
FREE SPEECH & ELECTION LAW

SHAKEDOWN IN ‘THE GOLDEN STATE’?

By ERIC SCHIPPERS*

More than 150 years after gold was first discovered at Sutter’s Mill in California, a new Gold Rush has begun in that state, fueled by the shameless exploitation of one of the most powerful consumer protection laws in the nation. Trading in their pick axes and mules for law degrees and monogrammed briefcases, today’s prospectors are trial lawyers who are panning for gold along the shores of endless streams of unsuspecting businesses.

In 1933, the California Legislature enacted the landmark Unfair Competition Law (UCL), better known as Section 17200 of the Business and Professions Code, to allow public prosecutors and private citizens (acting for themselves or on behalf of the public as “private attorneys general”) to file lawsuits to protect businesses from the unfair business practices of competitors. By the late 1970s, legislative amendments gradually expanded the law to protect consumers from any “unlawful, unfair or fraudulent business act or practice” and any “unfair, deceptive, untrue or misleading advertising.”

State courts, in refusing to narrowly define what constitutes an “unfair business practice,” have generally given free reign to 17200 actions, allowing the statute to be applied in almost any context. If found guilty under Section 17200, a business can be forced to disgorge all monies acquired by means of any unlawful actions.

While originally intended to protect both businesses and consumers, Section 17200, in combination with the state’s “private attorney general” provisions — which allow for attorneys’ fees to be paid to winning lawyers — have become a mother lode for trial lawyers looking to strike it rich, evidenced by the fact the state trial lawyers’ association reportedly held a how-to conference last year on 17200 claims.

Under the enormously broad UCL, any private attorney can independently sue a business without needing a client or any evidence showing someone has actually been deceived or harmed. A suit can be brought even if the alleged misconduct has already been investigated and/or remedied by the attorney general, district attorney or a regulatory agency.

In addition, separate 17200 suits can be brought against the same defendant by a multitude of law firms, all acting as “private attorneys general,” all seeking to hit pay dirt. In fact, once word gets out that a defendant has settled a 17200 suit, a pile-on will typically ensue with the furious filings of duplicative suits.

While a trial lawyer suing under Section 17200 is not entitled to punitive damages, unfair competition claims are often added to existing lawsuits to raise the prospects of a larger payout at the settlement table.

Over the last several years, hundreds of “representative action” lawsuits have been filed in California against thousands of business owners. Big ticket 17200 suits have been launched against the tobacco companies, the maker of the diabetes drug Rezulin, the Kaiser Foundation Health Plan, and sports equipment manufacturer Nike Inc.

The lawsuit against Nike exemplifies how the UCL can be hammered and forged into a mighty sword against deep-pocket corporations. In 1998, California anti-business activist Marc Kasky filed an unfair competition claim alleging the company’s public statements in defense of attacks against its overseas labor practices constituted false or misleading advertising.

The trial court and court of appeals ruled that even if Nike’s communications — including press releases and letters to newspaper editors — were assumed to be false, the First Amendment protected the statements because they did not promote a particular product, but were part of a general discussion concerning a matter of public interest and public debate.

The California Supreme Court reversed (4-3), characterizing Nike’s messages as “commercial speech,” a designation that stripped Nike’s statements of their full First Amendment protections and placed them in the same category as the company’s explicit product advertisements.

The U.S. Supreme Court will review the decision on appeal and issue its opinion this term. If allowed to stand, the *Nike* ruling will have a profoundly chilling effect on the free speech rights of all corporations, regardless of where they are based or where they speak. Nike, which is based in Oregon, was accused, in part, of making false statements which appeared in the *New York Times*, but were distributed in California.

While high profile 17200 suits, like the one against Nike, are often splashed across newspaper headlines and invoke the services of prominent attorneys for the defense, such as Harvard Law Professor Laurence Tribe and former Acting Solicitor General Walter Dellinger, the majority of unfair competition suits filed in California are against small and ethnic- or immigrant-owned “mom-and-pop” businesses. These are the stories one seldom hears.

Hard at work in pursuit of the American dream, these small business owners are less likely to be able to afford an attorney, thus they’re less likely to know their rights and more likely to pay out-of-court settlements.

