Study B-700 December 9, 1996

First Supplement to Memorandum 96-88

**Legislative Program: Unfair Competition Litigation**
**(State Bar Litigation Section Comments)**

Attached to this supplement is a letter from Robert L. Gorman expressing the opposition of the State Bar Litigation Section to the recommendation on *Unfair Competition Litigation*. The Section adopts a letter from Kenneth Babcock considered at an earlier meeting (see Memorandum 96-67, Exhibit pp. 20-27, at October meeting) and also opposes two sections that Mr. Babcock did not oppose. The Section concludes "that the burdens imposed on private plaintiffs by the proposed legislation outweigh the benefits suggested as the reasons for the proposal." (Exhibit p. 2.) The Section does not indicate any steps that could be taken to meet their objections, short of abandoning the study.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

# LITIGATION SECTION
## THE STATE BAR OF CALIFORNIA



555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8846
Fax: (415) 561-8868





December 9, 1996

BY FAX: (415) 494-1827

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Comments and recommendation re the California Law Revision Commission's "Working Final Draft" of the Commission's recommendation of its proposed Unfair Competition Litigation (November 21, 1996)

Dear Mr. Sterling:

The Litigation Section of the California State Bar hereby submits its comments on the "Working Final Draft" of the California Law Revision Commission's recommendation of its proposed Unfair Competition Litigation (November 21, 1996). We disagree with the proposal and recommend that the Law Revision Commission not present it to the Legislature. We adopt the reasons stated in the memorandum dated August 29, 1996 to the California Law Review Commission by Kenneth W. Babcock, Chair, Legal Services Section; that memorandum is titled "Comments re California Law Review Commission's Tentative Recommendation re Unfair Competition Litigation (May 1996), No. B-700." Although Mr. Babcock's comments were directed to the Law Revision Commission's Tentative Recommendations re Unfair Competition (May 1996), No. B-700, the Law Review Commission's "Working Final Draft" of the

proposal does not adequately address the concerns expressed by Mr. Babcock. Even as modified, we conclude that the burdens imposed on private plaintiffs by the proposed legislation outweigh the benefits suggested as the reasons for the proposal.

However, we also oppose two sections of the Law Review Commission's proposed unfair competition statute which Mr. Babcock did not entirely oppose.. These two sections are currently numbered Sections 17303 and 17304. (They were numbered Sections 17304 and 17305 in the California Law Review Commission's Tentative Recommendation that Mr. Babcock's memorandum commented on.)

We oppose proposed Section 17303 in its entirety. The requirement that a private plaintiff provide the Attorney General and the county district attorney with notice of the commencement of a representative action and any application for preliminary relief, together with a copy of the complaint, will be a waste of everyone's resources. A great many unfair competition claims are filed in California each year, either as the main cause of action in the complaint, or as only one of several causes of action in a complaint (such as a complaint where the main action is for common law fraud). If the Law Revision Commission's recommended Section 17303 were adopted by the Legislature, the Attorney General and the district attorneys throughout the state of California would be inundated with notices and complaints filed by private plaintiffs; these law enforcement agencies do not have the number of attorneys or staff necessary to carry out their current duties, much less sift through voluminous pages of allegations in complaints filed by private parties. We doubt that these law enforcement agencies, even if they take the time to review all of the complaints filed by private parties, will find many (if any) on which they will choose to take action.

We also oppose proposed Section 17304 in its entirety. That section (in subsection (a)) requires a defendant, promptly after summons is served on it in an enforcement action or representative action, to notify the plaintiff and the court "of any enforcement actions, representative actions, or class actions pending in this state against the defendant that are based on substantially similar facts and theories of liability and that are known to the defendant"; and that section (in subsection (b)) requires a defendant, promptly after summons is served on it in an enforcement action, representative action, or class action in this state to give notice of the filing to the plaintiff and the court "in all pending enforcement actions and representative actions in this state against the defendant that are based on substantially

similar facts and theories of liability and that are known to the defendant." The language "based on substantially similar facts and theories of liability" is overbroad and ambiguous. For example, if a summons is served on a bank in an enforcement action for allegedly unlawful charges to customers for overdrafts, must the bank provide that plaintiff with disclosure of a pending representative action in this state against the bank for allegedly unlawful late charges on home mortgage loan payments? The defendant, based solely on how it interprets the overbroad and ambiguous language of proposed Section 17034, may be compelled to provide disclosure of cases that are far afield from the plaintiff's action, or may choose not to provide disclosure of actions that the plaintiff or a court might believe are right on point. The problem is compounded by the fact that the Law Review Commission's proposed unfair competition statute appears to provide no remedy against a defendant who does not comply with the proposed Section 17304's disclosure requirement. We do not suggest the adoption of such a remedy in the proposed statute because of the overbroad and ambiguous language of the section. The lack of a remedy indicates that the section is not likely to serve its purpose to provide pertinent disclosure in any case.

Proposed section 17304, with its overbreath and ambiguity, would substitute an absolute statutory duty of disclosure on a defendant for what would othewise be an optional right of discovery by the plaintiff in such civil actions. A plaintiff that files an unfair competition action against a defendant under the current statute may use the civil discovery statute in the Code of Civil Procedure to request information from the defendant identifying pending lawsuits alleging factually similar or identical facts and allegations, and a defendant has the opportunity to comply fully with such discovery or to object to it on grounds the defendant considers justifiable (such as lack of relevance or likelihood to lead to admissible evidence, or ambiguity or overbreath). If the defendant refuses to disclose the information, the plaintiff may make a motion to compel the information, and a court will decide the merit of the defendant's objections. In the course of such discovery procedures (as opposed to the broad language of proposed Section 17304), the parties and the court (if necessary) will be dealing with the precise facts and legal theories at issue. The procedures for discovery of such information that currently exist in the Code of Civil Procedure are superior and more flexible and more likely to lead to the discovery of the pertinent information, if that

information is relevant to the subject matter of the lawsuit or likely to lead to admissible evidence.

Sincerely,

State Bar Litigation Section

Robert L. Gorman

By Robert L. Gorman

cc: Mr. David C. Long, Office of Research
Ms. Susan Mattox, Office of Legal Services (by fax)
Ms. Teresa Tan, Litigation Section Chair
Ms. Ruth L. Robinson, Chair, Litigation Section Secretary
Referrals Committee
Ms. Janet K. Hayes, Litigation Section Administrator
Mr. Jerome Sapiro, Jr.