


Introduction to Consumer Fraud Prosecution

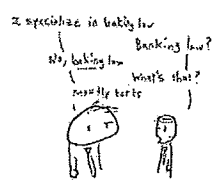
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What is Consumer Protection Prosecution?

- Consumer Protection includes prosecution and enforcement of laws against false advertising, unfair competition, and other forms of consumer fraud.



D.A.'s Consumer Protection Units

- Specialized Units
- Vertical prosecution
- Civil and criminal case filings
- Unfair Competition and False Advertising
 - Other consumer law violations
- State-wide jurisdiction

Consumer Protection – Statutes

- The two major components of Consumer Protection Prosecution are:
 - B&P section 17200 (Unlawful Business Practice), and
 - B&P section 17500 (False Advertising)
 - All violations of 17500 are also violations of 17200
- Section 17500 violations are misdemeanors.
- There is no criminal sanction for violation of section 17200.

Bus. & Prof. Code 17200

- 17200 – Unfair competition is defined to include any “unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by B&P Code 17500 et seq.”



17200 - Unlawful

- Unlawful business practices include...
 - “anything that can properly be called a business practice and that at the same time is forbidden by law.”
 - It is broader than a simple deception standard.

B & P 17200 – unlawful, unfair, fraudulent

- Under the “unlawful” prong, it does require that there be a violation of law.
- Whether a violation is imposed on a strict liability, negligence, or specific intent theory depends how the section 17200 violation is alleged.

B & P 17200 – unlawful, unfair, fraudulent

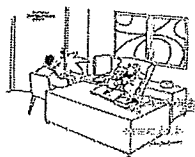
- The **ONLY** defense to an allegation of an unlawful business act or practice based upon a violation of another law is that the underlying law was not violated.

• *Hobby Industry Assn. of America, Inc. v. Younger* (1980) 201 Cal.App.3d 358
 • *People v. Dux-Mar Diagnostic Laboratory, Inc.* (1998) 68 Cal.App.4th 654.

17200 - Unfair

Unfair Business Practices:

- A practice may violate the UCL even if it is not unlawful.
- The law in this area appears to be in a state of flux because courts have stated a variety of different tests determining whether a practice is “unfair.”



“All I ask for is an ethical advantage.”

B & P 17200 – unlawful, unfair, fraudulent

▪ FTC Section 5 Test –

▪ Factors:

- (1) The consumer injury must be substantial;
- (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and
- (3) it must be an injury that consumers themselves could not reasonably have avoided.

17200 - Fraudulent

B & P 17200 – unlawful, unfair, fraudulent

- The elements of common law fraud are "(1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage."
- *BUT....Fraud under section 17200 "only requires a showing that members of the public 'are likely to be deceived.'"*
- A 17200 violation can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained damage.
- Negligent misrepresentations are included in the definition of fraudulent under 17200.

Other Considerations

- The doctrine of *caveat emptor* (aka "buyer beware") does not apply to false advertising.
 - There is no duty upon the public to suspect the honesty of those with whom they transact business.
- Once statement is made, cannot be remedies with subsequent disclosures/disclaimers
- Identifiable victims are not required; section 17500 simply prohibits the "likelihood of deception".

17500 - Puffing

- Distinguished from "mere puffing".
- Puffing involves vague or subjective generalized statements, not making specific claims that are so exaggerated as to preclude reliance by consumers.
 - (People v. Columbia Research Corporation (1977) 71 Cal.App.3d 607)



You did it! Congratulations! World's best cup of coffee! Great job, everybody! It's great to meet you!

Prop 64

- In 2004, California voters passed Proposition 64.
- The passage of Proposition 64 greatly limited private standing to sue and obtain relief under the UCL and FAL.
 - Under Proposition 64, private plaintiffs' law firms must show "injury-in-fact" and actual loss of money or property, and must meet full California class action standards, in order to bring "representative" private civil lawsuits for consumers.
- The sponsors of Proposition 64 specifically excluded prosecutors from these requirements, recognizing in the ballot arguments that "Public Prosecutors have a long, distinguished history of protecting consumers and honest businesses."

Statute of Limitations

- 17500 – 3 years after the discovery of the facts which gave rise to the cause of action. Civil only. (Code Civ. Proc., § 338(h).)
 - Criminal is 1 year (misdo.)
- 17200 - 4 years - civil. (B&P, § 17208.)
 - 4 years even if the underlying statute's SOL time has passed.
- SOL may be extended if acts are done as part of civil conspiracy.
 - Statutes of limitations do not begin to run on wrongful acts committed pursuant to a civil conspiracy until the last overt act of that conspiracy.

