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Consumer Protection

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Consumer Protection

Consumer Protection; false advertising

Business and Professions Code §17509 (new).
AB 4032 (Felando); 1984 STAT. Ch 643

Existing law prohibits a person from making false or misleading statements in advertisements.¹ Violation of false advertising laws is a misdemeanor punishable by imprisonment of up to six months, a fine of up to \$2500, or both.² In addition, existing law provides that violators of false advertising laws are subject to injunctive³ and civil penalties of up to \$2500 for each violation.⁴

Chapter 643 prohibits the advertising of a product or service that requires, as a condition of sale, the purchase or lease of a different product or service, without conspicuously disclosing in the advertisement the price of all conditional purchase requirements.⁵ Violators of Chapter 643 are subject to existing penalties imposed for violations of false advertising laws.⁶ Chapter 643 specifically excludes from the price disclosure requirement a seller whose contractual plan or arrangement calls for merchandise to be periodically shipped to a consumer who has previously consented to receive the merchandise on a periodic basis.⁷

1. CAL. BUS. & PROF. CODE §17500. A statement in an advertisement that is deceptive or misleading is a violation of section 17500 of the Business and Professions Code, without regard to any specific intent to deceive or the truth or falsity of the statement. *Audio Fidelity, Inc. v. High Fidelity Recording, Inc.*, 283 F.2d. 551, 555 (9th cir. 1960).

2. CAL. BUS. & PROF. CODE §§17500, 17534; *see also* CAL. PENAL CODE §19 (providing for punishment of a misdemeanor where not otherwise specified).

3. CAL. BUS. & PROF. CODE §17535; *see also id.* §17535.5. A person who intentionally violates any injunction issued pursuant to section 17535 is liable for a civil penalty not to exceed \$6,000 for each violation. *Id.*

4. *Id.* §17536; *see also id.* §§17200 (incorporating the statutory prescriptions of false and misleading advertising into the definition of unfair competition), 17203-17207 (providing remedies and penalties for violation of unfair competition laws).

5. CAL. BUS. & PROF. CODE §17509(a).

6. *Id.* §§17534 (criminal penalties), 17534.5 (providing for cumulative remedies), 17535 (injunctive penalties), 17536 (civil penalties); *see also id.* §§17206-17207 (providing remedies and penalties for violation of unfair competition laws), 17534.5, 17205 (specifying that remedies or penalties for violations of false advertising laws are cumulative).

7. *Id.* §17509(b)(2). The examples given as qualifying for the exemption or exclusion are: (1) continuity plans; (2) subscription arrangements; and (3) standing order arrangements where the seller ships merchandise to the consumer who has previously consented to receive the merchandise on a periodic basis. *Id.*

In addition, Chapter 643 excludes from the price disclosure requirement contractual plans or arrangements under which the seller periodically provides the consumer with a form or announcement card⁸ that the consumer may use to instruct the seller not to ship the offered merchandise.⁹ Chapter 643 requires the seller to specify the date by which the form or card must be mailed by the consumer¹⁰ or received by the seller¹¹ in order to prevent the shipment of the offered merchandise.¹² Moreover, in order for the contractual plan or arrangement to qualify for the disclosure exclusion under Chapter 643, the form or announcement card must be a pre-addressed postal reply card or must include a pre-addressed return envelope for returning the form or announcement card to the seller.¹³ Chapter 643 also requires that the contract, or the application form for the contractual plan or arrangement, clearly and conspicuously disclose the material terms of the contract,¹⁴ including the following: (1) aspects of the plan that explain how the subscriber is to notify the seller if the subscriber does not wish to purchase the offered merchandise;¹⁵ (2) the existence of a minimum quantity purchase requirement;¹⁶ (3) the right of the subscriber to cancel the contractual membership at any time;¹⁷ and (4) whether charges will include postage and handling costs.¹⁸

Finally, Chapter 643 specifically does not apply to publishers, radio or television broadcasters, or owners of cables, satellites, or other mediums of communication who broadcast or publish an advertisement in good faith without knowledge of a violation of Chapter 643.¹⁹

8. *Id.* §17509(b). Chapter 643 provides the seller with three alternatives for mailing the form or announcement card to the consumer. *Id.* The seller must mail the announcement card containing the shipping instructions at least 25 days prior to the date by which the card must be returned to the seller, or the seller may simply allow a mailing date of at least ten days after the consumer has received the announcement card. *Id.* The mailing procedure chosen by the seller must ultimately provide the consumer at least ten days to return the announcement card to the seller. *Id.*

9. *Id.* To qualify for the exclusion, any instructions not to ship merchandise included on the form or card will be printed in type as large as all other instructions and terms stated on the form or card. *Id.*

10. *See supra* note 8 and accompanying text.

