Study B-700 December 11, 1996

Second Supplement to Memorandum 96-88

Legislative Program: Unfair Competition Litigation
(Comments of Prof. Fellmeth and CAJ)

Attached to this supplement are three late-arriving letters:

(1) Prof. Robert Fellmeth, the Commission's consultant on unfair competition litigation, gives his view on the issue of whether it is advisable to apply the proposed 45-day notice rule to contested actions filed by public prosecutors. (See Exhibit p. 1.) He concludes by urging that the focus remain on the problems of lack of finality and private use of the unfair competition statute in a confusing and haphazard manner. He also hopes that the Commission will resist further changes or reconsideration of issues that have already been resolved in the recommendation.

(2) Lee Smalley Edmon writes on behalf of the State Bar Committee on Administration of Justice. (See Exhibit pp. 2-4.) CAJ "agrees that it is appropriate to revise the unfair competition law to address the problems of repetitive claims brought on behalf of the general public and improve the settlement process in these cases." CAJ makes a number of suggestions for revision, most of which have been considered before.

(3) James C. Sturdevant, San Francisco, writes on behalf of the Consumer Attorneys of California. (See Exhibit pp. 5-8.) His letter principally addresses the issues that were the focus of the discussion at the last meeting, the notice of prosecutors' enforcement actions and the relative priorities between private and public actions.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

University of San Diego

Center for Public Interest Law Children's Advocacy Institute

12-11-96

Allan Fink, Chair
Attn. Stan Ulrich
California Law Revision Commission
4000 Middlefield Road, Ste. D-2
Palo Alto, CA 94303-4739

Dear Allan and members of the Commission,

I had not planned on attending the 12-12 meeting of the Commission based on the recent vote to approve Stan Ulrich's final report, with specified changes. There is one remaining issue which the California District Attorneys' Association wishes the Commission to reconsider, the required public notice prior to entry of judgment for public prosecutor cases settled after initial filing. I am ill with a virus and cannot attend, however, I would reiterate several of my earlier comments on this issue.

While notice and wide participation are worthy goals, no such notice is required in the broad authority exercised by public prosecutors to settle criminal matters. Pleas may be taken at numerous points in criminal litigation without prior notice or invitation to intervene, including those pleas providing for restitution. I understand the fear of prosecutors of the precedent such a required notice may imply to their role as elected officials representing the "People" and acting on their behalf. Note that where a case is litigated, its pendency is a matter of public record, and private counsel are free to petition for consolidation. The court will know of their presence and may even require such consolidation with the public case - a change in the law which is a major concession for public prosecutors, moderating their victory in *Pacific Land Research.*

My primary hope is that the Commission retain its current strong focus in the area where there is a strong record of abuse - private litigants using this statute in a confusing and haphazard manner, and in facilitating finality to preclude related abuses. At the same time, I hope the Commission resists other suggested changes and critiques recently advanced by parties not previously hearing the full discussion and raising anew issues which the Commission has carefully considered and resolved.

1 Very sincerely,

Robert C. Fellmeth

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THE COMMITTEE ON ADMINISTRATION OF JUSTICE
THE STATE BAR OF CALIFORNIA

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December 11, 1996

BY FACSIMILE AND U.S. MAIL

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Attention: Mr. Nat Sterling, Executive Secretary
Mr. Stan Ulrich, Assistant Executive Secretary

Dear Ladies and Gentlemen:

The Committee on Administration of Justice ("CAJ") of the California State Bar has reviewed the California Law Revision Commission's (the "Commission") recommendation that the unfair competition law set forth in Business and Professions Code sections 17200 et seq. be revised to include proposed sections 17300 through 17312. The Committee agrees that it is appropriate to revise the unfair competition law to address the problems of repetitive claims brought on behalf of the general public and improve the settlement process in these cases. However, CAJ does recommend a few revisions to the proposed new Code sections, as set forth below:

Section 17302: CAJ suggests that there should be some reasonable time limit within which a party may bring a motion challenging whether the plaintiff or plaintiff's attorney have satisfied the requirements of section 17302 (a) and (b). Without such a time limitation, there is a potential for abuse by defendants who believe they may obtain some tactical advantage by challenges made shortly before trial.

Section 17303: CAJ suggests that the requirement that plaintiff "give" notice of the action be changed to "serve" notice, because the word "serve" has a recognizable definition. (We suggest that the word "serve" replace the word "give" in each section which requires notice to be given.) In addition, it is not entirely clear that the plaintiff is required to give only one notice, at the commencement of the action, to comply with section 17303. Specifically, an application for preliminary relief may not be sought at the time of the commencement of a representative action; instead it may be sought after substantial discovery is taken. The section should make clear that, except at the commencement of the action, a representative plaintiff need not serve notice of applications for preliminary relief on the law

enforcement entity, unless the law enforcement agency has intervened in the action.

