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Consumer Protection

University of the Pacific; McGeorge School of Law

Consumer Protection

Consumer Protection; automobile leasing agreements

Civil Code §2981 (amended); §§2981.5, 2985.81 (new).
AB 1364 (Foran); STATS 1973, Ch 696

Chapter 696 has been enacted to clarify Section 2981 of the Civil Code. The applicable portion of this section defines motor vehicle conditional sales contracts for the purposes of the Automobile Sales Financing Act [CAL. CIV. CODE §2981 *et seq.*]. One portion, Section 2981(a)(2), had defined certain bailment or leasing contracts as conditional sales contracts. In a 1971 case decided by a California appellate court, it was indicated that any leasing agreement which placed the risk of depreciation on the lessee would be considered a conditional sales contract for the purposes of the Act since assumption of the risk of depreciation was one of the indicia of ownership, not of leasing [Thomas v. Wright, 21 Cal. App. 3d 921, 98 Cal. Rptr. 874 (1971)].

Section 2981.5 has been added to the Civil Code to provide that the type of leasing agreement just described is not a conditional sales contract. The section states that a bailment or leasing agreement which establishes the maximum amount of liability based upon the value of the vehicle at the termination of the agreement is not a contract by which the bailee/lessee will or has the option of becoming the owner of the vehicle. The amendment to Section 2981 clarifies the type of bailment/leasing agreement which is to be considered a conditional sales contract. This type of agreement is defined as one in which the bailee/lessee agrees to pay a sum substantially equivalent to, or greater than, the aggregate value of the vehicle at the time of *executing* the contract. Chapter 696 states that this is a declaration of the existing law.

Section 2985.81 has been added to the Civil Code to provide the same protections to the bailee/lessee that are given purchasers under Civil Code Section 2984.2. Section 2985.81 provides that no bailment or leasing agreement for a motor vehicle which provides for the inclusion of security interests other than the vehicle itself shall be enforceable. The need for this amendment was pointed up by both the trial

and appellate courts in *Thomas v. Wright.* In that case an unsophisticated person, in need of a car for transportation to work, signed an agreement which used her home as security for the rental car. The trial court was asked to enjoin foreclosure, but felt it could not as it did not find the agreement a conditional sales contract. This section shall apply to such contracts executed on or after the effective date of this section.

Consumer Protection; credit refunds upon buyer's default

Civil Code §1806.3 (amended).
AB 952 (Murphy); STATS 1973, Ch 793

Section 1806.3 of the Civil Code has been amended to provide that notwithstanding the provisions of any contract to the contrary, a buyer is entitled to receive a refund credit for the unearned finance charge whenever the indebtedness created by any retail installment contract is satisfied prior to its maturity by any of the following means: (1) surrender of the collateral; (2) repossession of the collateral; (3) redemption of the collateral after repossession; or (4) any judgment. Such refund credit may be made in cash or credited to the amount due on the obligation of the buyer. The refund credit shall be computed by the holder as of the date the holder takes possession of the collateral or judgment is entered or, if the holder assigns the obligation for collection, at the time assignment for collection is made, and in the same manner that the refund credit for the buyer's anticipation of payment is computed in Section 1806.3(a).

Section 1806.3 has also been amended to specify that this section does not preclude the collection or retention by the holder of any delinquency charge made pursuant to Section 1806.3 of the Civil Code. Section 2 of Chapter 793 provides that this act shall apply only to retail installment contracts entered into on or after the effective date of this act.

COMMENT

Prior to amendment, Section 1806.3 provided that notwithstanding the contrary provisions of any contract, any buyer could pay the contract in full at any time before maturity and receive a refund credit thereon for such anticipation. However, this section did not provide for the situation where a buyer had defaulted under a conditional sales contract and the seller had repossessed and sold the merchandise.

In *Mann v. Earls* [226 Cal. App. 2d 155, 37 Cal. Rptr. 877 (1964)], the parties entered into a contract for improvements installed on real property. The purchase price and a service charge for five years of installment payments were secured by a lien on such property. Foreclosure was sought one year after the making of the contract, and plaintiffs demanded a judgment in the full amount of the contract price (including five years' worth of service charge). The court, in denying the judgment as to that portion of the price which included the unearned service charge, held that although Section 1806.3 did not expressly grant refund credit to a *defaulting buyer*, the right to credit upon default and foreclosure was not impliedly denied. Rather, the Unruh Act (CAL. CIV. CODE §1801 *et seq.*) did not preclude application of the principle that in an equitable action to foreclose a lien, the court will not enforce unfair and unconscionable forfeitures [*Cf.* Imperial Thrift & Loan v. Ferguson, 155 Cal. App. Supp. 2d 866, 318 Cal. Rptr. 566 (1957); Annot., 73 A.L.R.2d 1437 (1960)].

In a recent case, the court did not permit a deficiency judgment on a defaulted business loan (secured by fixtures and equipment as collateral) to include unearned interest [Atlas Thrift Co. v. Horan, 27 Cal. App. 3d 999, 104 Cal. Rptr. 315 (1972)]. The court concluded that the award of "after default interest" constituted an unlawful imposition in the nature of a penalty or forfeiture. Section 1806.3, as amended, now entitles the buyer who defaults under any retail installment contract to a rebate of the unearned finance charge.

See Generally:

1) Steffen v. Refrigerator Discount Corp., 91 Cal. App. 2d 494 (1949) (payment of unearned interest to avoid foreclosure is payment under duress).
2) NATIONAL CONSUMER LAW CENTER, NATIONAL CONSUMER ACT: FIRST FINAL DRAFT 40 (1970).
3) Comment, *The Unruh Act: A Legislative History*, 4 U.C.D. L. REV. 1, 12 (1971).
4) 40 OPS. ATT'Y GEN. 190-92 (1962) (method of computing refund credit).
5) Annots., 100 A.L.R. 1431 (1936); 84 A.L.R. 1283 (1933) (collection of after default interest).
6) 45 AM. JUR. 2d, *Interest and Usury*, §§183, 145, 146 (1969).

