

## Memorandum 96-18

### Unfair Competition: Statute of Limitations

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A statute of limitations issue has been raised in connection with the unfair competition litigation study. Business and Professions Code Section 17208 prescribes a four-year statute of limitations for causes of action under the unfair competition law (Bus. & Prof. Code §§ 17200-17208). Specifically, Section 17208 provides:

17208. Any action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section shall be revived by its enactment.

Section 17208 does not expressly address the situation where an unfair competition cause of action is premised on violation of another statute, such as Proposition 65. Under those circumstances, does the four-year period of Section 17208 apply to the unfair competition claim, even if it is longer than the limitations period for the underlying statutory violation?

The Coalition of Manufacturers for the Responsible Administration of Proposition 65 contends that Unfair Competition Act claims “predicated entirely on ‘borrowed’ violations of state or federal law” should be subject to the statute of limitations for the underlying violation. (Exhibit pp. 1-3.) The Coalition suggests amending Section 17208 along those lines. It maintains that such an amendment would be consistent with existing case law and would be good public policy.

Professor Fellmeth disagrees with the Coalition’s proposal. His comments on this point are attached as Exhibit pages 4-6.

This memorandum discusses the existing case law and other sources, and then explores the policy considerations.

## EXISTING LAW

Existing law directly addressing the issue is minimal to nonexistent. The staff has not found any published decision squarely discussing which statute of limitations applies when an unfair competition claim is based solely on violation of another statute. The Coalition's letter to the Commission dated January 15, 1996, acknowledges the dearth of clear appellate guidance, at least as to Proposition 65. (See Exhibit pp. 1-2.)

The Coalition states, however, that two superior courts recently considered the issue in the context of Proposition 65 and reached opposite conclusions. (See Exhibit p. 2, n.5.) At the staff's request, the Coalition provided copies of the briefs and opinion in one of the cases, *California v. American Standard*, San Francisco Superior Court Case No. 948017 (February 15, 1995) (Judge Bea). As yet, the staff has not received any materials pertaining to the other case, *Mangini v. Durand & Cie*, San Francisco Superior Court Case No. 952402 (April 27, 1994) (Judge Cahill).

Judge Bea's analysis of the issue is succinct: "A plain reading of § 17208 [establishes that] one can bottom a Business and Professions Code 'unfair competition' cause of action on a violation of Proposition 65 and thereby invoke the four-year statute of limitations of Business and Professions Code § 17208." Specifically,

Section 17208 states that "any action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued." (Emphasis added.) Where the legislature clearly contemplated and intended that this four-year statute of limitations would apply to all Business and Professions Code claims, even those based on 'unlawful' business practices, this Court will not read an exception into § 17208.

Judge Bea supported his analysis with language from Code of Civil Procedure Section 340 (the limitations statute applicable to Proposition 65 cases). He also cited *Eichman v. Fotomat Corp.*, 880 F.2d 149, 159 (9th Cir. 1989), in which the court applied Section 17208's four-year limitations period to an unfair competition claim based on breach of an oral contract. *Eichman* is arguably inapposite, because it did not involve an unfair competition claim grounded on a statutory violation.

Further support for Judge Bea's conclusion may, however, stem from Business and Professions Code Section 17205, which states: "Unless otherwise

expressly provided, the remedies or penalties provided by [the Unfair Competition Act] are cumulative to each other and to the remedies or penalties available under all other laws of this states.” Arguably, that language means the four-year limitations period of Section 17208 is cumulative to the limitations period for an underlying statutory violation. Professor Fellmeth considers this argument “persuasive as to the current state of the law.” (Exhibit p. 4.)

But is the limitations period of Section 17208 a remedy or penalty within the meaning of Section 17205? The defendants in Judge Bea’s case unsuccessfully contended that “section 17205, which refers only to remedies, does not define which alleged violations of law are actionable and not time barred.”

In arguing that the limitations period of the underlying statutory violation controls, the defendants also relied on general principles for determining the applicable statute of limitations. They cited cases stating that the gravamen of the complaint, not the label on a cause of action, is determinative. Thus, they argued, if an unfair competition claim is based solely on violation of Proposition 65 or another statute, the gravamen of the complaint is the underlying statutory violation and its limitations period applies to the unfair competition claim. The Coalition made similar arguments in its January 15 letter. (See Exhibit pp. 1-2.)

In and of itself, the reported existence of conflicting superior court decisions on the limitations period further shows that there are colorable arguments on both sides of the question. Although detailed statutory analysis may shed additional light on proper interpretation of the existing statute, the staff believes a policy analysis is more pertinent to answer the issues before the Commission: (1) Should Section 17208 be amended to clarify the limitations period for an unfair competition claim based solely on violation of another statute? (2) If so, what limitations period should apply?

