

Leg. Prog.

January 17, 1997

Memorandum 97-1

1997 Legislative Program

This memorandum reviews the status of items in the Commission's 1997 legislative program.

We have satisfied the January 24 deadline for submitting bill requests to Legislative Counsel for all items in our legislative program. The matters on which we have not yet completed work have been submitted in preliminary form. (It may be necessary to introduce them in that form and later amend them to reflect the Commission's final recommendation.)

Annual Resolution of Commission Authority. Senator Kopp has introduced this measure as SCR 3.

Tolling statute of limitation when defendant out of state. We have decided to start this bill on the Assembly side because of the problems it encountered last year on the Senate side. Assembly Member Ackerman has our materials on it. The measure is faced with opposition from plaintiffs' attorneys. We are awaiting announcement of the composition of the Assembly Judiciary Committee so we can assess the prospects for this legislation. The committee chair is Assembly Member Escutia, and the vice chair is Assembly Member Morrow.

Real property covenants. Our two real property covenant proposals — repeal of the First Rule in Spencer's Case (Civil Code § 1464), and application of the Marketable Record Title Act to obsolete land use restrictions — are in the possession of Senate Judiciary Committee. The chair and staff of the committee have changed since last session, and the persons most interested in making a committee bill of the two proposals are gone. The matter is currently under review by the new committee chair and staff.

Administrative adjudication by quasi-public entities. Senator Kopp has introduced this measure as SB 68. We have received a number of communications concerning it, and the staff is drafting possible refinements to provide a more precise definition of "quasi-public entity".

Ethical standards for administrative law judges. Individual members of the utilities deregulation conference committee who have been interested in administrative adjudication and the role of the administrative law judge are considering introducing this measure.

Best evidence rule. Senator Kopp has indicated his interest in introducing this bill.

Unfair competition. Senator Kopp has introduced this measure as SB 143. The text of the measure is attached to this memorandum.

Judicial review of agency action. We hope to complete work on this recommendation at the January meeting.

Mediation confidentiality. We hope to complete work on this recommendation at the January meeting.

Attachment by undersecured creditors. We have sent the material on this measure to the State Bar for possible inclusion in a bill they are sponsoring.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Introduced by Senator Kopp

January 13, 1997

An act to add Chapter 6 (commencing with Section 17300) to Part 2 of Division 7 of the Business and Professions Code, relating to unfair competition litigation.

LEGISLATIVE COUNSEL'S DIGEST

SB 143, as introduced, Kopp. Unfair competition litigation: representative actions.

Existing law prohibits unlawful, unfair, or fraudulent business acts or practices and unfair, deceptive, untrue, or misleading advertising. Existing law provides that relief for violations of these provisions may be obtained by the Attorney General, district attorneys, county counsels, city attorneys, and city prosecutors, as specified, or by certain other parties, including a person acting for the person's interests or on behalf of the general public. Available remedies under these laws are cumulative, and generally include injunctive relief, civil penalties, and restitution.

This bill would require unfair business practice actions brought by private parties on behalf of the general public ("representative actions") to comply with certain requirements. The bill would require a private plaintiff to be an adequate representative of the interests of the general public and would provide that the private plaintiff may not have a conflict of interest with the interests of the general public. The bill would also require the plaintiff's attorney to be an adequate representative of the interests of the general public. These matters would be determined by the court, and

the representative cause of action would be stricken from the complaint if these requirements are not satisfied, as specified.

The bill would also require the private plaintiff to provide notice of the representative action to the Attorney General and to the district attorney of the county where the action is pending. The defendant would be required to notify the plaintiff and the court of any other related actions pending in this state against the defendant.

The bill would also require the plaintiff to notify specified persons prior to entry of judgment or modification of judgment with respect to a final determination of the action, and would require a court hearing to determine if various requirements have been satisfied. A judgment approved by the court under these provisions would bar any further actions on representative causes of actions brought by private plaintiffs against the defendant based on substantially similar facts and theories of liability.

The bill would also provide that if a prosecutor has commenced an enforcement action against the same defendant based on substantially similar facts and theories of liability, a court may stay the representative action, make an order for consolidation or coordination of the actions, or make any other order, in the interest of justice.

The bill includes other related provisions.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Chapter 6 (commencing with Section
2 17300) is added to Part 2 of Division 7 of the Business and
3 Professions Code, to read:

4

5 CHAPTER 6. REPRESENTATIVE ACTIONS ON BEHALF OF
6 PUBLIC

7

8 17300. As used in this chapter:

9 (a) "Enforcement action" means an action by a
10 prosecutor under Chapter 5 (commencing with Section
11 17200) or Part 3 (commencing with Section 17500).

1 (b) "Prosecutor" means the Attorney General or
2 appropriate district attorney, county counsel, city
3 attorney, or city prosecutor.

4 (c) "Representative cause of action" means a cause of
5 action asserted by a private plaintiff on behalf of the
6 general public under Section 17204 or 17535.

7 17301. (a) A private plaintiff may plead a
8 representative cause of action on behalf of the general
9 public under Section 17204 or 17535 only if the
10 requirements of this chapter are satisfied.

11 (b) The private plaintiff shall separately state the
12 representative cause of action in the pleadings, and shall
13 designate it as being brought "on behalf of the general
14 public" under Section 17204 or 17535, as applicable.

15 17302. (a) A private plaintiff in a representative
16 action must be an adequate representative of the
17 interests of the general public pled and may not have a
18 conflict of interest that reasonably could compromise the
19 good faith representation of the interests of the general
20 public pled. The private plaintiff is not required to have
21 sustained any injury by the defendant.

