

TENSIONS BETWEEN CLASS
ACTIONS AND THE LIBERAL
STANDING REQUIREMENTS FOR
PRIVATE ATTORNEY GENERAL
ACTIONS BROUGHT UNDER
CALIFORNIA'S UNFAIR
COMPETITION LAW, BUSINESS
& PROFESSIONS CODE § 17200

Lawrence B. Steinberg
Buchalter Nemer

Copyright © 2004
All Rights Reserved

Biographical Information

Lawrence B. Steinberg
Buchalter Nemer
1000 Wilshire Boulevard, Suite 1500
Los Angeles, CA 90017-2457
Telephone: (310) 460-4481
E-Mail: LSteinberg@buchalter.com

Larry Steinberg is a shareholder in the Litigation Practice Group of the Los Angeles law firm of Buchalter Nemer. Prior to joining Buchalter, Mr. Steinberg managed the West Coast litigation practice for the national law firm of Hall Dickler Kent Goldstein & Wood and was a partner of the law firm of Wyman Bautzer Kuchel & Silbert. Mr. Steinberg has prosecuted and defended against a wide variety of unfair competition, false advertising, trade secret and intellectual property claims, specializing in the representation of clients in the entertainment industry, private equity and venture capital firms, advertising agencies, and businesses accused of false advertising. He has written and lectured widely on California's Unfair Competition Law, Business & Professions Code § 17200, having spoken at, among others, programs sponsored by the Practising Law Institute, Mealey's, Northstar Conferences, the Promotions Marketing Association and numerous bar associations. Mr. Steinberg was invited to participate in the annual program sponsored by the Litigation Section of the State Bar of California entitled "Champions of the Courtroom: The Masters in Action." He is currently serving as an officer and member of the Board of Trustees of the Los Angeles Copyright Society. Mr. Steinberg received his law degree in 1981 from Harvard Law School where he was an editor of the *Harvard Civil Rights-Civil Liberties Law Review*. He is a graduate of Yale University where he received his Bachelor of Arts *degree magna cum laude*, graduating with distinction in political science.

Table of Contents

TENSIONS BETWEEN CLASS ACTIONS AND THE LIBERAL STANDING REQUIREMENTS FOR PRIVATE ATTORNEY GENERAL ACTIONS BROUGHT UNDER CALIFORNIA’S UNFAIR COMPETITION LAW, BUSINESS & PROFESSIONS CODE § 17200

I. INTRODUCTION.....1

II. IN *KRAUS*, THE CALIFORNIA SUPREME COURT HELD THAT A “FLUID RECOVERY FUND” IS NOT AVAILABLE AS A REMEDY UNDER A UCL CLAIM THAT IS NOT CERTIFIED AS A CLASS ACTION.....3

III. THE TENSION BETWEEN THE LIBERAL STANDING REQUIREMENTS OF THE UCL AND THE REQUIREMENTS FOR CERTIFICATION OF A CLASS ACTION.....6

A. Standing and Competency to Bring Claims Under the UCL.....6

B. Standards for Class Certification in California.....10

1. “Typicality” Requirement.....10

2. “Substantial Benefit” Requirement.....11

Table of Contents
(continued)

IV.	RECENT CASE LAW DISCUSSING CERTIFICATION OF UCL PUTATIVE CLASS ACTIONS BROUGHT BY “UNAFFECTED” OR ATYPICAL PLAINTIFFS.....	13
	<i>A. Corbett v. Superior Court (2002).....</i>	<i>14</i>
	<i>B. Delaney v. Warner-Lambert Co. (2003).....</i>	<i>17</i>
	<i>C. Frieman v. San Rafael Rock Quarry (2004)....</i>	<i>18</i>
V.	CONCLUSION.....	21

Summary

A representative, "private attorney general" action brought under California's unfair competition law, Business & Professions Code §17200, has many similarities to, but several very significant differences from, a typical class action. This article examines and compares these two vehicles for presenting a claim for unfair competition on behalf of a group of persons and concludes that, where the representative plaintiff has not suffered personal damage, it will rarely, if ever, be appropriate to certify an unfair competition claim as a class action.

**TENSIONS BETWEEN CLASS ACTIONS AND
THE LIBERAL STANDING REQUIREMENTS
FOR PRIVATE ATTORNEY GENERAL
ACTIONS BROUGHT UNDER CALIFORNIA'S
UNFAIR COMPETITION LAW,
BUSINESS & PROFESSIONS CODE § 17200**

By Lawrence B. Steinberg¹

I. INTRODUCTION

California's unfair competition law (the "UCL"), California Business & Professions Code § 17200 *et seq.*, has attracted widespread attention, use and abuse due, in large part, to provisions which set it apart from other statutory and common law remedies available to plaintiffs.

