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LAW ENFORCEMENT'S ROLE IN CONSUMER PROTECTION

Gordon F. Bowley*

INCREASED CONSUMER AWARENESS AND THE NEED FOR PROTECTION

Consumer awareness is at a level unprecedented in American history. Facing the onslaught of eye catching advertisements, attractive packaging, and legions of forceful salesmen, the public is developing a justified skepticism for unsupported and unfulfilled promises. Although the manufacturer's ad men continue to assert their products' ability to soothe, comfort, and enrich the lucky purchaser, consumers are looking askance at these representations. Now more than ever before they are demanding that the doctrine of caveat emptor be replaced by equality and fairness in the market place, that manufacturers serve rather than dominate their customers, and that law enforcement agencies provide assistance when products fail to live up to the representations concerning them.

The impetus for this change in attitude derives from many sources. The consumer often finds that the goods purchased to save him time and labor actually cause him to expend time and money for their repair or replacement and may themselves cause nothing but frustration and anger. Frequently, the buyer is deprived of the benefit of his bargain, whether because of the non-delivery of goods, or if they are delivered, because his warranty is nonexistent, has expired, or because the repairman cannot adequately correct the malfunction or may constantly put off the repair services requested, in an attempt to cause the consumer to give up in disgust. Such consumer fraud results in serious economic consequences, not only to the consumer, but also to the businessman. If a businessman has to cheat the consumer in order to successfully compete with a competitor who is cheating the consumer, the whole business community suffers.

The traditional reaction of law enforcement officials to the consumer's plight was to tell the consumer that he had a private

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civil action against the business which cheated him and, therefore to "go get an attorney." This traditional response informed the consumer that he had no realistic remedy at all. Usually the amount lost by the individual consumer in a fraudulent transaction is far less than that necessary to make a private action economically feasible, yet often is greater than the jurisdictional amount of Small Claims Court.¹ In fact, in some instances a company engaging in fraud will intentionally induce customers into transactions involving an amount over the Small Claims Court jurisdiction yet under any amount which is possible to remedy by a private action.

A few years ago the Sacramento County District Attorney prosecuted at least one company engaged in this particular practice.² The company involved was an out-of-state business selling vending machines and routes. It advertised these machines and routes in the classified section of newspapers throughout California for an average price of two and three thousand dollars. When the consumer responded to this "business opportunity," he was immediately contacted by one of the company's salesmen, who proceeded to give him a sales pitch on the advantages of purchasing the company's machines and routes. Most, if not all, of the pitch was false or misleading. The customer, who was required to pay in advance for the machines and the route, usually did not receive the vending machines, or if the machines were sent to him, they were either used or, if new, they were disassembled, in which case the purchaser had to assemble them himself. The "route" sold to the consumer consisted of either a list of non-existent businesses or a list of businesses that had never agreed to allow the installation of vending machines on their premises. To tell these purchasers to pursue a private action against an out-of-state company for a two thousand dollar recovery is to leave them with no remedy.

Class actions alleging fraud or misrepresentations in the sale of consumer goods are available in both state³ and federal⁴ courts.

1. CAL. CIV. PRO. CODE § 117 (West Supp. 1974) provides in part that the jurisdiction of small claims courts "shall be confined to cases for the recovery of money only where the amount claimed does not exceed five hundred dollars. . . ."

2. *People v. Federal Distrib. Co. v. America*, Civil No. 203068 (Cal. Super. Ct. July 12, 1972).

3. CAL. CIV. CODE § 1781 (West 1973). See *Vasquez v. Superior Court*, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971). *Vasquez* was a class action brought by retail consumers against a dealer and a finance company for misrepresentation and fraud in retail installment contracts for food and freezers. In *Vasquez* the court enumerated the requirements necessary to formulate a viable state class action including: (1) numerous plaintiffs making it inconvenient and wasteful to bring separate suits; (2) an ascertainable class; (3) a community of interests with common questions of law and fact; and, (4) common elements of proof.

However, the private class action is not a panacea for the consumer in most situations. The private attorney to whom this consumer goes for assistance is seldom aware of other members of the class, nor can he usually find additional victims other than through costly civil discovery. The private attorney, then, must decide to accept the case and proceed with discovery before the class action becomes available to him. This he will generally not do.

LAW ENFORCEMENT AGENCIES' RESPONSE

Because of both increased consumer awareness and the need for consumer protection, California law enforcement agencies are beginning to protect the consumer against fraud and misrepresentation in the sale of goods, services, and real property.

This is the function of several newly-created fraud divisions in district attorneys' offices.⁵ While these fraud divisions concern themselves with criminal prosecution of traditional white collar crimes such as embezzlement, grand theft, and corporate security violations, an increasingly large percentage of their time is now spent in consumer protection.

Today's fraud divisions in district attorneys' offices are set up to receive, and act on, consumer complaints. If these complaints allege that a business is engaging in false advertising, misrepresentation, or other types of fraudulent conduct, the division initially seeks an explanation of the alleged fraudulent conduct from the company. In this manner, the division seeks to mediate some type of adjustment between the consumer and the company in question. However, if a pattern of fraudulent conduct by a company emerges, the fraud division then investigates that company in preparation for a consumer fraud prosecution.

Statutory Authority

In California there are two primary statutory methods available to protect consumers. These statutes are intended to safe-

The supreme court suggested that trial judges utilize the criteria and procedures in section 1781 of the California Civil Code (Consumers Legal Remedies Act) and Rule 23 of the Federal Rules of Civil Procedure in making class determinations. *Id.* at 820-21, 484 P.2d at 977-78, 94 Cal. Rptr. at 809-10.

4. FED. R. CIV. P. 23. If the attorney wishes to bring a class action in federal court, he must establish that each plaintiff has been injured in at least the requisite jurisdictional amount. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). See *Eisen v. Carlisle & Jacquelin*, 94 S. Ct. 2140 (1974).

