



7-1-1973

Private and Public Remedies for Fraudulent Business Practices in California: The Importance of a Strong Public Role

Robert D. Sevell

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

Recommended Citation

Robert D. Sevell, *Private and Public Remedies for Fraudulent Business Practices in California: The Importance of a Strong Public Role*, 6 Loy. L.A. L. Rev. 312 (1973).

Available at: <https://digitalcommons.lmu.edu/llr/vol6/iss2/3>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

PRIVATE AND PUBLIC REMEDIES FOR FRAUDULENT BUSINESS PRACTICES IN CALIFORNIA: THE IMPORTANCE OF A STRONG PUBLIC ROLE

The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous who, in making purchases, do not stop to analyze but are governed by appearance and general impressions.¹

In the not too distant past, the relationship between consumer and merchant was fully expressed by the ancient doctrine of “caveat emptor.”² The marketplace functioned on a laissez-faire basis and the existent remedies for frauds practiced upon consumers were minimal.³ In recent years, however, there has been a burgeoning public awareness of the dangers inherent in this traditional relationship, an awareness reflected in the continuing movement for the creation of consumer councils designed to educate and inform and in the sudden flurry of legislation dealing with consumer problems.⁴ Nevertheless, despite

1. Family Record Plan, Inc. v. Mitchell, 172 Cal. App. 2d 235, 244, 342 P.2d 10, 16 (1959), quoting Stork Restaurant, Inc. v. Sahati, 166 F.2d 348, 359 (9th Cir. 1948).

2. See generally Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931).

3. At common law, the major remedies for consumer misrepresentation were pursued through an action in contract for damages or rescission or an action in tort for fraud or deceit. Hester, *Deceptive Sales Practices and Form Contracts—Does the Consumer Have a Private Remedy?* 1968 DUKE L.J. 831, 835, 850, 860 [hereinafter cited as Hester].

4. Within the last two years the following major consumer protection statutes were passed: CAL. BUS. & PROF. CODE ANN. § 9880 *et seq.* (West Supp. 1973) (creates in Department of Consumer Affairs a Bureau of Automotive Repair to regulate certain aspects of automotive repair industry); *id.* § 17533.8 (prohibits offering someone, by mail or telephone, a prize or gift with the intent to offer a sales presentation upon delivery absent revelation of such intent); *id.* § 17535 (amends section to expressly authorize courts to grant restitutionary relief to persons harmed by unfair or fraudulent business practices); *id.* § 17538 (requires mail order companies, unless otherwise indicated in advertisement, to deliver goods ordered, to make a full refund, or to give notice of delay or substitution together with offer to refund within one week, within six weeks of accepting money); CAL. CIV. CODE § 1689.6 (West Supp. 1973) (creates a three day right of revocation with respect to any home solicitation contract); *id.* § 1720 (suspends accrual of interest, financing and similar charges on a retail installment contract should the obligee fail to timely respond to an inquiry concerning a debit or credit applicable to the obligation); *id.* § 1747.50 (requires credit card issuers to correct billing errors within sixty days upon request); *id.* § 1747.90 (subjects credit card issuer to

these and other efforts designed for his education and protection, the average consumer continues to be subjected to countless fraudulent and unfair business practices.⁵

It is estimated that these fraudulent practices result in the bilking of the American public of a sum approaching one billion dollars per year.⁶ In addition to these individual financial losses, consumer fraud exacts broader and potentially more serious costs from society as a whole. The prevalence of such fraud tends to undermine ethical business standards.⁷ A probable additional cost was cited by the Kerner Commission, which stated that such exploitative practices as high pressure salesmanship, bait advertising, misrepresentation of prices, substitution of used goods for promised new ones, failure to notify consumers of legal actions against them, refusal to repair or replace substandard goods, and exorbitant prices were among the factors to which ghetto rioting was at least partially attributable.⁸

There exists no evidence that the motives of the architects of the current consumer protection system were anything but well-intentioned.

defenses of cardholder as buyer against retailer on purchases exceeding fifty dollars); *id.* §§ 1750-84 (codifies the Consumers Legal Remedies Act, which delineates private legal remedies for fraudulent business practices); *id.* § 1804.2 (subjects assignee of seller's rights to all equities and defenses of the buyer against the seller arising out of the sale and existing in favor of the buyer at the time of the assignment, any agreement to the contrary notwithstanding); *id.* § 3370.1 (imposes civil penalty of up to \$2500 for unfair competition, including fraudulent business practices and deceptive advertising); CAL. CODE OF CIV. PROC. § 117 (West Supp. 1973) (increases jurisdiction of Small Claims Court from maximum of \$300 to \$500); CAL. VEH. CODE ANN. § 5906.5 (West Supp. 1973) (requires recordation of odometer reading upon transfer of motor vehicles).

5. In California, the sheer bulk of complaints and inquiries lodged with public and private agencies illustrates the extent of the problem. For instance, it has been estimated that the San Francisco Better Business Bureau received inquiries from consumers at the rate of 140 per day with the total incidents of service approaching 63,000 for the year. Telephone conversation with Leo Harth, Director of Trade Practices, San Francisco Better Business Bureau, February 23, 1973. In the same year, the Long Beach Better Business Bureau received a total of 49,650 inquiries, 2,865 of which resulted in written complaints. Telephone conversation with Ben Paris, President and General Manager, Long Beach Better Business Bureau, February 16, 1973. In addition, the California Attorney General's Office currently receives in excess of 1,000 written and 2,500 telephone complaints each month. Petitioner's Brief for Hearing before the California Supreme Court at 24, *People v. Superior Court*, 9 Cal. 3d 283, 507 P.2d 1400, 107 Cal. Rptr. 192 (1973) [hereinafter cited as *Petitioner's Brief*].

6. Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395 (1966) [hereinafter cited as *Translating Sympathy*].

7. See text accompanying note 36 *infra*.

8. REPORT OF THE NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS 276 (1968).

However, if, as has been asserted, up to 95% of illegal consumer abuses escape adjudication,⁹ it would seem safe to conclude that our system has failed to provide truly adequate protection for the consumer.

This Comment will examine the reasons for this failure by studying the present state of consumer protection law in California. It will be shown that for a variety of legal, social and economic reasons private remedies,¹⁰ whether pursued through an individual or a class action, do not afford the consumer a sufficiently adequate means by which to redress injuries suffered as result of unfair or fraudulent business practices. The recently enacted Consumers Legal Remedies Act¹¹ may have the potential for solving at least some of these problems; however, as will be demonstrated, the Act leaves untouched certain obstacles with respect to the initiation and maintenance of consumer actions¹² and certain insufficiencies within the Act itself may serve to undermine the effectiveness of some of its most salutary provisions.¹³ Finally, this Comment will attempt to establish that the best hope for providing the public with effective redress for consumer wrongs lies chiefly with those actions which can be brought by the Attorney General, and therefore that office must continue to be assured maximum power to effectively challenge unfair business practices if the consumer's protection is to be truly whole.

9. Tydings, *Fair Play for Consumers*, TRIAL, Feb.-Mar., 1970, at 37, quoting Ralph Nader testimony, *Hearings on S. 1980 Before the Subcomm. on Improvements in the Judicial Machinery of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. — (1969).

10. No attempt will be made herein to discuss in detail the various specific causes of action (see note 14 *infra*) available to the consumer injured by unfair or fraudulent business practices or the specific problems which may arise in connection with the prosecution of a particular cause of action. Rather, this Comment will attempt to provide an overview of the general effectiveness of private as opposed to public remedies for the redress and future deterrence of such practices. For discussions of the various problems which may arise in connection with a particular cause of action, see Hester, *supra* note 3, at 835-50 (problems related to a contract action for rescission including discussions of the effects of the parole evidence rule, puffing, the innocent principal, and affirmance of contract), 850-59 (problems related to a contract action for damages); 860-74 (problems related to recovery for misrepresentation on a tort theory); Note, *Disclaimers of Warranties in Consumer Sales*, 77 HARV. L. REV. 318 (1963) (problems posed by disclaimers of warranties in commercial transactions). See generally Traylor, *Consumer Protection Against Sellers' Misrepresentations*, 20 MERCER L. REV. 414 (1968) [hereinafter cited as Traylor].

11. CAL. CIV. CODE §§ 1750-84 (West Supp. 1973).

12. See text accompanying notes 14-46 *infra*.

13. See text accompanying notes 58-69, 104-08, 113-17 *infra*.

PRIVATE REMEDIES

A. Common Impediments to the Effective Utilization of Private Remedies, Whether through Individual or Class Actions

Private consumer actions to redress injuries suffered as a result of fraudulent or unfair business practices may take the form of either individual or class actions.¹⁴ However, irrespective of the type of action brought, a number of considerations militate against the general efficacy of the consumer litigant's suit. Some of these involve problems sui generis to the particular cause of action,¹⁵ while others are inherent in any legal action undertaken by a private party.

An obvious preliminary to the seeking of redress by an individual who has been the victim of a fraud is the individual's awareness that he has been wronged. Seldom, however, does the defrauded consumer actually possess this essential awareness. This consumer incognizance is largely attributable to the commercial actualities which govern the consummation of sales in the modern marketplace.¹⁶ The consumer is faced with a barrage of advertisements from distant sellers with whom he is often totally unfamiliar. It is difficult to distinguish actionable misrepresentation from "puffing" or mere opinion, which is deemed not actionable within the context of the marketplace.¹⁷ In many instances, prepackaging prevents the buyer from examining the product prior to purchase.¹⁸ Even in those situations in which the average consumer is able to inspect the product, the technical knowledge necessary to exercise an informed consumer judgment is ordinarily beyond his competence. Further, the consumer often buys without comparing or even considering the selling price.¹⁹ Finally, the problem is further aggravated by purchasing incentives, such as shopping for status and

14. Whether filed as an individual or class action the claim for relief may be pleaded in contract for rescission or damages, in tort for damages, under Business and Professions Code section 17535 for restitution and injunctive relief (false advertising), under Civil Code section 1780 for injunctive relief and actual and punitive damages (use or employment of practices declared unlawful by section 1770), or on the theory that the transaction constituted an illegal bargain, the enforcement of which is prohibited on public policy grounds. Hester, *supra* note 3, at 866.

15. See note 10 *supra*.

16. Note, *Consumer Protection Under the Iowa Consumer Fraud Act*, 54 IOWA L. REV. 319, 324 (1968).

17. See Hester, *supra* note 3, at 840-44. See also Traylor, *supra* note 10, at 420-21.

18. See Note, *Consumer Protection Under the Iowa Consumer Fraud Act*, 54 IOWA L. REV. 319, 324 (1968).

19. See Comment, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 767 (1967) [hereinafter cited as *Consumer Legislation*].

the widespread use of games and contests, which tend to focus the consumer's attention on things other than the quality of the product purchased.²⁰

While increased consumer education would seem to afford a potentially effective method of alleviating the purchaser's lack of awareness, experience has shown that the average consumer generally fails to utilize those educational materials that are available to him. As might be assumed, the better educated and more affluent segment of the public, since it is better able to afford and comprehend available educational materials, is generally better equipped to make intelligent choices in the marketplace.²¹ However, the wealthy, as a group, have apparently chosen not to make use of these sources to any significant degree. Indeed, there appears to be little difference between the buying habits of the rich and those of the poor. Consumers in general, regardless of class, tend to shop without comparing prices, fail to appreciate the cost of credit and shop for status or to take advantage of games and contests rather than for value.²²

Whereas the wealthy may choose not to utilize available information regarding product and merchant reliability, the less affluent are, more often than not, either unaware of the existence of the sources of such information or unable to afford them. In one survey conducted among the poor, 64% of those interviewed were unable to name any public or private agency which could render assistance should they be faced with a consumer problem.²³ Of those who were able to name an agency, more than one half identified the Better Business Bureau as their prime source of assistance when faced with a fraudulent business practice.²⁴ Certain factors, however, militate against the Bureau's effectiveness in providing the consumer with adequate information or redressing grievances. Requests for information concerning a given company result merely in a disclosure of the number of complaints registered against the company; the Bureau will not disclose the content of these complaints,²⁵ even though the contents will usually be the source of the most meaningful information.²⁶ If the Bureau is not contacted

20. *Id.*

21. A recent study, for example, has shown that of those who read Consumer Reports, one of the few objective sources of product information, 79% have a college background and 63% hold professional or managerial positions. Warne, *Impact of Consumerism on the Market*, 8 SAN DIEGO L. REV. 30, 31 (1971).