The substantive scope of the UCL is extremely broad, proscribing "any unlawful, unfair or fraudulent business act or practice." But just as noteworthy as the UCL's substantive scope are certain procedural aspects of the statute, especially the provision contained in Section 17204 allowing a claim to be brought by "any person acting for the interests of itself, its members or the general public." The California Supreme Court has repeatedly read this provision as allowing "a private plaintiff who has himself suffered no injury . . . [to] sue to obtain relief for others." *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal.4th 553, 561 (1998) (quoting, *Committee on Children's Television, Inc. vs. General Foods Corp.*, 35 Cal.3d 197, 211 (1983)). The

¹ Lawrence B. Steinberg is a partner in the Litigation Practice Group of the Los Angeles law firm of Buchalter Nemer. Mr. Steinberg, a graduate of Yale College and Harvard Law School, has lectured and written extensively on California's unfair competition law. He would like to thank Thomas W. Casparian, an attorney with the firm of Gilchrist & Rutter, for his invaluable assistance in connection with the writing of this article.

California Supreme Court, in *Kraus v. Trinity Management Services, Inc.*, 23 Cal.4th 116, 126 n.10 (2000), used the term “representative action” to refer to an action that is *not certified as a class action* and in which a private person is the plaintiff and seeks relief under the UCL “on behalf of persons other than or in addition to the plaintiff.” Commentators, and sometimes courts, have referred to such a plaintiff as a “private attorney general.”²

With increasing frequency in recent years, California courts have addressed the interplay between a representative action brought under the UCL and the requirements for certification of a class action. The broad scope of possible orders of restitution and injunctive relief that are available under the UCL, and the modest procedures which are required to award those remedies, stand in stark contrast to the expensive and cumbersome procedures involved in certifying a class action, which include notice, opt-outs, a class certification hearing and court approval of any settlement. Defendants would argue that the UCL does not afford them adequate safeguards against frivolous claims and strike suits but, until the Legislature acts or the people of

² See, e.g., *Consumers Union of United States, Inc. v. Fisher Development, Inc.*, 208 Cal.App.3d 1433, 1439 (1989) (“courts in California have consistently upheld the right of both individual persons and organizations under the unfair competition statute to sue on behalf of the public for injunctive relief as ‘private attorney[s] general,’ even if they have not themselves been personally harmed or aggrieved”); *Hernandez v. Atlantic Finance Co.*, 105 Cal.App.3d 65, 72 (1980) (“Nor is an action on behalf of the general public, prosecuted by a private attorney general, to be confused with a class action, wherein damage to the representative plaintiff is required”). *But see, Net2Phone, Inc. v. Superior Court*, 109 Cal.App.4th 583, 587 (2003) (“Although the label ‘private attorney general’ is often used (or misused) to describe a private plaintiff in a UCL action . . . [t]he filing of a UCL action by a private plaintiff does not confer on that plaintiff the stature of a prosecuting officer . . .”).

California speak through the initiative process,³ it appears highly unlikely that courts, on their own, are going to place significant obstacles in the way of UCL plaintiffs. Given that fact of life, we must address the very important question of when, if ever, a class should be certified in a UCL case.

II. IN *KRAUS*, THE CALIFORNIA SUPREME COURT HELD THAT A “FLUID RECOVERY FUND” IS NOT AVAILABLE AS A REMEDY UNDER A UCL CLAIM THAT IS NOT CERTIFIED AS A CLASS ACTION

The most recent pronouncement of the California Supreme Court on the subject of the interplay between the UCL and class actions is contained in *Kraus v. Trinity Management Services, Inc.*, 23 Cal.4th 116 (2000), wherein the court held that “a fluid recovery remedy” can not be awarded in an action under the UCL “when the action has not been certified as [a] class action.” *Id.* at 137.

In *Kraus*, six individual plaintiffs, all tenants, brought claims against their landlord (and affiliated parties) alleging that certain fees and charges assessed by defendants violated certain statutory provisions and, also, constituted an unlawful and unfair business practice under the UCL. Plaintiffs brought their complaint on behalf of themselves and the

³ A proposed initiative to drastically amend the UCL has qualified for the November 2004 ballot in California. If passed, this initiative would limit an individual's right to sue by allowing private enforcement only if that individual has been actually injured by, and suffered financial/property loss because of, an unfair business practice, would require representative claims to comply with the procedural requirements applicable to class action lawsuits and would only allow public prosecutors, and not individuals, to sue on behalf of the general public. *See*, Initiative Statute 1016 (SA03RF0051) (copy can be found at website of California Secretary of State: http://www.ss.ca.gov/elections/elections_j.htm#2004General).

present and former tenants of defendants. Plaintiffs did not bring their complaint as a putative class action. The trial court found that the fees assessed by defendants were wrongful, and ordered that all of the improper fees be disgorged by defendants; the trial court ordered that, to the extent that tenants could be identified and located, the fees be returned to those tenants. As to fees disgorged by defendants which could not be returned to tenants, the trial court, over defendants' objection, ordered that the disgorged funds be placed in a "fluid recovery fund"⁴ to be administered as a trust fund for the purpose of providing financial assistance for the advancement of legal rights of tenants in San Francisco.

