

## Consumer Laws & Enforcement

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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

## Why is it important?

- Protection of Consumers
- Public Safety
- COMPLIANCE!!
- Protect Honest Businesses that comply with the law
  - Prohibit law breakers from profiting at the expense of law followers.



### What are avenues of enforcement?

- **Criminal Prosecutions:** sought where civil filing is not appropriate to change the business practice or where offense is such that criminal prosecution is the better enforcement option.
- **Civil Prosecutions:** The DA's Office can file civil lawsuits on behalf of the People of the State to obtain injunctions to stop unlawful and illegal practices, seek restitution, and civil penalties to punish and deter such actions.
  - *In addition, costs may also be recovered for an agency.*
  - *Damages are not allowed in 17200 cases*

### Civil vs. Criminal

- **Civil Case**
  - Standard of Proof is "Preponderance of Evidence" = more likely than not that the defendant committed violation
  - No right to counsel
  - No right to a jury trial
  - 4 year Statute of Limitations
- **Criminal Case**
  - Standard of Proof is "Beyond a Reasonable Doubt"
  - Right to a jury
  - Shorter SOL

### 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

Unlawful means: "any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." (citations omitted)

### B & P 17200 - unlawful, unfair, fraudulent

Section 17200 is a chameleon statute.

- It changes colors depending on what is being charged.
- Cases frequently state that section 17200 imposes strict liability. Meaning "it is not necessary to show that the defendant intended to injure anyone."



### 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) 101 Cal.App.3d 358  
 • *People v. Duz-Mor 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 is in a state of flux because courts have stated a variety of different tests determining whether a practice is "unfair."
- Typically we avoid using this prong as "unfair" is challenging to prove.

**B & P 17200 - unlawful, unfair, fraudulent**

Casa Blanca Test Factors: (1) whether the practice is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; and (3) Whether it causes substantial injury to consumers (or competitors or other businesses).

• *People v. Casa Blanca Convalescent Homes*(1984) 159 Cal. App.3d 509

**B & P 17200 - unlawful, unfair, fraudulent**

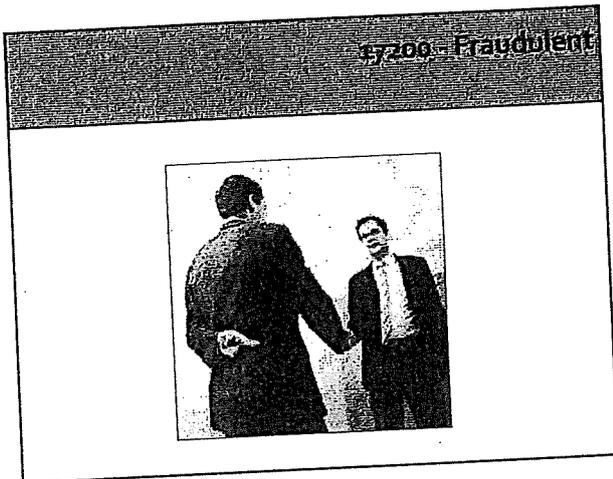
Cel Tech Test - "Unfair" means "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law; or otherwise significantly threatens or harms competition."

• *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163

**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.

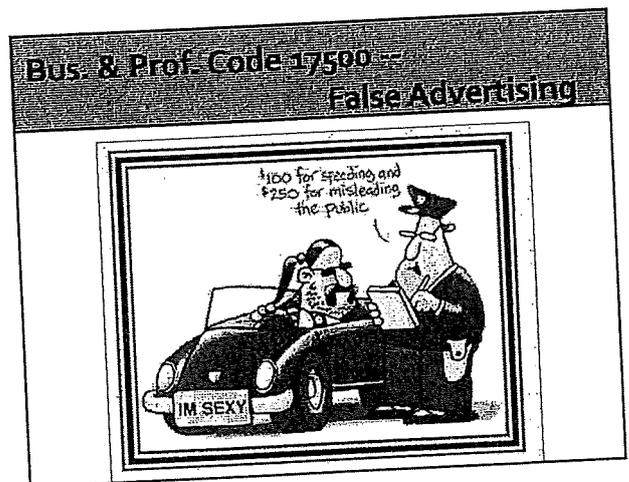


**B & P 17200 - unlawful, unfair, fraudulent**

- 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.

**Special Cases**

- There are penalty enhancements for those cases in which the targeted are elderly or disabled.
  - B&P 17206.1
- Types of cases which frequently target the elderly:
  - Home Repair Scams
  - Auto Repair Scams
  - Insurance Fraud – Example: Auto Accidents
  - Welfare Fraud
  - SSI Fraud
  - Financial



**Bus. & Prof. Code 17500**  
**False Advertising**

- ▶ It is unlawful for any person to knowingly or negligently make any public statement relating to real or personal property or services that is untrue or misleading with the intent to dispose of real or personal property, or to perform services.
- ▶ Also prohibited is the use of untrue or misleading prices or other statements as part of a plan or scheme to bait and switch ("with intent not to sell...at the price stated...or as so advertised.")

