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Consumer Protection

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Consumer Protection; accountants—contracting with the State Board of Accountancy

Business and Professions Code § 5025.1 (new).
AB 1754 (Frazee); 1994 STAT. Ch. 44
(Effective April 19, 1994)

Existing law provides for the State Board of Accountancy to administer and enforce the law with respect to accountants.[1] Chapter 44 authorizes the Board to contract with and employ private certified public accountants and public accountants as consultants for its enforcement program.[2] Chapter 44 also provides that private consultants hired under this statute receive the same indemnification and legal defense rights in civil tort actions available to public employees.[3] Contracts made pursuant to Chapter 44 will be applied to, but not subject to, general government personal service contract standards.[4]

INTERPRETIVE COMMENT

The State Board of Accountancy is responsible for the licensing and regulation of approximately 54,000 certified public accountants and 1300 public accountants and has regularly relied on private consultants for investigations.[5] However,

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1. CAL. BUS. & PROF. CODE § 5000 (West Supp. 1994); *see id.* (establishing the State Board of Accountancy); *id.* § 5020 (West Supp. 1994) (noting powers and duties of the Board's administrative committee).

2. *Id.* § 5025.1(a) (enacted by Chapter 44); *see* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1754, at 2 (Mar. 8, 1994) (stating that AB 1754 grants the Board authority to recruit and retain CPA consultants/experts through the sole source contracting process).

3. CAL. BUS. & PROF. CODE § 5025.1(d) (enacted by Chapter 44); *see* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1754, at 2 (Feb. 15, 1994) (stating that, as originally drafted, AB 1754 would have deemed outside consultants to be public employees with respect to the Tort Claims Act, but subsequent amendments instead provide legal defense and indemnity rights to private consultants). *See generally* CAL. GOV'T CODE § 825 (West Supp. 1994) (granting immunity to public employees against claims of injury arising out of an act or omission occurring within the scope of employment and noting that immunity is not granted for acts or omissions not within the scope of employment, nor is indemnity available for punitive or exemplary damages for malicious, oppressive or fraudulent conduct); Demery v. Kupperman, 735 F.2d 1139, 1147 (9th Cir. 1984) (holding that California Government Code § 825 did not immunize state officials from paying damages resulting from a 42 U.S.C. § 1983 action on Eleventh Amendment grounds), *cert. denied sub nom.* Rowland v. Demery, 469 U.S. 1127 (1985); Rivas v. City of Kerman, 10 Cal. App. 4th 1110, 1113, 13 Cal. Rptr. 2d 147, 148 (1992) (holding that California Government Code § 825, requiring a public employer to pay a judgment entered against an employee, applies only in situations where the public entity provides a defense for the employee, and where the city declined to defend the employee on the grounds that he was not acting within the scope of his employment).

4. CAL. BUS. & PROF. CODE § 5025.1(b) (enacted by Chapter 44); *see* CAL. GOV'T CODE §§ 19130-19133 (West 1990 & Supp. 1994) (setting standards for use of personal service contracts).

5. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1754, at 1 (Feb. 15, 1994); *see* Memorandum from Marvin Goldsmith, Senior Assistant Attorney General, to the Board of Accountancy Executive Director regarding Proposed Legislation 1, (Nov. 4, 1992) [hereinafter Memorandum] (copy on file with the *Pacific Law Journal*) (stating that the use of CPA consultants with expertise and specialized

recent administrative changes eliminated indemnification rights for such private consultants.[6] Chapter 44 statutorily provides board-employed private consultants with indemnification rights equal to those provided to public employees, similar to certain other state boards.[7]

Todd Eberle

Consumer Protection; disclosure requirements—contractors

Business and Professions Code § 7030 (amended).
AB 3001 (Conroy); 1994 STAT. Ch. 783

Existing law governing the licensure of contractors[1] does not require the disclosure of past violations of the Contractors' State License Law[2] or of complaints or legal actions relating to contractors' conduct under that law.[3] Chapter 783 requires a contractor whose violations of the license law have resulted in two or more license suspensions to disclose that information, as well as information regarding any citations or license revocations occurring over the past four years, prior to entering into a construction contract involving four or fewer residential units.[4] Chapter 783 additionally requires that such a disclosure include any complaints or legal actions relating to conduct regulated under the license law that resulted in judgments against the contractor.[5]

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knowledge is critical to the Board's Major Case Enforcement Program for major cases, such as the Lincoln Savings and Loan case).

6. Memorandum, *supra* note 5; *see id.* (stating that prior to January 1993, private CPAs hired by the Board were classified as "special consultants" and were indemnified as civil service employees, but that the State Department of Personnel Administration no longer accepts requests for appointments under this classification).

7. CAL. BUS. & PROF. CODE § 5025.1(d) (enacted by Chapter 44); *see id.* § 2471 (West 1990) (providing public employee defense and indemnification rights to private consultants hired by the Board of Podiatry); *id.* § 5528 (West Supp. 1994) (providing public employee defense and indemnification rights to private consultants hired by the Board of Architectural Examiners).

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1. *See* CAL. BUS. & PROF. CODE §§ 7026-7026.1 (West Supp. 1994) (defining contractor with examples of persons included within that definition).

2. *See id.* §§ 7000-7020 (West 1975 & Supp. 1994) (establishing the Contractors' State License Law).

3. *See id.*; ASSEMBLY COMMITTEE ON CONSUMER PROTECTION, GOVERNMENTAL EFFICIENCY & ECONOMIC DEVELOPMENT, COMMITTEE ANALYSIS OF AB 3001, at 2 (May 11, 1994) (stating that existing law contains no requirement that contractors disclose information regarding consumer complaints).

4. CAL. BUS. & PROF. CODE § 7030(b) (amended by Chapter 783); *see id.* (providing for disclosures in capital letters, in 10-point roman boldface type, or in contrasting red print of 8-point or larger roman boldface type); *see also id.* § 7090 (West Supp. 1994) (authorizing the denial or removal of licensure, citation, temporary suspension, or permanent revocation of contractors' licenses for violations of the Contractors' State Licensing Law).

5. *Id.* § 7030(b)(1) (amended by Chapter 783).

Chapter 783 requires that the disclosure document include a notice that the Contractors' State License Board may be contacted to obtain information regarding a contractor's license.[6] Chapter 783 additionally provides penalties for noncompliance with its disclosure requirements including fines of $1000 to $5000 and license suspension or revocation depending on the number of infractions.[7]

INTERPRETIVE COMMENT

Chapter 783 was enacted to address the inability of consumers to easily gain access to Contractors' State License Board records regarding contractors' past violations and judgment information.[8] The penalty provision of Chapter 783 places the burden of enforcement on the Contractors' State License Board rather than on the consumer and gives the Board greater authority to take action against disreputable contractors.[9]

Opponents and supporters of Chapter 783 have questioned the fairness of the penalty provision's disclosure requirement which is based on the total number of suspensions rather than a specified number of suspensions over a designated time

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6. *Id.* § 7030(b)(2) (enacted by Chapter 783). This section requires the inclusion of specific language reading:

> **YOU MAY CONTACT THE CONTRACTORS' STATE LICENSE BOARD TO FIND OUT IF THIS CONTRACTOR HAS A VALID LICENSE. THE BOARD HAS COMPLETE INFORMATION ON THE HISTORY OF LICENSED CONTRACTORS, INCLUDING ANY POSSIBLE SUSPENSIONS, REVOCATIONS, JUDGMENTS, AND CITATIONS. THE BOARD HAS OFFICES THROUGHOUT CALIFORNIA. PLEASE CHECK THE GOVERNMENT PAGES OF THE WHITE PAGES FOR THE OFFICE NEAREST YOU OR CALL 1-800-321-CSLB FOR MORE INFORMATION.**

Id.; *see also id.* (requiring additional language informing the contracting party of state law requiring construction work to be performed by licensed contractors, and stating that assistance from the Contractors' State License Board may be unavailable if work has been performed by an unlicensed contractor).

7. *Id.* § 7030(b)(4)(A)-(D) (amended by Chapter 783); *see id.* (providing for a $1000 fine for the first violation, a $2500 fine for the second violation, a $5000 fine and one-year suspension for the third violation, and license revocation for the fourth violation).

8. ASSEMBLY COMMITTEE ON CONSUMER PROTECTION, GOVERNMENTAL EFFICIENCY & ECONOMIC DEVELOPMENT, COMMITTEE ANALYSIS OF AB 3001, at 2 (May 11, 1994); *see id.* (stating that the disclosure requirement will afford consumers a greater opportunity to contract with reputable contractors); *see also id.* (citing concerns voiced by co-author, Gina Lamgurelle, that the Contractors' State Licensing Board has, in the past, been unable to provide consumers with easy access to information regarding past violations by, and judgments against, contractors).

