

The Role of California's Attorney General and District Attorneys in Protecting the Consumer

I. INTRODUCTION

Over the last decade the United States has experienced the eruption of a consumer revolution. The revolution can be understood in part by viewing the scope of consumer problems in the marketplace.¹ These problems can best be categorized by their relationship to the stages of the typical business transaction: the pre-sale, the sale, and the post-sale phases.² At the pre-sale stage, the consumer may be subjected to such abuses as false or misleading description of merchandise or credit terms, or bait advertising and switch selling schemes. At the sale stage of the transaction, the consumer is often confronted with such practices as high pressure salesmanship, failure to disclose the terms of the agreement to the buyer, or oral representations excluded from the written contract. And at the post-sale stage, potential abuses include undelivered merchandise, lower quality merchandise substituted for that actually purchased, refusal to repair, and unreasonable collection efforts.

¹See Eovaldi, *Private Consumer Substantive and Procedural Remedies Under State Law*, 15 ANTITRUST BULL. 255 (1970) [hereinafter cited as Eovaldi].

²Lorenz, *Consumer Fraud and the San Diego District Attorney's Office*, 8 SAN DIEGO L. REV. 47, 54 (1970) [hereinafter cited as Lorenz]; Eovaldi, *supra* note 1, at 255.

The dilemma faced by consumers generally in the marketplace is particularly aggravated for the lower economic classes.³ Because the low income consumer often cannot meet the credit requirements imposed by reputable merchants and lending institutions, he does not have the alternatives of purchasing the goods on credit from a reputable merchant or obtaining a loan and purchasing the goods from a reputable merchant for cash. He is forced to patronize the low income merchant who often sells lower quality goods or charges a higher price than the downtown merchant, or both.⁴ The effect of the credit market has been that the low income consumer must deal with merchants who are insulated to a large degree from price and quality competition by the more reputable, downtown retailer.⁵

For the consumer who has been abused as a result of any one of the numerous deceptive or illegal business practices engaged in by those who directly or indirectly sell goods or render services in the marketplace, there are three alternative courses of action that may be available in seeking reparation. The injured consumer may seek compensation for his loss on his own by bringing a private action. Should he be a member of a group of similarly defrauded consumers, he may join with the group in bringing a class action against the wrongdoer. And in the event that neither a private action nor a class action is feasible, the consumer may turn to a public enforcement agency. In California, the principle public enforcement agencies are the California Attorney General's Consumer Fraud Unit and local district attorneys.

³See Wenk & Moye, *Debtor-Creditor Remedies: A New Proposal*, 54 CORNELL L. REV. 249 (1969); McEwen, *Economic Issues in State Regulation of Consumer Credit*, 8 B.C. IND. & COM. L. REV. 387 (1967); Eovaldi, *supra* note 1.

⁴ In our low-income areas, a special kind of system of sales-and-credit has evolved to cater to the needs of the poor, one in which exploitation and fraud are more the norm than the exception. High-pressure tactics, 'bait' ads and 'switch sales', misrepresentation of price and quality, and the sale of used merchandise as new all flourish in the low-income market place. This deviant system rests in part upon the ignorance of low-income consumers and their vulnerability to fast-talking salesmen, but in large part it also rests upon the absence of meaningful alternatives to current practices. The poor, lacking the normal requirements of credit, cannot shop in the major department stores. Under present marketing arrangements in our society, unethical practices may be an inevitable consequence of serving the wants of the poorest risks. Society now virtually presents the very poor risks with twin options: of foregoing major purchases or of being exploited.

Caplavitz, *Consumer Credit In the Affluent Society*, 33 LAW & CONTEMP. PROB. 641, 647-48 (1968).

⁵Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745 (1967).

II. THE INDIVIDUAL ACTION AND THE CLASS ACTION

A. THE INDIVIDUAL ACTION

Harsh economic realities create numerous practical barriers which confront the consumer when he seeks to bring a private action. Professor Kripke, discussing the consumer's ability to seek individual redress in the marketplace, has stated:

The key problems are that many consumers do not know when they have been abused, do not know how to seek a lawyer, and cannot afford to throw good money after bad for lawyers' fees. Beyond this, the amount involved in the typical consumer transaction is too small to justify the expenditure of the legal time that might be necessary for proper representation on a private basis.⁶

These factors, when coupled with a market mechanism that particularly singles out the low income consumer, pose substantial obstacles for the consumer who would seek effective relief through an individual action.

Both the nature of the marketplace in which he buys his goods and the nature of the court system through which he seeks reparation limit the ability of the consumer to seek relief by a private action. Most consumer purchases and most purchases of goods on installment contracts are for relatively small amounts.⁷ The amount of the average consumer purchase being relatively small, it follows that the actual damages that the consumer might recover for any given abuse suffered will be correspondingly small.⁸ Whether defending an action brought by the merchant or instituting an action against him, the consumer will normally be required to consult with and be represented by an attorney.⁹ And even in the rare instance where reasonable attorneys fees are awarded to the prevailing party in a private action by statute,¹⁰ the injured consumer is still faced with loss of working time in attending interviews, pre-trial activities, and the trial itself and may even be faced with the possibility of complete loss of job due to absence.¹¹ When these factors are considered in total, the

⁶Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U. L. REV. 1, 41 (1969).

⁷Eovaldi, *supra* note 1, at 272.

⁸*Id.*

⁹*Id.* at 273.

¹⁰See CAL. CIV. CODE § 1811.1 (West Supp. 1971); CAL. CIV. CODE § 2983.4 (West Supp. 1971).