22 (b) The attorney for a private plaintiff in a
23 representative action must be an adequate legal
24 representative of the interests of the general public pled.

25 (c) On noticed motion of a party or on the court's own
26 motion, the court shall determine by order whether the
27 requirements of subdivisions (a) and (b) are satisfied.
28 The determination may be based on the pleadings. The
29 court may inquire into the matters in its discretion or may
30 permit discovery. In making its determination, the court
31 shall consider standards applied in class actions. If the
32 court determines that the requirements of subdivisions
33 (a) and (b) are not satisfied, the representative cause of
34 action shall be stricken from the complaint.

35 (d) An order under this subdivision may be
36 conditional, and may be modified before judgment in the
37 action.

38 (e) This section does not preclude the court from
39 granting appropriate preliminary relief before a
40 determination is made under subdivision (c).

1 17303. Within 10 days after commencement of a
2 representative action, the private plaintiff shall give
3 notice of the action and of any application for preliminary
4 relief, together with a copy of the complaint, to the
5 Attorney General and to the district attorney of the
6 county where the action is pending. Notice of any
7 application for preliminary relief shall be given in the
8 same manner as notice is given to the defendant.

9 17304. (a) Promptly after summons is served on the
10 defendant in an enforcement action or representative
11 action, the defendant shall notify the plaintiff and the
12 court of any other enforcement actions, representative
13 actions, or class actions pending in this state against the
14 defendant that are based on substantially similar facts and
15 theories of liability and that are known to the defendant.

16 (b) Promptly after summons is served on the
17 defendant in an enforcement action, representative
18 action, or class action in this state, the defendant shall give
19 notice of the filing to the plaintiff and the court in all
20 pending enforcement actions and representative actions
21 in this state against the defendant that are based on
22 substantially similar facts and theories of liability and that
23 are known to the defendant.

24 17305. (a) With respect to a representative cause of
25 action, at least 45 days before entry of a judgment, or any
26 modification of a judgment, which is a final
27 determination of the representative cause of action, the
28 private plaintiff shall give notice of the proposed terms of
29 the judgment or modification, including all stipulations
30 and associated agreements between the parties, together
31 with notice of the time and place set for a hearing on
32 entry of the judgment or modification, to all of the
33 following:

34 (1) The Attorney General.

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

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

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

3 (5) Other persons as ordered by the court.

4 (b) A person given notice under subdivision (a) or any
5 other interested person may apply to the court for leave
6 to intervene in the hearing provided by Section 17306.
7 Nothing in this subdivision limits any other right a person
8 may have to intervene in the action.

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

12 17306. (a) With respect to a representative cause of
13 action, before entry of a judgment, or any modification of
14 a judgment, which is a final determination of the
15 representative cause of action, a hearing shall be held to
16 determine whether the requirements of this chapter
17 have been satisfied.

18 (b) At the hearing the court shall consider the showing
19 made by the parties and any other persons permitted to
20 appear and shall order entry of judgment only if the court
21 finds that all of the following requirements have been
22 satisfied:

23 (1) The proposed judgment and any stipulations and
24 associated agreements are fair, reasonable, and adequate
25 to protect the interests of the general public pled.

26 (2) Any award of attorney's fees included in the
27 judgment or in any stipulation or associated agreement
28 complies with applicable law.

29 (3) The private plaintiff satisfies the requirements of
30 subdivision (a) of Section 17302.

31 (4) The attorney for the private plaintiff satisfies the
32 requirements of subdivision (b) of Section 17302.

33 (5) All other requirements of this chapter have been
34 satisfied.

35 17307. A representative cause of action may not be
36 dismissed, settled, or compromised without the approval
37 of the court and a determination that the disposition of
38 the representative cause of action is fair, reasonable, and
39 adequate to protect the interests of the general public
40 pled. The court, in its discretion, may set the matter for

1 hearing on notice to persons who would receive notice
2 under Section 17306.

3 17308. The determination of a representative cause of
4 action brought by a private plaintiff in a judgment
5 approved by the court pursuant to Section 17306 is
6 conclusive and bars any further actions on representative
7 causes of action brought by private plaintiffs against the
8 same defendant based on substantially similar facts and
9 theories of liability.

10 17309. (a) If a private plaintiff has commenced an
11 action that includes a representative cause of action and
12 a prosecutor has commenced an enforcement action
13 against the same defendant based on substantially similar
14 facts and theories of liability, the court in which either
15 action is pending, on motion of a party or on the court's
16 own motion, may stay the private plaintiff's
17 representative cause of action until completion of the
18 prosecutor's enforcement action, may make an order for
19 consolidation or coordination of the actions, or may make
20 any other order, in the interest of justice.

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

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

28 17310. Notice provided to the Attorney General or a
29 district attorney under Section 17303 or 17305 does not
30 impose any duty on the Attorney General or district
31 attorney. The Attorney General or district attorney is not
32 precluded from taking any future action as a consequence
33 of not taking action in response to notice or any
34 determination made under Section 17306.

35 17311. (a) Except as provided in subdivision (b), this
36 chapter does not apply to actions pending on its operative
37 date.

38 (b) If the parties to a representative action
39 commenced before the operative date of this chapter
40 substantially comply with the provisions of this chapter,

1 the substantive rules provided in this chapter apply in the
2 action unless the court determines that application of a
3 particular provision of this chapter would substantially
4 interfere with the effective conduct of the action or the
5 rights of the parties or other interested persons. For the
6 purpose of this subdivision, Sections 17301 and 17302 are
7 not applicable and the duty to give notice under Section
8 17303 is satisfied if the notice is given promptly after the
9 operative date of this chapter.