Seller Beware: Avoiding the Pitfalls of Selling to California Consumers – A Two-Part Webinar Series

Session 1 – Pricing & Promotion

Wednesday, July 17, 2013
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Avoiding the Pitfalls of Selling to California Consumers – 
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Session 1 – Pricing & Promotion

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Tab 1: Agenda
Seller Beware: 
Avoiding the Pitfalls of Selling to California Consumers – 
A Two-Part Webinar Series 

Session 1 – Pricing & Promotion 

Wednesday, July 17, 2013 
9 – 10 a.m. PT / Noon – 1 p.m. ET 

Agenda 

9:00–9:05 a.m.  
Introduction 

9:05–9:50 a.m.  
Presentation and Discussion 

Speakers: 
Angel A. Garganta, Partner, Arnold & Porter LLP, San Francisco 
James F. Speyer, Partner, Arnold & Porter LLP, Los Angeles 
Eric Shapland, Counsel, Arnold & Porter LLP, Los Angeles 
Kelly A. Welchans, Associate, Arnold & Porter LLP, Los Angeles 

9:50–10:00 a.m.  
Question-and-Answer Session 

CLE Credit is pending
Tab 2: Presentation Slides
Avoiding the Pitfalls of Selling to California Consumers

Session 1: Pricing & Promotion

July 17, 2013

Speakers

Kelly Welchans  Angel Garganta  James Speyer  Eric Shapland
Introduction

- 5 different ways California laws can trip up unsuspecting companies when pricing
  - Gift cards
  - Advertising of sale prices/free offers
  - Pricing accuracy
  - Below cost pricing
  - Resale price maintenance
- Today’s program is designed to help you
  - Avoid getting sued
  - Successfully defend if you do get sued

GIFT CARDS

Kelly Welchans
What Violates The Law?

- The Key Statutory Language

  "Any gift certificate [including gift cards] with a cash value of less than ten dollars ($10) is redeemable in cash"

- Violations will usually be based on
  - Statement on back of card that card may not be redeemed for cash
  - Individual store clerk’s refusal to give cash back when value of card is below $10

Compliance Measures

- Language on back of card should say “card may not be redeemed for cash unless required by law”
  - With limited real estate on back of card, unrealistic to require a nationwide vendor to identify each state’s legal requirements
- Store personnel should be trained to provide cash back when balance falls below $10
  - To ensure awareness of requirement, consider posters in staff rooms or company-wide memos
  - Also consider implementing a designated key on cash register to deal with these transactions
Defending Gift Card Lawsuits

- No standing to sue because no loss of money or property (Kwikset issue)
- Even if there is standing to sue, no monetary relief because restitution is only monetary relief available, and restitution is limited to “the excess of what the plaintiff gave the defendant over the value of what the plaintiff received”
- Class certification issues
  - e.g., if violation is based on store clerk’s refusal to redeem, certification would be inappropriate because individual issues regarding violation would predominate over common issues

One Final Point

- In California, gift certificates and cards *cannot* expire
ADVERTISING OF SALE PRICES OR FREE OFFERS

California Law Regulating the Advertising of “Former” and Sale Prices

- Regulated by the False Advertising Law (FAL)
  - FAL has a similar structure to the Unfair Competition Law, but a limited focus on deceptive advertising

- §17501 covers statements of former price in ads
  - Can only claim that a price was a former price if that former price was the prevailing market price—for the same good, in the same locality—during the three months immediately preceding the advertisement
Other Guidance on “Former” Prices in Advertisements

- The CA Code of Regulations states that claims of “former price” include, but are not limited to:
  - “Formerly—,” “regularly—,” “usually—,” “originally—,”
  - “reduced from . . .,” “was . . . now . . .,” “...% off.” (4 Cal. Code Regulations, § 1301)

- FTC Guidance:
  - Product in question does not have to have been actually sold at former price; active and open offer is sufficient to qualify
  - Manufacturer’s suggested or list prices do not automatically qualify as “former” prices, unless substantial sales are made in the advertiser’s trade area at that price

Avoiding “Former”/ Sale Price Liability?

- Survey prices at competitor and comparable merchants to document prevailing market prices
- Conduct periodic audits of own prices to ensure compliance with statute
California Laws Regulating the Advertising of Free Offers

- **Two Statutes:**
  - Coupons: Bus. & Prof. Code § 17537.11
  - Prizes and Gifts: Bus. & Prof. Code § 17537

- FTC has also issued advisory guidance on “free” offers and similar representations
  - To guarantee “that the consuming public is not deceived by offers of nonexistent bargains or bargains that will be misunderstood”

California Laws Regulating the Advertising of Free Offers (cont.)

- **Coupons—§ 17537.11:**
  - Unlawful to offer a “free,” “gift,” or “prize” coupon if the recipient must pay or buy something in order to obtain or use the coupon and the coupon offeror made the majority of their sales in the previous year in connection with similar coupons

- **Prizes—§ 17537:**
  - Unlawful to use the term “prize” or “gift” in a manner that is untrue or misleading
  - Unlawful to notify a person as part of an advertising plan that they have won a prize, if receipt is conditioned on a payment or purchase
California Laws Regulating the Advertising of Free/Gift Offers

- Gifts § 17537: Unlawful to notify a person that they will receive a gift, if receipt is conditioned on a payment or purchase, and:
  - Shipping cost exceeds average or actual cost;
  - Handling charge is unreasonable or exceeds either the average or actual cost;
  - Required purchase otherwise available for a lower price;
  - Majority of offeror's sales of the required items for purchase during the preceding year, through the same marketing channel in which gift is offered, were made in conjunction with a gift offer; or
  - Exception for general merchandise retailers selling goods or services through mail order that are special and for a limited time.
  - Untrue representation of a special selection

FTC Guidance on the Advertising of Free Offers

- Language that triggers concern: “Free,” “Buy 1-Get-1 Free,” “2-For-1 Sale,” “50% off with the purchase of 2,” “Half Price Sale,” “½ Off,” etc.

- When a purchaser is told an item is “Free” if another article is purchased, that suggests he is paying nothing for the article and no more than regular price for the other
  - Regular price is the price at which the seller has openly and actively sold the product or service in the same market or area for a reasonably substantial period of time where the “free” offer is made
FTC Guidance on the Advertising of Free Offers

- Frequency: “Free” offers should
  - (i) be separated by at least 30 days;
  - (ii) should not be advertised more than three times, or for more than 6 months, in a 12-month period; and
  - (iii) should not account for more than 50% of total volumes of sales for that product in the area.

Avoiding “Free/Gift” Offer Liability?

- Make “free” product independently available for a price to help establish that its value is not priced into the required-purchase product.
- Reduce the frequency and term of the “free” offer; do not let it become the majority of sales.
- Maintain documentation regarding the price history of the required-purchase and “free” products.
Pricing Accuracy: Bus. & Prof. Code §12024.2

- The scanned price at checkout must match the price on advertising, the shelf and the merchandise

- Violators face fines and jail time
California Business & Professions Code 12024.2

- (a) It is unlawful for any person, at the time of sale of a commodity, to do any of the following:
  - (1) Charge an amount greater than the price... that is then advertised, posted, marked, displayed, or quoted for that commodity.
  - (2) Charge an amount greater than the lowest price posted on the commodity itself or on a shelf tag that corresponds to the commodity, notwithstanding any limitation of the time period for which the posted price is in effect.

- (e) Except as provided in subdivision (f)... when more than one price for the same commodity is advertised, posted, marked, displayed, or quoted, the person offering the commodity for sale shall charge the lowest of those prices.

- (f) Pricing may be subject to a condition of sale, such as membership in a retailer-sponsored club, the purchase of a minimum quantity, or the purchase of multiples of the same item, provided that the condition is conspicuously posted in the same location as the price.

Enforcement by California Authorities

- **Wal-Mart**
  - $1.5M in penalties & costs
  - 4 years of “Get it Free” program

- **Sports Authority & SportMart**
  - $540,688 in penalties & costs
  - Ongoing discount program

- **Kragen Auto Parts**
  - $665,610 in penalties, costs & restitution
  - 5 years of audit & price accuracy procedures

- **Subway**
  - $360,000 in penalties & fines + gift-card restitution
  - 3 years of self-inspection at all franchises
Avoiding Lawsuits Under Section 12024.2

Cause of most violations: human error
- Advertising sale prices without adjusting the prices at the register
- Leaving out-of-date prices on the shelves

Steps to avoid liability for pricing inaccuracies
- Communicate new prices/promotions to employees
- Update pricing on the shelves and at the scanner simultaneously
- Inspect shelves and signage for out-of-date prices
- Direct employees to charge the lower price if an item is scanned at a different price than the shelf price

Franchisor Responsibility for Franchisee Violations
- Limits on vicarious liability
- BUT prudent franchisors take reasonable steps to help franchisees comply with the law
  - Discuss the importance of accurate pricing
  - Discuss enforcement activity by state and local officials
  - Discuss sources of pricing accuracy error
  - Recommend that franchisees direct their employees to charge the lower price etc.
BELOW-COST PRICING

Antitrust Warnings in a Nutshell

Predatory Pricing

Resale Price Maintenance

BROOKE GROUP

LELGIN
Federal Law

Goal
- Preserve competition for the benefit of consumers
- Not for competitors

Principle
- Encourage (don’t chill) low prices
- Low prices benefit consumers regardless of how those prices are set

Violation
- A price must be below cost, and
- A potential for recoupment must arise by post-predation overcharge

Advice
- You can lower your price as low as your costs, and
- Even lower where you are unlikely to recoup
California Unfair Practices Act

§ 17043. It is unlawful for any person engaged in business . . . to sell any article . . . at less than the cost thereof to such vendor . . . for the purpose of injuring competitors or destroying competition.


Key holdings
- Proof of likely recoupment is unnecessary under the UPA
- Instead, an intent to injure the plaintiff competitor is enough
- Lost sales due to the predation is sufficient to presume intent and shift the burden of proof to the defendant

Reasoning
- Contains plain language making clear that a violation arises whenever a firm acts to injure a competitor, not just competition
- Reflects a concern “not only with the maintenance of competition, but with the maintenance of fair and honest competition”
- “Protect[s] comparatively smaller enterprises from predatory pricing schemes of larger competitors”

Affirms a $15 million verdict in a predatory pricing case

Based on the following evidence of intent
- *New Times* enters SF’s market for alternative weekly newspapers with the purchase of the *SF Weekly*
- New executive editor announces that
  - He wants “the *SF Weekly* to be the only game in town”
  - The *New Times* has “deep pockets,” with the financial resources to “compete very aggressively” and use “guerilla tactics” in rate battles
  - He wants “to put the *Bay Guardian* out of business”

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**Measures of Cost**

**Federal Law: Avg. Variable Cost**
- AVC estimates the marginal cost of production
- It is commonly calculated for pricing decisions
- It is relatively easy for a business to know
- Its use as the safe harbor protects price cutting down to the cost of producing an additional unit and thus encourages competition

**State Law: Avg. Total Cost**
- ATC is a fully loaded cost of production
- It is not used in pricing decisions
- It is difficult to calculate due to subjective allocation issues
- Its use as the safe harbor subjects low prices to legal challenge even where profitable
California-Law Advice

To avoid all risk of liability:
- Keep prices well above marginal cost, and
- Do so in an amount that estimates per unit fixed costs

Practically speaking:
- Antitrust compliance programs and vigilance to eliminate hyperbole—e.g., “let’s kill ’em” email
- This may help tip the balance in a case that will turn on the issue of intent to harm a competitor

RESALE PRICE MAINTENANCE

Eric Shapland
Resale Price Maintenance

Acts a manufacturer takes to influence the minimum price that its customers charge to their customers

When achieved by an agreement fixing a reseller’s price, RPM is:

A restraint of trade, and Unlawful if “unreasonable”

Controversy over Reasonableness

Harm to intra-brand competition Boost to inter-brand competition
The Good and the Bad

U.S. Supreme Court's *Leegin* decision discards rule of per se unlawfulness

States can adopt their own rules

States are split on whether to follow *Leegin*

Which Way will California Go?

- Follow *Leegin*
- Stick with *Maitland*
State Enforcer’s View

The Cartwright Act explicitly defines a resale price maintenance agreement as a trust, and it is therefore unlawful. The Legislature has stated that RPMs are anticompetitive. We have no discretion to change the per se standard.

Kathleen E. Foote
Antitrust Division Chief

- Hand picking cases for enforcement
- February 2010 consent decree against DermaQuest
- January 2011 consent decree against Bioelements
- Both included a small fine and injunction
State of California Department of Justice

Office of the Attorney General

Kamala D. Harris

News Release
January 14, 2011
FOR IMMEDIATE RELEASE
Contact: (415) 703-5837

Attorney General Halts Online Cosmetics Price-Fixing Scheme

The settlement is one of the first applications of California’s pro-consumer antitrust law banning vertical price-fixing.

LOS ANGELES - Attorney General Kamala D. Harris today announced that her office had stopped Bioelements, Inc., a cosmetics company operating in California, from engaging in a blatant price-fixing scheme in which it prohibited retailers from selling its products online at a discount.

"Bioelements operated a blatant price-fixing scheme by requiring online retailers to sell its products at high prices," Harris said. "Price manipulation harms consumers, competition and our business community. We will continue to be vigilant in protecting our markets from these kinds of abuses."

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Cal. AG’s Personal Jurisdiction Allegations

7. This Court has personal jurisdiction over Bioelements because the company’s founder and president, Barbara Salomon, is domiciled and works for Bioelements within this State; Bioelements has made and currently has many dozens of business contracts with companies physically based and/or located in this State, which contracts are the bases for the allegations in this lawsuit; and Bioelements regularly delivers and/or sells cosmetics and related products into and within this State.
The Courts: Federal

Leger involved an interpretation of a federal statute, not the Cartwright Act. Under current California Supreme Court precedent, vertical price restraints are per se unlawful under the Cartwright Act. . . [S]imply because the Supreme Court has changed course regarding the Sherman Act does not mean the California Supreme Court will regarding the Cartwright Act. Until the California Supreme Court has given a persuasive indication that it will, the Court cannot simply disregard its decision.

-- District Judge Gary Allen Feess
Alan Darush v. Revision LP
April 10, 2013

The Courts: State

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

PHAIR KAE WANG,
Plaintiff,

VS.
SARA LEE FRISH, INC. ET AL.,
Defendant

This court, having received and reviewed the pleadings and authorities cited thereto, and having heard oral argument, adopts its April 2, 2013 tentative ruling and rules as follows:

Defendants’ Demurrer and Motion to Strike Portions of the Fourth Amended Complaint.
California Law Advice

- Stick with the tried-and-true strategies for complying with federal law before *Leegin*
  - Consider substitute agreements—exclusive territories, minimum advertised price
  - Avoid an “agreement” by unilaterally announcing MSRP and terminating non-complying dealers
  - Sell on a bona fide consignment arrangement
Avoiding the Pitfalls of Selling to California Consumers

Session 2: Grab Bag of Pitfalls

Next Wednesday -- July 24, 2013
Tab 3: Speaker Biographies
Angel A. Garganta
Partner

Angel A. Garganta represents businesses, including manufacturers, service companies, and financial institutions, in a broad range of unfair business practice/consumer class actions and complex commercial disputes. He is a recognized authority on consumer protection and advertising laws and uses his experience to achieve cost-effective, efficient results for his clients through the early and strategic use of motions to dispose of cases or to position them for favorable settlements.

Mr. Garganta clerked for the Honorable Marilyn Hall Patel, United States District Judge for the Northern District of California. He has served as President of the San Francisco Bank Attorneys Association, on the Board of Directors of the Bar Association of San Francisco, on the Executive Committee of its Litigation Section, and on the Editorial Advisory Board of California Forms of Pleading and Practice (Matthew Bender, ed.). Mr. Garganta has repeatedly been recognized as a Northern California "Super Lawyer" by his peers and Law & Politics and San Francisco magazines. He was Associate Editor of the California Law Review at University of California Berkeley School of Law (Boalt Hall) and is fluent in Spanish and French.