22. *Consumer Legislation*, *supra* note 19, at 767-68.

23. Caplovitz, *Consumer Problems*, 23 LEGAL AID BRIEF 143, 147 (1965).

24. *Id.*

25. *Translating Sympathy*, *supra* note 6, at 404-05.

26. *Id.* at 405.

until after a fraud has taken place, the agency's only remedial power is to seek a voluntary resolution of the problem.²⁷ Finally, it is worth noting that the Bureau is supported entirely through dues and membership fees of member merchants.²⁸ For these reasons, the extent to which the Bureau may serve as an effective source of protection for the low income consumer is indeed minimal.²⁹

Even assuming the consumer is able to recognize that he has been defrauded, he may still be unaware of the legal remedies available to him:

Most laymen lack more than a superficial knowledge of their rights and liabilities in a post-sale legal conflict, and rely on professional help when conflicts arise. Many low income consumers lack even this superficial knowledge, and of the substantial number who feel that they have at one time or another been cheated by a merchant, few have ever sought professional aid—only 9 percent in a recent survey.³⁰

The general lack of consumer education is simply one specific example of the fact that public education with respect to the functioning of our legal system is, unfortunately, of a rather general and informal nature. An additional factor, more prevalent among the less affluent, is a general reluctance to become involved in any manner with the legal process. This reluctance on the part of the poor is largely derived from a general lack of exposure to that process through other than unpleasant experiences.³¹ If an irate consumer does take action, it most often takes the form of self-help, usually accomplished by the stoppage of payment on a check or cessation of payment on a debt. Such action, however, only worsens the consumer's position³² since it often subjects him to the invocation of legal sanctions by the merchant.³³

Be he rich or poor, the consumer's failure to know his legal rights can have serious ramifications. Aside from the obvious costs in economic loss and inconvenience to the individual, lack of knowledge of legal rights prevents utilization of legislation specifically designed for

27. *Id.*

28. *Id.* at 404.

29. *Id.* at 404-05.

30. *Consumer Legislation*, *supra* note 19, at 752-53.

31. The attitude of the poor toward legal institutions is derived largely from poor experiences with the law. Education concerning the legal process is informal. The poor's principal acquaintance with the law is usually connected with experiences pregnant with oppression, abuse and frustration. Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 BOSTON U.L. REV. 559, 568 (1968) [hereinafter cited as Rice].

32. *Consumer Legislation*, *supra* note 19, at 764.

33. Caplovitz, *Consumer Problems*, 23 LEGAL AID BRIEF 143, 146 (1965).

the protection of consumers generally. For instance, the Consumers Legal Remedies Act,³⁴ which provides for damages and injunctive relief at the behest of individual consumers for certain enumerated fraudulent practices,³⁵ cannot achieve its laudatory objectives if the public is unaware of its existence. Failure to be aware of and to utilize existing remedies can also undermine ethical standards of business:

If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underline much contemporary law.³⁶

In those instances in which a class action is impracticable or otherwise undesirable, another major factor which often prevents the private litigant from pursuing an action for the redress of injury caused

34. CAL. CIV. CODE §§ 1750-84 (West Supp. 1973).

35. CAL. CIV. CODE § 1770 (West Supp. 1973) provides:

The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:

- (a) Passing off goods or services as those of another.
- (b) Misrepresenting the source, sponsorship, approval, or certification of goods or services.
- (c) Misrepresenting the affiliation, connection, or association with, or certification by, another.
- (d) Using deceptive representations or designations of geographic origin in connection with goods or services.
- (e) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not have.
- (f) Representing that goods are original or new if they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used, or secondhand.
- (g) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.
- (h) Disparaging the goods, services, or business of another by false or misleading representation of fact.
- (i) Advertising goods or services with intent not to sell them as advertised.
- (j) Advertising goods or services with intent not to supply reasonably expectable demand, unless the advertisement discloses a limitation of quantity.
- (k) Making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions.
- (l) Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law.
- (m) Representing that a part, replacement, or repair service is needed when it is not.
- (n) Representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not.
- (o) Representing that the consumer will receive a rebate, discount, or other economic benefit, if the earning of the benefit is contingent on an event to occur subsequent to the consummation of the transaction.
- (p) Misrepresenting the authority of a salesman, representative, or agent to negotiate the final terms of a transaction with a consumer.

36. Calvin and Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941).

by a fraudulent or unfair business practice is the cost involved in procuring legal counsel. If the consumer has lost only one or two hundred dollars as the result of such a practice, he will usually be unable to secure an attorney to represent him. The cost of the extensive discovery usually required in such cases would, alone, be likely to consume any potential recovery.³⁷ Furthermore, even if the consumer's claim were more substantial and assuming that he could recover his court costs and attorney's fees from the defendant if he should prevail, the highly speculative nature of the consumer action³⁸ would dissuade many attorneys from arranging for compensation on a contingency basis. Even the abbreviated procedures of the small claims court, where the services of an attorney are not required, have failed to materially help the consumer's position due to the widespread abuse and circumvention of these very procedures.³⁹ The unscrupulous merchant, being well aware of the difficulties experienced by the consumer in securing an attorney, will tend to avoid practices which could result in losses sufficient to make an attorney's services economically feasible.⁴⁰ Other merchants simply treat the loss of an occasional small claim as one of the risks of the trade, a risk made worthwhile by continued high profits resulting from misrepresentation or deceit.⁴¹

Because it is difficult for the defrauded consumer to secure the services of an attorney, legal aid services are increasingly called upon to provide legal assistance. However, such services do not currently have the ability to meet the need.⁴² The magnitude of the problem becomes readily apparent upon viewing the available statistics. It has been estimated that the number of persons qualifying for free legal services in California is probably about 5,700,000.⁴³ This figure

37. The factors necessitating extensive discovery in a consumer fraud case may include the consumer's inability to remember the representations made, the parties present, or the documents signed.

38. The factors mentioned in note 37 *supra* as necessitating extensive discovery also reduce the certainty of recovery. In addition, the fact that consumers tend to be easily swayed by high pressure salesmanship further complicates the consumer's plight.

39. See generally Comment, *Small Claims Courts and the Poor*, 42 S. CAL. L. REV. 493, 496-99 (1969).

40. *Translating Sympathy*, *supra* note 6, at 409.

41. See text accompanying note 6 *supra*.

42. Legal Aid Attorneys in 33 offices averaged 1,678 cases in 1964 and in only twenty-five of seventy offices surveyed did the average fall below 1,000. Contrast this with the fact that half of the lawyers in private practice in New York handled not more than 50 cases a year and only two percent took more than 500 cases. Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor*, 80 HARV. L. REV. 805, 807 (1967).

43. According to the 1970 Census, there were 2,282,990 welfare recipients in Cal-

should be read in light of the fact that of the 31,523 active members of the California State Bar in 1970,⁴⁴ there were a total of 325 legal service program attorneys in California.⁴⁵ Short of a substantial increase in governmental assistance, legal service programs will likely continue to be unable to adequately assist the defrauded consumer in obtaining relief.

While the above examples are by no means exhaustive, they are illustrative of the kind of general problems which hinder the institution of private suits for the redress of consumer grievances. Unfortunately, the recently adopted Consumers Legal Remedies Act,⁴⁶ which has the potential for alleviating many of the problems associated with achieving redress for consumer wrongs, does not address itself to resolution of these types of general problems. The Act merely adopts a liberalized remedial scheme in an effort to enhance the position of the wronged consumer who has been able to overcome the above obstacles. Given this purpose, it becomes necessary to explore the extent to which the provisions of the Act are likely to materially increase the overall efficacy of private remedies as a means of redress for and future deterrence of unfair or fraudulent business practices.

The Consumers Legal Remedies Act, which became operative on January 1, 1971,⁴⁷ provides that if a consumer experiences any of the sixteen specific unfair or deceptive acts or practices enumerated therein,⁴⁸ he may bring suit to obtain actual damages, injunctive relief, punitive damages or such other relief as the court may deem proper.⁴⁹ Such suit may be maintained on either an individual⁵⁰ or class⁵¹ basis.

The intention of the Act's draftsmen was succinctly stated by then Assemblyman James A. Hayes in testimony before the Assembly Ju-

ifornia. PUBLIC WELFARE IN CALIFORNIA, Statistical Series PA 3-141 (1971). It has been estimated by legal service attorneys that, since no more than 40% of their clients receive welfare assistance, the number of those qualifying for free legal services in California is close to 5,700,000. Brief for the Western Center on Law and Poverty and California Legal Assistance, Inc. as Amicus Curiae at 4, *People v. Superior Court*, 100 Cal. Rptr. 38 (Ct. of App. 1972).

44. Crowe, *Annual Report of the Board of Governors*, 45 CAL. ST. B.J. 601, 602 (1970).

45. See OFFICE OF ECONOMIC OPPORTUNITY, DIRECTORY, OFFICE OF LEGAL SERVICES, REGION IX (San Francisco 1972).

46. CAL. CIV. CODE §§ 1750-84 (West Supp. 1973).

47. *Id.* § 1756.

48. For a listing of the unfair or deceptive acts or practices covered by the Act, see note 35 *supra*.

49. CAL. CIV. CODE § 1780(a) (West Supp. 1973).

50. *Id.* § 1780.

51. *Id.* § 1781.

diciary Committee: "It [the Consumers Legal Remedies Act] represents an extended and thorough effort to arrive at legislation which will give consumers in this state much needed remedies against deceptive practices in the market-place" ⁵² It should be noted that the Act was the product of extended negotiations between members of the legislature, representatives of the business community and representatives of the consumer movement. ⁵³ Needless to say, these groups had substantially divergent views as to the purpose and implementing provisions of the Act. ⁵⁴ It is the opinion of this author that the compromise which resulted from a balancing of the respective interests of these factions leans too heavily toward the merchants' point of view. In an effort to assure that the Act would not "needlessly encourage frivolous and harassing law suits against legitimate businessmen," ⁵⁵ the legislature has enacted a statute which may have considerably less beneficial impact in the area of consumer remedies than was intended. One commentator, with firsthand knowledge of the legislative maneuvering which preceded the Act, has recognized that due to the ambiguities and insufficiencies of the statute "[u]nskilled attorneys or unimaginative judges could effectively destroy the utility of the legislation." ⁵⁶ Many of the problems inherent in the Act are equally applicable to both individual and class actions. The discussion which follows will serve to illustrate certain of these problems. ⁵⁷

A common law action to redress injury suffered as a result of a deceptive business practice is usually brought on a theory of general fraud. ⁵⁸ A traditional prerequisite to the success of such an action is proof that the merchant intentionally defrauded the consumer. ⁵⁹ Since

52. See the testimony of Assemblyman Hayes before the Assembly Judiciary Committee on May 25, 1970, reproduced in Reed, *Legislating for the Consumer: An Insider's Analysis of the Consumers Legal Remedies Act*, 2 PAC. L.J. 1, 7 n.21 (1971) [hereinafter cited as Reed].