9. *Id.*; *see* CAL. BUS. & PROF. CODE § 7030(b)(4) (amended by Chapter 783); *see also id.* § 7090 (West Supp. 1994) (authorizing the Registrar of the Contractors' State License Board to take disciplinary action against contractors violating the provisions of Chapter 9 (commencing with § 7000) of the California Business and Professions Code); ASSEMBLY COMMITTEE ON CONSUMER PROTECTION, GOVERNMENTAL EFFICIENCY & ECONOMIC DEVELOPMENT, COMMITTEE ANALYSIS OF AB 3001, at 2 (May 11, 1994) (stating that one of the purposes of AB 3001 is to shift the burden from the consumer to the licensing agency for pursuing a civil action against contractors).

period.[10] Nevertheless, the authority of the Registrar of the Contractors' State License Board to enforce provisions such as those contained in Chapter 783 is well established and the need to protect consumers from fraudulent practices by contractors is widely recognized.[11]

Mark W. Owens

Consumer Protection; disclosure requirements—depository institutions

Financial Code §§ 6650, 6654, 6655, 6656, 6657, 6658, 6659, 15150, 15151, 15152, 15153, 15154, 18330, 18331, 18332, 18333, 18334, 18335, 18336 (repealed); § 6660 (amended).
AB 1923 (Peace); 1994 STAT. Ch. 68
(Effective May 9, 1994)

Under prior state law, savings associations were required to disclose to account holders[1] a notice of maturity, charges to accounts, interest rates and circumstances when interest rates may vary, and to provide written statements of such information.[2] Savings associations were also required to inform account holders of charge increases and changes in the interest rate, or method or frequency of computing or paying interest.[3] If a savings association failed to disclose charge increases or interest rate, method or frequency changes that would be less favorable to the account holder, it could be liable to the account holder for the charges made and/or the amount of interest that would have been earned pursuant to the previous interest rate, method or frequency, less the interest earned

10. ASSEMBLY COMMITTEE ON CONSUMER PROTECTION, GOVERNMENTAL EFFICIENCY & ECONOMIC DEVELOPMENT, COMMITTEE ANALYSIS OF AB 3001, at 2 (May 11, 1994); *see* Telephone Interview with Lee Adler, Director of Governmental Relations for the Far Western Garage Door Ass'n (June 14, 1994) (notes on file with the *Pacific Law Journal*) (citing support of AB 3001 based on its positive effect on the reputation of contractors, but expressing concern regarding the arbitrariness of the requirement of five suspensions for disclosure and the apparent lack of an opportunity for contractor vindication).

11. Contractors' State License Bd. v. Superior Court, 187 Cal. App. 2d 557, 560, 10 Cal. Rptr. 95, 96-97 (1960); *see id.* (holding that the Registrar of the Contractors' State License Board is an officer of the law and has the authority to execute a public statute for the public benefit); *see also* Gene A. Marsh, *Lender Liability for Consumer Fraud Practices of Retail Dealers and Home Improvement Contractors*, 45 ALA. L. REV. 1, 6 (1993) (stating that many home improvement contractors are responsible for fraudulent practices which have been reported in popular magazines, newspapers, and movies).

1. *See* CAL. FIN. CODE § 6660(a)(1), (2) (amended by Chapter 68) (defining account and account holder).

2. 1983 Cal. Stat. ch. 1091, sec. 2 at 3928-30 (enacting CAL. FIN. CODE §§ 6654, 6655, 6656(a)); *see id.* (setting forth the disclosure requirements and requiring written statements of disclosure information to be provided to account holders).

3. *Id.* (enacting CAL. FIN. CODE § 6656(b)(1)-(2)); *see id.* (relating to charge increases and unfavorable interest rate changes).

pursuant to the less favorable interest rate, method or frequency.[4] Prior law also provided for the conditions when an account would escheat[5] to the state for inactivity.[6] Prior law further provided similar disclosure requirements for credit unions and industrial loan companies.[7]

Chapter 68 repeals various state law disclosure requirements for savings institutions, credit unions and industrial loan companies, in deference to federal disclosure requirements.[8] Chapter 68 also amends existing law relating to setoffs against accounts for debts owed, by moving a provision from one of the repealed sections to another section.[9]

INTERPRETIVE COMMENT

Chapter 68 was enacted with the legislative belief that federal disclosure requirements provide adequate consumer protection.[10] In addition, the Legislature considered that the federal disclosure laws provide for federal preemption of

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4. *Id.* at 3930-31 (enacting CAL. FIN. CODE § 6657(a), (b)); *see id.* (defining the institution's liability for charge increases and changes in the interest rate, method, or frequency that are not disclosed to the account holder).

5. *See* BLACK'S LAW DICTIONARY 545 (6th ed. 1990) (defining escheat as a reversion of property to the state).

6. 1983 Cal. Stat. ch. 1091, sec. 2, at 3931 (enacting CAL. FIN. CODE § 6659); *see id.* (defining circumstances when an account escheats to the state).

7. 1984 Cal. Stat. ch. 303, sec. 10, at 1539 (amending CAL. FIN. CODE § 15151); 1983 Cal. Stat. ch. 89, sec. 11, at 184 (amending CAL. FIN. CODE § 15154); 1979 Cal. Stat. ch. 112, sec. 2, at 274-77 (enacting CAL. FIN. CODE §§ 15150-15154); 1976 Cal. Stat. ch. 1279, sec. 4, at 5681-85 (enacting CAL. FIN. CODE §§ 18330-18336).

8. CAL. FIN. CODE § 6660(a)(3)(B) (amended by Chapter 68); *see* 15 U.S.C.A. §§ 1601-1667e (West 1982 & Supp. 1994) (setting forth federal disclosure requirements); 12 C.F.R. §§ 226.1-.30 (1993) (setting forth additional federal disclosure requirements); *id.* § 226.1(c) (1993) (providing that federal disclosure requirements apply to all individuals or organizations that regularly extend credit to consumers for personal, family or household purposes); *id.* §§ 230.1-.9 (1993) (defining additional disclosure requirements for all depository institutions except credit unions); CAL. FIN. CODE § 6660(a)(3)(B) (amended by Chapter 68) (requiring account charges to be disclosed pursuant to 15 U.S.C. §§ 1601-1667e and 12 C.F.R. §§ 226.1-.30); 1994 Cal. Legis. Serv. ch. 68, secs. 1-7, at 394 (repealing CAL. FIN. CODE §§ 6650, 6654-6659 which set forth disclosure requirements for savings associations); *id.*, sec. 9, at 396 (repealing CAL. FIN. CODE §§ 15150-15154 which set forth disclosure requirements for credit unions); *id.*, sec. 10, at 396 (repealing CAL. FIN. CODE §§ 18330-18336 which set forth disclosure requirements for industrial loan companies); 1994 Cal. Legis. Serv. ch. 68, sec. 11, at 396-97 (finding that federal law largely covers California's disclosure requirements with differences only in points of detail); *see also* Barber v. Kimbrell's, Inc., 577 F.2d 216, 222 (4th Cir. 1978) (explaining that the purpose of the federal disclosure law is to fully inform consumers and to prevent consumers from making uninformed decisions), *cert. denied*, 439 U.S. 934 (1978); White v. Arlen Realty & Dev. Corp., 540 F.2d 645, 650 (4th Cir. 1975) (stating that one purpose of the federal disclosure law is to protect the public from false or fictitious charges).

9. CAL. FIN. CODE § 6660 (amended by Chapter 68); *see id.* (defining account, account holder, and charges, and providing that state disclosure requirements follow federal disclosure requirements pursuant to the Truth-in-Lending Act, 15 U.S.C. § 1601-1667e, and Regulation Z, 12 C.F.R. 226.1-.30); *see also* 1985 Cal. Stat. ch. 983, sec. 9.5, at 3134-37 (amending CAL. FIN. CODE § 6650); 1994 Cal. Legis. Serv. ch. 68, sec. 1, at 394 (repealing CAL. FIN. CODE § 6650).

10. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1923, at 2-3 (Apr. 12, 1994); *see* 1994 Cal. Legis. Serv. ch. 68, sec. 11, at 396-97 (stating that the California Legislature finds that the federal disclosure laws largely cover the subject matter of the California disclosure laws and that federal law provides adequate consumer safeguards).

inconsistent state law.[11] However, the Legislature feared that state law might be interpreted as being inconsistent.[12] In the past, the Legislature had repealed similar state disclosure requirements for state chartered banks[13] but did not make mention of savings associations, credit unions or industrial loan companies.[14] Chapter 68 allows all state depository institutions to be federally regulated, in regards to disclosures, in order that these institutions are not burdened by potentially redundant or confusing state law.[15]

Jonathan P. Hobbs

Consumer Protection; disclosure requirements—rental-purchase agreements

Civil Code §§ 1812.620, 1812.621, 1812.622, 1812.623, 1812.624, 1812.625, 1812.626, 1812.627, 1812.628, 1812.629, 1812.630, 1812.631, 1812.632, 1812.633, 1812.634, 1812.635, 1812.636, 1812.637, 1812.638, 1812.639, 1812.640, 1812.641, 1812.642, 1812.643, 1812.644, 1812.645, 1812.646, 1812.647, 1812.648, 1812.649 (new).
AB 722 (Karnette); 1994 STAT. Ch. 1026

Under existing law, the Unruh Retail Installment Sales Act[1] governs retail installment sales contracts[2] consisting of more than four installments totaling an

11. 15 U.S.C.A. § 1610(a)(1) (West Supp. 1994); 12 C.F.R. § 226.28(a)(1) (1993); *see id.* § 230.1(d) (1993) (preempting inconsistent state law relating to all depository institutions except credit unions); ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1923, at 2 (Apr. 18, 1994) (stating that Regulation DD, 12 C.F.R. 230, preempts state law).

12. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1923, at 2 (Apr. 18, 1994); *see id.* (explaining that the state and federal law distinction is subjective and could leave financial institutions vulnerable to inadvertent state law violations).

13. *See* 1993 Cal. Legis. Serv. ch 107, secs. 1-2, at 984 (repealing CAL. FIN. CODE §§ 855, 865-867, which defined disclosure requirements for state chartered banks).

14. 1994 Cal. Legis. Serv. ch. 68, sec. 11, at 396-97; 1993 Cal. Legis. Serv. ch 107, secs. 1-2, at 984.

15. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1923, at 2 (Apr. 18, 1994); 1994 Cal. Legis. Serv. ch. 68, sec. 11, at 396-97.

1. *See* CAL. CIV. CODE §§ 1801-1812.20 (West 1985 & Supp. 1994) (establishing the Unruh Retail Installment Sales Act).

2. *See id.* § 1802.5 (West 1985) (defining a retail installment sale as the sale of goods or services by a retail seller in deferred payments payable in installments).

amount greater than the cash price[3] of the goods.[4] Existing law does not contain special regulations pertaining to rental-purchase agreements.[5]

Chapter 1026, known as the Karnette Rental-Purchase Act,[6] recognizes a distinction between rental-purchase agreements and retail installment sales contracts, or consumer credit contracts,[7] and seeks to treat such agreements as leases subject to the Consumers Legal Remedies Act[8] and Song-Beverly Consumer Warranty Act.[9]

Chapter 1026 requires written rental-purchase agreements and prescribes the content and manner of required disclosures.[10] Provisions in rental-purchase agreements that purport to waive certain rights of the lessor are prohibited.[11]

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3. *See id.* § 1812.622(e) (enacted by Chapter 1026) (defining cash price as the price at which retail sellers are selling and retail buyers are buying the same or similar property for cash in the same trade area where the lessor's place of business is located).

4. *Id.* §1802.6(b) (West 1985); *see* 53 Op. Cal. Att'y Gen. 160, 161 (1970) (excluding any down payment made on the sale from the calculation of the number of installments).

5. 1994 Cal. Legis. Serv. Ch. 1026, at 5187-88 (stating that existing law, while addressing installment sales contracts, does not regulate rental-purchase agreements); *see* Ken Chavez, *Despite Report, State Has No Protections*, SACRAMENTO BEE, Apr. 12, 1993, at C1 (quoting a statement made by John Lamb, attorney for the California State Department of Consumer Affairs, that California has no laws specifically governing rent-to-own firms); *see also* CAL. CIV. CODE § 1812.622(d) (enacted by Chapter 1026) (defining rental-purchase agreement as an agreement between a lessor and a consumer which provides for the rental or leasing of personal property, for an initial term of four months or less, with an option to become owner of the property).

6. *See* CAL. CIV. CODE § 1812.620 (enacted by Chapter 1026) (providing that the sections created by Chapter 1026 will be known as the Karnette Rental-Purchase Act).

7. *See id.* § 1799.90 (West 1985) (defining consumer credit contract as any of certain enumerated obligations to pay money for personal, family, or household items or services on a deferred basis).

8. *See id.* §§ 1750-1781 (West 1985 & Supp. 1994) (establishing the Consumers Legal Remedies Act).

9. *Id.* § 1812.622 (enacted by Chapter 1026); *see id.* §§ 1790-1795.7 (West 1985 & Supp. 1994) (establishing the Song-Beverly Consumer Warranty Act).

10. *Id.* § 1812.623(a) (enacted by Chapter 1026); *see id.* (requiring the inclusion of the following: (1) Identification of the parties, property, and date of the agreement; (2) a characterization of property as new or used and the date of the lessor's acquisition or the item's age, respectively; (3) the minimum rental period, duration of rental-purchase agreement if all regularly scheduled periodic payments are made, payment amounts, and total number and amount of payments, exclusive of other fees, necessary to acquire ownership with a statement that the consumer does not acquire such rights unless he or she has complied with the terms of the agreement; (4) the cash price of the property which is the subject of the rental-purchase agreement; (5) the cost of the rental; (6) a description of the consumer's liability for lost or damaged property; (7) a notice to the consumer that ownership will not pass until all payments have been made or a purchase option has been exercised; (8) a description of the consumer's right to acquire ownership before the expiration of the rental period; (9) a description of the consumer's reinstatement rights; (10) a description of warranty transferability if applicable; and (11) a description of the lessor's maintenance responsibilities); *see also id.* § 1812.623(b)-(d) (enacted by Chapter 1026) (describing the manner in which the required disclosures must be presented); *id.* § 1812.629 (enacted by Chapter 1026) (requiring lessors to provide a copy of the contract and all disclosures to the consumer prior to signing the agreement, upon the consumer's request).

11. *Id.* § 1812.624(a) (enacted by Chapter 1026); *see id.* (proscribing the inclusion of certain provisions in rental-purchase agreements including the following: (1) The granting of a power of attorney to confess judgment or appointing the lessor as the consumer's agent for collection or repossession; (2) authorization of the lessor to commit a breach of the peace in the course of repossession or to enter the consumer's premises without consent at the time of entry; (3) agreements to purchase insurance from the lessor or liability waivers against loss or damage to the property; (4) waivers of defenses, counterclaims, or rights the consumer may have against the lessor; (5) requirements that the consumer pay any reinstatement fee not otherwise provided for by Chapter 1026; (6) requirements that the consumer pay any fee for pickup of the property on termination of the

Chapter 1026 additionally regulates the payment and return of security deposits with provisions regarding the maximum amount allowed as well as the amount that must be returned along with disclosure requirements regarding amounts deducted.[12] Chapter 1026 specifies that certain disclosures must be made in rent-to-own advertising, including whether any price term is present.[13]

Chapter 1026 addresses consumer rights by classifying rental-purchase agreements as home solicitation contracts,[14] thus permitting consumers to cancel within three business days after signing.[15] Chapter 1026 also contains previously unaddressed provisions for default and reinstatement under rental-purchase agreements.[16] Chapter 1026 additionally allows the purchase of rented property at any time during the contract term for the cash price stated in the rental-purchase agreement multiplied by the percentage of the total number of periodic payments that remains unpaid under the agreement.[17]

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rental-purchase agreement; (7) requirements of any fee that is unreasonable or not an actual cost incurred by the lessor; (8) requirements of payment of any down payment exceeding one periodic payment other than security deposits as provided for in Chapter 1026; (9) waiver of any duty to exercise ordinary care in the use of the property or to effect repairs in the absence of such care subject to the limitations of Chapter 1026; (10) granting of a security interest in the property; (11) assumption of liability for loss or damage in excess of that allowed by Chapter 1026; (12) requirements of balloon payments in excess of the periodic payments except as authorized by Chapter 1026; (13) requirements of late payment fees not authorized by Chapter 1026 or of collection of past due amounts at the consumer's home; (14) waivers of any rights or remedies against the lessor for violations of Chapter 1026 or other laws; (15) provisions for commencement of any legal action outside of the county or judicial district where the rental-purchase agreement was signed or where the consumer resided at the time the action was commenced; and (16) any statement of the cash price which exceeds that for the same or similar new item).

12. *Id.* § 1812.625 (enacted by Chapter 1026); *see id.* (limiting security deposits to the equivalent of one month's rent to satisfy claims for losses and providing for the return of deposits within two weeks of return of the property with an itemized description of any deductions for loss or repair).

