Study B-700 January 16, 1996

Second Supplement to Memorandum 96-3

Unfair Competition: Status of Study (Comments from Coalition of Manufacturers for the Responsible Administration of Proposition 65)

We have received a letter from Stanley W. Landfair, McKenna & Cuneo, Los Angeles, on behalf of the Coalition of Manufacturers for the Responsible Administration of Proposition 65, which is attached. (The voluminous appendices have not been reproduced, but will be available at the meeting.)

The letter speaks to the issue of the need for reform of the unfair competition statute, and also comments on the staff draft statute that has been before the Commission at previous meetings. We have not analyzed the substantive comments for this meeting, but will do so if the Commission decides to proceed with the study.

As to the issue of whether there is a problem, Mr. Landfair's letter makes several points:

- There has been an "explosive growth in recent years in the number of claims initiated against manufacturers and distributors of chemical products …alleging violations of the warning provisions of Proposition 65. These lawsuits typically seek civil penalties under Proposition 65, injunctive relief under Proposition 65 and the Unfair Competition Act, restitution under the Unfair Competition Act, and (sometimes most significantly) attorneys' fees and costs pursuant to Cal. Civ. Proc. Code § 1021.5." (See Exhibit pp. 1-2.)
- "It has been the prevailing practice of Proposition 65 plaintiffs to allege parallel claims under both Proposition 65 and the Unfair Competition Act…." (See Exhibit p. 2.)
- "It is the view of the Coalition that most of the actions initiated under Proposition 65 … have little legal merit and no social value, but are instituted instead as nuisance suits, to be settled for the costs of defense.… These suits typically are settled as nuisance claims, for amounts ranging from $10,000 to $50,000 each." (See Exhibit p. 2.)
- "The Unfair Competition Act claims add nothing substantive to the underlying claims, and serve only to increase the scope of the possible penalty, to the point that defending the case on the merits is not feasible." (See Exhibit p. 3.)

- "The Unfair Competition Act claims are used to expand the period of limitations, such as to revive claims that otherwise would have expired under Proposition 65.…" (See Exhibit p. 3.)
- "The Unfair Competition Act is used by private party plaintiffs in cases where the Attorney General or other public prosecutors have asserted primary jurisdiction under Proposition 65 for the purpose of instituting a second, duplicative lawsuit, merely for the purpose of collecting attorneys fees and costs …." (See Exhibit p. 3.)
- "The Unfair Competition Act is used to circumvent the jurisdictional limitations of the federal and California occupational Safety and Health Acts to create a private right of action where none exists or is permitted." (See Exhibit p. 3.)

The Coalition supports the draft statute insofar as it addresses some of these problems and urges the Commission to consider clarifying (1) "that claims predicated solely on violations of specific statutes are made subject to the statute of limitations for the underlying statute" and (2) mandating an automatic stay of litigation of Unfair Competition Act claims that are the subject of pending administrative proceedings. (See Exhibit pp. 3-4.)

The Coalition letter provides significant input on the issue before the Commission in Memorandum 96-3: whether anyone thinks there are practical problems with the unfair competition litigation statutes that can profitably be addressed by the Commission.

Respectfully submitted,

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Assistant Executive Secretary

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January 15, 1996

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RE: Unfair Competition Act Revisions

Dear Mr. Ulrich and Commission Members:

On behalf of our client, the Coalition of Manufacturers for the Responsible Administration of Proposition 65 ("Coalition"), we are submitting the following comments regarding the proposal under consideration by the California Law Revision Commission ("Commission") to reform the Unfair Competition Act, Cal. Bus. & Prof. Code § 17200 *et seq.* (Deering 1995) ("Unfair Competition Act"). The Coalition is a nonprofit corporation, organized under the laws of California for the purpose of giving persons that manufacture, distribute or use chemicals in California the opportunity to address public issues that arise in the administration of California's Safe Drinking Water and Toxic Enforcement Act of 1986, Cal. Health & Safety Code § 25249.5 *et seq.* (Deering 1988) (hereinafter referred to by its popular name, "Proposition 65").

