

The Benefits of Adding a Private Right of Action Provision to Local Tobacco Control Ordinances

June 2004

Tobacco control laws are low on the list of enforcement priorities in many jurisdictions. Funding, staffing, and politics all contribute to this problem. One solution could be to extend enforcement power to those for whom tobacco laws *are* a priority: tobacco control advocates. To that end, TALC has developed a Model Private Right of Action Provision that can be added to any existing or proposed local tobacco control ordinance, including ordinances pertaining to secondhand smoke, self-service displays, land use, or licensing.

1. What kinds of cases can be brought under the Model Private Right of Action Provision?

The Model Private Right of Action Provision explicitly allows a private citizen to bring a lawsuit to enforce the ordinance on behalf of him/herself *or* on behalf of the general public. This means that advocates can bring an action if they have been harmed directly, or they can bring an action in a *private attorney general* capacity even if they have not suffered direct harm (or both).

Personal exposure to secondhand smoke would be the most likely basis for a suit for direct harm. For example, an individual might sue her employer if she was exposed to secondhand smoke in violation of an ordinance forbidding smoking in her workplace.

Self-service display, land use, and licensing laws would generally give rise to suits by citizens who have not suffered any direct harm as a result of an alleged violation. These *private attorneys general* can represent the interests of the public at large by taking noncompliant retailers to court. Because of the way local land use and licensing laws are drafted, the model provision can be an especially powerful tool for anyone who is concerned about violations of state tobacco control laws (including laws prohibiting sales to minors and sales of bidis, mini-packs, or single cigarettes). Many local land use and licensing laws provide for the revocation of a conditional

Developed by the Technical Assistance Legal Center (TALC), a project of Public Health Law & Policy (PHLP). This material was made possible by funds received from the California Department of Public Health, under contract #04-35336.

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use permit or a license to sell tobacco products if a retailer commits a certain number of violations of local or state tobacco control laws over a given period of time (e.g., three “strikes” in three years). If a local land use or licensing law contained the model provision, anyone could bring an action in small claims court alleging that a retailer breached the conditional use permit or license because the retailer violated a local or state tobacco control law. The city or county could then choose to count a judgment by a small claims court against a retailer as one strike against the retailer.

2. What type of relief is available under the Model Private Right of Action Provision?

The Model Private Right of Action Provision contains several types of relief. However, the exact type of available relief depends upon whether a case is heard in small claims court or in one of the other two divisions of superior court.¹ Small claims court is governed by special rules designed to ensure that litigants have a quick, easy, and inexpensive way to resolve disputes.² These rules limit the amount and form of relief that a small claims court is permitted to award.

The model provision allows for the collection of either *actual damages* or *statutory damages*. Actual damages can be difficult to prove, especially in a private attorney general action. For example, it could be hard to demonstrate the monetary value of the societal or competitive harm that results from the illegal sales of cigarettes to minors. Therefore, when proving actual damages would be impractical, the model provision has a statutory damages clause that sets a fixed dollar amount for each violation. Statutory damages can add up to a substantial sum, especially in the instance of a continuing violation, since each day counts as a separate violation.³

In addition to (or in lieu of) damages, a court may grant relief in the form of *restitution*. Restitution is a remedy that entails “making good,” or restoring an equivalent value for any loss, damage, or injury.⁴

In a case that does not involve breach of contract, a court may award *exemplary damages* “where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice.”⁵ Exemplary damages are also known as punitive damages. They are designed to punish and deter a defendant who has acted in an outrageous manner.⁶

Small claims court has the ability to grant actual damages, statutory damages, restitution, and exemplary damages. However, the jurisdiction of a small claims court is limited to cases in which the amount of money in demand does not exceed \$5,000.⁷ So, a small claims court cannot award a litigant more than \$5,000, no matter whether that money consists of actual damages, statutory damages, restitution, exemplary damages, or some combination of the above.

The model provision gives private enforcers the opportunity to ask for an *injunction* or a *conditional judgment*. An injunction is a court order either prohibiting or compelling an act. For example, under the model provision, a plaintiff might ask the court to issue an injunction that orders a retailer to stop stocking tobacco products on the counter in violation of a local self-service display law. An injunction is an available remedy in the other divisions of superior court but not in small claims court. However, a small claims court may issue a conditional judgment, which gives the defendant a choice between meeting certain conditions or facing an alternative monetary penalty. In the tobacco control setting, a conditional judgment would most likely involve an order either to stop the illegal conduct or to pay a fine. So, a conditional judgment

might order a retailer to choose between getting rid of an illegal self-service display or paying a fine of \$500. When the legislature amended the Small Claims Act in 1992 to allow for the issuance of a conditional judgment, it made the following findings:

The Legislature finds that small claims judgments are sometimes inadequate to redress certain types of disputes, such as neighborhood disputes involving barking dogs or other disturbances. Specifically, the Legislature finds that when a small claims court believes that a conditional judgment is appropriate, the court should be empowered to order the performance or cessation of acts by a party, consistent with the equitable powers of the court, and to condition an award of damages on noncompliance with the court's order.⁸

An injunction or a conditional judgment provides a particularly attractive remedy for advocates whose ultimate goal is to achieve compliance with tobacco control laws.

