreclosed merely because they failed to obtain the approval of the district attorney before or after they filed the same, or solely on the basis of whether a subsequent

101. Id.
103. Id.
105. Pondel, supra note 100, at B1.
106. Id. Consumers were falsely told they were buying a product that would clean their water, making it safer to drink. Id.
107. Id.
109. See, e.g., id.
similar action was filed by the People."\textsuperscript{110} Therefore, defendants are occasionally subject to both private and public actions for the same prohibited behavior.\textsuperscript{111} However, cases in which both a private party and a public entity seek "relief conferring a public benefit against a common private defendant" are particularly rare.\textsuperscript{112}

Similarly, civil actions brought under the UCL are not precluded because of the existence of parallel administrative proceedings.\textsuperscript{113} Thus, defendants might have to defend themselves in three separate lawsuits: one with a private party, one with the Attorney General, and another with an administrative agency.\textsuperscript{114} Courts defend this system, stating:

> The enforcement of administrative regulations and the civil proceedings to compel the cessation of unlawful or unfair business practices are two separate legal processes involving two separate, distinct law enforcement agencies. The commencement of an administrative action . . . does not restrain the authority delegated by law to the district attorney. One branch of government may not prevent another from performing official acts required by law.\textsuperscript{115}

Administrative and Attorney General actions are filed for different reasons.\textsuperscript{116} For example, in \textit{Setliff Bros. Service v. Bureau of Automotive Repair}, an automotive repair shop defended separate actions brought by the Attorney General under the UCL, as well as a separate action by the Department of Consumer affairs.\textsuperscript{117} The actions were based on the same facts and eventually led to the revocation of the shop’s smog license.\textsuperscript{118}

\textbf{4. True Class Actions Versus Representative Actions}

Another one of the controversial aspects the UCL was the
"representative" class action.119 Before Proposition 64, representative class actions allowed an individual plaintiff to bring an action for an injunction or restitution on behalf of an uncertified "class," regardless of whether the plaintiff was personally harmed by the challenged acts of unfair competition.120 Many of the attorneys sanctioned for UCL abuses filed these types of cases. Representative actions under the UCL prior to Proposition 64 varied significantly from true class actions.121 Class actions must be certified by the trial court only when the proponent of the certification establishes the elements of a certified class.122 Further, class actions cannot be dismissed or settled without court approval.123

From a defendant's perspective, a true class action may have advantages over a representative action.124 First, the increased cost of true class action litigation prevents a large number of plaintiffs from bringing such actions.125 True class actions have a res judicata126 effect as to all class members.127 By contrast, settlements in representative actions on behalf of the public do not bind the absent member of the general public, leaving defendants open to additional lawsuits arising from the same unfair conduct.128

119. See Stern, supra note 23, at 7-12.
121. Id. Before Proposition 64, true class actions were an option and could be brought under section 17200. Corbett v. Superior Court, 125 Cal. Rptr. 2d 46 (Cal. Ct. App. 2002). By certifying a section 17200 class, the plaintiffs were allowed a broader range of remedies, including the use of fluid recovery funds. Id. at 49. California's class action procedures are codified in California Code of Civil Procedure section 382. Id. at 51; see also Cal. Civ. Proc. Code § 382 (Deering 2004).
125. See id.
126. Res judicata is Latin term meaning "[a]n issue that has been definitively settled by judicial decision." Black's Law Dictionary, supra note 9, at 1336-37.
128. See Kraus v. Trinity Mgmt. Servs., Inc., 999 P.2d 718, 718 (Cal. 2000). Because representative class members are not actually parties to the action, they can not be bound by the judgment or settlement. Id.
For potential plaintiffs, there are both incentives and disincentives to filing a representative claim under the UCL.\textsuperscript{129} By allowing parties to bring actions on behalf of the public, public interest organizations are able to bring actions against companies to enjoin unfair practices that harm the public at large without having to go through timely and costly class action procedures.\textsuperscript{130} As one court expressed, "both [true] consumer class actions and representative class UCL actions serve important roles in the enforcement of consumers' rights... These actions supplement the efforts of law enforcement and regulatory agencies. This court has repeatedly recognized the importance of these private enforcement efforts."\textsuperscript{131}