Consumer Protection; drug price posting and advertising

Business and Professions Code §4333 (new).
AB 684 (Moretti); STATS 1973, Ch 883

Section 4333 has been added to the Business and Professions Code to require every pharmacy to post a list provided by the State Board of Pharmacy of the 100 prescription drugs most frequently sold in

the state and the professional services and nonprofessional convenience services association with the dispensing of drugs as specified by the board. The list must be posted on the premises in a place conspicuous to customers and be of specified size and style. The list shall provide space for the insertion of the retail price charged in the pharmacy for the three quantities most frequently dispensed in this state, as determined by the board, of each of the designated drugs, and provide space for the pharmacy to indicate the professional services and nonprofessional convenience services which are provided or not provided by the pharmacy as part of the retail price charged for the drug. The list shall be completed and posted by every pharmacy in accordance with regulations adopted by the board.

Section 4333 also provides that a pharmacist or his employee, upon a request communicated to him in any manner, must give the current retail price for any drug sold at the pharmacy, including the 100 prescription drugs required to be posted. This section does not apply to pharmacies located in licensed hospitals which are accessible only to hospital medical staff and personnel.

COMMENT

The enactment of Section 4333 was based on the legislative declaration that "it is the policy of this state to permit and encourage, for the benefit of the citizens of this state, the availability of factual information regarding charges by licensed pharmacists or pharmacies for prescription drugs and the professional services and nonprofessional convenience services associated with the dispensing of such drugs. It is the Legislature's intended purpose to permit and encourage the availability of such factual information in a manner which will not encourage unfair or deceptive competitive practices but will assist the public in making informed purchasing decisions based on total value received for prescription drug expenditures and not based on price alone. It is also the policy of this state, recognizing that prescription drugs are designated as such by law because they are potent medications not safe for use except when medically necessary and then only under close professional supervision and control, that information permitted and encouraged by Section 4333 shall be provided the public only in a manner which will not serve to create artificial demand for prescription drugs" [A.B. 684, CAL. STATS. 1973, c. 883, §3; see Sacramento Bee, May 1, 1973, §A, at 14].

It is of interest to note that statutes and regulations in most states

forbid the advertising of prescription drug prices or names [*e.g.*, FLA. STAT. ANN. §465.23(2)(f) (1967); N.J. STAT. ANN. §45:14-12 (1952); PA. STAT. ANN. tit. 63, §390-8(11) (1961)]. Court challenges on the issue of advertising and/or price posting have succeeded in some states [See, *e.g.*, Florida Board of Pharmacy v. Webb's City, Inc., 219 So. 2d 681 (Fla. 1969); State Board of Pharmacy v. Pastor, 441 Pa. 186, 272 A.2d 487 (1971)], and failed in others [See, *e.g.*, Supermarkets Gen. Corp. v. Sills, 93 N.J. Super. 326, 225 A.2d 728 (1966)].

See Generally:

1) A.B. 217, 1972 Regular Session, *as amended*, March 14, 1972.
2) COUNCIL OF STATE GOVERNMENTS, CONSUMER PROTECTION IN THE STATES 16 (1970) (protecting the consumer by regulation of the seller).
3) Stern, *Consumer Protection Via Increased Information*, CONSUMERISM: SEARCH FOR THE CONSUMER INTEREST 94, 96 (D. Aaker & G. Day eds. 1971).
4) Comment, *Prescription Drug Pricing in California: An Analysis of Statutory Causes and Effects*, 49 CAL. L. REV. 340 (1961).
5) Annot., 44 A.L.R.3d 1301, 1305 (1972) (prohibiting advertising of drug prices).

Consumer Protection; false advertising remedies

Business and Professions Code §17534.5 (new).
AB 1239 (Boatwright); STATS 1973, Ch 393
Support: Los Angeles County District Atttorney's Office

Under existing law, intentional and misleading false advertising is declared unlawful by a number of general and specific statutes in the Business and Professions Code. Among the criminal penalties set forth, there are statutes dealing with motel signs (§17568) and fraudulent use of the label "manufactured by the blind" (§17522), and also a "catch-all" statute declaring any violation of the advertising statutes a misdemeanor (§17702). Among the civil remedies set forth, there is a statute providing for injunctive relief (§17535), and one providing for a $2,500 civil penalty for each violation (§17536).

Section 17534.5 has been added to the Business and Professions Code to provide that, unless otherwise specified, the remedies or penalties provided by Chapter 1 (commencing with §17500) are *cumulative* to each other and to the remedies or penalties available under all other laws of this state.

Consumer Protection; false advertising—violation of injunctions

Business and Professions Code §17535.5 (new).
AB 1200 (Fenton); STATS 1973, Ch 1042

Chapter 1 (commencing with §17500) of the Business and Professions Code prohibits false representations in advertising. Section 17535 provides that any person, organization, or any other association which violates or proposes to violate Chapter 1 may be enjoined by any court of competent jurisdiction. Actions for injunction under Section 17535 may be prosecuted by the Attorney General or any district attorney, county counsel, city attorney, or city prosecutor in this state [See 4 PAC. L.J., REVIEW OF SELECTED 1972 CALIFORNIA LEGISLATION 335 (1973)].

