6-1-1988

Turning up the Contrast in a Grey Area: California Unleashes the Black Letter Grey Market Goods Act

Ondrea Dae Hidley

Recommended Citation
Available at: http://digitalcommons.lmu.edu/ilr/vol10/iss3/8
Turning up the Contrast in a Grey Area: California Unleashes the Black Letter Grey Market Goods Act

I. INTRODUCTION

Bargain priced goods naturally attract the financially conscious consumer. This is especially true with expensive goods such as electronic equipment, cameras, watches, and cars. However, the consumer often does not know how the retailer is able to sell these goods at such low prices. The consumer may not realize that the reason for the low price is because the product was not manufactured for sale in the United States. Consequently, the product does not come with a service or quality warranty even though it bears an authentic trademark.

These goods are manufactured in foreign countries and bear a foreign trademark which is identical to the domestic trademark. This often occurs when a foreign manufacturer creates a United States subsidiary which registers the trademark in the United States. This subsidiary is generally the foreign manufacturer's authorized United States distributor. However, when the domestic subsidiary sells the goods at a higher price than the foreign price, other importers have the incentive to buy the goods abroad and sell them in the United States at discounted prices. Thus, these goods are imported

3. Chains such as K-mart and Montgomery Ward offer many grey market goods for sale at a discounted price. Goodgame, supra note 1. However, many complaints come from purchases at “small gift shops and specialty electronics retailers.” Gilman, No Guarantees for Guarantees in Gray Market, Wall St. J., Feb. 5, 1985, at 33, col. 3.
5. Id.
7. Id.
8. Id.
9. Id. This becomes most prevalent when the value of the dollar rises with respect to foreign currency. When the dollar is strong, it has more purchasing power in foreign countries than domestically. Consequently, items purchased in foreign countries can be sold at reduced

657
through channels other than the manufacturer's authorized distributors. Goods such as these are known as "grey market goods."

This phenomenon of grey market importation has become a troubling issue for the owners of domestic trademarks and consequently, is the source of much litigation. The owners of the United States trademarks claim that the grey market retailers unjustly gain the benefits of advertising and goodwill paid for by the domestic trademark holder. Additionally, the domestic trademark holders claim that grey market goods hurt their reputations since the grey goods do not come with a manufacturer's express written warranty. For example, when the consumer of a grey market product sends the item to the United States manufacturer for repairs, the manufacturer will often send it back un repaired because the warranty is not valid in the United States. Thus, the consumer may become angry with the domestic trademark holder rather than the grey market retailer.

The supporters of grey market goods claim that the importation of such goods encourages competition within the free market. They base their argument on the notion that there is no reason for the extreme price differential between European and domestic goods. Allowing the sale of these goods at such low prices would force the manufacturers to lower their prices so that they may be competitive. However, grey market supporters do concede that the lack of warr-

---

10. Coalitio,n 790 F.2d at 904.
15. Goodgame, supra note 1.
16. Id.
17. Id.
18. See Eason, supra note 14, at 63.
20. See Eason, supra note 14, at 63.
ties add to the price differential.\textsuperscript{21} Since the grey goods are without warranties, the supporters argue that it is up to the consumer to choose whether they want to buy an item without a warranty in order to save money.\textsuperscript{22} The problem with this argument is that the consumer often does not know that the item is a grey market product without a warranty.\textsuperscript{23} In fact, some grey market retailers try to deceive the consumers by selling grey market goods with a photocopy of the manufacturer's warranty.\textsuperscript{24} Thus, the consumer is unable to make an informed decision.\textsuperscript{25} Seeing this as a major problem in the consumer marketplace, some state legislatures have come to the aid of the consumer.\textsuperscript{26}

This Comment will examine how legislatures have approached the problems presented by importation of grey market goods. Specifically, the Comment will focus upon the California Grey Market Goods Act\textsuperscript{27} and the extent of its impact upon grey market retailers located within California, outside of California, and outside of the United States. In determining the impact upon non-California retailers, the statute is examined under the dormant commerce clause\textsuperscript{28} and due process clause\textsuperscript{29} of the United States Constitution. The Comment will also examine the application of the Grey Market Goods Act to the sale of grey market automobiles and watches. Finally, in light of these analyses, specific amendments to the Grey Market Goods Act are recommended.

II. THE CALIFORNIA GREY MARKET GOODS ACT

\textbf{A. Overview}

In January of 1987, the California State Assembly expressed its concern for the unprotected consumer by passing a bill commonly known as the Grey Market Goods Act (GMGA).\textsuperscript{30} The legislative

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{21} See Kerr, \textit{Imports Without a Warranty}, N.Y. Times, June 22, 1985, at 52, col. 1.
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Diamond, \textit{supra} note 4.
\item \textsuperscript{24} CALIFORNIA SENATE RULES COMM., THIRD READING ANALYSIS OF AB 2735 (Aug. 19, 1986).
\item \textsuperscript{25} Diamond, \textit{supra} note 4.
\item \textsuperscript{26} See CAL. CIV. CODE §§ 1797.8-.86 (West Supp. 1988); N.Y. GEN. BUS. LAW § 218-aa (McKinney Supp. 1988); CONN. GEN. STAT. ANN. § 42-210 (West 1987).
\item \textsuperscript{27} CAL. CIV. CODE §§ 1797.8-.86 (West Supp. 1988).
\item \textsuperscript{28} See infra text accompanying notes 186-91 for the definition of the dormant commerce clause.
\item \textsuperscript{29} U.S. CONST. amend. XIV, § 1.
\item \textsuperscript{30} LEGISLATIVE COUNSEL'S DIGEST, AB 2735 (1986).
\end{itemize}
\end{footnotesize}
purpose was to provide protection for the purchaser of grey market consumer goods by regulating their sale.\textsuperscript{31} Much of the language of the GMGA was derived from the New York "Warranty Disclosure"\textsuperscript{32} Act.\textsuperscript{33} Connecticut also has a comparable statute entitled "Gray Market Merchandise."\textsuperscript{34}

Under the California statute, grey market goods are defined as: consumer goods bearing a trademark and normally accompanied by an express written warranty valid in the United States of America which are imported into the United States through channels other than the manufacturer's authorized United States distributor and which are not accompanied by the manufacturer's express written warranty valid in the United States.\textsuperscript{35}

This definition contains four elements. First, the product must bear a trademark.\textsuperscript{36} Second, similar products sold in the United States through an authorized distributor would normally be accompanied by a manufacturer's express written warranty.\textsuperscript{37} Third, the product must be imported into the United States through a distributor that is not authorized by the manufacturer.\textsuperscript{38} Finally, the manufacturer's warranty for the imported product must not be valid in the United States.\textsuperscript{39}

The GMGA does not apply to non-consumer goods, goods without a trademark, or goods that do not normally come with a warranty.\textsuperscript{40} Thus, the GMGA would not apply to the sale of a used product because used products do not normally come with a warranty. For example, if a consumer purchased a vehicle overseas and brought it to the United States for personal use, he would not be held accountable under the GMGA when he sold it.\textsuperscript{41} However, if this purchaser imported the vehicle for the purpose of selling it, then he is

\textsuperscript{31} Id.
\textsuperscript{32} N.Y. GEN. BUS. LAW § 218-aa (McKinney Supp. 1988).
\textsuperscript{33} CALIFORNIA SENATE RULES COMM., THIRD READING ANALYSIS OF AB 2735 (Aug. 19, 1986); Telephone interview with Jay J. DeFuria, Staff Council, Department of Consumer Affairs in Sacramento/Principle Consultant, California Assembly Consumer Protection Committee (Oct. 26, 1987).
\textsuperscript{34} See CONN. GEN. STAT. ANN. § 42-210 (West 1987).
\textsuperscript{35} CAL. CIV. CODE § 1797.8(a) (West Supp. 1988).
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} See id.
\textsuperscript{41} The GMGA only applies to retailers of grey market goods. See id. §§ 1797.8-.85. For a definition of retail seller, see infra note 42.
not a consumer. This purchaser is actually a retail seller. As a retail seller, he is liable under the GMGA even if he is only selling one vehicle.