**Bus. & Prof. Code 17500**  
**False Advertising**

- Untrue or misleading
  - is the "statement" is likely to mislead members of the public.
- Section 17500 is violated where the "advertising complained of is not actually false, but thought likely to mislead or deceive, or is in fact false."
  - "Made in America"



**Bus. & Prof. Code 17500**  
**False Advertising**

- Essentially, B&P section 17500 prohibits the making of any untrue or misleading statement in connection with the sale or lease of any product or service.
  - This statute is governed by the "tendency or capacity to deceive" standard. (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 951.)
- This law prohibits essentially all commercial statements in any form, be it the print in a marketing newsletter, daily newspaper ad, or even one-on-one representations of salespersons.
  - (*People v. Superior Court (Olson)* (2007) 95 Cal.App.3d 181; *Ford Motor Dealers Association v. Department of Motor Vehicles* (1982) 32 Cal.3d 347; *Feather River Trailer Sales v. Sillas* (1979) 96 Cal.App.3d 234.)

**Other Considerations**

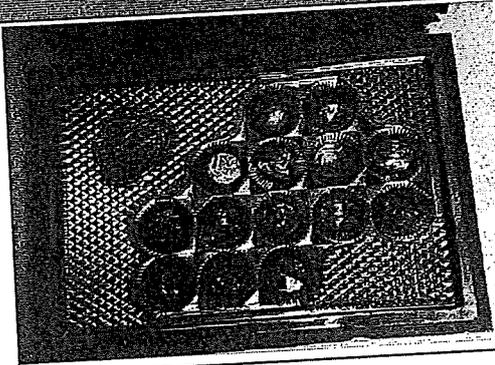
- The doctrine of *caveat emptor* (aka "buyer beware") does not apply to false advertising.
  - *There is no duty upon the public to suspect the honesty of those with whom they transact business.*
- Once statement is made, cannot be remedies with subsequent disclosures/disclaimers
- Identifiable victims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

**Slack Fill is a type of "false advertising"**

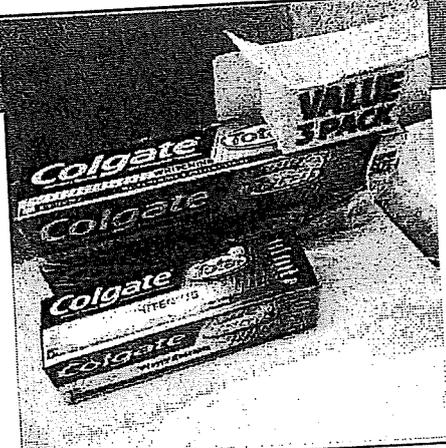


The image shows a vintage advertisement for Morello. It features a large, overflowing basket of various fruits, including apples, oranges, and pears, set against a dark background with floral patterns. The brand name "Morello" is written in a cursive font across the basket. The overall impression is one of abundance and quality.

**Slack Fill**



The image shows a vintage advertisement for a product, likely a beverage or food item. It features a large, overflowing container, possibly a can or a bottle, with a textured surface. The container is filled with a dark liquid or substance, and the overall impression is one of abundance and quality.



The image shows a vintage advertisement for Colgate toothpaste. It features several boxes of Colgate toothpaste, including a "VALUE 3 PACK" box. The boxes are arranged in a stack, and the overall impression is one of abundance and quality.

**47500 - 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)



The image shows a vintage advertisement for Columbia Research Corporation. It features a man in a suit standing in a room, possibly a laboratory or office. The man is looking towards the camera, and the overall impression is one of professionalism and quality.

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

## 17500 - Greenwashing



"It's not easy being green."  
— Kermit the Frog

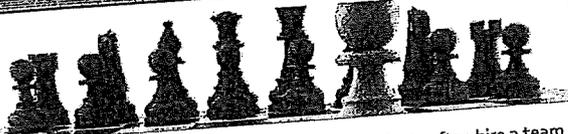
Bus. & Prof. Code, §§ 17580-17581, and the FTC Green Guides and PRC § 42357:

Addresses the use of such terms as: biodegradable, recyclable, ozone friendly, compostable, home compostable, marine degradable, degradable, decomposable, etc.

## Standing

- 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."

## Multi-Jurisdictional Enforcement



- Consumer cases cross county lines and Defendants often hire a team of lawyers
- Civil enforcement allows for multiple DA Offices to work together and pull resources for what is known as 'statewide' enforcement.
  - Identify more victims
  - Stronger injunctive terms
  - Adequately oppose defense counsel resources
  - Streamline prosecution
  - Address violations in single case

## 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.

## Remedies

- **INJUNCTION**
  - Arguably the most important part of Consumer Protection prosecution settlements
- **"JAIL"** – Violation of 17500 is a misdemeanor (no criminal violation for 17200)
  - Civil and Criminal charges vs. any person who willfully violates an injunction.
- **RECOVERY OF COSTS**
  - Investigative Expenses and Other Expenses Incurred
- **RESTITUTION**
  - Direct or Cy Pres (when can't restore specific victims)
- **CIVIL PENALTIES** – Up to \$2,500 are **mandatory** for each violation
  - Penalties are **MANDATORY** if a violation is found (B&P 17206/17536)
  - Discretionary → factors: seriousness, duration of conduct, willfulness, and ability to pay)
  - 17200 and 17500 are cumulative to each other.....
    - So, potentially up to \$5,000.00 per violation if using both 17200 & 17500!!! (plus any enhancements to penalties)

## Penalties

- B&P CODE section 17206 & 17536 provide:
  - civil penalties are to be paid to the DA Office for the exclusive use of enforcement of consumer protection laws.