Representative Matters

Consumer Products and Services

- Obtaining dismissal with prejudice of all claims in consumer class action alleging that yogurt manufacturer’s yogurt violated FDA’s Standards of Identity
- Defending manufacturer of popular pre-workout supplement in multiple class actions alleging that product was unsafe and falsely advertised
- Defending a national food manufacturer and a national grocery chain in multiple false advertising and consumer
class actions regarding the trans fat content of various food products

- Obtaining dismissal with prejudice of all claims against an inventory services company in a consumer class action alleging fraud and conspiracy in connection with an alleged recall of certain pharmaceutical products
- Obtaining summary judgment and dismissal for a national restaurant system in multiple consumer class actions nationally alleging false advertising about the nutritional content of its menu items
- Defending a yogurt manufacturer in multiple consumer class actions nationally alleging false advertising about the health benefits of its probiotic products
- Defending a manufacturer of Bluetooth headsets in federal multidistrict false advertising and unfair business practices class actions alleging failure to warn consumers of hearing loss risk
- Defending a national retailer of nutritional supplements in multiple consumer fraud and unfair business practices class actions concerning product quality
- Defending a printer manufacturer in a private attorney general action alleging misleading print speed ratings
- Defending a prescription drug manufacturer in a products liability class action alleging misleading labeling
- Defending a major real estate management company in several tenant class actions challenging its application and security deposit practices
- Representing a major French food and beverage producer as plaintiff in a multijurisdictional international commercial litigation against its Chinese joint venture partners

**Financial Services**

- Defending a national motor vehicle finance company in a nationwide class action alleging false advertising and unfair business practices regarding its extended service plans
- Defending a major national bank in an unfair business practices class action alleging violation of consumer privacy rights
- Representing a California state agency as plaintiff in foreclosure and receivership proceedings against a defaulting borrower, recovering nearly US$17 million
- Defeating a multimillion-dollar lender-liability cross-claim on summary judgment
- Achieving a no-payment settlement for a major national bank in a mortgage lending assignee liability and unfair business practices class action
- Defending a major bank in an unfair business practices and fraud class action, resulting in a favorable settlement after fraud claim was dismissed

**Rankings**
- **Northern California Super Lawyers** 2004-2011 for Business Litigation, Civil Litigation Defense, Consumer Law, and Banking

**Professional and Community Activities**

- Bar Association of San Francisco
  - Judiciary Committee
  - Board of Directors
  - Executive Committee, Litigation Section
  - Board of Directors, Barristers Club
- Editorial Advisory Board Member, California Forms of Pleading and Practice (Matthew Bender)
- Board of Directors, Northern District of California Practice Program
- President, San Francisco Bank Attorneys Association
- Consumer Financial Services Committee, State Bar of California

**Articles**

- Angel A. Garganta "The 'Non-Class' Class Action is Dead: California Courts Implement Proposition 64 Reforms, Restrict Consumer Suits" Co-author, Prop. 65 Clearinghouse, Vol. 4, No. 37, October 2006

**Blogs**

Angel A. Garganta and Jeremy M. McLaughlin "US Supreme Court To Hear Case About Evidence Of Damages At The Class Certification Stage" Consumer Advertising Law Blog, July 5, 2012


Trenton H. Norris and Angel A. Garganta "GE Foods: To Label or Not to Label - That is the Question (Again)" Consumer Advertising Law Blog, April 26, 2012


Angel A. Garganta and Zachary B. Allen "Birdsong v. Apple: Just Because You Might Hurt Yourself Doesn't Mean You Get to Sue" Consumer Advertising Law Blog, January 8, 2010

Presentations

Angel A. Garganta "Are These Foods Really 'Wholesome' and 'Natural'?" Panelist, ABA Section of Litigation: Food & Supplements, Third Annual Workshop, Oak Brook, IL, June 18, 2013


Angel A. Garganta "Class Action Litigation Update" Panelist, Grocery Manufacturers Association (GMA) Litigation Conference, Miami, FL, February 21, 2013

Angel A. Garganta "Food Labeling Litigation Issues" Panelist, Food Processing Expo 2013, California League of Food Processors (CLFP), Sacramento, CA, February 2013

• Angel A. Garganta "The Supreme Court Theater: Now Playing and Coming Soon" Moderator, 22nd Annual Golden State Antitrust and Unfair Competition Law Institute & Antitrust Lawyer of the Year Award Dinner, San Francisco, CA, October 25, 2012

• Angel A. Garganta "Settlement Mechanics in Light of Increased Scrutiny of Settlement Agreements, including Strategies for Dealing with Class Objectors" 13th Annual Class Action Litigation & Management Conference, San Francisco, CA, August 2012

• Angel A. Garganta "Qualified Settlement Funds" Panelist, Bridgeport Continuing Education, March 15, 2012

• Angel A. Garganta "From Health-Focused Marketing to Unappetizing Litigation: The Latest Trends in Food Labeling and Advertising Class Actions" Speaker, GMA 2012 Food Claims & Litigation Conference: Navigating Change in Food Related Litigation, Dana Point, CA, February 21-23, 2012

• Angel A. Garganta "Pre-Certification Dispositive Motions, Pleadings Challenges, 12 (b)(1) Motions, Economic Injury v. Manifestations" Chair and Panelist, 11th Annual Class Action Litigation Conference, San Francisco, CA, August 11-12, 2011

• Angel A. Garganta "Deterring and Defending Against the Growing Nightmare of Consumer Class Action Litigation" Speaker, American Conference Institute’s 2nd Annual Forum on Litigating and Resolving Advertising Disputes, New York, NY, June 22, 2011

• Angel A. Garganta "Update - The Class Action Fairness Act ("CAFA")" Panelist, Northern District of California Practice Program, April 27, 2011


• Angel A. Garganta "Updates in Food Marketing Litigation" Panelist, The American Bar Association, Section of Antitrust Law, Private Advertising Litigation Committee, February 2011

• Angel A. Garganta "Legal Developments In The Obama Era: Consumer Protection and Consumer Class Actions" Minority Attorney Summit, May 7, 2010

• Angel A. Garganta "Navigating Ethical Grey Areas in Class Action Litigation" Positioning the Class Action Defense for Early Success: ACI 2nd Annual Defense Counsel Summit, October 2008


• Angel A. Garganta and Sharon D. Mayo "Update on Recent Developments Under California’s Consumer Protection Laws, with Emphasis on Consumer Litigation Against Financial Institutions" San Francisco Bank Attorneys Association, August 2008

• Angel A. Garganta "Update on Consumer Litigation Against Financial Institutions" State Bar of California, Consumer Financial Services Committee, November 2006

• Angel A. Garganta "Update on Consumer Litigation Against Financial Institutions" San Francisco Bank Attorneys Association, May 2006
Angel A. Garganta "Panelist, Hot Topics in Financial Institutions Litigation" State Bar of California’s 78th Annual Meeting, September 2005

Angel A. Garganta "Co-Presenter, Update on Consumer Litigation" San Francisco Bank Attorneys Association, July 2005

Angel A. Garganta "Class Action Litigation in California: Requirements for Class Certification" Bridgeport Continuing Education Program, May 2005

Angel A. Garganta "Panelist, Person Most Knowledgeable Depositions (Rule 30 (b)(6); CCP 2025(d)): Are There Really Any Rules?" The Bar Association of San Francisco, November 2004

Angel A. Garganta "Speaker, The SB1 Privacy Litigation: Where is it Going and Where Do We Go From Here?" MCLE Program sponsored by the State Bar of California, the California Bankers Association and the San Francisco Bank Attorneys Association, October 2004

Angel A. Garganta "Panelist, Hot Topics in Financial Institutions Litigation," State Bar of California’s 77th Annual Meeting, October 2004

Angel A. Garganta "Panelist, Innovative Strategies for Pursuing Unfair Competition Claims" State Bar of California, May 2004


Angel A. Garganta "Panelist, Class Actions in California State Court: Issues and Developments From Plaintiff and Defense Perspectives" The Bar Association of San Francisco, November 2002

Angel A. Garganta “Panelist, Business and Professions Code Section 17200” California Minority Counsel Program, November 2002

Angel A. Garganta "Panelist, New Developments in California’s Unfair Competition Law: What the Practitioner Needs to Know About Section 17200" The Bar Association of San Francisco, May, 2002

Angel A. Garganta "Speaker/Panelist, Overview of Changes to FRCP rules 5, 26, 30 and 37" Northern District of California Judicial Conference, April 2001


Angel A. Garganta "Speaker, Overview of Recent Developments in Case Law Under California’s Section 17200" Bay Area Association of General Counsel, August 2000

Advisories

"Supreme Court Limits Plaintiffs' Strategy to Avoid Class Action Fairness Act Removal" Mar. 2013
"High Court Approves Ban on Classwide Arbitration" May. 2011

"California Supreme Court Lowers Bar For UCL Standing, Raised Bar For Money Damages" Feb. 2011

"Ninth Circuit: No Standing to Bring California Unfair Competition Law Claims Based on Hypothetical Injuries" Jan. 2010


"CA Supreme Court Relaxes Standing and Liability Requirements Under CA's Unfair Competition Law" May. 2009

"Reliance Is Not Enough: California Consumers Must Lose Money or Property to Sue" Mar. 2009

"CA Supreme Court Rules Consumers Need Actual Injury for CLRA Claim" Feb. 2009

**Multimedia**


Angel A. Garganta, Trenton H. Norris, Eric Shapland and James F. Speyer. "WEBCAST: Avoiding the Pitfalls of Selling to California Consumers" November 19, 2010. *(also available as a Podcast)*
James F. Speyer
Partner

James Speyer is a partner in the firm's Los Angeles office. His practice focuses on antitrust and other complex civil litigation, including consumer protection and franchise law. Mr. Speyer has an extensive background in all phases of civil trial practice and appeals, in federal and state courts in California and throughout the country. Recently, he successfully led the joint defense team in a set of antitrust class actions alleging price-fixing among competitors and seeking billions of dollars in damages.

From 1991 to 2005, Mr. Speyer was an attorney at Arnold & Porter LLP and practiced in the antitrust and trade regulation group. Prior to rejoining Arnold & Porter in 2008, Mr. Speyer served as Chair of the litigation practice group of Heller Ehrman’s Los Angeles office.

Mr. Speyer received his law degree from George Washington University Law School, where he was a member of the Law Review.

Representative Matters

- Represents global energy company in franchisee class action litigation asserting contract, unfair competition and antitrust claims.
- Represents global convenience store franchisor in consumer class action litigation and franchisee class action litigation.
- Represents global foodservice retailer in franchisee and real estate matters and consumer class action litigation.
- Represents leading tobacco company in antitrust class actions alleging Sherman Act § 1 violations.
- Represents leading global liability insurer in connection with hundreds of personal injury claims brought by retired NFL players against its insured, a leading helmet

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Practice Areas
Antitrust/Competition
Business Litigation
Consumer Protection and Advertising

Education
JD, The George Washington University Law School, 1985
BA in History, Philosophy, Phi Beta Kappa, Williams College, 1981

Admissions
California

arnoldporter.com
manufacturer.

- Represents leading internet domain name registry operator in antitrust lawsuit alleging Sherman Act § 1 and § 2 violations.
- Represents major professional sports league in consumer class action litigation.
- Represents national department store chain in consumer class action litigation.
- Represents leading concert promotion company in antitrust class actions alleging Sherman Act § 2 violations.
- Represents global energy company in business litigation.
- Served as lead counsel for the tobacco industry in healthcare reimbursement and unfair competition lawsuits brought by the State of California and 19 California cities and counties.
- Served as lead counsel for the lead industry in class action brought by California public entities seeking abatement of all lead-painted properties in California.
- Represented tobacco company in statewide consumer class action seeking to invalidate on antitrust grounds the landmark Master Settlement Agreement between 46 attorneys general and the major tobacco companies.
- Represented one of the nation’s largest distributors of electrical products in federal antitrust lawsuit alleging group boycott and attempted monopolization claims.
- Represented leading global liability insurer in connection with hundreds of sexual abuse claims brought against its insured, the Roman Catholic Archdiocese of Los Angeles.
- Represented sporting goods company in claims brought under California’s "Made in U.S.A." statute.
- Defended weapons manufacturer in product liability/wrongful death lawsuit.

**Rankings**

- *Southern California Super Lawyers* 2012 for Antitrust Litigation
- *Southern California Super Lawyers* 2011 for Antitrust Litigation and Business Litigation
- Named one of California’s “Top 20 Lawyers Under 40” by *Daily Journal*, 1999

**Professional and Community Activities**

**Professional Activity**

- Member, American Bar Association
- Member, California State Bar
- Member, Los Angeles County Bar
Member, Los Angeles Superior Court Bench/Bar Committee

Board Member, Law360 Competition Editorial Advisory Board

Community Activity

Director, Board of Directors, Premiere Oncology Foundation

Articles

James F. Speyer and Zachary B. Allen "Recent Developments In California's Antitrust and Unfair Competition Law" Business Torts and RICO News, Volume 6 Issue 4, Fall 2010

James F. Speyer and Zachary B. Allen "Strict Liability For Below-Cost Pricing In Calif.?" Competition Law360 Aug. 2010

Trenton H. Norris and James F. Speyer "Curtailing Class Action Abuse: How Three Developments Converged To Reduce The Pressure To Settle" Washington Legal Foundation, May 2010

Trenton H. Norris and James F. Speyer "California High Court Offers Mixed Results On Proposition 64" Washington Legal Foundation Legal Opinion Letter, August 2009

Blogs


James F. Speyer "California Supreme Court Poised To Hear Argument on Key UCL Standing Issue" Consumer Advertising Law Blog, November 2, 2010


James F. Speyer and Karen Otto "Made in the USA (We can't say this in California)" Consumer Advertising Law Blog, July 9, 2010

James F. Speyer and Trenton H. Norris "Culling the Herd of Abusive Class Action Litigation" Consumer Advertising Law Blog, June 1, 2010

James F. Speyer and Rachel L. Chanin "Not So 'Wonderful' for POM Wonderful: Federal District Court Tosses Case Based on Lack of Standing Under California's Prop 64" Consumer Advertising Law Blog, January 27, 2010


James F. Speyer "Another 'Juicy' Denial of Motion to Dismiss in Pomegranate Case" Consumer Advertising Law Blog, September 24, 2009


Presentations


Angel A. Garganta, Trenton H. Norris, Eric Shapland and James F. Speyer "WEBCAST: Avoiding the Pitfalls of Selling to California Consumers" November 19, 2010

James F. Speyer "Changing Standards for Certifying Class Actions" Speaker and Panelist, 2010 ABA Antitrust Section Annual Spring Meeting, April 2010

Advisories

"Supreme Court's Comcast Decision Reduces Threat Of Abusive Class Actions" Apr. 2013

"Supreme Court Limits Plaintiffs' Strategy to Avoid Class Action Fairness Act Removal" Mar. 2013

"Class Actions After Wal-Mart" Jun. 2011

"High Court Approves Ban on Classwide Arbitration" May. 2011

"California Supreme Court Lowers Bar For UCL Standing, Raised Bar For Money Damages" Feb. 2011

“New California Supreme Court Decision Provides More Confusion Than Clarity For Companies Facing Indirect Purchaser Claims” Jul. 2010

“Supreme Court Adopts “Nerve Center Test” to Determine a Company’s "Principal Place of Business”” Mar. 2010

“Ninth Circuit: No Standing to Bring California Unfair Competition Law Claims Based on Hypothetical Injuries” Jan. 2010


“CA Supreme Court Relaxes Standing and Liability Requirements Under CA’s Unfair Competition Law” May. 2009

Multimedia


Angel A. Garganta, Trenton H. Norris, Eric Shapland and James F. Speyer. “WEBCAST: Avoiding the Pitfalls of Selling to California Consumers” November 19, 2010. (also available as a Podcast)
Eric Shapland
Counsel

Eric Shapland is a general civil litigator with expertise in antitrust law, class actions and legal ethics. He is a member of Arnold & Porter LLP’s antitrust/competition practice group and its Ethics Committee.

Representative Matters

- Defends against antitrust and constitutional challenges to the master settlement agreement between numerous tobacco-product manufacturers and 46 states over tobacco-related healthcare costs. Vibo Corp. v. Conway, 669 F.3d 675 (6th Cir. 2012); Sanders v. Brown, No. 05-15676 (9th Cir. Sept. 26, 2007).

- Represented Microsoft Corporation in its defense against claims brought by Sun Microsystems, Inc. as follow-on litigation to the US Department of Justice’s antitrust action against Microsoft.

- Represented a vehicle parts maker in a case involving allegations that its customer rebate program unlawfully bundled rebates.

- Assisted in the firm’s representation of the Federal Housing Finance Agency, as Fannie Mae’s and Freddie Mac’s Conservator, by challenging allegations that actions to collect state real estate transfer taxes from Fannie and Freddie could proceed by way of a nationwide class.

- Represented Common Cause in support of California’s effort to enforce campaign contribution disclosure requirements against Indian tribes. With Common Cause’s help, California secured the first and only state supreme court decision holding a tribe subject to suit absent tribal or Congressional consent. Agua Caliente Band of Cahuilla Indians v. Superior Court, No. S123832 (Cal. Sup. Ct. Dec. 21, 2006).

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US District Courts for the Northern, Central, and Eastern Districts of California

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Professional and Community Activities

- Member, American Bar Association (Litigation and Antitrust Sections)
- Member, Bar Association of Los Angeles County (Antitrust Section)
- Member, State Bar of California

Articles

- Eric Shapland "Reverse-Payment Settlements Are Per Se Lawful Under California Law Too" ABA Health Care and Pharmaceuticals - Recent Developments, November 2011

Advisories

- "Ninth Circuit Decision on Grand Jury Subpoenas Shows Risks for Civil Defendants" Dec. 2010
- "Ninth Circuit Rules That Product Improvement is Exempt From Scrutiny Under the Federal Antitrust Laws" Jan. 2010

Multimedia

- Angel A. Garganta, Trenton H. Norris, Eric Shapland and James F. Speyer. "WEBCAST: Avoiding the Pitfalls of Selling to California Consumers" November 19, 2010. (also available as a Podcast)
Kelly A. Welchans  
Associate

Kelly Welchans is a member of Arnold & Porter LLP’s litigation practice group. Her practice encompasses a broad range of complex litigation in state and federal courts, covering environmental, antitrust, consumer protection, unfair competition, franchise law, and business contract cases. She has experience handling all stages of litigation from case initiation through appeals, including individual responsibility for questioning jury trial witnesses. Ms. Welchans maintains an active pro bono practice, which she considers to be an important supplement to her commercial case load.

Ms. Welchans graduated Order of the Coif from the University of California, Davis School of Law, where she was co-editor-in-chief of Environ Environmental Law & Policy Journal. Prior to joining Arnold & Porter, Ms. Welchans served as an extern at the United States Attorney’s Office for the Eastern District of California and the Sacramento County District Attorney’s Office. She earned her BS in general biology from the University of California, San Diego. Before attending law school, she was employed at a start-up biotechnology company that produced antibodies and other research reagents for immunological research.

Representative Matters

- Represents a global energy corporation in ongoing national MDL and California federal and state court proceedings relating to the gasoline additive methyl tert-butyl ether (MTBE).

- Represents a global energy corporation in mass and putative class actions filed by its gas station and convenience store franchisees asserting contract, unfair competition, and antitrust claims arising from point-of-sale and back-office accounting system, wholesale gasoline pricing, and selection of third-party vendors.

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- Trial representation of an HIV-positive woman asserting claims against a doctor and hospital for violations of the Unruh Act.

- Defended a national television network against an antitrust suit brought by a putative nationwide class of cable and satellite TV subscribers for allegedly unlawful bundling of "tiers" of channels.

- Defended leading internet domain name registry operator in antitrust litigation arising out of the registry operator's entry into a new agreement for operation of the registry.

- Represented various clients in matters alleging violations of California consumer protection laws, including the Unfair Competition Law and False Advertising Law.

Advisories

- "Class Actions After Wal-Mart" Jun. 2011

- "New California Supreme Court Decision Provides More Confusion Than Clarity For Companies Facing Indirect Purchaser Claims" Jul. 2010

Multimedia

Tab 4: Practice Overview
CONSUMER PROTECTION AND ADVERTISING

Arnold & Porter has for decades provided consumer products and services clients with high-quality risk reduction counseling, effective guidance in connection with federal and state regulatory investigations, and vigorous representation in consumer and competitor litigation matters.

Claims that a company makes about its product or service—even unintended claims that consumers perceive—can place the product or service in the sights of activist groups, plaintiffs’ lawyers, competitors, or state and federal regulators. Indeed, a single claim can prompt all of these groups. Other interactions with consumers also can run afoul of regulatory issues involving data collection, security, and privacy and can trigger claims relating to spamming, pretexting, telemarketing, and credit and debt collection.