The statute attempts to protect the consumer by requiring the retail seller of grey market goods to "post a conspicuous sign at the product's point of display and affix to the product or its package a conspicuous ticket, label, or tag disclosing any or all of the following" items:

(1) that the product is not accompanied by a manufacturer's express written warranty valid in the United States;
(2) that the product is not designed for United States electrical currents;\(^\text{45}\)

(3) that the product is not designed for United States broadcast frequencies;\(^\text{46}\)

(4) that the manufacturer’s United States distributor cannot provide replacement parts;\(^\text{47}\)

(5) that the manufacturer’s United States distributor cannot provide compatible accessories;\(^\text{48}\)

(6) that the instructions are not in English;\(^\text{49}\)

(7) that the purchaser is not entitled to a manufacturer’s rebate;\(^\text{50}\) and

(8) that the product is incompatible or does not conform to any relevant United States standards known to the retailer.\(^\text{51}\)

These same items must be conspicuously disclosed in any advertising of those products.\(^\text{52}\)

The required disclosure of the absence of a manufacturer’s express written warranty valid in the United States may be waived if the retailer meets certain requirements.\(^\text{53}\) First, the retail seller must provide a substitute express written warranty.\(^\text{54}\) This warranty must provide the same or better protections and benefits than the manufacturer’s express written warranty which normally would accompany the product when manufactured for sale in the United States.\(^\text{55}\) Second, the retailer’s express written warranty must comply

---


\(^\text{46}\) Id. § 1797.81(a)(3).

\(^\text{47}\) Id. § 1797.81(a)(4).

\(^\text{48}\) Id. § 1797.81(a)(5).

\(^\text{49}\) Id. § 1797.81(a)(6).

\(^\text{50}\) Id. § 1797.81(a)(7).

\(^\text{51}\) Id. § 1797.81(a)(8).

\(^\text{52}\) Id. § 1797.82.

\(^\text{53}\) Id. § 1797.81(b).

\(^\text{54}\) Id.

\(^\text{55}\) Id. § 1797.81(b)(1). Since section 218-aa(7) of the New York Warranty Disclosure Act is comparable to this section of the GMGA, *New York v. Sibley, Lindsay & Curr Co.*
with the requirements of the Song-Beverly Consumer Warranty Act (Song-Beverly). The GMGA specifically requires compliance with sections 1793.1 and 1793.2 of Song-Beverly. However, the drafters of the GMGA did not limit compliance to only those sections. Thus, when providing a substitute warranty, section 1797.81(b)(1) of the GMGA requires the grey market goods seller to comply with all of the Song-Beverly requirements.

The specific Song-Beverly requirements mentioned in the GMGA concern the warranty disclosure standards of section 1793.1 as well as the standards in section 1793.2 regarding service and repair facilities. The pertinent part of section 1793.1 requires that any warranty on consumer products must be in simple language and must disclose the identity of the warrantor. Section 1793.2, in part, requires that manufacturers providing express warranties must maintain sufficient service facilities within California. These facilities must be "reasonably close to all areas where its consumer goods are sold to carry out the terms of such warranties . . . ." Through the combination of these statutes, the duties originally imposed on the manufacturer through Song-Beverly are now being imposed upon the retail seller of grey market goods.

In order for the retailer to avoid disclosing the absence of a manufacturer's express written warranty valid in the United States, he must also inform the consumer that he has copies of the applicable warranties available for inspection upon request. The retailer may

---

57. CAL. CIV. CODE § 1797.81(b)(2) (West Supp. 1988). For a discussion of sections 1793.1 and 1793.2 of Song-Beverly, see infra text accompanying notes 60-64.
60. CAL. CIV. CODE § 1797.81(b)(2) (West Supp. 1988).
63. Id.
64. See id. §§ 1793.2(a), 1797.81(b)(2). (West Supp. 1988).
65. Id. § 1797.81(b)(3) (West Supp. 1988).
accomplish this by posting a "conspicuous sign at the product's point of sale or display, or [the retailer may] ... affix[ ... a conspicuous ticket, label, or tag" to the product or its package.66

Additionally, the retailer must comply with the regulations regarding pre-sale availability of written warranties promulgated by the Federal Trade Commission (FTC).67 These regulations were adopted pursuant to the federal Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (Magnuson-Moss).68 Section 2302(b)(1)(A) of Magnuson-Moss provides that the FTC shall prescribe the rules requiring the pre-sale availability of any written warranty on consumer goods.69 Pursuant to Magnuson-Moss, the FTC enacted regulations requiring that the seller make the text of any written warranties pertaining to consumer products costing more than fifteen dollars available to prospective buyers prior to sale.70 The retailer must also comply with the Magnuson-Moss and FTC disclosure regulations.71

The extensive requirements of the GMGA and those incorporated by reference from Song-Beverly, Magnuson-Moss, and the FTC, provide strong evidence of the California legislature's intent to ensure that the consumer is protected and has adequate knowledge upon the purchase of a grey market product.

B. Remedies and Penalties for a Violation of the GMGA

A violation of the California GMGA can result in numerous

---

66. Id. (emphasis added).
67. Id. § 1797.81(b)(4).
69. Id.
70. 16 C.F.R. 702.3(b)(1) (1987).
71. DEPARTMENT OF CONSUMER AFFAIRS/DIVISION OF CONSUMER SERVICES, CALIFORNIA RETAIL SELLERS MUST NOW DISCLOSE IMPORTANT FACTS ABOUT IMPORTED CONSUMER PRODUCTS 5, 7-9 (Jan. 1, 1987).

The FTC and Magnuson-Moss require warrantors of consumer products to disclose the following items among others:

(a) whether the warranty is full or limited (see 16 C.F.R. § 701.3(a) (1987));
(b) basic rights and duties of warrantors and buyers (id. § 701.3(a)(1)-(5); see also 15 U.S.C. § 2302(a)(1)-(7) (1983)); and
(c) buyer's remedies (16 C.F.R. § 701.3(a)(6)&(9); see also 15 U.S.C. § 2302(a)(8)-(9) (1983)).

Magnuson-Moss also provides the United States Attorney and the FTC the power to "maintain civil actions to restrain warrantors from making deceptive warranties." DEPARTMENT OF CONSUMER AFFAIRS/DIVISION OF CONSUMER SERVICES, CALIFORNIA RETAIL SELLERS MUST NOW DISCLOSE IMPORTANT FACTS ABOUT IMPORTED CONSUMER PRODUCTS 11 (Jan. 1, 1987); 15 U.S.C. § 2310(c) (1983).
penalties. These range from rescission of the sale to large civil fines.

Section 1797.85 of the GMGA provides that a retail seller who violates the GMGA must give a refund or credit on purchases to a consumer who returns a grey market product "if the product purchased has not been used in a manner inconsistent with any printed instructions provided by the seller." Furthermore, "[t]here is no time limit on the buyer's right to return a product for a refund should the buyer decide to do so.

Section 1797.86 provides that a violation of the GMGA "constitutes unfair competition under Section 17200 of the [California] Business and Professions Code, grounds for rescission under Section 1689 of [the California Civil Code], and an unfair method of competition or deceptive practice under Section 1770 of [the California Civil Code]." All three of these penalties may be imposed for one violation of the GMGA since they are connected by the word "and," a conjunctive. Thus, they are not mutually exclusive.

Unfair competition under section 17200 of the California Business and Professions Code can result in a maximum civil penalty of $2500 for each violation. The penalty is collected by various governmental agencies depending upon which agency prosecuted the case. The Business and Professions Code also specifically states that its remedies and penalties for a violation of section 17200 are cumulative "to the remedies or penalties available under all other laws of this state."

Sections 1689 and 1770 of the California Civil Code provide remedies for the injured consumer. The consumer may rescind under section 1689, and he may bring an action for damages under section

---

73. See id.
74. Id. § 1797.85.
75. Id.
76. DEPARTMENT OF CONSUMER AFFAIRS/DIVISION OF CONSUMER SERVICES, CALIFORNIA RETAIL SELLERS MUST NOW DISCLOSE IMPORTANT FACTS ABOUT IMPORTED CONSUMER PRODUCTS 7 (Jan. 1, 1987).
77. CAL. CIV. CODE § 1797.86 (West Supp. 1988).
78. Id.
79. CAL. BUS. & PROF. CODE § 17206(a) (West 1987).
80. Id.
81. Id. § 17205. See infra note 89 for a discussion of cumulative remedies and penalties.
82. CAL. CIV. CODE § 1797.86 (West Supp. 1988).
83. CAL. CIV. CODE § 1689 (West 1985).
1770 for an unfair method of competition or deceptive practice. The relief for section 1770 can be found under section 1780. Section 1780 allows the consumer to sue for actual damages, an injunction prohibiting the retailer from continuing such practices, punitive damages, and any other relief that the court deems proper.

