Study B-700 October 7, 1996

First Supplement to Memorandum 96-67

Unfair Competition Litigation: Comments on Tentative Recommendation (Attorney General Letter)

We have received two additional letters commenting on the Tentative Recommendation on *Unfair Competition Litigation* (May 1996):

pp.
1. M. David Stirling, Chief Deputy Attorney General (Oct. 3, 1996) 1
2. Fred J. Hiestand & Carol Livingston, Association for California Tort Reform (Oct. 8, 1996) 5

COMMENTS OF ASSOCIATION FOR CALIFORNIA TORT REFORM

The Association for California Tort Reform (ACTR) suggests that the recommendations for "repair" of the unfair competition statute

> do not go far enough to deal with abuses attendant to the Act. At the very least, then, ACTR urges the Commission not to retreat further from its modest recommendations in the face of opposition from counsel who have found it to be a fertile field for the mining of their future attorney fees. [Exhibit p. 5.]

ACTR suggests three areas of reform that are not covered by the tentative recommendation (Exhibit pp. 5-7):

> The Act should be amended to preclude the "bootstrapping" of standing to enforce another statute for which private enforcement has not been explicitly permitted.…
>
> The term "unlawful business practice" should be further defined in the Act. The term "unlawful" is not free from ambiguity; and thus far that ambiguity has served to embrace practically every conceivable source of law.…
>
> Some standards for standing and justiciability should be added to the Act.…

ACTR concludes with the hope that the Commission will "reconsider these additional recommendations for reform of the UCA." (Exhibit p. 7.)

The suggested revisions go to some of the fundamental principles of the unfair competition statutes. As ACTR recognizes, the Commission has attempted

to identify a set of modest procedural reforms that have a reasonable chance to achieve general support. The Commission has not considered the suggestion to define or limit the scope of the unfair competition statute. The "bootstrapping" issue has been considered only in the limited context of whether the unfair competition statute should be permitted to extend the statute of limitations that would otherwise apply — and that issue has been postponed for later consideration in light of its controversial nature. The issue of standing has been discussed but left untouched, in part because requiring that the plaintiff be an injured party or typical of the class was not seen as solving the problems identified in the statute.

The staff does not recommend including any of these features in the present draft. This would be contrary to the Commission's attempt to find a consensus approach. The question remains, however, whether the Commission is interested in any of these issues for future consideration.

COMMENTS OF ATTORNEY GENERAL

M. David Stirling urges the Commission to "defer action … on the proposed revisions until the potential problems with these aspects of the proposed revisions can be addressed." (Exhibit p. 1.) The staff does not believe that deferral is needed to resolve the concerns expressed. Mr. Stirling is concerned that the provisions relating to binding effect (Section 17309) and the priority of prosecutors (Section 17310) "have the potential for seriously undercutting the ability of the Attorney General and other law enforcement officials to carry out their responsibility" under the unfair competition laws. (Exhibit p. 2.)

§ 17309. Binding effect of judgment in representative action; setoff

The letter misstates the coverage of Section 17309(a). The binding effect rule does not apply to enforcement actions. As discussed in Memorandum 96-67, the provision should be applied only to what it is intended to cover — it speaks only to the binding effect of a private representative action on other members of the general public who might later try to bring another representative action. This is all the rule would govern. It does not govern or influence the effect of a public prosecutor's enforcement action. The developing, unclear, contradictory, confused (pick your adjective) case law on res judicata in this area is not affected. Consequently, we cannot agree with Mr. Stirling's conclusions based on his reading of Section 17309. If the law of res judicata is as Mr. Stirling suggests (see

Exhibit pp. 2-3), then defendants will continue to have the incentive to settle that they have now, because Section 17309 has no effect on that law.

The staff thinks that the clarifications proposed for Section 17309 and its Comment in Memorandum 96-67 at pages 19-20 should deal with this concern.

