CIVIL JUSTICE
ASSOCIATION OF CALIFORNIA

MEMORANDUM

May 7, 2003

TO: Hon. Ellen Corbett, Chair
Hon. Tom Harman, Vice-Chair
Members, Assembly Judiciary Committee

FROM: Jeff Sievers, Vice President-Legislation
John H. Sullivan, President
Laura Borden Riddell, Legislative Advocate

RE: **AB 95 (Corbett)**
Status: Assembly Judiciary Committee
Hearing Date: May 8, 2003

CJAC POSITION **OPPOSE**

The Civil Justice Association of California (CJAC) **opposes Assembly Bill 95 (Corbett).**

Process

At the outset, the Civil Justice Association of California wants to express its objection to what we believe is an abuse of legislative process with this bill. The substance of Assembly Bill 95 was not available in print for review by the public until today, May 7. According to J.R. 55 "no bill may be heard or acted upon by committee until the bill has been in print for 30 days." The purpose of this provision is to allow the public reasonable time to analyze the impact of a proposal and communicate with legislators. While a bill number 95 has been in print since January 8, the substantive provisions have been in print less than one day. This process of a "gut and amend" at the last minute circumvents the spirit and intent of the "30-day" rule.

Joint Rule 60 addresses committee hearings. Its Subsection (b) states "Four day's notice is required in the Daily File prior to the hearing." H.R. 11.3 (b) addressing committee hearings further states "Any meeting that is required to be open and public pursuant to this rule, may be held only after full and timely notice to the public as provided by the Joint Rules of the Assembly and the Senate." This provision has been traditionally viewed as enabling, among other things, witnesses to arrange schedules and travel to Sacramento. Assembly Bill 95 was noticed in the Daily File on May 7 for a hearing in the Assembly Judiciary Committee on May 8.

Assembly Bill 95 deals with a matter prominent on the Legislative agenda since the first day of the session this past December. The overall issue addressed by AB 95 and other bills was the subject of joint hearing of the Judiciary Committees on January 14. With this lead time, we know of no justification for tossing aside important, longstanding joint rules – an action which degrades the the legislative process and undermines confidence in the California Legislature.

Assembly Bill 95

Regardless of the outcome of current attempts to sanction selected attorneys for their use of Business and Professions Code Sec. 17200, legislation closing the avenues of abuse is essential. As Attorney General Bill Lockyer told the Judiciary Committees at their January 14 joint hearing: "It is better to discipline the system rather than just a couple of bad actors, if you can figure out the right way to do it."

There is no discipline in AB 95. The bill does nothing to reduce 17200's use as a legal shakedown tool – in fact it enhances it.

In Sec. 1 the bill sets out a demand letter to be used by private lawyers filing a 17200 lawsuit as a representative the general public. While the letter is not as abrasive as those used by attorneys such as the under-fire Trevor Law Group, it is practically as intimidating. We await explanation of the mandatory letter's titling as "IMPORTANT *CONSUMER* INFORMATION" (emphasis added). It says the accused business owner "may wish" to contact the Attorney General's Office – not necessary consoling advice to the average business owner. It's emphasis on the business owner's contacting an attorney in essence shifts to the defense bar responsibility for bearing the bad news: That with 17200's standing and strict liability elements unchanged, it's still cheaper to settle than fight when a private lawyer without a client and without any evidence of harm accuses you of unfair competition.

This section also requires a defendant to get a court to "review" (not "approve") an agreement to pay a plaintiff lawyer's attorney fees. Preliminary review suggests that this mandate can easily be avoided by lawyers who are careful not to state the settlement includes attorney fees at all. An attorney who fails to comply with the new section "may be subject to disciplinary action by the State Bar of California." Could the sanction possibly be any weaker?

In Sec. 2, AB 95 gives not only private attorneys but district attorneys and the Attorney General the ability to use 17200 to extract "disgorgement" money from a company even when no consumer plaintiffs exist who can be identified as suffering an economic loss. The California Supreme Court said in 2000 in *Kraus v. Trinity Management Services* (96 Cal.Rptr.2d 485) that this "disgorgement" feature only exists under California law in a class action lawsuit (which has many more protections for plaintiffs and defendants alike).

The bill does not create any standards for disgorgement and further allows these additional monies to be placed in a "fluid recovery fund." These "fluid recovery funds" have been used in the past as funding mechanisms for new "non-profit groups" whose purpose is to bring even more unfair competition lawsuits.

The Legislature should note that the Supreme Court in *Kraus*, finding that the Business and Professions Code does not permit disgorgement in a 17200 action, added the statement that "...because a representative UCL action is not subject to the same level of judicial supervision as a class action, a UCL action seeking disgorgement into a fluid recovery fund on behalf of absent persons may not, in fact, serve the public."

This section in AB 95 would "correct" the plaintiffs' lawyers' *Kraus* problem, thus opening the door to their taking control of "unfairly earned" profits from any company they sue under 17200 – regardless of whether consumers or other companies were ever harmed. With the incredibly broad standards contained within the UCL, this new remedy would make the current situation worse by allowing a private attorney to threaten even greater harm to the individual business targeted in the 17200 lawsuit.

It is an understatement to say this would be a mammoth incentive to more private lawyer 17200 lawsuits. The Attorney General sponsored an unsuccessful bill last year (SB 2019 - Wayne) to established 17200 disgorgement, but had the foresight not to include private lawyers in the plan.

This section also appears intended to further make 17200 a low-cost class action device for plaintiffs' lawyers. It facilitates grouping of defendants, which would pay off in bigger settlements. It expressly reinforces the practice of suing a business that simply *might* have committed a 17200 violation (of course, there is no compensation to a company wrongly sued).

California's unfair competition law was for years used by public prosecutors for the purpose suggested in its title -- to stop unfair competition that directly harmed competitors and indirectly harmed consumers of goods and services. A combination of amendments and court interpretations has created a statute which today encompasses any act that violates a common law rule, statute, regulation, or ordinance (whether or not such a violation is independently actionable), any act that a plaintiff claims is unfair (whether or not anyone has actually been harmed), and any act alleged deceptive (whether or not actual deception has ever occurred). No harm to "competition" need be shown to obtain broad equitable relief in the form of restitution or injunctions.

Private attorneys acting as "representatives" can under the UCL file what amounts to class action lawsuits without court-supervised class certification safeguards, without any showing that the attorney is a suitable representative of the people

allegedly represented (and without any notice to those people that a suit is being brought), and without any protection to defendants that once a case is concluded they won't be sued all over again on the same issues!

Current abuse of the UCL stems primarily from its recently exploding use by plaintiffs attorneys claiming to be acting on behalf of the general public or representing individuals who have not been harmed or misled and who may not even have had any personal involvement with the product or service. The law permits any private attorney to become a quasi-prosecutor, selecting deep pocket targets and shallow pockets alike! In fact, plaintiffs lawyers hold seminars on how to use the UCL to drive up settlement values and develop a new practice.

The law grants a private attorney the power to decide almost carte blanche what is "unfair." This allows private attorneys to use the UCL as a weapon in conjunction with other causes of action, for example, demanding broad discovery of all information relevant to "unfairness."

None of these problems are even marginally addressed by AB 95. They are only aggravated.

For these reasons, we oppose the measure and urge your no vote.

cc: Assemblywoman Ellen Corbett
Drew Liebert, Assembly Judiciary Committee
Mark Redmond, Assembly Republican Caucus
Ann Richardson, Office of Governor Gray Davis