The *Kraus* court reversed the trial court's establishment of a "fluid recovery fund," reasoning that, because such a remedy is expressly authorized for class actions (by Code of Civil Procedure § 384) but is not expressly authorized by the UCL, a fluid recovery fund could not be used unless the suit were certified as a class action. *Id.* at 137. On remand, the court ordered defendants to use all reasonable efforts to locate the tenants who had paid the illegal fees so that such fees could be returned to them, but held that "[t]o the extent that the trial court ordered

⁴ The "fluid recovery fund" finds its genesis in the doctrine of *cy pres*, which allows charitable trust funds to be put to the next best use if the original purpose of the trust can no longer be accomplished. *See*, California Probate Code § 15409. This policy was first applied to class actions in *Bruno v. Superior Court*, 127 Cal.App.3d 120, 123-24 (1981), and was codified by the Legislature when it enacted the statute now contained in California Code of Civil Procedure § 384. A fluid recovery fund "is necessary only when a defendant must disgorge money that is not to be returned to the persons from whom they were obtained Fluid recovery developed as a means by which to distribute the residue of a favorable class action judgment remaining after payment to those class members who have sufficient interest in obtaining recovery and can produce the documentation necessary to file individual claims." *Kraus*, 23 Cal.4th at 127-28.

defendants to make any refunds other than to refund money to tenants and former tenants, the award was not authorized by the UCL and was not a permissible exercise of the court's equitable powers. The judgment of the trial court for disgorgement of sums collected to secure liquidated damages may be enforced only to the extent that it compels restitution to those former tenants who timely appear to collect restitution.” *Id.* at 138. The court placed great importance on its belief that the only monetary remedy which the Legislature authorized under the UCL was restitution. *Id.* at 137). Three years later, in *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134 (2003), the court confirmed what was implied by its holding in *Kraus* -- that “nonrestitutionary disgorgement of profits is not an available remedy in an individual action under the UCL.” 29 Cal.4th at 1152.⁵

The holding in *Kraus* constituted the first instance in which a remedy was held to not be available in a representative UCL action (not certified as a class action) which could be available had a class been certified. Given that there is now a clear benefit to UCL plaintiffs’ obtaining class certification of their UCL claims, since *Kraus*, courts have been grappling with the thorny issue of under what circumstances can a UCL claim be certified as a class action.

⁵ In a footnote that has caused a great deal of discussion and consternation among commentators, the *Korea Supply* court limited its holding to individual private actions brought under the UCL, and expressly reserved the issue of the availability of nonrestitutionary disgorgement in a representative action or class action. The *Korea Supply* court did reference its *Kraus* holding that the Legislature has authorized disgorgement into a fluid recovery fund in class actions. *See, Korea Supply*, 29 Cal.4th at 1148 n.6. At least one trial court has applied *Korea Supply* to a representative class action for false advertising. *See, Park v. Cytodyne Technologies, Inc.*, San Diego County Superior Court, 2003 WL 21283814 (May 30, 2003) (appeal pending).

III. THE TENSION BETWEEN THE LIBERAL STANDING REQUIREMENTS OF THE UCL AND THE REQUIREMENTS FOR CERTIFICATION OF A CLASS ACTION

In *Kraus*, the Court stated: “Both consumer class actions and representative UCL actions serve important roles in the enforcement of consumers' rights. Class actions and representative UCL actions make it economically feasible to sue when individual claims are too small to justify the expense of litigation and thereby encourage attorneys to undertake private enforcement actions. . . . These actions supplement the efforts of law enforcement and regulatory agencies. This court has repeatedly recognized the importance of these private enforcement efforts.” *Kraus*, 23 Cal.4th at 126 (citations and footnote omitted).

But there are clear differences in a representative action under the UCL and a class action. In a representative action under the UCL, a private plaintiff is permitted to pursue injunctive relief and restitution on behalf of the public without showing that he was directly harmed by the defendant’s business practices. In a class action, by contrast, a plaintiff sues on his or her own behalf as well as on behalf of members of the class, and the class must be certified by the court under the standards set out in California Code of Civil Procedure section 382 and its interpretive case law. *Massachusetts Mutual Life Ins. Co. v. Superior Court*, 97 Cal.App.4th 1282, 1290 n.3 (2002).

