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August 7, 2007

Ms. Elizabeth Hill
Legislative Analyst
Mr. Daniel Carson
Director, Criminal Justice
Legislative Analyst's Office
Sacramento, CA 95814

By Email and Overnight

Re: Anti-Class Action Initiative (#07-0030)

Dear Ms. Hill and Mr. Carson:

We write to provide your office with our analysis of the proposed "California Class Action Lawsuit Fairness Act" submitted to the Attorney General on July 12, 2007.

Preliminarily, we wish to point out the particular importance of the task your office is charged to perform with respect to this proposal. In many key respects, this proposal is unprecedented. For example, none of the terms in the initiative are defined. Indeed, the initiative repeals decades of case law construing and applying the relevant statutes (Section 1(e)[1]). We are unaware of any previous ballot measure that proposed to sweep aside all decisional law interpreting both the existing statutes and the statutes that the measure proposes to enact.[2] The magnitude of this change is compounded by the fact that the field of law the measure targets is composed of particularly complex procedural rules that are applied to complex, subtle and highly varied factual and legal situations.

Thus your office must endeavor to assess a proposal whose terms have, by design, no intrinsic or understood meaning -- either to voters, or to the courts that will inevitably be called upon to apply the law if it is approved. We know from recent experience with Proposition 64 – discussed more fully below – that the sponsors and backers of this measure will seek to extend its preclusive reach as far as their lawyers

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[1] Citations are to the section of the measure and the proposed statute.
[2] While the measure explicitly states that it is to be applied retroactively, we believe that Section 1(e)'s directive unconstitutionally invades the authority of the judicial branch.

can conceive an argument to take it. For that reason, we believe the LAO analysis must note that the measure **expressly repeals all previous court decisions on class action laws and replaces that body of law with statutes whose meaning is unclear and will require extensive judicial review.**

The following analysis attempts to summarize the most problematic aspects of the proposal. Our suggestion as to how this information may be communicated is highlighted in **bold**.

The measure restricts consumer protection, civil rights and employment laws, not tort laws. While the proponents of this measure are well-known for their advocacy of restrictions on traditional tort law rights, it is essential to note that the laws this measure would change have nothing to do with tort (personal injury) law. Rather, the proposal targets class action litigation typically brought to enforce the state's consumer protection, civil rights and employment statutes: the Unfair Competition Law (Business and Professions Code § 17200), the Consumers Legal Remedies Act (Civil Code § 1750 *et seq.*), and the Unruh Civil Rights Act (Civil Code § 51), among others.

FTCR believes that the LAO's analysis must begin with a common sense explanation of the class action process and an illustrative example:

> **The purpose of a class action is to enable consumers to join together to bring a civil lawsuit in cases involving modest claims that would be too expensive to resolve through individual lawsuits, or would require duplicative litigation. Thus, under current law, one or more individuals who have been harmed may sue the defendant on behalf of themselves and others – the "class" - who have also been harmed. An example of a class action lawsuit is a suit alleging that an insurance company overcharged consumers.**
>
> **A court must determine whether a case is suitable to proceed as a class action. Under current law, a class action lawsuit must mainly involve questions of law and fact that are common to all members of the class. The person who brings the suit on behalf of the class must have claims that are typical of those of the class. If the court decides the case qualifies, it "certifies" the case as a class action.**
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> **Once certified, the case may then proceed to a trial, or the plaintiffs and the defendant may settle. If the parties settle, the court must approve the terms of the settlement. The terms include any refunds or damages, any agreement by the defendant to stop the conduct, and the amount of attorneys' fees that will be paid to the lawyers for the plaintiffs. (Defendants pay their own attorneys fees.) The defendant must notify all members of the class, who are also given an opportunity to attend a court hearing and challenge the terms of the settlement.**

The proposed measure would change each of these procedures.

The measure would make it virtually impossible for consumers to bring class action lawsuits against businesses that violate California's consumer protection laws. The proposal makes the following changes that would render the class action process so expensive, lengthy and cumbersome that, collectively, they will preclude use of the class action device.