53. Reed, *supra* note 52, at 8.

54. Obviously, consumer groups were interested in legislation which afforded the public the strongest possible protection while business interests, fearful of the possible adverse financial consequences of such legislation, championed a watered-down version of the Act. See generally Reed, *supra* note 52, at 6-8.

55. See the testimony of Assemblyman Hayes in Reed, *supra* note 52, at 7 n.21.

56. Reed, *supra* note 52, at 2.

57. Problems inherent in the Act but unique to the class action are discussed in the text accompanying notes 104-17 *infra*.

58. See Reed, *supra* note 52, at 5.

59. *Cardozo v. Bank of America*, 116 Cal. App. 2d 833, 837, 254 P.2d 949, 951 (1953); *Wishnick v. Frye*, 111 Cal. App. 2d 926, 930, 245 P.2d 532, 534 (1952). CAL. CIV. CODE § 1709 (West 1970) provides: "One who wilfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any

a merchant's intent can usually be proved only through utilization of circumstantial evidence,⁶⁰ this requirement of proof of intent poses a substantial problem to the consumer litigant.⁶¹ Thus, one of the chief advantages of the Consumers Legal Remedies Act would seem to be its apparent elimination of the requirement of proof of scienter, i.e., that the seller had knowledge of the falsity of his representation.⁶² Although the Act does not expressly disavow the scienter requirement, the absence of any language specifically requiring proof of intent would seem to imply that such proof is not required in order to successfully maintain an action under the Act.⁶³

However, section 1784 of the Act could indirectly result in the re-imposition of the very scienter requirement which the Act's draftsmen apparently sought to eliminate. This section, added at the request of business representatives,⁶⁴ provides that no award of damages may be given for any violation under the Act if the following requirements are met:

[I]f the person alleged to have employed or committed such method, act, or practice (a) proves that such violation was not *intentional* and resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid any such error and (b) makes an appropriate correction, repair or replacement or other remedy of the goods and services. . . .⁶⁵

damage which he thereby suffers." (Emphasis added). See generally Hester, *supra* note 3, at 860.

60. Reed, *supra* note 52, at 5.

61. *Id.*

62. CAL. CIV. CODE § 1780(a) (West Supp. 1973) provides:

Any consumer who suffers any damage as a result of the use or employment by any person of a method, act or practice declared to be unlawful by Section 1770 may bring an action. . . .

It is to be noted that in contrast with section 1709 (see note 59 *supra*), where proof of intent to deceive is required, under section 1780 no such showing is necessary. However, even the elimination of scienter as an element of the cause of action under section 1780 merely follows the trend of previous California decisional law which appears to have already substantially lessened the plaintiff's burden of proving scienter as a prerequisite for recovery on a general fraud theory. See *Gagne v. Bertran*, 43 Cal. 2d 481, 487, 275 P.2d 15, 20 (1954):

To be actionable deceit, the representation need not be made with knowledge of actual falsity, but need only be an "assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true." (Citations omitted).

Accord, *De Zemplen v. Home Fed. Sav. & Loan Ass'n.*, 221 Cal. App. 2d 197, 34 Cal. Rptr. 334 (1963). See generally 2 WITKIN, SUMMARY OF CALIFORNIA LAW, TORTS § 198 *et seq.* (7th ed. 1960).

63. See notes 59 & 62 *supra* and note 67 *infra*.

64. Reed, *supra* note 52, at 20.

65. CAL. CIV. CODE § 1784 (West Supp. 1973) (emphasis added).

Although the burden of establishing the factors delineated in section 1784 is on the defendant,⁶⁶ the absence of any specific provision in the Act expressly refuting the scienter requirement could enable a court, if it so desired, to seize upon the reference to intent in section 1784 and twist it into a requirement that intent be alleged as an element of the cause of action for any deceptive practice set forth in section 1770.⁶⁷

Although the Act was designed to augment the private litigant's remedies,⁶⁸ it failed to include a provision making unlawful any trade practice which is oppressive or otherwise unconscionable in any respect, or which fails to comply with any state or federal consumer protection statute. This omission takes on added significance in view of the fact that California, in adopting its version of the Uniform Commercial Code, refused to enact an "unconscionability" provision similar to section 2-302 of the Uniform Code.⁶⁹ As a result of the ab-

66. *Id.*

67. That such an interpretation would be a twisting of the statutory language should be fairly clear. It is hard to conceive of section 1784 as anything but an affirmative *defense*, as its title indicates. It can only be invoked if the *defendant* establishes *each* of the following requirements: (1) the violation was not intentional, (2) it occurred as a result of a bona fide error, (3) reasonable procedures had been used to avoid any such error and (4) the violation has been remedied. A showing that the violation was unintentional will not in itself absolve the defendant from liability under sections 1770 and 1780—the other three prerequisites must be satisfied as well. In fact, the inclusion of a showing of no intent as one of the four prerequisites to an affirmative defense under section 1784, if it is to have any interpretive significance at all, should serve to resolve in favor of the *plaintiff* the ambiguity concerning intent as a requirement in sections 1770 and 1780. If intent were already embodied as an element of plaintiff's cause of action, there would be no need to refer to it in section 1784. Furthermore, it should be noted that section 1784, by its very terms, is not even a complete defense to the plaintiff's cause of action. The fourth prerequisite demands that the defendant make "an appropriate correction, repair or replacement or other remedy of the goods and services" before he will be absolved of liability for damages. In addition, the plaintiff is apparently not precluded from seeking injunctive relief.

68. CAL. CIV. CODE § 1760 (West Supp. 1973) describes the statutory purpose:

This title shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.

See also text accompanying note 52 *supra*.

69. Section 2-302 of the Uniform Commercial Code provides:

- (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
- (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

sence of such a provision in California law, any fraudulent practice, no matter how aggravated, must be attacked on pre-Act grounds if it is not specifically enumerated in section 1770 of the Act. Narrow interpretations of the section 1770 categories, therefore, could deprive many consumers of the benefit of the advantages conferred by the Act.

Thus, although the Consumers Legal Remedies Act does have the potential for enhancing consumer litigants' legal position, the realization of this potential is conditioned upon a number of factors. Not only must the consumer be aware that he has been the victim of a fraud, have knowledge of his legal remedies and be able to procure legal counsel, but in order to gain the full benefit of the Act he must also rely upon favorable judicial construction of its provisions. It is far from certain that any, let alone all, of these preconditions can be met in any given case.

*B. Problems Specifically Related to the Utilization of the
Class Action Form of Private Remedy*

When faced with an unfair or deceptive business practice which has caused loss to a number of consumers, those defrauded may choose to pool their claims and bring a single action on behalf of the entire group.⁷⁰ A class action has been said to constitute a form of organized pressure analogous to "mass demonstrations of the streets . . . [the success of which] often hinges . . . on the publicity, visibility and aroused popular reaction it evokes."⁷¹ The chief advantages of the class action in the consumer context have been outlined by the California Supreme Court as follows:

Frequently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all. Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct. A class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial proc-

70. *The Role of California's Attorney General and District Attorneys in Protecting the Consumer*, 4 U.C. DAVIS L. REV. 35, 39 (1971) [hereinafter cited as *Protecting the Consumer*].

71. STARRS, *The Consumer Class Action—Part II: Considerations of Procedure*, 49 BOSTON U.L. REV. 407, 408 (1969).

ess of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts would, in many circumstances, be substantial.⁷²

While these advantages may serve to minimize some of the problems associated with the utilization of private remedies for the redress of consumer wrongs, they by no means totally alleviate such problems. For example, although the class action may, as a result both of attempts to notify members of the class and of any publicity attendant to the action itself, call the attention of certain consumers to wrongs suffered and existent remedies of which they might otherwise be unaware, the efficacy of the class action as a means of general consumer education is necessarily limited. Ordinarily, any publicity concerning the class action will have the desired salutary effect only upon those actually notified as potential members of the class or those who may happen to read any newspaper articles or published announcements describing the action.

In addition, however, to the problems inherent in the pursuit of private remedies generally, whether on an individual or class basis, further impediments to effective consumer utilization of the class action arise in connection with the requirements for maintenance of such an action.

Prior to the adoption of section 1781 of the Consumers Legal Remedies Act,⁷³ section 382 of the Code of Civil Procedure provided the sole authority for the maintenance of class actions in California. Section 382 provides in relevant part:

[W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the Court, one or more may sue or defend for the benefit of all.⁷⁴

72. *Vasquez v. Superior Court*, 4 Cal. 3d 800, 808, 484 P.2d 964, 966-67, 94 Cal. Rptr. 796, 800-01 (1971). In this case 37 named consumers who had entered into contracts for the purchase of meat and freezers brought a class action on behalf of themselves and all others similarly situated against seller's assignee, to rescind said contracts on the ground that the seller had fraudulently misrepresented the true facts regarding the value and durability of the goods to be supplied. *Id.* at 805, 484 P.2d at 966, 94 Cal. Rptr. at 798. The California Supreme Court, in vacating the decision of the trial court, held that plaintiff's complaint alleged the requisite elements of a class action as delineated in *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967). 4 Cal. 3d at 805, 484 P.2d at 966, 94 Cal. Rptr. at 798. The *Daar* case is discussed in the text accompanying notes 82-92 *infra*.

73. CAL. CIV. CODE § 1781 (West Supp. 1973). See text accompanying notes 93-97 *infra*.

74. CAL. CODE OF CIV. PROC. § 382 (West 1970).

The California courts' interpretation of this section has undergone substantial change in the years since its enactment. Originally, the courts construed the statute quite narrowly.⁷⁵ Generally, a class action was not permitted unless the person bringing suit and the members of the potential class were so united in interest as to make them *necessary parties* to the action.⁷⁶ This requirement was in accord with the weight of authority in the United States at the time, which tended to restrict the use of the class action to cases where joinder would otherwise be compulsory.⁷⁷ However, by tying the class suit to a showing that each member of the class was a necessary party to the action, the courts ignored the fact that the class suit was a product of their equitable jurisdiction,⁷⁸ a fact which would seem to require a more flexible and liberal reading of section 382.⁷⁹

Despite its inconsistency with the nature of the class action generally, the compulsory joinder test persisted in some California courts until 1948 when the California Supreme Court finally expressly disavowed the test in *Weaver v. Pasadena Tournament of Roses*.⁸⁰ However, although the *Weaver* court strongly asserted that section 382 does not require that class members be strictly united in interest,⁸¹ it failed to indicate or provide any guidelines as to the kind of showing which would be required to qualify for the maintenance of a class action under the statute. It was not until *Daar v. Yellow Cab Co.*,⁸² some twenty years later, that the California Supreme Court squarely confronted this issue.