By efficiently integrating multiple practices, jurisdictions, and forums, our full-service Consumer Protection and Advertising practice offers consumer product companies:

- Close coordination of regulatory and litigation matters with a view toward preventing future issues.
- Efficient handling of multi-forum matters ranging from government investigations to activist litigation to competitor challenges.
- Careful consideration of requirements outside the United States.

Advertising Substantiation

We advise clients on a wide array of claims, including health claims; weight loss claims; warranties; “green” claims; textile, wool, and fur labeling requirements; advertising to children; pricing or sales claims; claims of US origin; and comparative claims. We also have experience counseling clients with respect to the myriad of differing state regulations governing promotions, such as sweepstakes and gift cards.

We have advised consumer products and services clients from many different industries. In addition, our experience with privacy issues includes matters arising out of the Health Insurance Portability and Accountability Act (HIPAA), the Children’s Online Privacy Protection Act (COPPA), and the European Union Directive on Data Protection. The firm’s food and drug marketing experience includes FDA-related matters and claims involving food labeling, cosmetic, and dietary supplement labeling.
Our consumer protection and marketing experience extends internationally, and attorneys in our European practice advise on regulatory issues arising under UK and EU law in relation to various industry sectors.

California Proposition 65
Arnold & Porter has one of California’s largest and most experienced Proposition 65 practices, encompassing a dozen lawyers in our San Francisco, Los Angeles, and Silicon Valley offices. Our lawyers have represented hundreds of manufacturers, distributors, retailers, and trade associations in a wide range of industries. Our lawyers often handle cases involving newly emerging legal and scientific claims, and we have experience in multiparty representation in cases concerning issues of industry-wide significance. Our lawyers have also handled litigation challenging regulations and chemical listings under Proposition 65. The lawyers in our Proposition 65 practice have strong litigation defense experience involving environmental and consumer product claims, including class actions, both in California and around the country. Because of the breadth and depth of our experience, we are well prepared to assist clients in litigation and in the development of compliance strategies.

Unlike many of the law firms with significant Proposition 65 practices, Arnold & Porter has leading practices in related areas of law such as consumer product safety; consumer protection law; EU product regulation; environmental law; food, drug, and cosmetic regulation; product liability litigation; and unfair competition and trade practices law. We understand how the requirements of federal regulators such as the FDA and FTC, states such as Washington and Maine, and international standard-setting bodies interact with Proposition 65 and related consumer product regulatory issues. With this comprehensive experience, we offer an integrated approach in providing legal responses to both complex and relatively straightforward issues alike.

We focus on developing and implementing clear strategies that will achieve our clients' business and litigation objectives. Along with this strategic thinking, we bring experience, dedication, and zealous advocacy to bear on our clients’ Proposition 65 and chemical litigation needs.

Class Actions
As a premier class action defense firm, we handle class actions related to consumer protection/false advertising, antitrust, product liability, securities, distributor disputes, and environmental matters, among other areas. We draw on the full litigation resources of our firm, including a deep bench of experienced class action attorneys, to litigate in state and federal courts throughout the United States. We also have substantial experience with the intersection of class action claims and arbitration clauses.

Our clients include such leading firms as ARCO/BP, Bank of America, GEICO, General Electric, GlaxoSmithKline, Honeywell, Kmart, Monsanto, Philip Morris, Roche, VeriSign, Visa, Wyeth, and many others.

Representing defendants in class action litigation demands a level of resources, strategic skill, and legal acumen that is the hallmark of our firm. We have devised many innovative ways to defeat class actions, advancing new legal theories to bar or limit plaintiffs’ legal claims,
extricating clients from inappropriate and unfavorable forums, and highlighting conflicts between class members.

In many class actions, the decision on class certification is pivotal, and we have succeeded in extraordinary victories. In one case alleging consumer fraud by a major retailer, Arnold & Porter came into an ongoing case and succeeded in having a class decertified. On behalf of Philip Morris, we have prevailed against class certification repeatedly, for example, defeating certification of a statewide class of smokers of "light" cigarettes in Oregon and a putative nationwide class in New York for purposes of assessing damages. We prevented class certification in suits charging an insurance company with consumer fraud, as well as in product liability and toxic tort cases.

Consumer Product Safety
The firm has leading practices in matters before the US Consumer Product Safety Commission (CPSC) and in matters arising under state consumer protection laws, such as California’s Proposition 65. Our team, which includes a former General Counsel of the CPSC, regularly assists clients in matters covering the spectrum of CPSC actions -- recalls, enforcement actions, and regulatory matters -- as well as in litigation that can arise from product safety matters.

Recent significant representative matters:

- **Recall Implementation.** We have assisted clients in implementing numerous voluntary recalls, covering a wide variety of products such as toys, recreational equipment, household appliances, light fixtures, fire protection devices, building materials, electronic equipment, lithium-ion batteries, furniture, cigarette lighters, and motor vehicle equipment -- including a recent worldwide recall in which the notification of roughly 30 regulatory authorities was coordinated with the announcement of the recall in the US. We do so cost-effectively, in a manner that helps our clients protect consumers, minimize business disruption, and reduce potential exposure in product liability and consumer protection act lawsuits.

- **Coping with the new reality of life under the Consumer Product Safety Improvement Act.** We are representing numerous manufacturers, distributors, and retailers of consumer products, drugs, and cosmetics in helping them to understand, comply with, and adapt their operations to address groundbreaking CPSC reform legislation that was enacted in August 2008.

- **Avoiding Unnecessary Recalls and Defeating Class Certification.** We represented a leading retailer in securing a decision from CPSC that a product our client distributed need not be recalled and in successfully defending a consumer class action that had sought to require our client to conduct a nationwide recall of the product.

- **Enhancing Internal Controls.** We have assisted manufacturers and retailers in enhancing their internal controls to help ensure compliance with CPSC notification requirements.

- **Overcoming Child-Resistant Packaging Hurdles.** We have represented several drug companies in overcoming child-resistant packaging issues, including in one case resolving a packaging concern that threatened to block introduction of the company's first drug in the US.
FTC and State AG Consumer Protection Enforcement
Consumer complaints in response to marketing or promotion initiatives may trigger a letter or subpoena from a regulatory agency. Arnold & Porter has a depth of experience in handling FTC and state attorneys general investigations relating to privacy, advertising, and consumer protection issues. Our team includes key alumni from the regulatory agencies, including the former FTC chairman.

We have assisted clients from virtually every type of industry in connection with many FTC and state attorneys general investigations. We have negotiated consent orders with the FTC, as well as represented clients in federal litigation with the FTC in connection with the enforcement of those orders.

We handle the defense of such investigations aggressively and creatively, while still maintaining a professional and respectful relationship with the regulatory staff. Indeed, many of our lawyers are alumni of these agencies. Having the right regulatory team in place is even more important in today’s litigation environment because, increasingly, regulatory action leads to consumer and competitor litigation -- and one problem becomes many.

Global Brand Enforcement
Our clients invest significant resources in developing strong, distinctive, enduring brands. It is essential that they be protected, nurtured, and grown. Arnold & Porter’s brand enforcement practice understands that our clients’ brand names and goodwill are among their most valuable assets, and has assembled a team of highly experienced lawyers to protect them.

Many of the world’s leading companies turn to us for help in dealing with both the routine and the most complex issues that arise regarding the protection and enforcement of their critical intellectual property (IP) rights. With offices in strategic locations, and the experience of having enforced our clients’ IP rights in many countries, we are able to serve clients in industries—including luxury goods, pharmaceuticals, music, film, and software—where counterfeiting and piracy proliferate. Our brand enforcement credentials are especially strong in Washington, DC, New York, Los Angeles, and London, where we have worked on behalf of some of the most prestigious luxury brands in the world. Our capabilities are not just limited to litigation, where we have had many successes—we also lead domestic and international investigations, work with law enforcement and border patrol personnel, and audit our clients’ supply chains for evidence of both counterfeit and diverted authentic goods. We are truly a full-service operation when it comes to enforcing our clients’ brand rights on a global basis.

Anti-Counterfeiting and Brand Enforcement
A counterfeit product is one that is knowingly made with the intention of deceiving a recipient or buyer as to its true identity, content, or origin, and is branded with another’s registered trademark. Counterfeits are found in many industries, including fashion, jewelry, auto parts, software, and pharmaceuticals. A counterfeit product is often indistinguishable from a product protected by a registered mark, but is usually of lower quality and almost always costs less to manufacture.

Counterfeiting today is widespread and even rampant. Its effects are pernicious. Counterfeit products deprive legitimate businesses of revenue, and undermine consumer confidence. Even
more seriously, counterfeiting may put human safety and lives in jeopardy. Fake drugs, for example, threaten public health. The World Health Organization estimates that unauthorized drugs account for over 10 percent of all pharmaceutical products worldwide. An individual who inadvertently consumes a counterfeit drug is at obvious and immediate risk, with severe injury and even death a possible outcome.

Arnold & Porter attorneys are well-equipped to assist our clients in combating a worldwide counterfeiting problem. Our attorneys have won a number of leading decisions holding the suppliers and retailers of counterfeit products accountable for their conduct, and have recovered multimillion dollar settlements and judgments for clients in these matters, establishing new law in many instances.

Counterfeiting and Supply Chain Security
As difficult as the challenges posed by counterfeiting are, there is one important area over which businesses can exert a large measure of control: the security of their own supply chain. This is not to minimize the difficulties posed. Globalization and the Internet have made it easier for counterfeiters to infiltrate a company's supply chain, allowing for the distribution and availability of non-authentic goods around the globe. Still, by identifying and addressing weaknesses in the supply chain, a business can vastly curtail a counterfeiter's harm. Secondary markets are a good place to start. By developing much tighter contracts with secondary market retailers, a brand owner can regain and enforce a large measure of control. This might entail, for example, requiring that all unsold merchandise be returned, or being more selective about secondary buyers to whom the merchandise can be resold. Strong supply chain oversight yields yet another important result: it can discourage counterfeiters from undertaking illegal activity at the start.

Arnold & Porter attorneys can help a business audit its supply chain, so that it can identify and close supply chain gaps. Additionally, we have experience working with and building relationships with law enforcement. We can assemble and bring evidence to the attention of the authorities for the prosecution of counterfeiters who may have breached the supply chain.

Counterfeiting, Police, and Customs
Working with law enforcement officials is an important component in any drive to curb or end counterfeiting. One aspect of this is to ensure that details of IP rights are registered with border controls and that local, federal, and foreign law enforcement officials are adequately trained to recognize and positively identify counterfeits. Another involves aggressively investigating all supply chain incidents, and gathering sufficient evidence so that authorities can act on it. Arnold & Porter attorneys can drive these efforts home with cease and desist orders that put counterfeiters on notice and help gain quick resolution in court.

Grey Market
Grey market goods (or "parallel imported" goods) are goods originally intended by their manufacturer to be sold in certain countries that have been diverted to other countries where the manufacturer never intended to have them sold. Typically, the goods are diverted to a country area where the client's authorized goods sell at a price higher than the party importing the diverted goods will charge. The manufacturer's control over prices is thus diminished, as is the brand's image, cachet, and value. Arnold & Porter lawyers can identify and implement strategies
to avoid contractual problems in the supply chain and to enforce trademarks against unauthorized imports. This may be of particular importance to our clients, for in many circumstances, parallel importation and repackaging of goods is permitted in the US and the EU.

**Lanham Act/Competitor Challenges to Advertising**
Arnold & Porter has extensive experience with both making and defending against competitor challenges. We deal with competitor false advertising challenges in federal court under the Lanham Act, as well as with matters that fall under the general purview of unfair or deceptive trade practices. Our litigators frequently partner with the firm's advertising specialists to offer a comprehensive representation for our clients. The depth and breadth of our practice positions Arnold & Porter to respond to demands of accelerated litigation that characterizes false advertising cases; develop Daubert-proof evidence of consumer perception and consumer decision-making; work with scientific and technical experts to evaluate substantive advertising claims; and aggressively defend our clients' advertising claims and attack deceptive advertising claims made by our clients' competitors.

Sometimes challenges are fought out in a self-regulatory forum such as that provided by the National Advertising Division (NAD) of the Council of Better Business Bureaus. Our lawyers have appeared before the NAD and on NAD panels and have counseled clients on the pros and cons of NAD challenges versus litigation in court. We regularly work with the top consumer survey experts
CONSUMER PRODUCT SAFETY

The firm has leading practices in matters before the US Consumer Product Safety Commission (CPSC) and in matters arising under state consumer protection laws, such as California’s Proposition 65. Our team, which includes a former General Counsel of the CPSC, regularly assists clients in matters covering the spectrum of CPSC actions -- recalls, enforcement actions, and regulatory matters -- as well as in litigation that can arise from product safety matters.

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- **Coping with the new reality of life under the Consumer Product Safety Improvement Act.** We are representing numerous manufacturers, distributors, and retailers of consumer products, drugs, and cosmetics in helping them to understand, comply with, and adapt their operations to address groundbreaking CPSC reform legislation that was enacted in August 2008.

- **Avoiding Unnecessary Recalls and Defeating Class Certification.** We represented a leading retailer in securing a decision from CPSC that a product our client distributed need not be recalled and in successfully defending a consumer class action that had sought to require our client to conduct a nationwide recall of the product.

- **Enhancing Internal Controls.** We have assisted manufacturers and retailers in enhancing their internal controls to help ensure compliance with CPSC notification requirements.

- **Overcoming Child-Resistant Packaging Hurdles.** We have represented several drug companies in overcoming child-resistant packaging issues, including in one case resolving a packaging concern that threatened to block introduction of the company’s first drug in the US.
Tab 5: Supporting Materials
 LOS ANGELES - Attorney General Kamala D. Harris today announced that her office had stopped Bioelements, Inc., a cosmetics company operating in California, from engaging in "a blatant price-fixing scheme" in which it prohibited retailers from selling its products online at a discount.

"Bioelements operated a blatant price-fixing scheme by requiring online retailers to sell its products at high prices," Harris said. "Price manipulation harms consumers, competition and our business community. We will continue to be vigilant in protecting our markets from these kinds of abuses."

The settlement is one of the first applications of California's strict, pro-consumer antitrust law banning vertical price-fixing in the wake of a controversial 2007 U.S. Supreme Court decision that weakened federal law in this area. Vertical price-fixing occurs when companies along the distribution chain conspire to set the price of a product or service at an artificially high level. In California, prices must be set independently -- and competitively -- by distributors and retailers.

Bioelements markets a line of human beauty-care products under its BIOELEMENTS trademark, offering skin products it claims have quasi-medicinal properties such as reducing wrinkles. These products -- known as "cosmesceuticals" because they supposedly merge the attributes of cosmetics and pharmaceuticals -- are sold at beauty salons across California, as well as on the Internet.

An investigation initiated by Harris' predecessor as attorney general, Edmund G. Brown Jr., revealed evidence that since 2009, Bioelements had entered into dozens of contracts with other companies that required them to sell Bioelements' products online for at least as much as the retail prices prescribed by Bioelements. (There were no express pricing requirements for products sold in person or in shops.)

In doing so, Bioelements violated California's antitrust and unfair competition laws.

Under the settlement, in the form of a stipulated court judgment signed Tuesday by Riverside Superior Court Judge Harold W. Hopp, Bioelements is required to:

- Permanently refrain from fixing resale prices for its merchandise
- Inform distributors and retailers with whom Bioelements made price-fixing contracts that Bioelements considers the contracts void and will not try to enforce them
- Pay a total of $51,000 in civil penalties and attorney fees.
The 2007 U.S. Supreme Court decision Leegin Creative Leather Products, Inc. v. PSKS, Inc. sharply curtailed federal antitrust law pertaining to vertical price-fixing, but did not affect California's strict state antitrust law. In the last three years, the California Attorney General has sent two open letters to Congress urging passage of legislation reinstating federal safeguards against vertical price-fixing schemes like Bioelements'. In February 2010, the Attorney General obtained an injunction under California law against another cosmetics company, DermaQuest, Inc., which halted a price-fixing scheme similar to Bioelements'.

A copy of People v. Bioelements civil complaint and the stipulated judgment are attached to the press release online at www.ag.ca.gov

# # #

Westlaw Delivery Summary Report for PRO BONO ELIBRAR

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Court of Appeal, First District, Division 1, California.

BAY GUARDIAN COMPANY, Plaintiff and Respondent,
v.
NEW TIMES MEDIA LLC et al., Defendants and Appellants.

No. A122448.
Certified for Partial Publication. FN*

FN* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts IV and V of the Discussion.

As Modified Aug. 11, 2010.
As Modified on Denial of Rehearing Sept. 8, 2010.

FN** Kennard, J., is of the opinion that the petition should be granted.

Background: Weekly newspaper brought action against competing weekly newspaper, alleging unfair competition based on sales of advertising at rates below cost for the purpose of harming a competitor. The Superior Court, San Francisco County, Marla Miller, J., entered judgment on jury verdict in favor of plaintiff in the amount of $16 million. Defendant appealed.

Holdings: The Court of Appeal, Dondero, J., held that:
(1) state predatory pricing statute does not require proof of the defendant's ability to recoup losses;
(2) violation of predatory pricing statute does not require proof of intent to injure multiple competitors, as opposed to just a single competitor; and
(3) jury was not improperly instructed on the statutory presumption of improper purpose.

Affirmed in part and reversed in part.

West Headnotes

[1] Appeal and Error 30 $781(6)

30 Appeal and Error
30XIII Dismissal, Withdrawal, or Abandonment
30k779 Grounds for Dismissal
30k781 Want of Actual Controversy
30k781(6) k. Effect of settlement in general. Most Cited Cases

Court of Appeal would not dismiss appeal from jury verdict in predatory pricing action on grounds that parties' settlement of the case following oral argument and submission of the case rendered the appeal moot; action presented issues of continuing public interest which were likely to recur, and parties agreed that publication of an opinion in the case was appropriate. Cal.Rules of Court, Rule 8.1110(c); West's Ann.Cal.C.C.P. § 664.6.


30 Appeal and Error
30XIII Dismissal, Withdrawal, or Abandonment
30k779 Grounds for Dismissal
30k781 Want of Actual Controversy
30k781(6) k. Effect of settlement in general. Most Cited Cases

When settlement or stipulation of the parties following oral argument and submission of the case renders case moot, dismissal of appeal is discretionary rather than mandatory.

[3] Statutes 361 $1091

361 Statutes
361III Construction
361III(B) Plain Language; Plain, Ordinary, or Common Meaning
361k1091 k. In general. Most Cited Cases
(Formerly 361k188)

The first step in determining the Legislature's intent in enacting a statute is to scrutinize the actual
words of the statute, giving them a plain and commonsense meaning.