13. *Id.* § 1812.630(a) (enacted by Chapter 1026); *see id.* (requiring that advertisements state that the transaction is a rental-purchase agreement, whether the property is new or used, the amount and number of payments needed to acquire ownership of the property, and that the consumer will not acquire ownership of the property until all payments have been made); *see also id.* § 1812.630(b) (enacted by Chapter 1026) (prohibiting lessors who advertise that no credit investigation will be performed from making any inquiry or requiring the completion of any document regarding the consumer's assets or credit history).

14. *See id.* § 1689.5(a) (West Supp. 1994) (defining home solicitation contract as any contract or offer, subject to approval, for the sale, lease, or rental of goods, services, or both, made at other than appropriate trade premises in an amount of $25 or more, including any interest or service charges).

15. *Id.* § 1812.628(a) (enacted by Chapter 1026); *see id.* (providing for classification of rental-purchase agreements as home solicitation contracts if the initial term of the contract is longer than one week and the contract was made at other than appropriate trade premises).

16. *Id.* § 1812.631(a)(1)-(2) (enacted by Chapter 1026); *see id.* (providing that a consumer is in default if his or her payment is more than seven days late for weekly rental agreements or more than ten days late for longer rental periods); *see also id.* § 1812.631(b)-(c) (enacted by Chapter 1026) (allowing a consumer to reinstate his or her contract by paying all late payments and late charges within the period specified in subsection (a) if the consumer has retained possession of the property or within one year of the due date of the payment in default if the property has been returned); *id.* § 1812.631(d) (enacted by Chapter 1026) (requiring the lessor, upon reinstatement, to provide the same or comparable property); *id.* § 1812.631(e)-(f) (enacted by Chapter 1026) (denying the right to reinstatement where the consumer has stolen or unlawfully disposed of the property, willfully damaged the property, or defaulted on three consecutive occasions).

17. *Id.* § 1812.632 (enacted by Chapter 1026); *see id.* § 1812.632(b)-(c) (enacted by Chapter 1026) (setting forth the disclosure requirements for the purchase option as well as a provision for a reduction in the amount of each periodic payment of up to 50% when the consumer's employment has been involuntarily

Chapter 1026 addresses consumer responsibilities by allowing the assessment of late payment fees provided that they are specified in the rental-purchase agreement and are permitted by Chapter 1026.[18] The Act also specifies the circumstances under which the consumer is liable for loss or damage to the rented property.[19] Chapter 1026 further establishes regulations regarding the lessor's responsibility to maintain the rented property, the application of standard warranties of sale, the lessor's right to sell service contracts, the consumer's damages for the lessor's violation of the Act, collection and repossession tactics, reports to credit reporting agencies, solicitation of credit references, discrimination, notices to cosigners, the lessor's duty to maintain records, and criminalization of violations of Chapter 1026.[20]

Chapter 1026 provides that any rental-purchase agreement provision not in accord with the requirements and proscriptions of the Act is void and that the entire agreement is voidable at the consumer's option.[21]

INTERPRETIVE COMMENT

Chapter 1026 was enacted to address a perceived underregulation of the rent-to-own industry, since rental-purchase agreements are not credit sales, consumer leases, or retail installment sales and, therefore, are not governed by either the Unruh Retail Installment Sales Act or the Federal Truth in Lending Act.[22]

Chapter 1026 was also enacted to ensure that consumers are adequately informed with regard to the actual cost of items obtained through rental-purchase

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18. *Id.* § 1812.626 (enacted by Chapter 1026); *see id.* (prohibiting late payment fees for weekly payments less than three days late, late payment fees for less frequent payments less than seven days late, and multiple late payment fees for any particular late payment if the total penalty exceeds 5% of the payment or $5, whichever is less).

19. *Id.* § 1812.627(b) (enacted by Chapter 1026); *see id.* (providing for liability if the consumer is negligent or if the property has been damaged by the consumer's reckless, willful, wanton, or intentional act, but stating that the consumer is not liable for theft of the property if: (1) There is evidence of a burglary or the consumer files a police report, or (2) the consumer can establish by a preponderance of the evidence that he or she did not aid in the theft of the property); *see also id.* § 1812.627(a) (enacted by Chapter 1026) (limiting consumer liability to the lesser of the purchase option amount or the fair market value of the property at the time of theft or damage).

20. *Id.* §§ 1812.633-1812.649 (enacted by Chapter 1026).

21. *Id.* § 1812.624(b) (enacted by Chapter 1026).

22. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 722, at 2 (May 5, 1994); *see* 15 U.S.C.A. §§ 1601-1610 (West 1982 & Supp. 1994) (establishing the Federal Truth in Lending Act); *see also* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 722, at 2 (May 5, 1994) (stating that the purpose of AB 722 is to correct a lack of regulation of, and disclosures by, the rent-to-own industry); 1994 Cal. Legis. Serv. Ch. 1026, at 5187-88 (stating that existing provisions found in the Unruh Act do not regulate rental-purchase agreements); Lewis J. Heisman, Annotation, *Lease with Option to Purchase Agreement as Credit Sale or Consumer Lease Under Definitions in Truth in Lending Act (15 USCA §§ 1602(g), 1667(1)) and Applicable Regulations*, 58 A.L.R. FED. 929, 931-34 (1982 & Supp. 1994) (stating that the definition of credit sale as found in the Code of Federal Regulations, 12 C.F.R. § 226.2(a)(16) (1993), does not include rental-purchase agreements according to decisions in many state cases).

agreements.[23] Chapter 1026 additionally addresses the forfeiture of consumers' equity in the rented property due to late payments and the inability to reinstate without substantial penalties.[24] The Karnette Rental-Purchase Act was also intended to prohibit unfair or unconscionable practices with respect to rental-purchase transactions; prohibit unfair contract terms; prevent the forfeiture of contract rights by consumers; prohibit the practice whereby consumers are unable to reinstate their contracts after missed payments; and provide for the service, repair, or replacement of malfunctioning items.[25]

The cash price and total cost disclosure requirement of Chapter 1026 seeks to regulate misleading advertising by rent-to-own companies advertising low weekly rates without reference to the total amount and number of payments required for ownership.[26]

Opponents of Chapter 1026 say that the Act inadequately regulates rental-purchase agreements by failing to classify them as retail installment sales or consumer credit transactions.[27] They argue that rental purchases are functionally identical to installment sales and thus should be subject to the same laws that regulate such transactions.[28] Litigation in several states as well as a proposed federal statute have sought either to classify rental-purchase agreements as credit sales, subjecting them to existing rules governing such transactions, or to separately regulate rent-to-own transactions.[29]

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23. CAL. CIV. CODE § 1812.621 (enacted by Chapter 1026); *see* California Public Interest Research Group, *Costly Contracts: The High Cost of Rent-to-Own in California*, at 1 (Apr. 1992) [hereinafter CALPIRG] (copy on file with the *Pacific Law Journal*) (stating that consumers who purchase through rental-purchase agreements often pay six and one half times the price for which they could have bought the same item for cash, and estimating the equivalent interest rates on such purchases to be as high as 315%).

24. *See* CAL. DEP'T OF CONSUMER AFFAIRS, LEGAL SERVICES UNIT, *Rent-to-Own in California: Findings and Recommendations*, at 1-2 (1989) [hereinafter DEP'T OF CONSUMER AFFAIRS REPORT] (copy on file with the *Pacific Law Journal*) (finding that consumers jeopardize their equity in rented items since rent-to-own companies may consider rental-purchase contracts as terminated when payments are tendered late); *see also* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 722, at 4 (May 5, 1994) (stating as the partial purpose of Chapter 1026 that rental-purchase agreements are not currently regulated with respect to the ability of rent-to-own companies to declare consumers in default).

25. CAL. CIV. CODE § 1812.621 (enacted by Chapter 1026).

26. *See* DEP'T OF CONSUMER AFFAIRS REPORT, *supra* note 24, at 11 (citing survey results showing that between 50% and 80% of all rent-to-own transactions result in consumer purchases); *see also* CALPIRG, *supra* note 23, at 1 (citing research indicating that rent-to-own advertising and in-store sales presentations frequently emphasize the benefits of ownership over rental).

27. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 722, at 6 (May 5, 1994) (stating the argument of the California Public Interest Research Group that the amount over the cash price paid by consumers represents interest regardless of whether the agreement is called an installment sales contract or a rental-purchase agreement and should thus be expressed as an annual percentage rate).

28. *See* DEP'T OF CONSUMER AFFAIRS REPORT, *supra* note 24, at 3 (1989) (stating that rent-to-own transactions are indistinguishable from retail installment sales).