¹¹ The significance of the typically small provable claim for damages in a direct consumer versus seller dispute is apparent when one pauses to con-

individual consumer action for damages is, in most instances an “. . . illusory measure of relief which may, if pursued, actually visit greater net loss upon the injured consumer than he would have incurred if he had done nothing.”¹²

Even if these burdens are overcome, the problem remains that quite often the consumer is not aware that his legal rights have been violated or that he may have a cause of action against the merchant as a result of the merchant's conduct. While lack of education may be most acute among low income consumers,¹³ it has been shown that even the more affluent segments of the population are not properly educated as consumers, and lack knowledge concerning their legal rights in dealing with a merchant.¹⁴ Lack of awareness on the part of the injured consumer of the legal remedies available to him may often prevent utilization of protective legislation such as the recently enacted Consumers Legal Remedies Act,¹⁵ which provides damages and injunctive relief to consumers damaged by enumerated deceptive practices on the part of merchants.¹⁶

sider the costs of going to court to remedy an unadjusted or rejected complaint. Unless the consumer's claim is for personal injury on a products liability count, there can be no effective legal redress through the courts by an action seeking damages for unlawful conduct in connection with typical purchases for consumption or use. As a matter of fact, there can be no effective relief in keeping with the reparative concept of the action for damages where the claim is for one hundred, or even two hundred dollars. The cost of litigation in terms of attorney's fees alone is just too great to make such an action feasible, but the theoretically fee-producing character of the cause of action is sufficient to prevent representation of the poor consumer by many legal services agencies in almost all of these cases. In addition to actual legal costs, the low income consumer usually faces another financial hurdle in that he will lose the wages for those hours during which he is absent from work for purpose of litigation if, indeed, such an absence from work is permitted at all.

Rice, *Remedies, Enforcement Procedures and Duality of Consumer Transaction Problems*, 48 BOST. U.L. REV. 559, 569 (1968) [hereinafter cited as Rice].

¹²*Id.* at 569.

¹³Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 764 (1967).

¹⁴Rice, *supra* note 11, at 567.

¹⁵CAL. CIV. CODE §§ 1750-1784 (West Supp. 1971); See also Reed, *Legislating For the Consumer: An Insider's Analysis of the Consumer Legal Remedies Act*, 2 PAC. L.J. 1 (1971).

¹⁶CAL. CIV. CODE § 1770 (West Supp. 1971) provides:

The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results, in the sale or lease of goods or services to any consumer are unlawful:

- (a) Passing off goods or services as those of another.
- (b) Misrepresenting the source, sponsorship, approval, or certification of goods or services.

B. THE CLASS ACTION

The consumer class action, where applicable, may provide the ultimate remedy for the injured consumer because it overcomes many of the barriers which presently deter consumers from seeking redress in the courts by a private individual suit.¹⁷ When appropriate, the consumer class action permits consumers sharing a common complaint arising from an unfair or deceptive business practice to pool their claims and resources and maintain a single action on behalf of all the plaintiffs.¹⁸ Professor Starrs, commenting on the unique value of a class action, stated:

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- (c) Misrepresenting the affiliation, connection, or association with, or certification, by, another.
 - (d) Using deceptive representations or designations of geographic origin in connection with goods or services.
 - (e) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not have.
 - (f) Representing that goods are original or new if they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used or secondhand.
 - (g) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.
 - (h) Disparaging the goods, services, or business of another by false or misleading representation of fact.
 - (i) Advertising goods or services with intent not to sell them as advertised.
 - (j) Advertising goods or services with intent not to supply reasonably expectable demand, unless the advertisement discloses a limitation of quantity.
 - (k) Making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions.
 - (l) Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law.
 - (m) Representing that a part, replacement, or repair service is needed when it is not.
 - (n) Representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not.
 - (o) Representing that the consumer will receive a rebate, discount, or other economic benefit, if the earning of the benefit is contingent on an event to occur subsequent to the consummation of the transaction.
 - (p) Misrepresenting the authority of a salesman, representative, or agent to negotiate the final terms of a transaction with a consumer.

¹⁷See Goldhammer, *The Consumer Class Action in California - A Sketch of Some Practical Aspects*, 45 L.A.B. BULL. 235 (1970) [hereinafter cited as Goldhammer]; Eovaldi, *supra* note 1, at 307-311.

¹⁸Echhardt, *Consumer Class Actions*, 45 NOTRE DAME LAWYER 663 (1970).

The class action is clearly the kind of 'organized pressure' which is often needed to force into public and judicial view the widespread evils of a system, a place, or a person. It is the judicial analogue to the mass demonstrations of the streets. Its success often hinges less on the ultimate outcome of the particular case than on the publicity, visibility and aroused popular reaction it evokes. The class action, therefore, serves multiple purposes, some of which are tactical rather than legal.¹⁹

The state of the law in California concerning the requirements which must be present in order to bring a class action is far from clear.²⁰ Section 382 of the Code of Civil Procedure provides the statutory authority for bringing a class action in California and is directly traceable to the New York Code of Procedure of 1848 which in turn is credited largely to David Dudley Field.²¹ Section 382 in part provides:

. . . and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impractical to bring them all before the court, one or more may sue or defend for the benefit of all.²²

The leading case interpreting section 382 in California is *Daar v. Yellow Cab Co.*,²³ which involved an individual taxicab passenger suing for himself and all other users of the defendant's cabs to recover excess charges assessed by the defendant over a four-year period. In holding that a class action was proper Mr. Justice Sullivan restated the two conditions which must be met in order to sustain a class action as being ". . . (1) there must be an ascertainable class. . . ; and (2) there must be a well-defined community of interest in questions of law and fact involved affecting the parties to be represented. . . ." ²⁴ Professor Starrs contends that these requirements have not been kept distinct and separate but have been blended together so that instead of two prerequisites there remains only the requirement of a community of interest existing among the class

¹⁹Starrs, *The Consumer Class Action - Part II: Consideration of Procedure*, 49 BOST. U.L. REV. 407, 408 (1969) [hereinafter cited as Starrs].

