

CGB Report

Special Interest

- *“These Cases Are About The Money”*
- *At least superficially the cases are being brought under a California statute, called the “Unfair Competition Law.”*
- *Why me?*
- *Many of these are minor violations that the BAR did not consider serious enough to take any disciplinary action*
- *The complaints ask for both injunctions and restitution, as well as attorneys’ fees.*

Special Auto Repair Dealer Alert

Consumer Enforcement Watch Corporation Lawsuits against Auto Repair Shops

Questions and Answers

Q What are these Consumer Enforcement Watch Corporation (CEWC) cases all about?

A These cases are about money. At least superficially the cases are being brought under a California statute, called the “Unfair Competition Law.” This law permits state and local district attorneys or any person, or corporation, to bring a lawsuit on behalf of the general public to prevent continuing violations of the law. Such plaintiffs are sometimes referred to as “private attorneys general.” The complaints CEWC has filed allege that each of the repair shops violated one or more of the laws or Bureau of Automotive Repair (BAR) regulations that govern the auto repair service business. But, what these cases are about is getting shop owners to pay money to be left alone.

Q Why me?

It appears that the CEWC lawyers have obtained the names of repair shops from the BAR’s website. The BAR website lists all of the shops that have had any type of violation of auto repair laws or BAR regulations. Many of these are minor violations that the BAR did not consider serious enough to take any disciplinary action (NOV), such as late renewal of the ARD registration, minor defects in repair

work orders, etc. Even though the reason might have been purely technical or insignificant, the BAR listed your shop and the CEWC lawyers picked your name from that list.

Q What is CEWC seeking?

A The complaints ask for both injunctions and restitution, as well as attorneys’ fees. CEWC’s proposed injunctions have the court order the defendant to violate no auto repair law for four years. Any violation of the law while such a court order is in effect would create a new problem for the shop owner: “contempt of court.” CEWC would have a quick method to demand more money or to go back into court to seek further stiffer penalties because of any new violation. (See the more detailed discussion below about injunctions under the topic of possible settlements with the plaintiff.)

The relief requested which is referred to as “restitution” would, if available, require some combination of a return to consumers of payments which they made for services which were rendered contrary to the law (e.g., while the automotive repair shop was operating without a license, or where there were failures to provide written estimates or other specific violations of the statutes or regulations), or a return of “profits” made during the periods in which violations were occurring.

- *There are always claims for attorneys' fees. It is our belief, based upon the information which we currently have available, that this is the primary motivating factor for the lawsuit*

- *These are Not Class Action Lawsuits*

- *Q Why are so many different defendants being named in the same case?
A Again, it's about the money*

- *CEWC was formed for the sole purpose of bringing these lawsuits and the attorneys representing it in these lawsuits probably control it.*

We believe that the private attorneys general, such as the plaintiff in this case, should not be entitled to receive restitution in this type of case, where no class action is certified. That will be one of the areas of legal contention if the case proceeds that far.

The complaint also seeks recovery of attorneys' fees for plaintiff. In actions of this nature, which are allegedly brought on behalf of the general public, or numerous members of the public, there are always claims for an award of attorneys' fees. It is our belief, based upon the information which we currently have available, that this is the primary motivating factor for the lawsuit.

Q Is this a class-action lawsuit?

A No. It does, however, have some similarities to a class-action lawsuit in that the action is supposedly brought on behalf of people who are not directly involved in the action. Unlike a class-action, however, there are no established procedures for notifying the class of would-be plaintiffs being represented, allowing them to opt in or opt out of the class, or binding them with the results of the action.

Q Isn't it illegal for lawyers to do this sort of thing?

A It is our understanding that a complaint has been lodged with the California State Bar Association, but it will take time for the Bar Association to investigate, if they think there is a violation, and for any disciplinary action to be taken.

Q Why are so many different defendants being named in the same case?

A Again, it's about the money. It costs about \$200 to file a lawsuit, regardless of how many defendants are named. CEWC can file a lawsuit against 109 shops (as in one case) for \$200 whereas it would cost about \$21,900 to file individual suits against those same defendants. It's simply a matter of trying to

make the most money for the smallest investment by the CEWC lawyers. We do not believe that joining all large numbers of unrelated defendants in single cases should be permitted. There is generally a requirement that all defendants named in a lawsuit must have been involved in the same transaction, event, or series of transactions or events. There is no connection between you and the hundreds of other shops that have been sued, other than that you all have an ARD registration and your name appears on the discipline section of the BAR website. We don't believe that is enough and this is one of the grounds upon which we are attacking the complaint.

