

REPORTS FROM STATE CONSUMER PROTECTION AGENCIES

CALIFORNIA

Charles A. James

In 1959, shortly after the election of the present governor, Edmund G. Brown, and the present Attorney General, Stanley Mosk, two important things happened for the California consumer. (1) The Governor established the Office of Consumer Counsel through the Legislature and the Attorney General established a unit within the Department of Justice to deal with consumer frauds. The function of the Consumer Counsel is to represent the consumer before the Legislature, before state agencies and administrative bodies and to advise the Governor on consumer problems and probably today California is no doubt unique among the fifty states in that the Governor examines all legislation in the light of the impact and effect upon the consumers of the state.

Several states have recognized the necessity for the focus of law enforcement upon illegal activities directed toward the fleecing or bilking of the public as consumers.

In California the Attorney General is constitutionally the chief law officer of the state and as such he is constitutionally charged with the supervision of all law enforcement and the responsibility of making sure that all laws in California are uniformly and adequately enforced in every county in the State. In this context it is important to understand that California does not have a state police force as such. Consequently prosecution of offenders and law violators rests primarily with district attorneys or the peace officers of the fifty-eight counties and local law enforcement agencies. Consequently the protection of the public against the fly-by-night operator who utilizes a technique of saturating a community with door-to-door salesmen or telephone solicitations and then moving on to another community becomes particularly challenging to law enforcement. Once a jurisdiction determines that it has been selected for the operation of an unethical siding operation or saturated with book salesmen or food freezer plans, dozens and perhaps hundreds of people have been taken - signed up to the contracts which have been peddled to finance companies - and the dealers and the salesmen are no longer to be found within the community. And if found at all, they will be operating in another part of the state, a different county, which again does not discover the nefarious nature of the operation until it has closed shop. Many times these dealers would set up a company to conduct the operation and at the end of the saturation period the company would suddenly go bankrupt and the promoters would be out of town. Consequently the consumer is left without recourse and law enforcement is seemingly stymied for the moment by the problems of evidence, uncertain witnesses, vanished or bankrupt defendants or sometimes defendants who cannot be readily identified.

The merchandising of certain products and services degenerated to such outrageous abuse of business transactions that it became necessary for the Legislature to take direct action to attempt to curb some of the practices. In 1959 and 1961 the Legislature enacted far reaching consumer legislation. In 1959, for example, the Retail Installment Sales Law, otherwise known as the Unruh Act, was passed. It was subsequently amended in 1961. Generally this law applies to the selling of goods and services with the exception of automobiles and certain professional services, such as dentists, and applies generally to credit for installment buying of all such goods and services when the value is over \$50 unless a security is retained in the goods. The law applied to the purchasing by conditional sales contract and also by the retail installment account, or what is commonly known as the budget account and the abuses that the Legislature sought to correct are evidenced by the detailed proscriptions that were put into the law. For example, the law requires a contract to be completely filled in before it is signed by the purchaser, and it further provides that there be a notice set out in a certain size type within the contract which would warn the buyer, that he should not sign the agreement until he has read it and until the contract is completely filled in. The law requires that there be a notice to the buyer that he may, if he desires, pay the entire amount of the outstanding balance of the contract at any time that he wishes to pay it and in certain circumstances that if he does prepay the outstanding balance, he may be entitled to a refund of the service charges imposed. The distinction that is made in the law between the conditional sales contract and the revolving account or retail installment account is found primarily in the nature of the two agreements, or the two accounts. The conditional sales contract refers to an agreement whereby the interest or service charge is set out in the contract as a precomputed time price differential with the balance of the contract to be paid within a specified number of months at a specified rate. The law requires that each conditional sales contract contain the number of months, the last date of payment, and the amounts that must be paid on the contract, as well as a complete statement of the charges that are to be levied, including the time price differential, any insurance fees or costs, and other costs that may attach to the particular transaction. The law regulates the interest charges and imposes a maximum interest rate which breaks down in the following manner for a conditional sales contract:

