

Second Supplement to Memorandum 95-43**Unfair Competition: Draft of Tentative Recommendation
(Comments from Consumers Union)**

Attached to this supplement is a letter commenting on the staff draft statute in Memorandum 95-43 from Gail Hillebrand, on behalf of Consumers Union. The letter is reproduced in the Exhibit.

The comments are generally favorable, but raise a number of significant issues for Commission consideration. The staff will raise these issues at the appropriate point as the Commission reviews the draft statute section by section.

The principal substantive issue concerns the res judicata rules in draft Section 385.34 and in discussion Section 385.36. (See Exhibit p. 5.) CU is not persuaded that the res judicata rule is “really necessary to avoid the problems that have been alleged in Unfair Competition Act actions.” CU argues that the court in a second similar case on behalf of the general public would have the inherent power to dismiss the action based on mootness. The letter refers to an argument of this kind CU is making in a case currently on appeal. The staff will follow this matter and relay any additional information from CU on the topic. However, with the information at hand, and taking into account the arguments made by Prof. Fellmeth in his background study and various presentations to the Commission, the staff still considers a clear, if limited, binding effect to be a significant element of the proposed scheme. In addition, if the same result is to be achieved through mootness, the objection to the limited statutory rule on binding effect is not clear.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary



Publisher of Consumer Reports

Law Revision Commission
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SEP 20 1995

File: _____

September 19, 1995

Mr. Colin Wied
Chairperson
Mr. Stan Ulrich ✓
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite 2D
Palo Alto, CA 94303-4739

Re: Staff Draft Tentative Recommendation, B-700, Unfair Competition

Dear Chairperson Wied, Mr. Ulrich and Members of the Law Revision Commission:

Consumers Union, the nonprofit publisher of *Consumer Reports*, wishes to compliment the Law Revision Commission on the careful work and analysis which has resulted in the current, and more limited, draft proposal relating to the procedure for unfair competition actions. The latest proposal is far preferable to the broader proposals which have been previously discussed by the Law Revision Commission. However, we still must suggest that the Law Revision Commission give careful consideration to whether the res judicata portion of the proposal, found at sections 385.34 and 385.36, is necessary. Many of the issues which have been identified in connection with Unfair Competition Actions, such as conflict between public and private cases or allegedly inadequate plaintiffs or counsel, are usefully addressed in other sections of the staff draft tentative recommendation. Those sections can operate in the absence of any res judicata provisions. There is much to be said for moving forward with the conflict of interest, adequacy of settlement, public registry, and perhaps the public/private stay provisions now, and revisiting the issue of res judicata in the future if, and only if, these provisions are inadequate after they have been fully implemented. If the Commission chooses this approach, it would adopt all of the staff draft tentative recommendation except sections 385.34 and 385.36.

1. Placement in the Code

It is appropriate to place these procedural prerequisites to filing an Unfair Competition Act complaint in the Code of Civil Procedure. Avoiding placing these provisions in the Unfair Competition Act itself should assist the Law Revision Commission to keep the legislation focused on the procedural issues. It should help to avoid the measure becoming a lightning rod for other proposals by a variety of special interests which may desire to reduce the effectiveness of the

Unfair Competition Act.

2. Section 385.22: Adequate Legal Representation

The staff draft tentative recommendation on the issue of adequacy of legal representation and absence of conflict of interest by the plaintiff is a useful provision. It should promote additional court scrutiny so that these actions are brought by attorneys who are qualified and by parties which lack a conflict of interest. At the same time, this draft, unlike earlier drafts, avoids interfering with the broad standing principles of Business and Professions Code Sections 17204 and 17525.

3. Section 385.24: Notice to the Attorney General's Register

We believe that the registry is valuable and that notice should be required to be given to the registry as well as to the attorney general. The registry will permit the media, the public and public interest organizations to monitor the filing, pursuit and settlement or judgment of unfair competition actions in California. It will provide the same opportunity to any regulatory agencies which do not receive direct notice of the actions. Notice to the Attorney General without notice to the public registry is not adequate to serve this goal. Unfortunately, the degree of commitment to the enforcement of consumer and environmental laws can change with changes in publicly elected law enforcement officials, budgetary restraints, and other factors unrelated to the merit of the cases. Therefore, the registry is necessary to encourage public interest groups and others to monitor the filing and development of cases in this area.