Because the warranty provisions of the GMGA also require compliance with Song-Beverly, a violation of Song-Beverly would result in a violation of the GMGA. Consequently, it is possible that penalties may be imposed for violating Song-Beverly in addition to the penalties imposed for violating other sections of the GMGA. This conclusion is supported by the fact that the remedies under Song-Beverly are cumulative as specified under section 1790.4 of the California Civil Code. The remedies included under Song-Beverly allow the consumer to bring an action for the recovery of damages in addition to other legal and equitable relief specified by the statute. Included within the damages are those provided by the California Commercial Code which are predicated upon the actions of the consumer. The consumer may also receive a civil penalty which is not to exceed the amount of the actual damages by two times. Attorney's fees may

---

84. CAL. CIV. CODE § 1797.86 (West Supp. 1988); see also CAL. CIV. CODE § 1770(u) (West Supp. 1988).
85. CAL. CIV. CODE § 1780(a)(1)-(4) (West 1985).
86. Id.
87. CAL. CIV. CODE § 1797.81(b)(2) (West Supp. 1988); see supra text accompanying notes 56-64.
88. Id.
89. CAL. CIV. CODE § 1790.4 (West 1985). Civil actions alleging violations of several statutes against a defendant for a single bad act often result in multiple (or cumulative) penalties or remedies. The application of more than one penalty or remedy for one wrong act has been consistently upheld in the courts. The court in People v. Los Angeles Palm Inc. held that if two statutes are invoked, and one of the statutes provides for cumulative penalties or remedies, penalties or remedies for violating both statutes may be imposed. 121 Cal. App. 3d 25, 33, 175 Cal. Rptr. 257, 262 (1981) (citing People v. McKale, 25 Cal. 3d 626, 633 (1979)). The United States Supreme Court has also acknowledged the fact that many state statutes allow “double or treble or even quadruple damages.” United States v. Hess, 317 U.S. 537, 550-551 (1942) (citing Missouri Pac. Ry. v. Humes, 115 U.S. 512, 523 (1885)).
90. CAL. CIV. CODE § 1794(a) (West Supp. 1988). For examples of other relief, see infra note 91.
91. CAL. CIV. CODE § 1794(b) (West Supp. 1988). For example, if the “buyer rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, sections 2711, 2712, and 2713 of the Commercial Code shall apply.” Id. § 1794(b)(1). “Where the buyer has accepted the goods, sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the costs of repairs necessary . . . .” Id. § 1794(b)(2).
92. Id. § 1794(c).
also be included within the judgment.\textsuperscript{93}

In addition to Song-Beverly, the grey marketeer must abide by the requirements of Magnuson-Moss.\textsuperscript{94} The Magnuson-Moss Act encourages warrantors to establish informal dispute settlement procedures.\textsuperscript{95} If the warrantor has established such a procedure in compliance with the requirements, then the consumer must initially resort to such a procedure before instituting an action under Magnuson-Moss.\textsuperscript{96} In an action for damages, the consumer may recover damages and other legal and equitable relief as deemed appropriate by the court.\textsuperscript{97} This may include costs and expenses incurred by bringing the lawsuit.\textsuperscript{98} Additionally, the United States Attorney General or the FTC may obtain an injunction against the violator.\textsuperscript{99}

As evidenced by the foregoing discussion, a violation of the GMGA can be very costly to the violator. Although it may appear that the GMGA has created numerous remedies and penalties, the GMGA has in fact simply applied previously available remedies to a new category of potential defendants: retailers of grey market goods.\textsuperscript{100}

C. Comparison with the New York and Connecticut Statutes

In comparison with the New York and Connecticut statutes, the superiority of the California GMGA is manifested by the inclusion of the GMGA in the 1988 volume of \textit{Suggested State Legislation}.\textsuperscript{101} The decision to include the GMGA was made after having considered the benefits and drawbacks of the California, Connecticut, and New York grey market legislation.\textsuperscript{102}

\textsuperscript{93} Id. § 1794(d).

\textsuperscript{94} Id. § 1797.81(b)(4).


\textsuperscript{96} Id. § 2310(a)(3)(C)(i).

\textsuperscript{97} Id. § 2310(d)(1).

\textsuperscript{98} Id. § 2310(d)(2).

\textsuperscript{99} Id. § 2310(c)(1)(B).

\textsuperscript{100} Telephone interview with Herschel T. Elkins, Senior Assistant Attorney General, Consumer Law Section (Oct. 27, 1987).

\textsuperscript{101} Telephone interview with an anonymous representative of the Council of State Governments, publisher of \textit{SUGGESTED STATE LEGISLATION} (Jan. 8, 1988).

The purpose of \textit{Suggested State Legislation} is to provide actual legislation on specific topics to act as guidance for states during their legislative process. \textit{See 45 COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION} iv (1986).

Overall, the California statute is considerably stricter than the New York or Connecticut statutes. The "California law recognizes that grey market goods may be deficient [in many ways] . . . [and] requires consumer notification if the product is deficient in any way." On the other hand, both New York and Connecticut only require disclosure when:

(1) the product does not have a manufacturer's warranty valid in the United States;
(2) the product does not come with English instructions; or
(3) the purchaser is not eligible for a manufacturer's rebate.

Unlike California, neither New York nor Connecticut protects the consumer from goods which are not designed for United States electrical currents or broadcast frequencies. Additionally, neither of the two states require disclosure if the manufacturer's United States distributors cannot provide replacement parts or compatible accessories.

Another aspect of the California law evidencing its stricter requirements is that it does not exempt retailers who unknowingly sell grey market goods. In contrast, this exemption can be found in the Connecticut law since it only imposes sanctions on retailers who knowingly sell grey market goods.

Common to all three state grey market statutes is the basic definition of a grey market product. The only noticeable difference is that the New York and Connecticut definitions require that the product be imported to the United States through unauthorized distributors "for sale to the public in this state." The drafters of the

104. Shapiro letter, supra note 102 (emphasis in original).
105. N.Y. GEN. BUS. LAW § 218-aa(3)(a)-(c) (McKinney Supp. 1988); CONN. GEN. STAT. ANN. § 42-210 (b) (1)-(3) (West 1987). For the California requirements, see supra text accompanying notes 43-52.
108. Shapiro letter, supra note 102.
109. CONN. GEN. STAT. ANN. § 42-210(b) (West 1987).
110. N.Y. GEN. BUS. LAW § 218-aa(1) (McKinney Supp. 1988); CONN. GEN. STAT. ANN. § 42-210(a) (West 1987); see also CAL. CIV. CODE § 1797.8(a) (West Supp. 1988).
California statute removed this phrase from the definition. Consequently, the literal interpretation of the California definition of a grey market product only requires that it be imported through channels other than the manufacturer's authorized distributors; it does not indicate that the location of the retail seller or that the point of sale must be in California. Therefore, the retail seller under the GMGA may be a foreign or out-of-state retail seller. Additionally, the fact that the goods are imported into the United States does not necessarily indicate that the goods are intended for sale in the United States. To import simply means that the goods are transported into the state from another state or country. Thus, the ultimate consumer of the grey market product may also be the importer.

For example, while Mr. Tourist was vacationing in Japan, he decided to purchase a Vivitar camera. Since he is a United States citizen, when he brings his new camera home, he is theoretically importing his camera. Under the California statute, it would be a grey market product since it passes the four part test: the camera has a Vivitar trademark; Vivitar cameras manufactured for sale in the United States normally come with express written warranties; Mr. Tourist is not an authorized distributor; and the warranty on his camera would not be valid in the United States since it was not manufactured for the United States. Thus, Mr. Tourist's Vivitar camera is a grey market product under the California statute.

112. This phrase was included in the first version of the GMGA. See Cal. A.B. 2735, 1985-86 Sess. (original version, Jan. 22, 1986). However, the phrase was stricken from the GMGA when it was amended in the Assembly on April 7, 1986. See Cal. A.B. 2735, 1985-86 Sess. (as amended, Apr. 7, 1986). Extensive research has not led to an answer to why this phrase was eliminated.

113. This is especially worrisome for mail order companies. Although the retail mail order company is in another state, under some circumstances, it can be regulated under the GMGA. See infra text accompanying notes 168-72 and 186-214.


115. Since the term "import" is not defined in the Grey Market Goods Act, it is helpful to look to other California statutes for the definition. Although import is not specifically defined, the Alcoholic Beverage Control Act and the State Fireworks Law define the term "importer." See Cal. Bus. & Prof. Code § 23017 (West 1985); Cal. Health & Safety Code § 12513 (West 1975).

