Open Letter From Legal Scholars on
the Climate Science Truth and Accountability Act (SB 1161, Allen)

May 19, 2016

Dear Governor Brown and California Legislators:

We, the undersigned legal scholars, are writing to comment on Senate Bill 1161 (Allen), the Climate Science Truth and Accountability Act. **As experts in constitutional law, environmental law, corporate law, and securities law, we believe that SB 1161 furthers the protection of consumers from unfair business practices with respect to scientific evidence regarding anthropogenic climate change.**

A growing body of evidence indicates that major fossil fuel companies knew the risks and potentially catastrophic consequences of processing and burning their products for decades, and as early as the 1950s.[1] This evidence suggests that certain commercial representations made in the intervening decades by major fossil fuel companies regarding the scientific link between fossil fuels and climate change would constitute a deceptive, misleading, or fraudulent business practice.

Companies that engage in deceptive, misleading, or fraudulent business practices in violation of applicable law should be held liable. California Business and Professions Code Section 17200, commonly known as the Unfair Competition Law (UCL), provides such authority. The UCL has been used since its adoption in 1933 to effectively litigate claims concerning misleading representations made by companies across a number of sectors, including the tobacco industry, prescription drugs, and consumer goods.[2] The statute of limitations is only four years, however, creating a concern that knowing misstatements or deceptive behavior regarding climate science may escape liability.[3]

The objective of SB 1161 is to ensure that companies that misled consumers regarding climate science do not avoid responsibility for deception by simple virtue of the passage of time. SB 1161 is a reasonable and necessary measure to ensure that state attorneys can fully investigate and fairly

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[1] *Compare Smoke & Fumes,* CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, (last updated April 14, 2016), https://www.smokeandfumes.org/#/ (*citing* Brannon, H. R., Jr., A. C. Daughtry, D. Perry, W. W. Whitaker, and M.Williams (1957), *Radiocarbon evidence on the dilution of atmospheric and oceanic carbon by carbon from fossil fuels*, Eos Trans. AGU , 38(5), 643–650, doi:10.1029/TR038i005p00643; Robinson, E., & Robbins, R.C. (1968), *Sources, abundance, and fate of gaseous atmospheric pollutants. Final report and supplement*, United States: Stanford Research Institute, Menlo Park, CA) *with The Climate Deception Dossiers,* UNION OF CONCERNED SCIENTISTS, (last updated July 9, 2015), http://www.ucsusa.org/global-warming/fight-misinformation/climate-deception-dossiers-fossil-fuel-industry-memos; *see also* Katie Jennings et al., *How Exxon Went From Leader to Skeptic on Climate Change Research*, L.A. TIMES, Oct. 23, 2015, http://graphics.latimes.com/exxon-research/; Banerjee, Neela, *Exxon's Oil Industry Peers Knew About Climate Dangers in the 1970s, Too*, INSIDECLIMATE NEWS, Dec. 22, 2015 http://insideclimatenews.org/news/22122015/exxon-mobil-oil-industry-peers-knew-about-climate-change-dangers-1970s-american-petroleum-institute-api-shell-chevron-texaco.

[2] *See In re Tobacco II Cases*, 46 Cal. 4th at 312; *Rosado v. eBay Inc.*, 53 F.Supp.3d 1256 (N.D. Cal. 2014); *Kasky v. Nike, Inc.*, 27 Cal. 4th 939 (2002), *as modified* (May 22, 2002); *Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir.2008); *In re Neurontin Marketing & Sales Practices Litigation*, 748 F. Supp. 2d 34 (D. Mass 2010)(applying California law).

[3] In light of recent and ongoing revelations regarding corporate knowledge and conduct, many claims arising under the UCL may have been undiscoverable until recently; and, indeed, ongoing revelations may bring new claims to light. Moreover, past conduct may give rise to new and continuing harms in the climate context. Accordingly, defenses based on the statute of limitations may not prevail. Nonetheless, the existence of an ill-defined statute of limitations under the present, unique circumstances creates profound uncertainty for both litigants and the courts, and could lead to costly and unnecessary procedural litigation that delays adjudication on the merits.

litigate acts of unfair competition relating to climate science. It does this by reviving, for four years only, causes of action that may otherwise have been barred by the statute of limitations on January 1, 2017. This revival is narrowly limited to those claims arising only from "unlawful, unfair or fraudulent actions or practices, and unfair, deceptive, untrue or misleading advertising"[4] related specifically to scientific evidence regarding anthropogenic induced climate change, not to companies writ large.

For the following reasons, we believe that SB 1161 has merit.

First, SB 1161 affects only the potential procedural barrier to civil litigation imposed by the statute of limitations. It does not change, in any way, the substantive elements necessary to establish a violation of the UCL nor the substantive defenses available to potential defendants, including defenses based on the First Amendment of the U.S. Constitution. Nor does it risk infringing First Amendment rights. The First Amendment does not protect a defendant from potential liability for false and misleading statements in a commercial context, or from liability for fraud. The Supreme Court of California has already decided that the First Amendment to the U.S. Constitution does not preclude civil liability for deceptive or misleading statements by a commercial entity, even when statements concern contentious political issues such as infringement upon human rights. [5]

Second, SB 1161 allows a time-limited revival of civil claims that does not expose commercial entities to new sources of liability. Under federal securities laws, commercial entities listed on U.S. stock exchanges already risk liability, both civil and criminal, for statements of fact or expressions of opinion that are either not made in good faith or are materially misleading.[6] Commercial entities have long been on notice that their communications need to be accurate and made in good faith.[7]

Third, this bill's time-limited revival of civil claims is limited to the State Attorney General and district attorneys' ability to protect consumers, and does not expand the causes of action under the UCL. SB 1161 ensures that fair trials on the merits can proceed to uphold the rights of California citizens for protection from unfair competition, rather than the statute of limitations subverting this right for claims that were not only undiscovered but likely undiscoverable until very recently. If a defendant misled the public with respect to climate science for years, or decades, barring claims precisely because the truth was successfully concealed would reward that deceptive and fraudulent

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[4] The UCL defines unfair competition to include "unlawful, unfair or fraudulent actions or practices, and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200.

