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FLOOR ALERT

Date: September 2, 2003

To: Members of the California State Assembly

From Dan C. Dunmoyer, President,
G. Diane Colborn, Vice President of Legislative and Regulatory Affairs
Michael A. Gunning, Senior Legislative Advocate
Dan Chick, Senior Legislative Advocate

Re: SB 122 (Escutia): Unfair Competition Law §17200
Assembly Third Reading File
PIFC Position: Oppose

The Personal Insurance Federation of California **opposes SB 122 by Senator Escutia, as amended on August 28th**. This measure purports to "reform" the Unfair Competition Law in a manner that would reduce the number of frivolous lawsuits brought under Section 17200 of the Business and Professions Code. However, the bill will have just the opposite effect, *increasing* such shakedown suits by creating new incentives for the filing of Section 17200 actions. The bill creates these new incentives by allowing attorneys who file these suits to collect payments for "disgorgement" of earnings connected with the challenged practice. Such payments could be demanded even in cases where there has been no evidence of economic harm to any identifiable consumer.

Currently, under the existing law, an attorney who brings a representative action on behalf of the public at large, and without an identified client or any evidence of economic harm to any person, is limited to obtaining an injunction and recovering attorneys fees. SB 122 would greatly expand the incentives for bringing such actions by allowing "disgorgement" as an additional remedy. The bill provides that any disgorgement in excess of restitution shall be distributed as a fluid recovery or cy pres award, and could be paid into a fund for distribution to groups or law firms involved in issues related to the lawsuit.

A second provision in the bill could also lead to further §17200 abuses. Proposed Section 17204.8(c) would change the burden of proof in cases involving multiple defendants, effectively allowing an attorney to sue an entire industry and then require each defendant to separately prove their innocence. This provision would also make it extremely difficult to dismiss a §17200 case prior to trial.

Do not be fooled. Although the July 1st amendments deleted the word "disgorgement," the clear and intentional effect of the bill is to allow disgorgement as an additional remedy under §17200. The bill accomplishes this by incorporating the legal definition of disgorgement in Section 2 of the bill. In addition, the most recent amendments adopted on August 28th do nothing to address the real problems with the statute. For example, the section that purports to "prevent double recovery" does nothing to prevent a defendant from being exposed to multiple lawsuits and double or triple jeopardy for the same alleged conduct. This provision only applies in those few cases that actually go to trial, leaves any set off even in those limited cases up to the judge's discretion, and does not provide for res judicata or true finality of judgments.

Similarly, the amendments to the section on court review of attorneys fees and settlement agreements have weakened these provisions substantially in the trial lawyers' favor. This section now essentially requires a court to approve the award unless it is determined, based on a

subjective test with no specific standards, to be unfair. More to the point, court review of settlements and agreements regarding payment of attorneys fees will not solve the problem of coercive settlement agreements, since once a settlement agreement has been reached, both sides will be urging the court to approve the agreement in order to avoid the expense and risk of trial. The greater problem is that the defendant is subjected to such a Hobson's choice in the first place in cases where there has been no actual harm to an actual consumer.

Substantive reform of Section 17200 is clearly needed to address the abuses of that law, highlighted most recently by the rash of lawsuits filed against businesses throughout the state for minor technical alleged violations. Meaningful reforms would address such issues as standing, actual harm, and res judicata. The August 28th amendments are cleverly designed to look like reform but are not. Any minor improvements provided by these changes are more than offset by the negative effect of adding disgorgement as a remedy. The net effect will be to increase rather than decrease abuse and overreaching by unscrupulous attorneys under Section 17200. For all these reasons, PIFC urges a "no" vote on SB 122.

cc: Senator Escutia, Author
Ann Richardson, Office of the Governor
Richard Figueroa, Office of the Governor
Saskia Kim, Assembly Judiciary Committee
Mark Redmond, Assembly Republican Caucus