GIANELLI & MORRIS
A LAW CORPORATION
626 WILSHIRE BOULEVARD, SUITE 800
LOS ANGELES, CALIFORNIA 90017

ROBERT S. GIANELLI
TIMOTHY J. MORRIS
SHERRIL NELL BABCOCK
RICHARD R. FRUTO

OF COUNSEL
MARY T. RAHMES

TELEPHONE
(213) 489-1600
FACSIMILE
(213) 489-1611

August 5, 2005

The Honorable Chief Justice Ronald M. George
and Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: ***Cohen v. Health Net of California, Inc.***
Supreme Court Case No. S135104, Appellate No. G033868
Opinion Filed April 27, 2005, Modified May 25, 2005, Fourth Appellate District

Dear Chief Justice Ronald M. George and Associate Justices:

On behalf of the Foundation for Taxpayer and Consumer Rights, we write, pursuant to Rule 28(g) of the *California Rules of Court*, to support the Petition for Review filed by Robert J. Cohen in the above-entitled case.

The Foundation for Taxpayer and Consumer Rights is a nonprofit, nonpartisan consumer watchdog group that specializes in insurance and health care reform. Founded in 1985, FTCR advocates for the rights of patients, ratepayers, and policyholders and seeks to make corporations accountable in court.

Introduction

FTCR supports the Petition for Review because the Fourth District's opinion in *Cohen*, if allowed to stand, can be seen to confer exclusive jurisdiction on the Department of Managed Health Care over consumer suits against health care service plans. *Cohen* is contrary to well-established law upholding the rights of private litigants to enjoin acts that are unlawful under the Knox-Keene Act.

Moreover, just recently, the DMHC appeared as amicus curiae in support of a class action brought by physicians against Blue Cross over payment of emergency room services. *Bell v. Blue Cross of California* (July 21, 2005, B174131) ___ Cal. App.4th ___ [2005 Cal.App.LEXIS 1119, 4, 11-14]. Significantly, the DMHC took the view in *Bell* that the plaintiffs had standing to pursue allegations that Blue Cross had violated the Knox-Keene Act, and the Second District agreed. *Id.* at pages 10, 13.

Further, the Supreme Court has recognized actions against health care service plans under the Consumer Legal Remedies Act. See *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303; *Broughton v. CIGNA Healthplans of California* (1999) 21 Cal.4th 1066. Significantly, the class claims in both *Broughton* and *Cruz* were based on allegations that the defendant, as in *Cohen*, had engaged in false advertising and misrepresentations about its health care plan. *Cruz*, 30 Cal.4th at pages 307-309; *Broughton*, 21 Cal.4th at page 1072.

Discussion

In *Cohen*, the Fourth District misstated the law in holding that Cohen could not recover for violations of the Knox-Keene Act because his claims, if they had merit, fell "within DMHC's exclusive regulatory powers." Indeed, even the case the court relied on, *Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.App.4th 1284, 1299, review den., recognizes that "despite the existence of a statutory enforcement scheme," a private litigant may still sue for injunctive relief from "acts which are made unlawful by the Knox-Keene Act."

The *Cohen* opinion is also internally contradictory in holding that Cohen's claim that Health Net violated Health and Safety Code section 1360 is subject to the DMHC's exclusive jurisdiction. Section 1360 prohibits untrue, misleading, or deceptive statements in advertising for health service plans. Cohen alleged that Health Net made misrepresentations in its marketing materials and certificates of coverage.

First, the court acknowledges that "section 1360 defines an unlawful act and may be privately enforced." But then, the court states the DMHC has jurisdiction on the ground that the agency has "the exclusive power to regulate the content of plan disclosure forms, materials containing information regarding benefits, and the terms of contracts."

The court's conclusion is nonsensical. A statute may not be privately enforceable at the same time that it may be enforced only by a government regulator. Either a court has concurrent jurisdiction or an administrative agency has exclusive jurisdiction, but not both.

In any event, the *Cohen* opinion fails to consider *Samura* on this specific point about enforceability of section 1360. *Samura* is exactly on point here. There, the court

said, section 1360 "defines an unlawful act that may be enjoined as unfair competition under the Business and Professions Code." *Samura*, supra, 17 Cal.App.4th at page 1300.

Thus, *Cohen* also contradicts well-established case law that a private litigant may bring suit under the UCL to enjoin any business practice as unlawful. See *Committee on Children's Television, Inc. v. General Foods Corp.* (1985) 35 Cal.3d 197, 209-211 (hereinafter "Children's Television, Inc.") (upholding section 17200 causes of action based on violations of false advertising statute and Sherman, Food, Drug, and Cosmetic Law); *Consumers Union of United States, Inc. v. Fisher Development, Inc.* (1989) 208 Cal.App.3d 1433, 1438-1439 (upholding section 17200 action alleging Unruh Act violation), review den. The Supreme Court specifically said, "The Legislature apparently intended to permit courts to enjoin ongoing wrongful business conduct in whatever context such activity might occur." *Children's Television, Inc.*, 35 Cal.3d at page 210.

