Study B-700 December 6, 1996

Memorandum 96-88

Legislative Program: Unfair Competition Litigation (CDAA Comments)

At the November meeting, the Commission approved the recommendation on *Unfair Competition Litigation*, subject to a number of revisions. The most significant change was to apply the 45-day notice rule before entry of judgment to contested cases brought by public prosecutors. In the discussion, several Commissioners stated that it would be important to hear from representatives of public prosecutors before these changes are finalized.

Attached to this memorandum is a letter from Thomas A. Papageorge on behalf of the California District Attorneys Association Consumer Protection Committee, as well as his office, the Consumer Protection Division of the Los Angeles County District Attorney's Office. Mr. Papageorge outlines the differences between enforcement actions brought by prosecutors and representative actions brought by private plaintiffs, suggests a number of practical problems that would be faced by prosecutors under the proposed extension of the 45-day notice rule, and expresses concern that two years' of consensus building may be lost by this change. With the exception of the 45-day notice provision, Mr. Papageorge states that the CDAA is prepared to endorse the recommendation with the changes made at the November meeting.

The "working final recommendation" version of the sections in question are set out below. Application of the 45-day notice rule to prosecutors is set out in a separate section (17305) from the 45-day notice rule applicable to private plaintiffs (17306):

> **§ 17305. Notice of terms of judgment in contested enforcement action**
>
> 17305. (a) Except as provided in subdivision (d), with respect to an enforcement action, at least 45 days before entry of a judgment, or any modification of a judgment, which is a final determination of the action, the prosecutor shall give notice of the proposed terms of the judgment or modification, including all stipulations and associated agreements between the parties, to all of the following:
>
> (1) Other parties with cases pending against the defendant based on substantially similar facts and theories of liability known to the prosecutor.

(2) Each person who has filed with the court a request for notice of the terms of judgment.

(3) Other persons as ordered by the court.

(b) A person given notice under subdivision (a) or any other interested person may apply to the court for leave to intervene. Nothing in this subdivision limits any other right a person may have to intervene in the action.

(c) On motion of a party or on the court's own motion, the court for good cause may shorten or lengthen the time for giving notice under subdivision (a).

(d) This section does not apply to an enforcement action where the complaint and stipulated judgment are filed together.

Comment. Subdivision (a) of Section 17305 requires notice of the terms of any proposed disposition of a contested enforcement action brought by a prosecutor to be given to other interested parties.

As provided in subdivision (d), however, where the case has been settled in prefiling negotiations and the stipulated judgment is entered on the same day that the action is filed, the 45-day prejudgment notice requirement is inapplicable. The 45-day notice period is subject to variation on court order pursuant to subdivision (c).

Subdivision (b) recognizes a limited right to seek to intervene in the action before judgment is entered.

For the rule applicable to private representative actions, see Section 17306. See also Sections 17300(a) ("enforcement action" defined), 17300(b) ("prosecutor" defined).

§ 17306. Notice of terms of judgment in representative action

17306. (a) With respect to a representative cause of action, at least 45 days before entry of a judgment, or any modification of a judgment, which is a final determination of the representative cause of action, the private plaintiff shall give notice of the proposed terms of the judgment or modification, including all stipulations and associated agreements between the parties, together with notice of the time and place set for a hearing on entry of the judgment or modification, to all of the following:

(1) The Attorney General.

(2) The district attorney of the county where the action is pending.

(3) Other parties with cases pending against the defendant based on substantially similar facts and theories of liability known to the plaintiff.

(4) Each person who has filed with the court a request for notice of the terms of judgment.

(5) Other persons as ordered by the court.

(b) A person given notice under subdivision (a) or any other interested person may apply to the court for leave to intervene in the hearing provided by Section 17307. Nothing in this subdivision limits any other right a person may have to intervene in the action.

(c) On motion of a party or on the court's own motion, the court for good cause may shorten or lengthen the time for giving notice under subdivision (a).

Comment. Subdivision (a) of Section 17306 requires notice of the terms of any proposed disposition of the representative action to other interested parties. The 45-day notice period is subject to variation on court order pursuant to subdivision (c). The notice of the proposed terms of the judgment under this section may be given at the same time as the notice of commencement of the representative action is given under Section 17303, so long as other requirements are satisfied.

Under subdivision (b), a court may permit intervention in the hearing for approval of the terms of the judgment provided by Section 17307.

For the rule applicable to prosecutor enforcement actions, see Section 17305. As to the effect of notice given to the Attorney General or a district attorney under this section, see Section 17311. See also Sections 17300(b) ("prosecutor" defined), 17300(c) ("representative cause of action" defined).

The other nontrivial change was made in Section 17310(a) by requiring the court to make a determination under subdivision (a) rather than providing a presumption in favor of staying the private action:

§ 17310. Priority between prosecutor and private plaintiff

17310. (a) If a private plaintiff has commenced an action that includes a representative cause of action and a prosecutor has commenced an enforcement 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 stay the private plaintiff's representative cause of action until completion of the prosecutor's enforcement action, make an order for consolidation or coordination of the actions, or make any other order, in the interest of justice.

