

# Consumer Protection Update

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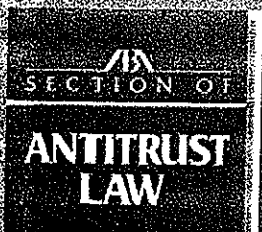
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For many competition lawyers, consumer protection has long been the foreign language they one day promised to master or the instrument they would learn to play. Based on recent comments by FTC Chairman Tim Muris and Kevin Grady, Chairman of the ABA's Section on Antitrust Law, now is the time.

At the Aspen Summit on August 18, Chairman Muris emphasized that the FTC will continue to focus on the interrelation between competition and consumer protection matters, and be flexible and responsive to changes. "We must increase the Commission's base of knowledge to address new commercial phenomena, to analyze complex technical issues involving health and safety, and to respond to new technologies," Muris said. "This base of knowledge will enable the Commission to retain the intellectual leadership necessary to persuade others to join us in our mission to foster consistent, market-driven consumer protection policies." Chairman Grady's comments, delivered one week earlier at the ABA Antitrust Section's Post-Annual Leadership meeting in Vancouver, echoed these sentiments, challenging the Antitrust Section to make the Section the first stop for information on consumer protection, most notably in the areas of advertising litigation, privacy, and cross-border cooperation.

While there is undoubtedly a lot to learn, the Consumer Protection Committee is here to help, and it begins with your becoming a member. Membership will entitle you to a host of benefits, including receipt of *Consumer Protection Update* and *Privacy Newsletter*. This edition of *Consumer Protection Update* is loaded with useful articles that cut across the discipline, including articles that relate to the explosion in consumer protection class action and Section 17200 cases, the FTC's efforts to reduce spam, recent actions by State Attorneys General in the area of Fair Credit Reporting, proposals for global privacy protection, and the National Advertising Division's excellent work in identifying the correct level of substantiation for advertising of a new category of products (enhanced infant formula). In addition, we have a full schedule of events, including two upcoming teleseminars. The first will occur on September 18, when the Consumer Protection and FTC Committees co-sponsor a Privacy Teleseminar that will focus on global compliance issues. Later, in November, we will conduct a second teleseminar on Advertising Self-Regulation.

We've only scratched the surface here of what will be a busy year. So if you are looking to brush up on some skills or learn new ones, start with our Committee. Membership info on page 32. — *Editor*

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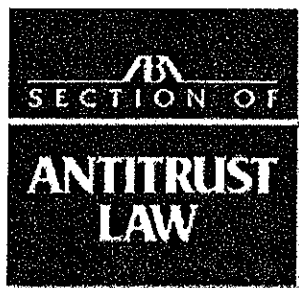
amicus brief, class counsel and the defendants urged the Commission not to file an amicus brief. One might expect some business interests to oppose efforts to ensure that class action settlements provide adequate relief to class members, given that such efforts would likely increase the net cost of settling class action cases. Overall, if people step back from their individual interests in a particular case, we think that everyone would agree that these efforts are in the best interest of business and consumers.

**CPU:** To what extent is the Commission's Class Action Fairness Project motivated by a desire to promote the FTC's role in the development and prosecution of consumer cases?

**EK:** By participating in appropriate class action cases, the Commission hopes to produce better results for consumers. We also hope to discourage defendants and class counsel in other cases from proposing flawed settlements that benefit class counsel and defendants at the expense of consumer class members. By doing so, we can help protect consumers and advance the public interest.

**CPU:** What advice does the Commission have for a consumer who has an opportunity to participate in a class action case as a member of the class?

**EK:** Consumers should read class action notices carefully, and keep in mind that they will generally be bound by the outcome of the class action lawsuit unless they take steps to opt out of the class. The Commission has published a brochure titled "Need a Lawyer? Judge for Yourself" for consumers who may need legal services or who need to make decisions regarding their participation in a class action case. <http://www.ftc.gov/bcp/conline/pubs/services/lawyer.pdf> ■



## The Trevor Case: Catalyst for Reforming California's Unfair Competition Law?

By Robert C. Wright\*

Will a recent lawsuit against a Beverly Hills law firm lead to major reform of California's Unfair Competition Law? There is reason to believe so.

