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An answer to the Trevor tactics

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For good reason, there is public outrage about the Trevor Law Group scheme. The Unfair Competition Law, Cal. Bus. & Prof. Code §17204, does not permit recovery of damages, restitution, statutory penalties or attorney's fees by uninjured private plaintiffs. Attorney's fees are only available on motion to the court for enforcing an important public right or creating or preserving a common fund for the benefit of a number of plaintiffs.

As Attorney General Bill Lockyer states, the Trevor scheme was a "shakedown operation" to extort attorney's fees from small business owners without oversight by the court. Letters to the State Bar have equated the Trevor Group to "legal terrorists" and described the UCL as a "disgrace that is literally choking the life out of California's struggling economy."

Unfortunately, Trevor is not an unusual, isolated instance of UCL abuse. The attorney general is currently investigating similar conduct by four other law firms in Long Beach, Tustin, Sacramento and San Diego. In March, an entity in San Diego, identified as the Consumer Law Protection Center, sent letters to auto stereo installers charging them with failure to be licensed as required by state law and demanding $10,000 to avoid UCL litigation.

Many of the bills introduced in response to Trevor suggest UCL changes far beyond what is needed to deter similar cases in the future. Two joined bills have made substantial progress.

Senate Bill 122, requiring court approval of attorney's fees in any proposed settlement of a representative action, permitting disgorgement and fluid recovery, and restating existing law on joinder of defendants in a lawsuit, has passed the state Senate. The Assembly has approved AB 95, requiring that a lengthy warning accompany service of a demand letter or complaint in a representative action. At press time, the bills were being considered by the opposite bodies and could be enacted before the end of the year. In some respects, these bills provide both too little and too much change to the UCL.

Any settlement or judgment resolving representative claims, including payment of plaintiff's attorney's fees, should be reviewed by a court to determine that it is lawful, non-collusive, and adequately protects the interests of the public and the defendant. Although class actions cannot be settled without a fairness hearing noticed to class members, the UCL is silent on this subject.

Nevertheless, settling parties often seek court approval of a stipulated judgment dismissing an action, sometimes without disclosing all set-

tlement terms. As in some of the Trevor cases, the court may not have sufficient facts presented to determine whether the settlement is lawful and in the public interest. Even with full disclosure, the court has no specified standards by which to judge the settlement.

UCL representative actions can be fair and effective without requiring the plaintiff to suffer harm or proceed as a class action. However, since the plaintiff is often a legal entity created and controlled by plaintiff's counsel, as in Trevor, or an individual who has no claim typical of the one being prosecuted, there may be no incentive to protect the public.

Similarly, the defendant's primary goal is usually to protect its own interest. The parties' compromise agreement in such cases is no substitute for review by a court applying statutory criteria, one of which is the public interest.

Adopting a new remedy of disgorgement of profits and fluid recovery is unnecessary to address the Trevor situation and creates due process problems. It also may risk turning the UCL into a device for avoiding the more extensive pleading and proof requirements of existing tort and contract theories.

As the state Supreme Court recently discussed in *Korea Supply Co. v. Lockheed Martin Corp.* ((2003) 29 Cal.4th 1134), allowing nonrestitutionary disgorgement in UCL actions conflicts with the history of the statute and public policy.

Like state and federal securities laws, the UCL was intended to provide a streamlined way of enjoining unfair business practices and restoring money to the victims of such practices without all of the evidentiary hurdles of common law torts. Turning the equitable UCL action into an all-purpose "super tort" or contract cause of action would permit recovery of damages without adequate protection against double recovery from the same defendant or a jury trial.

As the Supreme Court also warns in *Korea Supply Co.*, if an unharmed plaintiff recovers disgorgement in a UCL case, that may dissipate the funds available to a later suing, directly harmed victim. If adopted, this change would dramatically alter the basic characteristics of the UCL and likely result in unintended consequences.

In sum, the Trevor case brought public attention to potential abuses of the UCL. Although legislative proposals have been offered to address the problem, two — mandatory court review of settlements and judgments, and warnings served with demand letters and complaints — would substantially prevent recurrence of the same factual pattern. Drastically reshaping the UCL through new remedies is not necessary to achieve this goal.

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