Alternatively, a plaintiff may choose to certify the class UCL claim, thereby making it a true class action.\textsuperscript{132} One motivation for certifying the class is that remedies under the UCL are limited to restitution and injunction.\textsuperscript{133} Remedies such as fluid recovery\textsuperscript{134} and cy pres\textsuperscript{135} relief are only available in true class action cases.\textsuperscript{136} Furthermore, if the plaintiff wants to file causes of action in addition to her UCL claim, those causes of action must be brought as a class action.\textsuperscript{137} Representative actions are also sometimes more difficult to settle than true class actions because they do not ensure that the defendant will not be sued again.\textsuperscript{138}

\begin{itemize}
\item \textsuperscript{129} See STERN, supra note 23, at 7-20 to 7-21.
\item \textsuperscript{130} See id.
\item \textsuperscript{131} Kraus, 999 P.2d at 724-25.
\item \textsuperscript{132} See STERN, supra note 23, at 7-20 to 7-21.
\item \textsuperscript{133} See Corbett v. Superior Court 125 Cal. Rptr. 2d 46, 49 (Cal. Ct. App. 2002).
\item \textsuperscript{134} "Fluid recovery developed as a means by which to distribute the residue of a favorable class action judgment remaining after payment to those class members who have sufficient interest in obtaining recovery and can produce the documentation necessary to file individual claims." Kraus, 999 P.2d at 725-26.
\item \textsuperscript{135} Cy pres is "[t]he equitable doctrine under which a court reforms a written instrument with a gift to charity as closely to the donor's intention as possible, so that the gift does not fail. Courts use cy pres [especially] in construing charitable gifts when the donor's original charitable purpose cannot be fulfilled." BLACK'S LAW DICTIONARY, supra note 9, at 415.
\item \textsuperscript{136} Kraus, 96 Cal. Rptr. 2d at 492-94.
\item \textsuperscript{137} Id. Only California Business and Professions Code sections 17200 and 17500 allow actions on behalf of absent parties. Other causes of action require class certification. See STERN, supra note 23, at 7-21.
\item \textsuperscript{138} See id.
\end{itemize}
E. Publicity and the Campaign for Proposition 64

In the spring of 2003, the UCL started receiving bad press. The State Bar of California charged the Trevor Law Group with thirty-six counts of misconduct, including making misrepresentations and filing unjust actions under the UCL. The Trevor Law Group attorneys had incorporated an organization called Consumer Enforcement Watch Corp., which purported to be a consumer protection organization. Subsequently, the Trevor Law Group filed twenty-eight lawsuits, twenty-four on behalf of Consumer Enforcement Watch, and sent letters to potential defendants—mostly auto repair shops and restaurants—threatening audits and reviews of their business records.

The letters contained false and misleading statements regarding attorneys' fees that led potential defendants to believe they would have to pay extremely high attorneys' fees if they refused to settle quickly. The lawyers also encouraged the small businesses to settle confidentially to keep the details from the courts and to keep settlement payments under lawyer control. According to the State Bar, the Trevor Law Group lawyers made fee agreements with the plaintiff-client, Consumer Enforcement Watch, which provided the attorneys with up to ninety percent of the settlement money.

Further, the attorneys misinformed a charity, Helping Hands for the Blind, about their motives and filed suits in the charity's name. In addition, to get a million-dollar advance, they misrepresented to a lending institution that the Attorney General was supporting their actions. In response, the State Bar put the lawyers on inactive status.

The attorneys, faced with the possibility of disbarment,

139. McCarthy, supra note 90, at 7.
140. Id.
141. Id.
142. Id.
143. Disner & Jussim, supra note 71, at 45.
144. McCarthy, supra note 90, at 7.
145. Disner & Jussim, supra note 71, at 44.
resigned from the bar. The Attorney General also filed an action against the Trevor Law Group alleging that the lawyers had engaged in unfair business practices and were violating the UCL.