A. Standing and Competency to Bring Claims Under the UCL

The UCL “does not require that a plaintiff prove he or she was directly injured by the unfair practice or that the predicate law provides for a private right of action.” *Gregory*

v. Albertson's, Inc., 104 Cal.App.4th 845, 851 (2002) (citation omitted). To the contrary, “[c]ourts have repeatedly permitted persons not personally aggrieved to bring suit for injunctive relief under the unfair competition statute on behalf of the general public, in order to enforce other statutes under which such parties would otherwise lack standing.” *Consumers Union of United States, Inc. v. Fisher Development, Inc.*, 208 Cal.App.3d 1433, 1440 (1989). Although it is often incorrectly stated that standing is not necessary in order to bring an action under the UCL, it is more accurate to state that “standing to sue under the UCL is expansive.” *Korea Supply*, 29 Cal.4th at 1143.⁶

It is now a noncontroversial proposition that a person or organization can sue in a representative action under the UCL without demonstrating the usual requirements of standing or damage. In *Committee on Children's Television, Inc. vs. General Foods Corp.*, 35 Cal.3d 197, 211 (1983), the California Supreme Court, among other things, upheld the standing of five organizational plaintiffs (such as the Committee on Children's Television and the California

⁶ Perhaps counterintuitively, there is no standing in *federal* court for a UCL claim brought by a plaintiff who has not, himself, suffered injury. This result arises, not from any statutory issue, but from the requirement of Article III of the United States Constitution that limits cases considered by the federal judiciary to those involving an actual “case or controversy.” This constitutional requirement affects both the original jurisdiction of the federal courts over some UCL claims, as well as the ability to remove such a claim from state court to federal court. *See, e.g., Lee v. American Nat. Ins. Co.*, 260 F.3d 997, 1001-02 (9th Cir. 2001) (“a plaintiff whose cause of action is perfectly viable in state court under state law may nonetheless be foreclosed from litigating the same cause of action in federal court, if he cannot demonstrate the requisite injury”); *Mortera v. North America Mortg. Co.*, 172 F.Supp.2d 1240, 1243 (N.D.Cal. 2001). *See generally*, William L. Stern, *Bus. & Prof.C. §17200 Practice*, ¶¶ 7:32-7:33 at page 7-9 (The Rutter Group 2003). *See also*, Catherine L. Rivard, *Federal Court Standing in Unfair Competition Law Litigation*, Los Angeles Lawyer (March 2001) at page 16.

Society of Dentistry for Children) to bring a claim under the UCL against the manufacturer, advertising agencies and retail distributor of five sugared children's cereals alleging, in essence, that the cereals were advertised and distributed in a false and misleading fashion and in a way that concealed the sugar content and falsely implied health benefits of the cereals. The court had no problem with the standing issues, even though it was unclear whether there was a private right of action under one of the statutes (the Sherman Food, Drug & Cosmetic Law) that was alleged to prohibit the defendants' conduct. *Id.* at 214-15.

Six years later, in *Consumers Union of United States v. Fisher Development*, 208 Cal.App.3d 1433 (1989), the Court of Appeal similarly upheld the standing of a consumer group to bring suit under the UCL against a real estate developer and homeowners association for discrimination on the basis of age and against families with children, conduct which was unlawful under the state Unruh Civil Rights Act. Even though the Unruh Civil Rights Act had a standing requirement which limited civil claims under the statute to claims brought by "aggrieved" persons, the court held that "any person" could bring suit under Section 17204 of the UCL, regardless of whether the plaintiff would have standing under the substantive statute that forms the basis of the alleged act of unfair competition. *Id.*, 208 Cal.App.3d at 1439, 1441-42, 1444.

The California Supreme Court spoke again on this topic in *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal.4th 553 (1998), in which a private, for-profit corporation sued a retailer under the UCL on behalf of the general public for selling cigarettes to minors in violation of the California Penal Code. The court held that the private, for-profit corporation had standing under the UCL even though a private citizen could not have maintained a civil action directly under the Penal Code, and that authorizing such a private right of action under the UCL did not violate public

policy by vesting prosecutorial discretion within the control of an interested party. *Id.* at 565, 574.

That is not to say that a plaintiff will never be prohibited from bringing a UCL action due to standing-related concerns. In *Kraus*, the California Supreme Court, perhaps for the first time, discussed the concept of a “competent plaintiff” under the UCL: “We note, moreover, that, because a UCL action is one in equity, in any case in which a defendant can demonstrate a potential for harm or show that the action is not one brought by a *competent plaintiff* for the benefit of injured parties, the court may decline to entertain the action as a representative suit.” *Kraus*, 23 Cal.4th at 138 (citation omitted) (emphasis added). Though the case law on this issue has not yet been well developed, since *Kraus*, there have been some courts that have held that certain UCL claims could not be brought by certain plaintiffs due to issues relating to the plaintiffs’ competency to maintain a suit on behalf of the general public.⁷

⁷ See, e.g., *Rosenbluth Int’l, Inc. v. Superior Court*, 101 Cal.App.4th 1073, 1077 (2002) (court ruled that summary judgment was appropriate in action for accounting irregularities relating to rebates due to large corporate customers from travel agency; court ruled that large corporate customers did not constitute “general public” under UCL, and that permitting action to proceed could leave alleged victims worse off than if they had filed individual actions); *Lazar v. Trans Union*, 195 F.R.D. 665, 673-74 (C.D.Calif. 2000) (in a theft of identity case, federal district court granted motion to strike UCL prayer for restitutionary relief on behalf of general public on grounds that plaintiff’s circumstances were not sufficiently similar to his fellow consumers to allow him to bring an uncertified class action on their behalf).

