

Study B-700

March 29, 1995

Second Supplement to Memorandum 95-14**Unfair Competition: Consultant's Recommendations
(Comments of Consumers Union)**

Attached to this supplement are comments on the unfair competition draft statutes from Consumers Union. We will consider this letter along with Memorandum 95-14 and the First Supplement.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary



Publisher of Consumer Reports

March 29, 1995

Nat Sterling, Esq.
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

MAR 29 1995

Re: Memorandum 95-14, Unfair Competition

Dear Members of the Law Revision Commission:

Consumers Union, the nonprofit publisher of *Consumer Reports* magazine, and the Proposition 103 Enforcement Project urge you to avoid burdening private attorney general actions to enforce consumer and civil rights with significant new procedural requirements. We urge you to proceed with great caution in evaluating the proposed changes which have been suggested by your consultant and others in public and private attorney general actions under California Business and Professions Code Sections 17200 and 17500 (the Unfair Business Practices Act). The class action type procedural requirements which have been suggested in order to provide res judicata and or collateral estoppel effect to Unfair Business Practices Actions would stifle valuable law enforcement actions by private attorneys general. As discussed below, the two principal problems that have been identified in unfair business practice actions can be addressed with a far more limited set of changes.

Value and Importance of Private Unfair Business Practices Actions

The Unfair Business Practices Act, Business and Professions Code Sections 17200 and 17500, *et. seq.* is the fundamental tool for both law enforcement entities and private organizations, which are interested in the enforcement of consumer laws.

Consumers Union has used these statutes to successfully enforce critical consumer rights. Such cases have included:

- 1) A case challenging health claims in the advertising of unpasteurized milk. In that case a permanent injunction was entered, imposing a corrective warning label describing health risks of the product to older persons, pregnant women, infants, and other vulnerable groups;

California Law Revision Commission
March 28, 1995
Page 2

- 2) A case challenging allegedly deceptive advertising of adjustable rate mortgages, which was settled for 16 newspaper statewide corrective advertising campaign;
- 3) A case challenging sales practices in the sale of insurance premium finance loans, which was settled for changes in practice plus restitution;
- 4) A case challenging the manner of calculating the fee on small loans by major consumer finance lender which was settled for a cessation in the practice plus restitution; and
- 5) A case challenging sales practices in the door to door sale of health maintenance organization services (case pending).

These and other important law enforcement cases have been made possible by the Unfair Business Practices Act's broad standing to consumer organizations and other persons not directly affected by the challenged practices. We urge the Law Revision Commission not to add procedural requirements that will render impractical such private law enforcement efforts by private plaintiffs. Class action type notice requirements would do so.

Areas for Further Study by the Law Revision Commission

Our interest in preserving the mechanism of the Unfair Business Practices Act, Sections 17200 and 17500, does not mean that we oppose any change to these sections. Instead, we suggest that the Law Revision Commission explore narrowly focused changes to address the particular problems that have been alleged in connection with these actions.

As we understand it, the impetus for changes in the rules and procedures governing Unfair Business Practices actions stems from two circumstances. The first is the filing of follow-on or "copy cat" cases after the filing, pursuit, and settlement of a case under the same facts by a public law enforcement official. The second is the filing of private attorney general cases by persons who may attempt to or succeed in settling them for an inadequate remedy. If the Law Revision Commission desires to address these issues, it should do so with measures tailored to the problem areas, rather than with a broad revision importing burdensome and inappropriate notice requirements and collateral estoppel effects of class action procedures into every Unfair Business Practices Act case.

California Law Revision Commission
March 28, 1995
Page 3

Follow-On Private Action

The problem of inappropriate follow-on private actions can be addressed by a clarification, and perhaps modest statutory expansion, of the inherent ability of a court hearing a cause of action in equity to do equity. The Unfair Business Practices Action sounds in equity. A court sitting in equity has the authority to dismiss a private unfair business practices action which follows a resolved public action, if the court finds that it would be inequitable to the defendant to permit the follow-on actions. Such a finding should be simple for a court to reach if the resolution of the public action stopped the practice and required the defendant to disgorge the benefit from the illegal practice through restitution. On the other hand, if the public action resulted solely in civil penalties and not in a change in practice or in restitution, a court might determine that the follow-on private case would not be inequitable.

