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December 19, 2001

UNFAIR-COMPETITION LAWS NEED MORE FOCUS ON PROPORTIONALITY
By Jeffrey S. Galvin and Matthew G. Jacobs

The letter from the district attorney is terse and ominous. Your client is accused of falsely advertising a product in California. Although the product retails for a few bucks and nobody has complained of deception, the district attorney threatens to seek civil penalties of \$5,000 for each consumer who has seen or heard the challenged advertisement. The district attorney describes the liability as "astronomical" and invites your client to a meeting to discuss the matter.

Welcome to the netherworld of unfair-competition actions brought by public prosecutors in California. While courts and commentators have focused on actions brought by private parties, public prosecutors continue to make extensive use of the statutes.

A few of these efforts are high-profile, such as actions by the city attorneys in San Francisco and Los Angeles against firearms manufacturers to recover the municipal costs of gun violence. But many actions result in monetary settlements that garner little publicity.

State law broadly allows all public prosecutors, including the attorney general, district attorneys and city attorneys, to bring civil suits targeting false advertising and other unlawful, fraudulent and unfair business practices. Business and Professions Code Sections 17204, 17535.

Law enforcement officials can act on their own initiative by spotting a suspect ad in the Sunday paper, without a complaint from any alleged victim. For example, a district attorney might sue a retailer for claiming that "we sell for less" on the theory that the retailer should have conducted a detailed price survey before making that claim.

Indeed, because a prosecutor need not show that anyone actually was misled, a false-advertising suit can begin and proceed to trial without the testimony of a single disgruntled consumer. The standard for false advertising is an objective one such that a trial judge may view the advertisement and decide, in the abstract, whether it was likely to mislead.

Of course, deception lies in the eye of the beholder. When Justice Potter Stewart observed "I know it when I see it" in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), he was talking about obscenity, but the standard for a misleading advertisement equally depends on the unique viewpoint of the person wearing the robe. Thus, when advertisers draft their copy, they do not have a straight edge to follow.

While public prosecutors can seek restitution of money to any injured consumers, they often elect to pursue civil penalties that are paid to their own jurisdictions. Sections 17206(c), 17536(c).

Any person who violates the unfair-competition law by engaging in an unlawful, unfair or fraudulent business act or practice, including a false advertisement, "shall" be liable for a civil penalty of up to \$2,500 per violation, without any proof of wrongful intent. Section 17200, 17206.

False advertisements, when intentionally or negligently made, trigger additional civil penalties of up to \$2,500 per violation and expose the advertiser to criminal misdemeanor charges. Sections 17500, 17536(a). Since these provisions are cumulative, the maximum aggregate civil penalty for an intentional or negligent false advertisement is \$5,000 per violation.

The uncertainty, and potentially staggering liability, arises from the method of counting "violations" and the penalty amount associated with each one.

A false advertisement, such as a television commercial that airs once on a single channel, can amount to a vast number of violations. California courts generally count violations by the number of people solicited, i.e., potential victims, not the number of separately identifiable misrepresentations involved. *People v. Superior Court*, 9 Cal.3d 283 (1973).

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With regard to mass media advertisements, presumably extending to "hits" on an Internet site, "victims" may encompass any and all consumers who actually perceive the ad, whether or not they acted on it. *People v. Superior Court*, 96 Cal.App.3d 181 (1979). A widely circulated advertisement thus can create many thousands of "violations," even when it generates no sales.

Injecting further uncertainty into the mix, the Legislature has conferred broad latitude on judges to determine civil penalties for violations of the unfair-competition laws. While a judge "shall" impose some penalty when a violation is proved, the amount can be nominal.

In setting the penalty, the judge is directed to consider any relevant circumstance presented by the parties, including the nature, seriousness and persistence of the misconduct; the number of violations; the length of time over which the misconduct occurred; and the defendant's willfulness and financial circumstances. Section 17206(b), 17536(b).

Given the subjective nature of this assessment, the penalty amount can range from pennies to \$5,000 per violation. An inexpensive consumer product, if advertised in a misleading fashion, can cost the manufacturer many times the retail price of any units sold in California.

The pressure to settle with the public prosecutor weighs heavy, even where the defendant sharply disputes liability. Unfair-competition cases are difficult to attack on the pleadings, paving the way to expensive discovery. Contested cases draw greater media attention, tarnishing business reputation and spawning private lawsuits that can proceed in tandem with, or follow, the government's action.

Given this hostile landscape, resistance may be futile. While businesses may have solid defenses, or the circumstances may indicate that only a modest penalty is appropriate, it can be difficult to decline a settlement offer that is equivalent to or less than the anticipated costs of defense.

Prosecutors can calibrate their settlement demands to defense costs, as they are aware of the Hobson's choice thereby presented to their quarries: Either cough up the money in settlement or spend the same sum in legal fees but with virtually no cap on potential liability.

Our proposal for reform is a modest one: place greater emphasis on proportionality. Sections 17206(b) and 17536 (b) currently set forth a meandering trail of factors for determining penalty amounts, without any focal point. We suggest amending these provisions to provide that, while a judge may take any relevant factor presented by the parties into account, the total civil penalty imposed shall not be disproportionate to the amount of the actual or threatened injury.

We recognize that deterrence may require a penalty greater than the injury caused or profit realized. Yet the broadly defined limitation that we propose would reduce the unpredictability that now hangs over civil penalty actions while leaving trial court judges with ample discretion to determine appropriate penalty amounts.

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