B. Standards for Class Certification in California

Though a detailed discussion of the standards for certification of a class action in California is beyond the scope of this article, a brief explication is necessary so that these standards can be contrasted against the more permissive standards for bringing a representative action under the UCL.

Class actions are authorized pursuant to California Code of Civil Procedure section 382 “when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court.” “The party seeking certification as a class representative must establish the existence of an ascertainable class and a well-defined community of interest among the class members. The community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.” *Richmond v. Dart Industries, Inc.*, 29 Cal.3d 462, 470 (1981) (citations omitted).

1. “Typicality” Requirement

“‘The cases uniformly hold that a plaintiff seeking to maintain a class action must be a member of the class he claims to represent.’ The class representative must be situated similarly to class members. ‘It is the fact that the class plaintiff’s claims are typical and his representation of the class adequate which gives legitimacy to permitting him to bind class members who have notice of the action.’ Further, ‘there can be no class certification unless it is determined by the trial court that similarly situated persons have sustained damage. There can be no cognizable class unless it is first determined that members who make up the class have sustained the same or similar damage.’” *Caro v.*

Procter & Gamble Co., 18 Cal.App.4th 644, 663-64 (1993) (citations and internal quotation marks omitted). “[T]he crucial inquiry centers upon whether the plaintiffs are truly representative of the absent, unnamed class members.” *Id.* at 663.

Case law emphasizes that the “typicality” requirement for class certification is important to ensure that the representative plaintiff will be motivated towards obtaining goals that satisfy the common needs of all class members. Adequate representation of the other members of the class and protection of their interests must be assured, as *res judicata* will bar them from relitigating claims related to the primary right already decided. *Johnson v. American Airlines, Inc.*, 157 Cal.App.3d 427, 429-433 (1984). “It is the fact that the class plaintiff’s claims are typical and his representation of the class adequate which gives legitimacy to permitting him to bind class members who have notice of the action.” *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.*, 48 Cal.App.3d 134, 146 (1975) (citations omitted).⁸ Without assurance that the representative plaintiff will be properly motivated, sufficiently competent and representative of the class, substantial injustice may result.

2. “Substantial Benefit” Requirement

The requirements for certification of a class action present a second significant hurdle to the UCL claimant who

⁸ This aspect of a class action stands in contrast to the potential preclusive effects of a representative action under the UCL. The outcome of a non-class certified UCL action binds no one but the parties. “Absent parties generally are not bound by a judgment unless they were in privity with a party and the adjudication of their rights comports with due process.” *Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal.App.3d 758, 773 (1989). See generally, Scott C. Lascari, *Res Judicata and California’s Unfair Competition*, Los Angeles Lawyer (April 2003) at page 20.

seeks to certify a class. Class actions may be maintained only where there would be benefit to the litigants and the courts that would not occur without class certification.

“[D]espite [the California Supreme Court’s] general support of class actions, it has not been unmindful of the accompanying dangers of injustice or of the limited scope within which these suits serve beneficial purposes. Instead, it has consistently admonished trial courts to carefully weigh respective benefits and burdens and to allow maintenance of the class action *only where substantial benefits accrue* both to litigants and the courts.” *City of San Jose v. Superior Court*, 12 Cal.3d 447, 459 (1974) (emphasis added, citations omitted). *See also, Blue Chip Stamps v. Superior Court*, 18 Cal.3d 381, 385 (1976) (“representative plaintiff must show substantial benefit will result both to the litigants and the court”).⁹

As discussed below, the “substantial benefit” requirement takes on a special significance in the context of a UCL claim because many of the benefits usually cited in support of class action treatment would accrue to litigants and to the courts in a representative action, even if it were not certified as a class action. By way of example, a representative UCL action, even if not certified as a class, can provide redress to numerous aggrieved parties who could not otherwise maintain individual actions,” can foster judicial economy by avoiding repetitious litigation and can provide small claimants with a method of obtaining redress. *See, Blue Chip Stamps*, 18 Cal.3d at 385; *Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 714-15 (1967); *Richmond*, 29 Cal.3d at 469; *Reese v. Wal-Mart Stores, Inc.*, 73 Cal.App.4th 1225, 1237-38 (1999).

⁹ Rule 23(b)(3) of the Federal Rules of Civil Procedure similarly provides that, for a class action to be maintained, it must be “superior to other available methods for the fair and efficient adjudication of the controversy.”

IV. RECENT CASE LAW DISCUSSING CERTIFICATION OF UCL PUTATIVE CLASS ACTIONS BROUGHT BY “UNAFFECTED” OR ATYPICAL PLAINTIFFS

As discussed above, there is an inherent tension between several of the normal requirements for certification of a case as a class action, on the one hand, and the lack of any meaningful standing requirements for a plaintiff bringing a representative UCL claim, on the other hand. It is not a surprise then that some courts have been unwilling to certify as class actions UCL claims brought by truly “unaffected” plaintiffs who were not a victim of the alleged unfair business practices. This has especially been true since *Kraus*, when the court “upped the stakes” for certifying a UCL claim as a class action by holding that a certified class was a prerequisite before a “fluid recovery fund” could be incorporated into a court ordered UCL remedy.