On so much of the contract that does not exceed \$1,000-
interest may be charged at the rate of $\frac{5}{6}$ of 1% on the
outstanding balance;

On so much of the unpaid balance that exceeds \$1,000-
 $\frac{2}{3}$ of 1%;

However, if the service charge as computed is less than \$12, then \$12 may be levied as the charge on a conditional sales contract unless the due date of the last installment of the contract is less than 8 months after the effective date, in which case the service charge is limited

to \$10. This service charge is to be inclusive of all charges incident to investigating and making the contract and for extension of credit.

The Act also regulates the amount of service charge that may be levied on a retail installment account, the budget account which is added on from month to month and most commonly found in department stores, clothing stores, etc. The law provides that maximum interest rate to be charged on a balance of \$1,000 or less is 1- $\frac{1}{2}$ % per month and for that amount of the outstanding balance that may be in excess of \$1,000 at any one time, 1% of the amount that is in excess of \$1,000. The retailer or seller is required to give notice of the opening of such an account to the buyer and also a notice of the interest rates that will be charged by the seller on the retail installment account. The law contains several other provisions relating to assignment and the notice that is required on assignment, the time when defenses may be cut off. In 1961 the Legislature amended the act to require that any referral sale agreement or promise or statement that is made to a buyer or prospective buyer by a seller for the purpose of inducing that buyer to negotiate the contract shall now be included in the contract in writing and in the event there is such a promise or referral agreement that is included in the contract, then there must also appear a provision in the contract indicating that to the extent the seller becomes obligated to the buyer by reason of the referral sale, the outstanding balance then in effect shall be reduced. Or to say it another way, any amount owing by the seller to the buyer pursuant to such an agreement shall reduce the outstanding balance of the purchaser. As you will note this does not render the referral sale per se illegal. However, it does require that there be notice, that there be something in writing, and that the purchaser will have evidence that there was in fact such an agreement. It was found in California that many of the fraudulent operations involving food freezer plans, aluminum siding, vacuum cleaner sales, book and magazine sales involved the referral sale gimmick. This is the gimmick that is used by such operators with considerable success to persuade a prospective customer to sign up. The seller tells the buyer that the contract amount or the cost of the goods will be wiped out by the referrals that are made by the customer, because the seller promises or has promised the buyer that every referral that is made, for every customer that is realized, or may be realized as a result of the buyer's contact or the buyer's referral, the seller will pay to the buyer a certain sum of money. Consequently, the numerous sales that are anticipated will pay for the buyer's contract. Invariably, the purchaser receives little, if anything, for the referrals that were actually made, but to the companies the referrals were extremely important. In addition to the provision of notice to the buyer and concrete evidence of the existence of such an agreement, the requirement that such an agreement be included in the contract provides cumbersome paper for the finance companies to handle and it was felt that this would discourage the use of referral sales gimmicks. The law provides civil remedies for the buyer, including damages, and in certain circumstances relief

from the obligation to pay the service charge or time price differential and in the event of willful violation of any of the provisions of the chapter the violator is guilty of a misdemeanor. In the event there is noncompliance and a subsequent party acquires possession of the contract with knowledge of the non-compliance, then the holder will be barred from recovery of any time price differential or service charge or of any delinquency collection or refinance charge imposed, and the buyer has the right to recover such charges if they have in fact been paid to such a person. The law first became effective January 1, 1960, and provides a tool for law enforcement to use as well as the general public.