The Coalition is addressing the Commission's proposed revisions to the Unfair Competition Act because it is used so frequently by plaintiffs in Proposition 65 actions as the basis for a second cause of action, under circumstances that the Coalition believes are unfair and constitute an abuse of the Unfair Competition Act. The Coalition appreciates this opportunity to state its views, and hopes that the Commission finds our comments helpful.

Introduction to Comments

As the context for the Coalition's comments, we wish to bring to the Commission's attention the explosive growth in recent years in the number of claims initiated against manufacturers and distributors of chemical products, including many against Coalition members, alleging violations of the

warning provisions of Proposition 65.1/ These lawsuits typically seek civil penalties under Proposition 65, injunctive relief under Proposition 65 and the Unfair Competition Act, restitution under the Unfair Competition Act, and (sometimes most significantly) attorneys' fees and costs pursuant to Cal. Civ. Proc. Code § 1021.5 (Deering 1995). Copies of numerous representative complaints initiating parallel claims under Proposition 65 and the Unfair Competition Act appear as Attachment 1.

As evidence of the volume of these actions, we include as Attachment 2 several recent listings of the Proposition 65 "60-Day Notices Received By The California Attorney General", also referred to as "Notices of Intent to Sue", received and published by the Office of the Attorney General in the calendar year 1995.2/ It has been the prevailing practice of Proposition 65 plaintiffs to allege parallel claims under both Proposition 65 and the Unfair Competition Act; therefore, these listings approximate an equivalent number of potential Unfair Competition Act claims as well. *See* Attachment 1. As the Commission can see from the listings, the overwhelming majority of Notices are issued by just a few Proposition 65 plaintiffs, the most prolific of which is a group referred to by the name "As You Sow" ("As You Sow"). A copy of a recent news article describing this group and its activities appears as Attachment 3.

It is the view of the Coalition that most of the actions initiated under Proposition 65 Act have little legal merit and no social value, but are instituted instead as nuisance suits, to be settled for the costs of defense. Most of the actions allege trivial "violations" of the Act, arising from arguable claims that the warnings used by defendants on their products do not satisfy the vague statutory standard ("clear and reasonable"), or vary in some insignificant way from the State's preferred "safe harbor" warning statements. These suits typically are settled as nuisance claims, for amounts ranging from $10,000 to $50,000 each. In addition, many more highly publicized suits focus on novel legal claims, such as (1) arguments that Proposition 65 consumer warnings should be extended to industrial

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1/ Proposition 65, generally speaking, has two operative provisions. The provision with the broader impact requires that persons doing business in California extend warnings to any person in California who will be exposed to certain chemicals designated by the State as causing cancer or reproductive toxicity. Cal. Health & Safety Code § 25249.6. The other operative provision of the Act prohibits businesses from discharging significant amounts of the designated chemicals into, or where they probably will migrate into, sources of drinking water. Cal. Health & Safety Code § 25249.5

2/ Actions pursuant to Proposition 65 may be brought by any person in the public interest if (1) the action is commenced more than sixty days after the person has given notice of the violation to the Attorney General and the district attorney and any city attorney in whose jurisdiction the violation is alleged to occur and to the alleged violator, and (2) neither the Attorney General nor any district attorney nor any city attorney has commenced and is diligently prosecuting an action against such violation. Cal. Health & Safety Code § 25249.7(d).

chemicals used in the work place, supplanting the warning requirements under other laws, such as the Occupational Safety and Health Act ("OSHA"), or (2) that Proposition 65 warnings should be required for articles whose use may result in the use of another product that contains (or is) a Proposition 65-listed chemical, but which the defendant does not manufacture, such as apparel (whose use may allegedly result in exposure to dry-cleaning fluids), firearms (whose use may result in exposure to lead in ammunition) or fork-lifts (whose use may result in exposure to gasoline and petroleum fumes). The Unfair Competition Act is used by the plaintiffs (inappropriately, in our view) to increase their potential recovery, and thus their negotiating leverage, in suits that do not merit bringing in the first place.

