January 13, 2003

Joint Hearing
Senate Judiciary Committee
And Assembly Judiciary Committee
January 14, 2003 – Sacramento

Private Attorney Abuse of the Unfair Competition Law (Business and Professions Code Sec. 17200)

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I. The long season of denial is over. Business and Professions Committee Chair Lou Correa held a hearing in Orange County on Friday which pulled back the curtain once and for all on private lawyer abuse of B&P Code Sec. 17200.

II. Plaintiffs' lawyers are promoting the theme that 17200 "most often targets abuse by 'large companies.'"

A. Are we therefore to conclude that it is ok for smaller businesses to suffer because the problem is only "minimal" (a plaintiffs' lawyer official's statement to a legal reporter) and must be tolerated because of a "greater good"?

B. Are we to conclude that amendments to 17200, if they are considered at all, should be written to affect a business defendant based on its number of employees, or revenue, or how recently its owner of a business came to America?

C. An examination of cases can provide examples of questionable use of 17200 against larger businesses, for example:

1. The U.S. Supreme Court announced Friday it will look at 17200's use to attack a business' statements about its operations when the plaintiff's only standing to sue is being a resident of California and no damages have been shown.

2. A pet food company accidently made a contaminated batch of dog food. It spent $3.7 million recalling 7,500 tons of the product; notifying the public, distributors, veterinarians, and customers; paid customers for replacing the product, veterinarian bills, and other costs. It also paid thousands to defend itself all the way through the Court of Appeal against a 17200 claim that was eventually thrown out in a unanimous decision that called the company's behavior "exemplary." (*Klein v. Nature's Recipes, Inc*, 1997)

3. Ebay was recently sued by a private attorney over arbitration language in its user agreement which has already been determined to be inappropriate, has never been used, is being removed from the agreement, and notices being sent to more than 50 million people.

D. The attached January 13 letter to the Judiciary Committees briefly sets out the hopes and concerns of the broader business community.

III. Choices in Solving the Problem

A. Do nothing legislatively and urge State Bar to investigate lawyers individually: Past commentaries on the 17200 problem – the Law Revision Commission's, judicial opinions, and law review articles, for example – have either proposed legislation or stated that the remedy lies in statutory amendments. In 1995 the State Bar failed to find wrongdoing by an attorney filing suits and demanding settlements in a process virtually identical to those igniting current outrage. What will happen to current victims, who face court deadlines, while the Bar investigates?

B. Amend specific statutes dealing with the commercial activity involved; i.e., nail polish, restaurant health rules, etc. In 1998, AB 1394 (Figueroa and Escutia) successfully addressed a rash of lawsuits against software companies (a collection of small and not-small businesses) accusing them of selling software in retail boxes that were "too large." (The bill amended packaging law, not 17200)

C. Courts have ruled that a "safe harbor" exists for companies accused of violating 17200 – if the activity is specifically authorized by a statute, then it cannot be a 17200 violation. The Legislature could approach the 17200 problem via a galactic codifying project.

4. Amend 17200

a. The Civil Justice Association has proposed several solutions over the past few years and the Law Revision Commission sponsored a 1997 proposal as well. Each was dispatched at its first committee hearing.

b. Three Guidelines for Amendments

(1) Do not affect Attorney General and District Attorneys.

(2) Private lawyers who choose to wear the mantel of "private attorney generals" and file suits "representing the public" should receive much more judicial and public scrutiny than lawyers solely representing named clients. District attorneys and the Attorney General are elected officials and accountable to the public. Private lawyers are not.

(3) Solutions which begin only *after* a defendant has been dragged into a case will be ineffective. Lawyers will still be able to intimidate and put a defendant in financial jeopardy before a judge, district attorney, or regulatory agency ever hears about the case. "Legal shakedowns" will continue.

IV. National Microscope: As a statute unlike any other in the country – state or federal – 17200 has attracted national attention. Unfortunately, its abuse and questionable uses have attracted more attention than its positive uses for consumers and businesses. By permitting the kind of activity most recently documented last Friday in Orange County, 17200 will continue to be recognized as not only California's legal embarrassment, but its costly and cruel legal embarrassment. We look forward to working with all in the Legislature, the Administration, and with all concerned groups to put Business and Professions Code 17200 back on track.

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