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Forum

Shakedown

Lockyer Should Look Past Private Bar for Business Statute

Abuse <http://www.dbsr.com/attorneys/profiles/.php>, By Matthew G. Jacobs, Downey Brand LLP

Attorney General Bill Lockyer has announced that he is investigating at least five law firms for allegedly abusing Business & Professions Code Section 17200. He has filed suit against one of these firms, the Trevor Law Group. The central allegation appears to be that these lawyers have targeted small businesses, like auto-repair shops, restaurants and nail salons, with Section 17200 suits for technical violations of state or local laws. After filing suit, the lawyers quickly demand that the defendants pony up a few thousand dollars or face significant legal fees and the headache of going to court.

After a legislative hearing last month, Sen. Bill Morrow, R-Oceanside, called two of the lawyers "nothing but a couple of two-bit legal whores."

Assemblyman Lou Correa, D-Santa Ana, branded the lawyers "extortionists."

While this is the stuff of good sound bites (and because the bites were uttered in the Legislature, they conveniently are exempt from defamation liability), are these lawyer-targets really very different from their lawyer-inquisitors?

The evidence suggests not. The attorney general and his local counterparts, the county district attorneys, also make liberal use of Section 17200 to extract (or "extort") money from corporate defendants unfortunate enough to unknowingly violate one of the myriad and obscure statutes and regulations that the Legislature is so fond of enacting.

In fact, Section 17200 suits by public prosecutors share many of the same attributes as those filed by their private counterparts. Similar economic incentives motivate each. While the potential for fees under Section 1021.5 of the Code of Civil Procedure encourages the Trevor Law Group and others to bring these "gotcha" lawsuits, the statute creates a similar incentive for the attorney general and the district attorneys.

If the attorney general files suit under Section 17200, any penalty recoveries are split fifty-fifty between the state and the county in which the suit is brought. Business & Professions Code Section 17206(c).

However, if a district attorney sues under Section 17200, the county receives the entire penalty recovered. Section 17206(c). This creates a strong incentive for prosecutors generally, and for district attorneys specifically, to bring these types of actions, especially against deep-pocket defendants.

In fact, "[i]n some counties the DA's consumer fraud unit has become something akin to a 'profit center.' With local governments chronically short on funds, many of the larger district attorneys' offices have even set up consumer fraud bureaus with annual budgets and targets for the recovery of civil penalties." William I. Stern, "Unfair Business Practices and False Advertising" Section 8.80 (The Rutter Group 2000).

The attorney general and the district attorneys also have established an elaborate computer notification system whereby prosecutors can claim "first dibs" on specific defendants vis-à-vis their colleagues statewide.

This "county bounty," as it's come to be known, implicates due process concerns not similarly implicated by private suits. While we all know, at least in part, what motivates the Trevor Law Group – and, in fact, our laws specifically encourage these "private attorneys general" with economic incentives – public prosecutors are supposed to have more lofty objectives.

As the Supreme Court explained in *Marshall v. Jerrico Inc.*, 446 U.S. 238 (1980), "a scheme injecting a personal interests, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions."

Section 17200 arguably injects precisely this type of improper factor into prosecutorial decision making, especially by district attorneys. Sure, the district attorneys will argue that the penalties that they recover through their Section 17200 suits go to their county treasuries, not directly to their own office bank accounts. But when the counties set the district attorneys' budgets and when those decisions are based in part on the Section 17200 "profits" generated by the district attorneys, then there is a great potential for these "irrelevant [and] impermissible" factors to creep back into the enforcement process.

Moreover, it's not at all clear that the money does go to the county treasuries and not to the district attorneys' offices. Although the statute says that, when the action is brought by a district attorney, "the penalty collected shall be paid to the treasurer of the county in which the judgment was entered" (Business & Professions Code Section 17206(c)), many of my settling clients have been required to write checks directly to the district attorney. While the district attorneys eventually may transfer those funds to the county treasurers, I wonder how often this slips through the cracks and how well anyone is tracking this process.

Just because the law creates similar economic incentives for both public prosecutors and "private attorneys general" does not mean that both groups "misuse" them in the same way. Of course, "misuse" is surely in the eye of the beholder. But I have certainly handled many "public" Section 17200 actions that seem at least as "extortionate" as the private ones now under so much scrutiny.

One commenced with a letter from the district attorney to my client, a distributor of an inexpensive consumer product, complaining that its packaging violated a picayune labeling regulation. No one had complained to the district attorney or anyone else.

Nevertheless, the district attorney warned in his letter that, under Section 17200, he could recover up to \$5,000 for each time a consumer had so much as viewed my client's packaging, "whether or not [he or she] actually bought" the product.

"Therefore," the letter went on, "the civil penalties in this case could be astronomical."

The district attorney also sought the recovery of his own fees and costs in pursuing the action.

Extortionate? I certainly thought so. Yet what could the client do when faced with a monetary demand significantly lower than the cost of paying my fees? The point is that, whether initiated by opportunistic private attorneys or public prosecutors, businesses faced with Section 17200 suits can be coerced to pay money even whereon harm has been done.

My suggestion to Lockyer, and to the legislators now considering reforms to Section 17200, is a simple one. Don't cast the net too narrowly. Look beyond the private bar and consider whether public prosecutors are making proper use of Section 17200.