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Unfair Competition and the Consumer--Barquis v. Merchants Collection Association, Inc.

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UNFAIR COMPETITION AND THE CONSUMER—BARQUIS v. MERCHANTS COLLECTION ASSOCIATION, INC.

In *Barquis v. Merchants Collection Association, Inc.*,[1] individual debtors successfully invoked California's unfair competition statute, section 3369 of the Civil Code,[2] to enjoin a collection agency from knowingly misfiling complaints against debtors in order to procure default judgments. The California Supreme Court, in a unanimous opinion, broadly interpreted section 3369, expanding its application to injured consumers. This expansion had both a procedural and substantive aspect. First, the court liberally construed the standing requirement of section 3369, holding that the plaintiffs as private individuals could bring an action for injunctive relief under this section without a showing of competitive injury.[3] Secondly, the court interpreted "unlawful business practice" to enlarge the range of activities enjoinable under the statute. Specifically, the *Barquis* court reasoned that because the defendant's debt collection activities violated certain process statutes,[4] these activities therefore constituted an "unlawful business practice" under section 3369.[5] The court refused to limit the applicability of the statute to more traditional commercial notions of

1. 7 Cal. 3d 94, 496 P.2d 817, 101 Cal. Rptr. 745 (1972).

2. CAL. CIV. CODE § 3369 (West 1970), *as amended,* Cal. Stat. 1972, ch. 1084, § 1, at 2190 provides in part: "(2) Any person performing or proposing to perform an act of unfair competition within this State may be enjoined in any court of competent jurisdiction.

(3) As used in this section, unfair competition shall mean and include unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising and any act denounced by Business and Professions Code Sections 17500 to 17535, inclusive.

(4) As used in this section, the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons.

(5) Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney in this State in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public."

3. 7 Cal. 3d at 110-11, 496 P.2d at 829, 101 Cal. Rptr. at 757.

4. CAL. CODE CIV. PROC. §§ 395, 396(a) (West Supp. 1972). See text accompanying notes 31-32 *infra.*

5. 7 Cal. 3d at 113, 496 P.2d at 831, 101 Cal. Rptr. at 759.

unlawful business practice.[6] This note will critically analyze the effect of both holdings and will explore future implications of section 3369 as a remedy for consumers.

Unfair Competition and Section 3369: Changing Conception

> The legal concept "unfair competition" is as chameleonic as the two words which make up its title. It is one of those classic legal doctrines which does not lend itself to ready definition despite the fact that writers have described it as 'one of the romances of legal history.'[7]

The doctrine of unfair competition had its inception as a tort concept.[8] Initially the interest protected by the remedy was business goodwill and reputation.[9] Accordingly, unfair competition applied to "wrongful conduct in commercial enterprises which resulted in business loss to another, ordinarily by the use of unfair means in drawing away customers from a competitor."[10]

The California legislature altered this common law approach in 1933[11] by completely revising section 3369 of the Civil Code.[12] This revision defined unfair competition as an "unfair or fraudulent business practice and unfair, untrue or misleading advertising."[13] In 1963 the section was amended to include *"unlawful* . . . business practice

6. See text accompanying notes 62-72 *infra.*

7. Netterville, *California Law of Unfair Competition: Unprivileged Imitation,* 28 S. CAL. L. REV. 240 (1955).

8. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 956 (4th ed. 1971).

9. *See* Schwartz v. Slenderella Systems, Inc., 43 Cal. 2d 107, 112, 271 P.2d 857, 860 (1954); MacSweeney Enterprises, Inc. v. Tarantino, 106 Cal. App. 2d 504, 511, 235 P.2d 266, 270 (1951); 1 R. CALLMANN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 4.1, at 109 (3d ed. 1967).

10. People *ex rel.* Mosk v. National Research Co., 201 Cal. App. 2d 765, 770, 20 Cal. Rptr. 516, 520 (1962).

Examples of the earlier concept of unfair competition include: simulation of the appearance of marketable goods, Haeger Potteries, Inc. v. Gilner Potteries, 123 F. Supp. 261 (S.D. Cal. 1954); tradename infringement, Academy of Motion Picture Arts and Sciences v. Benson, 15 Cal. 2d 685, 104 P.2d 650 (1940); imitation of literary or artistic work, Metro-Goldwyn-Mayer, Inc. v. Lee, 212 Cal. App. 2d 23, 27 Cal. Rptr. 833 (1963).

11. Cal. Stat. 1933, ch. 953, § 1, at 2482 (now Cal. Stat. 1972, ch. 1084, § 1, at 2190, *amending* CAL. CIV. CODE § 3369 (West 1970)).

