

## Memorandum 2006-22

**Statutes Made Obsolete By Trial Court Restructuring:  
Miscellaneous Issues**

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Under Government Code Section 71674, the Commission is responsible for identifying statutes made obsolete by trial court restructuring and recommending needed reforms. Much of this work has already been done, but some remains unfinished. At the February meeting, the staff presented an overview of the work that still needs to be done. Of the remaining projects, this memorandum addresses the following:

- Court appearance by two-way electronic audiovideo communication.
- Concurrent jurisdiction.

Issues relating to appellate jurisdiction in a civil case are analyzed in Memorandum 2006-21 (available from the Commission, [www.clrc.ca.gov](http://www.clrc.ca.gov)). The other unfinished matters will be discussed in future memoranda. The Commission is working towards a tentative recommendation to be circulated for comment. For each subject discussed in this memorandum, the Commission needs to determine which, if any, reforms to include in the tentative recommendation.

In reviewing the material, the Commission should bear in mind the scope of its authority. The Commission is only authorized to study and recommend reforms necessitated by trial court restructuring. The Commission does not have unrestricted authority to propose whatever statutory improvements it considers desirable. Although the Commission might be tempted to do substantive clean-up unrelated to trial court restructuring, it should refrain from such efforts and use a light touch in revising the statutes under consideration. This approach is required by the limitations on the Commission's authority. It is also necessitated by political realities: The proposed legislation will stand a much better chance of enactment if it consists solely of reforms relating to trial court restructuring than if it also attempts to address other matters that may generate controversy. The

staff has followed the “light touch” approach in preparing the statutory revisions recommended in this memorandum.

#### COURT APPEARANCE BY TWO-WAY ELECTRONIC AUDIOVIDEO COMMUNICATION

Penal Code Sections 977 and 977.2 permit use of two-way electronic audiovideo communication for certain court appearances under specified circumstances. The Commission’s 2001 tentative recommendation on trial court restructuring proposed a number of revisions to these provisions to reflect unification of the municipal and superior courts. Among other things, both provisions include the following sentence, which the Commission proposed to revise as indicated: “However, if the defendant is represented by counsel at an initial hearing ~~in superior court~~ in a felony case, and if the defendant does not plead guilty or nolo contendere to any charge, the attorney shall be present with the defendant or if the attorney is not present with the defendant, the attorney shall be present in court during the hearing.”

In response to the proposed amendments, the Los Angeles County Superior Court (“LASC”) questioned whether the phrase “initial hearing in a felony case” was sufficient to “convey the intention of the Legislature in Penal Code § 977, subdivision (c) and Penal Code § 977, subdivision (b), when it specifically created an exception to the general provisions on attorney appearance during video arraignments in cases of arraignment on an information in superior court.” Memorandum 2002-14, Exhibit p. 59 (available from the Commission, [www.clrc.ca.gov](http://www.clrc.ca.gov)). The court suggested using the phrase “arraignment on an information” instead of “initial hearing.” *Id.*

This is an astute suggestion. Before trial court unification, a felony defendant was either (1) indicted and arraigned on the indictment in superior court or (2) arraigned on a complaint before a magistrate in municipal court, and, if held to answer at a preliminary hearing, later arraigned on an information in superior court. Now, under the second approach both the arraignment on the complaint and the arraignment on the information are conducted in superior court (technically the arraignment on the complaint is before a superior court judge acting as magistrate, rather than before the superior court, but this distinction is subtle). This makes the phrase “initial hearing in superior court” ambiguous: Does it refer to the arraignment on the complaint, or to the arraignment on the

information? Does it also encompass an arraignment on an indictment? LASC is correct that a more specific phrase should be used instead.

Rather than incorporating the court's suggested alternative language into the recommendation that the Commission finalized in 2002, the Commission decided that the language should first be circulated for comment. That has not yet been done.

Deciding precisely what revisions should be made in each provision requires some care. For example, Section 977(c) is expressly inapplicable to a defendant who is indicted, so there is no need to refer to an arraignment on an indictment. In contrast, Section 977.2(b) includes no such exception and it is thus necessary to refer to an arraignment on an indictment as well as an arraignment on an information.

The staff recommends that the Commission **include the following amendments of Penal Code Sections 977 and 977.2 in the tentative recommendation it is currently preparing:**

**Penal Code § 977 (amended). Presence of defendant and counsel**

SEC. \_\_\_\_\_. Section 977 of the Penal Code is amended to read:

977. (a) (1) In all cases in which the accused is charged with a misdemeanor only, he or she may appear by counsel only, except as provided in paragraph (2). If the accused agrees, the initial court appearance, arraignment, and plea may be by video, as provided by subdivision (c).

(2) If the accused is charged with a misdemeanor offense involving domestic violence, as defined in Section 6211 of the Family Code, or a misdemeanor violation of Section 273.6, the accused shall be present for arraignment and sentencing, and at any time during the proceedings when ordered by the court for the purpose of being informed of the conditions of a protective order issued pursuant to Section 136.2.

(b)(1) In all cases in which a felony is charged, the accused shall be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present, as provided by paragraph (2). If the accused agrees, the initial court appearance, arraignment, and plea may be by video, as provided by subdivision (c).

(2) The accused may execute a written waiver of his or her right to be personally present, approved by his or her counsel, and the waiver shall be filed with the court. However, the court may

specifically direct the defendant to be personally present at any particular proceeding or portion thereof. The waiver shall be substantially in the following form:

“WAIVER OF DEFENDANT’S PERSONAL PRESENCE”

“The undersigned defendant, having been advised of his or her right to be present at all stages of the proceedings, including, but not limited to, presentation of and arguments on questions of fact and law, and to be confronted by and cross-examine all witnesses, hereby waives the right to be present at the hearing of any motion or other proceeding in this cause. The undersigned defendant hereby requests the court to proceed during every absence of the defendant that the court may permit pursuant to this waiver, and hereby agrees that his or her interest is represented at all times by the presence of his or her attorney the same as if the defendant were personally present in court, and further agrees that notice to his or her attorney that his or her presence in court on a particular day at a particular time is required is notice to the defendant of the requirement of his or her appearance at that time and place.”

(c) The court may permit the initial court appearance and arraignment ~~in municipal or superior court~~ of defendants held in any state, county, or local facility within the county on felony or misdemeanor charges, except for those defendants who were indicted by a grand jury, to be conducted by two-way electronic audiovideo communication between the defendant and the courtroom in lieu of the physical presence of the defendant in the courtroom. If the defendant is represented by counsel, the attorney shall be present with the defendant at the initial court appearance and arraignment, and may enter a plea during the arraignment. However, if the defendant is represented by counsel at an ~~initial hearing in superior court~~ arraignment on an information in a felony case, and if the defendant does not plead guilty or nolo contendere to any charge, the attorney shall be present with the defendant or if the attorney is not present with the defendant, the attorney shall be present in court during the hearing. The defendant shall have the right to make his or her plea while physically present in the courtroom if he or she so requests. If the defendant decides not to exercise the right to be physically present in the courtroom, he or she shall execute a written waiver of that right. A judge may order a defendant’s personal appearance in court for the initial court appearance and arraignment. In a misdemeanor case, a judge may, pursuant to this subdivision, accept a plea of guilty or no contest from a defendant who is not physically in the courtroom. In a felony case, a judge may, pursuant to this subdivision, accept a plea of guilty or no contest from a defendant who is not physically in the courtroom if the parties stipulate thereto.

(d) Notwithstanding subdivision (c), if the defendant is represented by counsel, the attorney shall be present with the defendant in any county exceeding 4,000,000 persons in population.

**Comment.** Subdivision (c) of Section 977 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

In the first sentence, the reference to “municipal or superior court” is deleted because municipal courts no longer exist and all arraignments are held before a judicial officer of the superior court.

In the third sentence, the reference to “an initial hearing in superior court in a felony case” is replaced by a reference to “an arraignment on an information in a felony case.” This revision is necessary to clarify the type of proceeding to which the sentence applies.

Before unification, a felony defendant was either (1) indicted and arraigned on the indictment in superior court or (2) arraigned on a complaint before a magistrate in municipal court and, if held to answer at a preliminary hearing, later arraigned on an information in superior court. Because subdivision (c) is expressly inapplicable to an indicted defendant, the reference to “an initial hearing in superior court in a felony case” in the third sentence was sufficient to indicate that the sentence pertained to an arraignment on an information, not an arraignment on a felony complaint.

Now that the municipal and superior courts have unified, both an arraignment on a felony complaint and an arraignment on an information occur in superior court (technically, the arraignment on the complaint occurs before a superior court judge acting as magistrate). The phrase “initial hearing in superior court in a felony case” is thus vague; it could encompass either an arraignment on a felony complaint or an arraignment on an information or both. The amendment eliminates this ambiguity consistent with the pre-unification status quo.