Each of the following abuses of the Unfair Competition Act occur regularly in the context of Proposition 65 litigation:

> The Unfair Competition Act claims add nothing substantive to the underlying claims, and serve only to increase the scope of the possible penalty, to the point that defending the case on the merits is not feasible;
>
> The Unfair Competition Act claims are used to expand the period of limitations, such as to revive claims that otherwise would have expired under Proposition 65, or, to so expand the scope of potential liability for claims which ordinarily could be prosecuted under the underlying act to discourage the assertion of a proper defense on the merits and force a settlement for the costs of defense, as discussed above;
>
> The Unfair Competition Act is used by private party plaintiffs in cases where the Attorney General or other public prosecutors have asserted primary jurisdiction under Proposition 65 for the purpose of instituting a second, duplicative lawsuit, merely for the purpose of collecting attorneys fees and costs pursuant to Cal. Civ. Proc. Code § 1021.5; and
>
> The Unfair Competition Act is used to circumvent the jurisdictional limitations of the federal and California Occupational Safety and Health Acts to create a private right of action where none exists or is permitted.

Insofar as the Commission's Draft Tentative Recommendation (revised October 24, 1995) addresses some of the inequities under the current Unfair Competition Act, the Coalition supports the proposal. In addition, the Coalition urges the Commission to consider two additional procedural revisions not addressed in the current Draft Recommendation. First, the Commission should clarify Cal. Bus. & Prof. Code § 17208 such that claims predicated solely on violations of specific statutes are made subject to the statute of limitations for the underlying statute. Second, the Commission should

add a provision to the Unfair Competition Act that mandates an automatic stay of litigation of Unfair Competition Act claims that are predicated on alleged violations of administrative regulations, such as Cal/OSHA standards or orders, pending resolution of proceedings by the appropriate administrative agency.

The Coalition's comments on the Draft Tentative Recommendation, and its further suggestions, are discussed below.

Comments on Draft Tentative Recommendation (revised October 24, 1995)

The Draft Tentative Recommendation would address at least two critical flaws in the current Unfair Competition Act, by providing (1) prerequisites for pleading representative actions (*e.g.*, sections 385.20, 385.22, 385.23 and 385.24) and (2) a greater degree of finality for defendants (*e.g.*, section 385.34). The Coalition favors both of these revisions.

The Coalition offers the following cases as examples of the need for greater finality. In *The People of the State of California v. Talsol Corp.*, County of Solano Superior Court Case No. 109963 (July 30, 1990), the Solano County District Attorney's Office filed a verified complaint for civil penalties and injunctive relief pursuant to Proposition 65 and the Unfair Competition Act predicated on the sale of products in California containing methylene chloride. (A copy of the complaint appears as Attachment 4.) The complaint arose from the discovery of an old Talsol product, which contained a Proposition 65 chemical without a Proposition 65 warning on the label, that was manufactured and sold well before Proposition 65 was enacted.

On September 11, 1990, the Solano County District Attorney's Office filed a dismissal of the entire action with prejudice. (A copy of the signed Request for Dismissal appears as Attachment 5.) In a letter to Talsol Corporation, Mr. Pollock explained that the dismissal was "[b]ased on the evidence that [Talsol Corporation was] able to provide, showing that Talsol Corporation has made every reasonable attempt to comply with California's Proposition 65," and that "Talsol actively complied with the law in 1988 by placing a Proposition 65 warning on all product containing methylene choloride as it was manufactured and sending stickers out to distributors for labeling products already in the market." Mr. Pollock also expressed appreciation for the "level of cooperation and clear intent on the part of Talsol Corporation to comply with Proposition 65 . . . ." (A copy of Mr. Pollock's letter appears as Attachment 6.)

Notwithstanding these pioneering efforts by Talsol to comply with Proposition 65, as well as the dismissal with prejudice filed by the Solano County D.A.'s Office, on December 30, 1991, the Environmental Defense Fund ("EDF"), through its then-counsel Clifford Chanler, filed with the Attorney General a Proposition 65 Notice of Intent to Sue Talsol for its sale in California of products containing methylene chloride. (A copy of the notice appears as Attachment 7.) EDF never filed a

complaint in the matter. On March 17, 1995, however, As You Sow through counsel Patrick Wilson of Mr. Chanler's law firm, filed a second Proposition 65 Notice of Intent to Sue Talsol. (A copy of the second notice appears as Attachment 8.) Mr. Chanler later filed an action under the caption, *As You Sow v. Talsol Corp.*, San Francisco Superior Court Case No. 970615 (July 13, 1995), which is basically identical to the complaint that was filed and dismissed with prejudice by the Solano County District Attorney in 1990. (A copy of the complaint appears as Attachment 9.)