5. See, e.g., *Lorenz, Consumer Fraud and the San Diego District Attorney's Office*, 8 SAN DIEGO L. REV. 47 (1970); *Saxbe, The Role of Government in Consumer Protection: The Consumer Fraud and Crimes Section of the Office of the Ohio Attorney General*, 29 OHIO ST. L.J. 897 (1968); Note, *The Role of California's Attorney General and District Attorneys in Protecting the Consumer*, 4 U.C.D.L. REV. 35 (1971).

guard two segments of the community against fraudulent business practices. Sections 17500 to 17538.7 of the Business and Professions Code were designed to protect the consumer from false advertising or misrepresentations made in connection with the sale of goods, services or real property. Civil Code sections 3369 to 3370.1 were enacted to protect businessmen from unfair competition resulting from fraudulent business practices of a competitor.

Business and Professions Code section 17535 authorizes the Attorney General, any District Attorney, City Attorney or County Counsel to bring a civil action seeking to enjoin such fraudulent conduct.⁶ An injunction, which can take several forms, is a very effective way to prohibit fraudulent activity from occurring in the future. The injunction can be negative in the sense that it prohibits the defendant from defrauding the public in the manner that he did in the past. In addition, it can be positive, requiring certain disclosures or procedures to ensure proper policing of the injunction by enforcement agencies.⁷

An example of the broad use of injunctive relief can be seen in a prosecution brought by the Sacramento District Attorney against an out-of-state sleeping bag manufacturer.⁸ In that case, the People alleged that a company was mislabeling the inner contents of its sleeping bags as 100% acrylic fiber having a certain warmth factor and resiliency when in fact the contents of the sleeping bags were waste fibers (rough shavings discarded by carpet mills). An interesting side light was that this same label declared that if the purchaser broke the outer shell (perhaps to inspect the inner contents of the bag), his warranty as to resiliency, warmth factor and water repellancy was void. In addition to damages, an injunction was obtained not only prohibiting such mislabeling in the future but also requiring the company to set up a quality control procedure. Periodic reports were required to be sent to the appropriate state regulatory agency, the California Bureau of

6. CAL. BUS. & PROF. CODE § 17535 (West Supp. 1974) which provides in part:

Any person, corporation, firm, partnership, joint stock company, . . . or any other association or organization which violates or proposes to violate this chapter may be enjoined by any court of competent jurisdiction. . . .

Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney, county counsel, city attorney, or city prosecutor in this state in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.

7. See *People v. Superior Court (Jayhill Corp.)*, 9 Cal. 3d 258, 507 P.2d 1400, 107 Cal. Rptr. 192 (1973); *People v. Kellwood Co.*, Civil No. 218765 (Cal. Super. Ct. Jan. 7, 1972).

8. *People v. Kellwood Co.*, Civil No. 218765 (Cal. Super. Ct. Jan. 7, 1972).

Furniture and Bedding Inspection.⁹ This injunction provided for effective policing of the company's operations and ensured that the company would not defraud consumers in this manner in the future. As demonstrated by the result in this case, a varied and imaginative approach to the use of an injunction can make it a potent remedy.

As effective as an injunction is, it is not sufficient in all instances. While it slaps the hand of the company engaged in fraud by prohibiting that company from cheating its customers in the future, it nevertheless allows the company to keep the profit it has made from its fraudulent conduct. Therefore, the district attorney may seek to exact from the defendant civil penalties of up to \$2,500 for each misrepresentation.¹⁰ Civil penalties not only punish the defendant, but also force him to disgorge his illgotten gains and in so doing, act to effectively deter future conduct as much as does the injunction. The main reason a business cheats the public is to make money. If one takes the profit derived from fraudulent misconduct away from the company, there is little incentive to cheat.¹¹ Thus in the sleeping bag case, the manufacturer was ordered to pay civil penalties totaling the gross profit (\$11,725) it received from the sale of all of such bags in the state of California for the time period in question.¹²

If the Attorney General of California brings the consumer fraud action, one-half of the award goes to the State of California and the remaining half goes to the county in which judgment is entered.¹³ If the district attorney brings the action, the entire civil penalty goes to the county in which the judgment is entered.¹⁴ Because of these distribution provisions, it is possible for county fraud divisions to be entirely self-supporting. For example, from its in-

9. *People v. Barclay Home Product Sales Corp.*, Civil No. 218955 (Cal. Super. Ct. Jan. 14, 1972).

10. CAL. BUS. & PROF. CODE § 17536 (West Supp. 1974). This section provides in part:

Any person who violates any provision of this chapter, except Section 17530, shall be liable for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction.

See also *People v. Superior Court (Jayhill Corp.)*, 9 Cal. 3d 288, 507 P.2d 1400, 107 Cal. Rptr. 192 (1973).

11. See REVIEW OF SELECTED 1965 CODE LEGISLATION 21 (Cal. Continuing Education of the Bar 1965); MAGNUSON & CARPER, *THE DARK SIDE OF THE MARKET* (1968).

12. *People v. Kellwood Co.*, Civil No. 218765 (Cal. Super. Ct. Jan. 7, 1972).

13. CAL. BUS. & PROF. CODE § 17536 (West Supp. 1974).

14. *Id.*

ception Sacramento County's fraud division has brought to that county more money in civil penalties than the costs of the division's operations. In addition to the civil penalties provided for by section 17536 of the Business and Professions Code, section 17535¹⁵ provides that the court, in a consumer fraud action, may order restitution to the victims.¹⁶ This provision has proven to be an effective remedy to make consumers whole when the amount of money by which they were defrauded makes a private legal action, or even a class action, economically infeasible.

In a recent case the Sacramento District Attorney, in conjunction with the California Attorney General, forced a national department store to rebate almost a quarter of a million dollars in unreturned interest and insurance premiums to its customers.¹⁷ Similarly, the Sacramento County District Attorney, in conjunction with the district attorneys of Contra Costa and Nevada counties and the Attorney General of California, forced a recreational land developer to return, by way of restitution, cancellation of deeds and completion of recreational amenities at the particular land projects, over fifty million dollars to the purchasers of recreation land.¹⁸ Therefore, this provision for restitution, as much as civil penalties, acts to deter fraudulent conduct by exacting from defendants their illgotten gains.

