RECENT DEVELOPMENTS AND THE FUTURE OF BUSINESS & PROFESSIONS CODE 17200

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INTRODUCTION

California's Unfair Competition Law, Business & Profession Code Section 17200, et seq. (the "UCL"), has in recent years become the *claim du jour* in business litigation. Actions under the UCL for injunctions and restitution may be brought by a prosecuting authority or by private persons acting for themselves or the general public. The statutory language is both broad and uncertain; the statutory language permits virtually anyone to bring an action against a person engaged in an "unlawful, unfair or fraudulent" business act or practice. The statutory language gives little or no guidance as to the meaning of these terms. Consumer advocates and governmental regulators have embraced the UCL. See, *e.g.*, Remarks of Dennis Herrera, City Attorney of San Francisco, before the California Bar's Antitrust & Unfair Competition Section, *Public Prosecution: Using §17200 to Police the Marketplace* (May 7, 2004). Many corporate advocates have been equally adamant in criticizing it. In the past several years, several bills have been introduced into the state legislature to modify the UCL. In November, California voters will be presented with a proposition to limit the scope of the law.

Business litigators must understand the scope of the UCL and its most contemporary incarnations. The Court of Appeal for the First Appellate District has recently held that a cause of action for malpractice can lie for failure to include a UCL cause of action in a complaint. In a rather remarkable decision, *Janik v. Rudy, Exelrod & Zieff, et al*, (2004) 119 CA4th 930, 14 CR3d 751, the plaintiff sought to impose liability on attorneys who produced a class action

recovery of some $90 million, claiming they were negligent because they failed to obtain a still larger recovery which they may have been successful in doing had they amended their complaint to include a claim under the UCL. The trial court sustained a demurrer without leave to amend; the appellate court reversed, holding:

> While we may share the attorneys' dismay that their efforts have been rewarded with this lawsuit rather than with the kudos they no doubt expected, and perhaps deserve, we are nonetheless constrained to hold that plaintiff's claim cannot be rejected out of hand. While it may well be that the attorneys did not breach their duty of care in failing to proceed under an alternative theory that would have produced a greater recovery, we cannot say, as did the trial court, that there simply was no duty for the attorneys to breach.
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> Plaintiff Stanley Janik brought this purported class action for legal malpractice against defendants Steven Zieff and the law firm of Rudy, Exelrod & Zieff, LLP (collectively the attorneys), alleging that the attorneys mishandled a prior class action against Farmers Insurance Exchange (Farmers). While having secured recovery for a large class of claims representatives who were not paid overtime compensation on the ground that they were administrators to whom the applicable regulations under the Labor Code assertedly did not apply, the attorneys are faulted for not having sought recovery under the Unfair Competition Law, Business and Professions Code section 17200 (UCL). Under the UCL, the statute of limitations would have permitted recovery for overtime wages earned but unpaid during the four-year period preceding the filing of the complaint, rather than for only the three-year period available under the Labor Code.

119 CA4th at 934.

Given the breadth of the UCL, the reasoning in *Janik* may well require litigators to seriously evaluate the potential for UCL claims in virtually every business lawsuit. As discussed below, the broad expanse of Section 17200

makes it difficult to imagine the business lawsuit to which the action would not potentially apply, and, therefore, for which there would be no concern for the potential for malpractice liability in the absence of claiming it.

The purpose of this article is to focus on recent developments in the courts concerning the UCL and to suggest possible future developments.

ELEMENTS OF A CLAIM UNDER THE UNFAIR COMPETITION LAW

The UCL by its terms is extremely far reaching. To state a claim under the UCL, a plaintiff must allege simply that the defendant engaged in an unlawful, unfair, or fraudulent business act or practice. There is no requirement that the plaintiff – or if suing in a representative capacity, any member of the public – has suffered damage as a result of the defendant's violation of Section 17200. The statute is typically read in the disjunctive subjecting any defendant to liability for activity violating any of its three prongs: (1) unlawful, (2) unfair, or (3) fraudulent.

"Unlawful" Business Practice

The California Supreme Court has explained that "[a] business practice is unlawful 'if it is forbidden by any law . . . .'" *Olszewski v. Scripps Health* (2003) 30 C4th 798, 135 CR2d 1. California case law has interpreted the "unlawful" prong of Section 17200 to hold illegal a business practice that violates *any other law*, treating it as "unlawful" and making it independently actionable under 17200. *Cel-Tech Communications & Cel-Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 C4th 163, 180, 83 CR2d 548.