Section 17304: Although section 17304 requires a defendant in an enforcement action or representative action to notify all plaintiffs and all courts of any similar actions pending against it, there is no penalty for a defendant failing to do so. Without some consequences for failure to provide notice, there is a potential for abuse in that a defendant could obtain judgment in a collusive action without providing any notice regarding other pending representative actions, yet those other actions nevertheless would be barred thereafter under section 17309. CAJ suggests that a defendant's failure to give notice of a pending action under section 17304 should bar the binding effect of a judgment under section 17309 with respect to the action where no notice was given.

Section 17308: This section provides that a representative action may not be dismissed, settled, or compromised without approval of the court "and substantial compliance with the requirements of this chapter." CAJ believes the "substantial compliance" portion of this section is extremely confusing. It is not clear that anything in the proposed legislation governs dismissals and compromises, as opposed to entry of judgments. For example, if the case is settled and dismissed prior to entry of judgment, proposed sections 17306 and 17307 do not appear to apply. What, then, would be "substantial compliance" in the case of a compromise and dismissal of such an action? The comment to this section states that this section was drawn from Rule 23(e) of the Federal Rules of Civil Procedure (relating to class actions) and Civil Code section 1781(f) (Consumers Legal Remedies Act). Both of those provisions require approval of the court for a dismissal or settlement after appropriate notice is given to interested parties, but neither of them says anything about "substantial compliance" with other provisions. CAJ suggests that proposed section 17308 should be amended to state what is actually intended, or it should be stricken.

Section 17310: This section appears to provide that, if both private plaintiffs and public prosecutors have commenced actions on behalf of the public against the same defendant based on substantially similar facts and theories of liability, the prosecutor's action has preference. (The section is actually ambiguous in that it provides that the court "shall" stay the private plaintiff's representative cause of action; however, the court also appears to have the option of consolidating or

coordinating the actions or making any other order in the interests of justice, which seems inconsistent with the mandatory language regarding staying the private plaintiff's representative action.) While CAJ is cognizant of the existing problem of defendants being required to respond to a multiplicity of actions, and we believe that some amendment to the existing statute is required, in some instances a private plaintiff may have greater incentive and resources to conduct discovery and pursue recovery for the full extent of damages than does the public prosecutor. The court should be allowed to evaluate the ability of both the private plaintiff and the prosecutor to proceed with diligence and thoroughness before deciding that either action should be stayed. CAJ urges amendment to provide that the court has discretion to stay either the private action or the prosector's action, or make whatever other order is in the interests of justice. In the event CAJ's suggestions are adopted, the descriptive title of this section and the Comment should be made more neutral on the issue of "priority" of the prosecutor's action.

The Committee on Administration of Justice appreciates the opportunity to comment on the proposed recommendation of the Commission. If you have any questions, or have any further communications to send out with respect to the proposed recommendation, you can contact me as the CAJ member responsible for this matter, at the following address:

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Very truly yours,

LEdmon

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December 11, 1996

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Law Revision Commission
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File:

Mr. Colin Wied, Chairperson
Mr. Stan Ulrich, Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite 2D
Palo Alto, California 94303-4739

Re: Revised Tentative Recommendation, Unfair Competition Litigation Study (December 6, 1996), No. B-700 (Memorandum 96-88)

Dear Messrs. Wied and Ulrich:

On behalf of the Consumer Attorneys of California (CAOC) and the interests of the clients and the statewide classes of clients and others whom my law firm represents in representative litigation, we appreciate the opportunity to comment further upon the "working final recommendation" of the Law Revision Commission concerning Unfair Competition Litigation which was issued on December 6, 1996.

As you know, I appeared at the November 14 meeting and commented at some length orally as well as responded to questions and concerns raised by members of the Commission, particularly with respect to Sections 17306 and 17310. Those sections concern the notice of terms of judgment in representative actions and the priority between prosecutor and private plaintiff cases which allege representative cause of action. In addition, I have just received a copy of the Staff Memorandum dated December 6, 1996 and the letter attached to it dated December 2, 1996 addressed to Chairperson Fink, Mr. Ulrich and members from Thomas A. Papageorge, the Head Deputy of the Consumer Protection Division of the Los Angeles County District Attorney's Office. As a prelude to the hearing on Thursday, December 11, 1996, which I plan to attend, I wish to comment on the "working final recommendation" version of those sections and the issues raised by the letter from Mr. Papageorge.

In his letter, Mr. Papageorge echoes many of the points which I raised on November 14th. Mr. Papageorge agrees that there are many differences between private representative cases and representative actions filed by public prosecutors.

*ADMITTED IN CALIFORNIA AND CONNECTICUT
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He points to "fundamental differences" between the two types of actions including, specifically, "crucial differences in remedies sought by the People versus those sought by private litigants under Section 17200." Papageorge letter, at 2.