29. *See, e.g.*, Rent-a-Center v. Hall, 510 N.W.2d 789, 793 (Wis. 1993) (defining a rental-purchase agreement as a consumer credit sale governed by the Wisconsin Consumer Act, WIS. STAT. ANN. § 421.301(9) (West 1988)); *see also* S. 1566, 103d Cong., 1st Sess. § 2 (1993) (proposing an amendment to the Consumer Credit Protection Act, 15 U.S.C.A. §§ 1601-1610 (West 1982), regulating rent-to-own transactions); Scott Pendleton, *Rent-to-Own Industry Gets Hit by Critics as Regulations Loom*, CHRISTIAN SCI. MONITOR, Mar. 7, 1994, at 10 (stating that 35 states have adopted the Consumer Credit Reform Act of 1993).

Chapter 1026 will likely affect the rent-to-own industry which asserts that the Act will put it out of business by capping rental-purchase interest rates at the same level as credit sales.[30] However, Chapter 1026 does not classify rental-purchase agreements as credit sales[31] and thus is not governed by federal law regulating interest rates.[32]

Mark W. Owens

Consumer Protection; frozen poultry—labeling

Food and Agricultural Code § 26661 (amended); Health and Safety Code § 26575 (amended).
SB 1533 (McCorquodale); 1994 STAT. Ch. 106
(Effective June 16, 1994)

Under prior law, any person who processed, butchered, slaughtered, packed, repacked, or sold poultry or poultry products was prohibited from advertising as "fresh" any poultry whose internal temperature had been equal to or below twenty-five degrees Fahrenheit.[1] Also, prior law prohibited advertising or labeling as "fresh" any poultry that has been frozen.[2]

Chapter 106 changes prior law by prohibiting such persons from labeling as "fresh" any poultry whose internal temperature has been below twenty-six degrees Fahrenheit.[3] Chapter 106 also states that poultry retailers are in violation only if they act with actual knowledge regarding false or misleading labeling.[4] Additionally, Chapter 106 supplements existing law by allowing the Secretary of the California Department of Food and Agriculture (CDFA)[5] to adopt regulations consistent with federal law regarding advertising and labeling of poultry and

30. Chavez, *supra* note 5, at C1.
31. *See* 15 U.S.C.A. § 1602(g) (West 1982) (defining credit sale as any sale in which the seller is a creditor).
32. *In re* Hanley, 135 B.R. 311, 313 (Bankr. C.D. Ill. 1990); *see id.* (holding that Rent-to-Own agreements are exempt from the definition of credit sale); *see also* 15 U.S.C.A. § 1606(b) (West 1982) (establishing interest rate restrictions).

1. 1993 Cal. Legis. Serv. ch. 565, sec. 2, at 2351 (enacting CAL. FOOD & AGRIC. CODE § 26661).
2. 1977 Cal. Stat. ch. 579, sec. 120, at 1875 (amending CAL. HEALTH & SAFETY CODE § 26575); *see id.* (defining poultry as "frozen" if stored below five degrees Fahrenheit).
3. CAL. FOOD & AGRIC. CODE § 26661(a) (amended by Chapter 106).
4. *Id.* § 26661(b) (amended by Chapter 106).
5. *See id.* §§ 101-531 (West 1986 & Supp. 1994) (establishing the CDFA and setting forth its powers and duties).

providing that all new sections enacted by Chapter 106 will be severable upon a finding of federal preemption or unconstitutionality.[6]

Furthermore, in order to avoid conflict in existing law, Chapter 106 changes prior law by deleting poultry from a section of the Health and Safety Code which stated that meat was considered frozen if stored at or below five degrees Fahrenheit.[7]

COMMENT

Chapter 106 raises constitutional issues as to its validity under the Commerce Clause.[8] Additionally, Chapter 106 may be preempted by federal law already covering the labeling of poultry.[9] Federal law defines frozen poultry as any poultry whose internal temperature has been below zero degrees Fahrenheit.[10] Chapter 106 defines fresh poultry to be poultry whose internal temperature has not been below twenty-six degrees Fahrenheit.[11] The state and federal statutes have thus presented a definitional gap that has caused a great deal of controversy.[12] The following discussion will provide background information regarding interstate commerce and federal preemption, and will briefly analyze these issues as they relate to Chapter 106.

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6. *Id.* § 26661(d) (amended by Chapter 106); *see id.* (declaring that if any subdivision, sentence, clause, word, or portion is or has been held unconstitutional or preempted by federal law, it is not to affect any other portion of the statute); *id.* § 26661(c) (amended by Chapter 106) (stating that the adopted regulations must be as consistent as possible with regulations adopted by the United States Department of Agriculture (USDA)); *see also* 21 U.S.C.A. § 457 (West 1972); 9 C.F.R. §§ 381.115-.144 (1993) (setting forth federal poultry labeling requirements).

7. CAL. HEALTH & SAFETY CODE § 26575(c) (amended by Chapter 106); *see id.* (stating that California Food and Agricultural Code § 26661 applies to the exclusion of California Health and Safety Code § 26575); 1977 Cal. Stat. ch. 579, sec. 120, at 1875 (amending CAL. HEALTH & SAFETY CODE § 26575) (defining meat as "frozen" if stored at five degrees Fahrenheit or lower); *see also* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1533, at 2 (Apr. 21, 1994) (stating that the California Health and Safety Code's definition of frozen was in conflict with the poultry labeling provisions in the California Food and Agricultural Code).

8. U.S. CONST. art I, § 8, cl. 3; *see id.* (setting forth the Commerce Clause); *infra* notes 19-54 and accompanying text (discussing the viability of Chapter 106 under the Commerce Clause).

9. *See infra* notes 54-60 and accompanying text (discussing the possibility of Chapter 106 being preempted by federal law).

10. 9 C.F.R. § 381.66(f)(2) (1993); *see id.* § 381.129(b)(3) (stating that in order to be labeled "frozen" the poultry must comply with 9 C.F.R. § 381.66(f)(2)); *see also* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1533, at 1 (May 31, 1994) (stating that federal law does not define the term "fresh"). *But see id.* at 2, (stating that the USDA issued a policy memo in 1988 stating that "fresh" could only be used on labels where the poultry had not been kept below 26 degrees Fahrenheit, but that the USDA rescinded the memo under pressure from poultry producers).

11. CAL. FOOD & AGRIC. CODE § 26661(a)(1) (amended by Chapter 106).

12. Daniel P. Puzo, *Frozen Chicken Wars Heat Up*, L.A. TIMES, May 26, 1994, at H2; *see id.* (discussing the controversy and quoting scientific findings regarding what constitutes frozen); Virginia Van Vynckt, *Chicken Clout; Feathers Fly in Squawk over Fresh vs. Frozen*, CHI. SUN TIMES, May 12, 1994, at Food 1 (discussing the debate between fresh and frozen and including an example of a "fresh" chicken being used to pound nails into a 2x4 board); *see also* George Watts, President, National Broiler Council, *"Fresh" and Frozen Chickens*, WASH. POST, May 24, 1994, Letters to the Editor, at A20 (stating that the opposite of fresh is not frozen).

A. Interstate Commerce

The federal government is given the power to regulate interstate commerce through the Commerce Clause.[13] It is well settled that this power is exclusive to the federal government and supreme over the states.[14] Any state law that imposes an undue burden upon interstate commerce must therefore fail.[15]

While the test for what constitutes an undue burden on interstate commerce has been stated in varying terms, there seem to be three criteria on which the United States Supreme Court has relied when approaching the matter. These criteria are: (1) Whether the regulation burdening interstate commerce is justified in protecting a significant state interest;[16] (2) whether there is discrimination against interstate commerce;[17] and (3) whether there is a disruption of uniformity on a matter that necessitates uniform legal principles.[18]

1. Assessing the State Interest

The Supreme Court has stated that where a state regulates evenhandedly to realize a legitimate state interest, the regulation will be deemed violative of the Commerce Clause only if the burden is clearly excessive in relation to the local benefits.[19] In *Crossman v. Lurman*,[20] the Supreme Court upheld the validity of a

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13. U.S. CONST. art. I, § 8, cl. 3; *see id.* (granting the federal government the power to regulate commerce with foreign nations and among the several states); McLeod v. Dilworth Co., 322 U.S. 327, 330 (1944) (stating that the purpose of the Commerce Clause is to create an area of free trade among the states); Parker v. Brown, 317 U.S. 341, 363 (1943) (declaring that the principal goal of the Commerce Clause is to regulate commerce by a single authority and prevent obstruction of the free flow of commerce); JDS Realty Corp. v. Virgin Islands, 593 F. Supp. 199, 206 (D.V.I. 1984) (stating that a fundamental purpose of the Commerce Clause is to insure against discriminating state legislation (quoting Welton v. Missouri, 91 U.S. 275 (1876))), *aff'd*, 824 F.2d 256 (3rd. Cir. 1987).