"*Unfair" Business Practice*

The second type of conduct prohibited by Section 17200 is "unfair" business practices whether or not they are unlawful or deceptive. However, acts that the Legislature has affirmatively determined to be lawful may not form the basis for an action under the UCL as unfair. *Cel-Tech, supra* at 183. In 2003, the California Supreme Court extended this *safe harbor* to apply retroactively. Thus, even if a statute authorizing certain conduct is later determined to be invalid, conduct undertaken pursuant to the statute before the invalidating decision remains immune from claims of unfairness under the UCL. In *Olszweski, supra*, the California Supreme Court held that the retroactive application of the UCL's "unfairness" prong to conduct that was lawful when undertaken, even if later declared to be unlawful, could violate due0 process.

"Fraudulent" Business Practice

The third type of conduct prohibited by Section 17200 is "fraudulent business practices." It has been held that to state a claim for a fraudulent business practice under Section 17200, the plaintiff need only demonstrate that "members of the public are *likely* to be deceived." *Bank of the West v. Sup. Ct.* (1992) 2 C4th 1254, 1267, 10 CR2d 538. The term "business" is also broadly interpreted in actions brought pursuant to Section 17200.

The meaning of the term *fraudulent business practice* remains somewhat illusive. One recent appellate court explained the current state of the law as follows: "[T]he Supreme Court has not yet enunciated a legal test for unfairness in consumer actions under the unfair competition law. The courts of appeal have variously suggested that a practice is unfair if it offends an established public policy or is 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers,' and that unfairness is determined by weighing the utility

of the practice against the gravity of the harm to the consumer." *Kunert v. Mission Financial Services Corp*. (2003) 110 CA4th 242, 1 CR3d 589.

STANDING

Perhaps the most vocal current criticism of the UCL has focused on the UCL's broad grant of standing. UCL Section 17204 states that "any person" may sue to redress violations of Section 17200 – a private party may have standing even if not directly aggrieved. *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 C4th 553, 560, 71 CR2d 731. Private parties and some public prosecutors are given express standing to sue under Section 17200. Although the remedies differ, both have standing to sue not only on their own behalf but also on behalf of "members of the public" – without having to bring a true class action.

In state court, the plaintiff need not be a competitor, but may also simply be a member of the general public, whether or not he or she has suffered any injuries by reason of the conduct at issue. One court has explained that "[t]he definition of unfair competition in Section 17200 'demonstrates a clear design to protect consumers as well as competitors by its final clause, permitting *inter alia*, any member of the public to sue on his own behalf or on behalf of the public generally.'" *Gregory v. Albertson's, Inc.* (2002) 104 CA4th 85, 128 CR. 2d 389.

In federal court, the rule is different. Although the federal courts recognize the breadth of standing under the UCL, Article III of the Constitution limits the jurisdiction of the federal courts to "cases and controversies," a restriction that has been held to require a plaintiff to show, *inter alia,* that he has actually been injured by the defendant's challenged conduct. Accordingly, a plaintiff who has not been personally injured and whose cause of action under

the UCL is perfectly viable in state court nonetheless may be foreclosed from initiating the same cause of action in federal court if he cannot demonstrate the requisite injury. *Lee v. American Nat. Ins. Co*., 260 F.3d 997, 1001-02 (9th Cir. 2001), *cert. den.* 122 S.Ct. 1299, 535 U.S. 928, 152 L.Ed.2d 211, *cited with approval, Hangarter v. Provident Life and Accident Ins. Co.,* ___ F.3d ___ (9th Cir. June 25, 2004). The situation may be different where federal jurisdiction arises from removal. The *Lee* court included a footnote which stated:

> The seemingly obvious proposition that a removed case may not go forward in federal court unless Article III standing requirements are met as to some claims may not obtain in cases removed to federal court pursuant to all removal statutes. In *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 78 n. 4, 111 S.Ct. 1700, 114 L.Ed.2d 134 (1991), the Supreme Court expressly left open the question whether a plaintiff must have Article III standing with respect to state law claims within the federal court's supplemental jurisdiction to permit removal under 28 U.S.C. § 1442(a), the statute allowing federal officer defendants to remove cases from state court.