11. The date by which the seller must receive the form or card from the consumer is the return date. CAL. BUS. & PROF. CODE §17509(b).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* §17509(b)(1)(A).

16. *Id.* §17509(b)(1)(B).

17. *Id.* §17509(b)(1)(C).

18. *Id.* §17509(b)(1)(D).

19. *Id.* §17509(c).

Consumer Protection; gifts and prizes as part of an advertising plan

Business and Professions Code §17537.1 (new); §17537 (amended); §17539 (amended).

AB 1992 (Tanner and Wright); 1984 STAT. Ch 101

Chapter 101 modifies existing law regarding gifts and prizes awarded as part of an advertising plan or program.¹ In addition, Chapter 101 expands existing law regulating contests and puzzles that are not directly related to an advertising plan or program.²

Advertising Plan or Program

Under existing law, notifying any person as part of an advertising plan that a prize has been won conditioned upon purchasing or renting goods or services is unlawful.³ Chapter 101 makes it unlawful to notify a person that they will *receive a gift*, if the gift is conditioned upon the purchase or rental of goods or services.⁴ Additionally, requiring the payment of money as a condition of receiving the prize or gift is unlawful under Chapter 101.⁵

A. Required Information

With the enactment of Chapter 101, an individual is prohibited from offering any item⁶ as part of an advertising plan or program in order to induce the recipient to visit a location, attend a sales presentation, or contact a sales agent unless the following information is conspicuously disclosed in writing,⁷ and included in the offer:⁸ (1) the name and address of the owner of the real or personal property or the provider of the services that are the subject of the visit, sales presentation, or contact with a sales agent;⁹ (2) the purpose of any requested visit, sales presentation, or contact with a sales agent, including a general description of the property or services and a general

1. Compare CAL. BUS. & PROF. CODE §17537 with 1970 Cal. Stat. c. 1119, §1, at 1989-90 (enacting CAL. BUS. & PROF. CODE §17537).

2. Compare CAL. BUS. & PROF. CODE §17539.1 with 1974 Cal. Stat. c. 1152, §4, at 2442 (enacting CAL. BUS. & PROF. CODE §17539.1).

3. *Id.* §17537. Punishment is imprisonment in the county jail for up to six months or a fine of not more than \$2500. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* §17537.1 (item includes any prize, gift, money or item of value).

7. The writing must be in easily understandable language. *Id.*

8. *Id.*

9. *Id.* §17537.1(a)(1).

description of the business;¹⁰ (3) a statement of the odds of receiving each item offered;¹¹ (4) an explanation of all restrictions, conditions and qualifications which must be satisfied before receiving the item, including, but not limited to, deadlines, duration of the visit or sales presentation, minimum age requirements, financial qualifications,¹² and whether both spouses are required to attend;¹³ (5) a statement reserving the right to provide a raincheck or a substitute item, if the owner wants to reserve that alternative;¹⁴ and (6) a statement that a recipient will receive, upon request, evidence that the item provided matches the item selected randomly or otherwise for distribution.¹⁵

B. Availability of Prize or Gift

Chapter 101 prohibits offering an item as part of an advertising scheme when the offeror has reason to know that the offered item will not be available in sufficient quantity to meet the anticipated response to the offer.¹⁶ Failure to provide any offered item to a recipient who has correctly responded to the offer and fulfilled all requirements and qualifications is unlawful unless the item is not reasonably available and the offer includes a substitution or raincheck provision.¹⁷

When an offered item cannot be provided due to unforeseeable or uncontrollable supply, quantity, or quality limitations, Chapter 101 requires the offeror¹⁸ to inform the recipients of their right to receive a raincheck for the item offered.¹⁹ If the offeror knows or has reason to know that the item will not be reasonably available, the recipients must be informed of their right to receive a like or substitute item.²⁰ When a raincheck is provided, the offeror must deliver the item within a reasonable time not to exceed eighty days.²¹ Chapter 101 allows the offeror an additional thirty days to deliver the agreed upon item or substitute²² if the item for which the raincheck is provided continues

10. *Id.* §17537.1(a)(2).

11. *Id.* §17537.1(a)(3).

12. Any financial qualifications must be stated with sufficient specificity to enable recipients to reasonably determine their eligibility. *Id.* §17537.1(a)(4).