This quandary was actually anticipated by Justice Werdegar’s dissenting opinion in *Kraus*:

“UCL actions often are formally incompatible with class treatment, as class plaintiffs must be ‘truly representative of the absent, unnamed class members’ while, in keeping with the UCL’s broad remedial purposes, a private party has UCL standing regardless of whether he or she is directly aggrieved. ”

Kraus, 23 Cal.4th at 147 (concurring and dissenting opinion) (citations omitted).

A. *Corbett v. Superior Court (2002)*

In *Corbett v. Superior Court (Bank of America)*, 101 Cal.App.4th 649 (Aug 27, 2002), review denied (Dec 11, 2002), the First District of the California Court of Appeal reversed a trial court's ruling that a class cannot be certified under the UCL *as a matter of law*. Plaintiff was an individual who had purchased a motor vehicle, taking out a car loan from Bank of America. Plaintiff alleged that his car loan had, unbeknownst to him, been approved at one interest rate, but that he had then been charged a higher interest rate, with the bank and car dealership secretly sharing the difference between the approved interest rate and the higher interest rate actually charged. Plaintiff filed a putative class action on behalf of himself and all others similarly situated, alleging numerous causes of action, including a claim under the UCL.

Characterizing the issue as one of “first impression,” the court stated that “UCL claims and class actions are not mutually exclusive as a matter of law” and that, “[w]here a class has properly been certified, a plaintiff in a UCL action may seek disgorgement of unlawful profits into a fluid recovery fund.” 101 Cal.App.4th at 655. In support of its conclusion, the *Corbett* court cited and discussed a host of

cases¹⁰ that, in its view, presumed or implied, without directly addressing, that plaintiffs may bring UCL claims as class actions in appropriate cases. The court essentially found that because “any person”, including one unaffected by the defendant’s conduct, has standing under the UCL to bring a representative action, then such a person could be sufficiently “typical” of the other class members, irrespective of the differences in their contact with the defendant’s wrongful conduct or differing degrees of injury. In other

¹⁰ *Washington Mutual Bank v. Superior Court*, 24 Cal.4th 906, 928-929 (2001) (court reversed certification of a nationwide class action, but remanded so trial court could consider choice-of-law issues and other class certification issues such as whether representative plaintiffs can fairly and adequately protect the interests of the entire class); *Fletcher v. Security Pacific National Bank*, 23 Cal.3d 442, 454 (1979) (“trial court may conclude that adequacy of representation of all allegedly injured borrowers would best be assured if case proceeded as a class action; trial court must carefully weigh advantages and disadvantages of an individual action against the burdens and benefits of a class); *Massachusetts Mutual Life Ins. Co. v. Superior Court*, 97 Cal.App.4th 1282, 1292 (2002) (affirming trial court’s certification of class action in a case alleging violations of UCL and Consumer Legal Remedies Act; held that the “plaintiffs’ UCL claim presents common legal and factual issues which were plainly suitable for treatment as a class action”); *Payne v. National Collection Systems*, 91 Cal.App.4th 1037, 1039 (2001) (holding that prior UCL actions successfully prosecuted by Attorney General and District Attorney did not bar a UCL class action by 23 plaintiffs who received no restitution or monetary relief in the actions brought on behalf of the People); *Norwest Mortgage v. Superior Court*, 72 Cal.App.4th 214, 229 (1999) (reversing trial court’s order certifying a nationwide class because nonresidents of California could not assert UCL claims; court stated that reversal was without prejudice to plaintiffs moving to certify a new class); *Dean Witter Reynolds v. Superior Court*, 211 Cal.App.3d 758, 773 (1989) (holding that lower court abused its discretion by permitting the UCL action to proceed by class action, stating that suitability of UCL claims for class action treatment must be tested by principles developed under the general class action statute); *Bronco Wine Co. v. Frank A. Logoluso Farms*, 214 Cal.App.3d 699, 720 (1989) (court reversed a judgment that awarded restitution awards under UCL to growers who were not parties to the action, court suggesting that it may be improper to maintain an individual, representative action outside the confines of a class action).

words, because a UCL plaintiff could be any person, then they could not be said to be atypical of any other.

Although the court remanded to the trial court for consideration of whether the case should be certified as a class action under the normal class criteria, the court did express its skepticism over the appropriateness of according class status to most UCL claims: “[T]he reality is that often UCL actions will not be on behalf of a class because class plaintiffs must be ‘truly representative of the absent, unnamed class members,’ while a private party has UCL standing even if he or she is not aggrieved.” *Id.* at 671 n.10 (citations omitted).