On February 26, 2003, Attorney General Bill Lockyer filed an action in Los Angeles Superior Court against the Trevor Law Group, several of its lawyers, and the Consumer Enforcement Watch Corporation for violating Section 17200, *et seq.*, of the Business and Professions Code (commonly referred to as the Unfair Competition Law or "UCL").<sup>1</sup> The UCL defines and prohibits unfair competition including "any unlawful, unfair or fraudulent business act or practice." The Trevor defendants are accused of "extracting

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*Unlike Section 5 of the FTC Act which is enforceable exclusively by the government, the UCL permits "any person acting for the interests of itself, its members, or the general public..."*

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money from small businesses under the guise of purporting to enforce consumer protection laws . . ." by engaging in a scheme of filing UCL suits against businesses, purportedly in the public interest, and then offering to secretly settle for relatively small amounts of money to avoid the cost of litigation. In the wake of these widely publicized allegations, several bills were introduced in the state Assembly and Senate to amend the UCL and address the problems identified in Trevor. The State Bar also formed the largest task force in its history to prosecute disbarment proceedings against the individuals involved in the Trevor Group.<sup>3</sup>

Through legal counsel, the Trevor Group denied the contentions of the Attorney General's complaint. Nothing in this article is intended to prejudge the merits of the case or the State Bar charges against the Trevor Group.

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\* Robert C. Wright is a member of the San Diego firm of Wright & L'Estrange where he specializes in business litigation. The firm has been involved in a number of cases brought under section 17200 of the Business and Professions Code. Mr. Wright wishes to thank Edward D. Sybesma, Jr., of Rutan & Tucker, L.L.P.; Frank W. Chen of Wasserman, Comden, Casselman & Pearson, L.L.P.; Jayne Kim, Deputy Trial Counsel for the State Bar; and Howard Wayne, Deputy Attorney General, for providing information relating to this article. All rights reserved.

### UCL Litigation

Thirty-four states, including California, have "Little FTC Acts" prohibiting unfair business practices.<sup>4</sup> Paralleling Section 5 of the Federal Trade Commission Act,<sup>5</sup> California's statute is one of the broadest in the nation. Nevertheless, until 1957 its application was confined by the courts to instances of trade name misappropriation.<sup>6</sup> After the California Attorney General opened a Consumer Fraud Unit in 1959, consumer protection cases based on the UCL began to be regularly filed and upheld by courts.<sup>7</sup> Indeed, the name "Unfair Competition Law" has become a misnomer. As the California Supreme Court held in its 1972 landmark decision of *Barquis v. Merchants Collection Ass'n*, the UCL "broadened the scope of legal protection against wrongful business practices generally, and in so doing extended to the entire consuming public the protection once afforded only to business competitors."<sup>8</sup>

Although the disjunctive words "unlawful" or "fraudulent" are well defined by California cases, the state Supreme Court has yet to define "unfair" business practices in actions by consumers.<sup>9</sup> However, there is no doubt that "unfair" encompasses at least FTC concepts of unfairness and violations of any legislatively declared policy.<sup>10</sup> During the last year, the Attorney General used the UCL for such diverse purposes as challenging territorial allocation agreements between newspapers, failure to disclose the mercury content in fish, an agreement between automobile dealers not to advertise the price of new vehicles, misrepresentations by a company claiming to work with the Attorney General's office to eliminate unwanted telemarketing calls, illegal pricing of electricity to California consumers, and underground tank violations by gas stations.<sup>11</sup>

Unlike Section 5 of the FTC Act which is enforceable exclusively by the government, the UCL permits "any person acting for the interests of itself, its members, or the general public" to sue.<sup>12</sup> There is no requirement that the plaintiff be directly harmed by the defendant's unlawful business practices.