**Penal Code § 977.2. Appearance and arraignment by two-way electronic audiovideo communication**

977.2. (a) Notwithstanding Section 977 or any other law, in any case in which the defendant is charged with a misdemeanor or a felony and is currently incarcerated in the state prison, the Department of Corrections may arrange for all court appearances in superior court, except for the preliminary hearing, trial, judgment and sentencing, and motions to suppress, to be conducted by two-way electronic audiovideo communication between the defendant and the courtroom in lieu of the physical presence of the defendant in the courtroom. Nothing in this section shall be interpreted to eliminate the authority of the court to issue an order requiring the defendant to be physically present in the courtroom in those cases where the court finds circumstances that require the physical presence of the defendant in the courtroom. For those court appearances that the department determines to conduct by two-way electronic audiovideo communication, the department shall arrange for two-way electronic audiovideo

communication between the superior court and any state prison facility located in the county. The department shall provide properly maintained equipment and adequately trained staff at the prison as well as appropriate training for court staff to ensure that consistently effective two-way communication is provided between the prison facility and the courtroom for all appearances that the department determines to conduct by two-way electronic audiovideo communication.

(b) If the defendant is represented by counsel, the attorney shall be present with the defendant at the initial court appearance and arraignment, and may enter a plea during the arraignment. However, if the defendant is represented by counsel at an ~~initial hearing in superior court~~ arraignment on an information or indictment in a felony case, and if the defendant does not plead guilty or nolo contendere to any charge, the attorney shall be present with the defendant or if the attorney is not present with the defendant, the attorney shall be present in court during the hearing.

(c) In lieu of the physical presence of the defendant's counsel at the institution with the defendant, the court and the department shall establish a confidential telephone and facsimile transmission line between the court and the institution for communication between the defendant's counsel in court and the defendant at the institution. In this case, counsel for the defendant shall not be required to be physically present at the institution during any court appearance that is conducted via electronic audiovideo communication. Nothing in this section shall be construed to prohibit the physical presence of the defense counsel with the defendant at the state prison.

**Comment.** Subdivision (b) of Section 977.2 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

The reference to "an initial hearing in superior court in a felony case" is replaced by a reference to "an arraignment on an information or indictment in a felony case." This revision is necessary to clarify the types of proceeding to which the sentence applies.

Before unification, a felony defendant was either (1) indicted and arraigned on the indictment in superior court or (2) arraigned on a complaint before a magistrate in municipal court and, if held to answer at a preliminary hearing, later arraigned on an information in superior court. The reference to "an initial hearing in superior court in a felony case" was thus sufficient to indicate that the sentence pertained to an arraignment on an information or indictment, not an arraignment on a felony complaint.

Now that the municipal and superior courts have unified, all three kinds of arraignment occur in superior court (technically, an arraignment on a felony complaint occurs before a superior court

judge acting as magistrate). The phrase “initial hearing in superior court in a felony case” is thus imprecise; it could be construed to encompass an arraignment on a felony complaint, as well as an arraignment on an information or indictment. The amendment eliminates this ambiguity consistent with the pre-unification status quo.

#### CONCURRENT JURISDICTION

In the 2001 tentative recommendation on trial court restructuring, the Commission identified a number of sections that could, but need not necessarily, be construed to confer concurrent jurisdiction on the municipal and superior courts. In other words, these provisions conceivably could be interpreted such that a litigant would have a choice of whether to pursue a particular claim in superior court or in municipal court.

In most instances, we suspect that the Legislature did not intend such an interpretation. We did not have time to adequately study these provisions in preparing the 2001 tentative recommendation, however, because that proposal was prepared under pressure of a tight legislative deadline.

Consequently, the Commission did not propose specific revisions of these sections in the tentative recommendation. Instead, the tentative recommendation reproduced the text of each section and explained that further study was required to determine how to amend the section to provide appropriate guidance regarding jurisdictional classification. The Commission solicited comment on the proper treatment of each section.

The Commission received some input on these points, but did not have sufficient time to fully analyze the provisions before finalizing its recommendation. The Commission removed the provisions from the proposal for further study. See Memorandum 2002-14, pp. 7-8 (available from the Commission, [www.clrc.ca.gov](http://www.clrc.ca.gov)).

Some of the provisions have since been amended or repealed such that further work is unnecessary. The Commission needs to study the remaining provisions and propose appropriate amendments. Those provisions are analyzed in the following order, with similar provisions grouped together for purposes of discussion:

- (1) Violation of statute governing duties and qualifications of paralegal (Bus. & Prof. Code § 6455).
- (2) Unlawful employment practice (Gov’t Code § 12965).

- (3) Housing discrimination (Gov't Code § 12980).
- (4) Misleading packaging (Bus. & Prof. Code §§ 12606, 12606.2).
- (5) Abatement of nuisance created by food product (Food & Agric. Code §§ 25564, 29733, 43039).
- (6) Violation of marketing order or agreement pertaining to food commodity (Food & Agric. Code § 59289).
- (7) Enforcement of state tax liability pursuant to warrant or notice of levy (Code Civ. Proc. § 688.010).

Before discussing these matters, it is necessary to present some background information on trial court unification and limited civil cases.

### *Background*

In 1998, California voters approved a constitutional amendment authorizing trial court unification on a county-by-county basis. At the time, California had two types of trial courts: municipal courts and superior courts.

The superior courts had jurisdiction “in all causes except those given by statute to other trial courts.” Former Cal. Const. art. VI, § 10. By statute, a municipal court had jurisdiction in all cases at law in which the demand, exclusive of interest, or the value of the property in controversy was \$25,000 or less, except certain tax cases. Former Code Civ. Proc. § 86(a)(1). Under various different statutes, a municipal court also had jurisdiction in certain other types of cases.

A municipal court was statutorily authorized to issue a preliminary injunction or temporary restraining order where necessary to preserve the property or rights of a party to an action within the court’s jurisdiction. Former Code Civ. Proc. § 86(a)(8). As a general rule, however, a municipal court lacked authority to enter a permanent injunction, determine title to real property, enforce an order under the Family Code, or grant declaratory relief. See Section 580 Comment & authorities cited.

With limited exceptions, a civil case in municipal court was subject to economic litigation procedures. Former Code Civ. Proc. § 91. An appeal from a municipal court judgment was to the superior court, not to the court of appeal. Former Cal. Const. art. VI, § 11. In contrast, a civil case in superior court was subject to normal discovery and litigation procedures, not economic litigation procedures. An appeal from a superior court judgment was to the court of appeal. *Id.*

To accommodate trial court unification, the codes were revised on Commission recommendation to differentiate between limited civil cases and unlimited civil cases. A limited civil case is essentially a case formerly within the jurisdiction of the municipal court; it is treated essentially the same way as a municipal court case. See *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 1, 64 (1998). An unlimited civil case is essentially a case that would have been within the jurisdiction of the superior court before trial court unification; it is treated essentially the same way as a traditional superior court case. See Code Civ. Proc. § 88.

Code of Civil Procedure Section 85 is the key provision on what constitutes a limited civil case. It states:

85. An action or special proceeding shall be treated as a limited civil case if all of the following conditions are satisfied, and, notwithstanding any statute that classifies an action or special proceeding as a limited civil case, an action or special proceeding shall not be treated as a limited civil case unless all of the following conditions are satisfied:

(a) The amount in controversy does not exceed twenty-five thousand dollars (\$25,000). As used in this section, "amount in controversy" means the amount of the demand, or the recovery sought, or the value of the property, or the amount of the lien, that is in controversy in the action, exclusive of attorneys' fees, interest, and costs.

(b) The relief sought is a type that may be granted in a limited civil case.

(c) The relief sought, whether in the complaint, a cross-complaint, or otherwise, is exclusively of a type described in one or more statutes that classify an action or special proceeding as a limited civil case or that provide that an action or special proceeding is within the original jurisdiction of the municipal court, including, but not limited to, the following provisions:

- (1) Section 798.61 of the Civil Code.
- (2) Section 1719 of the Civil Code.
- (3) Section 3342.5 of the Civil Code.
- (4) Section 86.
- (5) Section 86.1.
- (6) Section 1710.20.
- (7) Section 7581 of the Food and Agricultural Code.
- (8) Section 12647 of the Food and Agricultural Code.
- (9) Section 27601 of the Food and Agricultural Code.
- (10) Section 31503 of the Food and Agricultural Code.
- (11) Section 31621 of the Food and Agricultural Code.
- (12) Section 52514 of the Food and Agricultural Code.
- (13) Section 53564 of the Food and Agricultural Code.