## 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

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Here's a dilemma. Should the disclaimer for our client's new sleeping pill read, "May cause drowsiness" or "May not cause drowsiness?"

## Where do cases originate?

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

### Referring Agencies

|  |  |
|--|--|
| <ul style="list-style-type: none"> <li>▪ ABC</li> <li>▪ Law Enforcement</li> <li>▪ BBB</li> <li>▪ Board of Equalization</li> <li>▪ Cal-OSHA</li> <li>▪ B.A.R.</li> <li>▪ Bureau of Electronic and Appliance Repair, Home Furnishings and Thermal Insulation</li> </ul> | <ul style="list-style-type: none"> <li>▪ C.S.L.B.</li> <li>▪ Dept. of Consumer Affairs</li> <li>▪ D.P.H.</li> <li>▪ Bureau of Gambling Control</li> <li>▪ Code Enforcement</li> <li>▪ Cal Lotto</li> <li>▪ State Bar of California</li> <li>▪ ***Other DDA's***</li> </ul> |
|--|--|



### Now you know ... so where do you look?

- Consumer complaints
- Referring Agencies
- Go forth and look
  - Stores
  - Newspapers
  - Fairs, Home shows, etc.
- Co-workers and other law-enforcement personnel



### Spotting a case

- Just keeping eyes open
- Educate your co-workers and other law enforcement
- Refer to those who wish to file a complaint so you can obtain a solid foundation of information from the opening

### Settlement vs Litigation

- Settlement
  - Defendant must agree to cease conduct before we resolve case
  - Stipulated Judgment → Injunctive Relief, Investigative Costs, Civil Penalties, and Restitution
  - Penalties are not our priority
  - Publically Filed Complaint
- Litigation
  - Publically Filed Complaint
  - Discovery (written/oral)
  - Motions
  - Court Ordered Judgment → Injunctive Relief, additional Investigative Costs, more Civil Penalties, and Restitution
  - Litigation Costs: Attorney Fees, Experts, Discovery, Travel expenses and other costs and fees



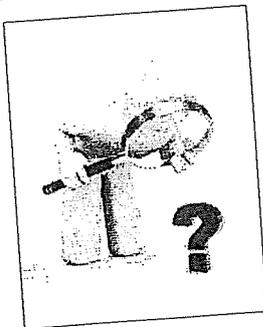
### Judgment

- Costs/Injunction/Penalties/Restitution
- Always a public judgment
  - No confidential settlements

### Post Judgment Issues

- Appeals
- Company Violates Judgment
  - Civil Contempt Charges (Civ Code 1209(a)(5))
  - Criminal Contempt Charges (PC 166(a)(4))
    - *Ponderosa Inn's Owner*
  - Up to \$12,000.00 per violation penalties (B&P 17207; 17535-5)

### 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)

### Sample Violations for Cases

- Enforcement of City and County codes
  - Very broad, depends on local ordinances
  - Unpermitted operations – Massage Parlors
- Selling and distributing counterfeit goods (PC 351a)
- Guard cards
- Selling alcohol to minors / Rose Meth Pipes
- Selling lottery tickets to minors
- Use of prohibited antibiotics in calves
- Use of tainted agricultural products
- Selling products not in compliance with State Laws

### Sample Violations for Cases

- Unpermitted Streambed alterations
- Illegal dumping (from Oil to Construction Materials)
- Unlawful disposal of hazardous waste
- Unlicensed & illegal storage and transportation of hazardous or toxic waste
- Unauthorized release of air contaminant
- Industrial Accidents - Chemical/HazWaste Spills
  - Private property
  - Public property
  - Roadways
- False claims of environmentally friendly products
- Use of pesticides in a non-approved manner
- Illegal application of pesticides

### 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 that originated in Shasta County. Went to Trial, judgment \$6.8 million (plus costs). They appealed, we won (published opinion). Interest was about \$3 million.
- Sysco Foods – Violation of food storage, almost \$20 million (with \$1 million going to food banks)
- Ponderosa Inn & Redding Inn – Penalties and strict compliance terms against motels and costs returned to RPD
- Harmony – unlawful auto renewal (aka negative option).
- Travel Agent – criminal case. Plead to 7 felonies and sentenced to 4 years
- 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.

### Usefulness of bringing a civil prosecution action

- Ultimately it is COMPLIANCE with the law
  - Change practices of a business or business owner
  - Violations are simply infractions or misdos
  - Want to adequately punish the business
  - Avoid higher burden of proof
  - Extend the SOL?
  - Create requirements to ensure compliance
    - \*Desire higher standards than required by law

### Hope I didn't bore you too much...