75. See *Carey v. Brown*, 58 Cal. 180 (1881); *Watson v. Santa Carmelita Mut. Water Co.*, 58 Cal. App. 2d 709, 137 P.2d 757 (1943); *Ballin v. L.A. County Fair*, 43 Cal. App. 2d 884, 111 P.2d 753 (1941). *But see Mitchell v. Pacific Greyhound Lines*, 33 Cal. App. 2d 53, 91 P.2d 176 (1939); *Jellen v. O'Brien*, 89 Cal. App. 505, 264 P. 1115 (1928). For a full discussion of the above cases, see Comment, *Class Actions and Interpleader: California Procedure and the Federal Rules*, 6 STAN. L. REV. 120, 124-33 (1953) [hereinafter cited as *Class Actions*].

76. *Carey v. Brown*, 58 Cal. 180, 183-84 (1881). In so requiring, the courts interpreted the "common or general interest" phrase of Code of Civil Procedure section 382 in light of the first clause of that section which provides: "Of the parties to the action, those who are united in interest *must* be joined as plaintiffs" CAL. CODE OF CIV. PROC. § 382 (West 1968) (emphasis added).

77. See *Class Actions*, *supra* note 75, at 122.

78. *Id.* at 121-22.

79. *Id.* at 122. The essentially equitable nature of the class action was recognized by the English Courts which appear to have never applied rigid rules to the class suit. *Id.*

80. 32 Cal. 2d 833, 841, 198 P.2d 514, 519 (1948).

81. *Id.*

82. 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

In *Daar* a suit was brought by an individual taxicab passenger on behalf of himself and all other users to recover excessive charges assessed by the taxicab company over a four-year period.⁸³ The question which faced the court in *Daar* was whether the facts as set out in the complaint were sufficient to meet the requirements of section 382.⁸⁴ The California courts had over the years evolved two prerequisites to the maintenance of a class suit under section 382: the existence of (1) an ascertainable class and (2) a well-defined community of interest in the questions of law and fact involved which affect the parties to be represented.⁸⁵ The principal issue in *Daar* was whether the first of these requirements had been met, *i.e.*, whether the existence of an ascertainable class had been sufficiently established. For, although the identity of passengers who were purchasers of script books could be ascertained from company records, the identity of those who paid cash could not be so verified.⁸⁶ The court's solution was to merge the ascertainable class requirement into the community of interest test:⁸⁷ "whether there is an ascertainable class depends in turn upon the community of interest among the members in the questions of law and fact involved."⁸⁸ Thus, the central consideration became simply whether the members of the class had a sufficient community of interest in the questions of law and fact involved to permit the maintenance of the class action.⁸⁹ By effectively eliminating the need to identify the individual class members as a prerequisite to determining the existence of an ascertainable class, the court carried the process of freeing the class suit from arbitrary fixed rules one step further.

Applying its new and simplified test for the maintenance of a class action to the case before it, the court concluded that the requisite community of interest was indeed present.⁹⁰ It noted that its views were in substantial agreement with the criteria set forth in Rule 23(a) of the Federal Rules of Civil Procedure.⁹¹ However, it refused to establish any fixed rule as to what would constitute a "community of interest." Instead it held that whether a community of interest exists

83. *Id.* at 699-700, 433 P.2d at 736, 63 Cal. Rptr. at 728.

84. *Id.* at 703, 433 P.2d at 738, 63 Cal. Rptr. at 730.

85. *Id.* at 704, 433 P.2d at 739, 63 Cal. Rptr. at 731.

86. *See Reed, supra* note 52, at 15.

87. *Id.*

88. 67 Cal. 2d at 706, 433 P.2d at 740, 63 Cal. Rptr. at 732.

89. *Id.*

90. *Id.* at 714, 433 P.2d at 746, 63 Cal. Rptr. at 738.

91. *Id.* at 709, 433 P.2d at 742, 63 Cal. Rptr. at 734.

in a given case will depend upon the facts and circumstances presented therein.⁹²

It is within this general context that the class action provisions⁹³ of the recently enacted Consumers Legal Remedies Act should be considered. As has been noted above, the Act provides the consumer with the right to bring an action for damages and injunctive relief for certain enumerated fraudulent practices.⁹⁴ Section 1781 of the Act specifically entitles the consumer to bring a class action if the following four conditions precedent are met:

- (1) It is impracticable to bring all members of the class before the court.
- (2) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members.
- (3) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class.
- (4) The representative plaintiffs will fairly and adequately protect the interests of the class.⁹⁵

Thus, under section 1781, a community of interest would exist if the questions of law or fact common to the class were substantially similar and predominant⁹⁶ and if the claims of the representative plaintiffs were typical of those of the class.⁹⁷ Obviously, these requirements do not establish rigid rules. Instead, they function as general guideposts which merely indicate to potential litigants the considerations which a court will find most compelling in deciding whether a class suit should be permitted in a given case. These guideposts would appear to be consistent with the principal thrust of *Daar*, in that their flexibility emphasizes and reinforces the equitable nature of the class suit.

The four factors specified in section 1781 are clearly applicable to all class actions brought to remedy any of the fraudulent business practices enumerated in the Consumers Legal Remedies Act. The question remains whether the courts will apply these same factors in resolving the community of interest question in consumer class actions which fall outside the scope of the Act, and which must therefore be brought as general section 382 class actions.⁹⁸ Although at this point

92. *Id.* at 710, 433 P.2d at 743, 63 Cal. Rptr. at 735.

93. CAL. CIV. CODE § 1781 (West Supp. 1973).

94. See note 35 *supra*.

95. CAL. CIV. CODE § 1781(b) (West Supp. 1973).

96. *Id.* § 1781(b)(2).

97. *Id.* § 1781(b)(3).

98. See text accompanying notes 47-51, 68-69 *supra*.

it is only possible to speculate, it would seem likely that the courts will do so. The requirements established by section 1781 are nearly identical to those set forth in Rule 23(a) of the Federal Rules of Civil Procedure, which were cited with approval by the *Daar* court.⁹⁹ The legislature was well aware of the *Daar* decision at the time it enacted section 1781.¹⁰⁰ It seems probable, therefore, that the factors delineated in section 1781 were intended to incorporate and clarify the *Daar* community of interest test.

A clue to the possible thinking of the courts can be gleaned from the California Supreme Court's language in *Vasquez v. Superior Court*.¹⁰¹

If the class action is to prove a useful tool to the litigants and the court, pragmatic procedural devices will be required to simplify the potentially complex litigation while at the same time protecting the rights of all the parties. Although we have concluded that the provisions of the Consumers Legal Remedies Act do not apply retroactively to this case, no valid reason exists to prevent the trial court from utilizing many of the procedural provisions of the act in the interests of efficiency.¹⁰²

The courts could easily apply the section 1781 requirements by analogy in every class action.¹⁰³ The application of these requirements would result in increased uniformity in judicial approach to and analysis of class actions whether brought under section 1781 or section 382. Uniformity in result, however, may still vary depending upon the type of class action brought, unless all of the attributes of the section 1781 form of action are deemed applicable and judicially adopted for section 382 actions as well. For the outcome in actions brought under section 1781 will depend on the ultimate resolution of certain currently unresolved questions arising under the Act.

One such question arises in connection with section 1781(c) of the Act, which requires a preliminary hearing to resolve certain questions incident to the bringing of a class action.¹⁰⁴ Under this section,

99. See text accompanying note 91 *supra*. For a general discussion of Rule 23(a), see Rice, *supra* note 31, at 579-83.

100. See the testimony of Assemblyman Hayes before the Assembly Judiciary Committee on May 25, 1970, reproduced in Reed, *supra* note 52, at 7 n.21.

101. 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).

102. *Id.* at 820, 484 P.2d at 977, 94 Cal. Rptr. at 809.

103. It is true that the Consumers Legal Remedies Act expressly states that the remedies provided in the Act are not exclusive, but are "in addition to any other procedures or remedies provided in any other law." CAL. CIV. CODE § 1752 (West Supp. 1973). This admonition, however, would not preclude a court, if it so desired, from utilizing the section 1781 requirements in the section 382 class action for the purpose of determining the existence of a community of interest.

104. CAL. CIV. CODE § 1781(c) (West Supp. 1973).

the court has the power to determine the propriety of the class, the necessity for published notice, the merit of the action or the existence of any defense to such action.¹⁰⁵ The Act does not state what kind of orders the court is to make as a result of its findings. It has been argued that the courts should look to Rule 23(c) of the Federal Rules of Civil Procedure for authority on this issue.¹⁰⁶ Rule 23(c) enables federal courts, in a preliminary hearing in actions brought on a class action basis, to issue orders "which may be conditional and may be altered or amended before the decision on the merits."¹⁰⁷ Thus, if the federal experience were to be followed, the court in class actions brought pursuant to section 1781 would only be able to issue conditional orders and could not defeat the class action at an early stage. Summary judgment pursuant to section 437c of the Code of Civil Procedure seems to be clearly prohibited in actions brought under section 1781.¹⁰⁸ Nevertheless, the failure of the section to clarify the courts' power at the preliminary hearing could easily result in the use of the hearing as still another obstacle for consumers to overcome in order to successfully maintain a class action.

Whatever the interrelationship between sections 382 and 1781, there are a number of obstacles common to the bringing of any class action which will continue to limit the effectiveness of the class action as a vehicle for the redress of consumer grievances. To begin with, for the successful maintenance of a class action, plaintiffs must establish the existence of common facts, i.e., in the defrauded consumer context, that the misrepresentations made to each member of the class were substantially identical.¹⁰⁹ This is the element which ties the class together and it must be proven to establish the requisite "community of interest."¹¹⁰ Most successful class action suits involve simple factual disputes. In *Daar*, for example, either the meters were rigged or they were not.¹¹¹ The complaints of each member of the class were the

105. *Id.* The converse of section 1781(c) can be found in recent additions to the Code of Civil Procedure which permit coordination of *separate* actions which share a common question of law or fact, upon the motion of the judge or any party. Ch. 1162, § 2, [1972] Cal. Stat. — (codified at CODE OF CIV. PROC. §§ 404-.8 (West Supp. 1973)) (effective Jan. 1, 1974).

106. *See Reed, supra* note 52, at 16.

107. FED. R. CIV. P. 23(c).

108. CAL. CIV. CODE § 1781(c) (West Supp. 1973); CAL. CODE OF CIV. PROC. § 437c (West Supp. 1973). *But see Reed, supra* note 52, at 16.

109. Smit, *Are Class Actions for Consumer Fraud a Fraud on the Consumer*, 26 BUS. LAWYER 1053, 1064 (1971) [hereinafter cited as Smit].

110. *Id.*

111. 67 Cal. 2d at 701, 433 P.2d at 737, 63 Cal. Rptr. at 729.

same. However, this is often not the case in consumer fraud situations. Because there is often no way to document that the oral representations made to each member of the class were the same, class litigants are frequently relegated to pleading that the representations constituted a common plan or scheme, the actual existence of which is at best a probability.¹¹² It is also highly unlikely that a single private attorney or firm will receive a sufficient number of identical complaints to even suspect that the basis for the bringing of a class action exists.