- (14) Section 53069.4 of the Government Code.
- (15) Section 53075.6 of the Government Code.
- (16) Section 53075.61 of the Government Code.
- (17) Section 5411.5 of the Public Utilities Code.
- (18) Section 9872.1 of the Vehicle Code.
- (19) Section 10751 of the Vehicle Code.
- (20) Section 14607.6 of the Vehicle Code.
- (21) Section 40230 of the Vehicle Code.
- (22) Section 40256 of the Vehicle Code.

Subdivision (a) essentially preserves the \$25,000 amount in controversy limit that applied to municipal court. See Section 85 Comment.

Subdivision (b), coupled with Code of Civil Procedure Section 580, is intended to preserve traditional limitations on the types of relief available in municipal court. Section 580(b) provides:

... [T]he following types of relief may not be granted in a limited civil case:

- (1) Relief exceeding the maximum amount in controversy for a limited civil case as provided in Section 85, exclusive of attorney's fees, interest, and costs.
- (2) A permanent injunction.
- (3) A determination of title to real property.
- (4) Enforcement of an order under the Family Code.
- (5) Declaratory relief, except as authorized by Section 86.

Under subdivision (c), the type of relief sought in a limited civil case must be described in a statute that either (i) classifies a matter as a limited civil case or (ii) provides that a matter is within the original jurisdiction of the municipal court. Among such statutes is Code of Civil Procedure Section 86(a)(1), which establishes a general rule that a case at law is a limited civil case if the demand or the value of the property in controversy is \$25,000 or less.

Like a municipal court case, a limited civil case is generally subject to economic litigation procedures. Code Civ. Proc. § 91. Similarly, an appeal from a judgment in a limited civil case is to the appellate division of the superior court, not to the court of appeal. Cal. Const. art. VI, § 11; Code Civ. Proc. § 904.2. In contrast, an unlimited civil case is subject to normal discovery and litigation procedures, not economic litigation procedures. An appeal from a judgment in an unlimited civil case is to the court of appeal. *Id.*

By early 2001, the municipal and superior courts in all 58 California counties had unified. The following year, numerous provisions in the codes were amended on Commission recommendation to reflect the elimination of the

municipal courts. Among the statutes not yet fixed are those that might be interpreted to confer concurrent jurisdiction on the municipal and superior courts.

*Violation of Statute Governing Qualifications, Duties, and Conduct of a Paralegal (Bus. & Prof. Code § 6455)*

Business and Professions Code Section 6455 is in a chapter governing qualifications, duties, and conduct of a paralegal. The provision states that “[a]ny consumer injured by a violation of this chapter may file a complaint and seek redress in *any municipal or superior court* for injunctive relief, restitution, and damages.” (Emphasis added.)

The phrase “any municipal or superior court” is unclear. It could be interpreted to allow a plaintiff to select any municipal or superior court as a forum for a claim under the chapter, regardless of the nature of the claim. Alternatively, it could be interpreted to allow a plaintiff to select any municipal court for a claim under the chapter that is within the jurisdictional requirements of the municipal court, and any superior court for a claim under the chapter that is within the jurisdictional requirements of the superior court.

The latter interpretation seems more likely. The staff is skeptical that before unification the Legislature would have wanted to allow a claimant to sue a paralegal for a small sum (\$25,000 or less) in superior court. Similarly, we doubt that the Legislature intended to allow a claimant to sue a paralegal for a large sum (more than \$25,000) or permanent injunctive relief in municipal court.

If that is the proper interpretation, all that needs to be done now is to delete the reference to municipal court. There is no need to add new language clarifying whether a claim under the chapter is to be treated as a limited civil case or an unlimited civil case. The proper jurisdictional classification will be determined by the general rules in Code of Civil Procedure Sections 85 and 580, and by provisions referenced in Section 85 (e.g., Code of Civil Procedure Section 86(a)(1), which classifies a damage claim as a limited civil case if the demand or the value of the property in controversy is \$25,000 or less).

The following amendment would implement this approach:

**Bus. & Prof. Code § 6455 (amended). Violation of chapter governing paralegals**

SEC. \_\_\_\_ . Section 6455 of the Business and Professions Code is amended to read:

6455. (a) Any consumer injured by a violation of this chapter may file a complaint and seek redress in ~~any municipal or~~ superior court for injunctive relief, restitution, and damages. Attorney's fees shall be awarded in this action to the prevailing plaintiff.

(b) Any person who violates the provisions of Section 6451 or 6452 is guilty of an infraction for the first violation, which is punishable upon conviction by a fine of up to two thousand five hundred dollars (\$2,500) as to each consumer with respect to whom a violation occurs, and is guilty of a misdemeanor for the second and each subsequent violation, which is punishable upon conviction by a fine of two thousand five hundred dollars (\$2,500) as to each consumer with respect to whom a violation occurs, or imprisonment in a county jail for not more than one year, or by both that fine and imprisonment. Any person convicted of a violation of this section shall be ordered by the court to pay restitution to the victim pursuant to Section 1202.4 of the Penal Code.

**Comment.** Subdivision (a) of Section 6455 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution. For the jurisdictional classification of an action under subdivision (a), see Code of Civil Procedure Sections 85 (limited civil cases) and 580 (relief awardable).

In comments on the 2002 tentative recommendation, LASC suggested instead that the first sentence of Section 6455 be revised to refer to the "superior court of the county where the injury occurs." Memorandum 2002-14, Exhibit p. 45. With regard to jurisdictional classification, this approach would be no different than the one proposed above. LASC's approach would, however, tackle a matter unrelated to trial court restructuring: It would impose a specific restriction on the proper venue of an action under Section 6455, instead of relying on the general provisions governing venue (Code Civ. Proc. § 392 *et seq.*).

That proposed change would not be consistent with the "light touch" philosophy that the Commission has successfully used in its work on trial court restructuring. The staff therefore recommends that the Commission **proceed with the amendment shown above**, rather than LASC's suggested approach.

#### *Unlawful Employment Practice (Gov't Code § 12965)*

Government Code Section 12965 is a lengthy provision on the procedure for redressing unlawful employment practices. A person seeking redress for such a practice may file a complaint with the Department of Fair Employment and Housing. Under subdivision (b), if the department does not pursue the matter by

accusation, the person seeking redress receives a right-to-sue letter and is permitted to bring a civil action. Subdivision (b) also provides that under specified circumstances a city, county, or district attorney may bring a civil action relating to HIV / AIDS discrimination. Subdivision (b) then states:

*The superior and municipal courts of the State of California shall have jurisdiction of those actions, and the aggrieved person may file in any of these courts. An action may be brought in any county in the state in which the unlawful practice is alleged to have been committed, in the county in which the records relevant to the practice are maintained and administered, or in the county in which the aggrieved person would have worked or would have had access to the public accommodation but for the alleged unlawful practice, but if the defendant is not found within any of these counties, an action may be brought within the county of the defendant's residence or principal office....*

(Emphasis added.)

Here again, the language is unclear. It could be interpreted to allow a plaintiff to select any municipal or superior court as a forum for an unfair employment claim, regardless of the nature of the claim, so long as the specified venue requirements are met. Alternatively, it could be interpreted to allow a plaintiff to select, subject to the specified venue requirements, any municipal court for an unfair employment claim that is within the jurisdictional requirements of the municipal court, and any superior court for an unfair employment claim that is within the jurisdictional requirements of the superior court.

As before, the latter interpretation seems more likely. The language in this provision is perhaps more suggestive of concurrent municipal and superior court jurisdiction than the language in the provision previously discussed (Bus. & Prof. Code § 6455). But we think it improbable that the Legislature intended to allow an unfair employment litigant, in the litigant's discretion, to opt to seek a small sum (\$25,000 or less) in superior court, or to opt to seek a large sum (more than \$25,000) or permanent injunctive relief in municipal court.

If this assessment is correct, then again all that needs to be done is to delete the language referring to municipal court. There is no need to add new language clarifying the proper jurisdictional classification, because that will be determined by the general rules in Code of Civil Procedure Sections 85 and 580, and by provisions referenced in Section 85.

**Section 12965 could thus be amended to read:**

**Gov't Code § 12965 (amended). Accusation or civil action for unlawful employment practice**

SEC. \_\_\_\_\_. Section 12965 of the Government Code is amended to read:

12965. (a) In the case of failure to eliminate an unlawful practice under this part through conference, conciliation, or persuasion, or in advance thereof if circumstances warrant, the director in his or her discretion may cause to be issued in the name of the department a written accusation. The accusation shall contain the name of the person, employer, labor organization, or employment agency accused, which shall be known as the respondent, shall set forth the nature of the charges, shall be served upon the respondent together with a copy of the verified complaint, as amended, and shall require the respondent to answer the charges at a hearing.

