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Consumer Protection

University of the Pacific; McGeorge School of Law

Consumer Protection

Consumer Protection; Information Practices Act of 1977

Civil Code Title 1.8 (commencing with §1798) (new).
SB 170 (Roberti); STATS 1977, Ch 709
Support: American Federation of Teachers of the University of California; California Labor Federation; California Organization of Police and Sheriffs; Intergovernmental Board on Electronic Data Processing

Establishes the Information Practices Act of 1977 to provide: (1) criteria for the collection, maintenance and disclosure of personal and confidential information by state agencies; (2) creation of the Office of Information Practices to assist individuals in identifying and gaining access to state agency records containing information about them; and (3) civil remedies and criminal penalties for violating the provisions of this Act.

Chapter 709 was enacted in response to the following situations understood to threaten the right of privacy embodied in the California Constitution [*See* CAL. CONST., art I, §1]: (1) indiscriminate collection, maintenance and dissemination of personal information and the lack of effective laws and legal remedies; and (2) the increasing use of computers and other sophisticated technological methods of collection, compilation and retention of records [CAL. CIV. CODE §1798.1(a)-(b)]. To minimize these excesses, Chapter 709 regulates the collection, maintenance, and disclosure of personal and confidential information [*See* CAL. CIV. CODE §§1798-1798.76] possessed by all state agencies except the legislature, the State Compensation Insurance Fund, and those agencies of the judicial branch established pursuant to Article VI of the California Constitution [*See* CAL. CIV. CODE §1798.3(d)(1)-(3)] with respect to the collection, maintenance and disclosure of personal and confidential information [*See* CAL. CIV. CODE §§1798-1798.76]. Personal information is defined as any information in any record maintained about an individual by an agency that is neither confidential nor nonpersonal [CAL. CIV. CODE §1798.3(b)] and that may only be disclosed to the subject of the file, and certain third parties under specified conditions [*See* CAL. CIV. CODE §1798.24]. Confidential information is defined as: (1) records maintained by an agency that is principally involved with enforcement of criminal laws; (2) written testing and examination material, the disclosure of which would compromise the objectivity or fairness of the testing process; (3) psychiatric or psychological material, the disclosure of which would, in the opinion of the holder, be medically or psychologically detrimental to the subject; (4) that information maintained by an agency for

the purpose of investigating a specific violation of state law that the agency is charged with enforcing; (5) records solely concerned with the verification and payment of government health care service claims; and (6) information that must be withheld from the subject pursuant to statute [CAL. CIV. CODE §1798.3(a)]. Confidential information generally may not be disclosed to third parties, absent specific statutory authority [*See* CAL. CIV. CODE §§1798.24, 1798.31]. Additionally, the sources of such information may be kept confidential whenever necessary to protect law enforcement activities [*See* CAL. CIV. CODE §1798.3(a)(4)]. By contrast, the disclosure of "nonpersonal" information, the collection of which is deemed nonthreatening to personal privacy, is not regulated by Chapter 709. Nonpersonal information is defined as: (1) general clerical records that could not, in any reasonable way, reflect or convey anything detrimental or threatening to the subject individual's reputation, rights, benefits or qualifications; (2) those records that contain no factors that tie the information to an identifiable individual such as telephone listings, mailing lists, and agency directories; or (3) records that an individual has the right to examine pursuant to Penal Code Sections 11120 through 11127, relating to records maintained by the Department of Justice [CAL. CIV. CODE §1798.3(c)].

Agency Collection, Maintenance, and Dissemination of Personal Information

Chapter 790 delimits the permissible scope of state information collection in an apparent effort to prevent random compilation of files [Senator David Roberti, Press Release No. 10, Sacramento, Cal., Jan. 24, 1977] by requiring that each governed agency collect only that information *relevant* and *necessary* to accomplish a specific purpose constitutionally or statutorily authorized [CAL. CIV. CODE §1798.14]. Agencies governed by this Act are now required to collect personal or confidential information, to the greatest extent practicable, from the subject of the particular record rather than another source [CAL. CIV. CODE §1798.15], and all of the records thus collected are to be kept in a relevant and timely condition so as to reflect a complete and accurate picture of the present status of the subject covered when such information is used to make any determination about the individual [*See* CAL. CIV. CODE §1798.18]. When information is solicited from an individual under a specific statutory or constitutional authorization, the collection form must reflect: (1) the name of the requesting agency and the title, business address, and telephone number of the responsible agency official; (2) the authority for collection, whether a statute, regulation, or

executive order; (3) notification as to whether submission is voluntary or mandatory and any consequences of refusal to comply; (4) the purpose for which the information is to be used by the collecting agency and any known or foreseeable intergovernmental transfers; and (5) the subject individual's right of access to the information [CAL. CIV. CODE §1798.17]. Once the information of this nature is collected, the source must be recorded in a readily accessible form for inspection pursuant to this Act, unless the source is the data subject or he or she has received a copy of the source document [*See* CAL. CIV. CODE §1798.16. *See generally* CAL. CIV. CODE §1798.34].

Covered agencies must formulate rules and regulations to insure that their employees, and the employees of any independent contractor involved in record collection, adhere to the procedures required by Chapter 709 [CAL. CIV. CODE §§1798.19, 1798.20], as well as establish safeguards to insure protection against anticipated threats or hazards to the security of the record system [CAL. CIV. CODE §1798.21]. The agency may request assistance in this effort from the Office of Information Practices, which is empowered to develop model guidelines for the implementation of Chapter 709 [CAL. CIV. CODE §1798.7]. Furthermore, one employee within each agency must be designated to administer the rules and regulations, and be responsible for insuring compliance [CAL. CIV. CODE §1798.22].