Q Who is this plaintiff, CEWC?

A CEWC is a California corporation that was formed about the same time the first lawsuit was filed, so it appears that it was formed for the sole purpose of bringing these lawsuits and the attorneys representing it in these lawsuits probably control it.

Q Why can this CEWC sue me when then never came to my shop and I don't know who these people are?

A As noted above, this California statutory scheme does permit "private attorneys general" to bring actions on behalf of other members of the public. While we don't believe this is what the law intended, the CEWC lawyers are using this law to attempt to squeeze money out of hundreds or thousands of repair shops.

Q Why can this plaintiff sue me for things that the BAR has already investigated and handled?

A The Plaintiff's lawyers would argue that the BAR has not done enough enforce the laws which the complaints allege to have been violated and that multiple attacks on the defendant who have violated the law is

- *What is the current status of the cases?*
- *While there are a variety of grounds upon which the complaint may be attacked at a later date, during the very early stage of the case it is only permissible to attack the complaint for matters that are obvious.*
- *If a Court determines that the complaint is defective, courts usually allow the plaintiff an opportunity to amend its complaint*
- *We have strong arguments that the plaintiff cannot correct its defects.*

permitted by the Unfair Competition Law.

We believe that there may be several legal defenses based upon legal principles designed to help prevent people from suffering multiple and repeated exposure to claims based upon allegations arising from the same events. If the relatively straightforward grounds for dismissing the complaints that are being used in the form of “demurrers” in the earliest stage of the lawsuits are not successful in stopping them, we plan to assert additional defenses later in the lawsuits.

Q What is the current status of the cases?

A The first lawsuit filed earlier this year named a single defendant by its real name and 100 additional defendants named as “Doe” defendants. Later complaints contained long lists of named defendants. As many as 1400 repair shops have now been named in several suits filed on Orange and Los Angeles counties.

One of the Firestone Tire & Service Centers owned by BPS Retail & Commercial Operations, LLC (“BFS”), was served as one of the Doe defendants in the original Orange County case.

BPS filed a motion to strike the complaint and a demurrer to the complaint attacking the complaint on defects that appear on the face of the complaint itself or as matters of public record. (While there are a variety of other grounds upon which the complaint may be attacked at a later date, during the very early stage of the case it is only permissible to attack the complaint for matters which are that obvious.) These attacks on the complaint asked the court to “dismiss” the complaint.

These motions were granted and the court also ordered that all of the remaining defendants were excused

from having to respond to plaintiff’s complaint until the plaintiff amended and refiled its complaint. Rather than face another attack on its complaint by BPS, CEWC dismissed BPS from the Orange County complaint.

Q Have any other defendants succeeded in getting a court to dismiss any of these cases?

A Not that we know of. Another motion to dismiss the complaint was filed and heard in the Orange County court for “complex litigation” (the cases in Orange County have been transferred to this special court) at the end of October. The preliminary decision by the Judge indicated that the defendants would win, but the court found after the hearing that because a “default” had already been entered against one defendant and the other had been dismissed, that the motion could not be granted. More demurrers and motions to strike have been filed and are waiting to be heard by the courts.

If they determine that a complaint is defective, and therefore rule in favor of the defendant and against the plaintiff, courts usually allow the plaintiff an opportunity to amend its complaint to correct the defects. In this case, we have strong arguments that the plaintiff cannot correct its defects. Nevertheless, courts usually, but not always, give the plaintiff one or more opportunities to correct defects which appear on the face of the complaint.

If we are fortunate, and the court rules in favor of one or more of these pending motions without granting the plaintiff an opportunity to amend, the complaint will be dismissed. At that stage, the plaintiff has three choices. It can appeal the ruling; it can file one or more new complaints; or it can simply drop the whole matter.

An appeal would directly involve only the defendants that filed the motions, and the case would

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- *Should I settle with the lawyers from CEWC?*
- *A settlement of this case might not prevent anyone else from suing you again based upon exactly the same facts and law.*
- *Worse still is the concern that settlement of this case would not only fail to prevent future lawsuits over the same past facts and demands, but it might even encourage future lawsuits.*

effectively be over with for the rest of the defendants unless and until an appellate court decided that the trial court had made an error, and the complaint should be reinstated, or at least that the plaintiff should be given an opportunity to amend the complaint. Appellate proceedings generally take many months, up to a couple of years.

