Study B-700 May 8, 1996

First Supplement to Memorandum 96-30

Unfair Competition (Mansfield comments)

Attached to this supplement is a letter from Alan M. Mansfield concerning unfair competition. He raises a number of issues that we will discuss as the Commission considers the draft tentative recommendation with Memorandum 96-30.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

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Mr. Colin Wied, Chairperson
Stan Ulrich, Assistant Executive Secretary
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 of the Law Revision Commission:

My law firm, which represents plaintiffs in class action and other representative litigation, wishes to comment further on the proposed amendments to Business & Professions Code §§17200 et seq., attached to Memorandum 96-30.

For the reasons set forth by myself and others throughout this process, I continue to believe that there is no need for the Commission to continue to address and to attempt to revise the statutory scheme embodied in Business & Professions Code §17200, et seq. Despite the open invitation of the Law Revision Commission, no one has stepped forward to identify any pervasive or systematic problem associated with prosecution of actions under these statutes. Indeed, the tentative staff recommendation which has been submitted indicates that these proposed revisions are intended to address "potential problems," despite the fact that no realized problems have arisen since the statute's substantive amendments in 1977 -- in existence and utilized for 20 years -- or, for that matter, since the predecessor statute, Civil Code Section 3369, was adopted in 1949.[1]

[1] The only issue which has been identified relates to the interplay between class actions and private and public attorney general actions, which this proposal does not address because of

With respect to the proposed amendments, I provide the following observations. Due to the short time period which we have had to respond to these proposed amendments, we will be submitting a more detailed analysis.

I. SECTION 17302. CONFLICT OF INTEREST PROVISION

This provision solves few problems, for policy reasons. This provision only ensures that those with the least interest -- i.e., those who have not been harmed -- will be the only persons who bring representative actions, while consumers who have been injured by a defendants' wrongful practices will bring individual and/or class actions. More importantly, any perceived conflict of interest by the plaintiff (1) will be addressed at the adequacy hearing (§17303); (2) at the fairness hearing (§17306); (3) or at dismissal of a representative action (§17308). Because the potential abuse identified by staff are already addressed by the above proposed amendments, it does not make good policy sense to prohibit an aggrieved individual from bringing his or her individual claims either in the same action or in a contemporaneous action. Furthermore, such claims are regularly considered after class claims, with no issue of conflict ever raised. Thus, §17302 should be deleted in its entirety.

II. SECTION 17309. BINDING EFFECT OF JUDGMENT AND REPRESENTATIVE ACTION

This provision provides defendants with a "set off" equal to the pro rata share of any direct or indirect restitutionary relief awarded as a result of a previously determined representative action. While providing for a set off for direct restitutionary relief may make sense, the Commission should revisit its thinking with respect to providing a set off for indirect restitutionary relief. Cy pres relief is premised on an inability to identify the individuals who have been harmed. Cy pres relief is a secondary form of restitution that is used when the individuals entitled to direct restitution supposedly cannot be identified. If the individuals harmed by a defendant's practices can be identified, but the defendant has convinced the attorneys and/or the court involved in the earlier filed action that these individuals cannot be located, the defendant should not be permitted to profit by claiming credit via a set-off. Moreover, by allowing a set-off credit only for direct restitution, defendants will have an incentive to provide restitution to those whom these statutes were

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the serious constitutional implications of such a proposal.

intended to protect -- aggrieved consumers. Thus, that portion of the proposed amendment providing for a set off with respect to indirect restitutionary relief should be deleted.

III. SECTION 17310. PRIORITY BETWEEN PROSECUTOR AND PRIVATE PLAINTIFF

This proposed amendment is extremely troubling as it shifts the "delicate balance" between the parties to such actions, and is actively opposed by most public interest groups. It calls for an immediate stay of any representative action, except in certain unspecified situations wherein the court may consolidate a representative action with a prosecutor's enforcement action. Since most enforcement actions are "sue and settle" cases, how this provision would work in practice is unclear and subject to abuse. There is no need to include this amendment, as existing law provides adequate procedural protections where duplicative actions are pending. Moreover, neither public enforcement officials nor the plaintiffs' bar perceives any problem with the existing state of the law. Even staff recognizes that this provision "is not essential to the draft statute." Memorandum 96-30, at 2. Therefore, this provision should be deleted from the proposed amendments.

If any version of this proposed amendment is to be included, protections must be built in for representative actions to protect against concerns of the staleness of evidence and the potential for disappearing evidence. We would suggest the creation of a presumption that the complained of practices are unfair, unlawful and/or fraudulent in the event that a public enforcement action secures an injunction or civil penalties. At a minimum, if the Commission still believes that this controversial provision should be included, defendants should be required to preserve all documents, including any computer tapes or customer lists relevant to the issues that would identify aggrieved individuals, pending resolution of the private plaintiffs' representative action.

IV. SECTION 17319. APPLICATION OF CHAPTER TO PENDING CASES

One of the most controversial provisions here is that this proposed amendment makes any amendments retroactive -- i.e., they apply to all pending actions. Retroactive application of these amendments is unworkable and unfair to litigants with pending actions. First, notices of pending litigation will overwhelm the Attorney General's office who will likely be unable to review all of the notices thus providing none of the perceived benefits of the contemplated notice. Moreover, numerous §17200 actions have been

litigated for years: to apply a whole new set of rules to such cases would be ripe for abuse. Forcing litigants with legitimate claims to dismiss vast portions of their actions, potentially after these actions have been pending for a period of years, is extremely inequitable. As these amendments are meant to address potential, unrealized problems, there is no need for retroactive application. Thus, we urge the Commission to delete §17319 in its entirety.

Respectfully submitted,

Alan M. Mansfield

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