Although this law was designed to help the consumer solve the problems he became enmeshed in with the "suede shoe" operations and the fly-by-night operator, there was one type of service that was offered and provided which was so overrun with fraud and chicanery that the Legislature decided to speak out against it specifically and the result was the Health and Dance Studio Contract Law. It is particularly interesting that the Legislature included in the enactment of the specific legislation a preamble decrying the tactics and techniques which prompted this specific law. This preamble reads as follows:

"(a) The Legislature finds that there exists in connection with a substantial number of contracts for health and dance studio services, sales practices and business and financing methods, which have worked a fraud, deceit, imposition, and financial hardship upon the people of the State; that existing legal remedies are inadequate to correct these abuses; that the health and dance studio industry has a significant impact upon the economy and well-being of this State and its local communities; that the abuses and problems which have arisen in the field of health and dance studio services are similar and substantial as to both industries and peculiar to both industries as to kind or extent; and that the provisions of this title relating to such contracts are necessary for the public welfare.

(b) The Legislature declares that the purpose of this title is to safeguard the public against fraud, deceit, imposition and financial hardship, and to foster and encourage competition, fair dealing, and prosperity in the field of health and dance studio services by prohibiting or restricting false or misleading advertising, onerous contract terms, harmful financial practices, and other unfair, dishonest, deceptive, destructive, unscrupulous, fraudulent and discriminatory practices by which the public has been injured in connection with contracts for health and dance studio services." [Part 4, Title 2.5, Division 3 of the Civil Code, §1812.80].

Briefly the law requires contracts for health and dance studio services to be in writing and limits the time for payments or financing by the buyer to a period of two years or less from the date that the contract is entered into. The law prohibits the measurement of the term of the contract by the life of the buyer and limits the services to be provided to a period not to exceed seven years from the date the contract is entered into. In addition, the services shall commence within six months from the date the contract is entered into and no contract for such services shall exceed in total amount \$500. The law requires every contract for such services to contain a provision that if by death or disability the person agreeing to receive the services is unable to receive all services for which he has contracted, he and his estate shall be relieved of the obligation of making payment for the services other than those received before the death or onset of the disability, and if any amount has been prepaid for such services, then to the extent that he has paid for services not yet received, this shall be refunded to him or his representative. The remedies provided by the law amount to a statement that any contract which does not comply with the provisions of the law is void and unenforceable as contrary to public policy, or if any contract is entered into in reliance upon a wilful, false, fraudulent, or misleading information or representation or a notice or advertisement of the seller, then it is void and unenforceable. A buyer who is injured by a violation of the law can bring an action for recovery of damages which may be three times the amount of actual damages plus reasonable attorneys fees.

Although this law unlike the Unruh Act does not provide for a criminal penalty, it is important to note that it does provide more stringent private remedy for the buyer and declares a public policy against enforcing a contract which is entered into contrary to the public policy of the state. However, the law provides that it is not exclusive in its application and all other laws that are pertinent would have full force and effect upon the transaction.

It would appear then that any contract which is entered into as a result of false or fraudulent misrepresentation or which violates the Unruh Act, which we just addressed ourselves to, could be successfully attacked and prosecuted as a violation of the applicable criminal provisions of the law to be found elsewhere in California codes.

A law which is not new but which would be applicable in this situation is the provision of section 17500 of the Business and Professions Code and the sections that follow immediately thereafter. This law declares:

"It is unlawful for any person, firm, corporation or association, or any employee thereof with intent to directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter

into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this State, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, any statement, concerning such real or personal property or services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any such person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell such personal property or services, professional or otherwise, so advertised at the price stated therein, or as so advertised."

The courts have construed this section to be applicable in a situation where statements made are literally true but tend to be misleading or deceptive to those for whom the statements are intended. If the advertisement, although literally true, is misleading in its implications, then it is prohibited by law. A California court declared the following advertisement to be misleading:

"SPECIAL SALE --FIRESTONE CONVOY TUBES 50% OFF REGULAR FIRST LINE TUBE LIST PRICE."