In order to avoid the high costs of litigation, Talsol was forced to enter into a settlement with As You Sow, even though it previously had reached agreement with a public prosecutor as to compliance with Proposition 65. Specifically, Talsol was forced to agree to pay As You Sow a sum of $10,000 in order to settle the second suit, consisting of $2,000 in "restitution" under the Unfair Competition Act, and $8,000 to "reimburse" As You Sow for its supposed attorneys fees and costs. More importantly, Talsol was forced to agree to re-label its products with a new form of Proposition 65 warning to satisfy As You Sow. In order to do so, Talsol must scrap many expensive lithographic plates used to print the labels for its products. The plates (and all Talsol's products made from 1988 through the present) contain a Proposition 65 warning approved by Deputy District Attorney Pollock. New plates will be necessary to accommodate the new Proposition 65 warnings acceptable to As You Sow.

In the case of *People of the State of California v. The Sherwin-Williams Co.*, San Francisco Superior Court Case No. 952433 (June 10, 1993), the Attorney General of California filed a complaint against Sherwin-Williams alleging causes of action under Proposition 65 and the Unfair Competition Act, predicated on the manufacture, distribution and sale in California of certain aerosol paints, primers and related coating products that contain toluene. (A copy of the complaint appears as Attachment 10.) As You Sow thereafter, on August 31, 1993, filed a virtually identical complaint under the caption *As You Sow v. The Sherwin-Williams Co. et al.*, San Francisco Superior Court Case No. 954568. (A copy of the complaint appears as Attachment 11.)

On February 28, 1994, Sherwin-Williams concluded a settlement with the State of California in Case No. 952433, that resolved all claims brought against Sherwin-Williams by the People of California under Proposition 65 and the Unfair Practices Act, and required the payment of a civil penalty, reimbursement of attorneys fees and costs incurred by the State of California, and certain injunctive relief. (A copy of the consent judgment appears as Attachment 12.) In order to conclude the second case, however, it still was necessary for Sherwin-Williams to enter into a second settlement agreement with As You Sow. Indeed, as consideration for Sherwin-Williams' agreement to pay As You Sow's attorneys fees and costs in bringing the second, duplicative suit As You Sow agreed to withdraw and waive any challenge to the settlement between Sherwin-Williams and the State of California. (A copy of the settlement agreement appears as Attachment 13.) Yet both the State and As

You Sow claimed to be representing the People of California, and both were prosecuting the same violations.

These cases illustrate how corporations doing business in California may be subjected to successive litigation for alleged Proposition 65 and Unfair Competition Act claims and demonstrate the need for the reforms proposed by the Commission. Further, in keeping with the Commission's primary purpose of reforming the Unfair Competition Act to provide defendants with a greater degree of finality, the Coalition proposes the following amendments to the current draft Recommendation.

(1) Section 385.24: Notice of Filing Representative Actions to Attorney General

Proposed section 385.24 requires a private plaintiff to give notice with a copy of the complaint to the Attorney General no later than 10 days after a private plaintiff commences a representative action on behalf of the general public. This section should be expanded so that public prosecutors also are required to give notice of filing a representative action and a copy of the complaint to the Attorney General, and the Office of the Attorney General should publish a list of such notices, as it does under Proposition 65. This will tend to discourage duplicative filings of actions by private plaintiffs, after actions have been initiated by public prosecutors. As the proposal stands, duplicative suits may be stayed under proposed section 385.40, but only after considerable expense to both sides.

(2) Section 385.32: Authorizing the Court to Grant Preliminary Relief

Proposed section 385.32 authorizes preliminary relief in representative actions. This section needs to be clarified such that preliminary relief is not allowed prior to the court making a determination that the private plaintiff and plaintiff's attorney have met the requirements of proposed sections 385.20, 385.22, 385.23 and 389.24.