13. *Id.*

14. *Id.* §17537.1(a)(5).

15. *Id.* §17537.1(a)(6).

16. *Id.* §17537.1(b).

17. *Id.* §17537.1(c).

18. *Id.* §17537.1 (offeror includes any employee or agent of the offeror).

19. *Id.* §17537.1(d)(1), (2).

20. *Id.* §17537.1(d)(3).

21. *Id.* §17537.1(e).

22. The substitute must be of equal or greater retail value. *Id.*

to be unavailable due to limitations of supply, quantity, or quality not reasonably foreseeable or controllable by the offeror.²³ In addition, Chapter 101 grants a recipient who has received, or has a right to receive, any offered item the right to request from the offeror evidence showing that the provided item matches the one selected randomly or otherwise for distribution to the recipient.²⁴

C. Misrepresentation

Under Chapter 101, an offeror may not (1) misrepresent the size, quantity, identity, or qualities of the items offered,²⁵ (2) misrepresent the odds of receiving the prize or gift,²⁶ (3) represent that the number of entrants is limited or a winner already has been selected unless that is true,²⁷ (4) label an offer a notice of termination or cancellation,²⁸ or (5) otherwise misrepresent the offer, plan or program.²⁹

Chapter 101 requires items distributed randomly by the assignment of a number actually be assigned by the offeror or an independent contractor.³⁰ The offeror or independent contractor must keep records³¹ for one year after the date the offer is made showing that the winning numbers or opportunity to receive the gift or prize were mailed or made available and were in accordance with the odds stated in the offer.³² The records are to be made available to the Attorney General within thirty days after a written request is made.³³

Contest Representations

Chapter 101 expands existing law regarding contests and games that are not directly part of an advertising plan or program³⁴ and specifically provides that the provisions for contests do not apply to an advertising plan or program.³⁵

Existing law prohibits a contest operator from falsely representing

23. *Id.*

24. *Id.* §17537.1(f).

25. *Id.* §17537.1(g)(1).

26. *Id.* §17537.1(g)(2).

27. *Id.* §17537.1(g)(3).

28. *Id.* §17537.1(g)(4).

29. *Id.* §17537.1(g)(5).

30. *Id.* §17537.1(h).

31. Chapter 101 includes postal receipt records, affidavits of mailing, or a list of winners or recipients of the major prizes in the definition of records. *Id.*

32. *Id.* §17537.1.1 (writing must be in easily understandable language).

33. *Id.*

34. Compare *id.* §17539.1 with 1974 Cal. Stat. c. 1152, §2, at 2444 (enacting CAL. BUS. & PROF. CODE §17539.1).

35. *Id.*

that a winner has been selected,³⁶ or that the number of participants has been limited.³⁷ In addition, Chapter 101 prohibits direct or implied representations that a particular person has won a prize unless a real contest has taken place in which at least a majority of the participants did not win a prize.³⁸ Chapter 101 also prohibits direct or implied representations that a participant has won a prize without disclosing the exact nature and approximate value of the prize.³⁹

36. *Id.* §17539.1(a)(8).

37. *Id.*

38. *Id.* §17539.1(a)(9).

39. *Id.* §17539.1(a)(10).

Consumer Protection; engine manufacturer disclosure

Vehicle Code §§9980, 9981, 9982, 11713.9 (new).

AB 2307 (Bane); 1984 STAT. Ch 1264

Existing law makes unlawful a statement publicly disseminated by a motor vehicle manufacturer¹ dealer² or salesperson which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.³ Chapter 1264 specifies that when the manufacturer of the engine of a new motor vehicle differs⁴ from the manufacturer of the vehicle,⁵ the vehicle manufacturer must affix a prominent label to the vehicle stating that the engine may have been manufactured by another manufacturer.⁶ The label is not required, however, if the engine manufacturer is disclosed in the sales literature

1. CAL. VEH. CODE §672 (definition of vehicle manufacturer).

2. *Id.* §285 (definition of dealer).

3. *Id.* §11713(a). "Publicly disseminate" has been interpreted to include omissions of crucial information in one-on-one discussions between automobile dealers and customers. *See Ford Dealers Association v. Department of Motor Vehicles*, 32 Cal. 3d 347, 357, 650 P.2d 328, 333, 185 Cal. Rptr. 453, 458 (1982).

4. A vehicle manufacturer is different from the vehicle engine manufacturer if a majority of the parts of the engine or most of the work in the assembly of the engine is provided by a person other than the vehicle manufacturer or by a subsidiary or an affiliate of the vehicle manufacturer. CAL. VEH. CODE §9980; *see id.* (definition of affiliate).