14. United States v. Hill, 248 U.S. 420, 425 (1919); *see* U.S. CONST. art. VI, cl. 2 (declaring that all laws made under the authority of the United States shall be the supreme law of the land); *see also* Washington Tel. Co. v. State, 468 P.2d 687, 689 (Wash. 1970) (proclaiming that in the field of interstate commerce, the federal Constitution is supreme), *appeal dismissed*, 400 U.S. 986 (1971). *See generally* 15A AM. JUR. 2D, *Commerce* § 11 (1976) (discussing federal superiority over state powers).

15. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); *see* State *ex rel.* Sammons Trucking Inc. v. Boedecker, 492 P.2d 919, 921 (Mont. 1972) (announcing that Congress has the power to declare what constitutes an undue burden).

16. *See infra* notes 19-33 and accompanying text (discussing protection of significant state interests).

17. *See infra* notes 34-39 and accompanying text (discussing discrimination against interstate commerce).

18. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 448 (1960); *see infra* notes 41-47 and accompanying text (discussing disruption of uniformity). *See generally* Sheldon R. Shapiro, Annotation, *Commerce Clause of Federal Constitution as Violated by State or Local Regulation or Prohibition Affecting Business of Selling, Distributing, Packaging, Labeling or Processing Food Intended for Human Consumption—Supreme Court Cases*, 25 L.Ed. 2d 846, 855-64 (1971) (discussing undue burdens on commerce and the three factors the Supreme Court has used to resolve the issue).

19. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); *see* Minnesota v. Clover Leaf Creamery Co, 449 U.S. 456, 471 (1981) (quoting *Pike* as stating that a court must strike down a statute if its burden on interstate commerce is clearly excessive in relation to its putative benefits).

20. 192 U.S. 189 (1904).

New York statute aimed at preventing fraud in the sale of food products.[21] However, protecting consumers from fraud and deception may not always outweigh the burden on commerce. In *Hunt v. Washington State Apple Advertising Commission*,[22] the Court struck down a North Carolina statute imposing uniform labeling requirements for apple packaging.[23] The Court held that the statute effectively prohibited the State of Washington from displaying its grade of apples on its labels and, therefore, was violative of the Commerce Clause.[24]

Additionally, the Court has struck down other protectionist state statutes that did not support a legitimate state interest that outweighed the burden on interstate commerce.[25] One of the most glaring examples of a violation of the Commerce Clause comes from *Polar Ice Cream & Creamery Co. v. Andrews*.[26] There, the Court held that a Florida regulation was aimed at the prevention of out-of-state competition in the milk industry—a regulation that the Court unequivocally held violated the Commerce Clause.[27] Another example is presented in *Hughes v. Oklahoma*.[28] In this case, the Supreme Court held that a regulation prohibiting the export of minnows was an undue burden on commerce that was not outweighed by the state's interest in conservation.[29]

As Chapter 106 is aimed at consumer protection, it is analogous to both *Crossman* and *Hunt*.[30] The issue is, of course, how substantial of a burden is placed on interstate commerce by Chapter 106. According to those who import poultry to California, the burden is massive.[31] It has additionally been argued that Chapter 106 is solely intended to protect local markets.[32] If this is the case,

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21. *Id.* at 196-97.
22. 432 U.S. 333 (1977).
23. *Id.* at 352-53.
24. *Id.*
25. Hughes v. Oklahoma, 441 U.S. 322, 338 (1979); *see id.* (holding that prohibiting the export of minnows in the interest of state conservation did not outweigh the burden placed on interstate commerce); Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361, 377 (1964) (striking down a Florida statute intended to prevent out-of-state competition from entering local markets).
26. 375 U.S. 361 (1964).
27. *Id.* at 377.
28. 441 U.S. 322 (1979).
29. *Id.* at 338.
30. *See Hunt*, 432 U.S. at 352-53 (1977) (involving a statute that purported to better inform consumers through the labeling of apple packages); *Crossman*, 192 U.S. at 196 (1904) (involving a statute that was aimed at protecting consumers from fraud in the sale of food products); *see also* Van Vynckt, *supra* note 12 (quoting Bill Matos, President of the California Poultry Industry Federation, asserting that the federal definitions of "frozen" could mislead consumers and equal to fraud).
31. *See* Van Vyckt, *supra* note 12 (discussing the debate between "fresh" and "frozen" and declaring that southern poultry producers claim that they are being prevented from fairly competing in California because they will not be able to label their product as fresh even though it is transported at a temperature well above the federal standard for what constitutes frozen).
32. Puzo, *supra* note 12 (quoting Gary Kushner, attorney representing national poultry trade groups, as saying that the California law is not aimed at protecting consumers from unscrupulous out of state producers, but rather intended to protect local markets).

Chapter 106 will almost assuredly fail under the holding of *Polar Ice Cream & Creamery Co.*[33]

2. Discrimination Against Interstate Commerce

In addition to weighing the state interest, the Supreme Court has also considered discrimination against interstate commerce when determining if a state regulation violates the Commerce Clause.[34] In *Corn Products Refining Co. v. Eddy*,[35] the Court held that the labeling of syrup was not discriminatory against interstate commerce because it promoted fair dealing in food products.[36] Conversely, the Court held in *Minnesota v. Barber*,[37] that a Minnesota regulation that required cattle, sheep, or swine to be inspected and slaughtered in Minnesota was violative of the Commerce Clause because of its discriminatory effect on interstate commerce.[38]

Since Chapter 106 is aimed at consumer protection and prevention of fraud in poultry markets, it is similar to the statute upheld in *Eddy*. However, the apparent contrary standards between state and federal law may discriminate against interstate commerce.[39] Such discrimination would be particularly apparent if Chapter 106 is intended to protect local chicken markets and is attempting to further such protection under the guise of consumer protection.[40]

3. Disruption of National Uniformity

Lastly, in determining whether a state regulation unduly burdens interstate commerce, the Supreme Court has looked toward a disruption in national uniformity.[41] In *Milk Control Board v. Eisenberg Farm Products*,[42] the Court held that the regulation of an interstate milk dealer's purchases from Pennsylvania was not violative of the Commerce Clause because the activity affected by the regulation was essentially local.[43] Similarly, in *Parker v. Brown*,[44] the Supreme

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33. 375 U.S. at 377; *see id.* (holding that a state statute aimed at preventing out-of-state competition is unconstitutional).

34. Corn Prod. Ref. Co. v. Eddy, 249 U.S. 427 (1919); Minnesota v. Barber, 136 U.S. 313 (1890).

35. 249 U.S. 427 (1919).

36. *Id.* at 433.

37. 136 U.S. 313 (1890).

38. *Id.* at 329-30.

39. *See* 9 C.F.R. § 381.66(f)(2) (1993) (defining "frozen" poultry as any poultry kept below zero degrees Fahrenheit); CAL. FOOD & AGRIC. CODE § 26661 (enacted by Chapter 106) (providing that poultry advertised as "fresh" must not have had an internal temperature equal to or below 25 degrees Fahrenheit).

40. *See Polar Ice Cream & Creamery Co*, 375 U.S. at 377 (holding that a protectionist law aimed at preventing out-of-state competition is unconstitutional).

41. Parker v. Brown, 317 U.S. 341 (1943); Milk Control Bd. v. Eisenberg Farm Prod., 306 U.S. 346 (1939).

42. 306 U.S. 346 (1939).

43. *Id.* at 353.

44. 317 U.S. 341 (1943).

Court upheld California's regulation of raisin crops.[45] The Court held that because almost all of the raisins consumed in the United States are produced in California, a regulation that might otherwise burden interstate commerce is not violative of the Commerce Clause as it is primarily local in nature.[46]

Both *Parker* and *Eisenberg* survived constitutional scrutiny because the Court found that the regulation occurred locally. However, this is probably not the case for poultry production as poultry consumption is on the rise nationally.[47] Therefore, Chapter 106 may very likely fail in deference to a necessity for uniformity in interstate commerce.

4. Disposition in Other Courts

While it appears that the Supreme Court has not squarely faced poultry regulations in the context of interstate commerce, other courts have encountered the issue.[48] In *Swift & Co. v. Wickham*,[49] a New York federal district court held that a state regulation requiring a statement of net weight for stuffed and unstuffed turkeys does not unduly burden interstate commerce.[50] Similarly, a Florida federal district court held in *Canton Poultry, Inc. v. Conner*[51] that a state law requiring the inspection, grading, and tagging of poultry does not violate the Commerce Clause.[52] Finally, in *Pacific Meat Company v. Otagaki*,[53] the Supreme Court of Hawaii upheld a state regulation regarding poultry labeling, concluding that states may use police power to prevent fraud and deception.[54] While there seems to be some acquiescence to state statutes regulating the labeling of poultry, the statutes involved in these cases did not have overtones of protectionist motives. This may distinguish Chapter 106 from the statutes at issue in these cases and ultimately render Chapter 106 violative of the Commerce Clause.