For any complaint treated by the director as a group or class complaint for purposes of investigation, conciliation, and accusation pursuant to Section 12961, an accusation shall be issued, if at all, within two years after the filing of the complaint. For any complaint alleging a violation of Section 51.7 of the Civil Code, an accusation shall be issued, if at all, within two years after the filing of the complaint. For all other complaints, an accusation shall be issued, if at all, within one year after the filing of a complaint. If the director determines, pursuant to Section 12961, that a complaint investigated as a group or class complaint under Section 12961 is to be treated as a group or class complaint for purposes of conciliation and accusation as well, that determination shall be made and shall be communicated in writing within one year after the filing of the complaint to each person, employer, labor organization, employment agency, or public entity alleged in the complaint to have committed an unlawful practice.

(b) If an accusation is not issued within 150 days after the filing of a complaint, or if the department earlier determines that no accusation will issue, the department shall promptly notify, in writing, the person claiming to be aggrieved that the department shall issue, on his or her request, the right-to-sue notice. This notice shall indicate that the person claiming to be aggrieved may bring a civil action under this part against the person, employer, labor organization, or employment agency named in the verified complaint within one year from the date of that notice. If the person claiming to be aggrieved does not request a right-to-sue notice, the department shall issue the notice upon completion of its investigation, and not later than one year after the filing of the complaint. A city, county, or district attorney in a location having an enforcement unit established on or before March 1, 1991, pursuant to a local ordinance enacted for the purpose of prosecuting HIV/AIDS discrimination claims, acting on behalf of any person claiming to be aggrieved due to HIV/AIDS discrimination, may also bring a civil action under this part against

the person, employer, labor organization, or employment agency named in the notice. The superior ~~and municipal~~ courts of the State of California shall have jurisdiction of those actions, and the aggrieved person may file in ~~any of~~ these courts. An action may be brought in any county in the state in which the unlawful practice is alleged to have been committed, in the county in which the records relevant to the practice are maintained and administered, or in the county in which the aggrieved person would have worked or would have had access to the public accommodation but for the alleged unlawful practice, but if the defendant is not found within any of these counties, an action may be brought within the county of the defendant's residence or principal office. A copy of any complaint filed pursuant to this part shall be served on the principal offices of the department and of the commission. The remedy for failure to send a copy of a complaint is an order to do so. Those actions may not be filed as class actions or may not be maintained as class actions by the person or persons claiming to be aggrieved where those persons have filed a civil class action in the federal courts alleging a comparable claim of employment discrimination against the same defendant or defendants. In actions brought under this section, the court, in its discretion, may award to the prevailing party reasonable attorney's fees and costs, including expert witness fees, except where the action is filed by a public agency or a public official, acting in an official capacity.

(c) (1) If an accusation includes a prayer either for damages for emotional injuries as a component of actual damages, or for administrative fines, or for both, or if an accusation is amended for the purpose of adding a prayer either for damages for emotional injuries as a component of actual damages, or for administrative fines, or both, the respondent may within 30 days after service of the accusation or amended accusation, elect to transfer the proceedings to a court in lieu of a hearing pursuant to subdivision (a) by serving a written notice to that effect on the department, the commission, and the person claiming to be aggrieved. The commission shall prescribe the form and manner of giving written notice.

(2) No later than 30 days after the completion of service of the notice of election pursuant to paragraph (1), the department shall dismiss the accusation and shall, either itself or, at its election, through the Attorney General, file in the appropriate court an action in its own name on behalf of the person claiming to be aggrieved as the real party in interest. In this action, the person claiming to be aggrieved shall be the real party in interest and shall have the right to participate as a party and be represented by his or her own counsel. Complaints filed pursuant to this section shall be filed in the ~~appropriate~~ superior court in any county in which unlawful practices are alleged to have been committed, in the county in which records relevant to the alleged unlawful practices are maintained and administered, or in the county in which the

person claiming to be aggrieved would have worked or would have had access to public accommodation, but for the alleged unlawful practices. If the defendant is not found in any of these counties, the action may be brought within the county of the defendant's residence or principal office. Those actions shall be assigned to the court's delay reduction program, or otherwise given priority for disposition by the court in which the action is filed.

(3) A court may grant as relief in any action filed pursuant to this subdivision any relief a court is empowered to grant in a civil action brought pursuant to subdivision (b), in addition to any other relief that, in the judgment of the court, will effectuate the purpose of this part. This relief may include a requirement that the employer conduct training for all employees, supervisors, and management on the requirements of this part, the rights and remedies of those who allege a violation of this part, and the employer's internal grievance procedures.

(4) The department may amend an accusation to pray for either damages for emotional injury or for administrative fines, or both, provided that the amendment is made within 30 days of the issuance of the original accusation.

(d) (1) Notwithstanding subdivision (b), the one-year statute of limitations, commencing from the date of the right-to-sue notice by the Department of Fair Employment and Housing, to the person claiming to be aggrieved, shall be tolled when all of the following requirements have been met:

(A) A charge of discrimination or harassment is timely filed concurrently with the Equal Employment Opportunity Commission and the Department of Fair Employment and Housing.

(B) The investigation of the charge is deferred by the Department of Fair Employment and Housing to the Equal Employment Opportunity Commission.

(C) A right-to-sue notice is issued to the person claiming to be aggrieved upon deferral of the charge by the Department of Fair Employment and Housing to the Equal Employment Opportunity Commission.

(2) The time for commencing an action for which the statute of limitations is tolled under paragraph (1) expires when the federal right-to-sue period to commence a civil action expires, or one year from the date of the right-to-sue notice by the Department of Fair Employment and Housing, whichever is later.

(3) This subdivision is intended to codify the holding in *Downs v. Department of Water and Power of City of Los Angeles* (1997) 58 Cal.App.4th 1093.

(e) (1) Notwithstanding subdivision (b), the one-year statute of limitations, commencing from the date of the right-to-sue notice by the Department of Fair Employment and Housing, to the person

claiming to be aggrieved, shall be tolled when all of the following requirements have been met:

(A) A charge of discrimination or harassment is timely filed concurrently with the Equal Employment Opportunity Commission and the Department of Fair Employment and Housing.

(B) The investigation of the charge is deferred by the Equal Employment Opportunity Commission to the Department of Fair Employment and Housing.

(C) After investigation and determination by the Department of Fair Employment and Housing, the Equal Employment Opportunity Commission agrees to perform a substantial weight review of the determination of the department or conducts its own investigation of the claim filed by the aggrieved person.

(2) The time for commencing an action for which the statute of limitations is tolled under paragraph (1) shall expire when the federal right-to-sue period to commence a civil action expires, or one year from the date of the right-to-sue notice by the Department of Fair Employment and Housing, whichever is later.

**Comment.** Subdivision (b) of Section 12965 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution. For the jurisdictional classification of an action under this section, see Code of Civil Procedure Sections 85 (limited civil cases) and 580 (relief awardable).

Subdivision (c)(2) is amended to delete surplusage. Formerly, the provision referred to “the appropriate superior or municipal court.” The reference to municipal court was deleted by 2003 Cal. Stat. ch. 62, § 118. Because there is only one superior court in each county, it is no longer necessary to refer to the “appropriate” court in a specified county.

#### *Housing Discrimination (Gov’t Code § 12980)*

Government Code Section 12980 governs the procedure for seeking redress for housing discrimination. It is closely similar to the provision on the procedure for seeking redress for unlawful employment practices (Gov’t Code § 12965). **It should be treated in the same manner as that provision:**

#### **Gov’t Code § 12980. Complaint, accusation, and civil action for housing discrimination**

12980. This article governs the procedure for the prevention and elimination of discrimination in housing made unlawful pursuant to Article 2 (commencing with Section 12955) of Chapter 6.

(a) Any person claiming to be aggrieved by an alleged violation of Section 12955, 12955.1, or 12955.7 may file with the department a verified complaint in writing that shall state the name and address

of the person alleged to have committed the violation complained of, and that shall set forth the particulars of the alleged violation and contain any other information required by the department.

The filing of a complaint and pursuit of conciliation or remedy under this part shall not prejudice the complainant's right to pursue effective judicial relief under other applicable laws, but if a civil action has been filed under Section 52 of the Civil Code, the department shall terminate proceedings upon notification of the entry of final judgment unless the judgment is a dismissal entered at the complainant's request.