Business and Professions Code section 17500 was enacted to protect one segment of the community—the consumer. However, law enforcement agencies also protect the businessman from these fraudulent companies. As a dual cause of action in consumer fraud prosecution, law enforcement agencies will allege that the defendant engaged in unfair competition in violation of Civil Code section 3369.¹⁹ Any violation of Business and Professions Code

15. CAL. BUS. & PROF. CODE § 17535 (West Supp. 1974) provides in part: The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person, corporation, firm, partnership, joint stock company, or any other association or organization of any practices which violate this chapter, or which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice in this chapter declared to be unlawful.

16. *Id.* See also *People v. Superior Court (Jayhill Corp.)*, 9 Cal. 3d 288, 507 P.2d 1400, 107 Cal. Rptr. 192 (1973).

17. *People v. W.T. Grant Co.*, Civil No. 232348 (Cal. Super. Ct. Mar. 14, 1973).

18. *People v. Boise Cascade Home & Land Corp.*, Civil No. 127902 (Cal. Super. Ct. Mar. 21, 1972).

19. CAL. CIV. CODE § 3369 (West 1970) provides:

1. Neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case, nor to enforce a penal law, except in a case of nuisance or *unfair competition*.

2. Any person performing or proposing to perform an act of *unfair competition* within this state may be enjoined in any court of competent jurisdiction.

section 17500 is also a violation of Civil Code section 3369. This means that the company that is engaging in false advertising, misrepresentation or other fraudulent conduct is also engaging in unfair competition. Civil Code section 3369 allows the Attorney General or local law enforcement agencies to seek an injunction to prohibit such activity. The policy underlying Civil Code section 3369 is the fear that if businesses are allowed to engage in false and misleading representations in connection with the sale of their goods, services, or real property it will start a "snow balling" effect. Competitors of the fraudulent company will have to engage in the same fraudulent conduct in order to successfully compete. In addition, willful violations of the law, which are repeated so regularly as to become a business practice, may be prosecuted as an unfair business practice under Civil Code section 3369.

In *Barquis v. Merchants Association of Oakland*²⁰ the California Supreme Court was presented with a pattern of unfair business practices which constituted unfair competition. The defendant in this case was one of the largest collection agencies in Alameda County—filing almost fourteen percent of the entire number of suits in the Oakland-Piedmont municipal court each year.²¹ The

3. As used in this section, unfair competition shall mean and include unlawful, *unfair or fraudulent business practice* and *unfair, deceptive, untrue or misleading advertising* and any act denounced by Business and Professions Code Sections 17500 to 17535, inclusive.

4. As used in this section, the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons.

5. Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney in this state in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public (emphasis added).

The wording of section 3369 of the Civil Code as well as section 17500 of the Business and Professions Code was held to be not unconstitutionally vague in *People v. Nat'l Research Co. of Cal.*, 201 Cal. App. 2d 765, 20 Cal. Rptr. 516 (1962). In *National Research Co.* the court of appeal stated:

'Unfair competition' and 'unfair or fraudulent business practices' are generic terms. Like the terms 'nuisance' or 'negligence' they must be translated into specific situations of fact in order to be cognizable. The attribute of generality does not of itself, however, require a holding of nullity for vagueness. As we have seen, the concept of unfair competition runs deep in the stream of our jurisprudence, and has been considered in numerous cases, articles and text. There is thus a definite background of experience and precedence to illuminate the meaning of the words employed in that statute. No one need reasonably be misled thereby.

Furthermore, it would be impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited, since unfair or fraudulent business practices may run the gambit of human ingenuity and chicanery. (Citations omitted.)

Id. at 772, 20 Cal. Rptr. at 521.

20. 7 Cal. 3d 94, 496 P.2d 817, 101 Cal. Rptr. 745 (1972). Six individual plaintiffs filed suit on behalf of themselves and others similarly situated.

21. *Id.* at 99, 496 P.2d at 821, 101 Cal. Rptr. at 749.

plaintiffs brought suit in order to attack the collection agency's "pattern and practice" of filing inadequate complaints in improper courts. The strategy of the collection agency was to encourage default judgments by impairing the consumer's right to defend. The effect was that the defendant either coerced inequitable settlements or obtained default judgments. The court, held that if this behavior constituted a distinct pattern and thereby an unlawful business practice it could be enjoined under section 3369.²²

In addition to an injunction, Civil Code section 3370.1²³ provides that a civil penalty not to exceed two thousand five hundred dollars (\$2500.00) for each act of unfair competition may be exacted from the defendant. The purpose of this civil penalty is identical to the purpose of the penalty provided by Business and Professions Code section 17536. By so acting to protect the consumer and the businessman, the district attorney, as any elected official must do, is responding to the needs and expressed wishes of his constituency.

THE PROSECUTION OF CONSUMER FRAUD ACTIONS

A. *Decision to Prosecute*

Because local law enforcement agencies in general, and fraud divisions in particular, are usually understaffed, consideration must be given to some order of priority regarding the types of cases to be prosecuted. Some of the relevant considerations are: 1) How extensive is the fraud or misrepresentation? 2) How many people have been victimized? 3) Must some action be taken immediately? 4) Are there a sufficient number of victims so that the case is immediately prosecutable or must additional investigation be completed? 5) Where are the victims located? Are they residents within the jurisdiction of the law enforcement agency considering prosecution? 6) Where did the fraud or misrepresentation occur?

22. The court reversed the judgment of the trial court indicating that the plaintiffs had "stated a cause of action entitling them to injunctive relief." *Id.* at 108, 496 P.2d at 827, 101 Cal. Rptr. at 755. The court also found that the defendant collection agency could be enjoined on the alternate ground that the practice engaged in constituted an abuse of process and a continuing mass tort. *Id.* at 103-08, 496 P.2d at 824-27, 101 Cal. Rptr. at 752-55.

23. CAL. CIV. CODE § 3370.1 (West Supp. 1974) provides:

Any person who violates any provision of this chapter shall be liable for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney in any court of competent jurisdiction. If brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State General Fund.