The court said the public would believe that the convoy tubes offered for sale were first line tubes. However, the convoy tubes actually offered for sale were third line tubes, contrary to the implication of the advertisement. Although this law is very general and appears applicable to any situation, where real or personal property is offered to the public for sale, there are many other sections of California law which declare false or misleading advertising or representations to constitute a crime. For example, section 10139 of the Business and Professions Code declares it a misdemeanor for anyone to advertise or act as a real estate broker or salesman without a license. Section 10140 of the Business and Professions Code makes such advertisement a felony and directs the district attorney to prosecute any person who distributes or publishes any false statements or representations concerning any land offered for sale, lease, etc. And the law also applies to any person who with knowledge of the falsity of the statements, circulates any advertisements, pamphlets of this character. Likewise, section 10261 of the Business and Professions Code provides that anyone who participates in false advertising relating to any business opportunity or who distributes such advertisement with knowledge of its falsity is guilty of a misdemeanor to be prosecuted by the district attorney. Section 12020 of the Business and Professions Code and section 12021 makes it a misdemeanor for a person to use a weight or measure or a weighing or

measuring instrument knowing it to be false. And the latter section makes it a misdemeanor to knowingly mark or stamp false or short weight or measure on any container or to knowingly sell any container so marked. The laws of California are replete with proscriptions against false or misleading representations and advertising in pursuit of almost any regulated profession or vocation and makes the violation a crime subject to prosecution.

In California generally crimes are divided into two general classes, misdemeanors and felonies, and for the sake of our discussion here, a misdemeanor constitutes the lesser of the two classes of offenses with punishment restricted to jail as opposed to state prison and/or fine usually not to exceed \$500 to \$1000 and the jail sentence is usually of a maximum term of one year, unless restricted to a lesser term by statute.

The nature of many of the consumer frauds that are practiced in the State or have been practiced in the State, the mobility of the operators and the structure of law enforcement, plus difficulties of prosecution under some of the laws, requires an imaginative approach by law enforcement to the task of consumer protection. One of the problems that plagues California consumers is telephone solicitation. Throughout the state housewives have been up in arms about the promoters who intrude via telephone. In several instances these promotions have been represented as quiz programs - an opportunity for the housewife to receive free services or products if she answers the quiz question correctly. The most recent example of the type of representation occurred in an activity which was promoted by a group of men who traveled from place to place in the state contracting with local businesses and services to conduct a promotional campaign involving a sale of coupon books if the particular service or the particular store or retailer would agree to provide free services or products. The promoters thereupon set up a 'boiler room' operation--that includes a bank of telephones and local girls to handle the phones. They secure reverse listings from the telephone company and then proceed to call people in the community systematically. If the individual answers the question correctly, and almost invariably she does, then she is entitled to a free gift, in most instances practically worthless, plus free merchandise either at a cleaners or at a photography shop, with the purchase of a coupon book. The pitch of the promoters fails to reveal that the services that were free had to be coupled with services for payment. And the promoters usually neglected to tell the store owner how many coupon books he was selling. In one county of the state, when this same operation commenced, the district attorney arrested the operators and charged them with conducting a lottery for which they were convicted and placed on probation.

In our California law we have the more traditional crimes that appear in our Penal Code that might be applicable to the "white collar criminal" or the fraud of misrepresentation; for example, the offense of larceny by trick or device, petty theft, theft by false pretenses, or attempted theft by false pretenses. It is important that law enforcement