During the spring of 2004, two more attorneys made headlines for their misuse of the UCL. The Attorney General charged attorney Harpreet Brar of violating section 17200. Brar had accused business owners of violating unfair business practice laws. Most of Brar's victims were Vietnamese-owned nail salons that allegedly applied nail polish from one bottle to many customers. Brar was ordered to pay nearly $2 million in fines and $11,200 in restitution to the ten businesses that represented the most egregious cases.

In addition, Sacramento solo practitioner Brian Kindsvater was sued by the Attorney General after filing lawsuits against travel agency websites, pornography sites, spammers, bulk-faxers, and video stores. Like the Trevor Law Group, he formed a shell corporation called Consumer Action League and sued businesses under the UCL. For example, he sued over two hundred travel agents and agencies for allegedly failing to post a business license number on their websites. Kindsvater agreed to return $35,000 in settlement funds.

149. Id. Since resigning from the bar, one Trevor Law Group attorney has opened a sports management agency in the law group's old law office, another has returned to Canada, and the third is selling used cars. Lisa Muñoz, California Businesses Seek to Limit Consumers' Ability to Sue with Initiative, ORANGE COUNTY REG., Aug. 4, 2004, at 1 [hereinafter Muñoz, California Businesses].

150. Disner & Jussim, supra note 71, at 42. California Attorney General Bill Lockyer called it a "delicious irony" that he was using section 17200 to enjoin the Trevor Law Group attorneys. Id.


152. Id. Brar was apparently a classmate of the Trevor Law Group attorneys at Western State University in Fullerton, California. Id.


154. Id.

155. Id.


157. Chorney, supra note 147, at 5.

158. Id.


160. Id. The attorney for Kindsvater reported that the substance of Kindsvater's lawsuits was not criticized, only the procedures he followed. Id.
Armed with the publicity stemming from these unscrupulous actions by a few attorneys, proponents of Proposition 64 launched a successful campaign to reform the law by eliminating the broad standing requirement and by requiring UCL claims to comply with California Civil Code section 382, a statute listing certain requirements for class action cases. As stated by Bruce M. Brusavich, President of the Consumer Attorneys of California, "the Trevor Law Group has done a huge disservice to the legal profession. They have maligned the intent of the UCL, which is despicable; they have instilled fear in the small-business communities of Southern California; and they have given the tort-reform crowd a soapbox to stand on."

The tort reformers began a powerful campaign, backed in part by small businesses. The largest contributors to the campaign, however, were large corporations who had previously been sued under the UCL. The money was poured into a televised campaign that bombarded voters with stories of small business owners being bullied by unethical and unscrupulous lawyers.

One advertisement in the television campaign endorsing Proposition 64 showed an unscrupulous attorney directing his paralegals to send out letters demanding money from businesses simply because they were financially capable of paying a settlement. The videos failed to show that the

163. Lawrence, Corporations Backing Competition Act Changes, supra note 161, at 3.
164. See id. Blue Cross donated $250,000 after a lawsuit was filed alleging that it had switched customers to more expensive life insurance policies. Id. Bank of American donated $100,000 after losing a lawsuit for misrepresenting to customers that it had the right to take social security and disability funds from their accounts to pay overdraft charges and other fees. Id. Microsoft gave $100,000 to the effort, as it had been sued under section 17200 for failing to alert customers of security flaws in its computer systems. Id. State Farm, after losing a section 17200 claim for reducing earthquake coverage without adequate notice and being forced to pay $100,000,000 in restitution to policy holders, gave $100,000 to the effort. Id.
attorneys who filed these types of lawsuits were disbarred or fined. Campaign advertisements also failed to explain that the vast majority of businesses sued under the UCL had actually broken the law.\textsuperscript{167}

Other advertisements depicted small business owners, recently sued under the UCL, threatening to go out of business or move out of the state.\textsuperscript{168} While the threat of businesses leaving the state is troubling, the advertisements did not explain why or how Proposition 64 might solve this problem, nor did they acknowledge that the law could be effective in prosecuting companies that exploit consumers. The purpose of Proposition 64, certainly, was never to exempt small businesses from following the law.