(b) The Attorney General or the director may, in a like manner, make, sign, and file complaints citing practices that appear to violate the purpose of this part or any specific provisions of this part relating to housing discrimination.

No complaint may be filed after the expiration of one year from the date upon which the alleged violation occurred or terminated.

(c) The department may thereupon proceed upon the complaint in the same manner and with the same powers as provided in this part in the case of an unlawful practice, except that where the provisions of this article provide greater rights and remedies to an aggrieved person than the provisions of Article 1 (commencing with Section 12960), the provisions of this article shall prevail.

(d) Upon the filing of a complaint, the department shall serve notice upon the complainant of the time limits, rights of the parties, and choice of forums provided for under the law.

(e) The department shall commence proceedings with respect to a complaint within 30 days of filing of the complaint.

(f) An investigation of allegations contained in any complaint filed with the department shall be completed within 100 days after receipt of the complaint, unless it is impracticable to do so. If the investigation is not completed within 100 days, the complainant and respondent shall be notified, in writing, of the department's reasons for not doing so.

(g) Upon the conclusion of each investigation, the department shall prepare a final investigative report containing all of the following:

(1) The names of any witnesses and the dates of any contacts with those witnesses.

(2) A summary of the dates of any correspondence or other contacts with the aggrieved persons or the respondent.

(3) A summary of witness statements.

(4) Answers to interrogatories.

(5) A summary description of other pertinent records.

A final investigative report may be amended if additional evidence is later discovered.

(h) If an accusation is not issued within 100 days after the filing of a complaint, or if the department earlier determines that no accusation will issue, the department shall promptly notify the person claiming to be aggrieved. This notice shall, in any event, be

issued no more than 30 days after the date of the determination or 30 days after the date of the expiration of the 100-day period, whichever date first occurs. The notice shall indicate that the person claiming to be aggrieved may bring a civil action under this part against the person named in the verified complaint within the time period specified in Section 12989.1. The notice shall also indicate, unless the department has determined that no accusation will be issued, that the person claiming to be aggrieved has the option of continuing to seek redress for the alleged discrimination through the procedures of the department if he or she does not desire to file a civil action. The superior and municipal courts of the State of California shall have jurisdiction of these actions, and the aggrieved person may file in any of these courts. The action may be brought in any county in the state in which the violation is alleged to have been committed, or in the county in which the records relevant to the alleged violation are maintained and administered, but if the defendant is not found within that county, the action may be brought within the county of the defendant's residence or principal office. A copy of any complaint filed pursuant to this part shall be served on the principal offices of the department and of the commission. The remedy for failure to send a copy of a complaint is an order to do so. In a civil action brought under this section, the court, in its discretion, may award to the prevailing party reasonable attorneys' fees.

(i) All agreements reached in settlement of any housing discrimination complaint filed pursuant to this section shall be made public, unless otherwise agreed by the complainant and respondent, and the department determines that the disclosure is not required to further the purposes of the act.

(j) All agreements reached in settlement of any housing discrimination complaint filed pursuant to this section shall be agreements between the respondent and complainant, and shall be subject to approval by the department.

**Comment.** Subdivision (h) of Section 12980 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution. For the jurisdictional classification of an action under this section, see Code of Civil Procedure Sections 85 (limited civil cases) and 580 (relief awardable).

*Misleading Packaging (Bus. & Prof. Code §§ 12606, 12606.2)*

Business and Professions Code Section 12606 prohibits misleading packaging of commodities. Subdivision (c) provides:

(c) Any sealer may seize a container that facilitates the perpetration of deception or fraud and the contents of the container.

By order of the *municipal or superior court* of the city or county within which a violation of this section occurs, the containers seized shall be condemned and destroyed or released upon such conditions as the court may impose to insure against their use in violation of this chapter. The contents of any condemned container shall be returned to the owner thereof if the owner furnishes proper facilities for the return.

(Emphasis added.)

Here, there seems to be clear legislative intent to allow a municipal court to order that noncomplying containers “be condemned and destroyed or released upon such conditions as the court may impose to insure against their use in violation of this chapter.” This might be considered a deviation from the general rule that a municipal court could not issue a permanent injunction. Presumably, the intent was to give a municipal court such authority only with regard to noncomplying containers with a value of \$25,000 or less.

To faithfully preserve this scheme post-unification, it would be necessary to add some language regarding jurisdictional classification:

(c) Any sealer may seize a container that facilitates the perpetration of deception or fraud and the contents of the container. By order of the

~~By order of the municipal or superior court of the city or county~~ within which a violation of this section occurs, the containers seized shall be condemned and destroyed or released upon ~~such~~ conditions ~~as~~ the court may impose to insure against their use in violation of this chapter. The contents of any condemned container shall be returned to the owner thereof if the owner furnishes proper facilities for the return. A proceeding under this section is a limited civil case if the value of the property in controversy is less than or equal to the maximum amount in controversy for a limited civil case under Section 85 of the Code of Civil Procedure.

**Comment.** Subdivision (c) of Section 12606 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

As amended, subdivision (c) makes clear that if the value of seized containers is less than or equal to the maximum amount in controversy for a limited civil case, a proceeding under this section is a limited civil case even though permanent injunctive relief generally is not allowed in a limited civil case (Code Civ. Proc. §§ 85, 580). This preserves the pre-unification status quo, under which a municipal court had authority to order condemnation of containers under this section in specified circumstances.

Subdivision (c) is also amended to make stylistic revisions.

It would also be necessary to amend Code of Civil Procedure Section 580 to make clear that it does not preclude a proceeding under Section 12606 from being treated as a limited civil case:

580. (a) The relief granted to the plaintiff, if there is no answer, cannot exceed that ~~which he or she shall have demanded in his or her~~ the complaint, in the statement required by Section 425.11, or in the statement provided for by Section ~~425.115; but in~~ 425.115. In any other case, the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue. The court may impose liability, regardless of whether the theory upon which liability is sought to be imposed involves legal or equitable principles.

(b) Notwithstanding subdivision (a), the following types of relief may not be granted in a limited civil case:

(1) Relief exceeding the maximum amount in controversy for a limited civil case as provided in Section 85, exclusive of attorney's fees, interest, and costs.

(2) A permanent injunction, except as otherwise authorized by statute.

(3) A determination of title to real property.

(4) Enforcement of an order under the Family Code.

(5) Declaratory relief, except as authorized by Section 86.

**Comment.** Subdivision (b) of Section 580 is amended to clarify its interrelationship with provisions such as Business and Professions Code Section 12606, under which a court in a limited civil case is authorized to grant relief that might be considered a permanent injunction (e.g., an order to destroy property packed in misleading containers). See also [insert list of other relevant sections].

Section 580 is also amended to make stylistic revisions.

The staff is not sure, however, whether it makes sense to preserve the existing scheme. That scheme complicates the codes because it can be viewed as a deviation from the normal rule on awarding permanent injunctive relief in a limited civil case. Perhaps it would be better to make clear that the normal rule applies here. There are reasons for that rule, as the Commission recognized when it rejected the possibility of eliminating the rule in its study of Equitable Relief in a Limited Civil Case (Study J-1323):

The Commission was concerned about the proposal to allow for permanent injunctive relief when the amount involved does not exceed \$25,000. Among the concerns expressed were the difficulty of determining potential damages to the defendant of injunctive relief, the differing effects of mandatory and prohibitory injunctions, the opportunity to "game the system" by including in

the complaint a spurious claim for permanent injunctive relief, and the potential for frequent litigation over reclassification motions. The Commission concluded not to further investigate this matter.

Minutes (June 2004), p. 5 (available from the Commission, [www.clrc.ca.gov](http://www.clrc.ca.gov)).

If the Commission would like to make clear that Section 12606 is subject to the normal rule on awarding permanent injunctive relief, that could be accomplished as follows:

(c) Any sealer may seize a container that facilitates the perpetration of deception or fraud and the contents of the container. By order of the

~~By order of the municipal or superior court of the city or county~~ within which a violation of this section occurs, the containers seized shall be condemned and destroyed or released upon ~~such~~ conditions as the court may impose to insure against their use in violation of this chapter. The contents of any condemned container shall be returned to the owner thereof if the owner furnishes proper facilities for the return.

**Comment.** Subdivision (c) of Section 12606 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

For the jurisdictional classification of a proceeding under this section, see Code of Civil Procedure Sections 85 (limited civil cases) and 580 (relief awardable). Formerly, a proceeding under this section could be brought in municipal court in specified circumstances. That might be considered a deviation from the general rule precluding a municipal court from issuing a permanent injunction. See *St. James Church of Christ Holiness v. Superior Court*, 135 Cal. App. 2d 352, 362, 287 P.2d 387 (1955) (municipal court lacks jurisdiction to grant permanent injunction). For purposes of simplification, the special rule is eliminated.

