Study B-700 June 6, 1997

Memorandum 97-44

SB 143: Unfair Competition Litigation

Senate Bill 143 (Kopp), which would have implemented the Commission's recommendation on *Unfair Competition Litigation*, was heard in the Senate Judiciary Committee on May 13. The bill did not receive enough votes to get out of committee, and so is technically a two-year bill.

Attached to this memorandum is an article from the San Francisco edition of the Daily Journal which presents an approximately accurate overview of the fate of SB 143 and two other bills concerning unfair competition. The article fails to mention that the Commission's bill was supported by a range of interests: California District Attorneys Association, Consumers Union, and California Manufacturers Association.

As the Commission knows, this subject is highly politicized. The Committee Chairman expressed amusement that both the Consumer Attorneys and the Association of Californians for Tort Reform were opposed to SB 143. We take this as evidence that the Commission had located the center of the controversy, and that groups taking an "all or nothing" approach would naturally be allied against the compromise center.

SB 143 received votes from both parties represented on the Committee, but fell short of the five votes needed. Vote on SB 1309 (the Governor's proposal) split on party lines.

The question the Commission needs to consider at this point is whether this matter should be pursued or dropped. Despite extended study, inclusion of all interests in the drafting process, and many attempts to find points of compromise after the bill was introduced, we were not able to break the logjam. The staff does not see any realistic possibility that further study or negotiation on the Commission's part would result in a bill acceptable to the Committee. There is no important rule in the bill that can be adjusted to satisfy some interest group's objection without creating more or stronger opposition from someone else. Accordingly, **the staff recommends that the Commission cease work on the unfair competition study.**

The problems identified by Professor Fellmeth and in the Commission's report will not go away. But if the time comes when a legislative solution is workable, the Commission's recommendation will be on record for whatever help it can provide. Other interest groups will continue to pursue amendment of the unfair competition statutes and those who are actively studying the problems now are aware of the contents of SB 143 and perhaps will draw some ideas from the Commission's work when the shouting stops and principal players get down to working out realistic compromises.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

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BUSINESS LAW

Effort to Limit Consumer Suits Appears At Impasse

■ Despite wide legislative support and a view that the plaintiffs bar uses the system as a cash cow, three bills on unfair business practices fail.

By Tom Dresslar
Daily Journal Staff Writer

SACRAMENTO — A broad legislative effort to curb consumers' ability to sue businesses for fraud, false advertising and other unlawful practices appears dead for the year, despite criticism plaintiffs lawyers are abusing the system to line their own pockets.

The Senate and Assembly Judiciary committees this week rejected a trio of bills that seek to restrict individuals' right to pursue lawsuits on behalf of the general public under the state's unfair and unlawful business practice statutes. None of the bills would affect prosecutors' ability to bring enforcement actions under the laws, found in Business and Professions Code sections 17200 and 17500.

Opposed by the plaintiffs bar lobby, which rejects critics' depiction of the system as a cash cow for lawyers, the measures could be revived this year. But business and other supporters seem hampered by a lack of evidence of rampant abuse, and are not likely to win approval from the Democrat-controlled judiciary panels.

Still, the author of one of the bills, Assemblyman Louis Caldera, D-Los Angeles, plans an all-out effort to win passage of his AB1295 next Wednesday when it comes up for a second vote in the Assembly Judiciary Committee. The bill fell two votes short Wednesday.

Caldera noted a Republican member who was absent will support the measure. And he said the bill's backers, including Silicon Valley high-tech companies hit with such lawsuits, will heavily lobby Democratic member Liz Figueroa of Fremont to switch her vote from "no" to "yes." Figueroa represents part of the Silicon Valley area.

"There will be a very concerted effort over the next week to talk to her," Caldera said Thursday. "We're going to try. I think we have a shot."

Still, history indicates that bills initially defeated by committees rarely pass the second time around unless they are amended to remove opposition.

The other two measures — SB143 by Sen. Quentin Kopp, I-San Francisco, and SB1309 by Sen. Richard Mountjoy, R-Arcadia — went down to defeat in the Senate Judiciary Committee.

James C. Sturdevant, a San Francisco plaintiffs lawyer who specializes in class actions and unlawful business practices litigation, said the three bills' demise represents "the considered finding by two legislative committees that there is no demonstration of widespread abuse and that the limited relief available [under the laws] is designed to achieve the broad legislative intent to eliminate unfair and unlawful business practices."

He also indicated Caldera will face a tough fight in the high-stakes bid to resurrect AB1295. "Mr. Caldera's bill is designed to repeal this statute," said Sturdevant.

On the defense side, Morrison & Foerster partner Penelope Preovolos was disappointed but not surprised by the week's developments.

"I think there needs to be more education of the Legislature on what a problem this is," she said. "No one expected this to be an easy, quick win. But there needs to be a change to stem the tide of hypertechnical and downright silly lawsuits."

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Penny Preovolos,
Morrison & Foerster

The measure least restrictive of private plaintiffs' ability to sue is Kopp's. It essentially proposes stricter court oversight of lawsuits brought on behalf of the general public. SB143 is sponsored by the California Law Revision Commission and supported by Consumers Union and the Center for Public Interest Law at the University of San Diego.

The measures by Caldera and Mountjoy are more sweeping. In contrast to Kopp's, they both could severely restrict individuals' right to bring general-public actions. Both bills are supported by business groups, and Mountjoy's is sponsored by Gov. Pete Wilson.

All three measures are opposed by the Consumer Attorneys of California, representing the trial lawyers bar. In addition, Consumers Union opposes the Mountjoy and Caldera bills.