Evidence of corporate support for Proposition 64 mounted late in the campaign. One newspaper reported that by October 2004, Phillip Morris, Exxon, State Farm, Citigroup, and General Motors had donated a combined $13 million to back Proposition 64.\textsuperscript{169} One of the nation's largest car retailers contributed more than $10 million to the effort.\textsuperscript{170} Bank of America donated $100,000 to the campaign after a jury found the bank had made misrepresentations to customers about overdraft charges and other fees.\textsuperscript{171} Kaiser Foundation Health Plan also donated $100,000.\textsuperscript{172} Nike, once sued for false advertising regarding poor working conditions in factories in which its products were made, donated $50,000 to the "Yes on 64" campaign.\textsuperscript{173}

According to one consumer rights advocate, the amount of corporate funding was excessive: "It's draconian. This is moneyed corporations reaping the benefits of 64 to get out of damaging lawsuits and their responsibilities."\textsuperscript{174} The AARP,  

\textsuperscript{167} Id.
\textsuperscript{168} Victim (Yes on Prop. 64 Television Ads) (2004) (on file with author); RECOVERY (Yes on Prop. 64 Television Ads) (2004) (on file with author).
\textsuperscript{169} John Court, Prop. 64 Poisons Public, Not Lawyers, CONTRA COSTA TIMES, Oct. 24, 2004, at 4.
\textsuperscript{170} Kevin Yamamura, Lockyer Criticizes Prop. 64's Limits on Lawsuits, SACRAMENTO BEE, Oct. 1, 2004, at A6.
\textsuperscript{171} Lawrence, Big Companies Fight, supra note 3, at 4.
\textsuperscript{172} Id. Kaiser had been sued a number of times under the UCL, including once for purportedly falsely advertising the way in which patient care decisions were made and in another case alleging that the company split patients' pills. Id.
\textsuperscript{173} Id.
\textsuperscript{174} Basye, supra note 165, at 1.
California Nurses Association, Sierra Club, Center for Environmental Health, Foundation for Taxpayer and Consumer Rights, and the Attorney General each opposed Proposition 64.\textsuperscript{175} However, on November 2, 2004, Proposition 64 passed with a fifty-nine percent majority vote.\textsuperscript{176} The newly enacted Proposition 64 would later be referred to as “an over-fix [consisting of] a very bad public policy that will soon cause its own harm.”\textsuperscript{177}

III. IDENTIFICATION OF THE LEGAL ISSUE

This comment has identified the weaknesses in the UCL. Next, it will analyze whether Proposition 64 successfully solves the issues it was enacted to cure. In particular, the comment will address whether the new, narrow standing requirements will solve the problems of unscrupulous attorneys abusing the UCL. The legal issue has thus become whether and how Californians can save the UCL to once again protect consumers while at the same time protecting businesses from unscrupulous lawyers. Unfortunately, Proposition 64 fails to discourage devious attorneys from filing and settling UCL claims,\textsuperscript{178} fails to ensure that business defendants will not be faced with simultaneous UCL actions by public and private parties,\textsuperscript{179} and fails to protect consumers against potentially harmful business practices.\textsuperscript{180}

IV. ANALYSIS

A. Purpose of Proposition 64

Proposition 64 limits the right to sue under the UCL to plaintiffs who had actually suffered injury from unfair business practices.\textsuperscript{181} Further, the Proposition may require class actions when individuals attempt to bring actions on

\textsuperscript{176} Lisa Muñoz, Lawyers, Businesses Debate Effect of New Limits on California Consumer Lawsuits, Orange County Reg., Nov. 9, 2004, at Business 3 [hereinafter Muñoz, Lawyers, Businesses Debate].
\textsuperscript{177} Basye, supra note 165, at 1.
\textsuperscript{178} See Muñoz, California Businesses, supra note 149, at 1.
\textsuperscript{179} Id.
\textsuperscript{180} Id.
\textsuperscript{181} Sec'y of State, supra note 175, at 109.
SAVING 17200

behalf of the public. However, the Attorney General or local government prosecutors can still bring actions on behalf of the public.