²⁰It is beyond the scope of this article to analyze, in depth, the California law relating to class actions. For recent articles dealing with this subject, see Article, *Tenants in Court: The Class Action*, 3 U.C.D. L. REV. 101 (1971); Goldhammer, *supra* note 17.

²¹Commenting on the Field Code Class Action, Professor Starrs stated:

Indeed, the language is so broad that this is the type of class action which potentially is most readily conformable to the consumer class action proposed in this paper. Starrs, *supra* note 19, at 434.

²²CAL. CODE OF CIV. PROC. § 382 (West 1954).

²³67 Cal. 2d 695, 533 P.2d 732, 63 Cal. Rptr. 724 (1967).

²⁴*Id.* at 704, 433 P.2d at 739, 63 Cal. Rptr. at 731.

members.²⁵ He concludes that the focus in California is on the community of interest requirement, and that “. . . a sufficient community-of-interest can be proved in spite of the fact that: (1) the class seeks relief which is not common to each class member, (2) the class does not have any interest in a common fund, and (3) the class is not so ‘united in interest’ as to be subject to compulsory joinder under section 382 of the Code of Civil Procedure.”²⁶ In *Daar*, rather than articulating specific tests for determining community of interest, the court specifically stated that whether a particular plaintiff can fairly protect the rights of the group he purports to represent must be determined on the basis of the facts and circumstances of each individual case.²⁷

California courts in determining whether a class action will be allowed have also focused on other factors in addition to the community of interest requirement.²⁸ These factors which are recognized in most jurisdictions as general rules governing all class actions include: (1) the requirement that there be a definable class which arguably has merged with the common interest requirement under the *Daar* decision; (2) the requirement that there be numerous persons whom it would be impractical to join; and (3) the requirement that the named plaintiffs adequately represent the unnamed class members.²⁹ The California Supreme Court, in *Gerhard v. Stephens*,³⁰ recently emphasized two additional requirements which must be present when bringing a class action. In upholding the trial courts determination that a class action was not maintainable, the court required that substantial benefits to all parties be shown to exist by the use of a class action, and that “. . . there must not be numerous and substantial questions left to be litigated by individual plaintiffs after a ‘class judgment’ on common questions has been rendered.”³¹ The present practice of California courts of determining the necessary requirements for bringing a class action on a case by case basis makes it difficult to determine which requirements will be emphasized in a given factual situation and whether additional requirements will be developed.

An alternative to the rather haphazard approach presently practiced by California courts in determining whether a class action is

²⁵Starrs, *supra* note 19, at 447.

²⁶*Id.* at 448.

²⁷67 Cal. 2d at 710, 533 P.2d at 743, 63 Cal. Rptr. at 735.

²⁸See Goldhammer, *supra* note 17.

²⁹Starrs, *supra* note 19, at 496.

³⁰68 Cal. 2d 864, 442 P.2d 692, 69 Cal. Rptr. 612 (1968).

³¹Article, *Tenants in Court: The Class Action*, 3 U.C.D. L. REV. 101, 125 (1971).

maintainable under C.C.P. section 382 may be embodied in the new Consumers Legal Remedies Act.³² That Act, passed by the California Legislature during the 1970 Regular Session, allows a consumer who has been damaged by any one of several enumerated deceptive practices to bring a class action on behalf of himself and other similarly situated consumers.³³ Section 1781(b) provides:

The Court shall permit the suit to be maintained on behalf of all members of the represented class if all the following conditions exist:

- (1) It is impracticable to bring all members of the class before the court.
- (2) The questions of law or fact common to the class are substantially similar and predominate over the questions effecting the individual members.
- (3) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class.
- (4) The representative plaintiffs will fairly and adequately protect the interests of the class.³⁴

On the question of notifying other members of the class, section 1781(d) provides:

If the action is permitted as a class action, the court may direct either party to notify each member of the class of the action. The party required to serve notice may, with the consent of the court, if personal notification is unreasonably expensive or it appears that all members of the class cannot be notified personally, give notice as prescribed herein by publication in accordance with Section 6064 of the Government Code in a newspaper of general circulation in the county in which the transaction occurred.³⁵

How the courts will interpret and apply the legislature's codification of the criteria necessary to bring a class action under the Consumers Legal Remedies Act, and whether by analogy these criteria will be applied to class actions brought under section 382 of the Civil Code of Procedure, remains to be seen.

When the appropriate situation arises, many of the disadvantages of an individual action—including in particular the problem of the disproportionately high litigation costs of individual claims—are overcome by a class action.³⁶ However, it is evident that there are numerous procedural and substantive requirements which must be

³²CAL. CIV. CODE §§ 1750-1784 (West Supp. 1971).

³³CAL. CIV. CODE § 1781 (West Supp. 1971).

³⁴CAL. CIV. CODE § 1781 (b) (West Supp. 1971).

³⁵CAL. CIV. CODE § 1781 (d) (West Supp. 1971).