§ 17310. Priority between prosecutor and private plaintiff

Mr. Stirling writes (Exhibit p. 2-3) that draft Section 17301

> recognizes law enforcement officials' primary authority to enforce the unfair competition law *only* on the condition that the prosecutor "seek substantial restitution to the general public." This provision effectively does away with the Attorney General's and other law enforcement officials' prosecutorial discretion to decide in a given case whether restitutionary recovery is appropriate given all the facts and circumstances.... [I]f the prosecutor does not seek substantial restitution, the private plaintiffs' class or representative action may be coordinated with the prosecutors' action and/or may proceed in tandem with it, thus effectively eliminating the prosecutor's ability to control the litigation.
>
> ....
>
> If the stipulated judgment obtained by the Attorney General or District Attorney in a consumer protection case does not bar a subsequent private action against the same defendants for the same unlawful business practice, then no defendant has any incentive to settle with the Attorney General or District Attorneys....

This concern revolves around the rule in Section 17309(b)-(c) intended to encourage "substantial restitution" to the general public. This addresses the frequently expressed concern that prosecutors may shade the settlement of monetary claims toward civil penalties at the expense of restitution to individuals who comprise the "general public" in the case. Note, however, that the draft statute does not require any particular form of restitution nor does it establish a right to restitution. It only provides a procedural right of private plaintiffs *to seek to be heard* on the issue in a pending case. If the prosecutor's action is filed first, then the private plaintiff cannot intervene at all unless the enforcement action does not seek substantial restitution. If a private plaintiff's action was filed first, the action is stayed upon the prosecutor's entry, then the private representative action may be reinstituted if the prosecutor's action does not result in substantial restitution. These rules should encourage substantial restitution, and to that extent, they will have a potential effect on the prosecutor's discretion, as Mr. Stirling fears.

The letter does not indicate what changes would need to be made to remove the Attorney General's objections. It appears that nothing less than a statutory rule providing absolute priority to public prosecutors' enforcement actions would be acceptable. That would codify the reported results in the trial court decisions (including the Computer Monitor Litigation, see Memorandum 96-67, Exhibit pp. 65-69). But the issue is far from settled and we do not find the authorities cited in Mr. Stirling's letter or in the amicus brief submitted in the Computer Monitor Litigation to be conclusive. Nor can we make the leap from the rule that a government suit on behalf of the public *can* bind private members of the public (*Rynsburger*), to the conclusion that a prosecutor's action under the unfair competition statute *must always* preclude private representative actions or participation.

The Commission has attempted to find a sensible compromise solution, working with the California District Attorneys Association and representatives of the Attorney General's office who have attended meetings and submitted written comments, as well as representatives of public interest groups and private litigators. We don't know that Mr. Stirling is suggesting adoption of an absolute preference rule, but that appears to be the direction of this comments. An absolute priority for the Attorney General would be vigorously opposed by the private plaintiffs and public interest bar. The Commission may recall that some very early draft proposals, including the original suggestions of Prof. Fellmeth, included a greater conclusive effect of prosecutor actions. The letters attached to the main memorandum amply demonstrate the difficulty the non-prosecutor bar has with accepting the draft proposal for a relative statutory preference for prosecutors. (See Memorandum 96-67, pp. 28-30.)

The staff does not see any compromise approach to resolving Mr. Stirling concerns with this section, as long as it contains the "substantial restitution" standard or equivalent language. It appears that he would agree with the recommendation of Alan Mansfield, Milberg Weiss Bershad Hynes & Lerach, that this section should be "deleted in its entirety." (See Memorandum 96-67, p. 29.) Tom Papageorge, CDAA, has made clear on several occasions that there are differing opinions in the prosecutor community on the acceptable level of private involvement and prosecutor priority. (See, e.g., Memorandum 96-67, p. 31.) Jeffrey Margulies, Haight, Brown & Bonesteel, speaking from the defense perspective, has urged a position consistent with the Mr. Stirling's letter, to give the Attorney General a greater or total authority to "intervene in and take over

any prosecution 'in the public interest,' regardless of whether he has filed his own action." (Memorandum 96-67, p. 31.)