Section 17535.5 has been added to the Business and Professions Code to provide that any person who intentionally violates any injunction issued pursuant to Section 17535 shall be liable for a civil penalty not to exceed $6,000 for each violation. When the conduct constituting a violation is of a continuing nature, each day of such conduct is a separate and distinct violation. In determining the amount of such fine, the court shall consider all relevant circumstances including, but not limited to: (1) the extent of harm caused by the conduct constituting a violation; (2) the nature and persistence of such conduct; (3) the length of time over which the conduct occurred; and (4) any corrective action taken by the defendant.

Section 17535.5 additionally provides that the civil penalty prescribed shall be assessed and recovered in a civil action brought in the name of the people by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction. Where an action to collect such penalty is 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 or county counsel, the entire amount of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered. If brought by a city attorney or city prosecutor, one-half of the penalty shall be paid to the treasurer of the county and one-half to the city.

An action brought pursuant to Section 17535.5 to recover such civil penalties shall take special precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law.

See Generally:

1) Comment, *Fraudulent Advertising: The Right Of A Public Attorney To Seek Restitution For Consumers*, 4 PAC. L.J. 168 (1973).

Consumer Protection; home solicitation contracts or offers

Civil Code §1689.8 (repealed); §§1689.5, 1689.6, 1689.7, 1689.10, 1689.11, 1689.12, 1689.13 (amended).
AB 1175 (Fenton); STATS 1973, Ch 554

Sections 1689.5 to 1689.13 of the Civil Code provide a right to cancel a home solicitation contract or offer within a specified time period. These sections further set forth procedures to be followed with respect to home solicitation contracts or offers and specify that waivers of these provisions are void and unenforceable [See 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 290 (1972)].

Chapter 554 has amended Section 1689.6 to expand the time in which a buyer has a right to cancel a home solicitation contract to midnight of the third *business day* after the day on which the buyer signs an agreement or offer to purchase which complies with Section 1689.7. Prior to amendment, the time in which a buyer had a right to cancel such contract was limited to midnight of the third *calendar day*. Section 1689.6, as amended, further provides that the written notice of cancellation given by the buyer need not take the particular form as provided with the contract or offer to purchase. Notice, however expressed, is effective if it indictates the intention of the buyer not to be bound by the home solicitation contract or offer.

Section 1689.7 has been amended to require that in a home solicitation contract or offer, the buyer's agreement or offer to purchase must be written in the same language as principally used in the oral sales presentation. Additionally, it must be dated, signed by the buyer, and must contain in immediate proximity to the space for his signature a conspicuous statement in a size equal to at least 10-point bold type, as follows:

> You the buyer may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right.

Prior to amendment, there existed no requirement that such agreement be written in the same language as used in the oral presentation. Section 1689.7 has additionally been amended to require that the agreement or offer to purchase must be accompanied by a completed form in duplicate, captioned "Notice of Cancellation," which must

be attached to the agreement or offer to purchase and be easily detachable. It must also be in type of at least 10-point and contain the following statement written in the same language as used in the contract:

NOTICE OF CANCELLATION

(date)

> You may cancel this transaction, without any penalty or obligation, within three business days from the above date. If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within 10 days following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be canceled. If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract or sale, or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk. If you do not agree to return the goods to the seller or if the seller does not pick them up within 20 days of the date of your notice of cancellation, you may retain or dispose of the goods without any further obligation. To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice, or any other written notice, or send a telegram to (name of seller), at (address of seller's place of business) NOT LATER THAN MIDNIGHT OF (date). I hereby cancel this transaction (date) and (buyer's signature).

Section 1689.7, as amended, additionally requires the seller to provide the buyer with a copy of the contract or offer to purchase and the attached notice of cancellation. The seller must also inform the buyer orally of his right to cancel at the time the home solicitation contract or offer is executed. Until the seller has complied with the provisions of Section 1689.7, the buyer may cancel the home solicitation contract. Prior to amendment, Section 1689.7 required the agreement or offer to purchase to contain "The Buyer's Right to Cancel" as was set forth in Section 1689.8. Chapter 544 has repealed Section 1689.8 and replaced it with the aforementioned "Notice of Cancellation," as now contained in Section 1689.7.

Under the provisions of Section 1689.10, the seller must tender to the buyer any payments made by the buyer and any note or evidence of indebtedness within ten days after a home solicitation contract or offer has been canceled (except as provided in §§1689.6-1689.11).

It is further provided that if the down payment includes goods traded in, the goods must be tendered in substantially as good a condition as when received. Chapter 554 has deleted the requirement that if the seller fails to tender the goods as provided by Section 1689.10, the buyer may elect to recover an amount equal to the trade-in allowance stated in the agreement. The seller's right to retain as a cancellation fee five percent of the cash price but not exceeding $15 or the amount of the cash payment, whichever is less, has additionally been deleted.

Section 1689.13 has been amended to provide that the provisions of Sections 1689.5 to 1689.7 and Sections 1689.10 to 1689.12 shall not apply to a contract in which the buyer has initiated the contract and which is executed in connection with the making of emergency repairs or services which are necessary for the immediate protection of persons or real or personal property. This exception, however, is qualified by the requirement that the buyer must furnish the seller with a separate dated and signed personal statement which: (1) describes the situation requiring immediate remedy; and (2) expressly acknowledges and waives the right to cancel the sale within three business days. Prior to amendment, Section 1689.13 merely held that such provisions did not apply to a contract which was executed in connection with the aforementioned repairs.

The definition of "home solicitation contract or offer" has been revised to mean any contract, whether single or multiple, or any offer which is subject to approval for the sale, lease, or rental of goods or services or both, made at other than appropriate trade premises in an amount of $25 (rather than $50) or more including any interest or service charges.