#### POLICY ANALYSIS

The answer to the first of the two questions seems relatively straightforward. Judge Bea maintains that Section 17208 *plainly* specifies a four-year limitations period for *all* unfair competition claims. Professor Fellmeth reaches the same conclusion for different reasons. (See Exhibit p. 4.)

Nonetheless, the statute does not explicitly address unfair competition claims based solely on violation of another statute. Uncertainty and disputes regarding the applicable statute of limitations plainly exist. Clear appellate guidance in the

near future appears unlikely, because of the expense of litigating cases through the appellate process. Amending Section 17208 to clearly resolve the limitations issue may benefit many persons, simply by sparing them the expense of having to litigate the point. The staff therefore recommends that the Commission attempt such clarification.

Whether clarification is feasible may turn on the manner of clarification proposed. The staff sees three alternatives.

(1) Section 17208 could be amended to clarify that its four-year limitations period is inapplicable to unfair competition claims based entirely on violation of another statute. Rather, the limitations period applicable to the underlying statute would also govern the unfair competition claim. The Coalition advocates this approach, arguing that it would prevent dilatory plaintiffs from unfairly dodging a limitations period through relabelling their claims. Another advantage of the approach is simplicity: only one limitations period would govern a statutory violation, not two.

(2) Amend Section 17208 to explicitly provide that its four-year limitations period applies even to unfair competition claims based solely on statutory violations. Professor Fellmeth explains the policy justifications for this result as follows:

[S]pecific statutes do define business liability and impose separate statute of limitations policies applicable thereto. But these specific statutes also have their own remedy schemes. Often, they include possible criminal sanctions. They sometimes provide for attorney's fees to any prevailing plaintiff, or even for a reward to claimants. Often they allow for damages and punitive damages.

In contrast, § 17200 is designed with a shallow and prophylactic intent: stop the violation and if money has been unjustly taken and held by a violator, make restitution to disgorge it. Only public prosecutors have any sanction beyond injunctive relief. Theoretically, this intent is a: "stop it because it is against public policy and continuation injures competition for all." Such a scheme can logically have a longer statute of limitations than a remedy system for the very same wrong punished by a different set of sanctions.

(Exhibit pp. 4-5.) Professor Fellmeth's analysis may not hold true for all statutory schemes. In some instances, there may be no significant difference between the relief available pursuant to the unfair competition statute and the relief available pursuant to the underlying statute.

(3) The staff recommends against what it sees as a possible third alternative: Drawing a distinction between (a) statutory schemes with their own statute of limitations (i.e., a statute specifying the limitations period for that particular statutory scheme and no other), and (b) statutory schemes like Proposition 65 that lack their own limitations statute and rely on the general limitations provisions. In the staff's opinion, such a distinction would not be meaningful, because it could turn on the accident of whether a limitations provision was deleted from a bill as redundant with the general statute of limitations that would otherwise apply.

Respectfully submitted,

Barbara S. Gaal  
Staff Counsel

Exhibit

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UNFAIR COMPETITION

(Excerpt from Stanley Landfair's letter to the Commission dated January 15, 1996, on behalf of the Coalition of Manufacturers for Responsible Administration of Proposition 65, pages 8-10, Second Supplement to Memorandum 96-3.)

**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.<sup>3/</sup> 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.<sup>4/</sup> 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.

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<sup>3/</sup> 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)).

<sup>4/</sup> 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,<sup>5/</sup> 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 posteriori.

*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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<sup>5/</sup> 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.





University of San Diego

Law Revision Commission  
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Center for Public Interest Law

Children's Advocacy Institute  
File:

To: Nathaniel, Stan, Colin, Commission members  
From: Bob Fellmeth *Bvz*  
Re: Unfair Competition Study and Options  
Date: February 13, 1996

I expect to attend the Commission's February 22 meeting in Sacramento but wanted to note in advance my response to the lengthy commentary and exhibits received just prior to the January meeting in Los Angeles.

A number of the comments made about language suggestions should be discussed carefully, but I believe it would be a mistake to expand the reform inquiry beyond the framework suggested in my January memorandum. The recent suggestions from part of the defense bar indicate some of the problems with an expansive approach. This memo addresses briefly the two major suggestions recently advanced, *seriatim*:

(1) **Statute of Limitations Imputation.** Where a Business and Profession Code § 17200 action is based on the violation of another statute, should the latter's statute of limitations apply? The affirmative suggestion is made on the grounds that such limitations are policy decisions based on the wrong involved, and the general language of § 17200 should not be used to bootstrap a longer (4 year) statute of limitations onto a violation intended by the legislature to be more limited in time.

