

LOS ANGELES

# Daily Journal

WEDNESDAY,  
JULY 21, 1999

## The Money Hook

### Plaintiffs' Bar Shouldn't Fish For Damages When Remedy Isn't Available

By Royal F. Oakes

The biggest year-2000 problem facing California businesses may have nothing to do with their computers' belief that, come New Year's Day, the president of the United States is William McKinley.

No, thanks to the generosity of the California Legislature and the creativity of the plaintiffs' bar, a greater threat in the new millennium is likely to be the "BPC 17200" problem, a.k.a., California's Unfair Business Practices Act, Business and Professions Code Section 17200 et seq.

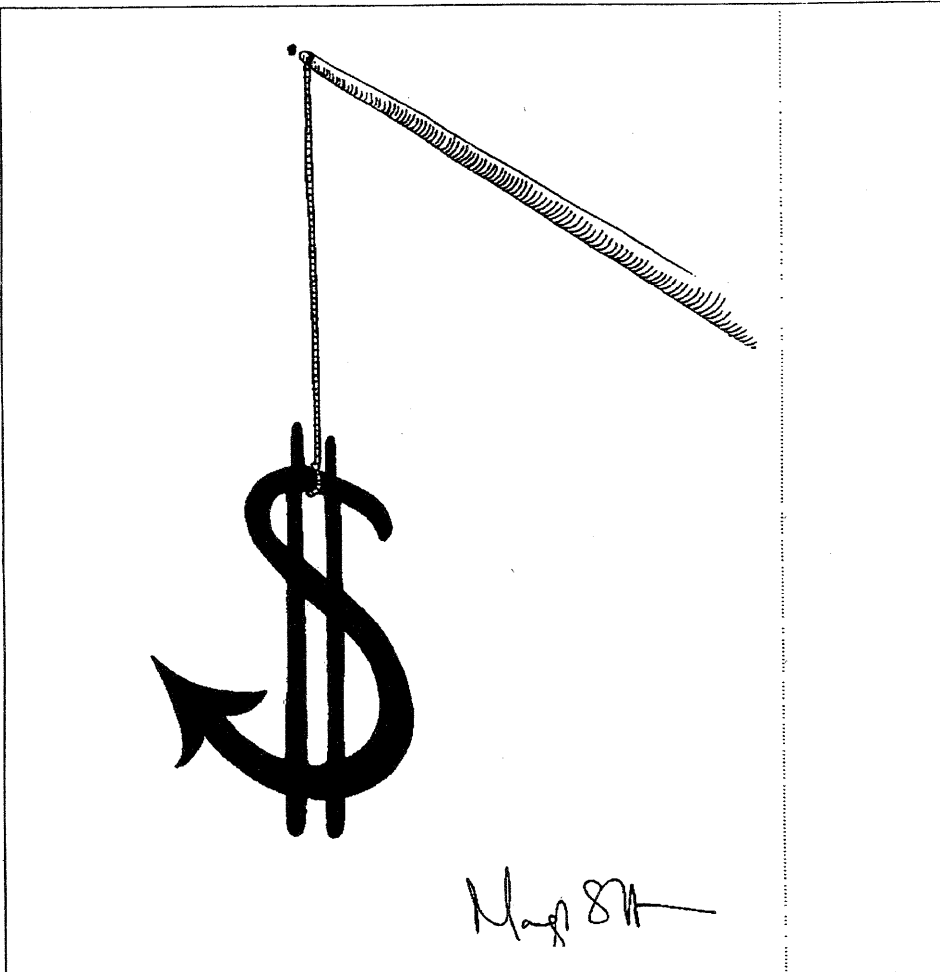
Defining "unfair competition" as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising," the act permits suits by not only the attorney general, prosecutors and government entities, but also by "any person acting for the interests of itself ... or the general public." The appellate courts have described the act's broad definition of misconduct as "sweeping language."

It all sounds innocent enough, but in practice the act has inspired an ill-defined grab bag of frivolous theories. Why? Because no one has a clue what's meant by "unfair practice."