As reported in the main memorandum, Prof. Fellmeth is also "not sure how to improve the current draft," from the perspective of trying to find a balanced approach. The staff thinks that the question for the Commission comes down to either approving Section 17310 largely as it stands or deleting it from the draft and leaving the matter to case law.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

State of California

Office of the Attorney General

Daniel E. Lungren
Attorney General

October 3, 1996

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Unfair Competition Litigation -- Proposed Revision

Dear Commission Members:

The Attorney General of California submits the following comments respecting the California Law Revision Commission's ("the Commission's") tentative recommendation regarding proposed revisions to the unfair competition law, California Business & Professions Code Sections 17200 et seq. ("proposed revisions"). Our comments relate specifically to the proposed revisions regarding the binding effect of judgments in representative actions brought pursuant to Sections 17200 et seq. (proposed Section 17309), and respecting the priority between an action brought by a public prosecutor and one brought by a private plaintiff (proposed Section 17310).

The Attorney General recognizes and commends the Commission's effort to clarify the law in this complex area. However, we are concerned that the proposed revisions would have the unintentional effect of impairing the Attorney General's ability to negotiate comprehensive settlements and obtain restitutionary relief for California consumers. Accordingly, as discussed below, we urge that the Commission defer action on the proposed revisions until the potential problems with these aspects of the proposed revisions can be addressed.

The Attorney General and other law enforcement officials are the primary enforcers of the unfair competition law. The Attorney General is the chief law enforcement official of the State, and has broad powers and obligations to protect public rights and interests. *See* Cal. Const., Art. 5, Section 13; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 14-15. The Attorney General and other law enforcement officials have powers and authority under these laws which private plaintiffs

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and their counsel do not. *See, e.g.*, Cal. Bus. & Prof. Code §§ 17206, 17206.1, 17207, 17535.5, 17536 (civil penalties and civil penalties for violation of an injunction); Cal. Bus. & Prof. Code § 17508 (authority to require advertisers to submit evidence substantiating advertising claim); Cal. Govt. Code § 12527 (authority to obtain or act as receiver to obtain restitution or freeze assets). Consequently, the Attorney General and other law enforcement officials have the preeminent role in implementing these statutes; private enforcement is secondary and subsidiary.

Two aspects of the proposed revisions have the potential for seriously undercutting the ability of the Attorney General and other law enforcement officials to carry out their responsibility to implement and enforce the unfair competition law. First, proposed Business & Professions Code Section 17309 as drafted appears to contemplate that although a judgment in an action brought by the Attorney General or a District Attorney would bar a future "representative" action under Business & Professions Code Sections 17200 et seq., it would *not* bar individual claims for damages or other relief based upon substantially similar facts and theories of liability. Thus, a defendant who entered into a consent settlement with the Attorney General or another law enforcement official could still face a private class action under these statutes, the California Consumers Legal Remedies Act and other statutes for the same alleged violations, subject only to "set off" of the relief obtained in the government action.

In addition, proposed Section 17310 recognizes law enforcement officials' primary authority to enforce the unfair competition law *only* on the condition that the prosecutor "seek substantial restitution to the general public." This provision effectively does away with the Attorney General's and other law enforcement officials' prosecutorial discretion to decide in a given case whether restitutionary recovery is appropriate given all the facts and circumstances. Under the provisions of proposed Section 17310 (b-c), if the prosecutor does not seek substantial restitution, the private plaintiffs' class or representative action may be coordinated with the prosecutors' action and/or may proceed in tandem with it, thus effectively eliminating the prosecutor's ability to control the litigation.

Under existing California res judicata principles, a judgment (including a stipulated judgment) in an action brought by a representative plaintiff that is a governmental entity with statutory authority to bring the action bars any subsequent suit by private individuals. This is so even though the government action was not a class action and actual notice was not given to

members of the public, because the governmental entity adequately represents the interests of its citizens. *See, e.g., Rynsberger v. Dairymen's Fertilizer Coop., Inc.* (1968) 266 Cal. App.2d 269, 277; *City of Chino v. Superior Court* (1967) 255 Cal. App.2d 747, 755; *and see Alaska Sport Fishing Ass'n v. Exxon Corp.* (9th Cir. 1994) 34 F.3d 769. The California Superior Court in three separate actions has concluded[1] that a stipulated consent judgment entered in an action brought by the Attorney General and District Attorneys pursuant to Section 17200 *et seq.* barred all claims in subsequent purported class actions brought by private parties. *In re Computer Monitor Litigation*, S.F. Super. Ct. No. JCCP-3158 (order dated July 3, 1996); *Alexandra v. Lucky Stores, Inc.*, Alameda Super. Ct. No. 727750-4 (order dated April 19, 1994); *Gray v. Safeway, Inc.*, Alameda Super. Ct. No. H-171057-9 (order dated July 19, 1994).[2]