12. The old section 3369 was not a statute codifying the law on unfair competition but concerned equity's refusal to provide specific relief against a penal law, except with respect to nuisance and unfair competition. This remains the first subsection of the current section 3369. *See* Cal. Stat. 1972, ch. 1084, § 1(1), at 2190, *amending* CAL. CIV. CODE § 3369 (West 1970).

13. Cal. Stat. 1933, ch. 953, § 1, at 2482 (now Cal. Stat. 1972, ch. 1084, § 1, at 2190, *amending* CAL. CIV. CODE § 3369 (West 1970)).

. . . ."[14] The legislature added a further adjective in 1972, thus making the section read in pertinent part: "unlawful, unfair or fraudulent business practice and unfair, *deceptive*, untrue or misleading advertising."[15]

The legislature not only changed the common law definition of unfair competition by these amendments, it also altered the traditional concepts of the right to bring an action for unfair competition. Under the common law, relief from unfair competition was limited to actions by one competitor against a wrongdoing competitor.[16] Section 3369 is much less restrictive in specifying who can sue. Subsection five allows the attorney general or any district attorney to sue but adds that "any person acting for the interests of itself, its members or the *general public*"[17] can seek a section 3369 injunction.[18]

Development of Section 3369

Simultaneously with these statutory changes, the concept of unfair competition was afforded an increasingly liberal interpretation in the courts. In *Athens Lodge No. 70 v. Wilson*,[19] the court held that unlawful competition could involve noncommercial organizations. Other cases also diluted the concept of competition by holding that

14. Cal. Stat. 1963, ch. 1606, § 1, at 3184 (emphasis added).

15. Cal. Stat. 1972, ch. 1084, § 1(3), at 2190, *amending* CAL. CIV. CODE § 3369 (West 1970) (emphasis added). Also encompassed within the definition are any acts prohibited by CAL. BUS. & PROF. CODE §§ 17500-535 (West 1964). Section 3370 of the Civil Code extends the definition of unfair competition to any act denounced by the "Unfair Practices Act," CAL. BUS. & PROF. CODE §§ 17000-101 (West 1964). CAL. CIV. CODE § 3370 (West 1970).

16. *See* People *ex. rel.* Mosk v. National Research Co., 201 Cal. App. 2d 765, 770, 20 Cal. Rptr. 516, 520 (1962); 1 H. NIMS, THE LAW OF UNFAIR COMPETITION AND TRADE-MARKS, §§ 8-9 (4th ed. 1947); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 954-56 (4th ed. 1971); Callmann, *What Is Unfair Competition?*, 28 GEO. L.J. 585, 594-602 (1940).

17. Cal. Stat. 1972, ch. 1084, § 1(5), at 2190, *amending* CAL. CIV. CODE § 3369 (West 1970) (emphasis added).

18. Section 17535 of the Business and Professions Code contains identical wording to subsection five of section 3369. CAL. BUS. & PROF. CODE § 17535 (West 1964).

To obtain an injunction under section 3369, after standing is determined, it is not necessary to allege irreparable injury. "The theory is that when a legislative body has authorized the injunctive remedy for the violation of a statute, it has determined as a matter of law that irreparable injury attends the violation of the statute." Paul v. Wadler, 209 Cal. App. 2d 615, 625, 26 Cal. Rptr. 341, 347 (1962). Also no intent to defraud or deceive need be shown; the unfairness of the competition is sufficient. Hair v. McGuire, 188 Cal. App. 2d 348, 10 Cal. Rptr. 414 (1961). And, at least as pertains to the Attorney General, there may be no necessity of proving any damage, potential or existing, at all. *See* 29 OP. CAL. ATT'Y. GEN. 175 (1957).

19. 117 Cal. App. 2d 322, 255 P.2d 482 (1953) (a fraternal organization can sue a rival fraternal club).

the competition could be indirect. For example, in *Academy of Motion Picture Arts and Sciences v. Benson*[20] the famed motion picture academy alleged that a dramatic school's appropriation of the name "The Hollywood Motion Picture Academy" constituted unfair competition because of the similarity in business titles. Even though there was no direct competition between the two entities, the school was enjoined from using its chosen name because of the consequences which could result to the plaintiff's reputation from the confusion.[21] Finally, dicta in the earlier cases indicated that the doctrine of unfair competition was not founded solely on the protection of a property right, but also "upon the right of the public to protection from fraud and deceit."[22]