5. *Id.* §415 (definition of motor vehicle); *see also id.* §430 (definition of new vehicle); For similar disclosure requirements for remanufactured vehicles, *see id.* §11713.7.

6. *Id.* §9981. The label must be placed on or adjacent to the window sticker identifying the manufacturer's suggested retail price for the vehicle. *Id.* If no suggested retail price is provided, the label must be located on or adjacent to the window sticker identifying the equipment provided with the vehicle. *Id.*

or in the sales contract.⁷ In addition the holder of a dealer's license may not knowingly display for sale or offer for sale any new motor vehicle not prominently labeled to state that the engine may have been manufactured by a manufacturer that is not the same as the manufacturer of the vehicle itself.⁸ Chapter 1264 applies to new passenger vehicles⁹ and to new motor trucks¹⁰ other than housecars, with an unladen weight¹¹ under 6,000 pounds.¹²

7. *Id.*

8. *Id.* §11713.9(a) (punishable as a misdemeanor).

9. *Id.* §465 (definition of passenger vehicles).

10. *Id.* §410 (definition of motor truck).

11. *Id.* §660 (definition of unladen weight).

12. *Id.* §§9982, 11713.9(b).

Consumer Protection; deceptive advertising

Civil Code §1770 (amended).

AB 2979 (Molina); 1984 STAT. Ch 1171

In 1970, the California Legislature enacted the Consumers Legal Remedies Act¹ which proscribes the use of specific unfair methods of competition and unfair or deceptive acts or practices intended to result or resulting in the sale or lease of goods or services to a consumer.² A consumer who is damaged as a result of these practices may bring either an individual or class action³ for actual damages, injunctive relief, punitive damages, or any other relief the court deems proper.⁴

Chapter 1171 extends the list of prohibited practices to include advertising⁵ that a product⁶ is offered at a specific price plus a specific percentage of that price,⁷ unless the total price of the product is

1. CAL. CIV. CODE §§1750-1789.

2. *Id.* Within the Consumers Legal Remedies Act, consumer refers to an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household use. *Id.* §1761(d). *See id.* §1761(c) (these acts may not be committed by any person, including individuals, partnerships, corporations, or other groups).

3. *See generally id.* §1781 (requirements for maintaining a class action based on practices proscribed by CAL. CIV. CODE §1770).

4. *Id.* §1780.

5. CAL. HEALTH & SAFETY CODE §26002 (advertisements include all representations intended to induce or that induce purchase or use).

6. CAL. BUS. & PROF. CODE §17024 (a product is any article, product, commodity, thing of value, service, or output of a service trade).

7. *See, e.g.,* 28 OP. ATT'Y. GEN. 277 (1956) (the California Attorney General determined that dry cleaners placing an additional five percent charge on the sales tag was unfair).

displayed in a size larger than any other price in the advertisement⁸ and the percentage price represents a markup from the seller's cost or from the wholesale price.⁹

8. The advertisement may include, but is not limited to, shelftags, displays, and media advertising. CAL. CIV. CODE §1770(t).

9. *Id.*

Consumer Protection; prepaid rental listing services

Business and Professions Code §§10167.9, 10167.10 (amended).
AB 2331 (Cortese); 1984 STAT. Ch 587

Existing law regulates prepaid rental listing services¹ and requires the licensing of any person or business rendering those services.² Chapter 587 revises the statutory licensing requirements for prepaid rental listing services,³ and increases the amount of recoverable damages against a licensee⁴ who, in bad faith, fails to make a refund to a customer as required by existing law.⁵

Contractual Provisions

Existing law requires that prior to the acceptance of a fee from a prospective tenant, a prepaid rental listing service licensee must provide the prospective tenant with a written contract⁶ containing specific information about the services that are offered.⁷ The contract must include a clause setting forth the customer's right to a full refund of the fee paid in advance in the event the licensee fails to comply with the provisions of existing law.⁸ Chapter 587 requires that this

1. CAL. BUS. & PROF. CODE §10167(a) (a prepaid rental listing service is the business of supplying prospective tenants with listings of residential property available for tenancy, in consideration of a fee paid in advance of, or contemporaneously with, the supplying of the listing).

2. *Id.* §§10167-10167.16.

3. Compare 1980 Cal. Stat. c. 1051, §2, at 3372 (enacting CAL. BUS. & PROF. CODE §§10167-10167.16) with CAL. BUS. & PROF. CODE §§10167.9, 10167.10.