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45. *Id.* at 368.
46. *Id.*
47. *See* Van Vynckt, *supra* note 12 (reporting that Americans are eating more chicken than beef, and discussing poultry production in California and southern states such as Arkansas); *see also* Puzo, *supra* note 12 (stating that the frozen poultry debate has pitted California against the rest of the world, but particularly, Arkansas and Georgia).
48. Swift & Co. v. Wickham, 230 F. Supp. 398 (S.D.N.Y. 1964), *appeal dismissed*, 382 U.S. 111 (1965), and *cert. denied*, 385 U.S. 1036 (1967); Canton Poultry, Inc. v. Conner, 278 F. Supp. 822 (N.D. Fla. 1968); Pacific Meat Co. v. Otagaki, 394 P.2d 618 (Haw. 1964). *See generally Commerce Clause—Food Labeling*, 79 A.L.R. FED. 246 § 8, 266-68 (1986) (discussing poultry regulations in relation to the Commerce Clause).
49. 230 F. Supp. 398 (S.D.N.Y. 1964).
50. *Id.* at 402-406.
51. 278 F. Supp. 822 (N.D. Fla. 1968).
52. *Id.* at 825-26.
53. 394 P.2d 618 (Haw. 1964).
54. *Id.* at 623.

B. Federal Preemption

Notwithstanding the potential violation of the Commerce Clause, Chapter 106 also raises a significant federal preemption concern. Federal law prohibits any state from enacting any marketing, labeling, packaging or ingredient requirement that is different from, or that adds to federal poultry requirements.[55] A case that is particularly germane to the possible preemption of Chapter 106 is *National Broiler Council v. Voss*.[56] In this case, a California federal district court held that the section of the California Food and Agricultural Code amended by Chapter 106 is preempted by federal law.[57] The case is currently on appeal to the Ninth Circuit.[58] As the amendment made by Chapter 106 does not substantively change California's definition of frozen as it applies to poultry, the survival of Chapter 106 is in question.[59] However, in enacting Chapter 106, the Legislature anticipated the possible preemption of its provision and added a severability clause.[60]

C. Conclusion

The survival of Chapter 106 is far from certain. It will inevitably be attacked on interstate commerce grounds and face potential invalidation by federal preemption. While the state interest served by Chapter 106 is consumer protection, this laudable state goal may not outweigh the burden it places on interstate commerce. With regard to the matter of federal preemption, the fate of Chapter 106 may already be sealed by the pending appeal of *National Broiler Council*.

Jonathan P. Hobbs

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55. 21 U.S.C.A. § 467e (West 1972).

56. 1994 U.S. Dist. LEXIS 5638 (E.D. Cal. 1994), *appeal filed*.

57. *Id.* at *27; *see id.* (holding that provisions of § 26661 of the California Food and Agriculture Code, prior to the amendments made by Chapter 106, are preempted and because the provisions are not severable, the entire statute is preempted). It is worth noting that the court also had before it the issue of whether there was an undue burden on interstate commerce but declined to address the issue and decided the case on preemption grounds. *Id.* at *2.

58. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1533, at 2-3 (May 31, 1994); *see id.* at 3 (declaring that the case is on appeal).

59. *Compare* 1993 Cal. Legis. Serv. ch. 565, sec. 2, at 2351 (enacting CAL. FOOD & AGRIC. CODE § 26661) (stating that in order for poultry to be advertised as fresh, it must not have had an internal temperature equal to or below 25 degrees Fahrenheit) *with* CAL. FOOD & AGRIC. CODE § 26661(a) (amended by chapter 106) (stating that in order for poultry to be advertised as fresh, it must not have had an internal temperature below 26 degrees Fahrenheit).

60. CAL. FOOD & AGRIC. CODE § 26661(d) (enacted by Chapter 106); *see id.*; (declaring that if any subdivision, sentence, clause, word, or portion is or has been held unconstitutional or preempted by federal law, it is not to affect any other portion); *see also* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1533, at 3 (May 31, 1994) (stating that the Legislature hopes that if *National Broiler Council* is sent back to a lower court that the severability clause will protect other portion of SB 1533 in the event that any part is preempted).

Consumer Protection; immigration consultants—disclosure and regulation

Business and Professions Code §§ 22442.2, 22442.3, 22442.4 (new); §§ 22445, 22446.5 (amended).
AB 2520 (Napolitano); 1994 STAT. Ch. 561

Existing law prohibits an individual from acting as an immigration consultant[1] unless authorized to practice law or authorized to represent persons before the Board of Immigration Appeals or the United States Immigration and Naturalization Service.[2] Existing law also prohibits an immigration consultant from making false or misleading statements to a client, making any unauthorized promises or guarantees, or making statements that he/she has special influence with the United States Immigration and Naturalization Service.[3] The consultant is also prohibited from charging referral fees when the consultant will not or cannot provide services to a client.[4] Consultants are required to provide the client with a written contract and are prohibited from retaining the original.[5] Existing law imposes civil and criminal sanctions for violations.[6]

Chapter 561 adds to existing law by requiring immigration consultants to conspicuously display information in their offices that includes the consultant's full name and address, evidence of compliance with any bonding requirement, and a statement that the consultant is not an attorney.[7] Additionally, Chapter 561

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1. *See* CAL. BUS. & PROF. CODE § 22441 (West Supp. 1994) (defining an immigration consultant as a person who gives nonlegal assistance or advice regarding an immigration matter); *id.* §§ 22442.2-.4 (enacted by Chapter 561) (setting forth the requirements for a person acting as an immigration consultant); *see also In re* Bachmann, 113 B.R. 769, 773 (Bankr. S.D. Fla. 1990) (stating that when considering what constitutes nonlegal advice, the court must consider the protection of the public); People v. Landlord Professional Serv., 215 Cal. App. 3d 1599, 1608, 264 Cal. Rptr. 548, 553 (1989) (holding that performing clerical functions and giving a client a detailed manual regarding unlawful detainer constituted nonlegal advice); *cf.* OR. REV. STAT. ANN. § 9.280(1)-(2) (1988) (defining immigration consultant and requiring such persons to be members of the Oregon State Bar); WASH. REV. CODE ANN. § 19.154.020 (West Supp. 1994) (defining immigration assistant similarly to California's definition of immigration consultant). *But see In re* Anderson, 79 B.R. 482, 485 (Bankr. S.D. Cal. 1987) (holding that a paralegal giving extensive bankruptcy advice constituted legal advice and was therefore an unauthorized practice of law).

2. CAL. BUS. & PROF. CODE § 22440 (West 1987); *see* 8 U.S.C.A. § 1551 (West 1970) (establishing the United States Immigration and Naturalization Service); 8 C.F.R. §§ 1-499 (1993) (setting forth the powers and duties of the United States Immigration and Naturalization Service); *id.* §§ 3.1-.8 (1993) (setting forth the powers, duties, and authority of the Board of Immigration Appeals); *id.* § 292.1 (1993) (stating who is authorized to represent immigrants in a United States Immigration and Naturalization Service proceeding); *see also* 8 U.S.C.A. § 1252(b)(2) (West Supp. 1994) (stating that aliens have the privilege of representation by counsel); *id.* § 1362 (West 1970) (stating that persons have a right to counsel at an exclusion or deportation proceeding).

3. CAL. BUS. & PROF. CODE § 22444(a)-(c) (West Supp. 1994).

4. *Id.* § 22444(d) (West Supp. 1994).

5. *Id.* § 22442(a) (West Supp. 1994); *id* § 22443 (West 1987).

6. *Id.* § 22445 (amended by Chapter 561).

7. *Id.* § 22442.2(a)(1)-(2) (enacted by Chapter 561); *see id.* § 22442.2(a) (enacted by Chapter 561) (requiring that the notice be in English and in the native language of the consultant's clientele); *id.* § 22442.2(b) (enacted by Chapter 561) (setting forth the specific information the consultant must provide to a prospective client prior to rendering services).

prohibits the literal translation of any foreign words in any documents where such a translation is intended to mislead a client to believe that the consultant is an attorney.[8] Chapter 561 also provides that a consultant is to notify the Secretary of State's Office[9] within thirty days of any change of name, address, telephone number, or agent for service of process, and states that this provision will only remain in effect until January 1, 1998.[10]

Chapter 561 imposes additional civil and criminal sanctions for violations.[11] However, the additional criminal penalties will not apply to the provisions set out in Chapter 561.[12]

INTERPRETIVE COMMENT

Chapter 561 was enacted in an attempt to protect immigrants from unscrupulous immigration consultants.[13] According to the author of Chapter 561, illegitimate immigration consultants have in the past collected money from unknowing immigrants who did not receive the services they expected and who could not afford an attorney.[14] Chapter 561, by providing greater regulation of immigration consultants, will help to ensure that legitimate consultants are able to maintain their businesses.[15]

Jonathan P. Hobbs

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8. *Id.* § 22442.3 (enacted by Chapter 561); *see id.* § 22442.3(b) (enacted by Chapter 561) (defining literal translation as a translation without regard to the true meaning of the word or phrase in the language that is being translated).