Prior to the *Barquis* case, the major departure from traditional ideas of unfair competition occurred in *People ex rel. Mosk v. National Research Co.*[23] In that case a company servicing debt collection agencies mailed "skip tracers" to debtors' last known residences in order to learn the debtors' current addresses. The company's locator forms simulated state government forms, such as those sent by the Department of Motor Vehicles. The attorney general brought suit under section 3369 on two distinct grounds. First, he argued that this practice constituted unfair competition with the state government.[24] Secondly, the attorney general contended that the public had been misled and that because the test of unfair competition was public deception, an injunction should issue on this ground as well.[25] Both arguments were accepted. After a review of the development of the statute, the court concluded "that the equitable relief authorized by Civil Code section 3369 [was] not circumscribed by any prerequisite showing that the conduct in question be limited to the field of business competition."[26] The court also suggested that the current tendency in the area of unfair competition was "to redefine the action as one against unfair business practices, rather than unfair competition, and, as a general rule, competition [was] not regarded as a necessary ingredient."[27]

This opinion in *National Research* thus continued the line of cases

20. 15 Cal. 2d 685, 104 P.2d 650 (1940).

21. *Id.* at 689-90, 104 P.2d at 652.

22. American Philatelic Soc'y v. Claibourne, 3 Cal. 2d 689, 698, 46 P.2d 135, 140 (1935). *Accord,* Academy of Motion Picture Arts and Sciences v. Benson, 15 Cal. 2d 685, 691, 104 P.2d 650, 653 (1940).

23. 201 Cal. App. 2d 765, 20 Cal. Rptr. 516 (1962).

24. *Id.* at 768-69, 20 Cal. Rptr. at 519.

25. *Id. noted in* 36 S. CAL. L. REV. 304, 305-06 (1963).
(1963).

26. 201 Cal. App. 2d at 771, 20 Cal. Rptr. at 520.

27. *Id.*

liberally explaining the competition component of section 3369. Of even greater significance, however, was the court's willingness to entertain the suit on grounds of public deception alone. In reaching this conclusion, the court relied heavily on an analogy to the cases construing the Federal Trade Commission Act,[28] a similarly drafted federal law. Here the court found abundant precedent awarding relief to protect the public in the absence of private competition.[29] Summing up the holding of *National Research*, one commentator has observed that "[i]nsofar as the court held that an action may be brought for the direct protection of the public from unfair or deceptive acts, it departed from the traditional concept of unfair competition which usually involves the protection of reputation and goodwill."[30]

Barquis v. Merchants Collection Association, Inc.

Against this background of statutory and case law evolution favorable to the consuming public, *Barquis* emerged in 1972. Appellants were individual consumers with charge accounts at large department stores. When the appellants' balances became overdue, their accounts were assigned to the respondent collection agency. Appellants contended that the collection agency had filed claims against them in venues which were not permissible under section 395 of the Code of Civil Procedure.[31] It was alleged that these claims were knowingly misfiled for the express purpose of impairing appellants' opportunity to defend. Furthermore, it was argued that the agency failed to state sufficient facts in their form complaints to determine correct venue, a violation of section 396(a) of the Code of Civil Procedure.[32] Appellants therefore sought injunctive[33] relief under

28. 15 U.S.C. § 45 (1970).

29. 201 Cal. App. 2d at 773, 20 Cal. Rptr. at 522.

30. 36 S. CAL. L. REV. 304, 306 (1963). After the *National Research* decision sanctioned the Attorney General's power to seek injunctive relief for the protection of the public, the Attorney General's Consumer Fraud Unit became active in enforcing laws concerning unfair competition and other types of business fraud oriented toward the public. 4 U.C. DAVIS L. REV. 35, 43 (1971). However, the Attorney General's best results have been in securing stipulated injunctions. Project, *The Direct Selling Industry: An Empirical Study*, 16 U.C.L.A.L. REV. 883, 963-65 (1969). There have thus been few section 3369 appellate cases directly involving the Attorney General since *National Research*. Barquis v. Merchant's Collection Ass'n, Inc., 7 Cal. 3d 94, 113 n.14, 496 P.2d 817, 830-31 n.14, 101 Cal. Rptr. 745, 758-59 n.14.

31. Cal. Stat. 1955, ch. 832, § 1, at 1447, *amending* CAL. CODE CIV. PROC. § 395 (West 1954).

32. CAL. CODE CIV. PROC. § 396(a) (West Supp. 1972).

33. Section 3369 is limited to injunctive relief. See Czap v. Credit Bureau, 7 Cal. App. 3d 1, 86 Cal. Rptr. 417 (1970) for a cause of action for damages against similar collection agency practices.