4. CAL. BUS. & PROF. CODE §10167(b) (definition of licensee).

5. Compare 1980 Cal. Stat. c. 1051, §2, at 3372 (enacting CAL. BUS. & PROF. CODE §10167.10(f)) with CAL. BUS. & PROF. CODE §10167.10(f).

6. CAL. BUS. & PROF. CODE §10167.9(a).

7. *Id.* §10167.9(a)(1)-(7); see also *Review of Selected 1980 California Legislation*, 12 PAC. L.J. 278, 280 (1981) (prepaid rental listing services-conduct of licensees).

8. CAL. BUS. & PROF. CODE §§10167.9(a)(6), 10167.10.

clause set forth the right to a partial refund as well as a full refund of the fee paid in advance.⁹ In addition, Chapter 587 imposes a requirement that the contract contain a clause outlining the small claims court remedy available to the prospective tenant in the event the licensee does not abide by the terms of the contract.¹⁰

Under existing law, a licensee is required to file a form of the contract to be used by the licensee with the Department of Real Estate (hereinafter referred to as the Department).¹¹ Under prior law, the Department could issue a license to perform prepaid rental listing services immediately after the proposed contract was filed.¹² Chapter 587 provides that the Department of Real Estate must withhold the issuance or renewal of a license until the proposed contract has been *approved* by the Department.¹³

Damages

Under existing law, in addition to actual damages sustained, a prospective tenant is entitled to recover a limited amount of court awarded damages if the licensee fails to make a refund and the denial or delay in making the refund is found to have been committed in bad faith.¹⁴ Chapter 587 increases the amount of court awarded damages recoverable for a bad faith refusal to make a refund from \$200 to \$500.¹⁵

9. Compare 1980 Cal. Stat. c. 1051, §2, at 3372 (enacting Cal. Bus. & Prof. Code §§10167-10167.16) with CAL. BUS. & PROF. CODE §10167.9(a)(6); see also *Review of Selected 1980 California Legislation*, 12 PAC. L.J. 278, 281 (1981) (prepaid rental listing services right to refund).

10. CAL. BUS. & PROF. CODE §§10167.9(a)(8), 10167.10(f).

11. *Id.* §10167.9(c).

12. 1980 Cal. Stat. c. 1051, §2, at 3372, 3374 (enacting CAL. BUS. & PROF. CODE §§10167.2, 10167.9(a)).

13. CAL. BUS. & PROF. CODE §10167.9(c).

14. *Id.* §10167.10(f).

15. Compare 1980 Cal. Stat. c. 1051, §2, at 3375 (enacting CAL. BUS. & PROF. CODE §10167.10(f)) with CAL. BUS. & PROF. CODE §10167.10(f).

Consumer Protection; counterfeit trademarks

Business and Professions Code §§14341, 14342 (amended); Penal Code §350 (new).

AB 3008 (Davis); 1984 STAT. Ch 1016

Existing law authorizes the owner of a registered¹ trademark² or service mark³ to bring an action enjoining the manufacture, use,⁴ display, or sale of counterfeit⁵ goods⁶ or services.⁷ The court may award trademark and service mark owners up to three times the profit resulting from the wrongful use of the trademark or service mark, and up to three times all resulting damage suffered by the owner.⁸ In addition, existing law provides that after a court determines a mark is counterfeit,⁹ the court may order the destruction of the counterfeit mark, all means of making the mark, and all goods, articles or other matters bearing the mark which are in the possession or control of the court or any party to the action.¹⁰ Alternatively, after destruction of the counterfeit mark, a court may order disposal of the goods by transfer to the State of California, a civil claimant, a charitable institution, or any appropriate private person other than the person from whom the goods were obtained.¹¹

In an apparent attempt to curtail the widespread practice of trademark infringement,¹² Chapter 1016 adds specific criminal counterfeiting penalties¹³ to existing civil¹⁴ and criminal remedies.¹⁵ Chapter 1016 provides that an individual may be fined not more than \$5,000 or imprisoned for not more than one year, or both, for willfully manufacturing or intentionally selling without the consent of the

1. See CAL. BUS. & PROF. CODE §§14200-14342 (provisions for registration of trademarks and service marks with the Secretary of State).

2. *Id.* §14207 (definition of trademark); see *Dollcraft Co. v. Nancy Ann Storybook Dolls*, 94 F. Supp. 1, 4 (N.D. Cal. 1951) (the purpose of a trademark is to distinguish the goods of one person from those of another, and the primary and proper function is to identify the origin or ownership of the article to which the trademark is affixed).