If many of the victims reside outside the jurisdiction of the particular law enforcement agency, the first consideration must be for residents within the jurisdiction. However, once the particular law enforcement agency has established jurisdiction to prosecute and has filed a complaint in superior court, it does so in the name of the People of the State of California and the jurisdiction of the superior court throughout the state.²⁴ Therefore the district attorney can use victims from outside his jurisdiction as well as those from within his county. Often it is advantageous to do so in order to show the extent of the fraudulent activity. In addition, once a judgment is obtained the terms of the injunction apply state-wide.²⁵

When determining priorities for prosecution, an important consideration is whether the consumer can adequately protect himself. Is the consumer able to investigate or obtain information as to the truth or falsity of the representations made to him? For example, it is extremely difficult, if not impossible, for the consumer to discover that the bottled water sold to him as "spring" water is really reconstituted city tap water,²⁶ or that the used car he purchased showing only 30,000 miles on the odometer has actually traveled 70,000 miles,²⁷ or that the ground beef labeled 100% ground beef is adulterated with soy flour and pork spleens, the latter ingredient used to make the ground beef red and juicy.²⁸ When, as in all of the above instances, the consumer has no way to find out whether the company is actually telling him the truth, and, therefore, cannot protect himself, law enforcement agencies must protect him.

B. *The Manner of Prosecution*

Once a law enforcement agency has decided to prosecute it must then determine in what manner to proceed. Does it file a criminal complaint, a civil consumer fraud action or both? The main considerations are how best to deter the activity from recurring in the future and how to rectify the present situation.

A short while ago the problem of odometer "turnbacks" reached disconcerting proportions in Sacramento County. The companies engaged in the sale of automobiles were "rolling back"

24. CAL. CONST., art. 6, § 5 (West 1954), provides that "[t]he process of the superior courts shall extend to all parts of the State. . . ."

25. Hackman v. O'Neal, 10 Cal. 292 (1858).

26. People v. Sierra Spring Water Co., Civil No. 199916 (Cal. Super. Ct. Feb. 27, 1970).

27. People v. Geer Leasing Co., Civil No. 209899 (Cal. Super. Ct. Mar. 5, 1971).

28. People v. Haro's Meat Packing Co., Inc., Civil No. 216144 (Cal. Super. Ct. Oct. 5, 1971).

the odometers of automobiles before selling them to the public. The traditional misdemeanor prosecution²⁹ and the usual fifty dollar fine, when the violation could be proved, hardly deterred the seller from rolling back the odometer and thus increasing the value of the car by several hundred dollars.

Consequently, the Sacramento District Attorney brought civil consumer fraud actions seeking an injunction and civil penalties against approximately thirty car dealers on the theory that by turning back the odometers of the vehicles they sold, the dealers misrepresented the mileage of the vehicles in violation of Business and Profession Code Section 17500.³⁰ As a result of these prosecutions, the District Attorney obtained injunctions against the defendant car dealers and exacted civil penalties from the defendants totaling close to one hundred fifty thousand dollars.³¹ Obviously this was a more effective deterrent and remedy than the traditional criminal prosecution.

It is sometimes advantageous to bring a criminal prosecution, and under a search warrant, seize business records which evidence the commission of fraud. Such a criminal prosecution necessitates an already well-supported and documented case. Too often, however, because the fraud is sophisticated and proof of the violation demands the use and compilation of business records which are in the hands of the defendant, the criminal case must be abandoned or delayed and a civil consumer fraud action brought in its place.

The great advantage of the consumer fraud prosecution in such instances is that it is not criminal, but civil in nature.³² There-

29. CAL. VEH. CODE § 28051 (West Supp. 1974) provides:

It is unlawful for any person to disconnect, turn back, advance, or reset the odometer of any motor vehicle with the intent to alter the number of miles indicated on the odometer gauge.

30. CAL. BUS. & PROF. CODE § 17500 (West 1964). Section 17500 provides:

It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this State, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, any statement, concerning such real or personal property or services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, or for any such person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell such personal property or services, professional or otherwise, so advertised at the price stated therein, or as so advertised.

31. *People v. Geer Leasing Co.*, Civil No. 209899 (Cal. Super. Ct. Mar. 5, 1971).

32. See *People v. Superior Court (Witzerman)*, 248 Cal. App. 2d 276, 52 Cal. Rptr. 393 (1967).

fore, all methods of civil discovery, including depositions,³³ interrogatories,³⁴ admissions,³⁵ and inspection and copying of business records³⁶ are available to the People. In fact, because the civil penalties sought in such an action are so similar to punitive damages, the People may also discover the financial status of the defendants.³⁷

In addition, because these consumer fraud actions are not criminal certain constitutional rights peculiar to criminal actions are not available to the defendants. The defendant does not have a right to a jury trial.³⁸ There is no requirement that the evidence be established beyond a reasonable doubt, but rather only by a preponderance of the evidence,³⁹ nor does the defendant have the sixth amendment right to be confronted by the witnesses against him.⁴⁰ Of equal importance, a criminal acquittal does not bar the civil action on the basis of double jeopardy.⁴¹

Additionally, a civil consumer fraud action is a more effective method than a criminal prosecution when the defendant is a corporation, which is the case in most instances of false advertising. A corporation cannot be incarcerated: it can only be given terms of probation and fined.⁴² Past experience has shown that the injunction obtained as a result of a civil consumer fraud prosecution can be constitutionally broader and more imaginative than terms of probation so as to more effectively prohibit the fraudulent practices from occurring in the future. Moreover, the civil penalties exacted from these defendant companies have been substantially greater than would have been obtained by criminal fine.

Also, consumer fraud actions are very newsworthy. The press usually gives them substantial coverage and prominence. Because such an action is civil and not criminal in nature, law enforcement officials are not restricted by the "Sheppard Doctrine" prohibiting

33. CAL. CIV. PRO. CODE § 2016 (West Supp. 1974).

34. CAL. CIV. PRO. CODE § 2030 (West Supp. 1974).

35. CAL. CIV. PRO. CODE § 2033 (West Supp. 1974).

36. CAL. CIV. PRO. CODE § 2031 (West Supp. 1974).

37. *People v. Superior Court (Kardon)*, 35 Cal. App. 3d 710, 111 Cal. Rptr. 14 (1973).