The text of Proposition 64 specifically points out that its purpose is to eliminate frivolous UCL lawsuits that clog the courts. It also expresses concern that uninjured plaintiffs can sue businesses without having used the "defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant." According to the text, the voters believe that only the Attorney General and other government attorneys should be able to file actions on behalf of the public.

B. Problems with Proposition 64

1. Attorneys Can Still File Unscrupulous Actions

The effect of Proposition 64 has been described by the following statement: "obviously, there are systems in place to eliminate the bad apples. You just don't want to put another system in place and throw away all of the good apples." By adding a standing requirement, proponents of Proposition 64 attempted to prevent lawyers such as those of the Trevor Law Group from filing frivolous cases. While advertised as being the solution to frivolous "shakedown lawsuits," it is unlikely that Proposition 64 will put an end to such cases. One consumer advocate suspects that it will prevent only about fifteen percent of the egregious UCL claims.

Furthermore, many of the most egregious cases will not be prevented by the changes Proposition 64 made to the UCL. For example, in the case of the firm that sued nail salons over reuse of nail polish, the attorney could have easily

182. Id.
183. Id.
184. Id.
185. Id.
186. Id.
188. See Muñoz, Lawyers, Businesses Debate, supra note 176, at Business 3.
189. See Muñoz, California Businesses, supra note 149, at 1.
191. See Muñoz, California Businesses, supra note 149, at 1.
recruited a number of women to get manicures or pedicures at the salons within the same day or two. The women could then claim to have suffered an injury. As a result, they would have standing to file an unfair competition action under the new version of the statute.

Another pre–Proposition 64 case further illustrates the point. In that case, an attorney filed an action under the UCL against Wal-Mart for offering a “Ladies Day” discount on oil changes. The plaintiff-client purposely went to Wal-Mart instead of his usual mechanic for an oil change and intentionally did not ask for the discount. All of this took place after the plaintiff had met and discussed the case with his attorney. This manipulation of the UCL is still legitimate after Proposition 64 because the plaintiff is a party that “has suffered injury in fact and has lost money or property as a result of such unfair competition.” According to one consumer advocate: “There are bad people in every single profession. But instead of stopping shady lawyers, this proposition unjustly protects HMOs, banks and other businesses. There are other ways to root out bad actions without eliminating consumer and public protections.”

The best way to stop unscrupulous and unethical lawsuits is to take away the attorney’s motivation to file such actions while at the same time ensuring that legitimate attorneys will not be discouraged from using the UCL on behalf of their clients. A number of solutions have been proposed. One solution is for the court to “freely

193. See id.
194. See id.
196. See id. Apparently, Wal-Mart will give the discount to anyone who asks for it on “Ladies Day”, including men. Id.
197. See id.
198. See Cal. BUS. & PROF. CODE § 17204 (Deering 2004).
199. Pondel, supra note 100, at B1.
201. Taylor, supra note 200, at 1147.
202. Id.
incorporate the unclean hands doctrine of abstention" in cases where it is obvious that the attorney misused the UCL to garner attorneys' fees,203 as the trial court is in the best position to judge whether cases are frivolous.204 Unfortunately, many of the cases brought for less than noble reasons settle out of court and are never scrutinized by a judge.205

Another solution is to use the UCL against the attorneys who abuse it,206 as the Attorney General has already done with some lawyers.207 Ultimately, while a few attorneys may be deterred by the possibility of future action against them, this method fails insofar as it does not prevent the problem until after the abuse has already occurred.208 A better remedy would be to keep attorneys from filing unscrupulous actions from the start.209