Take for example the frivolous 17200 lawsuits filed against hundreds of Vietnamese nail salon owners in Southern California by the law firm of Brar & Gamulin. According to the firm’s complaint, the salons are “unlaw-

fully” using the same bottle of nail polish on multiple customers. Never mind that the State Board of Barbering and Cosmetology regards reusing the same bottle of polish as standard industry practice.

“I’ve never had any complaints from customers, and the state board has never fined me or cited me,” complained Mindy Le, owner of Express Nails to the *Orange County Register*. Lawyers at Brar & Gamulin — supposedly working on behalf of the general public — are reportedly willing to quietly settle the matter for anywhere from a few hundred dollars to a thousand dollars per salon.

Welcome to the land of organic milk and cruelty-free honey. Who needs a baseball bat when Section 17200 works so well in separating an easy mark from his money?

Then there’s the case of Malcolm Smith, owner of a motorcycle shop in Riverside, who is being sued by a Beverly Hills law firm, Trevor Law Group, and a one-man for-profit group called “California Watch Enforcement Corp.” for abbreviating the words “on approved credit” (O.A.C.) in a print advertisement. Smith tells the *Press Enterprise* he got a letter from the Trevor lawyers saying they’d accept \$5,000 to settle the matter.

According to the *Associated Press*, an attorney for Trevor Law Group acknowledged at a recent legislative hearing that California Watch — which conveniently shares the same address as the Trevor Group — receives its income “solely” from 17200 legal settlements.

Last year, the Trevor firm and California Watch sued more than 2,000 auto-repair shops in California, alleging unfair business practices under Section 17200. Many of the suits were based on minor technical or administrative violations of the Automotive Repair Act that were posted on the Bureau of Automotive Repair’s website as “confirmed violations.”

One company being sued has taken its anger out on the Bureau of Automotive Repairs, a state consumer agency. According to a complaint filed by Caliber Collision Centers, a collision repair company, the Bureau is engaging in “unlawful” practices by issuing citations for alleged violations of the Automotive Repair Act without the proper regulatory authority to do so. In addition, the suit argues that the Bureau is violating the due process rights of those accused by not giving them an opportunity to contest the alleged violations before the Bureau posts them on its website.

Like ants following a trail of breadcrumbs to a picnic, the Bureau’s website, which is often outdated, has led hungry trial lawyers to a bountiful list of potential 17200 targets.

More and more, eerily similar horror stories coming out of the small business community are becoming impossible to ignore. In January, State Assemblyman Lou Correa (D-Anaheim) held a public hearing in Santa Ana, where hundreds of people attended to compare notes on their own 17200 shakedowns.

California Attorney General Bill Lockyer and the State Bar Association, after repeated pleas by the busi-

ness community, have agreed to look into the extortionist tactics of those who ply their trade on 17200 claims. Meanwhile, in the state legislature, reform efforts are once again underway despite historically stiff opposition from trial lawyers who argue the law must remain in place to protect consumers — an argument that is increasingly more difficult to make with a straight face.

Some of the ideas being discussed to fix the system include requiring a judge to review the validity of a 17200 claim before it’s filed, or requiring 17200 cases to be brought as class actions. Assemblyman Robert Pacheco (R-Walnut) is sponsoring a bill that would require a 17200 suit to include an actual plaintiff who can show harm from the alleged unfair business practice.

The attorney general and state legislature must stand up to the trial bar and fight for true and meaningful reform of California’s runaway tort system. As California Supreme Court Justice Janice Brown told the *Copley News Service*, 17200 claims have become “a means of generating attorney fees without any corresponding public benefit.” Few other statutes in this country “confer the kind of unbridled standing to so many without definition, standards, notice requirements, or independent review.”

It used to be that any two-bit thug wielding a law degree in a back alley could get some poor, unsuspecting mom-and-pop owner to fork over some cash. However, as with most “get-rich-quick” schemes of the past, someone usually gets too greedy and spoils it for everyone. Many a gold mine has come crashing down on an overeager prospector who dug too far, too fast. In the case of Section 17200, there is no way to hide the mountains of frivolous lawsuits being filed by unscrupulous trial lawyers and anti-business activists, all too hungry for a piece of the action.

It’s time for this California Gold Rush to be history.

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