In *Czap* defendant collection agency repeatedly attempted to garnish the plaintiff debtor's exempt wages. Plaintiff sought general and punitive damages on the theory

section 3369 on the theory that respondents' actions constituted unfair competition.[34] Two main arguments were advanced in denial of the appellants' claims: first, that the appellants as private individuals lacked standing to sue under section 3369; and, secondly, that respondents' activity though unlawful did not amount to an *unlawful business practice* as contemplated by section 3369.[35]

The Standing Question

Subsection five of section 3369,[36] when read literally, imposes no special standing restrictions. That is, any person acting on his own

that this action constituted a violation of section 6947(j) of the Business and Professions Code, prohibiting a collection agency from engaging in "any unfair or misleading practices or resort[ing] to any illegal means or methods or collection." CAL. BUS. & PROF. CODE § 6947(j) (West Supp. 1972). The court held that while no remedy existed within the statute, the agency's conduct was actionable on the grounds that the statute embodied public policy and any member of the public designed to be protected could sue on the theory of a tort in essence. 7 Cal. App. 3d at 6, 86 Cal. Rptr. at 420.

Also, if the collection agency's actions amount to abuse of process, as they did in both *Czap* and *Barquis*, damages can be awarded. See note 34 *infra*, for a discussion of the abuse of process cause of action in *Barquis*.

Section 3370.1 of the Civil Code, enacted after the *Barquis* decision now allows a civil penalty of $2500 for each violation of section 3369. The action can be brought by the Attorney General or by any district attorney. If the action is by the Attorney General, one-half of the penalty received goes to the county in which the judgment was entered and one-half to the state's General Fund. Cal. Stat. 1972, ch. 1084, § 2, at 2191.

34. The court also observed that plaintiffs stated a cause of action for an injunction on the grounds of abuse of process. 7 Cal. 3d at 103, 496 P.2d at 824, 101 Cal. Rptr. at 752. The court discussed the tort concept of abuse of process and based its decision partially on that theory even though it was not presented in the lower courts.

Appellants further contended that the venue requirements of section 396(a) of the Code of Civil Procedure were jurisdictional and that because respondent's form complaints did not conform to the section's conditions, all prior judgments obtained by respondents in the past two years should be set aside as void. Another claim was that the language of section 1812.10 of the Civil Code (Unruh Act), pertaining to installment contracts, mandated that the judgments be rendered void. The court did not uphold these latter two contentions but declared that the venue provisions of section 396(a) were not jurisdictional and that at the time plaintiff's suit was initiated section 1812.10 only applied to installment contracts. Installment accounts, which plaintiffs had opened, thus were not covered by the statute. 7 Cal. 3d at 123-24, 496 P.2d at 838-39, 101 Cal. Rptr. at 766-67.

However, it should be noted, that since its amendment in 1969, section 1812.10 applies specifically to installment contracts as well as to installment accounts. CAL. CIV. CODE § 1812.10 (West Supp. 1972). Also, the Attorney General has indicated that the requirements of section 1812.10 are jurisdictional and any judgments obtained by not conforming to the section are void. 51 OP. CAL. ATT'Y GEN. 179 (1968).

35. 7 Cal. 3d at 109, 496 P.2d at 828, 101 Cal. Rptr. at 756.

36. Cal. Stat. 1972, ch. 1084, § 1, at 2190, *amending* CAL. CIV. CODE § 3369 (West 1970). See text accompanying notes 16-18 *supra*.

behalf or on the public's behalf may seek injunctive relief under the express terms of the statute. Respondents in *Barquis*, however, argued that the section encompassed solely the conventional unfair competition concepts involving competitive injury and that consumer protection was not within the scope of the section's coverage.[37]

The *Barquis* court, while acknowledging that most of the prior cases under section 3369 involved attempts to vindicate a trade name from unfair competition or concerned similar deceptive practices,[38] declared that the section had "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."[39] The opinion drew support from the history of the section and anologies to litigation under the similar FTC Act as amended in 1938,[40] which specifically brought consumer protection within its provisions.[41] Finally, the court approved of the construction that section 3369 was given previously in *National Research*,[42] which recognized the attorney general's right to sue on behalf of consumer interests.[43] Deducing that the section was "equally directed toward 'the right of the *public* to protection from fraud and deceit,' "[44] the court held that the language of the section itself, "permitting . . . any member of the public to sue on his own behalf or on behalf of the public generally" proved "a clear design to protect consumers as well as competitors."[45]

While *National Research* established the attorney general's right to sue on behalf of the public, without any mention of competition, *Barquis* is the first supreme court case to hold that the injured consumer can sue directly under section 3369 without any showing of competitive injury. The *Barquis* opinion, however, leaves unanswered the question of what limits, if any, exist on this broad interpretation of the standing provision.[46]

37. 7 Cal. 3d at 109, 496 P.2d at 828, 101 Cal. Rptr. at 756. The court of appeals had agreed with respondents and had given very little attention to appellants' argument. Barquis v. Merchants Collection Ass'n, Inc., 94 Cal. Rptr. 500 (1971).