The courts have long held that the UCL, Business and Professions Code section 17200 et seq., "borrows" violations of other laws and treats them as unlawful practices independently actionable under section 17200. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180; *State Farm Fire & Casualty Co. v. Superior Court (Allegro)* (1996) 45 Cal.App.4th 1093, review den. It does not matter whether the underlying statute also provides for a private cause of action; section 17200 can form the basis for a private cause of action even if the predicate statute does not. *Stop Youth Addiction v. Lucky Stores* (1998) 17 Cal.4th 553, 560; see also *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 839 (citing *Samura* for proposition), overruled in part on another ground by *Equillon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th[th] 53, 68, fn. 5.

"The Supreme Court repeatedly teaches that the [UCL] allows a private plaintiff to proceed under it to seek redress for conduct which violates any predicate statute, unless the defendant is privileged, immunized by another statute, or the *predicate statute expressly bars* its enforcement under the [UCL]." *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 603-604 (emphasis in original); see also *Cel-Tech Communications*, supra, 20 Cal.4th at page 184 (stating predicate statute must actually bar section 17200 action, "not merely fail to allow it").

"The 'unlawful' practices prohibited by section 17200 are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." *Saunders*, supra, 27 Cal.App.4th at pages 838-839. In fact, in one case, a court of appeal held that violations of a conditional use permit, as well as violations of a

temporary restraining order, could be challenged as unlawful business practices. *Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 532, 535. The *Cohen* opinion is simply irreconcilable with a wide body of law that a private UCL action can be predicated on "[v]irtually any law." *State Farm*, supra, 45 Cal.App.4th at pages 1102-1103 (surveying various "unlawful business practices" decisions).

The *Cohen* opinion, in citing *Samura*, also ignored post-*Samura* decisions, including one issued from the Fourth District, that also rejected arguments that Knox-Keene barred private lawsuits. See, e.g., *Coast Plaza Doctors Hospital v. UHP Healthcare* (2002) 105 Cal.App.4th 693, 706-707 (no exclusive jurisdiction for DMHC); *California Medical Assn. v. Aetna U.S. Healthcare of California* (2001) 94 Cal.App.4th 151, 169 (acknowledging CMA's right to sue to enjoin acts unlawful under Knox-Keene, but finding defendants' conduct did not violate Act's statutory enforcement scheme).

In *CMA*, 94 Cal.App.4th at page 169, the court said, while section 17200 does not give a private party "a general power to enforce Knox-Keene," a private party "may nonetheless sue to enjoin acts made unlawful by Knox-Keene." Citing *Samura*, the Fourth District noted "other decisions have upheld the use of Business and Professions Code section 17200 to enjoin acts which are declared to be unlawful under a statutory enforcement scheme." *Ibid.*

In *Coast Plaza*, UHP Healthcare argued that a hospital had no standing to assert a private right of action under the Knox-Keene Act and urged the court to abstain from allowing the hospital to pursue its common law remedies in deference to the DMHC. The Second District disagreed. The court said, "We conclude that the department does not have exclusive jurisdiction, and that common law and other statutory causes of action may be brought by Coast [Plaza Doctors Hospital]." *Coast Plaza*, supra, 105 Cal.App.4th at page 706.

The court said "conduct in violation of the Knox-Keene act may be the basis for a cause of action under Business and Professions Code section 17200." *Coast Plaza*, supra, 105 Cal.App.4th at page 706. Moreover, the court said, "The Knox-Keene Act itself contemplates that a health care plan may be held liable under theories based on other law." The court cited Health and Safety Code section 1371.25, which states, "Nothing in this section shall preclude a finding of liability on the part of a plan. . . . based on . . . other statutory or common law bases for liability." *Id.* at page 707.

In *Bell*, the most recent post-*Samura* opinion, the Second District said, "Although the Department of Managed Health Care has jurisdiction over the subject matter . . . (of the Knox-Keene Act), its jurisdiction is not exclusive and there is nothing in . . . the Act generally to preclude a private action under the [Unfair Competition Law] or at common law. . . ." *Bell*, supra, 2005 Cal.App.LEXIS 1119, 8.

Distinguishing *Samura*, the Second District said, "*Samura* does not . . . purport to give the Department of Managed Health Care exclusive jurisdiction to enforce every section of the Knox-Keene Act, but simply limits a contracting provider's suit for injunctive relief to 'acts which are made unlawful by the Knox-Keene Act.'" *Bell*, supra, 2005 Cal.App.LEXIS 1119, 10.