260 F. 3d at 1002, fn. 4.

Some courts, have, however, held that UCL standing cannot overcome standing limitations placed on the underlying statute being 'borrowed' to state a UCL claim. For example, in *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 167 F. Supp. 2d 1114 (C.D. Cal. 2001), the Court held that the rule under the Copyright Act that provides that only the owner of a copyright has standing to bring suit for infringement cannot be circumvented by restyling the action as a UCL claim.

This year, a court outside of California interpreting California's UCL applied another limitation on standing. In *C.H. Robinson Worldwide, Inc. v. Ghiradelli Chocolate Company* 2004 WL (D. Minn. July 19, 2004), the federal

court in Minnesota considered a Section 17200 counterclaim in a case removed to federal court and then transferred on venue grounds. In that case, the court recognized that California courts viewed Section 17200 broadly, but held that it had found no case in which a 17200 claim was maintained by a sophisticated business entity dealing at arm's length with a business associate. The court then held that "[t]here is no indication that this is the type of conduct the California legislature intended to reach. As such, the Court grants CHR's motion to dismiss this claim."

Advocates of restricting the broad standing provisions of the UCL have placed a proposition (Proposition 64) on the November 2004 ballot in California which would amend the UCL to limit an individual's right to sue by allowing private enforcement only if that individual has been actually injured by, and suffered financial/property loss because of, an unfair business practice. Proposition 64 would require representative claims to comply with procedural requirements applicable to class action lawsuits and limit suits behalf of the general public to enforce unfair business competition laws to actions by the California Attorney General or local public officials. The measure has been supported by various business interests and the Chamber of Commerce and opposed by consumer groups.

CLASS ACTIONS

The issues surrounding class certification for purposes of adjudicating UCL claims are another area of currently evolving jurisprudence. The UCL permits a plaintiff – even one not harmed by the conduct at issue – to pursue an injunction and 'class wide' restitution without having to plead or certify a class. A full discussion of the relative advantages and disadvantages to the plaintiff of

proceeding as a class representative are beyond the scope of this article. However, the differences include the following: (1) UCL plaintiffs are limited to injunctive relief and restitution; (2) unlike a UCL representative action, a class action cannot be dismissed or settled without court approval (CCP § 581(k)); and (3) disgorgement into *a fluid recovery fund* is not a remedy available in such representative UCL actions, although it may be in a UCL class action.

In a fluid recovery the total amount paid is put into a fund from which individual class members are afforded an opportunity to collect their individual shares by proving what portion should be theirs; any residue remaining is distributed by one of several practical procedures that have been developed by the courts. In *Kraus v. Trinity Management Service, Inc.* (2000) 23 C4th 116, 96 CR2d 485, and *Cortez v. Purolator Air Filtration Products Co*. (2000) 23 C4th 116, 96 CR 2d 485, the California Supreme Court held that Section 17200 did not authorize a fluid recovery fund in a representative action. The Supreme Court found that the trial court erred when it permitted the amount of the unlawful fees charged to certain tenants to be paid into a fluid recovery fund to benefit tenants' rights activities. However, in *Corbett v. Sup. Ct.* (2002) 101 CA4th 649, 658, 125 CR2d 46, the First Appellate District held that a fluid recovery was permissible in a UCL class action. *Corbett, supra,* is also significant because the court specifically held that UCL claims and class actions are not mutually exclusive as matter of law. Numerous courts had presumed they have the authority to certify UCL claims as class actions and appellate courts had for many years considered what factors must be considered when certifying a class in a UCL lawsuit, but prior to *Corbett* no appellate court directly addressed the question of whether the UCL and class actions are fundamentally incompatible until 2002.

Civ. Pro. § 382 generally governs the propriety of state class certification under the UCL, permitting a class action only where there are questions of law

which predominate over questions affecting individual members. Federal class certification is governed by Rule 23, FRCP. During 2003 and 2004 a number of reported decisions specifically considered the application of these provisions to the UCL.

In *Lebrilla v. Farmers Group, Inc.* (2004) 119 CA4th 1070, 16 CR3d 25, the Court of Appeal for the Fourth District reversed an order denying class certification. The defendants argued against certification of a putative class which asserted violations of the UCL. The defendants argued that the UCL already provides an expedited mechanism for obtaining declaratory, injunctive, and restitutionary relief on behalf of the general public and that because of this, class treatment would be superfluous. The Court, *quoting Corbett, supra,* held:

> [A] UCL claim is procedurally distinct from a class action and … the two have different purposes. However, the mere fact that they differ does not mandate a conclusion that they are incompatible…. Under the proper circumstances […], certifying a UCL claim as a class action furthers the purposes and goals underlying both of these actions.