Thus, we believe the effect of the proposed revision is out of step with the evolution of res judicata and collateral estoppel principles both in the California and federal courts. From the perspective of the Attorney General, this is not a theoretical legal concern, but a serious practical problem, because it will impair the Attorney General and District Attorneys' ability to obtain stipulated judgments providing for injunctive relief and restitution for California consumers. The Attorney General made this point in an amicus curiae brief which was recently submitted in the *In re Computer Monitor Litigation, supra*, a copy of which is enclosed.

If the stipulated judgment obtained by the Attorney General or District Attorney in a consumer protection case does not bar a subsequent private action against the same defendants for the same unlawful business practice, then no defendant has any incentive to settle with the Attorney General or District Attorneys. Every defendant will argue that because the

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[1]We recognize that these decisions do not have precedential effect, but they do indicate how res judicata principles have been applied in practice in California in these situations.

[2]We recognize that arguably contrary dicta can be found in the California Supreme Court's decision in *People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10 and *People v. Superior Court (Good)* (1976) 17 Cal.3d 732. The res judicta issue was not presented to or decided by the Court in either case, however, and the subsequent evolution of res judicata law both in California and in the federal courts makes the continuing vitality of the dicta extremely questionable.

government attorney does not represent all consumers and because the defendant must face subsequent private suits for duplicative restitution, damages and even injunctive relief, the defendant cannot agree to any significant injunctive or restitutionary relief with the government. Indeed, defendants are likely to resist entering into settlements with the Attorney General or District Attorneys because the publicity surrounding such settlements will *trigger* copycat private class action lawsuits.

Accordingly, the proposed revisions would significantly undermine the ability of the Attorney General and District Attorneys to negotiate comprehensive settlements and obtain restitutionary relief on behalf of the general public for violation of the unfair competition law. Such a result does not serve the long-term interest of California consumers. The Attorney General therefore urges that the Commission defer action on the proposed revisions until these problems can be addressed. The Attorney General's office would be happy to work with the Commission respecting these issues.

Sincerely,

M. DAVID STIRLING
Chief Deputy Attorney General

Enclosure

ASSOCIATION FOR CALIFORNIA TORT REFORM

October 8, 1996

Mr. Allan L. Fink
Chairperson
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: *Tentative Recommendation on Unfair Competition Litigation*

Dear Chairman Fink and Members of the Commission:

The Association for California Tort Reform (ACTR) commends the Commission and its staff for the impressive work done to date on California's Unfair Competition Act (hereinafter "UCA" or "Act"), but respectfully suggests that the recommendations for its repair do not go far enough to deal with abuses attendant to the Act. At the very least, then, ACTR urges the Commission not to retreat further from its modest recommendations in the face of opposition from counsel who have found it to be a fertile field for the mining of their future attorney fees.

ACTR is an eighteen year old non-profit corporation with a broad membership from businesses, professional associations and local government. Our principal purpose is to educate the public about ways to improve California's civil liability system in terms of fairness, efficiency, economy and certainty. Toward that end we have petitioned the government—the legislature, the judiciary and the people themselves—for redress with respect to who get how much, under what circumstances, and from whom when injured by the tortious acts of others. The UCA, originally a codification of the common law tort of unfair competition, has unfortunately been expanded into a virtual Omnibus Act by a series of statutory amendments and unfortunate judicial gloss placed upon it. As currently applied, the UCA can be used to reach out through litigation and clobber anyone for any alleged wrong, real or imagined, to which any member of the public takes exception. The detrimental impact on the economy and the public interest from such an uncabined and unconfined legal cause of action cannot be gainsaid.