Significantly, the DMHC's support for private enforcement in *Bell* resolves any doubt about whether courts have jurisdiction over consumer suits against health care service plans. In *Bell*, the court said it agreed with the DMHC that the physicians' UCL claim "does not infringe on the Department's jurisdiction." *Ibid.*

UCL actions are typically resolved in the courts even when the action involves defendants that are otherwise subject to regulatory agency oversight. See *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 37, 44 (Insurance Commissioner); *Cundiff v. GTE California Inc.* (2002) 101 Cal.App.4th 1395, 1406-1407 (Public Utilities Commission); *Hewlett*, supra, 54 Cal.App.4th at page 528-529 (California Department of Forestry); *State Farm*, supra, 45 Cal.App.4th 1093, 1110-1113 (Insurance Commissioner).

For example, in *State Farm*, the court found that a request for injunctive relief from an insurer's alleged fraudulent misconduct could be prosecuted under the UCL. *State Farm*, supra, 45 Cal.App.4th at page 1098. The court also rejected the insurer's request for a stay of the entire action pending investigation and review of marketing practices by the Insurance Commissioner. *State Farm*, supra, 45 Cal.App.4th at pages 1101, 1110-1112.

"We do not agree with State Farm's related argument that recognition of an injunctive remedy would interfere with the Insurance Commissioner's ability to uniformly regulate the insurance industry or even the marketing activities of a particular insurer. Contrary to State Farm's assertion, a court would not be asked to limit or regulate how State Farm could market its earthquake coverage. Rather, injunctive relief would only be addressed to the enjoinment of future acts of fraud or deception," the court said. *State Farm*, supra, 45 Cal.App.4th at page 1110.

Finally, the Supreme Court itself has upheld enrollees' class actions against health care companies for false advertising in connection with the sale, marketing, and rendering of medical services. *Cruz*, supra, 30 Cal.4th at pages 307-308; *Broughton*, supra, 21 Cal.4th at page 1072. While *Cruz* and *Broughton* decided whether suits for injunctive relief under the UCL were subject to arbitration, the result nonetheless applies here: There, the Supreme Court held that the courts have jurisdiction over such suits. *Cruz*, supra, 30 Cal.4th at pages 307, 315- 316; *Broughton*, supra, at pages 1072, 1078-1080.

Conclusion

In sum, as the *Cohen* opinion would have it, consumers can never sue their health care service plans for deceptive advertising because such claims purportedly fall within the exclusive jurisdiction of the DMHC. However, that is not the law.

The courts have long recognized a health care plan member's right to seek injunctive relief in court for acts made unlawful under the Knox-Keene Act. Moreover, the DMHC itself has supported private enforcement of the Act. For the foregoing reasons, FTCR requests the Court grant the Petition for Review.

With kind regards,

RICHARD R. FRUTO

Attorneys for **THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS,**
A Non-Profit Public Interest Organization, For The Benefit of Affected California Public Employers, Public Employees, and Their Dependents

RRF/ds

cc: see attached Proof of Service

PROOF OF SERVICE

Re: Cohen v. Health Net of California, Inc.
Supreme Court Case No. S135104, Appellate No. G033868
Opinion Filed April 27, 2005, Modified May 25, 2005, Fourth Appellate District

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is ***626 Wilshire Boulevard, Suite 800, Los Angeles, California 90017.***

On **August 5, 2005**, I served the foregoing document described as:

FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS' AMICUS LETTER IN SUPPORT OF THE PETITION FOR REVIEW FILED BY ROBERT J. COHEN

X **(BY MAIL)** by placing a true copy thereof enclosed in a sealed envelope. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

(Cousel for Robert J. Cohen) Richard L. Spix 1505 E. 17th Street, Suite 229 Santa Ana, California 92705	**(Lower Court)** Honorable Clay Smith Dept. C-17 Orange County Superior Court 700 Civic Center Drive West Santa Ana, California 92702-1994
(Counsel for Los Alamitos) Law Office of Norman Filer 500 N. State College Blvd., Suite 1270 Orange, CA 92868	**(Appellate Court)** Clerk of the 4th DCA 925 N. Spurgeon Santa Ana, California 92701
(Counsel for Health Net) Musik, Peeler & Garret Michael F. Klien, Esq. 225 Broadway, Suite 1900 San Diego, California 92101-5028	**PER *Business & Professions* Code § 17209:** Orange County District Attorney 700 Civic Center Drive West, Suite 200 Santa Ana, CA 92702

PROOF OF SERVICE

Re: Cohen v. Health Net of California, Inc.
Supreme Court Case No. S135104, Appellate No. G033868
Opinion Filed April 27, 2005, Modified May 25, 2005, Fourth Appellate District

	Ronald A. Reiter, Esq. Supervising Deputy Atty. General Office of the Attorney General Consumer Law Section 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102

X **(State)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **August 5, 2005**, at Los Angeles California.

DIANE SCHMIDT