Under the Alcoholic Beverage Control Act, an "importer" includes "any person bringing alcoholic beverages into this State from without this State . . . which are for delivery or use within this State." Cal. Bus. & Prof. Code § 23017(d) (West 1985) (emphasis added).

An "importer" under the State Fireworks Law includes "any person who for any purpose . . . [b]rings fireworks into this state or causes fireworks to be brought into this state." Cal. Health & Safety Code § 12513(a) (West 1975).

116. See supra note 115.

117. See supra text accompanying notes 36-39.
New York and Connecticut definitions of a grey market product require that the product be for sale to the public within their respective states.\(^\text{118}\) Therefore, Mr. Tourist’s camera would not be a grey market product in New York and Connecticut because it was not for sale to the public within the state.\(^\text{119}\) Hence, such a consumer would not be protected under the New York or Connecticut laws.

The question then becomes whether California can impose the requirements of the GMGA upon foreign retail sellers\(^\text{120}\) who sell grey market goods to a California resident. To answer this inquiry, the ability to exercise jurisdiction over the potential defendants must be determined. After jurisdiction is established, the constitutionality of imposing the GMGA upon the defendant is ascertained by analyzing the statute in light of the dormant commerce clause\(^\text{121}\) and possibly the due process clause\(^\text{122}\) of the United States Constitution.

**D. Personal Jurisdiction of Foreign & Out-of-State Corporations**

In order to prosecute a corporation under the California GMGA, a court must be able to take personal jurisdiction over the corporate entity.\(^\text{123}\) The constitutionality of exercising jurisdiction depends upon the defendant’s contacts with the forum state.\(^\text{124}\) Traditionally, the defendant must have “purposely established ‘minimum contacts’ in the forum state” before a court may exercise jurisdiction.\(^\text{125}\) Stated differently, the defendant must purposely avail himself of the benefits and protections of the laws of the forum state.\(^\text{126}\) The application of this rule will “vary with the quality and nature of the defendant’s

\(^{118}\) See supra text accompanying note 111.

\(^{119}\) See id.

\(^{120}\) For simplicity, this Comment will assume that the retail seller is a corporation.

\(^{121}\) See infra text accompanying notes 186-91 for the definition of the dormant commerce clause.

\(^{122}\) U.S. Const. amend. XIV, § 1. Since parts of the dormant commerce clause analysis incorporate the notion of due process, it is unusual for a court to apply a separate due process analysis in a dormant commerce clause case. See South Carolina Highway Dept. v. Barnwell Bros., 303 U.S. 177, 190 (1938). However, cases involving state taxes which affect interstate commerce have been analyzed under the due process clause. See National Geographic Soc’y v. California Bd. of Equalization, 430 U.S. 551 (1977). Thus, if the GMGA is analogized to a tax, a court may apply a due process test. Without this analogy, a court will simply use the dormant commerce clause analysis.

\(^{123}\) J. Friedenthal, M. Kane & A. Miller, Civil Procedure § 3.1 (1985).


\(^{126}\) Hanson v. Denckla, 357 U.S. 235, 253 (1957).
activity."\(^{127}\)

Once a court determines that the defendant deliberately established the requisite minimum contacts within the forum state, the court must decide if asserting jurisdiction over the defendant would "offend 'traditional notions of fair play and substantial justice.'"\(^{128}\)

In evaluating the facts, the court should consider such items as the hardship on the defendant, the plaintiff's interest in obtaining relief in a convenient forum, the forum state's interest in resolving the controversy, and the national judicial system's interest in efficiency.\(^{129}\)

When the defendant is a foreign entity, the court should also consider the "procedural and substantive" interests of the other nations involved.\(^{130}\) Additionally, the court will consider whether exercising jurisdiction creates unreasonable burdens upon defendants when the plaintiff's or the state's interests are minimal.\(^{131}\)

In the recent decision of *Asahi Metal Industry Co. v. Superior Court*,\(^{132}\) the United States Supreme Court addressed the issue of personal jurisdiction over foreign corporations in positions similar to those potentially found under the GMGA. In *Asahi*, the plaintiffs were injured in a motorcycle accident. Consequently, they brought a products liability claim against the Taiwan-based manufacturer of the motorcycle tire tube, Cheng Shin Rubber Industrial Co., Ltd., (Cheng Shin).\(^{133}\)

The suit was initiated in California. In response to the lawsuit, Cheng Shin filed a claim against Asahi Metal Industry Co., Ltd. (Asahi) seeking indemnification. Asahi had manufactured the valve assembly for the tube in Japan and sold it to Cheng Shin in Taiwan.\(^{134}\)

Once the valve assembly was incorporated into the tube, Cheng Shin sold the tube in California.\(^{135}\) Consequently, Asahi did not have any direct contacts with California.

The Supreme Court "unanimously found that Asahi could not be

---

127. *Id.*


129. *Burger King Corp.*, 471 U.S. at 477 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).


131. *See id.* at 1035.


134. *Id.* at 1029-30.

135. *Id.* at 1030.
subject to . . . personal jurisdiction in the California forum.” 136 However, there were three different rationales for this result. 137 The plurality opinion focused on Asahi’s lack of purposeful contacts with California. The plurality found that placing a “product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.” 138 The plurality also addressed the issue of fairness involved in haling a foreign corporation into a domestic forum. The plurality concluded that requiring Asahi to appear in a California forum would be too severe. 139

In a separate opinion, Justice Brennan agreed that the California court should not exercise personal jurisdiction over Asahi. 140 He based his decision on his belief that an assertion of jurisdiction would not be fair or reasonable. 141 However, he made it clear that he felt Asahi did meet purposeful availment requirements under the “stream of commerce” theory. 142

In a third opinion, Justice Stevens expressed his belief that the plurality’s minimum contacts analysis was unnecessary. 143 He felt that the reasonableness test was sufficient to determine the constitutionality of exercising personal jurisdiction. 144

As a result of the decision in Asahi, it will be difficult to exercise jurisdiction over a foreign corporation that has no direct contacts with the forum state. Thus, a California consumer such as Mr. Tourist would not be able to bring an action in California against the Japanese retailer of his camera if the retailer has no contacts with California. However, unlike the situation in Asahi, many potential foreign defendants have purposeful contacts with the United States.

136. Specific Personal Jurisdiction, supra note 132, at 377-79.
137. See id.
138. Asahi Metal Indus. Co. v. Superior Ct., 107 S. Ct. 1026, 1033 (1987). From this statement, it can be inferred that if the foreign corporation did have purposeful contacts, a court could achieve personal jurisdiction over that corporation. This would be vital for mail order companies. If a foreign mail order company purposely seeks out California customers, then it could be subjected to potential claims under California law such as the GMGA.
139. Id. at 1034-35. The reasons given were that Asahi was headquartered in Japan and that it was unfair for Asahi to work out its dispute with Cheng Shin in a foreign forum. Id.
140. Id. at 1035.
141. Id.
142. Id. This theory holds that “[a] defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum state.” Id. Thus, the forum state should be able to exercise jurisdiction over such a corporation. Id. at 1035-36.
143. Id. at 1038.
144. Id.
When a defendant has purposefully sought contacts in the United States, a court might be able to exercise jurisdiction over this defendant. Since the corporate structure and factual situation will vary in each case, the ability to exercise jurisdiction will also vary. Two New York cases serve as excellent examples of the type of jurisdictional problems that might arise if a plaintiff tried to sue a foreign corporation under the California GMGA. These are Frummer v. Hilton Hotels International, Inc. and Delagi v. Volkswagenwerk AG.

In Frummer, a New York tourist fell and injured himself while taking a shower in the London Hilton. The plaintiff brought a personal injury action in a New York court against the hotel which is a London corporation. Jurisdiction was granted on the basis of the activities of the Hilton Reservation Service located in New York. Although the London Hilton and the Hilton Reservation Service are separate corporations, they are both wholly owned subsidiaries of Hilton Hotels International. The court held that there was an agency relationship between the London Hilton and the Hilton Reservation Service thereby making it acceptable to exercise personal jurisdiction over the London Hilton.