• California's Supreme Court has stated that the class action process "serves an important function in our judicial system": it "both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation. Because of these important dual functions, courts and legislators have looked with increasing favor on the class action device." *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005). The measure explicitly states that it seeks to abolish the judicial policy in favor of class actions. (Section 1(f).)

• The measure would effectively deny class action status if the defendant can show that it has any defense that is unique to a single plaintiff's individual injuries. (Section 5, proposed Code of Civil Procedure (CCP) § 382 (b)(3)(B).) For example, if the defendant could claim that members of the class owed it money – for refusing to pay a disputed bill – the case would not be certified as a class action. This organization has sued several cell phone companies for conduct that forced some customers to pay an $18 upgrade fee while other customers paid a $175 early termination fee. The defendants would no doubt argue this disparity required the court to deny class action status. In effect, the defendant can exercise veto power over a class action if its lawyers can point to any difference in circumstance between those it injured.

• The measure implies that if the defendant's acts or practices are theoretically subject to a state or federal agency's oversight, a class action may not be maintained. (Section 5, proposed CCP § 382 (b)(3)(C)(v).) Numerous insurance companies, subject to the right of consumers to sue insurers for violations of Proposition 103, have been sued and forced to pay refunds for premium overcharges. Courts have upheld Proposition 103's explicit private right of action, rejecting insurance company arguments that the Department of Insurance exclusively regulates the companies and therefore suits against insurers are barred. (See, e.g., *Donabedian v. Mercury Insurance* (2004) 116 Cal.App.4th 968.) Insurance companies would no doubt attempt to invoke the measure to argue it bars class actions, attempting an end run around Proposition 103's express statutory authority, despite the fact that the Department of Insurance, like most other state agencies, has inadequate resources to police the entire marketplace for violations of the law. And, of course, many agencies are beholden to the industries they regulate and routinely fail to act on health and safety problems (for example, the federal Food and Drug Administration). Under this proposal, industry would argue that agency inaction is irrelevant.

• The measure requires plaintiffs, rather than defendants, to pay the costs of notifying members of the class about the litigation "unless justice requires otherwise." (Section

5, proposed CCP § 382 (c)(3)(C).) Under current law, the court decides who pays. Manifestly, consumers who are owed small amounts of money are not going to be able to come up with the tens of thousands of dollars needed to pay for printing and mailing the notice. The meaning of "justice requires otherwise" is unknown. Moreover, the measure also authorizes defendants to demand that plaintiffs send out a notice of "any step" in the case, including to notify class members that they may challenge the plaintiff's attorney or notify other defendants that they may intervene in the case (Section 5, proposed CCP § 382 (d)(2)). Plaintiffs are also required to pay out of their own pocket to notify the class when they ask the defendant to pay their legal fees. (Section 5, proposed CCP § 382 (h)(1)). The cost of that notice, and the time expended requesting attorneys fees, cannot be recouped from defendants. (Section 5, proposed CCP § 382 (h)(6)). The multiple notice requirements provide marginal or no value to the class. Indeed, it is quite possible that in a case involving small amounts of money owed to each class member, the cost of repeated notices will consume most or all of the amount recovered from the defendant. Few plaintiffs or their lawyers would find it feasible to bring a suit under such circumstances.

• The measure requires plaintiffs to prove that their lawsuit qualifies as a class action (Section 5, proposed CCP § 382 (c)(2)) before a court can certify it, but at the same time prohibits plaintiffs from collecting information from the defendants through the discovery process prior to certification (Section 5, proposed CCP § 382 (d)(5)). Such pre-certification discovery is often critical to justifying class action certification. This "heads I win, tails you lose" requirement would be fatal to any class action.

• Defendants are authorized to take an immediate appeal of an order certifying a class (Section 5, proposed CCP § 382 (f)); during that appeal, all action in the lawsuit will necessarily stop. The cost to plaintiffs in terms of delay (potentially two to three years) and financial expense (equivalent to the cost of final appeal) will be enormous. The number of plaintiffs and plaintiff lawyers able to financially weather this process will be limited.