The notice requirement in section 385.24 does not suffer from the key drawback of mandatory pre-filing notice requirements, in that it should not interfere with the ability to seek temporary restraining orders or preliminary injunctions because the notice requirement may be satisfied at the time of filing. This is preferable to a pre-filing requirement.

4. Section 385.26: Disclosure of Similar Cases by Defendant

The staff note to this section raises the question of what the consequences should be for a defendant's failure to comply with the requirement to disclose similar cases. If the res judicata approach of the draft is adopted, then it would be critical that the penalty for failure to disclose to include failure to achieve res judicata status for the judgment as against those parties who had pending cases and received no direct notice because the defendant did not disclose the existence of those cases.

5. If a defendant could achieve res judicata effect as to actions on behalf of the general public without either giving notice to the parties in those cases or disclosing the cases so that its opposing party could give notice, this would be a recipe for abuse of the statute. It would reward violation of the statutory disclosure obligation. It also could encourage defendants to "shop" among multiple cases to select the case which is least likely to be vigorously litigated, presented, and negotiated as the case to be taken to stipulated judgment.

6. Section 385.28: Notice of Terms of Judgment

The staff draft raises the question of the appropriate length of time for notice of the proposed terms of a judgment in a representative action. We suggest that the period not be any shorter than 45 days. If the Attorney General is likely to take a week or ten days to post the notice on its registry, then a 60 day period would be more appropriate.

In this section, the staff draft also raises the question of how a plaintiff might determine which regulatory agency, if any, must receive notice. The staff note legitimately points out that it can be difficult to determine whether any agency has jurisdiction and to identify all the agencies that may have jurisdiction over a particular practice or entity. One way to address this would be to require notice only to any state regulatory agency which has licensed the defendant entity. If the defendant entity does not have a state license, no regulatory notices would be required. Some defendants do hold multiple state licenses, but in those instances, for all of their licensing agencies may wish to receive notice of the allegations and proposed judgment against them.

Another way to provide certainty on the question of regulatory agency notice would be to provide a safe harbor so that the regulatory agency notice provision is satisfied if notice is given to those agencies which the defendant discloses to the plaintiff as its regulatory agencies.

We urge the Commission to leave in the text the reference in section 385.28(b) to "other interested person(s)." In our experience, other interested persons such as consumer organizations are sometimes the most effective potential objectors to an inadequate proposed settlement.

Whether or not the judgment will have res judicata effect as against other actions on behalf of the general public, the procedure for entry of judgment in an action brought on behalf of the public should permit and indeed encourage comment on the adequacy of the proposed judgment from the widest possible group. This will

include not only persons with other similar cases against the defendant, but also other interested persons. Those persons might include other persons with claims that have not yet been filed against the defendant, or watchdog public interest groups, or regulatory agencies which did not receive direct notice.

7. Section 385.30: Findings for Entry of Judgment.

Our comments in connection with this section mirror those above. In order to encourage public comment prior to entry of the judgment in an action on behalf of the public, this section should be expanded to include a requirement to permit comment by any person on the fairness or adequacy of the proposed judgment. That provision is now found in section 385.36(c). However, that section is more limited in its application and is not recommended for adoption by staff. We strongly urge the Commission to include in section 385.30 the requirement for the court to provide an opportunity to comment to any person objecting to the fairness or adequacy of a proposed judgment, and to consider those comments. That requirement is now found at section 385.36(c). Although current section 385.30 requires that the court find that the entry of the judgment be in the interests of justice, it does not explicitly require the court to accept or consider the comments of the public.

If the res judicata approach of section 385.34 is retained, then we urge that one additional change be made to section 385.30. That change is to add to that section - which would govern entry of all Unfair Competition Act judgments - the precondition now found only in section 385.36(d). That precondition is that the court may limit the scope of the res judicata effect before entering the judgment. If the Commission does recommend adding res judicata effect for these actions, it should at least recommend an explicit authorization for the court to first make an affirmative determination of the degree to which res judicata effect is desirable before it enters the judgment.