The *Corbett* court issued its opinion over the vigorous dissent of Justice Paul Haerle. The dissent argued that, regardless of the correctness of the majority’s position that a UCL claim is not compatible with a class action as a matter of law, in the case at hand, the trial court’s denial of class certification should have been affirmed because, for among other reasons, the plaintiff admitted he was not a “typical” plaintiff because he had not read the financing documents and did not even recall the transaction. *Id.* at 679. Recognizing the circularity of the majority’s reasoning Justice Haerle argued that if the majority were correct, and the “typicality” analysis done of most proposed class action plaintiffs was watered down by the lesser standards of proof under the UCL, “a ‘typical’ UCL class action plaintiff could be, literally, anyone putative class counsel dragoons off the street.” *Id.* In a cogent manner, the dissent then proceeded, for ten pages, to argue that “class actions brought under Code of Civil Procedure section 382 and representative UCL actions brought under section 17204 are so substantial that the two are mutually inconsistent.” *Id.* at 680. This dissenting opinion is worth a careful read.

B. *Delaney v. Warner-Lambert Co. (2003)*

In an *unpublished* opinion, *Delaney v. Warner-Lambert Co.*, 2003 WL 1548691 (Cal.App. Mar 26, 2003), the Second District of the California Court of Appeal affirmed an order of the trial court denying class certification to a claim under the UCL and the Consumer Legal Remedies Act for alleged false advertising pertaining to the drug Rezulin. With respect to the UCL claim, the trial court had ruled that the claims of the two individuals proffered as class representatives were not typical of the class and, therefore, class certification was improper. Neither of the two representative plaintiffs nor their physicians had seen the allegedly false advertisements, nor were they misled in the manner the class had been allegedly deceived and neither plaintiff had sustained any damage.

On the overarching question of whether a representative UCL may ever be brought as a class action, the *Delaney* court confessed to “hav[ing] some reservations” on this subject. The court, however, acknowledged the decision in *Corbett v. Superior Court (Bank of America)*, 101 Cal.App.4th 649 (2002), and noted that the California Supreme Court had declined to grant review of this decision. The *Delaney* court concluded that it would “follow the holding of *Corbett* that: (1) ‘a trial court may certify a UCL claim as a class action when the statutory requirements of section 382 of the Code of Civil Procedure are met’; and (2) where a class has properly been certified, a plaintiff in a UCL action may seek disgorgement of unlawful profits into a fluid recovery fund.” *Delaney* at page *15 (citations omitted).

Having accepted this theoretical proposition, the *Delaney* court then proceeded to address what can be described as a disconnect between the UCL’s liberal standing and proof requirements, on the one hand, and the more stringent criteria for class certification, on the other hand:

“We conclude that although a plaintiff who has not personally been harmed may bring a representative action under the UCL on behalf of the general public, the unharmed plaintiff’s claim is not typical of that of members of the public who have been harmed. Therefore, a UCL action brought by an unharmed plaintiff on behalf of the general public cannot be certified as a class action under Code of Civil Procedure section 382. [The two named plaintiffs] did not meet their burden to establish as a matter of fact that their claims were typical of the class they sought to represent. [The two individuals] may continue to pursue their UCL action on behalf of the general public.”

Id. at page *16.¹¹

C. *Frieman v. San Rafael Rock Quarry (2004)*

The last of this trilogy is *Frieman v. San Rafael Rock Quarry*, 116 Cal.App.4th 29 (Feb 24, 2004), in which the First District of the California Court of Appeal affirmed the trial court’s denial of class certification. Plaintiffs, who lived

¹¹ The *Delaney* court found that its conclusion was “foreshadowed” by Justice Werdegar’s concurring and dissenting opinion in *Kraus* wherein she “noted that ‘UCL actions often are formally incompatible with class treatment, as class plaintiffs must be ‘truly representative of the absent, unnamed class members’ while, in keeping with the UCL’s broad remedial purposes, a private party has UCL standing regardless of whether he or she is directly aggrieved. [Therefore, restricting the availability of fluid recovery in UCL actions to those brought as class actions] will severely limit the remedies available in a critical class of UCL actions--those brought by personally unaggrieved plaintiffs.’” *Delaney*, at page *16 (quoting *Kraus*) (bracketed material appears in original).

near the defendant's rock quarry, sued under theories of UCL and public nuisance, accusing the rock quarry of operating in violation of numerous zoning and environmental statutes and regulations. The proposed class sought disgorgement of profits realized by the rock quarry as a result of the alleged unfair and illegal business practices. The trial court denied a motion to certify the UCL claim as a class action on the grounds that plaintiffs failed to show that a class action would be beneficial, that plaintiffs failed to show that the proposed class members would have claims for restitution under the UCL and that a class action was not necessary for the plaintiffs to pursue injunctive relief under the UCL. *Id.* at 33.