See Generally:

1) CONTINUING EDUCATION OF THE BAR, CALIFORNIA RETAIL INSTALLMENT SALES §§4.2, 4.5 (1969) (sales in the home and the "no-purchase" plan).
2) 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 290 (1972) (complete discussion of §§1689.5-1689.13).
3) Comment, *A New Remedy for California Consumers: The Right to Cancel a Home Solicitation Contract,* 3 PAC. L.J. 633 (1972).

Consumer Protection; impound accounts

Civil Code §2954 (amended).
AB 1514 (Deddeh); STATS 1973, Ch 975

"Accumulation by lenders of a 'trust fund' to pay taxes and insurance upon . . . property [subject to a mortgage or deed of trust]

has become a widespread feature of residential mortgage financing. Usually the fund is maintained by a barely distinguishable portion of the homeowner's total monthly payment." [36 CAL. S.B.J. 687 (1961)]. Section 2954 of the Civil Code provides that a mortgagor or trustor of a deed of trust may make written request for an itemized disclosure of the activity of such an impound or trust account. Chapter 975 has amended the section to additionally provide that no impound, trust, or other type of account for the payment of taxes or insurance premiums on real property shall be *required* as a condition of a real property sales contract or of a loan secured by a mortgage or a deed of trust respecting real property containing only a single-family, owner-occupied dwelling. A single-family, owner-occupied dwelling is defined as a dwelling which will be owned and occupied by a signatory to the mortgage or deed of trust secured by such dwelling within 90 days of the execution of such instrument. However, such an impound account *may* be required where the borrower or purchaser has been delinquent in the payment of tax installments on the property for two consecutive installments, or where otherwise required by a state or federal lending or insuring agency [*E.g.*, Federal Housing Administration, Veterans Administration]. In addition, the section indicates that no one will be precluded from establishing such an account by mutual agreement, upon compliance with the following conditions: (1) the seller or lender must furnish to the purchaser or borrower a written statement, which may be included in the loan agreement, indicating that the establishment of the account was not a prerequisite to the execution of the sales contract or loan; and (2) such statement must recite that interest will not be paid on any funds which are impounded.

COMMENT

It is worthy of note that a similar bill was introduced in the 1972 legislative session [S.B. 899, 1972 Regular Session]. The bill purported to add to Section 2954 precisely the same prohibition against imposition of impound accounts by lenders as does Chapter 975. However, there was no requirement in the 1972 enactment that a written waiver by the purchaser or borrower of all rights to interest on a mutually agreed upon impound account be included in the establishment agreement as is required by Chapter 975. It is not unreasonable to assume that the interests of commercial lenders will be enhanced by the inclusion of such a mandatory waiver in Section 2954, in that the

provision will serve as a bulwark to potential actions taken to recover unpaid, accrued back interest on such accounts.

See Generally:

1) 59 C.J.S., *Mortgages* §§322-25, 328 (1949) (prepayment of insurance and tax obligations to lender).

Consumer Protection; labeling of retail meats

Health and Safety Code §26569.7 (new).
AB 1875 (Foran); STATS 1973, Ch 569
Opposition: California Grocers Association

Section 26569.7 has been added to the Health and Safety Code to require any label of any retail cut of beef, veal, lamb, or pork held for sale in a retail food production and marketing establishment or a frozen food locker plant to clearly identify the species and the "primal cut" from which it is derived, and the retail name. Subdivision (b) specifies which cuts are primal cuts of the various species. Section 26569.7 does not apply to ground beef or hamburger, boneless stewing meat, cubed steaks, sausage, or soupbones.

Section 26569.7 additionally provides that it is unlawful and constitutes misbranding for any person to sell or offer for sale in a retail food production and marketing establishment or frozen food locker plant any retail cut of *beef* which is labeled in violation of this section. Such a violation constitutes a misdemeanor, punishable upon a first conviction by a fine of not less than $25 nor more than $500, or by imprisonment in the county jail for a term not exceeding six months, or both [CAL. HEALTH & SAFETY CODE §26050].

See Generally:

1) CAL. HEALTH & SAFETY CODE §28700 (frozen food locker plant defined), §28802 (retail food production and marketing establishment defined).

Consumer Protection; mail order forms

Civil Code §1584.5 (amended).
AB 2408 (Boatwright); STATS 1973, Ch 916

Section 1584.5 of the Civil Code protects the consumer from the voluntary and unsolicited sending of goods, wares, or merchandise not actually ordered or requested by the recipient. Such merchandise is deemed an unconditional gift, and the recipient may use or dispose of such merchandise in any manner he sees fit without any obligation on his part to the sender. Exempted from these provisions, however,

are contractual plans or arrangements under which the seller periodically provides the consumer with a form or announcement card which the consumer may use to instruct the seller not to ship the offered merchandise. The consumer who does not wish to purchase the offered merchandise under such a contractual plan or arrangement must affirmatively reject them by returning the form to the seller within a specified number of days.

Chapter 916 has amended Section 1584.5 of the Civil Code to require: (1) any instructions not to ship merchandise included on such form or card to be printed in type as large as all other instructions and terms stated on such form or card; and (2) such form or card must be preaddressed to the seller so that it may serve as a postal reply card or, alternatively, the form or card must be accompanied by a return envelope addressed to the seller. This act is operative January 1, 1975.

COMMENT

It should be noted that Chapter 916 fails to require that the preaddressed "do not ship" card or envelope have postage prepaid by the seller. Chapter 916, as introduced, required the seller to prepay postage on such card or envelope [A.B. 2408, 1973-74 Regular Session, *as introduced,* May 14, 1973]. Requiring the seller to prepay postage would have further lessened the consumer's burden of requesting the seller not to ship the offered merchandise.