With the lack of any standing requirement, UCL cases can take multiple forms, the most common of which are (i) a UCL claim is added as a last cause of action when one competitor sues another on tort or contract theories; (ii) a person brings a representative action on behalf of the general public for injunctive relief and restitution of money or property obtained by means of unfair competition; (iii) a person brings a statewide class action on behalf of similarly situated persons for injunctive relief and restitution; and (iv) a public prosecutor sues for injunctive relief, restitution, and civil penalties (up to \$2,500 per violation) on behalf of the general public. Although the UCL does not provide for recovery of attorneys' fees by prevailing plaintiffs, attorneys' fees are available

to a private plaintiff if, as a result of the litigation, a significant benefit was conferred on the general public or a large class of persons.<sup>13</sup>

Many of the problems that surfaced in *Trevor* resulted because UCL claims on behalf of the general public can be resolved without court approval. There is also no requirement that the Attorney General be notified of a UCL case until it reaches the appellate level.<sup>14</sup>

### Trevor Group Allegations

In *Trevor*, the Attorney General alleges that the defendants reviewed the websites of various government agencies, including the California Bureau of Automotive Repair and the Los Angeles County Department of Health Services, to identify notices of violations issued to businesses. Without further investigation, the defendants filed twenty-two lawsuits alleging violations of the UCL, including fourteen against about 2,200 auto repair shops and one against about 1,000 mostly immigrant-owned restaurants and markets. The defendants in these cases were misjoined, having no commonality except the type of business in which they were engaged.<sup>15</sup>

After the complaint was filed and served in these cases, the businesses or their attorneys received letters representing that the case was strong, that such cases usually settle for between \$6,000 and \$26,000, and that in lieu of expensive litigation, the client should sign the enclosed documents and return them with pay-

ment to resolve the matter. There was a misrepresentation that the settlement would confer *res judicata* and collateral estoppel benefits, barring any other persons from filing suit against the business based on that violation of law.

Although the Trevor Group suits were purportedly brought in the public's interest, there was a confidentiality agreement preventing disclosure of the terms of each proposed settlement.

The plaintiff in many of these cases is the Consumer Enforcement Watch Corporation, an entity formed by the Trevor Group with which it allegedly had an illegal agreement to split attorneys' fees.

The effect was a massive, abusive prosecution of misjoined defendants. In the guise of recovering fees and expenses, the Trevor Group and the Consumer Enforcement Watch Corporation committed the unfair business practice of seeking civil penalties, a remedy that can only be obtained by public agencies and officials under the UCL.<sup>16</sup> The Attorney General further asserts that by insisting on confidential settlements, the defendants wrongfully concealed their compromise of the public interest, also an unfair business practice.

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*"UCL representative actions can be a fair and effective tool without requiring the plaintiff to have suffered actual injury or proceed as a class action."*

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In addition to an injunction requiring dismissal of all suits and court permission to file any future actions under the UCL, the Attorney General seeks civil penalties exceeding \$1 million.<sup>17</sup>

The Trevor Group's conduct is not an isolated aberration in UCL cases. The Attorney General is currently investigating similar conduct by four other law firms in Long Beach, Tustin, Sacramento, and San Diego.<sup>18</sup> In March 2003, 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, enclosing applications to obtain licenses, and demanding \$10,000 to avoid UCL litigation. On July 8, 2003, the Attorney General filed another Trevor-type lawsuit against Long Beach attorney Harpreet Brar and others for violating the UCL by filing suits against hundreds of nail salons falsely alleging that they violated regulations of the Board of Barbering and Cosmetology by using the same bottle of nail polish for two or more patrons. As in Trevor, the Attorney General's complaint seeks an injunction requiring dismissal of the suits, court permission to file future actions under the UCL, civil penalties exceeding \$1 million, and restitution to all parties from whom the defendants obtained settlement funds.<sup>19</sup>

### Issues and Proposed Solutions

*Trevor* was not the first suggestion of problems and uncertainties in the UCL. A 1995 California Law Revision Commission Report identified similar problems.<sup>20</sup> It is the nature and magnitude of the *Trevor* allegations that caused the legislature to act. Among the proposed changes are bills that provide the following:

- In representative actions, a statement under penalty of perjury by a private plaintiff and his attorney that they do not have a conflict of interest or other impediment to prevent faithful representation of the interests of the general public.<sup>21</sup>
- Notification of the Attorney General, county district attorney, and state or local body responsible for regulating the defendant at the time of filing an action.<sup>22</sup>
- Court determination that any settlement or judgment is lawful, fair, reasonable, non-collusive and adequate to protect the interests of the general public.<sup>23</sup>
- Res judicata effect of any judgment or settlement approved by the court as a conclusive bar to further actions by private plaintiffs against the same defendant based on substantially similar facts and theories of liability.<sup>24</sup>
- Prohibition on settling any claim by a person acting for the interests of the general public without filing a complaint.<sup>25</sup>