In affirming the trial court's denial of class status to the UCL claim, the Court of Appeal focused on plaintiffs' failure to show that substantial benefits would accrue to the litigants and to the courts from class certification. *Id.* at 34-35. Plaintiffs had argued that the case should be certified as a class action so that the class could obtain "nonrestitutionary disgorgement" into a fluid recovery fund, which the plaintiffs read *Kraus* as authorizing. The appellate court rejected this reasoning as "put[ting] the cart before the proverbial steed." *Id.* at 35. "[B]y itself, the desire to obtain nonrestitutionary disgorgement is not a sufficient showing that a class action is more beneficial than a representative action under the UCL . . ." *Id.* The court seemed swayed by its belief that the proposed class members did not have individual claims for restitution. *Id.* The court acknowledged that "[t]he fact that plaintiffs in a proposed class action have individual claims for return of funds that may be redressed in the class proceeding is a factor to consider in granting certification of the class," but that "when the members of a proposed class have no individual monetary loss that may be redressed by disgorgement, that factor may weigh against class treatment." *Id.* at 36.

The *Frieman* court concluded that plaintiffs had not demonstrated that substantial benefits would accrue to the litigants or to the courts from class treatment. The court was unimpressed by plaintiffs' statement that the only benefit of a class action over a representative UCL action was "the opportunity to obtain fluid fund recovery."

"Plaintiffs made no showing of substantial benefit to the proposed class, aside from their hope of obtaining a remedy that the UCL does not provide in a representative action. 'Class actions are provided only as a means to enforce substantive law. . . .' The substantive law does not allow nonrestitutionary disgorgement in a representative UCL action. . . . We decline to interfere with the trial court's decision by ordering certification of a class for the sole reason that the proposed class members desire a remedy that they would not be entitled to as individuals."

Id. at 38 (citations omitted).¹² Having concluded that the individual members of the proposed class did not have individual claims for restitution, the court addressed the prayer for injunctive relief, and concluded that plaintiffs could use the "streamlined provisions of the UCL to obtain an injunction against the Quarry's illegal acts" and thus, there

¹² In another post-*Kraus* decision, *Kavruck v. Blue Cross of Calif.*, 108 Cal.App.4th 773 (May 14, 2003), review denied (July 30, 2003), the Second District of the Court of Appeal was also presented with the argument that the availability of fluid recovery made plaintiffs' proposed class action "a superior remedy" to a representative action under the UCL. Rather than rejecting the premise that the availability of fluid recovery might be a sufficient reason to certify a UCL claim as a class action, the *Kavruck* court ruled that, in the case at hand, because all of the members of the proposed class could be specifically identified, there was no need for a fluid recovery fund. *Id.* at 787.

was no reason to certify a class under the instant set of circumstances. *Id.*

V. CONCLUSION

Given the broad scope of behavior potentially encompassed by the unfair competition laws, courts adjudicating UCL claims have been and will continue to be presented with a wide continuum of plaintiffs, ranging from those who have had no contact with the defendants and no real interest in the subject matter of the complained of behavior (such as in *Rosenbluth*), to public interest groups claiming organizational standing (such as in *Committee on Children's Television*) to individual plaintiffs who have suffered real, cognizable monetary harm (such as in *Kraus*). Depending on where on this continuum a particular plaintiff falls, a UCL claim may or may not be an appropriate vehicle for class action treatment.

If normal class action rules apply to UCL claims (which, according to courts like *Corbett* appears to be the case), it seems that an “unaffected” plaintiff who has not suffered damage could be a permissible UCL plaintiff, but would not satisfy the “typicality” requirement for class certification. Permitting a class of unnamed and absent parties to be represented by a plaintiff who has neither been damaged by, nor even has had any direct contact with, the defendant will fail to ensure that the members of the class will have their interests kept paramount and duly protected.

A host of other issues are presented by the requirement that a class action be certified only in a situation where substantial benefits would accrue to the litigants and to the courts from class certification. From a plaintiff's perspective, after *Kraus*, the only advantage to certifying a UCL claim as a class action appears to be the availability of a

“fluid recovery” as part of a court ordered remedy.¹³ The current state of the law as to whether the availability of a fluid recovery fund is a sufficient benefit to litigants to justify certification of a class action is that cases such as *Delaney* (which is an unpublished decision), *Frieman* and *Kavruck* are in disagreement.

This author would argue that a representative action brought by an "unaffected" plaintiff (who has not been personally damaged by the defendant) is, by definition, an inappropriate person to adequately represent the interests of a putative class. Further, with the single possible exception of a "fluid recovery," it is difficult to think of a circumstance where a plaintiff, seeking to have a representative UCL action certified as a class action, would be able to make the required showing that substantial benefits would result from maintaining the case as a class action.

Whatever benefits would accrue to the public and the courts by certifying a UCL case as a class action need to be weighed against the very significant expenses and procedural burdens attendant to class certification, and the risk to the public presented by the *res judicata* bar that would result from a class action but, in a representative action under the UCL, would not prevent future lawsuits by victims who want to assert their individual claims.

The net result of the foregoing should be very few representative UCL actions being certified as class actions.

¹³ Whether such a fluid recovery fund constitutes non-restitutionary disgorgement and, thus, as *Korea Supply* holds, would not be a permissible remedy under the UCL, is an issue that still needs to be decided by the courts.