We urge the Law Revision Committee to reject the invitation to struggle with ill-defined notions of res judicata and collateral estoppel, which may require imposing very significant new procedural burdens upon Section 17200 and 17500 actions. Instead, the Commission can and should address the follow-on suit problem more directly and simply. It can do so by proposing a statutory procedure to permit a defendant in an unfair business practices case to move for early dismissal of an unfair business practices action on the ground that the substance of the action has been litigated to judgment or settled by a public law enforcement office for the same geographic area and that the follow-on action would be inequitable. Such a standard would lead to dismissal of truly repetitive claims in a high percentage of cases. It would, however, protect the public from being bound by a result negotiated by an occasional underfunded or underzealous public attorney general.

We oppose the proposal for res judicata and/or collateral estoppel in Section 17200 and 17500 actions for several reasons. First and most fundamentally, the increased notice and other procedural requirements that must accompany an action which binds absent persons would eliminate the chief advantages of these actions as law enforcement tools for private attorneys general. The lost advantages include speed, simplicity, and a relatively inexpensive method to have a court examine the legality of a challenged business practice.

Class-type notice requirement would seriously restrict the ability of nonprofit consumer organizations and other citizen groups to enforce existing laws through the private attorney general mechanism. The Unfair Business Practices Act is

California Law Revision Commission
March 28, 1995
Page 4

sometimes used to challenge practices where no class action has been filed. Perhaps there is not enough at stake for any one affected individual to act as a class representative, or perhaps such individuals have been unable to find counsel or to undertake the potential liability for the expenses of a class case. These are cases where the more streamlined procedure of the Unfair Business Practices Act is particularly necessary.

Another basis for our opposition to added class-type notice requirements is that expensive steps such as newspaper notice are unlikely to benefit the ordinary members of the public, who are not likely to see a newspaper notice or to realize that what they may have at stake if they do see it. Finally, providing res judicata or collateral estoppel effect to 17200 and 17500 judgments and settlements increases the risk that these cases could be used in the future as "set-up" litigation to validate business practices without a full airing of the issues.

Provisions to Prevent or Deter Irresponsible or Inappropriate Private Resolution of Unfair Business Practices Actions

The second issue that seems to be driving this proposed revision is the perception that some private counsel use the Unfair Business Practices Act cause of action to sue and settle for payment of their attorneys fees without a proportionately appropriate benefit to the public in terms of a change in practice or restitution. We have seen no studies on the scope of this alleged phenomenon, nor do we have any reason to believe that it is so widespread that it should call for measures likely to undermine the very fabric of the Unfair Business Practices Act cause of action. If, however, there is proved to be a broad problem, or if the Law Revision Commission wants to address this issue on the basis of the scanty and anecdotal evidence that appears to be available, it can do so without resorting to complex notice or to concepts of res judicata and collateral estoppel. The draft before the Commission contains the building blocks:

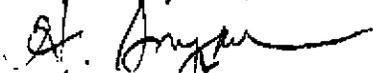
- 1) A judicial examination of the adequacy of counsel;
- 2) The absence of a conflict of interest by the plaintiff; and
- 3) A court hearing and approval of the fairness of any settlement of an Unfair Business Practices Act case.

California Law Revision Commission
March 28, 1995
Page 5

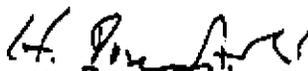
The draft before the Law Revision Commission proposes making these elements conditions precedent to res judicata or collateral estoppel effect of a judgment or settlement. We urge the Law Revision Commission to adopt a simpler approach: require that the court make an early finding of the adequacy of counsel and the lack of a conflict of interest in the plaintiff, and require that all proposed settlements of unfair business practices actions be brought before the court for a judicial evaluation of their fairness. These changes would go a very long way to preventing an inappropriate private action from progressing past the filing of the complaint. They would also avoid burdening with class action type requirements cases where a court has found the counsel to be adequate and the plaintiff to be appropriate.

California Unfair Business Practices Act, Business and Professions Code Sections 17200 and 17500 *et. seq.*, has been of great value to California consumers. We urge you to exercise extreme caution and to resist the invitation to impose class-action type procedural requirements plus res judicata or collateral estoppel on these cases. If any action is taken, it should be limited to action which addresses particular issues such as the follow-on case without restricting the availability of the cause of action to enforce consumer rights. In the era of shrinking government budgets, private enforcement of consumer rights is more critical than ever.

Very truly yours,



Harry Snyder
Gail Hillebrand
Consumers Union


Harvey Rosenfield
Proposition 103 Enforcement Project

cc: Stan Ulrich
Bob Fellmuth