38. 7 Cal. 3d at 111, 496 P.2d at 829, 101 Cal. Rptr. at 757. *See also* 19 HASTINGS L.J. 398, 408 (1968).

39. 7 Cal. 3d at 109, 496 P.2d at 828, 101 Cal. Rptr. at 756.

40. 52 Stat. 111, ch. 49, § 3 (1938), *as amended*, 15 U.S.C. § 45 (1970).

41. Although the Act protects consumers, only the FTC can sue under it. *But see* Lovett, *Private Actions for Deceptive Trade Practices*, 23 ADMIN. L. REV. 271 (1971), for a discussion favoring a private tort action for a violation of the federal act.

42. See text accompanying notes 23-30 *supra*.

43. *See* 201 Cal. App. 2d 765, 20 Cal. Rptr. 516 (1962).

44. 7 Cal. 3d at 110, 496 P.2d at 829, 101 Cal. Rptr. at 757.

45. *Id.* at 110, 496 P.2d at 828, 101 Cal. Rptr. at 756.

46. *See* CAL. CODE CIV. PROC. § 367 (West 1954), the real party in interest

Standing Ramifications and the Public Interest Plaintiff

In *Barquis* the plaintiffs seeking injunctive relief were debtors personally injured by the practices of the collection agency. However, the literal language of section 3369 does not impose a finding of such personal injury as a prerequisite for standing to sue. The *Barquis* decision therefore leaves unresolved the issue of whether the plaintiff must allege any personal interest which is affected adversely. This matter, however, was recently raised in the court of appeal in *Payne v. United California Bank*,[47] where the decision ultimately rested on other grounds.[48] Nonetheless, language in that case suggested that if the challenged activity of the *Payne* defendants had been within section 3369's definition of unfair competition, plaintiffs could have sued as private attorneys general even though they admitted they had not been damaged at all by defendants.[49]

Analogous situations to the section 3369 issue can be found both on the federal and state levels, where personal damage is a prerequisite to stating a claim. At the state level, the class action is one example.[50] On the federal level, the United States Supreme Court in *Sierra Club v. Morton*[51] has mandated that personal injury to the plaintiff is a necessary precondition to bringing environmental actions under the Administrative Procedure Act.[52] On the other hand, in addi-

statute, which declares that all actions, *except those specifically exempted,* must be prosecuted in the name of the real party in interest.

47. 23 Cal. App. 3d 850, 100 Cal. Rptr. 672 (1972).

48. The question was also raised as far back as 1963 in a comment on the *National Research* case. 36 S. CAL. L. REV. 304, 308-09 (1963).

49. 23 Cal. App. 3d at 855-57, 100 Cal. Rptr. at 675-77.

50. Personal damage is an essential element of the class action. Two requisites for a class action in California are that: (1) the plaintiff's claim be fairly representative of the claims of the class and (2) there be a sufficiently shared community of interest encompassing the claims. *See* Vasquez v. Superior Court, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971). Section 3369 is somewhat similar to the class action in that one person can sue on behalf of others. Thus, the two above-mentioned criteria *could* be adopted to clarify the meaning of section 3369's standing provision; and, if so, they would imply the necessity of a damaged plaintiff. However, the class action requirements do not result from the interpretation of a statutory standing provision but are judicial and legislative attempts to deal with a particular type of action. The class action example and section 3369 can certainly be distinguished.

51. 405 U.S. 727 (1972).

52. Sierra Club v. Morton, 405 U.S. 727 (1972), *aff'g sub nom.* Sierra Club v. Hickle, 433 F.2d 24 (9th Cir. 1970), held that for a party to sue under section ten of the Administrative Procedure Act, 5 U.S.C. § 702 (1970), to review a federal administrative agency ruling, he has to show that he has suffered, or will suffer some injury, economic or otherwise. See Hutchinson, *Standing to Sue in Public Interest Litigation,* 7 LINCOLN L. REV. 40 (1972) for a discussion of the *Sierra Club* case and its background.