[4] Statutes 361

361 Statutes
361III Construction
361III(E) Statute as a Whole; Relation of Parts to Whole and to One Another
361k1156 k. Superfluousness. Most Cited Cases
(Formerly 361k206)
Courts reject a statutory interpretation that would render particular terms mere surplusage, and instead seek to give significance to every word.


15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules, Regulations, and Other Policymaking
15Ak428 Administrative Construction of Statutes
15Ak432 k. Plain, literal, or clear meaning; ambiguity. Most Cited Cases
(Formerly 361k214)

Statutes 361

361 Statutes
361III Construction
361III(M) Presumptions and Inferences as to Construction
361k1361 k. In general. Most Cited Cases
(Formerly 361k185)
Courts do not lightly imply terms or requirements that have not been expressly included in a statute.

[7] Statutes 361

361 Statutes
361III Construction
361III(M) Presumptions and Inferences as to Construction
361k1363 Intent
361k1364 k. In general. Most Cited Cases
(Formerly 361k212.7)
An intention to legislate by implication is not to be presumed.

[8] Constitutional Law

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2472 Making, Interpretation, and Application of Statutes
92k2474 k. Judicial rewriting or revision. Most Cited Cases
Courts are not authorized to insert provisions or rewrite a statute to conform to an assumed intention which does not appear from its language.

[9] Antitrust and Trade Regulation

29T Antitrust and Trade Regulation
29TV Price Regulation
29TV(A) In General
29Tk461 Excessively Low Prices; Minimum Prices
29Tk464 k. Sales below cost in general. Most Cited Cases

[10] Antitrust and Trade Regulation 29T 464

29T Antitrust and Trade Regulation
29TV Price Regulation
29TV(A) In General
29Tk461 Excessively Low Prices; Minimum Prices
29Tk464 k. Sales below cost in general. Most Cited Cases

Predatory pricing provision of state Unfair Practices Act (UPA), prohibiting sales below cost for the purposes of harming a competitor, does not require an anticompetitive impact; the violation is complete when sales below cost are made with the requisite intent and not within any of the exceptions. West's Ann. Cal. Bus. & Prof. Code § 17043.


29T Antitrust and Trade Regulation
29TV Price Regulation
29TV(A) In General
29Tk461 Excessively Low Prices; Minimum Prices
29Tk464 k. Sales below cost in general. Most Cited Cases

Violation of predatory pricing provision of state Unfair Practices Act (UPA) applies to acts of below-cost pricing committed for the purpose of injuring either a single or multiple competitors or destroying competition. West's Ann. Cal. Bus. & Prof. Code § 17043.

[12] Antitrust and Trade Regulation 29T 128

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(A) In General
29Tk126 Constitutional and Statutory Provisions

29Tk128 k. Purpose and construction in general. Most Cited Cases

State Unfair Practices Act (UPA) is intended to maintain fair and honest competition to protect smaller, independent retailers from the predatory practices of larger, more controlling competitors. West's Ann. Cal. Bus. & Prof. Code § 17001 et seq.

[13] Statutes 361 1404

361 Statutes
361IV Operation and Effect
361k1402 Construction in View of Effects, Consequences, or Results
361k1404 k. Unintended or unreasonable results; absurdity. Most Cited Cases
(Formerly 361k181(2))

If possible, the words of a statute should be interpreted to make them workable and reasonable, practical, in accord with common sense and justice, and to avoid an absurd result.

[14] Appeal and Error 30 840(4)

30 Appeal and Error
30XVI Scope, Standards, and Extent, in General
30k838 Questions Considered
30k840 Review of Specific Questions and Particular Decisions
30k840(4) k. Review of questions of pleading and practice. Most Cited Cases

In considering a claim of instructional error, appellate court must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys.
A court is required to instruct on the law applicable to the case, but no particular form is required; the instructions must be complete and a correct statement of the law.

Absence of an essential element in a given jury instruction may be supplied by reference to another instruction, or cured in light of the instructions considered as a whole.

The meaning of jury instructions is tested by whether there is a reasonable likelihood that the jury misconstrued or misapplied the law in light of the instructions given, the entire record of trial, and the arguments of counsel.

Once a presumption affecting the burden of proof comes into play, that is an issue which must be presented to the trier of fact; if contrary evidence is introduced, the jury has the right to weigh the evidence and determine whether it sufficiently contradicts the presumption.
Proof of one or more acts of selling or giving away any article or product below cost or at discriminatory prices, together with proof of the injurious effect of such acts, is presumptive evidence of the purpose or intent to injure competitors or destroy competition; to create this presumption, proof must be had, among other things, of one or more sales of an article or product below cost together with proof of the injurious effect of the practice. West's Ann.Cal.Bus. & Prof.Code § 17071; West's Ann.Cal.Evid.Code § 606.

Presumption of a purpose or intent to injure competitors or destroy competition created by proof of one or more acts of selling or giving away any article or product below cost or at discriminatory prices, together with proof of the injurious effect of such acts, affects the burden of proof, thus shifting to defendant the burden of negating the inference of illegal intent or establishing an affirmative defense; once the presumption is rebutted, the burden shifts back to the moving party to offer actual proof of injurious intent. West's Ann.Cal.Bus. & Prof.Code § 17071.

A party is entitled upon request to correct, non-argumentative instructions on every theory of the case advanced by him which is supported by substantial evidence.

Substantial evidence necessary to support a jury instruction is evidence sufficient to deserve consideration by the jury, i.e., evidence from which...
a jury composed of reasonable persons could have concluded that the particular facts underlying the instruction did exist; evidence is substantial if a reasonable jury could find it persuasive and therefore conclude that the particular facts underlying the instruction did exist.

[24] Appeal and Error 30 930(2)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k930 Verdict
30k930(2) k. Instructions understood or followed. Most Cited Cases

Trial 388 295(1)

388 Trial
388VII Instructions to Jury
388VII(G) Construction and Operation
388k295 Construction and Effect of Charge as a Whole
388k295(1) k. In general. Most Cited Cases

Appellate court's duty is to look at jury instructions as a whole, not in isolation, and the court must assume jurors are able to correlate, follow, and understand the court's instructions.

[25] Antitrust and Trade Regulation 29T 501

29T Antitrust and Trade Regulation
29TV Price Regulation
29TV(B) Enforcement and Remedies
29Tk499 Evidence
29Tk501 k. Presumptions, inferences, and burden of proof. Most Cited Cases

Jury instruction on the statutory presumption of improper purpose in action alleging sales below cost for the purpose of harming a competitor should have advised the jury that the presumption was rebutted with proof by defendants of the nonexistence of the presumed fact of unlawful purpose by a preponderance of the evidence. West's Ann.Cal.Bus. & Prof.Code §§ 17043, 17071.

[26] Trial 388 296(7)

388 Trial
388VII Instructions to Jury
388VII(G) Construction and Operation
388k296 Error in Instructions Cured by Withdrawal or Giving Other Instructions
388k296(7) k. Evidence and matters of fact in general. Most Cited Cases

Flaw in jury instruction on the statutory presumption of improper purpose, in failing to advise the jury that the presumption was rebutted with proof by defendants of the nonexistence of the presumed fact of unlawful purpose by a preponderance of the evidence, was not prejudicial error in action alleging sales below cost for the purpose of harming a competitor, where additional instructions thoroughly defined for the jury the evidence that negated proof of purpose. West's Ann.Cal.Bus. & Prof.Code §§ 17043, 17071.


DONDERO, J.

*444* The Bay Guardian and the San Francisco Weekly are competing alternative newspapers in the San Francisco Bay Area. Each paper relies on advertising revenue in large part to sustain the publication of the news weekly. San Francisco Weekly offered advertising to business entities at a rate lower than was provided by the Bay Guardian. Consequently, the Bay Guardian sued San Francisco Weekly for unfair competition under California law. It was successful and won a jury verdict of
approximately $16 million.

This appeal has been taken by defendants New Times Media (the New Times), San Francisco Weekly (the SF Weekly), and East Bay Express (the Express), from a judgment that awarded plaintiff Bay Guardian (the Guardian) damages in an action for violations of Business and Professions Code section 17043 based on sales of advertising at rates below cost for *445 the purpose of harming a competitor. FN1 Defendants claim that the trial court erred by failing to admit defense evidence and properly instruct the jury on the essential element in a section 17043 action of proof of the defendant's ability to recoup losses. Defendants also argue that the court gave defective instructions on the intent or “purpose” to harm a competitor and the statutory presumption of improper purpose stated in section 17071. They further assert that the evidence presented by plaintiff failed to adequately prove the element of damages caused by the below-cost sales, or that the New Times and the Express were agents of the SF Weekly so as to incur liability to plaintiff pursuant to section 17095.

FN1. All further statutory references are to the Business and Professions Code unless otherwise indicated.

[1][2] We conclude that recoupment of losses by the defendant is not a requirement to prove a violation of section 17043. Therefore, the trial court did not err by failing to instruct the jury on recoupment **396 of losses as an element of the action, by limiting the presentation of defense evidence on recoupment, or by denying defendants' motions for judgment based on lack of evidence of recoupment. We also conclude that the court's instructions on the purpose to harm a competitor and the statutory presumption of improper purpose were not erroneous. Substantial evidence supports the finding of damages suffered by plaintiff, and the agency relationship between the SF Weekly and the New Times. The judgment against the Express must be reversed for lack of evidence that it acted as an agent of the SF Weekly to sell advertising at rates below cost in violation of section 17043. Otherwise, we affirm the judgment.

Additionally, this court consulted the parties regarding the possible partial publication of the decision in this case. The court has received written reply from counsel for the parties that both sides agree the publication of an opinion in this case is appropriate under California Rules of Court, rule 8.1110(c).

*446 STATEMENT OF FACTS

The Guardian was first published in October of 1966 in San Francisco as an “alternative” newspaper of “tabloid size,” published weekly and distributed free of charge. The Guardian targeted a young, educated, affluent audience, more focused on alternative views and life styles than daily newspapers such as the San Francisco Chronicle or San Francisco Examiner. Without any revenue from circulation, the Guardian relied almost exclusively on sale of advertising space in the paper to produce income. The Guardian sold two forms of advertising: classified advertising, which was primarily personal in nature and was placed in the back of the paper; and display advertising, which was purchased by local retail businesses and sold “modularly” as a larger portion of a page of the newspaper. During the first six years of existence the Guardian struggled, and was published only irregularly. By 1995, however, the Guardian became the dominant weekly newspaper in the San Francisco Bay Area. Between 1985 to 1995, revenues grew from $2 million to $8 million, and then to over $11 million by 2000, of which $7.6 million was attributable to display advertising.

Over the years the Guardian did not primarily compete with the radio or “even the daily,” newspapers, but rather with other “non-daily papers” which also had “alternative” editorial content. One of the **397 Guardian's competitors was defendant SF Weekly, which in 1995 principally focused “on the music scene in San Francisco,” and had a target demographic of 18 to 40 years of age.

Defendant the New Times decided to acquire the SF Weekly in 1995 to enter the vibrant San Francisco journalism market. At the time the SF Weekly was a marginally profitable newspaper of under 70 pages per edition, which had a circulation of about 90,000—about half that of the Guardian. The objective of the acquisition of SF Weekly was to increase circulation and improve content by bringing more “magazine-length journalism into the paper.” Thus, from 1995 to 2000 the journalism staff of the SF Weekly was increased significantly, as was the editorial size of the paper, its circulation, number of advertisers, and total revenue.

The Guardian adduced evidence at trial that soon after the acquisition the executive editor of the New Times, Mike Lacey, disparaged the content of both the SF Weekly and the Guardian at a staff meeting, and announced that he wanted “the SF Weekly to be the only game in town.” The Guardian was considered the primary competitor of the SF Weekly. Lacey stressed that the New Times had “deep pockets,” with the financial resources to “compete very *447 aggressively” with the Guardian and use “guerilla tactics” in rate battles. Lacey also emphasized that he was interested in improving the editorial quality of the SF Weekly. To increase circulation, additional salaried journalists were hired to bring higher quality “long form journalism” to the paper. The essence of Lacey's message was that he wanted “to put the Bay Guardian out of business.”

One of the “new policies” implemented at the SF Weekly was to specifically target businesses which advertised in the Guardian. The previous advertising policy of the SF Weekly, like that of the Guardian, was to set the advertising “rate card” based on the “overhead costs” of publishing the newspaper, plus a variable percentage, depending on the frequency of the customer's advertising. Rates were structured on a “graduated frequency discount” scale, with customers who advertised “52 weeks throughout the year” offered a lower rate than a “one time customer.” Ads were sold accord-
Following the acquisition of the SF Weekly by the New Times, sales representatives were authorized to directly contact advertisers in the Guardian and offer “to sell advertising at a lower frequency” than was earned to transfer their business to the SF Weekly. The sales representatives were made aware that advertising could be sold “below cost” if needed “in order to make a sale,” and the resources of the New Times would cover the losses, even over a term of many years. For example, the SF Weekly began to offer Bay Guardian advertisers the rate for “52 times, even if the advertiser only agreed to run for one week.”

Furthermore the SF Weekly identified “key categories” of advertising emphasis in the newspaper, such as restaurants, fitness clubs, health and beauty, music and film, and furniture. To increase volume in those categories, the strategy of SF Weekly was to “initially lower the [introductory] rate” to advertisers to “build up a certain amount of critical mass,” then once volume was established “slowly increase the rates” over time of both the “re-signs” and “new advertisers.”

The Guardian recognized that SF Weekly had become a threatening competitor, along with internet publishing. Both newspapers appealed to essentially the same demographic and attracted many of the same advertisers. Competition between**398 the two newspapers for advertisers was “pretty intense.” The fundamental objective of the Guardian was essentially the same as the SF Weekly: to become dominant in the San Francisco marketplace.

In March of 2001, the New Times acquired another alternative weekly newspaper, the Express, which then had a circulation of about 60,000 to 65,000. The Express, which was based in Oakland, offered advertising customers a slightly different geographical region of exposure than the Guardian or the SF Weekly, and in conjunction with the SF Weekly provided a greater coverage area and circulation than the Guardian alone. As with the SF Weekly, the “approach” of the New Times was to improve the editorial quality of the Express and increase circulation. The Express provided reduced rates to advertising customers, which it intended to “slowly raise” over time. Despite its lower circulation the Express charged higher advertising rates than the SF Weekly, although lower rates than the Guardian. Once the Express was acquired by the New Times, to entice prospective advertisers “away from the Guardian” the SF Weekly also offered free advertisements in the Express. The New Times anticipated losses at the Express while the paper was developed and expanded.

Thereafter, through 2007, the SF Weekly and the Express continued to offer advertising, particularly to advertisers in key categories, at rates at least 20 percent below those charged by the Guardian, below the “rate card” prices, and well below its own costs per inch of display advertising space. According to the calculations of plaintiff’s expert, the SF Weekly's average advertising space costs ranged from $21 per inch in 2001 to $29 per inch in 2007, whereas the average sale price of advertising space varied from $17 per inch in 2002 to $20 per inch in 2007. For the same time period, the Guardian's advertising costs per inch of paper ranged from nearly $23 in 2001, to $18 in 2004, and $20 in 2007; its display revenue per inch was nearly $23 in 2001, $18 in 2004, and nearly $22 in 2007.

As a result of reduced-price advertising offered by the SF Weekly, the Guardian consistently lost other advertising customers and revenue to the SF Weekly after 1995, even though the Guardian had 20 percent greater distribution in San Francisco—and therefore theoretically should have received a 20 percent greater price for advertising. An examination of customer account ledgers for 128 customers and over 20,000 advertising transactions with the Guardian and the two “New Times papers” between 1999 and the first quarter of 2007 revealed that 91 percent of the advertising sales transactions of the SF Weekly and Express were below cost. For approximately 66.5 percent of those
transactions the Guardian either lost customers to defendants' papers or was compelled to discount advertising rates to remain competitive.

As an illustration, by offering reduced rates to advertisers the SF Weekly managed to obtain the critical print advertising account of Bill Graham Presents (BGP), a major concert producer which historically advertised *449 heavily in the Guardian.\footnote{BGP as an independent concert promoter became part of Live Nation, a large conglomerate of entertainment entities.} After the acquisition by the New Times, BGP consolidated more of its advertising budget with the SF Weekly, 75 to 80 percent, at favorable, below-cost rates, while **399 at the same time reducing its overall print promotion in favor of “radio and online advertising.” Then in 2005, BGP entered into a “sponsorship agreement” to direct to the SF Weekly a minimum annual display advertising purchase of $350,000 or 90 percent of its advertising budget in alternative newspaper publications in the Bay Area market, whichever was greater.\footnote{The agreement also gave BGP discretion to allocate the annual minimum print placement to SF Weekly or the Express.} In exchange, the SF Weekly paid an annual “sponsorship” fee to BGP for “naming rights” to the Warfield Theatre owned by BGP, and was given exclusive advertising rights associated with that venue. The advertising prices charged to BGP by the SF Weekly under the sponsorship agreement were above previous rates, but still below cost. Before the sponsorship agreement, BGP spent approximately $160,000 per year in advertising with the Guardian. As a result of the agreement between BGP and the SF Weekly, the Guardian subsequently received only a fraction of its previous advertising revenue from BGP, and lost “hundreds of thousands” of advertising dollars.

In 2004, the Guardian began a program to match the SF Weekly's lower advertising prices to some customers on a “case by case basis” by giving discounts, “free ads” and “upsizes” in the paper. The program lasted two or three years, but did not appreciably abate the Guardian's revenue losses. Between 2000 and 2007 the Guardian suffered a loss of display advertising revenue of about 50 percent, and earned a total profit of $1.2 million.

The Guardian and the SF Weekly also lost advertising revenue, particularly “classified business,” to internet providers such as Craigslist, which attracted the youthful demographic targeted by both papers. The “dot com” bust in the San Francisco Bay Area in 2001 further caused appreciable loss of display advertising revenues for both papers, as did the ensuing more general recession. The Guardian increased advertising revenues between 1996 and 2000, but suffered substantial loss of income between 2000 and 2007.\footnote{Display advertising revenue figures for the SF Weekly and the Guardian, respectively, were as follows: $1.76 and $5.48 million in 1996; $5.25 and $7.84 million in 2000; and $4.32 and $4.51 million in 2007.}

Despite increases in circulation and advertising revenue, between 1995 and 2007 the editorial expenses for the SF Weekly and the Express increased dramatically, and with the exception of 2000 and 2001 the papers lost money every year that the New Times parent company was forced to “cover.” The *450 New Times sold the Express in 2007, due to lack of “progress financially,” for much less than the acquisition price six years earlier.

