Study B-700 February 20, 1996

First Supplement to Memorandum 96-11

Unfair Competition: Revised Draft (Comments of CDAA)

Attached to this supplement is a letter from Thomas A. Papageorge on behalf of the California District Attorneys Association Consumer Protection Committee and the Consumer Protection Division of the Los Angeles County District Attorney's Office.

Mr. Papageorge urges the Commission not to get involved in the statute of limitations issues discussed in Memorandum 96-18. More specifically, he notes that prosecutors would "vigorously resist any change" in the ability to apply the four-year statute under Business and Professions Code Section 17208. It should be noted, however, that the analysis in Memorandum 96-18 does not assume any conclusion. Several approaches could be taken, and not all of them would conflict with the goals of prosecutors as stated in Mr. Papageorge's letter. The letter also serves as a reminder that the more issues there are under consideration, the more difficult it is to find a general consensus.

Mr. Papageorge is generally positive about the latest draft, although expressing some concern over the consolidation provision in draft Section 17315. The statute is not intended to encourage routine intervention by private plaintiffs in a prosecutor's action. To prevent this possibility, the draft section could be revised to make clear that if the prosecutor's action is filed first, intervention is not permitted unless the prosecutor is not seeking substantial restitution. As drafted, the section is not an invitation to intervention; it provides that the private action is to be stayed unless, in the interest of justice, the court orders consolidation. In other words, consolidation is not intended to be routine.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

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February 15, 1996

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California Law Revision Commission
4000 Middlefield Road, Suite D-2
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Re: Study B-700 -- Unfair Competition

Dear Chairperson Wied, Mr. Ulrich and Members:

I write once again on behalf of the California District Attorneys Association Consumer Protection Committee, as well as my own office, to provide further input from public enforcement officials regarding the unfair competition study (B-700) and the Commission staff's February 9 revised draft.

This letter will offer preliminary observations to help guide the Commission's discussion at the February 22 meeting. As the draft only just arrived, we are still canvassing our members on the new version. More details will follow once that process is complete.

General Observations on the Scope of the B-700 Study

At its January 19 meeting the Commission voted to continue the B-700 study in order to offer either a consensus-based proposal for change or, in the alternative, a report on the Commission's study and findings. The staff was instructed to work with the consultant to produce a revised draft to advance these goals. In hearing the members' comments at that meeting, we interpreted the Commission's mandate to be that we all work together to seek a narrowly focused proposal on which all sides might agree.

In his memos of January 9 and February 13, Prof. Fellmeth urges the Commission to adopt that narrowly tailored approach to addressing the principal issue in the B-700 study: the concern over finality and possible redundancy in §17200 actions. The law enforcement community shares Prof. Fellmeth's view as to this key question of the focus of the B-700 study.

As we have all seen in the many views submitted to the Commission to date, the unfair competition statute (like its federal counterpart in the FTC Act) is a carefully balanced statute which is important to wide range of interests in the legal community.

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We have seen that §17200 is the principal consumer protection statute in California, and serves other important public and private functions as well. Given this importance, there is little or no chance of achieving a consensus on sweeping changes to California's Little FTC Act at this time.

Chairman Wied has indicated that the Commission's goal is to work by consensus to improve California law, not to champion partisan views or to change the balance between plaintiffs and defendants in this or any other area. We concur entirely with the Chairman and Prof. Fellmeth in this regard. We urge the Commission and its staff to concentrate on the narrowest possible means of addressing the "general public" representative action issue.

For that reason we urge the Commission to reject the invitation of the Proposition 65 defense firm to widen the study to include the §17200 statute of limitations and other administrative law and procedural issues. The statute of limitations issue is a good illustration of the problems involved in expanding the study to areas of great controversy.

Law enforcement offices in California feel very strongly about the importance of the four-year scope of §17200's statute of limitations. Limitations terms vary (down to as little as one year) in the underlying statutes used in enforcing §17200. The ability to reach back four years to recover ill-gotten gains for fraud victims is central to this statute's remedial scheme (and was clearly envisioned by the legislature when it explicitly provided for a four-year term in §17208 and for cumulative remedies in §17205).

Prosecutors would vigorously resist any change to this authority. Defense counsel might, understandably, wish for a shorter term and less exposure for their clients. This is clearly a "zero-sum game" issue where any change would be met with strong opposition from the interests on one side or the other. We respectfully submit that this is precisely the kind of issue the Commission should not undertake at this time, so that it can maximize the chances for consensus on the central issue.

Staff's Revised Draft

By contrast, those CDAA members I have contacted to date generally applaud the narrow and focused approach of the staff's new draft. The revised draft confines its proposal to an attempt to provide greater clarity and certainty in "general public" actions brought by private plaintiffs, but at the same time the proposal refrains from imposing burdens that would make

such cases unworkable. This approach -- a limited set of proposals addressed to the central concern of finality and redundancy -- gives us all the best chance at finding common ground and consensus.

Preliminary comments from our members reveal a few continuing concerns about the new draft, and we will offer more details on these at the February 22 meeting. In particular, the provision in draft section 17315 regarding public/private priority has raised concern with regard to the provision for consolidation of actions (p.6, lines 7-9).

Actions brought by the Attorney General or the 58 district attorneys under §17200 are of course "civil law enforcement actions," not private tort actions or even private actions to right wrongs for the "general public." People v. Pacific Land Research (1977) 21 Cal.3d 683. In contrast to private "general public" cases, public actions are brought by different actors (elected officials vs. private interests), subject to different checks and balances, and seek remedies which may differ. As a practical matter, consolidation of such cases is difficult.

A provision permitting consolidation of these very different public and private actions would have to be crafted very carefully and narrowly. For example, such a provision should ensure that there is no incentive for private firms to routinely file parallel actions as soon as all public cases are filed, and then follow with generic motions to consolidate in every such case. Such a scenario is the precise opposite of the central goal of the study.

We look forward to sharing these and other thoughts, both at the February 22 meeting and in advance of the April meeting as our members have an opportunity to share their comments with us.

Thank you once again for your consideration of our views.

Best regards,

GIL GARCETTI
District Attorney

By Tom Papageorge

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