Disclosure of personal and confidential information is prohibited unless it is in conformity with the guidelines enumerated by Chapter 709. Such information may be released: (1) pursuant to an unsolicited request or prior written voluntary consent by the subject individual; (2) within the collecting agency when directly related to the purpose for which the information was collected; (3) among agencies, whenever the intended user is authorized by constitutional or statutory provision, and the use in congruent with that for which the information was collected; (4) in response to another governmental entity when required by state or federal law; (5) pursuant to the California Public Records Act [CAL. GOV'T CODE §§6250-6261]; (6) to a person who has provided adequate written assurance that such information will be used solely for statistical purposes so long as any released information is stripped of identifying material; (7) in response to compelling circumstances that threaten to affect the health or safety of an individual, and the subject is notified of the disclosure; (8) to the State Archives as an historical document; (9) in response to subpoena after reasonable attempts to notify the subject unless such notification is prohibited by law or in response to a search warrant; (10) solely to verify and pay government health care service claims; (11) in response to a law enforcement agency that requires the information for a criminal investigation and disclosure is not prohibited by law; (12) in response to a government agency's request wherein release may be necessary to enable the disclosing agency to obtain further information to

aid in enforcement of a specific state law; (13) to the duly appointed guardian or conservator of the subject individual provided there is reasonably certain documentary evidence of his or her identity and authorization; (14) to the Office of Information Practices when necessary to an investigation of a complaint or the performance of mediation and the Office has received the written, voluntary consent of the subject individual; (15) to an adopted person so long as the disclosed records provide background information about, but do not reveal the identity of his or her natural parents; (16) to a committee or member of the legislature under permission of the subject individual; (17) to nonprofit educational institutions conducting scientific research under assurances of need, procedures for protection of and assurances against further disclosure of individually identifying personal or confidential information [CAL. CIV. CODE §1798.24]; and (18) pursuant to Section 1800 of the Vehicle Code, which permits disclosure of information relating to automobile registration, licensing, or accidents so long as the requester is adequately identified and the subject is notified of the release of information [*Compare* CAL. CIV. CODE §1798.24(m) *with* CAL. CIV. CODE §1798.26].

An accurate accounting is to be kept of any disclosure of personal or confidential information, which must include date, nature, and purpose of the disclosure, as well as the name, title, and business address of each person or agency receiving the information except when such disclosure is made within the collecting agency or to another governmental entity pursuant to state or federal law and the Office of Information Practices is notified of the disclosure pursuant to Sections 1798.9 and 1798.10 [*See* CAL. CIV. CODE §1798.25]. This accounting must be retained for three years thereafter or until destruction of the record, whichever period is shorter [CAL. CIV. CODE §1798.27].

In order to reduce the likelihood of secret governmental development of dossiers on California citizens [Senator David Roberti, Press Release No. 10, Sacramento, Cal., Jan. 24, 1977], a notice of each record containing personal or confidential information is to be provided to the Office of Information Practices for maintenance as a permanent public record [CAL. CIV. CODE §1798.9]. This notice must include: (1) the name of the agency; (2) the categories and numbers of individuals included in the record; (3) each use and purpose of and legal authority for the noticed record; (4) the agency retention and disposal policies; and (5) the general source or sources of information [CAL. CIV. CODE §1798.10]. In addition, the newly established Office of Information Practices may develop regulations prescribing the form and method required to keep noticed records timely and relevant [CAL. CIV. CODE §1798.9].

Office of Information Practices

Chapter 709 directs the Executive Officer of the State Personnel Board to appoint a director and staff to form the Office of Information Practices [CAL. CIV. CODE §1798.4]. The newly formed office is to assist individuals to identify and secure access to records that may contain information about them by providing toll free telephone lines or some other "comparably effective means" [CAL. CIV. CODE §1798.5]. This Office is also charged with the responsibility of investigating complaints and reporting violations of Chapter 709, first to the violating agency and then, if the violation is not corrected within 60 days, to the Governor, the legislature, and the appropriate law enforcement agency [CAL. CIV. CODE §1798.6]. Additionally, the Office of Information Practices is given mediation powers as between a complaining individual and an agency, though mediation is *not* a precondition to civil litigation [CAL. CIV. CODE §1798.8].

Record Access Rights

Pursuant to Chapter 709, all individuals now have the right to know if any agency maintains records [CAL. CIV. CODE §1798.32] that may contain *personal*, but *not* confidential information about them [CAL. CIV. CODE §1798.31]. Agencies must allow individuals to review notices filed with the Office of Information Practices and take other reasonable steps to assist individuals in making their requests sufficiently specific to assure comprehensive disclosure [CAL. CIV. CODE §1798.32], and must promulgate rules and regulations designed to allow full implementation of the individual's right of access [CAL. CIV. CODE §1798.30]. In response to a request for the disclosure of records containing personal information, the agency shall notify the individual of the existence of a record, the title and business address of the official responsible for its maintenance, and the procedure to be followed to gain access to the record or contest its contents [CAL. CIV. CODE §1798.32]. In formulating rules and regulations specifying procedures for responding to such individual requests, an agency may include reasonable times, places, and methods for identifying an individual who requests access to and disclosure of a record [CAL. CIV. CODE §1798.32]. Additionally, a reasonable fee may be charged for providing copies of the record to the requester not to exceed ten cents per page, unless specified otherwise by statute, except that the state colleges and universities may charge the prevailing national rate for transcripts [CAL. CIV. CODE §1798.33].

Disclosure to the individual by personal inspection may only be conditioned upon the showing of proper identification and the inspection must occur within 30 days of a request for an active record and 60 days for an inactive record [CAL. CIV. CODE §1798.34], and a request for an exact copy thereafter must also be honored although there is no direct time provision

specified [CAL. CIV. CODE §1798.34(e)]. The individual may also choose to be accompanied by another when inspecting the record and he or she is entitled to an exact copy within 15 days of the inspection although the agency may require a written authorization prior to disclosure in the presence of another [CAL. CIV. CODE §1798.34(b)]. Any disclosure to the subject individual must be in a form reasonably comprehensible to the general public [CAL. CIV. CODE §1798.34(c)]. The only other burden that the agency may place upon the requesting individual relates to occasions on which access to the desired record is not feasible on the basis of the individual's name alone [*See* CAL. CIV. CODE §1798.34(d)]. In such cases the agency may require individuals to submit other identifying information to facilitate access to the requested record [CAL. CIV. CODE §1798.34(d)].

If the individual wishes to challenge an element of the record after disclosure, he or she may request in writing that the record be amended [CAL. CIV. CODE §1798.35]. Within 30 days of the receipt of this request, the agency shall either make the correction and notify the individual [CAL. CIV. CODE §1798.35(a)], or inform him or her of its refusal to amend, the reasons for the refusal, and the procedures established to obtain a review by the head of the agency, who shall be identified by name, title, and business address [CAL. CIV. CODE §1798.35(b)]. This review shall be completed within 30 days of request absent a showing of good cause, which will permit a 30-day extension of the disclosure process [CAL. CIV. CODE §1798.36]. Should the finding be adverse to the individual, that person shall be permitted to file a statement of reasonable length outlining the specifics of his or her disagreement with the decision not to amend the record in question [CAL. CIV. CODE §1798.36].