See Generally:
1) 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 277 (1972).

Consumer Protection; mobilehome warranties

Civil Code §1797.3 (amended).
AB 1205 (Murphy); STATS 1973, Ch 807

Section 1797.1 *et seq.* of the Civil Code requires all new mobilehomes sold in California by a dealer to a buyer to be covered by a warranty, extends such warranty requirement to the manufacturer of the mobilehome as well as to the dealer, and sets forth the form and terms required of a mobilehome warranty. Chapter 807 has amended Section 1797.3 to require the mobilehome warranty from the manufacturer or dealer to the buyer to be in a *separate* written document entitled "Mobilehome Warranty," and requires such warranty to be delivered to the buyer by the dealer at the time the contract of sale is signed. Prior to amendment the mobilehome warranty was

only required to be in writing. Additionally, the mobilehome warranty must now contain, but is not limited to, the following terms: (1) that the manufacturer and dealer shall be jointly and severally liable to the buyer for the fulfillment of the terms of warranty, and that the buyer may notify either one or both of the need for appropriate corrective action in instances of substantial defects in materials or workmanship; (2) that the address and the phone number of where to mail or deliver written notices of defects shall be set forth in the document; (3) that the one-year warranty period applies to the structures, plumbing, heating, electrical systems, and all appliances and other equipment installed and included therein by the manufacturer or dealer; and (4) that while the manufacturers of any or all appliances may also issue their own warranties, the primary responsibility for appropriate corrective action under the warranty rests with the dealer and mobilehome manufacturer, and the buyer should report all complaints to the dealer and manufacturer initially. Prior to amendment, only two terms were required to be contained in the warranty. These terms, which remain in effect, are: (1) that the mobilehome is free from any substantial defects in materials or workmanship; and (2) that the manufacturer or dealer will correct, at the site of the mobilehome, substantial defects which become evident within one year from the date of delivery of the mobilehome provided the buyer or his transferee gives written notice of such defects to the manufacturer or dealer not later than one year and ten days after date of delivery.

See Generally:

1) CAL. CIV. CODE §1791.
2) S.B. 3, 1972 Regular Session (proposed enactment of consumer code including mobilehome warranties).
3) 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 279 (1972).
4) 2 PAC. L.J., REVIEW OF SELECTED 1970 CALIFORNIA LEGISLATION 347 (1971).

Consumer Protection; notice of public utilities rate increase

Public Utilities Code §454 (amended).
SB 370 (Alquist); STATS 1973, Ch 1105
Support: State Department of Consumer Affairs

Chapter 1105 has amended Section 45 of the Public Utilities Code to require that whenever any electrical, gas, heat, telephone, water, or sewer system corporation files an application for rate increases before the Public Utilities Commission, the corporation must furnish notice to its customers affected by the proposed increase. The notice

must be included with the next regular bill for charges transmitted to such customers within 45 days if the corporation operates on a 30-day billing cycle, or within 75 days if the corporation operates on a 60-day billing cycle.

The notice is required to contain: (1) the amount of the proposed increase expressed in both dollar and percentage terms; (2) a brief statement setting forth the reasons for the increase; (3) the mailing address of the Public Utilities Commission; and (4) the date, time, and place of the hearing of the commission on the proposed rate increase.

COMMENT

The California Administrative Code requires all utility corporations to give notice of a rate increase application within ten days after the filing of the application with the Public Utilities Commission. Such notice is required to be published at least once in a newspaper of general circulation and is only required to state that a copy of the application can be examined at the offices of the California Public Utilities Commission and in such offices of the applicant as specified by location in the notice [CAL. ADMIN. CODE tit. 20, art. 6, rule 24]. These Administrative Code Rules will apparently remain in effect.

It is of interest to note that S.B. 370 was amended to exclude railroads and other transportation companies from its provisions [S.B. 370, 1973-74 Regular Session, *as introduced*, March 5, 1973]. Apparently the reason for such exclusion was that these companies have many irregular customers who could not be notified individually. Perhaps these companies should be required to post a similar notice of rate increase proposals at the location where tickets for transportation are purchased.

See Generally:

1) 3 WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§194, 195, 199, 201, 203 (7th ed. 1960).
2) Rives, *Rate Making For California Public Utilities, Other Than Transportation*, 30 So. CAL. L. REV. 151-73 (1957).

Consumer Protection; real estate loans

Business and Professions Code §§10241.1, 10242.5, 10242.6, 10244.1, 10248.1, 10248.2 (new); §§10241, 10245, 10246 (amended).

SB 304 (Whetmore); STATS 1973, Ch 641

Support: Department of Consumer Affairs; Department of Real

Estate; California Real Estate Association; Department of Corporations; Staff, Federal Trade Commission; Western Center on Law and Poverty; American Plan Investment Company; Northern California Factoring Company

In 1961 Article 7 (commencing with §10240) was added to the Business and Professions Code to regulate the activities of mortgage loan brokers. A mortgage loan broker is a real estate licensee who does not actually lend his own funds but acts as an intermediary between the borrower and a lender. In general, this article requires disclosure of any fees assessed by the mortgage loan broker, specifies maximum levels for such fees, requires equal distribution of payments on loans which mature in three years or less, sets maximum levels for refinancing charges on such loans, and specifies the amount recoverable by the borrower for a violation of these provisions. This article did not, however, prevent such practices as "balloon payments," exorbitant late charges, repeated assessment of late charges as the result of one late payment, or excessive prepayment penalties [Senator James E. Whetmore, Press Release, State Senate Passes Mortgage Loan Broker Legislation, Sept. 25, 1973]. Chapter 641 has been enacted to remedy these problems.

