

Memorandum 95-57

Unfair Competition: Revised Draft of Tentative Recommendation

At the September meeting, the Commission began considering the staff draft of a tentative recommendation on *Unfair Competition Litigation*, but did not finish before time ran out. The memorandum and supplements under consideration at the September meeting have been combined for convenience in this memorandum. The staff notes in the draft statute have been updated to refer to several of the comments made in letters attached as exhibits, but only as to issues that have not been considered and resolved. The attached draft tentative recommendation implements the decisions made at the September meeting, although further work needs to be done in some sections. (The draft statute begins on page 11 of the attached draft tentative recommendation.)

The explanatory text of the draft tentative recommendation has been minimally revised; once the Commission has completed review of the draft, the staff will revise the explanatory text to explain the draft in greater detail. The current version is included here to provide background.

Exhibits attached to this memorandum include the following:

	<i>pp.</i>
1. Prof. Robert Fellmeth, Revised Consultant's Draft (July 1995)	1
2. Thomas A. Papageorge, California District Attorneys Association Consumer Protection Committee (CDAA), June CDAA Draft	7
3. Gail Hillebrand, Consumers Union, San Francisco	10
4. Thomas A. Papageorge, CDAA, Los Angeles	17
5. Jan T. Chilton, Severson & Werson, San Francisco	27
6. S. Chandler Visser, San Francisco	32

Since the draft statute is fairly short and is intended to provide an integrated procedure, at the November meeting the staff would like to review the draft statute from the beginning (p. 11), moving fairly quickly over the parts that have already been considered, and concentrating on draft Sections 385.30-385.44 (p. 16 *et seq.*) which have not yet been reviewed.

Constitutional Limits on Binding Absent Parties

Late in the discussion at the September meeting, the question arose as to the extent to which absent parties may be constitutionally bound in the context of representative actions. The staff analysis of the issues in this area, focusing on federal and state class action law and considering its application to unfair competition actions, was presented in Memorandum 95-35 at the June meeting. The issues are complex and not fully resolved, but general conclusions can be drawn, even if some of the finer distinctions are open to speculation.

Class action procedures meet constitutional requirements, but not all class action rules are constitutionally mandated. In other words, class action law is not automatically applicable to representative actions in unfair competition litigation. The class action rules of constitutional dimension must be strained out of the voluminous state and federal case law.

The open-ended standing afforded by Business and Professions Code Section 17204 permitting a suit on behalf of the general public for injunctive relief and restitution is inconsistent with several fundamental rules applied in class actions. The plaintiff need not be an adequate representative of the class of injured persons in the sense of having suffered the alleged injury. A class representative, on the other hand, must be a member of the represented class. We cannot say for certain whether the protections in the draft statute directed toward plaintiff adequacy — lack of a conflict of interest and adequate legal representation — are sufficient to overcome the weight of authority in the class action context. The staff concluded that it would be controversial and that there would be no guarantee that the courts would find it constitutionally sufficient to bind absent parties in unfair competition actions.

The other major problem is notice and an opportunity to be heard. No certain conclusions can be drawn. Notice may not be required in an action for injunctive relief, where the case is not predominately for monetary relief (or “damages”). The scope and form of notice would also be an issue. If notice is required, then mere published notice is not likely to be sufficient to save a statutory scheme that is suspect on due process grounds, although such notice may be permissible in some cases. Requiring class action type notice raises the serious issue of expense and would eliminate one of the major advantages of the unfair competition statute over class actions from the perspective of plaintiffs — perhaps the most attractive feature of the unfair competition statute from a litigation standpoint.

In view of these uncertainties, a statute that attempted to impose binding effect under the current draft statute could result in much litigation as the parties and courts tried to apply the constitutional principles in each case. Settlement would be uncertain, since the effect would be unknown until a court had determined the issue in a later action. Some statutory guidelines are needed or the courts will have to fill in the rules on a case by case basis (or hold the statute unconstitutional). This is not to say that the working approach — providing minimum standards of adequacy and precluding only later representative actions — is the only constitutional approach. It could be combined with a rule that attempted to distill the case law applicable to injunctive cases and assert a binding effect on absent parties. But any approach that seeks to test the constitutional limits will necessarily result in appeals until the issues are settled. Other creative options may also be available.

Location of Statute

The June Minutes note the opinion of commentators at that meeting that the statute should be located in the Code of Civil Procedure. The concern expressed at the meeting was that undue attention might be drawn to the unfair competition statutes themselves if the rules on litigation were added to the Business and Professions Code. This point is made in Gail Hillebrand's letter on behalf of Consumers Union. (See Exhibit pp. 10-11.)

Professor Fellmeth's early proposals were directed to the relevant parts of the Business and Professions Code. His July draft (see Exhibit pp. 1-6) would place the new statute immediately following Code of Civil Procedure Section 382, the class action statute.

In order to provide more drafting elbow room, the staff draft adds a new chapter following the chapter on "Permissive Joinder" in which Section 382 appears. In Memorandum 95-43, the staff concluded that it is "not inappropriate" to locate a statute on representative actions in this vicinity of the Code of Civil Procedure. Title 3 (commencing with Section 367) of this part of the Code of Civil Procedure — entitled "Of the Parties to Civil Actions" — includes chapters entitled General Provisions, Married Person, Disability of Party, Effect of Death, Permissive Joinder, Interpleader, Intervention, and Compulsory Joinder. Note that the draft statute goes beyond the issue of parties and joinder, but so do several of the other existing provisions. There are a few of special rules of limited application in these general statutes on civil procedure that arguably could have

been placed elsewhere. See, e.g., Sections 376 (suit by parents for injury to child), 383 (suit by common interest development association).

As the draft takes shape and we approach possible approval of a tentative recommendation to be circulated for comment, the Commission needs to be certain on where the statute should be located. While it may not be *inappropriate* to put it in the Code of Civil Procedure, the obvious and *appropriate* place to put a statute dealing with unfair competition litigation under Business and Professions Code Sections 17204 and 17535 is in that code. This part of the Business and Professions Code is not ideally organized, but there is room following Chapter 5 (commencing with Section 17200) (Enforcement) in Part 2 (commencing with Section 16600) (Preservation and Regulation of Competition). The basic unfair competition statute is in one part and the related false advertising statute, which is incorporated by Section 17200, is in another — Article 2 (commencing with Section 17530) (Particular Offenses) of Chapter 1 (Advertising) of Part 3 (Representations to the Public). Adding a new chapter following the 17200 series is fairly consistent with the existing structure. It is also consistent with the approach normally taken, as in the Consumers Legal Remedies Act, Civ. Code § 1750 *et seq.*, which contains its own special class action rules.

Respectfully submitted,

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Assistant Executive Secretary