The best proposal to curb unscrupulous tactics involving the UCL is to eliminate any incentive attorneys may have to file frivolous UCL lawsuits.210 A revision of the UCL could require that attorneys' fees must be approved by the court.211 Under this proposed solution, after finding liability, the judge would have to approve any award of attorneys' fees.212 In addition, prior to a finding of liability, the court would have to approve any settlement, including offers of attorneys' fees.213

This solution solves the problem of unscrupulous attorneys who take advantage of the law because it eliminates any monetary incentive to file the lawsuit.214 Threats of hefty attorneys' fees, like those threatened by the Trevor Law Group, were likely a deciding factor in achieving quick settlements.215 It is less likely that the Trevor Law Group would have even threatened to file suit if it was clear

203. Id.
204. Id.
205. Sullivan, supra note 195, at 22.
206. Wagstaffe, supra note 200, at 371.
207. See Leoni v. State Bar Ass'n, 217 Cal. Rptr. 423 (Cal. 1985).
208. Disner & Jussim, supra note 71, at 45.
209. Id.
210. Id.
211. Id.
212. See generally id.
213. See generally id.
215. Id.
they would receive no monetary benefit from the action.\textsuperscript{216} This type of amendment to the UCL would allow legitimate attorneys to protect their livelihoods while penalizing those who file frivolous suits.\textsuperscript{217}

2. **Defendants Are Still Subject to Simultaneous Public, Private, and Administrative Suits**

The changes to the UCL by Proposition 64 do not protect defendants from being forced to fight two or even three front wars; however, the possibility of this happening has significantly diminished with the addition of Proposition 64's "actual injury" requirement.\textsuperscript{218} Prior to Proposition 64, parties alleged of violating the UCL could be sued simultaneously by uninjured private parties and government entities.\textsuperscript{219} Now that private parties must have standing,\textsuperscript{220} it is less likely that defendants will find themselves fighting two or three front wars. Nevertheless, defendants may find themselves in court against both administrative agencies and government attorneys,\textsuperscript{221} as different government agencies serve different functions and none are prohibited by Proposition 64 from bringing actions on the public's behalf.\textsuperscript{222}

Should defendants find themselves fighting both private parties and public entities concurrently, the legislature could solve this problem by requiring private parties to give the Attorney General notice of the action, which gives the Attorney General time to decide if a public entity should take over the case.\textsuperscript{223} If a public entity takes the case, it should be required to include the private attorneys' costs and expenses when calculating any costs for a settlement.\textsuperscript{224} This method solves two problems. First, it eliminates businesses' concerns about defending against both public and private parties at the

\textsuperscript{216} See Stern, supra note 23, at 7-6.

\textsuperscript{217} Disner & Jussim, supra note 71, at 45 ("Lawyers, like everyone else, have to eat.").

\textsuperscript{218} Cal. Bus. & Prof. Code § 17203 (Deering 2004).


\textsuperscript{221} See Fellmeth, supra note 87, at 26-27.


\textsuperscript{223} Fellmeth, supra note 87, at 26.

\textsuperscript{224} Id. at 27.
same time. Second, it offsets the costs imposed on a financially burdened Attorney General's Office by taking actions that the State lacks the staffing or funding to pursue.\textsuperscript{225} Historically, private parties have played an important role in meritorious consumer protection cases, and they will likely continue to do so.\textsuperscript{226} It is unlikely that the Attorney General will take over many cases; however, this method would allow the Attorney General to regulate potentially conflicting actions.\textsuperscript{227}

3. \textit{Private Attorneys Are Unable to Protect Consumers}

Proposition 64 suggests that plaintiffs may have to certify a class before bringing an action for restitution on behalf of others.\textsuperscript{228} On one hand, this requirement ensures that settlement of UCL cases will have a res judicata effect, which would thus protect businesses from multiple private suits.\textsuperscript{229} On the other hand, class actions significantly raise the cost of litigation in many legitimate consumer actions and would unfortunately limit many consumer protection lawsuits.\textsuperscript{230}