8. Section 385.32: Preliminary Relief

The staff notes pose the question of whether this section is necessary since the court has inherent equitable power to grant preliminary relief. Because of the additional procedural requirements being placed on unfair competition actions, we believe that it would be valuable to retain this section to ensure that there no legislative intent is created to restrict or limit the ability of the court to provide for preliminary relief in advance of completing the various new notices. Therefore, we recommend retaining section 385.32.

9. Section 385.34: Binding Effect of Representative Action

As discussed above, we appreciate the thoughtful narrowing that has gone in to the preparation of this section. However, we are not persuaded that this res judicata rule is really necessary to avoid the problems that have been alleged in Unfair Competition Act actions. The stay provision addresses the possibility of multiple ongoing actions. We believe that the court in the second case already has the inherent power to dismiss a second action on behalf of the public without a res judicata effect of the first case. Indeed, we recently briefed this issue in the Court of Appeal in Gray v. Safeway, arguing that the law of mootness would have permitted a dismissal of a second private action where an earlier public action provided all the benefits to the public which were sought in the second action.

10. Section 385.36: Binding Effect on Individual Claims

We are in general agreement with the staff recommendation that this section should not be adopted. However, we strongly urge that subpart (c) of this section be moved into the general requirements in section 385.30 for findings prior to approval of settlement or entry of judgment. If the Commission adopts the res judicata approach, then subsection 385.36(d) also should be moved into section 385.30.

11. Section 385.40: Priority Between a Public Prosecutor and Private Plaintiff

With several changes, we would see this section as a balanced approach to the issue. We believe that the approach of this section is more likely to be workable and effective than the language proposed by the California District Attorneys Association Consumer Protection Committee on this point. The District Attorneys Association's proposal would provide for a stay of any private litigation until the law enforcement agency's proceedings are completed. Unfortunately, that proposal is not conditioned upon vigorous prosecution or upon timely completion of the public action. The staff draft tentative recommendation in section 385.40, by contrast, appears to permit a court to lift the stay of a private action in favor of a public action if the public action is not pursued in a timely fashion. We suggest, however, making this clearer in the staff draft by adding a third basis to overcome the presumption of preference for the public prosecutor. The new language would read, in substance: "385.40(b)(3) If the public prosecutor has not vigorously pursued the case, the presumption shall be overcome and the stay may be declined or lifted."

The second change we suggest in this section is to clarify that the stay under section 385.40 is discretionary rather than mandatory. We suggest this be addressed at section 385.40, line 10, by eliminating the language, "shall determine which action should proceed and shall stay the other action" and replacing this language with, "shall determine whether one of the actions should be stayed, and if so, shall stay that action after notice and opportunity to be heard by all affected parties."

Finally, the stay section also should be restricted to cases concerning similar time frames and geographic areas. On the face of the language of section 385.40, a court could stay a private action suing a defendant for activity in San Diego because a district attorney in Fresno had sued to stop the same conduct in its jurisdiction. Although this may not have been the intent of the language, it could be best avoided by adding at line 9 after "substantially similar facts and theories of liability," a phrase such as "in a similar time frame and in similar geographic areas."

12. Section 385.42: Attorneys Fees

We support this section. We believe that it will reduce the disincentive to develop private cases (which can deter illegal behavior) that otherwise would be caused by the notice and possibility of stay of a private action in preference to the public action.

Conclusion

We respectfully suggest that the Commission consider adopting the elements of the staff draft tentative recommendation without the two res judicata sections (sections 385.34 and 385.36), and revisit the issue in a few years if those new sections are found to be insufficient to reduce or eliminate the problems which have been alleged concerning Unfair Competition Act actions.

The new procedural rules would be quite substantial even without added res judicata. They would include:

- 1) an affirmative judicial inquiry into conflict of interest and adequacy of counsel;
- 2) notice to the registry of both filing and proposed settlement or judgment;
- 3) notice of settlement or proposed judgment and a fairness type hearing with notice to other parties and to a public registry, with an opportunity for public comment;
- 4) authority for stay where necessary due to multiple actions; and

- 5) preservation of the ability of private attorneys who develop cases to secure attorneys fees for work done before a stay.

We respectfully suggest that the Law Revision Commission adopt these elements of the staff draft tentative recommendation, with the recommended modifications to the stay section, while omitting the more radical res judicata sections until these other procedural improvements have had a chance to work. We look forward to discussing these issues with the Commission at its September meeting.

Very truly yours,


Gail Hillebrand

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