(b) The determination under subdivision (a) may be made at any time during the proceedings and regardless of the order in which the actions were commenced.

(c) Nothing in this section affects any right the plaintiff may have to costs and attorney's fees pursuant to Section 1021.5 of the Code of Civil Procedure or other applicable law.

Comment. Section 17310 provides a degree of priority to public prosecutor enforcement actions over conflicting private representative actions. If the enforcement action and representative action are consolidated, the court may give the prosecutor responsibility on the injunctive and civil penalty phases of the case and let the private plaintiff press the restitutionary claims.

Subdivision (c) recognizes that a private plaintiff may have a right to an attorney's fee award under general principles when the private representative action is stayed or consolidated pursuant to this section. This rule is intended to be applied consistent with case law. See, e.g., Ciani v. San Diego Trust and Savings Bank, 25 Cal. App. 4th 563, 572-73, 30 Cal. Rptr. 2d 581 (1994); Committee To Defend Reproductive Rights v. A Free Pregnancy Center, 229 Cal. App. 3d 663, 642-44, 280 Cal. Rptr. 329 (1991).

See also Sections 17300(a) ("enforcement action" defined), 17300(b) ("prosecutor" defined), 17300(c) ("representative cause of action" defined).

As noted above, in the interest of achieving a consensus, CDAA is not opposing this change. (See Exhibit p. 1.)

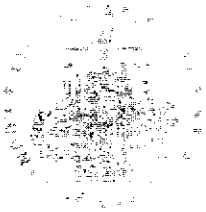
The staff is concerned that extension of the 45-day notice rule to prosecutors threatens only to create opposition to the recommendation without achieving any support from interests who have expressed opposition to the study. This seriously impairs any ability to introduce a recommendation aimed at achieving consensus.

The substantive issues are less clear. Although Mr. Papageorge argues that there is "no evidence demonstrating, or even suggesting, that public law enforcement judgments have been abused or require closer monitoring," there have been a number of situations described to the Commission where private plaintiffs and public interest attorneys believe that the interests of the injured class were not adequately served by settlements proposed or entered by public prosecutors. But these issues have been considered before, and the Commission has generally accepted the notion that enforcement actions brought by prosecutors may appropriately be given distinct treatment under the proposed statute. The Commission has sought to craft a modest reform that addresses a number of issues in a rational way without causing unnecessary disruption. Excusing prosecutors from the 45-day notice provision does not create new law — it simply recognizes a limitation on the scope of the reform attempted by the recommendation.

The technical issue that needs resolution at this meeting is the content of the Commission's final recommendation and the bill to be introduced in the 1997 legislative session. If the Commission feels strongly that the 45-day notice rule should be applied to contested actions brought by prosecutors, then the provision should remain in the recommendation and the CDAA concerns can perhaps be addressed by amendments to the bill. The Commission needs to consider whether this additional issue should be in the bill as introduced or whether it would be better to minimize the number of issues by eliminating Section 17305.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary



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December 2, 1996

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Re: Study B-700 -- Unfair Competition

Dear Chairperson Fink, 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's Working Final Draft Recommendation.

As my note of that date indicated, I was unable to attend the November 14 meeting because of airline equipment failure, and no other law enforcement representatives were present. At that meeting several changes to the proposed final recommendation were discussed and incorporated into the most recent version. All of the changes but one present no serious problem for the law enforcement community, and we are prepared to endorse them in the spirit of consensus which Chairs Wied and Fink have called for.

Unfortunately, the Commission also determined to reverse the position it adopted at the September 28, 1995 meeting and in all subsequent drafts, and insert a provision for a 45-day notice requirement for a large category of judgments obtained by public prosecutors. Although the category of simulataneous complaints and judgments was excepted from this requirement, this new provision will nonetheless:

- impose an additional lengthy delay in many law enforcement proceedings, without any clear reason or corresponding benefit;

- prevent injunctions and other relief from taking prompt effect, thus delaying remedies and permitting further consumer or competitive injury in a number of cases;

- hamper quick and efficient law enforcement at a time when the public resources to do this work are stretched thin.

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And the new requirement will do all this without evidence of any kind -- during two years of study and hearings -- that there is a problem with law enforcement judgments.

The Law Enforcement/Private Plaintiff Distinction, Revisited

It may be useful to consider again briefly why it is that the Commission wisely chose last year to differentiate between public law enforcement actions brought by elected officials, and private plaintiffs' actions brought by any person who so chooses. Fundamental differences between the two warrant this careful distinction.

Actions brought by the Attorney General or the 58 district attorneys under §17200 are "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 to obtain remedies which differ in important ways.

