

Initiative Is Sensible Attempt to Rein In a Terribly Problematic State Law

By Michael A.S. Newman

The experience of innumerable police states throughout history demonstrates that when a government offers a bounty to citizens to inform on their neighbors, the law becomes the tool of the corrupt. The unscrupulous inform on others to settle private grudges, to satisfy their envy or simply as a means of stealing wealth.

Further, when the definition of the wrongdoing is nebulous and malleable — when it involves inherently subjective words like “treason,” “sedition” or “heresy” — a potent recipe for injustice is brewed. In this way, Marcus Crassus, years before he crushed the rebellion of Spartacus, made his fortune during the reign of the brutal dictator Sulla by snatching up the estates of Roman citizens condemned without trial for “treason.”

In a modern democracy, the abuses are less flagrant and more subtle, but the same principles apply. An example of a law that unwisely fosters corruption amongst its citizens is California's Unfair Competition Law. To correct the inequities of this law, Gov. Arnold Schwarzenegger advocates Proposition 64, which will appear on the November ballot. The reforms embodied in Proposition 64 are absolutely necessary and are long overdue.

Indeed, the only problem with the measure is that it does not go far enough.

As it is now written, the Unfair Competition Law seeks to punish “unfair competition,” and permits anyone, even one who has never been damaged by the alleged wrongdoing of the defendant, to sue as a “private attorney general,” on behalf of the public good.

The Unfair Competition Law has two fatal flaws. One is the definition of “unfair competition,” which is “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.” By this definition a lawful, nonfraudulent business practice that is “unfair” is arguably a violation of the law. What does “unfair” mean? No one knows. The answer, like the proverbial definition of obscenity, appears to be, “I know it when I see it.”

Vats of printer ink have been spilt by the courts of California in a valiant effort to render some kind of a workable definition for “unfair practice,” but to no avail. And, of course, with no real definition of what practices are “unfair,” businesses have no adequate notice of what activities will be deemed violations of the Unfair Competition Law.

The second flaw is that a lawsuit can be brought by a person “acting for the interests of itself, its members or the general public.” This means that anyone can prosecute a lawsuit against a business for “unfair practices” even if they have never been harmed by the alleged practice, discarding the ordinary legal requirement that a litigant have some personal interest in a suit he initiates. As the U.S. Supreme Court noted in *Allen v. Wright*, 468 U.S. 737 (1984), the requirement that a plaintiff in fact have some interest in the dispute prevents the conversion of the judicial process into “a vehicle for the vindication of the value interests of concerned bystanders.” More important, limiting litigants to those with an actual stake in the matter keeps the process honest, and prevents sharp practitioners and unethical lawyers from suing at random, extorting settlements from unsophisticated business owners or those without the means to hire defense counsel.

Think that sounds alarmist? Think again. It has already happened.

Consider the Trevor Law Group, a firm of Beverly Hills attorneys that filed multiple suits against small businesses in a coordinated operation aimed at shaking them down for settlement money. The firm would obtain the names of its defendants from state agency Web sites listing businesses cited for minor code infractions. The firm would then sue the businesses for violation of the Unfair Competition Law, offering to drop such suits for settlements ranging from \$6,000 to \$26,000. The targets of these suits were mostly immigrant-owned auto repair shops, nail salons and ethnic restaurants. As the Trevor Law Group correctly anticipated, most of these businesses preferred to pay the money rather than mount a legal defense, which would have been even

more expensive. State authorities shut down the Trevor Law Group, but this episode only illustrates the most brazen abuses that arise where a law gives every “interested bystander” the power to sue. Many more subtle abuses continue to occur.

Proposition 64 is an attempt to remedy these abuses by providing that Unfair Competition Law suits be brought only by those “who ha[ve] suffered injury in fact and ha[ve] lost money or property as a result of such unfair competition.” The proposition still permits actions initiated by the attorney general, prosecutors from district and city attorneys’ offices, and other governmental counsel. Those elected and appointed to protect the “public interest” still will have the power to invoke the law. However, the measure will prevent private parties like the Trevor Law Group from profiting at the expense of businesses. Nongovernment lawyers will be subject to the salutary discipline of actually having to find a living, breathing plaintiff to represent before filing a lawsuit against a business. Proposition 64 is a sensible attempt to rein in a terribly problematic law.

If anything, Proposition 64 does not go far enough as it leaves in place the hopelessly unclear “unfair practice” language. Lawsuits based on nothing more than the “I-know-it-when-I-see-it” standard for unfairness will continue. Businesses will continue to shuffle blindly, never perfectly sure that they are in compliance with the Unfair Competition Law.

But it is a step in the right direction.

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