Although agencies are now required to disclose records containing personal information to the subject of such records [*See* CAL. CIV. CODE §1798.32], Chapter 709 also provides certain protections for the sources of this information [*See* CAL. CIV. CODE §1798.38]. If personal information is received by an agency prior to July 1, 1978 with an understanding of confidentiality, or subsequently, under a promise of confidentiality and the source of such information is not in a supervisory position with respect to the person to whom the record pertains, that agency must inform the subject individual of all personal information compiled on that individual *without revealing the identity of the source* [CAL. CIV. CODE §1798.38]. This qualified disclosure may be accomplished by deleting from a copy of the record only information that is necessary to protect a source's identity or by providing a comprehensive summary of the substance of the material [CAL. CIV. CODE §1798.38]. This process of deletion may also be used to separate confidential undisclosable material from personal disclosable material [CAL. CIV. CODE §1798.42] and to eliminate material that would convey informa-

tion of a personal nature relating to persons other than the subject individual [CAL. CIV. CODE §1798.41].

When an agency determines that information requested by the subject of a record is confidential, it must so inform the individual [CAL. CIV. CODE §1798.40(a)], and then independently review the information so classified within 30 days and inform the individual of this review and its result [CAL. CIV. CODE §1798.40(b)]. Should the agency believe, however, that the notification required by Section 1798.40(a) would seriously interfere with current law enforcement activities or endanger the life of an informant, it may petition a superior court for an *ex parte* order authorizing the agency to respond to the requester that *no* record is maintained [CAL. CIV. CODE §1798.40(c)]. The determination by the court of the reasonableness of the agency's request is to be made after an *in camera* review, and the resulting *ex parte* order may be issued for not more than 30 days at a time [CAL. CIV. CODE §1798.40(c)].

Remedies

Any individual who is the subject of a personal record may bring a civil action against an agency [CAL. CIV. CODE §1798.45] if the agency: (1) refuses to comply with a lawful inspection request [CAL. CIV. CODE §1798.45(a)]; (2) fails to maintain a record in a manner that would assure fairness in a determination based upon the record and such failure results in an adverse determination [CAL. CIV. CODE §1798.45(b)]; (3) fails to comply with *any* provision of Chapter 709, or any rule promulgated in relation to Chapter 709, *and* such failure leads to an adverse effect upon the subject individual [CAL. CIV. CODE §1798.45(c)]; or (4) permits the modification, transfer, or destruction of confidential records containing confidential or personal information in an effort to avoid compliance with any provision of Chapter 709 [CAL. STATS. 1977, c. 709, §2, at —].

A wide range of remedies is provided a complainant in that the court may: (1) enjoin further withholding after an *in camera* determination as to the confidentiality of any information included in the record with the agency bearing the burden of proof on the issue [CAL. CIV. CODE §1798.46(a)]; (2) award reasonable attorney's fees and costs against the agency if the complainant prevails [CAL. CIV. CODE §1798.46(b)]; (3) enjoin use of the record upon proof of noncompliance [CAL. CIV. CODE §1798.47]; and (4) award actual damages including mental suffering [CAL. CIV. CODE §1798.48(a)]. Chapter 709, however, makes it clear that these remedies are available *only* in response to erroneous factual assertions in the record, as opposed to statements of opinion included therein [*See* CAL. CIV. CODE §1798.50]. The statute of limitations for bringing an action seeking one of these remedies under Chapter 709 is either two years from the date upon which the

cause of action arose or two years from the date of discovery of a material and willful misrepresentation [CAL. CIV. CODE §1798.49]. After the statute of limitations has been exceeded, the individual is still entitled to obtain a correction of the record in a civil action, but may not recover damages or seek any other remedy [*See* CAL. CIV. CODE §1798.51]. Finally, any person, other than an employee of the agency acting within the scope of employment, who intentionally discloses information he or she knew or reasonably should have known to have been obtained from personal or confidential state or federal agency records is subject to a civil action for invasion of privacy by the subject of the information with the following recoveries available: (1) special and general damages; (2) minimum exemplary damages of $2,500; and (3) reasonable attorney's fees and costs [CAL. CIV. CODE §1798.53].

Penalties

Employees of the agency are subject to discipline, including termination of employment, for intentional violation of any of the provisions of, or rules and regulations promulgated to enforce, Chapter 709 [CAL. CIV. CODE §1798.55]. Additionally, it is a misdemeanor to willfully request or obtain any record containing personal or confidential information under false pretenses, punishable by a $5,000 fine and/or imprisonment for a period not to exceed one year [CAL. CIV. CODE §1798.56].

Miscellaneous Provisions

In the last instance, Chapter 709 prohibits the sale, rental or distribution of an individual's name and address for commercial purposes absent specific authorization by law [CAL. CIV. CODE §1798.60], but permits the release of the names and addresses of persons applying for or possessing professional licenses [CAL. CIV. CODE §1798.61]. Any individual may request in writing that his or her name and address be excised from any expected list unless such list is used solely to contact the individual for valid agency purposes [CAL. CIV. CODE §1798.62].

Chapter 709 is designed to be liberally construed [CAL. CIV. CODE §1798.63] and is expressly held to supercede any other provision of state law authorizing an agency to withhold records containing *personal* information that are otherwise accessible under this new law [CAL. CIV. CODE §1798.70]. The provisions of Chapter 709 are not deemed to affect the rights of litigants, including parties to administrative proceedings, under the statutory or case law of this state relating to civil or criminal discovery [CAL. CIV. CODE §1798.76], nor does this law supercede the provisions of the Education Code dealing with student records [CAL. CIV. CODE §1798.74; *see* CAL. EDUC. CODE §§67110-67147].

The enactment of Chapter 709, at least in terms of oversight by the Office of Information Practices, appears to be a tentative step, since the Legislative Analyst is directed to monitor the implementation of the provisions of the Information Practices Act by selected agencies and prepare and submit a report to the legislature no later than July 1, 1979 [CAL. CIV. CODE §1798.65]. The Legislative Analyst's report is to include: (1) a description of the procedures followed by the selected agencies and an evaluation of their effectiveness in light of the stated intent of Chapter 709 [*See generally* CAL. CIV. CODE §1798.1]; (2) an assessment of the effectiveness of the Office of Information Practices in assisting individuals to identify and gain access to their records; (3) a recommendation as to whether a central directory of state records should be published to further aid individuals in locating agency records pertaining to them; (4) an assessment of and a recommendation as to the review procedures followed by the selected agencies when elements of the record are challenged by the subject; (5) an assessment of the sufficiency of the damages provided by Chapter 709; and (6) an assessment of whether the provisions of Chapter 709 should be extended to local law enforcement agencies [CAL. CIV. CODE §1798.65].