Subdivision (c) is also amended to make stylistic revisions.

LASC proposed such an amendment in its comments on the 2001 tentative recommendation, but perhaps without realizing the implications. See Memorandum 2002-14, Exhibit p. 45.

It is debatable which of these possible amendments is preferable. The first amendment is consistent with the Commission's "light touch" approach to trial court restructuring. The second amendment violates the "light touch" principle but is perhaps a procedural improvement. It would in effect change the appeal path for some proceedings, and thus might generate concern about expanding the workload of the courts of appeal. If only a few cases are involved, however, that concern might be unwarranted. We do not have data on this point though

we could look for some or request such input in the tentative recommendation if the Commission considers it important.

Because the “light touch” approach has served well in this study, the staff recommends **using the “light touch” approach (including the proposed amendment of Code of Civil Procedure Section 580) in the tentative recommendation, but also including a Note that solicits comment on the alternative approach:**

**Bus. & Prof. Code § 12606 (amended). Misleading packaging of commodity**

SEC. \_\_\_\_ . Section 12606 of the Business and Professions Code is amended to read:

12606. (a) No container wherein commodities are packed shall have a false bottom, false sidewalls, false lid or covering, or be otherwise so constructed or filled, wholly or partially, as to facilitate the perpetration of deception or fraud.

(b) No container shall be made, formed, or filled as to be misleading. A container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack fill. Slack fill is the difference between the actual capacity of a container and the volume of product contained therein. Nonfunctional slack fill is the empty space in a package that is filled to less than its capacity for reasons other than the following:

- (1) Protection of the contents of the package.
- (2) The requirements of machines used for enclosing the contents of the package.
- (3) Unavoidable product settling during shipping and handling.
- (4) The need to utilize a larger than required package or container to provide adequate space for the legible presentation of mandatory and necessary labeling information, such as those based on the regulations adopted by the Food and Drug Administration or state or federal agencies under federal or state law, laws or regulations adopted by foreign governments, or under an industrywide voluntary labeling program.

(5) The fact that the product consists of a commodity that is packaged in a decorative or representational container where the container is part of the presentation of the product and has value that is both significant in proportion to the value of the product and independent of its function to hold the product, such as a gift combined with a container that is intended for further use after the product is consumed, or durable commemorative or promotional packages.

(6) An inability to increase the level of fill or to further reduce the size of the package, such as where some minimum package size is necessary to accommodate required labeling, discourage

pilfering, facilitate handling, or accommodate tamper-resistant devices.

(7) The product container bears a reasonable relationship to the actual amount of product contained inside, and the dimensions of the actual product container, the product, or the amount of product therein is visible to the consumer at the point of sale, or where obvious secondary use packaging is involved.

(8) The dimensions of the product or immediate product container are visible through the exterior packaging, or where the actual size of the product or immediate product container is clearly and conspicuously depicted on the exterior packaging, accompanied by a clear and conspicuous disclosure that the representation is the "actual size" of the product or the immediate product container.

(9) The presence of any head space within an immediate product container necessary to facilitate the mixing, adding, shaking, or dispensing of liquids or powders by consumers prior to use.

(10) The exterior packaging contains a product delivery or dosing device if the device is visible, or a clear and conspicuous depiction of the device appears on the exterior packaging, or it is readily apparent from the conspicuous exterior disclosures or the nature and name of the product that a delivery or dosing device is contained in the package.

(11) The exterior packaging or immediate product container is a kit that consists of a system, or multiple components, designed to produce a particular result that is not dependent upon the quantity of the contents, if the purpose of the kit is clearly and conspicuously disclosed on the exterior packaging.

(12) The exterior packaging of the product is routinely displayed using tester units or demonstrations to consumers in retail stores, so that customers can see the actual, immediate container of the product being sold, or a depiction of the actual size thereof prior to purchase.

(13) The exterior packaging consists of single or multi-unit presentation boxes of holiday or gift packages if the purchaser can adequately determine the quantity and sizes of the immediate product container at the point of sale.

(14) The exterior packaging is for a combination of one purchased product, together with a free sample or gift, wherein the exterior packaging is necessarily larger than it would otherwise be due to the inclusion of the sample or gift, if the presence of both products and the quantity of each product are clearly and conspicuously disclosed on the exterior packaging.

(15) The exterior packaging or immediate product container encloses computer hardware or software designed to serve a particular computer function, if the particular computer function to be performed by the computer hardware or software is clearly and conspicuously disclosed on the exterior packaging.

(c) Any sealer may seize a container that facilitates the perpetration of deception or fraud and the contents of the container. By order of the

~~By order of the municipal or superior court of the city or county~~ within which a violation of this section occurs, the containers seized shall be condemned and destroyed or released upon ~~such~~ conditions as the court may impose to insure against their use in violation of this chapter. The contents of any condemned container shall be returned to the owner thereof if the owner furnishes proper facilities for the return. A proceeding under this section is a limited civil case if the value of the property in controversy is less than or equal to the maximum amount in controversy for a limited civil case under Section 85 of the Code of Civil Procedure.

**Comment.** Subdivision (c) of Section 12606 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

As amended, subdivision (c) makes clear that if the value of seized containers is less than or equal to the maximum amount in controversy for a limited civil case, a proceeding under this section is a limited civil case even though permanent injunctive relief generally is not allowed in a limited civil case (Code Civ. Proc. §§ 85, 580). This preserves the pre-unification status quo, under which a municipal court had authority to order condemnation of containers under this section in specified circumstances.

Subdivision (c) is also amended to make stylistic revisions.

**Note.** An alternative approach would be to amend Section 12606(c) as follows:

(c) Any sealer may seize a container that facilitates the perpetration of deception or fraud and the contents of the container. By order of the

~~By order of the municipal or superior court of the city or county~~ within which a violation of this section occurs, the containers seized shall be condemned and destroyed or released upon ~~such~~ conditions as the court may impose to insure against their use in violation of this chapter. The contents of any condemned container shall be returned to the owner thereof if the owner furnishes proper facilities for the return.

**Comment.** Subdivision (c) of Section 12606 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

For the jurisdictional classification of a proceeding under this section, see Code of Civil Procedure Sections 85 (limited civil cases) and 580 (relief awardable). Formerly, a proceeding under this section could be brought in municipal court in specified circumstances. That might be

considered a deviation from the general rule precluding a municipal court from issuing a permanent injunction. See *St. James Church of Christ Holiness v. Superior Court*, 135 Cal. App. 2d 352, 362, 287 P.2d 387 (1955) (municipal court lacks jurisdiction to grant permanent injunction). For purposes of simplification, the special rule is eliminated.

Subdivision (c) is also amended to make stylistic revisions.

The Commission is particularly interested in comments on whether this approach would be preferable to the one proposed by the Commission and, if so, why.

Business and Professions Code Section 12606.2 prohibits misleading food containers. It is similar to Section 12606 and **should be handled the same way:**

**Bus. & Prof. Code § 12606.2 (amended). Misleading food containers**

SEC. \_\_\_\_\_. Section 12606.2 of the Business and Professions Code is amended to read:

12606.2. (a) This section applies to food containers subject to Section 403 (d) of the Federal Food, Drug and Cosmetic Act (21 U.S.C. Sec. 343 (d)), and Section 100.100 of Title 21 of the Code of Federal Regulations. Section 12606 does not apply to food containers subject to this section.

(b) No food containers shall be made, formed, or filled as to be misleading.

(c) A container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack fill. Slack fill is the difference between the actual capacity of a container and the volume of product contained therein. Nonfunctional slack fill is the empty space in a package that is filled to less than its capacity for reasons other than the following:

(1) Protection of the contents of the package.

(2) The requirements of the machines used for enclosing the contents in the package.

(3) Unavoidable product settling during shipping and handling.

(4) The need for the package to perform a specific function, such as where packaging plays a role in the preparation or consumption of a food, if that function is inherent to the nature of the food and is clearly communicated to consumers.

(5) The fact that the product consists of a food packaged in a reusable container where the container is part of the presentation of the food and has value that is both significant in proportion to the value of the product and independent of its function to hold the food, such as a gift product consisting of a food or foods combined with a container that is intended for further use after the food is consumed or durable commemorative or promotional packages.

(6) Inability to increase the level of fill or to further reduce the size of the package, such as where some minimum package size is necessary to accommodate required food labeling exclusive of any vignettes or other nonmandatory designs or label information, discourage pilfering, facilitate handling, or accommodate ~~tamper-resistant~~ tamper-resistant devices.