- Permissive joinder in one action of defendants involved in the same transaction or occurrence, if any question of law or fact applicable to all defendants will arise in the action.<sup>26</sup>
- Written disclosure of defendants' rights when serving a demand letter or summons.<sup>27</sup>
- Limiting private representative actions on behalf of the general public to instances where the plaintiff has suffered actual harm, is an adequate representative of the interests of the general public, has retained an attorney who will adequately represent the interests of the general public, has a claim typical of the claims of the general public, and no prior action has been commenced on similar facts by public prosecutors or a private plaintiff.<sup>28</sup>
- Requiring a ninety-day notice of intent to sue before commencement of a private representative action.<sup>29</sup>
- Allowing a court determining a remedy for unfair competition to consider mitigating actions taken by the defendant within the ninety-day period.<sup>30</sup>
- Requiring any person acting for the interest of the general public to have suffered injury and satisfy the class action requirements of Section 382 of the Code of Civil Procedure.<sup>31</sup>
- Prohibiting a private plaintiff from suing business organizations with less than 50 employees unless the private plaintiff has suffered actual harm.<sup>32</sup>
- Providing that, in actions by private plaintiffs who have not suffered injury, 85 percent of any judgment or settlement shall be deposited in the Restitution Fund in the State Treasury for allocation to crime victims.<sup>33</sup>
- Requiring that a private plaintiff be the original source of the information on which suit is based, and preventing private suits when a public agency is already a party to a similar action.<sup>34</sup>
- Allowing for disgorgement of profits as a remedy and distribution of any fluid recovery in a manner designed to further the purposes of the causes of action or promote justice for all Californians.<sup>35</sup>

Two bills have made substantial legislative progress. On June 4, 2003, Senate Bill No. 122 requiring court approval of attorneys' fees in any proposed settlement, and permitting disgorgement and fluid recovery, passed the state Senate. The next day, the Assembly approved Assembly Bill No. 95 requiring that a warning ac-

company service of a demand letter or complaint in a representative action. The bills will now be considered by the opposite bodies and could be enacted before the end of the year.

Although all of these proposals deserve careful consideration, many far exceed the scope of the *Trevor* allegations. UCL representative actions can be a fair and effective tool without requiring the plaintiff to have suffered actual injury or proceed as a class action. As pointed out by the state Supreme Court in *Kraus v. Trinity Management Services, Inc.*,<sup>36</sup> in a representative action, the trial court can adopt procedures that provide notice to affected persons not before the court, and prevent double recovery against the defendants. The trial court can also review whether the action is "one brought by a competent plaintiff for the benefit of injured parties" and otherwise "decline to entertain the action as a representative suit."<sup>37</sup> These are existing ways of resolving the res judicata problem.<sup>38</sup> Adopting a new remedy of disgorgement of profits is unnecessary to address the *Trevor* situation, creates due process problems, and may run the risk of turning the UCL into a device for avoiding the more rigorous pleading and proof requirements of existing tort and contract claims.<sup>39</sup> A ninety-day pre-suit notice period may frustrate the need for immediate injunctive relief. Moreover, the doctrine of mootness is already an equitable defense that the court may consider in fashioning a remedy for unfair competition.<sup>40</sup> Requiring 85 percent of a judgment or settlement to be deposited in a state restitution fund could defeat the current goal of restitution in UCL cases. Notice of suit to the Attorney General is unnecessary if a court must approve any settlement or judgment, and would make settlement more difficult in some cases.

The *Trevor* issues can be remediated without most of the present proposals. Consumer advocates and business interests should be able to agree that any settlement or judgment resolving representative claims, including payment of attorneys' fees, be reviewed by a court to determine that it is lawful, non-collusive, and adequately protects the interests of the general public and the defendant. Mandatory additional warnings are appropriate when a demand letter or complaint is served in a representative action. Although the current form of civil summons was adequate to cause hundreds of defendants sued by the *Trevor* firm to retain counsel, warnings may have prevented some from settling without the advice of counsel.