Explaining Consumers Union's decision to support the Kopp bill but oppose the other two, staff attorney Earl Lui said in an interview: "We felt [SB143] was pretty narrowly focused at producing a new set of procedures allowing the courts to more closely scrutinize these cases. The bill wouldn't have affected legitimate cases."

Business and Professions Code sections 17200 and 17500 prohibit any "unlawful, unfair or fraudulent business practice," including false or deceptive advertising.

State and local prosecutors can bring enforcement actions, and seek civil penalties, restitution for victims and "injunctive relief" that requires the defendant to stop the practice. In addition, private plaintiffs injured by the conduct can sue for restitution and injunctive relief, either on their own behalf or on behalf of the general public. In the latter case, plaintiffs can sue even if they have not been harmed by the practice themselves.

The Caldera and Mountjoy bills share three main provisions. They would require plaintiffs bringing so-called representative actions to prove actual or threatened harm. Both would require such plaintiffs to comply with class-action certification requirements when restitution is sought. And they would bar subsequent representative actions against the same defendant once a court entered judgment in such a lawsuit.

Caldera's AB1295 is narrow, however, in two important respects. First, it does not apply to actions brought by nonprofit groups. And, unlike Mountjoy's, its provision requiring actual or threatened harm would not apply to plaintiffs seeking injunctive relief only.

As currently drafted, SB143 specifies that private plaintiffs who sue on behalf of the general public could not have a conflict that could compromise the public's interest in the case. The plaintiff's lawyer would have to be an "adequate legal representative" of the public interest cited in the lawsuit.

In addition, Kopp's measure would impose a series of notice requirements on private plaintiffs and defendants in such general-public actions. And before entering judgment in such cases, the court would have to hold a noticed hearing, with intervention rights for prosecutors and interested parties, to consider whether the proposed resolution was fair and adequately protected the public's interest. Among other issues, the court also would determine the legality of the plaintiff's lawyer's proposed fees.

Another provision would specify that no lawsuit brought on behalf of the general public could be settled or dismissed unless the court approved the disposition and determined it sufficiently protected the public. And courts could stay private plaintiffs' representative lawsuits if prosecutors filed similar public enforcement actions.

Critics contend the current system is plagued by several problems. They include:

- A lack of finality, or res judicata, for defendants faced with a never-ending series of lawsuits that expose them to duplicative damages for the same alleged practices.
- The inclusion of public-interest causes of action in lawsuits brought by private lawyers eyeing hefty fees.
- And the filing of general-public actions by plaintiffs who only want to strengthen their bargaining leverage and settle their cases with no benefit to the public.

Those alleged problems were cited in a January 1995 report prepared for the law revision commission by Robert Fellmeth, director of the University of San Diego's Center for Public Interest Law.

But consumer advocates and the plaintiffs bar argue neither Fellmeth nor anyone else has been able to document widespread abuse of the current litigation regime. They say the proposed fixes would unduly curb the legal rights of consumers and undermine the deterrence provided by the current system.

One of the focal points of the legislative debate was the fees earned by plaintiffs lawyers in representative actions. Supporters of the bills pointed to cases where the attorneys earned millions, while individual consumers recovered relatively

paltry amounts, sometimes only pennies. Senate Judiciary Committee members used words like "squat" and "spit" to describe consumers' take in such cases.

"This act is being used as a plaintiffs counsel's get-rich technique," Preovolos told the Assembly Judiciary Committee.

But Sturdevant said it was misleading to compare the aggregate sum paid attorneys with the amounts received by individual consumers, who could number in the thousands.

And he noted attorney fees are not recovered under the unlawful business practices laws, but rather the "private attorney general" statute, found in Code of Civil Procedure section 1021.5. And under the requirements of that law, Sturdevant told the Assembly Judiciary Committee, "you don't recover fees unless you prove to the judge [the case] provided a significant benefit to a large number of people."

Supporters said the three bills were reasonable proposals that would curb what they view as abuses, but permit legitimate cases to go forward. They cited a series of "horror stories," including toy and software manufacturers getting slapped with lawsuits alleging packaging was too big, too small, insufficiently informative or too informative. Another involved a lawsuit filed against the maker of a children's oven whose promise that the product would bake cookies in 15 minutes did not take into account the time it took to make the dough and pre-heat the oven.

"This ... approach is very clear, and is not an overreaching approach," Caldera told the Assembly Judiciary Committee Wednesday. "This approach will weed out those frivolous actions filed simply to [leverage] money out of California businesses."

Opponents of the Caldera and Mountjoy bills contended that, despite the cases cited by proponents, there is no documented evidence of widespread abuse. And they cited their own litany of important cases the two bills might have prevented, including those that stopped misleading advertising by raw milk manufacturers, deceptive sales practices by health maintenance organizations and fraud by home foreclosure "consultants."

Critics focused their attack on the two bills' provisions that would require plaintiffs in representative actions to show actual or threatened harm and go through the costly class-action certification process.

Sturdevant noted the current liberal standing rules amount to a tradeoff for the limited relief allowed under the law: restitution and injunctive relief. He said in states that have the tougher standing requirements proposed by the two bills, plaintiffs can obtain traditional monetary damages, which are barred under California's statutes.

Sturdevant and Lui also argued the bills' standing provisions would violate central precepts that underpin sections 17200 and 17500: Unlawful business practices, by their very nature, harm the marketplace and should be stopped regardless of any harm suffered by a particular plaintiff.

Said Lui in testimony to the Assembly Judiciary Committee: "The injury is inherent to the marketplace when you lie, cheat or steal."