(3) Section 385.40: Priority Between Prosecutor and Private Plaintiff

Proposed section 385.40 provides for determining priority between public and private plaintiffs in conflicting actions. This section states, in pertinent part, "[i]f a private plaintiff has commenced a representative action and a prosecutor has commenced *an action against the same defendant based on substantially similar facts and theories of liability*, the court in which either action is pending, on motion of a party or on the court's own motion, shall determine which action should proceed and shall stay the other action" (emphasis added). In its current version, it is unclear whether this section applies in situations where when a public prosecutor commences an action against a defendant for violations of federal or state law (but not violations of the Unfair Competition Act), and a private plaintiff later initiates an action against the same defendant under the Unfair Competition Act based on the same violations of federal or state law that the public prosector is already pursuing. This section needs to be clarified to make clear that it does apply to such duplicative and wasteful actions.

As the Commission is aware, existing case law allows the Unfair Competition Act to be applied to a wide variety of alleged unlawful or unfair practices, including violations of federal and state law. *See Farmers Ins. Exch. v. Superior Court*, 2 Cal. 4th 377, 383 (1992) (Unfair Competition Act may address "anything that can properly be called a business practice and that is at the same time forbidden by law"). There are numerous instances where public prosecutors have brought actions against defendants for violations of federal or state laws (but not violation of the Unfair Competition Act), and private plaintiffs have initiated simultaneous actions under the Unfair Competition Act based on the same federal or state law violations.

This practice is patently unfair because it forces defendants with valid defenses to defend simultaneously against two plaintiff parties, so multiplying the costs of defense as to prevent the resolution of claims on their merits. This also results in a waste of judicial resources, since the private plaintiff's claims add nothing regarding the merits. In the view of the Coalition, private plaintiffs generally initiate these duplicative lawsuits merely for the purpose of collecting attorneys fees and costs pursuant to Cal. Civ. Proc. Code § 1021.5. To prevent this continued abuse of the Unfair Competition Act, we ask the Commission to clarify its proposed draft such that this practice falls squarely within the language of proposed section 385.40(a).

(4) Section 385.42: Attorney's Fees

Proposed section 385.42 provides that attorneys fees shall be based on work performed, the risk involved, a consideration of benefit conferred on the general public, and any "other applicable factors." We recommend that this provision be clarified to prevent the possibility of multiple recoveries of attorney fees, whether obtained by settlement or otherwise. For instance, it has been alleged that some Proposition 65 plaintiffs have brought Proposition 65 and Unfair Competition Act claims against distributors of industrial paint and automotive products, and have initiated separate claims against the manufacturers of the same products. Even where "global" settlement agreements have been reached with the distributors, including an agreement to pay "reasonable" attorney's fees, such plaintiffs have continued to pursue their claims for monetary relief (including attorneys' fees) against the manufacturers, without informing the manufacturers that those very products were also the subject of settlement negotiations with their distributor. Section 385.42 should be clarified to ensure, especially in cases alleging the wrongful sale of consumer products, that plaintiffs should not be permitted to institute duplicative claims against multiple parties in the chain of commerce under the Unfair Competition Act, by providing that recovery for attorneys' fees and costs is available in only one suit under the Unfair Competition Act.

Additionally, the Coalition recommends that a provision similar to Cal. Civ. Code § 1780(d) (Deering 1995), which provides reasonable attorney's fees to prevailing defendants "upon a finding by the court that the plaintiff's prosecution of the action was not in good faith," be added to proposed

section 385.42. Such a provision would help to discourage plaintiffs that bring meritless lawsuits to harass defendants or to settle with defendants for the "nuisance value" of the suit.