Plaintiff offered expert opinion testimony from CPA Clifford Kupperberg, presenting an analysis of damages suffered by the Guardian as a result of defendant's advertising price structure. Kupperberg suggested several models for the calculation of plaintiff's damages, which he characterized as the revenue or profits the Guardian would have earned during the “damage period” established by the
court—the fiscal years 2001 through 2007—“but for” defendants' below-cost advertising. Kupperberg acknowledged that a damage analysis of “something that didn't happen” can “never be perfect,” but through his methodology of examining “comparable” situations he attempted to discern the “most reasonable measure of damages.”

In one model Kupperberg assumed that between 2001 and 2007 the Guardian would have continued to charge the same rate for advertising space—that is, $2,270 per page—as it had for the five years (1996 to 2001) before the below-cost pricing “damage event.” The total amount of damages according to this model, without any increase in advertising volume, was $4,856,000.

A different “comparable model” approach took into account an increase in the Guardian's “display revenue achievement” in the damages period at a rate or percentage equivalent to the two other “most comparable” Bay Area weekly newspapers (the Bay weeklies)—those being the Palo Alto Weekly and the Pacific Sun—or alternative newspapers operated elsewhere by the New Times (the New Times weeklies), that were not impacted by the SF Weekly's pricing structure. Those projected profits were then compared to the actual expenditures, profits and losses of the Guardian during the same damages period. As so calculated the total projected damages ranged from a low of $7.3 million as measured by the Bay Weeklies to a high of $10.2 million as measured by the New Times weeklies.

Kupperberg also calculated damages according to a “minimum change” model, based on a projection that the Guardian would not have lost any net market share to the SF Weekly during the damages period in the absence of below-cost pricing. Assuming the Guardian maintained its revenues for the damages period, the total calculated damages were between $4 and $5.2 million. Kupperberg felt that the minimum change model did not give “a complete picture of the loss” because it was not adjusted for the higher prices the Guardian could have charged for the lost sales without the unfair practices.

*451 The calculation of damages under Kupperberg's models ranged from a low of $4,083,748 to a high of $11,834,570. Kupperberg asserted that all of the models he described, although imperfect, “could be representative of what happened,” but the most “appropriate” method of calculation depended on the jury’s “view of the facts.” He also testified that a calculation of damages based on an examination of individual transactions was both impractical—due to the hundreds of thousands of transactions at issue—and inaccurate given the impossibility of knowing which “transactions would have gone to [the] Bay Guardian absent the [be]low-cost pricing.”

†FN6 In his prior deposition Kupperberg reached a different calculation of the Guardian's lost revenues during the damages period based on use of statistics from the Association of Alternative Newspapers. Before trial Kupperberg repudiated his prior method of calculation because he decided it was based on lack of “comparable” information.

Defendants countered with expert opinion testimony by accountant Everett Harry that Kupperberg's models were based on faulty assumptions as to potential earnings during the damages period, and failed to follow established accounting guidelines for certainty. Harry formed the opinion that Kupperberg's models and ultimate analysis of damages were “unreasonable, unsupported based upon speculation” and “completely exaggerated.” The range of Kupperberg's damage estimates, asserted Harry, “is far too wide to pass a reasonableness test.” Harry testified that the evidence of damages presented by plaintiff failed to consider competition for advertising from the internet, direct mail advertising, other free newspapers such as the San Francisco Examiner, and entertainment inserts in the San Francisco Chronicle. He also considered the cost plus six percent revenue model used by Kupperberg for calculating damages unreasonable, as...
based on an erroneous assumption of a **401 price per page for display advertising that the Guardian could not have continued to charge during the damages period.

Defendants also presented expert opinion testimony to prove that the SF Weekly was not seeking to harm the Guardian as a competitor with its advertising pricing scheme. Economics Professor Joseph Kalt testified that below-cost pricing by the SF Weekly for the purpose of injuring competition would “not make sense from a business or economic point of view.” Kalt reasoned that the SF Weekly possessed neither the “market power” to control the alternative newspaper market and drive out competition, nor the protection from competitors to ultimately raise prices and recover the losses, both of which are required to make below-cost pricing a rational, sensible act from a business perspective. Kalt examined the economic data and market trends, including increased internet competition, and found that the SF Weekly failed to increase its revenues from below-cost pricing or drive the Guardian and other competition from the market.

*452 In rebuttal, plaintiff presented evidence that corroborated the essential enduring profitability of weekly alternative newspapers in the Bay Area during the damages period, in the form of testimony from William Johnson, who published the two Bay Weeklies—the Palo Alto Weekly and the Pacific Sun—used as comparables in Kupperberg's model. Many of the advertisers in the Guardian and the SF Weekly also advertise concurrently in these two Bay Weeklies. Johnson testified that the damage analysis by Kupperberg properly compared the Guardian and the SF Weekly with the Bay Weeklies he published in terms of content, circulation, marketing strategies and advertising revenues. He added that the New Times weeklies, with the exception of geography, were also “quite comparable” to the Guardian and the SF Weekly.

Johnson offered the opinion that the revenue and profit figures given by Kupperberg were correct. According to Johnson, the alternative weekly newspapers did not suffer from the “business downturn” during the damages period or the increase in internet advertising in the same way as did daily newspapers. He testified that the relocation of advertising revenues from the daily newspapers to the internet has not occurred to any appreciable degree with non-daily newspapers. FN7 Johnson observed “no impact” on any of his papers from internet advertising. Both the Palo Alto Weekly and the Pacific Sun, which were not affected by the SF Weekly's below-cost advertising, realized an average “gradual increase in display advertising revenues” and profits during the damages period. FN8 Johnson further testified that an offer by a competitor of advertising rates below the rate card has a “very large impact” on pricing and advertising revenue.

FN7. The reason, suggested Johnson, is that the editorial content of weekly newspapers is quite different and more localized than the daily papers, and advertisers “have no other place” to go, including the internet, to reach the audience of the alternative weeklies.

FN8. The Pacific Sun was purchased by Johnson in 2004, and became profitable by 2007.

At the conclusion of trial, the jury found that defendants sold advertising space at a price below cost for the purpose of harming plaintiff as a competitor in violation of section 17043. A verdict was rendered in favor of plaintiff and against each of the defendants in the total amount of $15,923,521.82—that is, $6,395,636 in actual damages suffered by plaintiff, partially trebled, **402 plus prejudgment interest. This appeal followed.

**DISCUSSION**

I. The Element of Recoupment of Losses.

Defendants argue that a series of errors was committed by the trial court, due to the court’s failure to recognize that a defendant's ability to recoup losses following below-cost pricing is an essential
element of proof of a *453 violation of section 17043. Referring to "parallel federal and state predatory pricing laws," defendants maintain that an "objectively reasonable probability of recouping" losses "through later monopoly pricing" must be established by the plaintiff in a section 17043 action.

The trial court denied defendants' motion for summary judgment, partially excluded proffered defense evidence on recoupment, denied motions for directed verdict, refused to give a recoupment instruction proposed by the defense, gave the plaintiff's instruction that no proof the "defendant would have had a reasonable expectation of recouping its losses by eliminating the plaintiff as a competitor" was necessary, **403 and finally denied a motion for judgment notwithstanding the verdict.

FN9. Defendants' proposed instruction No. 35 refused by the court was: "In order to recover, plaintiff must show that defendants had the motive to sell advertising below cost for the purpose and desire of injuring competitors or destroying competition, and also that they had the purpose and ability to recover any of their own lost profits after they have driven the plaintiff out of the market." In full, plaintiff's instruction given by the court was: "Plaintiff need not prove that it was economically rational for any defendant to act with the purpose of injuring competitors or destroying competition, or that a defendant would have had a reasonable expectation of recouping its losses by eliminating the plaintiff as a competitor. However, such evidence may be considered to the extent that it is relevant to a defendant's purpose."

[3][4][5] The issue of recoupment ability as an element of an action for below-cost pricing under the Unfair Practices Act (§ 17000 et seq.) **403 has not yet been resolved, and requires that we undertake an interpretation of section 17043. "In interpreting this statute, our goal is to determine the intent of the Legislature and thereby effectuate the purpose of the law. [Citation.] To do so, we apply certain fundamental rules of statutory interpretation. "Our first step [in determining the Legislature's intent] is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning. [Citations.]" (Colgan v. Leatherman Tool Group, Inc. (2006) 135 Cal.App.4th 663, 683, 38 Cal.Rptr.3d 36.) We **403 reject an interpretation that would render *454 particular terms mere surplusage, and instead seek to give significance to every word. (City of San Jose v. Superior Court (1993) 5 Cal.4th 47, 55, 19 Cal.Rptr.2d 73, 850 P.2d 621.) "When the language of a statute is clear, we need go no further. However, when the language is susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (Nolan v. City of Anaheim (2004) 33 Cal.4th 335, 340, 14 Cal.Rptr.3d 857, 92 P.3d 350.)

FN10. For convenience, we will refer to the Unfair Practices Act as the UPA, to distinguish it from related but separate statutory schemes, which have been referred to as the Unfair Competition Law and the Unfair Business Practices Act (§§ 17200 et seq.; 17500 et seq.). (See Cel–Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20
We commence our examination of section 17043 by observing the obvious: the language of the statute does not expressly mention recoupment in any way. Section 17043 provides: “It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof to such vendor, or to give away any article or product, for the purpose of injuring competitors or destroying competition.” Under section 17071, “proof of one or more acts of selling or giving away any article or product below cost or at discriminatory prices, together with proof of the injurious effect of such acts, is presumptive evidence of the purpose or intent to injure competitors or destroy competition.” Recoupment is nowhere referred to in the governing statutes.

Established law has also not specified that ability to recoup losses is an element of the statutory prohibition. To prove a violation of section 17043, the cases have declared that a plaintiff must allege and prove two elements: (1) below-cost sales undertaken for the purpose of injuring competitors or destroying competition that (2) have resulted in a competitive injury. (Cel–Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra, 20 Cal.4th 163, 175, 83 Cal.Rptr.2d 548, 973 P.2d 527; Fisherman’s Wharf Bay Cruise Corp. v. Superior Court (2003) 114 Cal.App.4th 309, 330, 7 Cal.Rptr.3d 628; Turnbull & Turnbull v. ARA Transportation, Inc. (1990) 219 Cal.App.3d 811, 819–820, 268 Cal.Rptr. 856.)

[6][7][8] Thus, as defendants recognize, recoupment as an element of the statutory cause of action must be added to section 17043 “by necessary implication from its consumer-welfare purpose.” We do not lightly imply terms or requirements that have not been expressly included in a statute. (People v. Gardeley (1996) 14 Cal.4th 605, 622, 59 Cal.Rptr.2d 356, 927 P.2d 713; Alpha Mechanical, Heating & Air Conditioning, Inc. v. Travelers Casualty & Surety Co. of America (2005) 133 Cal.App.4th 1319, 1340, 35 Cal.Rptr.3d 496.) “[A]n intention to legislate by implication is not to be presumed.” (Citizens for Better Streets v. Board of Supervisors (2004) 117 Cal.App.4th 1, 6, 11 Cal.Rptr.3d 349.) The courts are not authorized to insert provisions or rewrite a statute to conform to an assumed intention which does not appear from its language. (Stop Youth Addiction, Inc. v. Lucky Stores, Inc. (1998) 17 Cal.4th 553, 573, 71 Cal.Rptr.2d 731, 950 P.2d 1086; Lewco Iron Metals, Inc. v. Superior Court (1999) 76 Cal.App.4th 837, 843, 90 Cal.Rptr.2d 671.)

Defendants’ argument for an implied recoupment provision rests on federal laws, particularly the Robinson–Patman Act (15 U.S.C. §§ 13, 21) and section 2 of the Sherman Act (15 U.S.C. § 2), along with predatory pricing laws enacted by other states. We have no dispute with the first part of defendants’ premise that in predatory pricing actions pursued under federal law and some state laws, two prerequisites to recovery must be proved by the plaintiff: first, a rival’s low prices are below an appropriate measure of its rival’s costs; and second, the defendant had a reasonable prospect of recouping its investment in below-cost prices. (Brooke Group Ltd. v. Brown & Williamson Tobacco Corp. (1993) 509 U.S. 209, 222, 224, 113 S.Ct. 2578, 125 L.Ed.2d 168; Vollrath Co. v. Sammi Corp. (9th Cir.1993) 9 F.3d 1455, 1463.) The United States Supreme Court has declared: “‘For the investment to be rational, the [predator] must have a reasonable expectation of recovering in the form of later monopoly profits, more than the losses suffered.’ [Citation.] Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuc-
successful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers. [¶] ... [¶] For recoupment to occur, below-cost pricing must be capable, as a threshold matter, of producing the intended effects on the firm’s rivals, whether driving them from the market, or ... causing them to raise their prices to supracompetitive levels within a disciplined oligopoly.” (Brooke Group Ltd., supra, at pp. 224–225, 113 S.Ct. 2578.)

Where we find fault with defendants' argument is in the assertion that section 17043 is entirely analogous to the federal and sister-state predatory pricing laws, and must therefore be interpreted correspondingly. Section 17043 recites distinctive language, and has dissimilar elements and a different focus than defendants' proffered statutory counterparts. The predatory pricing statutes referred to by defendants may all prohibit discriminatory or below-cost pricing, but the federal and other state predatory pricing laws, unlike section 17043, do not include an intent requirement. (A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc. (7th Cir.1989) 881 F.2d 1396, 1401–1402.) The federal law instead looks to the ultimate monopolistic impact and threatened harm produced by the pricing scheme—that is, the probability of recoupment through future supracompetitive pricing upon elimination of competitors. FN11 (See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., supra, 509 U.S. 209, 224–225, 113 S.Ct. 2578, 125 L.Ed.2d 168; Cargill, Inc. v. Monfort of Colorado, Inc. (1986) 479 U.S. 104, 117–118, 107 S.Ct. 484, 93 L.Ed.2d 427; Matsushita Elec. Industrial Co. v. Zenith Radio (1986) 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538; A.A. Poultry Farms, Inc., supra, at pp. 1400–1402; Indiana Grocery, Inc. v. Super Valu Stores, Inc. (7th Cir.1989) 864 F.2d 1409.) Even if business competitors engage in predatory pricing with the utmost malice directed at each other, the federal law is unconcerned unless predatory losses may be recouped and competition is thereby impaired. As the Supreme Court has observed concerning the federal law on predatory pricing, “Absent some assurance that the hoped-for monopoly will materialize, and that it can be sustained for a significant period of time, ‘[t]he predator must make a substantial investment with no assurance that it will pay off.’ [Citation.] For this reason, there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.” (Matsushita Elec., supra, at p. 589, 106 S.Ct. 1348.)

FN11. For instance, section 13(a) of the Robinson–Patman Act forbids price discrimination “where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce...” (15 U.S.C. § 13(a), italics added.)

[9] In section 17043, in contrast, the very gravamen of the offense is the purpose underlying the anticompetitive act, rather than the actual or threatened harm to competition. The intent or purpose of the below-cost sale is at the heart of the statute, and distinguishes the violation from a below-cost pricing strategy undertaken for legitimate, nonpredatory business reasons. (Food and G. Bureau of S. California v. United States (9th Cir.1943) 139 F.2d 973, 974.) Section 17043 “does not make all sales below average total cost illegal per se. Instead, such sales must have been made ‘for the purpose of injuring competitors or destroying competition.’ [Citations.]” (William Inglis, etc. v. ITT Continental Baking Co. (9th Cir.1981) 668 F.2d 1014, 1049; see also Food & G. Bureau, Inc., supra, at pp. 974–975.) The intent requirement imposed by section 17043 is an especially stringent one. “Section 17043 uses the word ‘purpose,’ not ‘intent,’ not ‘knowledge.’ ” (Cel–Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra, 20 Cal.4th 163, 174, 83 Cal.Rptr.2d 548, 973 P.2d 527.) Therefore, the California Supreme Court has concluded “that to violate section 17043, a company must act with the purpose, i.e., the desire, of injuring competitors or destroying competition.” (Page 15

Id. at pp. 174–175, 83 Cal.Rptr.2d 548, 973 P.2d 527; see also Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 323, 70 Cal.Rptr. 849, 444 P.2d 481; Fisherman’s Wharf Bay Cruise Corp. v. Superior Court, supra, 114 Cal.App.4th 309, 330, 7 Cal.Rptr.3d 628.)

[10] Further, section 17043 does not require an anticompetitive impact. “[A]n injurious effect is not an essential element of the violation. The *457 violation is complete when sales below cost are made with the requisite intent and not within any of the exceptions.” (People v. Pay Less Drug Store (1944) 25 Cal.2d 108, 113–114, 153 P.2d 9.) The language of sections 17043 and 17071 make “it sufficiently clear that the Legislature deemed that injury to a competitor or destruction of competition was an ‘injurious effect,’ and therefore within the ban of the act; and that it was not necessary to await success in the monopolistic effort before the measures provided to safeguard the public interest and welfare could be invoked.” (Pay Less Drug, supra, at p. 113, 153 P.2d 9.) While evidence of an injury due to a below-cost pricing scheme may establish the rebuttable statutory inference of unlawful purpose, the plaintiff may also prove purpose independently without any injurious effect.