The court further held that because judgments in individual representative UCL actions are not binding as to nonparties, a defendant may be exposed to multiple lawsuits and therefore may be reluctant to settle a case that will not be final as to all injured parties. A class action may remedy this problem by including each participating member of the class as a party to the lawsuit subject to the court's jurisdiction.

In this past year, the Fourth Appellate District also reiterated that a class action may include both UCL claims and claims for damages under other theories. *In re Cipro Cases I and II*, 2004 WL 1627983.

However, not all courts in the past two years have embraced UCL class actions. In *Frieman v. San Rafael Rock Quarry, Inc.* (2004) 116 CA4th 29,10 CR 3d 82, the Court of Appeal for the First Appellate District found the "streamlined procedure" of the UCL to be enough to provide redress for individual plaintiffs, especially in the absence of a showing of a substantial benefit to the proposed class and held that this showing cannot be merely the potential class members' hope of attaining a remedy that the UCL does not provide in a representative action. The court held:

> Contrary to plaintiffs' argument, the *Corbett* court did not hold that the mere desire to obtain disgorgement of profits supports class certification without an appropriate showing, the court in *Corbett* specified, *"Where a class has properly been certified,* plaintiff in a UCL action may seek disgorgement of unlawful profits into a fluid recovery fund." [citation omitted] Even according to *Corbett,* a desire for a particular remedy is not itself a reason for certification.

116 CA4th at 88.

In *In re Paxil Litig.*, 218 FRD 242 (C.D. Calif. 2003), the federal district court also denied a motion to certify a UCL class. In *Paxil,* past and current users of the drug Paxil brought suit against its manufacturer, alleging, inter alia, that the manufacturer engaged in unfair and fraudulent practices in violation of the UCL as well as other tort-based claims. The Court held that: (1) adequacy of representation requirement for class certification was not satisfied; (2) certification of the proposed class was not appropriate, as the claim for restitution predominated over claims for injunctive or declaratory relief; and (3) certification of a "general causation" class – so as to allow plaintiffs, who allegedly experienced negative withdrawal symptoms, to try issues of general causation in one stage and individual causation and damages issues in separate stage – was

not the superior method for trying the case, and thus such certification was not appropriate. Though the plaintiffs advanced a broad reading of Section 17200, the court nevertheless declined to certify a UCL class.

Certainly, the presence of a UCL claim will not automatically thwart certification. However, while recent cases have not provided a clear indication of how any given court will adjudicate class certification issues for purposes of a UCL claim, they do reaffirm that the presence of a UCL claim will not be sufficient to circumvent normal class action considerations.

ARBITRATION OF SECTION 17200 CLAIMS

Another area of importance in recent 17200 case law has been arbitration. Because the wording of the UCL is so broad, many companies such as HMOs and banks have sought to limit litigation of UCL by inserting mandatory arbitration provisions into their contracts in order to avoid UCL actions. Last year, the enforceability of those provisions came into question when the California Supreme Court was asked to examine a claim for injunctive relief brought on behalf of the public by "private attorneys general." *Cruz v. PacifiCare Health Systems, Inc*. (2003) 30 C4th 303, 133 CR2d 58.

The *Cruz* court held that causes of action for unfair competition that seek injunctive relief on behalf of the general public are <u>not</u> subject to contractual arbitration. The reasoning of the court included such considerations as the public nature of claims for restitution, which, the court held, should be severed from arbitration. The court determined that those claims brought for the public benefit would be inconsistent with arbitration because arbitrators do not have the same capabilities of enforcement as courts. *Id.* at 313-14. However, if the UCL claimant seeks restitution, the claim *is* arbitrable. *Id.* at 320. Generally, the arbitral claim gets decided first. As the *Cruz* court notes, "the trial court has the

discretion to stay proceedings on the inarbitrable claims pending resolution of the arbitration" and "such a stay is generally in order under these circumstances."

For now, the *Cruz* court's iteration is the leading California state case on the subject. However, federal courts are not bound by the holding of the court in *Cruz*.