The Commission Should Clarify Business and Professions Code Section 17208 such that Unfair Competition Act Claims Predicated Entirely on Violations of *Borrowed* State or Federal Laws are Subject to the Statute of Limitation for the Underlying Violation

The Coalition believes that the Commission should clarify Business and Professions Code § 17208 such that Unfair Competition Act claims predicated entirely on "borrowed" violations of state or federal law are subject to the statute of limitation for the underlying violation.[3/] We offer this recommendation with experience litigating numerous Proposition 65 and Unfair Competition Act lawsuits, where plaintiffs take the position that the four-year limitations period set out in § 17208 governs the Unfair Competition Act portion of their complaint, even though the gravamen of their entire complaint is established under Proposition 65, to which a one year statute of limitations applies.[4/] Although this issue has not been decided in the California appellate courts, plaintiffs have effectively used this strategy to revive claims that otherwise would have expired under Proposition 65, or to so expand the scope of potential liability for claims which ordinarily could be prosecuted under the underlying act to discourage the assertion of a proper defense on the merits and force a settlement for the costs of defense.

The Coalition thus recommends a clarification of § 17208 that limits the commencement of a cause of action under the Unfair Competition Act to "4 years after the cause of action accrued or to the statutory limitation on the cause of action applicable to the underlying violation when the underlying violation is the gravamen of the complaint, whichever is shorter." Cal. Bus. & Prof. Code § 17208 (proposed changes underlined). We believe that such a clarification is consistent with case law and would more fairly allow the assertion of proper defenses on the merits of Unfair Competition Act claims.

3/ As the Commission is aware, "in essence, an action based on Business and Professions Code section 17200 to redress an unlawful business practice 'borrows' violations of other laws and treats these violations, when committed pursuant to business activity, as unlawful practices independently actionable under section 17200 et seq. . . ." *Farmers Ins. Exch. v. Superior Court*, 2 Cal. 4th 377, 383 (1992) (quoting *Barquis v. Merchants Collection Ass'n*, 7 Cal. 3d 94 (1972)).

4/ Cal. Civ. Proc. Code § 340(1) (Deering 1995) provides that an action based on "a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state," has a limitations period of one year unless the statute imposing the penalty or forfeiture provides for a different limitations period. Proposition 65 does not contain its own statute of limitations. Thus, the statute of limitations for alleged violations of Proposition 65 is one year.

Although it is unclear under current law whether the one year statute of limitations applicable to a Proposition 65 claim governs an Unfair Competition Act claim that relies entirely on a violation of Proposition 65 as its predicate unlawful act,[5/] it is well established that a plaintiff's selection of claims does not dictate the applicable statute of limitations:

> Neither the caption, form, nor prayer of the complaint will conclusively determine the nature of the liability from which the cause of action flows. Instead, the true nature of the action will be ascertained from the basic facts a posterior.

H. Russell Taylor's Fire Prevention Serv. Inc. v. Coca Cola Bottling Corp., 99 Cal. App. 3d 711, 717 (1979). The statute of limitations to be applied is determined by the "nature of the right sued upon," not by the form of the action or the relief demanded. *Jefferson v. J.E. French Co.*, 54 Cal. 2d 717, 718-19 (1960); *Hedlund v. Superior Court*, 34 Cal. 3d 695, 704 (1983); *Augusta v. United Serv. Auto. Ass'n*, 13 Cal. App. 4th 4, 8 (1993).

"Where a complaint pleads two interconnected causes of action, each governed by a different limitations period, the court must determine which cause of action is basic or 'quintessential' and which is merely ancillary or incidental." *Richardson v. Allstate Ins. Co.*, 117 Cal. App. 3d 8, 14 (1981). If a claim is merely ancillary to the primary purpose of the lawsuit, this claim "should not operate to avoid the effect of a statute prescribing a period of limitation with respect to the right basically in issue." *Jefferson*, 54 Cal. 2d at 718-19.

The Commission should clarify Business and Professions Code § 17208 such that Unfair Competition Act claims predicated entirely on "borrowed" violations of state or federal law are subject to the statute of limitation for the underlying violation. In the context of Proposition 65 litigation, such a clarification of § 17208 would be consistent with existing case law, since an Unfair Competition Act claim relies entirely on a violation of Proposition 65 as its predicate unlawful act and the Unfair Competition Act claim is merely ancillary to the primary purpose of the complaint which is the alleged violation of Proposition 65. The "true nature" of such action is the alleged violations of Proposition

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5/ Only two superior courts have addressed this issue and they reached opposite conclusions. In *Mangini v. Durand & Cie*, San Francisco Superior Court Case No. 952402 (April 27, 1994), Judge Cahill held that Unfair Practices Act claims based on alleged violations of Proposition 65 are subject to a one year limitation period. On the other hand, in *California v. American Standard*, San Francisco Superior Court Case No. 948017 (February 15, 1995), Judge Carlos Bea held that the four year limitation period set out in section 17208 governs that portion of the claim.