Section 10244.1 has been added to the Business and Professions Code to provide that no installment, whether providing for the payment of principal and interest or interest only, on any loan secured directly or collaterally by a lien on real property comprising an owner-occupied dwelling shall be greater than twice the amount of the smallest installment. In order to qualify for the protection offered by this section, the term of the loan must be for a period of six years or less. This section also does not apply to a note given back to the seller by the purchaser on account of the purchase price or any collateral loans secured solely by such a note. An "owner-occupied dwelling," as used in this section, means a single dwelling unit in a condominium or cooperative or a residential building of less than three separate dwelling units, one of which will be owned and occupied by a signatory to the mortgage or deed of trust secured by such dwelling within 90 days of the execution of the mortgage or deed of trust.

Section 10242.5 has been added to provide that a maximum late charge of ten percent of the principal and interest on the installment due and owing may be assessed for any delinquent payment. However, a minimum charge of five dollars may be imposed. Section 10242.5 also prohibits the imposition of: (1) more than one late charge per

delinquent payment; and (2) a late charge on any installment which is paid or tendered in full within ten days after its scheduled due date.

Section 10242.6 has been added to provide that the principal and accrued interest on any loan secured by a mortgage or deed of trust on real property containing only a single-family, owner-occupied dwelling may be prepaid in whole or in part at any time. A prepayment charge may be levied only on a prepayment made within seven years of the date of execution of the security instrument, provided, however, that an amount not exceeding twenty percent of the unpaid balance may be prepaid in any 12 month period without being subject to a prepayment charge. If otherwise qualified under this section, a prepayment charge may be imposed on any amount prepaid in a 12 month period in excess of twenty percent of the unpaid balance. This charge cannot exceed an amount equal to the payment of six months' advance interest on the amount prepaid in excess of the twenty percent of the unpaid balance. A single-family, owner-occupied dwelling, as used in this section, is also defined as a dwelling which will be owned and occupied by a signatory to the mortgage or deed of trust secured by such dwelling within 90 days of the execution of the mortgage or deed of trust.

Section 10241 has been amended to require a statement that the purchase of credit life or credit disability insurance is not required as a condition for making the loan to be set forth along with the other information which must be disclosed to the borrower as a condition precedent to his liability under Section 10240. In accordance with this amendment, Section 10241.1 has been added to specify that the purchase of credit life insurance or credit disability insurance to provide indemnity for payments becoming due on the indebtedness cannot be required as a condition precedent to making the loan. The mortgage loan broker may, with the consent of the borrower, provide such insurance through duly authorized agents and collect the costs therefor. The costs cannot be in excess of that which is reasonably necessary to discharge the obligation of the borrower and cannot be prorated over a term longer than the term of the loan. The form and rate of the mortgage loan broker's charges must be approved by the Insurance Commissioner as provided for in Section 779.9 of the Insurance Code. Furthermore, only one premium may be collected by the mortgage loan broker in connection with any loan contract irrespective of the number of borrowers, and only one borrower may be insured. Subsection (c) provides that the broker may collect

the costs of reasonable fire and casualty insurance on the property which secures the loan when the policies are made payable to the borrower or his family and the insurance is sold at standard rates through duly licensed agents.

In order to further the protection offered by Article 7, Section 10245 has been amended to provide that the provisions of this article do not apply to any bona fide loan secured directly or collaterally by a first trust deed, the principal of which is $16,000 or more, or to any bona fide loan secured directly or collaterally by a junior lien, the principal of which is $8,000 or more. Prior to amendment, the monetary limits of this section were $12,000 and $6,000, respectively. Additionally, Section 10248.1 has been added to prohibit the imposition of mortgage loan brokers' fees other than those presently permitted by law. This section was apparently added to stifle the development of new fees designed to augment mortgage loan brokers' income and circumvent existing statutory restrictions.

Section 10248.2 has been added to specify the sums recoverable by a borrower if a mortgage loan broker violates any provision of Article 7. Subsection (b) provides that if a loan is negotiated in violation of any section of this article the mortgage loan broker, on demand, shall return to the borrower any bonus, brokerage, or commission paid or payable under Section 10242 (specifies the monetary limits permissible for any such bonus, brokerage, or commission by a mortgage loan broker). If the mortgage loan broker does not remit such funds to the borrower within 20 days from the date of the written demand, the borrower is entitled to recover actual damages or twice any bonus, brokerage, or commission, whichever is greater, plus costs and reasonable attorney's fees. However, a mortgage loan broker cannot be held liable in any action brought under this section if he shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error nowithstanding the maintenance of procedures reasonably designed to avoid such errors. The date of written demand is defined as either the date upon which the written demand is personally delivered to the mortgage loan broker or the date upon which it is mailed. For a violation of Section 10241.1 (dealing with credit life or credit disability insurance) the mortgage loan broker shall pay to the borrower any commission or experience rating dividend attributable to the insurance written on the loan and payable to the mortgage loan broker, in addition to any premium loss due to short-rate cancellation of any insurance subject to Section 10248.1 which was purchased by the borrower. Section

10248.2 also provides that a borrower may not waive any right or remedy under this article. However, he is not prohibited from making a bona fide settlement, release, or compromise of any claim. Also, no action for damages shall be maintained under this section unless brought within two years after the maturity of the loan.

Section 10246 provides that a borrower is entitled to recover three times the amount of any charges in excess of the charges referred to in Sections 10241 and 10242. He may also recover costs and reasonable attorney's fees. Any action for recovery under this section must be brought within two years from the date the excess or prohibited charge was received. This section has been amended to include charges in excess of those permitted under Section 10248.1 (prohibits charges other than those now permissible by law within its sanctions). Additionally, this section now permits the recovery of the excess over the permitted charge or recovery of the prohibited charge even if such charge is the result of a bona fide error. Prior to amendment, the borrower could recover nothing if the charge was the result of a bona fide error. It should be noted that Section 10248.2 explicitly prohibits a double recovery under Sections 10246 and 10248.2 and also provides that the provisions of this article are not exclusive. The remedies provided herein shall be in addition to any other procedures or remedies provided under law.