The demurrers that have been filed by a few of the named defendants do not relieve the other defendant of the obligation to respond to the complaint within 30 days of the date that they are served with a copy of the summons and complaint. Failure to file legal documents within 30 days will result in a “default” being filed preventing that defendant from fighting the lawsuit.

Q Should I settle with the lawyers from CEWC?

A We cannot make this decision for you. However, we have examined the settlement documents which CEWC is requiring defendants to sign and we can identify for you some of the issues and questions that concern us about possible settlement, points which you should also consider.

Top among those concerns is the question of whether a settlement would truly settle anything, and whether it would be binding on anyone. In a normal lawsuit, settlement of the case almost always prevents the plaintiff from suing the defendant again on the same facts and issues. In a class-action lawsuit, there are special procedures designed to make sure that a settlement is binding on the members of the class of plaintiffs who do not opt out of the class.

Otherwise, however, most lawsuits are not binding on people who were not named as parties to those lawsuits. Thus, a settlement of this case might not prevent anyone else

from suing you again based upon exactly the same past statutory or regulatory violations asserted in this case.

Worse still is the concern that settlement of this case would not only fail to prevent future lawsuits over the same past facts and demands, but it might even encourage future lawsuits.

In addition, you need to be concerned about the effect of an injunctive order. Injunctive relief is the central focus of the Unfair Competition Law under which this lawsuit was brought. In order to justify having filed the lawsuit in the first place, and justify the recovery of attorneys’ fees, the plaintiff in a case of this nature will almost invariably request injunctive relief as part of a settlement. The settlement demands already made by the plaintiff in this case have included a requirement of injunctive relief to stay in effect for four years.

Agreeing to an injunction as part of the settlement of a lawsuit means that you will be agreeing to having a judgment entered against you. Disclosure of the existence of a judgment entered against you is commonly required in loan applications, employment applications, applications for government licenses and permits, and the like.

The settlement agreement adds new and additional penalties for future violation on top of the ones which already exist, including the possibility of both additional monetary sanctions and sanctions of criminal contempt of court.

Any later violations of the statutes or regulations become like “second offenses”, generally warranting stricter and more severe sanctions, and higher attorney fees and

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settlement demands for later violations.

Q Can my Auto Repair or Service Station Franchise possibly be terminated?

A Having a judgment entered against you means that you admit to having violated the law. A violation of the law related to the business is often included as grounds for termination in franchise agreements. Agreeing to a settlement of one of these suits could lead to termination of your franchise by your auto repair franchisor (such as Midas, Purrfect, Econo, etc.), or quick lube franchisor or your branded service station franchisor (such as ARCO, Chevron, Shell, Texaco, Union 76 or Ultramar). Such terminations are permitted by the Petroleum Marketing Practices Act, for branded service station franchises, and by the California "good cause" franchise termination law for franchised repair shops.

Recommendations:

Q What should I do now to protect my interests and minimize my expense?

A First and foremost you must take action before 30 days has passed since you were served with the Summons and Complaint. Failure to take action within this time period will surely result in CEWC filing a "Default" against you. CEWC's settlement demand will thereafter be much higher and if you don't settle the penalties against you will be determined by the court without you being able to present any defense.

Second, you need to keep informed about the results of motions filed in your lawsuit. Depending upon the results of the hearings, you may not need to do anything else at all, or you may need to prepare to respond to the complaint. Don't assume that what other Defendants are doing will protect you; it may not.

Third, regardless of the outcome of your particular case, this should also serve as a reminder to keep your compliance practices in good order. Although there are good reasons why this particular case should be terminated at an early stage, we certainly do not know whether that will happen and, even if it does, other plaintiffs in the future may well be able to successfully bring actions against individual shop owners based upon histories of noncompliance.

Fourth, in order to stay on top of what is happening in the automotive repair profession, it is important for you to be involved with at least one trade association. The associations are a good source of information about what is happening in the industry. They are also a good source of referrals when a problem such as this case arises.

Finally, if you are to preserve your rights to fight this lawsuit, or if you are considering the possibility of entering into a settlement of this case, you need to make sure that you get good legal advice.

Q What recourse is available to people who have already settled if this case is dismissed?

A Ordinarily, there is not really supposed to be any. Where one party settles, and another party later successfully defends the case, even at the earliest stages, throwing the complaint out of court based upon the pleadings themselves, the party who settled is still stuck with their settlement.

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