does not fall into the trap of stereotype thinking and action. The 'suede shoe' or 'fast buck' operator is clever and imaginative and, therefore, successful. Law enforcement must combat these crimes with equivalent vigor and imagination but must always be scrupulously legal. It is essential that local law enforcement agencies be cognizant of the administrative bodies that may regulate some phase of the business enterprise that is questionable. For example, the Sales Tax Law of California is administered by the Board of Equalization and in many situations the true character of an operation is ascertainable upon an audit and analysis of the records that are required to be kept by the Board of Equalization. In addition, other departments of State Government in California are charged with the administration and regulation of a multitude of businesses. For example, the Department of Agriculture is charged, among other things with maintaining a bureau of weights and measures. This Bureau enforces those sections of the Business and Professions Code of California applicable to weights and measures in petroleum products and maintains pertinent rules and regulations. Within the Department, there is also a meat inspection bureau, which operates under the California Meat Inspection Law, which requires inspection and approval of meat food products that are prepared in counties of over 28,000 population. In addition, there is a bureau of poultry inspection. The State maintains a Department of Investment, with a Division of Corporations, which administers the Industrial Loan Law, the Credit Union Law, Personal Property Brokers Law, Small Loan Law, Escrow Company Law, Check Sellers and Cashers Law, and in order to inspect financial concerns subject to such laws to see that their capital and business practices conform to law and that the charges which they make to the public do not exceed statutory limits. The Department of Professional and Vocational Standards includes several divisions, boards and commissions which separately administer the law as it pertains to several professional and skilled trade industries. One of the important, for purposes of consumer protection, is the Contractors' State License Board which regulates almost 90,000 contractors in the various branches of construction industry in California. As the title suggests, this is the licensing agency for the contractors of the state. The license may be suspended or revoked if the holder commits any act or omissions constituting causes for disciplinary action. The objective of this requirement is protection of the public against fraudulent, incompetent, inexperienced or unlawful acts or omissions arising out of, and incident to the execution of building construction agreements or contracts. As recently as one week ago this board ordered the suspension of the license of a large interstate furnace company for a period of sixty days. The suspension was stayed during a probationary period of one year on condition that the company would post a bond of \$10,000; would comply with the Contractors' License Law and would make restitution or effect settlement with a number of complainants around the state who charge some misrepresentation on the part of the agents of this company. The action of the Board was prompted by a concentration of complaints in one county and an investigation by the District Attorney of that County, plus the interest and inquiry from the Consumer Fraud Section of the Attorney General's Office and the Consumer Counsel.

This company operates in this State pursuant to the one contractor's license which is controlled by the Board.

Of great importance to law enforcement in this State is the Bureau of Criminal Identification and Investigation in the Department of Justice. This is the central clearing house for information on criminals in California. Fingerprints, photographs and descriptions in the files of this Bureau assist in the identification and apprehension of suspects and fugitives. Classified data are of ready service to local police officers. The data on modus operandi of known criminals is another source of identification and investigation. It is felt by the Consumer Fraud Section of the Attorney General's Office, as well as the many district attorneys throughout the state, that the establishment of a M.O. section within the Bureau of Criminal Identification and Investigation, plus a regular news bulletin carrying data on suspected criminal or consumer fraud activity on the part of the 'suede shoe' operators would be of inestimable benefit to the entire state and at the present time we are working on the establishment of this procedure. The California Bureau of Criminal Identification and Investigation is the largest state operation of its kind and is second only to the FBI in the scope of its operation.

The problems within the state are not completely solved. We feel that we have laws and tools and techniques which can help us tremendously if they are utilized most effectively. The first project, of course, is to utilize these laws and tools as effectively as they will permit. The second is to ascertain the deficiencies if any and to plug these deficiencies with new techniques and new laws and the third, to supply information to law enforcement officers throughout the state and to assist local law enforcement in the development and refinement of the techniques and tools that are available to protect the consumer. These objectives might be restated as a desire to provide the consumer public with the ultimate in law enforcement. Of equal importance is the maintenance and dissemination of information to the public about tricks, the cheats, as well as the rights of the consumer. The consumer who doesn't know his rights doesn't have any rights! Information for the consumer and law enforcement is essential. Law enforcement for the protection of the consumer will be effective to the extent that it becomes preventive law enforcement. Information among the states about consumer protection and problems can and should be developed as fully as possible. California stands ready to participate in a forward looking program of exchange of information among the several states beyond that which is now in effect.

California applauds the keen awareness displayed by President Kennedy's recent message to Congress recommending an extension of the Federal program of protection for the consumer. The interests of the consumer are the interests of the nation and protection of consumer interests is good business.