Corporate Liability

- Business Entities can be the guilty party, rather than an actual person or group of people.
- Theory of Respondeat Superior
 - A corporation is responsible for the actions of an employees acting within the scope of employment AND motivated, at least in part, by an intent to benefit the corporation.
 - *Not a part of any element of any crime, but important stuff for the prosecutor in deciding who to charge!*
- So, if you can find a violation on a particular employee or group of employees (accomplices), will usually also be able find a violation on the business, by operation of law.

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Summary of 17200 & 17500

B&P - 17200 Unfair Competition

- Unlawful, unfair, or fraudulent
- Civil Only
- 4 year SOL
- Violation of another law
 - predicate offense is not required, but preferred.
- Up to \$2,500.00 per violation

B&P - 17200 False Advertising

- Knowingly/negligently made public statement regarding disposition of real/personal property or services, that is untrue or misleading
- Civil OR Criminal
- Civil – 3 year SOL
- Criminal – 1 year SOL (misdo)
- Violations of 17500 are also violations of 17200
- Up to \$2,500.00 per violation

Start to Finish

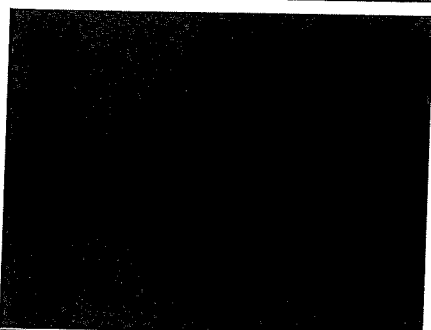
- Receive a Complaint/Report from consumer or agency
 - Or simply identify issue or problem
- Preliminary Investigation
- Contact with company
- Settlement or proceed to litigation
- Judgment
- Post Judgment Issues



Where do cases originate?

- Consumer complaints
 - Our office has a great consumer complaint form
- Referring Agencies
- Co-workers and other law-enforcement personnel

Shasta Consumer PSA



Investigative Techniques

- OVERCOMING THE ILLUSION OF "IN A VACUUM."
 - One-time violation? or routine practice?
 - Case may originate from a single complaint for small dollar amount.
 - Eliminate "rogue employee" defense
 - Connecting management / parent companies

Identifying prosecution "targets"

- Who did the "bad act"?
 - Was it many people? Why?
- Who made (or contributed to) the decision?
 - People make decisions.
 - Behind every "corporate decision" is a person who authorized it.
 - Follow the decision-making process up as far as you can
- Cast net wide, so have options.

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Initial Contact (all pre-filing)

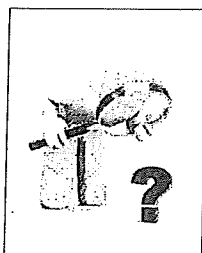
- Administrative subpoenas (*Gov. Code 11180, et seq.*) are used in civil cases before complaint filed.
 - Can request testimony, documents, interrogatories (questions eliciting facts re: witnesses/documents, etc.)
- Ad Substantiation Letters (B & P Code 17508)
 - Letter to business or person requesting evidence of the facts which the advertisement/claim is based on
- Cite Letter
- Simple Notice Letter

Post Judgment Issues

- Appeals
- Violate Judgment
 - Civil Contempt Charges (Civ Code 1209(a)(5))
 - Criminal Contempt Charges (PC 166(a)(4))
 - Up to \$12,000.00 in cumulative per violation penalties (B&P 17207; 17535.5)

How about some examples?

Ok so what do these cases really look like???



Sample Violations for Cases

- Scanner Violations- Charging more than marked price
- False or Misleading Advertising – Auto sales, Diet Supplements, Sale Prices, etc.
- Misleading packaging/Short weight (aka slackfill)
- Unlicensed Businesses - auto repair, medical procedures, restaurants, etc.
- Recyclers not following documentation rules
- Unlicensed practice of law (and LDAs)
- Running a business without being properly licensed (Contractors, Chiropractor/Massage, Real Estate)

Simultaneous Prosecution (Criminal & Civil)

- Scrap Metal or Pawn Shops
 - Civil vs. Business / Criminal vs. Individual
- Gambling
 - Civil vs. Store / Criminal vs. Distributor
- Illegal Sale of Alcohol
 - Civil vs. Business / Criminal vs. Clerk or Server
- Illegal Sale of Tobacco
 - Civil vs. Business / Criminal vs. Clerk

Successful Cases

- Overstock.com -- False Advertising case, judgment after trial \$6.8 million (plus costs)
- Sysco Foods -- Violation of food storage, almost \$20 million (with \$1 million going to food banks)
- L'Oreal -- False Advertising \$507,000 (some costs went to W&M)
- Outside Shasta example -- illegal dumping case and DA was able to get penalties for F & W to get a K-9 (nexus to harm committed).

Successful Cases - Local

- Shasta Properties --Property Management company operating without license (meaning all clients not protect by E&O).
- Pawn Shop -- Failing to hold, and also produce upon LE demand, items which were pawned.