In addition, there exists the possibility that the serious due process questions involved in utilization of class actions might develop into substantial obstacles to their successful maintenance. A class action will be *res judicata* as to all class issues adjudicated therein.¹¹³ If the named plaintiffs in the suit fail to prove their case, absent members of the class may be prevented from bringing an action for recovery based on the same facts, even if their claim of fraud could be more easily proved.¹¹⁴ Thus, it is essential to provide effective notice to all members of the class if minimum due process requirements are to be met. At present, however, there exists a degree of uncertainty as to the type of notice necessary to satisfy the due process requirement. Section 1781(d) of the Consumers Legal Remedies Act does attempt to deal with the problem. It provides that the court may appoint either party to notify class members of the action.¹¹⁵ Notice by publication is permitted if personal notification would be impractical or unreasonably expensive.¹¹⁶ However, despite the care with which the statute was written, it is impossible to be certain that the due process standards set out in the statute will hold up under judicial scrutiny.¹¹⁷ At the very least, it would seem that protracted litigation on the due process question, if not a certainty, is a distinct possibility.

Another obstacle which the consumer must surmount in order to maintain a class action involves the length of time required to litigate a class suit.¹¹⁸ The magnitude of the claim and the status of the de-

112. Smit, *supra* note 109, at 1062.

113. See *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 706, 433 P.2d 732, 740, 63 Cal. Rptr. 724, 732 (1967), wherein the court stated:

If we conclude that the instant complaint properly sets forth a class action, the judgment herein will be *res judicata* as to all persons to whom the common questions of law and fact pertain.

114. See Smit, *supra* note 109, at 1066.

115. CAL. CIV. CODE § 1781(d) (West Supp. 1973).

116. *Id.*

117. See the discussion in Reed, *supra* note 52, at 16-17.

118. *Daar*, for example, was filed on November 20, 1964, but was not finally settled until November, 1970. Smit, *supra* note 109, at 1063 n.35.

defendant in the ordinary class action usually lead to a spirited defense which in turn involves delays due to pleading challenges, discovery, trial and appeals. In the interim, the consumer is denied restitution. This can be especially serious when the person defrauded is poor. Delay also taxes the courts. While municipal and small claim courts normally handle retail sales cases, superior courts will be forced to try many of the aggregated individual claims.¹¹⁹ The increased caseload will further burden the already crowded court calendars.

Existing legislation which awards attorneys' fees to the party who prevails in certain civil actions¹²⁰ also tends to complicate the bringing of class actions in California. If the class loses and the defendant is awarded attorneys' fees, which can be quite substantial, the absent members as well as the named plaintiff would be forced to contribute to the award.¹²¹ To add insult to injury, an unsuccessful class action may have generated attorneys' fees in excess of any potential recovery.¹²² The chance that the action might not succeed and that the plaintiffs would therefore be saddled with high attorney costs tends to discourage the bringing of suits in all but the most aggravated cases of unfair or fraudulent practices.

The class action, then, whether brought pursuant to section 382 of the Code of Civil Procedure or section 1781 of the Civil Code, is not necessarily the "ultimate" remedy some have lauded it to be.¹²³ Like the private consumer remedies, the class suit suffers from existing and potential problems. The Consumers Legal Remedies Act, as discussed above, subjects the class suit to potential new problems in connection with the provision providing for preliminary hearings¹²⁴ and the section blocking any damage award if the defendant proves that the harm caused was unintentional, resulted from a bona fide error despite utilization of reasonable procedures adopted to avoid such error, and has been "appropriately" remedied.¹²⁵ Additionally, problems involved in the maintenance of any class action, namely, the establishment of common facts, the question of notice (due process), the length of litigation time, and the matter of attorneys' fees continue

119. Smit, *supra* note 109, at 1076.

120. CAL. CIV. CODE §§ 1811.1 (Retail Installment Sales Act) & 2983.4 (Automobile Sales Financing Act) (West 1970).

121. Smit, *supra* note 109, at 1067.

122. *Id.*

123. See *Protecting the Consumer*, *supra* note 70, at 39-42.

124. See text accompanying notes 104-08 *supra*.

125. See text accompanying notes 64-67 *supra*.

to pose substantial barriers to effective consumer utilization of the class action as a means of redressing wrongs suffered.¹²⁶

The burden of combatting unfair business practices too often falls in its entirety upon consumers lacking knowledge that they have been wronged, an awareness of potential remedies, or the resources to prosecute an action against the perpetrators of such practices. In addition, the damages suffered as a result of such practices are usually not substantial enough to provide the defrauded consumer with the incentive to bring the matter to the attention of an attorney. Further, the defrauded individual usually does not have the necessary knowledge of others similarly defrauded to alert an attorney to the possibilities of a class action. Even if an attorney does discover grounds for the maintenance of such an action, the many economic, procedural and substantive problems discussed above militate against a quick and successfully concluded suit.

By contrast, the Attorney General, because of his state-wide information gathering capabilities, is often able to recognize and isolate recurring fraudulent practices. In addition, his financial and manpower resources, while perhaps not fully adequate, do enable him to bring successful suits in many cases in which private attorneys might be unable or unwilling to do so.¹²⁷ It thus seems that if the often stated public policy of assuring the consumer effective redress for consumer wrongs is to ever be more than a partially fulfilled promise, it is necessary that the Attorney General's power to assure the consumer protection must be protected where sufficient and strengthened where necessary.

PUBLIC REMEDIES: THE ATTORNEY GENERAL'S POWER

A. Injunctions and Civil and Criminal Penalties

In view of the substantial problems involved in securing relief privately through individual or class actions, increasing attention is being focused on the role of the public sector in assuring the consumer adequate protection. The Attorney General's Consumer Fraud Unit, founded in 1959, has the primary responsibility for seeing that state laws concerning consumer protection are adequately enforced.¹²⁸

126. See text accompanying notes 109-22 *supra*.

127. For a discussion of the factors considered by the Attorney General's Office in initiating actions, see Comment, *Project: The Direct Selling Industry: An Empirical Study*, 16 U.C.L.A.L. REV. 883, 958 n.304 (1968-69) [hereinafter cited as *Project*].

128. See Traylor, *supra* note 10, at 431.

Each year the Attorney General's Office receives thousands of complaints of misrepresentation and unfair competition.¹²⁹ Through utilization of their powers to bring a number of different actions to redress wrongs suffered by the consumer,¹³⁰ the Attorney General and local district attorneys have the potential for bringing concerted public action to bear against unfair and fraudulent consumer practices. The large number of complaints received by the Attorney General's Office¹³¹ enables it to keep a finger on the pulse of the consumer situation in the state. It can assemble data on an area-wide basis and act when a potentially harmful trend emerges.¹³² The Office's investigative resources and staff, although limited in both size and budget, can nevertheless bring actions which many private litigants could not afford.¹³³

The Attorney General of the State of California has specific statutory authority to bring actions for injunctive relief,¹³⁴ actions in which civil penalties are sought,¹³⁵ and criminal prosecutions.¹³⁶ Basically, there are two sources of statutory authority for the seeking of injunctive relief by the Attorney General in cases involving unfair or fraudulent business practices. Section 17500 of the Business and Professions Code makes it unlawful for "any person, firm, corporation or association . . . to make or . . . cause to be made . . . any advertising device . . . or . . . any statement . . . which is untrue or misleading . . . with the intent not to sell such . . . property or services as so advertised."¹³⁷ Section 17535 of the same Code, insofar as is relevant to the discussion herein, authorizes the Attorney General to seek injunctive relief against the making of any untrue or misleading statement in violation of section 17500.¹³⁸ Section 3369 of the Civil Code deals with "unfair competition" and includes within the definition of that term "unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising and any act denounced by Business and Professions Code Sections 17500 through

129. See note 5 *supra*.

130. See text accompanying notes 134-36 *infra*.

131. See note 5 *supra*.

132. *Protecting the Consumer*, *supra* note 70, at 43-45.

133. See generally *Project*, *supra* note 127, at 956-57.

134. CAL. BUS. & PROF. CODE ANN. § 17535 (West Supp. 1973); CAL. CIV. CODE § 3369 (West 1970).

135. CAL. BUS. & PROF. CODE ANN. § 17536 (West Supp. 1973); CAL. CIV. CODE § 3370.1 (West Supp. 1973).

136. CAL. BUS. & PROF. CODE ANN. § 17534 (West 1964).

137. *Id.* § 17500.

138. CAL. BUS. & PROF. CODE ANN. § 17535 (West Supp. 1973).

17535."¹³⁹ Section 3369 also confers authority upon the Attorney General or any district attorney in the state, upon their own complaint or that of any board, officer, person, corporation or association, to bring an action for injunction for violations of the section.¹⁴⁰

California courts have construed the terms "misleading" and "untrue," as used in section 17500, broadly.¹⁴¹ Generally, there is no requirement of proof of intent to deceive,¹⁴² actual deception,¹⁴³ irreparable injury,¹⁴⁴ or any injury at all.¹⁴⁵ Even a statement which is technically true may be held to be "misleading" within the courts' broad interpretation.¹⁴⁶ For example, in one case,¹⁴⁷ an advertisement for chiropractic services invited the public to bring the ad to the chiropractor's office within ten days.¹⁴⁸ Although no discount was promised, the court held that the advertisement had a double meaning in that it carried with it the implication that its presentation at the office within the specified period would result in a discount of some

139. CAL. CIV. CODE § 3369 (West 1970).

140. *Id.* It should be noted that under section 3369, there need not even be actual "competition" in order to support the granting of an injunction. For example, in *People ex rel Mosk v. National Research Co.*, 201 Cal. App. 2d 765, 20 Cal. Rptr. 516 (1962), the trial court had found that the defendant's acts—the mailing of information blanks which directly simulated official governmental questionnaires, but which were in fact ploys to obtain confidential information to facilitate debt collection—constituted "unfair competition" within the scope of section 3369. *Id.* at 767-69, 20 Cal. Rptr. at 518-19. On appeal, defendants contended that section 3369 referred only to the narrow field of business competition and, since the parties offended were not in business, no violation of section 3369 had occurred. *Id.* at 769, 20 Cal. Rptr. at 519. The court of appeal, in rejecting this contention, held that section 3369 was broad enough to include the acts of the defendant, the essential test being whether the public was likely to be deceived. *Id.* at 772, 20 Cal. Rptr. at 521.

141. See *Project*, *supra* note 127, at 961-62.

142. *Audio Fidelity, Inc. v. High Fidelity Recordings, Inc.*, 283 F.2d 551, 555 (9th Cir. 1960); *People v. Lynam*, 253 Cal. App. 2d 959, 965-66, 61 Cal. Rptr. 800, 805 (1967); *People v. Wahl*, 39 Cal. App. 2d 771, 773, 100 P.2d 550, 551 (1940).

143. See *In re Application of O'Connor*, 80 Cal. App. 647, 252 P. 730 (1927); 28 OP. CAL. ATT'Y GEN. 277, 279 (1956).

144. See, e.g., *Paul v. Wadler*, 209 Cal. App. 2d 615, 625, 26 Cal. Rptr. 341, 347 (1962).

145. 29 OP. CAL. ATT'Y GEN. 175, 177-78 (1957). In determining that injury need not be shown, California has adopted the theory of the federal courts that ". . . when a legislative body has authorized the injunctive remedy for the violation of the statute, it has determined as a matter of law that irreparable injury attends the violation" *Paul v. Wadler*, 209 Cal. App. 2d 615, 625, 26 Cal. Rptr. 341, 347 (1962).

146. *Garvai v. Board of Chiropractic Examiners*, 216 Cal. App. 2d 374, 379, 31 Cal. Rptr. 187, 189 (1963).