³⁶Eovaldi, *supra* note 1, at 307-308.

met before the advantages of a class action become available to a group of injured consumers. And, moreover, due to the confused state of the law which presently exists in California, it is often extremely difficult to determine the factual situations in which a class action will be maintainable.

III. PUBLIC ACTION — THE ATTORNEY GENERAL AND DISTRICT ATTORNEYS

Absent a successful individual or class action, the injured consumer may ultimately be forced to depend on his third alternative, an action by a public enforcement agency, for protection. In California, the Attorney General's Consumer Fraud Unit and local district attorneys have assumed a major role in protecting the consumer.

As California's chief law officer, the Attorney General enjoys broad statutory authority in regard to enforcing the laws of the state.³⁷ Based on this authority, the Consumer Fraud Unit was conceived in 1959 and began achieving significant results by 1963.³⁸ The Unit was created to perform three basic functions: (1) the enforcement of laws protecting consumers from unlawful, unfair, fraudulent, or deceptive business practices or advertising; (2) to propose new legislation or suggest changes in existing laws where appropriate for consumer protection; and (3) to advise the legislature when requested as to the kind and magnitude of consumer protection problems.³⁹ The Consumer Fraud Unit fulfills these functions initially by acting as a clear-

³⁷CAL. CONST. ART. 5 § 13 (West Supp. 1971) provides:

Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be his duty to see that the laws of the state are uniformly and adequately enforced. . . . When required by the public interest or directed by the Governor, he shall assist any district attorney in the discharge of his duties.

In addition, see CAL. GOV'T CODE §§ 12510-12512 (West 1963); CAL. GOV'T CODE §§ 15000-15001 (West 1963).

CAL. GOV'T CODE § 15006 (West Supp. 1971) provides:

The Department of Justice shall maintain a continuing investigation on a statewide basis of investment frauds and business crimes and shall assist district attorneys of the various counties in the prosecution thereof.

³⁸Note, *Project - The Direct Selling Industry: An Empirical Study*, 16 U.C.L.A. L. REV. 883, 956 (1969) [hereinafter cited as *Project*].

³⁹Cal. Dep't of Justice, Office of the Att. Gen., Fact Sheet on *The Role of the Consumer Fraud Unit*, [hereinafter cited as Fact Sheet] (on file in the UCD Law Review Office).

ing house for consumer fraud complaints coming from individual consumers, businessmen, business organizations, and other law enforcement agencies.⁴⁰ Depending upon the nature of the complaint, the Unit may coordinate multi-county fraud investigations with district attorneys throughout California, process the complaint itself, or forward the complaint to the most appropriate local, state, or federal agency.⁴¹ In addition, to assist in performing its function of advising the legislature on matters concerning consumer protection, the Consumer Fraud Unit keeps a file of all complaints received.⁴² In conjunction with these activities, the Unit also performs an educational function by providing information for law enforcement agencies throughout the state on consumer protection laws.⁴³

In counties where the population and economic activity create a need for a Consumer Fraud Division within the District Attorney's Office, such a Division functions in much the same way as the Attorney General's Consumer Fraud Unit.⁴⁴ While size and operating procedures may vary from county to county, the general characteristics of the Consumer Fraud Divisions at the county level may be illustrated by the activities of the Office of the District Attorney of San Diego County. Like the Consumer Fraud Unit at the state level, the San Diego District Attorney's Office initially acts as a clearing house for consumer complaints.⁴⁵ Upon being contacted by an aggrieved consumer with a valid complaint, a record is made of the complaint and the parties involved are contacted—usually by telephone.⁴⁶ These initial functions are performed by two full-time investigators. One investigator receives complaints over the telephone, maintains a file on potential violators, and directs the complaining party to other agencies should the complaint not fall within the activities of the Division, while the second investigator conducts field investigations on complaints which are deemed suitable for prosecution.⁴⁷ Only a small number of the nearly four hundred telephone calls a month received by the San Diego Consumer Fraud Division from

⁴⁰It is estimated that approximately 75 percent of all complaints come from individuals, while a surprisingly small [less than 10 percent] number of the complaints come from Legal Aid or Legal Services Agencies. *Project, supra* note 38, at 957. For the Consumer Fraud complaint form currently used by the Consumer Fraud Unit, see appendix A.

⁴¹Fact Sheet, *supra* note 39.

⁴²*Id.*

⁴³*Id.*

⁴⁴See Lorenz, *supra* note 2.

⁴⁵*Id.* at 49.

⁴⁶*Id.* at 59.

⁴⁷*Id.* at 49.

complaining consumers are subsequently investigated.⁴⁸ However, while most complaints are resolved at the telephone stage, some are referred for civil or criminal prosecution.⁴⁹ In dealing with consumer fraud problems, the Division also cooperates with and is assisted by various agencies, including “. . . the State Food and Drug Inspectors, County Department of Weights and Measures, Legal Aid Society, Postal Department Investigators, specialized members of the various police agencies, Department of Motor Vehicles, Department of Corporations, Real Estate Commission, and Office of the State Attorney General.”⁵⁰

A. SUBSTANTIVE AREAS OF ACTION

Either by specific statutory authority or by authority of the common law, the Attorney General operating through the Consumer Fraud Unit or a local district attorney is empowered to seek redress in many areas where consumers commonly experience problems—including such areas as false and deceptive advertising,⁵¹ unfair competition,⁵² and credit abuses related to automobile sales⁵³ and other retail installment sales.⁵⁴

One of the primary areas in which the Attorney General and district attorneys are active in protecting the consumer is the field of

⁴⁸ March 1970-August 10, 1970. Only cases within the purview of consumer fraud recorded.