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 service of mandatory warnings with demand letters and complaints — are sufficient to prevent recurrence of the same factual pattern. Drastically reshaping the UCL is not necessary to achieve this goal. ■

## ***Nike v. Kasky: Sweatshops, Sneakers, and Corporate Speakers –The Supreme Court Declines to Tackle Commercial Speech***

By John Williams and Lisa Goldblatt\*

On June 26, 2003, in its final ruling of the term, the United States Supreme Court dismissed the closely watched commercial speech case *Nike, Inc. v. Kasky* in a one-sentence, unsigned order as "improvidently granted."<sup>2</sup> In effect, the Court said that it should never have agreed to hear the case in the first place.

The issue on appeal was whether Nike's public relations campaign responding to allegations that it used third-world sweatshops in its manufacturing process constituted commercial speech. The California Supreme Court had held that Nike's statements about its overseas labor practices constituted commercial speech, and, therefore, were entitled to less constitutional protection than other forms of speech, such as political speech. Accordingly, the California Supreme Court reversed the lower court's dismissal of the complaint alleging that Nike made false and misleading statements and remanded for further proceedings.

With this case, the U.S. Supreme Court had the opportunity to further define the limits of commercial speech and the level of constitutional protection to be afforded to corporate speakers. By disposing of the case on technical grounds, the Court effectively sidestepped the constitutional issues on appeal. The result allows the decision by the California Supreme Court to remain in effect. The California decision has the potential to transform virtually every corporate utterance entering the public domain into

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*The California decision has the potential to transform virtually every corporate utterance entering the public domain into commercial speech.*

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commercial speech. California corporate entities that engage in a public debate now risk being dragged into court to defend their statements.

### **Background**

In the mid-1990s, Nike, the world's largest manufacturer of athletic shoes and equipment, was the subject of severe criticism in the

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\* John Williams and Lisa Goldblatt are attorneys with Collier Shannon Scott, PLLC (<http://www.colliershannon.com>). Collier Shannon Scott has represented Nike on unrelated matters.

## Endnotes

### The Class Action Fairness Project: FTC Steps In

1 The FTC Act provides the Commission with broad law enforcement authority over entities engaged in, or whose business affects commerce. See 15 U.S.C. § 41, *et seq.*

2 Letter to Committee on Rules of Practice and Procedure of the Judicial Conference of the United States Concerning Proposed Amendments to Rule 23 of the Federal Rules of Civil Procedure, Governing Class Actions (Feb. 19, 2002) available at <http://www.ftc.gov/opa/2002/02/rule23.htm>.

3 The Commission contended that the amendments would benefit consumers by fostering competition in the appointment of class counsel and by requiring that notice to consumers be provided in plain, easily understood language.

4 See FTC's Memorandum of Points and Authorities in Opposition to Class Plaintiffs' Petition for Award of Counsel Fees and Reimbursement of Expenses, *United States v. First Databank Inc.*, (D.D.C. No. 1:01CV00879) available at <http://www.ftc.gov/os/2002/01/heardbrief.pdf>.

5 *First Databank Antitrust Litigation*, 209 F.Supp.2d 96, 101 (D.D.C. 2002).

6 See FTC's Memorandum of Law as Amicus Curia in *Erikson v. Ameritech*, (Cook County Cir. Ct., Ch. Div. No. 99 CH 18873) available at <http://www.ftc.gov/os/2002/06/eriksonmemo.pdf>

7 *Erikson v. Ameritech*, No. 99 CH 18873, slip op. (Cook County Cir. Ct., Ch. Div. Sept. 18, 2002).

8 Brief of Federal Trade Commission as Amicus Curiae in *Carter v. ICR Services, Inc.*, See (N.D. Ala. No. CV-00-C-2666-W) available at <http://www.ftc.gov/os/2002/08/icrsiamicusbrief.pdf>.

9 *Carter v. ICR Services, Inc.*, No. CV-00-C-2666-W, slip op. (N.D. Ala. Sept. 6, 2002).