147. *Id.*

148. *Id.*

kind and was thus "misleading."¹⁴⁹

Certain advantages adhere to the Attorney General's utilization of actions for injunctive relief as opposed to other available forms of action. For instance, as compared with a criminal prosecution, an injunctive suit affords the Attorney General the right to subpoena documents and business records without a court order.¹⁵⁰ The power to subpoena and discover enables the Attorney General to take full advantage of interrogatories, depositions and requests for admission.¹⁵¹ Not only does the availability and use of these devices save valuable time, but they may also provide the Attorney General with access to information which might otherwise have been difficult or impossible to obtain.¹⁵² In addition, in cases in which utilization of the injunctive process proves successful, the Attorney General is assured that the unfair or misleading practices in question will cease in the future.¹⁵³ A further advantage lies in the inability of the defendant to deny any fact necessarily determined in the injunction action should it arise again in a subsequent suit brought by or against him.¹⁵⁴ Through the use of this aspect of the doctrine of collateral estoppel, the consumer can gain a decided advantage in any private action against a defendant based on activities similar to those for which the injunction was issued.¹⁵⁵ The existence of this doctrine also affords

149. *Id.*

150. CAL. GOV'T CODE ANN. §§ 11180-82 (West 1970). Section 11181 (West 1970) provides that the Attorney General may:

- (a) Inspect books and records.
- (b) Hear Complaints.
- (c) Administer oaths.
- (d) Certify to all official acts.
- (e) Issue subpoenas for the attendance of witnesses and the production of papers, books, accounts, documents and testimony in any inquiry, investigation, hearing or proceeding pertinent or material thereto in any part of the State.

See generally *Project, supra* note 127, at 963.

151. *Project, supra* note 127, at 963.

152. *Id.*

153. See *Protecting the Consumer, supra* note 70, at 51.

154. *Project, supra* note 127, at 964.

This means that the facts determined in an injunctive suit brought against a seller by the Attorney General will be binding upon the seller in any subsequent suit by a consumer. *Id.*

155. *Id.* at 964-65.

Violation of an existing injunction provides the Attorney General with still another powerful bargaining tool. For example, the Attorney General recently obtained an agreement from an advertiser never to engage in that business in California again. The defendant had been previously enjoined from selling advertisements in what were supposed to be business directories with a large circulation. The violation of the injunction, which in California may be considered a misdemeanor or contempt, allowed the Attorney General to name his own terms. *Id.* (citations omitted).

the Attorney General increased leverage in forcing the offending party to agree to "stipulated injunctions," i.e., voluntary suspensions of the fraudulent activities in lieu of institution of an action.¹⁵⁶

In addition to the power to seek injunctive relief, the Attorney General has the statutory power to seek civil penalties for violations of certain of the state's consumer laws. Section 17536 of the Business and Professions Code provides, insofar as is relevant to the current discussion, that any person who makes any untrue or misleading statement in violation of Section 17500

shall be liable for a civil penalty not to exceed two thousand five hundred dollars (\$2500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney in any court of competent jurisdiction.¹⁵⁷

Section 3370.1 of the Civil Code, enacted in 1972,¹⁵⁸ adopts essentially identical provisions in imposing a civil penalty for violation of section 3369 of the Civil Code.¹⁵⁹ The California Supreme Court has recently interpreted section 17536 as affording a single cause of action for its violation, regardless of the number of misrepresentations made or the number of victims involved.¹⁶⁰ However, the court also held that the amount of damages recoverable in any given action is dependent on the number of violations committed and that the number of violations is determined by the number of persons to whom misrepresentations were made.¹⁶¹ Thus, potential fines could be quite large. Although it is likely that the threat of a fine totalling twenty-five or fifty thousand dollars might induce potentially unscrupulous sellers

156. For additional discussion on the mechanism of the stipulated injunction, whereby the Attorney General accepts assurance of the discontinuance of the unlawful practice in lieu of institution of an action, see *id.* at 964; see also *Protecting the Consumer*, *supra* note 70, at 51.

157. CAL. BUS. & PROF. CODE ANN. § 17536 (West Supp. 1973). The reasons necessitating the enactment of section 17536 are summarized in CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1965 CODE LEGISLATION 21 (1965):

[T]he injunction and misdemeanor provisions of the old law were not adequate to stop false advertising rackets. . . . The guilty party keeps his gains and is merely ordered not to defraud people in the same way again. Criminal prosecutions are seldom undertaken because juries tend to be reluctant to apply criminal sanctions to white-collar crimes and because it is difficult for outsiders to fix responsibility in . . . [the] . . . modern corporate structure.

158. Ch. 1084, § 2, [1972] Cal. Stat. — (codified at CAL. CIV. CODE § 3370.1 (West Supp. 1973)).

159. *Id.*

160. *People v. Superior Court*, 9 Cal. 3d 283, 288-89, 507 P.2d 1400, 1403-04, 107 Cal. Rptr. 192, 195-96 (1973).

161. *Id.*

to at least consider the fairness and veracity of their promotional schemes,¹⁶² it is too early to conclude that sections 17536 and 3370.1 constitute "nuclear weapons" in the war against consumer fraud.¹⁶³

In addition to seeking injunctions and civil penalties, the Attorney General or any district attorney may bring criminal charges against an individual guilty of violating consumer laws.¹⁶⁴ In the area of consumer credit protection, the Retail Installment Sales Act¹⁶⁵ and the Automobile Sales Finance Act¹⁶⁶ provide that any person who willfully violates any provision of either statute shall be guilty of a misdemeanor.¹⁶⁷ Criminal sanctions are also available for violation of section 17500 of the Business and Professions Code.¹⁶⁸ Violation of an injunction issued to enjoin illegal business practices also constitutes a misdemeanor.¹⁶⁹ However, the relatively minimal sentence or fine attached to misdemeanor violations¹⁷⁰ militates against the effectiveness of criminal prosecutions in preventing consumer fraud, for the penalty simply will not deter the constantly dishonest business operator.¹⁷¹ In addition, the time and manpower required to obtain conviction in such cases has an extremely taxing effect upon the limited resources of enforcement agencies.¹⁷² Further, in those cases in which a conviction is obtained, it is often the person least culpable who is

162. Kirby, *Actions for False Advertising Under California Business and Professions Code 17536: An Argument for Applying Civil Rules of Proof*, 5 U.S.F.L. REV. 440, 440-41 (1970). For an interesting argument that, in the spirit of efficiency and economy, the government should not be required to prove violations of § 17536 beyond a reasonable doubt but should only have to carry the civil burden of proof, see *id.* at 440-50.

163. In his article on the role of the San Diego District Attorney in the fight against consumer fraud, M. James Lorenz described California Business and Professions Code section 17536 in conjunction with section 17500 as constituting just such a "nuclear weapon." Certainly on the basis of the settlement of one section 17536 action against a large chain store for \$8,000, it would be an exaggeration to conclude that, when threatened with the use of section 17536, officials of chain stores would "move swiftly to discipline subordinates committing the offense complained of and make sure the deceptive practices are curtailed." Lorenz, *Consumer Fraud and the San Diego District Attorney's Office*, 8 SAN DIEGO L. REV. 47, 50-51 (1970) [hereinafter cited as Lorenz].

164. CAL. BUS. & PROF. CODE ANN. § 17534 (West 1970).

165. CAL. CIV. CODE §§ 1801-12.1 (West Supp. 1973).

166. *Id.* §§ 2981-84.4.

167. *Id.* §§ 1812.6 & 2983.6.

168. CAL. BUS. & PROF. CODE ANN. § 17534 (West 1970).

169. CAL. PEN. CODE § 166.4 (West 1970).

170. *Id.* § 19.

171. Lorenz, *supra* note 163, at 50.

172. *Project, supra* note 127, at 959.

punished.¹⁷³ It is probably for these reasons that only 5% of the cases handled by the California Consumer Fraud Unit are criminal.¹⁷⁴ Indeed, the chief advantage of the criminal remedy does not lie with the actual convictions obtained thereunder, but with the fact that the Attorney General or district attorney can use the threat of bringing charges as an additional bargaining device in securing stipulated injunctions.¹⁷⁵

B. Restitution

In empowering the Attorney General to seek civil penalties, criminal penalties and injunctions, the California State Legislature undoubtedly sought to provide the Attorney General with a complete array of devices with which to protect the consumer. However, mere passage of legislation is meaningless if such legislation cannot be translated into a workable program of truly effective protection of the consumer from unfair and fraudulent business practices. The effectiveness of any program will depend upon how completely the Attorney General is able to rectify consumer wrongs through his use of the tools which the legislature has placed at his disposal. While enjoining the unfair or fraudulent practice through either a stipulated or litigated injunction protects future customers,¹⁷⁶ it does nothing for those already defrauded. Similarly, criminal and civil penalties penalize the offender by extracting a portion of the fraudulently obtained property and by singling out the violator by way of example. However, these remedies do no more for those already defrauded than does the injunction.¹⁷⁷ What is needed is a remedy which goes beyond mere stoppage of the illegal act and punishment of the wrongdoer, a remedy which provides for the compensation of parties already injured and which thus can be utilized to "repair" the wrong done.¹⁷⁸ Since, as this Comment has attempted to demonstrate, consumer-initiated suits, whether collective or individual, are largely unavailable or ineffective, the procurement

173. *Id.*

174. *Id.*

175. *Protecting the Consumer*, *supra* note 70, at 53.

176. See text accompanying notes 153-56 *supra*.

177. It has been aptly pointed out that empowering the Attorney General to sue for civil penalty or injunctive relief without providing him with the authority to gain restitution on behalf of those parties actually defrauded results in the anomaly that the Attorney General may actually benefit individual consumers more by obtaining voluntary discontinuance and reimbursement than by instituting litigation. Comment, *Public and Private Consumer Remedies in New York*, 34 ALBANY L. REV. 326, 327-28 (1970).

178. See Rice, *supra* note 31, at 567.

of a satisfactory and complete remedy will in many cases depend upon the ability of the Attorney General to initiate actions in which appropriate individual relief may be secured. He must be assured the power not only to bring actions to enjoin or penalize a criminal violation of a consumer law, but also, as an adjunct to such actions, to compel the offender to restore the fraudulently obtained property.

Until recently,¹⁷⁹ there existed no explicit statutory authority empowering the courts to order restitution in a suit brought by the Attorney General, although he had always assumed that he could obtain such relief.¹⁸⁰ This assumption has now been vindicated by the California Supreme Court's decision in *People v. Superior Court*,¹⁸¹ which vocated a court of appeal decision that had completely rejected the Attorney General's contentions.¹⁸² The Attorney General had filed a complaint charging that defendants had used false and misleading statements and had engaged in other acts of unfair competition in their scheme to sell encyclopedias and related services to members of the public.¹⁸³ The complaint sought civil penalties and exemplary damages for false advertising.¹⁸⁴ In addition, an order was sought to compel defendants to offer each customer who was solicited by a salesman using an unlawful or fraudulent business presentation an opportunity to rescind his contract, return the products and obtain a refund.¹⁸⁵ The court of appeal, in affirming the trial court's ruling that the People had not stated a cause of action for restitution, refused to permit the Attorney General to seek an order forcing the defendant to disgorge himself of the illegally gained funds and to return such funds to the defrauded parties.¹⁸⁶ The court rested its opinion upon the ground that the Attorney General did not have a statutory action in restitution,¹⁸⁷ and that, in the absence of such an express provision, section 367 of the Code of

179. On June 30, 1972, Assembly Bill 1763 was signed into law amending California Business and Professions Code section 17535 to provide courts with the specific power to restore to any person in interest any money or property acquired through unfair or fraudulent business practices. Ch. 244, § 1, [1972] Cal. Stat. —. Section 17535 as amended will apply only to unfair or fraudulent business practices and therefore those defrauded through violations of Civil Code section 3369 (unfair competition) are not afforded any additional protection by the new provision. *But cf.* text accompanying notes 243-46 *infra*.