Resolved by telephone	87
Resolved by letter	72
Referred to other agency	56
Filed for information only, awaiting further complaint to show common scheme or design	78
Open for further investigation	36
Total number of cases	<u>329</u>

Total Civil Consumer Frauds filed — 12
(Includes cases prior to 1970)

Damages received by County — \$11,000 *Id.* at 54 n. 16.

⁴⁹ Consumer fraud cases present the usual pyramid found in legal work. A large number of complaints are made by consumers, of which a smaller number are investigated further. Of these a still smaller number actually lead to the filing of a complaint by the District Attorney for consumer fraud and an even smaller number actually reach trial. *Id.* at 59.

⁵⁰*Id.* at 49.

⁵¹CAL. BUS. & PROF. CODE §§ 17500-17535 (West 1964); CAL. BUS. & PROF. CODE § 17536 (West Supp. 1971).

⁵²CAL. CIV. CODE § 3369 (West 1970).

⁵³CAL. CIV. CODE §§ 2981-2984.4 (West Supp. 1971).

⁵⁴CAL. CIV. CODE §§ 1801-1812.10 (West Supp. 1971).

false and deceptive advertising. Statutory authority is provided for such activity by section 17500 of the Business and Professions Code which 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, and which is known, or which by the exercise of reasonable care should be known, to be 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.⁵⁵

California courts interpreting Business and Professions Code section 17500 have applied liberal judicial construction in determining what constitutes "misleading" or "untrue" statements.⁵⁶ In addition, cases decided under the Federal Trade Commission Act⁵⁷ dealing with false advertising or other unfair or fraudulent business practices have been recognized as valid authority in California.⁵⁸ It has been held that all that need be shown to prove a violation of section 17500 of the Business and Professions Code is that the statement is misleading.⁵⁹ No specific intent is required; and even though a statement may be technically true, it may still be held to be misleading, such as in a situation where the word or phrase used has a double meaning.

⁵⁵CAL. BUS. & PROF. CODE § 17500 (West 1964).

⁵⁶*Project, supra* note 38, at 961, 962.

⁵⁷15 U.S.C.A. §§ 41-77 (1969).

⁵⁸*Project, supra* note 38, at 961, 962; See *People ex rel. Mosk v. National Research Co. of Calif.*, 201 Cal. App. 2d 765, 20 Cal. Rptr. 516 (1962), where the court, after comparing state and federal statutes, stated: "In view of the similarity of language and obvious identity of purpose of the two statutes, decisions of the federal court on the subject are more than ordinarily persuasive." *Id.* at 773, 20 Cal. Rptr. at 522.

⁵⁹*People ex rel. Stanley Mosk v. Lynam*, 253 Cal. App. 2d 959, 965-968, 61 Cal. Rptr. 800, 805-807 (1967).

Thus, the court in *Garvai v. Board of Chiropractic Examiners*,⁶⁰ stated:

Appellants claim that the phrases, 'Please bring this ad with you' and 'Please present this card within 10 days,' were designed only to determine the effectiveness of their advertising. Read in their context, however, clearly they can be said to indicate that the presentation of the ad will result in a discount of one kind or another. Appellants are charged with the latter meaning: 'The use of a word having a double meaning is a common device of those desiring to deceive or mislead others. One who does this cannot escape the charge of misleading or deceiving by saying that to him, or as he meant the words, they were true.'⁶¹

Of particular interest in the area of consumer credit, it has been held by a federal court interpreting the Federal Trade Commission Act that it is misleading advertising to advertise the interest rate for financing an item as being a certain percent, such as 5 percent, when it is in fact add-on interest and actually refers to a real interest rate approximately double the amount advertised.⁶² As previously indicated, although FTC rules are applicable only in situations involving interstate commerce, such a decision would be good authority in California, being recognized as "more than ordinarily persuasive."⁶³

Should the alleged practice fall into the broad category of unfair business competition, the Attorney General or a district attorney may seek redress under section 3369 of the Civil Code.⁶⁴ Section 3369 defines unfair competition as being any "unlawful, unfair, or fraudu-

⁶⁰216 Cal. App. 2d 374, 31 Cal. Rptr. 187 (1963).

⁶¹*Id.* at 379, 31 Cal. Rptr. at 189.

⁶²*Ford Motor Co. v. Federal Trade Commission*, 120 F.2d 175, 182 (1941).

⁶³Note 58, *supra*.

⁶⁴CAL. CIV. CODE § 3369 (West 1970) provides:

1. Neither specific nor preventive relief can be granted to enforce the 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.
3. As used in this section, unfair competition shall mean and include unlawful, unfair or fraudulent business practice and unfair, 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

lent business practice and unfair, untrue or misleading advertising and any act denounced by Business and Professions Code Sections 17500 to 17535, inclusive.”⁶⁵ Whether a merchant’s conduct constitutes a violation of section 3369 is largely dependent upon the particular facts of the case. In determining whether section 3369 has been violated, the courts have stated: “Unfair competition is a question of fact and no inflexible rule can be stated as to what conduct will constitute unfair competition. The universal test is whether the public is likely to be deceived.”⁶⁶ Further, it has been held that it is unnecessary to prove a specific intent to defraud—a showing of any one of the types of conduct set forth in the statute being sufficient to justify injunctive relief.⁶⁷