Finally, consumers who sustain physical or financial harm to a degree that is substantial, but not at the threshold level enabling them to hire an attorney, will find that their only recourse will be to small claims court. This is a forum where the rights of plaintiffs are highly restricted: for example, no lawyers are permitted, discovery is limited, the amount a plaintiff can recover is limited, and no injunctive relief is available. Moreover, proceeding on one's own in small claims court is not a practical option in a case that challenges the conduct and/or practices of industries that will rely on complex defenses such as "federal preemption," "regulatory approval" or the presence of a "mandatory arbitration" clause.

The measure alters the law enacted by the voters in 2004 to regulate consumer protection lawsuits that are not brought as class actions. Proposition 64 on the November ballot eliminated the right of "any person" to bring a consumer protection lawsuit on behalf of the public. That initiative applied the procedural requirements of CCP § 382 to the Unfair Competition Law. As the title prepared by the Attorney General stated: "Requires private representative claims to comply with procedural

requirements applicable to class action lawsuits." The sponsors of Proposition 64 – organizations headed by the proponents of this measure – asserted that by applying the class action procedures of CCP § 382 to UCL actions, the public would be protected. The current proposal rewrites CCP § 382. The net effect is a two-step evisceration of the UCL.

The measure will impose significant additional costs upon state government. As noted, Proposition 64, enacted by the voters in 2004, purported to improve the Unfair Competition Law by importing certain standards from class action law. That measure has spawned an enormous volume of litigation as state courts grappled with (1) whether the measure was retroactive (the text of Proposition 64 was silent on that point); (2) the extent to which Proposition 64 imported all class action procedures and (3) whether Proposition 64 requires that plaintiffs show "reliance." A Westlaw review shows over 154 citations to appellate decisions referring to Proposition 64.

Compared to the current proposal, Proposition 64 was a paragon of clarity and simplicity. Because it mandates that courts ignore four decades of prior case law interpreting the statutory language at issue here (1(e)), the proposal will necessitate years, if not decades, of litigation to ascertain its meaning and requirements. The impact on court resources will certainly be profound.

Further, as noted above, several provisions will indisputably incite more judicial proceedings. Section 5, proposed CCP § 382 (f) authorizes immediate appeals of lower court orders granting class certification - interlocutory appeals that are not permitted now. Should the measure pass, all defendants in class actions underway at the time will avail themselves of this authority.

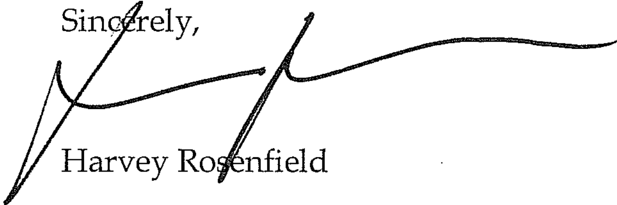
While it is clear that the measure would make class action lawsuits prohibitively expensive and inefficient, the impact will *not* be a net reduction in lawsuits. In civil rights, employment, housing and environmental litigation, the amounts at stake will impel lawyers to bring multiple cases on an individual, rather than class action, basis. For example, under existing law, a class action against an environmental polluter might be composed of one hundred residents of a neighborhood; under this proposal, lawyers will file one hundred individual lawsuits. In this sense, the proposed measure undermines the core value of the class action device: judicial economy and efficiency. Thus, the LAO must note the likelihood that a significant portion of the population whose rights would have been vindicated through class actions will nonetheless avail themselves of the remaining right to pursue an individual lawsuit in the courts, imposing enormous new costs upon the court system.

In our view, the one area of litigation that will be reduced, if not eradicated, is the consumer class action that targets practices that are either not quantifiable – i.e., false advertising – or involve illegal practices that result in very modest damages spread out over thousands or even millions of customers. For example, this organization has sued a cell phone company for unlawfully charging customers $2.50 to receive a fully itemized bill. In that case, each individual's recovery would be small, but

collectively the improper charges add up to an enormous windfall for the defendant. Overcharges and misbilling of that nature are rampant in the economy. The proposed measure will as a practical matter preclude the redress of such unlawful conduct. As noted above, small claims court is not a viable alternative, particularly for such cases.

Thank you for your consideration of our views.

Sincerely,



Harvey Rosenfield