[5] *Kasky v. Nike, Inc.*, 27 Cal. 4th 939 (2002), *as modified* (May 22, 2002). The Court examined the interaction of California's UCL and companies' First Amendment rights, stating: "[o]ur holding, based on decisions of the United States Supreme Court, in no way prohibits any business enterprise from speaking out on issues of public importance or from vigorously defending its own labor practices. It means only that when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully." *Id.* at 946.

[6] *See Omnicare Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund,* 135 S. Ct. 1318 (2015)("[a] reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about how the speaker has formed the opinion. If the real facts are otherwise, but not provided, the opinion statement will mislead."); *Va. Bankshares v. Sandberg*, 501 U.S. 1083, 1091-99 (1991)(opinion statements can be actionable where there is before the defendant evidence in direct conflict with the professed opinion).

[7] *See, e.g.,* John C. Coates, IV, *Corporate Speech and the First Amendment: History, Data, and Implications* (Feb. 27, 2015), Constitutional Commentary, 30(2) Constitutional Commentary 223 (2015), available at http://www.ssrn.com/abstract=2566785As ("The modern regulatory state brought into widespread acceptance a wide array of . . . laws that curtail or burden speech: securities laws, consumer protection laws, truth-in-lending laws, common carrier laws, professional licensing laws, etc.").

conduct. The state's interest in access to justice warrants the exercise of a revival power well within its right. [8]

SB 1161 would bring greater certainty for both plaintiffs and defendants, and for the courts. By increasing certainty with respect to the statute of limitations, SB 1161 will reduce unnecessary and costly procedural litigation that could delay cases reaching the merits or even prolong discovery for years. In the event a court were to find that a claim was discovered or discoverable before the recent disclosures, the public's interest in access to justice outweighs any potential harms to the defendants from the loss of a procedural defense.

In summary, the Climate Science Truth and Accountability Act (SB 1161) serves the compelling public interest in bringing the truth to light regarding claims under the UCL for acts of unfair competition with respect to the scientific evidence of climate change, and ensures that claims for protecting California consumers and citizens can be tried on the merits.

Sincerely,

Listing is alphabetical, affiliations for identification purposes only

Niranjali Amerasinghe
Adjunct Associate Professor of Law
American University, Washington College of Law

Margaret Blair
Milton R. Underwood Chair in Free Enterprise
Vanderbilt University Law School

Alejandro E. Camacho
Professor of Law
Director, Center for Land, Environment, and Natural Resources
University of California-Irvine School of Law

John C. Coates
John F. Cogan Professor of Law and Economics
Harvard Law School, and
Visiting Professor of Business Administration
Harvard Business School

Cara Horowitz
Co-Executive Director, Emmett Institute on Climate Change and the Environment
University of California-Los Angeles School of Law

[8] *See, e.g., Leibig v. Superior Court*, 209 Cal. App. 3d 828 (1989) ("unless the passage of the statute of limitations creates a prescriptive property right . . . the Legislature is free to revive a cause of action after the SOL has expired."); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945); *Plaut v. Sprendthrift Farm, Inc*., 514 U. S. 211, 229 (1995); *Stogner v. California*, 539 U.S. 607, 613, 651 (2003) (both majority and dissent recognize the continuing validity of *Chase*, 325 U.S. 304.).

David Hunter
Professor of Law, Director, International Legal Studies Program and Director, Program on International and Comparative Environmental Law
American University, Washington College of Law

Doug Kysar
Joseph M. Field '55 Professor of Law
Yale Law School

Bevis Longstreth
Former U.S. Securities and Exchange Commissioner
Former Adjunct Professor, Columbia University School of Law

Stephen C. McCaffrey
Distinguished Professor of Law
University of the Pacific, McGeorge School of Law

Thomas O. McGarity
Long Chair in Administrative Law
University of Texas School of Law

Tamara R. Piety
Phyllis Hurley Frey Professor of Law
University of Tulsa College of Law

Elizabeth Pollman
Associate Professor of Law
Loyola Law School, Los Angeles

Bertrall Ross
Assistant Professor of Law
UC Berkeley School of Law

William J. Snape, III
Professor and Practitioner in Residence
American University, Washington College of Law

James "Gus" Speth
Senior Fellow and Co-Founder, New Economy Law Center
Vermont Law School

David H. Webber
Professor of Law
Boston University School of Law

Listing is alphabetical, affiliations for identification purposes only

Cynthia A. Williams
Professor of Law Emerita
University of Illinois College of Law, and
Osler Chair in Business Law
Osgoode Hall Law School
York University

Chris Wold
Professor of Law & Director, International Environmental Law Project
Lewis & Clark Law School

Mary Christina Wood
Philip H. Knight Professor
Faculty Director, Environmental and Natural Resources Law Center
University of Oregon School of Law

Durwood Zaelke
Adjunct Professor of Law
American University, Washington College of Law

Listing is alphabetical, affiliations for identification purposes only