The case of Delagi v. Volkswagenwerk AG provides another illustration of how a court may approach personal jurisdiction over a foreign corporation. In Delagi, the New York plaintiff was injured in a car accident in Germany. Consequently, he sued the German car manufacturer in a New York court. The defendant manufacturer owned one hundred percent of the stock in a New Jersey corporation to which it exported the German automobiles. Neither the German manufacturer nor the New Jersey subsidiary "did business" with New York. The only relationship with New York was through a New

---

145. See supra note 138.
149. Id. at 536-38, 227 N.E.2d at 853-54, 281 N.Y.S.2d at 43-45. The court used the traditional minimum contacts test so as not to "offend 'traditional notions of fair play and substantial justice.' " Id. at 536, 227 N.E.2d at 853, 281 N.Y.S.2d at 44 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).
150. Id. at 538, 227 N.E.2d at 854, 281 N.Y.S.2d at 45.
151. Id.
154. Id. at 430, 278 N.E.2d at 896, 328 N.Y.S.2d at 655.
York distributor of the New Jersey subsidiary.\textsuperscript{155} Although the New York distributor was not owned by the manufacturer or its subsidiary, the plaintiff argued that the court should exercise jurisdiction over the manufacturer because it had control over the distributor in New York.\textsuperscript{156} The court held that it could not exercise jurisdiction over a foreign corporation simply because of control over a domestic entity. The court went on to say that it would exercise jurisdiction only if there was "at least a parent-subsidiary relationship."\textsuperscript{157}

The decisions of \textit{Frummer} and \textit{Delagi} demonstrate that a court may take personal jurisdiction over a foreign corporation if it is a subsidiary of a company which also owns a domestic corporation thus creating an agency relationship.\textsuperscript{158} This relationship allows the court to ascribe the activities of the domestic corporation to the foreign corporation. However, a court may not take jurisdiction over a foreign corporation if it simply owns the stock of a related domestic corporation.\textsuperscript{159}

In another scenario, rather than traveling to Japan, Mr. Tourist may decide to go to Delaware and purchase a camera from a grey market retailer in Delaware. The ability to exercise jurisdiction over this retailer will depend upon the retailer's contacts with California. The Minnesota Supreme Court was faced with a similar situation in \textit{West American Insurance Co. v. Westin, Inc.}\textsuperscript{160} In \textit{Westin}, the defendant was a tavern located in Wisconsin only fifteen miles from Minnesota.\textsuperscript{161} At the time, Wisconsin allowed people eighteen years or older to purchase beer or malt liquor. Unlike Wisconsin, Minnesota required that the purchaser be at least twenty-one years old.\textsuperscript{162} As a result of this discrepancy, the eighteen year old plaintiff drove from Minnesota to the defendant bar where she consumed alcohol.\textsuperscript{163} Upon the plaintiff's drive home, she collided with an on-coming car. Consequently, plaintiff's insurance company brought an action for indemnity against the defendant tavern in a Minnesota court.\textsuperscript{164} The

\textsuperscript{155.} \textit{Id.}
\textsuperscript{156.} \textit{Id.} at 431-32, 278 N.E.2d at 897, 328 N.Y.S.2d 656-57.
\textsuperscript{157.} \textit{Id.} at 432, 278 N.E.2d at 897, 328 N.Y.S.2d at 657.
\textsuperscript{158.} \textit{See supra} text accompanying notes 150-51.
\textsuperscript{159.} \textit{See supra} text accompanying notes 155-57.
\textsuperscript{160.} 337 N.W.2d 676 (1983).
\textsuperscript{162.} \textit{Id.}
\textsuperscript{163.} \textit{Id.}
\textsuperscript{164.} \textit{Id.}
tavern moved for a dismissal for lack of personal jurisdiction.\textsuperscript{165} Since the tavern had no other contacts with Minnesota other than the unilateral activity of the plaintiff, the court dismissed the action.\textsuperscript{166} In a concurring opinion, Justice Wahl noted that the court could have exercised jurisdiction if the tavern had solicited business in Minnesota.\textsuperscript{167}

Under Westin, Mr. Tourist’s ability to bring the Delaware retailer into a California court will depend upon the retailer’s contacts with California. If the retailer’s only contact with California consisted of Mr. Tourist’s camera purchase, then a California court could not exercise jurisdiction over the retailer. On the other hand, if the Delaware retailer solicited sales in California, the concurring opinion indicated the possibility of exercising jurisdiction.

After Mr. Tourist arrived home in California from Delaware, he received a mail order catalogue from a grey market retailer located in Texas. If the retailer violated the GMGA, a California court attempting to exercise jurisdiction over the defendant would turn to the United States Supreme Court decision in McGee v. International Life Insurance Co.\textsuperscript{168} for guidance.

In McGee, the plaintiff was a beneficiary of a life insurance policy underwritten by the defendant insurance company.\textsuperscript{169} The insured lived in California and the insurance company was located in Arizona. Aside from the policy with the insured, the insurance company had no other contacts with California.\textsuperscript{170} When the plaintiff beneficiary sued the insurance company for compensation, the Court held it was constitutional to exercise jurisdiction over the defendant.\textsuperscript{171} The Court reasoned that “the contract was delivered in California, the premiums were mailed from there,” and California had a manifest interest in providing its citizens with a method of redress.\textsuperscript{172}

Using the approach of McGee, Mr. Tourist would have a strong argument for bringing the Texas mail order company into a California court. Mr. Tourist would argue that the mail order form, which he received at his California residence, constituted a contract; that he

\textsuperscript{165} Id. at 677-78.
\textsuperscript{166} Id. at 681.
\textsuperscript{167} Id. (Wahl, J., concurring).
\textsuperscript{168} 355 U.S. 220 (1957).
\textsuperscript{170} Id. at 222.
\textsuperscript{171} Id. at 223.
\textsuperscript{172} Id.
mailed the check for his purchase from California; and that California has a manifest interest in protecting its citizens from deceptive sales of grey market goods. Foreign mail order companies soliciting grey market goods to California consumers would also be subject to the McGee analysis in connection with Asahi.

Although the previously described cases involved personal injury and breach of contract actions, the same analysis could be used to determine whether personal jurisdiction over a foreign or out-of-state corporation exists when other causes of action are involved. Consequently, this analysis would apply to a foreign or out-of-state corporation that is being sued for a violation of the California GMGA. Therefore, since the issue of personal jurisdiction will be decided differently depending upon the foreign or out-of-state party's corporate structure and the contacts with the forum state, the remainder of this Comment will be based upon the assumption that personal jurisdiction is not at issue.

E. Is it Constitutional to Prosecute Out-of-State or Foreign Corporations under the GMGA?

Assuming that a court may exercise personal jurisdiction over the foreign or out-of-state grey marketeer retailing grey market goods to California consumers, a court must then determine whether it is constitutional for California to impose such regulations. The constitutionality of imposing the GMGA is largely dependent upon where the title to the product passes. If the consumer is also the importer under the California definition of a grey market product, then title to the product necessarily passes outside California borders, i.e., wherever the grey market retailer is located. This situation must be distinguished from the circumstances where the retailer is located outside of California, but title to the product passes within California borders—as is the case with many mail order companies. These situations must be evaluated in light of the dormant commerce clause and possibly the due process clause of the United States Constitution.

173. Specific Personal Jurisdiction, supra note 132, at 364 n.17.
174. See infra text accompanying notes 178-85.
175. See supra text accompanying notes 116-19.
176. For a definition of the dormant commerce clause, see infra text accompanying notes 186-91.
1. Title of the Product Passes Outside of California

It is generally well accepted that a state cannot regulate a transaction occurring outside of its borders.178 The Supreme Court of the United States made this clear in Brown-Forman Distillers Co. v. New York State Liquor Authority.179 In Brown-Forman, the state of New York enacted a statute requiring "every liquor distiller or producer that sells liquor to wholesalers in [New York] to sell at a price that is no higher than the lowest price the distiller charges wholesalers anywhere else in the United States."180 The Court held that the statute violated the dormant commerce clause181 of the United States Constitution by regulating conduct and transactions occurring outside the state.182 The Court's rationale was based on the argument that "[w]hile New York may regulate the sale of liquor within its borders, and may seek low prices for its residents, it may not 'project its legislation into [other States] . . . .' "183

Under the analysis of Brown-Forman, California would not be able to extend the GMGA to transactions occurring outside of the California borders. Consequently, an attempt to regulate the sale of a grey market product to a California resident would violate the dormant commerce clause if the sale occurred outside of California. For example, assume Mr. Tourist purchased a defective grey market camera in another state (such as Delaware) or in another country (such as Japan), and subsequently imported the item into California. As a result of Brown-Forman, Mr. Tourist could not bring an action under the GMGA against the out-of-state or foreign retailer.