Cruz is in contrast to a federal decision in California on the issue of arbitrability --*Arriaga v. Cross Country Bank*. 163 F. Supp. 2d 1189 (S.D. Cal. 2001). In *Arriaga,* the court concluded that all of the plaintiff's claims, including her Section 17200 claims, would be subject to the arbitration provision in the contract at issue. *Id*. at 1200. The court held that "[s]tate legislatures may not attempt to limit the enforceability of arbitration agreements governed by the F[ederal] A[rbitration] A[ct]." 163 F. Supp. 2d at 1198 (disapproved on other grounds, *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003)).

In addition to *Cruz*, the recent decision of the Second Appellate District in *Malek v. Blue Cross of California*, 16 C.R. 3rd 687 (July 29, 2004) merits attention. In *Malek*, the plaintiffs were insureds who sued their health insurer, alleging improper denial of benefits. The insurer moved to compel arbitration under an arbitration provision in the insureds' enrollment form. The plaintiffs sought to avoid arbitration. The trial court initially ruled for the insurer and appointed an arbitrator. After the arbitration proceedings commenced, the insureds filed an amended complaint against the insurer which included, among other things, an additional claim on behalf of the general public under Section 17200. The arbitrator later ruled that while he had jurisdiction over the individual statutory claims under the UCL, he did not have jurisdiction to hear the "private attorney general" claims. A subsequent motion by the insureds addressed to the arbitrator to dismiss the arbitration on the grounds that the arbitration agreement had failed to comply with Health and Safety Code § 1363.1 (which imposes

specific requirements on arbitration provisions for healthcare service plans) was granted. On a petition to vacate the arbitrator's decision to dismiss, the trial court concluded that the arbitrator's dismissal order exceeded the arbitrator's authority, notwithstanding the trial court's own determination upon reconsideration that the matter should not continue in arbitration because of a change in applicable law. The trial court vacated the dismissal of the arbitration by the arbitrator and the appellate court affirmed that procedural determination. The appellate court held:

> An arbitrator exceeds his powers when he acts in a manner not authorized by the contract or by law [citation omitted]. The 'gateway question' of whether the parties are bound by a particular arbitration agreement is a question of arbitrability for the court. [Citations omitted].
>
> Here, the arbitrator exceeded his authority be reexamining whether the parties were bound by the arbitration provision in the Blue Cross enrollment form. That decision was in the province of the court which had previously determined arbitrability. (16 C.R. 3rd at 696).

Having reaffirmed the court's authority on the determination of arbitrability, the appellate court then went on to affirm the trial court's reconsideration of the initial question of arbitrability in which the trial court ultimately determined that the claims were not arbitrable for failure to comply with Health and Safety Code § 1363.1.

REMEDIES UNDER THE UNFAIR COMPETITION LAW

The private remedy provision applicable to Section 17200 is found at Section 17203. Section 17203 authorizes courts to award injunctive relief or restitution:

> [S]uch orders or judgments … 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 … any money or property … which have been acquired by means of such unfair competition.

Civil penalties are available in governmental enforcement actions. (Bus. & Prof. Code § 17206).

The two most important recent cases in the area of remedies are *Olson v. Cohen* (2003) 106 CA4th 1209, 131 CR2d 620 and *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 C4th at 1134, 131 CR2d at 29. In *Olson*, a UCL action was brought against a law firm for failure to failed to register as a 'law corporation' with the California State Bar. The appellate court affirmed the trial court's ruling sustaining on demurrer on the grounds that any injunctive or restiutionary relief was not warranted. The court made it clear that not all violations of law require that relief be ordered under the UCL, holding:

> To state a claim under sections 17200 through 17209 of the Business and Professions Code (the unfair competition law, or UCL), appellant must allege a business practice that is forbidden by law. (*Stop Youth Addiction*, *supra*, 17 Cal.4th at p. 560.) In the present case, appellant did not allege that Cohen was unlicensed, but only that Corp failed to register as a law corporation with the State Bar. Assuming that by holding Corp out as a law corporation, Corp and Cohen engaged in an unlawful business practice, appellant nevertheless failed to show that he is entitled to the relief he seeks.
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> A UCL action is equitable in nature, and the court may consider equitable factors in deciding which, if any, remedies authorized by the UCL should be awarded. (*Cortez v. Purolator Air Filtration*

> *Products Co.* (2000) 23 Cal.4th 163, 179-181.) In the present case, those factors weigh strongly in favor of denying appellant relief. Corp voluntarily registered with the State Bar prior to the filing of the original complaint. There is no present basis for ordering injunctive relief regarding registration. Nor has appellant shown a reasonable basis for restitutionary relief. Although appellant seeks a forfeiture of all fees collected from Corp, there is no allegation that any client relied upon the existence of a corporate entity in seeking legal services or was injured by the delay in registration. There is no allegation of malpractice.