It is especially important to recognize -- as our entire Penal Code does so clearly -- the different roles of elected public prosecutors and private litigants. The Attorney General and the district attorneys are the representatives the people have chosen to protect their legal interests in a wide range of contexts. In trade regulation law, the people have given prosecutors a unique public role to represent the "People of the State of California" in protecting consumers and the marketplace.

No other actors with standing under §17204 have been chosen democratically to act for the People or to use the unique powers, such as civil penalties, reserved for the People. The People's choice of legal representatives should be respected by respecting the litigation decisions those representatives make. Nearly everyone testifying before the Commission has agreed that the law enforcement function and the popular election of prosecutors together warrant a different set of procedural requirements under §17200 than those applied to self-appointed private actors.

Similarly, there are crucial differences in remedies sought by the People versus those sought by private litigants under §17200. The most obvious of these is the potent civil penalties authority vested exclusively in prosecutors. Equally important is the distinction between disgorgement and restitution in §17200 cases,

as private litigants are generally only interested in the latter, while public officials must consider both the need to force disgorgement of unjust enrichment and the importance of victim restitution. (See People v. Powers, (1992) 2 Cal.App.4th 330; California v. Levi Strauss & Co. (1986) 41 Cal.3d 460; People v. Parkmerced Co. (1988) 198 Cal.App.3d 683). (This distinction is developed in detail in our October 25, 1995, letter in the B-700 file.) In addition, there is a broad range of equitable remedies under §17200 regularly sought by prosecutors but seldom sought by private party litigants, e.g., cancellation of unlawful trust deeds (People v. Custom Craft Carpets (1984) 159 Cal.App.3d 676) and corrective advertising remedies (see Warner-Lambert Co. v. FTC (D.C.Cir.1977) 562 F.2d 749.)

In sum, there are decisive differences between public law enforcement using §17200 and private party actions under the same statute. As the purposes, remedies, and inherent safeguards of law enforcement and private litigation are different, the procedural requirements should reflect those differences.

Practical Problems With Prosecutor Notice

We appreciate the Commission's acknowledgement of the insuperable problems of the notice requirement in the many law enforcement cases involving simultaneous public complaints and judgments. While simultaneous filing occurs in perhaps two-thirds of all judgments (depending on office and case type), the remaining one-third of all law enforcement judgments are obtained after complaints are filed, and would have to meet the 45-day notice requirement. There are many such judgments each year.

A number of practical problems would result from this novel requirement. At a minimum this change would delay the usual remedies of an injunction, victim restitution and civil penalties for a 45-day period. Injunctive relief in particular should, by its very nature, take effect as soon as possible to avoid further harm to consumers and honest competitors. Indeed, as preliminary injunctive relief is sometimes unavailable, additional harm could easily occur during the enforced waiting period.

Defrauded consumers and disadvantaged competitors have a right to the quickest possible remedy. What proven problem of law enforcement judgments warrants this automatic delay in stopping fraud and providing restitution to victims? And if, as some might suggest, courts would often grant motions to shorten time in the nearly 100% of our judgments which provide for injunctions (as well as other remedies), what have we gained by a meaningless requirement of notice that is routinely waived?

Absence of Any Evidence Supporting This Change

In the two years during which this study has been underway, the Commission has heard from representatives of every part of the public and private bar which utilizes or litigates §17200 matters. Despite the Commission's repeated requests for examples of such problems, there has been no evidence demonstrating, or even suggesting, that public law enforcment judgments have been abused or require closer monitoring. An offhand suggestion from one sole practitioner, without a factual basis, is a poor basis for such a controversial change.

In the absence of evidence of problems with prosecutor judgments, our members are deeply troubled by the addition of a requirement whose presence suggests such problems. This proposal is, to our knowledge, unprecedented in California trade regulation law. If there is no evidence that this procedure is needed -- and if it will delay remedies and further burden underfunded public enforcement agencies -- the Commission should resist this change.

This new requirement is inconsistent with the distinction between public and private actions which the Commission has carefully maintained in the past fifteen months of its deliberations. Because it represents a significant shift in the focus of the study -- which had been exclusively on "representative actions" defined as private "general public" actions -- and because it establishes a troubling new precedent in California law, this requirement causes grave concern for prosecutors statewide.

After two years of CDAA's efforts to cooperate and assist the Commission in building a consensus on this issue, it would be a sad result if prosecutors statewide could no longer support this proposal. It certainly would mean that the consensus which Chairman Wied called for in January has not been achieved.

Our offices continue to believe that greater clarity on standing and finality issues in "general public" private actions would be helpful, but not at the expense of the present efficient system of public judgments. We respectfully urge the Commission to return to its previous distinction between the greatly different public and private actions under §17200, and to return to its September 1995 decision not to impose notice requirements on the elected representatives of the People.

Thank you once again for your consideration of our views.

Best regards,

GIL GARCETTI
District Attorney

By Thomas A. Papageorge

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