The Sierra Club believed it could sue under the act as a "special interest plain-

tion to section 3369, there are parallel broad standing provisions in California[53] and in other states. For example, Michigan recently enacted an environmental protection law which allows "any person" to maintain an action for declartory or equitable relief against anyone alleged to be engaged in despoiling the natural resources.[54] The wording of the Michigan act's standing provision[55] is strikingly similar to

tiff," claiming to be representative of the general public, without alleging any injury, economic or aesthetic, to its members. The Supreme Court, however, held against the club. The Court proclaimed that "a mere 'interest in the problem' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the A.P.A." 405 U.S. at 739.

Yet the above statement indicated that the Court was speaking of a statute worded in terms of a party aggrieved or adversely affected. However, section 3369's phrasing reads "any person" and attaches no such condition of being affected, aggrieved, or interested. Also, the problem in *Sierra Club* involved an environmental issue; section 3369 relates, at least potentially, to consumer actions. The distinction may be significant in that in the consumer area standing requirements may be less exacting. *See* Sierra Club v. Hickel, 433 F.2d 24, 30 (9th Cir. 1970). Because section 3369 has historically had a rather unfettered interpretation, there is every indication that the standing provision will be further liberally construed.

In short, the situations discussed are not as comparable as at first glance; further, it is arguable that the *Sierra Club* decision may not even be permanent constitutional law. The Court was split four to three, with Justices Blackmun, Douglas, and Brennan writing dissenting opinions. One commentator has termed the case a temporary halt in the expansion of the law of standing. Hutchinson, *Standing to Sue in Public Interest Litigation*, 7 LINCOLN L. REV. 40, 63 (1971). *See also* 43 MISS. L.J. 538 (1972).

53. Section 526(a) of the Code of Civil Procedure allows *any* municipal taxpayer to sue the necessary municipal official to prevent illegal expenditure of funds. While one could contend that sufficient interest, or damage, is present in the form of taxation, it is so minimal because suffered by each taxpayer that it amounts to no more than an interest by virtue of being a municipal citizen . In other words, there really is no damage requirement at all. CAL. CODE CIV. PROC. § 526(a) (West Supp. 1972). *See* Wirin v. Parker, 48 Cal. 2d 890, 313 P.2d 844 (1957). *See also* Flast v. Cohen, 392 U.S. 83 (1968), for the creation of a similar yet more restrictive standing provision by the judiciary in federal taxpayer suits.

Another instance granting "any person" the ability to sue involves an action to seek a writ of mandate. CAL. CODE CIV. PROC. § 1086 (West 1955). The statute's terms allow any person *beneficially interested* to petition for such a writ. A person "beneficially interested", relating to judicial review of administrative decisions, has been interpreted to mean anyone who was a proper party to the administrative action. W.H. DEERING, CALIFORNIA ADMINISTRATIVE MANDAMUS § 4.2 at 27-28 (Cal. Cont. Educ. Bar ed. 1966). Similarly, the Alcoholic Beverage Control Act, CAL. BUS. & PROF. CODE § 24201 (West 1964), allows *any person* to file a complaint against a licensee of the ABC Board. Thus, any person is a proper party to the ABC administrative action. The California Supreme Court has held that any person (with no limitations) who submits a complaint upon which no action is taken must be able to seek a writ of mandate if the right is of any meaning. Covert v. State Bd. of Equalization, 29 Cal. 2d 125, 130, 173 P.2d 545, 547 (1946).

54. MICH. COMP. LAWS ANN. §§ 691.1201-07 (Supp. 1972).

55. *Id.* § 691.1202 (Supp. 1972).

section 3369 subsection five and was specifically adopted to dispense with the normal standing requirement of proving for personal injury.[56]

Considering the language of section 3369,[57] its previous broad interpretation,[58] the dicta in the *Payne* case[59] and the current consumer oriented trend in the law, there is no reason why section 3369's standing provision should be seriously constricted. The courts certainly possess the necessary means to eliminate any frivolous suits.[60] Certain safeguards to ensure a plaintiff's ability to sue and his integrity are undoubtedly essential. These safeguards can be framed in terms that will require the party to demonstrate his adverseness and his position as honestly representative of the public, but without any requirement of alleging specific injury to himself.[61] However, as noted previously, this question of standing under section 3369 remains open.