38. *People v. Witzerman*, 29 Cal. App. 3d 169, 105 Cal. Rptr. 284 (1972). The court of appeal approved the trial court's denial of a jury trial stating that "the statutory action before us was not rendered criminal in nature [nor a legal rather than an equitable cause of action] because the People therein sought civil penalties." (Footnote omitted.) *Id.* at 177, 105 Cal. Rptr. at 289.

39. *See United States v. Regan*, 232 U.S. 37 (1914).

40. *United States v. Zucker*, 161 U.S. 475 (1896).

41. *Helvering v. Mitchell*, 303 U.S. 391 (1938).

42. *Commissioners v. Sellew*, 99 U.S. 624 (1878). A corporation's agents may be incarcerated. "As the corporation can only act through its agents, the courts will operate upon the agents through the corporation." *Id.* at 627. California has followed this principle. *See, e.g., CAL. CORP. CODE §§ 1307, 1309, 1511, and 3019-22* (West 1955).

the dissemination by parties to a criminal action of information not already publicly known.⁴³ Therefore, the enforcement agency may hold press conferences and dispense press releases. The consequential news coverage educates the consumer and apprises him of certain types of fraudulent business practices. Also, the press coverage deters other companies from engaging in or contemplating similar fraudulent conduct. Such companies seldom are willing to risk their established good will and trade name by continuing the fraudulent business practices which precipitated the prosecution of their competitors.

On occasion, the defendant in a consumer fraud action is so financially unsound that he is unable either to pay the civil penalty imposed upon him or to make his victims whole. A criminal prosecution may punish the defendant but it does not improve the lot of his victims. If, however, the fraudulent business has sold consumer goods regulated by the Unruh Act⁴⁴ and then assigned the contracts to a lending institution, that lending institution may not be a holder in due course but rather, an assignee of the seller's rights subject to all claims and defenses of the buyer against the seller arising out of the sale.⁴⁵ In these circumstances, law enforcement officials may join the lender as a defendant in the con-

43. *Sheppard v. Maxwell*, 384 U.S. 333 (1966). This case involved the question of whether Sheppard had been denied a fair trial in his state conviction for the second-degree murder of his wife because of the trial judge's failure to sufficiently protect him from the massive publicity that attended his prosecution. The Supreme Court concluded that Sheppard did not receive a fair trial consistent with the due process clause of the fourteenth amendment and reversed the judgment. In doing so, the Court held that where there is a reasonable likelihood that prejudicial news prior to a trial will prevent a fair trial, the judge should continue the trial until the threat of prejudicial news abates, or transfer it to another county. *Id.* at 363.

44. CAL. CIV. CODE § 1801 *et seq.* (West 1973). The Act is designed to regulate retail installment sales. The Act defines such transactions as the sale of goods or the furnishing of services by a retail seller to a retail buyer for a deferred payment price which is due in installments. CAL. CIV. CODE § 1802.5 (West 1973).

45. CAL. CIV. CODE § 1804.2 (West 1973); see also *Morgan v. Reasor*, 69 Cal. 2d 881, 447 P.2d 638, 73 Cal. Rptr. 398 (1968). In *Morgan v. Reasor* the California Supreme Court held:

(1) that the Unruh Act applies to the contract for the construction of the residential housing involved in the instant case, (2) that the holder of a note with constructive knowledge of noncompliance with the Unruh Act is 'barred from recovery of any time price differential or service charge,' (3) that the defendant assignee of that note here had both constructive and actual knowledge of the violations of the Unruh Act, (4) that the Unruh Act provides for reasonable attorney's fees and costs in a suit for a declaratory judgment, and (5) that violations of the Unruh Act cannot be corrected more than 30 days after the execution of the contract involved.

Id. at 885, 447 P.2d at 640, 73 Cal. Rptr. at 400. Constructive knowledge is that which is "sufficient to put a reasonable man on inquiry." *Id.* at 893, 447 P.2d at 646, 73 Cal. Rptr. at 406.

sumer fraud action and bar recovery by that lender of all or part of the money owed by the consumer under the contract.⁴⁶

In some instances, the lender may be treated as a party to the original transaction or be looked upon as the principal of the seller because of the lender's close involvement in the sale itself.⁴⁷ Such instances may occur, for example, when the lender furnishes the seller with credit applications and contract forms, or when the lender is the primary source of the seller's financing.⁴⁸ In these instances the lender serves as an essential moving force behind the sale.⁴⁹ In other circumstances, the lender may be held jointly and severally liable with the defrauding seller, as when the lender has received sufficient complaints from customers to put it on notice that the seller was using fraudulent sales devices in the promotion of his goods, since there may be a duty in the assignee to investigate these suspicious circumstances.⁵⁰

The civil prosecution has one additional advantage over a criminal prosecution. The civil consumer fraud action may be maintained even if the defendant is based outside California. To establish the court's jurisdiction and satisfy due process requirements, it is merely necessary to set forth defendant's minimum business contacts with the state. All that need be shown under this test is that the defendant is doing business in California⁵¹ and that in so doing it has allegedly acted fraudulently.⁵² If this is shown, law enforcement agencies need only properly serve the company with a copy of summons and complaint as in any other civil action.⁵³ The cumbersome and complicated extradition procedures frequently necessary in a criminal prosecution are thus avoided.

46. *Id.* at 897, 447 P.2d at 649, 73 Cal. Rptr. at 409. The court barred collection of the time price differential on the contract, the remedy specified by the Unruh Act. See CAL. CIV. CODE § 1812.7 (West 1970).

47. *Connot v. Great Western Savings & Loan Ass'n*, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968).

48. *Commercial Credit Corp. v. Orange County Mach. Works*, 34 Cal. 2d 766, 214 P.2d 819 (1950). The court held:

When a finance company actively participates in a transaction . . . from its inception, counseling and aiding the future vendor-payee, it cannot be regarded as a holder in due course of the note given in the transaction. . . ."

