

LEGISLATIVE LAW

Governor Schwarzenegger's Plan to Balance California's Budget on the Back of the Civil Justice System

by L. Tracee Lorens

Column Editors: L. Tracee Lorens and Timothy Blood

Tracee Lorens attended San Diego State University and Western State College of Law (now Thomas Jefferson) obtaining her J.D., B.S.L. in 1990 and was admitted to the California State Bar that same year. She served as a Director on the CASD Board for 15 years and was CASD's President in 2003. She received an Outstanding Advocacy Award from CASD in 2004 and the Consumer Advocate of the Year Award in 2007. Ms. Lorens practices primarily in the area of employment law, focusing currently on wage and hour class actions, as well as complex personal injury and insurance bad faith claims. She may be reached by email at: Tracee@LorensLaw.com.

The latest estimate from California's independent legislative analysis places the state's budget deficit at \$60 million. At the top of Governor Arnold Schwarzenegger's proposals for balancing California's budget is tort reform, a.k.a. tort deform. His "Tort Reform Package" won high praise from California Citizens Against Lawsuit Abuse's co-chairman, David Houston. Specifically, the governor seeks to change class action litigation rules to effectively eliminate the utilization of the class action procedure in California, to curtail product liability suits, to place a cap on damages for all types of lawsuits, and to require that 75% of all punitive damages awards be paid to the State of California. The proposal has faced scathing criticism from both the plaintiffs' bar and the defense bar. For instance, Victor Schwartz, general counsel to the American Tort Reform Association, in an op-ed in *USA Today*, stated: "Some things- - such as Venus flytraps and beautifully colored snakes- - may look good, but they are poisonous. The same is true of the idea of having punitive damage awards go to the State rather than to an individual plaintiff."

The current proposal is a scheme that would take, based on the governor's own estimates, \$450 million per year in awards owing to *the most deserving of plaintiffs* and redirect those monies to California's multi-billion dollar budget gap, by way of a large all-purpose fund. **At the same time, the governor wants to see the Legislature impose caps on punitive damages and a \$250,000 cap on non-economic damages awards.** These caps would be good for California's businesses, he stated in a position paper regarding his tort reform package. He added, "California's current litigation laws lead to large settlements with little value to consumers, but become worth millions to lawyers at the expense of California businesses."

Governor Schwarzenegger would also like to encourage the state Legislature to repeal Code of Civil Procedure §382 and replace it with new legislation which would effectively eliminate the class action vehicle in the State of California. The new legislation suggested in his tort reform position paper would *eliminate any presumption or policy in favor of class certification* **and** declare that all prior case law in conflict with this new legislation be of *no further force or effect* after enactment of his suggested Class Action Moratorium legislation.

For instance, in addition to the standards we are all familiar with relating to the utilization of the class action vehicle, the governor and his big business contributors would like to see new elements to class certification including: the ability for the defendants to forum shop, a requirement that the difficulties which may be encountered in the management of class action litigation be debunked at the certification stage, that the plaintiffs (who are generally low wage workers or average citizens) be required to pay for Class Notification, and that the plaintiffs be required to “front” the costs incurred by the defendants in securing the names and addresses of the class members for purposes of providing this Notice.

This legislation would overturn decades of well-established law in California which declares class actions a favored remedy. For instance, a person’s amount of damages would become a factor in determining class certification. Of course, one’s damages always differ and that has never been an impediment to class certification in the past. Likewise, such legislation, as proposed, would eviscerate the recent holding in *In re Tobacco II Cases*, which held, in part, that for a UCL class action and Proposition 64’s standing requirements, only the class representatives, and not all absent class members, need meet the standing requirements of Business & Professions Code §17204. Instead, the new legislation proposed by Governor Schwarzenegger would require a showing of **each individual’s injury**, thereby overturning our court’s legal rulings and affecting a radical policy shift -- all to assist California in balancing its budget.

Maybe most disconcerting of all of the proposals is a recommendation that the court be obliged to make determinations regarding merit-based issues at the class certification stage while, at the same time, except for good cause shown, stay all discovery directed to the merits of the claims or defenses in an action until the court has issued its written decision regarding certification of the class. Finally, the proposed legislation directs the court to evaluate who should act as attorney for the putative class. In making these determinations, the proponents of this potential legislation suggest that attorneys wishing to serve as class counsel provide information to the court such as proposed terms for attorney’s fees and non-taxable costs. In other words, let the putative class be represented by the least expensive lawyers willing to incur the least in expert witness costs and litigation costs so that when the defendants retain the best attorneys, hire the best expert witnesses and throw untold fortunes toward litigation expenses, they will have a much greater chance of prevailing.

In addition to gutting decades of case law favoring the class action remedy, our governor is proposing the following assault on Californians’ legal rights:

- A \$250,000.00 cap on non-economic damages in ALL tort actions.
- Punitive damage awards capped at three times compensatory damages.
- Eliminating the ability of the consumer to hold the seller of a defective product strictly liable for damages.
- Requiring payment of 75% of all punitive damages awards to the State of California instead of to the injured consumer.

While the governor and big business have made it clear their number one priority in 2010 is fostering a “business-friendly” economy and creating jobs, it seems terribly inappropriate to me to accomplish major tort revisions which do away with consumers’ rights and nearly 100 years of California jurisprudence under the guise of the state budget. Not only is this the wrong way to effect policy change (and appears a significant attack on the separation of powers), but, if our governor and the big business interests who so heavily support him are successful, these changes will apply retroactively.

Many of the governor’s proposals relating to class actions are in ABX8 38 (Strickland) introduced on 02/10/2010. This bill would establish the prerequisites for a class action, provide a process for defining or certifying a class, appointment of class counsel, notification to members of a class and payment for the notification, withdrawal by a member of a class, orders for the conduct of class actions, for the settlement, dismissal, or compromise of class actions, and for appeals from a class action. The bill would require a court that certifies a class for a class action to appoint the class attorney pursuant to specified requirements. Track the progress of ABX8 38 at http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0001-0050/abx8_38_bill_20100210_introduced.pdf