179. Id.
180. Id. at 575.
181. For a definition of the dormant commerce clause, see infra text accompanying notes 186-91. Although the Court in Brown-Forman specifically held that the New York statute violated the commerce clause, the Court arrived at this decision by using a dormant commerce clause analysis. See Brown-Forman, 476 U.S. at 578-79. The Court's test consisted of "examin[ing] whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." Id. at 579. For an example of the dormant commerce clause analysis, see infra text accompanying notes 186-214. Thus, this Comment will refer to the violation in Brown-Forman as a dormant commerce clause violation.
2. Title of the Product Passes in California but the Grey Market Retailer is Located in Another State or Country

When the grey market retailer is located in a state other than California or in a foreign country, there are circumstances where it may be subjected to the California GMGA. This could occur when a California consumer such as Mr. Tourist is solicited by a grey market mail order company located outside California borders. To determine whether the GMGA may be imposed upon these retailers, a court must evaluate the impact of the GMGA under the dormant commerce clause and possibly the due process clause of the United States Constitution.

a. dormant commerce clause analysis

The commerce clause of the United States Constitution grants Congress the power to "regulate Commerce with foreign Nations, and among the Several States . . . ." Although this clause relates to the powers of Congress, the Supreme Court has "recognized that it also limits the power of the States to erect barriers against interstate trade." This implied limitation upon the states is known as the dormant commerce clause. However, the states are not completely barred from creating regulations that affect interstate commerce. In fact, foreign and out-of-state corporations may be "subjected to reasonable regulation under the state police power." Thus, the purpose of the dormant commerce clause analysis is to determine if the state statute is a valid exercise of the state's police power to create regulations that have a resulting effect upon interstate commerce.

The first part of the dormant commerce clause analysis requires a determination of whether the state's purpose for the law is legitimate. According to the Supreme Court in *Hunt v. Washington Ap*.

---

184. For a definition of the dormant commerce clause, see infra text accompanying notes 186-91.
186. U.S. CONST. art. I, § 8, cl. 3.
189. Lewis, 447 U.S. at 36.
191. See *Shell Oil Co.*, supra note 188, at 589-90.
192. Id. at 590-91 n.51 (citing Professor Christopher May, Bradley Chair in Constitutional Law, Loyola Law School, Los Angeles).
pie Advertising Commission, states have a substantial interest in shielding their citizens from deception and confusion in the marketing and sale of goods. With respect to the GMGA, California's purpose is to protect the consumer of grey market goods from deception. According to the holding in Hunt, the purpose of the GMGA would be legitimate.

For the GMGA to survive a dormant commerce clause analysis, there must also be a rational relationship between the requirements of the law and the state's purpose. The Supreme Court in Hunt focused on whether the regulation was actually protecting against the problems it was designed to eliminate. Thus, under the analysis of Hunt, the GMGA must be protecting the consumer from the problems typically associated with the sale of grey market goods. Since the requirements of the GMGA involve disclosure of information relating to the typical problems with grey market goods, the consumer will have the necessary knowledge to avoid being deceived. By requiring disclosure and thereby preventing consumer deception with respect to grey market goods, the consumer is being protected. Thus, the GMGA should meet the rational relationship part of a dormant commerce clause analysis.

The dormant commerce clause also requires an analysis of whether the burdens upon interstate commerce are outweighed by the benefits to the state. California burdens interstate commerce by requiring out-of-state retailers to comply with the GMGA when these retailers sell grey market goods in California. If each state in the union enacted different grey market regulations, the burden on interstate commerce would be exorbitant. However, this is currently not the case because once the retailer complies with the California statute, the New York and Connecticut statutes will also be satisfied: the GMGA is simply stricter than the other two statutes—it does not conflict with them. Additionally, since the California statute will be

195. See text accompanying note 31.
196. Shell Oil Co., supra note 188, at 590-91 n.51 (1988) (citing Professor Christopher May, Bradley Chair in Constitutional Law, Loyola Law School, Los Angeles).
198. Id.
in the 1988 version of *Suggested State Legislation*,\(^{200}\) it is likely that other states will enact comparable rather than conflicting statutes. Thus, the burden upon interstate commerce created by the GMGA will be outweighed by the benefits to California.\(^{201}\)

The GMGA also provides benefits to the state over and above those existing under current federal law.\(^{202}\) While Magnuson-Moss and the FTC provide some guidelines regarding warranty requirements,\(^{203}\) these federal regulations do not protect the consumer of grey market goods from deception to the same extent as provided by the GMGA: neither Magnuson-Moss nor the FTC focus upon the specific problems common to the sale of grey market goods. The requirements of the GMGA clearly benefit California’s purpose—to enhance the consumers’ ability to make an informed decision with respect to the purchase of a grey market product.

In evaluating the state law, the dormant commerce clause requires a determination of whether the “‘statute regulates evenhandedly to effectuate a legitimate local [purpose] ...’”\(^{204}\) In other words, the statute must not impose a greater burden on foreign or out-of-state entities than it does on similarly situated local entities.\(^{205}\) Some courts refer to this requirement in terms of whether the state statute discriminates against interstate or foreign commerce.\(^{206}\) Since all grey market goods are imported from outside the United States, there is a possible argument that the GMGA discriminates against foreign commerce. If the GMGA is found to be discriminatory, California must prove that there are no other less discriminatory means available to obtain the results of the statute’s purpose.\(^{207}\) By definition, grey market goods do not originate in the United States. Therefore, because no comparable domestic problem exists, regulations regarding grey market goods will be discriminatory. Since there is no other less discriminatory means for California to control the problem presented by grey market goods, the GMGA would be found valid under this part of the dormant commerce clause inquiry.\(^{208}\)

---

\(^{200}\) See supra text accompanying notes 101-02.

\(^{201}\) See *Bibb*, 359 U.S. at 529-30.


\(^{203}\) See supra note 71.


\(^{206}\) *Id.*


\(^{208}\) *Id.*
Another aspect of discrimination focuses on whether the GMGA favors California grey market retailers at the expense of out-of-state or foreign grey market retailers. This requirement of evenhandedness/non-discrimination should not be problematic for the GMGA because grey market retailers in California are subjected to the same requirements as grey market retailers located out-of-state or in another country.

When the retailer is a foreign corporation, the state regulation burdening foreign commerce will be subjected to a more rigorous analysis. While the basic dormant commerce clause analysis is still applied, the court must also recognize that there is a special need for federal uniformity with respect to foreign commerce. However, the Supreme Court of the United States has made it clear that this need for uniformity is not absolute. Thus, states may impose a regulation upon foreign commerce if the regulation does not “impinge[ ] on the need for foreign uniformity in the area of foreign trade policy.” Since foreign mail order retailers of grey market goods, deliberately seek out California consumers, California should be able to regulate the sale of their goods.

In summary, as long as title to the product passes within California’s borders, the dormant commerce clause will not prevent California from enforcing the GMGA against foreign or out-of-state retailers of grey market goods. Hence, an out-of-state or foreign mail order company soliciting Mr. Tourist in California would be subject to the requirements of the GMGA.

b. the due process test

In addition to the restrictions imposed by the dormant commerce clause, the due process clause may bar a state from imposing significant burdens on those entities lacking a significant connection to the state. Recently, the Supreme Court has applied this analysis in determining the state’s ability to impose a burden of taxation upon enti-

212. Id. at 2375-76.
214. This situation may be distinguished from that where the goods are simply passing through the state in foreign or interstate commerce. See Japan Line, Ltd. v. Los Angeles, 441 U.S. 434 (1979).
ties located outside of the state.217

Regulations, like taxes, impose burdens on foreign and out-of-state corporations. By analogy, due process might restrict California's ability to impose GMGA disclosure requirements on those entities lacking a sufficient nexus to California. If a court is willing to draw an analogy between taxes and regulations, the nexus test of National Geographic Society v. California Board of Equalization218 provides an additional hurdle to the extensive dormant commerce clause analysis. In National Geographic, the Society had a mail order operation with headquarters in the District of Columbia. Although the Society had two offices in California, California residents would send their orders to the Washington D.C. headquarters and the goods were mailed from either the headquarters or the Maryland offices.219 Under the California Revenue and Tax Code, a use tax was imposed on the Society for the sales in California.220

The Supreme Court focused on the issue of "whether the Society's activities at the offices in California provided [a] sufficient nexus between the out-of-state seller [(the Society)] and the State—as required by the Due Process Clause of the Fourteenth Amendment and the Commerce Clause—to support the imposition upon the Society of a use-tax-collection-liability . . . ."221 The Court held that the presence of the California offices was sufficient to meet the nexus test.222 The Court further held that it did not matter that the offices had no relationship with the mail order sales.223

The Court in National Geographic distinguished National Bellas Hess, Inc. v. Department of Revenue of Illinois,224 a prior Supreme Court case involving a use tax imposed upon an out-of-state mail order company.225 In Bellas Hess, a Missouri based mail order company's only contact with Illinois consisted of the mail order sales,
catalogues, and flyers—all of which were transported through the mail or common carrier.\textsuperscript{226} In that case, Illinois could not impose a use tax on the mail order sales because the mail order company did not have the requisite nexus with Illinois.\textsuperscript{227} In order for a state to impose a use tax on mail order companies, the company must have "retail outlets, solicitors, or property within [the taxing] State ... ."\textsuperscript{228}

Under the rulings of \textit{National Geographic} and \textit{Bellas Hess}, a retail grey market mail order company in another state may be required to comply with the California GMGA only if it meets the requisite nexus test. Thus, if a court determines that a grey market mail order retailer located in another state or in a foreign country has a sufficient nexus with California, the retailer will be held accountable under the GMGA for mail order sales in California.