By instituting an action under the common law, the Attorney General or a district attorney has the power to seek relief on behalf of aggrieved consumers for substantive violations of various statutes enacted to protect the public which do not contain an express grant of such power. Of particular interest in the area of consumer credit protection would be protective statutes such as the Retail Installment Sales Act,⁶⁸ the Automobile Sales Finance Act,⁶⁹ the Automobile Leasing Act,⁷⁰ the Real Property Sales Contract Law,⁷¹ and the Contracts for Health Studio Services Act.⁷² This approach is illustrated by *People v. Arthur Murray, Inc.*,⁷³ where the Attorney General and district attorney of Santa Barbara County, in the name of the People of the State of California, sought to enjoin Arthur Murray, Inc., and others from violating the Dance Studio Act. In answer to the defendant’s contention that the Attorney General was without power to institute an action because the statute did not contain an express inclusion of the power of suit by the Attorney General, the court stated:

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.

⁶⁵*Id.* In addition, see CAL. CIV. CODE § 3370 (West 1970).

⁶⁶*Grant v. California Bench Co.*, 76 Cal. App. 2d 706, 707-708, 173 P.2d 817, 818 (1946).

⁶⁷See *Visser v. Macres*, 214 Cal. App. 2d 249, 255, 29 Cal. Rptr. 367, 370-371 (1963); *McCord Co. v. Platnick*, 108 Cal. App. 2d 392, 395, 239 P.2d 32, 34 (1951).

⁶⁸CAL. CIV. CODE §§ 1801-1812.10 (West Supp. 1971).

⁶⁹CAL. CIV. CODE §§ 2981-2984.4 (West Supp. 1971).

⁷⁰CAL. CIV. CODE §§ 2985.7-2985.93 (West Supp. 1971).

⁷¹CAL. CIV. CODE §§ 2985-2985.6 (West Supp. 1971).

⁷²CAL. CIV. CODE §§ 1812.80-1812.95 (West Supp. 1971).

⁷³238 Cal. App. 2d 333, 47 Cal. Rptr. 700 (1965).

We need not repeat here the analysis of the law of this state contained in the cited opinion. Here, as there, there is involved a statute, enacted after careful legislative consideration, designed to protect not only a group in society especially unable to protect themselves, but also to protect the public generally against the effects of practices which, as the legislative investigation disclosed not unfrequently resulted in loss and damage to the public economy as well as to the economy of the victims. We regard the power of the Attorney General to sue in this case as being beyond question. . . .

. . . For the reasons set out above, we think that the statute was enacted for a public purpose and that the accomplishment of that end justified relief in the name of, and on behalf of, the People.⁷⁴

Thus, the Attorney General or district attorney has the power to enjoin violations of statutes which do not specifically provide for such enforcement.

B. AVAILABLE REMEDIES

Depending upon the nature of the infraction, the Attorney General or a district attorney may enforce these statutes by seeking injunctive relief, a criminal prosecution, or in certain situations a civil penalty.⁷⁵ At the state level injunctive proceedings have become the most powerful consumer protection weapon.⁷⁶ As was stated by a former Attorney General, "The expense necessary to convict one individual may not under certain circumstances be warranted. That same expense, when binding upon a group of people, may well be warranted."⁷⁷

1. INJUNCTION

Either by specific statutory authority or by authority of the common law, the Attorney General or a district attorney is empowered to seek injunctions in areas where consumers commonly experience problems. When an untrue or misleading statement is made in violation of the provisions of section 17500, section 17535 of the Business and Professions Code provides:

⁷⁴*Id.* at 348, 349, 47 Cal. Rptr. at 710.

⁷⁵ At most, 5 percent of the cases handled directly by the Consumer Fraud Unit are criminal. Only two such cases were prosecuted during 1968. Criminal cases are usually referred to the District Attorney. Criminal convictions are difficult to obtain and are an inefficient way to regulate consumer fraud. Enforcement agencies do not have enough time and manpower to devote to criminal fraud cases; the time which is spent is less likely to result in conviction. If someone is convicted, the penalty will probably be too small to act as a deterrent. *Project, supra* note 38, at 959 n. 308.

⁷⁶*Id.* at 959.

⁷⁷*Id.* at 959-960 n. 310.

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 injunctions 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.⁷⁸

Should the defendant's act constitute "unfair competition", section 3369 of the Civil Code states in part:

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.⁷⁹

And, as previously noted, by resort to injunctive relief under the common law, the Attorney General or district attorney has power to enjoin substantive violations of various statutes which do not contain an express grant of such power.

An action for an injunction offers several practical advantages. Initially, when the statute which has been violated provides for relief by way of injunction, California courts have determined that a violation of the statute is sufficient cause for issuance of an injunction and it is not necessary to show irreparable injury.⁸⁰ By so holding, California has adopted the theory of the federal courts that ". . . when a legislative body has authorized the injunctive remedy for the violation of a statute, it has determined as a matter of law that irreparable injury attends the violation of the statute."⁸¹ As compared to a criminal prosecution in which discovery is limited, the Attorney General or district attorney when bringing an action for an injunction is accorded numerous methods by which he can uncover information.⁸² Through the use of such methods of discovery as interrogatories, depositions, subpoenas duces tecum, and requests for admissions, investigative time and expense can be reduced and material often unavailable to an investigator in a criminal case may be uncovered. In addition,

⁷⁸CAL. BUS. & PROF. CODE § 17535 (West 1964).

⁷⁹CAL. CIV. CODE § 3369 (West 1970).

⁸⁰Paul v. Wadler, 209 Cal. App. 2d 615, 625, 26 Cal. Rptr. 341, 347 (1962).