10 See Federal Trade Commission's Memorandum of Points and Authorities as Amicus Curiae Regarding the Proposed Class Action Coupon Settlement and Petition for an Award of Attorneys' Fees, *Haese v. H&R Block, Inc.*, No. CV-96-423 (Dist. Ct. of Kleberg County, Tex), available at <http://www.ftc.gov/os/2003/06/hrrmemo.pdf>.

### The Trevor Case: Catalyst for Reforming California's Unfair Competition Law

1 *People of the State of California v. Trevor Law Group, et al.*, Los Angeles Superior Court, Case No. BC 290989.

2 *Attorney General Sues Law Firm for Alleged "Shakedown"* Sacramento Bus. Journal (Feb. 26, 2003), available at <http://sacramento.bizjournals.com/sacramento/stories/2003/02/24/daily29.htm/>.

3 In a 91-page Verified Application for Involuntary and Inactive Enrollment filed with the State Bar Court on March 13, 2003, the State Bar charges Trevor Group lawyers Damian Trevor. Allan

Hendrickson, and Shane Chang Han with, *inter alia*, forming a shell corporation to perpetrate fraud; committing repeated acts of malicious prosecution by filing UCL lawsuits without conducting any reasonable inquiry; and mail and wire fraud through the sending of letters and settlement documents containing false and misleading statements of fact and law. On May 21, 2003, the Application was granted, and the lawyers were suspended by the State Bar from practicing law. On July 10, 2003, they resigned from the State Bar in the face of disbarment proceedings.

4 William L. Stern, *Unfair Business Practices And False Advertising*, § 2:49, 21 (2000).

5 *People v. National Research Co. of California*, 201 Cal.App.2d 765, 773, 20 Cal.Rptr. 516 (1962).

6 *Hesse v. Grossman*, 152 Cal.App.2d 536, 540, 313 P.2d 625 (1957).

7 Wesley J. Howard, *Former Civil Code Section 3369: A Study in Judicial Interpretation*, 30 Hastings L. J. 705, 713 (1979).

8 *Barquis v. Merchants Collection Ass'n*, 7 Cal.3d 94, 109, 101 Cal.Rptr. 745, 496 P.2d 817 (1972).

9 *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 187 n. 12, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999).

10 *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 184-86, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999); *Schnall v. Hertz Corp.*, 78 Cal.App.4th 1144, 1166, 93 Cal.Rptr.2d 439 (2000).

11 See <http://caag.state.ca.us/newsalerts>.

12 Cal. Bus. & Prof. Code § 17204.

13 Cal. Civ. Proc. Code § 1021.5.

14 Cal. Bus. & Prof. Code § 17209.

15 On April 1, 2003, Los Angeles Superior Court Judge Carl J. West dismissed nine of the actions against the automotive repair shops on the ground of misjoinder. Statement of Decision Re: Order To Show Cause, In Re Automobile Repair Cases, *Consumer Enforcement Watch Corporation v. Porter Automotive, et al.*, Los Angeles Superior Court, Case No. BC 281693. An appeal of the decision is pending. On April 8, 2003, the suit against about 1,000 restaurants was dismissed voluntarily in face of a tentative ruling doing so, again on the ground of misjoinder. *Trevor Law Group Suit Against Restaurants Dismissed in Superior Court*, Metropolitan News-Enterprise, April 9, 2003, at 3, available at <http://www.metnews.com/articles/trev040903.htm>.

16 Cal. Bus. & Prof. Code § 17206.

17 Instead of answering the Attorney General's complaint, the Trevor Group brought a still-pending motion to strike it under California's "anti-SLAPP statute." Cal. Civ. Proc. Code § 425.16. "SLAPP" is an acronym for strategic lawsuits against public par-



ticipation. When a cause of action against a person arises in the furtherance of the person's right of petition or free speech under the United States or California constitutions in connection with a public issue, a special motion may be brought to strike the claim unless the plaintiff can show a probability of prevailing.

18 Attorney General Lockyer Files "17200" Consumer Protection Lawsuit Against Beverly Hills Law Firm. Trevor Law Group Filed Abusive Actions Against Thousands of Small Businesses, February 26, 2003, available at <http://caag.state.ca.us/newsalerts/2003-03-021.htm>.

19 Attorney General Lockyer Files Second Action to Fight Abuse of Consumer Protection Law, July 8, 2003, at <http://caag.state.ca.us/newsalerts/2003/03-85.htm>.