When a plaintiff's interest is similar to the interests of the public at large, it may be appropriate to bring an action to enjoin a company on behalf of the public.\textsuperscript{231} In addition to bringing a tort action, an injured plaintiff should be able to enjoin businesses from further unfair business practices.\textsuperscript{232} Unfortunately, Proposition 64 could eliminate the injured plaintiff's ability to bring an uncertified representative action on behalf of the public, even if there could be a significant public benefit.\textsuperscript{233}

The California state budget is currently facing a variety of cuts, including the elimination of thirty-two boards and commissions.\textsuperscript{234} These cuts threaten to leave consumers

\textsuperscript{225} See Landhuis, supra note 4, at 1B.
\textsuperscript{226} FELLMETH, supra note 87, at 26-27.
\textsuperscript{227} Id. at 28. Similar procedures are used in taxpayer waste qui tam actions and federal employment discrimination civil rights complaints. Id.
\textsuperscript{228} See STERN, supra note 23, at 7-20.
\textsuperscript{229} See id.
\textsuperscript{230} See id.
\textsuperscript{231} Landhuis, supra note 4, at 1B.
\textsuperscript{232} Id.
\textsuperscript{233} Id.
\textsuperscript{234} Id.
vulnerable to unfair business practices and with an insufficient number of government agencies to protect public health and safety. One way to combat this problem would be to allow certain injured plaintiffs to use the UCL to enjoin companies on the public's behalf. To ensure that this cause of action is not abused, the legislature could require approval by the Attorney General before an action is commenced. Attorney General approval would simultaneously prevent abuse by unscrupulous attorneys and at the same time allow legitimate consumer advocates to protect the public safety and welfare.

V. PROPOSALS

Proposition 64 fails to protect the UCL from abuse by unscrupulous attorneys. Further, the changes made by Proposition 64 fail to address the problem of businesses having to defend simultaneous cases brought by private plaintiffs and public entities. Perhaps the biggest failure of Proposition 64 is that it eliminates the ability of legitimate and ethical attorneys to bring protective actions on behalf of the public during a time of increased budget cuts to government consumer protection agencies. Proposed below are three additions to the UCL that, if enacted by the legislature, could effectively solve these problems while retaining the spirit and purpose behind Proposition 64.

A. Attorneys' Fees Must Be Approved by the Court

To eliminate potentially frivolous lawsuits, the legislature should look at attorneys' incentives for filing an action. In some cases, lawyers act in the consumers' best interest and file legitimate and important actions to protect the public. In rare cases, however, attorneys file actions

235. See FELLMETH, supra note 87, at 26. Another solution already utilized by the Attorney General is to hire private plaintiffs' attorneys as contract lawyers to take suits too large or complex for the Attorney General's Office. See Justin Scheck, Plaintiff Firms Offer to Take Cases from the AG, THE RECORDER, Feb. 8, 2005, at 1.
236. See FELLMETH, supra note 87, at 26-27.
237. See id. at 26.
238. Disner & Jussim, supra note 71, at 45.
239. Disner & Jussim, supra note 71, at 45.
240. Id.
solely to acquire attorneys' fees through quick settlements.\textsuperscript{241} To prevent attorneys from abusing the UCL, the latter incentive must be eliminated\textsuperscript{242} by adding the following language to section 17200: "Attorneys filing actions under California Business & Professions Code section 17200 on behalf of the public are not entitled to attorneys' fees without receiving judicial approval based on California Civil Code section 1021.5 or another independent basis for attorneys' fees." This statute would significantly deter unscrupulous actions, yet award reasonable attorneys' fees to attorneys filing real and meaningful claims. Because they would have to seek court approval for fees even at the settlement stage, lawyers, such as those in the Trevor Law Group, will not be able to quickly and quietly settle their UCL cases.