Id. at 771, 214 P.2d at 822.

49. See *Vasquez v. Superior Court*, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971); *Morgan v. Reasor*, 69 Cal. 2d 881, 447 P.2d 638, 73 Cal. Rptr. 389 (1968).

50. See *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).

51. *Id.*

52. CAL. BUS. & PROF. CODE § 17500 (West 1964).

53. CAL. CIV. PRO. CODE § 416.10 (West 1973).

ELEMENTS OF A CONSUMER FRAUD PROSECUTION

A. *Establishing a Cause of Action*

Once the decision has been made to bring a civil consumer fraud action, it must be determined whether the facts demonstrate a violation of the Business and Professions Code section 17500. A complaint alleging a violation of section 17500 is sufficient if it alleges: (1) an intent to dispose of real or personal property or to perform services or to enter into an obligation therefore; (2) the making or dissemination of any statement, or causing the same to be made or disseminated, before the public in any manner or means whatsoever, whether oral, written or otherwise, that is untrue or misleading; (3) a connection between the statement made or disseminated and the property being disposed of, or the services rendered, or matters of fact or circumstances connected therewith; and, (4) knowledge by the defendant (or the ability to have acquired such knowledge by the exercise of reasonable care) that the statement made was untrue or misleading.⁵⁴ These elements need only be set forth with limited specificity. Evidentiary facts such as the names of the customers solicited, the names of the salesmen allegedly making the misrepresentations, and the exact time and place of the misrepresentations need not be pleaded.⁵⁵

Elements one and three, the intent to dispose of property and the showing of a nexus between the statements made concerning this property, can be proven by the statement or advertisement itself, since such advertising is usually an offer by a named person to sell particular goods at a certain price.⁵⁶

The first part of the second element, that the defendant made or disseminated the statement, can be proven by testimony from the customers to whom the defendants made the statement, from employees whom the defendant instructed to make the statement, or from advertising media paid and instructed by defendant to carry its advertisement.⁵⁷ However, the second element is not yet complete. The prosecution must also show that the statement was made to the public and that the statement was untrue or misleading.

54. *Id.* See *People v. Superior Court (Jayhill Corp.)*, 9 Cal. 3d 283, 507 P.2d 1400, 107 Cal. Rptr. 192 (1973).

55. *People v. Superior Court (Jayhill Corp.)*, 9 Cal. 3d 283, 288, 507 P.2d 1400, 1403, 107 Cal. Rptr. 192 (1973). *Jayhill* involved a civil action brought by the Attorney General of California against sellers of encyclopedias by door-to-door solicitation, charging false and misleading advertising and unfair competition. The California Supreme Court held, in part, that a trial court has the inherent power to order that the defendants in such a case make or offer to make restitution to customers found to have been defrauded. *Id.* at 286, 507 P.2d at 1402, 107 Cal. Rptr. at 194.

56. *Id.* at 288, 507 P.2d at 1403, 107 Cal. Rptr. at 145 (1973).

57. *Id.*

B. *The Public*

The determination of "who is the public" for purposes of ascertaining whether the misleading or untrue statement was made to the public, is answered by reference to decisions interpreting section five of the Federal Trade Commission Act.⁵⁸ Because the FTC Act is so similar to section 3369 of the California Civil Code and applicable sections of the California Business and Professions Code,⁵⁹ the California courts have held that federal court decisions interpreting the FTC Act "are more than ordinarily persuasive" in interpreting the application of sections 3369 and 17500.⁶⁰

In interpreting the Federal Trade Commission Act, federal courts have described the public as including the trusting as well as the suspicious;⁶¹ not only experts but that "vast multitude which includes the ignorant, the unthinking, and the credulous, who in making purchases do not stop to analyze but are governed by appearances and general impressions."⁶² Caveat Emptor is dying,⁶³ simply because

the buying public does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression upon the mind of the reader arises from the sum total of not only what is said, but also of all that is reasonably implied. . . . Advertisements are intended not to be carefully dissected with a dictionary at hand, but rather to produce an impression upon prospective purchasers.⁶⁴

Therefore, "the important criterion is the impression that the advertisement is likely to make on the reader,"⁶⁵ and its capacity to deceive the general populace.⁶⁶ The general populace is not "the scientific or legal mind which will dissect and analyze each phrase," but, rather "the average member of the public who more likely will be influenced by the impression gleaned from a quick glance at the most legible words."⁶⁷

C. *False or Misleading Statements*

A statement is false or misleading if it has the capacity to

58. Federal Trade Commission Act § 5, 15 U.S.C. § 45 (1950).

59. CAL. BUS. & PROF. CODE § 17500 *et seq.* (West 1964).

60. *People v. National Research Co. of Cal.*, 201 Cal. App. 2d 765, 773, 20 Cal. Rptr. 516, 521 (1962).

61. *FTC v. Standard Education Society*, 302 U.S. 112 (1937).

62. *P. Lorillard Co. v. FTC*, 186 F.2d 52, 58 (4th Cir. 1950), *quoting Florence Mfg. Co. v. J.S. Dowd & Co.*, 178 F. 73, 75 (2d Cir. 1910).

63. *See, e.g., FTC v. Standard Education Society*, 302 U.S. 113 (1937).

64. *Aronberg v. FTC*, 132 F.2d 165, 167 (7th Cir. 1942).

65. *Koch v. FTC*, 206 F.2d 311, 319 (6th Cir. 1953).

66. *Charles of the Ritz Distrib. Corp. v. FTC*, 143 F.2d 676 (2d Cir. 1944).