COMMENT

In general, Chapter 709 responds to a growing concern over the unchecked proliferation of personal data collected by governmental agencies that threatens to overwhelm the basic right of citizens to privacy [*See* CAL. CIV. CODE §1798.1]. Specifically, Chapter 709 appears to remedy several areas of deficiency perceived to exist in the prior California method of responding to the constitutional right of California citizens to be secure in their personal privacy [*Compare* CAL. CIV. CODE §1798.1 *with* CAL. CIV. CODE §§1798.4-.67. *See generally* CAL. CONST. art. I, §1].

This legislation was enacted following a gubernatorial veto of the similar Information Practices Act of 1976 [*See* Governor Edmund G. Brown, Jr., Press Release, No. 369, Nov. 30, 1976; *see* SB 1586, 1975-76 Regular Session]. This veto resulted from the Governor's apprehension at the cost of the oversight and review portions of the 1976 proposed law rather than from any disagreement with the need to provide greater protection of privacy [*See* Governor Edmund G. Brown., Press Release, No. 369, Nov. 30, 1976]. This concern was evidenced by the concurrent declaration of Executive Order No. B-22-76, which applied the collection, maintenance, disclosure, subject access, and amendment elements of SB 1586 to all executive agencies [Exec. Order No. B-22-76, §§1, 2, 3 (1976)]. In addition, the Governor indicated that, should the administrative action taken be insufficient to protect the privacy right of California citizens, legislative action

might be appropriate in the future [Governor Edmund G. Brown, Jr., Press Release No. 369, Nov. 30, 1976].

Chapter 709 apparently is intended to respond to the suggestion that legislation is appropriate in the area of personal privacy, since it extends coverage to all but explicitly excepted *state* agencies [CAL. CIV. CODE §1789.3(d)] and outlines specific judicial remedies [CAL. CIV. CODE §§1798.45-.53], while Executive Order No. B-22-76 applied only to executive agencies and provided only for administrative mediation hearings.

Prior to the enactment of Chapter 709 a complaint challenging state agency compilation, maintenance, or dissemination of files containing personal information as a violation of Article One, Section One of the California Constitution would arguably be subjected to a judicial balancing of the individual's right to personal privacy and the government's proof of a "compelling state interest" [*Cf.* White v. Davis, 13 Cal. 3d 757, 775 & n.11, 553 P.2d 222, 240 & n.11, 120 Cal. Rptr. 94, 112 & n.11 (1975) (compiling "police dossier's" on university students and professors based upon recorded classroom discussions constitutes prima facie violation of right to privacy)]. Under the new Information Practices Act of 1977 there will be no need for such ad hoc judicial scrutiny as a violation of the provisions of the Act are instantly subject to legal remedy as per se violative of an individual's right to privacy [*See* CAL. CIV. CODE §§1798.45-.56]. Thus, the enactment of Chapter 709 appears to respond to the general concern for protection of the constitutional right of privacy by delineating the scope and by providing an effective means to redress any infringement of this right.

See Generally:

1) *The Supreme Court of California*, 64 CALIF. L. REV. 347 (Privacy: The New Constitutional Language and the Old Right) (1976).
2) Comment, *Informational Privacy and Public Records in California*, 8 PAC. L.J. 25 (1977).
3) Comment, *The Computerization of Government Files: What Impact on the Individual*, 15 U.C.L.A. L. REV. 1377 (1968).
4) Note, *Government Access to Bank Records*, 83 YALE L.J. 1439 (privacy as a property right) (1973-74).

Consumer Protection; public access to DMV records

Vehicle Code §1810 (amended).

AB 465 (Ryan); STATS 1977, Ch 374

Support: California Trial Lawyers' Association; Ford Motor Company

California law requires that all records maintained by the Department of Motor Vehicles pertaining to the registration of vehicles, licensing of drivers, abstracts of convictions, and accident reports be open to public inspection [*See* CAL. VEH. CODE §1808], except those records relating to certain narcotics convictions and the physical or mental condition of the subject of

the record [*See* CAL. VEH. CODE §1808.5]. Prior to the enactment of Chapter 374, however, there was apparently some public concern over the misuse of information obtained from the records maintained by the Motor Vehicles Department [*See* Department of Motor Vehicles, Press Release, Release of Information from DMV Files, Feb. 22, 1977]. In response to this concern the Department of Motor Vehicles adopted a new policy for controlling the release of information from their files [*See generally*, Department of Motor Vehicles Policy Statement, Feb. 22, 1977 (copy on file at *Pacific Law Journal*)]. Section 1810, as amended by Chapter 374, now incorporates the procedural limitations established by the Motor Vehicles Department policy, but continues to provide public access to these records through the sale of specified information from department files at a fee sufficient to discharge the departmental cost of compliance with the newly imposed record and notice requirements [*See* CAL. VEH. CODE §1810(a)].

Section 1810 now directs the Department of Motor Vehicles to establish administrative procedures that would require anyone requesting information to: (1) identify himself or herself sufficiently to permit verification of name and address; and (2) state the reason for which the information is requested. These procedures must also provide for notification of the person to whom the information relates that indicates: (1) what information was provided; and (2) to whom the information was disclosed [CAL. VEH. CODE §1810(b)]. Finally, Section 1810 now requires that the Department of Motor Vehicles maintain a record of each request, verification, and notification made pursuant to this section and establish by regulation "a reasonable period of time" during which these records must be retained [*See* CAL. VEH. CODE §1810(b)].