The Definition of Unlawful Business Practice

A second matter of statutory construction presented in the *Barquis* case encompasses the very scope of section 3369. The act, though directed at unfair business practice, provides no explicit definition of the activities prohibited by its terms. Respondents contended that section 3369 should be limited to injunctions against fraud or deceit.[62] That is, they argued that the supression of unfair business competition was the primary thrust of the section and actions should be limited to the traditional activities which compose this category. In rejecting respondents' argument the court did concede that most section 3369 cases had arisen under the common law notions.[63] However, the court emphasized that in 1963 the legislature amended the section to include unlawful business practices within the definition of unfair competition.[64] The *Barquis* court noted the lack of legislative

56. Sax & Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report,* 70 MICH. L. REV. 1003 (1972).

57. The pertinent portion of the standing provision states that an action may be prosecuted "by any person acting for the interests of . . . the general public." Cal. Stat. 1972, ch. 1084, § 1(5), at 2190, *amending* CAL. CIV. CODE § 3369 (West 1970).

58. See text accompanying notes 18-27 *supra.*

59. See text accompanying notes 44-46 *supra.*

60. *See* Davis, *The Liberalized Law of Standing,* 37 U. CHI. L. REV. 450, 468-71 (1970); 32 LA. L. REV. 634, 645-46 (1972). *See also* MICH. COMP. LAWS ANN. § 691.1202a (Supp. 1972), concerning suits under the new Michigan environmental act, which allows the court to require a plaintiff to post a $500 bond if the court doubts plaintiff's capability to pay costs or satisfy any judgment rendered against him.

61. *See* Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970); Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970). *See generally* 41 U. CIN. L. REV. 669, 684-87 (1972).

62. 7 Cal. 3d at 111, 496 P.2d at 829, 101 Cal. Rptr. at 757.

63. *Id.*

64. Cal. Stat. 1963, ch. 1606, § 1, at 3184.

history on the amendment and surmised that the addition was an effort to give equity a flexible hand in combating all the new machinations of the unfairly competitive mind.[65] The court quoted one commentator who had suggested that "it is difficult to see any other purpose [of the amendment] than to extend the meaning of unfair competition to anything that can properly be called a business practice and that at the same time is forbidden by law."[66]

The first reported appellate case seeking a section 3369 injunction for unlawful business practice was *Diaz v. Kay-Dix Ranch.*[67] There, the plaintiff sought to enjoin farm owners from knowingly hiring Mexican laborers who had illegally entered the United States. The court refused to grant the injunction, basing its decision primarily on the overriding federal issues concerned.[68] The *Diaz* court, however, indicated that the action was otherwise proper under the unlawful business practice portion of section 3369.[69] The *Barquis* court referred to the earlier *Diaz* decision in finding that the *Barquis* appellants had stated a cause of action. That is, the court held that because the resondents' activities (1) violated express statute and (2) constituted a regular activity of respondents' business, this conduct could comprise an unlawful business practice within the purview of section 3369.[70] Thus, in *Barquis,* the term "unlawful" was not confined to the violation of laws concerning fraudulent or deceptive business practice, as respondents had urged,[71] but was expanded to include any business practice which is independently unlawful.[72] The court thus severed the term "unlawful" from an exclusive connection with fraudulent or deceptive business practice—the traditional methods of unfair competition.

Ramifications of the Expansion of "Unlawful"

Because of the court's construction of "unlawful," not only can the specific collection agency activities involved in the *Barquis* case

65. 7 Cal. 3d at 112, 496 P.2d at 830, 101 Cal. Rptr. at 758.

66. 19 HASTINGS L.J. 398, 408-09 (1968), *cited in* 7 Cal. 3d at 113, 496 P.2d at 830, 101 Cal. Rptr. at 758.

67. 9 Cal. App. 3d 588, 88 Cal. Rptr. 443 (1970).

68. *Id.* at 599, 88 Cal. Rptr. at 451.

69. *Id.* at 591-92 and n.3, 88 Cal. Rptr. at 444-46 and n.3.

70. 7 Cal. 3d at 113, 496 P.2d at 831, 101 Cal. Rptr. at 759.

71. *Id.* at 111, 496 P.2d at 829, 101 Cal. Rptr. at 757. The court of appeals did not even discuss the term "unlawful" as used in section 3369. The opinion confined its explanation of unfair competition to the traditional theory of unfair diversions of customers from one competitor to another. Barquis v. Merchants Collection Ass'n., Inc., 94 Cal. Rptr. 502 (1971).