In *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 C.4th 1134, 131 CR2d 29, the California Supreme Court placed limits on the scope of 'restitution' under the UCL.

The plaintiff in *Korea Supply* was an arms broker retained to promote its principal's bid to sell a missile defense system to the Republic of Korea. Instead, the contract was awarded to defendant Lockheed Martin's predecessor. Plaintiff sued defendant, alleging the contract was unfairly won through bribes and sex offered to Korean officials; plaintiff sought an award of 'restitution' in the form of an order forcing Lockheed to disgorge all profits earned from the missile defense contract. The Supreme Court reversed the court of appeal (which had reversed the trial court's order sustaining defendant's demurrer), holding that restitution is limited to either "money or property that defendants took directly from plaintiff" or "money or property in which [plaintiff] has a vested interest." *Korea Supply Co. v. Lockheed Martin Corp.,* supra, 29 C.4th at 1146-1147, 131 CR2d at 39-40.

SECURITIES LAW

One of the key decisions in 2004 concerning Section 17200 limited its application by excluding all securities transactions. In *Bowen v. Ziasun Technologies, Inc.* (2004) 116 CA4th 777, 11 CR 3d 552, the Fourth Appellate District concluded that Section 17200 does not apply to securities transactions, although the language of Section 17200 on its face would extend to these transactions. The *Bowen* court reviewed both federal law and case law in 15 other states that have similar unfair competition statutes. The Court then concluded that the predominant view was that such statutes did not apply to securities transactions. The Court explained:

> Section 17200 provides in part: "[U]nfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Section 17200 is known as California's "little FTC Act," which mirrors its federal counterpart, the Federal Trade Commission (FTC) Act, 15 United States Code section 45 et seq. [citation omitted]. Historically, the FTC has not viewed the FTC Act as reaching securities transactions. (*Russell v. Dean Witter Reynolds, Inc.* (Conn. 1986) 510 A.2d 972, 977 (*Russell*) ["The FTC has never undertaken to adjudicate deceptive conduct in the sale and purchase of securities"].)
>
> Further, federal cases (some, admittedly unpublished) have held that California's section 17200 also does not apply to securities transactions. [citations omitted] § 17200 is inapplicable to securities transactions"].)[footnote omitted]
>
> Additionally, at least 15 other jurisdictions that have considered whether investment securities are within the scope of their consumer protection statutes have reached the same conclusion, holding that

> claims based upon securities violations are not actionable under those statutes. [citations and footnote omitted] Only three states have ruled that their little FTC acts apply to securities transactions. (See *Denison v. Kelly* (M.D.Pa. 1991) 759 F.Supp. 199 [Pa. law]; *Onesti v. Thomson & McKinnon Securities, Inc.* (N.D.Ill. 1985) 619 F.Supp. 1262 [Ill. law]; *State ex rel. Corbin v. Pickrell* (Ariz. 1983) 667 P.2d 1304 [Ariz. law].)

Interestingly, the *Bowen* court identified the issue of the application of the UCL to securities transactions as a case of first impression. However, in *Roskind v. Morgan Stanley Dean Witter & Co.* (2000) 80 CA4th 345, 95 CR 2d 258, the First Appellate District found that the trial court in that case had erred by concluding the federal securities laws preempted the UCL in the area of securities regulation. The *Bowen* decision distinguished the holding in *Roskind* by concluding that it was limited to preemption. By contrast, the *Bowen* court reasoned that the UCL was not intended to extend to securities transactions. The *Bowen* court on its own motion modified its March 8, 2004 opinion the following month to emphasize the distinction, writing:

> [D]espite the fact that both the FTC Act and state statutes such as section 17200 would on their face appear to reach securities transactions, the FTC, federal courts, and state courts interpreting their own unfair competition statutes have held that securities transaction are exempt. The reasoning is not that they do not meet the definition of "unfair" or "fraudulent," but that section 5 of the FTC Act and similar state statutes were never intended to apply to securities transactions *at all* because of the comprehensive regulatory umbrella of the Securities and Exchange Commission over such transactions. decision acknowledges that the language.