67. *Ward Laboratories Inc. v. FTC*, 276 F.2d 952 (2d Cir. 1960).

deceive,⁶⁸ the test being whether the public is likely to be misled.⁶⁹ The foremost criterion in determining whether a product is falsely advertised is the impression that the statement is likely to make on the reader⁷⁰ and its capacity to deceive the general populace.⁷¹ A representation may be deceptive even if its wording can be literally or technically construed as true since consumers do not weigh each word.⁷² The controlling inquiry must then be whether the *impression* likely to be formed by the consumer has the capacity to deceive.⁷³

D. *The Deception*

A violation under section 17500⁷⁴ is complete with the publication and circulation to the public of the false or misleading representation, without regard to whether anyone was actually deceived or damaged by it.⁷⁵ It is not necessary to present evidence of actual deception by means of a public sampling or evidence of defrauded customers;⁷⁶ the representations themselves may sufficiently demonstrate their capacity to deceive.⁷⁷ In addition, evidence of intent to deceive or defraud is not necessary in order to bring a civil consumer fraud action.⁷⁸ Furthermore, a violation exists if the first contact or interview with the consumer is secured by deception, even though the true facts are made known to the buyer before he actually purchases the goods.⁷⁹

The fourth and final element, that the defendant knew or, acting as a reasonable man, should have known, that the statements were false or misleading, is simply a negligence standard. If by his statement the defendant holds himself out as an expert, he is charged with possessing an expert's knowledge.⁸⁰ Even if the defendant does not hold himself out as an expert but, rather,

68. *Goodman v. FTC*, 244 F.2d 584 (9th Cir. 1957).

69. *Charles of the Ritz Distrib. Corp. v. FTC*, 143 F.2d 676 (2d Cir. 1944). See also, *Kalwajtys v. FTC*, 237 F.2d 654 (7th Cir. 1956); *P. Lorillard Co. v. FTC*, 186 F.2d 52 (4th Cir. 1950); *People v. Wahl*, 39 Cal. App. 2d 771, 100 P.2d 550 (1940).

70. *Koch v. FTC*, 206 F.2d 311, 319 (6th Cir. 1953).

71. *Charles of the Ritz Distrib. Corp. v. FTC*, 143 F.2d 676 (2d Cir. 1944).

72. *People v. Wahl*, 39 Cal. App. 2d 771, 100 P.2d 550 (1940).

73. *Kalwajtys v. FTC*, 237 F.2d 654 (7th Cir. 1956); *P. Lorillard Co. v. FTC*, 186 F.2d 52 (4th Cir. 1950).

74. CAL. BUS. & PROF. CODE § 17500 (West 1964).

75. *Hair v. McGuire*, 188 Cal. App. 2d 348, 10 Cal. Rptr. 414 (1961); *Ex parte O'Connor*, 80 Cal. App. 647, 252 P. 730 (1927).

76. *Double Eagle Lubricants, Inc. v. FTC*, 360 F.2d 268 (10th Cir. 1965).

77. *Id.*

78. *People v. Lynam*, 253 Cal. App. 2d 959, 61 Cal. Rptr. 800 (1967).

79. *Exposition Press v. FTC*, 295 F.2d 869 (2d Cir. 1961); *Carter Prod. Inc. v. FTC*, 186 F.2d 821 (7th Cir. 1951).

80. *People v. Lynam*, 253 Cal. App. 2d 959, 968, 61 Cal. Rptr. 800, 806 (1967).

makes absolute, unqualified and positive statements which imply knowledge, he is held to have known the falsity of his statements and is as "culpable as if he had willfully asserted that to be true which he knew was false. . . ." ⁸¹ Moreover, under most circumstances, the defendant making the representations is under a duty to verify the truth of the statements made. ⁸² Therefore, good faith on the part of the defendant is no defense. ⁸³

ACTIONS FILED IN CONJUNCTION WITH CONSUMER FRAUD PROSECUTIONS

A. *Temporary Restraining Order*

Where prohibited acts are authorized to be enjoined by specific statutes such as section 3369⁸⁴ and section 17500,⁸⁵ and good cause exists to believe that the prohibited acts would otherwise be committed in the future, the state may seek temporary relief. However, because of the nature of the action, the decision to seek a temporary restraining order will depend upon the facts of the particular case. If the defendant is either transient or principally doing business outside of California, a temporary restraining order may not be warranted because of the great amount of time necessary to properly support the motion.⁸⁶ In such cases the limited staff of the fraud division may be unable to complete the declarations or affidavits and obtain the evidence necessary to support the order to show cause why a preliminary injunction should be issued. However, it is precisely in the instances where the businessman may leave the jurisdiction that a restraining order is so necessary. If, however, the fraud division has filed or is about to file a consumer fraud action, the motion for a temporary restraining order may be supported by the pleadings and affidavits filed in that action.⁸⁷

In order to support the motion all that need be demonstrated is that the defendant retains the ability to make misrepresentations in the future,⁸⁸ it is the likelihood of a resumption of

81. *Id.*

82. *People v. Witzerman*, 29 Cal. App. 3d 169, 180, 105 Cal. Rptr. 284, 291-92 (1972).

83. *Koch v. FTC*, 206 F.2d 311 (6th Cir. 1953).

84. CAL. BUS. & PROF. CODE § 17500 (West 1964).

85. CAL. CIV. CODE § 3369 (West 1970).

86. *Paul v. Wadler*, 209 Cal. App. 2d 615, 26 Cal. Rptr. 341 (1962).

87. *Walling v. Builders' Veneer & Woodwork Co.*, 45 F. Supp. 808 (D.C. Wis. 1942).

88. *Dept. of Agriculture v. Tidewater Oil Co.*, 269 Cal. App. 2d 145, 74 Cal. Rptr. 799 (1969); *Walling v. Builders' Veneer & Woodwork Co.*, 45 F. Supp. 808 (D.C. Wis. 1942).

fraudulent acts that is the continuing menace.⁸⁹ The defendant's promise to discontinue the violative activity is no defense to the motion.⁹⁰

B. *The Constructive Trust*

Since, as part of its consumer fraud action, law enforcement agencies may now seek restitution for victims of a fraudulent business,⁹¹ it often becomes necessary to prevent dissipation of the defendant's assets and thereby ensure an adequate fund as a source, not only for restitution to victims, but also for payment of the civil penalties authorized by Business and Professions Code section 17536.⁹² The most effective way to ensure that such a fund will exist is to seek a constructive trust over the defendant's assets, which the defendant gained or in some part were realized by means of his misrepresentations, fraud or other unlawful business practices.⁹³ The imposition of such a trust is an assurance that the defendant will not benefit by his own wrongdoing and it is authorized by section 17535 of the California Business and Professions Code which provides in part:

. . . The court may make such orders or judgments, including the appointment of a receiver, . . . which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice in this chapter declared to be unlawful.⁹⁴

SETTLEMENT VS. TRIAL

As the trial date draws near, the defendant begins weighing the following factors favoring settlement: the anticipated unfavorable press coverage that a protracted trial might occasion, pressure from financial institutions to which the defendant may have assigned its conditional sales contracts, and the possibility that a loss at trial might collaterally estop him from raising the same defenses in some future private class actions. Such pressures as these often

89. *See* *People v. Superior Court (Jayhill Corp.)*, 9 Cal. 3d 283, 507 P.2d 1400, 107 Cal. Rptr. 192 (1973).