One answer to this suggestion was registered by David Roe in his comments: the legislature has specified that the remedies of many of the specific statutes involved are cumulative to other causes of action or statutory schemes. And § 17200 itself provides similarly that its remedies are cumulative to all others. This argument is persuasive as to the current state of the law, but does not address the merits of changing the law.

I believe that the policy rationale not to change § 17200 to reflect the limitations of other statutes invoked is as follows: As argued by proponents of § 17200 limitation change, specific statutes do define business liability and impose separate statute of limitations policies applicable thereto. But these specific statutes also have their own remedy schemes. Often, they include possible criminal sanctions. They sometimes provide for attorney's fees to any prevailing plaintiff, or even for a reward to claimants. Often they allow for damages and punitive damages.

In contrast, § 17200 is designed with a shallow and prophylactic intent: stop the violation and if money has been

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unjustly taken and held by a violator, make restitution to disgorge it. Only public prosecutors have any sanction beyond injunctive relief. Theoretically, this intent is a: "stop it because it is against public policy and its continuation injures competition for all." Such a scheme can logically have a longer statute of limitations than a remedy system for the very same wrong punished by a different set of sanctions.

(2) **Agency Primary Jurisdiction or Exhaustion Bar.** The proponents of § 17200 reform also argue that much business practice is subject to regulation by state agencies. Where there is a matter before an agency, there should be an arrangement to allow agency determination of findings or of policy before court consideration of the very same issue.

Although this suggestion appears to have merit on the surface, there are serious problems in its exercise. One problem has to do with the capture of many agencies by the industry or trade it is intended to regulate in the public interest. Such an observation is not meant as hyperbole; many state agencies have on their governing boards a majority of state officials from the trade or profession they regulate. The trade associations affected understandably lobby their colleagues doing the regulating. There are virtually no *ex parte* prohibitions on private party/agency official contact - including private contacts with the board officials making final decisions.

The message here is not that state agencies are corrupt or useless, but that the legislature has wisely drawn more than one point of entry into the courts - which are a more independent check on private abuse and executive branch error than are the agencies *vis-a-vis* the commerce they regulate. One California Justice pointed out, for example, that the insurance commissioner had disciplined a single insurance firm for non-payment of claims or bad faith, in the history of the position to that point. Yet the argument that civil bad faith actions by third parties (not policy holders) rested on the argument that the insurance commissioner should exercise jurisdiction. When? Where? As one reviews the record of bad faith insurance, it seems that there may be a couple of candidates for agency sanction among them.

There are occasions when the expertise of an agency can contribute to a court's informed decision. A short delay may be merited where an identical issue is about to be decided. But courts have discretion to do that at present.

The Supreme Court appears to be considering already an improvident expansion (or creation) of a "primary jurisdiction" doctrine. I would prefer an approach allowing the agency to intervene, or to contribute as an *amicus*. It can do either now. If the case requires a factual record which the agency is uniquely empowered to create, that is a different matter entirely. But I

believe current law addresses that situation.

As to both of these suggestions, they appear to be driven by alleged problems involving a single statutory basis for unfair competition - among a very large universe of other bases.

I would urge the Commission to base its reform proposal on the following specific propositions which should be subject to consensus, even among contending counsel:

(1) A final judgment between two parties is a final judgment between those parties.

(2) Where one party purports to represent the general public, it is helpful to clarify the rights of individual victims (who may have disproportionately suffered) and wish to retain rights to sue as individuals.

(3) Where a private party seeks to represent the general public and intends to foreclose any other party from that representative role, there should be clarity between him and public prosecutors seeking to litigate similarly.

(4) Where there is competition for representative capacity between public prosecutors and private litigants, the former are entitled to some preference in representing the "people."

(5) Where a private party has met the conditions for private attorney general recompense, and has contributed to an outcome beneficial to the general public, he should not be foreclosed categorically from attorney fee recompense.

(6) Where a private party seeks to represent the general public, he should not have a conflict of interest which undermines his ability to discharge his fiduciary duty to said public, including a collateral and individual economic dispute with the defendant separate and apart from the unfair competition interests of the public at issue.

(7) Where a private party seeks to obtain a final judgment on behalf of the general public by stipulation between the parties, entry should require some form of advance notice and public hearing. The defendant should not be in a position of choosing with whom he will enter a final judgment.

(8) It is better to decide who represents who before final judgment is entered. It is unwise to allow final judgments based on defendant decisions to agree with a particular plaintiff, and then attempt to check abuse *post hoc* by limiting or unwinding entered and possibly implemented judgments.