20 Robert C. Fellmeth, *California's Unfair Competition Act: Conundrums and Confusions*, 26 Cal. L. Revision Comm'n Reports 227 (1996).

21 A.B. 69, 2003 Leg., 2003-2004 Reg. Sess. (Ca. 2003).

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 A.B. 95, 2003 Leg., 2003-2004 Reg. Sess. (Ca. 2003).

27 *Id.*

28 A.B. 599, 2003 Leg., 2003-2004 Reg. Sess. (Ca. 2003).

29 A.B. 102, 2003 Leg., 2003-2004 Reg. Sess. (Ca. 2003).

30 *Id.*

31 A.B. 599, 2003 Leg., 2003-2004 Reg. Sess. (Ca. 2003).

32 S.B. 899, 2003 Leg., 2003-2004 Reg. Sess. (Ca. 2003).

33 S.B. 890, 2003 Leg., 2003-2004 Reg. Sess. (Ca. 2003).

34 S.B. 912, 2003 Leg., 2003-2004 Reg. Sess. (Ca. 2003).

35 S.B. 122, 2003 Leg., 2003-2004 Reg. Sess. (Ca. 2003).

36 *Kraus v. Trinity Management Services, Inc.*, 23 Cal.4th 116, 138, 96 Cal.Rptr.2d 485, 999 P.2d 718 (2000).

37 *Id.*

38 Problems of *res judicata* and collateral estoppel most frequently arise when representative actions seeking restitution are not brought as class actions. Lack of notice, adequate representation, and privity violate basic safeguards of due process and prevent any settlement or judgment from binding third parties. *Bronco Wine Co. v. Frank A. Logoluso Farms*, 214 Cal.App.3d 699, 715-716, 262 Cal.Rptr. 899 (1989); William L. Stern, *Unfair Business Practices And False Advertising*, 248-265. UCL defendants may not be heard to complain about this issue if they oppose class action certification. *Wilner v. Sunset Life Ins. Co.*, 78 Cal.App.4th 952, 970, 93 Cal.Rptr.2d 413 (2000).

39 *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1151, 131 Cal.Rptr.2d 29, 63 P.3d 937 (2003).

40 *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal.4th 163, 179, 96 Cal.Rptr.2d 518, 999 P.2d 706 (2000).

### *Nike, Inc. v. Kasky: Sweatshops, Sneakers, and Corporate Speakers--The Supreme Court Declines to Tackle Commercial Speech*

1 *Nike, Inc. v. Kasky*, \_\_\_ U.S. \_\_\_, 123 S. Ct. 2554 (2003).

2 *Kasky v. Nike, Inc.*, 45 P.3d 243, 248 (Cal. 2002).

3 *Kasky v. Nike, Inc.*, 79 Cal. App. 4th 165, 178 (Cal. 2000).

4 *Kasky*, 45 P.3d at 258-62.

5 *Id.* at 247.

6 *Id.* at 262.

7 *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

8 *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748 (1976).

9 *Id.* at 763.

10 *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

11 *Id.* at 566.

12 *Id.*

13 *Id.* at 561 (emphasis added).

14 *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60 (1983).

15 *Id.* at 66.

16 *Id.* at 66-67 & n.13.

17 *Id.* at 67.

18 *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

19 *Id.* at 509.

20 *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999).

21 *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

22 *Id.* at 544-55 (citations omitted).

23 *Thompson v. Western States Med. Ctr.*, 535 U.S. 357 (2002).

24 *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001) (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748 (1976)).

25 *Kasky*, 45 P.3d 243 (Cal. 2002).

26 *Id.* at 259.

27 *Id.* at 262.

28 *Nike, Inc.*, 123 S. Ct. at 2555.

29 *Id.*

30 *Id.* at 2557.

31 *Id.* at 2559.

32 *Id.* at 2569.

### FTC Forum Focuses On Stopping Spam

1 Theodor Suess Geisel, *Green Eggs And Ham* (Random House 1988) (1960).

2 This article summarizes the central themes discussed during the FTC's three day public forum. It is not intended to be a comprehensive review of all subjects raised during the various panel discussions. For more detailed information, including links