Even the objectives of the laws, though certainly similar, are not identical. The Sherman Act and Robinson–Patman Act (15 U.S.C. § 13(a)) seek to prevent anticompetitive acts that impair competition or harm competitors, whereas the UPA reflects a broader “[l]egislative concern not only with the maintenance of competition, but with the maintenance of ‘fair and honest competition.’” [Citations.]” (ABC Internat. Traders, Inc. v. Matsushita Electric Corp. (1997) 14 Cal.4th 1247, 1262, 61 Cal.Rptr.2d 112, 931 P.2d 290.) We disagree with defendants’ characterization of the UPA as legislation that was merely “intended to protect the public, not individual competitors.” The UPA has been described by our high court “as a legislative attempt ‘to regulate business as a whole by prohibiting practices which the legislature has determined constitute unfair trade practices.’” (Wholesale T. Dealers v. National etc. Co. (1938) 11 Cal.2d 634, 643 [82 P.2d 3, 118 A.L.R. 486]; see also Max Factor & Co. v. Kunsman (1936) 5 Cal.2d 446, 447 [55 P.2d 177] (dis. opn. of Shenk, J.) [UPA ‘appears to be a painstaking endeavor**406 by the legislature to combat the abuses which the business interests have deemed unfair practices in the competitive field.’].)” (Id. at p. 1256, 61 Cal.Rptr.2d 112, 931 P.2d 290.) The history of the amalgamation of statutes that comprise the UPA “teaches that a primary concern in the enactment of the UPA was the protection of smaller, independent retailers, especially grocers, against unfair competitive practices of the large chain stores. As a contemporary commentator explained, the prohibitions added in 1933 on secret rebates and unearned discounts (now section 17045) and below-cost sales (now section 17043) ‘are designed to protect the retailer whose more powerful neighbor is attempting to drive him out of business.’” [Citations.]” (ABC Internat., supra, at p. 1261, 61 Cal.Rptr.2d 112, 931 P.2d 290; see also Fisherman’s Wharf Bay Cruise Corp. v. Superior Court, supra, 114 Cal.App.4th 309, 322, 7 Cal.Rptr.3d 628.) The defendant's ability to recoup losses is unnecessary to the dual objectives of preventing unfair trade practices and protecting comparatively smaller enterprises from predatory pricing schemes of larger competitors.

Thus, California and federal cases have recognized that the UPA in many respects does not mirror federal predatory pricing law. *458(William Inglis, etc. v. ITT Continental Baking Co., supra, 668 F.2d 1014, 1049; Kirk–Mayer, Inc. v. Pac Ord, Inc. (C.D.Cal.1986) 626 F.Supp. 1168, 1173; Fisherman’s Wharf Bay Cruise Corp. v. Superior Court, supra, 114 Cal.App.4th 309, 325, 7 Cal.Rptr.3d 628.) FN12 Defendant's reliance on federal law “fails to acknowledge the significant differences between the language of the Sherman Act, the federal antitrust statute prohibiting predatory below-cost pricing, and its state counterpart, section 17043 of the UPA.” (Fisherman’s Wharf Bay Cruise Corp., supra, at p. 325, 7 Cal.Rptr.3d 628.) “It has
been observed that ‘[t]he UPA, in contrast to the federal antitrust statutes, is precisely drawn to eliminate defined commercial practices such as predatory pricing. Therefore, changing judicial perspectives on antitrust enforcement have far less influence on the development of California predatory pricing law than on the development of the federal counterparts.’ (McCall, Private Enforcement of Predatory Price Laws Under the California Unlawful Practices Act and the Federal Antitrust Acts (1997) 28 Pacific L.J. 311, 315; ...)

FN12. In contrast, the federal anticompetition philosophies of the Sherman and Robinson–Patman Acts are often valuable in discussing the provisions of the California Cartwright Act (§ 16700 et seq.). (See SC Manufactured Homes, Inc. v. Liebert (2008) 162 Cal.App.4th 68, 90, 76 Cal.Rptr.3d 73.)

Additional features of the statutory construct of the UPA further persuade us that implication of recoupment ability as a requirement in section 17043 is neither necessary nor intended. Within other unfair trade provisions of the UPA that prohibit loss leaders (§§ 17030, 17044) and secret discriminatory rebates or allowances (§ 17045), the Legislature has seen fit in the language of the statutes to refer to potential injury to a competitor or the competitive structure, while statutes that prohibit locality price discrimination (§§ 17040–17042), like section 17043, are directed at the intent of the violation.

FN13. For instance, section 17030 defines a “loss leader” as any article or product sold at less than cost: “(a) Where the purpose is to induce, promote or encourage the purchase of other merchandise; or (b) Where the effect is a tendency or capacity to mislead or deceive purchasers or prospective purchasers; or (c) Where the effect is to divert trade from or otherwise injure competitors.” (Italics added.) Section 17045 provides: “The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is unlawful.” (Italics added.) However, section 17040, more in line with section 17043, prohibits locality discrimination in the “production, manufacture, distribution or sale of any article or product of general use or consumption, with intent to destroy the competition of any regular established dealer in such article or product, or to prevent the competition of any person who in good faith, intends and attempts to become such dealer, to create locality discriminations.” (Italics added.)

Finally, we are not convinced by defendants' argument that the “severe consequences” of violation of section 17043—which may include fines, treble damages, and even potential criminal sanctions—make the statute “draconian” without an implied recoupment requirement. The rigorous task imposed upon the plaintiff in a section 17043 action to prove “that the below-cost sales were done ‘for the purpose of injuring competitors or destroying competition’ ” makes proof of a statutory violation “formidable” enough to justify the associated penalties. (Fisherman's Wharf Bay Cruise Corp. v. Su-
In light of the distinctions we discern, some glaring, some subtle, between section 17043 and the federal or other state predatory pricing laws, FN14 and particularly in light of the conspicuous focus of section 17043 upon the mental state of defendants' purpose rather than ultimate impact of below-cost pricing, we decline to imply a recoupment element in the statute where none has been expressed. We therefore conclude that the trial court, in its rulings on motions, the presentation of evidence, and instructions, did not err by refusing to recognize defendants' recoupment claim. FN15


FN15. The instruction to the jury that specified what the plaintiff did not need to prove—that it was economically rational for any defendant to act with the purpose of injuring competitors or destroying competition, or that a defendant would have had a reasonable expectation of recouping its losses by eliminating the plaintiff as a competitor may have been unnecessary, but we find that it was not prejudicial error.

II. The Instructions on Purpose to Harm a Competitor.

[11] We turn to defendants' challenge to the instructions and accompanying verdict form on the “purpose requirement” of section 17043. Defendants claim the “instructions and verdict form erroneously permitted the jury to base liability on an intent to harm a single competitor,” rather than “the UPA term ‘competitors.’ ” (Italics added.) Two instructions are at issue. In the first, the court explained the statutory presumption by stating that if the jury found “any below-cost sales injured the Bay Guardian as a competitor, it is presumed that defendants' purpose was to injure competitors and destroy competition.” In the second, the court advised the jury that a “defendant does not act with the required ‘purpose’ under the statute merely because it had knowledge of probable substantial harm to a competitor or that customers would be diverted from a competitor.” (Italics added.) The verdict form asked the jury to determine if defendants' purpose was to “injure a competitor or destroy competition.” Defendants maintain that the effect of the instructions and verdict form was to direct the jury to “impose liability merely by finding defendants made below-cost sales with a subjective intent to harm [the Guardian] alone,” in contradistinction to the statutory language which prohibits below-cost pricing “for the purpose of injuring competitors or [destroying] competition.” (Italics added.) Defendants' position is that the jury “should have evaluated whether defendants' purpose was to inflict market-wide injury.”

[12] Defendants' proposed interpretation of section 17043 is at odds with both common sense and the objectives of the statute. Defendants would have us interpret the law to prohibit below-cost pricing only if multiple competitors are the target of an unlawful marketing scheme. As we have observed, the “declared purposes of the UPA 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.’ ” (§ 17001.)” ( ABC Inter- nat. Traders, Inc. v. Matsushita Electric Corp., supra, 14 Cal.4th 1247, 1256, 61 Cal.Rptr.2d 112, 931 P.2d 290.) The Legislature has also
“specifically directed that the UPA's provisions ‘shall be liberally construed that its beneficial purposes may be subserved.’ (§ 17002.)” (Ibid; see also Co–Opportunities v. National Broadcasting Co. (N.D.Cal.1981) 510 F.Supp. 43, 49–50.) Thus, section 17043, like the remainder of the UPA, seeks to maintain fair and honest competition to protect smaller, independent retailers from the predatory practices of larger, more controlling competitors. (ABC, supra, at p. 1262, 61 Cal.Rptr.2d 112, 931 P.2d 290.) The prohibitions against below-cost sales “‘are designed to protect ... [a competitor ] whose more powerful neighbor is attempting to drive him out of business.’” [Citations.]” (Fisherman’s Wharf Bay Cruise Corp. v. Superior Court, supra, 114 Cal.App.4th 309, 322, 7 Cal.Rptr.3d 628, italics added, quoting from ABC Internat. Traders, Inc. v. Matsushita Electric Corp., supra, at p. 1261, 61 Cal.Rptr.2d 112, 931 P.2d 290.) “[I]njury to a competitor or destruction of competition” is considered an “‘injurious effect,’ ” and therefore within the ban of the UPA. (People v. Pay Less Drug Store, supra, 25 Cal.2d 108, 113, 153 P.2d 9, italics added.) In short, section 17043 is designed to reach a one-on-one clash between competitors, not just an effect on competition.

[13] A literal reading of section 17043 to require at least one economic actor in the field in addition to the defendant, so as to injure multiple competitors, would deprive the statute of much of its utility in at least two practical situations. If a given plaintiff and defendant are the only providers of an article or product, any head-to-head competition between them would *be beyond the reach of section 17043 because neither is “injuring competitors.” Indeed, head-to-head competition was the legal focus of the section 17043 claim in **409 Fisherman’s Wharf Bay Cruise, supra. (The plaintiff was the Red & White Fleet, and defendant was Blue & Gold Fleet.) Moreover, defendants' suggested interpretation of the law would immunize a business which serially engages in below-cost pricing to eliminate competitors one at a time, thereby permitting the very unlawful practices the statute seeks to proscribe. We are guided by maxims of statutory interpretation, which direct us to avoid such illogical and meaningless consequences. (People v. Navarro (2007) 40 Cal.4th 668, 680, 54 Cal.Rptr.3d 766, 151 P.3d 1177.) “‘If possible, the words should be interpreted to make them workable and reasonable [citations], ... practical [citations], in accord with common sense and justice, and to avoid an absurd result [citations].’” [Citation.]” (Cummings v. Stanley (2009) 177 Cal.App.4th 493, 508, 99 Cal.Rptr.3d 284.) Giving the statute an interpretation that reaches only plural rather than single competitors also conflicts with the more general directive of the Business and Professions Code that words used in the singular or plural refer to both. (§ 23008; see also People v. Manfredi (2008) 169 Cal.App.4th 622, 363, 86 Cal.Rptr.3d 81; Cheek v. Superior Court (2002) 103 Cal.App.4th 520, 525, 126 Cal.Rptr.2d 820; San Gabriel Valley Water Co. v. Hartford Accident & Indemnity Co. (2000) 82 Cal.App.4th 1230, 1240, 98 Cal.Rptr.2d 807.) We find that section 17043 applies to acts of below-cost pricing committed for the purpose of injuring either a single or multiple competitors or destroying competition. Therefore, the reference to a single competitor in the instructions and verdict form was not incorrect in the present case, particularly inasmuch as only a single competitor was the focus of the predatory pricing scheme.

FN16. Section 23008 reads: “‘Person’ includes any individual, firm, copartnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, or any other group or combination acting as a unit, and the plural as well as the singular number.”

III. The Instructions on the Statutory Presumption.

We move to defendants' contention that the instructions on the statutory presumption of improper purpose (§ 17071) were defective. The court instructed the jury on the essential element of purpose
by stating: “It is only when a defendant sells advertising below cost and does so with the purpose, that is, desire of injuring competitors or destroying competition, that such conduct is unlawful under California law.” The court also advised the jury that, “Purpose may be inferred from circumstantial evidence of a party’s conduct or course of dealing, and may be proved the same way as any other fact may be proved either by direct or circumstantial evidence or by both direct and circumstantial evidence.” In addition, pursuant to section 17071 the court gave the following instruction on the presumption of unlawful purpose: *462 “If you find that any defendant sold advertising space below cost, and any below-cost sales injured the Bay Guardian as a competitor, it is presumed that defendants’ purpose was to injure competitors and destroy competition. But this presumption may be overcome by other evidence.” The court then proceeded to describe the nature of evidence that did not prove unlawful purpose. Defendants complain that the presumption instruction was “incorrect for two reasons” and thus should not have been given: first, once some rebuttal evidence was adduced that defendants “did not act with an anticompetitive purpose,” the presumption was rendered inoperative and the instruction became irrelevant; and second, the instruction**410 “improperly shifted plaintiff’s burden to prove purpose to defendants to disprove it.”

[14][15][16][17][18] “In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys.” (People v. Andrade (2000) 85 Cal.App.4th 579, 585, 102 Cal.Rptr.2d 254.) “A court is required to instruct on the law applicable to the case, but no particular form is required; the instructions must be complete and a correct statement of the law. [Citation.] The meaning of instructions is tested by ‘whether there is a “reasonable likelihood” that the jury misconstrued or misapplied the law in light of the instructions given, the entire record of trial, and the arguments of counsel.’ [Citation.] ‘[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.” [Citation.]’ [Citation.] Thus, absence of an essential element in a given instruction may be supplied by reference to another instruction, or cured in light of the instructions considered as a whole.” (People v. Fiu (2008) 165 Cal.App.4th 360, 370–371, 81 Cal.Rptr.3d 32.)

Dealing first with the claim that the presumption was no longer operative once defense presented evidence “sufficient to support a finding of the nonexistence of the presumption,” defendants do not dispute the presentation of adequate foundational evidence by plaintiff to trigger the initial presumption. Instead they claim that the presumption was effectively rebutted by their “denial of anti-competitive purpose,” which was “sufficient evidence to take section 17071’s presumption out-of-play [sic].” The propriety of the presumption instruction in the present case depends upon whether the section 17071 presumption of purpose is viewed as one affecting the burden of proof or the burden of presenting evidence. The distinction has an important consequence when conflicting evidence is presented. “A rebuttable presumption may affect the burden of proof or may affect the burden of producing evidence. (Evid.Code, § 601.)” (In re Heather B. (1992) 9 Cal.App.4th 535, 560, 11 Cal.Rptr.2d 891.) “A presumption affecting the burden of producing evidence requires the ultimate fact to be found from proof of the predicate facts in the absence of other evidence. If contrary evidence is introduced then the presumption has no further effect and the matter must be determined on the evidence presented. (Evid.Code, § 604.)” (Id. at p. 561, 11 Cal.Rptr.2d 891.)

[19] In contrast, a “presumption affecting the burden of proof has a more substantial impact in determining the outcome of litigation. The effect of a presumption affecting the burden of proof is “to impose upon the party against whom it operates the burden of proof as to the nonexistence of the pre-
sumed fact.” (Evid.Code, § 606.)’... [Citation.]” (Gee v. Workers’ Comp. Appeals Bd. (2002) 96 Cal.App.4th 1418, 1425, 118 Cal.Rptr.2d 105; see also Shadow Traffic Network v. Superior Court (1994) 24 Cal.App.4th 1067, 1085, 29 Cal.Rptr.2d 693.) “[O]nce a presumption affecting the burden of proof comes into play, that is an issue which must be presented to the trier of fact.” (Haycock v. Hughes Aircraft Co. (1994) 22 Cal.App.4th 1473, 1495, 28 Cal.Rptr.2d 248.) “If contrary evidence is introduced, the jury has the right to weigh the evidence and determine whether it sufficiently contradicts the presumption.” (Noble v. Key System, Ltd. (1935) 10 Cal.App.2d 132, 138, 51 P.2d 887.) A presumption affecting the burden of proof “survives even though there is a conflict in the evidence,” **411 so “in the face of conflicting evidence, the issue must be presented to the jury so long as there is some logical basis for the presumption.” (Haycock, supra, at p. 1491, 28 Cal.Rptr.2d 248.)

[20] We thus examine the nature and result of the presumption. “Under section 17071, ‘proof of one or more acts of selling or giving away any article or product below cost or at discriminatory prices, together with proof of the injurious effect of such acts, is presumptive evidence of the purpose or intent to injure competitors or destroy competition.’ ” (Fisherman’s Wharf Bay Cruise Corp. v. Superior Court, supra, 114 Cal.App.4th 309, 321, 7 Cal.Rptr.3d 628.) “To create this presumption proof must be had, among other things, of one or more sales of an article or product below cost together with proof of the injurious effect of the practice.” (Dooley’s Hardware Mart v. Food Giant Markets, Inc. (1971) 21 Cal.App.3d 513, 517, 98 Cal.Rptr. 543.) “Injurious effect” is not explicitly defined in the statute, but has been interpreted to mean “injury to a competitor or destruction of competition,” consistent with the language of section 17043. (People v. Pay Less Drug Store, supra, 25 Cal.2d 108, 113, 153 P.2d 9.)

The functionally identical presumption created by section 17071.5 FN17 of the UPA for loss leader sales has been found to be “a presumption affecting the *464 burden of proof,” rather than the burden of producing evidence—that is, if the presumption arises defendants are required to prove “they did not intend to injure competitors or destroy competition” through their use of predatory pricing. (Dooley’s Hardware Mart v. Food Giant Markets, Inc., supra, 21 Cal.App.3d 513, 517–518, 98 Cal.Rptr. 543, italics added.)

FN17. Section 17071.5 reads: “In all actions brought under this chapter proof of limitation of the quantity of any article or product sold or offered for sale to any one customer to a quantity less than the entire supply thereof owned or possessed by the seller or which he is otherwise authorized to sell at the place of such sale or offering for sale, together with proof that the price at which the article or product is so sold or offered for sale is in fact below its invoice or replacement cost, whichever is lower, raises a presumption of the purpose or intent to injure competitors or destroy competition. This section applies only to sales by persons conducting a retail business the principal part of which involves the resale to consumers of commodities purchased or acquired for that purpose, as distinguished from persons principally engaged in the sale to consumers of commodities of their own production or manufacture.”

[21] Like section 17071.5, we conclude that the section 17071 presumption is properly categorized as one that affects the burden of proof rather than merely the burden of persuasion. (See Dooley’s Hardware Mart v. Food Giant Markets, Inc., supra, 21 Cal.App.3d 513, 517–518, 98 Cal.Rptr. 543.) “A presumption affecting the burden of proof shifts the burden of persuasion on an ultimate fact to the party against whom the presumption operates upon a finding of the predicate facts. (Evid.Code, § 606.)” (In re Heather B., supra, 9 Cal.App.4th 535, 560, 11 Cal.Rptr.2d 891.) “A presumption meant to
establish or implement some public policy other than facilitation of the particular action in which it applies is a presumption affecting the burden of proof.” (*People v. Dubon* (2001) 90 Cal.App.4th 944, 953, 108 Cal.Rptr.2d 914; see also Evid.Code, § 605; *Reeves v. Workers’ Comp. Appeals Bd.* (2000) 80 Cal.App.4th 22, 30, 95 Cal.Rptr.2d 74.) As we view section 17071, the presumption is indicative of an effort by the Legislature to implement the public policy of facilitating proof of unlawful purpose of below-cost sales that injure a competitor by shifting the burden of proof to **412** the party more in possession of relevant evidence demonstrating the true intent associated with the pricing scheme. (*People v. Pay Less Drug Store,* supra, 25 Cal.2d 108, 114–115, 153 P.2d 9.) Thus, the presumption is intended to affect the burden of proof. (*Gee v. Workers’ Comp. Appeals Bd.*, supra, 96 Cal.App.4th 1418, 1426, 118 Cal.Rptr.2d 105.)