3. CAL. BUS. & PROF. CODE §14206 (definition of service mark).

4. *Id.* §14209 (definition of use of trademark).

5. *Id.* §14340(h) (counterfeit is defined as a spurious mark that is identical with, or substantially indistinguishable from, a registered mark that is used on or in connection with counterfeit goods or counterfeit services for which the genuine mark is registered).

6. *Id.* §14291 (description of what is classified as goods).

7. *Id.* §§14340(a); 14292 (description of what is classified as services).

8. *Id.* §14340(a).

9. CAL. PENAL CODE §350(e) (definition of counterfeit mark).

10. CAL. BUS. & PROF. CODE §14340(a) (provides for destruction or transfer of counterfeit goods).

11. *Id.* See generally *Review of Selected 1983 California Legislation*, 15 PAC. L.J. 491 (1984) (penalties for counterfeiting trademarks).

12. Existing civil sanctions against commercial counterfeiters have entirely failed to control the immense problem of commercial counterfeiting. Rakoff, *Commercial Counterfeiting: The Inadequacy of Existing Remedies*, 73 TRADEMARK REP. 493, 534 (1983).

13. CAL. PENAL CODE §350. See generally Rakoff, *supra* note 12, at 515 (existing civil sanctions often are not effective against counterfeiters because monetary penalties are more than offset by profits).

14. CAL. BUS. & PROF. CODE §14340 (civil remedies for forged and counterfeited trademarks).

15. *Id.* §14341 (registrant may prosecute under any applicable section of the Penal Code).

registrant a counterfeit of a mark.¹⁶ An individual previously convicted of violating Chapter 1016 provisions, upon a subsequent conviction, may be fined not more than \$50,000 or imprisoned for not more than one year, or both.¹⁷ A corporation may be fined a maximum of \$100,000 for the first violation and a maximum of \$200,000 for subsequent violations.¹⁸

Chapter 1016 imposes specific penalties for conduct that has directly and foreseeably caused death or great bodily injury to another who had relied on the counterfeited item for its intended purpose.¹⁹ An individual may be fined not more than \$50,000 or imprisoned for two, three, or four years, or both.²⁰ A corporation may be fined not more than \$200,000.²¹

Under existing law, a registered service mark is not enforceable against a party who has adopted and lawfully used²² the same or a confusingly similar service mark in the performance of like services in the State of California from a date prior to the effective date of registration.²³ Chapter 1016 extends the scope of existing law by making a *registered trademark* unenforceable against a party who has adopted and lawfully used the same or a confusingly similar trademark for the manufacture or sale of like goods prior to the effective date of trademark registration.²⁴

16. CAL. PENAL CODE §350(a). Mark must be registered with the Secretary of State and registerable under 15 U.S.C. section 1052 or incontestable under 15 U.S.C. section 1065. *Id.*

17. CAL. PENAL CODE §350(b).

18. *Id.* §350.

19. *Id.* §350(c).

20. *Id.*

21. *Id.* But see generally CAL. PENAL CODE §351(a). A person who sells goods, products, or output, which are willfully and falsely represented to be other than that of the true manufacturer or producer, is subject to a maximum fine of \$600 or a maximum of 90 days in the county jail, or both, when no counterfeit trademark or service mark is involved. *Id.*

22. CAL. BUS. & PROF. CODE §14209 (definition of use of trademark and service mark).

23. *Id.* §14342; see also *id.* §14210 (protection of rights in marks acquired in good faith at common law); *North Carolina Dairy Foundation, Inc. v. Foremost-McKesson, Inc.*, 92 Cal. App. 3d 98, 107 n.5, 154 Cal. Rptr. 794, 798 n.5 (1979). Registration constitutes presumptive evidence of ownership of a mark, but is not a required condition to establish a protectable proprietary interest under common law. *Id.*

24. Compare CAL. PENAL CODE §350(f) (penalties for counterfeit goods without counterfeit trademarks attached) with CAL. BUS. & PROF. CODE §14342 (penalties for counterfeit goods with counterfeit trademark or service mark attached).

Consumer Protection; credit services organizations

Civil Code §§1789.10, 1789.11, 1789.12, 1789.13, 1789.14, 1789.15,

1789.16, 1789.17, 1789.18, 1789.19, 1789.20, 1789.21, 1789.22,
1789.23 (new).