3. What makes small claims court a good place to enforce local tobacco control laws?

The California legislature created the small claims court system “to formulate a method of procedure for small claims of all kinds, which would obviate the expense and delay due to ordinary methods of litigation.”⁹ The Small Claims Act of the California Code of Civil Procedure sets forth comprehensive rules about the operation of small claims courts across the state.¹⁰ Every superior court in the state must have a small claims court division that has jurisdiction over “minor civil disputes.”¹¹ The Small Claims Act mandates that a small claims court must provide a forum in which to resolve these disputes “promptly, fairly, and inexpensively.”¹² This mandate is advanced by three statutory requirements. First, disputants must represent themselves.¹³ The rule of self-representation not only eliminates the high costs of attorneys, but it also enables the court to function efficiently by interacting directly with the parties.¹⁴ Second, the hearing and disposition of a small claims court action must be “informal.”¹⁵ Instead of formal procedural and evidentiary requirements, small claims courts use a simple, common-sense approach to conflict resolution in which the judge enjoys a great deal of discretion.¹⁶ Third, a small claims court only has jurisdiction over cases in which the amount in demand does not exceed \$5,000.¹⁷ This ceiling ensures that the reduced procedural and evidentiary safeguards are commensurate with the relatively “small claim” at stake.

Each of these three statutory requirements makes small claims court an appropriate forum in which to enforce local tobacco control laws. By bringing actions in small claims court, tobacco control advocates can spare themselves the trouble and expense of hiring an attorney. They merely need to follow simple claim and notice rules, appear in court, and make a reasonable argument that a violation has occurred.¹⁸ The \$5,000 limit leaves plenty of room for tobacco control advocates to seek meaningful sanctions. The model provision can provide advocates an opportunity to fill the gap created by limited enforcement of tobacco control laws by some public agencies. Moreover, as discussed above, advocates can sue in small claims court not only for monetary compensation but also for a conditional judgment giving the violator a choice between paying a fine or ceasing the illegal conduct. Of course, advocates can always avoid the limitations of small claims court by filing suit in one of the other divisions of superior court.¹⁹

4. Would it be legal to add the model provision to a local ordinance?

The model provision raises three potential legal concerns. The first is whether it is legal to allow private attorneys general to bring lawsuits even when they have suffered no injury themselves. TALC's model private right of action provision is intentionally analogous to California's Unfair Competition Law (UCL),²⁰ which permits any person "acting for the interests of itself, its members or the general public" to sue any business that operates unfairly, unlawfully, or fraudulently.²¹ Under the UCL, private parties can bring a claim in an individual or representative capacity without alleging any harm from the offending business practice. The California Supreme Court upheld this concept in *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*²² Like the UCL, TALC's model private right of action provision gives advocates the opportunity to sue on behalf of the general public without having to show that they were personally harmed.²³ Since the UCL already allows private attorneys general to enforce local tobacco control laws on behalf of the general public, local governments should be free to pass specific unfair competition laws permitting actions on behalf of the general public in the area of tobacco control. The extensive body of UCL case law can serve as guidance for tobacco control advocates seeking further knowledge about private attorney general actions.

The second concern is whether it is legal to reference small claims court in an enforcement section of a local ordinance. Nothing in California statutes appears to prohibit the inclusion of such a reference. At least two state statutes contain language specifically authorizing a person to enforce the statute by bringing a civil action in small claims court,²⁴ and there is no apparent reason why a local ordinance could not do the same. To the extent that local governments can pass ordinances that are enforceable in any court of law, they should be able to provide for actions in small claims court. A local government would not be extending the jurisdiction of small claims court, but merely would be encouraging citizens to make use of small claims court to enforce tobacco control laws when the amount in demand falls under the \$5,000 cap.