With respect to "remedies," Mr. Papageorge candidly states that only public prosecutors may obtain civil penalties in representative actions. The other major difference is the difference between "disgorgement" and "restitution." The former seeks to separate the wrongdoer from the money wrongfully withheld while the latter focuses on restoring that same money to those wrongfully overcharged. In both situations, the wrongdoer is separated from the money wrongfully obtained. Trial courts in representative actions are vested with broad discretion with respect to ancillary remedial measures to fulfill the statutory scheme of preventing unlawful, unfair and fraudulent business practices and deterring wrongdoers from engaging in them. Corrective advertising remedies have been sought and obtained in private representative actions in California in recent years. See e.g. Consumers Union v. Alta-Dena Cert. Dairy (1992) 4 Cal.App.4th 963.

As I indicated at some length in my letter of October 9, 1996 as well as in my presentation at the hearing on November 14, 1996 there are pressures which exist in both public and private representative actions which the Commission has considered in developing its proposed structuring of the revisions to Business and Professions Code § 17200, et seq. Because such pressures exist, in both types of representative actions, the Commission has proposed a notice and hearing before the claims made in either type of representative action can be settled. Public prosecutors and others talk about "strike" cases or others in which the private representative party trades off private benefits against which might otherwise adversely affect the interest of the general public whose interests have sought to be represented and protected in the case. Contrary to the statements in Mr. Papageorge's letter, private litigants and organizations have pointed to instances in which public prosecutors have dismissed defendants or settled cases which provide no remedy whatsoever to those individuals on whose behalf the action was brought and on whose behalf relief was specifically sought. I specifically identified both the Wilshire Computer (vocational school fraud) litigation in Los Angeles and the Computer Monitor Litigation in San Francisco in my letter to the Commission dated October 9, 1996. I mentioned these same examples at the hearings prior to that letter and on November 14, 1996. Both examples have received publicity in the press as well.

These examples point to the wisdom of the requirement in the "working final recommendation" version of § 17306 requiring notice of the terms of a proposed judgment in a representative action whether that action is brought by a private litigant or a public prosecutor.

In enacting § 17200 the legislature previously recognized the force of a public prosecution action by limiting the award of civil penalties to those actions. But the language of § 17203 is very broad and provides standing to private litigants to challenge unlawful, unfair and fraudulent business practices where none would otherwise exist. That broad legal standing, See Hernandez v. Atlantic Finance Company (1980) 105 Cal.App.3d 65, and the breadth of relief available in a representative action brought by private litigants, See State Farm Fire & Casualty Co. v. Superior Court (1996) 45 Cal.App.4th 1093, rev. denied; Consumers Union v. Alta-Dena Cert. Dairy, supra, points to the need to ensure with respect to a representative cause of action in both types of actions that the individuals whose rights gave rise to the lawsuit and against whom the business practices were targeted receive effective injunctive relief and monetary restitution.

Trial courts ought to ensure that cases brought by public prosecutors in which defendants are dismissed or in which no relief is obtained for those subject to past unlawful business practices and who have been harmed are entitled to no relief. That is all the notice requirement is intended to do in the "working final recommendation" version. We urge that the Commission leave that notice requirement where it is now.

With respect to § 17310, the language still poses a major problem for private litigants in private representative actions. The "priority" of remedial options available to the trial court and set forth in the language of the section suggests an order of actions the trial court should take when presented with representative causes of action in both private actions and public prosecutor actions. I suggest a revision to the language proposed in § 17310(a) as follows:

> "...[t]he court in which either action is pending, on motion of a party or on the court's own motion, shall enter an order, in the interest of justice to properly supervise the prosecution of the actions. Such orders may include, but are not limited to, an order for consolidation or coordination of the actions, or a stay of the private plaintiff's representative cause of action until completion of the prosecutor's enforcement action."

A change in language is necessary to preserve and protect the rights of the private litigants in the private representative action, but more importantly the rights of those whose interests is sought to be protected in the enforcement actions. It is initially important, given the divergence of remedies and interests between private and public enforcement actions, as evidenced in the letter from Mr. Papageorge, for trial courts to recognize, in appropriate cases, that private enforcement actions should be consolidated or coordinated, rather than stayed, so that necessary discovery and litigation decisions may be made under the supervision of the trial court.

The language in the December 6, 1996 working draft suggests a legislative preference that the private action be stayed. We do not believe a trial court should be in any way circumscribed and should be free to take appropriate action, "in the interest of justice" based upon the circumstances presented at the time and given the procedural and substantive circumstances of the particular actions.

Thank you again for your consideration of our views. I look forward to answering any questions you may have at the hearing on Thursday, December 11th.

Sincerely yours,

James C. Sturdevant

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