⁸¹*Id.* at 625, 26 Cal. Rptr. at 347.

⁸²*Project, supra* note 38, at 963.

by seeking an injunction the Consumer Fraud Unit or a local district attorney can be assured that similar practices will not be used again by the guilty party.⁸³ Injunctive relief also provides flexibility, allowing the Attorney General or a district attorney in some cases to design the remedy in a manner which will most completely benefit those consumers with whom the guilty party deals. For example, in a case involving a stipulated injunction, the defendant was required to place funds in trust with a local small claims court against which consumers with claims could sue for damages and gain individual relief.⁸⁴ Finally, under the doctrine of collateral estoppel, in a litigated civil case resulting in a final judgment, the defendant cannot deny any facts determined by the court in future civil cases brought by them or against them.⁸⁵ Thus, the consumer subsequently bringing a private lawsuit against the defendant enjoys a decided advantage, and the Attorney General or a district attorney is given a powerful bargaining device when negotiating for a stipulated injunction.

Even though there is ample authority available to support actions to enjoin various practices designed to defraud the consumer, the Consumer Fraud Unit is infrequently required to resort to actual litigation to achieve its desired result.⁸⁶ In the usual case, the Unit first makes a motion for a preliminary injunction in response to which the wrongdoer quite often agrees to halt the practices which originally lead to the complaint.⁸⁷ Normally, the violator will also stipulate to the final injunction under the threat of actual litigation, thereby avoiding additional litigation expenses and adverse publicity for himself, but at the same time allowing the Attorney General to draft the stipulation in a manner which will afford the most protection to the public in each particular case.⁸⁸ Similarly, at the county level, far more cases are resolved by negotiation or by threat of litigation than are resolved by actual litigation.⁸⁹ Because the legislature has given district attorneys broad statutory authority from which they can negotiate with businessmen, the District Attorney's Consumer Fraud Division often “. . . functions much like the Better Business

⁸³Note, *State Consumer Protection: A Proposal*, 53 IOWA L. REV. 710, 716-722 (1967). In addition, see 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).

⁸⁴*Project*, *supra* note 38, at 965.

⁸⁵*Id.* at 964.

⁸⁶*Id.* at 963.

⁸⁷*Id.*

⁸⁸*Id.* at 964.

⁸⁹Lorenz, *supra* note 2, at 54, 59.

Bureau by providing a source of pressure on businessmen to behave equitably.”⁹⁰

2. CIVIL PENALTIES

In certain situations, the Attorney General or a district attorney may also bring an action for civil penalties. In conjunction with the power to enjoin violations of section 17500, section 17536 of the Business and Professions Code states:

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 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 Treasurer. If brought by a district attorney, the entire amount of penalty collected shall be paid to the treasurer of the county in which the judgment was entered.⁹¹

“Person” as used in section 17536, includes “. . . any individual, partnership, firm association, or corporation.”⁹² Because *each* violation of section 17500 can be fined \$2500, there is no limit to the total amount which a “person” can be assessed under section 17536, and since the penalties are paid to the state and county treasurer, the Consumer Fraud Unit at the state level and the Consumer Fraud Divisions at the county level have the capability of being self-supporting.⁹³ Since section 3369 of the Civil Code does not provide for civil penalties, the Attorney General normally charges it only as a second count in conjunction with Business and Professions Code section 17500.⁹⁴ It should be noted, however, that exemplary damages as

⁹⁰*Id.* at 59.

⁹¹CAL. BUS. & PROF. CODE § 17536 (West Supp. 1971).

⁹²CAL. BUS. & PROF. § 17506 (West Supp. 1971).

⁹³Section 17536 was adopted by the Legislature on the basis of the following reasoning:

The injunction and misdemeanor provisions of the old law were not adequate to stop false advertising rackets . . . The guilty party keeps his gains and is merely ordered not to defraud people in the same way again. Criminal prosecutions are seldom undertaken because juries tend to be reluctant to apply criminal sanctions to white-collar crimes and because it is difficult for outsiders to fix responsibility in the modern corporate structure.

Project, supra note, 38 at 960. See Lorenz, *supra* note 2, at 50.

⁹⁴*Project, supra* note 38, at 961.

provided for in section 3294 of the Civil Code may be sought in a complaint alleging a violation of section 3369 when the defendant is found guilty of fraud, oppression, or malice.⁹⁵

3. CRIMINAL PROSECUTION

While an action for an injunction offers numerous advantages, the Attorney General or a local district attorney may in a particular case determine that a criminal prosecution is warranted. In the area of consumer credit protection, both the Retail Installment Sales Act⁹⁶ and the Automobile Sales Finance Act,⁹⁷ provide that any person who willfully violates any provision of the statute shall be guilty of a misdemeanor. Criminal sanctions are also available for a violation of section 17500 of the Business and Professions Code. Section 17534 states, "Any person, firm, corporation, partnership, or association or any employee or agent thereof who violates this chapter is guilty of a misdemeanor."⁹⁸ A misdemeanor in California, unless otherwise prescribed by law, is punishable by imprisonment in the county jail up to a maximum of six months, or by a fine not exceeding five hundred dollars, or by both.⁹⁹ In addition, a violation of an injunction is a misdemeanor.¹⁰⁰ Thus, the Attorney General or a district attorney may use the violation of an existing injunction as a bargaining device in negotiating another stipulated injunction, or it may result in larger penalties should a second injunction be pursued through actual litigation.¹⁰¹ A criminal prosecution is rarely pursued, however, because it often results in smaller penalties and does little to prevent recurrence of the same violation by the same party or to discourage similar activities practiced by others.¹⁰²

IV. CONCLUSION

The consumer who has been victimized by fraudulent or deceptive practices in the marketplace has in theory three alternative methods

⁹⁵CAL. CIV. CODE § 3294 (West 1970); See *Project, supra* note 38, at 961.