Plaintiffs have long tried to slip past the pleading stage in Section 17200 cases with beefs that would not pass muster if they had to actually explain how the defendant's conduct had breached a contract, an implied covenant, a fiduciary duty or a statutory duty.

But the geniuses in Sacramento decided that, akin to the church raffle, plaintiffs "need not be injured to win." That's right. In order to sue, you don't have to be damaged in any way; all it takes is a burning desire to bring some faceless corporate entity to its knees.

If you're a Legislature with a sense of humor, and you've drafted a statute whose meaning is about as clear as a major policy address by



Yogi Berra, what do you do to compound the fun? Abandon the annoying requirement that a plaintiff actually suffer any injury.

The act lets you sue as a private attorney general, a white knight whose chain mail has not been sullied but who is nonetheless eligible under the law to sue on behalf of the general public.

"Bravo," say the plaintiffs' bar. "Justice at last. *Moradi-Shalal v. Fireman's Fund*, 46 Cal.3d 287 (1988), may have stripped us of our God-given right to sue somebody else's insurance company, but this almost makes up for it."

A poster child for the dubious use of the act is Cynthia Haines. It seems Haines became a fan of online gambling. Using her credit cards, she managed to rack up over \$70,000 in losses. She responded to her bank's suit against her for failing to make payments on her Visa card account by filing a private attorney general suit in Marin County Superior Court last July.

Haines claims that it is unconscionable that online casinos display Visa and Mastercard logos on their Web pages, when gambling is illegal in California. Yes, it's another noble use of the Unfair Business Practices Act: getting out from under the fact you dropped \$70 grand at the virtual tables.

One problem with a vague, open-ended statute is that people start

taking liberties with its meaning. That has led to plaintiffs' seeking money damages under the act, in spite of case law clarifying that only injunctive relief and restitution are permitted under the statute. Plaintiffs' counsel with a deep-seated interest in remuneration have been advancing theories that, by a mysterious process of legal alchemy, somehow transform restitutionary relief into a company writing a check in the amount of a plaintiff's purported damages.

The plaintiffs' bar has not yet quite figured out the trick for transforming restitution into money damages sought by people who never gave anything to the wrongdoer, but they're trying.

In a recent transparent attempt to twist the act's restitutionary relief into a grab for money damages, a plaintiff claimed an insurer had tricked its insureds into not purchasing a type of coverage the carrier was allegedly reluctant to sell. The suit sought an order that even though no ill-gotten gains ever flowed from consumers to the insurer (a requirement for restitution imposed by every judge from William Rehnquist to Roy Bean), "restitution" meant retroactively imposing coverage that never existed. In granting the insurer's motion for summary adjudication, the trial court referred the plaintiffs' ploy as

a "quantum leap."

Let's face it: Everybody's got dubious motives. Plaintiffs' lawyers want to retire early; companies under attack want to get Section 17200 suits off their back; and the companies' attorneys — many of whom are fine human beings in their own right, by the way — certainly have a bias.

That's why it is so important for trial judges to rise about the fray and say enough is enough. Just because the Legislature chose to dump this mess in our lap does not mean the court system should have to put up with theoryless plaintiffs, traipsing through the halls of commerce looking to scoop up nuisance settlements.

Unfair competition actions should set forth a coherent explanation of how conduct violates a legally cognizable duty, and the remedy sought should bear some resemblance to the restitutionary or injunctive relief the statute provides. If not, judges should resolve to banish "creative" Section 17200 actions from their 21st century courthouses.

Royal F. Oakes, a partner with the Los Angeles law firm of Bargier & Wolen, represents insurers and other companies in Business and Professions Code Section 17200 litigation.

#### Op-Eds Welcome

Articles should be sent to Brenda McGann, Los Angeles Daily Journal, P.O. Box 54026, Los Angeles, Calif., 90054 or by email to [brenda\\_mcgann@dailyjournal.com](mailto:brenda_mcgann@dailyjournal.com). They should include the author's name, mailing address and phone number.