The procedural requirements for purchasing information from the Department of Motor Vehicles are not applicable to: (1) governmental entities; (2) persons having a permit certifying them as a public service entrepreneur [*See* CAL. VEH. CODE §1814]; (3) persons who have applied for and have been issued a "requester code" by the department; (4) courts of competent jurisdiction; (5) attorneys admitted to practice in this state who allege that the requested information is relevant to any pending or potential litigation; and (6) accredited members of the press [CAL. VEH. CODE §1810(b)]. A "requester code," which is excepted in (3) above, may be obtained by applying to the department, posting a bond or cash deposit to cover the cost of providing requested information, and stating the name and address of the applicant and the purpose for which the information is requested [*See* Department of Motor Vehicles Policy Statement, Feb. 22, 1977 (copy on file at *Pacific Law Journal*)]. Thus, Chapter 374 appears to respond to the public concern over the misuse of information gained by free access to Department of Motor Vehicles records by now imposing specific identifica-

tion, notification, and recordation procedures upon the department and individuals seeking access to the department records.

Consumer Protection; Robbins-Rosenthal Fair Debt Collection Practices Act

Business and Professions Code §§6863, 6947 (amended); Civil Code Title 1.6C (commencing with Section 1788) (new).
SB 237 (Robbins); STATS 1977, Ch 907
Support: California Bankers Association; California Retailers Association; Consumers United of California; Merchants Research Group

Prior to the enactment of Chapter 907, it was unlawful, pursuant to the Collection Agency Act [CAL. BUS. & PROF. CODE §§6850-6956], for a licensed collection agency to practice certain debt collection techniques [CAL. BUS. & PROF. CODE §6947]. Chapter 907 creates the Robbins-Rosenthal Fair Debt Collection Practices Act [CAL. CIV. CODE §§1788-1788.32], which prohibits any debt collector from engaging in certain debt collection practices [*See* CAL. CIV. CODE §§1788.10-.15]. The term "debt collector" is defined by Chapter 907 as any person, except an attorney, who, in the ordinary course of business, regularly engages in debt collection on behalf of himself or herself or others, and includes anyone who composes and sells, or offers to compose and sell, letters and other collection media used or intended to be used for debt collection [CAL. CIV. CODE §1788.2(c)].

The purpose of Chapter 907 is to prohibit unfair and deceptive collection practices by debt collectors in consumer credit situations and to require debtors to act fairly when they enter into and are requested to honor such debts [CAL. CIV. CODE §1788.1(b)]. To serve this purpose, Chapter 907 provides for the recovery of actual damages, court costs and attorney's fees, limited punitive damages [CAL. CIV. CODE §1788.30], and possible revocation of license [CAL. BUS. & PROF. CODE §6863] for violations by the debt collector. Although Chapter 907 does not prescribe a penalty for a debtor for violation of its provisions, a debt collector may raise as a defense to a claim or action brought by the debtor, any relevant and *intentional* violation of the provisions of the new law by the debtor [CAL. CIV. CODE §1788.30(g)].

Recognizing the need to ensure that debt collectors exercise their responsibilities toward debtors fairly and honestly [CAL. CIV. CODE §1788.1(a)(2)], the legislature has proscribed a variety of unfair debt collection practices, which generally include, among other things, the following types of conduct: (1) employing various forms of physical and verbal threats against debtors to coerce debt payment [*See* CAL. CIV. CODE §1788.10]; (2) using obscene and profane language to degrade debtors, or using the

telephone to otherwise harass debtors in essentially any manner [*See* CAL. CIV. CODE §1788.11]; (3) communicating to third parties, certain unreasonable or unnecessary information concerning a debt or a debtor [*See* CAL. CIV. CODE §1788.12]; (4) making oral or written false representations to a debtor concerning the debt, the debt collector, or any action that may be taken against the debtor [*See* CAL. CIV. CODE §1788.13]; and (5) misusing the judicial process to coerce debt payments [*See* CAL. CIV. CODE §1788.15]. Additionally, Chapter 907 prevents a debt collector from: (1) obtaining an affirmation of a debt from a bankrupt debtor without first giving him or her a clear written notice that he or she is not legally obligated to affirm the debt; (2) trying to collect from a debtor any part of the debt collector's fee or expenses except as allowed by law; and (3) initiating communications with the debtor, other than to provide account statements, after written notification from the debtor's attorney that the debtor would like all matters to be handled by his or her legal counsel, unless the attorney fails to respond to such communications, prior approval has been obtained from the attorney, or the communication is in response to an inquiry by the debtor [CAL. CIV. CODE §1788.14]. Thus, Chapter 907 clearly sets out a detailed list of legislatively proscribed unfair debt collection practices in an apparent attempt to restore public confidence in the banking and credit system—confidence that has been undermined by the existence of unfair and deceptive collection practices [*See* CAL. CIV. CODE §1788.1(a)(1)].

Although Chapter 907 appears to be directed primarily toward unfair debt collection practices, the legislature has recognized that a debtor also has an obligation to act fairly and honestly when dealing with creditors [*See* CAL. CIV. CODE §1788.1(a)(2), (b)]. Consequently, the Fair Collection Practices Act tasks the debtor with certain responsibilities, which include the obligation to refrain from: (1) requesting any consumer credit if he or she knows there is no reasonable probability of being able to pay or does not intend to pay the obligation created [CAL. CIV. CODE §1788.20(a)]; or (2) knowingly supplying false information or willfully concealing adverse information bearing upon his or her eligibility for credit [CAL. CIV. CODE §1788.20(b)]. In addition, a debtor must notify the creditor of any change of his or her name, address, or employment when such a requirement is clearly and conspicuously disclosed in writing by the creditor [CAL. CIV. CODE §1788.21]. Furthermore, a debtor must refrain from charging items to a terminated or suspended account and must notify the creditor of lost or stolen credit cards if a creditor clearly and conspicuously informs the debtor in writing of these responsibilities [CAL. CIV. CODE §1788.22].

Intentional violations of Chapter 907 by a debtor may be raised by the debt collector as a defense in any action against the debt collector if such a violation is pertinent or relevant to the action brought by the debtor [CAL.