Further, the stated consequence of the articulated presumption demonstrates that it modifies the burden of proof. “[T]he obvious and only effect of the presumption created by section 17071” is to require the defendant “to go forward with proof to negate the presumption of wrongful intent.” (*Western Union Financial Services, Inc. v. First Data Corp.* (1993) 20 Cal.App.4th 1530, 1540, 25 Cal.Rptr.2d 341, italics added.) “[T]he allocation of evidentiary burdens [under section 17071 is] as follows: ‘Assuming proof of injury to a competitor has been made, California law allows plaintiffs to establish a prima facie case with proof of prices below average total cost. The defendant then has the burden of negating the inference of illegal intent or establishing an affirmative defense.’ [Citation.]” *Turnbull & Turnbull v. ARA Transportation, Inc.*, supra, 219 Cal.App.3d 811, 824–825, 268 Cal.Rptr. 856. The presumption “may be rebutted by establishing one of the statute's affirmative defenses, such as meeting competition, see Cal. Bus. & Prof.Code § 17050, or by showing that the sales ‘were made in good faith and not for the purpose of injuring competitors or destroying competition.’ [Citation.]” (*William Inglis, etc. v. ITT Continental Baking Co.*, supra, 668 F.2d 1014, 1049; see also *Dooley's Hardware Mart v. Food Giant Markets, Inc.*, supra, 21 Cal.App.3d 513, 518, 98 Cal.Rptr. 543.) “After proof of the sales below cost and injury resulting therefrom, there is no undue hardship cast upon the defendants to require them to come forward with evidence of their true intent as against the prima facie showing, or with evidence which will bring them within a specified exception in the act.” (*People v. Pay Less Drug Store,* supra, 25 Cal.2d 108, 115, 153 P.2d 9.) Once the presumption is rebutted, “the burden shifts back to the moving party to offer actual proof of injurious intent.” (*Western Union Financial Services, Inc. v. First Data Corp.*, supra, at p. 1540, 25 Cal.Rptr.2d 341.)

The section 17071 presumption, being one that in both nature and consequence alters the burden of proof, did “ ‘not disappear in the face of evidence as to the nonexistence of the presumed fact....’ [Citations.]” (*Haycock v. Hughes Aircraft Co.*, supra, 22 Cal.App.4th 1473, 1495, 28 Cal.Rptr.2d 248.) Therefore, the fact that defendants denied any purpose to harm competition, and produced some evidence of good faith efforts to compete in the marketplace, did not negate plaintiff's right to an instruction on a presumption affecting the burden of proof of unlawful purpose. Defendants may have offered rebuttal evidence, but they did not negate the presumption by conclusive proof that negated unlawful purpose as a matter of law or compelled a finding on the issue in their favor based on this record. (See *Xebec Development Partners, Ltd. v. National Union Fire Ins. Co.* (1993) 12 Cal.App.4th 501, 552, 15 Cal.Rptr.2d 726, disapproved on other grounds in *Essex Ins. Co. v. Five Star Dye House, Inc.* (2006) 38 Cal.4th 1252, 1265, fn. 4, 45 Cal.Rptr.3d 362, 137 P.3d 192.)

[22][23] Despite the defense efforts to rebut the section 17071 presumption, at least substantial evidence in support of the presumption instruction remained. “A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which **413** is sup-
ported by substantial evidence.” (Soule v. General Motors Corp. (1994) 8 Cal.4th 548, 572, 34 Cal.Rptr.2d 607, 882 P.2d 298; see also Munoz v. City of Union City (2004) 120 Cal.App.4th 1077, 1107–1108, 16 Cal.Rptr.3d 521.) Substantial evidence necessary to support a jury instruction is “evidence sufficient to deserve consideration by the jury, i.e., evidence from which a *466 jury composed of reasonable [persons] could have concluded that the particular facts underlying the instruction did exist....” [Citation.]” (People v. Strozier (1993) 20 Cal.App.4th 55, 63, 24 Cal.Rptr.2d 362; see also People v. Marshall (1997) 15 Cal.4th 1, 39–40, 61 Cal.Rptr.2d 84, 931 P.2d 262; National Medical Transportation Network v. Deloitte & Touche (1998) 62 Cal.App.4th 412, 429, 72 Cal.Rptr.2d 720.) “Evidence is substantial if a reasonable jury could find it persuasive [citation] and therefore conclude ‘that the particular facts underlying the instruction did exist’ ” [citation].” (People v. Elam (2001) 91 Cal.App.4th 298, 308, 110 Cal.Rptr.2d 185.) Substantial evidence to support the presumption was presented, and the contradictory rebuttal evidence offered by defendants did not irrefutably disprove purpose. Plaintiff was therefore entitled to the benefit of an instruction on the section 17071 presumption, just as defendants were entitled to an instruction that the presumption was subject to rebuttal. (Lara v. Nevitt (2004) 123 Cal.App.4th 454, 460, 19 Cal.Rptr.3d 865; Haycock v. Hughes Aircraft Co., supra, 22 Cal.App.4th 1473, 1492, 1495, 28 Cal.Rptr.2d 248.)

Turning to the second prong of defendants' challenge to the presumption instruction, we find nothing in the instruction that erroneously shifted the burden of proof. The trial court gave a definitive standard instruction that plaintiff bore the burden to prove by a preponderance of the evidence all of the elements of the case, and specifically “that the defendant's purpose was to injure competitors or destroy competition.” Thus, the jury knew that plaintiff retained the essential burden to prove the unlawful purpose of the sales. The court then advised the jury that unlawful purpose “may be proved the same way as any other fact,” by direct or circumstantial evidence. The presumption was explained with an instruction that if the jury found “below-cost sales injured the Bay Guardian as a competitor, it is presumed that defendants' purpose was to injure competitors and destroy competition.” The rebuttal part of the instruction stated, “But this presumption may be overcome by other evidence.”

[24] The section 17071 instruction thus merely stated a rebuttable permissive presumption or inference, which allowed, but did not compel, the trier of fact to infer the elemental fact from proof by plaintiff of other foundational facts. (See People v. Parson (2008) 44 Cal.4th 332, 355–356, 79 Cal.Rptr.3d 269, 187 P.3d 1; People v. McCall (2004) 32 Cal.4th 175, 182–183, 8 Cal.Rptr.3d 337, 82 P.3d 351.) The instruction did not create a mandatory presumption that operated to shift plaintiff's burden of proof to the defense, as the jury was not required to draw the described inference. (People v. Parson, supra, at p. 356, 79 Cal.Rptr.3d 269, 187 P.3d 1; People v. McCall, supra, at p. 183, fn. 5, 8 Cal.Rptr.3d 337, 82 P.3d 351; People v. Yeoman (2003) 31 Cal.4th 93, 131, 2 Cal.Rptr.3d 186, 72 P.3d 1166.) Further, nothing in the instruction directly or indirectly relieved plaintiff of its *467 burden to establish proof of unlawful purpose. (People v. Prieto (2003) 30 Cal.4th 226, 248, 133 Cal.Rptr.2d 18, 66 P.3d 1123.) “The most common evidentiary device is the entirely permissive inference or presumption,” which “leaves the trier of fact free to credit or reject the inference and does not shift **414 the burden of proof” to the defense. (Ulster County Court v. Allen (1979) 442 U.S. 140, 157, 60 L.Ed.2d 777, 99 S.Ct. 2213.) In any event, given the court's other instructions regarding the burden of proof and proper consideration and weighing of evidence, the presumption instruction did not shift or reduce plaintiff's burden of proof in this case. (People v. Parson, supra, at p. 356, 79 Cal.Rptr.3d 269, 187 P.3d 1; Cristler v. Express Messenger Systems, Inc. (2009) 171 Cal.App.4th 72, 84, 89 Cal.Rptr.3d 34; Sargent Fletcher, Inc. v. Able Corp. (2003) 110 Cal.App.4th 1658,
1673–1674, 3 Cal.Rptr.3d 279; People v. Gonzalez (1995) 33 Cal.App.4th 1440, 1443, 39 Cal.Rptr.2d 778; People v. Carter (1993) 19 Cal.App.4th 1236, 1252–1253, 23 Cal.Rptr.2d 888. Furthermore, our duty is to look at the instructions as a whole, not in isolation, and we must assume jurors are able to correlate, follow, and understand the court's instructions. (People v. Vang (2009) 171 Cal.App.4th 1120, 1129, 90 Cal.Rptr.3d 328; People v. Ibarra (2007) 156 Cal.App.4th 1174, 1192–1193, 67 Cal.Rptr.3d 871.) We conclude that no shift in the burden of proof occurred with the presumption instruction, as the jury was aware from the totality of the instructions that a verdict could not be rendered in favor of plaintiff unless a finding was made based on a preponderance of the evidence that defendants did in fact make below-cost sales with the requisite purpose.

[25][26] The minor flaw we perceive in the instruction, when it is viewed in isolation, is that it was somewhat incomplete. In addition to the admonition that the presumption “may be overcome by other evidence,” the instruction should have more specifically advised the jury that the presumption was rebutted with proof by defendants of the nonexistence of the presumed fact of unlawful purpose by a preponderance of the evidence. (See Shadow Traffic Network v. Superior Court, supra, 24 Cal.App.4th 1067, 1085, 29 Cal.Rptr.2d 693; Haycock v. Hughes Aircraft Co., supra, 22 Cal.App.4th 1473, 1495, 28 Cal.Rptr.2d 248.) When we again view the instructions in their entirety, however, we find no prejudicial error. The additional instructions thoroughly defined for the jury the evidence that negated proof of purpose.

IV.-V. FN***

FN*** See footnote *, ante.

*468 DISPOSITION

Accordingly, the judgment against defendant East Bay Express is reversed. In all other respects the judgment is affirmed.

Respondent to recover costs on appeal.

We concur: MARCHIANO, P.J., and MARGULIES, J.

Cal.App. 1 Dist., 2010.
Bay Guardian Co. v. New Times Media LLC
Effective: January 1, 2008

West's Annotated California Codes Currentness
Civil Code (Refs & Annos)
Division 3. Obligations (Refs & Annos)
 Part 4. Obligations Arising from Particular Transactions (Refs & Annos)
 § 1749.5. Prohibited transactions; redemption or replacement; expiration dates; application of section; full refund

(a) It is unlawful for any person or entity to sell a gift certificate to a purchaser that contains any of the following:

(1) An expiration date.

(2) A service fee, including, but not limited to, a service fee for dormancy, except as provided in subdivision (e).

(b)(1) Any gift certificate sold after January 1, 1997, is redeemable in cash for its cash value, or subject to replacement with a new gift certificate at no cost to the purchaser or holder.

(2) Notwithstanding paragraph (1), any gift certificate with a cash value of less than ten dollars ($10) is redeemable in cash for its cash value.

(c) A gift certificate sold without an expiration date is valid until redeemed or replaced.

(d) This section does not apply to any of the following gift certificates issued on or after January 1, 1998, provided the expiration date appears in capital letters in at least 10-point font on the front of the gift certificate:

(1) Gift certificates that are distributed by the issuer to a consumer pursuant to an awards, loyalty, or promotional program without any money or other thing of value being given in exchange for the gift certificate by the consumer.

(2) Gift certificates that are donated or sold below face value at a volume discount to employers or to nonprofit and charitable organizations for fundraising purposes if the expiration date on those gift certificates is not more than 30 days after the date of sale.
(3) Gift certificates that are issued for perishable food products.

(e) Paragraph (2) of subdivision (a) does not apply to a dormancy fee on a gift card that meets all of the following criteria:

(1) The remaining value of the gift card is five dollars ($5) or less each time the fee is assessed.

(2) The fee does not exceed one dollar ($1) per month.

(3) There has been no activity on the gift card for 24 consecutive months, including, but not limited to, purchases, the adding of value, or balance inquiries.

(4) The holder may reload or add value to the gift card.

(5) A statement is printed on the gift card in at least 10-point font stating the amount of the fee, how often the fee will occur, that the fee is triggered by inactivity of the gift card, and at what point the fee will be charged. The statement may appear on the front or back of the gift card, but shall appear in a location where it is visible to any purchaser prior to the purchase thereof.

(f) An issuer of gift certificates may accept funds from one or more contributors toward the purchase of a gift certificate intended to be a gift for a recipient, provided that each contributor is provided with a full refund of the amount that he or she paid toward the purchase of the gift certificate upon the occurrence of all of the following:

(1) The funds are contributed for the purpose of being redeemed by the recipient by purchasing a gift certificate.

(2) The time in which the recipient may redeem the funds by purchasing a gift certificate is clearly disclosed in writing to the contributors and the recipient.

(3) The recipient does not redeem the funds within the time described in paragraph (2).

(g) The changes made to this section by the act adding this subdivision shall apply only to gift certificates issued on or after January 1, 2004.

(h) For purposes of this section, “cash” includes, but is not limited to, currency or check. If accepted by both parties, an electronic funds transfer or an application of the balance to a subscriber's wireless telecommunications account is permissible.
CREDIT(S)

(Added by Stats.1996, c. 933 (A.B.2466), § 1. Amended by Stats.1997, c. 472 (A.B.1054), § 1; Stats.2003, c. 116 (A.B.1092), § 2; Stats.2004, c. 319 (A.B.656), § 1; Stats.2007, c. 640 (S.B.250), § 1.)

Current with urgency legislation through Ch. 20 of 2013 Reg.Sess, also including Chs. 25-27, 29-32, 34-36, 41, 43, 54, and 57.

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END OF DOCUMENT
For the purpose of this article the worth or value of any thing advertised is the prevailing market price, whole-
sale if the offer is at wholesale, retail if the offer is at retail, at the time of publication of such advertisement in
the locality wherein the advertisement is published.

No price shall be advertised as a former price of any advertised thing, unless the alleged former price was the
prevailing market price as above defined within three months next immediately preceding the publication of the
advertisement or unless the date when the alleged former price did prevail is clearly, exactly and conspicuously
stated in the advertisement.

CREDIT(S)

(Added by Stats.1941, c. 63, p. 728, § 1.)

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43, 54, and 57.

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§ 1301. Former Price, Defined.

The term “former price” as used in Section 17501 of the Business and Professions Code and in this article includes but is not limited to the following words and phrases when used in connection with advertised prices; “formerly -,” “regularly -,” “usually -,” “originally -,” “reduced from ________,” “was ________ now ________,” “____% off.”

Effective: January 1, 2001

West's Annotated California Codes Currentness
Business and Professions Code (Refs & Annos)
Division 7. General Business Regulations (Refs & Annos)
Part 3. Representations to the Public (Refs & Annos)
Chapter 1. Advertising (Refs & Annos)
Article 2. Particular Offenses (Refs & Annos)
§ 17537.11. Unlawful advertising; coupons

(a) It is unlawful for any person to offer a coupon that is in any manner untrue or misleading.

(b) It is unlawful for any person to offer a coupon described as “free” or as a “gift,” “prize,” or other similar term if (1) the recipient of the coupon is required to pay money or buy any goods or services to obtain or use the coupon, and (2) the person offering the coupon or anyone honoring the coupon made the majority of his or her sales in the preceding year in connection with one or more “free,” “gift,” “prize,” or similarly described coupons.

(c) For purposes of this section:

(1) “Coupon” includes any coupon, certificate, document, discount, or similar matter that purports to entitle the user of the coupon to obtain goods or services for free or for a special or reduced price.

(2) “Sale” includes lease or rent.

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§ 17537. Unlawful advertising; conditional offer of prizes or gifts

(a) It is unlawful for any person to use the term “prize” or “gift” or other similar term in any manner that would be untrue or misleading, including, but not limited to, the manner made unlawful in subdivision (b) or (c).

(b) It is unlawful to notify any person by any means, as a part of an advertising plan or program, that he or she has won a prize and that as a condition of receiving such prize he or she must pay any money or purchase or rent any goods or services.

(c) It is unlawful to notify any person by any means that he or she will receive a gift and that as a condition of receiving the gift he or she must pay any money, or purchase or lease (including rent) any goods or services, if any one or more of the following conditions exist:

(1) The shipping charge, depending on the method of shipping used, exceeds (A) the average cost of postage or the average charge of a delivery service in the business of delivering goods of like size, weight, and kind for shippers other than the offeror of the gift for the geographic area in which the gift is being distributed, or (B) the exact amount for shipping paid to an independent fulfillment house or an independent supplier, either of which is in the business of shipping goods for shippers other than the offeror of the gift.

(2) The handling charge (A) is not reasonable, or (B) exceeds the actual cost of handling, or (C) exceeds the greater of three dollars ($3) in any transaction or 80 percent of the actual cost of the gift item to the offeror or its agent, or (D) in the case of a general merchandise retailer, exceeds the actual amount for handling paid to an independent fulfillment house or supplier, either of which is in the business of handling goods for businesses other than the offeror of the gift.

(3) Any goods or services which must be purchased or leased by the offeree of the gift in order to obtain the gift could have been purchased through the same marketing channel in which the gift was offered for a lower price without the gift items at or proximate to the time the gift was offered.
(4) The majority of the gift offeror's sales or leases within the preceding year, through the marketing channel in which the gift is offered or through in-person sales at retail outlets, of the type of goods or services which must be purchased or leased in order to obtain the gift item was made in conjunction with the offer of a gift.

This paragraph does not apply to a gift offer made by a general merchandise retailer in conjunction with the sale or lease through mail order of goods or services (excluding catalog sales) if (A) the goods or services are of a type unlike any other type of goods or services sold or leased by the general merchandise retailer at any time during the period beginning six months before and continuing until six months after the gift offer, (B) the gift offer does not extend for a period of more than two months, and (C) the gift offer is not untrue or misleading in any manner.

(5) The gift offeror represents that the offeree has been specially selected in any manner unless (A) the representation is true and (B) the offeree made a purchase from the gift offeror within the six-month period before the gift offer was made or has a credit card issued by, or a retail installment account with, the gift offeror.

(d) The following definitions apply to this section:

(1) “Marketing channel” means a method of retail distribution, including, but not limited to, catalog sales, mail order, telephone sales, and in-person sales at retail outlets.