⁹⁶CAL. CIV. CODE § 1812.6 (West Supp. 1971).

⁹⁷CAL. CIV. CODE § 2983.6 (West Supp. 1970).

⁹⁸CAL. BUS. & PROF. CODE § 17534 (West 1964).

⁹⁹CAL. PEN. CODE § 19 (West 1970).

¹⁰⁰CAL. PEN. CODE § 166.4 (West 1970).

¹⁰¹*Project, supra* note 38, at 964, 965.

¹⁰²Note, *State Consumer Protection: A Proposal*, 53 IOWA L. REV. 710, 716-722 (1967).

available for seeking relief. Absent a private settlement of the dispute with the merchant, he may initiate private individual litigation, bring a class action, or turn to an appropriate governmental agency for relief. These methods of obtaining relief may be somewhat illusory for many consumers, however, when the economic realities of the marketplace are recognized. By the very method of operation of the market mechanism for goods and services in general and consumer credit in particular, the low-income consumer is singled out as primary target for fraud and deception. Because of a lack of knowledge and limited resources, the low-income consumer in particular is severely limited when attempting to seek relief.

The average consumer in seeking relief has as his ultimate goal either monetary damages or rescission of the contract entered into as a result of the fraud or deception. In most cases, private individual litigation does not provide an adequate remedy for even if the consumer is aware of his legal rights, the small size of his claim, the necessity of hiring a lawyer, and the loss of working time necessitated by seeking relief present practical barriers which are not easily overcome. The class action, considered by many commentators as the ultimate consumer remedy, where applicable not only achieves the individual consumer's goal of damages or rescission, but also may protect other members of the class by providing some form of injunctive relief. But as previously noted, there are numerous procedural and substantive obstacles which must be overcome before a class action may be successfully waged.

When considered in light of the potential relief afforded the injured consumer by the individual or class action, the role played by the Attorney General and local district attorneys in protecting the consumer becomes of major importance. As a vehicle for achieving its goal of protecting those persons who for various reasons do not or cannot seek either public or private relief, the Consumer Fraud Unit has chosen the injunction as its ultimate weapon. While in many cases some form of immediate relief is gained for the injured consumer through negotiation of a stipulated injunction, the thrust of the Unit's method of operation is prospective protection of consumers who have not yet been victimized by the fraudulent or deceptive practice. This form of relief acquires added significance when it is recognized that the group commonly the target of fraudulent practices in the marketplace—the low-income consumer—either because of lack of knowledge or because of apathy fails to take advantage of the services of the Consumer Fraud Unit.¹⁰³ The Unit receives very

¹⁰³*Project, supra* note 38, at 965, 966.

few complaints from the poor, the same group which for all practical purposes is prevented from seeking private relief. While the poor as a class suffer most from consumer fraud, the Unit receives most of its complaints from the white, middle-class community.¹⁰⁴ In view of the realities of today's marketplace, effective application of injunctive relief by the Attorney General's Consumer Fraud Unit and by local district attorneys may in the long-run provide the best protection available for the consumer in general and the low-income consumer in particular.

Dale A. Reinholtsen

¹⁰⁴*Id.*

Consumer Fraud Unit
 Attorney General's Office
 500 Wells Fargo Bank Building
 Fifth Street and Capitol Mall
 Sacramento, California

Gentlemen:

I wish to file a complaint against the company named below. I understand that the Attorney General's Consumer Fraud Unit does not represent private citizens seeking the return of their money or other personal remedies. I am, however, filing this complaint to notify your office of the activities of this company so that it may be determined if law-enforcement action is warranted.

[PLEASE PRINT OR TYPE, IF POSSIBLE]

NAME OF COMPANY OR FIRM _____ SALES _____
 COMPLAINED ABOUT _____ PERSON _____
 ADDRESS _____ PHONE _____
 DATE OF _____ NAME OF PRODUCT OR
 TRANSACTION _____ SERVICE INVOLVED _____
 WAS A CONTRACT SIGNED? _____ (If so, attach copy of contract or
 send original for us to copy and return)

HAVE YOU CONTACTED A
 PRIVATE ATTORNEY? _____
 IF PRODUCT OR SERVICE ADVERTISED: WHEN _____ WHERE _____
 (Attach copy of ad or send original for us to copy and return)

COMPLAINT INVOLVES MISREPRESENTATIONS:
 ADVERTISED _____ ORAL _____ OTHER _____

EXPLAIN FULLY: Describe events in the order in which they happened, if possible.
 (If necessary, use separate sheet and staple to this form.)

NAMES & ADDRESSES OF OTHER WITNESSES:

THIS COMPLAINT MAY BE SENT TO THE COMPANY COMPLAINED
 ABOUT: YES _____ NO _____

YOUR NAME (Please Print) _____
 HOME ADDRESS _____
 TELEPHONE _____ (City) _____ (Zip Code) _____
 BUSINESS ADDRESS _____ PHONE _____

SIGNED: _____
 DATED: _____

PLEASE *STAPLE* TO FORM *ALL* PAPERS RELATING TO TRANSACTION
 TO BE COPIED AND RETURNED.

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