CIVIL JUSTICE
ASSOCIATION OF CALIFORNIA

MEMORANDUM

May 8, 2003

TO: Hon. Martha Escutia, Chair
Hon. Bill Morrow, Vice-Chair
Members, Senate Judiciary Committee

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

RE: **SB 122 (Escutia)**
Status: Senate Judiciary Committee
Hearing Date: May 13, 2003

CJAC POSITION **OPPOSE**

The Civil Justice Association of California (CJAC) **opposes Senate Bill 122 (Escutia).**

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 SB 122. The bill does nothing to reduce 17200's use as a legal shakedown tool – in fact it enhances it.

In Sec. 1 the bill 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? Subsection (b) then excludes labor unions from this requirement. Why should labor unions be excluded from this minimal requirement?

In subsection (c), SB 122 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 sub-section in SB 122 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 SB 122. They are only aggravated.

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

cc: Senator Martha Escutia
Gene Wong, Chief Counsel, Senate Judiciary Committee
Mike Petersen, Senate Republican Caucus
Ann Richardson, Office of Governor Gray Davis