65; the Unfair Competition Act claim is incidental. As a result, the one year statute of limitations applicable to Proposition 65 claims should apply to both causes of action.

Further, it is fundamentally unfair that claimed violations of Proposition 65 that are barred under Section 340(1) of the Code of Civil Procedure are resurrected simply by re-labeling them as unlawful business practices with a statute of limitations of four years. Such an interpretation of the law allows a plaintiff to plead around the limitation period established by the legislature for the Proposition 65 cause of action.

The Commission should not wait for this important issue to be addressed in the appellate process, principally because most cases that raise this issue are currently being settled due to the high-costs of litigation. Even though many hundreds of Superior Court cases have been filed under Proposition 65, this issue is not likely to be raised before an appellate court any time soon.

The Commission Should Adopt A Provision In The Unfair Competition Act To Stay Adjudication Of Claims Based Entirely On Alleged Violations Of Administrative Actions, Pending Resolution Of Proceedings By The Appropriate Administrative Agency

The Coalition believes that the Commission should adopt a provision in the Unfair Competition Act to stay adjudication of claims based entirely on alleged violations of administrative actions, pending resolution of proceedings by the appropriate administrative agency. Such a provision would enhance court decision making and efficiency by allowing courts to take advantage of administrative expertise and help assure uniform application of regulatory laws. Further, such a provision is a natural extension of proposed section 385.40, and would follow the generally accepted legal principles that favor exhaustion of administrative remedies and conservation of judicial resources.

We offer this suggestion with experience litigating numerous cases where plaintiffs have circumvented the jurisdictional limitations of the federal and California Occupational Safety and Health Acts by bringing Unfair Competition Act claims predicated on alleged violations of California's Hazard Communication Standard at Cal. Code Regs. tit. 8, § 5194 ("HazCom Standard"). *See, e.g.*, Attachment 1. As the Commission is probably aware, the enforcement of standards or orders promulgated under California's HazCom Standard are exclusively in the purview of the California Division of Occupational Safety and Health.6/

6/ As further background on the enforcement of Cal/OSHA standards and orders, we point out that safety and health standards are enforced by the Division of Occupational Safety and Health. Cal. Lab. Code §§ 142, 6307 (West 1995). In

(Footnote cont'd on next page.)

The California Supreme Court has already recognized the benefits of exhausting administrative remedies prior to pursing claims under the Unfair Competition Act. In *Farmers Ins. Exch. v. Superior Court*, 2 Cal. 4th 377 (1992), the People filed a two-count complaint alleging that several insurers violated sections of California's Insurance Code by refusing to offer a "Good Driver Discount policy" to all eligible applicants. The first cause of action was premised on the Insurance Code, and the second cause of action asserted that violations of the Insurance Code constituted unlawful and unfair business practices. *Id.* at 381-83. The defendants demurred to both causes of action on the ground, *inter alia*, that the People's suit was precluded by their failure to pursue and exhaust administrative remedies. *Id.* The trial court sustained defendants' demurrer to the first cause of action on the ground that the claim was precluded by the People's failure to exhaust administrative remedies available under the Insurance Code. *Id.* However, the trial court overruled defendants' demurrer to the Unfair Competition Act claim and concluded that the People could proceed on this cause of action. *Id.*

The California Supreme Court reversed the trial court's decision regarding the People's second cause of action and directed the trial court to stay judicial proceedings pending proceedings before the Insurance Commissioner. *Id.* at 401. Applying the primary jurisdiction doctrine, the Court held that the interest of judicial economy and concerns for uniformity in applying complex insurance regulations militated in favor of staying the action pending proceedings by the Insurance Commissioner. *Id.* at 396-401. The People alleged specific statutory violations, and the Commissioner had at his disposal a pervasive and self-contained system of administrative procedure to deal with the relevant questions. *Id.* Even if recourse in the court eventually became necessary, the court would have the benefit of the commissioner's expertise. *Id.*

The exhaustion of remedies doctrine and the primary jurisdiction doctrine are both essentially doctrines of comity between courts and agencies. They are two sides of the timing coin: each determines whether an action may be brought in a court or whether an agency proceeding, or further agency proceeding, is necessary.