9. *See* CAL. GOV'T CODE §§ 12159-12214 (West 1992 & Supp. 1994) (setting forth the duties of the Secretary of State).

10. CAL. BUS. & PROF. CODE § 22442.4 (enacted by Chapter 561); *see id.* (stating that this section will be repealed January 1, 1998, unless a later statute deletes or extends this date).

11. *Id.* § 22445(a), (b) (amended by Chapter 561); *see id.* (setting civil sanctions at a maximum amount of $10,000 and providing that criminal sanctions are a misdemeanor punishable by a $2,000-$10,000 fine or imprisonment in the county jail with provisions for subsequent offenses); *id.* § 22446.5 (amended by Chapter 561) (providing that aggrieved parties will have a civil cause of action and setting forth damage guidelines).

12. *Id.* § 22445(c) (enacted by Chapter 561) (declaring that the criminal penalties set out in California Business and Profession Code § 22445(b) will not apply to violations of §§ 22442.2, 22442.3, or 22442.4 of the same code).

13. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 2520, at 2 (June 2, 1994); *cf. In re* Bachmann 113 B.R. 769, 773 (Bankr. S.D. Fla. 1990) (stating that the court is to consider the protection of the public when determining what activities constitute nonlegal advice).

14. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 2520, at 2 (June 2, 1994); *see also* Alicia Di Rado, *Scams Victimize Mexicans Who Seek Work Permits; Immigrants: Thousands Have Been Duped by Consultants Who Promise Employment Papers but Actually Submit Bogus Political Asylum Claims*, L.A. TIMES, Dec. 2, 1993, at 13 (describing how unethical immigration consultants obtain temporary work permits for their clients by filing false political asylum claims which are usually rejected later).

15. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 2520, at 2 (June 2, 1994).

Consumer Protection; ticket sellers—requirements of contracts for sale

Business and Professions Code §§ 22502.1, 22502.2, 22502.3 (new); § 22500 (amended).
AB 3083 (Alpert); 1994 STAT. Ch. 1132

Existing law provides for the comprehensive regulation of ticket sellers,[1] with some exemptions for specified entities.[2] Under existing law, ticket sellers are required to maintain certain information regarding ticket sales.[3] Ticket sellers must also be locally licensed and maintain a permanent business address.[4] Existing law also requires that ticket sellers refund the ticket price if the event is canceled, postponed, or rescheduled.[5] Violations of these provisions are misdemeanors.[6] Existing law also imposes penalties for false or misleading advertisements.[7]

Chapter 1132 provides that it is unlawful for a ticket seller to contract for the sale of tickets unless the ticket seller is in possession of the ticket, has a written contract to obtain the ticket, or discloses to the purchaser orally and in writing that the seller: (1) Does not have the ticket, (2) has no contract to obtain the ticket, and (3) may not be able to supply the ticket.[8] If such a disclosure is made, Chapter 1132 specifies that the ticket seller may accept a deposit for the ticket as part of an agreement that he or she will make best efforts to obtain the ticket.[9] Chapter 1132 also pronounces that it is unlawful for a ticket seller to represent that he or

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1. *See* CAL. BUS. & PROF. CODE § 22503 (West 1987) (defining ticket seller).
2. *Id.* § 22500 (amended by Chapter 1132); *id.* §§ 22501-22511 (West 1987); *see id.* § 22503.5 (West 1987) (exempting primary contractor, defined as the person or organization responsible for the event for which the tickets are being sold, from regulation under California Business and Professions Code §§ 22500-22511); *id.* § 22503.6 (West 1987) (exempting agents of transportation carriers who sell tickets in conjunction with tour packages); *id.* § 22504 (West 1987) (exempting sellers of six or fewer tickets); *id.* § 22511 (West 1987) (exempting nonprofit charitable organizations). *See generally* 3 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Sales*, § 320(33) (9th ed. 1987) (discussing regulation of ticket sales).
3. CAL. BUS. & PROF. CODE § 22501 (West 1987); *see id.* (requiring ticket sellers to maintain records of ticket sales, deposits, and refunds).
4. *Id.* § 22500(a) (amended by Chapter 1132).
5. *Id.* § 22507 (West 1987).
6. *Id.* § 22505 (West 1987); *see* CAL. PENAL CODE § 19 (West 1988) (setting penalties for misdemeanors at a maximum of six months of imprisonment and/or a $1000 fine, unless prescribed otherwise by another law).
7. CAL. BUS. & PROF. CODE § 17500 (West 1987); *see id.* (providing that the dissemination of false or misleading advertisements is a misdemeanor punishable by up to six months of imprisonment and/or a $2500 fine); *see also* Kahn v. Medical Bd., 12 Cal. App. 4th 1834, 1846, 16 Cal. Rptr. 2d 385, 392 (1993) (stating that false advertising does not require criminal intent, and that California Business and Professions Code § 17500 can be violated through negligence).
8. CAL. BUS. & PROF. CODE § 22502.1 (enacted by Chapter 1132).
9. *Id.* § 22502.1(c) (enacted by Chapter 1132).

she will deliver a ticket at a specified price, and then fail to do so.[10] Additionally, Chapter 1132 increases civil and criminal sanctions for violations.[11]

INTERPRETIVE COMMENT

Chapter 1132 was enacted to protect consumers from ticket sellers who sell tickets that they do not possess and later cannot deliver or will only deliver at a higher than agreed-upon price.[12] Chapter 1132 is in response to problems with the 1994 Rose Bowl, where many out-of-state consumers purchased tickets that the ticket sellers did not yet have in their possession.[13]

Jonathan P. Hobbs

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10. *Id.* § 22502.2 (enacted by Chapter 1132).

11. *Id.* §§ 22500, 22502.3 (enacted by Chapter 1132); *see id* § 22500(b) (amended by Chapter 1132) (stating that a violation shall be a misdemeanor punishable by up to six months of imprisonment and/or a $2500 fine); *id.* § 22500(c) (amended by Chapter 1132) (providing for civil penalties of up to $2500 for violations of California Business and Professions Code § 22500); *id* § 22502.3 (enacted by Chapter 1132) (stating that in addition to any other remedy, a ticket seller who fails to supply a ticket at the contracted price may be liable to the purchaser for twice the contracted price, as well as nonrefundable expenses incurred by the buyer attempting to attend the event and reasonable attorney' fees).

12. ASSEMBLY COMMITTEE ON CONSUMER PROTECTION, GOVERNMENTAL EFFICIENCY AND ECONOMIC DEVELOPMENT, COMMITTEE ANALYSIS OF AB 3083, at 2 (Apr. 6, 1994); *see* SENATE COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF AB 3083, at 3 (June 13, 1994) (describing the ticket industry practice of brokers selling tickets that they do not actually possess).

13. ASSEMBLY COMMITTEE ON CONSUMER PROTECTION, GOVERNMENTAL EFFICIENCY AND ECONOMIC DEVELOPMENT, COMMITTEE ANALYSIS OF AB 3083, at 2 (Apr. 6, 1994); *see id.* (discussing the problem where hundreds, or perhaps thousands, of Wisconsin football fans purchased 1994 Rose Bowl packages and did not receive their tickets); SENATE COMMITTEE ON BUSINESS AND PROFESSIONS, COMMITTEE ANALYSIS OF AB 3083, at 3 (June 13, 1994) (stating that at least 1500 complaints came from Wisconsin visitors regarding manipulation of 1994 Rose Bowl ticket prices); *see also* Laura Del Rosso & Jennifer Dorsey, *States Probe Rose Bowl Ticket Scam*, TRAVEL WKLY., Jan. 20, 1994, at 4 (stating that the California Legislature is considering legislation to prevent future problems similar to the Rose Bowl ticket incident); Wendy Witherspoon & Bob Wolf, *Ticket Shortage Has Wisconsin Fans in Uproar*, L.A. TIMES, Dec. 31, 1993, at 1 (discussing the problems of the 1994 Rose Bowl and stating that expected ticket prices increased drastically or tickets became completely unavailable due to brokers selling tickets they did not yet have).