(2) “General merchandise retailer” means any person or entity regardless of the form of organization that has continuously offered for sale or lease more than 100 different types of goods or services to the public in California throughout a period exceeding five years.

(e) Each violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both.

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§ 12024.2. Computation of untrue value at time of sale; misdemeanor; infraction; punishment; “overcharge” defined; lowest advertised price to be charged; prices subject to condition of sale

(a) It is unlawful for any person, at the time of sale of a commodity, to do any of the following:

(1) Charge an amount greater than the price, or to compute an amount greater than a true extension of a price per unit, that is then advertised, posted, marked, displayed, or quoted for that commodity.

(2) Charge an amount greater than the lowest price posted on the commodity itself or on a shelf tag that corresponds to the commodity, notwithstanding any limitation of the time period for which the posted price is in effect.

(b) A violation of this section is a misdemeanor punishable by a fine of not less than twenty-five dollars ($25) nor more than one thousand dollars ($1,000), by imprisonment in the county jail for a period not exceeding one year, or by both, if the violation is willful or grossly negligent, or when the overcharge is more than one dollar ($1).

(c) A violation of this section is an infraction punishable by a fine of not more than one hundred dollars ($100) when the overcharge is one dollar ($1) or less.

(d) As used in subdivisions (b) and (c), “overcharge” means the amount by which the charge for a commodity exceeds a price that is advertised, posted, marked, displayed, or quoted to that consumer for that commodity at the time of sale.

(e) Except as provided in subdivision (f), for purposes of this section, when more than one price for the same commodity is advertised, posted, marked, displayed, or quoted, the person offering the commodity for sale shall charge the lowest of those prices.

(f) Pricing may be subject to a condition of sale, such as membership in a retailer-sponsored club, the purchase of a minimum quantity, or the purchase of multiples of the same item, provided that the condition is conspicu-
ously posted in the same location as the price.

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§233.1 Former price comparisons.

(a) One of the most commonly used forms of bargain advertising is to offer a reduction from the advertiser's own former price for an article. If the former price is the actual, bona fide price at which the article was offered to the public on a regular basis for a reasonably substantial period of time, it provides a legitimate basis for the advertising of a price comparison. Where the former price is genuine, the bargain being advertised is a true one. If, on the other hand, the former price being advertised is not bona fide but fictitious -- for example, where an artificial, inflated price was established for the purpose of enabling the subsequent offer of a large reduction -- the "bargain" being advertised is a false one; the purchaser is not receiving the unusual value he expects. In such a case, the "reduced" price is, in reality, probably just the seller's regular price.

(b) A former price is not necessarily fictitious merely because no sales at the advertised price were made. The advertiser should be especially careful, however, in such a case, that the price is one at which the product was openly and actively offered for sale, for a reasonably substantial period of time, in the recent, regular course of his business, honestly and in good faith -- and, of course, not for the purpose of establishing a fictitious higher price on which a deceptive comparison might be based. And the advertiser should scrupulously avoid any implication that a former price is a selling, not an asking price (for example, by use of such language as, "Formerly sold at $XXX"), unless substantial sales at that price were actually made.

(c) The following is an example of a price comparison based on a fictitious former price. John Doe is a retailer of Brand X fountain pens, which cost him $5 each. His usual markup is 50 percent over cost; that is, his regular retail price is $7.50. In order subsequently to offer an unusual "bargain", Doe begins offering Brand X at $10 per pen. He realizes that he will be able to sell no, or very few, pens at this inflated price. But he doesn't care, for he maintains that price for only a few days. Then he "cuts" the price to its usual level -- $7.50 -- and advertises: "Terrific Bargain: X Pens, Were $10, Now Only $7.50!" This is obviously a false claim. The advertised "bargain" is not genuine.

(d) Other illustrations of fictitious price comparisons could be given. An advertiser might use a price at which he never offered the article at all; he might feature a price which was not used in
the regular course of business, or which was not used in the recent past but at some remote period in the past, without making disclosure of that fact; he might use a price that was not openly offered to the public, or that was not maintained for a reasonable length of time, but was immediately reduced.

(e) If the former price is set forth in the advertisement, whether accompanied or not by descriptive terminology such as "Regularly," "Usually," "Formerly," etc., the advertiser should make certain that the former price is not a fictitious one. If the former price, or the amount or percentage of reduction, is not stated in the advertisement, as when the ad merely states, "Sale," the advertiser must take care that the amount of reduction is not so insignificant as to be meaningless. It should be sufficiently large that the consumer, if he knew what it was, would believe that a genuine bargain or saving was being offered. An advertiser who claims that an item has been "Reduced to $9.99," when the former price was $10, is misleading the consumer, who will understand the claim to mean that a much greater, and not merely nominal, reduction was being offered. [Guide I]

§233.2 Retail price comparisons; comparable value comparisons.

(a) Another commonly used form of bargain advertising is to offer goods at prices lower than those being charged by others for the same merchandise in the advertiser's trade area (the area in which he does business). This may be done either on a temporary or a permanent basis, but in either case the advertised higher price must be based upon fact, and not be fictitious or misleading. Whenever an advertiser represents that he is selling below the prices being charged in his area for a particular article, he should be reasonably certain that the higher price he advertises does not appreciably exceed the price at which substantial sales of the article are being made in the area -- that is, a sufficient number of sales so that a consumer would consider a reduction from the price to represent a genuine bargain or saving. Expressed another way, if a number of the principal retail outlets in the area are regularly selling Brand X fountain pens at $10, it is not dishonest for retailer Doe to advertise: "Brand X Pens, Price Elsewhere $10, Our Price $7.50".

(b) The following example, however, illustrates a misleading use of this advertising technique. Retailer Doe advertises Brand X pens as having a "Retail Value $15.00, My Price $7.50," when the fact is that only a few small suburban outlets in the area charge $15. All of the larger outlets located in and around the main shopping areas charge $7.50, or slightly more or less. The advertisement here would be deceptive, since the price charged by the small suburban outlets would have no real significance to Doe's customers, to whom the advertisement of "Retail Value $15.00" would suggest a prevailing, and not merely an isolated and unrepresentative, price in the area in which they shop.

(c) A closely related form of bargain advertising is to offer a reduction from the prices being charged either by the advertiser or by others in the advertiser's trade area for other merchandise of like grade and quality -- in other words, comparable or competing merchandise -- to that being advertised. Such advertising can serve a useful and legitimate purpose when it is made clear to the consumer that a comparison is being made with other merchandise and the other merchandise is, in fact, of essentially similar quality and obtainable in the area. The advertiser
should, however, be reasonably certain, just as in the case of comparisons involving the same
merchandise, that the price advertised as being the price of comparable merchandise does not
exceed the price at which such merchandise is being offered by representative retail outlets in
the area. For example, retailer Doe advertises Brand X pen as having "Comparable Value
$15.00". Unless a reasonable number of the principal outlets in the area are offering Brand Y,
an essentially similar pen, for that price, this advertisement would be deceptive. [Guide II]

§233.3 Advertising retail prices which have been established or suggested by
manufacturers (or other nonretail distributors).

(a) Many members of the purchasing public believe that a manufacturer's list price, or suggested
retail price, is the price at which an article is generally sold. Therefore, if a reduction from this
price is advertised, many people will believe that they are being offered a genuine bargain. To
the extent that list or suggested retail prices do not in fact correspond to prices at which a
substantial number of sales of the article in question are made, the advertisement of a reduction
may mislead the consumer.

(b) There are many methods by which manufacturers' suggested retail or list prices are
advertised: Large scale (often nationwide) mass-media advertising by the manufacturer himself;
preticketing by the manufacturer; direct mail advertising; distribution of promotional material or
price lists designed for display to the public. The mechanics used are not of the essence. This
part is concerned with any means employed for placing such prices before the consuming
public.

(c) There would be little problem of deception in this area if all products were invariably sold at
the retail price set by the manufacturer. However, the widespread failure to observe
manufacturers' suggested or list prices, and the advent of retail discounting on a wide scale,
have seriously undermined the dependability of list prices as indicators of the exact prices at
which articles are in fact generally sold at retail. Changing competitive conditions have created a
more acute problem of deception than may have existed previously. Today, only in the rare
case are all sales of an article at the manufacturer's suggested retail or list price.

(d) But this does not mean that all list prices are fictitious and all offers of reductions from list,
therefore, deceptive. Typically, a list price is a price at which articles are sold, if not
everywhere, then at least in the principal retail outlets which do not conduct their business on a
discount basis. It will not be deemed fictitious if it is the price at which substantial (that is, not
isolated or insignificant) sales are made in the advertiser's trade area (the area in which he does
business). Conversely, if the list price is significantly in excess of the highest price at which
substantial sales in the trade area are made, there is a clear and serious danger of the consumer
being misled by an advertised reduction from this price.

(e) This general principle applies whether the advertiser is a national or regional manufacturer
(or other non-retail distributor), a mail-order or catalog distributor who deals directly with the
consuming public, or a local retailer. But certain differences in the responsibility of these various
types of businessmen should be noted. A retailer competing in a local area has at least a general
knowledge of the prices being charged in his area. Therefore, before advertising a
manufacturer's list price as a basis for comparison with his own lower price, the retailer should
ascertain whether the list price is in fact the price regularly charged by principal outlets in his area.

(f) In other words, a retailer who advertises a manufacturer's or distributor's suggested retail price should be careful to avoid creating a false impression that he is offering a reduction from the price at which the product is generally sold in his trade area. If a number of the principal retail outlets in the area are regularly engaged in making sales at the manufacturer's suggested price, that price may be used in advertising by one who is selling at a lower price. If, however, the list price is being followed only by, for example, small suburban stores, house-to-house canvassers, and credit houses, accounting for only an insubstantial volume of sales in the area, advertising of the list price would be deceptive.

(g) On the other hand, a manufacturer or other distributor who does business on a large regional or national scale cannot be required to police or investigate in detail the prevailing prices of his articles throughout so large a trade area. If he advertises or disseminates a list or preticketed price in good faith (i.e., as an honest estimate of the actual retail price) which does not appreciably exceed the highest price at which substantial sales are made in his trade area, he will not be chargeable with having engaged in a deceptive practice. Consider the following example:

(h) Manufacturer Roe, who makes Brand X pens and sells them throughout the United States, advertises his pen in a national magazine as having a "Suggested Retail Price $10," a price determined on the basis of a market survey. In a substantial number of representative communities, the principal retail outlets are selling the product at this price in the regular course of business and in substantial volume. Roe would not be considered to have advertised a fictitious "suggested retail price." If retailer Doe does business in one of these communities, he would not be guilty of a deceptive practice by advertising, "Brand X Pens, Manufacturer's Suggested Retail Price, $10, Our Price, $7.50."

(i) It bears repeating that the manufacturer, distributor or retailer must in every case act honestly and in good faith in advertising a list price, and not with the intention of establishing a basis, or creating an instrumentality, for a deceptive comparison in any local or other trade area. For instance, a manufacturer may not affix price tickets containing inflated prices as an accommodation to particular retailers who intend to use such prices as the basis for advertising fictitious price reductions. [Guide III]

§233.4 Bargain offers based upon the purchase of other merchandise.

(a) Frequently, advertisers choose to offer bargains in the form of additional merchandise to be given a customer on the condition that he purchase a particular article at the price usually offered by the advertiser. The forms which such offers may take are numerous and varied, yet all have essentially the same purpose and effect. Representative of the language frequently employed in such offers are "Free," "Buy One -- Get One Free," "2-For-1 Sale," "Half Price Sale," "1 Sale," "50% Off," etc. Literally, of course, the seller is not offering anything "free" (i.e., an unconditional gift), or \1/2\ free, or for only 1, when he makes such an offer, since the purchaser is required to purchase an article in order to receive the "free" or "1" item. It is important, therefore, that where such a form of offer is used, care be taken not to mislead
the consumer.

(b) Where the seller, in making such an offer, increases his regular price of the article required to be bought, or decreases the quantity and quality of that article, or otherwise attaches strings (other than the basic condition that the article be purchased in order for the purchaser to be entitled to the "free" or "1" additional merchandise) to the offer, the consumer may be deceived.

(c) Accordingly, whenever a "free," "2-for-1," "half price sale," "1 sale," "50% off" or similar type of offer is made, all the terms and conditions of the offer should be made clear at the outset. [Guide IV]

§233.5 Miscellaneous price comparisons.

The practices covered in the provisions set forth above represent the most frequently employed forms of bargain advertising. However, there are many variations which appear from time to time and which are, in the main, controlled by the same general principles. For example, retailers should not advertise a retail price as a "wholesale" price. They should not represent that they are selling at "factory" prices when they are not selling at the prices paid by those purchasing directly from the manufacturer. They should not offer seconds or imperfect or irregular merchandise at a reduced price without disclosing that the higher comparative price refers to the price of the merchandise if perfect. They should not offer an advance sale under circumstances where they do not in good faith expect to increase the price at a later date, or make a "limited" offer which, in fact, is not limited. In all of these situations, as well as in others too numerous to mention, advertisers should make certain that the bargain offer is genuine and truthful. Doing so will serve their own interest as well as that of the public. [Guide V]
§251.1 The guide.

(a) General. (1) The offer of "Free" merchandise or service is a promotional device frequently used to attract customers. Providing such merchandise or service with the purchase of some other article or service has often been found to be a useful and valuable marketing tool.

(2) Because the purchasing public continually searches for the best buy, and regards the offer of "Free" merchandise or service to be a special bargain, all such offers must be made with extreme care so as to avoid any possibility that consumers will be misled or deceived. Representative of the language frequently used in such offers are "Free", "Buy 1-Get 1 Free", "2-for-1 Sale", "50% off with purchase of Two", "1 Sale", etc. (Related representations that raise many of the same questions include "XX Cents-Off", "Half-Price Sale", "1/2 Off", etc. See the Commission's "Fair Packaging and Labeling Regulation Regarding 'Cents-Off' and Guides Against Deceptive Pricing.")

(b) Meaning of "Free". (1) The public understands that, except in the case of introductory offers in connection with the sale of a product or service (See paragraph (f) of this section), an offer of "Free" merchandise or service is based upon a regular price for the merchandise or service which must be purchased by consumers in order to avail themselves of that which is represented to be "Free". In other words, when the purchaser is told that an article is "Free" to him if another article is purchased, the word "Free" indicates that he is paying nothing for that article and no more than the regular price for the other. Thus, a purchaser has a right to believe that the merchant will not directly and immediately recover, in whole or in part, the cost of the free merchandise or service by marking up the price of the article which must be purchased, by the substitution of inferior merchandise or service, or otherwise.

(2) The term regular when used with the term price, means the price, in the same quantity, quality and with the same service, at which the seller or advertiser of the product or service has openly and actively sold the product or service in the geographic market or trade area in which he is making a "Free" or similar offer in the most recent and regular course of business, for a reasonably substantial period of time, i.e., a 30-day period. For consumer products or services which fluctuate in price, the "regular" price shall be the lowest price at which any substantial sales were made during the aforesaid 30-day period. Except in the case of introductory offers, if no substantial sales were made, in fact, at the "regular" price, a "Free" or similar offer would not be proper.

(c) Disclosure of conditions. When making "Free" or similar offers all the terms, conditions and obligations upon which receipt and retention of the "Free" item are contingent should be set forth clearly and conspicuously at the outset of the offer so as to leave no reasonable probability that the terms of the offer might be misunderstood. Stated differently, all of the terms, conditions and obligations should appear in close conjunction with the offer of "Free" merchandise or service. For example, disclosure of the terms of the offer set forth in a footnote of an
advertisement to which reference is made by an asterisk or other symbol placed next to the offer, is not regarded as making disclosure at the outset. However, mere notice of the existence of a "Free" offer on the main display panel of a label or package is not precluded provided that (1) the notice does not constitute an offer or identify the item being offered "Free", (2) the notice informs the customer of the location, elsewhere on the package or label, where the disclosures required by this section may be found, (3) no purchase or other such material affirmative act is required in order to discover the terms and conditions of the offer, and (4) the notice and the offer are not otherwise deceptive.

(d) Supplier's responsibilities. Nothing in this section should be construed as authorizing or condoning the illegal setting or policing of retail prices by a supplier. However, if the supplier knows, or should know, that a "Free" offer he is promoting is not being passed on by a reseller, or otherwise is being used by a reseller as an instrumentality for deception, it is improper for the supplier to continue to offer the product as promoted to such reseller. He should take appropriate steps to bring an end to the deception, including the withdrawal of the "Free" offer.

(e) Resellers' participation in supplier's offers. Prior to advertising a "Free" promotion, a supplier should offer the product as promoted to all competing resellers as provided for in the Commission's "Guides for Advertising Allowances and Other Merchandising Payments and Services." In advertising the "Free" promotion, the supplier should identify those areas in which the offer is not available if the advertising is likely to be seen in such areas, and should clearly state that it is available only through participating resellers, indicating the extent of participation by the use of such terms as "some", "all", "a majority", or "a few", as the case may be.

(f) Introductory offers. (1) No "Free" offer should be made in connection with the introduction of a new product or service offered for sale at a specified price unless the offeror expects, in good faith, to discontinue the offer after a limited time and to commence selling the product or service promoted, separately, at the same price at which it was promoted with the "Free" offer.

(2) In such offers, no representation may be made that the price is for one item and that the other is "Free" unless the offeror expects, in good faith, to discontinue the offer after a limited time and to commence selling the product or service promoted, separately, at the same price at which it was promoted with a "Free" offer.

(g) Negotiated sales. If a product or service usually is sold at a price arrived at through bargaining, rather than at a regular price, it is improper to represent that another product or service is being offered "Free" with the sale. The same representation is also improper where there may be a regular price, but where other material factors such as quantity, quality, or size are arrived at through bargaining.

(h) Frequency of offers. So that a "Free" offer will be special and meaningful, a single size of a product or a single kind of service should not be advertised with a "Free" offer in a trade area for more than 6 months in any 12-month period. At least 30 days should elapse before another such offer is promoted in the same trade area. No more than three such offers should be made in the same area in any 12-month period. In such period, the offeror's sale in that area of the
product in the size promoted with a "Free" offer should not exceed 50 percent of the total volume of his sales of the product, in the same size, in the area.

(i) Similar terms. Offers of "Free" merchandise or services which may be deceptive for failure to meet the provisions of this section may not be corrected by the substitution of such similar words and terms as "gift", "given without charge", "bonus", or other words or terms which tend to convey the impression to the consuming public that an article of merchandise or service is "Free".

[36 FR 21517, Nov. 10, 1971]