B. Require Private Plaintiffs to Notify the Attorney General Prior to Filing UCL Actions

By adding a standing requirement, Proposition 64 may have eliminated the problem of defendants who concurrently fight both private and public actions.\textsuperscript{243} If, however, the legislature finds this a common occurrence in the future, it should enact legislation that requires notice to the Attorney General, thereby giving public prosecutors an opportunity to file cases independently and allowing the Attorney General's Office to monitor ongoing UCL cases.\textsuperscript{244} The following is a sample statute:

A private litigant commencing an action under section 17200 must first submit his or her proposed civil complaint to the Attorney General. The public authorities will have sixty (60) days to prosecute the case. If any public prosecutor decides to pursue the matter she or he must include all of the reasonable costs and fees incurred by the private plaintiff and his or her counsel.\textsuperscript{245}

The sixty-day requirement gives public offices sufficient time to decide whether the public's interest would be better

\begin{footnotesize}
\textsuperscript{241} See id.
\textsuperscript{242} Id.
\textsuperscript{243} FELLMETH, supra note 87, at 27.
\textsuperscript{244} Id.
\textsuperscript{245} Fellmeth makes a similar proposal, but suggests sixty days for the Attorney General to decide to take the case. See id.
\end{footnotesize}
served by public prosecution of the case.246

C. Private Plaintiffs Can Bring Actions on Behalf of Those Similarly Situated

Proposition 64 severely decreased an attorney's ability to bring actions that could benefit the public,247 particularly actions on behalf of consumers who often fall victim to unfair business practices.248 Since the State's budget cuts, consumers have become even more susceptible to unfair and unlawful business practices.249 One remedy to this situation would be to allow injured plaintiffs to bring representative actions enjoining a business from continuing its harmful practices. By requiring the Attorney General to approve these actions before they are filed, the intent of voters who approved Proposition 64 would be upheld because only the Attorney General could authorize UCL actions.250 The legislature could add a phrase to the end of section 17203 that reads: "A person entitled to bring an action under this section may, if the unfair practice has caused similar injury to other persons similarly situated and the person is an adequate representative of the similarly situated persons, bring a civil action on behalf of those persons."251 This legislation would likely provide effective protection to consumers while still protecting businesses from meritless actions.

VI. CONCLUSION

For decades, California's UCL has been in force to protect

246. See id.
248. See Landhuis, supra note 4, at 1B.
249. See id.
250. SEC’Y OF STATE, supra note 175, at 109.
251. This language is inspired in part by California Labor Code section 2699(a). This labor law, often known as the “Sue Your Boss” statute, allows an aggrieved employee to bring a civil action on behalf of other employees. See CAL. LABOR CODE § 2699 (Deering 2004). The labor statute differs from the proposed statute insofar as it provides for civil penalties, not injunction and restitution. See id. The labor statute and the proposed statute are similar in that the rationale for the laws is the same: to provide a means of collecting civil penalties during a time when the Attorney General's Office does not have the funds and resources to do so itself. Ben Nicholsen, Businesses Beware: Chapter 906 Deputizes 17 Million Private Attorneys General to Enforce the Labor Code, 35 McGeorge L. Rev. 581, 585-86 (2004).
consumers. With the passage of Proposition 64 and the elimination of many consumer protection agencies due to budget cuts, consumers are at an increased risk of not receiving adequate protection in the marketplace. At the same time, small businesses have not been protected by legislation intended to immunize them from frivolous lawsuits.

To solve these problems, the California legislature should reevaluate the UCL and again amend the law. First, it should eliminate the incentive for unscrupulous attorneys to bring unfair competition actions. Next, the legislature should protect small businesses by eliminating the possibility that these businesses will have to defend against lawsuits by both private parties and public entities simultaneously. Finally, the legislature should enact a statute that allows private plaintiffs, in limited circumstances, to file actions on behalf of the public.

252. Disner & Jussim, supra note 71, at 45.
253. See Landhuis, supra note 4, at 1B.
255. See Disner & Jussim, supra note 71, at 45.
256. See Fellmeth, supra note 87, at 26.
257. See generally Landhuis, supra note 4, at 1B.