180. *See* Petitioner's Brief, *supra* note 5, at 16, 18-19 n.3.

181. 9 Cal. 3d 283, 507 P.2d 1400, 107 Cal. Rptr. 192 (1973).

182. 100 Cal. Rptr. 38 (1972).

183. 9 Cal. 3d at 286, 507 P.2d at 1402, 107 Cal. Rptr. at 194.

184. *Id.*

185. *Id.* *See* Petitioner's Brief, *supra* note 5, at 12.

186. 100 Cal. Rptr. at 43-48.

187. *Id.* at 43-46.

Civil Procedure would control.¹⁸⁸ Section 367 provides that every action must be prosecuted in the name of the real party in interest.¹⁸⁹ The court stated that for the People to assert a restitutionary obligation, they would have to show that they constituted the real parties in interest, i.e., the party to whom such obligation was owed.¹⁹⁰ The court held that the People had not made such a showing, since it was the defrauded parties and not the state which suffered the detriment.¹⁹¹

The court of appeal's decision was alarming because, had it been affirmed, it would have drastically restricted the ability of the Attorney General and courts of equity to utilize remedies which adequately provide relief to the injured consumer. The opinion itself was surprising in two respects. First, it was inconsistent with a national and state atmosphere extremely sensitive to consumer problems.¹⁹² Second, it contradicted the overwhelming legal precedent which has consistently recognized the Attorney General's right to bring actions to protect the public interest, whether statutorily given or not.¹⁹³

The Supreme Court of New Jersey, in the case of *Kugler v. Romain*,¹⁹⁴ was recently confronted with a problem nearly identical to that involved in *People v. Superior Court*. In resolving the issue in favor of the Attorney General's right to seek restitution on behalf of a class of defrauded consumers, the court took cognizance of the national climate supporting expanded consumer remedies:

Obviously, a just resolution can be reached only through a sensitive awareness of the climate of our time as it has been influenced by legislative and judicial measures affecting the buyer-seller relationship in the marketing of consumer goods. There can be no doubt that, in today's society, sale of consumer goods, especially on an installment credit basis, has become a matter of ever-increasing state and national anxiety. In recent years, New Jersey lawmakers have become deeply concerned with suppression of commercial deception in consumer transactions.¹⁹⁵

188. *Id.* at 43.

189. CAL. CODE OF CIV. PROC. § 367 (West 1970).

190. 100 Cal. Rptr. at 43.

191. *Id.*

192. See text accompanying notes 4 & 52 *supra* and notes 194-200 *infra*.

193. See text accompanying notes 212-35 *infra*.

194. 279 A.2d 640 (N.J. 1971). In that case, the Attorney General of the State of New Jersey sought an injunction and other appropriate relief against a seller of "educational" materials for violations of the state's Consumer Fraud Act. *Id.* at 641-42. The court entered judgment in favor of the Attorney General holding that, because the price of the educational material was two and one-half times its reasonable market value and the materials sold had little or no educational value, the contracts under which the goods were sold were rendered invalid. *Id.* at 653.

195. *Id.* at 647.

California lawmakers are no less concerned with the suppression of commercial deception in consumer transactions. The proliferation of statutes dealing with the problem of consumer fraud clearly demonstrates the emphasis which the California legislature has placed on assuring that the consumer is adequately protected from unscrupulous business practices.¹⁹⁶ The importance attached to the protection of the consumer in today's society has also been underlined by the language in a number of judicial decisions.¹⁹⁷ The California courts have clearly recognized that, in light of this public policy of consumer protection, statutes designed for the protection of consumers are to be given a broad and liberal interpretation. For example, the court in *People ex rel. Mosk v. National Research Co.*,¹⁹⁸ in exploring the meaning and purpose of Civil Code section 3369, noted that:

The very breadth of the terms used by the Legislature indicate, in our judgment, an intent to be inclusive rather than restrictive in the practices to be enjoined. We refrain from construing the language narrowly in a field where the trend is opposed to unfair trade practices which affect the public interest. As our Supreme Court has stated: "It is also to be borne in mind that the rules of unfair competition are based, not alone upon the protection of a property right existing in the complainants, but also upon the right of the public to protection from fraud and deceit"¹⁹⁹

In interpreting section 3369 in this broad way, the court was affirming its belief that the legislature, in enacting this statute as well as others in the field, was attempting to provide adequate protection for the consumer against fraudulent business practices. In deciding whether the Attorney General has the authority to seek restitution under statutes clearly enacted for the benefit of consumers, this public policy favoring the "right of the public to protection from fraud and deceit"

196. See note 4 *supra*.

197. In *Vasquez v. Superior Court*, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971), for example, the court commented that the "[P]rotection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society." *Id.* at 808, 484 P.2d at 968, 94 Cal. Rptr. at 800. See also the opinions in the following cases which exemplify the courts' concern for consumers and their desire to formulate effective relief: *Connor v. Great W. Sav. & Loan Ass'n*, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968); *Morgan v. Reasor Corp.*, 69 Cal. 2d 881, 447 P.2d 638, 73 Cal. Rptr. 398 (1968); *Laczko v. Jules Meyes, Inc.*, 276 Cal. App. 2d 293, 80 Cal. Rptr. 798 (1969); *Horn v. Guaranty Chevrolet Motors*, 270 Cal. App. 2d 477, 75 Cal. Rptr. 871 (1969).

198. 201 Cal. App. 2d 765, 20 Cal. Rptr. 516 (1962).

199. *Id.* at 771, 20 Cal. Rptr. at 520-21, quoting *Academy of Motion Pictures Arts & Sciences v. Benson*, 15 Cal. 2d 685, 691, 104 P.2d 650, 653 (1940).

should be a paramount consideration.²⁰⁰

The erroneous decision of the court of appeal in *People v. Superior Court* may be traceable to the court's apparent failure to take cognizance of the strong public policy considerations aimed at guaranteeing the consumer protection in the marketplace. Rather than recognize these considerations, the court chose to distinguish, on rather narrow grounds, the situations in which statutes have traditionally been held to give rise to express or implied power in the Attorney General to institute actions which will adequately protect the consumer.²⁰¹ The first situation discussed by the court was that in which there exists a statute specifically empowering the Attorney General to seek the desired remedy.²⁰² Clearly this situation was not applicable to the facts presented in *People v. Superior Court* since, at the time, no statute existed which specifically authorized the Attorney General to seek restitution.²⁰³ The court next discussed those situations in which the Attorney General seeks to utilize a remedy specifically provided for by statute, even though he is not expressly included within the class authorized to bring an action for that remedy.²⁰⁴ The court noted that, although in a proper case a court will construe such a statute to include the Attorney General within the designated class, it will never do so where, by definition, the statutory class precludes such a construction.²⁰⁵ Although Civil Code section 1692 provides that an "aggrieved party" can bring an action for restitution,²⁰⁶ the court concluded that the Attorney General was not an "aggrieved party" within the meaning of that term as used in the statute.²⁰⁷ The third situation distinguished by the court involved those cases in which there exists a statute directly authorizing the Attorney General to initiate an action to redress a wrong, but where the particular remedy desired by the Attorney General has not been expressly provided for in the statute.²⁰⁸ The court recognized that when presented with such a factual situation a court may construe the language of the statute to permit the desired remedy.²⁰⁹ How-

200. *Id.*

201. 100 Cal. Rptr. at 44.

202. *Id.*

203. *Id.* A statute now exists which specifically recognizes the power of a court to grant restitution in suits brought by the Attorney General to remedy unfair or fraudulent business practices. See note 179 *supra* and text accompanying notes 245-46 *infra*.

204. 100 Cal. Rptr. at 45.

205. *Id.*

206. CAL. CIV. CODE § 1692 (West 1970).

207. 100 Cal. Rptr. at 45.

208. *Id.*

209. *Id.*

ever, it decided that this alternative is available only when there is appended to the statute a broad enabling clause authorizing the Attorney General to seek orders enforcing compliance with the law.²¹⁰ Since the Attorney General was unable to demonstrate the existence of a statute containing the requisite enabling clause, the court felt constrained to deny the restitutionary remedy sought.²¹¹

Through its narrow construction of the three categories discussed above, the court clearly demonstrated its failure to recognize the important policy considerations which underlie the tendency of courts to construe statutes so as to provide the Attorney General with the broadest possible remedial prerogatives. When a statute expressly empowers the Attorney General to bring an action for a desired remedy, there is, of course, no question as to the propriety of the Attorney General's utilization of this remedy. But even when such authority is not expressly authorized, the courts are not precluded from empowering the Attorney General to bring an action for a desired remedy if the court feels this remedy is essential to carrying out the underlying policy of the statute.²¹²

The court in *People v. Superior Court* tacitly recognized the artificiality of the three categories it had constructed when it conceded that, even when the facts in a particular case do not fall within any of the statutory categories, a court may nonetheless allow the desired remedy if the statutory remedies are not meant to be exclusive and if the desired remedy would be available in a non-statutory action arising from the same wrong.²¹³ The court of appeal cited *Orloff v. Los Angeles Turf Club*,²¹⁴ in which injunctive relief had been allowed in addition to the damages prescribed by the relevant statute, as an example of such a situation. However, it distinguished *Orloff* by characterizing restitution as an *action* rather than a *remedy* and refused to take cognizance of the underlying rationale for the *Orloff* decision, namely, that where a statutorily authorized remedy fails to effectively carry out the purposes of the statute, the courts tend to exercise their inherent equitable powers to grant the required remedies.²¹⁵

Common law precedent affords another basis for vindicating the state's strong interest in providing adequate remedies for consumer

210. *Id.*

211. *Id.*

212. See text accompanying notes 225-41 *infra*.

213. 100 Cal. Rptr. at 46.

214. 30 Cal. 2d 110, 180 P.2d 321 (1947).

215. 100 Cal. Rptr. at 46. See text accompanying notes 225-41 *infra*.

fraud through the recognition of authority in the Attorney General to seek restitution for consumers injured by illegal business practices. The court of appeal, although recognizing that the Attorney General in his capacity as the chief law enforcement officer of the state has the authority to institute actions on behalf of the people of the state in cases involving directly their rights and interests,²¹⁶ emphasized that this right is limited to situations where the rights and interests of the state are truly direct.²¹⁷ The court viewed the interest of the Attorney General in seeking restitution for defrauded consumers as being comparable to a desire to intervene to block performance of an illegal contract because such intervention would lessen his burden of prosecution of violators of the law.²¹⁸ This is but another example of the extremely narrow manner in which the court viewed the Attorney General's power to bring actions to remedy consumer wrongs.

The broad common law authority of the Attorney General was best summarized in the case of *People v. Centr-O-Mart*,²¹⁹ wherein the court stated:

In the case of *Pierce v. Superior Court*, it was held that the attorney general, as the chief law officer of the state, has broad powers derived from common law, and in the absence of any legislative restriction, has the power to file any civil action or proceeding directly involving the rights and interest of the state, or which he deems necessary for the enforcement of the law of the state, the preservation of order, and the protection of public rights and interests.²²⁰

216. 100 Cal. Rptr. at 46.