3. Conclusions Regarding Application of the Dormant Commerce Clause and the Due Process Clause to the GMGA

The constitutionality of applying the GMGA to out-of-state and foreign entities rests in large part upon where the transaction occurs. If title to the product passes outside the California border, it would violate the dormant commerce clause of the United States Constitution to invoke the GMGA.\textsuperscript{229} Thus, while the GMGA does not expressly indicate where the sale must occur, the United States Constitution requires that the title of the product must pass within California's borders before the GMGA may be applied. Consequently, if the consumer imported the product, he must prove that the sale of the product occurred within California borders before he may invoke the GMGA. This would be nearly impossible since a consumer must normally purchase a product before he may remove it from the premises of the retail seller. Thus, when the consumer imports the product into California, the consumer has usually already purchased the product. Therefore, the title of a item imported by a consumer normally passes outside of the California borders. The result is that the consumer may not invoke the GMGA.

If title to the product passes within the California border and the retailer is not located in California, the constitutionality of imposing the GMGA might be determined under two approaches: (1) the court

\textsuperscript{226} National Bellas Hess, Inc. v. Department of Revenue of Ill., 386 U.S. 753, 753-55.
\textsuperscript{227} Id. at 758.
\textsuperscript{228} Id.
\textsuperscript{229} See supra text accompanying notes 181-83.
may use a dormant commerce clause analysis to evaluate whether the GMGA is a proper use of the California's regulatory power despite effects upon interstate commerce; and (2) the court also might analogize the regulations of the GMGA to a tax and use the nexus test of *National Geographic*. The GMGA appears to be a valid exercise of police power under the commerce clause and the outcome of the nexus test is dependent upon the defendant's contacts with California.

III. APPLICATION OF THE GMGA TO GREY MARKET AUTOMOBILES

The importation of grey market items such as cameras is a fairly simple process: the grey marketeer generally purchases the product in a foreign country and imports it into the United States where it is sold. In contrast, the importation of grey market automobiles is much more complex. Since grey market vehicles are manufactured for sale in a foreign country, they do not meet United States standards promulgated by the federal Environmental Protection Agency (EPA) and the federal Department of Transportation (DOT). Additionally, the California Air Resources Board (ARB) has provided specific standards to which a grey market car must conform before it can be registered or sold in California. The question that arises from this situation is whether the GMGA, which intends to cover all grey market goods, can satisfactorily apply to these modified grey market cars.

A. Evidence of a Necessity for Regulating Grey Market Cars

In 1984, the German sticker price of a 500 SEL Mercedes-Benz was $25,000. In the United States, the same model had a sticker price of $51,950. Although additional costs for shipping and con-

230. See supra text accompanying notes 186-214.
232. See supra text accompanying notes 6-11.
233. GAO REPORT TO THE CHAIRMAN, SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, HOUSE COMM. ON ENERGY AND COMMERCE, AUTO SAFETY AND EMISSIONS: NO ASSURANCE THAT IMPORTED GREY MARKET VEHICLES MEET FEDERAL STANDARDS 3, 20, 53-55 (Dec. 1986) [hereinafter GAO REPORT].
234. Id. at 3, 39, 43-48.
235. AIR RESOURCES BOARD, CALIFORNIA CERTIFICATION AND COMPLIANCE TEST PROCEDURES FOR NEW MODIFIER CERTIFIED MOTOR VEHICLES (July 16, 1986) [hereinafter CALIFORNIA CERTIFICATION].
237. Id.
version added up to approximately $8000, the foreign Mercedes was almost $18,000 less expensive than the domestic Mercedes. This price differential provided auto importers considerable incentive to purchase the vehicles overseas and import them to the United States.

The primary drawback with these vehicles is that most of them are manufactured for sale in a foreign country. Thus, they are not manufactured to meet certain United States specifications. Consequently, the importer must modify the vehicles to meet the United States standards. Such modifications include the installation of "U.S. bumpers, U.S. headlights, VIN at windshield pillar, side door reinforcements, U.S. version seatbelts, and non-flammable seats." The importer must also modify the emissions system to meet the standards of the federal EPA and California ARB.

However, numerous grey market cars have not been properly modified. According to a 1986 report by Mercedes-Benz of North America, approximately ninety-five percent of the grey market vehicles inspected failed to meet all of the federal safety requirements. The Mercedes-Benz dealers made:

'simple visual inspections' to determine whether a particular required feature had been installed. For example, the dealers determined whether the vehicle had:

* European or U.S. standard headlights,
* reinforcement of any European bumpers,
* bolts in the sides of its doors to indicate their reinforcement,
* seat belts having DOT [(Department of Transportation)] markings and production date, and
* a vehicle identification number visible from outside the vehicle.

In addition to violating the above safety standards, many grey

238. Id. at 139.
239. Approximately half of the imports are sold by "professional auto converters who adapt the foreign-equipped cars to U.S. safety and emission standards. The rest are imported by tourists, military personnel stationed overseas, or business travelers." Id. at 134.
240. GAO REPORT, supra note 233, at 2.
241. Id.
242. Id. at 47.
243. Id. at 2.
244. See CALIFORNIA CERTIFICATION, supra note 235.
245. GAO REPORT, supra note 233, at 45 (citing the Mercedes-Benz of North America Report (May 14, 1986)).
246. Id. at 46 (quoting the Mercedes-Benz of North America Report (May 14, 1986)).
market cars do not meet the required emissions standards. In 1984, the Environmental Protection Agency tested twenty-seven grey market cars for compliance with EPA standards. Of the twenty-seven vehicles tested, only one passed the emissions test requirements. In fact, some vehicles cannot be modified to meet the emissions standards without damaging the design.

B. California Statutes Regulating Grey Market Automobiles

Persistent non-compliance with federal EPA standards resulting in numerous high polluting vehicles prompted the California legislature to enact specific standards for grey market automobiles apart from the comprehensive GMGA. California legislators enacted different regulations for new and old grey market cars. The lenient standards for used grey market cars were intended to protect consumers who move to California from other states.

Prior to amendment, the old California law defined a new grey market car as a vehicle with less than 7500 miles registered on the odometer. Since these vehicles were subject to tougher standards than used vehicles, many retailers would “roll[] forward to 7500 miles.” By doing so, the retailers avoided having to

247. Id. at 20.
248. Id.
250. CALIFORNIA SENATE RULES COMM., THIRD READING ANALYSIS OF SB 1118 3 (May 6, 1985); CALIFORNIA SENATE TRANSPORTATION COMM., ANALYSIS OF SB 1118 2 (Sept. 5, 1985).

Additionally, California Health and Safety Code section 44200 refers to used grey market cars as “direct import used motor vehicles.” CAL. HEALTH & SAFETY CODE § 44200 (West Supp. 1988) For simplicity, these vehicles will be referred to as “used grey market cars.”

Used grey market cars do not fall within the scope of the GMGA because used vehicles do not normally come with a valid manufacturer’s express written warranty. Therefore, the requirements regarding used grey market cars will not be discussed in this Comment. However, it should be noted that a used grey market car is one which is at least two years old. CAL. HEALTH & SAFETY CODE § 44200 (West Supp. 1988).