CIV. CODE §1788.30(g)]. Since the main thrust of the Fair Debt Collection Practices Act is against unfair practices by the debt collector, civil liability for violations by the debt collector is more severe, but applies only in individual actions, apparently precluding the application of these provisions to class actions [*See* CAL. CIV. CODE §1788.30(a), (b), (f)]. Thus, the debt collector will be held liable for any actual damages sustained by the debtor as a result of the violation [CAL. CIV. CODE §1788.30(a)], plus court costs and reasonable attorney's fees [CAL. CIV. CODE §1788.30(c)]. If the debt collector willfully and knowingly violates this new law, punitive damages must also be awarded in an amount not less than $100, but not more than $1,000 [*See* CAL. CIV. CODE §1788.30(b)]. In the event the debt collector prevails in the lawsuit, he or she is entitled to costs of the action, and reasonable attorney's fees may be awarded upon a finding by the court that the debtor's prosecution or defense of the action was not in good faith [CAL. CIV. CODE §1788.30(c)]. The statutory limitation for bringing an action against a debt collector under Chapter 907 is one year from the date of the occurrence of the violation [CAL. CIV. CODE §1788.30(f)]. Chapter 907 specifically indicates, however, that the remedies created by its provisions are intended to be cumulative and are in addition to any other procedures, rights, or remedies available under any other provision of law [CAL. CIV. CODE §1788.32].

Chapter 907 also authorizes the Director of Consumer Affairs to establish and enforce regulations governing licensed and applicant debt collectors that are reasonable and necessary for the implementation of this new Act [*See* CAL. BUS. & PROF. CODE §§6851(c), 6863]. Furthermore, the willful violation of any of these rules and regulations or of any provision of the Robbins-Rosenthal Fair Debt Collection Practices Act is sufficient ground to revoke the debt collector's license, or other disciplinary action [CAL. BUS. & PROF. CODE §6863].

Finally, the Fair Debt Collection Practices Act enumerates methods by which a debt collector may avoid civil liability [CAL. CIV. CODE §1788.30(d), (e)]. For example, if within 15 days after discovering a violation *that is able to be cured*, or within 15 days after receiving written notice of such violation, the debt collector notifies the debtor of the violation *and* makes whatever adjustments or corrections that are necessary to cure the violation with respect to the debtor, then there is no civil liability [CAL. CIV. CODE §1788.30(d)]. In addition, if the debt collector shows by a preponderance of the evidence that the violation was not intentional but occurred notwithstanding the maintenance of procedures reasonably adopted to avoid such a violation, then there is no civil liability [CAL. CIV. CODE §1788.30(e)].

In conclusion, Chapter 907 sets forth a comprehensive list of prohibited debt collection practices and provides civil sanctions for violations of its provisions. Additionally, Chapter 907 enumerates principles of conduct that must be followed by debtors when engaging in consumer credit transactions. Thus, Chapter 907 is designed to balance the rights and obligations of debtors and debt collectors, and is apparently intended to restore public confidence in the banking and credit system [*See* CAL. CIV. CODE §1788.1].

See Generally:
1) CONTINUING EDUCATION OF THE BAR, CALIFORNIA REMEDIES FOR UNSECURED CREDITORS Ch. 16 (collection agency practices) (1957).
2) CONTINUING EDUCATION OF THE BAR, DEBT COLLECTION TORT PRACTICE §§3.1-.59 (basic collection torts) (1971); §§3.1A-.58 (basic torts collection) (Supp. 1976).

Consumer Protection; packaging standards

Health and Safety Code §§26564.5, 26649.5, 26735.5, Chapter 15 (commencing with §30000) (new); §28755 (amended).
AB 1089 (Gualco); STATS 1977, Ch 831
Support: California Department of Health

Prior to the enactment of Chapter 831, statutory regulation of packaging used to contain hazardous substances was limited to labeling requirements designed to give the user notice of any hazard posed by the contents and to recommend action to be taken should these hazards result in injury [*See* CAL. STATS. 1971, c. 1768, §3, at 3820]. In addition to these labeling requirements, Chapter 831, a significant portion of which is entitled the California Poison Prevention Packaging Act [CAL. HEALTH & SAFETY CODE §§30000-30010], now provides special packaging standards for substances deemed hazardous in an apparent effort to protect children from serious injury or illness caused by gaining access to such substances [*See* CAL. HEALTH & SAFETY CODE §§28755, 30001(d), 30002(a), 30007, 30008(b)]. A hazardous substance is defined as any substance that is toxic, corrosive, an irritant, a strong sensitizer, flammable or combustible, or generates pressure through decomposition, heat or other means [CAL. HEALTH & SAFETY CODE §28743]. To accomplish this goal and bring California into uniformity with the federal law, Chapter 831 expressly adopts the packaging standards developed under the Federal Poison Prevention Packaging Act of 1970 [15 U.S.C. §§1471-1476 (1970), *as amended*, Consumer Safety Improvements Act, Pub. L. No. 94-284, §§3(a), 17(c), 90 Stat. 503, 513 (1976). *Compare* CAL. HEALTH & SAFETY CODE §§30002-30007 *with* 15 U.S.C. §§1471-1476 (1970), *as amended*, Consumer Safety Improvements Act, Pub. L. No. 94-284, §§3(a), 17(c), 90 Stat. 503, 513 (1976)]. This new state law directs the State Department of Health to adopt independent

regulations establishing packaging standards for any specified household substance, provided that these regulations do not differ in substance or proscribe or require conduct that differs from the provisions of the federal act [*See* CAL. HEALTH & SAFETY CODE §30002]. Since the packaging standards under the federal law apply to all household substances involved in interstate commerce [*See* Houser, *The Consumer's Sleeping Giant—The Federal Hazardous Substances Labeling Act*, 14 SANTA CLARA LAW. 520, 521 & n.7 (1973-74)], and the new California law adopts these same standards for "any household substance" [CAL. HEALTH & SAFETY CODE §30002], it would appear that the main emphasis of the California law is to establish packaging regulations for such substances involved in intrastate commerce.

Further, the Department of Health may only incorporate federal packaging standards for such household substances into state law or establish independent standards upon findings that *special packaging* is required to protect children from serious injury or illness, and that each requirement is technically feasible, practicable, and appropriate for the substance involved [CAL. HEALTH & SAFETY CODE §30002]. "Special packaging" means packaging designed or constructed to be *significantly* difficult for children under five years of age to open or obtain a toxic or harmful amount of the substance contained therein within a reasonable time, but not difficult for normal adults to use properly [CAL. HEALTH & SAFETY CODE §30001(d)]. Moreover, in establishing standards for such "special packaging," the Department of Health is required to consider all of the following: (1) the reasonableness of the proposed standard; (2) available scientific, medical and engineering data concerning the effectiveness of special packaging in protecting children as desired; (3) the nature and use of the household substance in question; and (4) the impact on the manufacturing systems of industries affected by the standard [CAL. HEALTH & SAFETY CODE §30003].