This section shall be interpreted consistent with the comments by the United States Food and Drug Administration on the regulations contained in Section 100.100 of Title 21 of the Code of Federal Regulations, interpreting Section 403(d) of the Federal Food, Drug and Cosmetic Act (21 U.S.C. Sec. 343(d)), as those comments are reported on pages 64123 to 64137, inclusive, of Volume 58 of the Federal Register.

(d) If the requirements of this section do not impose the same requirements as are imposed by Section 403(d) of the Federal Food, Drug and Cosmetic Act (21 U.S.C. Sec. ~~343(d)~~, 343(d)), or any regulation promulgated pursuant thereto, then this section is not operative to the extent that it is not identical to the federal requirements, and for this purpose those federal requirements are incorporated into this section and shall apply as if they were set forth in this section.

(e) Any sealer may seize any container that is in violation of this section and the contents of the container. By order of the ~~municipal or~~ superior court of the ~~city or~~ county within which a violation of this section occurs, the containers seized shall be condemned and destroyed or released upon any conditions that the court may impose to ensure against their use in violation of this chapter. The contents of any condemned container shall be returned to the owner thereof if the owner furnishes proper facilities for the return. A proceeding under this section is a limited civil case if the value of the property in controversy is less than or equal to the maximum amount in controversy for a limited civil case under Section 85 of the Code of Civil Procedure.

**Comment.** Subdivision (e) of Section 12606.2 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

As amended, subdivision (e) makes clear that if the value of seized containers is less than or equal to the maximum amount in controversy for a limited civil case, a proceeding under this section is a limited civil case even though permanent injunctive relief generally is not allowed in a limited civil case (Code Civ. Proc. §§ 85, 580). This preserves the pre-unification status quo, under which a municipal court had authority to order condemnation of containers under this section in specified circumstances.

Section 12606.2 is also amended to correct a spelling error in subdivision (c)(6) and a typographical mistake in subdivision (d).

**Note.** An alternative approach would be to amend Section 12606.2(e) as follows:

(e) Any sealer may seize any container that is in violation of this section and the contents of the container. By order of the ~~municipal or~~ superior court of the ~~city or~~ county within which a violation of this section occurs, the containers seized shall be condemned and destroyed or released upon any conditions that the court may impose to ensure against their use in violation of this chapter. The contents of any condemned container shall be returned to the owner thereof if the owner furnishes proper facilities for the return.

**Comment.** Subdivision (e) of Section 12606.2 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

For the jurisdictional classification of a proceeding under this section, see Code of Civil Procedure Sections 85 (limited civil cases) and 580 (relief awardable). Formerly, a proceeding under this section could be brought in municipal court in specified circumstances. That might be considered a deviation from the general rule precluding a municipal court from issuing a permanent injunction. See *St. James Church of Christ Holiness v. Superior Court*, 135 Cal. App. 2d 352, 362, 287 P.2d 387 (1955) (municipal court lacks jurisdiction to grant permanent injunction). For purposes of simplification, the special rule is eliminated.

Subdivision (e) is also amended to correct a spelling error in subdivision (c)(6) and a typographical mistake in subdivision (d).

The Commission is particularly interested in comments on whether this approach would be preferable to the one proposed by the Commission and, if so, why.

Interestingly, in commenting on the 2001 tentative recommendation LASC seemed to recommend that any proceeding under Section 12606.2 be treated as an unlimited civil case:

To get to the proper jurisdiction to open such a superior court case, the agency responsible for regulating/prosecuting violations should be taken into consideration. If such organization, e.g. comparable to the State Weights and Measures Agency is responsible for regulation, then any action filed under these provisions might be considered a matter for general jurisdiction courts. This approach is consistent with the jurisdiction responsible for issuance of inspection warrants.

Memorandum 2002-14, Exhibit p. 45.

*Abatement of Nuisance Created By Food Product (Food & Agric. Code §§ 25564, 29733, 43039)*

Food and Agricultural Code Section 25564 governs destruction of poultry meat that fails to comply with applicable standards. It provides:

25564. If the lot of poultry meat which is held is perishable or subject to rapid deterioration, the enforcing officer may file a verified petition in *any superior or municipal court* of the state to destroy such lot or otherwise abate the nuisance. The petition shall show the condition of the lot, that the lot is situated within the county, that the lot is held, and that notice of noncompliance has been served pursuant to this chapter. The court may thereupon order that such lot be forthwith destroyed or the nuisance otherwise abated as set forth in such order.

(Emphasis added.)

As with the provisions governing misleading packaging, there seems to be clear legislative intent to allow a municipal court to grant what might be viewed as essentially permanent injunctive relief: an order compelling destruction of perishable, noncomplying poultry meat. Again, the probable intent was to give a municipal court such authority only with regard to noncomplying meat with a value of \$25,000 or less.

The Commission should **handle this situation the same way that it handles the provisions on misleading packaging**. If the Commission follows the staff's recommendation in that context, it should use the same approach here, as shown below:

**Food & Agric. Code § 25564 (amended). Destruction of perishable noncomplying lot of poultry meat**

SEC. \_\_\_\_ . Section 25564 is amended to read:

25564. If the lot of poultry meat which is held is perishable or subject to rapid deterioration, the enforcing officer may file a verified petition in ~~any superior or municipal court of the state~~ to destroy such the lot or otherwise abate the nuisance. The petition shall show the condition of the lot, that the lot is situated within the county, that the lot is held, and that notice of noncompliance has been served pursuant to this chapter. The court may thereupon order that such the lot be forthwith destroyed or the nuisance otherwise abated as set forth in such the order. A proceeding under this section is a limited civil case if the value of the property in controversy is less than or equal to the maximum amount in controversy for a limited civil case under Section 85 of the Code of Civil Procedure.

**Comment.** Section 25564 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

As amended, the provision makes clear that if the value of poultry meat is less than or equal to the maximum amount in controversy for a limited civil case, a proceeding under this section is a limited civil case even though permanent injunctive relief generally is not allowed in a limited civil case (Code Civ. Proc. §§ 85, 580). This preserves the pre-unification status quo, under which a municipal court had authority to order destruction of poultry meat under this section in specified circumstances.

Section 25564 is also amended to make stylistic revisions.

**Note.** An alternative approach would be to amend Section 25564 as follows:

25564. If the lot of poultry meat which is held is perishable or subject to rapid deterioration, the enforcing officer may file a verified petition in ~~any~~ the ~~superior or municipal court of the state~~ to destroy ~~such~~ the lot or otherwise abate the nuisance. The petition shall show the condition of the lot, that the lot is situated within the county, that the lot is held, and that notice of noncompliance has been served pursuant to this chapter. The court may thereupon order that ~~such~~ the lot be forthwith destroyed or the nuisance otherwise abated as set forth in ~~such~~ the order.

**Comment.** Section 25564 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

For the jurisdictional classification of a proceeding under this section, see Code of Civil Procedure Sections 85 (limited civil cases) and 580 (relief awardable). Formerly, a proceeding under this section could be brought in municipal court in specified circumstances. That might be considered a deviation from the general rule precluding a municipal court from issuing a permanent injunction. See *St. James Church of Christ Holiness v. Superior Court*, 135 Cal. App. 2d 352, 362, 287 P.2d 387 (1955) (municipal court lacks jurisdiction to grant permanent injunction). For purposes of simplification, the special rule is eliminated.

Section 25564 is also amended to make stylistic revisions.

The Commission is particularly interested in comments on whether this approach would be preferable to the one proposed by the Commission and, if so, why.

Food and Agricultural Code Sections 29733 and 43039 are similar to Section 25564, but pertain to different types of food products. **They should be handled**

in the same manner as Section 25564. If the proposed treatment of Section 25564 is acceptable, Section 29733 should be treated as follows in the tentative recommendation the Commission is preparing:

**Food & Agric. Code § 29733 (amended). Failure to recondition or remark honey**

SEC. \_\_\_\_\_. Section 29733 is amended to read:

29733. If a packer or owner of honey, or the agent of either, after notification to the packer, owner, or agent that the honey and its containers are a public nuisance, refuses, or fails within a reasonable time, to recondition or remark the honey so as to comply with all requirements of this chapter, the honey and its containers:

(a) May be seized by the director or any enforcement officer.

(b) By order of the ~~municipal or~~ superior court of the county ~~or city~~ within which the honey and its containers may be, shall be condemned and destroyed, or released upon ~~such~~ conditions as the court, in its discretion, may impose to insure that it will not be packed, delivered for shipment, shipped, transported, or sold in violation of this chapter. A proceeding under this section is a limited civil case if the value of the property in controversy is less than or equal to the maximum amount in controversy for a limited civil case under Section 85 of the Code of Civil Procedure.