AB 3654 (Calderon); 1984 STAT. Ch 1177

Chapter 1177 enacts the Credit Services Act of 1984¹ providing prospective buyers² with the information needed to make intelligent decisions regarding the purchase of credit services and to protect the public from deceptive and unfair practices.³ Under Chapter 1177, a credit services organization is an individual, corporation, partnership or joint venture⁴ that sells, provides, or performs services, or represents the individual, corporation, partnership or joint venture and can sell, provide or perform services to improve a buyer's credit record, history or rating or to obtain an extension of credit⁵ for the buyer.⁶

Restrictions on Credit Services Organizations

Under Chapter 1177, a credit services organization⁷ may not (1) charge or receive money⁸ without full and complete performance of the agreed upon services unless the company has a surety bond or a trust account at a federally insured bank or savings and loan⁹ or (2) charge or receive money for referring a credit buyer to a retail seller offering to extend credit on substantially the same terms as those available to the general public.¹⁰ A credit services organization also is prohibited from making, counseling, or advising a buyer to make an untrue or misleading statement regarding the buyer's

1. CAL. CIV. CODE §1789.10.

2. Buyer is defined as any person who is solicited to purchase or who purchases the services of a credit services organization. *Id.* §1789.12(b).

3. *Id.* §1789.11(b).

4. *Id.* §1789.12(d).

5. Extension of credit means the right to defer payment of debt or to incur debt and defer its payment, offered or granted primarily for personal, family, or household purposes. *Id.* §1789.12(c).

6. *Id.* §1789.12(a). A credit services organization does not include certain banks, savings and loan associations, real estate brokers, attorneys, or non-profit organizations. *Id.*

7. The provisions of Chapter 1177 apply to credit services organizations, including salespersons, agents, representatives, or independent contractors who sell or attempt to sell credit services. *Id.* §1789.13.

8. Money includes any valuable consideration. *Id.* §1789.13(a).

9. *Id.* The bond or trust account will be in an amount equal to five percent of the total amount of the fees charged by the credit services organization during the previous 12 months, but in no case shall the bond or trust account be less than \$5,000 or more than \$25,000. *Id.* §1789.18(d).

10. *Id.* §1789.13(b).

creditworthiness or credit standing,¹¹ or making any false or misleading representations in the offer or sale of credit services.¹²

Written Statement

Chapter 1177 requires credit service organizations to provide a written statement to a buyer before a contract is executed, services provided, or money is paid.¹³ The statement must include the following: (1) an explanation that the buyer may review files on the buyer maintained by any consumer credit agency;¹⁴ (2) a complete statement of the buyers' right to dispute the completeness or accuracy of the files;¹⁵ (3) a complete and detailed description of the services to be performed for the buyer by the consumer services organization;¹⁶ and (4) the total amount of the fee to be charged.¹⁷ If the credit services organization is required to obtain a bond or establish a trust account,¹⁸ the statement must include an explanation of the buyer's right to proceed against the bond or trust account as well as the name and address of the surety company or trustee.¹⁹

Contract

Under Chapter 1177, every contract between a credit service organization and a buyer must be in writing, dated, and signed by the buyer.²⁰ The contract also must include the following: (1) a conspicuous clause giving the buyer the right to cancel within five days after the date of the transaction;²¹ (2) the terms and conditions of the buyer's payment;²² (3) a full and detailed description of the services to be performed by the credit services organization;²³

11. *Id.* §1789.13(c).

12. *Id.* §1789.13(d).

13. *Id.* §1789.14. The statement must specify that the file will be furnished free of charge by the consumer credit reporting agency if requested within thirty days after the buyer has been notified of a denial of credit. *Id.* §1789.15(a).

14. *Id.* §1789.15(a).

15. *Id.* §1789.15(b).

16. *Id.* §1789.15(c).

17. *Id.*

18. *See id.* §1789.18 (procedure for obtaining a bond or trust account).

19. *Id.* §1789.15(d).

20. *Id.* §1789.16(a).

21. *Id.* §1789.16(a)(1). The clause must be at least equal in size to 10-point bold type and state: "You, the buyer, may cancel this contract at any time prior to midnight of the fifth day after the date of the transaction. See attached notice of cancellation form for an explanation of this right." *Id.*

22. *Id.* §1789.16(a)(2).