72. There appears to be very little discussion in any of the decisions on unfair competition about what constitutes a business practice. *See, e.g.,* Barquis, 7 Cal. 3rd at

be curbed, but many related debt collection tactics can be enjoined as well. For example, section 6947 of the Business and Professions Code details additional prohibited collection agency practices.[73] *Barquis* now will allow any one of these activities, if engaged in as a business practice, to be enjoined under section 3369. The question arises, though, as to the parameters of the term "unlawful" as used in section 3369. Where a legislative act refers to "laws," normally the term is confined to statutory laws rather than to the common law, unless a different intent can be found.[74] However, "unlawful" implies a broader definition; it embraces "wrongful", "immoral", "tortious", and "against public policy."[75] This more inclusive meaning has implications for consumer protection actions under section 3369.

For example, the Bureau of Collection and Investigative Services, under the Department of Consumer Affairs, is empowered to promulgate regulations to enforce the Business and Professions Code provisions dealing with collection agencies.[76] The purpose of such regulations is to fill gaps left by the legislature. However, the regulations have the force and effect of law.[77] Accordingly, a violation of a regulation should be considered unlawful and enjoinable under section 3369. This argument has not been presented to the courts, but hopefully the test soon will be forthcoming. The importance of holding that a regulation violation is unlawful under section 3369 is that the existing regulations control collection agency activity fairly extensively.[78] Therefore, a section 3369 injunction could be a means of enforcing these somewhat stringent regulations. The limitation of "unlawful" to purely statutory violation or contravention of case law would restrict unnecessarily the broad equitable powers given a court under section 3369.

113, 496 P.2d at 831, 101 Cal. Rptr. at 759. *See also* 19 HASTINGS L.J. 398, 409 (1968).

73. The section prohibits the use of "deadbeat lists," the simulation of government forms, the violation of postal regulations, the use of profanity in collection, among other activities. CAL. BUS. & PROF. CODE § 6947 (West Supp. 1972).

74. Gilliam v. California Employment Stabilization Comm'n., 130 Cal. App. 2d 102, 114, 278 P.2d 528, 536 (1955).

75. *See, e.g.*, Loup v. California S.R.R. Co., 63 Cal. 97, 99 (1883); Sultan Turkish Bath, Inc. v. Board of Police Comm'rs., 169 Cal. App. 2d 188, 200-201, 337 P.2d 203, 210 (1959); BLACK'S LAW DICTIONARY 1705 (4th ed. rev. 1968).

76. CAL. BUS. & PROF. CODE § 6863 (West 1964).

77. *Cf.* Nelson v. Dean, 27 Cal. 2d 873, 881, 168 P.2d 16, 21 (1946); First Indus. Loan Co. v. Daugherty, 26 Cal. 2d 545, 549, 159 P.2d 921, 923 (1945); Rigley v. Board of Retirement, 260 Cal. App. 2d 445, 450-51, 67 Cal. Rptr. 185, 188 (1968).

78. *See* CAL. ADM. CODE tit. 16, §§ 606-34 (West 1954) (particularly §§ 620, 627-29).

Conclusion

Barquis conclusively severed section 3369 from the traditional concepts of unfair competition, the protection of a business' reputation and goodwill. The public, as well as business, is entitled to the benefits of the section; a direct suit by a member of the public without a showing of competition is now permitted. The court's interpretation of the section's standing provision leaves open the question of the meaning of "any person"; but in keeping with the liberal construction of the section, the standing requirement probably will not become overly harsh.

In considering the term "unlawful" as found in the section, the *Barquis* court stressed that the word be broadly construed to include anything unlawful. This interpretation is consistent with the general liberal application of the statute and with the progressive California trend in consumer law. Although the meaning of the term "unlawful" has not been definitively resolved, it most likely will not be shackled to statutory law but will embrace administrative regulations as well.

Use of section 3369 possesses a large number of assets with few liabilities.[79] It has great advantages over the criminal sanction;[80] it dispenses with the complicated rules encountered in class action suits. Furthermore, it now contains a civil penalty.[81] The final judgment under the section has the effect of collateral estoppel; and, thus, the facts determined are binding in future litigation against the defendant.[82] The section has a liberal history. There is no indication of a deviation from this past, nor is there any indication that anti-consumer limitations will be imposed on the section's future use. In sum, section 3369 promises to be a powerful consumer tool.

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79. *See* Lorenz, *Consumer Fraud and the San Diego District Attorney's Office*, 8 SAN DIEGO L. REV. 47, 50-52 (1970).

80. Project, *The Direct Selling Industry: An Empirical Study*, 16 U.C.L.A.L. REV. 883, 961 (1969).

81. See note 33 *supra*.

82. Project, *The Direct Selling Industry: An Empirical Study*, 16 U.C.L.A.L. REV. 883, 964 (1969); 4 U.C.DAVIS L. REV. 35, 51 (1971).

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