**Comment.** Section 29733 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

As amended, the provision makes clear that if the value of honey product is less than or equal to the maximum amount in controversy for a limited civil case, a proceeding under this section is a limited civil case even though permanent injunctive relief generally is not allowed in a limited civil case (Code Civ. Proc. §§ 85, 580). This preserves the pre-unification status quo, under which a municipal court had authority to order destruction of honey product under this section in specified circumstances.

Section 29733 is also amended to make stylistic revisions.

**Note.** An alternative approach would be to amend Section 29733(b) as follows:

(b) By order of the ~~municipal or~~ superior court of the county ~~or city~~ within which the honey and its containers may be, shall be condemned and destroyed, or released upon ~~such~~ conditions as the court, in its discretion, may impose to insure that it will not be packed, delivered for shipment, shipped, transported, or sold in violation of this chapter.

**Comment.** Section 29733 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

For the jurisdictional classification of a proceeding under this section, see Code of Civil Procedure Sections 85 (limited civil cases) and 580 (relief awardable). Formerly, a proceeding under this section could be brought in municipal court in specified circumstances. That might be considered a deviation from the general rule precluding a municipal court from issuing a permanent injunction. See *St. James Church of Christ Holiness v. Superior Court*, 135 Cal. App. 2d 352, 362, 287 P.2d 387 (1955) (municipal court lacks jurisdiction to grant permanent injunction). For purposes of simplification, the special rule is eliminated.

Section 29733 is also amended to make stylistic revisions.

The Commission is particularly interested in comments on whether this approach would be preferable to the one proposed by the Commission and, if so, why.

Likewise, if the proposed amendment of Section 25564 is acceptable, Section 43039 should be treated as follows in the tentative recommendation:

**Food & Agric. Code § 43039 (amended). Destruction of perishable noncomplying lot of fruits, nuts, or vegetables**

SEC. \_\_\_\_ . Section 43039 of the Food and Agricultural Code is amended to read:

43039. If the lot which is held is perishable or subject to rapid deterioration, the enforcing officer may file a verified petition in ~~any superior or municipal court of the state~~ to destroy the lot or otherwise abate the nuisance. The petition shall show the condition of the lot, that the lot is situated within the county, that the lot is held, and that notice of noncompliance has been served as provided in this article. The court may thereupon order that the lot be forthwith destroyed or the nuisance otherwise abated as set forth in the order. A proceeding under this section is a limited civil case if the value of the property in controversy is less than or equal to the maximum amount in controversy for a limited civil case under Section 85 of the Code of Civil Procedure.

**Comment.** Section 43039 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

As amended, the provision makes clear that if the value of food product is less than or equal to the maximum amount in controversy for a limited civil case, a proceeding under this section is a limited civil case even though permanent injunctive relief generally is not allowed in a limited civil case (Code Civ. Proc. §§ 85, 580). This preserves the pre-unification status quo, under which a municipal court had authority to order destruction of food product under this section in specified circumstances.

Section 43039 is also amended to make stylistic revisions.

**Note.** An alternative approach would be to amend Section 43039 as follows:

43039. If the lot which is held is perishable or subject to rapid deterioration, the enforcing officer may file a verified petition in ~~any superior or municipal court of the state~~ to destroy the lot or otherwise abate the nuisance. The petition shall show the condition of the lot, that the lot is situated within the county, that the lot is held, and that notice of noncompliance has been served as provided in this article. The court may thereupon order that the lot be forthwith destroyed or the nuisance otherwise abated as set forth in the order.

**Comment.** Section 43039 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

For the jurisdictional classification of a proceeding under this section, see Code of Civil Procedure Sections 85 (limited civil cases) and 580 (relief awardable). Formerly, a proceeding under this section could be brought in municipal court in specified circumstances. That might be considered a deviation from the general rule precluding a municipal court from issuing a permanent injunction. See *St. James Church of Christ Holiness v. Superior Court*, 135 Cal. App. 2d 352, 362, 287 P.2d 387 (1955) (municipal court lacks jurisdiction to grant permanent injunction). For purposes of simplification, the special rule is eliminated.

Section 43039 is also amended to make stylistic revisions.

The Commission is particularly interested in comments on whether this approach would be preferable to the one proposed by the Commission and, if so, why.

*Violation of Marketing Order or Agreement Pertaining to Food Commodity (Food & Agric. Code § 59289)*

Food and Agricultural Code Section 59289 is much like the sections just discussed, except it applies when an agricultural product or other food commodity produced in California violates a marketing order or agreement. It authorizes an enforcing officer to petition a superior or municipal court to divert a violating lot “to any other available lawful use or to destroy the lot.”

This section **should be treated in the same manner as the other sections authorizing destruction of various noncomplying food products.** Consistent with its prior suggestions, the staff recommends the following approach:

**Food & Agric. Code § 59289 (amended). Petition to divert or destroy lot in violation of marketing order or agreement**

SEC. \_\_\_\_\_. Section 59289 of the Food and Agricultural Code is amended to read:

59289. (a) The enforcing officer may file a verified petition in ~~any superior or municipal court of this state~~ requesting permission to divert ~~such~~ the lot to any other available lawful use or to destroy the lot. The verified petition shall show all of the following:

~~(a)~~ (1) The condition of the lot.

~~(b)~~ (2) That the lot is situated within the territorial jurisdiction of the court in which the petition is being filed.

~~(c)~~ (3) That the lot is held, and that the notice of noncompliance has been served as provided in Section 59285.

~~(d)~~ (4) That the lot has not been reconditioned as required.

~~(e)~~ (5) The name and address of the owner and the person in possession of the lot.

~~(f)~~ (6) That the owner has refused permission to divert or to destroy the lot.

(b) A proceeding under this section is a limited civil case if the value of the property in controversy is less than or equal to the maximum amount in controversy for a limited civil case under Section 85 of the Code of Civil Procedure.

**Comment.** Section 59289 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

As amended, the provision makes clear that if the value of the lot in question is less than or equal to the maximum amount in controversy for a limited civil case, a proceeding under this section is a limited civil case even though permanent injunctive relief generally is not allowed in a limited civil case (Code Civ. Proc. §§ 85, 580). This preserves the pre-unification status quo, under which a municipal court had authority to order destruction of a lot under this section in specified circumstances.

Section 59289 is also amended to make stylistic revisions.

**Note.** An alternative approach would be to amend Section 59289 as follows:

59289. The enforcing officer may file a verified petition in ~~any superior or municipal court of this state~~ requesting permission to divert ~~such~~ the lot to any other available lawful use or to destroy the lot. The verified petition shall show all of the following:

....

**Comment.** Section 59289 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

For the jurisdictional classification of a proceeding under this section, see Code of Civil Procedure Sections 85

(limited civil cases) and 580 (relief awardable). Formerly, a proceeding under this section could be brought in municipal court in specified circumstances. That might be considered a deviation from the general rule precluding a municipal court from issuing a permanent injunction. See *St. James Church of Christ Holiness v. Superior Court*, 135 Cal. App. 2d 352, 362, 287 P.2d 387 (1955) (municipal court lacks jurisdiction to grant permanent injunction). For purposes of simplification, the special rule is eliminated.

Section 59289 is also amended to make stylistic revisions.

The Commission is particularly interested in comments on whether this approach would be preferable to the one proposed by the Commission and, if so, why.

*Enforcement of State Tax Liability Pursuant to Warrant or Notice of Levy (Code Civ. Proc. § 688.010)*

Code of Civil Procedure Section 688.010 pertains to enforcement of state tax liability pursuant to a warrant or notice of levy. It unambiguously provides for municipal court jurisdiction in circumstances in which the superior court also has jurisdiction:

688.010. For the purpose of the remedies provided under this article, jurisdiction is conferred upon any of the following courts:

(a) The superior court, *regardless of whether the municipal court also has jurisdiction* under subdivision (b).

(b) The municipal court if (1) the amount of liability sought to be collected does not exceed the jurisdictional amount of the court and (2) the legality of the liability being enforced is not contested by the person against whom enforcement is sought.

(Emphasis added.) The constitutionality of such an approach is debatable. See Plant, Comment, *Effect upon Jurisdiction of Superior Courts of Statutes Vesting Jurisdiction in Municipal or Inferior Courts*, 21 Cal. L. Rev. 42 (1932). The staff needs to do further research before presenting a proposed amendment of this section for the Commission's consideration. We will try to do that for the Commission's next meeting, so that this provision can be included in the same tentative recommendation as the other amendments potentially raising issues of concurrent jurisdiction.

Respectfully submitted,

Barbara Gaal  
Staff Counsel