254. Regulation of New Vehicles Not Manufactured for California Emissions Standards:
add the equipment necessary to meet the required standards of a new grey market vehicle.255

Seeing this statute as problematic,256 the legislature amended the statute to incorporate a different definition of a new grey market car. Under the current law, a new grey market car is defined as one which is less than two years old.257 Specifically, section 43203.5 of the Health & Safety Code requires the ARB to adopt "a certification program for any light duty motor vehicle manufactured outside of the United States and not intended by the manufacturer for sale in the United States which is less than two years old and was not certified by the [ARB] . . . ."258 The ARB subsequently set forth these regulations in the "California Certification and Compliance Test Procedures for New Modifier Certified Motor Vehicles."259

---

255. Id.

256. See id. In addition to the problem with the odometers, there are constitutional concerns regarding the old statute. In the case of Hassen Imports, Inc. v. California Air Resources Board, the plaintiff alleged that the old sections 43150-56 were unconstitutional under the supremacy clause, commerce clause, and the fourteenth amendment. Plaintiff's Memorandum of Points and Authorities at 1-17, Hassen Imports, Inc. v. California Air Resources Bd., No. C529914 (Cal. Super. Ct., Los Angeles Cty., settled Apr. 11, 1986).

Hassen argued that the statutes were preempted by section 209 of the Federal Clean Air Act; that they unreasonably burdened and discriminated against interstate commerce; and that they denied him equal protection. Id. at 4, 11, 16. Although this case was settled before a judge could decide it on its merits, Hassen was granted a preliminary injunction on the grounds that the statutes were unconstitutional. Settlement and Release Agreement at 2, Hassen Imports, Inc. v. California Air Resources Board, No. C529914 (Cal. Super. Ct., Los Angeles Cty., settled Apr. 11, 1986). By settling, the ARB avoided setting precedent and thereby enabled the ARB to continue prosecuting violations which occurred under the old statutes prior to amendment. Telephone interview with Steven P. Rice, Partner at Kindel & Anderson; Attorney for Hassen Imports (Feb. 5, 1988).

257. CAL. HEALTH & SAFETY CODE § 43203.5 (West 1986); CAL. HEALTH & SAFETY CODE § 43156(b) (West 1986) (amended 1985).

Section 43156 sets out specific ways in which the age of a motor vehicle shall be determined. They are as follows, in order of preference:

(a) From the first calendar day of the model year as indicated in the vehicle identification number.

(b) From the last calendar day of the month the vehicle was delivered by the manufacturer as shown on the foreign title document.

(c) From January 1 of the same calendar year as the model year shown on the foreign title document.

(d) From the last calendar day of the month the foreign title document was issued.

258. Id. § 43203.5.

C. Applying the GMGA to Retailers of Grey Market Automobiles

The problem with applying the GMGA to the retailer of grey market cars is that the grey market importers are required to modify the vehicles to conform with the requirements of the DOT, EPA, and ARB.\[260\] Once an automobile has been modified by someone other than the manufacturer, the modified part of the vehicle might be excluded from warranty coverage.\[261\] Thus, since a modified vehicle might not be accompanied by a complete valid manufacturer's express written warranty, a modified grey market vehicle might not be classified as a grey market product under the GMGA.\[262\] Consequently, retailers of modified grey market cars might not be held liable under the GMGA.\[263\] Accordingly, a literal reading of the GMGA could result in the following inconsistency: the retailer of modified grey market cars might not be required to disclose the absence of a manufacturer's express written warranty. Furthermore, these retailers might not be required to provide their own express written warranties.

By allowing a modification to vitiate the requirements of the GMGA, the purpose of the act, to protect the consumer, would be defeated. Consequently, if a court were faced with the problem of whether to enforce the GMGA once the product has been modified, the court should defer to the legislative intent of consumer protectionism.\[264\] The court should then construe the intent and requirements of the GMGA and ARB in such a manner so that both statutes may retain their effectiveness.\[265\] Moreover, a court should consider the fact that the warranty is still valid—the modification simply excludes warranty coverage. Thus, these modified grey market cars are within the bounds of the GMGA, and the retailer of such cars should be required to comply with the GMGA.

---

260. See supra text accompanying notes 241-44.
262. Under the GMGA, the definition of a grey market good requires that similar products sold in the United States through authorized distributors would normally come with a manufacturer's express written warranty. See supra text accompanying note 37.
263. However, a consumer may be able to bring an action for fraud or misrepresentation against such a retailer. This subject matter is beyond the scope of this Comment.
265. Id.
IV. APPLYING THE GMGA TO GREY MARKET WATCHES

An even more compelling example regarding modification of grey market goods involves watches. United States Customs law requires specific markings on all watches imported into the United States. The name of the importer, country of origin, and other information regarding the watch’s workings must be marked on its movements and on the inside back of its case. Watches manufactured for the United States are marked by the manufacturer prior to completion. However, most of the watches destined for sale in other countries are not marked. Consequently, the retailer of grey market watches must open up the backs of the watches so that they may be marked. Since watches are delicate precision instruments, this process of opening the watch can impair its performance and may break the water resistant seal.

Some watch warranties are automatically voided if the back of the watch is opened. Additionally, once a watch has been tampered with, the manufacturer’s warranty is often invalidated. Assuming arguendo that opening the watch to mark the movements and case qualifies as tampering, the manufacturer’s warranty would be invalidated by this process. Thus, since a modified watch does not normally come with a valid manufacturer’s express written warranty, a modified grey market watch would not be classified as a grey market item under the GMGA. If the modified watch does not fall under the definition of a grey market product under the GMGA, then the retailer of the modified watch would not be subjected to the requirements of the GMGA. This analysis is identical to that used for modified grey market cars. But, modifying a car may only exclude partial warranty coverage whereas modifying a watch would void the

267. Id.
268. Id.
269. Id.
270. Id.
272. See Tabakow Warranty, supra note 44.
273. See Hattori Warranty, supra note 44.
274. Whether marking the movements and the inside back of the case constitutes tampering is a factual issue.
275. See supra text accompanying notes 37 and 262.
276. See supra text accompanying notes 260-63.
entire warranty. As a result, the need to protect consumers from modified grey market goods becomes even more apparent.

V. RECOMMENDATIONS

The California GMGA is a valuable piece of consumer protection legislation. However, as evidenced by the foregoing analyses, the statute contains some ambiguous language. Accordingly, the ambiguities give rise to questions regarding the extent of the statute's impact.

Specifically, the lack of the phrase "for sale to the public in this state" allows the consumer to be the importer and the retailer to be a foreign or out-of-state entity. Since imposing a state statute upon a foreign or out-of-state entity raises serious constitutional difficulties, the GMGA should be amended to include a requirement that the sale of a grey market product take place within California's borders. This requirement would resolve any questions as to where the sale must occur in order for a grey market consumer to uphold his rights under the GMGA.

Another difficulty arises when a grey market retailer modifies the product prior to sale to a consumer. As discussed, this situation commonly occurs with the sale of grey market automobiles because the retailer must modify the vehicle prior to sale to meet California and federal smog standards. Since a modified vehicle often does not come with a complete valid manufacturer's warranty, a modified grey market car might not be a grey market product under the GMGA and the retailer might not be bound by the requirements of the GMGA. This same result occurs with the sale of grey market watches which must be modified to conform to United States customs standards. Since modifying a watch usually voids the entire manufacturer's warranty, a modified grey market watch no longer fits the definition of a grey market good and the retailer would not be bound by the GMGA. This result is contrary to the original intent of the legislature. The statute should specifically be extended to cover the sale of modified grey market goods when such modifications are required by law.

These amendments would clarify the scope of the GMGA. Additionally, they would preserve the legislators' intent in a situation where a technicality could result in a large loss for an unsuspecting consumer of a modified grey market product.

VI. CONCLUSION

Despite the ambiguities, the California GMGA provides far bet-
ter protection for consumers of grey market goods than the comparable statutes of Connecticut or New York. Until the value of the dollar increases, and lower priced foreign goods become more desirable, the full potential of the GMGA will not be realized. When the economy completes its cycle\textsuperscript{277} and the value of the dollar again increases, let the retailer of grey market goods beware, for California will unleash the Grey Market Goods Act.

\textit{Ondrea Dae Hidley*}

\textsuperscript{277} See L. VALENTINE \& C. DAUTEN, BUSINESS CYCLES \& FORECASTING (6th ed. 1983).

* The author gratefully acknowledges Professor Christopher May for his encouragement, patience and insightful comments, but assumes sole responsibility for the final product. Special thanks to Shirley Hidley and David Lamensdorf for their support and understanding during the preparation of this article.