The third concern is whether small claims court would be an appropriate forum for a private attorney general action. Under TALC's model provision, advocates can choose to sue in small claims court, so long as the amount in demand and the type of relief sought are within the jurisdictional requirements.²⁵ The Small Claims Act does not contain any standing or jurisdictional provisions that would preclude the filing of a private attorney general action in small claims court. Moreover, a California appeals court explicitly stated that small claims court is an appropriate forum in which to resolve issues that have a social policy impact. This court declared that the right to access the courts—including the small claims courts—includes the right to file suit not only "to obtain monetary compensation for individualized wrongs" but also "to draw attention to issues of broader public interest or political significance."²⁶

Conclusion

In sum, adding TALC's model provision to a local ordinance could provide advocates with an effective approach to enforcing tobacco control laws. The model provision gives advocates the option to bypass traditional barriers to enforcement. Under the model provision, advocates can hire a lawyer and bring a case in the limited or unlimited jurisdiction division of superior court demanding a large sum of money and an injunction. Alternatively, advocates can represent themselves in user-friendly and informal small claims courts, which are empowered to impose limited but significant monetary judgments, as well as conditional judgments that serve to induce increased compliance with tobacco control laws.

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- ¹ In California, the superior court system has jurisdiction over civil and criminal trials. The civil side of superior court has three divisions: the small claims court division, the limited jurisdiction division, and the unlimited jurisdiction division. See below for an explanation for the special rules that govern small claims court.
- ² See below for a discussion of why small claims court is a good forum in which to enforce local tobacco control laws.
- ³ Note that the model provision protects a retailer from being sued for statutory damages multiple times for the same violation.
- ⁴ Restitution is a common remedy under the California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200–17210.
- ⁵ Cal. Civ. Code § 3294. See also 1 *Consumer Law Sourcebook for Small Claims Court Judicial Officers* (California Department of Consumer Affairs 1996) § 12.13 (noting that the rules for awarding exemplary damages in small claims court are the same as the rules for awarding exemplary damages in the other divisions of superior court).
- ⁶ See, e.g., *Moore v. American United Life Insurance Co.*, 150 Cal. App. 3d 610 (1984).
- ⁷ See Cal. Civ. Proc. Code § 116.220(a)(1).
- ⁸ See Cal. Civ. Proc. Code § 116.220 (West 2003).
- ⁹ *Leuschen v. Small Claims Court*, 191 Cal. 133, 138 (1923).
- ¹⁰ See Cal. Civ. Proc. Code §§ 116.110–116.950.
- ¹¹ Cal. Civ. Proc. Code § 116.120(c).
- ¹² Cal. Civ. Proc. Code § 116.510.
- ¹³ See Cal. Civ. Proc. Code § 116.540.
- ¹⁴ See 1 *Consumer Law Sourcebook for Small Claims Court Judicial Officers* (California Department of Consumer Affairs 1996) §§ 2.6–2.7 (discussing the prohibition of attorney representation and the benefits of self representation).
- ¹⁵ Cal. Civ. Proc. Code § 116.510.
- ¹⁶ See 1 *Consumer Law Sourcebook for Small Claims Court Judicial Officers* (California Department of Consumer Affairs 1996) § 2.5 (describing various elements of “informality” in small claims court).
- ¹⁷ See Cal. Civ. Proc. Code § 116.220(a)(1).
- ¹⁸ For a simple step-by-step guide to using small claims court, see California Department of Consumer Affairs, *The Do's and Don'ts of Using the Small Claims Court* (2002), available at http://www.dca.ca.gov/legal/small_claims/ (last accessed March 11, 2003). This guide explains how to file a claim, how to notify the opposing party, how to present a case in court, and how to ensure that a judgment is enforced.
- ¹⁹ Note that only the party against whom a claim is filed has a right to appeal from the judgment on that claim. In other words, a plaintiff has no right to appeal unless the defendant filed a cross claim (i.e., a demand against the plaintiff) and the court ruled in the defendant's favor on the cross claim. The superior court that hears an appeal must conduct a new hearing (rather than merely reviewing the small claims court proceedings) with the same informality and procedures used in small claims court. See Cal. Civ. Proc. Code §§ 116.710(b), (c); 116.770(a), (b).
- ²⁰ Cal. Bus. & Prof. Code §§ 17200–17210.
- ²¹ Cal. Bus. & Prof. Code § 17204.
- ²² 17 Cal. 4th 553 (1998).
- ²³ TALC's model private right of action provision was drafted to limit some of the abuses that have been associated with section 17200 lawsuits. For example, TALC's model prohibits multiple suits on behalf of the general public for the same violation.
- ²⁴ See Cal. Bus. & Prof. Code § 17593 (stating that any person who has received a telephone solicitation in violation of state law “may bring a civil action in small claims court for an injunction or order to prevent further violations”); Cal. Civ. Code § 1950.5 (stating that any controversies that arise with regard to the law on rental security deposits may be adjudicated in small claims court if the damages claimed are under \$5,000).
- ²⁵ Otherwise, advocates have the option to sue in one of the other divisions of superior court.
- ²⁶ *City and County of San Francisco v. Small Claims Division of San Mateo*, 141 Cal. App. 3d 470, 476 (1983) (finding that a small claims court had jurisdiction over 170 individual actions alleging that airport noise was a nuisance that caused damages of \$750 to each claimant).