(Footnote cont'd from previous page.)

enforcing such standards, the Division may enforce any standard or order of the Occupational Safety and Health Standards Board. *Id.* § 6308. The Occupational Safety and Health Appeals Board hears employer appeals of citations or orders issued by the Division. *Id.* §§ 6319, 6600. Decisions and orders of the Appeals Board are reviewed by application for writ of mandamus in the superior court. *Id.* §§ 6627, 6631. No new evidence is taken, and the matter is determined on the record by the Appeals Board. *Id.* § 6628. The standard of review is the substantial-evidence rule. *Id.* § 6629; *see Troy Gold Indus., Ltd. v. Occupational Safety & Health Appeals Bd.*, 187 Cal. App. 3d 379, 387 (1986).

Exhaustion of remedies applies where a claim is cognizable in the first instance by an administrative agency alone, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. *Id.* at 390 (quoting *United States v. Western Pac. R. Co.*, 352 U.S. 59 (1956)). In such a case, judicial interference is withheld until the administrative process has run its course. *Id.* For instance, Count 1 of the People's complaint in *Farmers Ins.* presented a question of exhaustion of administrative remedies, since the People attempted to litigate Insurance Code claims over which the Insurance Commissioner has been given exclusive jurisdiction without first invoking and completing the available administrative process set out in the Insurance Code.

Primary jurisdiction applies where a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. *Id.* In this case the judicial process is suspended pending referral of such issues to the administrative body for its review. *Id.* For instance, Count 2 of the People's complaint in *Farmers Ins.* presented a Section 17200 claim. Such a cause of action is originally cognizable in the courts, and thus, it triggers application of the primary jurisdiction doctrine and not the exhaustion of remedies doctrine.

The primary jurisdiction doctrine[7/] may be invoked, unless explicitly precluded by the Legislature, whenever a court concludes there is a "paramount need for specialized agency fact-finding expertise." *Farmers Ins.*, 2 Cal. 4th at 401. A court must confine its analysis to the complaint as written. *Id.* at 398. No rigid formula exists for applying this standard. Instead, resolution generally hinges on a court's determination of the judicial and administrative efficiency, uniform application of regulatory laws, and agency autonomy to be gained by application of the doctrine. *Id.* at 390-92. Courts have also considered the alleged "inadequacy" of administrative remedies, and other factors affecting litigants, in determining whether the interests of justice militate against application of the doctrine in a particular case. *Id.*

7/ The judicially created doctrine of "primary jurisdiction," originated in *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), and most of the development of the doctrine has occurred in the federal courts. *See, e.g., Gt. No. Ry. v. Merchants Elev. Co.*, 259 U.S. 285 (1922) (stating that "[p]reliminary resort to the [Interstate Commerce Commission is necessary when] the inquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission"); *United States v. Western Pac. R. Co.*, 352 U.S. 59 (1956) (stating that "the question of tariff construction, as well as that of the reasonableness of the tariff as applied, was within the exclusive primary jurisdiction of the Interstate Commerce Commission").

The inevitable result of allowing trial courts to decide whether to stay adjudication of Unfair Competition Act claims based entirely on alleged violations of administrative actions pending resolution by the administrative agency, is that particular decisions will vary from case to case and defendant to defendant. Some courts will decide to hear such claims, while other courts will not. Further, as in *Farmers Insurance*, some of these decisions will be reversed on appeal. Such an *ad hoc* approach is unfair to defendants since it will increase time and costs to litigate these actions. Therefore, the Commission should revise the Unfair Competition Act, permitting actions on behalf of the general public, where the predicate unlawful action is based entirely to on an administrative action, only after, exhaustion of administrative remedies for the predicate unlawful act.

Conclusion

On behalf of the Coalition, we trust these comments will be useful to the Commission, and appreciate the opportunity to submit them.

Respectfully submitted,

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