"Household substances" as used in this new Poison Prevention Packaging Act are defined as substances customarily distributed or sold for consumption or use in and about the household and include the following: (1) a hazardous substance; (2) a food, drug, or cosmetic that is toxic, corrosive, irritating, flammable, strongly sensitizing, or generates pressure through decomposition, heat or other means that they may cause substantial injury or illness as a result of handling, using or ingesting such substances; and (3) substances intended for use as a fuel; (4) toys or other articles intended for use by children that are a hazardous substance or which bear or contain hazardous substances susceptible of access by children to whom the toy or articles may be given [CAL. HEALTH & SAFETY CODE §28755]; (5) substances intended for use as a fuel that are stored in portable containers and used in heating, cooking or refrigeration systems in residential dwellings

[CAL. HEALTH & SAFETY CODE §30001(b)(3)]; and (6) designated household substances [*See* CAL. HEALTH & SAFETY CODE §28743(b)-(d)]. Beyond the explicit provisions of Chapter 831, the Department is empowered by existing law to adopt any regulations as to hazardous substances deemed necessary to protect the public [CAL. HEALTH & SAFETY CODE §28775], with the exception of specific substances due to the size of the packaging, the minor hazard posed, impracticability of imposing the regulation or "other good and sufficient reasons" [CAL. HEALTH & SAFETY CODE §28778], or to defer regulation as to any substance adequately regulated by other state law [CAL. HEALTH & SAFETY CODE §28779].

Current federal standards are deemed incorporated into state law by enactment of Chapter 831 [CAL. HEALTH & SAFETY CODE §30004], and any new federal standards adopted by the Department of Health are deemed effective in this state 30 days after becoming effective as federal regulations [CAL. HEALTH & SAFETY CODE §30005]. Any person adversely affected by the adoption of a proposed federal standard, however, may file written objections and request a hearing, the timely filing of which will stay the adoption of the federal packaging regulation by this state [CAL. HEALTH & SAFETY CODE §30005]. Section 30006 provides that if timely, substantial objections are made to any federal or proposed state regulation, the Department of Health must hold public evidentiary hearings on the regulation. Chapter 831, however, apparently does not define the term "substantial objection," and thus, this term might be construed as requiring multiple objections, qualitative challenges, or a combination of both. Nevertheless, following a public hearing on a regulation proposed by the Department of Health, the regulation may be withdrawn, modified or published as originally proposed [CAL. HEALTH & SAFETY CODE §30006]. The new law, however, does not indicate what alternatives are available to the Department of Health with regard to an adopted federal regulation that has been objected to and reviewed at a public hearing, although to the extent that the proposed regulation applies solely to intrastate household substances, the Department arguably could decline to adopt the regulation.

Besides providing for the adoption and review of intrastate poison packaging regulations, Chapter 831 also specifies that these regulations will not be applicable to the packaging of hazardous household substances that are: (1) readily available to the elderly or handicapped persons who are unable to use the substance when packaged in compliance with current regulations [CAL. HEALTH & SAFETY CODE §30008]; and (2) dispensed pursuant to an order of a physician, dentist, or other licensed medical practitioner authorized to prescribe the substance [CAL. HEALTH & SAFETY CODE §30009]. Furthermore, noncomplying packages may be utilized in the sale of hazardous substances to elderly or handicapped persons only if these packages bear

conspicuous labeling stating, "This package for household without young children"; and the manufacturer also supplies the substance in packages that comply with current standards [CAL. HEALTH & SAFETY CODE §30008(a)-(b)]. Failure of a manufacturer to additionally supply these complying packages may result in the manufacturer being required to supply hazardous household substances only in packages that comply with current state and federal standards [*See* CAL. HEALTH & SAFETY CODE §§30002, 30008, 30010]. When used to contain substances that can only be prescribed by licensed medical practitioners, noncomplying packages may be employed only if ordered by such practitioner in the prescription or when requested by the purchaser [CAL. HEALTH & SAFETY CODE §30009].

Thus by incorporating the Federal Poison Prevention and Packaging Act into state law, and permitting identical state standards to be formulated by the Department of Health, Chapter 831 would appear to have reacted to concern expressed over the reports of large numbers of children poisoned by the ingestion of household substances in California [See *Nat'l Clearinghouse for Poison Cont. Centers Bull.*, DEP'T OF HEALTH, EDUC., AND WELFARE (Feb. 1977)]. The legislative response to this concern would appear to embody the belief that state regulations and enforcement are necessary supplements to the federal efforts.

See Generally:
1) 15 U.S.C. 1476 (1970), *as amended*, Consumer Safety Improvements Act, Pub. L. No. 94-284, §17(c), 90 Stat. 513 (1976)(Poison Prevention Packaging Act of 1970—preemption of federal standards).
2) 16 C.F.R. §§1700.1-.20 (1977) (Poison Prevention Packaging Act of 1970 Regulations).
3) Houser, *The Consumer's Sleeping Giant—The Federal Hazardous Substances Labeling Act*, 14 SANTA CLARA L. REV. 520 (1973-74).

Consumer Protection; penalty for violations of Fair Packaging and Labeling Act

Business and Professions Code §12615.5 (new).
AB 515 (Bates); STATS 1977, Ch 1185

Chapter 1185 reestablishes the criminal penalties for violations of the Fair Packaging and Labeling Act [CAL. BUS. & PROF. CODE §§12600-12615.5], which were inadvertently removed by 1975 legislation requiring item pricing of consumer commodities [*Compare* CAL. STATS. 1969, c. 1309, §3, at 2647 *with* CAL. STATS. 1975, c. 1120, §2, at 2728; *see* Assemblyman Tom Bates, Press Release, Aug. 30, 1977]. Generally, the Fair Packaging and Labeling Act proscribes deceptive packaging practices [CAL. BUS. & PROF. CODE §12606]; requires labels on consumer commodities to accurately and prominantly display the net contents of the package and the name and location of the manufacturer packer, or distributor [CAL. BUS. & PROF.