Those aspects of the UCA most in need of reform include the following:

●**The Act should be amended to preclude the "bootstrapping" of standing to enforce another statute for which private enforcement has not been explicitly permitted.** The most recent example of this type of overreaching is *Reese v. Payless, Inc. (1995) 34 Cal.App.4th 19, review dismissed as improvidently granted, S046829.* In this case the plaintiff sued on the ground that, though defendant sold containers of food that displayed on their labels the prescribed federal warning about the possible hazards of consuming the artificial sweetener saccharin, it did not post additional conspicuous notices near these food

containers stating the same warning as required by federal law. The pertinent federal law, however, prohibited any private right of action for failure to post this notice, conferring enforcement of this provision upon the federal government through civil or criminal prosecution. Nonetheless, the appellate opinion allowed plaintiff to use the UCA as a "toehold" to enforce the federal notice requirement.

Similarly, in *Stop Youth Addiction, Inc. v. Lucky Stores, Inc., et al.*, S055373, the appellate held that the plaintiff had stated a cause of action for violation of Business and Professions Code §17200 because the sale of cigarettes to minors is "unlawful" pursuant to Penal Code section 308, which confers enforcement for its violation exclusively upon public prosecutors. Additionally, the court found SYA had standing to sue under the UCA because the broad standing provisions of Business and Professions Code §17204 permits an action to enforce the UCA by " . . . any person acting for the interests of itself, its members or the general public." (*Id.*)

●**The term "unlawful business practice" should be further defined in the Act.** The term "unlawful" is not free from ambiguity; and thus far that ambiguity has served to embrace practically every conceivable source of law. Does it, for instance, refer only to the laws of California? Given *Reese*, obviously not. Does it embrace laws of other states? Should it be permitted to enforce either, since "the Legislature should neither invite federal encroachment nor surrender to a foreign agency, over which it has no control or supervision, powers given solely to it by the people. Illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure." *DeAgostina v. Parkshire Ridge Amusements, Inc.* (Sup. Ct. 1935) 278 N.Y.S. 622, 629 (quoting *Boyd v. united States* (1886) 116 U.S. 616, 635. If limited to California law, does it embrace all California laws, prohibitory and mandatory, criminal and civil, statutory and common law, regulatory and municipal? Does it sweep within its ambit prohibitions for which private rights of action are, either by the terms of the enactments themselves or judicial opinions interpreting them, barred? To raise these questions suggests sensible answers to them—e.g., not every source of law defines what is an unlawful business practice under the Act—but unfortunately to date the answers given by most courts in dealing with each question on an isolated basis has been to answer it in the affirmative.

●**Some standards for standing and justiciability should be added to the Act.** As the Commission knows, the UCA is bereft of any standing requirement, which is to say that one seeking to avail oneself of the Act's broad remedies need not show any real injury suffered as a result of the practice challenged under the Act. This permits counsel to borrow, which they in fact they have done, their mothers, secretaries or whoever as paper plaintiffs with no real interest or injury suffered from the challenged conduct. Indeed, the UCA may have had something to do with the demise of the old comic strip titled "There ought to be a law;" as it is difficult to conceive of any business practice that could not be said to be "unlawful" or "unfair" in the opinion of someone and therefore redressable under the Act.

Coupled with the enticement of potential attorney fees awarded a "prevailing party" under section 1021.5 of the Code of Civil Procedure, the UCA is fast becoming an "Attorney's Full Employment Act." Indeed, it well explains the cynical adage that "any town that can't support one lawyer, will always support two." ACTR submits that this is not what the Legislature intended when it enacted the UCA; and the sweeping interpretation of its scope and application over the years does not further the public interest or comport with common sense. It is, in short, time for the Commission to make serious recommendations to rein in the aforementioned abuses attendant to the UCA. We hope you will reconsider these additional recommendations for reform of the UCA and, should you afford us and other members of the business community a future opportunity to provide input on this important issue, look forward to working with you.

Cordially,

Fred J. Hiestand
ACTR General Counsel
Carol Livingston
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ACTR Special Counsel