90. *Walling v. Builders' Veneer & Woodwork Co.*, 45 F. Supp. 808, 810 (D.C. Wis. 1942).

91. *People v. Superior Court (Jayhill Corp.)*, 9 Cal. 3d 283, 286-87, 507 P.2d 1400, 1402, 107 Cal. Rptr. 192, 194 (1973). *See also* notes 10-13 and accompanying text *supra*; CAL. BUS. & PROF. CODE § 17535 (West Supp. 1974).

92. CAL. BUS. & PROF. CODE § 17536 (West Supp. 1974).

93. CAL. CIV. CODE § 2224 (West Supp. 1974) provides:

One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have it.

94. CAL. BUS. & PROF. CODE § 17535 (West Supp. 1974).

bring the defendant to the bargaining table and induce him to stipulate to the entry of a final judgment.

A stipulated final judgment is also advantageous to the People. It allows the prosecution to prohibit fraudulent conduct engaged in by numerous businesses in a variety of economic areas by the entering of a judgment which often is broader and more imaginative than one that can be supported by evidence presented at trial.

TRIAL

Even though the defendant in a consumer fraud suit has no right to a jury trial,⁹⁵ it is often advantageous for the People to try the action before a jury. The prosecution's underlying assumption is that the jury is typically composed of consumers who often have some personal "axe to grind" against business. Whether the trier of fact is judge or jury, however, it is usually very receptive and sympathetic to consumer fraud actions. On past occasions at the superior court level, the Sacramento County Fraud Division has successfully argued that the judge sitting as a court of equity should decide whether an injunction should issue and, if so, the terms thereof. But if civil penalties are sought by the People pursuant to either Business and Professions Code section 17536⁹⁶ or Civil Code section 3370.1,⁹⁷ a jury should decide the award because the penalties are in the nature of punitive damages.⁹⁸

ENFORCEMENT OF THE JUDGMENT

Since the injunction obtained in a consumer fraud action may be positive in nature,⁹⁹ the terms of the injunction can be adequately policed and violations, if any, discovered. Once a violation is discovered, how are the terms of the judgment enforced? Code of Civil Procedure section 1209 provides that a criminal contempt action may be brought for "disobedience of a lawful judgment, order or process of the court."¹⁰⁰

Such a criminal prosecution may be effective against individuals, or on some occasions, corporate officials,¹⁰¹ but it is of

95. *People v. Witzerman*, 29 Cal. App. 3d 169, 176, 105 Cal. Rptr. 284, 289 (1972); see note 38 and accompanying text *supra*.

96. CAL. BUS. & PROF. CODE § 17536 (West Supp. 1974).

97. CAL. CIV. CODE § 3370.1 (West Supp. 1974).

98. *People v. Superior Court (Kardon)* 35 Cal. App. 3d 710, 111 Cal. Rptr. 14 (1973).

99. See notes 6-7 and accompanying text *supra*.

100. CAL. CIV. PROC. CODE § 1209 (West 1972).

101. *FTC v. Standard Education Society*, 302 U.S. 112 (1937). In this case the United States Supreme Court commented that:

a command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, appraised of the writ directed to the corporation, prevent compliance . . .

little effect against the corporation, itself, which as an entity, cannot be incarcerated. For that reason, in 1973, Business and Professions Code section 17535.5¹⁰² was enacted. This code section enables the court to levy a civil penalty of not more than six thousand dollars (\$6,000) for each violation by the corporation of an injunction issued pursuant to section 17535.¹⁰³ Section 17535.5 further states that when the conduct constituting the violation is of a continuing nature, then each day of such conduct is to be considered a separate and distinct violation.¹⁰⁴ In determining the amount that the corporation is to be penalized, the court is to consider

all relevant circumstances, including but not limited to, the extent of harm caused by the conduct . . . , the nature and persistence of such conduct, the length of time over which the conduct occurred, and any corrective action taken by the defendant.¹⁰⁵

The effectiveness of this section as a deterrent to violations of an injunction by a corporation has yet to be determined.

CONCLUSION

The California consumer in redefining his role as "consumer" has actively sought, and received, the help of law enforcement agencies. With the assistance of district attorneys' offices, the consumer's individual strength is now approaching that of the business who would cheat him.

California law enforcement agencies have the power with which to prosecute consumer fraud actions and, with the establishment of consumer fraud divisions in many district attorneys' offices, have begun to exercise their power. However, much more remains to be done. An increasing number of adequately staffed consumer fraud units must be created. In that way, all consumers, not only those who live within a jurisdiction having a fraud division or those having the ability to adequately recover their losses by private action, will be able to pursue their rightful remedy. In addition, already existing fraud divisions must respond to the consumer outcry for more protection and furnish their constituency with an effective guard against fraudulent practices by businesses whose only concern is profit. Only then will Caveat Emptor truly be dead and the consumer obtain an equal bargaining position in the market place.

they, no less than the corporation itself, are guilty of disobedience and may be punished for contempt.

Id. at 119.

102. CAL. BUS. & PROF. CODE § 17535.5 (West Supp. 1974).

103. CAL. BUS. & PROF. CODE § 17535 (West Supp. 1974).

104. CAL. BUS. & PROF. CODE § 17535.5 (West Supp. 1974).

105. *Id.*