23. *Id.* §1789.16(a)(3). The description of services must include all guarantees and promises for refunds, and the estimated length of time for services or the date services are to be performed. *Id.*

(4) principal business address of the credit services organization;²⁴ (5) the name and address of the agent authorized to receive service of process;²⁵ and (6) a notice of cancellation form.²⁶ Any waiver by a buyer of the provisions of Chapter 1177 is contrary to public policy and is void and unenforceable.²⁷

Violations

A violation of the provisions of the Credit Services Organization Act is a misdemeanor.²⁸ The Attorney General, district attorneys and city attorneys, may prosecute misdemeanor actions or institute equity proceedings enjoining violations of the provisions of Chapter 1177.²⁹ In any proceeding under Chapter 1177, the person claiming an exemption or an exception from a definition has the burden of proof.³⁰ In addition, a buyer injured by violations of Chapter 1177 may bring an action for recovery of damages.³¹

24. *Id.* §1789.16(a)(4).

25. *Id.*

26. *Id.* §1789.16(b). Chapter 1177 provides the exact form which must be attached. *Id.*

27. *Id.* §1789.19(a). An attempt by a credit services organization to have a buyer waive rights under Chapter 1177 is considered a violation of the Chapter. *Id.*

28. *Id.* §1789.20(a). The provisions of this section do not apply to a seller's breach of contract subject to Chapter 1177. *Id.* §1789.20(b).

29. *Id.* §1789.20(a).

30. *Id.* §1789.19(b).

31. *Id.* §1789.21. Judgment will be entered for actual damages, but in no case less than the amount paid by the buyer to the credit services organization, plus reasonable attorney's fees and costs. Punitive damages also may be awarded. *Id.*

Consumer protection; patient access to health records

Health and Safety Code §§25251, 25253 (amended).

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Under existing law, individuals have a right of access to complete information regarding their health care or the health care of those for whom they are legally responsible.¹ Existing law permits an adult patient,² a minor patient legally authorized to consent to medical

1. CAL. HEALTH & SAFETY CODE §25250. See *Review of Selected 1982 California Legislation*, 14 PAC. L.J. 521 (1983) (analysis of health records access laws).

2. CAL. HEALTH & SAFETY CODE §25251(c) (patient defined as a current patient or former patient of a health care provider).

treatment, or a patient's representative³ to have access to patient records⁴ from the health care provider⁵ within five days after presenting a written request.⁶ Chapter 223 expands the definition of health care provider to include (1) licensed marriage, family, and child counselors,⁷ and (2) licensed clinical social workers.⁸

Existing law provides that a minor's legal representative is not entitled to inspect or obtain copies of the patient records if the minor is legally authorized to consent to the treatment described in the records⁹ or if the health care provider determines that disclosure will adversely affect the health care provider's professional relationship with the minor patient.¹⁰ Under Chapter 223, the representative also may be denied access to a minor's patient records if the health care provider determines that disclosure will have a detrimental effect on the minor's physical safety or psychological well being.¹¹

3. *Id.* §25251(e) (defining patient's representative as a minor patient's parent or guardian or conservator of an adult patient). *But see* CAL. PROB. CODE §1485. A guardian of an adult is deemed to be a conservator. *Id.*

4. CAL. HEALTH & SAFETY CODE §25251(b), (d), (f) (defining mental health records, patient records, and alcohol and drug abuse records).

5. *Id.* §25251(a) (definition of health care provider). The term "health care provider" has been defined inconsistently throughout the California codes. *Compare id. with* CAL. CIV. CODE §56.05(d), CAL. BUS. & PROF. CODE §6146(c)(2), *and* CAL. CIV. PROC. CODE §1295(g)(1).

6. CAL. HEALTH & SAFETY CODE §25252(a).

7. *Id.* §24241(a)(9); *see also* CAL. BUS. & PROF. CODE §§4980-4984 (marriage, family and child counselor licensing provisions).

8. CAL. HEALTH & SAFETY CODE §25251(a)(10). *See also* CAL. BUS. & PROF. CODE §§9000-9076 (clinical social worker licensing provisions).

9. CAL. HEALTH & SAFETY CODE §25253(a)(1). Any minor who has contracted a lawful marriage or is on active duty with the armed services can consent to medical treatment without consent from a parent or guardian. CAL. CIV. CODE §§25.6, 25.7. Minors who have reached the age of 12 may consent, without permission from a parent or guardian, to outpatient mental health treatment or counseling services if the minor is a victim of incest or child abuse, or if the attending professional believes the minor (1) is mature enough to intelligently participate in the treatment and (2) would be harmed physically or emotionally without the treatment. *Id.* §25.9.

10. CAL. HEALTH & SAFETY CODE §24243(a)(2).

11. *Id.* Liability does not attach to the health care provider's decision to disclose or not disclose a minor patient records unless the health care provider acted in bad faith. *Id.*