217. *Id.* at 47. For examples of cases wherein the court found sufficient direct interest, see *People v. Oakland Water Front Co.*, 118 Cal. 234, 50 P. 305 (1897); *People v. Brophy*, 49 Cal. App. 2d 15, 120 P.2d 946 (1942); *People v. San Diego*, 71 Cal. App. 421, 236 P. 377 (1925).

218. 100 Cal. Rptr. at 46.

219. 34 Cal. 2d 702, 214 P.2d 378 (1950).

220. *Id.* at 704, 214 P.2d at 379-80 (citation omitted). Another case illustrating the breadth of the Attorney General's common law power to bring an action to protect public rights and interests is *People ex rel Lynch v. San Diego Unified School Dist.*, 19 Cal. App. 3d 252, 96 Cal. Rptr. 658 (1971). In *Lynch* the Attorney General of California filed a petition for a writ of mandate directing the San Diego Unified School District to take steps to alleviate racial imbalance in the district's schools. *Id.* at 257, 96 Cal. Rptr. at 660. The court, in rejecting the district's contention that the Attorney General lacked standing to bring the suit, commented on the breadth of the Attorney General's power:

At the outset we consider and reject the District's contention the attorney general lacks standing to bring the action. Our conclusion is premised on the settled rule in California that the Attorney General is authorized "to file any civil action for the enforcement of the laws of the state or the United States Constitution, which in the absence of legislative restriction he deems necessary for the protection of public rights and interests." *Id.* at 258, 96 Cal. Rptr. at 661, citing *People ex rel. Lynch v. Superior Court*, 1 Cal. 3d 910, 912, 464 P.2d 126, 127, 83 Cal. Rptr. 670, 671 (1971).

In *Centr-O-Mart*, the District Attorney of San Joaquin had brought an action against the defendant to enjoin certain violations of the Unfair Trade Practices Act.²²¹ The express purposes of that Act are to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented.²²²

Public officers, however, were not specifically included among the persons who could bring an action under the Act.²²³ Despite this, the court allowed the Attorney General to maintain a suit under the Act since this would further the statutory purposes and since the language of the statute did not specifically exclude him from bringing such an action.²²⁴

Although the factual situation involved in *Centr-O-Mart* was clearly distinguishable from that in *People v. Superior Court*, the court of appeal erred in emphasizing this distinguishability when emphasis should have been on the similarity of the public policy considerations underlying the situation in each case. Thus, applying the logic of the *Centr-O-Mart* case, the Attorney General should have the right, even in absence of statute, to bring actions for restitution of money fraudulently taken from individual consumers.

As has been shown above, there exist two bases upon which the Attorney General can invoke the equitable jurisdiction of the court: he can exercise his statutory authority to do so under either Civil Code section 3369²²⁵ or Business and Professions Code section 17500,²²⁶ or he can bring an action pursuant to his common law power to protect the interests of the people of California.²²⁷ Once the Attorney General has properly invoked the jurisdiction of the court, that court should be able to exercise the full range of its inherent equitable powers. The traditional view of the courts with respect to the extent

221. CAL. BUS. & PROF. CODE ANN. §§ 17000-101 (West 1970).

222. *Id.* § 17001.

223. *Id.* § 17070, which provides: "Any person or trade association may bring an action to enjoin and restrain any violation of this chapter and, in addition thereto, for the recovery of damages."

224. 34 Cal. 2d at 704, 214 P.2d at 380; *accord*, *Pierce v. Superior Court*, 1 Cal. 2d 759, 37 P.2d 453 (1934); *People v. Arthur Murray*, 238 Cal. App. 2d 333, 47 Cal. Rptr. 700 (1965); *Don Wilson Builders v. Superior Court*, 220 Cal. App. 2d 77, 33 Cal. Rptr. 621 (1963).

225. See text accompanying notes 139-40 *supra*.

226. See text accompanying notes 137-38 *supra*.

227. See text accompanying notes 216-24 *supra*.

to which their equitable powers allow them to render adequate relief in cases properly before them is well illustrated by the case of *People ex rel. Mosk v. National Research Co.*²²⁸ The defendants in *National Research Co.* were accused of violating Civil Code section 3369 by mailing out questionnaires resembling official documents of the State of California and the United States.²²⁹ Actually the documents were part of a scheme engineered by collection agencies to facilitate the gathering of information about debtors.²³⁰ The Attorney General sued to enjoin the defendants from engaging in this unfair and deceptive practice²³¹ and was held to be entitled to an injunction restraining the defendant not only from selling, handling or otherwise dealing in the bogus letters from California, but also from engaging in these acts from Washington, D.C., or any other place.²³² The appellate court considered the question of whether the judgment granted was too broad in that it extended the effect of the decree to activities outside the State of California and found no abuse of discretion or excess in the use of equitable remedies in the decree as granted. Equity is not limited in scope or type of relief which may be granted. Its decrees are molded in accordance with the exigencies of each case and the rights of the persons over whom it has acquired jurisdiction.²³³

The court noted that it is often necessary, in order to insure that full justice is attained, to grant relief as varied and diversified as the means used to produce the grievance complained of.²³⁴ It supported its recognition of the need for broad and imaginative relief to combat unfair business practices as being consistent with analogous federal decisional law:

[Because] of the similarity of language and obvious identity of purpose of the two statutes [Civil Code § 3369 and 15 U.S.C.A. § 45(a)],

228. 201 Cal. App. 2d 765, 20 Cal. Rptr. 516 (1962).

229. *Id.* at 768, 20 Cal. Rptr. at 518-19.

230. *Id.*

231. *Id.*

232. *Id.* at 774-75, 20 Cal. Rptr. at 522.

233. *Id.*

234. *Id.* The "flexible and expanding" type of relief a court of equity may give was stressed in *Holibough v. Stokes*, 192 Cal. App. 2d 564, 13 Cal. Rptr. 528 (1961). In *Holibough* plaintiff loaned one Mrs. Stokes money with which to purchase property upon her agreement to execute a note and deed of trust to the plaintiff. *Id.* at 566, 13 Cal. Rptr. at 529. However, in contravention of her agreement, Mrs. Stokes borrowed additional money from another person and gave this person deeds to the property in question. *Id.* The trial court held that said deeds were in fact mortgages and gave plaintiff liens on these mortgages for the amount loaned. *Id.* at 567, 13 Cal. Rptr. at 529. The appellate court affirmed the trial court's findings relying upon the broad equitable powers of the courts to fashion those remedies essential to achieving a just result. *Id.* at 568, 13 Cal. Rptr. at 530.

decisions of the federal courts on the subject are more than ordinarily persuasive.²³⁵

In *Decorative Carpets, Inc. v. State Board of Equalization*,²³⁶ Decorative Carpets had over a period of years erroneously collected excessive sales taxes from its customers and had then paid said taxes to the state.²³⁷ Upon realizing its error, Decorative Carpets brought suit to require the State Board of Equalization to refund to Decorative Carpets the tax paid in excess of the amount actually due.²³⁸ Although the California statutes established a procedure whereby Decorative Carpets could obtain a refund of overpaid taxes, they contained no specific provision which would have required the carpet company to reimburse its customers.²³⁹ The court used its equitable power to mold a remedy to fit the circumstances of the case in holding the carpet company to be the constructive trustee of the tax reimbursement and ordering it to repay to its customers the amounts erroneously collected.²⁴⁰ The court reasoned that to do less would be to "sanction a misuse of the sales tax by a retailer for his private gain."²⁴¹ In a broader consumer context, if money obtained through unfair or fraudulent business practices is not repaid to the wronged consumer, the courts would be, in much the same way, sanctioning the fraudulent act by permitting the wrongdoer to keep his ill-gotten gains.

The California Supreme Court's unanimous opinion in *People v. Superior Court* quickly disposed of the restitution issue. Justice Mosk simply noted that, absent a statutory restriction on the court's general equity jurisdiction, "a court of equity may exercise the full range of its inherent powers in order to accomplish *complete* justice between the parties, restoring if necessary the *status quo ante* as nearly as may be achieved."²⁴² Viewing the restitutionary relief sought by the Attorney General under section 17535 as an ancillary remedy under that section, rather than as a separate cause of action, the supreme court held that the trial court had the inherent power to order the defendants to make or offer to make restitution to the individual defrauded consumers.²⁴³ The court did not elaborate on the reasons for this con-

235. 201 Cal. App. 2d at 773, 20 Cal. Rptr. at 522.

236. 58 Cal. 2d 252, 373 P.2d 637, 23 Cal. Rptr. 589 (1962).

237. *Id.* at 253-54, 373 P.2d at 637-38, 23 Cal. Rptr. at 589-90.

238. *Id.* at 254, 373 P.2d at 638, 23 Cal. Rptr. at 590.

239. *Id.* at 255-56, 373 P.2d at 639, 23 Cal. Rptr. at 591.

240. *Id.*

241. *Id.* at 255, 373 P.2d at 638, 23 Cal. Rptr. at 590.

242. 9 Cal. 3d at 286, 507 P.2d at 1402, 107 Cal. Rptr. at 194 (emphasis added).

243. *Id.*

clusion, although it did cite the *National Research Co.* case and the analogous federal cases discussed in the *National Research Co.* opinion.²⁴⁴ The court also observed that the legislature had recently amended section 17535 to explicitly recognize the courts' inherent power to order restitution.²⁴⁵ This amendment, stated the court, was not intended to create any new power in the trial courts but rather to clarify existing law regarding the existence of the courts' inherent equitable powers.²⁴⁶

CONCLUSION

Although the legislature and the courts have sought to expand the private remedies for consumer fraud, the social, economic and legal problems involved in the utilization of individual or class actions are currently substantial enough to prevent adequate protection of the consumer through purely private suits.²⁴⁷ Most of the social and economic problems can be avoided by utilizing the existent, although limited, resources of the Attorney General to protect the consumer from widespread abuses.²⁴⁸ Until quite recently, however, even the Attorney General was not clearly afforded adequate legal remedies.²⁴⁹ With the passage of supplementary statutory measures by the legislature²⁵⁰ and the announcement by the supreme court, in *People v. Superior Court*, of a policy favoring full exercise of the courts' remedial powers to protect the consumer in actions brought by the Attorney General,²⁵¹ the importance of a strong public role has clearly been recognized. The Attorney General's Office can now, through statutory and decisional law, seek injunctions,²⁵² criminal and civil penalties,²⁵³ and individual restitution²⁵⁴ to remedy most fraudulent business practices within California. Although certain deficiencies still exist, the overall remedial scheme is much broader and more flexible now than it was prior to 1972.

Robert D. Sevell

244. *Id.* See text accompanying notes 196-200, 225-35 *supra*.

245. 9 Cal. 3d at 287 n.1, 507 P.2d at 1402 n.1, 107 Cal. Rptr. at 194 n.1.

246. *Id.*

247. See text accompanying notes 14-127 *supra*.

248. See text accompanying notes 128-33 *supra*.

249. See text accompanying notes 170-91 *supra*.

250. CAL. BUS. & PROF. CODE ANN. § 17535 (West Supp. 1973); CAL. CIV. CODE § 3370.1 (West Supp. 1973).

251. 9 Cal. 3d at 286, 507 P.2d at 1402, 107 Cal. Rptr. at 194.

252. See text accompanying notes 134-56 *supra*.

253. See text accompanying notes 157-75 *supra*.

254. See note 179 and text accompanying notes 242-46 *supra*.