Given the seemingly contrary directions suggested by *Roskind* and *Bowen*, it would be reasonable to conclude, as one commentator has stated, that "one should not assume that *Bowen* is the last word on the subject of 17200/securities overlap." See Belgum, *The Application Of Business & Professions Code § 17200 to Securities Transactions – Will* Bowen v. Ziasun Technologies *Survive?,* Mealey's 17200 Report, June 2004.

THE FUTURE OF SECTION 17200

Attorneys increasingly have utilized the broad language of Section 17200 to bring litigation. Some of the litigation has been widely criticized as abusive. In February 2003, the California Attorney General brought an action against the Trevor Law Group, a Beverly Hills firm, and others, alleging that the law firm and various associates individual defendants engaged in abusive practices in threatening to sue and suing over two-thousand auto repair shops. Ironically, the Attorney General sued the defendants under Section 17200. Four months later, the State Bar announced that it had initiated disbarment proceedings against three Trevor Law Group attorneys charging them with 36 counts of misconduct including filing unjust actions, the unauthorized practice of law, making misrepresentations and forming a sham corporation to serve as plaintiff in litigation carried out with a corrupt purpose. The Trevor Law Group rapidly became the poster child for abuse of Section 17200. In July of the same year the Attorney General sued another law firm in Orange County for establishing and maintaining a plan for filing litigation under Section 17200 to improperly secure settlement. Again, ironically, the Attorney General brought the action under Section 17200.

In addition to the cases brought by the Attorney General, Section 17200 had engendered wide-spread public criticism. Currently, as noted above, this criticism has coalesced in a ballot initiative to limit the use of the UCL. The sponsors of that initiative have argued that it is designed, in part, to rectify the misuse of the unfair competition law by private attorneys who file frivolous lawsuits as a means of generating attorneys' fees without creating a corresponding public benefit. The voters' determination on Proposition 64 is likely to be the most significant development in the near future for Section 17200.

In the longer term, it is the authors' view that court decisions will continue to limit the implementation of Section 17200 as various recent decisions discussed above have done. One area which may be rife for decision in the short term are unanswered questions concerning secondary liability. Various California cases have held that there is no vicarious liability under the UCL, *see, e.g., Emery v. Visa International Service Assoc.*, (2002) 95 CA4th 952, 960 ("We need go no further than to remind plaintiff that his unfair practices claim under Section 17200 cannot be predicated on vicarious liability. 'The concept of vicarious liability has no application to actions brought under the unfair business practices act.' [citation omitted].). However, claims of other forms of secondary liability (*e.g.,* liability based upon agency or conspiracy) arguably may still be viable. It is reasonable to anticipate that these alternatives will be tested in upcoming appellate cases.

Several legislators have introduced bills to amend the UCL in the past. Proposition 64 may have abated this effort to legislate change in 17200, although sentiment continues for a legislative change. In an August 17, 2004 editorial, *The Los Angeles Times,* wrote:

> There's no denying that the 70-year-old law, intended to protect consumers from unfair or fraudulent

> business practices and deceptive ads, has flaws. It allows unscrupulous lawyers to conduct what amounts to legalized extortion by filing nuisance lawsuits intended to produce out-of-court settlements. Business leaders in California, frustrated by Sacramento's long-standing failure to stop the shakedowns, already have stockpiled more than $7 million to lobby for passage of Prop. 64 on Nov. 2. But the all-or-nothing initiative risks throwing out the good with the bad. Gov. Arnold Schwarzenegger, who has yet to take a public stand on the measure, should quickly move to broker a legislative deal that would spare voters from what could become one of November's most heavily contested propositions.

While the attention devoted by the press and others concerning the misuse by some attorneys of Section 17200 may appear unique at times, the UCL is not the first law that has gone through the process of having been popularized as a claim due to its broad language, only to be limited by the courts. The federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), part of the Organized Crime Control Act of 1970, went through a somewhat similar history. Like the UCL, RICO by its terms has a perhaps startlingly broad application. Like the UCL, RICO also collected vociferous opposition as it was increasingly "discovered" by the plaintiff's bar. However, over the years, the language of the RICO Act came to be limited by the courts. At the same time, RICO continues to serve both private plaintiffs and governmental authorities as a useful tool in a broad range on contexts. Section 17200 similarly continues to serve a useful purpose when properly applied.

The limitations on its broad language are likely to be the subject of an increasing number of appellate decisions in the next few years. It is, of course, difficult to predict where the lines will be drawn.