COMMENT

The leading California case regarding the validity of late charges is *Garrett v. Coast Southern Federal Savings and Loan Association* [9 Cal. 3d 731, 511 P.2d 1197, 108 Cal. Rptr. 845 (1973)]. In this case the plaintiffs asserted that a late charge of two percent per annum of the *unpaid principal balance* on a deed of trust was a penalty and therefore invalid under Civil Code Section 1670 (prohibition against penalties for breach of contract). The Supreme Court of California held that in order for a late charge to be upheld as liquidated damages, the lender's charges must be "fairly measured by the period of time the money was wrongfully withheld plus the administrative costs reasonably related to collecting and accounting for the late payment" [9 Cal. 3d at 741, 511 P.2d at 1203, 108 Cal. Rptr. at 851]. A late charge computed on the basis of a percentage of the unpaid balance is "an attempt to coerce timely payment by a forfeiture which is not reasonably calculated to merely compensate the injured lender" [9 Cal. 3d at 740, 511 P.2d at 1203, 108 Cal. Rptr. at 851] and therefore is invalid under Civil Code Section 1670. Since

the holding in *Garrett* is based on an interpretation of Civil Code Section 1670, it would appear that the validity of a late charge of ten percent of the principal and interest *on the installment due and owing* authorized under Section 10242.5 of the Business and Professions Code could not effectively be contested under the *Garrett* rationale. It seems unlikely that it could be shown that such a charge of ten percent is not reasonably related to interest charges and administrative costs associated with collecting the late payment.

See Generally:

1) Clermont v. Secured Invest. Corp., 25 Cal. App. 3d 766, 102 Cal. Rptr. 340 (1972) (late fees were in the nature of liquidated damages).
2) Sedia v. Elkins, 201 Cal. App. 2d 440, 20 Cal. Rptr. 278 (1962) (action for treble damages pursuant to CAL. CIV. CODE §§3081.1-3081.93).
3) Mayer, *Protection of the Investor in Real Estate and Real Property Securities in California,* 9 U.C.L.A. L. REV. 643 (1962).

Consumer Protection; repairs conducted by persons other than automobile repair dealers

Business and Professions Code §9984.9 (amended).
AB 1539 (Ingalls); STATS 1973, Ch 1056

Section 9884.9 of the Business and Professions Code requires an automobile repair dealer to give the customer a written estimate of costs for labor and parts before any work commences or charges accrue on any job. Chapter 1056 has amended Section 9884.9 to provide that in addition to the automobile repair dealer's written cost estimate, there must be a statement of any automobile repair service which, if required to be done, will be done by someone other than the dealer or his employees. Furthermore, no service shall be performed by other than the dealer or his employees without the consent of the customer *unless* the customer cannot reasonably be notified. The dealer shall be responsible, in any case, for any such service in the same manner as if he or his employees had done the service.

Additionally, under the provisions of Section 9884.7(1)(i), the Director of the Department of Consumer Affairs may invalidate, temporarily or permanently, the registration of a repair dealer for "having repair work done by someone other than the dealer or his employees without the knowledge or consent of the customer unless the dealer can demonstrate that the customer could not reasonably have been notified."

See Generally:

1) 4 PAC. L.J., REVIEW OF SELECTED 1972 CALIFORNIA LEGISLATION 343 (1973).
2) 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 284 (1972).

Consumer Protection; repair of automotive equipment

Business and Professions Code §§9884.7, 9884.9 (amended).

SB 132 (Beilenson); STATS 1973, Ch 57

Support: Bureau of Automotive Repair, Department of Consumer Affairs

All automotive repair dealers must register annually with the Director of Consumer Affairs [CAL. BUS. & PROF. CODE §§9884, 9884.3]. The director may refuse to validate, or may invalidate, temporarily or permanently, a registration for a dealer's commission of numerous acts related to automotive repair [CAL. BUS. & PROF. CODE §9884.7; see 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 284, 286 (1972)]. Section 9884.7 further provides that after an automotive repair dealer is notified that validation of his registration has been refused, the applicant-dealer must make a written request for a hearing or the refusal will be deemed affirmed. The filing period for requesting a hearing has been reduced from 60 to *30* days. Section 9884.9 has been amended to provide that no work shall be done and no charges shall accrue before authorization to proceed is obtained from the customer. Previously, the customer had to give his consent only for repairs *in excess* of the dealer's written estimate.

COMMENT

It is of interest to note that although Section 9884.9 has been amended to require a dealer to obtain consent before undertaking a job, this is what the law of contracts has already required in order to manifest mutual assent. That is, an auto-repair dealer who gives a written estimate to a customer merely makes an offer that is converted into a contract by a regularly communicated acceptance conveyed to him by the customer [CAL. CIV. CODE §1582; see REST., CONTRACTS §§61, 66; UNIF. COM. CODE §2-206]. However, including this provision within the Automotive Repair Act may have additional significance. Section 9884.7(f) provides that a dealer's registration may be invalidated or revoked whenever he violates any provision or regulation contained within the Act.

See Generally:

1) WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* §§59, 62 (7th ed. 1960).
2) 4 PAC. L.J., REVIEW OF SELECTED 1972 CALIFORNIA LEGISLATION 343 (1973).
3) 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 284 (1972).