CODE §12603]; and allows the Director of Food and Agriculture to promulgate regulations to effectuate the purposes of the Act [CAL. BUS. & PROF. CODE §§12603, 12609, 12610. *See generally* 4 CAL. ADM. CODE §§2918-2929.1, 2940-2941, 2970-2970.2, 2982.2]. Chapter 1185 adds Section 12615.5 to the Business and Professions Code to provide that violation of any of these provisions, except those provisions relating to clearly readable prices on certain items sold by stores with an automatic checkout system, is a misdemeanor and is punishable by imprisonment in the county jail for six months and/or a fine of at least $25, but not more than $500 [CAL. BUS. & PROF. CODE §12615.5. *See generally* CAL. BUS. & PROF. CODE §12604.5]. Thus, it would appear that individuals who violate the item pricing provisions of Section 12615 are liable for both civil and criminal penalties, while individuals who violate any other provision of the Fair Packaging and Labeling Act are only subject to the criminal penalties prescribed by Chapter 1185 [*See* CAL. BUS. & PROF. CODE §§12615, 12615.5].

See Generally:
1) B. WITKIN, CALIFORNIA CRIMES, *Crimes Against Property* §530 (false weights and measures) (Supp. 1975).
2) 1 PAC. L.J., RECENT DEVELOPMENTS, SELECTED CODE LEGISLATION OF 1969 at 399 (trust in packaging and labeling) (1970).

Consumer Protection; public utility service termination

Public Utilities Code §§779, 780, 10010, 10011, 12823, 12824, 16482, 16483 (new).
SB 181 (Alquist); STATS 1977, Ch 1027
Support: California Public Utilities Commission

Prior to the enactment of Chapter 1027, there was no provision of law expressly speaking to procedures required for termination of utility services by the deliverers of such services, apparently leaving regulation to the Public Utilities Commission [*See, e.g.*, CAL. PUB. UTIL. CODE §216(c); Cal. Pub. Util. Comm'n Order No. 103, para. 6 at 4-5 (1975)]. Chapter 1027 establishes definite termination procedures to be followed by any public utility or private utility corporation providing electric, gas, heat, or water service to residential dwellers. To effectuate fully the new mandatory procedures for termination, Chapter 1027 incorporates two basic provisions into the Public Utilities Code governing the termination of certain public utility services and makes them applicable to private corporations [*See* CAL. PUB. UTIL. CODE §§779, 780], public utilities [*See* CAL. PUB. UTIL. CODE §§10010, 10011], municipal utility districts [*See* CAL. PUB. UTIL. CODE §§12823, 12824] and public utility districts [*See* CAL. PUB. UTIL. CODE §§16482, 16483].

The first basic provision prescribes that whenever a gas, heat, electrical or water corporation contemplates terminating service because of delinquency in service payments, a notice must be sent by first class mail at least seven days in advance of any proposed termination to the residential consumer to whom service is billed [CAL. PUB. UTIL. CODE §779(a) (private corporations), §10010(a) (public utilities), §12823(a) (municipal utility districts), §16482(a) (public utility districts)]. Service, however, may not be terminated while an investigation of a customer dispute or complaint is pending [CAL. PUB. UTIL. CODE §779(b) (private corporations), §10010(b) (public utilities), §12823(b) (municipal utility districts), §16482(b) (public utility districts)]. Additionally, any customer who has initiated a complaint or request an investigation within *five* days of receiving the contested bill pursuant to Sections 779(b), 10010(b), 12823(b), or 16482(b) may request review by a review manager of the utility that is to include consideration of amortization of any unpaid balance over a reasonable period of time. Agreement by a customer to an amortization schedule will preclude the termination of utility service, provided that the resulting amortization agreement is carried out and all subsequent charges are paid as they accrue [CAL. PUB. UTIL. CODE §779(c) (private corporations), §10010(b) (public utilities), §12823(c) (municipal utilities district), §16482(c) (public utility districts)]. Thereafter, any customer whose complaint or request for an investigation has received an adverse ruling by a utility that is subject to the jurisdiction of the Public Utilities Commission, is granted a right to appeal to the Commission [CAL. PUB. UTIL. CODE §779(d) (private corporations), §10010(d) (public utilities), §12823(d) (municipal utility districts), §16482(d) (public utility districts)]. This right to appeal an adverse ruling to the Public Utilities Commission, however, does not further retard termination of services by the utility in question [*See* CAL. PUB. UTIL. CODE §§779(d), 10010(d), 12823(d), 16482(d)]. In addition, Chapter 1027 adds a second basic provision that prohibits termination of services, for reason of payment delinquency, on a Saturday, a Sunday, a legal holiday, or at any other time the business offices of the utility are closed and therefore not accessible to the public [CAL. PUB. UTIL. CODE §780 (private corporations), §10011 (public utilities), §12824 (municipal utility districts), §16483 (public utility districts)].

COMMENT

Chapter 1027 apparently responds to a recent decision by the United States Supreme Court holding that state influence in the regulation of a public utility is insufficient to subject such utility provider to due process requirements as a "state actor" [Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358 (1974)]. Consumers, therefore, may not initiate legal actions

to challenge arbitrary terminations of service under the aegis of the fourteenth amendment to the United States Constitution [*Id.* at 358-59]. In *Jackson v. Metropolitan Edison Co.* [419 U.S. 345 (1974)], the Court held that even the approval of a state agency was insufficient to subject a utility to such a legal action; only adherence to a direct state agency order would provide a sufficient nexus between the challenged conduct and the government to permit a legitimate due process attack on a termination of one or more public services [*Id.* at 357]. Arguably, the decision in *Jackson* demonstrated that California citizens had *no* legal means of protecting themselves from arbitrary terminations of essential services even when such an action could be proven unjustified or life threatening [*Id.* 350-51]. By enacting Chapter 1027, the legislature has provided notice and procedural rights to the residential utility consumer that are designed to prevent any unexpected termination of critical utility services, and has conceivably exposed the deliverers of such services to a threat of federal litigation for due process violation should they fail to adhere to the provisions of the Act [*See* Case Comments, 27 U. FLA. L. REV. 855, 869-71 (1974-75)].

See Generally:

1) Davis v. Weir, 328 F. Supp. 317 (N.D. Ga. 1971) (publicly operated utility district).
2) Isler, *Termination of Service by Privately-Owned Public Utilities: The Tests for State Action*, 12 URB. L. ANN. 153 (1976).
3) Note, *Constitutional Safeguards for Public Utilities Customers: Power to the People*, 48 N.Y.U. L. REV. 493 (1973).
4) Comment, *The Entitlement to Municipal Water Service: Constitutional Problems in the Termination of a Public Utility Service*, 9 URB. L. ANN. 285 (1975).
5) Case Comment, 24 EMORY L.J. 511 (review of *Jackson v. Metropolitan Edison Co.*) (1975).