Consumer Protection; repairs—farm equipment

Civil Code §1718 (amended).
AB 551 (Maddy); STATS 1973, Ch 235
Support: California Farm Bureau

Section 1718 was added to the Civil Code in 1972 to protect farmers needing repairs on their farm equipment. Prior to amendment, Section 1718 required that *all work done* by a farm machinery repair shop, including all warranty work, be recorded on a comprehensive invoice describing all service work done and parts supplied. Chapter 235 has amended Section 1718 to provide that where work is done on an agreed total-cost-per-job basis, or the work includes an agreed total cost for component unit replacement, the invoice need only describe the work done on such basis and the total cost for such work. In effect, whenever the owner of farm machinery knows in advance what has to be done to repair his machinery and the cost is agreed upon, a *comprehensive* invoice describing all services performed and parts supplied will not be required.

Section 1718 previously required written consent by the customer before work could be done in excess of the estimated price for labor and parts. This section has been amended to allow work in excess of the estimated price to commence upon the written or *oral* consent of the customer. Section 1718, as amended, will correspond closely to the provisions in the Automotive Repair Act [CAL. CIV. CODE §§9884.8, 9884.9] which provide for itemized invoices, written estimates, and written or oral authorization of additional work.

See Generally:
1) 4 PAC. L.J., REVIEW OF SELECTED 1972 CALIFORNIA LEGISLATION 344 (1973).
2) 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 284 (1972).

Consumer Protection; restitution

Business and Professions Code §125.5 (amended).
AB 2368 (Thurman); STATS 1973, Ch 632

Chapter 632 has amended Section 125.5 of the Business and Professions Code to provide that any board within the Department of Consumer Affairs may seek restitution for individuals who were injured by licensees as the result of a violation of a chapter of this code administered or enforced by such board. This is in addition to the remedies of injunctive relief and license revocation previously authorized. Chapter 632 also provides that a person subject to the sanctions of

Section 125.5 may be required to reimburse the board for the costs of the investigation of his infractions.

COMMENT

Although California has not ruled on the legality of charging an administrative body's investigative costs to the individual under investigation, other states have held the practice to be valid. [Maltbie v. Comprehensive Omnibus Corp., 75 N.Y.S.2d 260 (Sup. Ct. 1947)]. It is likely that California would so hold, and that agreement to this procedure will be made a prerequisite for future licensing and renewal. Under the provision of Chapter 632 which provides that the board may request reimbursement of investigative costs, it is possible that the board could petition for such costs at the same time that a temporary restraining order or a preliminary injunction is issued, notwithstanding the fact that at this time a final determination that the licensee had committed unlawful acts has not yet been made.

See Generally:

1) CAL. BUS. & PROF. CODE §129 (definition of board).
2) 4 PAC. L.J., REVIEW OF SELECTED 1972 CALIFORNIA LEGISLATION 341 (1972).
3) Comment, *Fraudulent Advertising: The Right Of A Public Attorney To Seek Restitution For Consumers,* 4 PAC. L.J. 168 (1973).

Consumer Protection; upholstered furniture

Business and Professions Code §§19162, 19163 (new).
AB 685 (Ray E. Johnson); STATS 1973, Ch 173
Support: Bureau of Home Furnishings, Department of Consumer Affairs

Section 19162 has been added to the Business and Professions Code to require a custom upholsterer to give his customer a written estimate of the price of the labor and materials necessary for a specific job. However, a custom upholsterer is not required to give an estimate if he does not agree to perform the requested work. Section 19163 has been added to provide that all work to be performed by a custom upholsterer must be recorded on a work order containing information required by the rules and regulations adopted by the Bureau of Home Furnishings. Such work order must describe all work to be performed, all materials to be supplied, and the period within which the estimate shall remain effective. If any secondhand materials are to be supplied, the work order must clearly identify them as secondhand. One copy of the work order must be given to the customer before

any work is performed, and one copy must be retained by the custom upholsterer for at least one year. As a practical matter, it would appear that custom upholsterers will be able to satisfy the requirements of both of these sections on a single piece of paper (a work order which includes a price estimate).

Sections 19162 and 19163 provide that no work can be performed on a job before authorization to proceed is obtained from the customer. A custom upholsterer is prohibited from charging a customer for work performed or materials supplied whenever: (1) authorization to proceed with the job is not obtained from the customer; (2) the charges exceed the estimated price and oral or written consent is not obtained from the customer after it is determined that the estimated price is insufficient; or (3) the charges differ from those specified in the work order and oral or written consent is not obtained from the customer. These sections also define "materials" to include structural units, filling materials, containers, and coverings.

See Generally:

1) CAL. BUS. & PROF. CODE §19010.1 (custom upholsterer defined).

Consumer Protection; vehicle advertising by dealers

Vehicle Code §11713.1 (new).
AB 872 (Maddy); STATS 1973, Ch 1031
Support: Department of Motor Vehicles

Section 11713.1 has been added to make unlawful certain specified advertising practices by vehicle dealers licensed under Article I (commencing with §11700) of the Vehicle Code. The unlawful practices are: (1) advertising the total price of any specific vehicle without including all costs to the purchaser at time of delivery at the dealer's premises, except sales tax, registration fees, and finance charges; (2) advertising the sale of a specific vehicle without identifying the vehicle by its vehicle identification number or license number; and (3) refusing to sell to any person a vehicle at the advertised total price while such vehicle remains unsold unless the advertisement states that the total price is good only for a specific time and such time has elapsed. A violation of any of the above provisions subjects the violator to suspension or revocation of his license (§11705).

See Generally:

1) CAL. VEHICLE CODE §11700 *et seq.* (manufacturers, transporters, dealers, and salesmen).